Comments of the
United States Telecom Association
to the
Antitrust Modernization Commission's
Request for Public Comment
"Regulated Industries"

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Summary

Antitrust laws should continue to be applied to regulated industries unless Congress expressly provides antitrust immunity or, in accordance with established judicial principles, immunity must be implied to prevent destructive interference between the antitrust and regulatory regimes.

Enforcement and judicial application of the antitrust laws in regulated industries must take full account of the regulatory environment as in the *Town of Concord* and *Trinko* cases.

Savings clauses that say they are not intended to modify the applicability of antitrust laws may not be interpreted as diminishing or adding new antitrust duties.

The *Trinko* decision correctly took into account the unique characteristics of the telecommunications industry, is entirely consistent with fundamental antitrust principles and strikes the right balance between antitrust and regulation. Legislation to modify or undermine the *Trinko* decision is not only unnecessary but also unwarranted and unwise.

When antitrust and regulatory agencies have concurrent responsibility for reviewing mergers or conduct, the antitrust agencies should have final responsibility for deciding antitrust issues but should solicit, consider and give appropriate weight to regulatory agency evaluations of market facts (e.g., the present and anticipated future state of competition in the markets they regulate).

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I. INTRODUCTION

The United States Telecom Association ("USTelecom") respectfully submits this statement in response to the Antitrust Modernization Commission's Request for Public Comment – Regulated Industries of May 19, 2005.[1]

USTelecom is the nation's leading trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms

II. ANTITRUST LAWS SHOULD APPLY TO REGULATED INDUSTRIES BUT SHOULD NOT BE APPLIED IN A MANNER WHICH UNDERMINES, DEFEATS OR CONFLICTS WITH REGULATORY OBJECTIVES, PROCEDURES, MANDATES AND REMEDIES.

A. Congress may provide express immunity in particular regulatory contexts, and immunity may be implied where the application of antitrust could conflict with the regulatory mandate

As a general rule, regulated firms have no blanket immunity from the antitrust laws.[2] Congress can, of course, authorize behavior that would otherwise be considered a violation of antitrust laws by adopting an express antitrust immunity clause into the statute.[3] In a similar manner, express immunity exists where the pertinent regulatory agency possesses an explicit statutory power to grant antitrust immunity, and has done so for the activity in question. However, such express immunities are not necessarily completely clear, as it is not always clear how far the antitrust shield extends. Therefore, even where such express immunity clauses are in place, an antitrust court retains the power to decide whether immunity applies in the case before it.[4]

Where the statutes that set up a regulatory regime create no express antitrust immunity, in appropriate situations immunity may be implied as a result of the regulatory framework established by Congress. The Courts, the government and academic authorities have generally

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[1] Request for Public Comment, 70 Fed. Reg. 28,902 (May 19, 2005).

[2] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75 (1973); *Cantor v. Detroit Edison*, 428 U.S. 579, 596 n. 35 (1976); *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973).

[3] USTelecom does not assert that blanket immunity has been granted to telecom companies or that Congress should grant such blanket immunity. USTelecom does not express an opinion as to the wisdom of Congressional grants of blanket immunity in other industries.

[4] *See* C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §§3536-3537 (2d ed. 1988 & current supp.).

taken the view that such implied immunity from the antitrust rules is exceptional and disfavored,[5] and refused to infer antitrust immunity in the absence of a "pervasive" agency regulation.[6] The rationale for this view has been that where the regulatory regime is pervasive, the simultaneous application of the antitrust laws and the regulatory laws could bring antitrust laws to conflict with the policies articulated by the regulatory statute, a scenario also referred to as "repugnancy."

In any event, Congress can use savings clauses to direct courts not to imply immunity. For example, the antitrust savings clause in the Telecommunications Act of 1996[7] has been applied to reject implied immunity claims in the *Trinko* case[8] and other cases decided before and after *Trinko*.

B. The influence of regulatory regimes on the application of antitrust laws.

Regulatory regimes vary greatly in the comprehensiveness of their powers over the market players they regulate and in the degree to which they allow organic competitive forces to operate. Hence, the room left for the continued operation of the general antitrust rules may differ from one specific regulated industry to another, since the more intensive the regulatory framework is, the more caution may be called for in order to ensure that antitrust rules do not transgress it.

Therefore, it should be noted that even where a company's conduct is not immune from the antitrust laws, the regulation of a market may still bear substantially on the manner in which antitrust principles apply to such conduct. The need for such a specifically tailored application process stems from two sources. First, there is a need to harmonize the application of the two frameworks, so that antitrust policy's general set of remedies does not trump the more specific normative framework laid down by the regulation of that sector; second, the regulatory regime affects the application of antitrust principles since regulatory frameworks often create market conditions of which antitrust policy must take account when calculating harms and benefits of potential intervention. In other words, the regulatory environment becomes a market reality that must be given weight by the antitrust analysis.

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[5] *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963); Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary Subcommittee on Antitrust, Competition, and Business and Consumer Rights United States Senate, Concerning An Overview of Federal Trade Commission Antitrust Activities (September 19, 2002), *available at* http://ftcgov.ftc.gov/os/2002/09/020919overviewtestimony.htm, at 32-34; ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 1135 (4th ed. 1997).

[6] *United States v. RCA,* 358 U.S. 334, 348-350 (1959); *California v. EPC*, 369 U.S. 482, 485 (1962).

[7] 110 Stat. 143, 47 U.S.C §152.

[8] *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004).

This second notion of the regulatory effects becoming an integral part of that antitrust factual analysis has been endorsed in the *MCI v. AT& T* [9] decision as regulation as a "fact of market life:"

> Our conclusion that AT&T is not entitled to antitrust immunity in the instant case does not mean that AT&T's status as a regulated common carrier is irrelevant to our evaluation of AT&T's conduct. On the contrary, an industry's regulated status is an important "fact of market life," the impact of which on pricing and other competitive decisions "is too obvious to be ignored."[10] Recent cases follow this principle.

1. The *Town of Concord* Case

One example of the principle that a regulatory framework may affect the application of antitrust laws can be found in *Town of Concord v. Boston Edison* ("Town of Concord").[11] In *Town of Concord*, the plaintiff municipalities purchased electric power from the defendant, Boston Edison, who was selling power both on a wholesale level to municipalities and on a retail level to private consumers. The defendant, an alleged monopolist, raised its wholesale price without raising its own retail prices. The plaintiffs alleged the defendant's conduct thus amounted to a monopolistic "price squeeze" that would give the defendant's retail operations an advantage that would ultimately bring it to control over all retail markets. Boston Edison was a utility company whose rates were completely regulated by the Federal Energy Regulatory Commission. The chief question presented in the case, therefore, was whether the antitrust laws could and should be applied to condemn the regulated prices established through regulatory processes in a fully regulated industry.

Justice (then – Judge) Stephen Breyer, who wrote the decision, commenced the analysis by reiterating the basic premise that antitrust laws apply in the context of regulated industries and no less stringently so than their application elsewhere.[12] However, given this basic premise Judge Breyer acknowledged that "antitrust analysis must sensitively 'recognize and reflect the distinctive economic and legal setting' of the regulated industry to which it applies,"[13] and his analysis in the case indeed applies the antitrust laws *mutatis mutandis* in a manner which takes into consideration the specific regulatory rules constraints and circumstances in the regulated environment examined there. Judge Breyer stated that "the relevant antitrust considerations differ significantly, in degree

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[9] *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied* 464 U.S. 891 (1983).

[10] *Id*. at 1105 (quoting *ITT v. GTE Corp*., 518 F.2d 913, 935-936 (9th Cir.1975)(footnote omitted).

[11] *Town of Concord v. Boston Edison Co*., 915 F.2d 17 (1st Cir. 1990), *petition for rehearing denied* 500 U.S. 930 (1991).

[12] *Id*. at 19-20 ("we *are not* saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere").

[13] *Id*. at 22 (quoting Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565 (1977)).

and in kind, where a price squeeze occurs in a fully regulated as opposed to an unregulated industry,"[14] and, ultimately concluded, that the conduct alleged by the plaintiff did not violate the antitrust laws. To conclude otherwise, would have required a finding that either wholesale rates authorized by regulators, retail rates authorized by regulators, or both should be nullified and declared unlawful because of their relationship to each other. Setting rates, of course, is a regulatory function, not a judicial function, and it is difficult to find fault with a judicial conclusion that there is no occasion for antitrust judges to nullify decisions regulators have been directed to make or provide ostensibly aggrieved parties means of challenging rates or securing remedies other than those provided through the regulatory processes.

2. The *Trinko* Case

The fine balance between specific federal regulation and the application of general antitrust policy has been recently addressed by the Supreme Court in its 2004 decision in *Verizon v. Trinko* ("Trinko").[15] The *Trinko* decision is of crucial importance here, since not only does it offer the Supreme Court's profound consideration of the antitrust and regulatory relationship, but does so in the specific context of the telecommunications industry.[16]

The respondents in *Trinko*, the Law Offices of Curtis Trinko, claimed that the petitioner Verizon Communications Inc., an incumbent local exchange carrier, had violated the antitrust laws by breaching its statutory duty under the Telecommunications Act of 1996[17] ("1996 Act") to share its network with competitors.

The Court began its analysis by looking into the question of what effect, if any, the 1996 Act had upon the application of traditional antitrust principles. The Court noted that the 1996 Act imposes a large number of duties on incumbent local exchange carriers, duties that go above and beyond those it imposes upon all other carriers. Thus, for example, the Court noted the incumbent carrier's statutory duty to offer competitors access to unbundled network elements on "just, reasonable and nondiscriminatory terms," as well as the statutory duty to permit competitors to locate and install their equipment on the incumbent's premises.[18] Despite the

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[14] *Id*. at 28.

[15] *Supra* note 8.

[16] Historically, USTelecom recognizes that even before *Trinko* was decided, the issue of the relationship between antitrust and regulation was hotly debated in Congress, with hearings being held before the House Judiciary Committee to consider whether the earlier *Goldwasser* opinion written by noted antitrust scholar Judge Diane Wood (*Goldwasser v. Ameritech Corp*., 222 F.3d 390 (7th Cir. 2000)) should be legislatively overruled. Indeed, one of the areas identified by Chairman F. James Sensenbrenner, in his opening address to this Commission, was to determine whether *Trinko* should be legislatively overruled. For the reasons stated below, USTelecom respectfully submits that *Trinko* "got it right" and that this Commission should so state in no uncertain terms, making it clear that courts are ill equipped to perform a regulatory function and should be particularly reluctant to do so when there is a regulatory structure in place that is designed to deter and remedy anticompetitive harm.

[17] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[18] *Trinko*, *supra* note 8 at 405-406.

existence of these numerous statutory duties, the Court determined that the existence of the 1996 Act's savings clause (discussed in more detail below) precluded a finding of implied immunity and preserved those antitrust claims that satisfied established standards.

The Court next examined whether the activity of which Trinko complained violated any pre-existing antitrust standards, and concluded that it did not. The Court then considered whether traditional antitrust standards should nevertheless be expanded to encompass the conduct at issue. In doing so, the Court again stressed the importance of undertaking antitrust analysis in light of the particular structure and circumstances of the affected industry, quoting from the *Town of Concord* case.[19] The factor of particular importance was, as in *Town of Concord*, the existence of a regulatory structure designed to deter and remedy anticompetitive harms. The Court explained that where such a regulatory structure is in place, the additional benefits to competition provided by antitrust enforcement tend to be small. Antitrust does however perform a role where the regulatory framework does not address issues properly subject to antitrust scrutiny. In applying this general principle to the pertinent regulation of the *Trinko* case, the Court found that the extensive regulation significantly diminished the likelihood of antitrust harm since "it served as an effective steward of the antitrust function."[20] Therefore, the Court generally considered the benefits of antitrust intervention under these circumstances to be minimal. Against these slight benefits, the Court identified significant costs of such potential antitrust intervention (the difficulty for an antitrust court to evaluate the claims correctly as well as to enforce the remedy sought for), and hence in the final cost-benefit balance found no need for an antitrust intervention in that case.

In overview, the analysis in *Trinko* of the relationship between regulatory and antitrust law and principles is fundamentally sound. It provides a careful and comprehensive analysis of the influence exercised by a regulatory structure on antitrust analysis. The decision also forcefully distinguished between regulatory mandates and the distinct provisions of the antitrust laws, demonstrating that a violation of the former does not, *ipso facto*, constitute a violation of the latter. Moreover, the opinion does so with a telling explanation of the reasons why public policy and consumer welfare could be damaged by stretching the general application of antitrust laws to serve regulatory goals that stem from different public policy considerations.

C. The 1996 Act antitrust savings clause does not modify the basic principle of antitrust coverage nor should it by implication permit regulators to legislate new antitrust duties or otherwise modify antitrust standards.

In its interpretation of Section 601(b)(1) of the 1996 Act, the *Trinko* Court clarified that the clause does not modify any of the basic principles reviewed above in any way, namely that the antitrust rules continue to apply to the regulated telecommunications industry, and that they so apply in their general form without creating any new claims that go beyond its existing general standards. As a basis for this interpretation the Court quotes the FCC's position that the savings

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[19] *Trinko*, *supra* note 8, at 411-412 (quoting *Town of Concord supra* note 13).

[20] *Trinko*, *supra* note 8, at 414.

clause preserves those "claims that satisfy established antitrust standards".[21] It also deemed any other interpretation as inconsistent with the clear language of the savings clause's mandate that nothing in the Act "modify, impair, or supersede the applicability" of the antitrust laws.[22]

Congressman F. James Sensenbrenner, Jr., chairman of the House Judiciary Committee, has agreed that the *Trinko* decision correctly interpreted the 1996 Act's savings clause, in issuing the following official statement about the decision:

> I am pleased that the Court has unequivocally upheld the antitrust savings clause contained in the Telecommunications Act of 1996. In doing so, it affirms the central role of Congress in setting antitrust and telecommunications policy. It also rejects the efforts of some lower courts to read the savings clause out of the law. As I have said from the outset, Congress intended that all parties in the telecommunications industry would be subject to the antitrust laws, and yesterday's decision confirms that central principle.[23]

Chairman Sensenbrenner's general position on the *Trinko* decision seems to have changed since making his earlier essentially correct comment. This switch is evidenced by his introduction, together with ranking member John Conyers, of H.R. 4412, of a bill which would provide that violations of the 1996 Act may be actionable under the antitrust laws.[24] Effectively, that bill would have the result of authorizing regulators to draft antitrust laws. USTelecom respectfully submits that antitrust laws have functioned effectively for more than a century as general laws protecting competitive markets, and that whatever remedies Congress may deem appropriate to deal with transgressions of regulatory requirements is a proper subject of regulatory laws, not antitrust laws. Chairman Sensenbrenner's shift in position, moreover, stands the savings clause on its head. Far from "saving" antitrust jurisprudence, the proposed legislation would radically reverse antitrust principles, superimpose an intricate and unnecessary regulatory regime on competition law, undermine the general antitrust regime, and presumably return to the Department of Justice partial responsibility for enforcing regulatory laws instead of antitrust laws of general application. For all of the reasons stated in *Trinko* and its First Circuit predecessor *Town of Concord*, such a step is unjustified, contrary to the policies underlying the antitrust laws,

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[21] *Trinko*, *supra* note 8, at 406-407 (quoting Brief for United States and the Federal Communications Commission as *Amici Curiae* Supporting Neither Party in No. 02-7057, *Covad Communications Co. v. Bell Atlantic Corp.* (CADC), p. 8).

[22] *Trinko*, *supra* note 8, at 407.

[23] U.S. House of Representatives, Committee on the Judiciary, F. James Sensenbrenner, Jr., Chairman, Sensenbrenner Statement on Supreme Court's Trinko Decision (Jan. 14, 2004), *available at* http://judiciary.house.gov/legacy/news011404.htm.

[24] Clarification of Antitrust Remedies in Telecommunications Act of 2004, H.R. 4412, 108th Cong. (2004); *see also,* Press Release, U.S. House of Representatives, Committee on the Judiciary, Sensenbrenner and Conyers Introduce Legislation to Strengthen Competition in Telecom Marketplace (May 20, 2004), *available at* http://judiciary.house.gov/newscenter.aspx?A=309.

and inconsistent with the 1996 Act itself, which ended judicial regulation of the telecom industry by the AT&T Decree Court.

Joel I. Klein, then Assistant Attorney General for Antitrust Division at the U.S. Department of Justice, commended the balance set by the 1996 Act's savings clause, in a statement that acknowledges its important balancing function between regulation and antitrust laws both today and in the face of potential future deregulation:

> [T]he Telecom Act explicitly keeps the antitrust laws in force. This serves not only to guard against any anticompetitive consolidation, but also against any other practices that violate the antitrust laws.[25]

III. THERE IS NO BASIS FOR LEGISLATIVE MODIFICATION OF ANTITRUST STANDARDS APPLICABLE TO THE TELECOM INDUSTRY.

A. *Trinko* is consistent with fundamental antitrust principles and sets the correct balance between antitrust and regulation.

The *Trinko* decision provides a comprehensive and correct statement of law by the highest judicial authority in the Country. In this reasoned decision, six justices from across the spectrum of perceived legal viewpoints (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia, Ginsburg and Breyer) ruled unanimously on the correct balance between regulation and antitrust in general, and between the 1996 Act and the Sherman Act in particular. The other three Justices who sat on the case (Justices Stevens, Souter and Thomas) concurred and concluded that Trinko did not have standing to bring suit, but did not quarrel with the merits decision.

Trinko has enjoyed widespread support from numerous members of the pertinent legal and political communities. Amici briefs urging the Court to adopt the reasoning it eventually did in the decision have been filed by the United States and Federal Trade Commission;[26] numerous States (such as Alabama, Delaware, Indiana, Nebraska, New Hampshire, Oklahoma, Utah and Virginia); and various private market companies (such as Visa, United Parcel Service, Honeywell and Kodak).

The Court's decision not to expand antitrust liability in the telecommunications industry that is already extensively regulated is also consistent with prior case law (such as the *Town of*

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[25] Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Preparing for Competition in a Deregulated Telecommunications Market, Remarks Presented at Willard Inter-Continental Hotel, Washington, D.C. (Mar. 11, 1997), *available at* http://www.usdoj.gov/atr/public/speeches/1070.pdf at 14.

[26] Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications v. Law Offices of Curtis v. Trinko, LLP* (May 23, 2003), *available at* http://www.usdoj.gov/atr/cases/f201000/201048.pdf.

Concord and *MCI* cases mentioned above) that held that an existing regulatory framework should be considered in deciding how to apply antitrust principles to a regulated industry.

USTelecom duly believes that the *Trinko* decision, having taken into consideration the unique characteristics of the telecommunications industry and the case law that has built up on this complex topic throughout the years, is an accurate and well-thought statement of law which should continue to guide policy on this matter.

B. Requirements of the 1996 Act reflect a Congressional policy decision lodged in considerations apart from antitrust principles.

The 1996 Act, which covers more than two hundred pages, creates an exhaustive regulatory regime that has been designed, *inter alia*, to affirmatively promote telecommunications rivalry and encourage facilities investment. Given that it was the first major overhaul of United States telecommunications policy in nearly sixty-two years, the legislative process of the Act was been extensive and took into consideration a broad array of factors.

In order to jump start competition in telecommunications, the 1996 Act and the FCC's rules adopted under it impose a comprehensive scheme of duties on incumbent telecommunications market entities. These duties were designed to maintain the balance between the different objectives Congress sought to achieve in the legislation of the Act, such as facilitating new entry while stimulating investment in facilities by both incumbents and new entrants. The task of continuously refining the rules has been consuming the FCC in the years since the Act came into law.

The fact that the 1996 Act encompasses considerations that go well beyond antitrust considerations is crucial when contemplating whether antitrust intervention in this industry should be expanded. This reality provides a reminder that, as in many other cases, the regulatory goals of the framework set by the Act only partially overlap those of antitrust laws. Thus, the FCC has a responsibility to consider the extent to which incumbent firms must share facilities and take into account the economic desirability of promoting facility-based rivalry. To apply these considerations in the antitrust context is both foreign to the principles of antitrust and could interfere, as well, with the performance by the regulatory agency of its balancing of interests in making judgments as to asset sharing. Application of antitrust principles to this judgment would not enhance the regulated outcome; the FCC's regulations set the outer boundaries of any mandate to share. Other regulatory requirements do not at all implicate and may be inconsistent with antitrust principles (for example universal service), and antitrust should play no role in the regulatory judgment. Thus, expansion of the intervention of antitrust laws with respect to conduct that is regulated under the 1996 Act would not only be inconsistent with antitrust jurisprudence, but may well interfere with the federal agencies' implementation and enforcement of the Act.

For a concrete example of how these considerations come about in real life, consider the *Trinko* case again. The specific conduct of which Trinko complained, namely that the incumbent

local exchange carrier had in effect denied interconnection services to rivals, was conduct fully regulated by the 1996 Act, which chose an enforcement mechanism of imposing fines on violators. Therefore, additional active intervention by antitrust laws in that context would have disserved both statutes. On the one hand, it would have disserved antitrust law because it would have departed from sound, generally applicable antitrust principles for the purpose of solving a perceived regulatory problem. And on the other hand, it would compromise the 1996 Act because it would depart from the carefully considered regulatory enforcement scheme that Congress adopted in the 1996 Act. In other words, the conduct complained of was addressed by the 1996 Act, and hence the only real issue was that of remedies under the Act. It would thus be inappropriate to import a thin, contorted version of antitrust laws for use as a mere instrument for remedying a wholly regulatory issue.

The current legal framework, which applies antitrust laws to telecommunication markets in a manner taking into account the regulatory market environment, best achieves what Congress intended in its adoption of the Act. Further antitrust legislation is both unnecessary and undesirable.

IV. WHEN ANTITRUST AND REGULATORY AGENCIES HAVE CONCURRENT RESPONSIBILITY FOR REVIEWING MERGERS OR CONDUCT, ANTITRUST AGENCIES SHOULD DECIDE THE ANTITRUST ISSUES AFTER GIVING APPROPRIATE WEIGHT TO REGULATORY AGENCY EVALUATIONS OF MARKET FACTS.

The allocation of responsibilities among governmental bodies is often imperfect, placing responsibilities in the hands of agencies that are not adept at executing that authority. One area of particular concern, and potentially severe economic impact, is the grant of authority to sectoral regulators to assess antitrust issues that should be left to competition experts. In the United States, two federal agencies – the U.S. Department of Justice Antitrust Division and the Federal Trade Commission – share generalized responsibility for merger review and competition policy formulation across the economic spectrum. In addition to these two agencies, certain sectoral agencies have been allocated specialized authority for competition assessment and enforcement in designated regulated or semi-regulated industries. The role of the sectoral government agency varies from concurrent jurisdiction with the DOJ and the FTC to preemptive jurisdiction over mergers in a specific industry. The decisions made by these specialized agencies are sometimes at odds with the recommendations and decisions of the antitrust enforcement agencies.

The problem of overlapping sectoral and generalized antitrust review has global significance. The frictions and complexities presented by the possibility of merger inquiries in sixty to seventy jurisdictions presents in itself an extraordinarily daunting challenge to expeditious and consistent enforcement. Concurrent or subsequent sectoral antitrust determinations elevate further the spectrum of delay, cost and inconsistent result to impede the progress of what may well be

pro-competitive, efficient transactions or, conversely, in the case of sectoral preemption authorize transactions which would merit antitrust challenge.

While a regulatory agency might appropriately address non-antitrust issues in evaluating a transaction under a broad legislatively mandated public interest standard, there is no justification for the regulatory agency to invoke antitrust considerations in applying this elastic and indefinite standard. The antitrust agencies have for more than 100 years demonstrated both experience and sound judgment in enforcement of our antitrust laws. No comparable record supports the intrusion of the regulatory agencies into the field of competition law. There are certainly no historic or otherwise demonstrable grounds for concluding that the regulatory agencies are a necessary watchdog over antitrust review by the antitrust agencies either from the standpoint of competency or confidence in the outcome. To vest the regulatory agency with antitrust jurisdiction invites, at best, cost and delay and, at worst, conflict.

This Modernization Commission, of course, has not been requested or authorized to evaluate regulatory laws or the scope of authority of regulators under those laws. The Commission should, however, urge that Congress, the enforcement agencies, the regulatory agencies and courts clearly distinguish what is "antitrust" from what is "regulatory." Thus, if a regulatory agency classifies conduct as being anticompetitive, or inadequate to achieve regulatory goals such as the goal of "jumpstarting competition," it does not follow that such a conclusion should have any evidentiary value in antitrust proceedings as to whether the conduct in question does or does not violate antitrust laws.

A. Conflict and delay arise where antitrust jurisdiction is shared or is solely with a regulatory agency.

The DOJ and the Federal Communications Commission have concurrent jurisdiction over mergers and acquisitions in the telecommunications industry. The FCC's jurisdiction to review such mergers is derived from both the Clayton Act[27] and the Communications Act of 1934.[28] The Clayton Act grants the FCC concurrent authority with DOJ to bar acquisitions of common carriers engaged in wire or radio communications where the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.[29] The Communications Act

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[27] We recognize that §11 of the Clayton Act, codified as amended, 15 U.S.C. §21, gives the FCC authority to enforce various Clayton Act provisions. The FCC has not exercised this authority in recent years, and wisely so. The FCC has rarely invoked this authority to attack mergers under §11, a process that requires strict adherence to statutory safeguards that are not applicable to the FCC when it exercises regulatory authority over mergers under the Communications Act of 1934.

[28] Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C).

[29] The Clayton Act, *supra* note 27, grants the DOJ statutory authority to review mergers, and prohibits the acquisition of stock or assets by any 'person' where 'the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.'

requires the FCC to review mergers between telecommunications common carriers under a "public interest" standard.

The 1996 Act ended a regime in which federal and state regulators shared regulatory authority over the telecom industry with the AT&T Decree Court and the Department of Justice, which effectively provided regulatory staff to Judge Greene. There is no occasion to recreate a failed regime of conflicting regulation or exacerbate it by authorizing antitrust courts and juries across the nation to regulate a key, infrastructure industry. The antitrust courts simply are not supposed to serve as regulators. Although they may exercise a degree of authority to regulate conduct as a tool of remedying past anticompetitive conduct, it does not follow that they should ever play the role as regulatory agencies second guessing or supplementing the regulatory role assigned to proper regulatory bodies.

While both agencies undertake a competition analysis, the principles guiding each agency's review differ significantly. The DOJ review focuses on whether possible anticompetitive effects of the merger violate antitrust laws – the mandate of the Clayton Act. While the FCC has authority to challenge proposed common carrier transactions under the Clayton Act, it rarely, if ever, does so. Instead, the FCC uses its broader powers under the Communications Act to apply the public interest standard, which includes an assessment of the competitive effects of the merger. Thus, from the merging parties' perspective, it gives the government a "second bite at the apple" to reject the proposed merger on competition grounds. The FCC's scope of review under this standard is not clear, creating confusion and uncertainty for the merging parties. Former FCC Commissioner Furchtgott-Roth addressed this issue in Congressional testimony, stating:

> I also have grave concerns about the process and practices employed in FCC merger review. The current system – or rather, the lack of a clearly delineated one – puts merging entities in an inequitable and difficult situation… Unfortunately there is no established Commission standard for distinguishing between the license transfers that trigger extensive analysis by the full Commission and those that do not. Nor do any of the Commission's orders in "merger" reviews elucidate the standard.[30]

While the scope of review under the FCC's public interest standard is not well defined, it clearly extends well beyond the parameters of review under the antitrust laws and encompasses the policy objectives of the 1996 Act. Such objectives include providing services to rural areas (*i.e.*, universal service) and sustaining high levels of residential service quality. In short, while a DOJ merger analysis ensures that a proposed merger is not harmful to competition, the FCC views itself as required to conclude that a merger will *enhance* competition and benefit consumers.[31]

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[30] Testimony of Federal Communications Commissioner Harold W. Furchtgott-Roth before the House Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumers (Mar. 14, 2000), *available at* www.fcc.gov/Speeches/Furchtgott_Roth/2000/sphfr004.html.

[31] *See* Statement of Commissioner Susan Ness, Federal Communications Commission, Before the Committee on the Judiciary, U.S. House of Representatives (June 24, 1998).

There are a number of examples where the express or clearly implied application by FCC of antitrust principles has caused distinct results from those applied by DOJ, or delay, or both.

1. The *Bell Atlantic/NYNEX* Merger Review

With such differing review standards, it is not surprising that the DOJ and the FCC have come to different conclusions for the same merger. In the case of the merger between Bell Atlantic and NYNEX, the DOJ did not oppose the merger while the FCC imposed several conditions.[32] The FCC's conditions included (1) performance monitoring reports, negotiated performance standards, and enforcement mechanisms; (2) carrier-to-carrier testing of uniform operations support systems; (3) prices based on forward-looking economic costs; (4) shared transport facilities on a minutes-of-use basis; and (5) easy payment plans for non-recurring charges. These conditions are clearly directed toward meeting the policy objectives of the Telecommunications Act rather than addressing potential antitrust harm. This reflects the FCC's belief that "the proper role of competitive forces in an industry must… be based not exclusively on the letter of the antitrust laws," but on the "special circumstances of the industry."[33] However, the FCC decision in *Bell Atlantic/NYNEX* implies that the Commission reached a different conclusion than the DOJ on the competitive effects of the transaction.[34] In fact, then FCC Chairman Hundt made clear that the Commission was imposing an antitrust-sounding standard of "precluded competition" in imposing the FCC remedy, a standard that was never used and had no roots in antitrust jurisprudence.

2. The *SBC/Ameritech* Merger Review

In the case of the merger between SBC Communications, Ameritech Corporation and Comcast Cellular Corporation, the DOJ reached its decision seven months before the FCC. The DOJ announced in March 1999 that it would require SBC and Ameritech to divest one of the two cellular telephone systems in 17 markets.[35] The complaint alleged that "the 17 markets for wireless mobile telephone services at issue are highly concentrated and that the SBC-Ameritech and SBC-Comcast mergers would greatly increase concentration in these markets. According to

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[32] Press Release, Department of Justice Antitrust Division, Antitrust Division Statement Regarding Bell Atlantic/NYNEX Merger (Apr. 24, 1997), *available at* http://www.usdoj.gov/atr/public/press_releases/1997/1113.pdf; Press Release, Federal Communications Commission, FCC Approves Bell Atlantic/NYNEX Merger Subject to Market-Opening Conditions (Aug. 14, 1997), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1997/nrcc7059.html.

[33] *United States v Federal Communications Commission*, 652 F.2d 72, 88 (D.C. Cir. 1980).

[34] *See* Memorandum Opinion and Order in the Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, No. NSD-L-96-10 (Aug. 14, 1997), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Orders/1997/fcc97286.txt at ¶ 37.

[35] Press Release, Department of Justice Antitrust Division, Justice Department Requires SBC to Divest Cellular Properties in Deal with Ameritech and Comcast (Mar. 23, 1999), *available at* http://www.usdoj.gov/atr/public/press_releases/1999/2322.htm.

the complaint, the mergers could give SBC the ability to increase prices, reduce quality and quantity of service, and refrain from making network improvements, through either unilateral actions or coordinated actions with the limited number of remaining competitors."[36] Final judgment between DOJ and the parties was entered on August 2, 1999.[37] [38]

The FCC concluded its review of this merger on October 6, 1999, approving the merger subject to 30 conditions.[39] In its press release announcing the approval, the FCC stated that the merger was "in the public interest" and was "designed to accomplish five central public interest goals:

1) promoting equitable and efficient advanced services deployment;
2) ensuring open local markets;
3) fostering significant out-of-region competition for the first time by a Bell Operating Company;
4) improving residential phone service; and,
5) ensuring compliance with and enforcement of the conditions.

These goals flow from the FCC's statutory objectives to open all telecommunications markets to competition, to promote rapid deployment of advanced services, and to ensure that the public has access to efficient, high-quality telecommunications services."[40]

3. The *Cingular/AT&T Wireless* Merger Review

Although there was no delay of time between the decisions of the DOJ[41] and the FCC[42] during the *Cingular/AT&T Wireless* merger review, the decisions demonstrate the different

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[36] *Id.*

[37] *United States v. SBC Communs., Inc.*, No. 99-0715, 1999 U.S. Dist. LEXIS 16789 (D.D.C. 1999).

[38] For another example of how a duplicate review may significantly delay the process see the case of the merger between Univision and the Hispanic Broadcasting Co. (HBC), in which the DOJ reached its decision six months before the FCC although the two agencies began reviewing the transaction at the same time. See Press Release, Department of Justice Antitrust Division, Justice Department Requires Univision to Make Divestitures To Complete Acquisition Of Hispanic Broadcasting Corporation (Mar. 26, 2003), *available at* http://www.usdoj.gov/atr/public/press_releases/2003/200871.htm; and Press Release, Federal Communications Commission, FCC Grants Conditioned Approval of Univision/HBC Merger (Sept. 22, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239081A1.pdf.

[39] *In Re Ameritech Corp. and SBC Communs, Inc.*, 14 F.C.C.R. 14712 (1999).

[40] Press Release, Federal Communications Commission, FCC Approves SBC-Ameritech Merger Subject to Competition-Enhancing Conditions (Oct. 6, 1999), *available at* http://ftp.fcc.gov/Bureaus/Common_Carrier/News_Releases/1999/nrcc9077.html.

[41] Press Release, Department of Justice Antitrust Division, Justice Department Requires Divestitures in Cingular Wireless's Acquisition of AT&T Wireless (Oct. 25, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/205960.pdf.

conclusions that can be reached when an antitrust agency and a regulatory agency separately require antitrust-driven divestitures. The FCC went well beyond the divestitures required by the DOJ and required divestitures in 11 additional local markets in various states.[43]

B. Support for exclusive responsibility for competition review in antitrust agency:

1. Former FCC Commissioners

Not all FCC Commissioners and executive officers are comfortable with their role in merger review. Former Chairman Michael Powell and Commissioner Furchtgott-Ross have been vocal in their concerns regarding concurrent DOJ and FCC authority for telecommunications merger review.

Former Chairman Powell has expressed concern about the differing standards and duplicative functions of the FCC and the federal antitrust authorities:

> The antitrust authorities must prove their case by a preponderance of the evidence to block a merger, whereas the FCC places the burdens on the applicants to affirmatively prove the transaction is "pro-competitive," a fairly recent pronouncement [referring to the Bell Atlantic-NYNEX case]…The Commission should be constrained to consider only such issues as whether the merger would violate an express provision of the Communications Act or the Commission's rules. In addition, it is appropriate for it to consider the merger's impact on other communications policies such as media diversity and universal service that are not appropriately considered by antitrust authorities. However, I believe that the Commission should be required to defer to the antitrust authorities' competitive analysis and leave it up to them (and the courts) to address the specific competitive harms that they identify… The Commission could file comments with the appropriate antitrust authority reviewing a merger or issue an advisory opinion on a given merger."[44]

Former Commissioner Harold Furchtgott-Roth's testimony before the House Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumer also highlighted the

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[42] Press Release, Federal Communications Commission, FCC Consents with Conditions to Cingular Wireless Acquisition of AT&T Wireless Licenses and Authorizations (Oct. 26, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253545A1.pdf.

[43] *Id.* at 2.

[44] Testimony of Federal Communications Commissioner Michael K. Powell before the House Committee on Commerce, Subcommittee on Telecommunications, Trade, and Consumer Protection, on The Telecommunications Merger Act of 2000 (Mar. 14, 2000), *available at* www.fcc.gov/Speeches/Powell/Statements/2000/stmkp005.doc.

problems associated with shared jurisdiction in this area. Noting that the FCC has authority under the Clayton Act but rarely invokes such power, Commissioner Furchtgott-Roth stated:

> If the Commission intends to exercise authority over mergers and acquisitions as such, it ought to do so pursuant to the Clayton Act, not the licensing provisions of the Communications Act…The Commissions focus on mergers rather than on license and authorization transfers creates another problem: our work often duplicates that of the Department of Justice's Antitrust Division and the Federal Trade Commission. Merging companies should not have to jump through excessive federal antitrust hoops, and those hoops should be held out by the institutions with the express statutory authority and expertise to do so. Those agencies are the Department of Justice and the FTC. When the FCC gets into the game as well, it increases the costs of the merging parties and expends taxpayer funds, while adding little from an antitrust perspective.[45]

2. International Competition Policy Advisory Committee

The problem of dual review was directly addressed by the U.S. Department of Justice when it formed the International Competition Policy Advisory Committee (ICPAC) in November 1997 to study and present recommendations to the Justice Department on the future of international antitrust policy.[46] In its final report, a majority of the ICPAC members recommended removal of the oversight authority for the competition aspects of merger review from the sectoral agencies.[47] In offering this recommendation, the ICPAC majority explained that overlapping sectoral and generalized agency authority threatens: (1) efficient review; (2) substantive international convergence; (3) case-by-case cooperation; and (4) consistency and transparency.[48]

3. Organization for Economic Cooperation and Development

The Organization for Economic Cooperation and Development (OECD) has also addressed the issue of the relationship between antitrust and sectoral agencies, most recently

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[45] *See supra* note 30.

[46] The Committee was co-chaired by the author of this paper and Paula Stern. Committee members included the following leading representatives from the worlds of business, law, and academia: Zoe Baird, Thomas E. Donilon, John T. Dunlop, Eleanor M. Fox, Raymod V. Gilmartin, Vernon E. Jordan, Jr., Steven Rattner, Richard P. Simmons, G. Richard Thoman, and David B. Yoffie.

[47] *See* Final Report, Department of Justice's International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (hereinafter "ICPAC Report") at 154. The Advisory Committee was assisted in large part by a paper prepared for the Committee by William E. Kovacic, "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards" (Mar. 15, 1999). Note that entrusting competition policy exclusively to the federal agencies requires Congressional action.

[48] ICPAC Report at 145-147.

during its February 2005 Global Forum on Competition. In its paper prepared by the OECD Secretariat, the OECD suggests that there are six primary potential government tasks faced in regulated sectors: (1) wholesale regulation; (2) retail regulation; (3) public service regulation; (4) resolution of disputes; (5) technical regulation; and (6) competition oversight.[49] While it was unclear about the distribution of the first four tasks, the OECD concluded that sectoral agencies are best suited for technical regulation and that competition agencies are best suited for competition oversight.[50] This view was also supported by the Business and Industry Advisory Committee (BIAC) to the OECD.[51]

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[49] OECD Competition Committee, The Relationship Between Competition Authorities and Sectoral Regulators Issues Paper, DAF/COMP/GF(2005)2 (Feb. 2, 2005) at 4.

[50] *Id.* at 4-5.

[51] *See* Summary of Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Global Forum on Competition, Session 2: Relationship Between Competition Authorities and Sectoral Regulators (Feb. 17, 2005), *available generally at* www.biac.org. BIAC's comments on this topic were prepared principally by James F. Rill.

Mr. Rill has also authored many other articles relating to dual competition enforcement. *See* "Federalism in Antitrust Enforcement: The United States' Experience with a Dual Enforcement Regime," Robert Schuman Centre Annual on European Competition Law 1996 (Dordrecht, Kluwer Law Int'l, 1997); "Recent Trends and Developments in the Role of Federal and State Authorities in Antitrust Enforcement: Is Cooperation Working?," European Competition Law Annual 2000: The Modernization of EC Antitrust Policy (Claus-Dieter Ehlermann and Isabela Atanasiu, eds., Hart Publishing) (2001); "Why Sectoral Regulators Should Not Compete in U.S. Merger Analysis," European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities (Claus-Dieter Ehlermann and Isabela Atanasiu, eds., Hart Publishing) (2005); "The Evolution of Modern Antitrust Among Federal Agencies," 11 Geo. Mason L. Rev. 135 (2002); and "The Interaction Between Federal and State Law: The U.S. Experience with Competition Law with Reference to EU Practice," Outline of Remarks by James F. Rill, Conference of the Paris Bar (Nov. 11, 2004).