

AMC Comments

Subject: Significant disruptive events and impact upon antitrust laws

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Deborah Garza, Esq.

Chair

Antitrust Modernization Commission

Dear Ms Garza

In light of such events as the recent Indian Ocean tsunami, I have the following suggestion for consideration at the AMC meeting tomorrow.

During the 217 years since the Constitution was adopted, the generally competitive American economy has survived many significant disruptive events, including financial panics, a Civil War, the Great Chicago Fire, other wars, the Great Depression, the NRA, etc. But since the Sherman Act was enacted, with few exceptions such as the periods after the attacks on Pearl Harbor, the more recent attack that destroyed the World Trade Center, and OPEC actions in 1973-74, the American economy has not typically faced the loss of consumer welfare stemming from long-term reductions in the aggregate capacity to supply essential goods or services caused by serious natural disasters or other unanticipated disruptive events. Accordingly, the antitrust laws do not deal with this except through the not necessarily relevant Sherman Act prohibitions of private sector cartels and group boycotts.

But unanticipated disruptive events beyond the normal reach of the antitrust laws are likely to continue on occasion to reduce productive capacity in various sectors of the economy. The recent conjunction of such disparate events as consecutive Florida hurricanes in 2004, earthquakes in California, volcanic eruptions in the Pacific Northwest, and forest fires, floods, and tornadoes in many states should remind us that America is not immune from natural disasters and their potential to shift aggregate supply curves in particular lines of commerce to the left and reduce consumer welfare. Some scientists are now suggesting the danger, after distant earthquakes, of tsunamis to our densely-populated coastal areas. Separately, hackers create man-made disruptive events to modern communications in the form of computer viruses, while some unknown person recently shut down buildings by mailing anthrax-laden letters. Additionally, if the Department of Homeland Security were to provide input to this Commission, it might suggest that it probably will not be able to prevent all future acts of terrorism that could reduce the productive capacity in particular lines of commerce as well as kill or injure many Americans. Stockpiles, strategic reserves, and inventories may blunt the immediate effects of a sudden, unanticipated shortfall in supply of some commodities and some finished goods, but they are unlikely to have any such impact on sudden unanticipated supply shortfalls in the increasingly important service sectors of the economy.

No revision of the antitrust laws can reduce the incidence of significant disruptive events such as natural disasters or terrorist incidents. However, I suggest that the Antitrust Modernization Commission can and should take their existence, and possible cumulative impact, into account when considering possible revisions of the antitrust laws. For example, it might usefully study whether the antitrust community, despite the recent, well-documented implosions of Enron, Arthur Anderson, and some communications companies, should continue to make the usual *ceteris paribus* assumptions in certain steps in merger analysis, most notably the assumption that the acquired company is the only current competitor in a relatively concentrated product market that will cease to play an independent competitive role during the first two years following a merger investigation. Even today, the antitrust community implicitly makes that benign assumption when it describes a particular pending merger as an "eight going to seven" or a "four going to three". Rethinking the latter as "four going to no more than three, and possibly fewer" might suggest a policy

conclusion that more "borderline" horizontal mergers ought to be challenged and blocked because subsequent unanticipated and unenjoinable disruptive events may transform them into mergers to monopoly or to tight oligopolies that may facilitate tacit collusion. (Unanticipated disruptive events in the future may also delay the actuality of the timely new entry that often is anticipated to offset any lessening of competition occasioned by a merger.)

Conversely, this Commission may conclude that certain mergers ought to be encouraged to decrease the likelihood that an unanticipated physical disaster at a stand-alone facility will leave scarce complementary resources (such as skilled labor) underutilized at the very moment when they are most needed and when markets for labor and other inputs may not be functioning particularly well. Particularly in the hospital and health care industries, which are called upon to respond instantly in the event of natural or other disasters, there may now be a need to revisit antitrust policies. This is more than a plea for policies to encourage more stand-by capacity and redundancy of physical facilities. Section One of the Sherman Act bans certain concerted actions by competitors. Currently-competing medical services providers at stand-alone hospitals may fear to prepare and practice in advance elsewhere with others to develop the cooperation and coordination that medical teams need in order to provide prompt and effective life-saving medical services to disaster survivors that the American public will expect despite damage to, or even destruction of, one or more hospitals. Perhaps Congress or the antitrust agencies should provide an antitrust exemption or interpretation to facilitate this. Or perhaps the ability of merged hospitals to have all of their medical personnel routinely obtain enough experience at each campus of the merged hospital to be able to function there efficiently from the onset of any emergency should qualify as a merger-specific efficiency that trumps the loss of whatever competition existed between such hospitals prior to their merger.

It may be that mergers are not necessary; carefully-drafted contracts may be sufficient to enable horizontal competitors to prepare for and later deal with anticipated disruptions, as in the electric power distribution industry where repair crews and vehicles from various companies that once held local monopolies subject to price regulation routinely travel considerable distances to assist each other in the restoration of electricity service after ice storms or hurricanes. Other options may be available. But I believe that this Commission should look into this issue.

Thank you for your consideration of this request.

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