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Antitrust Modernization Commission
Attn: Public Comments
1001 Pennsylvania Ave., N.W.
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Re: Comments Regarding Commission Issues for Study

On behalf of the United States Telecom Association (USTA) and its member companies,* I submit this letter in response to the July 23, 2004, Federal Register Notice soliciting comments from the public on antitrust issues appropriate for study by the Antitrust Modernization Commission. 69 Fed. Reg. 43,969. The USTA believes that the Commission should consider the following issues:

1. *The Proper Role of the States in Antitrust Enforcement:* An important and controversial issue for American business is the proper role of the states in antitrust enforcement. *See, e.g.,* Michael Greve, “*What They Have Done, and What They Have Failed To Do,*” 1 n.2 (John M. Olin Program in Law and Economics, University of Chicago Law School June 18 & 19, 2004) (collecting authorities identifying competing positions). Scholars such as Judge Richard Posner and Michael DeBow have taken the position that Congress should repeal or amend the provision in the Hart-Scott-Rodino Act authorizing states to bring *parens patriae* lawsuits on behalf of their citizens, 15 U.S.C. § 15c, for several reasons: for example, even when state regulators or enforcers act in good faith, their actions can generate multiple or inconsistent obligations on companies doing business in interstate or foreign commerce, because state enforcement only expands and cannot reduce federal court intervention in the market. Also, states lack the resources or expertise independently to enforce the antitrust laws in complex or large-scale cases. The result is that the states simply free ride on federal efforts, which delays or impedes the proper and efficient enforcement of the antitrust laws. *See, e.g.,* Richard Posner, *Antitrust Law* 280-82 (2d ed. 2001); Richard Epstein & Michael Greve, *Competition Laws in Conflict* 252-87 (2004) (separate articles by Judge Posner and Michael DeBow); *see also* Edward T. Swaine, *The Local Law of Global Antitrust*, 43 Wm. & Mary L. Rev. 627 (2001); John Thorne, “*A Short Note on Government Amicus Briefs in Antitrust Cases,*” (John M. Olin Program in Law and Economics, University of Chicago Law School June 18 & 19, 2004). In addition, supplemental state enforcement of the antitrust laws is particularly unnecessary in a field like telecommunications because the Federal

* USTA is the nation’s oldest trade association representing service providers and suppliers for the telecom industry. USTA represents more than 1,200 companies offering a wide range of services, including local exchange, long distance, wireless, internet and cable television service.

Communications Commission and state public utility commissions already heavily regulate this field in ways that help ensure that it is competitive. See *Verizon Communications v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 881 (2004) (“[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.” * * * One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm.”) (citation omitted); *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) (“[R]egulation’ and ‘antitrust’ typically aim at similar goals – *i.e.*, low and economically efficient prices, innovation, and efficient production methods – but they seek to achieve these goals in very different ways. Economic regulators seek to achieve them *directly* by controlling prices through rules and regulations; antitrust seeks to achieve them *indirectly* by promoting and preserving a process that tends to bring them about. An antitrust rule that seeks to promote competition but nonetheless interferes with regulatory controls could undercut the very objectives the antitrust laws are designed to serve.”).

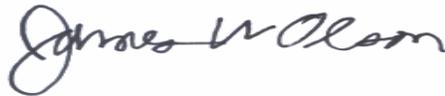
Several remedies have been proposed to eliminate or reduce the problems caused by state enforcement. One option would be to repeal that section of the Hart-Scott-Rodino Act authorizing states to bring *parens patriae* actions. States would remain free to sue when they are injured in the same manner as any private party, such as when a horizontal conspiracy forces a state to pay a supranormal price for supplies. Another option would be for Congress to allow states to continue to enforce the federal antitrust laws, but to preempt state antitrust laws and to channel all antitrust litigation into the federal courts by granting them exclusive jurisdiction over all such actions. Each option is worthy of consideration.

2. *The Relationship between the Antitrust Laws and Regulation.* Congressman Sensenbrenner has suggested that the Commission investigate the relationship between the role played by the antitrust laws and the regulatory processes in order to determine whether the federal courts have misread the role played by the former in the overall effort to promote healthy competitive markets. In particular, he believes that the courts have misconstrued the function of savings clauses in federal legislation that preserve the applicability of the federal antitrust laws in regulated industries. Indeed, he (along with Congressman Conyers) recently introduced legislation that would partially overturn the Supreme Court’s recent decision in *Trinko*, the “Clarification of Antitrust Remedies in Telecommunications Act of 2004,” H.R. 4412,” 108th Cong., 2d Sess. (2004). In *Trinko*, six Justices across the spectrum of political viewpoints (Chief Justice Rehnquist, Justices O’Connor, Kennedy, Scalia, Ginsburg, and Breyer) ruled that violations of the 1996 Telecommunications Act do not automatically violate the Sherman Act. At the same time, the Court held that the Antitrust Savings Clause in the Telecommunications Act of 1996 would be given full force and effect. In doing so, the Court recognized that the law, economics, and common sense require a court to consider the role of a regulatory agency in deciding whether to expand reach of the antitrust laws. The other three Justices

(Justices Stevens, Souter, and Thomas), who concluded that Trinko did not even have standing to bring suit, did not quarrel with the merits decision.

We are glad to participate in discussion of this issue if the Commission were to take it up for study. At present, however, we doubt that the Commission should treat as a priority review of a recent Supreme Court decision (a) that was unanimous on this issue, (b) that agreed with the position of the federal government, the Communications Workers of America, several states, the Telecommunications Industry Association, and leading academics, to name just a few, (c) that already has been the subject of a hearing before the House Judiciary Committee, "*Saving the Savings Clause: Congressional Intent, the Trinko Case, and the Role of the Antitrust Laws in Promoting Competition in the Telecom Sector*," Hearing Before the House Judiciary Comm., 108th Cong., 2d Sess. (Nov. 19, 2003), and (d) that already is the subject of pending legislation before one of the relevant congressional committees. Other issues are more important to the protection of the American economy.

Thank you for the opportunity to submit these comments.



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