Statement of Darren Bush*
Before the Antitrust Modernization Commission

Hearings on Statutory Immunities and Exemptions

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Introduction

I want to thank the Commission for giving me the opportunity today to speak about statutory immunities.

To complement my oral statement summarizing the Report, my written remarks today focus on issues related to, but not the direct topic of, the Report.[1] There are certain substantive implications for antitrust doctrine should our procedural Framework or one similar in structure and content be implemented. In particular, the realms of express and implied immunities, and the role of primary jurisdiction, appear implicated in the Report.

Before proceeding, I disclose that my views are my own and do not purport to reflect the views of my coauthors Gregory Leonard and Stephen Ross.

Express Immunities

One area of law impacted by any report on statutory immunities is the realm of express immunities in regulated industries. As the Report states, an immunity may be justified when a regulatory agency has been expressly empowered by Congress to displace competition in an industry. Congress may expressly confer upon the regulator

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[1] Darren Bush, Gregory K. Leonard, and Stephen F. Ross, A Framework for Policymakers to Analyze Proposed and Existing Antitrust Immunities and Exemptions, available at http://www.amc.gov/commission_hearings/pdf/IE_Framework_Overview%20_Report.pdf (hereafter "Report" or "Framework.") Portions of my comments are derived from JOHN J. FLYNN, HARRY FIRST AND DARREN BUSH, FREE ENTERPRISE AND ECONOMIC ORGANIZATION: ANTITRUST (7TH ED.)(in draft).

the exclusive power to control competitive issues within that industry by providing the industry with antitrust immunity.[2]

Traditionally, such grants of authority were for the purpose of displacing competition with rate and entry regulation while providing the firm with a monopoly, albeit a regulated one. The agency would confer upon the industry the right to some reasonable rate of return and an exclusive right to provide service within its territory in exchange for the provision of service to all comers, agency review of rates and costs associated with providing that service, and other hurdles that limited the ability of the firms within that industry to expand into other realms or charge higher rates.

In this realm, the common notion was that antitrust had little to say. Indeed, notions of competition were antithetical to this arrangement. After all, there was little ability to compete between franchises as entry was highly restricted.[3] Moreover, the terms, conditions, and prices of the services offered in such industries were actively overseen by administrative agencies. Thus, with few exceptions, antitrust was required to remain silent.

However, current notions of regulation focus on market mechanisms that are not necessarily antithetical to the antitrust laws.[4] "Regulated" industries today are typically

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[2] *See*, *e.g.*, 49 U.S.C. § 10706 (Rail transportation exemption).

[3] One notable exception was competition for larger industrial and commercial customers in the electricity industry.

[4] *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 341 (2003). Professor Hovenkamp states:

> One consequence of regulation is a reduced role for the antitrust laws. When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside. A corollary is that as an industry undergoes deregulation, or removal from the regulatory process, antitrust re-enters as the residual regulator. Since our fundamental criterion for determining antitrust immunity in regulated industries is the extent of unsupervised private discretionary conduct, the natural result of deregulation is an increased role for the antitrust laws. In general, the more extreme the deregulation--that is, the more that the market is opened to ordinary competitive forces--the greater the role for antitrust.

regulated only in the parameters under which competition takes place. Agencies do not to the same degree restrict entry—they encourage it. They no longer to the same degree review rate schedules and tariffs—they allow the market constructed by administrative rules and statutes to determine the rates and prices charged. They also do not to the same degree guarantee a rate of return, instead allowing the market to winnow out losers and reward winners.

It is imperative Congress recognize that antitrust law and regulation may serve complementary purposes[5] in industries subject to what my colleague Harry First and others have called "regulated deregulation."[6] Under these "new" regulatory schemes common today, express exemptions from the antitrust laws generally will be inappropriate and, therefore, should be rare. In other words, the "default" rule should always be that competition and its enforcement agent, the antitrust laws, prevail.[7]

Id.

[5] For a discussion of the complementary nature of regulation and antitrust, *see* Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect Us Against Market Power When the Market Rules Encourage Its Use),* 83 OR. L. REV. 207 (2004).

[6] *See* Harry First, *Regulated Deregulation: The New York Experience in Electric Utility Deregulation*, 33 LOY. U. CHI. L. J. 911, 924 (2002)(discussing "regulated deregulation" as the replacement of cost of service regulation with state and federal regulation of "the mechanism put into place to manage competitive markets.")

[7] It follows that antitrust "savings clauses" should not be required, given the Report's stance that immunities ought to be express and a detailed legislative history provided. A savings clause, in contrast to establishing competition as the default rule, places the burden upon Congress to actively declare (and redeclare) that the antitrust laws apply. *See, e.g.*, Telecommunications Act of 1996, sec. 601(b)(1), (c)(1), § 152 note, 110 Stat. 56, 143 (1996)(" SAVINGS CLAUSE ... nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. NO IMPLIED EFFECT ... This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local laws unless expressly so provided in such Act or amendments.").

Implied Immunities

Implied immunities, or claims that Congress "intended" to exempt regulatory conduct from antitrust even though it did not do so by express statutory language, are not necessarily excised completely from existence through implementation of our Framework. The implication of our Report is that the presumption should be against a finding of implied immunity. Particularly in light of the current trend towards "regulated deregulation," it is increasingly unlikely that the roles of regulation and antitrust serve antithetical purposes. Rather, the creation and fostering of competition might indeed be best served by the complementary potential of regulation and antitrust.[8]

Historically, courts have viewed implied immunities with extreme skepticism. As one group of commentators has stated:

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[8] Similar arguments might be made in favor of a limited state action doctrine and the filed rate doctrine. The original state action doctrine arose out of principles of federalism and a concern that the federal government not intrude upon state created and sanctioned regulation. Again, the most common type of industry regulation was rate and entry regulation. However, "regulated deregulation" has come onto the state scene in many instances. In such instances, it is unlikely that the clearly articulated state policy seeks to displace competition with regulation. Rather the purpose of the policy would be that regulation creates competition. The creation of competition cannot be said to be in contradiction with the purposes of antitrust. *See* Darren Bush, *Mission Creep: Antitrust Exemptions and Regulated Industries*, working paper available January 1, 2006. For examples of state policies creating competition in the context of traditionally regulated industries, *see* United States v. City of Stillwell, Oklahoma, Case No. CIV 96-196 B, government filings available at http://www.usdoj.gov/atr/cases/stilwe0.htm (Oklahoma statute allowed municipal electric cooperatives to compete with one another for new customers); United States v. Rochester Gas & Elec. Corp., 4 F.Supp.2d 172 (W.D. N.Y. 1998)(New York statute allowing retail sales of electricity by cogeneration plants) .

Similarly, the *Keogh* doctrine or filed rate doctrine was originally designed to preclude the bypassing of statutory damages granted under the Interstate Commerce Act. The Interstate Commerce Act provided for single damages as a remedy. The plaintiffs in *Keogh* sought to use antitrust to bypass statutorily conferred remedies. This approach was rejected by the Court. The case was not about the justness or reasonableness of rates, as has been increasingly the case with application of the *Keogh* doctrine. Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156, 162-163 (1922).

As has increasingly been the case, *Keogh* has been applied in the context of "regulated deregulation." However, the market clearing prices typically found in such industries bear no relation to the types of rates originally addressed by the *Keogh* progeny, namely, traditional cost of service rates set via tariff after review by an administrative agency. In contrast, market rates are only reviewed (in rare instances) and even then they are reviewed *ex post*. Courts nonetheless continue to hold that the filed rate doctrine applies to market based rates. *See, e.g.*, Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc., 370 F.3d 641, 651 (9th Cir. 2004)("[W]hile market-based rates may not have historically been the type of rate envisioned by the filed rate doctrine, we conclude that they do not fall outside of the purview of the doctrine.")

> [T]wo grounds--and only two grounds--will support an implied repeal: the first is irreconcilability and the second is an affirmative showing of legislative intent to repeal by implication. The latter criterion has only been satisfied in cases in which the repealing act contains a directive to the regulatory agency to police the interplay of competitive forces. The irreconcilability criterion requires, at a minimum, that the statutes [antitrust and regulatory] produce differing results. This finding alone is not sufficient however. Rather, to find 'irreconcilability' there must be a determination that repeal of the antitrust laws is necessary to make the regulatory act work. This requires an appreciation of the nature of the various regulatory acts.[9]

Broad delegations of power to a regulatory agency may lead to instances where agency directives are in tension with antitrust law. As Judge Greene's opinion in an early phase of the Antitrust Division's suit against AT&T seeking dissolution of the company on the ground of unlawful monopolization points out, however, such instances are relatively narrow. In response to AT&T's motion to dismiss the suit claiming that Congress had committed regulation of the activity in question to the F.C.C. under the Communications Act of 1934, Judge Greene wrote:

> Regulated conduct is . . .deemed to be immune by implication from the antitrust laws in two relatively *narrow* instances: (1) when a regulatory agency has, with congressional approval, exercised explicit authority over the challenged practice itself (as distinguished from the general subject matter) in such a way that antitrust enforcement would interfere with regulation . . . and (2) when regulation by an agency over an industry or some of its components or practices is so pervasive that Congress is assumed to have determined competition to be an inadequate means of vindicating the public interest.[10]

I concur with the viewpoint that implied immunities should be viewed with extreme skepticism and that conduct should be deemed immune only under the relatively narrow circumstances set forth by Judge Greene.

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[9] Robert Balter and Christian Day, Implied Antitrust Repeals: Principles for Analysis, 86 DICK. L. REV. 447 (1982). *See also* United States v. National Association of Security Dealers, 422 U.S. 694, 719 (1975)("Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).

[10] U.S. v. Amer. Tel. & Tel. Co., 461 F.Supp. 1314, 1322 (D.C.D.C. 1978)(emphasis supplied).

Primary Jurisdiction

The Report impacts upon the realm of primary jurisdiction law as well. For purposes of the Report, the limitations that the Framework imposes as a practical matter for findings of express or implied immunities might lead to a renewed importance for the role of primary jurisdiction.[11] If the use of primary jurisdiction increases, it is important that the Commission make clear that primary jurisdiction is *not* a methodology by which to grant immunity or exemption, but rather a method by which courts might rely on an agency's expertise in order to resolve a dispute before them.[12]

The doctrine of "primary jurisdiction" is not, as is sometimes thought, an implied immunity. "Primary jurisdiction" addresses the question of whether the antitrust court should *suspend* the resolution of some questions of fact or law over which it possesses antitrust jurisdiction, until passed upon by the regulatory authority whose jurisdiction encompasses the activity involved. Although infrequent, such initial deference can be the practice when (1) resolution of the case involves complex factual inquiries particularly within the province of the regulatory body's expertise; (2) interpretation of administrative rules is required; and (3) interpretation of the regulatory statute involves broad policy determination within the special ken of the regulatory agency. This deference to statutory interpretation extends even to questions of jurisdiction.[13]

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[11] For a discussion of historical misuse of the doctrine, *see* Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954). *See also* Louis Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. PA. L. REV. 577 (1954); JUDICIAL DOCTRINE OF PRIMARY JURISDICTION AS APPLIED IN ANTITRUST SUITS, STAFF REPORT TO THE ANTITRUST SUBCOMMITTEE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 84TH CONG., 2D SESS. (1956).

[12] Schwartz, *supra* note 11 at 470-471 ("The lesson taught by [the expansion of primary jurisdiction doctrine from a procedural rule to a judicial exemption] is this: if a primary jurisdiction does not already exist, it may be advisable for an industry to create one as a means of avoiding the compulsion to compete which is embodied in the antitrust laws as administered by the federal courts.")

[13] *See Sourthern Railway Co. v. Combs*, 484 F.2d. 145 (6th Cir. 1973). *See also* Alpharma, Inc. v. Pennfield Oil Co., 411 F.3d 934, 938 (8th Cir. 2005)("The contours of primary jurisdiction are not fixed by a precise

The effect of judicial reference of a question to an administrative agency should be agency action on the question referred and then further court action in the antitrust case, although agency action might be dispositive. Unlike a finding of express or implied immunity, however, where primary jurisdiction doctrine is applied, the trial court's action is reviewed and that review is on antitrust standards.

Where the doctrines of express or implied immunity are applied, on the other hand, the agency's action is reviewed on the standards set forth in the regulatory statute, and usually with the judicial deference to the agency's fact finding. As a practical matter, the initial determination of which doctrine applies in a particular case is of great significance in deciding what law applies, the degree to which antitrust considerations may or may not be accorded weight, and whether the antitrust remedies of criminal sanctions or treble damages are available in a particular case. An express or implied exemption finding precludes the application of antirust standards and remedies; while an application of the primary jurisdiction doctrine does not necessarily preclude use of antitrust standards and remedies to adjudicate the dispute but may only defer the adjudication pending an initial decision by the agency.

A court may find none of these doctrines apply in a case involving activity by a regulated industry—even where the agency has some jurisdiction over the activity in question. As Judge Greene pointed out in the AT&T case, in such cases antitrust policy and regulatory policy are seen as compatible and not antagonistic.

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formula. Rather, the applicability of the doctrine in any given case depends on "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application. . . . Among the reasons and purposes served are the promotion of consistency and uniformity within the areas of regulation and the use of agency expertise in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion.")(internal quotations and citations omitted).

Conclusion

The Report serves the laudable purpose of providing a framework with which Congress is able to consider the full implications of any proposed statutory immunity, given the most complete information available at the time of consideration of passage. It also provides tools useful in carefully limiting the scope of the immunity to its intended effects, such as sunset provisions and the provision of a detailed legislative history.

The issues I raise above might be characterized as incidental merits to the Framework. Express immunities, pursuant to the framework, will be established only with clearly defined parameters. Implied immunities will only exist to the extent that broad regulation creates the potential for conflict between administrative agencies and antitrust enforcement. Given the trend towards agency creation of regulated competitive markets, these conflicts are likely to become *de minimus*.

The narrowing of express and implied immunities might come with the increased, although still relatively modest, use of primary jurisdiction. Here, I seek to raise the issue that it is not the intended consequence of the Report to have primary jurisdiction serve the role it once did, as that of an additional avenue for immunity. With the focus shifting from express and implied immunities to primary jurisdiction, it must be made clear that primary jurisdiction is a method by which courts might rely on an agency's expertise to resolve a dispute, not a method of conferring immunity.