

Duke Energy Settlement Raises Key Antitrust Questions

By **Joseph Ostoyich, Danielle Morello and Kaia Pankey** (March 19, 2026)

On March 6, the eve of a jury trial, Duke Energy Carolinas LLC settled an antitrust case brought by NTE Carolinas II LLC, bringing to an end nearly seven years of litigation. The amount of the settlement is not public, and neither party has provided any substantive public comment.

The development around this case is critical, and it could have far-reaching implications on future antitrust litigation. Why? Because the settlement in the U.S. District Court for the Western District of North Carolina occurred shortly after the U.S. Supreme Court denied Duke Energy's petition for certiorari late last year, and that is significant because it left in place a key tool of the plaintiffs' antitrust toolbox, the "monopoly broth" doctrine.

And this is not just any version of the doctrine; it is one that involves the collision of two competing lines of Sherman Act and Section 2 case law, and it arguably might allow a plaintiff to turn lawful conduct into a treble-damages claim, and thus to create incredible settlement pressure on a defendant.

On Jan. 12, at the urging of the U.S. Department of Justice, the Supreme Court denied review in *Duke Energy v. NTE Carolinas II*.^[1] In doing so, the high court tacitly endorsed the U.S. Court of Appeals for the Fourth Circuit's 2024 holding that lower courts must consider exclusionary efforts "in their totality," without tightly compartmentalizing and dismembering the various types of conduct "and wiping the slate clean after each."^[2]

That, effectively, left intact the monopoly broth doctrine, which permits plaintiffs to aggregate multiple distinct, independent and potentially lawful acts into a valid theory of harm that masks what amounts to a head-on collision between two theories of monopolization.^[3]

Two Conflicting Lines of Section 2 Cases

On the one hand, it is clear that Sherman Act Section 2 does not reach lawfully acquired or maintained monopolies. The mere possession of monopoly power, and its acquisition or maintenance through lawful means, fails to establish a violation.

That is true whether the monopoly results from mere historic accident or from the defendant's competitive conduct: for example, innovation that creates a superior product, the exercise of more astute business acumen, marketplace strategies that outflank rivals, or vigorous price competition.^[4] Those are precisely the types of conduct "the Sherman Act does not forbid — indeed, it encourages" under the Supreme Court's 2004 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*.^[5]

Any other rule would be perverse and counterproductive to the goal of promoting



Joseph Ostoyich



Danielle Morello



Kaia Pankey

competition,[6] and would embroil the courts in central-planning decisions on price, output and other terms of dealing for which they are ill-suited.[7]

Indeed, Under *Trinko*, the possibility that a company may be able to compete its way to obtaining a monopoly is the catalyst that drives the economic gains the antitrust laws encourage; it "attracts business acumen in the first place" and induces risk-taking "that produces innovation and economic growth." [8]

On the other hand, even under "the best of circumstances, applying the requirements of Section 2 can be difficult," according to *Trinko*, because pro-competitive conduct, like cutting prices, can be considered exclusionary when provided by an alleged monopolist, at least in the narrow circumstance where they are predatorily low. [9]

"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," according to the U.S. Court of Appeals for the District of Columbia Circuit's 2002 decision in *U.S. v. Microsoft Corp.* [10]

In addition, at least one scholar — Robert H. Lande, writing in the *American Bar Association Antitrust Magazine* — has posited that a strict textualist analysis of the legislative record, legal debate and common source dictionaries in place in 1890 when the Sherman Act was written would have to conclude that "there was no requirement of anticompetitive conduct." [11]

If that is right, then any act that allows a company to obtain or preserve monopoly power would be per se illegal.

Distinguishing between an alleged monopolist's lawful conduct and conduct that creates Section 2 liability is thus often very difficult, and the task is not simplified by simply labeling the conduct exclusionary, predatory or anticompetitive.

The difficulties are not insurmountable, however.

The Supreme Court has carefully crafted tests that distinguish between lawful price concessions, for example, from predatorily low price concessions that are "only actionable under the Sherman Act when the prices are below cost and there is a dangerous probability that the predator will be able to recoup the profits it loses from the low prices," according to the court's 2009 decision in *Pacific Bell Telephone Co. v. linkLine Communications Inc.* [12]

And, in *linkLine*, the Supreme Court expressly noted the importance of parsing the conduct to determine whether each act, on its own, crosses the line from lawful to monopolistic. There, the court flatly rejected a Section 2 claim based on an alleged monopolist's price squeeze combined with its refusal to deal because neither act, standing alone, crossed the line under the court's established tests for each type of conduct.

The court thus "declined the invitation" to "join a wholesale claim that cannot succeed with a retail claim that cannot succeed, and alchemize them into a new form of antitrust liability never before recognized by this court." Indeed, the ruling was unambiguous: "Two wrong claims do not make one that is right." [13]

That was a decision on the sufficiency of the pleadings, and it is obvious that drawing the distinction between lawful and unlawful Section 2 conduct earlier is better to conserve judicial resources and for the litigants; hence, the court's repeated reminder that it is

particularly important to do so early because the typical antitrust case entails a massive and potentially enormous expense and, given the fact that damages are trebled, raises the in terrorem effect of pressuring a defendant to settle.[14]

This leads us to the high court's failure to take up Duke Energy's petition for certiorari and, unsurprisingly, Duke Energy's settlement shortly thereafter.

The Duke Energy Case

The case originated in a dispute over interconnection agreements between Duke Energy, a North Carolina power generating and transmission company, and NTE, a Florida power company that generated power, but did not own transmission lines. In 2014 and 2015, NTE built and opened a power-generating facility in Kings Mountain, North Carolina, and a few years later embarked on plans to open another generating plant in Reidsville.

The parties also signed interconnection agreements allowing NTE to transmit its power through Duke Energy's transmission lines in the Carolinas, and they competed to obtain and retain retail customers.

In the Spring of 2019, for example, Duke Energy offered a discount to, and secured the business of, one of its longstanding and significant customers, the City of Fayetteville, in response to NTE's competition for the city's expiring contract.

Shortly afterward, NTE stopped working on the construction of the Reidsville power plant and suspended interconnection payments to Duke Energy. In return, Duke Energy terminated the interconnection agreement that fall and listed the Reidsville project as canceled in the Federal Energy Regulatory Commission's open-access same-time information system terminated the Reidsville Interconnection Agreement, and sued NTE for breach of contract.

NTE responded with counterclaims against Duke Energy for unlawfully maintaining a monopoly in violation of Section 2 of the Sherman Act. It alleged that Duke Energy engaged in a series of monopolistic acts, including that (1) Duke Energy's concessions to retain the City of Fayetteville's business amounted to predatory pricing, (2) its termination of the Reidsville interconnection agreement was a refusal to deal and (3) its breach of contract suit against NTE was "sham litigation."

The Western District of North Carolina granted Duke Energy's motion for summary judgment in June 2024, concluding that each type of conduct passed the Supreme Court's test to distinguishing lawful from unlawful Section 2 conduct. On appeal, the Fourth Circuit vacated the motion for summary judgment and remanded the case back to the district court in August 2024, reprimanding the district court for "tightly compartmentalizing" the alleged anticompetitive conduct — precisely what linkLine, in fact, required.

Duke Energy filed a petition for a writ of certiorari on Feb. 25, 2025, and the high court denied the petition on Jan. 12, 2026. Two months later, reportedly facing more than half a billion dollars in potential treble-damages liability at trial, Duke Energy settled.

Lawful Conduct and Antitrust Injury

The Supreme Court's failure to take up Duke Energy's certiorari petition was a missed opportunity to reiterate under linkLine that multiple insufficient acts do not add up to a valid claim, or to clarify linkLine and explain why Duke Energy was different.

Granted, the high court takes up very, very few cases each year, typically granting and hearing oral argument in about 80 cases each year,[15] and the court will only hear arguments for about 64 cases this year.[16] But, by missing this opportunity, the court left Section 2 case law with yet more confusion on the core question of what, exactly, is monopolistic conduct and how does it differ from legitimate, competitive conduct.

The confusion does not stop there, unfortunately. The corollary to the court's repeated endorsement of monopolies that are lawfully acquired and maintained through pro-competitive pricing, the exercise of superior business acumen, and historic accident is found in the doctrine of antitrust injury, a doctrine stemming from the language of Clayton Act, Section 4.[17]

Congress created a dual enforcement regime that authorized private attorneys general to sue for antitrust wrongs, in addition to government enforcement efforts. But that cause of action is limited to situations where the private plaintiff's property or business was injured "by reason of" something "forbidden in the antitrust laws." [18]

As the Supreme Court explained in the 1977 decision in *Brunswick Corp. v. Pueblo Bowl*, antitrust injury can only be established by proof of an injury "of the type the antitrust laws were intended to prevent and that flows from defendants' wrongful conduct." [19]

Further, in the 1990 decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, the Supreme Court said that antitrust injury "does not arise" unless a private plaintiff is adversely affected "by an anticompetitive aspect of the defendant's conduct." [20]

The high court in *Arco* added that a company's lawful acts thus do not cause antitrust injury; that is true whether the company succeeds because it designs and builds a better mousetrap or because it offers low prices that benefit consumers.[21] Low prices that are above-cost simply "do not threaten competition. Hence, they cannot give rise to antitrust injury." [22]

The confusion wrought by the court's failure to jibe *linkLine* and the Fourth Circuit's decision in the *Duke Energy* case also spills into the quantification of damages. Courts require antitrust plaintiffs calculating their damages to disaggregate the impact of a defendant's lawful conduct — or a recession or other events that are unrelated to defendant's conduct and attributable to other causes — from those caused by any unlawful conduct. [23]

Only damages that flow from a defendant's unlawful conduct are recoverable; a plaintiff cannot permissibly claim damages caused by lawful conduct. [24] A plaintiff that fails to separate out and remove the impact of lawful conduct proffers a damages model that is inadmissible as a matter of law. [25]

"To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful," according to the U.S. Court of Appeals for the Seventh Circuit in the 1983 *MCI Communications Corp. v. AT&T Co.* decision. [26]

The Risk of Chilling Lawful Conduct in the Wake of Duke Energy

Finally, of course, the confusion wrought by the Supreme Court's failure to address *Duke Energy* calls into question the very core purpose and effect of the antitrust laws.

Ensuring that consumers enjoy the benefits of a competitive marketplace does not come

easily. Courts must be vigilant to safeguard and encourage efforts to engage in vigorous competition and to avoid the especially costly and intolerable risk of chilling beneficial behavior.[27]

Thus, clarifying the principle that a Section 2 violation "will not be found" unless there is "an element of anticompetitive conduct," in *Trinko*,[28] and the broader requirement that antitrust injury and damages flow from defendant's wrongful — not lawful — conduct, is essential for protecting competition. Even the Fourth Circuit's opinion, while failing to apply this principle, recognized that "care must be taken lest ... illegality be inferred from procompetitive conduct." [29]

Is a single lawsuit, for nonpayment of millions of dollars seemingly due under a contract, potentially sham litigation sufficient to be part of a monopoly broth claim? Generally, the answer would seem to be no.

Is the termination of that contract, following nonpayment, a refusal to deal? Again, in insolation, the answer seems likely to be no. Is a profitable contract with a single customer predatory pricing sufficient to be tossed into the soup? No.

Does the answer to these questions change if the plaintiffs combine the three and label it all part of a monopoly broth? That is the \$64,000 question — or, more likely in the *Duke Energy* case, a question with millions or tens of millions of dollars at stake. It is a question that comes up regularly.

And after the Supreme Court's refusal to address the issues raised in *Duke Energy's* cert petition, the answer is, at least, maybe and potentially yes.

Joseph Ostoyich is a partner and head of the U.S. antitrust litigation practice at Clifford Chance LLP.

Danielle Morello is counsel at the firm.

Kaia Pankey is an associate at the firm.

Clifford Chance associate Dodi Allocca contributed to this article.

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[1] *Duke Energy Carolinas LLC v. NTE Carolinas II LLC*, No. 24-917, 2026 WL 79821, at *1 (U.S. Jan. 12, 2026).

[2] *Duke Energy Carolinas LLC v. NTE Carolinas II LLC*, 111 F.4th 337, 355 (4th Cir. 2024), cert. denied sub nom., 2026 WL 79821 (U.S. Jan. 12, 2026).

[3] See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962).

[4] See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966); see also *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004).

[5] Trinko, 540 U.S. at 407.

[6] *Id.*; see also *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, C.J.).

[7] *Pac. Bell Tel. Co. v. linkLine Commc'ns Inc.*, 555 U.S. 438, 452 (2009) ("Courts are ill suited 'to act as central planners, identifying the proper price, quantity, and other terms of dealing.'") (quoting *Trinko*, 540 U.S. at 408).

[8] *Trinko*, 540 U.S. at 407.

[9] *Id.* at 414.

[10] *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[11] Robert H. Lande, *The No-Fault Approach to Monopolization: Terrific, Terrible, or Textualism?*, ABA Antitrust Magazine Online (Aug. 2021), <https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/august-2021/atonline-lande.pdf>.

[12] *linkLine*, 555 U.S. at 457.

[13] *Id.*

[14] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-60 (2007) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

[15] Sup. Ct. of the U.S., *FAQs - General Information*, https://www.supremecourt.gov/about/faq_general.aspx (last visited Mar. 12, 2026).

[16] Kelsey Dallas, *The Supreme Court Has (Probably) Chosen All the Cases It Will Hear This Term*, SCOTUSblog (Jan. 30, 2026), <https://www.scotusblog.com/2026/01/the-supreme-court-has-probably-chosen-all-the-cases-it-will-hear-this-term/>.

[17] 15 U.S.C. § 15(a).

[18] *Id.*

[19] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added); see also Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 391a, at 320 (4th and 5th eds. 2024) ("A private plaintiff must identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful.").

[20] *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990).

[21] *Id.* at 340.

[22] *Id.*

[23] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

[24] *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988) ("A plaintiff's proof of amount of damages thus must provide the jury with a reasonable basis upon which to estimate the amount of its losses caused by other factors, such as management problems, a general recession, or lawful factors"); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir. 1985) (reversing jury award because of plaintiff's "utter failure to make any segregation between damages attributable to lawful competition and that attributable to [defendant's] unlawful scheme").

[25] *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) ("The damage figures advanced by plaintiff's experts may be substantially attributable to lawful competition. In the absence of any guidance in the record, we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition."); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1263 (9th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) ("[T]here was on this element of damages insufficient 'relevant data' for the jury to 'make a just and reasonable estimate.' Instead the verdict can only have been 'based on speculation or guesswork.'"); *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081, 1163 (7th Cir. 1983) ("When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage.").

[26] *MCI Commc'ns*, 708 F.2d at 1162-63 (citing *Momand v. Universal Film Exchanges*, 172 F.2d 37 (1st Cir. 1948)).

[27] *linkLine*, 555 U.S. at 454; *Trinko*, 540 U.S. at 407.

[28] *Trinko*, 540 U.S. at 407.

[29] *Pet. App. 31a* (quoting *Areeda & Hovenkamp*, *supra* note 14, at ¶ 310c7).