No.

In the Supreme Court of the United States

DUKE ENERGY CAROLINAS, LLC, DUKE ENERGY CORPORATION, DUKE ENERGY PROGRESS, LLC, PETITIONERS,

v.

NTE CAROLINAS II, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff can prevail on a monopolization claim under Section 2 of the Sherman Act by aggregating multiple distinct, independently lawful acts into an unlawful whole.

PARTIES TO THE PROCEEDING

Petitioners are Duke Energy Carolinas, LLC; Duke Energy Corporation; and Duke Energy Progress, LLC.

Respondents are NTE Carolinas II, LLC; NTE Carolinas II Holdings, LLC; NTE Energy, LLC; NTE Southeast Electric Company, LLC; NTE Energy Services Company, LLC; and Castillo Investment Holdings II, LLC.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Duke Energy Corporation, a provider of electricity and natural gas, is a Delaware corporation whose common stock is publicly traded on the New York Stock Exchange under the ticker symbol DUK. It has no parent corporation, and no publicly held company owns 10% or more of its shares.

Petitioner Duke Energy Carolinas, LLC is a wholly owned, direct subsidiary of Duke Energy Corporation. Petitioner Duke Energy Progress, LLC is a wholly owned, direct subsidiary of Duke Energy Corporation. No other publicly held company owns 10% or more of Duke Energy Carolinas, LLC or Duke Energy Progress, LLC.

RELATED PROCEEDINGS

United States Court of Appeals (4th Cir.):

Duke Energy Carolinas, LLC, et al. v. *NTE Carolinas II, LLC, et al.*, No. 22-2168 (Aug. 5, 2024)

United States District Court (W.D.N.C.):

Duke Energy Carolinas, LLC v. *NTE Carolinas II, LLC, et al.*, No. 3:19-CV-00515 (June 24, 2022)

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INTRODUCTION

This petition presents an important and recurring question of antitrust law: when can 0 + 0 = 1? The district court found that antitrust math is no different from ordinary arithmetic. If an antitrust plaintiff pleads a series of independently lawful acts, each of which does not violate this Court's precedents, those acts cannot together add up to some nebulous antitrust violation. The court of appeals concluded otherwise, embracing a "monopoly broth" theory prominent in the 1960s to 1980s but long since discarded. This Court's intervention is needed to restore antitrust law to the

principles that have governed for the last three decades.

Beginning in the 1990s, this Court overhauled the requirements to prove monopolization under the Sherman Act. It replaced open-ended standards and generalized questions of anticompetitive intent with clear rules for particular categories of conduct. That doctrinal shift has provided much-needed certainty for businesses and judges alike, and has prevented antitrust law from chilling vigorous competition in the marketplace.

Antitrust plaintiffs have long resisted that shift. As soon as this Court started announcing clear rules for monopolization claims, plaintiffs began asking lower courts to ignore them, arguing that specific conduct-based tests could be disregarded any time a complaint alleged an anticompetitive "course of conduct." The playbook for these suits is familiar: the plaintiff (almost always a competitor) alleges that the defendant engaged in a series of disparate acts to grow or maintain its market share. But rather than prove that any one of those acts was unlawful, the plaintiff asks the court to aggregate them into a single Section 2 claim.

Before the decision below, that maneuver failed every time. Rather than allow plaintiffs to put before a jury a combination of independently *lawful* acts, every court to consider the question in recent decades has required a Section 2 plaintiff to identify at least one anticompetitive act. This Court crystallized that rule in *Pacific Bell Telephone Co.* v. *linkLine Communications, Inc.*, 555 U.S. 438 (2009). It rejected the plaintiffs' effort to cobble together a "meritless claim at the retail level and a meritless claim at the wholesale level" to make out an aggregate Sherman Act violation. *Id.*

at 452. As the Court explained, because neither challenged action was anticompetitive on its own, plaintiffs could not "alchemize them into a new form of antitrust liability." *Id.* at 457. Five courts of appeals, numerous district courts, and the leading antitrust treatise have all since applied that test: "Two wrong claims do not make one that is right." *Ibid.*

The decision below bucked that consensus. Respondent NTE Carolinas accused petitioner Duke Energy of engaging in various unlawful actions, all of which bore standard Section 2 labels. It challenged Duke's low-priced bid to a single customer as "predatory pricing," *see Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993); Duke's termination of a federally regulated contract for failure to pay as an unlawful "refusal to deal," *see Verizon Commc'ns, Inc.* v. *Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408-409 (2004); and Duke's decision to sue NTE for breach of contract as "sham litigation," *see Professional Real Est. Invs., Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993). But to get around this Court's well-established tests for predatory pricing, refusals to deal, and sham litigation, NTE dusted off the old monopoly-broth playbook, arguing that Duke was liable because of its overall "anticompetitive scheme."

This time, the move worked. Breaking from decades of case law, the Fourth Circuit held that antitrust plaintiffs can add up distinct, independently lawful actions and put their "*combined effect*" before a jury, App. 32a—even if each of the specific acts alleged could have been assessed under a particular conduct-based test established by this Court. And based on that aggregation theory, the panel allowed this case to proceed to trial.

That decision requires this Court's intervention. The panel's monopoly-broth standard departs from this Court's Section 2 cases—including, most obviously, *linkLine*. As the judges dissenting from the denial of rehearing en banc explained, the decision allows both "the recharacterization of claims to evade the Supreme Court's doctrinal tests" and "the amalgamation of § 2 claims that fail such doctrinal tests." App. 147a (Quattlebaum, J., dissenting from denial of rehearing en banc). The decision "isolate[s]" the Fourth Circuit "from [its] sister circuits," creating a square 5-1 split among the courts of appeals. *Id.* at 139a. And it establishes a vague and factbound standard for future Section 2 claims, thereby "produc[ing] the very uncertainty the Supreme Court's clear rules were designed to eliminate." *Id.* at 149a.

The consequences of the decision below are far-reaching. In recent years, lower courts have repeatedly batted down efforts to revive the monopoly-broth theory—including in high-profile cases targeting technology firms, *see, e.g.*, *United States* v. *Google LLC*, 687 F. Supp. 3d 48, 70 (D.D.C. 2023). But the decision below has breathed new life into that once-defunct theory, and the plaintiffs' bar is already taking note. What's more, the decision has cast a shadow over businesses nationwide, which now have lost this Court's safe harbors and must instead worry that hard-nosed competition will prompt treble-damage suits by disgruntled competitors. This Court's review is needed to prevent the decision below from rolling back decades of antitrust law.

OPINIONS BELOW

The opinion denying the petition for rehearing en banc (App. 128a-155a) is reported at 122 F.4th 120. The opinion of the court of appeals (App. 1a-60a) is reported

at 111 F.4th 337. The opinion of the district court (App. 61a-127a) is reported at 608 F. Supp. 3d 298.

JURISDICTION

The court of appeals denied the petition for rehearing en banc on November 26, 2024. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

A. Factual Background

1. Duke and NTE sell wholesale electricity in North Carolina. Duke is a large utility company that both owns power plants and operates transmission lines that transport electricity to customers. NTE built its own power plants, but it relied on other firms' transmission lines to reach the market. When NTE entered the North Carolina market, it contracted with Duke to connect its power plants to Duke's transmission network. App. 67a. Duke and NTE thus competed to generate and sell power, but were contractual counterparties for purposes of transmitting that power.

Contracts like the one between Duke and NTE are closely governed by the Federal Energy Regulatory Commission. FERC requires energy utilities that own transmission networks (like Duke) to provide their competitors (like NTE) with "open access" to those networks and to treat competitors' transmission needs no differently from their own. 61 Fed. Reg. 21,540, 21,541 (1996). FERC adopted its "open access" rules to promote "competition in the wholesale bulk power marketplace." *Ibid.* To implement those rules, it requires parties to use a standard interconnection agreement, which ensures that transmission network operators are fairly compensated for connecting a competitor's power plants.

2. Duke and NTE first entered into an interconnection agreement for a facility located in Kings Mountain, North Carolina. That contract was never an issue. Duke provided NTE with access to its network, and NTE paid what it owed on time. App. 67a.

A few years later, NTE decided to build a new facility in Reidsville, North Carolina, and entered into a new interconnection agreement with Duke. Under the terms of that contract, Duke would spend more than $59 million to connect the Reidsville plant to its transmission lines, and NTE would reimburse Duke in installments between 2017 and 2020. App. 68a.

NTE's financial strategy for the Reidsville plant turned on its ability to convince a single large customer, the Fayetteville Public Works Commission, to switch from Duke to NTE. That gamble did not pay off. Rather than cede its business to NTE, Duke lowered its prices to compete to retain Fayetteville as a customer. In 2019, Duke offered Fayetteville new terms, which included both a discount on the remaining life of an existing contract and a lower price on a new

contract. In a separate contract, Duke also agreed to pay more for electricity from a plant operated by Fayetteville that fed into Duke's transmission network. App. 70a-71a.

That proposal made good economic sense for Duke. From Duke's perspective, losing Fayetteville as a customer would have cost $100 million in annual revenue and forced Duke to raise prices on other customers to make up the shortfall. But by keeping Fayetteville's business, albeit at a lower price, Duke could retain $60 million of that revenue, earning enough money to both cover the costs of providing service to Fayetteville and contribute to Duke's fixed costs. App. 105a-106a. The offer was also a good deal for the citizens of Fayetteville. After considering Duke's bid alongside four others—including one from NTE—Fayetteville concluded that Duke offered advantages no other firm could match, including lower prices, a more stable source of supply, and low credit risk. *See* C.A. J.A. 1383. Fayetteville also concluded that NTE's bid had many distinct disadvantages, including reliance on a single source of supply (the planned Reidsville plant). App. 14a-15a; *see* C.A. J.A. 1383. So, on the recommendation of a neutral consultant, Fayetteville decided to stick with Duke.

After Fayetteville's decision, Duke submitted the revised Fayetteville contract to FERC, as required by federal law. NTE did not challenge Duke's rates, *see* 18 C.F.R. §§ 382.214, 385.211, nor did it file a complaint with FERC related to the Fayetteville contract, *see* 18 C.F.R. § 385.206.

3. Meanwhile, NTE began to miss payments to Duke under the interconnection agreement. It failed to make a $2.5 million payment in March 2019, then missed another $4.5 million payment two months later.

App. 72a-73a. Shortly after the second default, NTE asked Duke to suspend the interconnection agreement altogether. *Ibid.*

At that point, NTE was required to pay Duke for the costs Duke had incurred before the suspension—including the roughly $7 million in missed payments. Duke tried for months to recover those payments, including by sending invoices in response to additional requests from NTE. *See* C.A. J.A. 1707-1709. After months spent chasing NTE, Duke cancelled the interconnection agreement—meaning that it changed the status of the Reidsville project from "suspended" to "terminated" in a FERC-regulated database. App. 73a.

NTE challenged that decision before FERC, arguing that Duke could not update the database without FERC approval. FERC decided to review the matter "to remove uncertainty regarding the termination provisions in" its standard interconnection agreement. *See* 171 FERC ¶ 61,128, ¶¶ 15, 27 (2020). FERC ultimately found that Duke should have obtained its approval before terminating the agreement, though it declined to pass on the merits of the parties' underlying contract dispute. *See id.* ¶¶ 27, 29. Duke promptly switched the reported status of the Reidsville project from "terminated" back to "suspended." NTE never attempted to restart the project.

B. Procedural Background

1. In September 2019, Duke sued NTE in North Carolina state court for NTE's failure to pay the $7 million owed under the interconnection agreement. NTE removed the case to federal court, raising both contract claims and federal antitrust claims. As to its antitrust claims, NTE alleged, among other things, that (i) Duke's bid to Fayetteville reflected a predatory

-pricing scheme; (ii) Duke's termination of the interconnection agreement amounted to a "refusal to deal"; and (iii) Duke's contract suit was sham litigation. App. 87a. But NTE argued that it did not actually need to satisfy the Supreme Court's tests for predatory pricing, refusals to deal, or sham litigation, because it could prove a Sherman Act monopolization claim based on the aggregate effects of Duke's supposedly exclusionary campaign. *Id.* at 87a-88a.

2. The district court granted Duke's motion for summary judgment on the antitrust claims.

At the outset, the district court rejected NTE's argument that it could prevail at trial "even if none of [Duke's] alleged exclusionary acts [were] unlawful by themselves." App. 87a. As the court explained, a monopolization plaintiff must show "at least one instance of conduct that is not protected from antitrust scrutiny" to make out its claim. *Id.* at 88a (quoting *In re Intuniv Antitrust Litig.*, 496 F. Supp. 3d 639, 680 (D. Mass. 2020)). Accordingly, "[a]dding up several instances of lawful conduct cannot total unlawful conduct. In simple mathematical terms, 0 + 0 = 0." *Ibid.*

The district court then examined each of Duke's allegedly unlawful acts. For the pricing claim, the court held that NTE failed to satisfy this Court's test in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-224 (1993), which requires a plaintiff to establish both (i) prices below an appropriate measure of cost, and (ii) a "dangerous probability" that a defendant can recoup its lost profits by charging higher prices in the future. The court held that NTE could not establish below-cost pricing because it was undisputed that the price Duke charged to Fayetteville fully covered the costs incurred by Duke to service that contract (*i.e.*, Duke's variable costs). The court also

held that NTE had failed to put forward any evidence showing that Duke could recoup its (nonexistent) losses in the future—let alone that FERC would approve such a price hike.

The district court next rejected NTE's refusal-to-deal claim, holding that NTE's allegations were "almost identical" to those rejected by this Court in *Trinko*. As the court explained, *Trinko* required NTE to show that Duke and NTE had a pre-existing and voluntary course of dealing before their contract dispute. That condition was obviously not met here, because FERC *required* the parties to sign the interconnection agreement. The court also noted that Duke had an obvious and procompetitive reason for terminating the contract: "NTE [had] stopped making payments." App. 93a.

The district court rejected a smattering of other arguments raised by NTE, including its allegation that Duke's contract suit was "sham litigation." App. 106a-107a. That decision was quickly proved correct: the parties then settled the contract suit, with NTE's confessing judgment and providing a promissory note to Duke.

3. A panel of the Fourth Circuit reversed.

At the outset, the panel embraced an aggregate approach to Section 2 claims. The panel acknowledged that this Court "has developed tests for" recurring categories of conduct, including "predatory pricing [and] refusing to deal." App. 29a. But it nonetheless held that "the application of such specific conduct tests would prove too rigid" "when a court is faced with allegations of a complex or atypical exclusionary campaign." *Ibid.* In those circumstances, the panel held, "two or more practices, while lawful individually, can be aggregated" to prove a Section 2 violation. *Id.*

at 32a. And it concluded that it was therefore appropriate to assess "Duke's *campaign as a whole*." *Id.* at 28a (emphasis in original). After all, the court observed, "NTE claims [Duke's actions] to be part of a singular, coordinated anticompetitive effort." *Id.* at 32a.

Armed with that aggregation approach, the panel went on to consider the "combined effect" of "Duke's interference with NTE's effort to obtain Fayetteville's business and Duke's disruption of NTE's interconnection efforts." App. 32a.

On the Fayetteville fight, the panel recognized that NTE's claim boiled down to an allegation about "exclusionary pricing." App. 41a. But it held that "*Brooke Group* does not provide a one-size-fits-all analytic framework for assessing exclusionary pricing allegations." *Ibid.* Freed from the demands of *Brooke Group*, the panel concluded that NTE could put its claim before a jury because Duke had structured its new offer to spread discounts across both its existing contract with Fayetteville and its new contract—and "the structure and price level of Duke's offer, *taken together*," may have been anticompetitive. *Id.* at 45a (emphasis in original). The panel also suggested in the alternative that NTE could argue to a jury that Duke's prices were below-cost under *Brooke Group* by showing that Duke's prices were below the total cost of operating its entire utility system—a pricing standard no court has ever adopted. *Id.* at 42a-43a. And on *Brooke Group*'s recoupment prong, the panel found that it was enough that Duke intended to make up some of the Fayetteville discount by shifting certain fixed costs to other customers, which the panel reasoned was "similar but not identical to 'recoupment' under a traditional predatory pricing framework." *Id.* at 39a.

On the contract fight, the panel noted that, "[b]ecause Duke's conduct somewhat resembles a refusal to deal, that is the framework through which the parties discuss Duke's conduct." App. 46a. It then concluded that "the facts of record support a potential finding that Duke timed its unilateral termination of the Reidsville Interconnection Agreement to achieve anticompetitive ends." *Id.* at 54a. According to the panel, it "need not determine, as a matter of law, whether . . . such conduct in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability." *Ibid.* Instead, it was enough that NTE had alleged that Duke terminated the contract as "part of a larger scheme," which had the "synthetic consequence" of preventing NTE from "compet[ing] to secure an anchor customer for its Reidsville plant." *Ibid.*[1]

4. The court of appeals denied Duke's petition for rehearing en banc, over a dissent by Judge Quattlebaum, joined by Judge Richardson.

As the dissenters observed, the panel's decision left the Fourth Circuit "noncompliant with Supreme Court directives, isolated from [its] sister circuits and out of step with the leading antitrust scholarship." App. 139a. They explained that this Court "has created doctrinal tests for common types of unlawful conduct"—including predatory pricing and refusals to deal—and "has commanded that these doctrinal tests be followed." *Id.* at 148a (citing *linkLine*, 555 U.S. at 457). The panel's monopoly-broth holding discarded that framework, thereby "establish[ing] a new rule for the Fourth

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[1] The panel also concluded that, on remand, a new judge should be assigned because of a technical recusal issue. App. 57a-60a. Because the panel vacated on the merits, it did not consider whether the failure to recuse was harmless—as it plainly was. *See Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988).

Circuit—if an antitrust plaintiff alleges 'complex' or 'atypical' allegedly anticompetitive conduct that 'does not fit neatly within pre-established categories,' courts must permit claims to go forward even if they flunk doctrinal antitrust tests." *Id.* at 144a (quoting App. 29a).

As the dissenters further explained, those flaws were borne out here. The panel's nebulous standard "relieve[d] NTE" of both the "duty to satisfy the predatory pricing test" and "the burden to show that Duke's transmission line relationship with NTE was voluntary and not compelled by FERC regulations." App. 150a, 151a. The panel thus allowed NTE to get to a jury, even though the panel found "no unlawful conduct under a recognized § 2 claim." *Id.* at 154a; *see id.* at 151a (explaining that, under the panel's view, "the only thing that matters is amalgamation"). The dissenters lamented that such a result "conflicts with the Supreme Court's *linkLine* and *Trinko* decisions" and "will lead to uncertainty, contrary to the Supreme Court's 'repeated emphasis on the importance of clear rules in antitrust law.'" *Id.* at 155a (quoting *linkLine*, 555 U.S. at 452).

REASONS FOR GRANTING THE PETITION

In the last three decades, this Court has overhauled antitrust law, replacing freewheeling inquiries into anticompetitive intent with "clear rules" that separate competition on the merits from illegal monopolization. *linkLine*, 555 U.S. at 452. Because of that doctrinal shift, there are now precise tests that apply to many "common forms of alleged misconduct." *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013) (Gorsuch, J.). To ensure that those tests have meaning, both this Court and lower courts have rejected plaintiffs' efforts to prove monopolization claims without

showing that any of the defendant's actions were anticompetitive on their own.

The panel's decision departs from that consensus. It allows a plaintiff to prove a monopolization claim based solely on a combination of distinct *lawful* acts. That decision readily satisfies the criteria for this Court's review. First, it reflects a severe error of law, reviving a theory of monopolization that was rejected in *linkLine*. Second, it creates a direct conflict between the Fourth Circuit and five other courts of appeals, all of which have expressly rejected the monopoly-broth theory—with two reaffirming their position during the pendency of this case. And third, the petition presents a clean vehicle for definitively resolving an important question, in a case that is already causing confusion throughout the lower courts.

I. THE DECISION BELOW IS WRONG.

A plaintiff must identify at least one anticompetitive act to prove a Section 2 violation. That rule follows from this Court's decision in *linkLine*, which rejected an aggregated claim stronger than the one embraced by the Fourth Circuit here. And it is necessary to prevent the evasion of this Court's decisions establishing conduct-based tests for monopolization. The panel gave no explanation for shrugging off *linkLine*'s lessons. Instead, it held that plaintiffs can simply avoid this Court's monopolization tests by "alchemiz[ing]" two or more lawful actions in the same complaint. *linkLine*, 555 U.S. at 457. That rule finds no support in the case law or even major treatises, and it would roll back 30 years of antitrust doctrine.

A. This Court Has Squarely Rejected The Monopoly-Broth Theory.

1. The Sherman Act proscribes coordination among multiple firms under Section 1, and monopolization by a single firm under Section 2. There are two elements of a Section 2 claim: (i) "the possession of market power in the relevant market" and (ii) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Trinko*, 540 U.S. at 407 (quoting *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966)). To determine whether a defendant's actions reflect the "willful acquisition or maintenance" of monopoly power, this Court has spent decades "develop[ing] considerably more specific rules for common forms of alleged misconduct." *Novell*, 731 F.3d at 1072. Those rules provide significant guidance to businesses by requiring plaintiffs to satisfy specific elements to prove their claims and establishing "presumptive legality for certain forms of conduct." *Id.* at 1073.

The modern test for predatory pricing is illustrative. For many years, plaintiffs brought Section 2 claims against competitors, alleging that they had violated the law by charging low prices that the plaintiff could not match. These claims typically relied on evidence of anticompetitive intent. *See, e.g.*, *Utah Pie* v. *Continental Baking Co.*, 386 U.S. 685, 703 (1967). This Court put an end to that approach in *Brooke Group*. In place of vague and imprecise inquiries into the defendant's motives, *Brooke Group* announced a clear standard that requires a plaintiff to demonstrate both (1) below-cost pricing and (2) a dangerous probability of recoupment. 509 U.S. at 222-224. This Court clarified that, unless both prongs are satisfied, "[e]ven an

act of pure malice by one business competitor against another" does not state a Section 2 claim. *Id.* at 225; *see id.* at 221 (explaining that "*Utah Pie* was an early judicial inquiry in this area and did not purport to set forth explicit, general standards").

The Court has announced similar tests for many other types of conduct. Among them, there is a clear rule for refusals to deal: the plaintiff and defendant must have engaged in a prior voluntary course of conduct, and the defendant must have refused to sell its services to the plaintiff at retail prices offered to others. *See Trinko,* 540 U.S. at 408-409. Likewise for sham litigation: the defendant's position must be objectively baseless and subjectively motivated to interfere with a competitor's business. *See Professional Real Est. Invs.*, 508 U.S. at 60-61.

The Court's conduct-based approach to monopolization makes good sense. Unlike coordinated action between multiple firms, which is inherently suspect under the antitrust laws, hard-nosed competition by a single firm is "precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984). Setting a high bar for Section 2 liability "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Id.* at 768.

At the same time, "applying the requirements of Section 2 'can be difficult,'" even "[u]nder the best of circumstances." *Trinko*, 540 U.S. at 414 (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc)). And the costs of false positives can be severe. In the predatory-pricing context, for example, setting the bar for liability too low can "discourag[e] a price cut and forc[e] firms to maintain

supra-competitive prices." *Brooke Group*, 509 U.S. at 224. The same is true for refusals to deal, where the prospect of Section 2 liability "may facilitate the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 408; *see Novell*, 731 F.3d at 1073 ("Forcing firms to help one another would . . . risk reducing the incentive both sides have to innovate, invest, and expand—again, results inconsistent with the goals of antitrust."). Clear, conduct-based tests avoid these harms and provide businesses with the certainty they need to compete vigorously in the marketplace.

2. For clear rules to have any meaning, they must be followed. Accordingly, this Court has repeatedly "rejected efforts to avoid doctrinal tests when the facts are not picture-perfect fits" to a prior case. App. 150a. In *Trinko*, for example, the Court analyzed the plaintiff's claim as a refusal to deal, even though the plaintiff alleged that the defendant had simply provided poor service to its rivals. *Ibid.* (citing *Trinko*, 540 U.S. at 410). Similarly, in *Weyerhaeuser Co.* v. *Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312, 315 (2007), the Court held that *Brooke Group*'s predatory-pricing test applies with equal force to "predatory bidding"—overturning a lower court decision rejecting the application of "rigid, numerical test[s]" in that context. *Confederated Tribes* v. *Weyerhaeuser Co.*, 411 F.3d 1030, 1039 (9th Cir. 2005).

This Court in *linkLine* held that plaintiffs likewise cannot evade applicable conduct tests by cobbling together multiple lawful acts into a supposed "course of conduct." The plaintiffs in *linkLine* competed with AT&T to provide internet service, but relied on AT&T's network to reach their customers. They alleged that AT&T had violated Section 2 through a

"price squeeze": AT&T had raised the price for wholesale access to its network while cutting its own retail price for internet service. 555 U.S. at 443. The plaintiffs acknowledged that neither the wholesale charge nor the retail price was unlawful in its own right. But they argued that the two actions together could be "alchemize[d]" into a Section 2 violation because of the "*interaction*" between multiple otherwise-lawful actions. *Id.* at 453, 457 (emphasis in original).

This Court rejected that argument. As the Court explained, plaintiffs had alleged "nothing more than the amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 450-452. And because "[t]wo wrong claims do not make one that is right," plaintiffs could not establish a Section 2 violation. *Id.* at 457. The Court also emphasized the important principles animating that holding. For one, clear rules keep courts from becoming "central planners." *Id.* at 452 (citing *Trinko*, 540 U.S. at 408). For another, they offer "safe harbor[s]" for businesses that seek to compete aggressively, including to lower prices. *Id.* at 453. Aggregated claims undermine both principles because they require courts and businesses to "aim[] at a moving target," predicting how one otherwise-lawful action interacts with another. *Ibid.*

Following *linkLine*, the legal standard is clear: when a Section 2 plaintiff challenges conduct that can be analyzed under an existing doctrinal test—such as predatory pricing, a refusal to deal, or sham litigation—the court must apply that test. And if the plaintiff cannot satisfy it, the challenged conduct is free from antitrust scrutiny. Conduct that fails the predatory-pricing test, for example, is not *a little bit* anticompetitive; there is no anticompetitive inference to be drawn

at all. So if none of the acts challenged by the plaintiff are anticompetitive, an aggregated claim must fail.

B. The Court Of Appeals Departed From This Court's Decisions.

1. The panel rejected the *linkLine* approach. It held that NTE could establish a monopolization claim even if none of Duke's allegedly anticompetitive acts violated the applicable conduct-based test. In the panel's view, what mattered was that the discrete pieces of conduct were alleged to be "a part of a larger scheme" that hurt a rival. App. 54a. Thus, a jury should be allowed to decide whether Duke had "acted, through a broad range of anticompetitive conduct in various contexts, to eliminate [NTE's] competition." *Id.* at 55a.

Critically, the panel acknowledged that NTE's allegations *could* be analyzed under existing doctrinal tests. With respect to Duke's Fayetteville bid, the panel explained that NTE's challenge was premised on alleged "exclusionary pricing" and could have been evaluated under "a strict predatory pricing theory." App. 41a, 42a. And for the termination of the interconnection agreement between Duke and NTE, the panel noted that (as in *Trinko*) NTE's claim "somewhat resembles a refusal to deal." *Id.* at 46a; *see id.* at 151a (explaining that "[t]his case is no different" from *Trinko*). But rather than simply apply *Brooke Group* and *Trinko*, respectively, the panel reasoned that the "application of specific . . . conduct tests would prove too rigid" because NTE had alleged "a complex or atypical exclusionary campaign." *Id.* at 29a. To the panel, it was therefore necessary to consider "the *combined effect*" of "Duke's interference with NTE's effort to obtain Fayetteville's business and Duke's disruption of NTE's interconnection efforts"—even if neither act

was unlawful on its own. *Id.* at 32a (emphasis in original).

There is no way to reconcile that holding with *linkLine.* Like the *linkLine* plaintiffs, NTE argued that Duke had violated the law both by refusing to deal on the terms NTE preferred and by offering a lower price to potential customers. If anything, NTE's claim of interconnectedness is far weaker than the one this Court rejected in *linkLine*. The plaintiffs in *linkLine* credibly argued that a "price squeeze" claim comprises two interrelated acts that must be assessed together: the wholesale prices that AT&T charged the plaintiffs constrained the retail prices the plaintiffs could profitably charge consumers. By contrast, the two most significant "prongs of Duke's conduct" here, App. 55a, are unrelated, except for the fact that they involve Duke and NTE. The contract dispute between Duke and NTE had no bearing on the prices Duke offered in its bid for Fayetteville. To the contrary, as the district court found, Fayetteville decided to stick with Duke before Duke terminated the interconnection agreement with NTE. *Id.* at 69-73a.

If the *linkLine* plaintiffs had to satisfy this Court's tests for predatory pricing and refusals to deal, surely NTE has to as well. But the panel's monopoly-broth standard relieved NTE of that burden, applying a legal rule that would have led to a different outcome in *linkLine* itself. Conversely, as the en banc dissent recognized, a faithful application of *linkLine* would have led to a different result in this case. App. 149a.

2. The panel never tried to reconcile its monopoly-broth holding with *linkLine* or any of this Court's recent monopolization precedents. Indeed, in defending its aggregation approach, the panel did not cite a single

decision of this Court *after 1966*. App. 30a-31a. Instead, the panel relied on the same older decisions that plaintiffs have unsuccessfully invoked for decades in an attempt to prop up monopoly-broth claims: *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). *Id.* at 30a. Both contain language generally reaffirming that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts." *Continental Ore*, 370 U.S. at 699 (quoting *United States* v. *Patten*, 226 U.S. 525, 544 (1913)); *see Swift*, 196 U.S. at 396 (holding that the various acts of defendants alleged to be part of a long-running conspiracy were "elements of [a single] scheme"). Neither decision is relevant here.

At its broadest, *Continental Ore* may support the proposition that when a monopolist enters into a series of contracts that each tie up a portion of the market, it is appropriate "to consider the effect of the monopolist's contracts as a whole in order to determine legality." Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 Antitrust L.J. 663, 670-672 (2010); *see New York* v. *Facebook*, 549 F. Supp. 3d 6, 46-47 (D.D.C. 2021), *aff'd* 66 F.4th 288, 300 n.13 (D.C. Cir. 2023). For example, four exclusive contracts that each foreclose 20% of the market can be considered together to state an exclusive-dealing claim. But nothing in *Continental Ore* suggests that a failed exclusive-dealing claim can be combined with a totally different kind of failed Section 2 claim (*e.g.*, sham litigation or a refusal to deal) to create a viable aggregate claim. Over the last half-century, numerous courts have recognized as much. *See, e.g.*, *In re EpiPen Mktg., Sales Pracs. & Antitrust Litig.*, 44 F.4th 959, 982 (10th Cir. 2022) (rejecting plaintiff's reliance on *Continental Ore*); *United States*

v. *Google LLC*, 687 F. Supp. 3d 48, 70 (D.D.C. 2023) (same).

Swift, meanwhile, was a conspiracy decision under Section 1 of the Sherman Act. Aggregating evidence of intent for purposes of demonstrating the existence of a conspiracy, *see Swift*, 196 U.S. at 396, has no bearing on whether it is appropriate to aggregate discrete lawful acts into a hybrid monopolization claim under Section 2. The panel merely asserted, without citation or explanation, that "the principle also applies in the context of § 2." App. 30a. But no other court has found as much—and logic and *linkLine* both demonstrate otherwise.

Without any relevant judicial authority, the panel was left to rely on selective excerpts from the leading antitrust treatise, Areeda & Hovenkamp. But it got those wrong, too. The panel quoted Areeda for the proposition that monopolization cases may be "analyzed as a whole" and that "aggregation is appropriate" when alleged violations are "part of the same scheme to perpetuate dominance or drive the plaintiff from the market." App. 31a-32a (citing Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7 (5th ed. 2024)). But even accepting Areeda's relatively permissive view, the panel overlooked the key caveat in the very next paragraph: that to avoid inferring illegality from procompetitive conduct, "[t]he dominant conduct causing the plaintiff's injuries must still be found to be unlawful." Areeda & Hovenkamp, *supra*, ¶ 310c7.

The rest of the panel's decision confirms its sharp break from modern antitrust law. Since *Brooke Group*, no court of appeals has allowed a pricing-based claim to proceed without evidence showing that the defendant's prices were below its variable costs or that the defendant would be able to charge higher prices as a

monopolist in the future. But under the panel's aggregation test, neither condition was necessary to challenge the Fayetteville bid. App. 42a ("[W]e need not assess whether the price level [in the Fayetteville bid], standing alone, amounted to a violation of § 2 under a strict predatory pricing theory of liability."). Since *Trinko*, no court of appeals has allowed a refusal-to-deal claim to proceed where the parties lacked a prior voluntary course of dealing or were subject to extensive federal regulation. But under the panel's approach, none of that mattered. *Id.* at 54a ("[W]e need not determine, as a matter of law, whether [the termination of the interconnection agreement] amounted to a [Section] 2 violation under a refusal-to-deal theory of liability.").

The panel's approach defies this Court's decision in *linkLine* and undermines decades of precedent articulating conduct-based limits on monopolization liability. Simply put, this petition presents the most severe error of antitrust law committed by a court of appeals in years. That error alone warrants this Court's intervention.

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FIVE OTHER COURTS OF APPEALS.

The panel's decision also conflicts with the consistent decisions of several other courts of appeals. For decades, lower courts have confronted arguments that mirrored NTE's and relied on the same authorities. And each time, courts have reaffirmed the basic principle that a plaintiff must identify one unlawful act (or at least a series of the same anticompetitive act) to prove a monopolization claim. As the en banc dissenters recognized, "[w]ith the panel's decision, we have

elected to chart our own path in conflict with the Supreme Court and all our sister circuits that have addressed these issues post-*linkLine.*" App. 153a. Review in this Court is the only way to restore uniformity in the courts of appeals.

A. The Ninth Circuit recently rejected the monopoly-broth theory. In *Dreamstime.com, LLC* v. *Google, LLC*, 54 F.4th 1130 (2022), an online supplier of stock images alleged that Google had monopolized the online-search advertising market by "mistreat[ing] Dreamstime as a Google customer," preferring Google's images in its search results over those of Dreamstime, and unlawfully collecting data on users and advertisers. *Id.* at 1141-1142. On appeal, the Ninth Circuit marched through each one of those theories separately, holding that none properly alleged a Section 2 violation. *Ibid.* The court then rejected the plaintiff's argument that "Google's predatory acts [should be] taken together as an overall scheme." *Id.* at 1142. As the Court explained, "[b]ecause each individual action alleged by Dreamstime does not rise to anticompetitive conduct . . . , their collective sum likewise does not." *Ibid.*; *see ibid.* (discussing *Continental Ore*, 370 U.S. at 699).

The Tenth Circuit's recent decision in *EpiPen* is similar. *See* 44 F.4th at 982. The plaintiff in *EpiPen* argued that a drug manufacturer had monopolized the epinephrine-autoinjector market by entering into exclusive contracts with payers and offering loyalty rebates to existing customers. Relying on *Continental Ore*, the plaintiff asked the court to consider its discrete allegations together, rather than assessing each one separately. *Id.* at 982. The Tenth Circuit refused. The court began by holding that, when "allegedly ex-

clusionary conduct . . . does not fit within a single paradigm," courts should "disaggregate the exclusionary conduct into its component parts before applying the relevant law." *Ibid.* (citing *linkLine*, 555 U.S. at 457). And it explained that a precise, rules-based approach to monopolization was necessary "[f]or the sake of accuracy, precision, and analytical clarity." *Ibid.*; *see id.* at 981 (citing *Novell*, 731 F.3d at 1072).

The D.C. Circuit adopted the same test in its influential decision in *United States* v. *Microsoft Corp.*, 253 F.3d 34 (2001) (en banc). In that case, the United States argued that Microsoft had monopolized the operating-system market through its agreements with internet access providers and equipment manufacturers and its efforts to tie sales of the Microsoft operating system to its internet browser. *Id.* at 58. After assessing each of Microsoft's allegedly anticompetitive actions separately, the D.C. Circuit reversed the district court's conclusion that Microsoft's entire "course of conduct" was a standalone basis for liability. *Id.* at 78. As the court explained, the district court's aggregation holding was wrong because the specific acts identified were "not in themselves unlawful." *Ibid.*

After *Microsoft*, some antitrust plaintiffs continued to argue that the decision left open the door for monopoly-broth claims in the D.C. Circuit. A pair of recent decisions have shut it tightly. First, in *Facebook*, Judge Boasberg explained that an antitrust plaintiff cannot aggregate various acts that are immune from antitrust scrutiny—such as "unilateral refusals to deal" that do not satisfy *Trinko*—to make out an antitrust violation. 549 F. Supp. 3d at 46-47. The D.C. Circuit later affirmed that decision, adopting Judge Boasberg's analysis as its own. *See New York* v. *Meta Platforms, Inc.*, 66 F.4th 288, 300 n.13 (D.C. Cir.

2023). Second, in *United States* v. *Google*, Judge Mehta explained that, "under *Microsoft*, courts must evaluate whether each type of alleged exclusionary practice has the requisite anticompetitive effect." 687 F. Supp. 3d at 68.[2] Those decisions, and the affirmance in *Meta*, leave no doubt that the monopoly-broth theory is not viable in the D.C. Circuit.

The Federal Circuit has also rejected the monopoly-broth theory. *See Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1366-1367 (1999). In *Intergraph*, a patent plaintiff asked the district court to enter an injunction requiring Intel to continue dealing with the plaintiff, arguing that such a remedy was necessary because of Intel's various violations of the Sherman Act. *Id.* at 1350. To support that request, the plaintiff (again relying on *Continental Ore*) claimed that, even if "each aspect" of Intel's conduct "fail[ed] to violate the Sherman Act," the plaintiff's "various theories of antitrust liability . . . should be taken together" to determine if Intel violated the law. *Id.* at 1366. The Federal Circuit rejected that approach, holding that "[e]ach legal theory must be examined for its sufficiency and applicability." *Id.* at 1367. The plaintiff thus could not "add[] up" Intel's lawful acts to make out an aggregate monopolization claim. *Ibid*.

Finally, the Second Circuit has agreed with the majority view, though most clearly in an unpublished decision. In *Eatoni Ergonomics, Inc.* v. *Research in Mo-*

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[2] The court in *Google* rejected plaintiffs' reliance on many of the authorities cited by the panel here, including *Continental Ore*, *Conwood Co.* v. *U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), and *LePage's Inc.* v. *3M*, 324 F.3d 141 (3d Cir. 2003). *See* 687 F. Supp. 3d at 69-70; *see also* App. 152a (explaining that *LePage's* "has been roundly criticized for muddying the waters of antitrust rules").

tion Corp., 486 Fed. Appx. 186 (2012), the court addressed a claim brought by a software company against a major rival, which alleged that the rival had engaged in monopolization by refusing to enter into a partnership with the plaintiff and by infringing the plaintiff's patents. *Id.* at 191. In addition to challenging each action separately, the plaintiff argued that its rival's "overall course of conduct . . . cumulatively establishe[d] a [Section 2] violation." *Ibid.* After finding each individual action lawful, the Second Circuit explained that those acts could not be relied on to establish a Section 2 claim: "Because these alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either." *Ibid.* In reaching that result, the court cited the Second Circuit's pre-*linkLine* decision in *City of Groton* v. *Connecticut Light & Power Co.*, which had "reject[ed] the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act." 662 F.2d 921, 928-929 (1981); *see Northeastern Tel. Co.* v. *American Tel. & Tel. Co.*, 651 F.2d 76, 95 n.28 (2d Cir. 1981) (holding that "claims collectively cannot have a synergistic effect" when none of the defendant's individual actions were unlawful).

B. If all that were not enough, the leading antitrust scholarship also rejects the panel's approach. As explained above, the Areeda and Hovenkamp treatise—often cited by this Court in significant Section 2 cases, *see, e.g.*, *linkLine*, 555 U.S. at 453; *Trinko*, 540 U.S. at 411—argues that a plaintiff must identify at least one incident of independently unlawful conduct to establish a Section 2 violation. *See* p. 22, *supra*. Other leading scholars have agreed, explaining that "plaintiff[s]

should not be allowed simply to allege a laundry list of bad acts by the defendant and get to a jury by claiming that all of the bad acts chipped away at the rival's viability in the market." Crane, *supra*, at 673; *see Facebook*, 549 F. Supp. 3d at 47 (citing Crane).

C. The panel's decision cannot be squared with any of this authority. Although the panel suggested that this case involves "a complex or atypical exclusionary campaign," it rests on allegations about a single bid to a single customer and an unrelated contract dispute in which NTE ultimately confessed judgment. If those allegations are "complex or atypical," the same could be said of any of the cases described above. For example, *EpiPen* challenged various contracting and promotional practices by a drug manufacturer across the entire market, 44 F.4th at 972-979, and *Dreamstime* challenged Google's interactions with an advertiser over a period of many years, 54 F.4th at 1135-1136. And as noted above, the conduct here is far less interrelated than in *linkLine* itself. The panel's holding thus "established a new rule for the Fourth Circuit" alone, and presents a square conflict for this Court's review. App. 144a.

III. THIS PETITION PRESENTS AN IDEAL VEHICLE FOR RESOLVING AN IMPORTANT QUESTION.

A. The panel's embrace of aggregation is vitally important. The decision has created substantial confusion in the Fourth Circuit and beyond, bolstering plaintiffs' efforts to revive a monopoly-broth theory that many had long believed to be dead. If left intact, the decision below will harm consumers and businesses alike, chilling all manner of procompetitive conduct and subjecting firms to liability (and treble damages) for acts that are indisputably lawful under settled law.

And it will prove unworkable for courts and juries, which will have no guardrails to apply when separating legitimate competition from anticompetitive conduct.

The ramifications of the decision below are already being felt. Multiple plaintiffs have cited the panel's decision to support their challenges to "multipart anticompetitive scheme[s]." Doc. 345, *Government Emps. Health Assn.* v. *Actelion Pharms. Ltd.*, No. 18-cv-3560 (D. Md. Aug. 9, 2024); *see* Doc. 267, *FTC* v. *Amazon.com, Inc.*, No. 23-cv-1495 (W.D. Wash. Aug. 9, 2024). And courts have started relying on the panel's decision to conduct a "holistic" analysis of antitrust suits—even in cases that do not involve monopolization. *See Carefirst of Maryland, Inc.* v. *Johnson & Johnson*, 2024 WL 3858249, at *4 (E.D. Va. Aug. 16, 2024) (holding that "because plaintiffs have alleged a scheme, and consistent with Fourth Circuit case law, the Court will consider each [component] 'as part of a single campaign to foreclose competition' "); *fuboTV Inc.* v. *Walt Disney Co.*, 2024 WL 3842116, at *17 (S.D.N.Y. Aug. 16, 2024) (citing the decision below as authority for not "look[ing] at only one aspect" of a joint venture to determine its legality under Section 7 of the Clayton Act). Without this Court's intervention, the decision below will become the go-to authority for plaintiffs' lawyers trying to circumvent binding precedent, and will generate uncertainty across the country.

That confusion will ultimately harm consumers and businesses. This Court has repeatedly warned against broad liability for single-firm conduct, which may deter firms from lowering pricing, improving their products, or enforcing their contracts. *See Trinko*, 540 U.S. at 414 (explaining that, in monopolization cases, "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the

very conduct the antitrust laws are designed to protect' ") (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); *Brooke Group*, 509 U.S. at 224 ("[D]iscouraging a price cut and forcing firms to maintain supracompetitive prices . . . does not constitute sound antitrust policy."). The Court has also emphasized the importance of "safe harbors" in antitrust law, *see linkLine*, 555 U.S. at 453, which the decision below all but eliminates. The costs of false positives and market uncertainty will eventually fall on consumers like Fayetteville, who will face higher prices and lower-quality products as a result.

On top of all that, the panel's decision raises serious due process concerns about fair notice. By definition, the monopoly-broth theory matters primarily in situations where the defendant engaged in actions that were lawful under an established, conduct-based test; otherwise, there would be no need for a plaintiff to invoke it in the first place. The upshot is that defendants targeted by that theory will face treble damages (and potentially criminal prosecution) for engaging in activities that were expressly permitted by prevailing law—so long as a plaintiff can show that the defendant engaged in *other lawful* conduct that also harmed the plaintiff's position in the market. That sort of liability-by-hindsight would be misguided in any context, but it is especially problematic under a statute with sanctions as severe as the Sherman Act's. *See* 15 U.S.C. § 2 (authorizing "imprisonment not exceeding 10 years" for monopolization offenses); *id.* § 15 (allowing a plaintiff to seek "threefold the damages by him sustained").

For courts and juries, meanwhile, the panel's aggregation approach will prove utterly unworkable. This Court has long disfavored antitrust rules that require

courts to act as "central planners" or to "determine a fair price" in the market. *linkLine*, 555 U.S. at 454 (quoting *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, J.)). The decision below requires courts to do exactly that. Without conduct-based tests to apply, courts and juries will have to decide each case based on nothing more than the defendant's supposedly improper motives and the net effect of otherwise-permissible competition. This case demonstrates how unprincipled that inquiry can be. According to the panel, NTE's proof of a Sherman Act violation includes Duke's intent to offer Fayetteville benefits that its competitor could not match and statements from some Duke employees indicating they were happy to terminate a federally mandated relationship with a competitor. App. 40a, 52a. That sort of evidence will almost always be available in suits between competitors in a free market. *See A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (explaining that "[i]ntent does not help separate competition from attempted monopolization" because "[l]awyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury").

B. This case is an ideal vehicle to resolve the question presented. The panel clearly held that NTE did not need to show a specific unlawful act to make out an antitrust claim, reversing a district court decision that had held the opposite. App. 32a; *see id.* at 88a (citing *Eatoni Ergonomics*, 486 Fed. Appx. at 191).

Correcting the panel's error will at a minimum completely reshape this suit, and should end it entirely. As Judge Quattlebaum recognized, the panel's entire opinion was driven by its embrace of the monopoly-

broth theory. The panel began its analysis by explaining that NTE's various allegations must be evaluated as "part of a singular, coordinated anticompetitive effort," App. 32a, and ended its analysis the same way, noting that trial was needed to assess whether Duke engaged in "a broad range of anticompetitive conduct" that harmed a competitor, *id.* at 55a. Along the way, the panel repeatedly disclaimed any need to find that Duke's conduct "in isolation amounted to a § 2 violation," instead concluding that Duke's actions were relevant as part of a "larger scheme." *Id.* at 54a; *see id.* at 151a (explaining that the panel "never ultimately applie[d] the Court's refusal to deal test"). The panel's monopoly-broth theory will fundamentally distort the forthcoming trial, allowing NTE to put forward evidence that would not be relevant under this Court's established doctrinal tests and creating questions about how to instruct the jury under an amorphous standard not used in any other court of appeals.

If the Court rejects the monopoly-broth standard, the Fourth Circuit can decide on remand whether anything is left of this case under the normal antitrust rules articulated in *Brooke Group* and *Trinko*. For the pricing-based claim, NTE would no longer be able to press its arguments about the supposed "structural" unfairness of Duke's bid, App. 34a-39a, and would be left at most with its contention that the bid was below Duke's "average system cost"—an argument that took up a single paragraph of the panel's decision, *id.* at 42a-43a, and that has been roundly criticized as "nonsense," Areeda & Hovenkamp, *supra*, § 741f. The panel would also need to consider for the first time whether, for that more limited pricing argument, NTE had developed evidence of likely recoupment "under a traditional predatory pricing framework." App. 39a.

As for the termination of the interconnection agreement, the panel was careful to avoid the suggestion that Duke's conduct was unlawful under *Trinko*—perhaps recognizing that the facts of that case are on all fours with this one. *See* App. 145a (Quattlebaum, J., dissenting from denial of rehearing en banc) (explaining that "refusal to deal claims require voluntary engagement in a course of dealing as opposed to a regulatorily compelled relationship").

Although the decision below is interlocutory, this Court should not wait for trial to correct the panel's error. Monopolization trials are exceedingly rare and impose substantial costs on defendants. Rather than incur those costs and risk a judgment for treble damages, most Section 2 cases settle before trial. If this Court waited until final judgment to address important Section 2 disputes, it would lose nearly every opportunity to do so. For that reason, this Court frequently reviews monopolization cases in an interlocutory posture. *See, e.g.*, *linkLine*, 555 U.S. at 445-446 (reviewing decision rejecting judgment on the pleadings); *Trinko*, 540 U.S. at 405 (reviewing decision rejecting a motion to dismiss); *Eastman Kodak Co.* v. *Image Tech. Servs. Inc.*, 504 U.S. 451, 459-460 (1992) (reviewing decision rejecting defendants' motion for summary judgment); *Matsushita*, 475 U.S. at 578-580 (same). This case should be no different.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 21, 2025

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2168

DUKE ENERGY CAROLINAS, LLC,

Plaintiff-Appellee,

and

DUKE ENERGY CORPORATION;
DUKE ENERGY PROGRESS, LLC,

Counter-Defendants-Appellees,

v.

NTE CAROLINAS II, LLC; NTE CAROLINAS
II HOLDINGS, LLC; NTE ENERGY, LLC; NTE
SOUTHEAST ELECTRIC COMPANY, LLC; NTE
ENERGY SERVICES COMPANY, LLC; CASTILLO
INVESTMENT HOLDINGS II, LLC,

Defendants-Appellants.

AMERICAN ANTITRUST INSTITUTE,

Amicus Supporting Appellants.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; NORTH CAROLINA CHAMBER LEGAL INSTITUTE; DR. BENJAMIN ZYCHER; GEOFFREY A. MANNE; PROFESSOR RICHARD A. EPSTEIN; PROFESSOR DONALD J. BOUDREAUX,

Amici Supporting Appellees.

Argued: May 7, 2024
Decided: August 5, 2024

Before NIEMEYER and THACKER, Circuit Judges, and MOTZ, Senior Circuit Judge.

OPINION

Vacated and remanded by published opinion. Judge Niemeyer wrote the opinion, in which Judge Thacker and Senior Judge Motz joined.

NIEMEYER, Circuit Judge:

NTE Carolinas II, LLC ("NTE"[1]), a power company based in St. Augustine, Florida, sued Duke Energy Corporation ("Duke"[2]), a power company based in Charlotte, North

1. NTE will be used as shorthand to refer collectively to NTE Carolinas II, LLC; NTE Carolinas II Holdings, LLC; NTE Energy, LLC; NTE Southeast Electric Co., LLC; NTE Energy Services Co., LLC; and Castillo Investment Holdings II, LLC.

2. Duke will be used as shorthand to refer collectively to Duke Energy Corporation, and its subsidiaries Duke Energy Carolinas, LLC, and Duke Energy Progress, LLC.

Carolina, alleging that Duke had monopoly power in the wholesale power market in the Carolinas and willfully maintained that power through anticompetitive conduct to exclude NTE from the market, in violation of § 2 of the Sherman Act. *See* 15 U.S.C. §§ 2, 15. In particular, NTE presented evidence in the district court that Duke devised a plan to ensure that NTE, its only serious competitor, would not have the opportunity to compete for the business of Fayetteville, North Carolina, the only major wholesale customer whose long-term contract with Duke was expiring soon enough to allow NTE to compete for its business.

The district court granted Duke's motion for summary judgment, in which Duke argued that the conduct that NTE imputed to Duke constituted legitimate competition in seeking to retain Fayetteville's business and that none of the actions on which NTE relied was unlawful. While the court concluded that there was a question of fact on whether Duke had monopoly power, it also concluded as a matter of law that Duke did not engage in anticompetitive conduct but rather legitimate competition to retain Fayetteville's business.

The record in this case is large, and it contains much evidence related to Duke's conduct in response to NTE's competitive efforts. While we recognize that much of Duke's conduct can be understood to be legitimate competitive conduct, as well explained by very able counsel, we also have found much from which a jury could conclude that Duke's actions were illegitimate

anticompetitive conduct that violated § 2 of the Sherman Act, also as well explained by very able counsel. Because genuine disputes of material fact exist, we vacate the district court's summary judgment and remand for further proceedings.

We also order that, on remand, the case be assigned to a different judge. In an act of caution, the district judge in this case initially recused himself because of the appearance of one of his former law partners on behalf of Duke. But he was reassigned the case a couple of years later after the "conflict" abated, and he then declined to recuse himself on NTE's motion, determining that his earlier recusal had not been necessary. We conclude, as most courts have, that once a judge recuses himself from a case, he should remain recused from that case, even though his recusal may not have originally been required.

I

After Duke filed an answer to NTE's operative antitrust complaint, the parties engaged in extensive discovery, creating a substantial record, which included detailed and complex expert witness reports. Duke then filed a motion for summary judgment based on that record. While the district court concluded that genuine questions of material fact remained on whether Duke had monopoly power, it concluded that NTE failed to show that Duke had engaged in "improper exclusionary conduct harming competition." *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 608 F. Supp. 3d 298, 317 (W.D.N.C. 2022). Identifying five

distinct courses of conduct claimed by NTE to have been part of Duke's anticompetitive scheme, the district court addressed each course independently, found that each was not unlawful by itself, and concluded that "[a]dding up several instances of lawful conduct [could not] total unlawful conduct." *Id.* at 319; *see also id.* at 319–28. The court accordingly granted summary judgment to Duke.

Because one issue raised is whether the record reveals genuine issues of material fact, we find it appropriate to recite the record in some detail.

A

The summary judgment record shows the following:

NTE, as an independent power producer ("IPP"), generates power at power plants, but it does not own transmission lines and therefore cannot, with its own resources, transmit the energy it produces to wholesale customers. Thus, NTE must rely on the transmission networks owned by other energy companies to transmit electricity over power lines to its wholesale customers, typically municipalities. J.A. 4455; FERC, *Energy Primer: A Handbook of Energy Market Basics* 47 (2020). To facilitate such access, the Federal Energy Regulatory Commission ("FERC") requires utilities to share their transmission networks with competitors. *See generally Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21540 (May 10, 1996).

In 2014, NTE began construction of a new combined-cycle natural gas facility in Kings Mountain, North Carolina. *See* J.A. 4616. To transmit electricity in the Carolinas, however, it needed to use the transmission lines of Duke, a longtime monopolist holding more than 90% of the wholesale power market in the region. J.A. 4481. Duke is a vertically integrated power company, meaning that it owns both power plants and transmission lines and serves both wholesale and retail customers. In accordance with FERC regulations requiring interconnection, Duke and NTE entered into a standard interconnection agreement, with Duke providing NTE access to its transmission network so that NTE could sell power from its Kings Mountain plant. While NTE thus entered Duke's service area, Duke at first had little concern about its presence as a competitor, inasmuch as NTE's Kings Mountain plant was a relatively small generator. Duke's Vice President of Wholesale Power Sales remarked at the time that he "[thought] it [was] very doubtful that the threat [of Duke customers switching to NTE] [was] real." J.A. 4830.

Duke's view of NTE changed over the following year, however, as Duke began to realize that NTE was successfully attracting Duke customers. *See* J.A. 5047 (Duke email stating that NTE winning Winterville was a "total surprise"). In October 2014, Duke executives asked their subordinates to keep them briefed on NTE's development plans. J.A. 4832–33. In January 2015, Duke's internal briefing reports showed that "[s]tand-alone combined cycle plants" like NTE's "offer less expensive energy than Duke Energy system average rates for the foreseeable future, along with lower capacity prices."

J.A. 4881. In short, the combined-cycle plants that NTE was in the business of building were more cost-efficient than Duke's own plants. *See* J.A. 4471–72. Duke then recognized that it "[couldn't] chase the price competition and earn a reasonable return." J.A. 4888.

When NTE opened its Kings Mountain plant, Duke customers, too, took note of NTE's new offerings. For example, in October 2015, a representative of a wholesale customer informed Duke that it was signing a Letter of Intent to buy electricity from NTE due to the savings that NTE offered, explaining:

> The issue with my towns is cost. We are in an area of the state where wages have stagnated and making ends meet is incredibly difficult for many folks. Duke's offer, over the long term, was simply uneconomic.

J.A. 5060. Eventually, Duke lost a total of nine of its customers to NTE selling electricity from its Kings Mountain plant. J.A. 4618. Yet, during that same time, it lost only one customer to a competitor other than NTE. *See* J.A. 4659.

Despite NTE's cleaner, more efficient power generators, Duke recognized that it had an advantage by reason of its long-term wholesale power supply contracts with its customers, which spanned 20 years and required several years' notice of termination. *See, e.g.*, J.A. 2545 (10-year notice period); J.A. 5235 (7-year notice period). These long-term contracts, which were common in the

Southeast energy markets, decreased the risk that a Duke wholesale customer would switch to a new entrant provider of electricity like NTE. As a consequence, such contracts limited opportunities for new entrants such as NTE to compete for customers and thus to gain economies of scale. But Duke identified one contract that was set to expire soon enough for Duke to worry about losing a major customer's business to NTE—the City of Fayetteville, which provided a peak demand load for electricity of approximately 500 MW. *See* J.A. 2847, 5086.

Fayetteville had been a Duke customer for more than 100 years, and, at the time that NTE began its attempt to win Fayetteville's business, Fayetteville and Duke were operating under a 20-year agreement that they had entered into in 2012 ("2012 Power Supply Agreement"). J.A. 4453, 6719. Under the 2012 Power Supply Agreement, Fayetteville agreed to buy power from Duke until June 30, 2032. But in the Agreement, Fayetteville retained the right to terminate the Agreement as of July 1, 2024, upon notice to Duke given by June 30, 2017—a deadline that Duke extended to 2019 and later to 2020. J.A. 906–07, 2845, 3463. Duke not only sold Fayetteville electrical power, but, under a separate contract, it also purchased excess power from Fayetteville that was produced at Fayetteville's Butler Warner plant. J.A. 2848. That plant was, however, very inefficient, made up of eight gas or oil combustion turbine generating units and one combined-cycle steam turbine unit. *See* J.A. 3683, 4942. In theory, Duke could sell the excess power generated at the Butler Warner plant to other customers. J.A. 1188; *see also* Response Br. at 9 ("Duke . . . bought excess power

produced by Fayetteville's power plant, which Duke could potentially sell to other customers").

In 2016, in light of NTE's success with its King Mountain plant, Duke's internal reports observed that "[b]ut for NTE customers," Duke's "portfolio [was] stable." J.A. 5086. Duke's internal reports additionally projected that Duke's rates would remain much higher than NTE's through at least 2025, J.A. 5071, and that Duke's "[c]ompetitive disadvantage [was] not going away soon," J.A. 5086. NTE's competitive advantage prompted Duke to recognize that Fayetteville, which had been providing Duke with $100 million in annual net revenue, was its "[l]argest customer risk." J.A. 5086. And in the months thereafter, Duke continued to report internally that NTE was its "biggest threat," J.A. 4700, listing Duke's relative inefficiency as a major factor for why Duke was, in its words, "not competitive," J.A. 7273.

NTE did indeed then have plans to build additional power plants in the Carolinas. But key to its plans for expansion was the rare opportunity—because of the terms of Fayetteville's agreement with Duke—to compete for Fayetteville's business. Thus, in 2016, NTE announced its plan to build a second plant, the Reidsville Energy Center, which could serve Fayetteville. That plant would have a capacity of approximately 475 MW and would be a natural gas combined-cycle electric generation plant. J.A. 4466. To bring the Reidsville plant online, however, NTE needed to attract not only wholesale customers who were not already locked into long contracts, but especially a large wholesale customer such as Fayetteville.

Because NTE was an IPP, it also needed to enter into an interconnection agreement with Duke to have access to Duke's transmission lines for its Reidsville plant. So, in November 2017, again in accordance with FERC regulations, NTE and Duke entered into a standard interconnection agreement for the Reidsville plant ("the Reidsville Interconnection Agreement"). *See* J.A. 418–504; *see also Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61103 (2003). Under this pro forma interconnection agreement, NTE agreed to pay Duke $58,917,362 to build the interconnection infrastructure for the Reidsville plant, and once the lines were built, Duke would own those transmission lines and charge NTE to use them. J.A. 465, 491. The contract required NTE to make "security payments"—payments made in advance of incurred costs—for Duke's construction work on a schedule fixed by the agreement. J.A. 467, 575.

A few months after Duke and NTE entered into the Reidsville Interconnection Agreement, NTE persuaded three of Duke's wholesale customers to buy power from NTE—McCormick, South Carolina; City of Camden, South Carolina; and Western Carolina University, J.A. 5395, 5989, 6071. These were significant wins for NTE. Camden, for example, had been a Duke customer for more than 70 years. J.A. 5476.

As Duke continued to lose customers to NTE, Duke's competitive concerns intensified. In 2017, Duke projected its all-in costs to be 30 percent higher than NTE's costs for its new combined-cycle plants. J.A. 1806. In March 2018,

at an all-hands meeting, Duke's wholesale power segment warned that Duke's systems were "no longer competitive," although it observed that the "[p]roblem [was] mitigated by [the] long-term nature of [its] contracts." J.A. 5388. Duke's data showed that its average system cost was well above the cost for combined-cycle plants, such as NTE's. J.A. 5389. In light of these efficiency concerns, Duke internally identified the retention of Fayetteville's future business as its "biggest upcoming battle." J.A. 5390.

Later that spring, Duke officials sent internal emails regarding Camden's decision to move its business to NTE. J.A. 5476. They also discussed a desire to keep Fayetteville from issuing a "Request for Proposal" ("RFP")—a mechanism that customers use to invite bidders to make proposals in response to specific requests for service—to provide it with options for the supply of wholesale power for the years after it could terminate its agreement with Duke in 2024. J.A. 5476. In those emails, Duke officials recognized that "[o]ther than Fayetteville, [they] [did] not have any other contracts in the Carolinas at risk for several years." J.A. 5476. The Vice President of Wholesale Power Sales informed other Duke officials that Fayetteville "ha[d] committed to give [Duke] an opportunity to modify [its] contract to meet [Fayetteville's] needs before they go out for an RFP." J.A. 5476. A few months later, a Duke report indicated that its "[p]rimary proposal objectives" in its talks with Fayetteville "[were] to avoid RFP and retain [Fayetteville's] load." J.A. 7297. To meet these goals, Duke identified an opportunity to make Fayetteville an offer that Duke's competitors could not match, in part by modifying Duke's *current* long-term contract with Fayetteville, the 2012 Power Supply

Agreement. It noted, "Formula rate discount *prior to 2024* provides value *other competitors can't offer.*" J.A. 7297 (emphasis added).

While Duke recognized that it "need[ed] the NTE train to stop," NTE continued to attract attention with its superior efficiency. J.A. 5733. In December 2018, Stantonsburg's mayor reported that a "9 percent rate cut will make Christmas a bit brighter for our citizens," thanks to switching from Duke to NTE. J.A. 5894. That same month, Duke again projected that "the delta"—i.e., the differential—between Duke's system costs and NTE's "[was] 25 to 30 percent." J.A. 4484.

Despite Duke's concern with NTE's competition, NTE and Duke continued to operate under the terms of the Reidsville Interconnection Agreement throughout 2018, and by January 2019, NTE had paid Duke $1.6 million in security payments, as required by the schedule set forth in the Agreement. J.A. 575, 2019. In February of that year, however, Duke changed the routine payment practice. It sent NTE an email stating that it was implementing a new payment program, and NTE "should wait and send their payments per the instructions on the invoice, instead of just wiring it in" in accordance with the Agreement's schedule. J.A. 5891–92. Only days later, Duke officials exchanged emails discussing its hope to "get [Fayetteville] wrapped up and [p]ut it to bed and ruin NTE's plans" for the Reidsville plant. J.A. 5906. When March 1, 2019, came around—the day that NTE would have owed Duke a security payment under the Reidsville Interconnection Agreement—Duke did not send an invoice. Accordingly,

in compliance with Duke's instructions, NTE did not wire Duke the security payment then due. J.A. 4764–67.

At the same time that Duke failed to send NTE invoices, it again circulated internal reports showing that Duke was unable to compete with NTE on efficiency: "Duke energy rate of ~$60-65/MWh compares unfavorably against IPPs (e.g. NTE) with offers of ~$40-45/MWh. Duke Energy capacity charges of ~$18/kw-month far exceed NTE's $8/kw-month." J.A. 5927. Duke continued to recognize in its internal reporting that, although "[m]ost wholesale contracts continue another 12-15yrs," "Fayetteville" was the exception. J.A. 5927.

Despite its relative inefficiency, Duke made a highly attractive, multi-faceted offer to Fayetteville, which amounted in the aggregate to a discount of $325 million for Fayetteville and which was unprecedented. J.A. 577, 4586. First, Duke agreed to provide Fayetteville with a $30/kW-year discount on its *existing arrangement* with Fayetteville from January 2021 to June 2024, which was worth approximately $42 million to Fayetteville. J.A. 4415. It agreed to give Fayetteville this massive discount on the rates set forth in its 2012 Power Supply Agreement with Fayetteville—something no other competitor could offer—but it required as a condition that Fayetteville begin to pay Duke more for its electricity after 2024, indeed more than NTE would have charged Fayetteville. J.A. 577–78, 4414–4416, 6224–27. Duke labeled this two-part discount-now increase-later strategy as "blend-and-extend," and it later admitted that the strategy would enable Duke to charge customers like Fayetteville "higher

prices than offered by the competition" beginning in 2024. J.A. 4663–64. And as the last part of its proposal to Fayetteville, Duke agreed to quadruple the price it paid for the excess power it bought from Fayetteville's Butler Warner plant—increasing its purchase price from $50/kW-year to $197.82/kW-year. J.A. 4418–19. One Duke employee acknowledged regarding this proposal that Duke would pay more to Fayetteville under this arrangement than it would have to pay at market for the same power. J.A. 4419. Thus, under this multi-faceted proposal, Fayetteville would in the immediate term save money, not because Duke was more efficient, but in part because Duke could offer a large discount on the years during which Fayetteville was already locked into Duke's services and it could provide Fayetteville with a large profit on Butler Warner purchases.

After receiving Duke's proposal, Fayetteville considered its options, hiring a consultant group to help it decide whether it should renew its contract with Duke or issue an RFP and potentially buy its electricity elsewhere, such as from NTE. Fayetteville's consultants compared Duke's offer to what it projected NTE's would be. The consultants' report noted that Duke was able to cut below NTE's rates by (1) offering a substantial discount on Fayetteville's current contract and (2) offering to pay far more for energy coming from Fayetteville's Butler Warner plant. J.A. 6226–27. When listing the benefits of sticking with Duke, the consultants first highlighted that Duke's offer "provide[d] savings prior to 2024." J.A. 6233. While NTE would offer a lower price for electricity than would be provided after the potential termination

of Fayetteville's contract with Duke in 2024, NTE's offer would come with its own risks. The consultants noted disadvantages to doing business with NTE, including an increased potential for "cost volatility" and NTE's higher credit risk. J.A. 6230.

Subsequently, in May 2019, Fayetteville and Duke signed a Letter of Intent, reflecting Fayetteville's tentative decision to renew its 2012 Power Supply Agreement with Duke in light of what appeared to be an attractive offer. J.A. 1391–92.

Meanwhile, NTE was originally required to make another security payment to Duke under the Reidsville Interconnection Agreement on May 1, 2019. J.A. 575. But, as with the March 1 security payment, Duke again did not send NTE an invoice, and NTE, in accordance with Duke's instructions, did not make the payment. J.A. 4764–67.

Later that month, on May 15, 2019, NTE exercised its contractual right under the Reidsville Interconnection Agreement to suspend work on the construction of the transmission lines facility. J.A. 447, 6239. Such suspensions were common in the industry, and NTE's suspension was explicitly permitted by the Reidsville Interconnection Agreement, which allowed NTE "to suspend at any time" so long as NTE paid Duke "for all reasonable and necessary costs" incurred "prior to the suspension." J.A. 447. NTE had decided to suspend the Reidsville Interconnection Agreement to create some flexibility in its development timeline. J.A. 1493.

Nonetheless, Duke interpreted NTE's suspension and nonpayment of the security payments as a breach of the Reidsville Interconnection Agreement, and Duke therefore sent NTE a notice of breach by a letter dated May 22, 2019. J.A. 3865–68. In the letter, Duke also demanded payment of the security amounts for which it had not invoiced NTE. Duke's letter stated that Duke had in fact sent invoices earlier, but Duke later admitted that that statement was false. J.A. 4764. The day Duke sent its letter, a Duke official discussing NTE's suspension remarked to another, "breach! breach! punt em!" J.A. 6364.

Important to NTE, when an IPP suspends a standard interconnection agreement, such suspension is not supposed to affect its placement in the queue for interconnection with transmission lines. FERC requires energy providers like Duke to publish information about their transmission capacity to industry participants and the general public through the online Open Access Same-Time Information System ("OASIS"). *See Real-Time Information Networks & Standards of Conduct; Notice of Proposed Rulemaking*, 60 Fed. Reg. 66182, 66188 (proposed Dec. 21, 1995) (OASIS provides "information between customers and providers regarding available products and desired services"); 18 C.F.R. § 37.2. And an IPP's listing in an OASIS queue informs the public (including potential customers) that the IPP would be capable of transmitting the electricity it produced. Thus, if an IPP's interconnection project is listed as "canceled" on an OASIS queue, that signals to the public—including customers and investors—that the IPP is unable to transmit its power.

Duke previously had an arrangement with an independent monitor who was charged with the detection and reporting of anticompetitive conduct in the transmission and interconnection process, including misconduct on the OASIS queue. J.A. 4468–69. But Duke terminated that arrangement in March 2019, leaving it with those responsibilities. J.A. 4468–69.

Duke was aware that NTE's OASIS queue placement mattered to NTE and that it would be advantageous to Duke if NTE's Reidsville project was not on track to rise to the top of the interconnection queue. Indeed, soon after NTE provided Duke notice of its suspension, a Duke official asked another, "[D]oes this mean you get to kick NTE Reidsville out of the queue?" J.A. 6246.

During the summer of 2019, Duke and NTE disputed the consequences of NTE's suspension under the terms of the Reidsville Interconnection Agreement, and in June 2019, Duke sent NTE a formal notice of default. J.A. 3870. NTE disputed that it had breached the agreement or defaulted in any manner, but it offered to pay Duke for the costs that it had incurred on the Reidsville project and for the reasonable and necessary costs caused by the suspension. J.A. 3874–75. Duke then sent a second notice of default and now demanded security payments, stating that it had earlier sent NTE invoices. J.A. 3878–81. Later, however, Duke again admitted that such statement was false. J.A. 4766.

During the same period when Duke was attempting to end its arrangement with NTE, it also was ironing out

its proposal to retain Fayetteville's business. And in a "White Paper" directed to Duke's Transaction & Risk Committee, the CEO, and the Board of Directors to justify the new Fayetteville proposal, Duke officials reported that "[i]f the environment remains as competitive as it is today . . . when [Duke's wholesale] customers are ready to negotiate extensions (likely 5 years before expiration), then [Duke] will also have to offer them alternative, more competitive solutions to retain the business." J.A. 2847. The White Paper reported further that the "structure" of its multi-part offer to Fayetteville—including both the retroactive discount and Duke's increased purchase price for power from the Butler Warner plant—would allow it "to retain [Fayetteville's] significant load as well as retain approximately 60% of [Fayetteville's] contribution towards fixed costs starting in 2024 and beyond." J.A. 2847. Also in the White Paper, the Duke officials disclosed a plan to shift the cost of the discount it had offered Fayetteville back to its wholesale customers and to its retail customers in years to come. J.A. 2851, 6614. Under the "best case" scenario, officials explained, Duke would cross-subsidize its lower rate starting in June 2024 by raising rates on these other customers, as Duke expected to lose $100 million on the Fayetteville deal. J.A. 2851. That "best case" scenario did not account for the $42 million decrease in total revenues caused by the retroactive discount on the charged rate from January 2021 to June 2024. J.A. 2851; *see also* J.A. 7003.

On September 6, 2019, Duke unilaterally terminated the Reidsville Interconnection Agreement with NTE. J.A. 3894–97. While the terms of that agreement required

Duke to notify FERC prior to any termination, Duke did not do so. J.A. 435. Later that same month, Duke also listed the Reidsville project as "canceled" in its OASIS queue, effectively "punt[ing]" NTE to the end of the line. J.A. 714, 6364. Duke did this at a time when NTE's lenders were "crystal clear that the[ir] ability to finance the Reidsville project ha[d] everything to do with ensuring that the [Interconnection Agreement] [was] intact." J.A. 4529.

Then, within days, Duke's Board of Directors passed a resolution approving the new Fayetteville arrangement, considering the retroactive discounts to the 2012 Power Supply Agreement and increased payment on the Butler Warner agreement "collectively." J.A. 7070. And accordingly, in November 2019, while NTE's Reidsville project was still listed as "canceled" in Duke's OASIS queue, Duke and Fayetteville formally executed a new agreement (the "2019 Power Supply Agreement"). J.A. 911. Fayetteville signed the agreement without issuing an RFP to consider other offers, including NTE's. After execution of the 2019 Power Supply Agreement, Duke submitted it to FERC. J.A. 3518–27, 3853. But it only submitted that agreement alone, which provided for the discount it was offering Fayetteville as a wholesale customer of electricity, and not its agreement to buy power back from Fayetteville's Butler Warner plant at a quadrupled rate. J.A. 4414, 4295–96. Duke determined internally that it "[did] not need to file the Butler Warner [power supply agreement] extension at FERC," and therefore concluded that that portion of its agreement with Fayetteville would not pose a "[f]ederal [r]egulatory [r]isk." J.A. 6727.

NTE did not seek to intervene in the FERC proceeding initiated by Duke's filing of the 2019 Power Supply Agreement. *See* J.A. 2359; *see also* 18 C.F.R. § 385.206 (permitting "[a]ny person" to "file a complaint seeking [FERC] action against any other person alleged to be in contravention" of a law administered by the agency); 18 C.F.R. § 385.214 (providing a mechanism for a person to intervene as a party in a FERC action); 18 C.F.R. § 385.211 (allowing "[a]ny person" to object to a rate filing with FERC). And on January 22, 2020, FERC approved Duke's new selling rates, and the 2019 Power Supply Agreement took effect shortly thereafter. J.A. 3480–82.

Without the hope of competing for Fayetteville's business to justify its Reidsville plant, NTE's expansion effort lost force. In November 2019, one of NTE's business partners informed NTE that "Reidsville sounds like a good project . . . but we can't make any commitment until the interconnection issues are resolved." J.A. 843. Even so, NTE sought to move forward with the project, and it applied to the North Carolina Utilities Commission for a permit needed to construct the Reidsville plant. *See* J.A. 7162. Such applications rarely attracted outside involvement and were routinely granted. J.A. 4624. Duke, however, petitioned to intervene before the State Commission to assert that NTE had breached the Reidsville Interconnection Agreement and to suggest that NTE would fail to meet its construction goals "apparently due to a lack of financing and insufficient wholesale customers to justify the need for [Reidsville]." J.A. 516–17, 4293. At that time, however, Duke knew that NTE had won the business of some of Duke's own customers, such as the City of Camden. J.A. 5476.

In November 2019, NTE petitioned FERC, pursuant to 18 C.F.R. § 385.207(a)(2), for review of Duke's unilateral termination of the Reidsville Interconnection Agreement, and in May 2020, FERC issued an opinion concluding that Duke's termination was unlawful. J.A. 562–64. The parties, however, disagree as to the effect of FERC's order.[3] When FERC issued its decision, Duke still had the Reidsville project listed as "canceled" in its OASIS queue. Having already secured Fayetteville's business, Duke corrected the OASIS queue and NTE's placement on it after FERC's decision issued. *See* J.A. 1634. Duke then also sent an invoice to NTE accounting for the actual costs of NTE's suspension.[4] J.A. 3913–18.

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3. At the parties' request, FERC "d[id] not address the merits of any breach of contract claim concerning the Reidsville [Interconnection Agreement]," but it granted NTE's petition "in part, by confirming [FERC's] exclusive jurisdiction over the termination of conforming [interconnection agreements], clarifying a transmission provider's responsibility to file a notice of termination with [FERC] when terminating a conforming [interconnection agreement] over an interconnection customer's objection, and providing guidance on [electric quarterly reports] and OASIS postings." J.A. 562. NTE says that "FERC agreed with NTE . . . that Duke's unilateral termination of NTE's agreement was unlawful," Opening Br. at 19, whereas Duke counters that FERC "concluded that its approval was required to terminate, but made clear that it was not addressing the merits of the parties' contract dispute," suggesting that FERC "granted NTE's petition (with Duke's assent) [merely] in order 'to remove uncertainty regarding the termination provisions in the' Interconnection Agreement," Response Br. at 12–13.

4. The district court stated that "these allegedly due payments were ultimately invoiced to NTE in the Summer of

According to NTE, Duke's actions "destroyed" "the value of the Reidsville project," leaving Duke's customers with no choice but to pay Duke's higher rates. J.A. 4604, 4754. This litigation followed.

B

The day that Duke unilaterally terminated the Reidsville Interconnection Agreement—September 6, 2019—it also sued NTE in North Carolina state court for breach of the agreement. J.A. 348. NTE removed the action to federal court and filed a counterclaim alleging that Duke had monopolized or attempted to monopolize the Carolinas wholesale energy market, in violation of § 2 of the Sherman Act, 15 U.S.C. §§ 2, 15. J.A. 347–416. NTE also alleged that Duke had violated North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1(a); had breached the Reidsville Interconnection Agreement; and was liable for common law unfair competition. J.A. 408–11

The case was assigned to U.S. District Judge Kenneth Bell. When, however, one of his former partners at the Virginia law firm of McGuire Woods LLP appeared as counsel for Duke, Judge Bell recused himself pursuant to a prophylactic policy he had adopted after becoming a judge for cases in which lawyers from his former firm appeared. Consequently, the court clerk reassigned the case to another judge, noting on the docket that "conflict"

2019." *Duke Energy Carolinas*, 608 F. Supp. 3d at 312 (citing J.A. 3863–68). Our de novo review of the record, however, shows that those summer 2019 invoices were for security payments, and Duke had sent no invoices for actual costs until July 2020. J.A. 3913–18.

was the ground for doing so. The other judge presided over the case well into discovery until he also developed a conflict. Then, roughly two years after the case had been assigned to Judge Bell, it was reassigned to him, who had in the interim abandoned his prophylactic recusal policy. NTE filed a motion to disqualify Judge Bell under the principle that "once recused, a judge cannot resume authority over a case, not even to rescind an erroneously entered recusal order or because the conflict originally requiring the recusal has resolved." J.A. 248. Judge Bell denied NTE's motion, concluding that his prior recusal "did not reflect a considered 'recusal.'" J.A. 343. He thus remained on the case.

Following discovery, Duke filed a motion for summary judgment. Duke argued that NTE's antitrust claims should be dismissed because NTE had failed to present evidence sufficient to show both that Duke held monopoly power in a relevant market and that Duke had engaged in illegal exclusionary conduct. NTE challenged Duke's arguments based on the sufficiency of evidence it produced to prove its claims. It also argued that disputes of material facts precluded summary judgment, as a reasonable jury could find that Duke had monopoly power and that it had engaged in exclusionary conduct by taking actions that would be irrational but for their tendency to harm NTE. NTE argued that it could demonstrate, among other things, that Duke lost millions of dollars to stop NTE from competing for Fayetteville's business; that it failed to inform FERC of the full extent of the discount it had offered Fayetteville; that it had unlawfully terminated the Reidsville Interconnection Agreement; that it had falsely

published that the Reidsville project was "canceled" in its OASIS queue; and that it made false statements about NTE to the North Carolina Utilities Commission.

In an opinion dated June 24, 2022, the district court granted summary judgment to Duke on NTE's antitrust and unfair competition counterclaims. *See Duke Energy Carolinas*, 608 F. Supp. 3d 298. While the court found a triable issue as to whether Duke had or was likely to achieve monopoly power, it concluded that NTE had not demonstrated that Duke had engaged in anticompetitive or exclusionary conduct. In reaching that conclusion, the court divided NTE's allegations into discrete challenges to assess whether each individually amounted to an antitrust violation, addressing particularly: (1) Duke's termination of the Reidsville Interconnection Agreement as a "refusal to deal" or "denial of an essential facility," (2) Duke's renewal offer to Fayetteville as "predatory pricing" or "fraud on FERC," (3) Duke's filing of its breach-of-contract lawsuit against NTE as "sham" litigation, (4) Duke's erroneous OASIS posting as "defamation," and (5) Duke's intervention before the North Carolina Utility Commission as an additional exclusionary act. *Id.* at 318. The court applied separate tests as relevant to each subject, found each of them lawful, and declined to consider the acts taken as a whole. *See id.* at 319. The court accordingly held that NTE's Sherman Act claims failed as a matter of law because "[a]dding up several instances of lawful conduct cannot total unlawful conduct"—"[i]n simple mathematical terms, 0 + 0 = 0." *Id.* The court also granted summary judgment to Duke on NTE's state law claims of unfair competition. *Id.* at 328–32.

As for the parties' breach of contract claims against each other, the district court denied summary judgment. 608 F. Supp. 3d at 332–36. The parties, however, then settled those claims.

From the district court's orders dated December 8, 2021 and June 24, 2022, NTE filed this appeal, challenging the denial of its motion to recuse Judge Bell and the grant of Duke's motion for summary judgment on NTE's Sherman Act claim. We address first NTE's antitrust claim.

II

The summary judgment standard, which is on duty in this case, allows a case to be resolved before and without a trial when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The court's role in ruling on such a motion is not to assess the truth of any fact alleged or to weigh facts, as would a jury in finding facts, but only to determine whether facts are disputed *and* whether the disputed facts are material. *See Tekmen v. Reliance Standard Life Ins. Co.*, 55 F.4th 951, 959 (4th Cir. 2022); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing a summary judgment, we apply the same standard that the district court was required to apply and review the judgment de novo. *W.C. English, Inc. v. Rummel, Klepper & Kahl, LLP*, 934 F.3d 398, 402–03 (4th Cir. 2019).

In this case, the district court entered summary judgment in favor of Duke on NTE's antitrust claim, thus requiring

us to determine whether material facts relevant and necessary to the judgment were disputed and, if not, whether the undisputed facts, taken in the light most favorable to NTE, entitled Duke to judgment on NTE's § 2 claim.

Section 2 of the Sherman Act provides in relevant part:

> Every person who shall monopolize, . . . or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

15 U.S.C. § 2. And a plaintiff may bring a civil action when "injured in his business or property by reason of anything forbidden in [§ 2]." *Id.* § 15(a).

The Supreme Court has held that the purpose of this law is not to protect competitors, but rather to safeguard the competitive process itself, ultimately for the benefit of consumers. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458–59, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). To that end, it has required that a plaintiff, to be successful on a § 2 claim, must satisfy two essential elements: (1) that the defendant "possess[ed] . . . monopoly power in the relevant market," *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966), and (2) that the defendant willfully acquired or maintained that power through anticompetitive conduct, as opposed to gaining its monopoly status "as a consequence of a

superior product, business acumen, or historic accident," *id.* at 571, 86 S.Ct. 1698.

The first element is not at issue in this appeal. Duke does not challenge the district court's conclusion that a reasonable jury could find that Duke has or is likely to achieve monopoly power in the relevant market, given Duke's "durably high market share," which stands "at or approaching 90%." *Duke Energy Carolinas*, 608 F. Supp. 3d at 315–17. But the second element is at issue—whether Duke maintained its power through anticompetitive conduct, i.e., conduct intended to "exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) (quoting R. Bork, *The Antitrust Paradox* 138 (1978)).

A monopolist does not violate § 2 by offering a superior product, service, or lower prices, as such conduct is procompetitive and thus increases consumer welfare. Similarly, a monopolist does not violate § 2 even if it attracts customers by a subpar or overly expensive product, as "business acumen" or "historic accident" could explain such fortune. *Grinnell Corp.*, 384 U.S. at 571, 86 S.Ct. 1698. Rather, a monopolist violates § 2 when it "use[s] [its] monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482–83, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948)).

To begin, we address the parties' disagreement over the proper analysis of Duke's conduct. NTE alleges that Duke engaged in several, simultaneous courses of conduct that combined to thwart NTE from bringing a more efficient powerplant online and ultimately from competing with Duke in the Carolinas wholesale power market. It argues that the district court erroneously "compartmentalized" the various aspects of Duke's anticompetitive conduct and asked whether each one, *independently*, was unlawful. Opening Br. at 4, 25, 27. NTE maintains that, in approaching the record in this manner, the court failed to apply the correct legal standard, which required it to take account of all the conduct holistically and determine its effect on potential competition in the relevant market. It observes that in compartmentalizing Duke's conduct for analysis, the district court included no discussion of the alleged anticompetitive *consequences* of Duke's *campaign as a whole*—namely, reduced consumer choice, higher prices in the long term, and market foreclosure. Under the correct approach, it claims, the facts presented show that consumers were denied the choice of purchasing wholesale power from someone other than Duke.

Defending the district court's approach, Duke argues that we must reject NTE's holistic approach because the Supreme Court has set forth specific tests for various kinds of conduct, such as refusals to deal and predatory pricing, which it argues are involved here, and that NTE flunks each test. Duke maintains that "NTE cannot string together a series of acts—all lawful in themselves under the relevant tests—and claim that the whole is more than the sum of the parts." Response Br. at 46–47.

In the context of the allegations in this case, we agree with NTE. It is foundational that alleged anticompetitive conduct must be considered as a whole. Section 2 focuses on anticompetitive conduct, not on court-made subcategories of that conduct. To be sure, when anticompetitive conduct is alleged to be typical predatory pricing, refusing to deal, price fixing, or dividing markets, as but examples, the case law has developed tests for analyzing such claims. *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013). In cases where the alleged conduct falls within such well-defined categories, the method relied on by the district court—that 0 + 0 = 0—is a proper approach. *See, e.g., Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 449, 129 S.Ct. 1109, 172 L.Ed.2d 836 (2009) (observing that the presented "price-squeeze claim" focused on "retail prices—where there [was] no predatory pricing—and the terms of dealing—where there [was] no duty to deal" and evaluating the plaintiffs' claim under those two relevant tests).

But anticompetitive conduct comes in many different forms that cannot always be categorized. *See Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 783–84 (6th Cir. 2002). Thus, when a court is faced with allegations of a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within pre-established categories, its application of such specific conduct tests would prove too rigid. This is because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 414, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004) (cleaned up); *see also Viamedia, Inc. v. Comcast*

Corp., 951 F.3d 429, 453 (7th Cir. 2020) ("The fact that categories of conduct here [refusals to deal and tying] are conceptually related and may overlap should not cause confusion if we stay focused on the underlying inquiry: the conduct 'must harm the competitive *process* and thereby harm consumers'" (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc))).

Thus, when a plaintiff alleges that a scheme or course of conduct was anticompetitive, the scheme or conduct must be considered as alleged, not in manufactured subcategories. As Justice Holmes explained,

> The constituent elements . . . are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.

Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518 (1905). While that case was before the Court under § 1 of the Sherman Act, the principle also applies in the context of § 2. As the Supreme Court expressed in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), it is a misapplication of antitrust doctrine for a court to treat a plaintiff's allegations of anticompetitive conduct

"as if they were five completely separate and unrelated lawsuits," effectively "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Id.* at 698–99, 82 S.Ct. 1404. Just as the "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole," *id.* at 699, 82 S.Ct. 1404 (cleaned up), so too must a firm's exclusionary efforts be considered in their totality, *see Grinnell Corp.*, 384 U.S. at 576, 86 S.Ct. 1698 (affirming a judgment against a monopolist whose exclusionary campaign included anticompetitive restrictive agreements, pricing practices, and acquisitions). Indeed, a leading antitrust treatise likewise promotes the view that, in particular, exclusionary conduct alleged under § 2 must be considered holistically:

> In a monopolization case conduct must always be analyzed "as a whole." A monopolist bent on preserving its dominant position is likely to engage in repeated and varied exclusionary practices. Each one viewed in isolation might be viewed as de minimis or an error in judgment, but the pattern gives increased plausibility to the claim.

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 310c7 (4th and 5th eds. 2024).

Of course, we recognize that "care must be taken lest . . . illegality be inferred from procompetitive conduct." Areeda & Hovenkamp, *supra*, ¶ 310c7. The easier

cases are those in which individual practices are each independently unlawful, and so they naturally remain unlawful when considered together. The more challenging cases, however, are those in which the question is "whether two or more practices, while lawful individually, can be aggregated into a series or pattern capable of sustaining a Sherman Act § 2 offense." *Id.* While such cases may be uncommon and challenging, they are not categorical impossibilities, for "aggregation is appropriate" when individual acts are all "part of the same scheme to perpetuate dominance or drive the plaintiff from the market." *Id.* Thus, while courts must not dismember the individual acts of an exclusionary campaign when those acts are interconnected, they also must take care not to aggregate acts that are procompetitive to produce only a semblance of an exclusionary effect when considered together.

With these principles in hand, we turn to NTE's claim that it presented sufficient evidence to show that Duke engaged in anticompetitive conduct in the maintenance of its monopoly power in the relevant market based on the *combined effect* of two main components—Duke's interference with NTE's effort to obtain Fayetteville's business and Duke's disruption of NTE's interconnection efforts. While we discuss these components separately because of the complex factual allegations related to each, we recognize that NTE claims them to be part of a singular, coordinated anticompetitive effort. And, ultimately, therefore, we conclude that they must be taken as alleged, considered as part of a single campaign to foreclose competition in the Carolinas wholesale power market.

A

NTE argues that Duke's conduct in connection with its offer to Fayetteville to supply wholesale power to the municipality after 2024 was irrational and anticompetitive, designed only to exclude NTE from competition.

When NTE announced its plans to construct the Reidsville plant, Duke identified Fayetteville as its "[l]argest customer risk," noting that otherwise, given the long terms of its prior supplier agreements, its "portfolio [was] stable," other than the customers it had already lost to NTE in 2019. J.A. 5086. Duke's risk with respect to Fayetteville existed because its 2012 Power Supply Agreement with Fayetteville allowed Fayetteville to move its future business away from Duke, beginning in 2024. As alleged by NTE, Duke thus engaged in conduct to shore up Fayetteville and to exclude NTE, not for rational business reasons but to exclude competition.

Duke's take on these events is that Duke simply engaged in healthy competition. It "competed for Fayetteville by lowering its prices." Response Br. at 55. It argues accordingly that NTE's challenge to its Fayetteville offer must be viewed through the strict lens of a predatory pricing theory and that NTE has not shown that it could win under such theory. Lowering prices to retain customers is simply old-fashioned competition, and NTE did not show, according to Duke, that (1) Duke's pricing was "below an appropriate measure of its . . . costs," *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,

509 U.S. 209, 222, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) and (2) there was a "dangerous probability[ ] of [Duke] recouping its investment in below-cost prices," *id.* at 224, 113 S.Ct. 2578, which are the elements of a predatory pricing claim.

Agreeing with Duke, the district court applied this analysis to find that Duke's pricing under its 2019 Power Supply Agreement with Fayetteville was above Duke's average variable costs, which, the court determined, was the appropriate measure. *Duke Energy Carolinas*, 608 F. Supp. 3d at 325–26.

NTE argues that its challenge to Duke's conduct was not simply based on predatory pricing but on a larger scope of anticompetitive conduct, maintaining more broadly that "the *structure* of Duke's offer was exclusionary," a contention that the district court overlooked altogether. Opening Br. at 50. As NTE explains it, "[t]he key structural feature of blend-and-extend was massive discounts and rebates conditioned on a long-term renewal agreement with Duke even though NTE's rates in the renewal period—the only period NTE could bid for—were lower than Duke's." *Id.* It also notes that the massive discounts included an agreement by Duke to purchase excess power from Fayetteville's Butler Warner plant at extraordinarily high prices—above market. Thus, NTE argues that the district court should have considered the overall structure of Duke's multi-faceted renewal offer, which NTE compares more to exclusive dealing or tying, and that the "[r]igid price-cost tests are . . . inapt." *Id.* at 51.

Because the predatory pricing approach argued by Duke focuses only on the pricing levels in the 2019 Power Supply Agreement, even though the extent of its massive discounts and NTE's challenge both reach more broadly, we agree with NTE that the predatory pricing analysis cannot fully account for the more comprehensive conditions of Duke's blend-and-extend strategy and the Butler Warner offering. Duke's full offer instead was roughly akin to a "package discount," such as is described by the Third Circuit:

> The anticompetitive feature of package discounting is the strong incentive it gives buyers to take increasing amounts or even all of a product in order to take advantage of a discount aggregated across multiple products. In the anticompetitive case, which we presume is in the minority, the defendant rewards the customer for buying its product *B* rather than the plaintiff's *B*, not because defendant's *B* is better or even cheaper. Rather, the customer buys the defendant's *B* in order to receive a greater discount on *A*, which the plaintiff does not produce. In that case the rival can compete in *B* only by giving the customer a price that compensates it for the foregone *A* discount.

LePage's Inc. v. 3M, 324 F.3d 141, 155 (3d Cir. 2003) (quoting Areeda & Hovenkamp, *supra*, ¶ 794). In the case before us, *B* would refer to the product of electric power that both Duke and NTE sought to provide to Fayetteville after 2024, when Fayetteville could terminate its 2012

Power Supply Agreement with Duke. *A* would be the pre-2024 product of electric power that Duke alone could sell to Fayetteville under its 2012 Power Supply Agreement. And, we can say, even more inculpatory of Duke's conduct, that *A* also includes Duke's purchase of excess electric power from Fayetteville's Butler Warner plant, again which NTE could not offer. Due to its superior efficiency, NTE would have offered Fayetteville a better price than Duke on *B*, but it was unable to offer *A*. Duke, meanwhile, rewarded Fayetteville for purchasing its more-expensive power beginning in 2024 by bundling that price with the massive retroactive discount on the 2012 Power Supply Agreement and the very attractive terms for purchasing excess power from the Butler Warner plant.

NTE presented evidence that this packaging structure of Duke's offer was anticompetitive in at least three respects. *First*, the blend-and-extend strategy hindered a new entrant's ability to compete on *the basis of efficiency* with Duke for Fayetteville's business after 2024. A chart produced in one of NTE's expert reports illustrates this foreclosure:

Example of Exclusionary Price
(Price/Offers in $/kW-month)

Year	Original Above Competitive Pricing (e.g., Old Duke Contract)	Competitive Offer Starting in 2024 (e.g. NTE Offer)	Incumbent Exclusionary Offer (e.g. New Duke Contract)
2021	9.64	9.64	7.14
2022	9.64	9.64	7.14
2023	9.64	9.64	7.14
2024	9.64	6.65	7.37
2025	9.64	6.65	7.37
2026	9.64	6.65	7.37
2027	9.64	6.65	7.37
2028	9.64	6.65	7.37
2029	9.64	6.65	7.37
2030	9.64	6.65	7.37
2031	9.64	6.65	7.37
2032	9.64	6.65	7.37
Average	***9.64***	***7.40***	***7.31***

J.A. 4487. As shown in the chart, the structure of Duke's offer was such that, even if NTE could offer Fayetteville a better price on power after 2024, it was severely disadvantaged because, as a result of the 2012 Power Supply Agreement, only Duke could provide a discount on pre-2024 prices—discounts made not for the purpose

of providing a superior product, but for the purpose of cutting out a more efficient competitor for future years.

Second, NTE presented evidence that Duke designed this strategy with the intent of foreclosing any new entrant from ever competing with it as the incumbent monopolist on the merits. According to Duke, its blend-and-extend strategy enabled Duke to charge customers "higher prices than offered by the competition" once the contract subject to the retroactive discount expired—here, the 2019 Power Supply Agreement. J.A. 4663–64. As Duke's future prices increased, so too would the attractiveness increase of any retroactive discount Duke later provided under its blend-and-extend strategy. The higher Duke set its prices, the more flexibility it would enjoy to cut those prior prices through a conditional retroactive discount—returning a portion of its monopoly prices to customers without actually competing on efficiency grounds against new entrants. This strategy would permit Duke to perpetually lock out upstart competitors like NTE with well-timed discounts without seriously threatening its bottom line long term. While it is true that Duke's wholesale rates were subject to FERC approval and that monopoly rents may well fall beyond the scope of what FERC would deem reasonable, *see* 16 U.S.C. § 824d, a jury could find that Duke's blend-and-extend strategy was designed to charge consumers up to the limit while impeding market entry by more efficient producers. Looked at in this light, a factfinder could conclude that Duke's offer did not reflect true price competition, but rather was designed to avoid such competition.

Third, NTE presented evidence that the structure of the offer was anticompetitive in that it was designed expressly to "shift" the cost of the massive discount "back to retail and wholesale customers." J.A. 4421. This strategy was similar but not identical to "recoupment" under a traditional predatory pricing framework. In a classic predatory-pricing scheme, the monopolist waits to recoup the losses it incurred by pricing a particular product below cost by raising its prices after the monopolist succeeds at excluding its rival from competing on the same product. Duke's internal documents tell of a plan instead to raise prices on other of Duke's wholesale and retail customers to make up for the profit it lost on the Fayetteville deal. *See* J.A. 6725, 6760, 6980, 7013. Duke's projected best-case scenario "assumed the difference in fixed costs no longer recovered from [Fayetteville] due to average 190 MW monthly billing demand credit (approximately $40 million) shift back to retail and wholesale customers, with a 1.5-year delay in retail recovery." J.A. 6725. This evidence is material because a discount forsaking some amount of profits by itself is not anticompetitive—lower prices, of course, enhance consumer welfare—but cross-subsidization can produce anticompetitive consequences, as some customers make up for the discount by paying higher prices. Duke's own documents, paired with NTE's experts' discussions of their anticompetitive effects, leave open a genuine factual dispute as to whether the structure of Duke's Fayetteville offer was designed to cut out a more efficient competitor *at consumers' expense. See* J.A. 4422, 4488–89. And that factual dispute precludes summary judgment.

Duke argues that NTE's challenge *to the structure* of Duke's offer to renegotiate its existing contract with Fayetteville was "forfeited," as NTE did not present the argument to the district court. Response Br. at 36. It also argues that NTE's challenge is, in any event, "wrong," because *Brooke Group*'s two-prong test must be applied to NTE's exclusionary-pricing argument. *Id.* We find both arguments unpersuasive.

First, NTE did make the argument below, at least in substance. Its expert gave his opinion that the structure of Duke's offer was exclusionary—that Duke's blend-and-extend strategy was an "exclusionary retroactive discount," which had two features, a "retroactive discount and a form of deferred rebate pricing." J.A. 4486. He explained that, "when a monopolist charges above a competitive price, that leaves a margin above competitive costs[, and] [if] the contract also has a substantial prior notice period, that allows the incumbent to offer a discount on the old contract and thereby exclude more efficient competitors." J.A. 4486. Furthermore, in its summary judgment briefing below, NTE argued that the conditionality of Duke's offer was exclusionary—"a 'retroactive discount' or rebate on an existing contract can be predatory when offered by a firm with market power." J.A. 4383. And Duke recognized that NTE had argued that its "retroactive discount" was exclusionary in its summary judgment reply brief but argued that "[a]ny such claim must satisfy *Brooke Group.*" J.A. 7322. The record thus shows that NTE did not forfeit its challenge to the *structure* of Duke's Fayetteville bid.

Second, Duke argues again on appeal that NTE's challenge to its retroactive discount is still precluded by *Brooke Group*'s holding addressing predatory pricing. Because *Brooke Group* does not provide a one-size-fits-all analytic framework for assessing exclusionary pricing allegations, we reject Duke's argument that it provided the only applicable analysis. This is shown, for instance, by the Third Circuit's decision in *LePage's Inc. v. 3M.* The plaintiff in that case, a competitor in the transparent tape market, alleged that 3M had used a range of exclusionary tactics to maintain its monopoly power, including targeted discounts, exclusive dealing arrangements, discriminatory rebates, and promotional allowances. *See LePage's*, 324 F.3d at 144–45. Recognizing that the "relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together," *id.* at 162, the court rejected 3M's argument that each aspect of its conduct should be reviewed individually, and it affirmed a § 2 verdict against 3M, observing that the "jury had before it evidence of the full panoply of 3M's exclusionary conduct, including both the exclusive dealing arrangements and the bundled rebates," *id.* at 154. Rather than strictly applying *Brooke Group*, the Third Circuit thus considered 3M's interrelated strategies, assessing that 3M's foreclosure of the market was "caused by exclusive dealing practices [and] was magnified by [its] discount practices." *Id.* at 159. It remains true that "[n]othing in any of the Supreme Court's opinions in the decade[s] since the *Brooke Group* decision suggest[s] that the opinion overturned decades of Supreme Court precedent that evaluated a monopolist's liability under § 2 by examining its exclusionary, i.e., predatory, conduct." *Id.* at 152; *accord ZF Meritor, LLC*

v. Eaton Corp., 696 F.3d 254, 277 (3d Cir. 2012) (holding that "the rule of reason is the proper framework" for assessing whether conditional rebates on long-term contracts are anticompetitive because "price-cost test cases are inapposite" when "price itself was not the clearly predominant mechanism of exclusion").

Because we conclude that disputed facts persist regarding whether *the structure* of Duke's offer was exclusionary, we need not assess whether the price level of the 2019 Power Supply Agreement between Duke and Fayetteville, standing alone, amounted to a violation of § 2 under a strict predatory pricing theory of liability.

But even if we were to focus on a strict predatory pricing theory, a factual dispute would remain as to whether Duke's pricing was indeed predatory. Duke argues that it "stood to make $60 million profits from its Fayetteville bid, which was plainly the right business decision." Response Br. at 20. But NTE's expert calculated that Duke's offer fell below its average system cost, which in this case converges with its marginal cost. J.A. 4488–89. This could be an appropriate measure in markets with extremely high fixed costs and very low variable costs, as is characteristic of the wholesale power market.[5] *See* Areeda & Hovenkamp, *supra*, ¶ 786 ("[A] common characteristic of public utilities is extremely high fixed

5. A fixed cost does not vary with output levels; a variable cost does. Average variable costs are the sum of variable costs divided by output. Average total costs are the sum of fixed and variable costs divided by output. *See* Areeda & Hovenkamp, *supra*, ¶¶ 740–41.

costs accompanied by very low variable costs. As a result, the average variable cost test . . . may give the public utility defendant too much leeway"). And we further note that Duke's amici, in arguing that we should not adopt average total cost as the appropriate measure for gauging predation here, fail to account both for the high fixed costs associated with the wholesale electricity market and the fact that the price cut in this case resulted in the exclusion of a *more* efficient rival. Economics Professors Amici Br. at 13 (arguing that "[i]t would be inconsistent with a consumer-welfare standard to contend that the seller (including an electrical utility) should effectively be forced to stand down from competitor pressure by keeping prices no lower than the average system cost" and reasoning that "[n]aturally, price competition can result in exclusion of *less* efficient rivals," which does not harm consumers (emphasis added)). The parties' experts dispute whether the $60 million that Duke earned from Fayetteville in its renewal contract is properly considered "profit" or is rather a partial recovery of its marginal costs.[6] And that price-cost allocation dispute should be given to the factfinder to resolve. *See Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 397–98 (4th Cir. 1974).

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6. The district court found that "NTE has acknowledged that Duke's price at [Fayetteville] contributed $90 million to fixed costs above variable or marginal costs." *Duke Energy Carolinas*, 608 F. Supp. 3d at 326. This was a mistake, however. In the deposition of NTE's expert witness cited by the district court, the expert stated that under the "current contract, not . . . the renewal," Duke would recover $90 million "towards fixed costs above variable or marginal costs," and he did not agree that Duke's revenues under the renewal contract contributed $90 million to fixed costs above variable or marginal costs. J.A. 7426.

Duke also argues, again relying on the application of a strict predatory pricing analysis, that the "filed-rate" doctrine bars NTE's challenge to Duke's Fayetteville renewal offer, because FERC approved the 2019 Power Supply Agreement, deeming the rate "just and reasonable." 16 U.S.C. § 824d(a). Furthermore, Duke argues, this is especially so here because NTE had the opportunity to intervene in FERC's review of the 2019 Power Supply Agreement but did not do so. *See* 18 C.F.R. §§ 385.206, 385.211, 385.214. To be sure, the filed-rate doctrine forecloses a private suit for damages based on a claim that a "rate submitted to, and approved by, [a federal regulator] was the product of an antitrust violation." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) (discussing *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922)). Indeed, the idea behind filing rates is that it prevents regulated firms from deviating from their published rates, and thus prevents discriminatory rates. Regulating rates is thus designed *to protect customers* who pay the filed rates, but *not competitors* who are not the intended beneficiaries of such a scheme. Recognizing this, the majority of courts of appeals have held that the filed-rate doctrine does not apply to preclude *competitor suits. See Cost Mgmt. Servs. v. Washington Nat. Gas Co.*, 99 F.3d 937, 945–46 (9th Cir. 1996); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1179 (8th Cir. 1982); *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Essential Commc'ns Sys., Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1121–22 (3d Cir. 1979). *Accord* Areeda & Hovenkamp, *supra*, ¶ 247c ("We agree with those decisions refusing to apply *Keogh* to competitor suits").

The record in this case demonstrates well why the filed-rate doctrine is ill suited for this competitor suit. For one, the 2019 Power Supply Agreement that Duke filed with FERC informed FERC *only* of the retroactive discount and the new rate that it agreed to charge Fayetteville upon renewal of the contract. Duke's filing did not reveal either its cross-subsidization plan or its Butler Warner buy-back agreement, even though its generous pricing on that contract was an integral piece of its Fayetteville offer. Because Duke did not provide FERC with material aspects of its arrangement with Fayetteville, FERC was not invited to scrutinize the structure of Duke's offer, which is what NTE maintains is the foundation of its exclusionary character. Additionally, FERC also was not asked to consider the exclusionary effects of Duke's pricing structure; it determined only that Duke's pricing level as revealed in the 2019 Power Supply Agreement fell within FERC's zone of reasonableness. The limited scope of FERC's review of Duke's offer thus precludes application of the filed-rate doctrine to NTE's exclusionary pricing allegations.

At bottom, while Duke argues that its Fayetteville renewal offer was procompetitive because it lowered prices, that view is myopic in light of NTE's claims and supporting evidence about the overall structure of Duke's offer. Because a factual dispute exists concerning whether the structure and price level of Duke's offer, *taken together*, had the effect of foreclosing a more efficient rival from competing, we cannot agree with Duke that, as a matter of law, its conduct was procompetitive.

The record is thus sufficient to support a finding that Duke's blend-and-extend strategy, coupled with its Butler Warner agreement, independently produced anticompetitive effects. Even so, NTE alleged that Duke's Fayetteville strategy was but one prong of its alleged campaign to keep NTE from building its Reidsville plant. NTE alleged that there was another prong involving Duke's additional efforts to ensure that NTE's potential customers and investors did not view NTE as a viable contender in the Carolinas wholesale power market. We now turn to that alleged prong.

B

The second prong of Duke's campaign, as NTE has alleged, was Duke's interference with NTE's effort to connect its Reidsville plant to Duke's transmission lines, which included disrupting NTE's placement in Duke's OASIS queue and interfering with its application to the North Carolina Utilities Commission. Because this aspect of Duke's conduct somewhat resembles a refusal to deal, that is the framework through which the parties discuss Duke's conduct.

Typically, firms have no duty to deal with their competitors, although in "limited circumstances . . . a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability." *linkLine*, 555 U.S. at 448, 129 S.Ct. 1109. Applying the established principles applicable to refusals to deal, Duke notes that NTE needed to show (1) that both NTE and Duke, as competitors, were engaged in a voluntary course of dealing, and (2) that Duke refused to

sell its goods or services to NTE on the same terms as it would to others, citing *Trinko*, 540 U.S. at 408–09, 124 S.Ct. 872. It argues that NTE failed to make that showing.

While NTE agrees that those conditions are sufficient, it argues that they are not necessary to establishing antitrust liability. The "ultimate test" remains whether Duke refused to deal in order to exclude a rival on a basis other than efficiency. Opening Br. at 49.

The leading case concerning refusal to deal with a competitor is *Aspen Skiing*, where the Supreme Court upheld a jury verdict against a dominant ski resort that had cut a smaller rival out of a joint venture to sell multiarea ski tickets. 472 U.S. at 590–94, 105 S.Ct. 2847. The dominant ski resort failed to persuade the jury that its refusal to continue the joint ticket arrangement "was justified by any normal business purpose." *Id.* at 608, 105 S.Ct. 2847. Instead, the jury credited the smaller rival's evidence of predation, which included, among other evidence, "statements made by the officers or agents of the company" and "evidence that the conduct was not related to any apparent efficiency." *Id.* at 608 n.39, 105 S.Ct. 2847 (cleaned up). In those circumstances, the Court identified the dominant firm's termination of the prior voluntary course of dealing and refusal to sell at a retail price as sufficient conditions for establishing § 2 liability. The main lesson of *Aspen Skiing* is that "it is fair to characterize [a monopolist's] behavior as predatory" "[i]f [it] has been attempting to exclude rivals on some basis other than efficiency." *Id.* at 605, 105 S.Ct. 2847 (cleaned up).

In a subsequent § 2 case arising between parties in a regulated market, the Supreme Court applied the principles of *Aspen Skiing*. *See Trinko*, 540 U.S. at 408–11, 124 S.Ct. 872. The *Trinko* plaintiff was an AT&T customer who claimed that Verizon delayed fulfilling its rivals' interconnection requests "as part of an anticompetitive scheme" to disincentivize customers from moving to Verizon's rivals, "thus impeding the [rivals'] ability to enter and compete" in the local telephone services market. *Id.* at 404, 124 S.Ct. 872. The Telecommunications Act of 1996 required Verizon to share its network with competitors, and the *Trinko* plaintiff alleged that Verizon breached that duty and that such breach violated § 2 of the Sherman Act. *Id.* at 401, 124 S.Ct. 872. After holding that the Telecommunications Act did not preclude the plaintiff's antitrust claim, the Court considered whether the challenged activity "violate[d] pre-existing antitrust standards," including those articulated in *Aspen Skiing*. *Id.* at 407, 124 S.Ct. 872. But the Court distinguished *Trinko* from *Aspen Skiing* on two grounds. First, *Aspen Skiing* involved "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggest[ing] a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* at 409, 124 S.Ct. 872. By contrast, the interconnection service Verizon was required to offer its rivals was not profitable to it. *See id.* Second, "the [*Aspen Skiing*] defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent." *Id.* By contrast, interconnection to Verizon's own system was not something that Verizon had offered at retail price, and its "reluctance to interconnect at the cost-based rate of

compensation," as provided for in the Telecommunications Act, revealed "nothing about dreams of monopoly." *Id.* The *Trinko* record contained no evidence that Verizon had abandoned a profitable deal for the purpose of undermining competition, and so the Court concluded that Verizon's behavior did not fall within "a recognized antitrust claim under [the] Court's existing refusal-to-deal precedents." *Id.* at 410, 124 S.Ct. 872. Accordingly, the Court concluded that the plaintiff's complaint failed to state a claim under the Sherman Act. *Id.* at 416, 124 S.Ct. 872.

An important distinction between *Aspen Skiing* and *Trinko* is that *Trinko*—like the case now before us—involved a regulated market. Even so, the *Trinko* Court did not adopt a rule that unlawful refusals to deal were impossible in regulated markets. Instead, it instructed that "the existence of a regulatory structure designed to deter and remedy anticompetitive harm" was an important "factor" in an antitrust analysis because the existence of such a regime can lessen the need for antitrust enforcement by courts. 540 U.S. at 412, 124 S.Ct. 872.

Trinko's statement that the presence of regulatory oversight is only an important "factor" in any antitrust analysis confirmed prior Supreme Court precedents that recognized that § 2 liability can arise in regulated markets. *See, e.g., New York v. FERC*, 535 U.S. 1, 9 n.6, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002). Indeed, in *Otter Tail Power Co. v. United States*, where the refusal to deal involved the wholesale power market, the Court rejected Otter Tail's contention that "by reason of the Federal Power Act it

[was] not subject to antitrust regulation with respect to its refusal to deal." 410 U.S. 366, 372, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). The Court affirmed a district court judgment against Otter Tail for unlawfully refusing either to sell or transmit wholesale power to newly established municipal power distribution systems. *Id.* at 368–71, 93 S.Ct. 1022. The municipalities had purchased Otter Tail's distribution services before building their own competing systems, at which point Otter Tail refused to sell them wholesale power. *Id.* at 371, 93 S.Ct. 1022. Although Otter Tail had no prior course of dealing with the municipality distribution systems, the Supreme Court recognized that Otter Tail's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position." *Id.* at 378, 93 S.Ct. 1022. At the time, the Federal Power Commission—FERC's predecessor—"ha[d] the authority to compel involuntary interconnections," but "[o]nly if a power company refuse[d] to interconnect voluntarily." *Id.* at 373, 93 S.Ct. 1022. Indeed, the Commission had compelled interconnection for one of the municipal power systems in *Otter Tail, id.* at 371, 93 S.Ct. 1022, and yet the Court still found that Otter Tail's refusal to deal was unlawful. *Otter Tail* thus made clear that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.* at 372, 93 S.Ct. 1022.

In this case, if a jury were to resolve all factual disputes in NTE's favor, it could reach the conclusion that Duke, like the defendant in *Aspen Skiing*, "[forsook] short-term profits to achieve an anticompetitive end" by unilaterally

terminating the Reidsville Interconnection Agreement. *Trinko*, 540 U.S. at 409, 124 S.Ct. 872. A reasonable jury could find that Duke put NTE in the position of appearing to have breached its agreement with Duke, thereby giving Duke a justification to upset NTE's placement in Duke's OASIS queue. NTE's apparent breach and lack of interconnection ability, in turn, would ensure that Fayetteville would not issue an RFP to NTE, thereby ultimately stalling it from bringing its Reidsville plant online.

In this formulation of facts, FERC's regulatory oversight would not foreclose antitrust liability. It is true that, as in *Trinko*, Duke only offered NTE interconnection services because it was compelled to do so by statute, and therefore the parties' dealing was not voluntary. But the Reidsville Interconnection Agreement was profitable to Duke, a fact Duke does not dispute. Once NTE paid Duke $59 million to build the transmission infrastructure, Duke would own the infrastructure, and it would then provide transmission services at FERC-approved rates. *See* 18 C.F.R. § 2.22. Thus, in terminating that relationship, Duke forewent a profitable arrangement. *Trinko* emphasized that foregoing a "*presumably profitable*" course of dealing was one reason why the refusal to deal in *Aspen Skiing*, unlike that in *Trinko* itself, was anticompetitive. 540 U.S. at 409, 124 S.Ct. 872. Duke, however, observes that it "stood to gain 'short-term profits' and 'infrastructure upgrades' from the Interconnection Agreement with NTE . . . only if NTE *actually paid its bills.*" Response Br. at 31. Yet, a reasonable jury could find that Duke actually instructed NTE not to pay those bills and ultimately walked NTE

into an apparent breach of the Reidsville Interconnection Agreement. Moreover, it could find that Duke sacrificed short-term profits as part of its concerted efforts to keep NTE from expanding its footprint in the Carolinas.

The record includes evidence from which a jury could find that Duke sought out an opportunity to terminate its agreement with NTE in order to keep NTE from bringing the Reidsville plant online and to avoid having to compete with NTE on the merits because Duke believed it was at a "competitive disadvantage" efficiency-wise, which was "not going away soon." J.A. 5086. Indeed, some evidence indicated that Duke was eager for NTE to "breach!" so that Duke could "punt em!" from the queue. J.A. 6364. Although the district court did not consider such evidence in its opinion, "the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival," *Aspen Skiing*, 472 U.S. at 610, 105 S.Ct. 2847, as Duke questioned whether it could "kick Reidsville out of the queue," J.A. 6246, even when doing so would require Duke itself to terminate a profitable deal.

In short, we conclude that a reasonable jury could find that Duke's unilateral termination of the Reidsville Interconnection Agreement and attendant disruption of NTE's place in the OASIS queue was anticompetitive conduct.

Relying on *Trinko*, Duke nonetheless argues that FERC's regulatory purview over its interconnection agreements forecloses NTE's ability to complain of an antitrust refusal

to deal. But *Trinko* has a more limited effect. As discussed above, in enforcing the Telecommunications Act of 1996, the Federal Communications Commission's role was "*to eliminate the monopolies.*" *Trinko*, 540 U.S. at 415, 124 S.Ct. 872 (cleaned up). The *Trinko* Court thus observed that the Commission's "complex regime for monitoring and enforcement" made it an "effective steward of the antitrust function." *Id.* at 401, 413, 124 S.Ct. 872. In contrast here, however, FERC's enforcement of the Federal Power Act, while aimed to promote competition in the market, is not designed specifically to eradicate existing monopolies. And, in any event, the timing of the events in this case shows that FERC's ability to play any antitrust-enforcement function was limited. Duke unilaterally terminated the Reidsville Interconnection Agreement in September 2019 and *promptly* thereafter listed NTE's status in its OASIS queue as "canceled." J.A. 714. Listing NTE's status as "canceled" signaled to potential customers and investors that the Reidsville project would not move forward. And once NTE was apparently out of the picture, Duke and Fayetteville finalized the 2019 Power Supply Agreement. NTE did petition FERC for review of Duke's unilateral termination, but by the time FERC issued an opinion agreeing with NTE, the damage had already been done—NTE had lost the opportunity to compete on efficiency grounds for an anchor customer, Fayetteville, and Fayetteville then became locked into a new contract with Duke for years into the future. NTE's recourse at that point could not lie with FERC but with the courts. In short, FERC's regulatory oversight, even as exercised, did not diminish the likelihood of significant antitrust harm because FERC was not timely presented with the full range of alleged anticompetitive conduct.

Regarding NTE's claim that Duke interfered with its efforts to interconnect with Duke's transmission line, Duke asserts that it had good reasons for terminating the Reidsville Interconnection Agreement and canceling NTE's position in its OASIS queue. Of course, if that were a true fact, Duke would not be liable for violating § 2 under a refusal-to-deal theory. But accepting Duke's business justifications as fact at this stage of the litigation would require resolving factual disputes in favor of Duke, in violation of the applicable standards for summary judgment. While Duke maintains that it "stopped dealing with NTE only when NTE stopped paying," Response Br. at 27, NTE presented evidence that it stopped paying on the Reidsville Interconnection Agreement only at Duke's request.

At bottom, the facts of record support a potential finding that Duke timed its unilateral termination of the Reidsville Interconnection Agreement to achieve anticompetitive ends. And we need not determine, as a matter of law, whether, if those facts are believed, such conduct in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability. Rather, we recognize NTE's claim that this conduct was but a part of a larger scheme. As NTE has shown, the interconnection dispute occurred during the very same time that Duke designed its retroactive rebate for Fayetteville to keep it from issuing an RFP. On NTE's telling of the facts, the two prongs were executed simultaneously and *to the same effect.* As a synthetic consequence, NTE could not compete to secure an anchor customer for its Reidsville plant, thus depriving it of any practical ability to bring the more efficient plant to market. Such foreclosure to competition is precisely what § 2 seeks to proscribe.

C

In discussing the two prongs of Duke's conduct, we have pointed to material disputed facts—both in NTE's claims and Duke's responses—which are sufficient to preclude summary judgment at this stage of the proceedings. Upon resolution of those disputed facts, a jury might well conclude that Duke's conduct was simply good, old-fashioned competition, which, in the end, favors the consumers of electric power in the relevant market. On the other hand, the factfinder might just as well conclude that Duke saw a more efficient competitor in NTE and acted, through a broad range of anticompetitive conduct in various contexts, to eliminate that competition, to the detriment of consumers. The facts supporting the parties' conflicting positions, we conclude, are fairly disputed and therefore require a trial to resolve.

And there are numerous more particular examples. For instance, as discussed at length, Duke asserts that it "competed for Fayetteville by lowering its prices," Response Br. at 55 (citing J.A. 4188–89), but NTE asserts that "Duke offered such a massive discount that NTE could not win the Fayetteville contract even though it produced power more efficiently," Opening Br. at 53, and that Duke planned to recoup its lowered prices after pushing NTE out of the market. And as we have also discussed, Duke asserts that it terminated the Reidsville Interconnection Agreement only after NTE breached and that it simply tried to recover the money NTE owed, Response Br. at 55 (citing J.A. 4180–81), but NTE asserts that Duke unilaterally terminated the Reidsville

Interconnection Agreement for a pretextual reason—Duke instructed NTE not to pay until it received an invoice, held off on sending invoices, demanded payments that NTE did not yet owe, and then terminated at the time when NTE needed the contract intact in order to compete for Fayetteville's business, Opening Br. at 18 (citing J.A. 3894–97). Duke asserts that it reported the status of the Reidsville project as required by FERC regulations and promptly updated its terminology from "canceled" or "terminated" to "suspended" when it was informed that it had erroneously categorized NTE's project status as terminated in its OASIS queue, Response Br. at 55 (citing J.A. 4190–91), but NTE asserts that Duke's motivation for misidentifying the suspension as a termination was, in Duke's own words, to "kick NTE Reidsville out of the queue" in order to "stop" the "NTE train," Opening Br. at 13 (quoting J.A. 5733); *id.* at 49 (quoting J.A. 6246). Duke asserts that it innocently intervened in state regulatory proceedings when NTE sought a permit for its Reidsville plant and that NTE "failed to disclose . . . that NTE . . . defaulted under the [Interconnection Agreement]," Response Br. at 55 (citing J.A. 517), but NTE asserts that "Duke falsely asserted to the [state agency] (among other things) that NTE lacked customers, even though the City of Camden had already notified Duke that it was moving its business to NTE," Opening Br. at 20 (citing J.A. 515–19). Duke asserts that it "brought a meritorious contract claim" to recover the money NTE owed, Response Br. at 55 (citing J.A. 4189–90, 4207), but NTE asserts that the Duke's suit for breach of contract was a "sham" and that it settled with Duke on that claim without admitting liability, Reply Br. at 5 (citing J.A. 4207).

Alongside those disputes, NTE has presented evidence that Duke's conduct was deliberate in that Duke consciously sought to exclude NTE from the relevant market because it was as a more efficient rival and Duke's efforts produced that effect. *See Grinnell Corp.*, 384 U.S. at 571, 86 S.Ct. 1698. NTE presented evidence addressing the mens rea of Duke's conduct, suggesting that it amounted to anticompetitive malice. That evidence bolsters our conclusion that the case is trial worthy, as we have recognized that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 212 (4th Cir. 2002) (quoting *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)).

In these circumstances, we conclude that many genuine disputes of material fact persist in this case, and accordingly we vacate the district court's summary judgment and remand for further proceedings.

III

Finally, NTE contends that if we vacate the district court's order, we should remand the case to a different district judge, as its motion to recuse Judge Bell under 28 U.S.C. § 455(a) should have been granted. Indeed, NTE argues that Judge Bell's refusal to recuse himself serves as an independent ground to vacate the summary judgment.

After this case was assigned to Judge Bell, a partner from his former law firm appeared in the case in December 2019

on behalf of Duke. At the time, Judge Bell had in place a standing prophylactic policy, adopted when he ascended the bench, to recuse himself from cases involving lawyers from his former firm, and in accordance with that policy, the clerk of court reassigned the case to another judge, recording the reason on the docket as "conflict."

Almost two years later, in October 2021, the judge to whom the case had been reassigned developed a conflict himself, and the case was then reassigned to Judge Bell who had by then abandoned his initial prophylactic policy. Nonetheless, NTE filed a motion that Judge Bell recuse himself, arguing that once a judge has recused himself in a case, he should not later return to that case, regardless of whether the original recusal was necessary or whether the original conflict had been resolved. Judge Bell denied the motion, concluding that his prior withdrawal "did not reflect a considered 'recusal,'" J.A. 343, and NTE has appealed that order.

Judicial partiality or bias is a fundamental and structural procedural error. *See Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). And accordingly, Congress has provided that even if a judge's "impartiality might reasonably be questioned," he should recuse himself from the proceeding. 28 U.S.C. § 455(a). Indeed, even the appearance of partiality requires recusal.

Judge Bell, when newly appointed, responded with appropriate sensitivity to the rule by recusing himself from cases in which lawyers from his former firm appeared. But such a prophylactic rule needed to serve

only a limited, albeit sufficient, amount of time to create a clearly perceived distance from his former firm.

No one contends that Judge Bell acted inappropriately when he disqualified himself initially, nor does anyone contend that Judge Bell acted inappropriately when he abandoned the initial prophylactic recusal policy. Rather, the question presented here is whether a judge, once he recuses himself from a case, can return to the same case later if circumstances have changed such that he no longer perceives himself to have a conflict or an appearance of one.

For good reasons, especially for the appearance of impartiality, we have held that once a judge is recused, the judge is "*out of service* insofar as that case is concerned" and that he "should take no action which would possibly affect the outcome of [the] case." *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 904–05 (4th Cir. 1983) (en banc) (discussing whether a majority of "active judges" had voted to hear a case en banc). Such a brightline rule can be applied with ease and promotes the goal of ensuring public confidence in the impartiality of the judicial process. It also accords with the practices adopted by several other jurisdictions, which have implemented a "once recused, always recused" rule. *See United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997) (holding that a judge who recused himself after granting the defendant a new trial should not have ruled on a motion for reconsideration); *El Fenix de P.R. v. M/Y JOHANNY*, 36 F.3d 136, 141 (1st Cir. 1994) (holding that a judge who has recused himself cannot reconsider the order of recusal); *Moody v. Simmons*, 858

F.2d 137, 143 (3d Cir. 1988) (holding that a judge should not have continued to enter non-ministerial orders after announcing his intention to disqualify himself because his daughter worked for one of the parties).

In this case, because Judge Bell had previously recused himself for a potential conflict, prudence instructs that he should not have reentered the case, even after what the docket identified as a "conflict" had been resolved. *See, e.g., O'Keefe*, 128 F.3d at 891 ("Once a judge recuses himself from a case, the judge may take no action . . . even when recusal is improvidently decided"); *El Fenix*, 36 F.3d at 141–42 (observing there was "no authority for" the proposition that "an improvident recusal order may be revisited by the recused judge"). That rule serves the judicial process well, and we adhere to it.

But, to be clear, we do not find that Judge Bell acted inappropriately in recusing himself in the first instance, nor do we find that he did not allow sufficient time to pass before abandoning his initial policy. Rather, we simply apply our precedent that eliminates gray areas, public confusion, and any question about the integrity of the judicial process.

* * *

For the reasons given, we vacate the district court's June 24, 2022 summary judgment order and remand to a different district judge for further proceedings.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 3:19-CV-00515-KDB-DSC

DUKE ENERGY CAROLINAS, LLC,

Plaintiff/Counter-Defendant,

v.

NTE CAROLINAS II, LLC, *et al.,*

Defendants/Counterclaimants,

v.

DUKE ENERGY PROGRESS, LLC, and
DUKE ENERGY CORPORATION,

Counter-Defendants.

Signed June 24, 2022

ORDER ON MOTION FOR SUMMARY JUDGMENT

Kenneth D. Bell, United States District Judge

This is an action involving antitrust, unfair competition and breach of contract claims among competitors in the market to sell wholesale electricity, none of whom is

entitled as a matter of law to succeed in their competitive efforts. Indeed, it has long been emphasized that the antitrust and unfair competition laws at issue stand not as a means to choose market winners and losers, but rather only as guardrails to protect the fairness of the process. Here, it appears to the Court that the NTE Defendants / Counterclaimants want to use these laws not as the shield they are intended to be but as a sword to ensure their own success where the market hasn't fully rewarded their labor.

NTE repeatedly assails the Duke Plaintiff and Counterdefendants as nefarious companies, but it is not for the Court to determine if Duke should receive a corporate citizenship award. Even accepting that Duke has aggressively sought to maintain its leading market position to NTE's detriment, the sole question before the Court is whether it has done so unlawfully. For the reasons described below, the Court finds Duke has not engaged in unlawful anticompetitive conduct and is entitled to summary judgment with respect to NTE's counterclaims under the Sherman Act and North Carolina's unfair competition law.

However, with respect to the parties' competing claims for breach of contract under the parties' Large Generator Interconnection Agreement ("LGIA"), the Court finds that neither party is entitled to summary judgment, and it will be up to the jury to decide if the LGIA has been breached, unless the parties' settle their dispute prior to trial.[1]

1. As ordered below, the parties are directed to again mediate their claims prior to trial in light of this Order.

I. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)); *see United States, f/u/bModern Mosaic, LTD v. Turner Construction Co., et al.*, 946 F.3d 201, 206 (4th Cir. 2019). A factual dispute is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "A fact is material if it might affect the outcome of the suit under the governing law." *Vannoy v. Federal Reserve Bank of Richmond*, 827 F.3d 296, 300 (4th Cir. 2016) (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013)).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact through citations to the pleadings, depositions, answers to interrogatories, admissions, or affidavits in the record. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003). "The burden on the moving party may be discharged by 'showing' . . . an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. Once this initial burden is met, the burden shifts to the nonmoving party. The nonmoving party "must set forth specific facts showing that there is

a genuine issue for trial," *Id.* at 322 n.3, 106 S.Ct. 2548. The nonmoving party may not rely upon mere allegations or denials of allegations in his pleadings to defeat a motion for summary judgment. *Id.* at 324, 106 S.Ct. 2548.

In determining if summary judgment is appropriate, "courts must view the evidence in the light most favorable to the nonmoving party and refrain from weigh[ing] the evidence or mak[ing] credibility determinations." *Variety Stores*, 888 F.3d at 659 (internal quotation marks omitted) (quoting *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017)); *see Modern Mosaic* at 205-06. "Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568-69 (4th Cir. 2015) (quoting 10A Charles Alan Wright & Arthur R. Miller et al., Federal Practice & Procedure § 2728 (3d ed. 1998)).

However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Ricci v. DeStefano*, 557 U.S. 557, 586, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (internal citations omitted). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Also, the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *Id.* If the evidence is merely colorable, or is not significantly probative, summary judgment is appropriate. *Id.* at 249-50, 106 S.Ct. 2505.

In the end, the question posed by a summary judgment motion is whether the evidence as applied to the governing legal rules "is so one-sided that one party must prevail as a matter of law."*Id.* at 252, 106 S.Ct. 2505.

II. FACTS AND PROCEDURAL HISTORY

The parties have filed a voluminous record in this matter reflecting the expansive scope of their discovery efforts. The Court cannot (and need not) recite all of the facts that the parties contend are applicable to the pending motion. Rather, the Court will attempt to "summarize" the relevant facts below with additional facts discussed as necessary in its legal analysis.

A. The Parties and the Relevant Market

Counterclaim Defendant Duke Energy Corporation, a large energy holding company, provides electricity and natural gas to millions of customers in several states, including North and South Carolina. It is the parent company of Plaintiff Duke Energy Carolinas, LLC and Counterclaim Defendant Duke Energy Progress, LLC, which provide energy products and services in the Carolinas. The principal place of business of all these "Duke" entities (which will collectively be referred to as "Duke" unless more specificity is required) is Charlotte, North Carolina.

Duke sells electric power directly to residential and commercial "retail" customers and to "wholesale" customers – primarily municipalities – which operate

their own distribution lines. Unlike in its retail business, where it is a public utility monopoly regulated by a state public utilities commission,[2] in its wholesale business Duke competes against companies which independently produce and/or sell wholesale power. The market for wholesale power is regulated by the Federal Energy Regulatory Commission (FERC), which has exclusive authority over "'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *New York v. FERC*, 535 U.S. 1, 6-7, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002) (quoting 16 U.S.C. § 824(b)).

Duke operates approximately 70 power plants in the Carolinas region. As of 2014, Duke served the "vast majority of available customers" and "approximately 90% of the available load [in] NC and SC." *See* Doc. No. 214-35 at DUKE_0088890–91. Similarly, NTE's expert Dr. John Morris testified that Duke's share in the relevant market has exceeded 90% since 2012. *See* Doc. No. 214-4 at ¶ 71. Duke does not challenge the extent of its market share (although it does argue that market share has limited relevance in this market as discussed below). Also, FERC has recognized since at least 2008 that Duke has "market power" for purposes of determining how Duke must price the wholesale power it sells (i.e., "cost based" pricing). *See* Doc. No. 214-11 at 128:16–129:3; 137:6–23; Doc. No. 214-18 at 99:22–100:16.

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2. The rates that Duke charges to North Carolina and South Carolina retail customers are regulated by the North Carolina Utilities Commission ("NCUC") and the South Carolina Public Service Commission ("SCPSC").

Defendants and Counterclaimants NTE Carolinas II, LLC, NTE Carolinas II Holdings, LLC, NTE Energy, LLC, NTE Southeast Electric Co., LLC, NTE Energy Services Co., LLC, and Castillo Investment Holdings II, LLC (together, "NTE") are collectively an independent power producer ("IPP") that develops and operates power generation facilities that sell wholesale power to municipalities and electric cooperatives. NTE has its principal place of business in St. Augustine, Florida. While NTE builds power plants, it does not also build transmission networks to connect its plants to the interstate transmission grid. Therefore, to deliver the power it sells, NTE needs to connect to utilities like Duke that own transmission networks. By regulation, FERC requires that Duke allow NTE to connect to Duke's network, and FERC sets the terms of the interconnection by requiring that Duke and IPPs enter into a FERC approved standard contract, the pro forma LGIA.

B. The Kings Mountain Energy Center

In 2014, NTE began developing the Kings Mountain Energy Center ("Kings Mountain"), a combined-cycle natural gas plant. *See* Doc. No. 214-14 at 339:4–13. Duke and NTE entered into a standard LGIA to interconnect Kings Mountain with Duke's transmission network. The project was successful. Nine former Duke customers agreed to buy power from the Kings Mountain plant, and it began operations in April 2018. There is no claim in this action related to Kings Mountain; however, NTE alleges that because of NTE's success at Kings Mountain, Duke became worried about its ability to retain its wholesale

customers and began to target NTE as a competitor. Duke's internal documents contain vivid rhetoric regarding its intent to compete against NTE, including that Duke planned to go to "battle" to "stop the NTE train" and "ruin NTE's plans." *See* Doc. No. 214-63, Doc. No. 215-1, Doc. No. 215-6.

C. The Reidsville Plant and its LGIA

In 2016, NTE announced plans to build a second plant in the Carolinas, the Reidsville Energy Center ("Reidsville"), which was designed to be a 450 MW power generation facility. NTE signed contracts with three smaller customers who agreed to buy power from the plant, including a former Duke customer. Doc. No. 214-57; Doc. Nos. 214-74, 214-75. Also, the NCUC granted Reidsville a Certificate of Public Convenience and Necessity for the plant. Doc. No. 214-52 at NTE_00436341. As with Kings Mountain, Duke and NTE entered into a standard LGIA for Reidsville in 2017. In that LGIA, NTE agreed to pay Duke approximately $59 million for connection costs. *See* Doc. No. 204-1 at Appendix A, B. The LGIA included a Payment Schedule, which specified the dates and amounts of NTE's scheduled payments. *Id.* Appendix B. The LGIA also contained provisions providing for authorization in advance of Duke spending money on the project. *Id.* at §§ 5.5, 5.6, 11.5.

Duke's municipal power customers typically sign long term contracts spanning many years so only a few contracts may come up for renewal in a given year. As of 2016, the largest North Carolina city served by Duke

that might be served by Reidsville and had the ability to evaluate alternative energy options was Fayetteville, North Carolina. Fayetteville, which has a peak load of approximately 500 MW, was a prize municipal wholesale electricity customer. The contract Duke had with the Fayetteville Public Works Commission ("FPWC") was up for renewal in 2024, with an option for Fayetteville to "opt out" several years before then. Both Duke and NTE, which said that it needed FPWC as an anchor customer for Reidsville, focused heavily on keeping/getting FPWC's business.

D. Competition for the City of Fayetteville's Business

Since the 2012 merger between Duke and Progress Energy, FPWC had received its full energy and capacity requirements from Duke under an amended Power Supply and Coordination Agreement ("PSCA") at a FERC-approved formula rate. The 2012 Power Supply Agreement had a term of July 1, 2012 through June 30, 2032, but Fayetteville retained the right to terminate the PSCA as of June 1, 2024, upon notice to Duke by June 30, 2017, a date which was extended several times to June 30, 2019, December 31, 2019 and June 30, 2020.[3]

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3. NTE contends that these extensions, which Duke admits were given so that it and FPWC would have more time to reach a deal on a renewal of the contract before a RFP process might be undertaken, are evidence of wrongful conduct. However, as discussed below, FPWC was not required to go through a formal RFP process and more importantly FPWC went through an extensive process to evaluate numerous competing bids – including NTE's – before choosing one of Duke's proposals.

Although it did not conduct a formal RFP process, FPWC went through an extensive evaluation process prior to deciding whether to terminate/renew its PSCA with Duke. This process included engaging GDS & Associates ("GDS"), an outside consultant. After evaluating six pricing proposals from five viable potential suppliers, including Duke and NTE, FPWC decided on April 24, 2019 to negotiate contract amendments with Duke rather than pursue an RFP to select a different supplier. *See* Doc. No. 204-10 (GDS 30(b)(6) Deposition) at 167-170); Doc. No. 204-39 at 177-178. In GDS' view, three of the proposals (including both DEP proposals) reflected a lower cost than NTE's. *See* Doc. No. 204-10 at 137-138, 164-165; Doc. No. 204-11 at FPWC_0004977, 82. Further, NTE's proposal was found to have more "risks" than the other proposals. *Id.* at 146-165, Doc. No. 204-11 at FPWC_0004981-82. For example, Duke offered a diverse system and native load status unlike NTE, which planned to primarily serve FPWC using a single plant and a single fuel source (natural gas) that is subject to market-price risks. This diversity was sought after by wholesale customers like FPWC. *See* Doc. No. 204-39 at 237, 252-253.

On May 24, 2019, FPWC and Duke executed a letter of intent containing the material financial terms of the amendments to their existing PSCA. *See* Doc. No. 204-9. Under the agreed terms, FPWC would receive a lower price from Duke for the same power services going forward through a number of "discounts" or credits, including: (1) a $2.50 kw-month discount to its capacity price for the period from 2021 to mid-2024 and (2) a billing demand credit of on average 190 MW for FPWC's Butler

Warner facility (an older, less efficient facility). *Id.* Duke also extended (by six months) an existing Power Purchase Agreement ("PPA") for capacity and energy from FPWC's Butler Warner facility and entered into a PPA for Butler Warner capacity and energy to take effect once the prior contract expired. *Id.* FPWC and Duke executed the final revised PSCA on November 13 and 25, 2019.

Duke's wholesale power contracts must be filed with FERC, who may decide not to accept the filing if it finds that Duke's wholesale rates are not "just and reasonable" based on its costs of providing service, *i.e.*, a "cost-of-service" formula rate. See 16 U.S.C. § 824. Duke filed the new FPWC PSCA with FERC on November 27, 2019. *See* Doc. No. 226-1. After NTE failed to complain, seek to intervene or protest the filed rate (as it could have done by December 18, 2019 or later),[4, 5] FERC formally accepted

4. NTE could have challenged Duke's FPWC rate with FERC in at least three ways. First, NTE had the right to file a complaint against Duke if it believed that Duke's contract with FPWC violated a FERC statute, rule, order, or other law. *See* 18 C.F.R. § 385.206. Second, NTE could have intervened in Duke's request to file the rate, *see* 18 C.F.R. § 385.214, and, third, NTE could have protested the rate. *See* 18 C.F.R. § 385.211. And, if NTE was not satisfied with FERC's ruling on its challenge then it could seek rehearing or court review. *See* 16 U.S.C. 8251. FERC has the authority to not allow the rate to be filed or to set a just and reasonable rate if it finds that Duke's rate was unjust, unreasonable, unduly discriminatory, or preferential. *See* 16 U.S.C. § 824.

5. NTE alleges that Duke failed to fully disclose its FPWC discounts and credits to FERC. While this appears to be incorrect

the rate for filing effective February 1, 2020. *Id.* FPWC's CEO and corporate representative both testified that none of the alleged Duke conduct that NTE complains of had any effect on FPWC's decision to choose Duke. *See* Doc. No. 204-39 at 269-271; Doc. No. 204-8 at 190-197.

E. Duke's Termination of the LGIA, OASIS Posting and NCUC Intervention

The LGIA permits NTE to suspend work on the Reidsville interconnection project "at any time." Doc. No. 204-1 at § 5.16. NTE exercised this right on May 15, 2019, allegedly because it had "additional flexibility with scheduling." Doc. No. 215-15 at DUKE_0017112; Doc. No. 214-14 at 453-454. Although Duke (and perhaps the timing of the suspension shortly following FPWC's initial decision to select Duke's proposal) suggests otherwise, NTE states that the suspension was not based on any information about FWPC, which NTE continued to pursue. Doc. No. 216-5; Doc. No. 217-3.

In 2017 and early 2018, NTE made payments totaling $1.6 million on the Reidsville LGIA and Duke twice agreed to delay the payment schedule dates and/or reduce the remaining interim payments due. As amended, the LGIA scheduled payments of $2.5 million to be due on March 1,

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on the merits, *see* Doc. No. 204-48 at Exhibit B, NTE ought not, having failed to take any action to challenge Duke's FPWC contract with FERC, be permitted to assert in this action its inadequate disclosure arguments (which if true could have been remedied before FERC accepted – or perhaps might not have accepted – the filed FPWC rate).

2019, and $4.5 million on May 1, 2019. *See* Doc. No. 204-2. Neither payment was made on those dates; however, Duke admits that it failed to timely invoice NTE and, in fact, specifically instructed NTE to wait to pay until it received invoices (which had not previously been sent during the parties' relationship even though contemplated by the LGIA). In addition to these scheduled payments, Duke contends that the LGIA obligated NTE to pay Duke certain costs upon suspension of the project. *See* Doc. No. 204-1 at § 5.16. Duke claims that the amount of these suspension costs is approximately $6.3 million. *See* Doc. No. 204-53 at Exhibit Y. All of these allegedly due payments were ultimately invoiced to NTE in the Summer of 2019, but no payments were made. *See* Doc. No. 204-53 at Exhibit B, E. NTE has also failed to pay any of the disputed payments into escrow, which Duke claims is required under Article 12.3 of the LGIA.

The parties' efforts to resolve their payment dispute through communications among counsel and then during an in person meeting involving the parties was unsuccessful.[6] On September 6, 2019, Duke terminated the LGIA under Article 17.1.2. NTE contends that Duke was not entitled to terminate the LGIA without FERC's authorization,

6. NTE initially argued that Duke's alleged refusal to settle the parties' dispute over the amount of payments due under the LGIA was part of its wrongful conduct, but at oral argument NTE abandoned that claim, conceding that Duke's settlement demands could not be the basis of a claim for exclusionary antitrust conduct or an unfair trade practice. *See* Doc. No. 228 at 86 ("I can't say that someone refusing to settle a lawsuit is a wrong. I'm not suggesting that.").

see Doc. No. 204-1 at § 2.3, and that Duke did so only to harm NTE because "terminating" the LGIA allowed Duke to claim that the Reidsville project was "canceled" or "terminated" rather than "suspended." Beyond the filing of this action which NTE alleges to be "a sham lawsuit," NTE complains that Duke used the termination of the LGIA to list the Reidsville interconnection project as "canceled" on its publicly available Open Access Same-Time Information System ("OASIS"). *See* Doc. No. 217-14. Further, On December 6, 2019, Duke filed a Petition with the NCUC to intervene in NTE's efforts to extend its Certificate of Public Convenience and Necessity for Reidsville, citing, in part, the termination of the LGIA. However, despite Duke's intervention, NTE was ultimately successful in renewing its certificate in August 2021. Doc. 123 at p. 44. Further, NTE has not identified any customer or potential customer who saw the OASIS posting. Doc. No. 204-4 at 154; Doc. No. 204-41 at 262.

On November 8, 2019, NTE filed, pursuant to Sections 206 and 306 of the FPA, a petition for a declaratory order requesting that FERC declare, *inter alia*, that a transmission provider such as Duke seeking to terminate an LGIA (1) must receive FERC approval to do so, and (2) may not announce any such termination until it has been approved by FERC. *See* Doc. No. 125-3. On May 21, 2020, FERC granted in part NTE's petition, holding that "a transmission provider seeking to terminate a conforming LGIA over an interconnection customer's objection must receive Commission approval to do so," and that "a transmission provider may not announce the termination of a conforming LGIA over an interconnection

customer's objection (either on its OASIS or in reports to the Commission) unless and until the Commission has approved the termination." *NTE Carolinas II, LLC & NTE Energy, LLC*, 171 FERC ¶ 61128 P14 (2020); Doc. No. 125-4. However, FERC explained that it granted NTE's petition in part to "remove uncertainty regarding the termination provisions in the Commission's *pro forma* LGIA," and the order stated that FERC was not addressing the merits of the parties' breach-of-contract claims. *Id.* at P 27. Following FERC's ruling, Duke returned the Reidsville project to its public "queue" project list in the same position as before September 6, 2019 and changed the project status on OASIS from "canceled" to "suspended." Doc. 204-26 at 196-197. The Reidsville plant currently remains accurately listed as a "suspended" project on OASIS and Duke's queue list.

F. The Lawsuit

Duke Energy Carolinas, LLC, the entity that entered into the Reidsville LGIA with NTE, filed this lawsuit in North Carolina Superior Court on September 6, 2019, the same day that Duke sent NTE a letter terminating the LGIA. In its Complaint, Duke asserted substantive claims for breach of contract, unjust enrichment, negligent misrepresentation and unfair trade practices. Doc. No. 1-1. On October 8, 2019, Defendants removed the action to this Court, Doc. No. 1, and there has been no dispute over the Court's jurisdiction or the venue of this action after removal. On December 11, 2019, NTE filed their Answer and Counterclaims denying Duke's claims and asserting claims of monopolization and attempted

monopolization under Section 2 of the Sherman Act, statutory and common law unfair trade practices and unfair competition under North Carolina law and breach of contract. Doc. No. 13. The parties have since amended their claims and counterclaims, with each side now also seeking a declaratory judgment in their favor regarding their respective claims. *See* Doc. Nos. 114, 125. Before the Court is Duke's Motion for Summary Judgment on all of NTE's amended counterclaims and Duke's breach of contract and account stated claims. Doc. No. 191. The parties have extensively briefed the motion and the Court heard oral argument on the motion on June 13, 2022. The motion is now ripe to be decided.

III. DISCUSSION

A. NTE's Sherman § 2 Antitrust Counterclaims

NTE alleges that Duke has violated Section 2 of the Sherman Act, 15 U.S.C. § 2, both as a monopolist and an attempted monopolist. The statute provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person . . . to monopolize any part of the trade" is guilty of an offense and subject to penalties. It has been long established that a violation of Section 2 consists of two elements: (1) possession of monopoly power and (2) " . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 480, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (citing *United States v. Grinnell*

Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966)). Duke has moved for SJ on both monopolization claims on the grounds that as a matter of law Duke lacks "monopoly power" and the conduct alleged to be exclusionary was not unlawful. Each issue is addressed below.

1. Monopoly Power

"Monopoly power under § 2 requires . . . something greater than market power under § 1," *Eastman Kodak*, 504 U.S. at 481, 112 S.Ct. 2072; thus, the concept of "monopoly" is distinct from "monopoly power." Monopoly power has been broadly defined as the ability "to control prices or exclude competition." *Grinnell*, 384 U.S. at 571, 86 S.Ct. 1698; *see also United States v. E.I. du Pont de Nemours and Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). However, courts often do not limit their analysis to direct evidence of monopoly pricing or the exclusion of competitors. Rather, some courts hold that because such evidence is "only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power." *United States v. Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001). Under this approach, monopoly power may be found from a firm's possession of a dominant share of a relevant market that is protected by entry barriers. *Id.*; *see Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). "Entry barriers" are factors such as long lead times, high capital costs and regulatory requirements that prevent new rivals from timely responding to an increase in price above the competitive level. *Microsoft*, 253 F.3d at 51; *S. Pac. Communications Co. v. AT & T*, 740 F.2d 980, 1001–02 (D.C. Cir. 1984).

As explained in *Intell. Ventures I LLC v. Cap. One Fin. Corp.*, 99 F. Supp. 3d 610, 624–26 (D. Md. 2015):

> a party may establish monopoly power "'either through 'direct evidence of supracompetitive prices and restricted output' or by inference 'from the structure and composition of the relevant market.'" *Intellectual Ventures* [*I LLC v. Capital One Financial Corp.*], 2013 WL 6682981, at *4 [(E.D.Va. 2013)] (quoting *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007)). For example, control of seventy percent or more of the relevant market is circumstantial evidence of monopoly power. *See* [*E.I. du Pont de Nemours and Co. v.*] *Kolon Indus.*, 637 F.3d [435] at 450–51 [(4th Cir. 2011)]. But, it is not sufficient evidence in and of itself: A plaintiff using market share to establish monopoly power also "must show that new competitors face high market barriers to entry and that current competitors lack the ability to expand their output to challenge a monopolist's high prices." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1208 (9th Cir. 1997). These "[b]arriers to entry 'must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting.'" *Id.* (quoting *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995)).

Further, "antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies." *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411–12, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004) ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation.").

Predictably, the parties urge the Court to focus on the type of evidence which each believes favors their position. In particular, they disagree on how the Court should view Duke's indisputably high share of the market, which is at or approaching 90%. While nominally agreeing that market share is "relevant" to whether a jury could find that a company has monopoly power, Duke asks the Court to in practical effect ignore market share.[7] Instead, Duke wants the Court to focus only on what it argues is Duke's inability to either control prices or exclude competitors, including FERC's regulations that limit Duke's pricing power and require it to allow competitors to use its

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7. Duke asks the Court to find that historical market share is irrelevant because its current market share is based on numerous contracts entered into long ago, which it argues are not relevant to the current market for new or renewing customers. Duke is plainly wrong on this point. It is universally true that market share is a snapshot in time reflecting transactions that occurred in the past and cannot predict the future with certainty. Thus, all market shares are by nature "historical," and blanket acceptance of Duke's argument would always preclude the consideration of market share, in contravention of decades of established authority.

transmission network. On the other hand, while NTE acknowledges that monopoly power ultimately relates to the control of prices and exclusion of competitors, it argues that the Court need not address those issues directly because a jury can (and in their view should) simply "infer" monopoly power from Duke's high market share.

The Court finds that both sides miss the mark. Market share is important evidence in determining if a company has monopoly power, but it is not solely dispositive, through "inference" or otherwise. Also, contrary to Duke's arguments, the presence of regulation does not mean that a utility company can never be found to have monopoly power. Instead, the jury must consider market share together with the realities of the structure of the relevant market to decide if Duke has or is likely to achieve monopoly power.

Here, while FERC limits the maximum price that Duke can charge a customer, that does not necessarily mean that Duke cannot control prices above a "competitive" price. Indeed, Duke concedes that it was only after it faced significant competition from NTE that it offered to lower its price at FPWC. *See Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (market power is "the ability to raise prices above those that would otherwise prevail in a competitive market"). In the absence of viable competition, Duke can and will set its price at "as much as the market will bear,"[8] which in the market for the sale of wholesale

8. Even a clear monopolist has an upper limit on its prices, which is "as much as the market will bear." *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979) ("A pristine

electricity is the upper limit of what FERC will allow. And, as reflected in the price of Duke's renewed contract at FPWC, the difference between the maximum price FERC would allow (at least FPWC's then existing rate) and a "competitive" price can be substantial. Therefore, a jury could find that Duke can "control prices" in the relevant market.

Similarly, with respect to the exclusion of competitors, FERC's regulatory role does not preclude the possibility that a jury could find that the structure of the market can lead to the "exclusion" of competitors. Again, while Duke narrowly focuses on the FERC regulations that require the sharing of transmission lines (for fair compensation), the jury must look at market exclusion through a broader lens. Specifically, the jury must consider whether there are "barriers to entry" in the market that would allow Duke time to control prices before a new rival could emerge. *See Microsoft*, 253 F.3d at 51. First, the structure of the wholesale electricity market includes the fact that there are only a limited number of customers up for renewal each year so the opportunities for new entrants are constrained. Further, entering the market to generate and sell wholesale electricity takes considerable time and resources, including obtaining financing and regulatory approvals and then actually building a power plant. Therefore, although the necessity of a large investment to compete in a market cannot, standing alone, lead to a finding of monopoly power against the market's

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monopolist, we have held, may charge as high a rate as the market will bear.").

dominant firm, a jury could find that Duke has or could readily achieve monopoly power based on the hurdles to market entry, considered together with the other evidence discussed above.

However, just as the jury could find that Duke has monopoly power it could also reject that conclusion. Duke argues that the proper way to look at its alleged monopoly power in the relevant market is to use the analysis described by the court in *Ticketmaster Corp. v. Tickets.Com, Inc.*, No. CV99-7654-HLH(VBKX), 2003 WL 21397701, at *5–6 (C.D. Cal. Mar. 7, 2003), *aff'd*, 127 F. Appx 346 (9th Cir. 2005). In that case, the court found that Ticketmaster, by far the dominant company in the ticket industry at the time, did not have monopoly power (that is, the ability to control prices or exclude competition) in an industry marked by long term exclusive contracts and bidding for those contracts. In making its ruling, the court stated:

> Size alone or heavy market share alone does not make one a monopolist (or in danger of becoming one). To qualify as a monopolist or have a dangerous likelihood of becoming one, one must have either the power to control prices or to exclude competition. In fact, the power to exclude competition is almost a necessity to be able to charge prices above competitive levels. (*Grinnell Corp.*, ('66) 384 U.S. 563 [86 S.Ct. 1698] 16 L.Ed.2d 778; *Image Technical Services* (9Cir'97) 125 F.3d 1195.) There must be evidence of the ability to control prices or

exclude competitors. (*Oahu Gas Servs. Inc.* [*v. Pacific Resources Inc.*] (9Cir'88) 838 F.2d 360.)

The evidence here establishes that these conditions do not exist because of the bidding nature of the competition, in which [Plaintiff] TX is fully able to join, that the venues have the bargaining power to prevent being taken advantage of, that prices cannot be unilaterally raised because of the long term contracts controlling the prices, and that there are no meaningful barriers to entry by TX if it can convince venues that it can provide better service or a better price.

The evidence is uncontradicted that virtually all long term contracts are awarded after some form of bidding competition. The bidding may be more or less formal, but every time a contract is up for renewal (about 20% or more of the total per year), TX as well as TM have the opportunity to compete for the contract. TX has competed in all situations. The fact that TM has won the majority of these competitions shows only that the contracting venue believes that TM offers the better deal, not only in terms of price, but also in terms of reliability and ability to do a competent job. However, TM's victories are not unanimous. TX has prevailed in head to head competition in a number of regions, and most impressively in major league baseball. The bidding nature of the competition is a powerful

> deterrent against the existence of monopoly power so long as there are competitors to bid so as to give the customer an alternative, and TX has been a major alternative.

The *Ticketmaster* analysis could be persuasive in thinking about the "structure" of the relevant market in this case. Duke clearly has the dominant market share in the market; however, the structure of the market may suggest limitations on Duke's ability to wield "monopoly power" in the form of price controls and exclusion of competitors. With respect to prices, as in *Ticketmaster*, there is almost always competitive bidding for major customers, the municipalities themselves have negotiating power and – going beyond the *Ticketmaster* facts – Duke's prices are regulated by FERC. Thus, Duke argues that, all things considered, its opportunity to charge "above market" monopolistic prices is low.[9] Also, with respect to exclusion of competitors, beyond the FERC regulations supporting the entry of competitors into the market, Duke points to evidence that there were five companies bidding for the FPWC business, more than ten companies bidding for another recent customer, and NTE has itself been successful against Duke in the past at both Kings

9. NTE argues that Duke intends to make up any discounts used to keep customers away from NTE by raising prices with other customers, but there is no reason to believe the same limitations to raising prices would not equally apply to all cities of similar sizes.

Mountain and Reidsville. Thus, according to Duke, the market does not reflect the exclusion of competitors.[10]

In sum, a reasonable jury could find either that Duke has "monopoly power" or it does not. There is evidence from which a jury could find that Duke has a durably high market share together with barriers to entry; however, the structure of the market also suggests potential limitations on Duke's ability to control prices and exclude competitors. Thus, the Court will not grant summary judgment for Duke on the issue of monopoly power, the first element of liability under Section 2 of the Sherman Act.

2. Anti-Competitive / Exclusionary Conduct

However, the Court reaches a different conclusion on the second element of a claim for monopolization under § 2, which is proof of improper exclusionary conduct harming competition. That is, a claimant must allege not only the possession of monopoly power in the relevant market, but also the unlawful use of that power. *See Eastman Kodak Co.*, 504 U.S. at 481–83, 112 S.Ct. 2072 (To run afoul of Section 2, a defendant must be guilty of illegal conduct "to foreclose competition, gain a competitive advantage, or to destroy a competitor."). As explained by the Supreme

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10. NTE argues that this evidence regarding the number of bidders is undercut by evidence that Duke had only lost business to NTE in the relevant recent past. *See* Doc. No. 214-16 at 47. (Duke executive testifying that Duke lost only one customer to a competitor other than NTE). Therefore, NTE raises questions as to the actual practical viability of Duke's other "competitors" in the market.

Court, "to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*" *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407, 124 S. Ct. 872, 879, 157 L. Ed. 2d 823 (2004) (emphasis in original); *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'") (internal citations omitted).

Thus, NTE must prove that Duke unlawfully "use[d] [its] monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor,'" or acquired or maintained that power willfully, and not "from growth or development as a consequence of a superior product, business acumen, or historic accident." *Id.* (quoting *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948)). Also, some behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist. As noted in *LePage's, Inc. v. 3M*, 324 F.3d 141, 151–52 (3d Cir. 2003), "a monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior."

"Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be

difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad." *Microsoft*, 253 F.3d at 58–59. Still, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice. *Id.* "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993).

Here, NTE alleges the following "exclusionary" acts which it contends, considered collectively and individually, support its antitrust claims: 1) terminating the LGIA without FERC approval (refusal to deal / denial of an essential facility); 2) obtaining a new contract with FPWC through predatory pricing and gaining approval for the price from FERC without full disclosure of the discount given to FPWC (predatory pricing / fraud on FERC); 3) Filing this lawsuit, which NTE alleges to be a "sham lawsuit"; 4) Duke's OASIS posting that the Reidsville project had been "canceled" (defamation); and 5) Duke's intervention against NTE's request to renew its Certificate of Public Convenience and Necessity with the NCUC.

With respect to this conduct, NTE first argues that even if none of the alleged exclusionary acts are unlawful by themselves that the acts taken together can be sufficient to support a Sherman Act violation. According to NTE,

"a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable," quoting *In re Intuniv Antitrust Litig.*, 496 F. Supp. 3d 639, 680 (D. Mass. 2020). The Court disagrees, at least with respect to the circumstance where none of the alleged exclusionary conduct is unlawful. Adding up several instances of lawful conduct cannot total unlawful conduct. In simple mathematical terms, 0 + 0 = 0. *See Eatoni Ergonomics, Inc. v. Rsch. in Motion Corp.*, 486 F. Appx 186, 191 (2d Cir. 2012) ("Because these alleged instances of misconduct are not independently anticompetitive, we conclude that they are not cumulatively anti-competitive either."); *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 928 (2d Cir. 1981); *Arminak & Assocs. v. Saint-Gobain Calmar, Inc.*, 789 F. Supp. 2d 1201, 1211 (C.D. Cal. 2011). Indeed, the case cited by NTE says that plaintiffs "must plead at least one instance of conduct that is not protected from antitrust scrutiny." *Intuniv*, 496 F. Supp. 3d at 680. Therefore, if none of the actions NTE alleges to be improper are actionable, NTE cannot maintain its Sherman Act claims. Thus, each alleged exclusionary act is discussed below.

a. Termination of the LGIA / Refusal to Deal / Denial of Essential Facility

NTE alleges that Duke unlawfully terminated the LGIA and denied NTE's access to Duke's transmissions grid, which NTE alleges to be "an essential facility." Duke seeks summary judgment on this claim of "exclusionary" conduct on the grounds that: (1) FERC regulates access

to Duke's network and controls the scope of the LGIA; therefore, NTE cannot pursue an antitrust claim under the authority of *Verizon v. Trinko* and (2) NTE's refusal-to-deal claim does not meet the prerequisites for such claims. The Court finds Duke's arguments have merit.

In making its first argument, Duke relies on *Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004). In *Trinko*, a local telephone service customer of AT&T filed a complaint against Verizon for its alleged denial of interconnection services to rivals with the purpose of limiting their entry into the market for telephone services. *Id.* at 407, 124 S.Ct. 872. The Supreme Court held that Verizon's alleged refusal-to-deal could not be pursued as an antitrust claim, reasoning that it could not find anticompetitive malice in the circumstances of Verizon being statutorily compelled to share its services (typically there is no requirement even for a monopolist to do business with a rival). "We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.* at 410, 124 S.Ct. 872.

Also, and even more directly relevant here, the Supreme Court concluded that "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms." *Id.* at 410-11, 124 S.Ct. 872. It explained:

> As we have noted, "careful account must be taken of the pervasive federal and state regulation characteristic of the industry."

> . . .
>
> One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.

Id. at 411–12, 124 S.Ct. 872 (citations omitted). Applying *Trinko* to this action, FERC's regulatory scheme compels Duke to share its transmission systems with competitors; therefore, according to Duke, *Trinko* bars NTE's antitrust claim based on a failure to deal or inadequate compliance with FERC regulations.

NTE argues that *Trinko* does not apply because *Trinko* was a "pure failure-to-deal case" whereas "NTE's claims are not so limited," although it offers little explanation for this argument beyond its conclusion. More substantively, NTE asserts that *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) rather than *Trinko* applies because "Duke denied NTE access to essential facilities to impair NTE's competitive efforts." In *Otter Tail*, the Supreme Court held that the plaintiff was not immune from antitrust regulation because it was in the business of providing power transmission over its network to certain customers, "and refused to provide the same service to certain other customers." *Id.* at 370-371, 377-378, 93 S.Ct. 1022. The Court reasoned

that when commercial relationships are entered into voluntarily, "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Id.* at 374, 93 S.Ct. 1022. NTE claims that *Otter Tail* and not *Trinko* applies because it alleges that Duke continues to offer interconnection services to less threatening rivals while refusing to offer those services to NTE based on NTE's competitive success.

The Court finds that *Trinko* rather than *Otter Tail* is more applicable to this case for at least two reasons: (1) *Trinko* was not a "pure" failure-to-deal case, and (2) the authority of the Federal Power Commission in *Otter Tail* was more limited than FERC's current authority. NTE asserts that its allegations that Duke's intent in terminating the LGIA was to impair NTE's competitive efforts distinguishes the case from *Trinko.* However, the plaintiff in *Trinko* made almost identical allegations. In *Trinko*, the plaintiff's amended complaint "alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LEC's. . . ." *Trinko*, 540 U.S. at 404, 124 S.Ct. 872. Accordingly, NTE's argument that *Trinko* does not apply because it was a "pure" failure-to-deal case is unpersuasive.

Second, *Otter Tail* is not applicable because the authority of the Federal Power Commission was more limited than FERC's current authority. In *Otter Tail*, the essential thrust of the authority of the Federal Power Commission was to encourage voluntary interconnections. *Otter Tail*,

410 U.S. at 366, 93 S.Ct. 1022. It was against this backdrop that the Court concluded that "courts should be hesitant to override the fundamental national policies embodied in the antitrust laws." *Id.* at 374, 93 S.Ct. 1022. In *Otter Tail*, the Federal Power Commission lacked the authority to correct the Plaintiff's monopolistic practices. *Id.* at 366, 93 S.Ct. 1022. Here, NTE concedes that FERC requires Duke to share its transmission networks with competitors. Doc. No. 125. Accordingly, *Otter Tail* does not apply because its holding was predicated on the limited authority of the Federal Power Commission to correct anticompetitive practices. Because FERC has the authority to correct Duke's sharing of its transmission network, *Trinko* rather than *Otter Tail* applies.[11]

Lastly, Duke argues that even if *Trinko* does not apply, NTE's refusal-to-deal claim does not meet the prerequisites for such claims. Generally, the Sherman Act "does not restrict the long-recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919). However, "the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co.*

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11. And FERC has broad enforcement power, including authority to impose civil penalties of over $1 million per violation per day (*see* 16 U.S.C. § 825***o***-1(b); *Civil Monetary Penalty Inflation Adjustments*, 178 FERC ¶ 61,008, at P 8 (2022)). Therefore, "Congress has given FERC the tools to police anticompetitive conduct in the market for transmission capacity." *Breiding v. Eversource Energy*, 939 F.3d 47, 55 (1st Cir. 2019).

v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985). *Aspen Skiing* is "the leading case for § 2 liability based on refusal to cooperate with a rival," which "is at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 408-09, 124 S.Ct. 872. In *Aspen Skiing*, the Court found two factors significant in determining whether a refusal-to-deal was exclusionary: (1) "the unilateral termination of a voluntary course of dealing," and (2) the refusal to deal at retail price. *Id.* at 879-880.

The factors identified in *Aspen Skiing* help case-by-case assessments of whether a refusal-to-deal is anticompetitive, but no factor is always decisive by itself. *Viamedia, Inc. v. Comcast Co.*, 951 F.3d 429, 465-467 (7th Cir. 2020). Unlike in *Aspen Skiing*, NTE does not allege a unilateral termination of a voluntary course of dealing nor does it have evidence that Duke refused to provide its interconnection services at a "retail" price. Indeed, the "price" for the interconnection was set in the LGIA and approved by FERC. Also, Duke terminated the LGIA after NTE stopped making payments under the contract (although the amount owed is of course disputed). Therefore, Duke's motion for summary judgment as to whether its termination of the LGIA was exclusionary should independently be granted under both *Trinko* and *Aspen Skiing.*[12]

12. Moreover, since May 2020, the status of the Reidsville LGIA has properly been referenced as "suspended," and NTE has failed to establish that the termination of the LGIA caused any harm to the competitive process because there is no evidence that any potential customer failed to do business with NTE because of the termination (or even considered the termination in deciding

b. Predatory Pricing at FPWC / Fraud on FERC

NTE's second claim of exclusionary conduct is that Duke obtained its renewed contract with FPWC through predatory pricing and Duke's alleged failure to disclose information to FERC about the discounts it gave to FPWC.[13] Again, Duke offers several grounds for summary judgment on this conduct. First, Duke seeks summary judgment based on the "filed rate" doctrine, which generally prohibits claims challenging a "filed" rate approved by a regulator, and, as a second argument, asserts that its price at FPWC was not "predatory" as a matter of law because the price was above its marginal / incremental cost and it had no reasonable probability of recouping any alleged losses incurred by below cost pricing.

1. The Filed Rate Doctrine

Duke contends that the filed rate doctrine bars NTE's claims related to the FPWC contract. The filed rate

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whether to choose NTE as its power provider). *See* Doc. No. 204-4 at 154; Doc. No. 204-8 at 190-192, 194-196; Doc. No. 204-40 at 270-271; Doc. No. 204-41 at 262.

13. To the extent that NTE asserts that Duke's alleged failure to disclose information in violation of FERC regulations is an independent exclusionary act, it is barred under *Trinko* for the same reasons discussed above. Indeed, as noted, NTE could have timely challenged Duke's price at FPWC (including any alleged failure to disclose information) but failed to do so. *See* 18 C.F.R. § 385.206, 16 U.S.C. § 825e, 18 C.F.R. § 385.211(a)(1).

doctrine provides that antitrust law "may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225 (9th Cir. 2007); *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). The doctrine bars any interference with the rate setting authority of an administrative agency or a claim that a rate is incorrect, including rates approved by FERC. There is no dispute that Duke's contract price at FPWC is a "filed rate" subject to FERC's regulation. Therefore, if the filed rate doctrine applies to this action, it bars NTE's claims related to Duke's rate at FPWC.

In response, NTE contends that the filed rate doctrine (also known as the *Keogh* doctrine) does not apply to suits involving competitors. Except in an unpublished decision, *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp. of Delaware*, 998 F.2d 1009 (4th Cir. 1993), the Fourth Circuit has not addressed this issue, which has been decided differently among the circuit courts that have considered the question. *Compare Arsberry v. Illinois*, 244 F.3d 558, 562 (7th Cir. 2001) (Posner, J.) ("A customer or competitor . . . cannot ask the court . . . to invalidate or modify the tariff" in an antitrust suit); *Pinney Dock & Transp. Co. v. Penn Central Corp.*, 838 F.2d 1445, 1457 (6th Cir. 1988) *with Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 945 (9th Cir. 1996); *Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114 (3d Cir. 1979) (refusing to apply the *Keogh* doctrine because the FCC tariff was not

intended to protect competitors). Closer to this Court in the District of South Carolina, the court in *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp. of Delaware*, 805 F. Supp. 1277, 1295–96 (D.S.C. 1992), *aff'd*, 998 F.2d 1009 (4th Cir. 1993), applied the doctrine to an antitrust dispute involving trucking companies, citing *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), a case in which the Supreme Court applied the *Keogh* doctrine in a case in which Georgia was both a customer and a competitor.

One of the principal reasons for the doctrine is to preserve the primacy/exclusivity of the regulator's power to set rates. *Arsberry*, 244 F.3d at 562–63 ("The filed-rate doctrine, which is based both on historical antipathy to rate setting by courts, deemed a task they are inherently unsuited to perform competently, and on a policy of forbidding price discrimination by public utilities and common carriers, forbids a court to revise a public utility's or (as here) common carrier's filed tariff."). Indeed, filed rates (including those regulated by FERC) "must not only protect against overcharging captive customers but must also keep in mind the economic costs of delivery of the service." *Pinney*, 838 F.2d at 1457 ("the ICC is the sole source of the rights not only of shippers, but of the entire public, including competitors. Plaintiffs here had a right under the ICC to complain to the Commission. We should not easily infer that the Reed-Bulwinkle amendments were not intended to extend to competitor's suits.").[14]

14. The Court also notes that FERC regulations specifically permit protests, complaints and interventions by competitors. If

If a primary purpose of the filed rate doctrine is not to undermine the regulator's authority to set rates and manage the rate setting process, any undermining of that authority, whether it comes from a customer or a competitor, would adversely impact the agency's rate setting authority. However, the court in *Cost Mgmt. Servs.* makes a thorough argument against applying the doctrine to competitors on the grounds that 1) the *Keogh* reasoning has been criticized and has limited application to competitors, 2) *Keogh* has received at best lukewarm support from the Supreme Court and 3) "exemptions from the antitrust laws are strictly construed and strongly disfavored." *See Cost Mgmt. Servs.*, 99 F.3d at 945-47; *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 415, 421, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986).

In sum, there is a sharp split of authority on this issue, which no court in the Fourth Circuit has directly addressed in thirty years. As discussed below, the Court finds that NTE's predatory pricing allegations fail on the merits, and a reasonable jury could not find based on the record before the Court that Duke offered FPWC a predatory price. Therefore, in the absence of guidance from our Court of Appeals or the need to resolve this murky question, the Court will not reach out to decide the

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FERC can disallow a rate as too low, then it is clearly protecting competitors because customers with long term set rates are unlikely to be hurt by rates that are "too low." Also, while NTE points out that FERC cannot award "money damages," it can overturn a rate, which should have the effect of supporting the competitive process by allowing NTE and other competitors to compete for business against a lawful rate.

issue and simply assume, without deciding, that the filed rate doctrine does not bar NTE's predatory pricing claim.

2. Predatory Pricing

Even if the "filed rate" doctrine does not apply, NTE cannot prevail on the merits of its predatory pricing claim. A plaintiff seeking to establish competitive injury resulting from a rival's predatory pricing must prove that: (1) the rival's prices are below an appropriate measure of its rival's costs, and (2) the rival had a dangerous probability of recouping its investment in below-cost prices. *Brooke*, 509 U.S. at 222-24, 113 S.Ct. 2578. "The choice of a cost-based standard for evaluating claims of predatory pricing is a question of law to be decided by the trial judge." *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1111 (7th Cir. 1983).[15]

15. NTE argues that the determination of which cost measure is the proper standard to apply for predatory pricing is a "jury" question. However, NTE has offered no support for that proposition and the Court has not found any. In fact, multiple circuits explicitly hold the contrary. In *MCI Communications*, the Seventh Circuit noted there "is no support. . . . for the proposition that a jury may simply choose the cost-based standard it feels is most appropriate." *Id.* at 1112. Consequently, in *MCI* the court reversed the trial judge and held that the choice of a cost-based standard for evaluating claims of predatory pricing is a question of law to be decided by the court. *Id.* at 1111. Similarly, in *Northeastern Telephone Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981), the Second Circuit held that the cost standard used to determine whether a monopolist's prices were predatory was a "legal question." 651 F.2d at 87. In sum, there is no support for the proposition that the determination of the correct cost measure is a jury question. As such, the Court will address it as a question of law.

Antitrust law begins with the premise that all firms, even dominant firms, are permitted to compete aggressively and that hard competition is a desired outcome rather than an evil. Thus, prices above the relevant measure of cost become an absolute safe harbor. *See Phillip E. Areeda (late) & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Areeda") ¶735. (4th and 5th Editions 2015-2021); *Brooke*, 509 U.S. at 226-227, 113 S.Ct. 2578 ("[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices' in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect. It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.") (internal citations omitted).

Although in *Brooke* the Supreme Court appeared to clearly discourage condemnation of prices that are not "below some measure of incremental cost," *id.* at 223, 113 S.Ct. 2578, the Supreme Court has not articulated a definitive standard under which to measure a defendant's costs. Similarly, the Fourth Circuit has not specified a test other than acknowledging that prices must be below an appropriate measure of a defendant's cost to be predatory (*Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335, 339 (4th Cir. 1992), affirmed by *Brooke Group Ltd. v. Brown Williamson Tobacco Corp.*, 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)).

In discussing what should be the appropriate measure of costs with respect to alleged predatory pricing, it is helpful to first explain some economic definitions:

> The economic costs facing a firm differ in an important respect: some are "fixed" and others are "variable."
>
> Fixed costs are costs that do not vary with changes in output. They typically include some management expenses, interest on bonded debt, depreciation (to the extent that equipment is not consumed by using it), property taxes, and other irreducible overhead. . . . In short, it is reasonably accurate to say that fixed costs are costs that would continue even if the firm produced no output at all.
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> "Variable costs," as the term implies, are costs that vary with changes in output. They typically include items such as materials, fuel, labor directly used to produce the product, indirect labor such as supervisors, clerks, and custodial help, use depreciation, repair and maintenance, and per-unit royalties and license fees. The "average variable cost" is the sum of all variable costs divided by output.
>
> "Marginal cost," or "incremental cost," is the increment to total cost that results from producing an additional increment of output. The usual meaning of marginal cost is "short-run" marginal cost, which is a function solely of

> variable costs, since fixed costs by definition are costs unaffected by changes in output. Short-run marginal cost usually decreases over low levels of output and increases as production approaches plant capacity.
>
> "Total cost" is the sum of fixed cost and total variable cost. That total divided by output is average cost or average total cost or, to use the layperson's synonym, full cost.

See Areeda at ¶735.

Here, NTE has suggested "total average system costs" as the relevant measure of costs and Duke argues that the measure should be "incremental" costs. *See* Doc. No. 204-31 at 130, 134-35; Doc. No. 204-32 at ¶ 86; Doc. No. 224 at 6. While the Court need not specifically define the appropriate measure of costs among "incremental," "marginal," and "average variable costs," the overwhelming weight of authority favors a measurement that does not include the fixed, non-incremental costs included in NTE's proposed measurement. Circuit courts outside the Fourth Circuit have routinely held that the appropriate measure of costs is either "average variable costs" or "marginal costs." *See, e.g., Tri-State Rubbish v. Waste Management*, 998 F.2d 1073, 1080 (1st Cir. 1993) (variable costs); *Irvin Indus. v. Goodyear Aerospace Corp.*, 974 F. 2d 241, 245 (2d Cir. 1992) (marginal costs); *Clean Water Opportunities, Inc. v. Williamette Valley*, 759 Fed.Appx. 244, 246-247 (5th Cir. 2019) (Pricing is anticompetitive when it is below a defendant's true marginal cost but because true marginal

cost may be difficult to calculate, Fifth Circuit courts may use average variable cost); *William Inglis & Sons Baking Co., v. ITT Cont'l Baking Co., Inc.*, 668 F.2d 1014, 1035-1036 (9th Cir. 1981) (there is a presumption that if a defendant's price is above its average variable cost, it is not predatory); *U.S. Philips Corp. v. Windmere Corp.*, 861 F.2d 695, 703 (Fed. Cir. 1988) (pricing below a defendant's average variable cost is predatory).

Similarly, the leading antitrust treatise argues for a "marginal cost" or "average variable cost" standard of measurement. *See* Areeda at ¶739 ("We generally say that under perfect competition a firm produces at a level such that its price equals marginal cost . . . [thus] a price above marginal cost—or higher than the competitive price—cannot be condemned as 'predatory' . . . . Our own position is that no price equal to or exceeding properly defined and reasonably anticipated marginal cost should be deemed unlawful under the antitrust laws."), ¶740 (proposing that average variable cost be used as a surrogate for marginal cost when marginal cost is difficult to calculate).

In contrast, courts and commentators have often rejected fully allocated total system costs as the appropriate measure of costs. In *MCI*, 708 F.2d at 1116–17, the court explained:

> FDC [Fully distributed costs] also fails as an economically relevant measure of cost for antitrust purposes because it relies on historical or embedded costs. For it is current

and anticipated cost, rather than historical cost that is relevant to business decisions to enter markets and price products. The business manager makes a decision to enter a new market by comparing anticipated additional revenues (at a particular price) with anticipated additional costs. If the expected revenues cover *all* the costs caused by the new product, then a rational business manager has sound business reasons to enter the new market. The historical costs associated with the plant already in place are essentially irrelevant to this decision since those costs are "sunk" and unavoidable and are unaffected by the new production decision.

. . .

FDC is, at best, a rough indicator of an appropriate rate *ceiling* for regulatory purposes and should not be used as a measure of the minimum price permissible in a competitive market. . . . A standard making predatory pricing illegal and subject to treble damages must be carefully structured to fit the needs of the Sherman Act and its encouragement of competition on the merits. (citation omitted). When a price floor is set substantially *above* marginal or incremental cost a price "umbrella" is created which allows less efficient rivals to remain in the market sheltered from full price competition. A fully distributed price floor may thus misallocate resources and force consumers

> to pay more for less production than competition would dictate.

See also Northeastern Telephone Co. v. AT & T, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982) (rejecting fully distributed cost and adopting marginal cost as the test for predation). More specifically, the Areeda treatise explains as follows regarding the error in using fully distributed costs as the measure of predatory pricing:

> Looking at its sales as a whole, a firm must recover long-run incremental costs in order to be profitable. But any individual sale that is sufficient to recover short-run costs is profitable, and may be much more profitable than not making the sale at all. Consider this simplified example: a firm pays a building rent of $1,000 per month, which does not vary with output or revenue and is thus a long-run cost. This rental is its only fixed cost. The firm produces widgets at a short-run marginal cost of $3 and sells approximately 1,000 a month, which is its capacity. Thus a price of $4 is needed to cover both short-run and long-run (overhead) costs. But suppose a buyer offers $3.50 each for 500 widgets and will not pay a penny more, and the seller can produce them out of existing capacity. In this case producing the widgets covers all short-run marginal costs and generates a $250 contribution toward the rental of the building—not enough, to be

> sure, to pay the rent, but far better than no contribution at all. Taking the offer increases the firm's profits (or reduces its losses) without regard to the impact of the sale on rivals; it is clearly not predatory.

Areeda at ¶739a, ¶741. *See also Superior Prod. P'ship v. Gordon Auto Body Parts Co.*, 784 F.3d 311 (6th Cir. 2015) (evidence tended to show that while defendant's prices were below its average total costs, they were higher than its average variable costs, thus excluding its predatory pricing claim).

Using a proper measure of incremental, marginal or variable costs, a reasonable jury could not find that Duke engaged in predatory pricing at FPWC. First, as discussed above, NTE has not offered evidence or analysis of Duke's variable costs related to FPWC, instead arguing that Duke is liable for predatory pricing for pricing below its average system costs.[16] Second, NTE has acknowledged that Duke's price at FPWC contributed $90 million towards fixed costs above variable or marginal costs. *See* Doc. No. 204-30 at 77. Because it is undisputed that Duke's FPWC price contributed significantly to fixed

16. On March 22, 2022, a month after the expert report deadline, and on the eve of his deposition, Dr. Morris submitted a new analysis purporting to reallocate Duke's common fixed costs as part of his total average cost analysis. *See* Doc. Nos. 214-22. 224-8. However, this belated evidence does not address whether any of those costs are incremental. Further, the Court declines to consider any portion of Dr. Morris' analysis that is untimely. *See* Doc. No. 187 (declining to consider untimely damages contentions).

costs above its variable costs, Duke's price is not predatory under the antitrust laws. Therefore, NTE cannot establish that Duke committed unlawful exclusionary conduct by its competitive pricing at FPWC.[17]

c. Sham Litigation

NTE's third allegation of exclusionary conduct is Duke's filing of this lawsuit, which NTE alleges to be "sham litigation." The parties have spent relatively little time on this claim – with good reason. To the extent this claim is not barred by *Trinko* as part of NTE's claim for unlawful termination of the LGIA, this action cannot be considered to be sham litigation. Under the *Noerr Pennington* doctrine, those who petition government for redress – including through civil lawsuits – are immune from antitrust liability, unless "the litigation is objectively baseless" (i.e., a "sham"). *See Professional Real Estate Investors, Inc. ("PREI") v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51, 56, 113 S.Ct. 1920, 123 L.Ed.2d

17. NTE has also failed to establish the second prong of predatory pricing, which is that there is a "dangerous probability" that Duke would be able to "recoup" its losses from unlawful below cost pricing after it excluded its competitors. "If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed." *Brooke Grp.*, 509 U.S. at 226, 113 S.Ct. 2578. Here, Duke not only had a long term contract with FPWC that prevented Duke from raising prices during the contract, but also there is no evidence that FPWC would be able to charge improperly increased prices to other customers (where there would be similar bidding, negotiation and regulation) to make up for "losses" at FPWC.

611 (1993); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 362 (4th Cir. 2013). A lawsuit is objectively baseless if "no reasonable litigant could realistically expect success on the merits."

As discussed further below, Duke's claims in this action are not baseless. Indeed, NTE has not even moved for summary judgment on Duke's claims, thereby conceding that a reasonable jury could find in either party's favor (as NTE explicitly argues in response to Duke's motion for summary judgment). Further, rather than being surprised by Duke's claims, NTE expected Duke to sue for the LGIA payments Duke claims to be owed. *See* Doc. No. 204-17 at NTE_00103057 (NTE Managing Partner Green writing in May 2019 that if NTE received an invoice under the Payment Schedule and refused to pay it, then NTE would be "in default," Duke would terminate the LGIA, and NTE would be sued). Therefore, this suit is not "sham litigation," and Duke is entitled to judgment as a matter of law on NTE's allegation that this lawsuit is itself an unlawful exclusionary act.[18]

18. At oral argument, NTE somewhat changed the thrust of its sham litigation argument, asserting that Duke's initial inclusion of two of NTE's executives as individual defendants was wrongful even if the lawsuit itself was not a "sham." However, both of the individual defendants were voluntarily dismissed on October 31, 2019, only approximately three weeks after NTE removed the action to this Court, and there is no evidence that the brief inclusion of these defendants caused any competitive harm.

d. Defamation

NTE's fourth allegation of exclusionary conduct is its allegation that Duke defamed NTE, specifically that Duke put an allegedly false statement in its OASIS database saying that the Reidsville project had been canceled. However, NTE cannot establish that this statement, even if materially false,[19] constitutes defamation because there is no evidence that the statement was in fact heard or read by a third party. "In order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." *Lippard v. Holleman*, 271 N.C. App. 401, 439-40, 844 S.E.2d 591, 617 (2020) (citing *Desmond v. News & Observer Publ. Co.*, 241 N.C. App. 10, 16, 772 S.E.2d 128, 135 (2015)). But here, NTE has failed to produce any admissible evidence that any customer or potential customer saw the OASIS posting. *See* Doc. No. 204-4 at 154, Doc. No. 204-41 at 262. Therefore, there was no defamatory publication under North Carolina law and, more directly relevant to NTE's claim of exclusionary antitrust conduct, there could not have been any harm to the competitive process in the absence of the statement being seen in the relevant market. Indeed, there is no evidence that a potential customer would view "termination," "cancelation" and "indefinite suspension" of the LGIA as materially different. *See* Doc. No. 204-19 at

19. The falsity of this statement is disputed by Duke, which argues that during the time the project was listed as canceled in OASIS, the LGIA had in fact been canceled by Duke (even though that status was later changed back to suspended in May 2020).

NTE_00264339 (NTE managing partner Green writing in an email "when our prospective customers . . . read 'suspension', they will walk away with the thought that the REC project is 'terminated.'"). Accordingly, NTE's defamation claim related to the OASIS posting also fails as an exclusionary act.

e. Duke's Intervention Against NTE's Renewal of its NCUC Certificate of Necessity

Finally, NTE alleges that Duke's intervention in opposition to NTE's petition to renew its Certificate of Public Convenience and Necessity for Reidsville was an unlawful exclusionary act. This argument is meritless. Even if Duke was not entitled as a matter of right to oppose NTE's petition (which it almost certainly was under the *Noerr Pennington* doctrine), there is no dispute that NTE was ultimately successful in renewing its certificate in August 2021. Doc. 123 at p. 44. Duke's intervention against NTE at the NCUC thus had no effect on the competitive process and cannot be an unlawful exclusionary antitrust act as a matter of law.

In summary, each alleged instance of Duke's exclusionary antitrust conduct fails as a matter of law. Even though it did not achieve the success it hoped for, NTE was not the victim of an unlawful competitive process. FERC protected and supported NTE's efforts to build the Reidsville plant, requiring Duke to enter into the LGIA. Also, NTE had a full opportunity to sell power to FPWC; however, their offer was found lacking, not by Duke but by FPWC. Indeed, NTE had several means to challenge

Duke's FPWC rate with FERC but chose not to do so. As to Duke's termination of LGIA (after NTE's unilateral decision to suspend the Reidsville project and cease payments to Duke), NTE opposed the termination at FERC, which held in NTE's favor, thereby returning the status of the project to "suspended" before any customer or potential customer was affected. Again, antitrust law should not be employed to pick winners and losers and the Court declines to do so here. Such judgments must be left to the market, whose conclusions may indeed be painful to some competitors, as it apparently has been to NTE. Simply put, NTE has not presented sufficient evidence of unlawful anticompetitive conduct to warrant a trial on its Sherman Act claims. Accordingly, the Court will grant Duke's motion for summary judgment on those claims.

B. NTE'S UDTPA and Unfair Competition Claim

NTE asserts claims against Duke for both statutory and common law unfair competition under North Carolina law. The North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-1.1, et seq., makes unlawful unfair or deceptive acts or practices in or affecting commerce that proximately injures a plaintiff. *See Shepard v. Bonita Vista Properties*, L.P., 191 N.C. App. 614, 664 S.E.2d 388, 395 (N.C. Ct. App. 2008). Consequently, NTE's UDTPA claims require that "(1) [Duke] committed an unfair or deceptive trade practice, (2) the act or practice in question was in or affecting commerce; and (3) the act or practice proximately caused injury to the plaintiff." *Elsayed v. Family Fare* LLC, 2020 WL 4586788 at *14 (M.D.N.C. Aug. 10, 2020).

An act is deceptive "if it has a tendency or capacity to deceive" and unfair if it "offends established public policy" or is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397, 403 (N.C. 1981). Unfair competition "encompass[es] any conduct that a court of equity would consider unfair." *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987). A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position. *Johnson v. Phx. Mut. Life Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980)

Commerce is defined as "all business activities." N.C. Gen. Stat. § 75-1.1(b). North Carolina courts have interpreted business activities broadly. *See Bhatti v. Buckland*, 328 N.C. 240, 400 S.E.2d 440, 444 (N.C. 1991). Business activities is defined as "the manner in which businesses conduct their regular, day-today activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." *Sara Lee Corp. v. Carter*, 351 N.C. 27, 519 S.E.2d 308, 311 (N.C. 1999).

Similarly, the North Carolina "tort of unfair competition consists of acts or practices by a competitor which are likely to deceive the consuming public." *Camco Mfg., Inc. v. Jones Stephens Corp.*, 391 F. Supp. 3d 515, 528 (M.D.N.C. 2019). The "standard for violation of the UDTPA and common law unfair competition are not appreciably different." *Id.* (citation omitted). "The gravamen of unfair competition is the protection of a business from misappropriation of its

commercial advantage earned through organization, skill, labor, and money." *Henderson v. U.S. Fidelity & Guar. Co.*, 346 N.C. 741, 488 S.E.2d 234, 240 (1997).

With respect to its UDTPA and unfair competition claims, NTE alleges that Duke acted unfairly through the same conduct that it alleges to be unlawful exclusionary acts under the Sherman Act. *See* Doc. No. 228 at 113. (NTE counsel agreeing at oral argument that "yes, [the acts that constitute the unfair and deceptive are the same as with the Sherman Act] - I don't have a different set of facts."). And, in response, Duke asserts both procedural and merits arguments as it did with respect to NTE's Sherman Act claims. Specifically, Duke reprises its argument under the "filed rate" doctrine, argues that NTE's state law claims are preempted by federal law and claims that NTE has not established that any one of the alleged acts is unfair or deceptive as a matter of law.

1. Federal Preemption of State Law

Duke argues NTE's UDTPA and common law unfair competition are preempted by federal law for several reasons including: 1) that the filed rate doctrine bars the state claims; 2) Congress has preempted the field of wholesale energy regulation; and 3) *Buckman* or "conflict" preemption applies. The Court has thoroughly discussed the filed rate doctrine above and will not repeat that discussion here. As with NTE's claims under the Sherman Act, the Court will assume, without deciding, that the filed rate doctrine does not bar NTE's state law claims.

However, Duke's other preemption arguments fare better, at least with respect to much of NTE's alleged unfair trade practices. Duke contends that Congress occupied the field of wholesale electricity regulation with the FPA. Under field preemption, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). State law is impliedly preempted by federal law whenever Congress has regulated a particular field so pervasively that there are no gaps within which state law may operate. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1155 (4th Cir. 1996).

In *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 849 (9th Cir. 2004), the 9th Circuit held the Federal Power Act ("FPA") "delegates to [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." *Lockyer* rejected California's attempt to enforce state-law prohibitions on "fraudulent business practices" in the context of wholesale electricity. Further, the court stated, "that remedies for breach and non-performance of FERC approved operating agreements in the interstate wholesale electricity market fall within the exclusive domain of FERC." NTE argues *Lockyer* is distinguishable because the claim in that case directly challenged the reasonableness of FERC-approved wholesale rates. *Id.* at 852. NTE argues that it is not challenging Duke's rates directly in its state claims and therefore can obtain relief without disturbing any FERC-approved rate.

However, the FPA's preemption of the field of wholesale energy regulation is broader than simply rate setting. By

its allegations of unfair trade practices, NTE is directly challenging not only the lawfulness of Duke's rates at FPWC (arguing that the filed rate should have been different to prevent the rate from being anticompetitive) but also the lawfulness of Duke's termination of the LGIA as well as Duke's alleged violation of other FERC regulations, including disclosure obligations. To the extent that NTE claims that Duke's FPWC rates should not have been allowed or Duke's conduct violated FERC's regulations then NTE seeks to apply state law to an area in which Congress has given FERC undisputed exclusive authority. Thus, *Lockyer* is directly on point and field preemption bars NTE's first two alleged exclusionary/unfair acts discussed above (unlawful termination of the LGIA and wrongful conduct at FPWC).

Third, Duke argues *Buckman* preemption applies. Under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 121 S.Ct. 1012, 148 L.Ed.2d 854 (2001), a plaintiff's attempts to use state law to second-guess a defendant's interactions with a federal agency are preempted. In *Buckman*, the plaintiffs claimed that the defendant misled the FDA in its application for approval of a medical device that allegedly harmed them and that, "[h]ad the representations not been made, the FDA would not have approved the devices, and plaintiffs would not have been injured." *Id.* at 344, 121 S.Ct. 1012. The Supreme Court held that the plaintiffs' attempt to police the defendant's "dealings with the FDA" was preempted because "the federal statutory scheme amply empowers the FDA to punish and deter fraud against the [agency], and . . . this authority is used by the [agency] to achieve a somewhat

delicate balance of statutory objectives. The balance sought by the [agency] can be skewed by allowing fraud-on-the-FDA claims under state tort law." *Id.* at 347-48, 121 S.Ct. 1012.

Again, NTE's response is that its claims are based on "traditional state tort law principles"—which *Buckman* specifically distinguishes, *id.* at 352, 121 S.Ct. 1012—and involves an area not exclusively regulated by the federal government. However, as discussed above, much of NTE's claims consist of allegations that Duke violated FPA and FERC regulations. As such, FERC would be the proper place to pursue those allegations, not this Court. Any finding by this Court or a jury that Duke committed a "fraud-on-FERC" would encroach on FERC's authority to regulate entities under its control and are thus preempted under *Buckman.*

2. Duke's Arguments on the Merits of NTE's Alleged Unfair and/or Deceptive Acts

Even if none of NTE's unfair competition claims are preempted by federal law, Duke argues that it is still entitled to summary judgment on NTE's state law claims. The Court agrees, for many of the same reasons that it found that none of NTE's exclusionary acts to be unlawful plus additional reasons discussed below.

With respect to NTE's claims related to Duke's alleged wrongful termination of the LGIA, in the UDTPA context the question becomes whether Duke's "breach of contract, even if intentional, is [ ] sufficiently unfair or deceptive

to sustain an action under [the UDTPA].” *Mitchell v. Linville*, 148 N.C.App. 71, 557 S.E.2d 620, 623 (2001). As a matter of law a breach of contract without more culpable conduct cannot support a claim under Section 75-1.1; that is, a claim may not be based on the “existence of an agreement, the terms contained in the agreement, and the interpretation of an agreement.” *Broussard v. Meineke*, 155 F.3d at 347. Rather, a plaintiff must show “substantial aggravating circumstances attending the breach.” *Id.*; *see also Post v. Avita Drugs*, LLC, No. 17 CVS 798, 2017 WL 4582151, *5 (N.C.Super. Oct. 11, 2017) (aggravating circumstances must “exhibit clear deception” (citations omitted)). An example of an aggravating circumstance is deception “in the formation of the contract.” *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989). Indeed, a party’s “threats to terminate,” “efforts to encourage” another to continue contractual performance while “planning to breach,” and “refusal to otherwise meet” contractual obligations have been held not to rise to the level of aggravating circumstances. *See Deltacom, Inc. v. Budget Telecom, Inc.*, No. 5:10-cv-38-FL, 2011 WL 2036676, at *4 (E.D.N.C. May 20, 2011).

NTE argues that it has shown a broad campaign of unfair acts intended to interfere with NTE’s emergence as a competitor. Specifically, NTE says that Duke knowingly breached the LGIA and did so specifically so it could announce to the public that the Reidsville project had been canceled so as to ruin NTE. However, even assuming that Duke “intentionally” breached the contract, the Court does not find sufficient “aggravating” circumstances where, even though FERC ultimately ruled in favor of

NTE on the termination issue, in doing so it suggested that it was "clarifying" the relevant regulations and contractual provisions. A contract and regulations in need of clarification, even to a small extent, cannot be grounds for a finding of the substantial "aggravating" circumstances sufficient to support an unfair trade practice under North Carolina law. Moreover, Duke's conduct in allegedly attempting to collect more than NTE owed and failing to file a termination notice required under the contract clearly goes directly to the contract and the "terms contained in the agreement."

With respect to NTE's predatory pricing claims, to the extent those claims survive preemption they also fail on the merits as non-predatory for the reasons described at length above. Finally, NTE's defamation, sham litigation and wrongful NCUC claims fail on the merits for the same reasons discussed above. There is no evidence of wrongful publication of the alleged defamatory statement in OASIS that the Reidsville project had been "canceled," *See Arnold v. Sharpe*, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979) (there is no basis for an action for libel unless there is a publication of the defamatory matter to a person or persons other than the defamed person); *West v. King's Dep't Store*, Inc., 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988) (to be published, the defamatory material must be "communicated to and understood by a third person."). Further, this action is not a sham litigation that is "objectively baseless." And, finally, as to all of these claims, NTE has not presented evidence from which a jury could find that any of them proximately caused injury

to NTE's business.[20] As repeated now several times, NTE has failed to produce evidence that any customer, prospective customer or other person or entity failed to do business with NTE because of Duke's alleged unfair or deceptive conduct.

Accordingly, all of NTE's alleged unfair trade practices fail on the merits and Duke is entitled to summary judgment on NTE's state law statutory and common law unfair competition claims.

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20. NTE maintains that it has satisfied the proximate cause requirement because the causation standard is low and that it need only prove that Duke's "conduct was a substantial cause of [its injury]" or the injury was the type Duke's "conduct was naturally likely to cause." *See Am. Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411, 1444–46 (E.D.N.C. 1986); *Ellis v. Smith-Broadhurst*, Inc., 48 N.C.App. 180, 268 S.E.2d 271, 273–74 (1980). However, the Court finds NTE's cited cases easily distinguishable. In *Ellis*, the court found that there was some "evidence that [the customer] was influenced by the alleged misrepresentations in their initial rejection of plaintiff's policy and that even after plaintiff attempted to correct the alleged misrepresentations, [the customer] continued to rely upon the comparison made by defendants." 48 N.C. App. 180, 184, 268 S.E.2d 271. And in *Am. Rockwool, Inc.*, there was no question that the customers had knowledge of the defendant's disparagement of plaintiff's product and false statements about its own product even though the customers disclaimed reliance on the information. In contrast, NTE has been unable to identify a single potential customer that would otherwise have purchased electricity from NTE who was aware of the OASIS posting or Duke's intervention in the NCUC proceeding.

C. The Parties' Breach of Contract Claims

Both parties have asserted claims for breach of the LGIA contract. Duke seeks payment under the agreement for contractual "milestone" payments as well as payments Duke contends it is entitled to receive for costs incurred related to NTE's suspension of the LGIA. According to Duke, the total that NTE owes under the contract exceeds $12 million. Specifically, Duke has filed claims for breach of contract and a separate claim for "account stated" on the grounds that NTE has allegedly acknowledged its debt to Duke.

In turn, NTE claims that Duke has breached the Reidsville LGIA by failing to comply with (1) the provisions of LGIA related to suspension of work and the termination of the agreement; (2) failing to give NTE the actual amount of its costs prior to suspension and demanding that NTE pay an amount in excess of the reasonable and necessary costs incurred by Duke prior to and after suspension; (3) promoting the interests of its wholesale electric power business through false and misleading practices in its Transmission Group; (4) failing to provide NTE reasonable access to Duke's accounts and records pertaining to Duke's performance under the Reidsville LGIA; (6) violating Article 27.1 of the Reidsville LGIA by failing to designate a senior representative to meet with NTE in connection with the dispute resolution process; (7) violating Article 5 of the Reidsville LGIA by spending money on procurement that was neither authorized nor secured by NTE in advance of the commencement of such procurement; (8) violating Article 5 of the Reidsville LGIA

by spending money on construction of the facilities that was neither authorized nor secured by NTE in advance of the commencement of such work; (9) violating Article 24.2 of the Reidsville LGIA by failing to send monthly reports containing the contractually required information; and (10) failing to file a Notice of Termination to record its purported termination of the Reidsville LGIA with FERC pursuant to the FPA and Article 2.3.3 of the Reidsville LGIA.

Duke has moved for summary judgment on both parties' claims. For the reasons discussed below, the Court finds that there are disputed material facts with respect to these claims so Duke is not entitled to summary judgment on either its breach of contract claims or NTE's.

1. Duke's Breach of Contract and "Account Stated" Claims

The elements of a breach of contract claim are "(1) the existence of a valid contract and (2) breach of the terms of that contract." *Karanik, et al. v. Cape Fear Academy*, No. 7:21-CV-169-D, 608 F.Supp.3d 268, 292 (E.D.N.C. June 17, 2022), quoting *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000); *see Wells Fargo Ins. Srvs. USA. Inc. v. Link*, 372 N.C. 260, 276, 827 S.E.2d 458, 472 (2019) (per curiam). The parties agree that the Reidsville LGIA is a valid contract (in fact, they are both suing to enforce it); therefore, the question with respect to Duke's claim for breach of contract is whether NTE breached the terms of the LGIA. Although it is undisputed that NTE has not paid the amounts that Duke contends are due under the

LGIA, NTE disputes whether any amount is owed and, if so, how much.

Specifically, NTE contends that NTE's suspension of work under the LGIA also adjourned the "milestone payment" schedule in the LGIA's Appendix B. *See* Ex. 89; Doc. No. 214-6 at 113; Doc. No. 214-14 at 463-464. Further, there is a genuine factual dispute over whether Duke received NTE's written authorization and ignored other conditions precedent established by Sections 5.5, 5.6, 11.5, and 5.16 of the LGIA related to the suspension costs Duke seeks to recover. *See, e.g.*, Doc. No. 214-7 at 162-163. Also, there is a factual dispute over whether Duke is entitled to recover "internal costs" that it has "allocated" to Reidsville, including charges for employee's meals and portions of Duke employees' salaries. In sum, there are myriad disputed issues of material facts with respect to Duke's claims for breach of contract. Therefore, Duke's motion for summary judgment on those claims will be denied.[21]

The Court will also not grant summary judgment on Duke's "account stated" claim. The elements of this claim

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21. Duke is similarly not entitled to summary judgment on its claim that the LGIA requires that NTE place into escrow the amount that Duke claims that NTE owes under the LGIA. The Court agrees with NTE that, fairly read, the language of Article 12.4. on which Duke relies is intended only to provide security for a transmission provider to continue service in the event of a payment dispute rather than, as Duke argues, to require NTE to pay all disputed amounts into escrow even though Duke is no longer being asked to provide services to NTE on the suspended Reidsville project.

are "(1) a calculation of the balance due; (2) submission of a statement to [the defendant]; (3) acknowledgment of the correctness of [the] statement by [the defendant]; and (4) a promise, express or implied, by [the defendant] to pay the balance due." *Carroll v. McNeill Indus., Inc.*, 296 N.C. 205, 250 S.E.2d 60, 62-63 (1978). Duke's sole support for this claim is its contention that in responding to a statement of NTE's claimed balance under the LGIA, NTE allegedly "acknowledged that the statement was correct and agreed to pay" when NTE responded that the two payments totaling $7 million had not been paid and that it "need[ed] to settle up with [Duke] based on what [NTE] owe[d] to date." *See* Doc. No. 204-30 at DUKE_0004199. However, the Court finds that, at a minimum, a reasonable jury could decide that this statement is equivocal and does not reflect any acknowledgement of a debt, especially in any specific amount. Indeed, Duke's interpretation of NTE's response is expressly disputed by the author of the email. *See* Doc. No. 212 at 33. Therefore, as with Duke's claims of breach of contract, there are genuinely disputed factual issues with respect to this claim which require that the Court deny Duke's motion for summary judgment.

2. NTE's Breach of Contract Claim

The Court will similarly deny Duke's motion for summary judgment on NTE's breach of contract claim. As to this claim, Duke does not challenge the merits of any of NTE's assertions of breach. Rather, the grounds for Duke's summary judgment motion are that NTE cannot pursue a claim for breach of contract against Duke because 1) NTE failed to notify Duke of any purported breaches or provide

an opportunity to cure as required by LGIA Article 17.1.1 and 2) NTE cannot show that it suffered any recoverable damages as a result of any breach. In response, NTE argues that it was not required to provide notice of breach beyond its counterclaims in the lawsuit because after the lawsuit was filed the LGIA had been terminated and cure was not possible. Further, while NTE concedes that it has not identified specific contractual damages beyond the harm to its business related to Duke's termination of the LGIA discussed above, it argues that it is nevertheless entitled to recover nominal damages if it proves Duke breached the LGIA.

North Carolina law generally enforces valid notice and cure clauses in a contract. *See Moses H. Cone Mem'l Hosp. Operating Corp. v. Conifer Physician Servs., Inc.*, No. 1:13CV651, 2017 WL 1378144, at *4 (M.D.N.C. Apr. 11, 2017), citing *Dishner Developers, Inc. v. Brown*, 145 N.C. App. 375, 378, 549 S.E.2d 904, *aff'd*, 354 N.C. 569, 557 S.E.2d 528 (2001); *Jordan's Constr., Inc. v. Forest Springs, LLC*, 225 N.C.App. 654, 738 S.E.2d 454 (N.C. Ct. App. 2013). Article 17.1.1 ("Default") of the LGIA provides that "[u]pon a Breach, the non-breaching Party shall give written notice of such Breach to the breaching Party. Except as provided in Article 17.1.2, the breaching Party shall have thirty (30) Calendar Days from receipt of the Default notice within which to cure such Breach."

Article 17.1.2 ("Right to Terminate") states that:

> If a Breach is not cured as provided in this article, or if a Breach is not capable of being cured within the period provided for herein,

> the non-breaching Party shall have the right to declare a Default and terminate this LGIA by written notice at any time until cure occurs, and be relieved of any further obligation hereunder and, whether or not that Party terminates this LGIA, to recover from the breaching Party all amounts due hereunder, plus all other damages and remedies to which it is entitled at law or in equity. The provisions of this article will survive termination of this LGIA.

Doc. No. 204-1 at 17.1.1-17.1.2. Thus, the LGIA requires the non-breaching party to give "written notice" to the breaching party, but does not mandate the form or the timing of the notice, except to say that these provisions survive the termination of the LGIA.

Accepting the application of these provisions to NTE's claims for breach of contract, the Court nevertheless finds that a jury could conclude that NTE satisfied its obligations to give Duke notice and an opportunity to cure the alleged breach. Because the LGIA does not limit how or when a party may give written notice, a jury could find that NTE's counterclaims (which Duke does not dispute provided actual notice of NTE's claims) constitute effective notice. Further, because the notice and cure provisions survive the termination of the LGIA,[22] Duke has had an opportunity to cure the various allegations of breach to the extent they could be cured.[23]

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22. And, in any event the LGIA was reinstated in May 2020 after FERC ruled that Duke could not terminate the LGIA without FERC's approval.

23. In fact, it appears that several of the alleged breaches may have already been resolved by FERC's ruling reinstating the LGIA; access to books, records and other information during

While Duke concedes actual notice, it argues that the timing of NTE's claims of breach denied it the opportunity to cure its alleged breach, particularly with respect to the alleged lack of authorization to purchase equipment. The Court finds Duke's argument as to the substantive importance of cure provisions in contracts to be persuasive; however, the ability for a contracting party to *effectively* cure an alleged breach depends not only on the right to cure but also on timely notice of the breach. However, as to the timing of notice, the LGIA falls short, only requiring that notice of breach be in writing without mandating that notice be given at any particular time following a breach. In other words, Duke would have been no better off with respect to its ability to cure an alleged breach in 2018 related to the purchase of equipment had NTE given notice shortly before Duke filed suit in 2019 rather than a few weeks later in its counterclaims.[24]

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discovery; mediations involving senior executives; etc. At the pretrial conference in this matter the Court will determine which of NTE's specific allegations of breach of contract still require adjudication.

24. Further, there are other policy implications of disallowing NTE's responsive claims for breach of contract. The Court is concerned that a rule stating that the filing of a lawsuit prohibits a party from claiming breach of contract where notice had not yet been given might create harsh and perhaps unfair consequences for a defendant surprised by a lawsuit (for example here where no period of cure is required if a breach cannot be cured). Such a defendant would, according to Duke, both be unable to assert any counterclaims for breach of contract for lack of notice, but would also lose the ability to file its contractual claims separately because they would be compulsory counterclaims under Fed. R. Civ. P. 13(a) (assuming the claims arose from the same conduct, which would be likely).

Finally, with respect to damages, the Court agrees with NTE that it may recover at least nominal damages upon proof of breach. In support of its damages argument, Duke relies on LGIA Article 18.2 which specifically prohibits the recovery of special, incidental and consequential damages. However, that provision does not mention nominal damages (and Duke has cited no authority for its argument that nominal damages are subsumed in any of the prohibited damages categories). Therefore, in the absence of a contractual agreement that NTE cannot recover nominal damages, it will be permitted to do so.

Having found that NTE can establish notice and may recover nominal damages, the Court will deny Duke's motion for summary judgment on NTE's claims for breach of contract.[25]

25. The Court further notes with respect to NTE's claims for breach of contract that a number of them, including NTE's claims of lack of authorization for purchases and costs and the lack of specificity in calculating suspension expenses, are at the heart of NTE's defenses to Duke's breach of contract claims. Therefore, the Court will at the pretrial conference explore with the parties whether the substance of NTE's claims would be most cogently presented to the jury as defenses rather than separate claims for breach of contract.

ORDER

NOW THEREFORE IT IS ORDERED THAT:

1. Plaintiff's Motion for Summary Judgment (Doc. No. 192) is **GRANTED** as to NTE's Counterclaims Counts I-IV (NTE's Sherman Act and North Carolina unfair competition claims) and otherwise **DENIED;**

2. The parties are directed to again mediate this dispute on or before July 15, 2022; and

3. This case shall proceed to trial on the merits on the remaining claims in the absence of a voluntary resolution of the dispute among the parties.

SO ORDERED ADJUDGED AND DECREED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-2168

DUKE ENERGY CAROLINAS, LLC,

Plaintiff-Appellee,

and

DUKE ENERGY CORPORATION;
DUKE ENERGY PROGRESS, LLC,

Counter-Defendants-Appellees,

v.

NTE CAROLINAS II, LLC; NTE CAROLINAS II
HOLDINGS, LLC; NTE ENERGY, LLC;
NTE SOUTHEAST ELECTRIC COMPANY, LLC;
NTE ENERGY SERVICES COMPANY, LLC;
CASTILLO INVESTMENT HOLDINGS II, LLC,

Defendants-Appellants.

AMERICAN ANTITRUST INSTITUTE,

Amicus Supporting Appellants.

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA; NORTH
CAROLINA CHAMBER LEGAL INSTITUTE;
DR. BENJAMIN ZYCHER; GEOFFREY A. MANNE;
PROFESSOR RICHARD A. EPSTEIN;
PROFESSOR DONALD J. BOUDREAUX,

Amici Supporting Appellees.

FILED: November 26, 2024

ORDER

The court denies the petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Judges Niemeyer, King, Gregory, Agee, Wynn, Thacker, Harris, Rushing, Heytens, Benjamin, and Berner voted to deny rehearing en banc. Judges Richardson and Quattlebaum voted to grant rehearing en banc. Chief Judge Diaz and Judge Wilkinson were disqualified.

Entered at the direction of Judge Niemeyer with the concurrence of Judge Thacker.

NIEMEYER, Circuit Judge, in support of denying rehearing en banc:

Because this court's panel opinion, reported at 111 F.4th 337, concluded that numerous material facts were disputed and needed to be resolved before a court could determine Duke Energy Corporation's civil liability under § 2 of the Sherman Act for willfully maintaining monopoly power through anticompetitive conduct, en banc review now is not suitable. To draw legal conclusions from facts not yet established would be tentative and inefficient, amounting to a speculative use of judicial resources. My good colleague in dissent, however, does not even recognize that facts are disputed, nor does he acknowledge the critical ones presented by the plaintiff.

The facts asserted by NTE Carolinas, LLC, *if proved*, would show that Duke Energy engaged in a broad scheme of anticompetitive conduct that was designed to exclude NTE from the relevant market and thus to maintain its monopoly power, which, the district court concluded, was demonstrated by its 90% share of the market. The evidence that NTE presented showed that it cost Duke Energy 30% more to produce energy than it cost NTE and that Duke Energy recognized this fact. At an "all-hands" meeting, Duke Energy's wholesale power segment warned that Duke Energy's systems were "no longer competitive." As a result, NTE was increasingly able to persuade Duke Energy's wholesale customers to switch their source of energy from Duke Energy to NTE, with nine such customers leaving Duke Energy to purchase electricity generated by NTE at a new power

plant. During the events at issue in this case, NTE began planning the construction of a second new plant, the Reidsville Energy Center, but to bring that plant online, NTE needed to attract the business of a large wholesale customer. To this end, NTE began targeting the City of Fayetteville, North Carolina, one of Duke Energy's largest customers. Indeed, Fayetteville had been a Duke Energy customer for more than 100 years, and Duke Energy received approximately $100 million in annual net revenue from it. Internally, Duke Energy recognized the looming problem posed by NTE's relative efficiency and stated that it "need[ed] the NTE train to stop." NTE has pointed to testimony and documents indicating that, in response to NTE's competition, Duke Energy focused its attention specifically on NTE's proposed construction of the Reidsville plant, with which NTE planned to compete for Fayetteville's business.

Because NTE was an independent power producer that generated power at its plants but did not own its own transmission lines, it was dependent on transmission networks owned by other energy companies, such as Duke Energy. To facilitate access to such transmission lines, the Federal Energy Regulatory Commission ("FERC") requires utilities to share their transmission networks with competitors. Accordingly, Duke Energy did dutifully enter into a contract with NTE to provide the proposed Reidsville plant with access to its transmission network, which would enable NTE to serve customers such as Fayetteville.

Nonetheless, as NTE showed, shortly after entering into that contract, Duke Energy undertook a course of conduct designed to frustrate or end it and thus undermine NTE's competitive effort, and it did so precisely because Duke Energy believed that it was at a "competitive disadvantage" in terms of efficiency that was "not going away soon." Duke Energy recognized that NTE was its "biggest threat" and that it needed to stop "the NTE train." And NTE has presented evidence of numerous specific acts that Duke Energy took to that end, presenting evidence of the following acts, among others:

- Duke Energy manufactured a breach of the transmission line agreement with NTE and then, based on that breach, terminated the agreement, causing numerous anticompetitive impacts to NTE's planned Reidsville plant. Prior to the termination of the agreement, a Duke Energy official cheered, "breach! breach! punt em!" And "punt em" they did, as the sham breach adversely affected NTE's place in FERC's "Open Access Same-Time Information System," which directly affected its ability to succeed with the proposed Reidsville plant. NTE petitioned FERC to review Duke Energy's unilateral termination of the Reidsville interconnection agreement, and FERC issued an opinion concluding that the termination was indeed unlawful. But Duke Energy's conduct nonetheless delayed NTE's project by almost a year.

- Duke Energy also approached Fayetteville to make it an offer that NTE could not match even with its greater efficiency. The multi-faceted offer amounted in the

aggregate to a $325 million discount for Fayetteville, which was unprecedented and which, NTE alleged, would amount to Duke Energy providing energy at a price *below its cost*. Duke Energy itself acknowledged that it expected to lose $100 million on the arrangement, but it planned to recoup those losses later by raising rates on other customers. While Duke Energy contended that its discount was merely legitimate price competition and not predatory pricing, NTE's expert disagreed and concluded that the arrangement was predatory, creating a factual dispute.

- In addition, as part of its offer to Fayetteville, Duke Energy agreed to *quadruple* the price it paid Fayetteville to purchase excess energy from Fayetteville's old, inefficient Butler Warner Plant, even though that price was above the market rate. Duke Energy thus took a loss on such purchases to provide Fayetteville an additional benefit that NTE could not match.

- And when NTE submitted an application to the North Carolina Utilities Commission for a permit needed to construct the Reidsville plant, the type of application that rarely attracted outside involvement and was routinely granted, Duke Energy petitioned to intervene before the State Commission to assert falsely that NTE had breached the Reidsville interconnection agreement and to suggest that NTE would fail to meet its construction goals "apparently due to a lack of financing and insufficient wholesale customers to justify the need for [Reidsville]." At that time, however, Duke

> Energy knew that NTE had already won the business of some of Duke Energy's customers and was threatening to take one of its largest customers, Fayetteville, with its more efficient facilities.

NTE pointed to yet other actions by Duke Energy, as set forth in more detail in this court's panel opinion, and maintained that such conduct did not represent legitimate competition, but rather anticompetitive conduct.

While many of the facts that NTE advanced were undisputed, many were also disputed. If the disputed facts were to be proved at trial, it would become clear that what NTE proffered was not conduct that amounted to old-fashioned competition based on efficiency, better products, and better service. Rather, it was conduct expressly aimed at keeping NTE out of Duke Energy's market because NTE was concededly more cost-efficient—30% more efficient, as Duke Energy recognized. When such conduct is carried out by an entity with monopoly power, it amounts to a violation of § 2 of the Sherman Act, 15 U.S.C. § 2.

To succeed on its § 2 claim, NTE would have to satisfy two essential elements: (1) that Duke "possess[ed] . . . monopoly power in the relevant market," *United States v. Grinnell Corp.*, 384 U.S. 563, 570, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966), and (2) that it willfully acquired or maintained that power through anticompetitive conduct, as opposed to "as a consequence of a superior product, business acumen, or historic accident," *id.* at 571.

The first element is not at issue here, as Duke Energy does not challenge the district court's conclusion that a

reasonable jury could find that Duke Energy has or was likely to achieve monopoly power in a relevant market, given its "durably high market share," which stands "at or approaching 90%." *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 608 F. Supp. 3d 298, 315-17 (W.D.N.C. 2022). But the second element is at issue—whether Duke Energy maintained its power through anticompetitive conduct, *i.e.*, conduct intended to "exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985) (quoting R. Bork, *The Antitrust Paradox* 138 (1978)).

Of course, a monopolist does not violate § 2 by offering a superior product, service, or lower prices, as such conduct is procompetitive and thus increases consumer welfare. Rather, a monopolist violates § 2 when it "use[s] [its] monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482-83, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992) (quoting *United States v. Griffith*, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)).

NTE has presented sufficient evidence to demonstrate that Duke Energy attempted to maintain or maintained its monopoly power through anticompetitive conduct, *i.e.*, conduct intended to exclude NTE on bases other than efficiency. Indeed, increased efficiency was a course that Duke Energy conceded it was unable to take, as its "competitive disadvantage" in terms of efficiency was "not going away soon." In short, the facts suggested by NTE's

evidence, if proved, show a deliberately anticompetitive course of conduct that violates § 2 of the Sherman Act.

My colleague in dissent fails to address some of the most critical facts for determining § 2 liability, such as the undisputed fact that Duke Energy itself projected that its all-in costs were 30% higher than NTE's, thus making NTE more competitive. He fails to address NTE's evidence that Duke Energy manufactured NTE's supposed breach of the transmission line agreement, and, based on that breach, terminated it, a termination that FERC later found to be unlawful. Again, he fails to take account of the fact that Duke Energy offered Fayetteville a $325 million aggregate discount that Duke Energy projected would cause it a $100 million loss and that, NTE's expert witness explained in detail, was predatory, *i.e.*, below Duke Energy's costs. While he briefly mentions anticompetitive malice, he also fails to address its inculpating power under a § 2 monopolization claim. Skirting these critical facts that, if proved, would show anticompetitive conduct, he instead cabins NTE's claims into two distinct narrower categories of refusal to deal and predatory pricing, arguing that under *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009), NTE's claim can only succeed if it satisfies one of those two bases. He notes that the *linkLine* Court found that the complaint in that case failed to state either of those two claims. And interpreting *linkLine* to hold that only refusals to deal and predatory pricing may establish a § 2 claim, he accuses the panel opinion of "[r]ejecting *linkLine*'s directives." *Post*, at 21. This position, however, cannot be supported by *linkLine* even in the least.

In *linkLine*, the plaintiffs alleged that a "price squeeze" brought about by conduct in two distinct markets was anticompetitive under § 2 of the Sherman Act. *See* 555 U.S. at 442. The plaintiffs explained in their complaint that the price squeeze was brought about by the defendant's setting a high price for the plaintiffs in a relevant *wholesale* market and an aggressively low price in a relevant *retail* market. *Id.* at 443, 449. The theory depended on the "interaction" of conduct in the two markets, and not the illegality of conduct in either market. *Id.* at 453.

The Supreme Court held "that the price-squeeze claims set forth in [the] complaint [were] not cognizable under the Sherman Act." *linkLine*, 555 U.S. at 456. The Court explained first that because the defendant had "no antitrust duty to deal with its rivals" in the wholesale market at all, it followed that the defendant was not required to offer the plaintiffs their "preferred" "wholesale prices." *Id.* at 450-51. Likewise, it found that the defendant's conduct in the retail market (aggressive price reductions) also was not illegal. *Id.* at 451-52. From there, the Court explained why price-squeeze claims based on legal conduct in two distinct markets should not be recognized as a violation of § 2:

> Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze.

Id. at 453 (emphasis added). Thus, the Supreme Court did not suggest, as my colleague claims, that only illegal refusals to deal and predatory pricing could violate § 2. It addressed a unique claim in which the "independent competitive harm" from *price squeezes* could not be identified. *Id.* at 455.

This case is entirely different from *linkLine*; it does not depend on the "interaction" of conduct in two distinct markets. It is based on what the record indicates may have been deliberately anticompetitive conduct in the wholesale energy distribution market in the Carolinas—conduct that was not based on "superior product, business acumen, or historic accident." *linkLine*, 555 U.S. at 448 (quoting *Grinnell*, 384 U.S. at 570-71). NTE presented evidence that it was more efficient; that its efficiency allowed it to offer customers in the relevant market lower prices; and that, with its scheme, Duke Energy sought to eliminate that competition not with greater efficiency, but with deliberately anticompetitive conduct that was designed to exclude NTE from the market. This is a standard monopolization claim. *See Grinnell*, 384 U.S. at 570-71.

But, of course, as the case now stands, if NTE fails to carry its burden of proving the facts it advances in support of its claim, we will no longer have to review the sufficiency of its § 2 claim. Thus, at this point, it would only be speculative for an en banc court to review disputed facts to assess antitrust liability. In these circumstances, en banc review, I submit, would be a wasteful use of limited judicial resources. The court's vote in this case to deny en banc review is thus well justified.

QUATTLEBAUM, Circuit Judge, with whom Judge RICHARDSON joins, dissenting from the denial of rehearing en banc:

This case raises at least two issues of "exceptional importance": (1) whether Sherman Act § 2 antitrust claims can be recharacterized to evade the Supreme Court's doctrinal tests, and (2) whether § 2 claims that fail such doctrinal tests can be amalgamated to create a sufficient claim. The Supreme Court has told us the answer to both questions is no. And since the Court's instruction, no court of appeals faced with these issues has entertained these prohibited theories. That is, until now. Unfortunately, the panel's decision, which will provide the framework for how our circuit reviews § 2 antitrust cases in the future, goes in the opposite direction. As a matter of law, it allows plaintiffs to recharacterize antitrust claims not only to evade the Supreme Court's clear tests, but also to amalgamate them into a "monopoly broth." Daniel A. Crane, *Does Monopoly Broth Make Bad Soup*? 76 ANTITRUST L.J. 663, 663 (2010). This new legal rule leaves us noncompliant with Supreme Court directives, isolated from our sister circuits and out of step with the leading antitrust scholarship. We should have reheard this matter en banc and affirmed the district court's order of summary judgment.

I.

For years, Duke was the dominant energy supplier in North Carolina.[1] But beginning around 2015, NTE, a Florida energy company, emerged as a threat to that position. NTE built a power plant in Kings Mountain, North Carolina that produced power more efficiently than Duke could. With this leg up, NTE began enticing customers away from Duke. Eager to expand, NTE began building another plant in Reidsville, North Carolina. But NTE's expansion faced two challenges.

First, Duke enjoyed decades-long contracts with big customers in North Carolina. NTE's best chance at one of these big customers was the City of Fayetteville, which could terminate its contract with Duke in 2024 if it gave notice by 2017. But Duke wasn't about to let Fayetteville go without a fight. Internal emails show that Duke realized it "need[ed] the NTE train to stop!" J.A. 5733. So Duke forestalled Fayetteville from issuing a request for proposals from Duke's competitors with a two-pronged offensive that would "provide[] value other competitors can't offer." J.A. 7297. First, Duke offered Fayetteville a $30kW-year discount on its existing Duke contract for 2021-2024, worth about $42 million. Second, Fayetteville has its own small, inefficient power plant from which Duke had bought energy since 2012. Duke offered to quadruple the price it paid for that energy. Fayetteville determined

1. This factual description is admittedly condensed to provide the background necessary for my opinion. The panel opinion ably describes the facts. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 344-351 (4th Cir. 2024).

this proposal from Duke was a better deal than what it surmised NTE would offer. So, it stuck with Duke.

The second challenge NTE faced was its reliance on Duke's transmission lines. Duke had its own lines to supply energy to customers. NTE did not. Fortunately for NTE, the Federal Energy Regulatory Commission required Duke to provide NTE access to its lines. Following those regulations, Duke entered into a contract with NTE under which NTE paid Duke to connect with Duke's energy transmission lines. But that solution to NTE's lack of transmission lines was short-lived.

In February of 2019, Duke emailed NTE saying that it was changing the payment program, such that NTE "should wait and send their payments per the instructions on the invoice, instead of just wiring it in" on March 1 per the contract's schedule. J.A. 5891-92. A few days later, internal Duke emails expressed Duke's hopes to "get [Fayetteville] wrapped up and [p]ut it to bed and ruin NTE's plans" for the Reidsville plant. J.A. 5906. When March 1 came, NTE had not received an invoice, so it did not pay Duke. By the time the next payment was due on May 1, Duke still had not sent an invoice, so NTE did not make that payment either. Two weeks later, NTE instructed Duke to suspend work on Duke's transmission lines to "create some flexibility" in its development of the plant. *Duke Energy*, 111 F.4th at 348. According to NTE, such suspensions are common, and the contract allowed for it, as long as NTE paid Duke "for all reasonable and necessary costs." J.A. 447. But from Duke's perspective, NTE's nonpayment and suspension breached the contract.

Internal emails—"breach! breach! punt em!"—reveal Duke's delight at the perceived breach and the excuse it provided to kill the NTE Reidsville project. J.A. 6364. Duke sent NTE a letter saying NTE had breached the contract. While Duke claimed it had sent the invoices before, Duke later admitted that that was untrue. But the upshot of all this was Duke's cancellation of NTE Reidsville's connection.

II.

The same day it terminated NTE's connection, Duke sued NTE for breach of contract. NTE countersued for breach of contract, common law unfair competition, violations of North Carolina's Unfair and Deceptive Trade Practices Act and antitrust violations. The breach of contract claims all settled, and the district court determined both flavors of unfair competition were preempted by federal law. That left only NTE's counterclaim for violations of § 2 of the Sherman Act, for which NTE alleged several theories of liability. The most important theories for our purposes were (1) Duke's alleged refusal to deal with NTE based on the termination of NTE's connection to Duke's transmission lines and (2) Duke's alleged predatory pricing based on its efforts to obtain a renewed contract with Fayetteville.[2] *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 608 F. Supp.

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2. NTE also alleged Duke violated antitrust laws by filing this lawsuit (which it called a "sham lawsuit"), defamatorily posting that the Reidsville project had been "canceled," and intervening against NTE's request to renew its certificate of public convenience and necessity.

3d 298, 318 (W.D.N.C. 2022), *vacated and remanded*, 111 F.4th 337 (4th Cir. 2024).

After discovery, Duke moved for summary judgment. The district court rejected Duke's argument that a reasonable jury could not find that Duke had monopoly power. *Duke Energy*, 608 F. Supp. 3d at 317. But it agreed with Duke that NTE had not shown a genuine dispute of material fact as to Duke's anti-competitive conduct. The court determined that none of NTE's claims were independently unlawful. *Id.* at 319-26. It held that no reasonable jury could find that Duke priced predatorily because NTE offered no evidence that Duke priced below its variable costs. *Id.* at 323-26. As for the refusal to deal theory, the court determined that refusal to deal claims of this variety "'should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.'" *Duke Energy*, 608 F. Supp. at 320 (quoting *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)). Because FERC required Duke to share its facilities, the district court determined *Trinko* foreclosed this claim. *Id.* at 319-20. Finally, in a move the panel opinion rebukes, the district court rejected NTE's amalgamation theory. *Id.* at 319. It reasoned that "[a]dding up several instances of lawful conduct cannot total unlawful conduct. In simple mathematical terms, 0 + 0 = 0." *Id.*

NTE then appealed to our court. After briefing and oral argument, the panel disagreed with the district court's analysis.

First, the panel embraced NTE's amalgamation theory. It concluded that the district court's rejection of that theory "dismember[ed]" NTE's claims. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337, 355 (4th Cir. 2024). The panel acknowledged that "when anticompetitive conduct is alleged to be typical predatory pricing [or] refusing to deal . . . the case law has developed tests for analyzing such claims." *Id.* at 354. But it insisted that "when a court is faced with allegations of a complex or atypical exclusionary campaign, the individual components of which do not fit neatly within pre-established categories, its application of such specific conduct tests would prove too rigid." *Id.* In such cases, the panel determined that "[a]ggregation is appropriate when individual acts are all part of the same scheme to perpetuate dominance or drive the plaintiff from the market." *Id.* at 355 (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 310c7 (4th and 5th eds. 2024)) (cleaned up). As a result, the panel established a new rule for the Fourth Circuit—if an antitrust plaintiff alleges "complex" or "atypical" allegedly anticompetitive conduct that "do[es] not fit neatly within pre-established categories," courts must permit claims to go forward even if they flunk doctrinal antitrust tests. *Id.* at 354.

The panel then considered NTE's specific claims. As for predatory pricing, the panel opinion determined that the court did not have to "assess whether" the allegedly anticompetitive actions taken "amounted to a violation of § 2 under a strict predatory pricing theory." *Duke Energy*, 111 F.4th at 360. It reasoned that "the predatory pricing analysis cannot fully account for the more comprehensive

conditions of Duke's offer." *Id.* at 357. The panel likened Duke's willingness to increase the price at which it bought power from Fayetteville plus its discount to the current contract to a package discount. *Id.* From there, it looked to the Third Circuit's opinion in *LePage's Inc. v. 3M*, 324 F.3d 141, 155 (3d Cir. 2003). The *LePage's* court determined that 3M's "exclusive dealing practices" and "discount practices" wrested the case from the standard doctrinal test for predatory pricing.[3] *Id.* at 159. The *Duke* panel made the same move. It reasoned that because NTE challenged the overall structure of the deal, the standard doctrinal test for predatory pricing under *Brooke Group* did not apply. *Duke Energy*, 111 F.4th at 358-60. The panel concluded that the record contained a factual dispute as to whether the structure of Duke's Fayetteville offer was exclusionary, which was enough to vacate the summary judgment order. *Id.* at 360.

The panel then turned to NTE's refusal to deal claim. Despite *Trinko*'s instruction that refusal to deal claims require voluntary engagement in a course of dealing as opposed to a regulatorily compelled relationship, the panel concluded that a jury could hold Duke liable for refusing to deal with NTE. *Id.* at 364. In reaching this conclusion, the panel determined that a jury could find Duke decided to give up short-term profits by ensnaring NTE in a manufactured breach of the contract, even though Duke was only sharing its transmission lines with NTE because FERC required it to. *Duke Energy*, 111 F.4th at 365.

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3. The standard test for predatory pricing is pricing below cost before raising prices once competitors are driven off. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993).

But ultimately, the panel did not deny summary judgment on that basis. Instead, it excused itself on the grounds that amalgamation would make Duke's conduct liable in any event. *Duke Energy*, 111 F.4th at 366 ("And we need not determine, as a matter of law, whether, if those facts are believed, such conduct in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability. Rather, we recognize NTE's claim that this conduct was but a part of a larger scheme.").[4]

Duke moved for rehearing en banc. It first argued that the panel decision was infected by an openness to the combined effects of Duke's Fayetteville offer and the termination of the interconnection contract. Such openness, Duke maintained, is directly contrary to the Supreme Court's "repeated[] emphasi[s on] the importance of clear rules in antitrust law." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 452, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009). Second, Duke asserted that the panel's predatory pricing holding again

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4. Because the panel held as a matter of law that NTE need not satisfy the Supreme Court's clear rules for predatory pricing and refusing to deal claims, the alleged factual disputes my colleague describes in his opinion in support of denying rehearing en banc do not justify our denial of Duke's petition. That's because they are not material under the amalgamation theory the panel embraces. Had the panel vacated the district court's order granting summary judgment to Duke because of genuine disputes of material fact under the Court's doctrinal tests, I agree rehearing en banc would be inappropriate. But that is not what it did. It held that even if NTE could not satisfy those tests at trial, it could still prevail under its theory that Duke's broader scheme was unlawful.

flouted Supreme Court precedent by sidestepping the *Brooke Group* test for the sake of the offer's structure. Third, Duke insisted that under *Trinko* it was entitled to judgment as a matter of law on NTE's refusal to deal claim since Duke's relationship with NTE was not voluntary but instead compelled by FERC. We denied Duke's motion.

III.

We should have reheard this matter en banc. Rehearing en banc is appropriate "to secure or maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). And we have said that "lower courts grappling with complex legal questions of first impression must give due weight to guidance from the Supreme Court, so as to ensure the consistent and uniform development and application of the law." *Manning v. Caldwell*, 930 F.3d 264, 282 (4th Cir. 2019). Besides being a question of exceptional importance under Rule 35(a)(2), this case also demands rehearing en banc because of the panel's violations of Supreme Court precedent.

Contrary to that precedent, the panel opinion establishes a framework for § 2 antitrust cases that permits both the recharacterization of claims to evade the Supreme Court's doctrinal tests and the amalgamation of § 2 claims that fail such doctrinal tests to create a sufficient claim.

Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with

> any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. The Act does not specify what types of activities are unlawful. But the Supreme Court has recognized that "clear rules" are important for antitrust law. *linkLine*, 555 U.S. at 452. To establish such rules, the Court has created doctrinal tests for common types of unlawful conduct. Relevant to NTE's claims, if a company is refusing to deal on the free market with its competitors, certain conditions must be met before the conduct may be considered unlawful. *See Trinko*, 540 U.S. at 408-10. Likewise, if a company is setting curiously low prices, certain conditions must be met before the conduct may be considered unlawful. *See Brooke Grp.*, 509 U.S. at 243.

What's more, the Supreme Court has commanded that these doctrinal tests be followed. In *linkLine*, the Court held that plaintiffs may not take claims that fail these tests, amalgamate them with a "course of conduct" label, and then cast aside the tests. 555 U.S. at 457. After determining that the plaintiffs had not stated a refusal to deal claim or a predatory pricing claim, the Court rejected the plaintiffs' attempt to "alchemize them into a new form of antitrust liability never before recognized by this

Court." *Id.* It described the claims as "an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level." *Id.* at 452. As the Court summed up, "[t]wo wrong claims do not make one that is right." *Id.* at 457.

But they do to the panel. Rejecting *linkLine*'s directives, the panel casts the tests for refusal to deal and predatory pricing aside because, according to the panel, they are "too rigid" for conduct that is "complex or atypical." *Duke*, 111 F.4th at 354. But those tests aren't options for lower courts to use only in run-of-the-mill cases. They are requirements, even if rigid and even for complex cases. As I have said before, "Supreme Court precedent is not like the green vegetables on a buffet line that we can simply pass by for more dessert." *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 148 (4th Cir. 2022) (Quattlebaum, J., concurring).

The panel decision's squishy reasoning will produce the very uncertainty the Supreme Court's clear rules were designed to eliminate. Antitrust claims are almost always factually complex. It is hard to imagine how good and creative lawyers will not use this new rule to broadly expand antitrust liability. That's exactly what has happened in this case. Consider the panel's treatment of predatory pricing. For good reason, antitrust law does not prohibit low prices. That's because lower prices are generally good for consumers, not bad. The lone exception is predatory pricing, which has two elements—pricing below cost, and a reasonable probability the monopolist firm will recoup its losses by jacking up prices after

its below-cost prices have driven off competitors. *See Brooke Grp.*, 509 U.S. at 222-24. Duke insists that NTE cannot pass this test because Duke's offer to Fayetteville was not below its costs. Rather than addressing this essential issue, the panel side-steps it, agreeing with NTE's characterization of Duke's Fayetteville offer not as a predatory pricing claim, but as an exclusionary "structure" claim. According to the panel, "only Duke could provide a discount on pre-2024 prices," and this *structure* of the offer rendered it anticompetitive. 111 F.4th at 358. But it wasn't the *structure* of the deal that made Fayetteville pick it; it was the dollars it saved the city. And almost any alleged anticompetitive pricing will be part of some economic or contractual structure. The fact that Duke's preexisting relationship allowed it more ways to save Fayetteville those dollars does not, under Supreme Court precedent, relieve NTE of its duty to satisfy the predatory pricing test.

Importantly, the Supreme Court has rejected efforts to avoid doctrinal tests when the facts are not picture-perfect fits. In *Trinko*, the defendant sometimes "failed to fill" its rivals' orders "at all," while other times it only failed to fill its rivals' orders "in a timely manner" or "after filling those for its own local phone service." *Trinko* 540 U.S. at 404-05. The Court described the plaintiffs' alleged theory as one of "insufficient assistance in the provision of service to rivals." *Id.* at 410. Thus, it was not literally a refusal to deal, but rather a lackluster reluctance to deal. And crucially, the Court determined that distinction made no difference. It analyzed all this conduct under the familiar refusal to deal test. *Id.* It did not avoid the standard test just because the facts were not neat and tidy.

Despite that guidance, the panel permits what *Trinko* and *linkLine* reject. It relieves NTE of the burden to show that Duke's transmission line relationship with NTE was voluntary and not compelled by FERC regulations. The panel insists it "need not determine, as a matter of law, whether,"—if Duke's termination of the Reidsville Transmission Agreement was intended to achieve anticompetitive ends—"such conduct in isolation amounted to a § 2 violation under a refusal-to-deal theory of liability." *Duke Energy*, 111 F.4th at 366. If that is true, what is the point of its analysis which cites *Trinko* and other Supreme Court refusal to deal decisions? The panel sets out its analysis admitting that Duke's alleged conduct "somewhat resembles a refusal to deal." *Id.* at 337. But it never ultimately applies the Court's refusal to deal test, instead concluding that the only thing that matters is amalgamation. The problem is that we have seen facts that "somewhat resemble[] a refusal to deal" somewhere before—*Trinko*, where the Court nevertheless applied the doctrinal test. This case is no different; at least, it shouldn't be.

Not only does the panel deviate from Supreme Court precedent, but it improperly claims support for its amalgamation approach from three sources. First, the panel relies on the Supreme Court's *Continental Ore Company v. Union Carbide & Carbon Corporation*, 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962) decision. According to the panel, *Continental Ore*—issued almost 50 years before *linkLine*—justifies its amalgamation theory. But why would we grasp for this decision when the Court recently came to the exact opposite conclusion?

Besides, *Continental Ore* doesn't even provide the support the panel suggests. As the Federal Circuit has explained, in "*Continental Ore* the Court held that the factual components of a case should be viewed together, not the pieces of legal theory . . . *Continental Ore* did not hold . . . that the degrees of support for each legal theory should be added up." *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999) (cleaned up).

Second, the panel relies on the Third Circuit's *LePage's* decision. But that reliance is misplaced for two reasons. One, the decision has been roundly criticized for muddying the waters of antitrust rules that the Supreme Court has sought to clear. "As the bipartisan Antitrust Modernization Commission recently noted, the fundamental problem with the *LePage's* standard is that it does not consider whether the bundled discounts constitute competition on the merits, but simply concludes that all bundled discounts offered by a monopolist are anticompetitive with respect to [] competitors who do not manufacture an equally diverse product line." *Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 899 (9th Cir. 2008) (cleaned up); *see Collins Inkjet Corp. v. Eastman Kodak Co.*, 781 F.3d 264, 273 (6th Cir. 2015) ("The Ninth Circuit's analysis in *Cascade Health* is more compelling than that of the Third Circuit in *LePage's*."); Bruce H. Kobayashi, *The Economics of Loyalty Discounts and Antitrust Law in the United States* (Geo. Mason U. Sch. of L., Working Paper No. 05-26) [https://perma.cc/4T4C-2ESM].

Two, *LePage's* predates *linkLine*. And, since *linkLine* rejected this sort of "alchemiz[ing]," no court of appeals has dared to embrace this now-forbidden theory. *See In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig., 44 F.4th 959, 982 (10th Cir. 2022)*, 44 F.4th 959, 982 (10th Cir. 2022) ("For the sake of accuracy, precision, and analytical clarity, we must evaluate Mylan's allegedly exclusionary conduct separately."), *cert. denied sub nom. Sanofi-Aventis U. S., LLC v. Mylan, Inc.*, 143 S. Ct. 1748, 215 L. Ed. 2d 649 (2023); *Eatoni Ergonomics, Inc. v. Rsch. in Motion Corp.*, 486 Fed. App'x 186, 191 (2d Cir. 2012) ("Because these alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either."). That is, until now. With the panel's decision, we have elected to chart our own path in conflict with the Supreme Court and all our sister circuits that have addressed these issues post-*linkLine*.

Third and finally, the panel claims that Phillip Areeda and Herbert Hovenkamp's leading antitrust treatise supports its decision. It doesn't. The panel cites this treatise for the proposition that "conduct must always be analyzed 'as a whole.'" *Duke Energy*, 111 F.4th at 355 (citing Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7). In the part of the treatise the panel references, Areeda and Hovenkamp advocate amalgamating individual actions which together satisfy an announced § 2 category, just as the Federal Circuit explained in *Intergraph*. They do not support amalgamating individual actions which, together, do not satisfy an established doctrinal category. In fact, they reject the panel's reasoning. Aggregation is improper,

according to Areeda and Hovenkamp, where there is no "dominant conduct causing the plaintiff's injuries" that is independently "found unlawful" under a recognized § 2 category. Areeda & Hovenkamp, *Antitrust Law* ¶ 310c7. The panel finds no unlawful conduct under a recognized § 2 claim. Yet it permits NTE's claims to escape summary judgment.

In sum, the panel's decision defies recent Supreme Court precedent, ignores our sister circuits, rests on a maligned and outdated Third Circuit decision and misreads the leading antitrust scholarship. We should have reheard this case en banc and rejected this amalgamation theory of § 2 liability.

IV.

The panel makes much of the evidence NTE produced of Duke's anticompetitive intent. I do not quarrel with the assessment of that evidence. Indeed, I understand how that evidence of anti-competitive intent could raise concerns. But under the law, Duke's intent matters only if its conduct violated a recognized antitrust claim. *United States v. Microsoft Corp.*, 253 F.3d 34, 59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) ("[I]n considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it."); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1078 (10th Cir. 2013) ("Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring

vigorous competition.”). As explained, Duke’s conduct does not violate any such claim. So, its intent—no matter how abhorrent—does not create a genuine dispute of material fact on NTE’s § 2 claims. And we must not let subjective discomfort with Duke’s intent distract us from the Supreme Court’s objective tests for § 2 liability.

V.

To be sure, Duke used hardball business tactics. And perhaps North Carolinians would be better off with NTE than with Duke. But that is not what Fayetteville thought. And the law neither requires nor permits us to substitute our business judgment for Fayetteville’s. Yet the panel’s decision to do just that conflicts with the Supreme Court’s *linkLine* and *Trinko* decisions. It also establishes a nebulous rule that will lead to uncertainty, contrary to the Supreme Court’s “repeated[] emphasi[s on] the importance of clear rules in antitrust law.” *linkLine*, 555 U.S. at 452.

I respectfully dissent from our denial of rehearing en banc.