

## ANTITRUST MODERNIZATION COMMISSION

## PUBLIC HEARING

Thursday, December 5, 2005

Rayburn House Office Building, Room 2237  
Independence Avenue and South Capitol Street, S.W.  
Washington, D.C.

The hearing convened, pursuant to notice, at 1:05 p.m.

## PRESENT:

DEBORAH A. GARZA, Chairperson  
JONATHAN R. YAROWSKY, Vice Chair  
W. STEPHEN CANNON, Commissioner  
DENNIS W. CARLTON, Commissioner  
DONALD G. KEMPF, JR., Commissioner  
DEBRA A. VALENTINE, Commissioner

## ALSO PRESENT:

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SCOTT G. ALVAREZ, Board of Governors of the  
Federal Reserve System

RAYMOND A. ATKINS, Surface Board of Transportation

J. BRUCE MCDONALD, U.S. Department of Justice,  
Antitrust Division

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MARK COOPER, Consumer Federation of America

HAROLD FURCHTGOTT-ROTH, Consumer Federation of  
America

DIANA L. MOSS, American Antitrust Institute

JOHN THORNE, Verizon Communications

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

## PROCEEDINGS

CHAIRPERSON GARZA: I'd like to welcome everybody to this afternoon's hearings on antitrust and regulated industries and our first panel of distinguished witnesses.

Let me just explain briefly how we generally proceed, gentlemen. I will give each of you, each of the witnesses, about five minutes to summarize your testimony. After that, on behalf of the Commission, Jon Yarowsky, who is one of the co-chairs of the study group for this topic area, will have about 20 minutes to put questions to the witnesses, and then following that, each of the Commissioners present will get about five minutes to ask their own questions.

Because of the weather, we're going to try to take advantage of the fact that, because of the weather, in part, we don't have a full complement of Commissioners, and so we won't prolong this any longer than we need to, so we can get the second panel and hopefully get people out before the weather does kind of hold you captive here.

I'll start from my right and go to the left, so the Honorable Attorney General McKenna, would you like to begin by summarizing your testimony?

MR. MCKENNA: I would be happy to, Madam Chair.

Thank you very much for the opportunity to be here today and also for the opportunity to provide written testimony in advance. I will summarize the four main points of our written testimony and then provide one example that we think underscores the points that we are making here, an example from our experience in the 2000-2001 energy crisis on the west coast.

The first point that I'd like to make on behalf of my office and my state is that we believe that antitrust enforcement has an important role to play, particularly in industries that are transitioning to deregulation. We believe that enforcers and regulators should have complementary, seamless authority to protect consumers from marketplace abuses. While each should be aware of the other's role, each should also maintain its unique jurisdictional authority and focus.

Secondly, we believe that when there is no specific antitrust exemption, none should be implied by the courts simply based on the existence of a regulatory structure. To the contrary, we believe that antitrust exemptions should be express. We will elaborate further on this when I discuss our experience concerning the filed-rate doctrine and proceedings before the Federal Energy Regulatory Commission.

The third main point is that I believe that Congress may, in appropriate circumstances, continue to establish industry-specific standards for particular regulatory decisions, such as the public-interest test, that are not identical to general antitrust standards.

And finally, my comments reflect the National Association of Attorneys General resolution, which we adopted this year, entitled "Principles of Antitrust Enforcement." These principles state our strongly held views supporting the federalist ideals, and I would like to quote one particularly relevant section. Quote, "The National Association of Attorneys General has consistently opposed legislation that weakens antitrust standards for specific industries because there is no evidence that any such exemptions would either promote competition or serve the public interest." I believe that statement underscores my position and the position of the Attorneys General of this country that regulated industries should not be given a blanket exemption from antitrust laws.

Let me now turn to an example from our experience, the example of the energy crisis on the west coast in 2000-2001. To begin with, I'd like to provide a little factual background for those of you who didn't get to live through

that particular crisis.

In the year 2000, across the western states, energy prices went up overnight by up to ten times, in fact, up to 20 times in the real-time wholesale market, wholesale spot market for electricity. Our prices had been pretty consistently \$25 to \$35 per megawatt hour for some time, but pretty much overnight, they started to go up by ten to 20 times. There were a series of price caps imposed by the state of California and by the U.S. Secretary of Energy in 2000, and to illustrate the volatility that had arisen in the market, when a federal price cap was removed in early December of 2000, we actually saw a spike and a single trade in early December of up to \$3,500 per megawatt hour. Fortunately, that was not typical, but hundreds of dollars per megawatt hour was entirely typical at that time. Washington consumers, and consumers in the other states, California and the rest, are still paying for the hundreds of millions of dollars in increases that resulted, in Washington state alone, hundreds of millions.

When we started to look into what happened during the energy crisis, we found evidence of market manipulation, the famous Enron memos that were brought to light by California, Oregon, and Washington, working together on the

documents that were produced, and to date, it's really been the states that have achieved relief for consumers as a result of state antitrust enforcement. Initially, FERC was not really doing much of anything on this issue. Eventually, they did become involved, and unfortunately, the two systems came into conflict, the state antitrust systems and the Federal Energy Regulatory Commission system. FERC protective orders, which they issued in the course of their investigation, actually made it more difficult for the states to conduct their antitrust enforcement efforts. For example, some of our CIDs were frustrated.

The bottom line is that we believe we need a collaborative approach, which will probably require legislative action between FERC and state and federal antitrust enforcement, which would be a better approach to the conflicts that we saw. We need to continue to have state antitrust enforcement. It is the states that can bring relief to consumers, whereas FERC's role is limited to remedies aimed at players in the wholesale market. But we think that both can work together, they can be effective, and the consumers ultimately will benefit.

Thank you very much, and I look forward to your questions later on.

CHAIRPERSON GARZA: Thank you.

Deputy Assistant Attorney General Bruce McDonald?

MR. McDONALD: Thank you, Madam Chairman. The Justice Department Antitrust Division appreciates being invited to testify on enforcement of the antitrust laws in regulated industries. I am pleased to join my fellow officials from other antitrust enforcement and regulatory agencies in this discussion.

The fundamental organizing principle of the U.S. economy is that competition is a superior mechanism for bringing the public higher quality and lower cost goods and services. In specific cases, Congress has determined to provide other public benefits that might not be provided by market competition but can be secured through industry-specific regulation. Examples are safety in transportation systems, ubiquity in telecommunications service, and public confidence in financial institutions.

These two legal systems, general antitrust enforcement and industry-specific regulation, are not inconsistent, and they usually work harmoniously to the public benefit. One of the ways in which the Antitrust Division works to harmonize these systems is in advocating to other parts of government that they allow competition to

replace economic regulation where appropriate. Some examples of relevant competition advocacy efforts are cited in my prepared statement. In an even more recent example, last Friday, the Division filed comments with the Surface Transportation Board. The STB is considering whether to continue eliminating antitrust immunities for certain conferences among motor carriers. As the STB shepherds the trucking industry through a period of deregulation, we hope it will continue to propose regulatory changes that allow the industry and its customers to benefit from competition.

Of special interest to this Commission, the federal antitrust agencies, to one extent or another, share authority with sister regulatory agencies in determining whether to allow mergers or other activities that may affect competition. For instance, as explained in detail in Mr. Alvarez's testimony, the Federal Reserve Board and DOJ both may review bank mergers, and we cooperate closely to share information and work to reach the best decisions. Although without the same sort of procedural rules that apply in banking, the same is true for the Federal Communications Commission in telecommunications mergers.

Mr. Atkins' testimony describes another model. In railroad mergers reviewed by the STB, the antitrust agencies

have no Clayton Act authority. DOJ may make recommendations, which the STB is directed to accord substantial weight.

In various other industries that have been deregulated, sole merger authority has been transferred to the antitrust agencies. Airlines is one example. Authority to review airline mergers was moved from the Transportation Department to DOJ in 1989. DOT retains authority to approve airline alliances, to which the Sherman Act still applies.

State and federal antitrust enforcement and industry regulation share the role of ensuring that the public benefits from this country's exceptional economy. Except in those rare cases of express or clearly implied antitrust immunity, antitrust enforcement is essential to protect competitive markets, which most effectively bring economic benefits to consumers.

Thank you again for the invitation to participate here. I look forward to hearing the testimony of my government colleagues on the panel and taking your questions.

CHAIRPERSON GARZA: Thank you.

Mr. Atkins?

MR. ATKINS: Madam Chairwoman, members of the Commission, my name is Raymond Atkins. I am with the Office of the General Counsel of the Surface Transportation Board.

On behalf of the STB, we thank you for the invitation to participate in these hearings. You have quite a daunting task, and I hope we can provide you some assistance.

As you know, the majority of the STB's work involves economic regulation of the railroad industry. This includes the authorization of entry and exit, monitoring the financial health of the industry, and acting in a judicial capacity to hear service and rate disputes. The agency also has more limited jurisdiction over motor carriers, buses, pipelines, and some water carriers.

There are a number of arrangements that companies must bring to the STB for formal approval, and once the agency concludes that those agreements are in the public interest, the arrangements cannot also be challenged under the antitrust laws. The most notable of these are perhaps the rail mergers.

This Commission has indicated interest in how responsibility for the enforcement of the antitrust laws should be divided between the antitrust agencies and other regulatory agencies. You have noted that the rail industry mergers are reviewed by only the STB, which appears to be something of an exception to the rule. It is, therefore, my intention to focus my opening remarks on the merger review

process at the agency.

I would like to start by correcting what I view as something of a misnomer, that the STB is the only federal agency that reviews rail mergers. In reality, in a major rail merger, they are reviewed by quite a few federal agencies: the Department of Justice, the Department of Transportation, and the Department of Agriculture. We also see a lot of state agencies reviewing those quite carefully to look at the regional significance, if they have regional impacts. So the DOJ does conduct its typical merger review analysis, and it submits that analysis to the STB. The STB always finds that analysis informative, and it almost always agrees with the DOJ's analysis.

But conceptually, you really can think of the STB as more like a district court judge. There are multiple agencies that may look at the merger, but there is only one decision-making body to decide whether or not the merger is in the public interest, and the one difference between the STB and a district court judge who might hear a preliminary injunction order, is that they have to be slightly larger and have a larger staff with more technical expertise.

There are a fair number of similarities between the STB's merger review process and the ordinary merger review

process under the Hart-Scott process. You've got premerger notification requirements. These mergers must be—you must notify the agency in advance of the acquisition. There's massive discovery of relevant information needed to conduct the merger review. And, of course, there's judicial review to the federal courts of appeals once the agency issues a decision.

There are, of course, differences in the view and the approach taken by the Board. Four of them are notable. First is the broader inquiry undertaken by the STB. In a major rail merger, the agency is required to look at the adequacy of the transportation to the public, the effects on other carriers in the area, the total fixed charges of the acquisition, rail labor, and then, of course, the likely anticompetitive impact. In addition to those concerns, the agency is required to look at the environmental impact of the merger as well as whether or not there will be an impact on service.

Everyone doesn't always agree with the STB's decisions, but that's really not unusual, as I'm sure the hostile mergers come to mind. Not everyone always agrees with the decisions by the district court judge, but the process itself does seem to work rather well.

The STB, in the course of its responsibilities, regularly conducts rail rate investigations—not investigations, but looking at how rail rates have changed over time, and those studies have routinely shown that rail rates have fallen in nominal terms since the passage of the Staggers Act, and so the process does seem to be working as Congress had intended.

I would be pleased to take any of your questions.

CHAIRPERSON GARZA: Thank you. Mr. Alvarez?

MR. ALVAREZ: Thank you very much for the opportunity to discuss the Federal Reserve's role in enforcing the antitrust laws in the banking industry. It's a role that the Fed takes very seriously, even though it's not the role for which we are best known.

There are four key aspects to the legal framework governing the antitrust review of bank combinations. First, the banking laws require prior review and approval by the federal banking agencies of each bank combination and prohibit agency approval if the agency finds the transaction would violate the antitrust standards that are embodied in those laws. Unlike the Department of Justice, the Board does not have the discretion to review only those transactions that involve large organizations or that occur in particular

markets or that meet other enforcement goals.

In 2004 alone, the Federal Reserve considered 649 bank merger and acquisition proposals. In each case, the Federal Reserve invites public comment on the proposal, including comment on the expected competitive effects of the proposal and consults with the Department of Justice regarding its analysis.

Second, the antitrust standards in the banking laws mirror the standards in Section 2 of the Sherman Act and Section 7 of the Clayton Act, with one exception. In recognition of the critical and unique role that banks play in communities and the importance of ensuring that banks operate in a safe and sound manner, Congress specifically authorized the banking agencies to approve a bank combination that would otherwise violate the standards of the Clayton Act if the banking agency finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction meeting the convenience and needs of the communities being served. The Federal Reserve has used this exception in only rare occasions, primarily involving acquisitions of troubled institutions.

Third, Congress determined that it was important to

provide certainty to bank combinations and avoid the potential disruption that might occur from a significant delay in bank mergers or the potential unwinding of consummated transactions. Accordingly, the banking laws generally prohibit the parties from consummating a bank combination for 30 days after approval by the relevant banking agencies and permit the Department of Justice and other parties to initiate a court challenge for a combination on antitrust grounds only during this post-approval waiting period. The banking laws also provide that any antitrust challenge must be reviewed by the court using the same standards set forth in the banking laws, including the public interest exception I just described.

Finally, in order to encourage consistency among the banking agencies and the Department of Justice in the review of bank combinations, the banking laws require the banking agencies to notify each other and the Department about proposed bank combinations and share analysis of the competitive effects of these transactions. The Board and the Department of Justice use a combination of formal and informal procedures to exchange information about each proposed bank combination. There are slight differences in the approaches taken by the Department and by the banking

agencies to analyze the competitive effects of bank combinations. The Department places substantial weight on the potential effect of a merger in lending to small businesses while the Federal Reserve considers all lending in the context of the more general analysis of the cluster of banking products and services. However, it is rare that the agencies differ in their final recommendations and never a surprise when we disagree.

There are two other antitrust-type restrictions that I would like to mention that are unique to banks. First, the Federal Reserve and the other banking agencies are prohibited from approving an interstate bank combination if the holding company or resulting bank, along with its insured depository institution affiliates, would control more than 10 percent of the total deposits held by all insured depository institutions in the United States, or more than 30 percent of deposits held by institutions in the relevant state. These deposit caps were enacted in 1994, at the time Congress removed most of the barriers to interstate bank transactions, and were designed to serve as the general limit on the concentration of banking resources on both a nationwide and state-by-state basis.

Banks and thrifts are also subject to special anti-

tying restrictions. Congress adopted these special restrictions in 1970 out of concerns that banks and thrifts might use their ability to offer products, and in particular credit products, in a coercive manner to gain an unfair competitive advantage in markets for non-banking products and services, such as insurance products. Although the bank anti-tying rule is modeled on the anti-tying restrictions in the general antitrust laws, it has some unique characteristics. First, it contains an exception for certain types of tying arrangements involving traditional bank products. Second, the courts have held that unlike the general antitrust laws, the bank anti-tying rule may be violated even though the bank or thrift does not have economic power in the market of the customer's desired product and without a showing that the tying arrangement has actual anticompetitive effects.

I appreciate the opportunity to outline the competitive analysis of bank combinations performed by the Fed and look forward to your questions.

CHAIRPERSON GARZA: Thank you very much.

Commissioner Yarowsky?

VICE CHAIR YAROWSKY: Thank you very much. I want to thank all of you for your excellent testimony, including

your general observations, and also for distilling, in the case of a couple agencies, your procedures. I thought you did that very well in a very limited time frame.

We appreciate your testimony because we—I think I speak for everyone—view this as a very important area, the interface of antitrust, free-market principles safeguarded by antitrust, and regulation, because, historically, I think we are at a very interesting juncture. We have watched for 15 or 20 years a pattern of progress toward deregulation, not complete, so that the usual dialectic that we saw for many years in the 1900s of either comprehensive, pervasive regulation, versus no regulation safeguarded by the antitrust laws, have now been somewhat supplanted by either hybrid regulation or very particularized regulation, and so these questions have a new vitality, at least for us up here. But I also know, since we're sitting in a very venerable room of a very venerable committee, that this is of great interest to folks on the Hill, and we are going to be reporting to the Hill about some of our thoughts.

So, having said that, your testimony, I think, helps at least me pare down in my mind some of the areas that we have listed in terms of the questions that we might ask. I don't want to limit that for any other Commissioner, but I

am interested in three or four main areas.

What should be the role of antitrust, particularly in the areas of industries transitioning to deregulation? A lot of you have even phrased these the same way.

If there is no explicit antitrust exemption in the regulatory statute or regulatory scheme, should none be implied?

Three, if a regulatory scheme has a savings clause for the antitrust laws, either generally or very specifically, should that apply?

And four, should the expert antitrust agencies—Bruce represents one, but there's another—be deferred to when the issue is purely an antitrust issue, meaning there may be some other factors that go into the ultimate decision-making matrix that is granted to a particular agency, but let's say one or more of those factors has to do with a pure antitrust determination. Should some deference be given to the expert agencies, the Antitrust Division and the FTC?

Having said that, let's see if we can probe this further. Mr. Alvarez, I am just going to take a few examples from a couple different agencies, so you are not on the hot seat at all, but this may help us discuss this, because I hope we're not going to be territorial. I know you have to

defend the agency and your mandate, but what we're trying to do is just get some common ideas that might be useful to try to think through this.

Now, the Federal Reserve applies a public interest test for mergers, ultimately, which includes, as you described so well in your testimony, some parts that mirror the antitrust laws, particularly Section 2 of the Sherman Act and Section 7 of the Clayton Act. Now, for just those two parts—you have many other important determinations you have to funnel into your ultimate decision to approve a merger or not—but just for those two parts, shouldn't the analysis of the Fed be convergent with the DOJ if the ultimate public interest approval still lies with the Federal Reserve, at least as to those two areas?

So, when you come to a—whether something substantially lessens competition, though the phraseology may be slightly different, but the legislative intent seems to say the goal of the words in the Bank Holding Act, as amended, was to mirror Section 7, as well as Section 2 of the Sherman Act, when issues arise under those two sections of the antitrust laws, wouldn't it be convenient and useful if the analysis was somewhat convergent, not for the ultimate decision but just for those issues?

MR. ALVAREZ: Well, we do, in fact, work very closely with the Department of Justice to try to make sure that our analysis converges on the same result. There is, in the banking area, a concern that safety and soundness of banking organizations at some point may be more important than competitive effects. It's better to have one bank in a community than no banks in a community. So Congress has made the determination for a slightly different weighting.

I think, while there is a slightly different weighting, I do think it's only slight. I think the Federal Reserve, for example, looked at 649 mergers last year. We disagreed with the Department of Justice in exactly no circumstances last year. In fact, the only time that I know that we disagreed with the Department of Justice in my 25-year tenure was one time, 15 years ago. So we are applying the same standards.

I think we bring a particular expertise to the analysis, slightly different than the Department, because of our understanding of the workings of banks, the interaction of banks with the economy and with their community, that it is a specialized industry that has specialized regulatory effects, and the government guarantees standing behind the deposits, which heightens the financial and safety and

soundness aspects of review of those mergers.

VICE CHAIR YAROWSKY: Absolutely, in terms of the final determination. But I was interested in your testimony, again, not talking about solvency and other issues that you have the right to look at, redlining and the possibility for that. You mentioned that there was a slightly different efficiency analysis in a particular merger.

MR. ALVAREZ: Right.

VICE CHAIR YAROWSKY: Now, I just needed to understand a little better, though I do want to move the discussion along, why, if we are really talking about efficiencies, the economic analysis of that should be different even from a specialized banking perspective than—and I'll ask certainly you, Mr. McDonald, the same question—you don't have to opine on that particular merger, but why should that be different? If you pried apart the other public interest considerations, which DOJ is not going to look at, there's the pure efficiency economic analysis. Why wouldn't that be the same?

MR. ALVAREZ: I think that emerged from the fact that we're required to review every merger—

VICE CHAIR YAROWSKY: Right.

MR. ALVAREZ: —and the Department is not required to

review every merger. So they are able to pick and choose the submarkets, subproducts that they are most interested in, and the kinds of mergers they're most interested in and use their resources differently than we are, because we have to look at all of the mergers, and the data—we don't have the ability to compel third parties to provide us data in connection with our review of mergers, unlike the Department. So we're reliant on data that are generally available for all the market participants. That has led us to using deposits as a proxy for our competitive analysis into this cluster of banking services, which is a different approach than the Department has—

VICE CHAIR YAROWSKY: I see.

MR. ALVAREZ: So the Department focuses on small business lending. It often uses CIDs and other kinds of mechanisms that are within its authority to get particular data that we don't have access to.

VICE CHAIR YAROWSKY: I see.

MR. ALVAREZ: I think that's led to this—

VICE CHAIR YAROWSKY: Led to occasionally, not very often?

MR. ALVAREZ: It's led to different approaches, though not to the different results.

VICE CHAIR YAROWSKY: Bruce, let me ask you. Given that you're generally convergent, but in those situations, you do have a 30-day window to challenge a merger, I take it, after the Fed makes a final determination. Would it make sense--again, we're trying to think out of the box a little bit just in terms of public policy, not taking any agency as our brief or province to defend or exhort. Would it make sense for the Department to work out some arrangement to share information so that at least that part of the analysis would generally be convergent, because to me, that's more of a--if the agencies could get together, apart from the public interest factors that Mr. Alvarez and others will look at over there, it seems to me that one could get together with a sister or brother agency and work together on that.

MR. McDONALD: Mr. Vice Chairman, I agree with you in that last point especially. With the Federal Reserve in particular, the DOJ does share information and, in fact, we provide to the Fed a report on our views on specific mergers. We find this coordination to be very valuable. I assume that that is one of the reasons that our decisions are so harmonious.

Having the antitrust agency provide information to the regulatory agency, which makes the relevant decision, or

having the two share information, is one model that could be used to help ensure that the two agencies will reach similar conclusions.

VICE CHAIR YAROWSKY: Okay. I appreciate that.

Mr. Atkins, thanks for taking us through the current procedures that exist and the history. It's a fascinating history, the ICC and Surface Transportation Board. You make a very clear point that Congress revisited the way how things worked ten years ago and that they decided to explicitly exempt three areas from the antitrust laws: mergers—I'm not going to go into all the subdivisions of mergers—but mergers; certain pooling agreements and traffic agreements—let's call them; and certain collective agreements about setting rates and charges. So again, from a Congressional policy and drafting point of view, that seems very clear.

So once you set aside those areas that were clearly set out by Congress, I take it the antitrust laws apply generally to those areas that aren't specific?

MR. ATKINS: That's correct.

VICE CHAIR YAROWSKY: Okay. That's the policy for the regulatory regime that Mr. Atkins helps administer. For the rest of the panelists, and I'll start with you, Rob,

because we've kind of been moving from left to right, we'll start from right to left, do you think that's the right result? If it's not explicitly exempted by Congress, should the antitrust laws apply in regulatory schemes that may be very partial, free market principles may preside in some parts of the industry, other times as regulation—if not explicitly preempted, should the antitrust laws apply?

MR. MCKENNA: Yes, we think they should. We're not a big fan of implied immunities at the state level, as you can imagine, and clarity is better. We cite an example in our written testimony regarding the clarity in Washington state law regarding the regulative authority and the antitrust authority. When you have, for example, purely intrastate telecommunications, the authority to regulate is granted to the Washington Utilities and Transportation Commission, and expressly, there's no antitrust authority. But if the WUTC subsequently declares a business or portion of that business to be competitive, then the state antitrust laws kick in. Another example could be drawn from the comparison of the Telecommunications Act of '96 and the Federal Power Act. The former contains a saving clause and the latter doesn't and we think that the former is a better approach.

VICE CHAIR YAROWSKY: Bruce?

MR. McDONALD: I agree in principle that where Congress has not explicitly exempted some particular activity, leaving it solely up to the regulatory agency, or where antitrust immunity is not clearly implied, then antitrust should have full reign.

MR. ATKINS: Let me just elaborate, too, because when you asked if the general antitrust laws applied to conduct that's not expressly approved, the answer is, of course, yes, the railroads have found themselves subject to liability for a range of types of conduct. There are circumstances, however, where you could see conflict arising between the antitrust laws and the general regulatory powers of the federal agency, particularly with regard to types of conduct that's required by the regulatory agency. It's difficult to imagine that it could also result in a violation of the Sherman Act.

One such example, particularly in other industries, is the conflict between the filed-rate doctrine and the general antitrust laws, where you've got a document that says you have to publish your filed rates and you have to adhere to them and they have to be public, to then say that that conduct can then also constitute the basis for an antitrust

violation would leave that regulated entity between a rock and a hard place.

VICE CHAIR YAROWSKY: So you're helping to flesh this out. You're saying where something's required is an area we need to consider apart from the specific?

MR. ATKINS: Well, that's certainly one illustration. I guess the next question would be is what about a type of conduct where the Congress has seemingly tasked the responsibility to a regulated entity for deciding what should or should not be permissible. One example in our industry would be open access to terminal areas. We have a statutory provision that governs when a railroad is required to grant access. The agency has promulgated rules governing when that is required. In that circumstance, I don't know if the antitrust laws should also place another set of requirements on the railroads for when, under maybe the bottleneck doctrine or *Aspen Skiing* or something like that, where they may be required to provide access--notwithstanding that they wouldn't be required to under the existing regulatory regime.

VICE CHAIR YAROWSKY: This is very helpful, but let's say an agency under some clear or somewhat ambiguous mandate from Congress fails to do that, so it doesn't really

assert regulation, so there's neither regulation at the moment or in the foreseeable future, or, conceivably, antitrust. I mean, that could be a very difficult situation if you have the absence of both regulatory oversight and the absence of the application of antitrust laws. We have to thread through all of these things just as a general proposition.

Mr. Alvarez?

MR. ALVAREZ: No, I agree with what the other panelists have said. There are two examples in the banking area, one express and one implicit, I'd bring up. When a bank holding company, which is a company that already controls one bank, wants to buy a second bank, the law specifically provides that the state antitrust laws are preserved. So there was uncertainty about that up until the mid-'90s, when Congress clarified it.

But another area where it hasn't been clarified but where the Department and the FTC have asserted their jurisdiction, I believe appropriately, is in the acquisition of non-banking activities by bank holding companies.

VICE CHAIR YAROWSKY: Right.

MR. ALVAREZ: There is a review process at the federal level, that the Board has to apply an antitrust

standard as part of a general balancing test for non-bank acquisitions, and there's a partial exemption from the filing requirements in the Hart-Scott-Rodino Act. Nonetheless, the Department and the FTC have worked out arrangements to review those, applying the full antitrust standards, and the Board has always supported that.

VICE CHAIR YAROWSKY: Let's turn to the savings clause, because a lot of what we might recommend is really about statutory instruction in drafting. In the absence of a savings clause, should regulatory regimes that regulate some, let's say, but not all conduct of a particular industry, be read to create an implied preemption? There's no savings clause, but let's say we have an agency—no savings clause, an agency that regulates some but not all—not a pervasive regulatory scheme—of an industry's conduct. Should we read an implied preemption in that case? I mean, you can just throw them off.

MR. McKENNA: Right. I agree with that, as well. Yes, absolutely. And when we talk about things like the filed-rate doctrine, that's well established, right? But when you consider what happened under the Federal Power Act when FERC went to market-based full-sale tariffs for electric energy and really didn't pay enough attention to market power

by some of the players, we were left under the filed-rate doctrine without—adequate, or any, federal antitrust enforcement. Only FERC was regulating and was fairly late getting into it, frankly. It was the state antitrust enforcement which really came into play there and was effective at providing restitution for consumers. So no, you shouldn't imply immunity.

You're zeroing in on a point you made in your opening remarks, Commissioner, about how we're in a different world now and we have these hybrid forms of regulation and we have markets, or I should say, well, we have markets, we have industries that are transitioning from being more heavily regulated to less heavily regulated. At some point in the crossover, there need to be complementary, seamless authority for antitrust and regulators together.

VICE CHAIR YAROWSKY: Bruce?

MR. McDONALD: It would be, I think, a serious mistake to infer antitrust immunity from the absence of a savings clause. And as for the antitrust principles that ought to apply in an industry that is deregulating, I think that the current judicial doctrines have it right. The implied immunity doctrine continues to be fairly stingy, and the case, *Billing v. Credit Suisse*, that I cited in my

prepared statement, makes a very comprehensive review of implied immunity in the securities area. I think it takes the right approach.

MR. ATKINS: I want to ask a question. By savings provision, did you mean a provision—

VICE CHAIR YAROWSKY: Savings clause.

MR. ATKINS: Savings clause—that the antitrust laws still apply?

VICE CHAIR YAROWSKY: Still apply.

MR. ATKINS: But not—I'd have to answer your question by asking another question, which is, what was left regulated and what was left unregulated, because in my industry, for example, the Board no longer regulates safety of the railroads. Now, that's still regulated, it's just done by somebody else. But if you've got an agency that's regulating rates, entry, exit, service, you can see that what's left off the table could influence whether or not you thought the antitrust laws should apply. And I also think it's a question of which antitrust laws apply. Is it broad field preemption? I don't think anyone has ever thought that you'd see sort of broad-based exemptions just because it happens to be regulated, but a particular doctrine may no longer be applicable in a particular regulatory regime.

MR. ALVAREZ: I think it depends also on the context of the regulatory scheme. I know in the banking area, while the banking agencies feel very expert in looking at the antitrust aspects as they apply to the bank or the thrift itself, as Congress has amended the law to allow broader and broader affiliation, so banks can affiliate with securities firms and insurance companies and other financial firms, we're now dealing with situations that are outside our areas of expertise. And so absent a direction by Congress that we should devote the resources to becoming expert in how to analyze the antitrust aspects of mergers of insurance companies, we would just as soon leave that to the Department of Justice who does understand that better.

CHAIRPERSON GARZA: Thank you. It seems that everyone, or most of the witnesses agree that the hard case is where an industry is in transition from regulation or, in the case of the tariffing, where there are market-based tariffs that are filed. The question I have is it's not clear to me where people are coming from. Do, to each of the panelists, do you think that current judicial doctrine is sufficiently handling the question of when and where the antitrust laws apply and don't, or do you think that there is some need for legislative clarification? I start with

General McKenna.

MR. MCKENNA: Thank you very much, Madam Chair. I will always favor greater clarity on the legislative side. As I mentioned, in Washington State, it's very clear and it would be better if it were clearer in more federal laws than it is currently.

CHAIRPERSON GARZA: Can you explain a little bit further, what kind of legislative clarification would you be looking for?

MR. MCKENNA: Well, I would be looking for clarification which states, effectively, where the boundary is between the regulator's role and antitrust role. Where, for example, we have telecommunications regulation in Washington state and the WUTC maintains jurisdiction because it's not a competitive market, prices are set by rates and terms and conditions of service might be set by Commission order, as well, the law clearly says no antitrust enforcement. But when the regulator decides, the regulating agency decides that the markets become competitive or they're going to transition into a competitive market, then the law automatically provides for antitrust enforcement to kick in. We're not there yet with intrastate telecommunications in Washington State, but we may very well

be headed there. In fact, I believe we are, and there will come a time when the regulators at the WUTC state we're now competitive or we're competitive enough and antitrust enforcement will kick in.

So I think what this approach requires is careful thought given to the role of the regulators and to what they're regulating and what they're going to cover, and then to some sort of decision-making authority, either their own or through a consultative process with antitrust authorities.

In the case that I cited regarding the Federal Energy Regulatory Commission, in the absence of a saving clause under the Federal Power Act, we had the problem that we saw with market-based tariffs without adequate consideration being given to market power and it didn't work very well, frankly. The FERC was not exercising adequate oversight under its jurisdiction, but federal antitrust enforcement seemed to be effectively preempted at the same time. It didn't happen at the state level with state authorities, but it clearly happened at the federal level. There's something about that market where they were trying to transition to a more competitive model for wholesale electric energy, but they didn't do an adequate job of defining where their regulatory powers stopped and where antitrust would

kick in.

CHAIRPERSON GARZA: Actually, I'm a little bit uncertain about, in the case of the Washington state's electricity crisis, you mentioned that what the states were concerned about is market manipulation.

MR. McKENNA: Yes.

CHAIRPERSON GARZA: Is it your position that the conduct that amounted to the market manipulation would separately have violated the antitrust laws?

MR. McKENNA: I think under state antitrust laws, yes. I'm not sure about federal antitrust laws because I'm not enough of an expert in federal antitrust law, but—

CHAIRPERSON GARZA: This is in California, the Cartwright Act? Or was it the Washington state—

MR. McKENNA: Under law—I only know about our state's laws, but we believe that there were—the market manipulation we saw would rise to the level of antitrust violations.

CHAIRPERSON GARZA: Okay. So your focus, then, was on the market manipulation. It wasn't on whether the rates were just and reasonable—

MR. McKENNA: Correct.

CHAIRPERSON GARZA: And it wasn't on the question

of challenging the agencies' determination that market power didn't exist?

MR. McKENNA: That's correct. Not much had changed in the marketplace in terms of generation assets, demand, transmission, and so forth, and yet the market became extremely volatile when California partially deregulated, FERC moved to market-based wholesale tariffs, and all of a sudden, we saw this extreme volatility that had not been present before which was very puzzling, and some of it was caused, we believe, by market manipulation by Enron. In fact, some other power marketers were adjudicated—well, we ended up settling with them, but they would have been found liable.

CHAIRPERSON GARZA: While I'm still in the orange zone, do any of the other witnesses have a response to the question, whether the current judicial doctrine on implied immunity is sufficient or whether there needs to be a legislative change, or any comments on General McKenna's response?

MR. ALVAREZ: In the banking area, the division of labor and the standards that apply are pretty clearly stated in the statutes already, so I don't think we would look for any change there other than perhaps some streamlining. We've

recommended several streamlining provisions that make it easier to manage the communication between the Department of Justice and the banking agencies, but we actually are thankful for the clarity in the statute now.

CHAIRPERSON GARZA: Mr. Atkins or Mr. McDonald?

MR. ATKINS: I don't think my agency sees a need for a legislative change. My understanding is that the Supreme Court has laid down some good general principles regarding looking for conflict and then the courts apply that on a case-by-case basis, which I think is probably the best result.

CHAIRPERSON GARZA: Mr. McDonald?

MR. McDONALD: As I have earlier expressed my view, the implied immunity doctrine is appropriately stingy these days in federal courts.

CHAIRPERSON GARZA: Thank you. Who's next on the list—Commissioner Valentine?

COMMISSIONER VALENTINE: Good afternoon, and thank you for your testimony. I think I'm going to ask an impossible question for most of you to answer, but I'd like for you to take off your current federal agency hats and simply think about if you were writing on a blank slate, and it goes back to, I think, Mr. Yarowsky's third and fourth

question, which I don't think he got to.

One of the panelists that we'll hear from later this afternoon, Mr. Furchtgott-Roth, has suggested that something that, in fact, Michael Porter has both recommended for Australia and New Zealand, and Australia and New Zealand have followed this suggestion, which is that whenever there is an industry-specific regulatory agency, like FERC, like the Fed, like the STB, like the FCC, they should refer—they should have all—in the merger context—antitrust issues, analyzed by the competition agency, by the antitrust enforcer, and defer to that agency judgment on antitrust or competition issues. And then with respect to any remaining—all the remaining issues with respect to which you have jurisdiction, whether it be the banking safety and soundness, transportation safety, uniformed service, diversity issues at FCC, whatever, that those would be the proper province of the specific agency-specific regulatory agency.

Why wouldn't that be a much more ideal and rational scheme? Just start right and go left. I know you're all going to want to jump up for this one.

MR. ALVAREZ: Well, it is certainly the most intuitively obvious scheme and I think there's a lot of merit in that approach. It, in my mind, begs the question of how

then you weigh the competitive analysis against the other factors that are considered in reviewing a transaction. For example, in the banking area, if we were to defer to the Department of Justice on the competitive analysis and they were to make a recommendation, the question then remains can the competitive analysis be outweighed by the financial aspects that another agency would do, or the managerial resources, or the view of the insurance fund on how to deal with the deposit insurance.

COMMISSIONER VALENTINE: And I might be willing to have your various public interest areas trump, but I didn't want to quite get to that yet, but that's a very fair question.

MR. ALVAREZ: I think that becomes, then, the key part to the question. The competitive analysis itself viewed strictly as a competitive analysis could easily be done by a single expert agency. Then you have to figure out the weighing from there.

MR. ATKINS: I think another thing to ponder would be who's going to do the critical review of the antitrust agency's analysis. If our agency, for example, were required to simply adopt the DOJ's recommendation, that gets a very deferential standard of review at the court of appeals level,

and so it would, in effect, just default to the Department of Justice without any sort of independent decision maker looking carefully and requiring them to sort of make their case, which is what is required at the district court level and which is, frankly, what's required at our agency, where they submit their evidence and if it's persuasive, the agency adopts it. And when it's unpersuasive or somebody comes up with an alternative view, the agency will balance the evidence before it.

COMMISSIONER VALENTINE: It certainly would still be thought out, either before an agency adjudicator or in court, but okay. Mr. McDonald?

MR. McDONALD: Commissioner Valentine, that's another model in contrast to the model we use today, or the models we use today, and the other suggestion that some of the commenters made, which is that all competition authority should be allocated to the competition agencies. Mr. Atkins and Mr. Alvarez raised some of the "devil in the details" problems with the sort of halfway solution, which raised interesting points.

From the perspective of the antitrust agencies, I think that we'd be confident that if competition authority solely belonged to the competition agencies in these

regulated industries, that they would be able to develop the expertise, if they don't have it already, and bring their competition expertise to bear to effectively enforce the antitrust laws in those new industries, as well.

COMMISSIONER VALENTINE: Actually--well, my time is almost up, but Mr. McKenna, rather than expressing a federal interagency issue, maybe if you could clarify what exactly you meant when you said that you think that legislation that clarifies the roles of the regulator and the enforcer and expressly provides for antitrust enforcement where market forces are to replace regulation as a primary force keeping competitors--resolve this problem and/or when you were recommending legislation, Congressional clarification, the scope and limits of the filed-rate doctrine, these are lovely ideas, but how do we--we don't really want to just have Congress write this. We'd like to suggest something, if possible.

MR. MCKENNA: Right. Absolutely. We'd be happy to provide additional testimony to you that can provide more specificity beyond the general principles that we articulated in the written testimony. But as I mentioned earlier, with respect to the filed-rate doctrine and the need for greater clarity there, we already have experienced what happens when

there's reliance on the filed-rate doctrine to escape antitrust scrutiny even though you're talking about market-based wholesale rates. If they're market-based, there should be some role for antitrust to assure that the market is a competitive market. If they are not market-based, if they are filed rates or tariffs that are determined by the regulatory authority, then the filed-rate doctrine, filed-tariffs doctrine should kick in and you should not have antitrust enforcement.

COMMISSIONER VALENTINE: Mr. McKenna, I agree with you.

CHAIRPERSON GARZA: Commissioner Cannon?

COMMISSIONER CANNON: Thank you, and thanks again for the panel for coming on what might be a bad day. Who knows at this point. We'll see.

Mr. McDonald, let me follow up, if I can, on your remark about—essentially that the court should be stingy in awarding or saying that implied immunity is appropriate. I mean, the Congress in a federal statute has a kind of an easy thing to do. Either they have express exemption from the antitrust laws, or a savings clause that says the antitrust laws apply, and then, of course, there's implied immunity, which to me has seemed pretty clear. Of course, the courts

have, in fact, said they have been very stingy in saying that they will imply immunity.

And then I read *Trinko*, which I don't think we've really talked about yet, which you knew would come up at this hearing, I'm sure, and we have these comments by Justice Scalia. I think it's *dicta*, I don't think it's part of the holding, but essentially, he says something to the effect that in a situation where a regulatory scheme has the ability to both deter or to root out and then deter or to address anticompetitive conduct, that in fact, that weighs against the application of the antitrust laws and vice versa.

So how do you read that? How do you square it with what we all believe, I think, is the case, that implied immunity is generally not a good idea?

MR. McDONALD: Thank you, Commissioner Cannon. Justice Scalia's comments, I think, can't be read as anything but *dicta* as regards the implied immunity jurisprudence. The Telecommunications Act of 1996 has a savings clause; therefore, implied immunity was not possible. However, in that opinion Justice Scalia also evaluated whether the scope of Sherman Act Section 2 should be extended, creating a new exception beyond the one created by *Aspen Skiing*. Justice Scalia evaluated that question in light of the existing

regulatory scheme, which does handle some of the competition function, paraphrasing the opinion.

That analysis is not inconsistent with implied immunity jurisprudence but just doesn't relate to it. It is consistent with the jurisprudence that the antitrust laws should take into account the regulatory scheme in determining whether there is an antitrust violation. I think that, if a court is evaluating whether to extend the scope of antitrust liability, that comes into play even more so.

COMMISSIONER CANNON: Great. Thanks. General McKenna, do you have any comment on that, or—

MR. MCKENNA: I do. Thank you, Commissioner Cannon.

COMMISSIONER CANNON: —and Mr. Alvarez and Mr. Atkins, it would be interesting to hear from you also.

MR. MCKENNA: Very good. Thank you again, Commissioner. I agree with Mr. McDonald that Justice Scalia's analysis of the savings clause in the Telecommunications Act does not create an immunity. It's an analysis of the clause, but as extensive as it is, it does not give rise to some new implied immunity.

COMMISSIONER CANNON: Great. Mr. Alvarez?

MR. ALVAREZ: In the one area where that is relevant in the banking world, as I mentioned earlier, when a bank holding company is beginning to affiliate with non-banking institutions, there is a dual review by the Federal Reserve of some of the competitive standards and also a review by the Department of Justice. While we regulate that part of an organization, we've never asserted an implied immunity from the antitrust laws and never sought to do that. It seems appropriate that the Department, absent a direction by Congress that we have exclusive authority, it's appropriate for the Department of Justice to be involved.

MR. ATKINS: Although we haven't really studied that decision out of my agency as it doesn't have a lot of relevance to regulating the railroads, in reading it, it is rather intuitive, the basic proposition that if you've got regulation in place, the added value of the antitrust laws is diminished. And whether or not that principle will be cited outside of the context of that case and perhaps in some implied immunities, I don't know.

COMMISSIONER CANNON: I think actually the question was if the regulatory scheme itself was focused at trying to prevent anticompetitive activity versus other areas of regulation, so your answer would still be the same, I

presume?

MR. ATKINS: Yes.

COMMISSIONER CANNON: General, one question. I understand you had a bad experience with the energy issue out in California, but I assume your office—or what has been the experience of your office in dealing with other federal regulatory agencies and mergers, et cetera? I don't know whether it's telecommunications or other areas.

MR. McKENNA: We could certainly cite to the example of recent telecommunication mergers. Our office has been involved through its Public Counsel Section, for example, in looking at the Verizon-MCI merger and the AT&T-SBC merger, and to my knowledge, that has been—our relationship with the federal government has been perfectly satisfactory in those cases. We have been able to take a look at the issues affecting consumers in Washington state from those mergers, to weigh in with the WUTC, and it's been just fine.

Similarly, I believe that the WUTC staff and the attorneys in my office who advise the staff have been satisfied with respect to the FCC, at least to the extent that no concerns have been raised to my attention that I can report to you.

COMMISSIONER CANNON: My time is up.

CHAIRPERSON GARZA: Thank you. Commissioner Kempf?

COMMISSIONER KEMPF: Yes. Mr. Alvarez, I had a couple questions for you. Through your testimony, you referred to a test of ten percent of all assets. If you could articulate that, and I am going to follow up with a couple questions.

MR. ALVAREZ: Absolutely. In the banking laws, we are prohibited from approving a transaction if the result would cause the applicant to control depository institutions that would have more than ten percent of all the deposits held by insured depository institutions in the United States.

COMMISSIONER KEMPF: If I take three big banks, Citi, Chase, and B of A, what is their range of stand-alone stuff right now?

MR. ALVAREZ: We're actually reviewing an application currently by Bank of America to buy MBNA, which is a large credit card company. Bank of America is near the ten percent cap and one of the questions that we'll be sorting out in the next couple of weeks is whether they are above or below that cap as a result of the transaction. The other institutions are more in the six to seven percent range. Bank of America is the only one that's close to the

top.

COMMISSIONER KEMPF: In the MBNA case, are there also issues of how do you count certain things?

MR. ALVAREZ: There's always an issue of how you count certain things, but yes, one of the questions there is whether our traditional approach of looking at the cluster of banking services, which is based on deposits, is the right approach when one of the institutions is a bank and the other is largely a credit card institution that doesn't collect deposits but rather is a consumer lending institution. So we're looking at the appropriate approach to competitive analysis.

COMMISSIONER KEMPF: Is that currently an unresolved issue?

MR. ALVAREZ: It is currently an unresolved issue. It's an application that is pending in front of us right now.

COMMISSIONER KEMPF: Now let me go to the other question. Why do you use the ten-percent test, and when I say you—

MR. ALVAREZ: It's statutorily required. We have no choice.

COMMISSIONER KEMPF: I understand that. Is there legislative history that explains why there's a ten-percent

test?

MR. ALVAREZ: There was general concern about concentration of banking resources in the United States at the time the interstate—the cap came into being at a time when banks were largely confined to single states and Congress removed the barriers for interstate acquisitions. At that point, there was no institution that was above one percent of the deposits in the United States. But Congress expected that as the interstate statutes were repealed, there would be a lot of consolidation among the industry and they thought—

COMMISSIONER KEMPF: And what's the date of that legislation?

MR. ALVAREZ: 1994.

COMMISSIONER KEMPF: The ten-percent cap comes about in '94?

MR. ALVAREZ: Right.

COMMISSIONER KEMPF: The question I am driving at is if two widget companies were to merge and each had five percent, you'd end up with ten percent of widget production. That would probably not even get a second request, and I use widgets as a proxy for all industries. My question is, should we urge Congress to take a fresh look at whether the

ten-percent cap makes sense or not?

MR. ALVAREZ: And that's an excellent question. It is very different than the analysis we do of the actual competitive effects of a transaction in the local markets, where we found the real price fixing ability exists. In a local market, we would be willing to accept something more like 30 or 35 or 40 percent, depending on what the other market structure factors are. So ten percent is a much smaller number than we are used to dealing with in the actual competitive analysis, and I think it was really less based on fear of competition and more concern about dominance of the banking industry and having financial resources be so concentrated in a single entity it might be overwhelming to the Federal Deposit Insurance Fund or might limit access to credit for the largest borrowers or might have other dominant—other risks to the financial system generally that are apart from competition strictly.

COMMISSIONER KEMPF: That's all I have.

CHAIRPERSON GARZA: Thank you.

Commissioner Carlton?

COMMISSIONER CARLTON: I have a few questions. One of the concerns with regulatory agencies is that studies of regulatory agencies have shown, that over time, sometimes

they can get captured by one interest group or another. It seems to me one of the benefits of having, say the Department of Justice review mergers with their specialists in mergers, is that even if the regulatory agency retains overall decision making authority based on a larger public interest standard, which may not be in my public interest, someone else's perhaps, it seems to make transparent what's going on, and when things are made transparent, it will make it clear what the costs of these other public interest goals are.

I'm just wondering, is there anything to be lost if the Department of Justice, say, was to have the sole voice on defining the competitive harms that come from a merger? I'd be curious, and maybe start with Mr. McDonald on the Department of Justice and then get the views of the regulatory agencies.

MR. McDONALD: Commissioner Carlton, I don't have a view on a specific legislative proposal, but I think it is valuable to view the evidence of the costs of having multiple review of mergers or other activities that may affect competition. In the last administration, the Department of Justice formed the International Competition Policy Advisory Committee—formed of persons from inside and outside the Department—to evaluate a variety of questions. One of the

questions they took up was the specific one you asked about, the allocation of competition authority between regulatory agencies and the antitrust agencies.

Among the costs of having multiple review is the uncertainty of having more than one standard, more than one agency applying a competition standard, where the agencies actually are free to reach different results. There's uncertainty as to timing. There's inefficiency and cost to defend transaction against review by multiple agencies. The Committee also suggested that there's a risk that the agency will get the decision wrong when operating in a field in which the other agency actually has the expertise. I think those ought to be considered in any proposal to reallocate competition authority between regulatory agencies and antitrust agencies.

As to the cost of not moving them, I really don't have anything to suggest.

COMMISSIONER CARLTON: Mr. Atkins?

MR. ATKINS: It's a difficult question to say what would be lost. I can think of anecdotal evidence with what might be lost in our industry, and that comes back to one of the more contentious mergers in our industry recently, which was the Union Pacific-Southern Pacific merger. In that

merger, the Department of Justice challenged it, believed it should be blocked based on its merger analysis and it didn't believe the SP was failing. It didn't believe that the merger benefits were merger related. And it didn't believe the trackage rights would be an appropriate remedy and advocated the complete divestiture of the Southern Pacific lines at issue.

The agency didn't agree with them. Subsequent analysis has demonstrated that the agency was probably right. And in the interim period, Union Pacific has poured billions of dollars of investment into the Southern Pacific Railroad, basically keeping it from going under. And in our industry, if one railway goes under, it can have a ripple effect throughout the whole network of not just Southern Pacific or the Union Pacific, but also the eastern railroads and the like.

So it was the technical expertise of this agency looking at that merger that led them to a contrary result. That might be lost if they had to give controlling recommendation to the Justice's views on all mergers.

COMMISSIONER CARLTON: Mr. Alvarez?

MR. ALVAREZ: Yes, actually, to start with transparency, where you began, I think that transparency is

actually facilitated by having the arrangement that we have now, because we've been able to build off of the Department of Justice guidelines on how they approach mergers generally and provide very specific guidance on how it applies in the banking area. We've had a long and consistent, over time, approach to evaluating the competitive effects of mergers. So there is a benefit to having an expert agency translate those guidelines into the actual industry-specific approach.

COMMISSIONER CARLTON: And then a quick question for Attorney General McKenna. You, in your remarks, explained how state antitrust laws were useful for you to deal with in Washington state with the energy crisis. Why do you think there was a failure of the federal antitrust laws to handle the problem?

MR. MCKENNA: I actually don't know why the federal antitrust enforcers didn't step in. Certainly, it was effective when the state stepped in. We've done a number of settlements with companies, El Paso, for example, Williams, and others, that have resulted in restitution to consumers of wholesale customers and through cy pres funds, retail customers, as well. So I'm not sure why they didn't step in at that point. I don't know if it was because of the statutes, the way the federal laws are written, or if there

was some other factor at play.

MR. McDONALD: Madam Chairman, I had a comment—

CHAIRPERSON GARZA: Go ahead.

MR. McDONALD: On the merger of SP and UP, Mr. Atkins and I may have to agree to disagree on whether, at the time the merger was reviewed, it would have been appropriate to allow it or block it. The two studies that you mentioned are cited in his prepared remarks. A quick review of those studies implies that they do not actually support the contention that the outcome of the merger was procompetitive as opposed to anticompetitive. There are two other studies—also not completely comprehensive—but they reached the opposite conclusion. It probably doesn't make a big difference to the overall question whether this Commission takes the view that competition authority ought to be allocated to the competition agencies or to the regulatory agencies, but I thought that I ought to be on the record on that.

MR. McKENNA: Madam Chair, if I can just supplement my answer—

CHAIRPERSON GARZA: Go ahead.

MR. McKENNA: —I should point out what I think we've already talked about, which is that the Federal Power Act

does not contain a savings clause the way the Telecom Act does. So certainly the absence of such a clause in the Federal Power Act might have played an important role in the absence of federal antitrust enforcement.

CHAIRPERSON GARZA: I was going to say, we may have a little bit of time for additional questions. Commissioner Kempf, do you have a--can I just find out what other Commissioners might have questions? We'll do another round. Go ahead.

COMMISSIONER KEMPF: Just a quick follow-up on the four competing studies that say, hey this is great or this is a disaster. Were those who said it was great those who favor the merger and those who say it's a disaster those who oppose the merger? Are they partisan studies?

MR. McDONALD: I think none of the four studies should be considered partisan.

COMMISSIONER KEMPF: They reached an even break?

MR. McDONALD: Yes, but again, none of the studies was comprehensive. Two studies are cited in the STB testimony, one focused specifically on certain efficiencies and the other focused specifically on the effects of shippers in one particular part of the country, Salt Lake City in particular, which was not the area in which post-merger there

were serious operational problems. So my view is that the two studies cited by the STB certainly don't support the view that the merger definitely did not lessen competition.

COMMISSIONER KEMPF: Broadly speaking?

MR. McDONALD: Correct.

COMMISSIONER KEMPF: How about the other two? Can you offer a quick comment on what they particularly focused on?

MR. McDONALD: The other two, one focused on price trends, rate trends in the industry, noting that while, over time, rates have declined, the most recent, if I have this correct, the most recent survey of rates indicates that rates are not as favorable as they had been during some of the last number of years. And the last study focused on the operational difficulties that followed from the merger.

COMMISSIONER KEMPF: Mr. Atkins, are you looking to-

MR. ATKINS: I don't want to debate the UP-SP merger. A couple of things you might be interested in, though, is that unlike most mergers, the STB has a lengthy oversight process, and during that oversight process, the parties are required to submit substantial evidence on their pricing practices and basically their whole traffic tapes.

Those are turned over to Justice and all interested parties. In the five years following the UP-SP merger, nobody indicated any anticompetitive harm as a result of that merger or brought that to the agency's attention.

The fact that there was some service-related issues associated with the UP-SP merger, which is one of the reasons the agency has new guidelines in place to regulate major Class 1 railroads. I don't think anybody at the time anticipated the service-related issues of the Union Pacific-Southern Pacific merger. That wasn't really part of the merger process.

COMMISSIONER KEMPF: On the first study-

MR. ATKINS: Rate trends increasing?

COMMISSIONER KEMPF: Rate trends.

MR. ATKINS: There's no question, in the last year or so, the railroad industry has experienced a massive surge in demand for its transportation services and that has corresponded to an increase in rates. I don't know exactly how much, but it's been fairly widely recognized and that that demand increase is expected to continue into the future.

COMMISSIONER KEMPF: I think the answer anticipates my next question. Let's make sure we're on the same track. I don't view a rate increase as a sign of anticompetitive

necessarily. It could be, but it could be a reflection of a change in the demand-supply thing, and I take it what you're saying is with respect to that what I'll call third study, before we place any reliance on it, we'll have to look, as well, to the demand-supply equation?

MR. ATKINS: Yes, and once you get further away from the time of the merger, of course, it becomes much more difficult to determine what you can draw back to the merger and what you can account for just changes in the marketplace.

CHAIRPERSON GARZA: Commissioner Yarowsky, did you have any additional—

VICE CHAIR YAROWSKY: Just a few points to follow up. Thanks again for all your input, really. Four things, so why don't I just say what they are and we'll see what we can get answered.

One, I didn't have time to ask you, Mr. Alvarez, about Section 106. You did treat the other issue that Commissioner Kempf went over about the ten percent rule, but we do have kind of a more specialized time requirement in the bank statute, so I'd like to hear your view about the current usefulness of that in a more deregulated industry. A lot has happened, especially since Congress has acted. I don't know if the effects of the Gramm-Leach-Bliley Act have started

spreading quickly or not, but one would raise the question about whether, in the spirit of deregulation, that specialized time provision is useful or not.

Second, let's look at—and this is to everybody—let's look at having two different antitrust determinations of the same issue looked at by the court, not just looked at by us now as people trying to think about public policy or view as public policy. Let's say in the Bank Holding Act scenario, but we don't have to limit it to that, using that, that in the 30-day window, let's say Justice and the Fed really kind of disagree on the competitive analysis using the same basic Section 7—looking at competitive effects. Justice uses its right in the 30-day window to go file.

Okay. You're before the federal district court judge. Obviously, the whole record comes in, so I would assume the federal judge would see your analysis in some way or the other. You'll file something to explain it. You will probably file something, as well, to explain why you might differ there. I mean, you'll talk about the public interest factors, but that doesn't really involve the DOJ or your ultimate balancing decision. You're the ultimate balancer. That's not really for the DOJ to second-guess how you balance that. But just on the narrow issue of the competitive

analysis, here's a federal judge and he sees the expert agency with this analysis of efficiency and he sees the Fed, and that's no disrespect, coming in with a different analysis. What does that do to a federal judge just on that issue?

COMMISSIONER KEMPF: Just to make sure that I understand the question, I had thought that the role that the DOJ played was an expert advisory role to whatever agency it is and not a freestanding one that they could go in on their own motion and challenge.

MR. McDONALD: Both.

VICE CHAIR YAROWSKY: At different stages. At different stages, they--tell me if I'm right.

COMMISSIONER KEMPF: I'm asking it as a question.

CHAIRPERSON GARZA: Can you just for a quick second, Mr. Alvarez, can you just clarify what the role of the DOJ is in transactions before your agency?

MR. ALVAREZ: It is, as Mr. McDonald mentioned, that there is an advisory role during the application process. Then following the approval by the banking agency, the Department of Justice has 30 days in which to initiate court action if the Department decides that's appropriate.

COMMISSIONER KEMPF: Thank you.

VICE CHAIR YAROWSKY: So the question stands. I mean, how does that look to a federal judge who gets the entire record before him or her? The 106, how does it look to a federal judge?

Third, and Bruce, I'm interested in this, as we've talked about the transition to—the regulated industries to move into deregulated status, has the DOJ or the FTC thought about issuing some guidelines that might help this review, might help us, but it probably won't have time to do that, but it might help Congress, as well? Just a question there.

Lastly—I'm watching that light—should Congress readdress the balance in terms of making more explicit savings clauses, the absence of savings clauses, specific savings clauses, general savings clauses, so that at least in a number of key regulatory statutes, there is a real understanding about how the antitrust laws apply or don't apply? It would be a major effort, but it could be an important one.

Anyway, those are the four issues. If we don't have enough time, you can supplement the record with your responses.

MR. McKENNA: I agree that explicit is better and these are problems that have to be worked out in advance and

they require hard work, as Commissioner Valentine suggested. It's not easy to write into the law where the dividing line is, but where you can't write it into the statute, it seems to me that antitrust enforcement authority and regulatory authority could be cause to require to work together and look for opportunities to be more collaborative. Maybe that could be a requirement for them, in other words, be more directive to them as opposed to hoping that they might do it.

MR. McDONALD: In a deregulating period—a period that, I think, ought to be as quick as possible in whatever industry—if Congress thinks that economic regulation should be retained for a period of time, we would have to assume that it would do so explicitly. And were it to not do so, antitrust enforcement moves in to fill the vacuum. Then, where a district court is faced with multiple views of competitive effect of a merger or other conduct, we would hope that the district court would respect the views of the competition agencies, as we hope that our sister regulatory agencies do.

In general, the antitrust agencies could be relied on to evaluate competition and enforce the antitrust laws in newly-deregulated industries, just as they do in industries that have been deregulated or were never regulated across the

economy—airlines, pharmaceuticals, health care, steel, et cetera.

The savings clause question is a tricky one for Congress, given the many different ways in which legislation actually gets drafted. I'd want to ensure that the absence of a savings clause did not lead to an inference of implied immunity.

MR. ATKINS: My agency's job is to carry out the commandments of Congress, and so to the extent Congress can make those commands more clear, I think that's a general benefit to the agency. In our field, I think the commandments are relatively clear, but if they're less in other fields, I imagine that would be a positive to the extent it actually made things clearer and didn't make them more complicated.

MR. ALVAREZ: I think to start with, the first question on Section 106, the special anti-tying rules really are something we're watching closely now that the Gramm-Leach-Bliley Act has allowed broader expansion. In a way, the special rules tend to undermine what Congress was trying to achieve with Gramm-Leach-Bliley by allowing the broader provision of banking products and services and other financial services. It does so because it doesn't—not only

does it prohibit tying the availability of services, but it also prohibits price adjustments. So the efficiencies that could be gained by affiliation are in some way lost by having the special anti-tying rules. They are more rational under the antitrust standards where market power is taken into account and competitive effects are taken into account, but removing those in the banking world seems to make less sense than it once did.

On the difference in antitrust evaluation, if you're a court, it would seem perfectly rational to me for the court to give great deference to the expert banking agency in a bank merger, though I could see where the court might be tempted to follow the Department of Justice's lead in analyzing these cases. I think that forces the court into a de novo review, which is probably the best thing if there's two agencies that have looked at the transaction and decided that there's different approaches and one's got a problem and one does not.

In the banking area as in the surface transportation area, the law is rather clear on where the antitrust standards apply and when they don't and who's responsible for that and I think that's been helpful.

CHAIRPERSON GARZA: I have a few quick questions.

I'll try to make my questions quick and ask you to try and make your answers quick. Just to follow up on 106 of the Bank Holding Company Act, is it possible to interpret that section as suggested by the DOJ without legislative change, given the terms of the legislation and the existing judicial interpretations?

MR. ALVAREZ: That is a question that the Fed is thinking about very carefully right now, how far we can go to harmonize the two laws. There's quite a string of court cases that suggest that we cannot harmonize the two laws. The Board does have authority, though, to grant exceptions and has done so for some consumer products in order to allow price bundling at the consumer level, and we've got a request that we're considering now for a similar exception for large corporate borrowers. But the court cases seem to make it difficult for us to harmonize the laws without a change.

CHAIRPERSON GARZA: And if you make an exception or exemption under the statute, is that just reviewable on a discretion standard?

MR. ALVAREZ: Yes, that's right.

CHAIRPERSON GARZA: Secondly, on the question of the UP-SP transaction, I had similar questions to what have been asked, and I should disclose that I had a marginal role

at the time in private practice on behalf of one of the railroads, as perhaps did Ray--no? Okay. In terms of the oversight, the continuing oversight that the STB does and what you submit to the DOJ, do you just submit raw data or do you submit an actual assessment geared to the competitive effects of this transaction?

MR. ATKINS: The agency doesn't submit anything. It's the parties. So the evidence that they submit during oversight, those reports are provided to all the parties, and that includes raw data.

CHAIRPERSON GARZA: And what is required to be included in the reports?

MR. ATKINS: Well, it includes the traffic tapes, which shows all the traffic moving over the lines in question. I think there's some financial reporting requirements, as well. And then there's the, tell us what has happened as a result of this merger. Show where you've been making investments into the system, talk about what investments they are, how much capital you've been spending, stuff like that.

CHAIRPERSON GARZA: And do shippers have an opportunity periodically then, too, to comment?

MR. ATKINS: Everyone who participated in the

original proceeding can participate in the oversight proceeding.

CHAIRPERSON GARZA: And the STB, other than those independent studies you sought, has the STB ever undertaken any type of assessment of the effects of the merger on competition?

MR. ATKINS: Every year in that oversight process, the agency did sort of another investigation. Once the oversight closed after five years, I don't believe the agency has gone back and looked at the SP merger, but it was then doing oversights of the Conrail merger or the subsequent mergers.

CHAIRPERSON GARZA: In the first five-year period, did the STB actually generate a report that specifically addressed—

MR. ATKINS: Every year, there was an oversight report released by the agency.

CHAIRPERSON GARZA: Has the Federal Reserve System staff ever conducted any studies designed to determine whether there actually was an effect driven by—whether there was an effect driven by a merger or there was a link between concentration in the banking industry and competition?

MR. ALVAREZ: Yes. Yes, we collect data in a

number of ways. We have an annual survey of small business data that looks at both the pricing and availability of services. We have done some more targeted market studies of the demand for the cluster of banking services, how many groupings—what kind of groupings that both consumers and businesses get at banks and whether there's been changes in prices in those groupings over time. We do those kinds of surveys more on the five- or six-year time periods. We've done it in the early '90s, the middle-late '90s, and we're probably due to do it again.

CHAIRPERSON GARZA: And the 35 to 40 percent figure that you mentioned in response to Commissioner Kempf's question about the ten percent deposit aggregation, was that based on a study of likely competitive effects?

MR. ALVAREZ: That's based more on the Board's experience in doing bank merger review.

CHAIRPERSON GARZA: Okay. Thank you.

Commissioner Cannon?

COMMISSIONER CANNON: Yes. This is our last hearing of the year and so far, we've all collectively established that there is no such thing as a short antitrust question.

[Laughter.]

COMMISSIONER CANNON: We go for a long time on these. We apologize.

One question. I think we may have a little interesting debate in the next panel coming up between Mr. Furchtgott-Roth and Ms. Moss on this whole question we've talked a little bit about this morning, or this afternoon, on information sharing. Mr. Furchtgott-Roth, as a former FCC Commissioner really kind of counsels against that and says it tends to kind of muddy things or it makes the process, the procedure, a little more mysterious than it should be and, in fact, can make for an incomplete record. I'm sure he'll correct me when he gets up here and says I misstated what he said, but I hope not.

And Ms. Moss, on the other hand, is very much in favor of as much collegial activity as possible and to share as much information as possible. Can I get your take on that, beginning with Mr. Alvarez?

Oh, and one other question I had for you, just a short question—

VICE CHAIR YAROWSKY: You're proving your point.

COMMISSIONER CANNON: I knew it. I knew it. I knew it. When you said that you don't have the ability in a merger investigation to go out and ask third parties for

information, does the opposite happen, for third parties who may have something to say or some interest in a merger come in to talk to the Fed, or how does that work?

MR. ALVAREZ: Sure. Let me start with the second question. All the bank transactions we review, we invite public comment for a period of at least 30 days, often closer to 60 days. We regularly receive comments on the competitive effects, sometimes from local citizens, sometimes from competitors, and we take that into account in-

COMMISSIONER CANNON: Are those comments public, or are they-

MR. ALVAREZ: Yes, they are.

COMMISSIONER CANNON: Okay.

MR. ALVAREZ: On sharing of information, our experience has been it's been very helpful. It allows us to leverage off information that the Department of Justice collects and vice versa. It also helps us, I think it helps our approaches to the mergers to converge. We and the Department have both been very transparent in the banking area about what our guidelines are, what information we require from the parties, what standards we're applying, what the HHIs are that we look for, mitigating factors. We have similar approaches to divestitures and divestiture

requirements and I think that's resulted from sharing of information, so I am a fan of that approach.

MR. ATKINS: I would have to agree with that. I don't want to leave you an impression that we disagree in great lengths with the Department of Justice. We find their interaction in our mergers to be invaluable and the heart of that is the conveying of information back and forth. But we also believe that that should become an open record so that all interested parties know of the communication that takes place and so that if there's anyone out there who has a different viewpoint, that they can also share that with the agency.

COMMISSIONER CANNON: Mr. McDonald?

MR. McDONALD: Commissioner Cannon, I agree with Mr. Alvarez and Mr. Atkins, except for the question of whether it should appear on the public record. That's something I won't take a position on because that's a matter for the ex parte and other rules of the particular regulatory agency.

I have to disagree with Dr. Furchtgott-Roth's point that not sharing information in that context is better, especially as it applies in our relationship with the Federal Communications Commission. I think that the exchange of

information is very valuable on both sides. We get from the FCC their views generally of the technology of the merging parties. The FCC gets from us information that might not otherwise come to the FCC's attention because we have greater discovery tools and more resources to review the tens of millions of documents that come in.

In general, I think more information is better. And in the particular case of the FCC, my understanding is that if the Commission wants to rely on some information that the Commission has gotten from the Antitrust Division, then they go out and make a special effort to get that information through their own discovery processes, put it in the record, and then rely on it.

COMMISSIONER CANNON: General, do you have anything to add on this?

MR. McKENNA: I would just observe that in multi-state litigation, information sharing between states is critical. By definition, when that litigation ends up involving the federal government—because the federal government is involved, the Department of Justice, for example, is conducting its own investigation. I can think of a few examples where there has been good information sharing and cooperation. It certainly does not guarantee it. I

don't want to be Pollyanna-ish about it. There is such a thing as federal-state rivalry. But nevertheless, we can certainly point to examples of effective communication and information sharing between the federal government and the states in certain investigations.

MR. McDONALD: Commissioner Cannon, I should add the one point that the statutes that authorized us to discover information from parties and third parties also require that we get waivers from them before sharing that information with an agency like the FCC.

COMMISSIONER CANNON: I was going to say, it's a different process, really, between the STB process versus what DOJ or the FTC merger.

CHAIRPERSON GARZA: Commissioner Carlton, do you have any quick follow-up questions?

COMMISSIONER CARLTON: Just one follow-up on the tying in non-banks and banks. As I understand it, non-banks aren't subject to these tying laws. It does raise the question, why subject one set of firms to these laws and not the other. But the other part of your testimony that I thought was quite striking is, as I understand it, these tying laws applied even in the absence of market power.

MR. ALVAREZ: Correct.

COMMISSIONER CARLTON: My recollection is these, I think you said in your testimony these were passed in the '70s.

MR. ALVAREZ: Yes.

COMMISSIONER CARLTON: We now know a lot more about when tying can be harmful, and as far as I'm aware, you need some market power in order to make them harmful. Is that something the Federal Reserve has been studying and is concerned about?

MR. ALVAREZ: It is something we've been concerned about and are studying. There have been—we've been requested by some on the Hill to look into tying in particular and we've been in the process of developing guidance for the industry on how to interpret the bank tying rules and looking to the question that the Vice Chair raised earlier and the Chairman raised earlier of whether there's a way to harmonize the antitrust laws and Section 106. It's a difficult question for us, but one we're looking at.

COMMISSIONER CARLTON: Another question I had, really for Mr. McDonald, when a regulatory agency has a public interest standard, I always sometimes get nervous. I mean, the history of regulation, as I said earlier, has motivated the movement towards deregulation as some of these

public interest standards have actually wound up harming wide classes of consumers. But if a public interest standard is interpreted to include things like quality, safety, why isn't that something that the Department normally considers when it's considering a merger? If you were considering a merger, I assume if you thought the product quality would get degraded, that would be something that would go into your analysis. Am I wrong on that?

MR. McDONALD: Commissioner Carlton, of course, you're not wrong.

[Laughter.]

MR. McDONALD: You know as well as anyone in this room that one of the dimensions of competition is quality, price being the principal dimension. In the course of our review of a merger to determine whether it lessens competition, we would, of course, explicitly or implicitly consider the question of whether quality would be degraded post-merger. As for safety and other matters of that kind, in areas like airline transportation, I think you would have difficulty convincing Congress that that ought to be left to the market. But those don't come up in most industries.

COMMISSIONER KEMPF: One follow-up to something—

CHAIRPERSON GARZA: I wanted—if it can be done in a

minute—because we want to start the next panel in five minutes.

COMMISSIONER KEMPF: Just a follow-up which I'll be asking Mr. Alvarez, and that is in the financial services industry, isn't there a, what I'll call a nomenclature debate, of one person's tying is another person's bundling and vice-versa, depending on which financial institution it is and what they do and what the other financial institution does. Something will be attacked as tying as harmful and the other person will say, this is not tying, it's bundling. Isn't that a frequent debate?

MR. ALVAREZ: Yes. It does depend on which side you're on, the producer or the customer.

CHAIRPERSON GARZA: Okay. Thank you very much to the panelists. We appreciate your written and your oral testimony here today. It's been very helpful.

The next panel will begin in five minutes.

[Recess.]

CHAIRPERSON GARZA: We will begin with the second panel of our hearings this afternoon on antitrust applied to regulated industries.

Some of you were here during the earlier panel, so you know the procedures. What we'll do is we'll give each of

you five minutes to summarize your written testimony. Then we will have lead questioning for the Commission by Commissioner Cannon, who is one of the co-chairs of our study group for regulated industries. After that, each of the remaining Commissioners will have five minutes for follow-up questions, and if time allows and the witnesses are amenable, we may circle around to three-minute follow-up questions for each of the Commissioners.

So with that, I think we'll go from right to left and start with Mr. Thorne.

MR. THORNE: Thank you, Madam Chair. It's a pleasure to be here. I'm going to be a little bit informal and brief, if that's okay.

One thing I noticed after I had submitted my written comments and then saw the ones submitted by Scott Alvarez and Ray Atkins was how good their submissions were. I thought their review of the merger practice in those two agencies was very useful. If I were on your side of the bench, I would appreciate those comments.

I did something kind of like that with a couple of friends in a treatise called *Federal Telecommunications Law*, second Edition, Chapter 7, and so if you want a comparable description of telecom merger history and practice, that's a

source.

Some of the discussion of the topic for the panel seems to me a little bit incorrect. Some of the discussion talks about whether antitrust applies to regulated industries. Certainly in telecommunications, where there's a savings clause, antitrust applies fully in telecommunications. If there's not an express preemption, I would expect, absent some strong repugnancy, that antitrust applies. So that doesn't seem to advance things much. The question is, what's the substance of the antitrust duties or requirements, and there's something that's not nebulous to talk about and that's that antitrust does not incorporate regulatory requirements because they're so different, both substantively and for good institutional reasons.

So in my written submission, I tried to highlight some of the ways where you wouldn't expect antitrust to do what regulation does. For example, in America, it's legal to have a monopoly if you get it through hard work and effort and investment and taking risks, and so antitrust doesn't require a monopoly to dismantle itself the way regulation can require. Antitrust doesn't require a firm that has a monopoly to price at its costs. A firm is allowed to price at any level it can command. Antitrust generally doesn't

require firms to deal with others. It doesn't require firms to deal on non-discriminatory terms in the way that regulation requires. And antitrust, even though I think the Justice Department and the Federal Trade Commission have the finest antitrust officials on the planet, antitrust does not have the industry-specific expertise and the continuing supervision, the ability to experiment with requirements, to adjust, to fine-tune, that the regulatory agencies have.

So you can criticize, in fact, some good people have criticized regulatory agencies, but at least they're still going to be there supervising what they have accomplished and making revisions to it in a way that the antitrust enforcers can't do. So it would be very, very odd to say that antitrust in a regulated industry should incorporate features of the local regulation because the regulatory mission and institution is so different. I guess that's my one positive urging for clarifying some of the confusion.

The testimony I submit had several minor suggestions. One is that regulation itself is often anticompetitive and ought to be treated like a restraint on speech. It ought to be treated with heightened suspicion. When regulation restricts free markets, there ought to be a

good justification for it. Antitrust should not be remade in the image of regulation. It should instead protect free markets.

There are, I think, a couple of old doctrines that should be preserved. These are venerable, nearly century-old doctrines, the filed-tariff doctrine. There is a common-carrier line-extension efficiency doctrine that's buried in the fourth paragraph of Clayton 7 that I think ought to continue to be respected. These are not really immunities. They're not the abolition of antitrust. The filed-tariff doctrine allows full antitrust supervision even of tariffed activities on a prospective basis. The common-carrier line-extension doctrine just recognizes the efficiency of extending networks.

I think the one other possibly controversial way that antitrust and regulation intersect is when you're thinking about a novel expansion of antitrust, it's legitimate, like the court in *Trinko* did, to consider the presence of regulation as another fact of market life. I would not have answered the question to the prior panel the way Bruce McDonald did when he was asked, didn't the court treat regulation as some kind of a buffer that prevents expansion of antitrust? I think that the court treated that

as a factor in deciding not to expand antitrust to require duties of dealing, but only after talking at some length about the substantive and institutional reasons that courts normally should not get into setting price in terms of dealing.

So I'll stop there. Thank you.

CHAIRPERSON GARZA: Thank you.

Ms. Moss?

MS. MOSS: Thank you. I'm honored to be here today, and thank you for the invitation to participate in the hearings on regulated industries. I'm going to draw my remarks from the comments filed on July 15 by the AAI working group that was set up for the purpose of responding to the study issues, and that was very much a group effort which consisted of a number of experts.

Let me talk first about the working group's comments on the role of antitrust and restructuring industries. I think we all know that many formerly regulated industries—natural gas, electricity, and telecom—have been transformed from a transition to lighter-handed and market-driven mechanisms from relatively constraining price and profit and entry regulation. But the phase between regulation and effective or workable competition has been

very difficult in many industries. I would note that a key debate is still unresolved, and that is whether to put antitrust on hold until markets are workably competitive or whether some mixture of regulation and antitrust can facilitate competition.

The working group suggests that antitrust should and can be seen as a complementary policy instrument as opposed to a substitute. One important reason is that underutilization of antitrust leaves regulators to shoulder a very heavy burden of detecting and remedying anticompetitive conduct. Those issues are better dealt with by antitrust. But a cumbersome regulatory process for doing so instead is costly and it can potentially chill procompetitive behavior.

So figuring out when antitrust should play a role should get high priority, in the view of the working group, and at a minimum, it would depend on factual circumstances, regulatory context, and the comparative advantages of each type of institution.

Let me turn now to some thoughts on how antitrust should account for regulatory systems and how regulations should account for remedies. The working group notes that antitrust has a comparative advantage in preserving competition within more competitive market structures whereas

the advantage of regulation is in creating the conditions that move industries from tight oligopoly or monopoly towards more workably competitive market structures.

Complementary markets and the network models that characterize regulated industries, either the end-to-end network models or the vertical access model, are becoming more competitive as a result of access and other reforms and these markets should be subject to lighter-handed regulation while antitrust enforcement deters and remedies anticompetitive conduct.

The working group suggests that remedies reflect the relative strengths of regulation and antitrust. Regulation is traditionally focused on conduct-based approaches, such as interconnection standards, defining the terms of access, monitoring functions, market functions, but regulators must deal with a host of issues, including rent seeking, strategic behavior, and imperfect information when they administer their compulsory access regimes.

This means that conduct-based remedies should probably not be the first line of defense in remedying the exercise of market power. In contrast, structural remedies favored by antitrust, and by this I mean divestiture or even network expansion in some cases, can reduce market

concentration and make access less problematic. They are generally a one-time fix for which compliance is immediate and permanent.

Given the complex issues that arise in these transitioning industries, the working group recommends that increased collaboration between regulators and antitrust enforcers on remedies should get high priority. Procedures for promoting coordination between courts and agencies and methods for encouraging dialogue should be studied.

A few words now on standards for applying the laws, the antitrust laws in regulated industries when there is no specific exemption. The working group believes that harmonization of the various doctrines under which the laws are precluded in a regulated industry context should be a policy imperative, and by the various doctrines, I mean implied immunity, filed-rate doctrine, *Town of Concord*, and *Trinko*. One reason is that many doctrines service the same purpose. Plaintiffs should not have to face repetitive and multiple defenses, and the role of antitrust enforcement is growing.

Harmonization should reflect the extent to which enforcement and regulatory systems can be viewed as complements, and we propose a variety of affinity and

repugnancy factors that would feed into that analysis.

In closing, let me convey the working group's suggestions on the role of regulation and antitrust in merger review. The debate over allocation should be driven by a number of objectives, including insulation from special interest capture of regulatory agencies, a high level of quality and transparency in merger review, freedom from political pressure and regulatory policy goals, as well as the application of technical and industry-specific expertise.

One implication of these goals is that regulatory agencies should, in fact, play a role in merger review, but that role should probably be limited to the analysis of non-competitive issues while the antitrust agencies take the lead on evaluating the effect of the merger on competition. Our comments provide more details on ways to implement such a policy. It relies on increased collaboration and detailing of regulatory personnel to share expertise with antitrust enforcers.

Thanks very much for the invitation to speak, and I look forward to your questions and comments.

CHAIRPERSON GARZA: Thank you very much.

Mr. Furchtgott-Roth?

MR. FURCHTGOTT-ROTH: Thank you very much. Thank

you very much for having me to this hearing. I feel like I'm coming home here, being in the Rayburn House Office Building where I worked for several years for the House Commerce Committee. In fact, it may have been in this very hearing room where I worked with staff from the House Judiciary Committee on various aspects of the '96 Act. The House Commerce Committee staff worked particularly closely with the House Judiciary Committee on provisions of the Act to essentially eliminate FCC review of mergers. We thought we had language in the Act to that effect, and it's very clear that we failed.

From 1997 through 2001, I was a Commissioner of the FCC. In that capacity, I was called upon to review dozens of mergers in the telecommunications industry, the same mergers that were being reviewed by one of the federal antitrust agencies. In that situation, I developed views about the proper federal review of mergers of regulated firms and I'm pleased to share those views today.

Let me emphasize that the views I express are my own. They should not be associated with any institution or association that I've ever been associated with. And particularly, I would not want any of these comments in any way to reflect badly on any individuals, and certainly not

the extraordinarily talented and hard-working staff of the FCC. In fact, I would say that my comments are precisely aimed at enabling staff to operate in a professional manner and not be put in what I view to be an impossible situation, which is where I view the FCC as being today.

I request that my written testimony be entered into the record.

The purpose of laws generally is to encourage good behavior and deter bad behavior. Antitrust law is, or at least should be, no different. In my testimony, I focus on only one area of antitrust law, merger reviews under the Clayton Act, but the general principles hold for other areas of antitrust law, as well.

If you were to talk to many people who have been involved in mergers involving regulated firms in the telecommunications industry, I believe you would find widespread dissatisfaction. Merging parties would claim the process has the three following attributes: Costly, involving dozens of different agencies at the federal and state level; time consuming, sometimes taking a year or more; with unpredictable outcomes that are not necessarily tied to any specific rule, regulation, or law.

Parties opposing a merger, whether consumer groups

or other firms within an industry, lament similarly the merger review process. They will tell you that the merger is costly, involving dozens of different agencies at the federal and state level; time consuming, sometimes taking a year or more; with unpredictable outcomes.

The purposes of law are served when the methods to administer, enforce, and adjudicate decisions under them are consistent and reinforcing of one another and work predictably for the public. In the case of government merger reviews of regulated firms, the methods to review mergers should be such that mergers and acquisitions that will lead to an unlawful expansion of the opportunity to exercise market power should be discouraged and rejected, and other mergers and acquisitions should be permitted. Private parties should have clear methods to petition the government, to understand the mechanisms by which the government will make its decisions, to appeal decisions with which they are unsatisfied, to have reasonable expectations of timely and low-cost decisions, to understand which office of government is ultimately responsible for the decision.

Unfortunately, the current process of governmental merger review of regulated firms confuses and confounds many of these purposes. Private parties do not have clear methods

to petition the government to approve mergers or to block ones that may be anticompetitive, to understand transparently the mechanisms by which the government will make its decisions; to appeal decisions with which they are dissatisfied; to understand which office of government is ultimately responsible for the decision. For, lo, no single office of government is ultimately responsible for the decision.

But for all of the excessive administrative costs associated with the redundant merger review of regulated firms, there is still no greater sense than with the merger review of less regulated firms that anticompetitive mergers are blocked and other mergers are permitted. With multiple agencies reviewing mergers, no single agency is responsible. No single agency ensures that each merger of regulated firms is reviewed in detail. As a society, we gain little, if nothing, from redundant merger reviews and we even lose much in the process.

In my written testimony, I have five recommendations, which I'd be happy to explain in more detail, and those five are: Only one federal agency should review any merger or acquisition for competition reasons. My preference is for one of the antitrust agencies to review

mergers, but in any case, no more than one.

Second, regulatory agencies should only review mergers for compliance with existing rules.

Third, if multiple agencies continue to conduct merger reviews, their proceedings should be strictly separated.

Fourth, regulatory agencies should avoid company-specific behavioral rules.

And fifth, antitrust agencies and regulatory agencies should set binding time limits on merger reviews.

Thank you very much.

CHAIRPERSON GARZA: Thank you.

Mr. Cooper?

MR. COOPER: Madam Chairwoman, members of the Commission, the Consumer Federation of America and Consumers Union appreciate the opportunity to offer our views on the role of antitrust in regulated industries. They are quite different than the ones you just heard.

These are important industries in which there is a high probability that unregulated competitive markets will not produce the outcome that society wants. First, where there is market failure, the market will not produce efficient outcomes.

Second, there are industries where efficiency is not the only or even the most important outcome for our society. These include industries with public-good characteristics and large economies of scale.

But a more fundamental market failure arises where the industry exhibits what I call infrastructural externalities. These are industries that support a wide range of activities and the external benefits are indirect and diffuse, with many complementary activities and vertical linkages to economic and social activity. These are frequently networks that exhibit strong network effects called platforms in our contemporary economic jargon. Private actors cannot identify or internalize the value to the society created in these sectors and simple micro-economic calculations do not capture the economic structure and value of these industries.

On the demand side, regulation has frequently been applied where there are few substitutes for basic necessities. Where the price elasticity of demand is very low and the income elasticity of demand is moderate, the ability to exercise market power is magnified.

Finally, regulation has frequently been applied where the product of the industry has non-economic

characteristics, like electronic speech or non-efficiency aspects, such as universal service or public safety.

To put it simply, antitrust has come to be about deficiency. It does not do democracy or equity or public safety very well.

Public policy has rightly concluded that these sectors are affected by the public interest, affected with the public interest, and it has defined that public interest broadly to reflect the broad and diffuse impact of these sectors on the economy and society. Commissioner Kempf reminds us that the public interest is invoked 112 times in the Communications Act, and we think that's a good thing since it affects the public so dearly, both economically and socially.

Given the nature of these industries and the narrow focus of antitrust, the primary regulator is not the market and antitrust cannot replace regulation unless it can be conclusively shown that the underlying conditions have changed. Therefore, the purpose of antitrust is to probe for areas where the underlying assumptions of market failure no longer apply and to ensure that market power at the core sector of these industries is not extended to other sectors. In this sense, antitrust fences in the sectors where market

failure is likely and allows competition around it.

However, it is fundamentally incorrect to assume, as many do, that all regulated industries are just in some stage of transition to competition. In fact, it is critically important to recognize that even where there is a transition, we must have workable competition before we have deregulation. Because policy makers have failed to adhere to this simple principle, consumers have been abused. They frequently fall into a catch-22, where regulation, which is based on the assumption about a market, is invoked to prevent antitrust. In essence, consumers are protected neither by market forces nor by regulation nor by antitrust. The solution is obvious, to have full antitrust enforcement wherever the market has been invoked as an excuse to deregulate or a pretext to deregulate.

But mergers need to be reviewed by regulatory agencies, as well, precisely because the core of these industries is not competitive. Efficiency gains will not be passed through to the public because competition will not make it so. More importantly, vertical leverage and linkages become critically important as complements may be more competitive than the core industry, or as incumbents will identify opportunities to raise barriers to entry, to

diminish the ability of neighboring markets to compete and chip away at their monopolies. So regulators who have the expertise should, in fact, look at these mergers from that point of view.

And finally, let us be clear. State officials have a role here. These industries are frequently last-mile networks, or first-mile networks. The costs incurred in these industries are local. Even in telecom today, 75 percent of the costs are local. Even in wireless today, 75 percent of the calls are intrastate. We have made the mistake of assuming these are national industries. When local conditions affect local cost and the local company is the primary point of contact with the industry, clearly, state officials have a role to play because it is their cost, because costs vary, and they bear the brunt of the public reaction.

Multiple merger review reflects the importance and complexity of these vital industries and the important social goals that the public interest demands that they provide.

Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Cannon?

COMMISSIONER CANNON: Thank you, Madam Chairman.

Perhaps I should start off, since I have set up the battle of the brains here between Dr. Furchtgott-Roth and Ms. Moss, to talk about information sharing. Obviously, I think you have kind of opposite opinions on this and I really wanted to get a better feel for that, if I could, because it certainly seems you think that's a really bad idea, and just as certain, as I said before, a murkiness factor there. Obviously, witnesses from the prior panel were very enthusiastic about it.

Mr. Furchtgott-Roth, do you want to talk about that first?

MR. FURCHTGOTT-ROTH: Certainly, Commissioner Cannon. I agree in the abstract that more information is better, but in this country, we have an Administrative Procedure Act. We have various laws that provide for a public awareness of the information on which government officials make decisions. Much as this very Commission today is holding a public forum to collect information, it is not the case that the Antitrust Modernization Commission goes around to private parties and says, let's meet in private and I want to hear your views about how antitrust law could be modernized. Nor do you even go to federal agencies and have them tell you off the public record how the antitrust laws

ought to be modernized.

At the end of the day, I'm just a follow-the-law type of guy. In my view, it's very difficult for an agency such as the Federal Communications Commission, which makes decisions based on the APA and based on its rules about how it collects information, to go to the extraordinary trouble that it does to have a public record, to have honest folks like Ms. Moss and Dr. Cooper submit information for the record about, for example, a merger. I think they would be very troubled if they knew they were submitting information on a public record that was publicly viewed if at the same time an antitrust agency were whispering into the ears of the FCC Commissioners, psst, you don't know this, it isn't on the public record, but I've seen some secret documents. I can't share my secret documents with you, but there's a problem here, and there's this problem I can only tell you about. I can't share it with Dr. Cooper. I can't share it with Ms. Moss. But I can tell you, here's the problem.

I've been there. I don't like it. I don't think it's fair to the Commissioners. I don't think it's fair to the staff. I think there are serious problems when you have agencies that collect information in different ways, to commingle that information in a way that is not—it's one

thing if the Defense Department shares secret information with the State Department, which shares their secret information with them, and no one expects the public to be involved. The FCC operates on a public record, though. I think it's very difficult for the FCC to make decisions based on information that it has collected from information on highly business-sensitive information that's collected from private parties.

COMMISSIONER CANNON: Ms. Moss?

MS. MOSS: I think, at a broader sort of 10,000-foot level, it's important in responding to your question, Commissioner Cannon, to distinguish between the policy issues and the implementation issues. They're very different, and obviously implementation, when it comes to collaboration and information sharing, I think poses some real hurdles for the agencies.

I guess my major comment would be as industries transition out of the more regulated context into a more competitive context and you have an opportunity to introduce a dual role for regulation and antitrust, effectively implementing that, if it is to be a policy priority, is really contingent on the ability of the agencies and the personnel to get together and put their heads together and

share information and collaborate to the extent that it informs the policy debate, not only in case-specific instances but in sort of broader policy instances where rule makings, for example, are being crafted.

I would also say that, having worked in the federal government at FERC for seven years, where I headed up the merger shop, there was a fair bit of collaboration between the FERC and between the antitrust agencies, and this collaboration was mutually beneficial to not only the regulatory agency, but also to the antitrust agencies, as well. The tremendous amount of technical and institutional knowledge that resides in the regulatory agencies that the antitrust enforcers may or may not have access to, and it turns out to be very helpful for them to understand some of the finer details and technical complexities of the industries.

I think at a broader sort of generic policy level, we had meetings four times a year, but that's where it stopped, and it stopped well before we got to a particular case in a litigated context. I think one of the AAI's recommendations would be that all of the avenues for collaboration and information sharing, which is, as I mentioned earlier, very important in these transitioning

industries, that all the avenues be investigated with the understanding that overcoming some of these hurdles in terms of sharing confidential and non-confidential information and reconciling of public interest, open advocacy process with the confidential discovery process, that some of these impediments be looked at very closely.

COMMISSIONER CANNON: Dr. Cooper?

MR. COOPER: Harold hauled me into the middle of this and I'm actually going to agree with him, which may be a first, not that there shouldn't be information sharing, but that differential confidentiality is, in fact, a challenge here. I've signed 250 confidentiality agreements at the state and federal level, so I live with them. Some consumer advocates won't. I do.

But in order to understand the purpose—let's understand the purpose of the differential confidentiality before we blow it away. At the Justice Department, they will solicit from people very, very sensitive information, people who would never risk that information being revealed to the public in any way. And for whatever reason, since no one even knows who the Department of Justice is talking to, people are confident in revealing to the Department of Justice very, very sensitive information. Those same people

will not put that information on the record at the FCC no matter how you try and craft that confidentiality coverage because it's a different kind of agency. And maybe the FERC actually has better ex parte rules and takes care of its confidential information a little better, I'm told.

So you have this dilemma, and how to put a finger on a dilemma is that when the DOJ talks to the FCC staff, things are said that are nowhere in the FCC public record. And he is right, that is a problem, and maybe it ought to be the other way. Maybe only the FCC should help the DOJ do its competition analysis and not the other way around. But he has clearly put his finger on a dilemma with the sharing of information. So if you recommend sharing, you ought to also recommend how we're going to handle this differential confidentiality.

COMMISSIONER CANNON: I was going to ask you, FERC is under the same essential rules as the FCC would be. So are you aware of this sort of issue or dilemma or perhaps problem, as Dr. Cooper states, at FERC?

MS. MOSS: I think there is an awareness of that. I think FERC has been—and I don't in any way purport to speak for FERC, having been gone for five years—but I think there is a provinciality there that has created an environment in

the agency which is very self-contained and not necessarily outward-looking to other agencies. And there was a great deal of resistance when I was there to collaborating with the antitrust agencies.

I think to pick up on something that both of these gentlemen have said, because of the implementation issues involved and reluctance to—or incentives to produce a certain type of information in a regulatory proceeding and not to produce that information—well, it should be the other way, incentives to produce it in an antitrust proceeding but not in a regulatory proceeding really pushes the debate further into who should take responsibility for looking at, for example, merger cases. If you can't reconcile this implementation issue and this sort of tension or conflict between the types of information and the procedures associated with sharing information, then one agency will have to take the lead and the other agency can serve in a consultative capacity to assist and provide needed, important information. And in the AAI's view, of course, that should be the antitrust agency.

COMMISSIONER CANNON: Mr. Thorne, do you want to get in the middle of this?

MR. THORNE: Not from the 10,000-foot level but

from the very ground, we turn over our most confidential pricing and product plans in a very fast-moving industry to the antitrust agencies for their review and then they talk to the FCC and the FCC says, that sounds interesting. Let's put those documents in the public record and we'll make all the lawyers for all of your competitors sign confidentiality agreements, which, of course, are strong instruments of a sort, but lots of people then see the most internally sensitive documents that actually do have an effect on the business.

COMMISSIONER CANNON: And you have no ability at this point to do the equivalent of, say, a reverse FOIA action, where before something gets revealed to somebody else, you have to be notified and have the opportunity to object?

MR. THORNE: We've done that in some cases, actually. In some cases, there's an opportunity to object to the particular lawyers or in-house firm members reviewing things, but the volume of material that gets reviewed, it's breathtaking. We give waivers to allow that process to go forward, because when you're at a regulatory agency, you need their positive permission to close a merger and you don't want to delay the process any longer than you have to.

COMMISSIONER CANNON: Actually, that kind of gets me into the public interest standard and discussion, and I thought your testimony was particularly helpful on that. And as I understand your testimony, and I think Dr. Furchtgott-Roth's, as well, the question is, what else is included in the public interest standard over and above a normal competitive analysis? I think, if I'm quoting you correctly, you essentially said that the Commission can use this to essentially extract behavioral concessions or conduct concessions on the parties looking to have their licenses transferred, et cetera, that they otherwise would not be willing to do, and I think, actually, Dr. Furchtgott-Roth said something to the effect in his testimony that in this situation, there might be even individual Commissioners or other people at the Commission who do this because they have this notion as to these conditions should be imposed on the entirety of an industry, or at least they have two parties before them at that particular moment and they can impose those.

MR. THORNE: Well, there's certainly a risk of that. I would again point you to, I think it's Chapter 7 of the second edition of *Federal Telecommunications Law* where we go through merger by merger in the telecom industry how

different conditions get imposed. This is after DOJ has cleared or found lesser conditions that satisfy it on the antitrust front. And the major difference is just the procedural posture. The antitrust agency has the affirmative disciplining burden of bringing a case if it wants to stop a merger, and it knows that if it can't clear the deal or negotiate satisfactory conditions, it's got to bring a case and it's going to be tested in front of a federal judge someplace.

The agency, on the other hand, has to be positively convinced to grant a license transfer, and in a fast-moving business, a lengthy delay waiting for your merger to be approved is death. The employees of a company that is going to be subject to a merger are not going to wait forever to find out the answer. So there's the ability of an agency to get conditions that may or may not be strictly necessary in light of the change the merger causes.

COMMISSIONER CANNON: Or that may or may not have been requested or thought of by the antitrust agency that reviewed the acquisition or the merger.

MR. THORNE: I think that's true, too.

COMMISSIONER CANNON: Dr. Cooper?

MR. COOPER: Well, I mean, the notion that—well,

let me start from the first point that there's a license here. That automatically makes this a different business. Now, you may think the license doesn't belong there, but these people need a license from the federal government to do business. That's not true in unregulated industries. So it changes the premise of what's happening here.

Second of all, we do get this tendency to say, hey, you didn't put this merger condition over here. Why are you putting it on us? And the answer is, us may be a very different fact situation on the ground. To use an example, Bell Atlantic-Nynex involved a massive contiguous border with all kinds of possibilities for cross-border competition and so forth, unlike SBC-Southern New England Telephone, which did not have regional and geographic implications and so forth.

So the notion that it is unthinkable that you would put different conditions on a specific merger, or let's look at the cross-technology mergers. We have had now the local companies acquire wireless competitors, or in theory competitors, right, and that poses different challenges than some horizontal or some other types of mergers.

So the answer is that for the regulatory agency which is regulating a core of market power, and you may say,

well, the licenses have outlived their usefulness and there is no market power, but that's a different debate. As long as the agency is regulating subject to the Communications Act market power, it's perfectly reasonable to come up with different sets of conditions for different mergers because they give you different fact bases on the ground.

COMMISSIONER CANNON: And Doctor, I know you want to respond to that.

MR. FURCHTGOTT-ROTH: Commissioner, I would just point out, I think it would be one thing if the FCC did this in a predictable manner based on rules that had been promulgated based on information collected under the APA. The FCC does not have clear rules about which mergers it's going to review. For example, in the prior panel, we heard discussion about two major mergers, Union Pacific-Southern Pacific, Bank of America-MBNA. It turns out that any company of any size in America holds FCC licenses, usually not one or two, but lots of times many, many licenses. The FCC does not have clear rules about which mergers it's going to review. I don't know if it's reviewing or did review SP-Union Pacific or not, but it's unclear, and even though those are two fairly major holders of FCC licenses.

Then when it reviews the mergers and it imposes

conditions, what we wind up with is this polyglot of company-specific rules. Every major communications company in the United States operates under a different set of rules from every other major communications company because it's gone through a different review process. This leads to a situation which I think is the worst form of the rule of law, which is when you have company-specific rules. That's not a very good way to operate.

COMMISSIONER CANNON: Mr. Thorne, do you have a comment on that?

MR. THORNE: A friend of mine, Peter Huber, and I once wrote a paper on economic licensing reform. The basic idea is licenses to enter a business, the ability to exit a business once licensed, the ability to transfer license ought to be subject to the most minimal supervision. In general, entry and exit deterrence is anticompetitive and interferes with the free market. Transferring the right to a business is generally anticompetitive, and you leave the competition issues to the competition agencies.

COMMISSIONER CANNON: Yes, ma'am?

MS. MOSS: Just a couple of follow-up remarks. One is my perception is that some of the regulatory agencies, in implementing a public interest standard, have actually moved

more into line with antitrust's concept or the goal of antitrust, and that is to promote consumer welfare. I think if you go back at least in energy and look at the merger policy statement, for example, that FERC put out in 1995, they dispense with a lot of sort of antiquated, outdated factors that they would consider in a merger review and replace them, trim them down and replace them with a review of competition, review of rates, and a couple of other things. That public interest standard, that modernized standard was very much more in line with what the goals of antitrust are.

I think that another important thing to note, it's important to look at specific instances where the implementation of a public interest standard in the case where a regulatory agency reviews a merger and at the same time when an antitrust agency reviews that very same merger, and there are many instances, for example, in telecom and electricity, where there is dual review authority, to see where the conflicts are coming up, if at all. We have seen a number of conflicts. I can tell you about a number of cases where regulatory agencies imposed conduct-based remedies and the antitrust agencies came in with structural-based remedies, thus mooted the need for the conduct-based remedy

in the first place. That's sort of duplicative and costly from the consumer's perspective. So I think those two things are important to consider.

COMMISSIONER CANNON: My impression is usually it's the case, and Dr. Furchtgott-Roth, you can comment, but usually in a communications merger, it's the antitrust agency that first makes their decision and then it essentially lobs it to the agency for further proceedings. Is that your general impression?

MR. FURCHTGOTT-ROTH: In the past nine to ten years, I know of only one instance where it went the other way around, and that was the DirectTV-EchoStar merger where the FCC rejected it first. But typically, you are quite right. I'm troubled, though, that the Department of Justice or the FCC will make its decision and then, coincidentally, the FTC reviews it within a week or two. There's obviously been some coordination going on.

COMMISSIONER CANNON: Dr. Cooper, did you have any comment to what Professor Moss had to say on the coming together, the convergence of the antitrust standard with regulatory approvals?

MR. COOPER: Let's separate out sort of two fundamental areas. One is non-economic public interest

goals, and if there's non-economic public interest goals, then those are clearly not going to be part of the antitrust standard and review. An obvious example is electronic speech in the spectrum and I sure do hope that Verizon supports our effort to have unlicensed spectrum and get rid of licenses altogether, although that's not been their position. We have those non-economic areas and those are important areas.

Even within economic areas, it may well be that the competition standard has been too low, but clearly, the FERC-- the markets that FERC has deregulated over the last few years have not treated the two very kindly, at least my members don't think they've been treated well, and you could have looked at those markets, as we did, before the fact and said, you mucked up the competitive standard. It may be the case that the competition standard is not well applied.

We're not actually opposed, and if you look at my testimony, to a division of labor where we move more of the competition review to a competent antitrust authority and move the regulatory agency out of that business, because clearly, the regulatory agencies have difficulty imposing the pain of competition on the industries they regulate. So they haven't done a very good job of that.

But the thing that concerns is us things like

universal service. That is clearly in the purview of state and federal regulators. In one sense, it is completely inimical to the efficiency standard that the antitrust agency would apply. We are clearly engaging in cross-subsidization for social goals. But if that's what Congress wants, then that's what the regulator has to accomplish and that's not what the antitrust agency is going to be very adept at or willing to impose.

CHAIRPERSON GARZA: Thank you.

Mr. Furchtgott-Roth, I have a question for you based on one of the statements you just recently made in response to Commissioner Cannon. You were saying that you were particularly troubled by apparent coordination, where the FCC approval of a license transfer happens a week, two weeks, whatever, after the Department of Justice has made known its position on the transaction. I just want to be clear. What aspect is troubling to you about that? Is it that the FCC could have acted quicker on the standards that it applies to the license transfer? Is it that the DOJ isn't required to meet the normal standard that it has to meet in order to challenge a transaction, in other words, be ready to go and challenge it in court? Or what is it that is troubling to you about the coordination? Or maybe it's

neither of those.

MR. FURCHTGOTT-ROTH: No, I understand the question. Under the Communications Act, the Commission has responsibility to review requests for license transfers, for requests for transfers of various FCC permissions. The Commission under, I believe it's Section 5, also has obligations to use the public meetings to encourage review of proceedings that have been pending for more than, it's either three months or four months or some period of time. There's no reference in the Communications Act to withhold judgment on proceedings before it based on information that it might receive from other agencies.

In my view of the world, which is not the FCC's view of the world, it has the license transfer application before it. It should evaluate that license transfer application. I think it's entirely appropriate for it to review the license transfer application to determine whether the licensees are up to date with all their regulatory fees, whether they have followed the law to that point.

I'm not convinced that the Commission necessarily should withhold a license transfer pending the decision of another government agency. There is one exception, though, and the Communications Act is quite specific about this,

which is for national security purposes. The administration may request the FCC not transfer licenses for national security reasons. There is no reference in the Communications Act that I'm aware of that the FCC has the authority to withhold a license transfer pending a request for another agency based on a competition standard. Now, it could always condition the license transfer based on approval of this other agency that also is necessary, but it's my view, again, it's a fairly—I'm just a dumb economist. I'm not a lawyer. I was asked to be a Commissioner to read and interpret the law, and that's just how I interpreted it.

CHAIRPERSON GARZA: Ms. Moss—should I be calling you Professor Moss? I apologize to Mr. Cooper for calling you Mr. instead of Dr., but I want to make sure I don't insult anybody more than I have. Your joinder proposal, I want to make sure that I understand it correctly. You talk about a joinder rule and better coordination of the courts and the agencies. Can you explain, exactly what kind of situation would that arise in and exactly what would you have happen?

MS. MOSS: I'll try and offer as much as I can as an economist as opposed to a lawyer. I think, and it is just a suggestion for something that could be studied to promote

coordination between regulators and antitrust enforcers, and I think the intention here is to utilize or invoke the rule, which would imply that the agency, the regulatory agency, would be a party to any federal antitrust proceeding, but only under a specific set of circumstances when the debate or the policy issue, whether it be conduct-based or more policy-oriented in general, involve market conditions, for example, or a form of conduct that have come out of regulatory policy. So if the regulatory regime has been developed or imposed that creates market conditions or creates a form of conduct out of which a dispute evolves, then that might be a circumstance where this rule could be invoked, and-

CHAIRPERSON GARZA: So would that be the regulatory agency coming in and saying, wait a minute, if the court acts in this situation, you're going to step on the regulatory regime. Or is it a situation in which the regulatory agency is providing facts or consultation to the judge or what?

MS. MOSS: I think it would be the latter, where they would provide advice, technical expertise, information that would help inform the decision, the antitrust decision.

CHAIRPERSON GARZA: And do you have any concern—I think maybe Mr. Thorne raised it in his testimony about the separation of powers and what an Article 3 court does or

doesn't do. Would your proposal raise those concerns at all?

MS. MOSS: Without having fleshed out the proposal in more detail, I can't say at this point, but I would certainly think if we were to put more thought into it in terms of working up of a more detailed proposal, yes, we'd have to consider those.

CHAIRPERSON GARZA: Thank you.

Commissioner Yarowsky?

VICE CHAIR YAROWSKY: Thank you. The previous panel, I think many of you were here for that discussion. There seemed to be an emerging consensus that implied immunity in the antitrust law in any regulatory scheme, statute, should be narrowly construed. We went through a number of different cases. You could have a savings clause that was highly specific or general and you have to deal with that. Or you might even have the absence of a savings clause. But, one, what are your views about implied immunity, because I think we'd like to build that into the record along with the government witnesses?

And second, the Telecommunications Act of '96 is going to probably be up for review—you mentioned your experience with it a few years ago—in the coming year. That's what many people anticipate. What would be the

structural relationship that you would recommend, existing or new, for how mergers should be reviewed vis-à-vis the DOJ and the FCC? Who should have the primary authority in what areas if Congress should come back and try to rewrite that Act and revisit it?

So, first, implied immunity; second, recommendations for restructuring the relationship between FCC and DOJ, if any, in a new rewrite of the Telecom Act. Should we go right to left? Mr. Thorne?

MR. THORNE: I'll start briefly. On implied immunity, the court in *Trinko* said that my industry was a good candidate for it, but we had a savings clause and so we don't get the benefits. The practice is surely true that it's a fairly rare industry that gets the benefit of implied immunity. The presumption is that antitrust applies in a regulated industry with or without a savings clause.

I don't have a specific legislative proposal and I'd refer the Commission to the comments filed by the U.S. Telecom Association on how to allocate merger authority. It certainly is weird, to use the most colloquial non-binding term I can think of, that you'd have two agencies trying to do the same competitive analysis—in fact, it's not even two agencies. We've got the states. We've got the other

international bodies doing essentially the same analysis around these large mergers.

MS. MOSS: Just a very brief response. In our working group comments, we actually propose a test to harmonize these various preclusion doctrines, which would cover implied immunity, but also filed-rate and *Town of Concord* and *Trinko*. There, I think as I noted earlier in my comments, there are any number of different regulatory preclusions and some are redundant. The current system seems very out of sync with the direction in which a lot of these industries are moving, where there might well be a complementary role for antitrust. The test that the AAI working group proposes is, in fact, a very narrow one that would be conduct-specific in an attempt to sort of harmonize these different exclusion doctrines.

I think I will--actually, could you restate, Commissioner, your second issue?

VICE CHAIR YAROWSKY: The second question is, do you have any recommendations about keeping the allocation authority for approving telecom mergers or changing the way that works in the '96 Act?

MS. MOSS: I guess in response to that, I would note, just for entertainment, I think, that the number of

arrangements that there exist across regulatory agencies for merger review authority is really stunning. As high as we could count, there were four different arrangements that currently exist. One is exclusive enforcement authority. That's railroads. Another is major enforcement authority with the antitrust agency a party to the proceeding, as in airlines. There's dual review authority, as in electricity and telecom, at least in some form. And then there's no statutory or effective enforcement authority by the regulatory agency, say in the case of natural gas pipelines.

One issue we think is very important is to improve the consistency in merger review across these different industries because what we have right now is a patchwork and sort of a mishmash of how merger review is implemented, and this gets back to our proposal that antitrust take the lead on looking at competitive issues and there are two ways to approach it. One is for the antitrust agencies, in the case of telecom or electricity or any other industry, to provide the competitive analysis and have the regulatory agency throw it into the hopper, sort of the public interest hopper, and weigh it against other public interest factors. The other alternative is for them not to put it into the public interest balance but to take it as it stands and deny the

merger if it has potentially anticompetitive effect.

MR. FURCHTGOTT-ROTH: Commissioner, on the second question about merger review, I've been there. I've worked with staff on the '96 Act and it's not always easy to translate the intention of the committee or the house of Congress or all of Congress into a law that actually results in a way that mergers will be reviewed. I would just point out that, at least in the case of the FCC, the way, quote-unquote, "mergers" are reviewed is not based on any specific merger review authority. It's based on sections of the Act that refer to transfers of licenses and transfers of various authorities.

In terms of your first question about implied immunity, I would simply note that on a clear day, anyway, if one looked out that window, one could look at the future site of what will be owned today by Major League Baseball, which has explicit antitrust immunity. The notion of implied immunity being applied to various regulated entities, to some extent, every business in America is regulated. I think it would be a shame if antitrust laws simply are applicable only where no other body of law applies.

I think the role of both government officials and the courts is to try to make various laws harmonize with one

another, and I think if one does that, then one probably would find very few examples of implied immunity.

MR. COOPER: I think I've made my feelings on implied immunity known already. I mean, it certainly is nonsensical to imply an immunity when the rule being invoked has to do with competition. I mean, if the antitrust authorities find that there's an abuse of competition, then the basis for the immunity—it doesn't exist.

But the irony is that, of course, the '96 Act reflects the ultimate reaction to exactly the fencing-in activity that I'm talking about. That is, the antitrust authorities were attempting to fence in the monopoly power of what was a thoroughly regulated industry and I don't know why they didn't invoke implied immunity to avoid the antitrust cases over 50 years, but they didn't, and most people in this room would say we're better off because the antitrust authorities were allowed to say regulators were not doing their job in protecting the public and compel the industry to identify more competitive neighboring markets to the core monopoly. So for me, we ought to have the narrowest scope possible for implied immunity, especially when we're claiming a transition to competition.

On the question of dual reviews, we're not opposed

to having antitrust agencies take the lead on the fundamental competition analysis. We probably prefer the FTC because it has an administrative structure and might go for behavioral remedies. It has the ability to do so perhaps better than the Department of Justice. Certainly, the Department of Justice is not inclined to do those kinds of reviews. But that should not be—and here's why we're very cautious when we speak those words, because the competition analysis is not the sum total of what these industries are about. The difficulty in Congress is that you will frequently get folks who say, well, we're trying to have competition and if the Department of Justice or the Federal Trade Commission will take care of competition, then there's no space left for regulation. That's just not the case in these industries. So we've got long discussions about moving antitrust competitive analysis out of the regulatory agencies and into the stand-alone competition agency. Terms and conditions—the devil is in the details.

CHAIRPERSON GARZA: Are you ready, Dennis?

Commissioner Carlton?

COMMISSIONER CARLTON: Yes, I'm ready. I thank you all for your comments. It's a pleasure to see a panel dominated by economists and one lawyer who knows a lot of

economics.

I had really two areas I wanted to explore and they both involve telecommunications, so I want to put on the record that I've done a lot of work on telecommunications on behalf of several of the former Bell Companies and submitted testimony in the recent mergers, the SBC-AT&T merger and the Verizon-MCI merger. So with that as background, let me follow on something you were saying, Dr. Cooper.

Suppose one concedes that there are non-economic goals of regulation. Let's just focus on the FCC, some of the conditions the FCC lays down when they approve a merger. I don't think it's correct to read you as saying, but correct me if I'm wrong, that the conditions the FCC lays down to—what they think—to remedy competitive harms are necessarily requiring them to invoke the public interest standard. It's remedying competitive harm, and those may be remedying competitive harms that the Department of Justice doesn't think are there. Would you say that that's accurate for at least some of the conditions they lay down and some of the times when they give justification?

MR. COOPER: There is clearly duplication in the oversight of competition today, which is why we have begun to think very hard about how we would allocate those

responsibilities.

Part of the difficulty, I think, is the fact that— and a lot of the conditions have been interconnection issues, and the difficulty you get into then is that the Department of Justice is not inclined institutionally nor organized institutionally to get in the process of regulating interconnection.

COMMISSIONER CARLTON: I want to go to that, because that's really my second topic. Let me ask—

MR. COOPER: So the answer was that the FCC looks at the industry, sees the vertical leverages, the linkage, the interconnection question, right, and applies a set of competitive conditions that the Department of Justice has not applied, and was not inclined to apply. So—

COMMISSIONER CARLTON: Yes, but I would read that a—my interpretation is that the DOJ comes to the conclusion there aren't competitive harms if you do certain conditions, but the FCC says, no, I want these interconnection conditions. That's a disagreement about whether there's competitive harm or whether a remedy is necessary. But I wanted to distinguish that from something that might be a broader public interest end. That's a disagreement about competition.

But let me go to access and interconnectiveness. You put your finger on what I think is an important question. In virtually everyone's testimony, either oral or written, they talk about access and whether it should be mandated or not. I really have two questions. The first is, when people are talking about shared access, sometimes in some of the statements you are saying that should be regulatory, and that's what you were just saying, Dr. Cooper. But in the other parts of the statement, like the AAI's statement, they say antitrust should pay attention to mandatory access. I'm curious whether you think that's regulation or antitrust. That's one question.

The second question is, all of you were talking about, in certain parts of your testimony, a transition from a regulated industry to an unregulated industry, and I think Dr. Cooper pointed out not all industries are going to be unregulated. But it's also true that some industries are on this transition path because, one, technology is dramatically changing, so maybe they don't have to be regulated, while others are on this transition path or have transitioned because it was a mistake to regulate them in the beginning. They don't need to be regulated.

Are your standards, if you're in favor of mandating

access, different in industries that are undergoing rapid technological change, and don't you fear that in those industries, saying that you're mandating access is really removing incentives to undertake investment? Maybe you could go from right to left this time.

MR. THORNE: There's a grave concern in forced sharing arrangements with deterring investment. Now, let me say that it's really opposite what you expect me to say. I don't think it's impossible, I don't think it never happens that sharing isn't a good thing and that it ought to be required. In fact, some regulations—I teach my class at Columbia, I tell them, this is a good regulation. It requires sharing. It requires interconnection. But for an antitrust authority to force sharing risks deterring, first, investment by the incumbent, whoever's assets have to be shared, because once you get the idea that you have to share these things, the incentive to keep them up and build more of them is reduced, but also the incentive for the people who might build their own thing if they couldn't share them on easy terms. There's a lot of risk when you put things in the ground. People will take those risks if they have to, but if they can share, they'll share and they'll be sharing a monopoly rather than having real competition.

So there is a grave risk of misperceiving the investment deterrence, and courts, in the worst case, one-time lay juries are really not well set up to calculate how we're going to deter investment by all of these parties if we force sharing.

COMMISSIONER CARLTON: Dr. Moss?

MS. MOSS: I think you raise sort of the critical issue for transitioning industries. I would be the first to admit, as a former regulator, that regulators are very good at defining and crafting compulsory access regimes. They know the industry. They know the relationships between the parties. They have all of the technical details and information that are really necessary to put together compulsory access and to specify price and non-price terms and conditions.

I think access is important, critical, in cases where it's very clear that you have an incumbent network monopolist, in industries where there's an essential facility or a severe bottleneck at the network level or the platform level, and I think those cases are fairly clear-cut, that early intervention in the form of a regulatory compulsory access regime is important.

I think where the policy debate becomes more

difficult is as these industries transition and benefit from access and other types of reforms, like interconnection standards and various other policies, these complementary markets, markets complementary to the network market, become more competitive, and that's really the opening, the window opening for antitrust to play a larger role.

I think the biggest policy issue today is looking at this end-to-end, or development of end-to-end network competition, and there, I would say to the FCC's decision in broadband, where they really took a wait-and-see approach to regulating broadband, DSL, for example, as a competitor to cable broadband. So it's very much a timing of intervention issue in terms of whether to intervene in the market, impose compulsory access, or to wait and see how technology develops, how quickly it develops, to what extent competing systems are developing that provide effective competition. But there, of course, the question is when do you have enough competing systems to ensure that you'll get prices that reflect truly competitive outcomes.

The AAI just conducted a three-year project on network access and we're moving into another project on systems competition which takes up these very issues. So we've spent a lot of time on it and made a number of very

interesting observations from a number of different industries.

MR. FURCHTGOTT-ROTH: Professor Carlton, let me just touch on three points. One, the initial issue you raised about DOJ merger review and the public interest. The DOJ merger review and the FCC merger review are not independent events. They're highly conditional on each other. It is precisely that point, that I think if there were no specific FCC merger review, then I think if they were truly independent, it would be impossible to say that the DOJ merger review by itself would not be in the public interest. It would completely address all antitrust issues.

Because there is information sharing, because there is some coordination that goes on, I think it's quite possible—I have no specific evidence of this, but it's within the realm of plausibility that there is some coordination of merger conditions between the two agencies and, therefore, it's—simply because it is plausible and there's no way of demonstrating it, that very fact troubles me. But I think it's impossible to look at the current situation and say that the two merger reviews are independent and, therefore, the DOJ merger conditions by themselves address everything.

The second point is several witnesses, both on this

panel and the last panel, mentioned transition deregulation and rapid tech launch, quick change. In terms of structuring the antitrust law, these are all very interesting issues, but that was true in the 1930s and the 1940s and the 1950s and it'll be true 100 years from now. The notion of technology change is always with us and the ebbs and flows of the degree of regulation that applies to industry is very difficult to predict. But I think it would be—my personal view is it would be a mistake to structure federal law, or federal antitrust law, based on perceptions of whether two or more businesses are in a state of greater or lesser deregulation. I think that antitrust law should be written with as few conditions—rather temporal conditions. That was not very artfully worded, but laws should not be written conditional on things that are likely to change, and in this case, to say something is in a state of technological change or deregulation and that would, therefore, affect the type of antitrust analysis that would be conducted, I personally think that would be a mistake.

The whole issue of access to network facilities as an antitrust issue is very real. You, Professor Carlton, know as much about this literature as probably anyone in this room, if not anyone in America, and there is just a very

robust literature. I think the good news is I think that the academic literature and the concepts of access as an antitrust issue fit within antitrust law today. I'm not sure that there is a need for changing the law in any way to accommodate network industries. For good or bad, the antitrust agencies have been addressing network industries in great detail over the past 15 or 20 years. But even long before that, the idea that airlines, as an example, are networked industries and there have been antitrust and that going back many decades.

So I guess those are my answers to the three questions you've raised.

MR. COOPER: A few points. At the end of the last panel, someone mentioned that one man's bundling is another woman's tying. One man's forced sharing is another woman's nondiscriminatory interconnection and carriage. If I say it my way, it sounds a lot more reasonable than forced sharing.

I think the fundamental difference is the fact that the Communications Act, certainly after '96, had these two different concepts. We had interconnection and carriage in Sections 201 and 202 and we had all this unbundling stuff for a completely different purpose in 251 and 271 et cetera and we really shouldn't confuse the two. Of course,

interconnection and carriage, I'm going to agree with Harold again. Nondiscriminatory interconnection and carriage has been with us for an awfully long time. In fact, I like to say it's part of the DNA of capitalism.

You can go all the way back to common law and find prohibitions against undue discrimination. The tariff sheet— I give this lecture, you all know where the tariff sheet came from an inn where the prices were put on the window and the innkeeper was subject to common law suit if he unduly discriminated against a traveler. If he didn't let you sleep there because you sold knives and his cousin sold knives, you could sue him in court.

The difficulty in America began when the railroads decided they didn't want to be treated that way and they tried to be private carriers and they gave us the whole framework of common carrier regulation. But that was not forced unbundling, that was nondiscriminatory interconnection and carriage.

I think it's a really good principle, which has been impervious to centuries of technological change. So I would not give up that principal. We may have to find different ways to get it, first point.

Second point, why antitrust doesn't work in these

industries goes back to my original discussion about why they're so different. Antitrust tends, except in merger review, to be backward looking. That is, after the problem has arisen, we're going to try and fix it. The social cost of allowing these networks to be closed is too great to let that happen. That's why we don't leave it to antitrust alone. So we can't bear that burden.

When is it—and we're now having this big debate about four is few and six is many, a very famous—and now I'm told that two and a half is enough and I don't buy that yet. People will talk about dynamic duopolies, a new concept I've now run into out there. So I'm not convinced that relying on antitrust for this fundamental function in our economy, and also in our policies. Let's be clear—telecom is an information industry, and so if you don't get to speak, you lose more than just economic opportunity to profit. You may also lose your chance to participate.

So for me, the goal here is to find ways to preserve the principle of non-discrimination in interconnection and carriage, and frankly, two-and-a-half end-to-end networks, I don't believe that they will behave—if I had ten, I'd be happy. If I had six fully competitive head-to-head networks and you came to me and said, Mark,

you've got enough competition, you don't have to worry about discrimination, it would be a more plausible case. But where we are today with two and a half and maybe only two, having lost our best third platform in Sprint-Nextel, who controls a huge amount of spectrum and promised they were going to be the third platform, and then they signed a 20-year deal with the cable operators, I just lost my third independent competitor.

So that's the difference. I don't think antitrust is sufficiently responsive to the fundamental economics of nondiscrimination.

CHAIRPERSON GARZA: Commissioner Kempf?

COMMISSIONER KEMPF: Doctor, let me continue. One man's meat is another woman's potatoes, and the reason I posed that last one is something you say both in your testimony here and in your written submission where you talk about regulated industries. These are industries in which there is a high probability that unregulated competitive markets will not produce the outcome that society wants. The question I have is, how do we know what the outcome is that society wants?

If I go back to the *Northern Pacific* case, the Supreme Court says, hey, we've made a collective,

Congressional decision that the unrestrained interactive competitive forces gives us what society wants and that anything else is just one man's meat is another woman's potatoes.

MR. COOPER: The answer is, you've put your finger on it. Congress decides. I mean, in a democracy, people get to write the rules under which they live. They have declared—the example I love to use is reasonably comparable services at reasonably comparable rates will be available to low-income, rural, Indian areas, all kinds of areas. That makes no economic sense. It costs more to deliver those services in rural areas than it does in urban areas and society has said they want reasonably comparable services available at reasonably comparable rates and that is what our democratic process has given us. So the answer is that the people act—the will of the people is expressed through their elected representatives, and that's why the Communications Act has the public interest standard 112 times.

Let me give you a perfect example. We're on the House side. In the staff draft of the rewrite of the Communications Act on the House side, which was marked up or debated a while back, the words "public interest" never appear. In Senator Ensign's bills on the Senate side,

repeals the Communications Act, essentially, the words "public interest" never appear. This Congress, through the will of their representatives, may repeal the commitment to universal service. There'll be a heck of a fight about that, but that is the way we decide what our non-economic goals are.

COMMISSIONER KEMPF: Thank you. Dr. Furchtgott-Roth, let me turn to your fifth recommendation. Both antitrust agencies and regulatory agencies should set binding time limits on merger reviews. Let me start with going outside the regulated industries.

The Hart-Scott-Rodino Act itself not only has binding limits, they're pretty short ones. The problem is that even with those statutory binding limits, the agency typically says to the merging parties, if you require us to make a decision in 30 days, we'll do it, but gosh, you ought to reflect on whether you want us to really do that on a basis where we don't feel as informed as we'd like to be. Therefore, why don't you extend it and routinely extend it longer than your Table 1, or Table 2, I guess it is, timetable frames you have in there. So when you say we ought to set the binding time limits, as a practical matter, how has that got any teeth when we have seen that in an area

where you do have them, they are ignored more often than observed?

MR. FURCHTGOTT-ROTH: Well, Commissioner, I think that's a very good point. I'm sure many of us in this room have witnessed that very exchange go on. Let me suggest two interpretations of that.

One is, I'm quite willing to believe that the timelines in the Hart-Scott-Rodino Act are too short. It could be that DOJ and the FTC reasonably need more time to review information, but I think the situation that exists now of the federal agencies going to merging parties and saying, you will agree to more time, won't you, because the alternative is we're going to reject it. I think that very process is—I think it's wrong. I think it's unconscionable because it is used not as the rare exception, it is used as the norm. I think it is not a very good way for the government to operate.

It should be the case that the government has to be able to go to court to challenge a merger, that the government needs a fair amount of information to block a merger, but it should be able to collect that in a timely manner. The current situation of unpredictable timelines, I think is very detrimental to the efficiency of the operation

of markets. Merging parties should be able to get some clarity within some reasonable and predictable amount of time. And actually, it turns out for major mergers, going outside of—maybe it's not 180 days, but if you, say, you went outside of 360 days, that's very rare. There is some time period beyond which even the agencies can make a determination. Maybe there should be some adjustments in what's there right now.

Going to the regulatory agencies, going to the FCC, and again, I would say almost all of the delays beyond 180 days are because the FCC decides it's going to wait on DOJ and the FTC to rule first, and there's no reason for that. They have enough information to make a decision within 90 days if they wanted to, or 120 or 180 days, and all of these extensions are simply the FCC waiting for another agency to act.

COMMISSIONER KEMPF: Mr. Thorne, one quick thing. I read your résumé with great interest, but weren't you also involved in a landmark international case involving the intersection of antitrust and communications law in New Zealand?

MR. THORNE: That was one of the most important cases I ever worked on, Commissioner Kempf.

[Laughter.]

MR. THORNE: I did work on that. If I could respond briefly to your meat and potatoes question—

COMMISSIONER KEMPF: Yes.

MR. THORNE: —I think it's a serious question, and the question is, what would a free market produce. A good way to look at some of the questions that we've been discussing, like should antitrust require interconnection or access or dismantling, forced sharing, or whatever mark we call it, but should antitrust do that, is we look at what different parts of the industry that by accident are either competitive or unregulated, look for natural experiments. What does a free market produce when firms aren't dominant or regulation doesn't apply?

In the written testimony, I could think of four places where regulation, despite its pervasiveness, doesn't require, or hasn't been applied to interconnection in my industry, telecommunications. They were e-mail, Internet backbones, wireless roaming, and AOL's instant messaging, although the AOL instant messaging, for a while, the regulators said, interconnect with others. In the first three, the parties worked it out. All of them interconnected with others of their kind to offer seamless, ubiquitous

services on their own terms, very detailed terms, things that would be difficult for regulators to have duplicated, but they did it on their own without regulatory mandate. The fourth, AOL began interconnecting its instant messenger system after the regulation requiring it expired. So, will interconnection occur if you don't force it, and the answer seems to be yes, based on the places I have been able to find.

The other interesting natural experiment I didn't mention in my testimony is we had cable telephones both simultaneously offering broadband service. Cable got ahead of telephone. Cable was essentially unregulated for a long time. Telephone was thickly regulated. I'm not going to say that's the cause of cable getting ahead, but there was a period where—and it's still going on—there's a horse race, who's going to offer more broadband, cable or telephone. Cable was watching what the regulators were doing to telephone for a while. For telephone you had to share the whole line, then you had to share part of the line, then you do the opposite, you shared just the broadband without the line. All these questions were going on.

On cable, my friend, Tom Hazlett, a very good economist, was Chief Economist of the FCC a few years ago,

looked at what cable was doing. They were only dedicating a little bit of their spectrum to their broadband, and they calculated, what are they doing with the rest of their spectrum? There are some very high-value channels on cable, but there are also some very low channels on a typical 80, 100-channel system, the third bass fishing channel or something that was only bringing in a couple of pennies a month. Hazlett asked, well, what if they took that least valuable cable TV channel and diverted it to broadband? Could they make more money? His business case showed, yes, they'd make a lot more money if they put more capacity into broadband.

So the question comes up, why? Why are they self-suppressing their own output in a business they are leading? They are beating telephone companies. My hypothesis was, well, they're trying to suppress Internet video because that competes with their pay-per-view or their premium channels. That's my hypothesis.

Hazlett disagrees. He thinks they're afraid if cable devotes more to broadband, regulators will do to cable what they were doing to telephone, that the fear of forced access was suppressing what cable devoted to this broadband service. Another natural experiment to suggest to you.

MS. MOSS: Commissioner?

COMMISSIONER KEMPF: Do you have a reference to that?

MR. THORNE: I'll supply a reference to Tom Hazlett's article on that.

MS. MOSS: Can I respond quickly to your question?

COMMISSIONER KEMPF: Sure.

MS. MOSS: Just one additional thread in this story of merger review, and it's actually based on what's ongoing right now in the PSE&G-Excelon case, two large electric integrated public utilities. There's an effect when you have not only dual merger review at the federal level, but also state regulatory commissions and antitrust authorities involved where you have multiple agencies looking at a particular transaction and there's a tremendous incentive to play the wait and watch what the other guy is going to do game, what the other guy does game. I call it the wait-and-see game, which is the DOJ, for example, waiting for FERC to act on a particular merger as a way of feeding information into their own decision, or the state agencies free-riding on remedies imposed in the federal cases. So this dynamic that occurs when you have multiple agency review, I think can contribute to a very protracted merger review process and is

sort of a difficult thing to deal with in some industries.

MR. COOPER: I could go on and on about broadband. I have a completely different view of what the cable guys are doing. I've debated Hazlett on it. Let me just make two observations. One, the platform was rolled out not for the Internet. They discovered the Internet. They upgraded their digital platform to compete with satellite. They imposed conditions in the early days of broadband intended specifically to prevent the development of competing video services, protecting their franchise product. And yes, they have underallocated capacity to broadband. They continue to do so.

The fundamental point is that Americans, on cable systems, they bundle and they tie basic video service to their broadband offering. If you call your cable company up and say, I want broadband but I don't want your basic cable service, they say, \$60. If you take basic cable from them, they give you a negative price of \$15. You pay less for the bundle than you do for the stand-alone service. And as a result, Americans pay ten times as much as Japanese or Koreans do for broadband service. I don't look on broadband service as a particularly successful development, and there are lots of anticompetitive issues and I give you a footnote

about a completely different vision of why the cable and the telecom guys have gotten themselves into that different set.

So I just can't let the record stand with the glorious success of the cable modem rollout. It's--it hasn't been that from our point of view.

CHAIRPERSON GARZA: Are there any Commissioners that want to take three minutes for other questions, follow-up questions?

[No response.]

CHAIRPERSON GARZA: Well, I want to thank the panelists very much for your thoughtful written testimony and for your comments here today. I hope that by letting you go a little bit earlier, it'll make your life a little bit easier. Thank you.

[Whereupon, at 4:25 p.m., the hearing was adjourned.]