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COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON REGULATED INDUSTRIES

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INTRODUCTION

These are the comments of a Working Group on Regulated Industries established by the American Antitrust Institute ("AAI") for the purpose of responding to the AMC's request for public comments. These comments reflect a consensus of the Working Group, but it should not be assumed that all members agreed with every statement or position taken. The Working Group is chaired by Diana Moss (AAI) and the other members are: Albert Foer (AAI), Alfred Kahn (Cornell University, emeritus and National Economic Research Associates), Susan Kelly (American Public Power Association), Roger Noll (Stanford University), Jonathan Rubin (AAI), and Philip J. Weiser (University of Colorado).

Question 1. What role, if any, should antitrust enforcement play in regulated industries, particularly industries in transition to deregulation? How should authority be allocated between antitrust enforcers and regulatory agencies to best promote consumer welfare in regulated industries?

The Role of Antitrust Enforcement in Industries in Transition

Most regulated industries, such as natural gas, electricity, telecommunications, and transportation, have undergone fundamental transformation as a result of a transition to lighter-handed regulation and market-driven mechanisms. In many of these sectors, regulation no longer focuses narrowly on permissions to enter the market or allowable tariffs and profits based on a public interest standard. Instead, modern regulation addresses a broader set of objectives, including substantially more emphasis on promoting competition. As regulatory agencies increasingly rely on markets and competitive constraints to achieve regulatory goals, antitrust can and should be seen as harmoniously coexisting with regulation as a complementary policy instrument for remedying market distortions.

2919 ELLICOTT STREET, NW • WASHINGTON, DC 20008
PHONE: 202-276-6002 • FAX: 202-966-8711 • [redacted]
www.antitrustinstitute.org

Unfortunately, the transition phase between regulated monopoly and workable competition has until recently been under-recognized in antitrust thinking.[1] Despite a broad deregulatory consensus, there is no antitrust-analytic model for how it all should work. In theory, the success of deregulation in a market implies that competition has taken hold. At some point, regulatory oversight is lessened or eliminated. An earlier deregulatory effort in the commercial aviation industry (an industry not dominated by incumbent monopolies) did not involve a protracted transition period.[2]

Deregulatory transitions that take time, on the other hand, raise some thorny issues for the role of antitrust. Chief among them is whether antitrust should be put on hold until the deregulatory process is complete and the market is competitive, or whether transition-phase industries could benefit from some mixture of regulation and antitrust to hasten the arrival of competition.

In industries that are in transition to a more competitive paradigm but may still be dominated by incumbent monopolists antitrust has an important role to play for at least three reasons. First, relying too heavily on antitrust or regulation during a transition phase reflects a mistaken reliance on established models and will lead to poor outcomes. Underutilization of antitrust in transitioning industries leaves regulators to shoulder an expansive burden they may not be well-equipped to bear, such as promoting sound competition policy and deterring, detecting, and remediating anticompetitive conduct. There are risks of chilling pro-competitive behavior with a cumbersome regulatory process for issues that are more effectively dealt with by antitrust, and there are costs for establishing and maintaining such systems. A categorical rule that antitrust enforcement has no role to play in transitional markets unnecessarily limits a key instrument of competition policy which may be needed to shape policy in newly emerging spheres of competition.

Second, deregulatory schemes can involve transitions that have no end, in which case a categorical rule against antitrust enforcement during the transitional stage precludes it indefinitely. Both the Federal Communications Commission ("FCC") and the Federal Energy Regulatory Commission ("FERC") have presided over markets that are "competitive" in the *de jure* sense of qualifying according to a regulatory formula, but in which incumbents continue to wield monopoly power. A court evaluating an antitrust claim in such a market would not be bound by the agency's decree that, for example, a monopolized market is really competitive simply because the agency decrees it. Indeed, the court is free to conclude that effective competition does not exist, no matter what

[1] But see Albert A. Foer and Diana L. Moss, "Electricity in Transition: Implications for Regulation and Antitrust," 24 *Energy L. J.* 89 (2003), Philip J. Weiser, "The Relationship of Antitrust and Regulation In A Deregulatory Era," 50 *Antitrust Bull.*___ (2005), forthcoming, and Joel I. Klein, "Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process of Electric Power Restructuring," Address by the Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Federal Energy Regulatory Commission Distinguished Speaker Series, Washington, D.C. (Jan. 21, 1998).

[2] See Jonathan E. Nuechterlein and Philip J. Weiser, *Digital Crossroads: American Telecommunications Policy in the Internet Age*, MIT Press (2005), at 407, and sources cited (comparing civil aviation deregulation of the 1970s with telecommunications deregulation of the 1990s).

checklist the agency may have consulted to determine otherwise. Such a market is still in transition and, perversely, antitrust will never play a role as long as market power and monopoly continue to plague the market.

Because of this dynamic, the tardy entrance of antitrust enforcement into transitioning markets could delay the process of deregulation in potentially competitive markets. The optimal mix requires responsibility for competition law and policy in regulated industries to be more equally shared between the regulatory agencies and the courts, with the mixture appropriately calibrated to the existing established regulatory instruments. Except for merger reviews, however, the courts have been slow to recognize the benefits of concurrent antitrust scrutiny and regulatory oversight, in part because the interface between antitrust enforcement and economic regulation has been dominated historically by a concern over potential conflict between the two legal regimes. Courts are used to considering regulation as a *substitute* for enforcement of the antitrust laws. Less frequently recognized or discussed, and more unfamiliar to courts, are the *complementarities* between antitrust and regulation, which take on increasing importance as regulated industries transition to competition and less intrusive regulation and as antitrust enforcement bears more of the load as the primary instrument for competition policy. The historical bias against antitrust as a complement rather than a substitute has found expression in a variety of undisciplined exemptions, immunities, and avoidance doctrines under which defendants may escape antitrust liability. In the response to Question 3, below, we offer a proposal for modernization aimed at harmonizing the disparate doctrines of regulatory antitrust preclusion.

A final reason antitrust enforcement has a role to play in transitioning industries is that not all deregulatory schemes are equally successful or well-designed. Particularly in sharing and access regimes where terms of dealing may be compulsory, delegating the entire load to the regulator does not guarantee that extensive litigating and judicial meddling won't occur, as recent experience in telecommunications demonstrates. Moreover, in some cases industry regulators find it difficult to discharge their main deregulatory responsibility, to promote effective competition and then to step aside and let market forces take over.

For these reasons the Working Group believes, therefore, that antitrust enforcement can have an important role to play in industries in transition to competition in appropriate cases. Figuring out which cases are appropriate, however, depends on the factual circumstances and the regulatory context. Moreover, the case-by-case analysis required to determine the propriety of antitrust enforcement should reflect the same calculus that must be solved to determine whether the regulatory system, because of its supervision in the area, merits deference by the antitrust court. Because any antitrust litigation in the presence of regulation will be met with a defense based on preclusion by regulation, the factors relevant to the role of antitrust in the context of the particular regulatory scheme will be confronted as a matter of course. The factors the Working Group recommends for consideration in resolving this issue are discussed below in response to Question 3.

With particular respect to merger law in regulated industries, the Working Group believes that the default rule of full applicability to regulated industries should not only be retained but strengthened.[3]

The Allocation of Authority

In general the allocation of authority should be made according to the comparative advantages of each type of institution. Antitrust enforcement is well suited for disputes requiring an adjudicatory resolution of a specific competitive distortion created by a merger or other anticompetitive conduct. Regulatory agencies, which are inherently consultative in their mode of operation due to their elaborate administrative procedures, are better suited to rulemaking and operational oversight. Antitrust has a comparative advantage in maintaining competitive markets, once they exist; but regulation has a comparative advantage in creating the conditions that will eliminate monopoly or oligopoly so that a market can become competitive. Similarly, while antitrust courts have a wider range of remedies available to them that include divesture and other structural remedies, regulatory agencies are well-equipped to administer continuing interventions, including those ordered as part of an antitrust decree.

In some circumstances, the after-the-fact method of antitrust hampers its ability to address certain competitive problems. Unrestrained antitrust enforcement would have been ineffective, for example, in preventing the California electricity crisis. The underlying logic for this is well-known, as Donald Turner noted in 1962:

> . . .to hold unlawful the charging of a monopoly price by a monopolist, or the maintaining of noncompetitive prices by oligopolists, would be to invoke a purely public-utility interpretation of the Sherman Act. . .Congress did not intend the courts to act "much like public-utility commissions in order to cure the ill effects of non-competitive oligopoly pricing."[4]

As discussed in the Working Group's response to Question 6, one of the major ways to address this problem is through the application of structural remedies in antitrust merger enforcement. Instances of anticompetitive conduct will, necessarily, be less frequent if structural conditions in markets are more conducive to competitive outcomes.

Promoting Consumer Welfare in Regulated Industries

[3] As discussed in more detail in our response to Question 6, below, even though antitrust has played an important role in promoting competition in transitioning industries through merger enforcement, that role should be strengthened and be shared more equally between antitrust enforcement agencies and regulatory bodies.

[4] Donald F. Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusal to Deal, *Harv. L. Review* 75, 669 (1962).

The regulatory “public interest” standard gives regulators a great deal of flexibility in defining consumer welfare. Indeed, a common criticism of regulation has been that it is prone to interpret the “public interest” as the promotion of the industry, and as a result to behave as a captured keeper of a cartel. On the other hand, both the FERC and the FCC have demonstrated a willingness to interpret their public interest standard as promoting consumer welfare through pursuit of enhanced economic efficiency, including the promotion of technical progress and greater consumer choice. But these advances in regulatory policy serve only to bring it closer to the policy goal of antitrust—maximization of long-run consumer welfare. Because antitrust is inherently less affected by the forces that push regulators to promote the interest of regulated industries, it is usually a better device than regulation for pursuing the goal of maximizing consumer welfare.

Question 2. How, if at all, should antitrust enforcement take into account regulatory systems affecting important competitive aspects of an industry? How, if at all, should regulatory agencies take into account the availability of antitrust remedies?

The two predominant ways in which regulated industries are organized puts the interface with antitrust in those industries into context. One commonly encountered market structure is competing end-to-end networks, notable in mobile telephony, telecommunications since the reintegration of ILECs into long distance, broadband access, and video and radio program service providers. This model poses numerous challenges for competition policy. One is determining when there is sufficient network competition to justify deregulation of all or a substantial part of the industry. A second is determining the right competition policy to foster the ongoing development of competing networks.

Another commonly encountered organization is a vertically integrated platform monopolist that faces some competition in markets that rely on the platform. Electricity, telecommunications, and freight rail are examples of this type of industry structure. Disputes over platform access are a persistent feature of these industries, and the principles of antitrust provide the most appropriate guidelines for the design and implementation of policies for resolving access disputes.

As complementary markets become more competitive as a result of access reforms, ideally regulation should play a lesser role, focusing more exclusively on access pricing, interconnection, and network infrastructure as long as incumbent access providers have a dominant market position. Complementary markets should be subject to lighter handed regulation or left entirely to competition, with antitrust enforcement as the primary means of deterring and remedying anticompetitive conduct.[5]

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[5] See Albert A. Foer and Diana L. Moss, “Electricity in Transition: Implications for Regulation and Antitrust,” 24 *Energy L. J.* 89 (2003).

Both courts and enforcement agencies must remain fully cognizant of the important role played by regulators, particularly in addressing access issues in network industries dominated by platform monopolists. At the same time, collaboration between regulators and the institutions of antitrust is increasingly necessary to address the complex technical issues that arise as industries transition to more of a competitive model. Regulators should take advantage of the fact that antitrust enforcement can promote the mission of the agency and its enabling legislation.

Antitrust and Regulatory Remediation Compared

The responsibility for the administration of pro-competitive remedies should be shared so as to take full advantage of the unique strengths of each kind of institution. To promote collaboration on both the substantive and remedial issues, and to ensure consistency of outcomes, the Working Group suggests that procedures designed to promote coordination between courts and agencies deserve study. Ways of formalizing and encouraging dialogue and engagement between antitrust and regulatory authorities should be explored. One procedural device would be a compulsory joinder rule of civil procedure rendering regulatory agencies indispensable parties in federal antitrust proceedings arising in markets in which the agency is responsible for promoting competition. The motivation for such a rule is to put the agency's expertise and administrative structure more readily at the court's disposal.

Regulatory policy in the U.S. is clearly focused on behavioral (*i.e.*, conduct-based) approaches to the access problem and other anticompetitive conditions that pervade regulated industries. Structural remedies (*e.g.*, divesture) have remained largely the province of antitrust enforcement, either because federal regulators conservatively interpret their statutory authority or because they have an institutional bias toward behavioral fixes.[6]

Since regulatory agencies are designed to undertake perpetual continuing surveillance, regulators are well-equipped to develop non-discriminatory service provisions and access pricing regimes, and to engage in fine-tuning and continuous oversight necessary to adjust regulatory rules to accommodate changing technology and market conditions.[7] But involvement by regulatory agencies in administering access

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[6] David Newbery, for example, notes that lawmakers in the European Union have at times failed to write into restructuring legislation the necessary informational requirements and enforcement power necessary to deal with market power. See David Newbery, "Electricity Liberisation in Britain: The Quest for a Satisfactory Wholesale Market Design," University of Cambridge, Department of Applied Economics, Working Paper 0469, (2002)(Available at http://www.econ.cam.ac.uk/electricity/publications/wp/ep64.pdf. last accessed February 2, 2005).

[7] For a more detailed discussion, see Part III of Diana L. Moss, editor, *Network Access, Regulation and Antitrust* (London: Routledge, 2005).

regimes in network markets still poses numerous challenges.[8] An effective regime requires that policy makers know the location and magnitude of scale economies in the production chain. Rules of access also induce rent-seeking and strategic behavior, particularly when technology and standards are changing rapidly, so they must be crafted carefully. Moreover, regulators often have imperfect information or face significant political or legal constraints in fashioning remedies.[9] Thus, conduct-based remedies administered exclusively by regulatory agencies should not be the exclusive or even primary line of defense for remedying the exercise of market power in regulated industries.

Antitrust intervention, on the other hand, is less consultative than regulation and more adjudicatory in nature. Its strength is in evaluating individual instances of potentially unlawful conduct and at undertaking in-depth analysis of a particular transaction or dispute. Courts are much less effective at, and so should be disinclined to take on, the type of indefinitely long oversight characteristic of regulatory bodies. Decrees should, and usually are, designed as a one-shot solution to an anticompetitive problem for which compliance is immediate and permanent, without further continuing surveillance. One-time structural approaches that are available in antitrust enforcement, such as divestiture or network expansion, can promote market structures that are conducive to competitive outcomes, ideally making issues such as network access less problematic.[10] Network expansion, for example, can broaden the scope of a geographic market, reducing market concentration and incentives to exclude rivals. Divestiture can sever the ownership link between a platform monopolist and a complementary market, reducing or eliminating the incentive for a vertically-integrated network owner to exclude rivals.[11]

The application of antitrust remedies, however, can also raise other problems. First, one-time structural fixes are necessarily more complex in regulated industries. Divestiture, for example, requires resolving issues such as the type and quantity of assets that should be divested, to whom the assets should be sold (*i.e.*, to incumbents or to entrants), and how long the network owner must stay out of complementary markets. In some cases, the efficiencies achieved through vertical integration will militate against the use of divestiture. Similarly, forcing divestiture in small geographic markets (*e.g.*, in the electricity industry) where certain generators must run for reliability or environmental reasons may not be as effective as requiring expansion of the transmission grid. As a generalization, it appears that antitrust is at its best in preserving competition within

[8] Critics would argue that compulsory access approaches justify the continued existence of regulatory infrastructure and perpetuate enforcement costs.

[9] The consequences of not getting access “right” may affect what remedies are chosen, particularly if failure carries significant private and social costs.

[10] Ongoing oversight and enforcement of access rules by an antitrust agency is not usually very efficient.

[11] If the network is divested, ability and incentive are eliminated. If complementary assets are divested, ability and incentive may be reduced or eliminated, depending on how many assets are sold.

already competitive market structures; whereas regulation has a comparative advantage in driving markets from monopoly or tight oligopoly toward a more competitive structure.

Promoting Coordination

The Working Group suggests that there is an urgent need for regulatory agencies and antitrust institutions to improve their institutions and abilities for working collaboratively. The regulatory system and how it functions informs the factual basis and the economic reasoning supporting the antitrust violation, and coordination in implementing remedies creates a wider range of available solutions. When such coordination makes use of the superior institutional and technical knowledge possessed by regulatory agencies, the process of building an antitrust remedy is improved.

Technological developments and strong economies often provide powerful incentives for network owners to re-integrate, making it necessary to perform *ex post* monitoring and full-scale review after a certain period of time and to specify the conditions (if any) under which the network owner can re-enter the restricted market. In this case, the remedy may be structural in nature, but can benefit greatly from continuing oversight by the relevant regulator.

The implementation of inconsistent remedies by regulatory and antitrust agencies can be costly and inefficient. If it is effective, coordination between antitrust enforcement and regulation therefore lowers the overall costs of competition policy. The importance of such coordination is likely to intensify as regulated industries transition to a more competitive model.

To promote coordination, the Working Group recommends the study of a compulsory joinder rule. This rule would require that the relevant agency be made an indispensable party to any federal antitrust proceedings arising out of conditions in markets or anticompetitive conduct by firms covered by a specific and enforced rule adopted by the agency. Joinder of the agency would be triggered on the same basis as the court's decision to permit antitrust enforcement in the particular circumstances and should rely on the presence of factors that indicate that antitrust enforcement and the regulatory system would be mutually reinforcing if both were applied concurrently. Such "affinity factors" have the opposite effect from those factors that would militate against antitrust enforcement in a regulated environment. A unified balancing approach to these issues is proposed in response to Question 3. Such a rule would not only promote coordination, but it would focus regulatory agencies on the competitive conditions in the industry it is regulating and encourage the agency to exert pro-competitive regulatory authority.

Question 3. What are the appropriate standards for determining the extent to which the antitrust laws apply to regulated industries where the regulatory structure contains no specific antitrust exemption? For example, in what circumstances should antitrust immunity be implied as a result of a regulatory structure?

In general, if a regulatory statute does not grant an antitrust immunity to a firm on a specific aspect of its behavior, and that aspect also is not covered by an explicit and enforced regulatory rule, then antitrust law applies.[12] Regulatory agency authority over important competitive aspects of an industry, therefore, does not automatically relieve enforcement authorities or the courts of their responsibilities under the antitrust laws.[13] However, regulation has implications for antitrust that pertain to the reach of its substantive provisions as well as the range and efficacy of its remedies. Accordingly, concurrent jurisdiction in some circumstances could be counterproductive.

In general, if the regulatory structure contains no specific antitrust exemption, preclusion of the antitrust laws should not occur unless the regulatory scheme has either unambiguously foresworn competition or the regulator has adopted and is enforcing a reasonable mechanism for implementing a competitive mandate.[14] If a regulator fails to implement its pro-competitive mandate, implements one but fails to enforce it, or seeks to enforce it but is stymied either by conflicts with other regulatory authorities (including state regulators) or by appeals of its rules in the courts, then antitrust enforcement should not be precluded.

This standard involves a factual inquiry into the efficacy of regulatory practice and actual market conditions, so it ordinarily cannot be determined on a motion to dismiss. In rare circumstances, however, an antitrust defendant may be entitled to a factual presumption that the antitrust violation is not provable or that antitrust harm is highly improbable due to the presence of regulation, provided that the regulatory scheme constitutes an effective steward of the antitrust function.[15] The Working Group recommends a simplified approach in which the current variety of regulatory preclusion doctrines, including the filed rate and implied immunity doctrines, are harmonized and unified under the foregoing standard. To set the stage for this proposal, we briefly review the legal background in the area of regulatory antitrust preclusion.

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[12] See Verizon Comm'n v. Trinko, 540 U.S. 398 (2004).

[13] The rare occasions on which regulation immunizes, pre-empts, or otherwise displaces antitrust enforcement—thus precluding liability—should arise only when the regulatory scheme serves as an effective steward of the antitrust laws. Moreover, the substitution of regulation for antitrust, when it occurs, should be governed by a coherent and unified set of legal rules, such as those proposed herein.

[14] See Verizon Comm's v. Trinko, 540 U.S. 398 (2004).

[15] *Id.*

Current Regulatory Antitrust Preclusion Doctrine

Where the regulatory structure contains no specific antitrust exemption, courts have nullified antitrust enforcement by concluding either that 1) the regulatory enactment implies that regulated firms are beyond the reach of the antitrust laws, or, 2) conduct-specific exemptions are justified because of the active economic supervision by a regulatory body pursuant to a specific rule. Implied immunity, the first general category, is strongly disfavored by the courts. The second category, involving a factual presumption, which, if accepted, logically undermines the antitrust violation, includes the more frequently encountered filed rate doctrine and the other kinds of presumptions such as those employed in *Town of Concord, Ma. v. Boston Edison Co.*[16] and *Verizon v. Trinko.*[17]

Implied Antitrust Immunity or Repeal

The Supreme Court has considered implied antitrust immunity on numerous occasions and in numerous industries.[18] Implied immunity is rooted in the idea that Congress does not intentionally undermine its own regulatory regimes. Thus, the "antitrust laws do not come into play when they would prohibit an action that a regulatory scheme permits"[19] because it exposes firms to conflicting mandates and frustrates the purposes of the regulatory system.

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[16] 915 F.2d 17 (1st Cir., 1990), cert. denied, 499 U.S. 931 (1991).

[17] 540 U.S. 398 (2004). There are, of course, numerous exemptions and immunities governing the conflict of antitrust with other legal regimes or principles. This area is well developed and constitutes the agenda of the Exemptions and Immunities Working Group. Some of these rules apply to regulated industries. For example, the primary jurisdiction doctrine gives courts the option of staying antitrust matters and referring issues to a regulatory agency with special competence to resolve a specific controversy. Similarly, the doctrines of "field preclusion" and "conflict preclusion" can oust state antitrust intervention, as can the "state action" doctrine, see, *e.g.*, Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc., 384 F.3d 756 (2004), cert. denied.___U.S. ___ (June 27, 2005) and the comments of the AAI Exemptions and Immunities Working Group (July 15, 2005).

[18] See Nat'l. Railroad Passenger Corp. v. Nat'l. Ass'n. of Railroad Passengers, 414 U.S. 453 (1974), California Motor Transport Co. v. Trucking Unlimited, et al., 404 U.S. 508 (1972), Maryland & Virginia Milk Producers Ass'n. v. U.S., 362 U.S. 458 (1960), U.S. Navigation Co., Inc. v. Cunard S.S. Co., Ltd., 284 U.S. 474 (1932), U.S. v. Philadelphia National Bank, 374 U.S. 321 (1963), U.S. v. Radio Corp. of America, 358 U.S. 334 (1959), Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973), California v. FPC, 369 U.S. 482 (1962), Nat'l. Gerimedical Hosp. & Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378 (1981), Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993), Pan American World Airways, Inc., v. United States, 371 U.S. 296 (1963), Hughes Tool Company v. Trans World Airlines, Inc., 409 U.S. 363 (1973), Silver v. New York Stock Exchange, 373 U.S. 341 (1963), Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975).

[19] Finnegan v. Campeau Corp., 915 F.2d 824, 827 (2d Cir.1990).

Federal securities laws, for example, imply repeal of the Sherman Act with respect to certain actively regulated conduct.[20] In *Gordon v. NYSE*,[21] the Supreme Court held that the practice of securities exchange members employing fixed commission rates was immune from antitrust challenge because the SEC had actively exercised authority over commission rates. Despite the fact that fixing commissions was prohibited by both the securities laws and antitrust laws, the SEC had the statutory authority to permit it should it so choose. "If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC."[22] The Court concluded that the "failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates."[23]

By contrast, the *Silver* case[24] involved an antitrust challenge to a New York Stock Exchange order enforcing a rule prohibiting direct communications with non-member firms. The Supreme Court rejected implied antitrust immunity because the Securities and Exchange Commission did not have jurisdiction to review particular stock exchange rules, so there was no potential for conflict between the SEC's regulatory power and the antitrust laws.[25]

In *NASD*,[26] decided the same day as *Gordon*, the Court determined that the defendants were immune from antitrust liability for activities restricting the transferability of mutual fund shares in the secondary market. The Court found that the SEC's regulatory authority was "sufficiently pervasive" to confer implied immunity. Even though the conduct was not explicitly authorized by the SEC, the "pervasive regulatory scheme" necessitated such a finding in order for the SEC to discharge its responsibility "free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws."[27]

Silver, *Gordon* and *NASD* reflect the two narrow contexts in which antitrust immunity may be implied on account of the presence of industry-specific economic

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[20] See United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975), Gordon v. New York Stock Exch., Inc., 422 U.S. 659 (1975), and Silver v. New York Stock Exch., 373 U.S. 341 (1963).

[21] 422 U.S. 659 (1975).

[22] *Id*. at 689.

[23] *Id.*, at 691.

[24] Silver v. New York Stock Exch., 373 U.S. 341 (1963).

[25] See In re Stock Exchanges Options Trading Antitrust Litigation, 317 F.3d 134, 145 (2nd Cir., 2003) (discussing *Silver*: "There was a need for applicability of the antitrust laws, for if those laws were deemed inapplicable the challenged conduct would be unreviewable").

[26] U.S. v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975).

[27] *Id*., at 734-35.

regulation or supervision: "'first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged, ... and second, when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition.'"[28]

These two contexts notwithstanding, the general rule remains that "repeals by implication are not favored."[29] Thus, "only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal of the antitrust laws be implied."[30]

<u>The Filed Rate Doctrine and Other Factual Presumptions</u>

Active regulation of conduct that is challenged on antitrust grounds can give rise to the second general category of antitrust preclusion, viz., where regulation justifies invoking a factual presumption, as in the filed rate doctrine or *Town of Concord, Ma. v. Boston Edison Co.*[31] and *Verizon v. Trinko.*[32] This category of antitrust displacement is significant because it may be applied even where implied immunity must be ruled out because, for example, the regulatory statute includes an express anti-immunity, or "antitrust savings" clause.

The prototype for this type of exemption is the filed rate (or *Keogh*[33]) doctrine. In *Keogh*, a shipper's complaint alleged that rates filed with the Interstate Commerce Commission ("ICC") had been fixed by an agreement that violated Section 1 of the Sherman Act. The shipper claimed treble damages measured by the difference between the rates paid and the rates existing prior to the offending agreement. The Court concluded that "the legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper."[34]

In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*,[35] the Supreme Court was called upon to "give careful consideration to the sometimes conflicting policies of the antitrust laws and the Interstate Commerce Act."[36] The Court considered whether the rule

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[28] In re Stock Exchanges Options Trading Antitrust Litigation, 317 F.3d 134, 147 (2nd Cir., 2003) (quoting Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 82 (2nd Cir.,1981)).

[29] United States v. Borden Co., 308 U.S. 188, 198 (1939).

[30] *Gordon*, 422 U.S. at 682 (citation omitted).

[31] 915 F.2d 17 (1st Cir., 1990), cert. denied, 499 U.S. 931 (1991).

[32] 540 U.S. 398 (2004).

[33] Keogh v. Chicago & Northwestern Rwy, 260 U.S. 156 (1922).

[34] *Id.*, at 162.

[35] 476 U.S. 409 (1986).

[36] *Id.*, at 411.

of *Keogh* was correctly applied in a case out of the Second Circuit in which motor freight shippers alleged antitrust injury from paying "higher rates for motor carrier freight transport than they would have paid in a freely competitive market,"[37] and, if so, whether the rule of *Keogh* should be overruled.[38] The Second Circuit had affirmed the district court's dismissal of the treble damage claim based on anticompetitive prices, but had reinstated the shippers' claim for equitable and injunctive relief and remanded, granting the shippers leave to amend to plead additional claims that did not implicate filed tariffs.

Before the Supreme Court, the shippers attempted to distinguish *Keogh* on the grounds that, in contrast to *Keogh*, "there was no ICC hearing in this case and because *Keogh* did not involve allegations of the type of covert legal violations at issue …"[39] The Supreme Court disagreed, however, quoting with approval the following from the court of appeals' opinion:

> 'Rather than limiting its holding to cases where, as in *Keogh*, rates had been investigated and approved by the ICC, the Court said broadly that shippers could not recover treble-damages for overcharges whenever tariffs have been filed.'[40]

Interestingly, the Solicitor General supported the private treble-damage action in *Square D*, arguing that private antitrust enforcement "would further the congressional policy of promoting competition in the transportation industry reflected in the Motor Carrier Act of 1980."[41] But no matter how unwise as a matter of policy, the Court declined to overrule the filed rate doctrine, reasoning that Congress must be presumed to have been fully cognizant of it when they reexamined the law in 1980 yet did not see fit to repeal it. As a result, private plaintiffs under current law cannot seek damages under the antitrust laws in cases claiming that rates filed as tariffs with an industry regulator are anticompetitive, although criminal enforcement or equitable relief may be available.

It is notable that the filed rate doctrine pares back antitrust only as far as necessary to avoid the factual conflict that arises when a tariff is considered legal for regulatory purposes but unlawful for the purpose of calculating antitrust damages. The filed rate doctrine rests, therefore, on the proposition that rates filed as tariffs with regulatory bodies are entitled to a presumption of reasonableness, and, therefore, lawfulness.

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[37] *Id.*, at 413.

[38] *Id.*

[39] *Id.*, at 417, citing Brief for Petitioners, 10-11.

[40] *Id.*, quoting Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 760 F.2d at 1351 (2nd Cir., 1985).

[41] *Id.*, at 419.

The *Keogh* presumption of legality is less clearly justified in the case of industries in the process of deregulation. Regulation by FERC of the wholesale electric rates of public utilities under Subchapter II of the Federal Power Act ("FPA")[42] provides a case in point.

Since 1992, FERC has attempted to bring the benefits of increased competition to wholesale electric power markets. Among other things, the agency granted to wholesale sellers of electric power broad "market-based rate" authority. Unfortunately, FERC did not first ascertain whether the sellers seeking such authority could exercise market power in setting its rates, either individually or in concert with others. The former Chairman of the FERC, Pat Wood, as much as admitted this in a recent trade press interview:

> FERC was giving out deregulation certificates without doing what I consider an intellectually honest job of saying, 'Is this really a competitive market or not?' You don't bet on a competitive market by giving deregulation [authority] and hoping [competitive markets] will come, but unfortunately I think that's what we did in the mid-90s."[43]

Most analysts now agree that during the California energy crisis of 2000-2001, FERC failed to exercise sufficient oversight of market-based rates.[44] Nonetheless, one day after admonishing FERC for its lax oversight, a Ninth Circuit panel decided *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.,*[45] holding, among other things, that the filed rate doctrine precluded state antitrust and consumer protection claims against wholesale sellers for anticompetitive pricing and other conduct concerning market-based rates.

Despite acknowledging that "FERC has waived many of the requirements that applied under the cost-based system,"[46] that "actual prices are no longer filed with FERC 60 days before they can be charged,"[47] that "the utilities do not provide FERC with detailed schedules of their costs,"[48] and that "the price of wholesale electricity is

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[42] 16 U.S.C. §§ 824, *et seq*.

[43] FERC Chairman Pat Wood, final press conference, June 22, 2005, as reported by *Energy Daily* on June 23, 2005.

[44] See California ex rel. Lockyer v. FERC, 353 F.3d 1006 (9th Cir., 2004), *petitions for rehearing pending* (admonishing FERC for its lack of supervision of market-based rates).

[45] 384 F.3d 756 (2004), *cert. denied.*___U.S. ___ (June 27, 2005).

[46] *Id*., at 760.

[47] *Id.*

[48] *Id.*

determined in the markets,"[49] the court nonetheless concluded that the state antitrust claims were barred, *inter alia*, by the filed rate doctrine.[50] The Court concluded:

> FERC approved tariffs that governed the California wholesale electricity markets. Therefore, if the prices in those markets were not just and reasonable or if the defendants sold electricity in violation of the filed tariffs, Snohomish's only option is to seek a remedy before FERC.[51]

This case illustrates the current lack of discipline in applying the rule governing the circumstances under which antitrust enforcement should be suspended on account of the filed rate doctrine.[52] Under the actual circumstances of FERC's tariff-filing procedure, the market-based rates cannot reasonably be said to have been "approved" by FERC, and should not be entitled to a presumption of reasonableness that cannot be overcome by a contrary evidentiary showing.

The filed rate doctrine as it applies in electricity is a central feature of the current competition policy debate. The rote application of the filed rate doctrine to bar all antitrust scrutiny of rates filed with a regulatory agency opens up substantial remedial gaps, to the detriment of counterparties and consumers. For example, the FPA provides FERC with very limited authority to enforce market rules. The agency can impose refunds for overcharges, but it has little or no authority to impose civil penalties or penalties for violations of market rules. Its authority exerts no effective deterrence. It is unwise as a matter of policy to interpret the filed rate doctrine so broadly that it places the entire burden of deterring, detecting and remedying abuses of market power on a regulatory agency with such limited enforcement authority.

Another type of factual presumption that may preclude antitrust scrutiny arose in *Town of Concord, Ma. v. Boston Edison Co.*,[53] in which a First Circuit panel held that antitrust law applied to wholesale electricity sales, but then vitiated this finding by concluding that the regulatory scheme made the "critical difference in terms of antitrust harms, benefits, and administrative considerations."[54] In *Concord* the plaintiff was a

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[49] *Id.*

[50] *Id.,* at 761. The court also held that the plaintiff's claims were barred by the doctrines of field preemption and conflict preemption, both of which depend on federal preemption of state law.

[51] *Id.*. at 762.

[52] For discussion on whether the filed rate doctrine is an impediment to Section 2 enforcement in regulated industries see Gregory Werden, "Remarks at the American Antitrust Institute Fifth Annual Energy Roundtable Workshop, 'Open Access Revisited,'" January 11, 2005. Online. Available http:/ http://www.antitrustinstitute.org/recent2/368.pdf. Last accessed July 2, 2005.

[53] 915 F.2d 17 (1st Cir., 1990), cert. denied, 499 U.S. 931 (1991).

[54] 915 F.2d, at 23.

municipal electric power distributor that sued a vertically integrated power company alleging that it had engaged in an unlawful price squeeze by lowering its retail prices while at the same time raising its wholesale prices. The court of appeals in an opinion by then-Chief Judge Breyer held that despite the active regulation of the prices defendant charged on both the retail and the wholesale levels, the defendant was not entitled to implied immunity. However, the ultimate effect of the regulation made the probability of anticompetitive harm from the alleged price squeeze highly unlikely, so, while not rendering the defendant immune from the antitrust laws, the regulation vitiated the prospect that the defendant could have caused anticompetitive harm through the price squeeze conduct alleged.

Similar reasoning has been applied when the regulatory environment creates a strong incentive to engage in certain conduct that a regulated entity may then argue is legitimately necessitated by the regulatory scheme. In cases in which only certain areas of a firm's conduct may be supervised or regulated, implied immunity cannot be justified under a standard such as implied immunity that requires a pervasive regulatory scheme or clear repugnance between the regulation and antitrust. In such intermediate cases, as then-judge Kennedy wrote in *Phonetele, Inc., v. American Telephone and Telegraph Company*,[55] "a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, [but] some degree of necessity may be established as a matter of fact in individual cases."[56]

In *Verizon Communications, Inc. v. Trinko*[57] the Court concluded (in the vein of *Concord*) that the "economic and legal setting" created a significantly diminished likelihood that antitrust harm could arise within the regulatory framework of the Telecommunications Act of 1996.[58] In the final leg of its reasoning, the Court observed that "[a]ntitrust must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. ... '[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies.'"[59] Relying heavily on the FCC as an effective steward of the antitrust function, the Court indulged in the presumption that the type of antitrust harm alleged was not sufficiently likely. Moreover, because the pro-competitive policies of the antitrust laws were adequately protected by the FCC, the regulatory scheme was an effective substitute for antitrust enforcement.

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[55] 664 F.2d 716, 737 (1981).

[56] See also *United States v. Otter Tail Power Co.*, 410 U.S. 366 (1973).

[57] 540 U.S. 398 (2004).

[58] The TCA amended the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §151 *et seq.*

[59] *Id.*, at 411, quoting *Concord*, 915 F.2d, at 22.

In *Trinko* an express anti-immunity provision (the antitrust 'savings clause')[60] prevented the Court from implying antitrust immunity. No matter how plainly repugnant or all-pervasive the regulatory scheme in the 1996 Act might have been, Congress clearly did not intend to immunize regulated firms against antitrust liability. Justice Scalia, the author of the Court's main opinion, lamented openly, clearly unhappy that the legislature had done so.[61]

The basis on which the antitrust defendants in cases such as *Concord* and *Trinko* escape liability is heavily fact-based and amounts to a pre-evaluation of the probability that a claimed anticompetitive effect can be proven in light of existing regulation. In rare circumstances such a factual presumption may justify disposal of an otherwise well-pled antitrust claim at the pleading stage.[62] This type of antitrust preclusion does not depend on the pervasiveness of the regulatory scheme or a plain repugnance between the approach of a regulatory statute and the policies of the antitrust laws, but rather on the likely effect of specific features of the regulatory system on the factual circumstances that give rise to the antitrust claim.

<u>Rationalizing Legal Doctrine Relating to Regulatory Preclusion of Antitrust</u>

The standards under which regulation should be allowed to circumscribe the antitrust laws because of tariff-filing requirements or an agency's other oversight authority should be narrowly and simply defined. The existing conflict-centric doctrines, including the filed rate and *Concord* doctrines, should be harmonized and applied in a way that is not predisposed to view antitrust enforcement and regulatory systems as mutually exclusive choices between incompatible economic approaches.

Such a framework encompasses the filed rate doctrine as a factual presumption about the lawfulness of regulator-approved rates that belongs to a wider class of circumstances in which specific conduct deserves a narrow antitrust exemption due to effective regulatory oversight. Under a unified approach, the same standard would apply whether the defendant claims that the prices it charged could not have been anticompetitive because of the rule in *Keogh*, or that some other presumption will necessarily undermine the ability of the claimant to prove the antitrust claim pled against it, as in *Trinko* or *Concord*.

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[60] 110 Stat. 143, 47 U.S.C. §152, note.

[61] 540 U.S. at 406 ("In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgment conflicting with the agency's regulatory scheme that might be voiced by courts exercising jurisdiction under the antitrust laws" [citation omitted]).

[62] See *Square D*, 476 U.S. 409, 414 (1986) (affirming dismissal of the treble-damage action under the filed rate doctrine even though "[u]nder the plain language of the relevant statutes, it would appear that petitioners have alleged a valid antitrust action").

One way to characterize the basic issue is to ask whether antitrust and the regulatory scheme are more like substitutes or complements. In these terms, the thrust of the issue raised here ("When should antitrust *not* apply to regulated industries?") is the obverse of the thrust of the issue raised in Questions 1 and 2 ("When *should* antitrust apply to regulated industries?"). This determination should turn on factors that reflect ways in which regulation and antitrust share common goals and other "affinities," as well as more common "repugnancy" factors that argue against the application of antitrust enforcement in any given case.

The "affinity factors," *i.e.*, indicators that antitrust enforcement and regulatory oversight would be mutually reinforcing rather than at odds if both regimes were concurrently applied, include:

- The regulation serves a pro-competitive policy goal and supports a market environment consistent with a competition policy committed to a marketplace characterized by multiple competitors acting independently with open entry and exit;

- Competition could benefit from an in-depth study and fact finding regarding a particular competitive problem in an adversary proceeding;

- Competitive conditions could benefit from adjudicatory rulemaking, *i.e.*, rules limited to a particular type of dispute that is characteristic of competitive distortion in the relevant market;

- Agency oversight is dysfunctional in the sense that effective competition has not emerged in a market covered by a pro-competitive regulatory policy and the conditions in that market could benefit from an analysis adjudication; and,

- The views, rules, and culture of the regulatory agency are material in understanding the conduct of the antitrust defendant and the conditions in the market.

Repugnancy factors, on the other hand, reflect inconsistent goals, mandates, incentives, or policies in the regulatory regime and antitrust enforcement. Specific repugnancy factors include:

- Active and effective regulatory supervision of the specific challenged conduct;

- The regulator has unambiguously foresworn competition or has adopted and is enforcing a reasonable mechanism for implementing its competitive mandate and is an effective steward of the antitrust function;

- The defendant can plausibly claim that the challenged conduct was reasonably necessitated by a regulatory mandate, rule, or incentive; and,

- There is little or no prospect that antitrust adjudication will resolve any broader issue of competition policy in the industry.

Itemizing these affinity factors and the repugnancy factors leads directly to the Working Group's harmonization proposal: a test to determine when regulatory preclusion of antitrust enforcement is appropriate on account of a specific feature of the regulatory scheme. Balancing these factors suggests the following baseline standard: *Suspension of antitrust due to a regulation-based factual presumption should be limited to a narrow, conduct-specific exemption that is only justified because active regulatory supervision pursuant to a specific rule either undermines the likelihood that the challenged conduct can be proven to have occurred or renders the claimed anticompetitive effect highly improbable.*

A defendant should be entitled to a conduct- and rule-specific exemption from antitrust only if the agency has either foresworn the competitive paradigm altogether, or has adopted and is enforcing a reasonable mechanism for implementing its competitive mandate. The challenged conduct should have been to some degree necessitated by a specific rule or regulatory incentive.

On the other hand, claimants should be permitted to bring antitrust claims for conduct that is related only in an indirect way to the regulatory system or to filed rates not actually supervised or approved by the regulator, or when the absence of antitrust enforcement would open up gaps in the deterrence or remediation of antitrust law violations in putatively competitive markets.

For example, a defendant raising a filed rate doctrine defense under this standard must be able to show that the regulatory agency actually approved the rates in question, or at a minimum, exercised close and continuing supervision of the applicable rate regime, and that the agency has the enforcement and remedial authority to exercise the antitrust function of detecting, deterring, and remediating anticompetitive exclusion or collusion.

The need for such a balancing approach is more acute whenever regulatory regimes must coexist with antitrust enforcement because the regulator intends to rely heavily on competition rather than cost-based regulation to maintain reasonable rates (*e.g.*, electricity), or because markets have special rules and procedures to achieve the transition from monopoly to competition (*e.g.*, telecommunications). It is not unusual in deregulatory regimes for pro-competitive rules to enlarge the potential range of anticompetitive mischief, resulting in a need for correspondingly enlarged areas for antitrust enforcement. The larger policy in this case, however, is that enforcement authorities and parties reasonably relying on the pro-competitive provisions of a regulatory enactment should have recourse to enforce the antitrust laws against anticompetitive conduct or to enjoin prohibited transactions that occur in markets that are supposed to be competitive, even though under pro-competitive supervision.

The Working Group in its response to Question 2 proposed the study of a rule that in proceedings in which antitrust violations arise out of markets under pro-competitive regulatory supervision the relevant regulatory agency should be joined as an indispensable party. Such a compulsory joinder rule, together with the balancing approach to the regulatory preclusion issue recommended here, would confront courts with three principal options in antitrust suits implicating an industry under pro-competitive regulation.

First, the court could determine that antitrust is not an appropriate instrument for policy in the particular industry, because, for example, the regulatory scheme eschews competitive markets or involves a sufficient regime to fulfill the antitrust function. Second, the court could accept the case, join the relevant regulator, and adjudicate the antitrust claims and, if warranted, issue a remedial order, in whole or in part administered by the regulator. Third, the court could stay the antitrust proceedings and defer the matter for further action by the regulatory body under the doctrine of primary jurisdiction, or other subject-matter or administrative law grounds.

Question 4. How should courts treat antitrust claims where the relevant conduct is subject to regulation, but the regulatory legislation contains a "savings clause" providing that the antitrust laws continue to apply to the conduct?

In legislation in which Congress has included an antitrust-specific savings clause, antitrust should be conclusively regarded as a complement to the regulatory scheme. Except in rare cases,[63] courts should assume that Congress intended potential antitrust intervention to act as a deterrent against anticompetitive conduct even in the context of regulated or managed competition and to provide a remedy in addition to those provided for by the regulatory legislation.

Question 5. Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?

No. Unless a regulatory statute explicitly immunizes a regulated firm from antitrust immunity, regulators should not be regarded as legally entitled to grant immunity or limit liability. Moreover, antitrust doctrine should not be fractured into industry-specific legal rules. Accordingly, Congress should refrain from industry-specific tinkering with the standards of antitrust.

[63] See, *e.g.,* Verizon Comm's v. Trinko, 540 U.S. 398 (2004).

Question 6. When a merger or acquisition involves one or more firms in a regulated industry, how should authority for merger review be allocated between the antitrust agencies (DOJ and FTC) and the relevant regulatory agency?

a. Are there additional costs and delay when two agencies (one antitrust, one regulatory) both analyze the antitrust effects of the same mergers? Are there benefits to such dual review?

b. Should regulatory agencies defer to antitrust analysis by the antitrust agencies, or should both the antitrust and regulatory agencies conduct separate antitrust analyses in performing merger reviews? Should the antitrust agencies have primary responsibility or simply an advisory role with respect to antirust analysis in merger review?

The Working Group suggests that in general, antitrust should play a stronger role in merger review in regulated industries. The process for merger review differs dramatically among regulated industries. These include arrangements in which the regulatory agency has: (1) exclusive enforcement authority (e.g., railroads); (2) major enforcement authority with the antitrust agency a party to the proceeding (e.g., airlines); (3) dual review authority along with an antitrust agency (e.g., electricity and telecommunications); and (4) no statutory or "effective" enforcement authority (e.g., natural gas pipelines). Whereas in most cases regulators play a major role in merger review, the differences across agencies do not appear to be rationally based. The Working Group proposes that merger review be made more consistent across regulated industries, and that the lead role for merger review be given to antitrust authorities rather than regulators.

The debate over allocation of merger review authority between regulatory and antitrust agencies should be driven by a number of objectives. One is that merger review should be insulated from special interest capture of regulatory agencies. A second is that merger analysis should have a high level of quality and transparency. Transparency provides legal practitioners with the ability to predict with a fairly high degree of accuracy whether a proposed deal in a particular form will be deemed to violate the law, thereby avoiding the expense of pursuing transactions that have a high probability of being challenged. Transparency also makes it easier for outside observers to evaluate merger policy or particular mergers. Third, merger analysis should be part of broader competition policy that is relatively free of political pressure and regulatory policy goals, which can create a bias toward mergers. Fourth, the staff and decision-makers should have adequate technical and industry-specific expertise available so that decisions will reflect industry realities. Finally, remedies should not create excessive costs for the merging parties as a result of dual enforcement.

The general thrust of the foregoing objectives is that the ultimate authority to review the competitive effects of mergers should be vested in the antitrust agencies. Regulatory agencies would be responsible for analyzing the non-competitive issues.[64] The antitrust agency would then submit its competitive effects analysis to the regulatory agency, which would then make its "public interest" determination to approve or disapprove the merger based on the typical balancing of public interest criteria. An alternative approach would reverse the process so that the enforcement agency would provide the competitive effects analysis for the merger while the regulatory agency analyzed non-competitive issues. The antitrust enforcer's analysis would be incorporated into the regulatory agency's decision—but with the requirement to accept the competitive analysis.

The expertise needed to address complex and esoteric technical and institutional issues in regulated industries resides with a multitude of specialists in the regulatory agencies. This is most apparent, for example, in the areas of market definition and remedy, particularly in electricity and telecommunications. Regardless of the path chosen, the Working Group suggests that increased collaboration between the antitrust and regulatory agencies would be highly beneficial. For example, sharing or detailing of legal-economic personnel from the regulatory agency to the FTC's Bureau of Competition would enhance the FTC's capability in regulated industries.

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<u>Contact person for these comments:</u>

Diana Moss, Vice President and Senior Fellow at [redacted]

[64] This includes non-economic policies such as universal access, independence from foreign sources, etc.