MEMORANDUM

From: AMC Staff[†]

To: All Commissioners

Date: July 11, 2006

Re: Regulated Industries Discussion Memorandum

The Commission adopted for study several issues relating to the role of antitrust law in industries subject to economic regulation that replaces competition to one degree or another.[1] In particular, the Commission agreed to focus on the following three questions.

A. How should responsibility for the enforcement of antitrust laws in regulated industries be divided between the antitrust agencies and other regulatory agencies?

B. How should the presence or absence of antitrust savings clauses in regulatory legislation be interpreted?

C. Should Congress and regulatory agencies set industry-specific standards for particular antitrust violations that may conflict with general standards for the same violations?[2]

The Commission received several suggestions to study this issue, including from the Attorneys General of forty-one states and the District of Columbia,[3] the Antitrust Section of the

† This memorandum summarizes comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

1 Thus, for example, the Commission did not consider, and this memo does not discuss, safety, environmental, or other types of regulation.

2 *See* Regulated Industries Issues Recommended for Commission Study, at 2 (Dec. 21, 2004); Jan. 13, 2005 Meeting Trans. at 176.

American Bar Association,[4] the Business Roundtable,[5] and the United States Telecom Association.[6]

The Commission requested comment on May 19, 2005, regarding the following issues related to regulated industries.

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?

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?

3. What is the appropriate standard 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?

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?

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

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 merger? Are there benefits to such dual review?

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[3] *See* Amended Comments Regarding Commission Issues for Study of the Attorneys General of the Undersigned States and District of Columbia, *available at* http://www.amc.gov/comments/stateags.pdf.

[4] *See* Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission, September 30, 2004, *available at* http://www.amc.gov/comments/abaantitrustsec.pdf.

[5] *See* Comments of the Business Roundtable Regarding Commission Issues for Study, September 29, 2004, *available at* http://www.amc.gov/comments/businessroundtable.pdf.

[6] *See* United States Telecom Association Comments Regarding Commission Issues for Study, September 30, 2004, *available at* http://www.amc.gov/comments/usta.pdf.

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 antitrust analysis in merger review?[7]

The Commission held a hearing on December 5, 2005, regarding these issues, taking testimony from two panels of witnesses. The first panel included Scott G. Alvarez, General Counsel, Board of Governors of the Federal Reserve System; Raymond A. Atkins, Office of the General Counsel, Surface Transportation Board; J. Bruce McDonald, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice; and Hon. Rob McKenna, Attorney General, State of Washington. The second panel included Mark Cooper, Director of Research, Consumer Federation of America; Harold Furchtgott-Roth, President, Furchtgott-Roth Economic Enterprises and former Commissioner of the Federal Communications Commission; Diana L. Moss, Vice President and Senior Fellow, American Antitrust Institute; and John Thorne, Senior Vice President and Deputy General Counsel, Verizon Communications.[8] The Commission also received comments from several organizations and individuals.[9]

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[7] 70 Fed. Reg. 28,902, 28,907 (May 19, 2005). The Commission invited the public to address responses to item 6 in the context of any or all of 12 different regulated industry merger review regimes. *See id.* (listing merger regimes).

[8] All citations to "Trans." are to the transcript of the AMC hearing on Regulated Industries held on December 5, 2005, unless otherwise noted. Representatives from the Federal Communications Commission ("FCC") declined an invitation to testify.

[9] *See* Comments of the American Antitrust Institute Working Group on Regulated Industries (July 15, 2005) ("AAI Comments"); Comments to the Antitrust Modernization Commission on Regulated Industries Submitted by Peter C. Carstensen ("Carstensen Comments"); Comments of CompTel/ALTS to the Antitrust Modernization Commission (July 15, 2005) ("CompTel/ALTS Comments"); Testimony of Washington State Attorney General Rob McKenna Concerning Antitrust Enforcement and Regulated Industries ("McKenna Comments"); Comments of the United States Telecom Association to the Antitrust Modernization Commission's Request for Public Comment (July 15, 2005) ("USTA Comments"); Comments of the Western Coal Traffic League on Railroad Antitrust Issues (July 15, 2005) ("WCTL Comments"); Comments of the World Shipping Council Regarding Immunities and Exemptions and Regulated Industries ("WSC Comments"); Comments of the

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Following a brief background discussion, this memorandum discusses in turn each of the three general questions adopted by the AMC for study. The first question (regarding division of antitrust enforcement responsibility between the antitrust and regulatory agencies) is discussed at pp. 6-18. The second question (regarding savings clauses and implied immunity) is discussed at pp. 18-26. The third question (regarding the enactment of industry-specific standards) is discussed at pp. 27-29.

I. Background

At the federal level,[10] industry regulation has typically resulted from congressional creation of administrative agencies charged with general oversight of the economic functioning of particular industries.[11] Regulation was thought to be necessary in instances of market failure, particularly in cases of natural monopoly.[12] Accordingly, regulation was intended to limit the exercise of monopoly power and advance the objective of reliable service, provided on non-discriminatory terms, through rate and service regulation.[13] Under such regulation, there is at most a limited role for antitrust laws.[14]

Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission (Nov. 4, 2005) ("Business Roundtable Comments"); Public Comments of the American Public Power Association (Jan. 27, 2006) ("APPA Comments").

10 The Commission's questions were directed to, and this memo discusses, the interaction of antitrust and economic regulation at the federal, not state, level.

11 *See* Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 339 (2004) ("Hovenkamp, *Enterprise*").

12 *See id.*

13 *See id.*

14 *See* Hovenkamp, *Enterprise*, at 341 ("When the government makes rules about price or output, market forces no longer govern. To that extent antitrust is shoved aside.").

A substantial transformation in the last quarter-century, however, has led to an increasing disenchantment with economic regulation.[15] As a result, competition has been introduced to varying degrees in regulated industries, by easing entry and creating consumer choice.[16] For example, the role of agencies has sometimes reduced to monitoring regulatory access requirements and pricing of "bottleneck" monopolies.[17] As deregulation occurs, the role for antitrust law increases.[18]

There are three general ways in which antitrust may (or may not) apply in regulated and deregulating industries.

- **The regulated industry may be expressly exempted from antitrust law.** In creating a regulatory entity to oversee an industry, Congress also may have specifically exempted the regulatory industry from antitrust law. Even where the antitrust laws do not apply to regulated industries, the enforcement agencies can and do advocate the application of competitive principles in a variety of ways—*e.g.*, that regulatory agencies avoid approving conduct that may harm competition and consumers and eliminate obstacles to competition.[19]

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15 *See* Joseph D. Kearney and Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323, 1325 (1998) ("Kearney and Merrill, *Transformation*"). These authors do not settle on a single reason for this transformation, but identify technological change, destabilization of regulated industries because of deregulation and increased competition in related industries, interest group politics, and a recognition that regulatory failure may be more costly than market failure as contributing factors. *Id.* at 1383.

16 *See id.* at 1326.

17 *See* Hovenkamp, *Enterprise*, at 341.

18 *See id.*

19 *See* Statement of J. Bruce McDonald on Behalf of the United States Department of Justice, at 2 (Dec. 5, 2005) ("McDonald Statement"). For example, the Antitrust Division recently recommended to the Department of Transportation that an alliance among two U.S. airlines and three foreign carriers to combine their international operations not be granted immunity from the antitrust laws. *See id.* at 3. Similarly, this year the Division filed comments with the Federal Maritime Commission and the Surface Transportation Board, urging competitive discipline. *See id.* at 3-4. Similarly, the Federal Trade Commission has provided comments to the Federal Energy Regulatory Commission ("FERC") on how to define "market power" for purposes of deciding whether a market participant may charge unregulated rates. *See* Comment of the FTC Before the FERC on Market-Based Rates for Public Utilities, *available at* www.ftc.gov/bc/v060004.pdf.

- **The regulated industry may be expressly subject both to regulation and antitrust law through, for example, a "savings clause".** In creating a regulatory regime, Congress may expressly provide that the antitrust laws will continue to apply to the industry. In such circumstances, regulators and antitrust enforcers may use different standards to evaluate the same conduct, such as a merger (*e.g.*, a "public interest" test under a regulatory statute and Clayton Act Section 7 standards).
- **It may be unclear whether and to what extent the regulated industry is subject to the antitrust laws.** If Congress fails to specify whether the antitrust laws continue to apply, courts may be called upon to decide whether Congress intended to displace application of the antitrust laws when it established the regulatory scheme.

II. Discussion of Issues

A. <u>How Should Responsibility for the Enforcement of Antitrust Laws in Regulated Industries Be Divided between the Antitrust Enforcement Agencies and Other Regulatory Agencies?</u>

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?*

As described below, commenters proposed a number of ways to evaluate the role of antitrust in regulated industries, including how the role of antitrust may change as industries move from regulation to deregulation.

a. The role of antitrust in regulated industries generally

Commenters note that, although there has been a movement toward deregulation and a greater role for market forces throughout the U.S. economy, significant monopoly characteristics remain in many regulated industries, along with the potential for strategic conduct that can exclude competition and exploit consumers.[20] Accordingly, commenters stated, the transition from regulation to competition may increase the need for antitrust enforcement, although, they

[20] *See, e.g.*, Carstensen Comments, at 2.

explained, antitrust may not be the only or even the primary tool to help transitioning industries toward competition.[21]

Witnesses and professors highlighted the following values of antitrust enforcement in regulated industries:

- Economic regulation in some circumstances is the antithesis of competition, tending to preserve monopolies and other noncompetitive market structures by restricting entry, controlling price, skewing investment (causing either too little or too much), and limiting or delaying innovation (*e.g.*, by forcing assets to be shared with rivals on regulated terms).[22] A reliance on competition, enforced through antitrust law, is preferable.[23]
- In some circumstances, antitrust enforcement is more effective and timely than regulatory enforcement by virtue, for example, of broader discovery, a wider scope of remedial authority, and insulation from political interference.[24]

Commenters advocated various approaches to the use of antitrust law in the context of regulated industries.

- **Legislate clearly—**Some commenters advocate the coexistence of regulators and antitrust enforcers in a clearly defined, complementary enforcement scheme.[25] They argue that conflict occurs if no clarity exists regarding who exercises authority over market participants, and this can result in consumers with no meaningful remedy for their harms.[26] Moreover, they contend, without clear definition there is a risk of turf battles over jurisdiction, with resources diverted to procedural disputes, rather than applied to substantive enforcement.[27] Finally,

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21 *See* CompTel/ALTS Comments, at 3; USTA Comments, at 1-2; *see also* Prepared Remarks of Diana L. Moss, Regulated Industries, at 5 (Dec. 5, 2005) ("Moss Statement") ("[R]egulatory conduct-based remedies should probably not be the front line of defense on remedying the exercise of market power.").

22 *See* Testimony of John Thorne Before the Antitrust Modernization Commission, at 4 (Dec. 5, 2005) ("Thorne Statement").

23 *See id.*

24 *See* Philip J. Weiser, *The Telecom Act and Reflections on Antitrust Remedies*, 55 Admin. L. Rev. 1, 6 (2003) ("Weiser, *Reflections*").

25 *See* Testimony of Washington State Attorney General Rob McKenna Concerning Antitrust Enforcement and Regulated Industries, at 3 (Dec. 5, 2005) ("McKenna Statement"); Cong. Rec. E934-E935 (May 21, 2004) (Sensenbrenner remarks).

26 *See* McKenna Statement, at 5.

27 *See id.* at 3.

without a clearly defined scheme, they note, the courts are left to discern the intent behind complex statutes and regulatory schemes and fill in the gaps.[28]

- **Apply antitrust where regulation relies on competition—**Some argue that the antitrust laws should apply with full force wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.[29]
- **Allocate between antitrust and regulation based on comparative advantages—**One commenter recommended allocating authority according to the comparative advantages of each type of enforcement regime.[30] According to this commenter: a) antitrust enforcement is well suited for disputes requiring judicial resolution of a specific competitive distortion, while regulatory agencies are better suited to rulemaking and ongoing operational oversight;[31] b) antitrust has a comparative advantage in maintaining competitive markets, while regulation has a comparative advantage in creating the conditions that allow a market to become competitive;[32] and c) antitrust courts have a wider range of remedies available to them (including divestiture and other structural remedies), but regulatory agencies are well-equipped to administer continuing interventions.[33]
- **Involve regulatory agencies in antitrust enforcement through compulsory joinder—**One commenter proposes a compulsory joinder rule making regulatory agencies indispensable parties in federal antitrust proceedings arising in markets they regulate.[34] The goal of this proposal is to promote collaboration, make use of superior institutional and technical knowledge possessed by regulatory agencies, and ensure consistency of outcomes, thus lowering the overall costs of competition policy.[35]

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[28] *See id.*; *see also* Cong. Rec. E934-E935 (May 21, 2004) (Sensenbrenner remarks).

[29] *See* Mark Cooper (on behalf of the Consumer Federation of America and Consumers Union), Antitrust Should Promote Competition on Top of Well Regulated Infrastructure Platforms, at 9 (Dec. 5, 2005) ("Cooper Statement").

[30] *See* AAI Comments, at 4.

[31] *See id.* at 4.

[32] *See id.* at 4, 7-8.

[33] *See* AAI Comments, at 4.

[34] *See id.* at 6, 8.

[35] *See id.*

b. The role of antitrust in industries transitioning to deregulation

As noted above, antitrust law is generally considered to have a more important role to play as an industry moves toward less direct regulation.[36] The reasons given include the following.

- Underutilization of antitrust in transitioning industries leaves regulators burdened with promoting sound competition policy and deterring, detecting, and remediating anticompetitive conduct.[37] Regulators are ill-equipped to do this and can inadvertently chill procompetitive behavior.[38]
- Deregulatory schemes can involve lengthy transitions, and a categorical rule against antitrust enforcement during the transitional stage could preclude it indefinitely.[39]
- Not all deregulatory schemes are well designed to promote competition or are successful at doing so.[40]
- Reduced regulation means that the regulatory agency will be playing a reduced role, so will be less likely to curb anticompetitive conduct.[41]

Commenters have cautioned, however, that until a "workably competitive context" has developed, general antitrust principles may be insufficient to reshape the former structure of an industry and limit the incentive for incumbents to engage in strategic conduct that may frustrate the development of competition. As this commenter explained,

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[36] *See* AAI Comments, at 2-3; Hovenkamp, *Enterprise*, at 341; Trans. at 5 (McKenna).

[37] *See* AAI Comments, at 2.

[38] *See id.*

[39] *See id.*

[40] *See* AAI Comments, at 3.

[41] *See* CompTel/ALTS Comments, at 2-3. This commenter pointed to the FCC's reduced regulation of special access prices in 1999, based on the premise that certain service was becoming competitive. *See id.* at 3 n.2. Rather than becoming more competitive, CompTel argues, the service has become less competitive. *See id.* Comments filed in an ongoing proceeding (*In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (FCC)), the argument goes, show that the local monopolists have offered large discounts to purchasers who agree to take all or nearly all of their special access service from them. *See* CompTel/ALTS Comments, at 3 n.2. CompTel argues that, because the FCC no longer reviews this type of exclusive dealing contract, these contracts should receive antitrust scrutiny. *See id.*

> workable, desirable economic competition in these industries requires self-conscious development of legal rules to facilitate such conduct in the market. . . . Antitrust assumes a workably competitive context from which individual firms have deviated. When an industry is making a transition, the problem is to define the market context. This is very difficult because in greater or less degree, the actual needs of the new market will only emerge as the market develops. For this reason, regulatory agencies ought to have relatively broad mandates to adopt and revise rules that will govern emerging markets.[42]

Of course, such regulation "needs to be framed in light of clearly defined Congressional goals of achieving workably market oriented institutions wherever possible."[43] But some believe the regulatory agency may be better suited than an antitrust agency to develop and implement such rules, which may deviate from generally applicable antitrust standards designed for application to competitive marketplaces, and may require ongoing monitoring and delicate calibration of the sort for which the antitrust agencies are ill-adapted.[44]

2. *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?*

The role regulatory agencies play in merger review varies by industry. In general, merger review responsibility is allocated in one of four ways.

(1) Exclusive regulatory agency review. The Surface Transportation Board ("STB"), for example, is exclusively authorized to review certain rail and motor carrier mergers.[45] The antitrust agencies may provide their views to the STB, but they have no independent authority to challenge a merger reviewed by the STB. Similarly, the Department of Transportation has the exclusive authority to approve and immunize agreements between U.S. airlines and foreign carriers.[46]

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42 Carstensen Comments, at 4; *see also* Cooper Statement, at 6 ("Antitrust cannot replace competition unless it can be conclusively shown that the underlying conditions have changed.").

43 Carstensen Comments, at 4.

44 *See Verizon Communications, Inc. v. Trinko*, 540 U.S. 398, 411 (2004); *see also* USTA Comments, at 5.

45 49 U.S.C. § 11321(a) (rail mergers); 49 U.S.C. § 14303 (motor carriers).

46 *See* 49 U.S.C. §§ 41308-09.

(2) Primary review by regulatory agency. The Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve Board, and Office of Thrift Supervision are primarily responsible for reviewing mergers involving financial institutions, for example.[47] With respect to commercial bank mergers, the banking agency must obtain a report from DOJ before approving a merger, and no such merger may close before the thirtieth day following approval by the banking agency, to give DOJ time to challenge the transaction in court.[48] A court must preliminarily enjoin a commercial bank merger challenged by DOJ.[49] But a bank merger not challenged within the 30-day period is subsequently immune from attack except under Section 2 of the Sherman Act.[50]

(3) Concurrent review by regulatory agency and antitrust agency. For example, either the FTC or DOJ typically reviews mergers in FCC-regulated industries, along with the FCC and state public service commissions.[51] The antitrust agency may challenge a transaction approved by the FCC or seek restructuring or other relief the FCC has not obtained. Similarly, mergers in the electric power industry are reviewed by one of the antitrust agencies, FERC, and state public service commissions. In these instances, each agency's review is nonexclusive. Approval (or the imposition of conditions) by one entity does not preclude challenge (or the imposition of additional conditions) by another.

(4) Sole review by antitrust agency. As a result of deregulation, natural gas company mergers are reviewed solely by the antitrust agencies, for example.[52]

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[47] The Comptroller of the Currency regulates transactions involving national banks; the Federal Deposit Insurance Corporation regulates transactions involving federally-insured state-chartered banks that are not members of the Federal Reserve System; the Federal Reserve Board regulates bank holding companies and state-chartered banks that are members of the Federal Reserve System; and the Office of Thrift Supervision regulates savings and loan companies and savings associations. The regulatory treatment of various types of mergers under the Bank Merger Act of 1996, 12 U.S.C. § 1828(c)(5)(A), the Bank Holding Company Act, 12 U.S.C. §§ 1841-50 (2000), and the Gramm-Leach-Bliley Financial Services Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999), is described in ABA Section of Antitrust Law, *Antitrust Law Developments*, 1317-22 (5th ed. 2002) ("*Antitrust Law Developments*").

[48] 12 U.S.C. § 1828(c); 12 U.S.C. § 1842; 12 U.S.C. § 1467a(e). DOJ and the banking regulator may allow the transaction to be consummated earlier if there is no competitive issue, and a transaction may also be consummated earlier under certain emergency circumstances. 12 U.S.C. § 1828(c)(6).

[49] 12 U.S.C. § 1828(c)(7)(A).

[50] 12 U.S.C. § 1828(c)(7)(C).

[51] 47 U.S.C. §§ 214, 310(d).

[52] *See Antitrust Law Developments*, at 1292 (citing 15 U.S.C. § 717(f)). This allocation applies only to acquisitions of voting securities. If the transaction is structured as an asset acquisition, then the Federal Energy Regulatory Commission ("FERC") must give approval for any license transfers. *See* 15 U.S.C. § 717f(c)(1)(A).

Regulatory agencies generally evaluate mergers under a "public interest" standard.[53] This standard typically includes competition concerns similar to those underlying the antitrust laws, but also takes other considerations into account. For example, the public interest may include preserving a diversity of viewpoints in the media (in the case of broadcast mergers reviewed by the FCC) or protecting labor interests (in the case of rail transactions reviewed by the STB).[54] The Bank Merger Act and Bank Holding Company Act expressly incorporate Sherman and Clayton Act standards, but also allow for the approval of anticompetitive transactions upon a finding that the anticompetitive effects are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[55] It is therefore possible for the antitrust agencies and industry regulators to reach different conclusions about the propriety of approving the same transaction.

The issue of antitrust versus regulatory agency review of mergers continues to receive attention.[56] For example, in 2000, the majority of members of the International Competition

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53 For example, the FCC must determine whether a proposed transfer of station licenses would serve the "public interest, convenience, and necessity." 47 U.S.C. § 310(d). Similarly, the STB evaluates mergers to determine whether they are "consistent with the public interest." 49 U.S.C. § 11324(b).

54 The FCC determines whether a proposed license transfer would "ensur[e] that a diversity of voices is made available to the public," in addition to questions about competitive issues. *See, e.g.*, *In re Application of General Motors Corp. & Hughes Elec. Corp. and the News Corp. Ltd.*, 19 F.C.C.R. 473, 483 (2004). One factor the STB evaluates in a merger is the "interest of rail carrier employees." 49 U.S.C. § 11324(b).

55 12 U.S.C. § 1828(c)(5)(A).

56 The debates over the Energy Policy Act of 2005 included some discussion of concurrent merger review. Senators emphasized the parts of the bill that granted broad merger review powers to the Federal Energy Commission. *See* 151 Cong. Rec. S9255, 9258 (2005). In subsequent debates, Senator Shelby voiced concern that expanding FERC's merger review authority would simply replace one duplicative regulatory framework with another. *See* 151 Cong. Rec. S7204, 7267 (2005). Senator Kyl put the issue more bluntly: "giving FERC new merger authority is going in the wrong direction. Utility mergers and acquisitions are already subject to multiple and overlapping reviews by FERC, SEC, DOJ, FTC." 151 Cong. Rec. S7451,

Policy Advisory Committee ("ICPAC") recommended giving federal antitrust agencies exclusive jurisdiction to review mergers in regulated industries and further studying issues relating to overlapping agency review.[57] Moreover, some argue, the continued transition from direct

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7465; *see also* 151 Cong. Rec. H2192, 2271-2278 (2005) (Section 1291 of the Act discussing merger reform).

[57] *See* International Competition Policy Advisory Committee, *Final Report* 143 (2000) ("ICPAC Report"). The majority of ICPAC members recommended removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. Some recommended instead creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings. The Report also advocated "soft convergence" strategies, including greater cooperation between agencies that exercise concurrent jurisdiction over mergers. *See id.* at 143.

All ICPAC members agreed that several issues deserved further study. These include (a) How does the specialized agency process differ from the antitrust agency review process? (b) In what ways do the substantive standards of review differ? (c) Would a unified solution be appropriate or do the agencies present different challenges or different problems? *See id.* at 153-54.

ICPAC's record is anecdotal and does not exhaustively review the interactions among the relevant agencies. To develop such a record, ICPAC suggested postmerger audits could be conducted on those matters where the agencies disagreed. They also suggested an assessment of the sectoral agencies' competence in undertaking competition analyses, and whether and to what extent such analyses duplicate the efforts of the antitrust agencies. Finally, they suggested considering whether the antitrust agencies have the necessary expertise to undertake merger analysis across different industries. *See id.* at 153-54.

Appendix B lays out the relationship between antitrust agencies and sectoral regulators, as defined by ICPAC. The AMC record is more extensive on that topic. *See, e.g.*, Statement of Scott G. Alvarez Before the Antitrust Modernization Commission (Dec. 5, 2005) ("Alvarez Statement") (banking industry); Raymond A. Atkins, Written Statement of the Surface Transportation Board (Dec. 1, 2005) ("Atkins Statement") (Surface Transportation Board); Testimony of Harold W. Furchtgott-Roth Before the Antitrust Modernization Commission (Dec. 5, 2005) ("Furchtgott-Roth Statement") (FCC).

Both Douglas Melamed, then Acting Assistant Attorney General of the Antitrust Division, and Joel Klein, then Assistant Attorney General of the Antitrust Division, expressed their reactions to ICPAC's conclusions in speeches later in 2000. *See* A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy ("Melamed, *Enforcement*"), *available at* http://www.usdoj.gov/atr/public/speeches/6785.htm; Joel I. Klein, Time for a Global Competition Initiative? ("Klein, *Global*"), *available at* http://www.usdoj.gov/atr/public/speeches/6486.htm. Neither focused specifically on ICPAC's proposals regarding dual merger review by antitrust and sectoral regulators, but both made comments relevant to that issue.

("command-and-control") regulation to a market-oriented system is likely to result in further consolidation (for example, in the telecommunications and air transportation industries), and how such mergers are reviewed could potentially significantly affect the ongoing competitiveness of those industries.[58]

Appendices A and B provide additional record data that may be useful in the Commission's analysis of this topic. Appendix A is a list of specific examples in which the competitive analysis of a merger differed between the regulatory agency and the antitrust agencies. Appendix B lays out the relationship between the antitrust agencies and sectoral regulators, as described by ICPAC.

Commentators and witnesses before the Commission identified the following positive and negative aspects of the current system of concurrent merger review authority in most regulated industries.

Potential Benefits of Concurrent Merger Review

- Concurrent review of a merger by more than one agency may help to ensure that problematic mergers are recognized and efficiently addressed.[59]
- Concurrent review may help to ensure that important non-competition concerns are considered in assessing the overall effect of a transaction and crafting remedies. Including competition policy in the mix of factors considered by the industry regulator may temper the regulator's reliance on non-competition factors; conversely, removing competition policy from the mix of factors considered by the regulatory agency might diminish its influence.[60]

Klein pointed out that it is "clear that the trend away from sectoral regulation in favor of generalized antitrust enforcement will grow." Klein, *Global*, at 2. Melamed noted that dual review can impose costs on parties that may "function as a tax on efficient transactions," and that this can be "especially burdensome" if the different reviews have "seriously inconsistent procedural or substantive requirements." Melamed, *Enforcement*, at 5-6.

[58] *See* Carstensen Comments, at 3.

[59] *See, e.g.*, ICPAC Report, at 150 (recommending that any proposed solution must take into account the costs and benefits of change, including whether concurrent review "deal[s] with problems of underenforcement.").

[60] *See id.*; *see also* Atkins Statement, at 6-7.

- Concurrent review may help to ensure that best use is made of both the technical and industry-specific expertise of the regulatory agency and the competition law expertise of the antitrust agencies.[61]
- Providing merger review jurisdiction to the regulatory agency may improve its ability to oversee an industry transitioning to competition, providing a tool that can be superior to direct regulation.[62]
- Regulatory agencies may have more expansive remedial powers at their disposal than do the antitrust agencies, including the power of continuing oversight.[63]

Potential Costs of Concurrent Merger Review

- Shared review of a merger by more than one agency (where the views of one agency are not binding on the other) can lead to inconsistent policies and enforcement decisions.[64] Such inconsistency can prevent the development of a cohesive policy, undermine the efficacy of both antitrust enforcement and industry regulation, create intolerable uncertainty about the legality of transactions, and can undermine public confidence in government.[65]
- Concurrent review can increase transaction costs for businesses. In addition to the uncertainty costs inherent in a system that allows for the use of different standards and the possibility of inconsistent enforcement results, there are substantial direct costs associated with multiple independent reviews, and the time frames associated with gaining approval from various agencies may be inconsistent.[66]
- Concurrent review may increase costs to government as well. It may involve not only the duplicative expenditure of resources, but also an inefficient allocation of

[61] *See* McDonald Statement, at 7; AAI Comments, at 21-22; Rachel E. Barkow and Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. Chi. Legal F. 29, 33 (2000) ("Barkow and Huber, *Comparative*").

[62] *See* Harold Feld, *The Need for FCC Merger Reform*, 18-FALL Comm. Law 20, 21 (2000) ("Feld, *FCC*").

[63] *See* Atkins Statement, at 7.

[64] *See* ICPAC Report, at 143, 146; *see also id.* at 149-50 (listing examples where the regulatory agency did not follow the DOJ's competitive analysis of a transaction); McDonald Statement, at 6 (discussing divergent outcomes in the 1997 proposed merger of Bell Atlantic and NYNEX). However, McDonald points to "much more consonance than dissonance" between the Division's review and the FCC's. *See id.* (discussing DirecTV/EchoStar proposed merger); *see also* Furchtgott-Roth Statement, at 6; USTA Comments, at 9-10.

[65] *See* ICPAC Report, at 143, 146; USTA Comments, at 9-10; Barkow and Huber, *Comparative,* at 31.

[66] *See* ICPAC Report, at 143, 146; Furchtgott-Roth Statement, at 6; AAI Comments, at 21; USTA Comments, at 9-10; Barkow and Huber, *Comparative*, at 31.

scarce government resources, particularly where an industry regulator disregards the antitrust agency's analysis.[67]

- The consideration of competition policy as one of several factors in a broad public interest assessment may result in less transparency regarding the grounds for a decision and the extent to which or how antitrust standards were applied.[68] The scope of the public interest standard is ill-defined and relatively unbounded, especially as compared to standards developed under the antitrust laws.[69] If a regulatory agency decides to allow a merger despite the likelihood that it has an anticompetitive effect, there is a strong public policy value to making that choice transparent.
- Concurrent review can complicate cooperation with foreign competition authorities reviewing multinational mergers in regulated industries. U.S. antitrust agencies may be stymied in crafting a common settlement with the merging parties and foreign jurisdictions by the different time frame for review by the industry regulator. In addition, there is no effective mechanism by which foreign competition authorities and U.S. industry regulators can exchange views and information about a transaction, as occurs between foreign and U.S. antitrust agencies.[70]
- Industry regulators lack the experience and expertise of the antitrust agencies in applying competition law principles and may be more susceptible to "industry capture" and political influence.[71] According to one commenter, experience shows that the least desirable merger decisions have occurred when the regulatory agency has had exclusive jurisdiction.[72]

In light of the identified costs and benefits of having concurrent review of mergers, commenters and witnesses proposed a number of alternatives to the status quo.

- **Congress should vest all competition oversight authority exclusively in the federal antitrust agencies—**Under this proposal, in situations in which a regulatory agency has some merger review authority, it would be required to accept the findings of an antitrust agency on antitrust issues, and those findings

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67 *See* ICPAC Report, at 145; Barkow and Huber, *Comparative*, at 31.

68 *See* ICPAC Report, at 145; *see also* AAI Comments, at 21.

69 *See* USTA Comments, at 10 (Whereas the antitrust agencies "have for more than 100 years demonstrated both experience and sound judgment" in enforcing the antitrust laws, "[n]o comparable record supports the intrusion of the regulatory agencies into the field of competition law.").

70 *See* ICPAC Report, at 145.

71 *See id.* at 147 n.152; AAI Comments, at 21.

72 *See* Carstensen Comments, at 1, 5.

would be binding upon the industry regulator.[73] The antitrust agencies would do the competition analysis. This approach would ensure policy and enforcement consistency, align competition policy assessments across industries (regardless of the existence of different regulatory agencies), facilitate transparency in decision-making, and allow the antitrust agencies to act where they have a comparative advantage.[74] The antitrust agencies would draw on the expertise of the industry regulator in conducting its competition analysis, much as it does today with respect to defense industry and other mergers.

- **Congress should require industry regulators to accord presumptive weight to the competition assessments of the antitrust agencies—**Under this proposal, competition analyses undertaken by the antitrust agencies would be accorded presumptive weight in parallel or subsequent proceedings by the regulatory agencies.[75]
- **Congress should mandate that the antitrust agencies advise industry regulators with respect to the competitive effects of a transaction—**Under this proposal, the antitrust agencies would advise the regulatory agencies on antitrust, but their advice would enjoy no preclusive effect or presumptive weight.[76]

In addition to these principles of allocation, several commenters and witnesses proposed other general points that would not necessarily require legislative action.

- **Clarify that regulatory decisions do not set antitrust precedent—**One commenter suggested that Congress, the antitrust enforcement agencies, the regulatory agencies, and courts should clearly distinguish what is "antitrust" from what is "regulatory."[77] That is, if a regulatory agency concludes that a merger or acquisition conflicts with a regulatory goal of "jumpstarting" or increasing competition, such a conclusion does not have any evidentiary value in

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73 This proposal was recommended by ICPAC and supported in comments and testimony to the AMC by the Business Roundtable. *See* ICPAC Report, at 143, 148 (FCC Commissioners supporting this idea), 151, 153; Business Roundtable Comments, at 28; *see also* Furchtgott-Roth Statement, at 6.

74 *See* ICPAC Report, at 143, 148; Moss Statement, at 9 ("[R]egulatory agencies should play a role in merger review, but their function should be limited to the analysis of non-competition issues, while the antitrust agency evaluates the effect of the merger on competition."); *see also* USTA Comments, at 10 ("The antitrust agencies have for over 100 years demonstrated both experience and sound judgment in enforcement of the antitrust laws. No comparable record supports the intrusion of the regulatory agencies into the field of competition law.").

75 *See* ICPAC Report, at 143; *see also* AAI Comments, at 22; Moss Statement, at 10.

76 *See* ICPAC Report, at 150.

77 *See* USTA Comments, at 10.

establishing a violation of Sherman Act or Clayton Act.[78] For example, a network's refusal to interconnect is not an antitrust violation.[79]

- **Soft convergence of substantive review standard—**Some commentators suggest that, to the extent possible under existing legislation, the antitrust and regulatory agencies should pursue "soft convergence" in the procedural and substantive standards they apply in order to achieve greater consistency of results and simplicity of process.[80] For example, the adoption of common analytical standards and methods (and greater transparency) could be encouraged through the activities of interagency working groups and jointly sponsored public conferences to address policy. Industry regulators could formally adopt the FTC-DOJ Merger Guidelines or issue their own guidelines following input from the public and the antitrust agencies.[81] These commenters advise that identifying differences in competition policy methodologies among reviewing bodies would make existing processes and standards more transparent and encourage debate and improvement where appropriate.[82] Some commenters suggest that, to enhance uniformity and consistency, regulatory agencies should avoid industry-specific behavioral rules.[83]

B. <u>How Should the Presence or Absence of Antitrust Savings Clauses in Regulatory Legislation Be Interpreted?</u>

1. *What is the appropriate standard 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 regulatory structure?*

Analysis of implied immunities begins with the "cardinal principle of construction" that "repeals by implication are not favored."[84] This principle reflects a presumption that Congress does not intend to limit the scope of the antitrust laws except where it expressly says so.[85]

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78 *See id.*

79 *See* Thorne Statement, at 18.

80 *See* ICPAC Report, at 151. This kind of approach has been undertaken before. For example, the 1994 Interagency Task Force on Bank Competition met to identify the common principles of bank competition. *See id.* at 152.

81 *See id.* at 152; *see also* WCTL Comments, at 16.

82 *See* ICPAC Report, at 152.

83 *See* Furchtgott-Roth Statement, at 18; AAI Comments, at 21.

84 *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see also* AAI Comments, at 10.

Antitrust immunities may be implied in two narrow contexts. The first is when an agency, acting pursuant to a specific Congressional directive, actively regulates the conduct challenged. The second is where the regulatory scheme is so pervasive that Congress is "assumed to have foresworn the paradigm of competition."[86]

To determine whether either of those circumstances applies, courts look for evidence of congressional intent to repeal the antitrust laws.[87] Immunities will be implied only if a repeal of antitrust law would be necessary to make the regulatory provisions work, "and even then only to the minimum extent necessary."[88] An implied immunity is limited to the particular activity challenged and does not extend to other conduct regulated by the same agency.[89]

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85 *See* AAI Comments, at 10; USTA Comments, at 2.

86 *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 147 (2d Cir. 2003) (*quoting Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 82 (2d Cir. 1981)); *see also Antitrust Law Developments*, at 1239; *Gordon v. New York Stock Exchange*, 422 U.S. 659, 659 (1975); *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 161 (2d Cir. 2005). A potential conflict between the antitrust laws prohibiting a specific activity, and a regulatory regime compelling or permitting that activity, is necessary. *See Billing*, 426 F.3d at 161-62.

87 *See In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d at 147. In discerning that intent, courts look at four things: (a) legislative history or statutory structure; (b) regulatory structure that empowers the agency to compel action prohibited by the antitrust laws; (c) whether applying the antitrust laws would moot a statutory provision or remove discretion from the regulatory agency; and (d) regulatory history showing whether the challenged anticompetitive conduct has been permitted. *See Billing*, 426 F.3d at 162-64.

88 *Gordon*, 422 U.S. at 682; *Silver*, 373 U.S. at 357; *see also National Gerimedical Hosp.*, 452 U.S. at 388 (1981); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963) ("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.").

89 *See Antitrust Law Developments*, at 1239; *see also National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 389 (1981). The proper approach to immunity questions requires "reconcil[ing] the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.* The Supreme Court has considered implied antitrust immunity on numerous other occasions. *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*,, 404 U.S. 508 (1972); *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *United States Navigation Co., Inc. v. Cunard S.S. Co., Ltd.*, 284 U.S. 474 (1932); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United*

A mere overlap between a regulatory scheme and the antitrust laws should not be read to signal a congressional intent to repeal the antitrust laws.[90] Moreover, the determination of whether to imply an immunity should be based on the specific facts of a situation and whether enforcing the antitrust laws would interfere with the regulator's ability to perform its regulatory duty.[91] Unless such a conflict exists, courts should continue to presume that Congress intended both the regulatory scheme *and* the antitrust laws to apply.[92]

Although immunities have been implied in a variety of areas, one prominent and long-standing immunity that was raised in several comments is the filed-rate, or *Keogh*, doctrine.[93] The filed-rate doctrine provides that where a regulator has approved a tariff submitted by a company pursuant to regulatory requirements, courts will not hear antitrust claims that the tariff is unreasonable.[94] Accordingly, no private action will be entertained even where the rates submitted resulted from coordination with competitors.[95] Although the Supreme Court has questioned the continuing vitality of the filed-rate doctrine, it nonetheless concluded that it is for Congress, and not the courts, to overrule *Keogh*.[96]

States v. Radio Corp. of America, 358 U.S. 334 (1959); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *California v. FPC*, 369 U.S. 482 (1962); *Hartford Fire Ins. 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); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975).

90 *See Billing*, 426 F.3d 130; *see also* McKenna Statement, at 2.

91 *See* McDonald Statement, at 11.

92 *See id.*; *see also Billing*, 426 F.3d at 168-70 (securities laws did not impliedly repeal the antitrust laws with respect to the specific claims, despite the SEC's extensive regulation of the area in general).

93 *Keogh v. Chicago and Northwestern Railway*, 260 U.S. 156 (1922).

94 *See* McKenna Statement, at 7-9.

95 *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986).

96 *See Square D*, 476 U.S. at 424.

Two commenters proposed limits or repeal of the filed-rate doctrine. One commenter, Attorney General McKenna, proposes clearly worded legislation clarifying that where industry participants are subject to the free market, whether under a market-based rate tariff or detariffing or some other form of price deregulation, antitrust enforcers are best suited to police and protect competition.[97] He argues that although the filed-rate doctrine makes sense where the regulating agency has procedures in place to review rates and address and remedy tariff violations, it makes much less sense in cases where the regulator has determined that the possibility of future competition justifies allowing market participants to operate without price regulation and subject only to the constraints of the free market.[98] He argues that the filed-rate doctrine impairs complementary enforcement by regulators and antitrust enforcers in the areas of their respective greatest expertise.[99]

The Western Coal Traffic League proposes legislative overruling of *Keogh*.[100] That commenter argues that the railroads were exempted from private treble-damage antitrust actions under *Keogh* to avoid conflict with a then-pervasive regime of federal rate regulation based primarily on principles of rate equalization and non-discrimination in rates and services.[101] However, that regime no longer exists.[102] Since 1980, the railroads have been operating in a deregulated environment where, among other things, rates are no longer required to be filed with the STB.[103] Immunizing the railroads from the antitrust laws today is detrimental to consumers,

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97 *See* McKenna Statement, at 7-9.

98 *See id.*

99 *See id.*

100 *See* WCTL Comments, at 7-9.

101 *See id.*

102 *See id.*

103 *See id.*

the economy, technological innovation, and service improvements.[104] Therefore, the League argues, in light of the nature of the railroad industry, the changes in regulatory policies, and the public need for competitive protections, *Keogh* should be overturned.[105]

AAI also contends that deregulation has led to less or no regulatory scrutiny of filed rates, and that "[t]he rote application of the filed rate doctrine to ban all antitrust scrutiny of rates filed with a regulatory agency opens up substantial remedial gaps, to the detriments of counterparties and consumers."[106] The American Antitrust Institute, however, proposes a broader method of rationalizing the case law on implied immunity, including the filed-rate doctrine.[107]

AAI proposes that courts should refuse to imply immunity where a regulator (a) fails to implement a pro-competition mandate; (b) implements one but does not enforce it; or (c) seeks to enforce it but is impeded in enforcement either by conflicts with other regulatory authorities or by appeals of its rules in the courts.[108] AAI calls for a determination of whether antitrust and regulation are substitutes or complements, and whether antitrust enforcement and regulatory oversight are mutually reinforcing. Indicators of mutual reinforcement include:

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104 *See id.*

105 *See id.*

106 AAI Comments, at 15. AAI points to skyrocketing rates for wholesale electricity in California in 2000-2001 as an example of where the filed rate doctrine has precluded state antitrust challenges to anticompetitive conduct that produced those rates. *See id.* at 14-15 (*citing Public Util. District No. 1 of Snohomish County v. Dingy Power Marketing, Inc.*, 384 F.3d 760, 762 (9th Cir. 2004), *cert. denied* __ U.S. __ (June 27, 2005)).

107 *See* AAI Comments, at 14-15.

108 *See id.* at 9. This standard requires a complex factual inquiry that generally cannot be made on a motion to dismiss, although there may be circumstances where an antitrust defendant would be entitled to a presumption that the antitrust violation is not provable or that antitrust harm is highly improbable. *See id.*; *see also Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004). AAI emphasizes that 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. *See* AAI Comments, at 18. The AAI Comments do not provide specific examples of how its proposal would work.

- The regulation serves a pro-competitive goal and supports a market with many independent competitors and easy entry and exit.[109]
- There is a competitive problem that could be resolved through an adversary proceeding, and a proceeding might also benefit general competitive conditions.[110]
- Agency oversight is dysfunctional, and the market is not competitive.[111]

Indicators of inconsistent goals, mandates, incentives, or policies include:

- Active and effective regulatory supervision of the specific challenged conduct.[112]
- The regulator has adopted and is enforcing a reasonable mechanism for implementing its competitive mandate and is an effective antitrust enforcer.[113]
- The defendant can plausibly claim that the challenged conduct was reasonably necessitated by a regulatory mandate, rule, or incentive.[114]
- Antitrust adjudication is unlikely to resolve any broader issue of competition policy.[115]

Balancing these factors suggests a baseline standard that exemptions should be "narrow, [and] conduct-specific," and justified only when active regulatory supervision either "undermines the likelihood that the challenged [antitrust] conduct can be proven to have occurred or renders the claimed anticompetitive effect highly improbable."[116]

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109 *See* AAI Comments, at 18.

110 *See id.*

111 *See id.*

112 *See id.*

113 *See id.*

114 *See id.*

115 *See id.* at 19.

116 *See id.*

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?*

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?

Some statutes have antitrust "savings clauses," which expressly preserve the applicability of antitrust laws within a regulatory scheme.[117] For example, the Telecommunications Act of 1996 (the "1996 Act") provides that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."[118]

The application of such clauses—and the appropriate balance between specific federal regulation and application of general antitrust principles—was brought to the fore by the Supreme Court's recent decision in *Verizon Communications, Inc. v. Trinko.*[119] In that case, the Law Office of Curtis Trinko alleged that Verizon violated Section 2 of the Sherman Act by breaching its duty under the 1996 Act to provide competitors with reasonable and nondiscriminatory access to unbundled network elements. (The FCC had already fined Verizon for violating the 1996 Act.) The Court began its analysis by examining the relationship between general Sherman Act principles and the 1996 Act, which imposed a comprehensive scheme of duties on incumbent local exchange carriers designed to introduce competition in telecommunications while maintaining appropriate incentives for investment in facilities by both incumbent and new entrants.

Despite the comprehensive nature of the 1996 Act in regulating competition in the telecommunications industry, the Supreme Court ruled that the antitrust savings clause prevented

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117 *See* McDonald Statement, at 9; AAI Comments, at 20.

118 47 U.S.C. § 601(b).

119 540 U.S. 398 (2004).

the implication of immunity under the Sherman Act and expressly preserved antitrust claims under established law.[120] Nevertheless, the Court concluded that the allegations against Verizon failed to state a claim under Section 2 of the Sherman Act, given existing general antitrust principles governing the duty of companies to facilitate competition by their rivals.[121] The Court declined to expand the parameters of Section 2 in order to encompass the plaintiff's claims, particularly given "the existence of a regulatory structure designed to deter and remedy anticompetitive harm."[122] According to the Court, in such circumstances, "[t]he additional benefit to competition provided by antitrust enforcement will tend to be small," while the potential costs of erroneous antitrust intervention that might actually deter investment in facilities and innovation (considering the difficulty an antitrust court would have in evaluating and enforcing claims for access on "just, reasonable and nondiscriminatory terms") could be significant.[123]

Some commentators have expressed concern that *Trinko* failed to give sufficient effect to the antitrust savings clause in the 1996 Act.[124] One commenter, for example, faulted the Court's decision in *Trinko* as a "*per se* conclusion that regulation sufficiently minimizes all risk to competition and applying the antitrust laws somehow threatens a regulatory regime that is consistent with the antitrust laws," which conflicts with the "expressly stated intent of Congress

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[120] *See id.* at 406; *see also* USTA Comments, at 5.

[121] *See* 540 U.S. at 409-10; *see also* USTA Comments, at 5.

[122] *See* 540 U.S. at 411; *see also* USTA Comments, at 5.

[123] *See* 540 U.S. at 411.

[124] *See* CompTel/ALTS Comments, at 9 (courts should not decline to apply antitrust law on this basis); McKenna Statement, at 6.

in inserting a savings clause."[125] Such concerns prompted commenters to express the following recommendations:

- Congress should craft savings clauses carefully to clearly and specifically delineate what claims are saved.[126]
- Courts should interpret savings clauses to give deference to the antitrust laws.[127]

These concerns have also led to the introduction of legislation, the Clarification of Antitrust Remedies in Telecommunications Act of 2004, which would specifically provide that violations of the 1996 Act may be actionable under the antitrust laws.[128] Critics of this proposal, however, contend that it would stand antitrust savings clauses on their head by superimposing a detailed regulatory scheme on the antitrust laws, undermining existing standards under the current general antitrust regime, and returning the Justice Department to the role of regulator it had under the AT&T decree before the adoption of the 1996 Act.[129]

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125 *See* CompTel/ALTS Comments, at 9; *see also* McKenna Statement, at 6 ("On its face, the savings clause says that there is a role for antitrust enforcement," although the Supreme Court concluded otherwise from the pervasive nature of FCC regulation and the comprehensive nature of the 1996 Act; "[s]pecifically, the Court held that where a regulatory statute . . . was designed to create more competition, violation of the procompetition provisions of the Act did not give rise to an antitrust violation."); AAI Comments, at 22 (characterizing the Supreme Court as applying a factual presumption to undermine the plaintiff's ability to plead an antitrust claim).

126 *See* McKenna Statement, at 6.

127 *See id.* at 2; *see also* CompTel/ALTS Comments, at 9.

128 *See* Clarification of Antitrust Remedies in Telecommunications Act of 2004, H.R. 4412, 108th Cong. (2004), introduced by Congressman F. James Sensenbrenner, Jr., Chairman, House Judiciary Committee, and Congressman John Conyers, Ranking Member. Prior to introducing this legislation, Chairman Sensenbrenner issued an official statement commending the Supreme Court for refusing to find an implied immunity in *Trinko* and "affirm[ing] the central role of Congress in setting antitrust and telecommunications policy." 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 ("Congress intended that all parties in the telecommunications industry would be subject to the antitrust laws, and yesterday's decision confirms that general principle.").

129 *See, e.g.*, USTA Comments, at 6.

The *Trinko* decision also has its defenders. The position of the Court was supported in *amicus* briefs filed by the Department of Justice, Federal Trade Commission, several states, and various private parties.[130] In his testimony before the Commission, Deputy Assistant Attorney General J. Bruce McDonald described the *Trinko* decision as consistent with pre-existing jurisprudence (namely, *Town of Concord v. Boston Edison Co.*[131]) that courts should take into account the regulatory scheme in determining whether there is an antitrust violation.[132]

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

There are instances in which Congress or regulatory agencies set specific antitrust rules for an industry that are not consistent with more general antitrust standards. The following are two examples:

- *Bank tying act*.[133] This law provides that a bank may not condition the extension of credit on the customer's additional acquisition of credit or other service from the bank.[134] Although the provision uses language modeled on Section 1 of the Sherman Act and Section 3 of the Clayton Act, courts generally have interpreted the act as not requiring any showing that the defendant bank had market power in the tying product market.[135] This contrasts with the general antitrust standard that plaintiffs in a tying case must show defendant's market power in the market for the tying product.[136]

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130 *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications v. Law Office of Curtis Trinko LLP*, *available at* http://www.usdoj.gov/atr/cases/f201000/201048.pdf; *see also* USTA Comments, at 7.

131 915 F.3d 17 (1st Cir. 1990).

132 *See* Trans. at 47 (McDonald).

133 *See* 12 U.S.C. § 1972(1). This provision was enacted as part of the Bank Holding Company Act Amendments of 1970.

134 *See* 12 U.S.C. § 1972(1).

135 *See, e.g., David v. First National Bank of Westville,* 868 F.2d 206, 208 (7th Cir. 1989).

136 *See Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281, 1293 (2006).

- *Media ownership restrictions*. The FCC has adopted complex ownership limitations for radio and television broadcasters.[137] There are local ownership limitations for radio and television, as well as national ownership limitations for television. There are also limitations on cross-ownership of broadcast licenses and other media-related entities.[138] These limitations are designed (1) to promote "diversity of program and service viewpoints," and (2) to prevent "undue concentration of economic power."[139] This is different from general antitrust standards, which limit the aggregation of control over assets based on the possession or exercise of market power.

In addition, legislation was recently introduced that would apply special standards to mergers in the oil and gas industry.[140] This legislation would also prohibit oil and gas companies from selling petroleum or natural gas "with the primary intention of increasing prices or creating a shortage in a geographic market."[141]

The Commission received limited comments and testimony addressing whether Congress or regulatory agencies should define industry-specific antitrust standards for regulated industries. One commenter specifically urged that Congress and regulatory agencies should not set industry-

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137 *See* 47 C.F.R. § 73.3555. Recent FCC changes to these regulations have been stayed and remanded by the Court of Appeals for the Third Circuit, pending further action by the FCC to "justify or modify its approach to setting numerical limits" to local ownership rules for television and radio, as well as cross-ownership for owners of different media-related entities. *Prometheus v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004). The regulations had been modified to increase the national ownership limitations from 35% to 45%. *See* 47 C.F.R. § 73.3555(d). The ownership limitation changes were superseded by Congress when it attached a rider to the 2004 omnibus appropriations bill, which provided that the limit on national ownership for television is 39%. *See* Consolidated Appropriations Act, Pub. L. No. 108-199, tit. VI, § 629, 118 Stat. 3, 99-100 (2004).

138 *See* 47 C.F.R. § 73.3555(d).

139 *Prometheus*, 373 F.3d at 383 (citations omitted).

140 *See* S. 2557, Oil and Gas Industry Antitrust Act of 1996 (proposed legislation prohibits petroleum mergers that could "appreciably diminish competition," although revised version leaves the appropriate standard up to the GAO and antitrust enforcement agencies). FTC Chairman Deborah Platt Majoras testified before the Senate Committee on Commerce, Science and Transportation on May 23, 2006. *See* FTC Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases, *available at* http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1759&Witness_ID=3484.

141 *See* S. 2557, § 2.

specific standards for particular antitrust violations, because antitrust doctrine should not be fractured into industry-specific legal rules.[142] Another commenter observed that special rules may be warranted for industries transitioning from regulation to competition.[143] Until a "workably competitive context" has developed, normal antitrust laws may be need to be supplemented by rules that "jump start" competition and limit the incentive of incumbents to engage in strategic conduct that will inhibit the development of a competitive marketplace.[144] A third commenter suggested that Congress should establish industry-specific antitrust standards only after it has specifically considered the peculiarities of an industry, determined the most appropriate way to regulate it, and addressed any domestic and foreign policy implications.[145]

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142 *See* AAI Comments, at 20.

143 *See* Carstensen Comments, at 4.

144 *See id.*

145 *See* WSC Comments, at 15.

APPENDIX A

International Competition Policy Advisory Committee, *Final Report* (2000)
Excerpt: pp. 149-50

CASE SPECIFIC EXAMPLES. During the past several years, several instances also have emerged where the regulatory agency did not follow the DOJ's competitive analysis of a transaction.

- In the Burlington Northern, Inc./Santa Fe Pacific Corp. merger, the Interstate Commerce Commission decision rejected the comments submitted by the Antitrust Division, warning that if the merger proceeded without necessary conditions, competition would be lessened in several markets.[1]
- In the merger between Union Pacific Corporation and Southern Pacific Rail Corporation, the DOJ argued that the merger should not go forward because it would result in a monopoly in several markets and create a rail duopoly throughout the West. Despite that vigorous opposition, the Surface Transportation Board approved the merger.[2] Criticism has been levied that the STB failed to take into account the view of the DOJ.[3]
- The Department of Transportation approved an alliance of Delta Airlines, Swissair, Sabena Airlines, and Austrian Airlines despite concerns expressed by the DOJ about competitive effects in four New York city-pair markets.[4]
- In 1997, the DOJ allowed the merger of Bell Atlantic and NYNEX to proceed without adjustments.[5] The FCC separately reviewed the merger and imposed various competition-related restrictions in reaching a settlement with the parties. Although the FCC's public interest standard includes social welfare considerations, the tone and content of the FCC's opinion allowing the merger subject to conditions suggests that the FCC reached different conclusions than the DOJ concerning possibilities for actual and potential competition between the

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1 10 I.C.C. 2d 661 (Aug. 16, 1995).

2 Remarks by Anne K. Bingaman, then-Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Statement on the Surface Transportation Board's Approval of the Union Pacific and Southern Pacific Merger (July 3, 1996).

3 *See* Wilner ("[T]he STB needs to give the [DOJ's] opinion no more weight than they give to a handscrawled letter submitted by bitter widow Jones whose husband died in a train wreck").

4 *See Joint Application of Delta Airlines, Inc., Swissair, Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines for Approval of and Antitrust Immunity for Alliance Agreements*, Dep't of Transportation Order 96-6-33 (June 14, 1996).

5 *See* U.S. Dep't of Justice Press Release, Antitrust Division Statement Regarding Bell Atlantic/NYNEX Merger (Apr. 24, 1997) (announcing decision not to challenge merger).

companies.[6] The FCC's review of recent transactions involving AT&T/TCI, Bell Atlantic/GTE, and SBC/Ameritech also has stimulated a debate about the appropriate division of labor between the FCC and the DOJ.[7]

6 *See* In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, 1997 FCC LEXIS 4349, at *20 (Aug. 14, 1997).

7 *See* Kovacic Submission, at 24.

APPENDIX B

International Competition Policy Advisory Committee, *Final Report* (2000)
Excerpt: Annex 3-B

THE RELATIONSHIP BETWEEN ANTITRUST AGENCIES AND SECTORAL REGULATORS[1]

In a number of sectors, public competition authorities share responsibility for formulating and implementing merger policy with other government agencies. Shared authority appears most often in industries that previously have been the subject of comprehensive regulation that governs entry, exist, and rate making. Prominent illustrations are described below.

Airlines. The Department of Transportation (DOT) has exclusive authority to approve agreements between U.S. airlines and foreign carriers[2] and to grant antitrust immunity for such agreements.[3] In these matters, DOJ plays an advisory role exclusively.

Electric Power. Transactions involving energy companies are subject to competition policy review or challenge by:

- One of the federal antitrust agencies (both DOJ and the FTC have reviewed transactions involving electric power producers);
- The Federal Energy Regulatory Commission (FERC);[4]
- For some transactions, the Securities and Exchange Commission (exercising powers granted by the Public Utility Holding Company Act);[5]
- The public service commission (PSC) of each state in which the parties do business (although it is not clear under the law of several states whether remedial action can be ordered by a single PSC over a multistate company);
- As with other mergers, the attorney general of each state in which the parties do business (the attorney general may develop a policy position independent from and inconsistent with the position adopted by the public service commission); and
- As with other mergers, private entities, such as competitors to the merging parties.

Review by each of these potential challengers is nonexclusive. Acquiescence in a transaction by any one entity does not preclude a separate challenge by any of the other entities.

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1 Source: William E. Kovacic, "The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards," (submission of March 15, 1999).

2 49 U.S.C. app. § 41309 (1994).

3 *Id.* at § 41308.

4 16 U.S.C. §§ 791a-828c (1994).

5 15 U.S.C. §§ 79i, 79j (1994).

Approval of a transaction by one entity subject to one set of concessions does not preclude another entity from insisting upon further concessions.

Financial Services. DOJ shares competition policy jurisdiction over mergers involving banks with four federal banking regulators: the Office of the Comptroller of the Currency, which reviews transactions involving national banks; the Federal Deposit Insurance Corporation, which reviews transactions involving federally-insured, state-chartered banks that are not members of the Federal Reserve System; the Board of Governors of the Federal Reserve System, which reviews transactions involving bank holding companies and state-chartered banks that are members of the Federal Reserve System; and the Office of Thrift Supervision which reviews transactions involving savings and loan companies and savings associations.[6] In general, the banking regulators apply standards similar to those established under § 7 of the Clayton Act and must consider a report filed by DOJ before completing their own assessment of a transaction.

Railroads. Jurisdiction over mergers involving railroads resides solely in the Surface Transportation Board (STB).[7] The DOJ provides nonbinding advice to the STB, which must consider, but need not heed, DOJ's recommendations.

Telecommunications. Mergers involving telecommunications service providers usually are subject to competition policy review or challenge by:

- One of the federal antitrust agencies (only the DOJ has jurisdiction to review mergers involving telephone companies; both the DOJ and the FTC have reviewed mergers between cable television firms);
- The Federal Communications Commission (FCC);[8]
- The PSC of each state in which the parties do business (although most state PSCs lack jurisdiction over cable television mergers and some lack jurisdiction over mergers);
- In the case of cable television, county and municipal authorities with responsibility for granting and overseeing cable franchise agreements;
- The attorney general of each state in which the merging parties do business; and
- Private entities such as competitors to the merging parties.

As with mergers involving electric power firms, review by any of these entities is nonexclusive. Approval of a transaction by one entity does not preclude a separate challenge by any of the other entities, nor does it bar another entity from seeking adjustments that exceed concessions that resolved the concerns of other bodies.

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6 *See* II ABA Antitrust Section, Antitrust Law Developments 1233-40 (4th ed. 1997).

7 49 U.S.C. § 11321 (West 1997).

8 *See* ABA Antitrust Section, Antitrust Law Developments, at 1160-66 (describing allocation of authority established by the 1996 Telecommunications Act).

A DETAILED ILLUSTRATION: THE CASE OF TELECOMMUNICATIONS

Recent experience with consolidation in the telecommunications sector illustrates the intricacies of merger review with multi-jurisdictional oversight. Major transactions such as AT&T/TCI, Bell Atlantic/NYNEX, Bell Atlantic/GTE, and SBC/Ameritech have engaged the energies of many of the public institutions that formulate telecommunications competition policy and, in some instances, have elicited private challenges. Presented below is a description of the process by which the various institutional gatekeepers would consider a merger between two telecommunications services providers. This example assumes that both parties provide local telephone service.

1. Review by Federal Antitrust Officials

The merging parties ordinarily set the merger review process in motion by filing premerger notification forms with the federal antitrust agencies. DOJ and the FTC allocate the review of specific mergers through a "clearance" process that emphasizes comparative expertise. Since the FTC lacks jurisdiction over common carriers, DOJ would receive clearance to examine the transaction in detail. In reviewing transactions under the Hart-Scott-Rodino premerger notification mechanism, the federal antitrust agencies are subject to statutory time constraints. DOJ and the FTC have authority to attack a merger after the mandatory waiting periods (or timing agreements to extend the waiting periods) have expired, but neither agency has exercised that power for an HSR-reportable transaction since the HSR mechanism took effect in 1977.

When they sue in federal district court to halt mergers, the federal agencies must establish the liability standard of § 7 of the Clayton Act and demonstrate their entitlement to relief by a preponderance of the evidence. The FTC also has the option of initiating administrative litigation, where the Commission's decisions are subject to review by the courts of appeals under the deferential standard of review accorded to administrative agencies.

2. Review by the Federal Communications Commission

The parties to a merger requiring FCC approval have discretion to choose when to submit their transaction for the Commission's review. In some instances, the merging parties submit their requests for approval to the FCC at the same time that they make their HSR filings with the federal antitrust regulators. In other cases, they await the results of the federal antitrust agency review before approaching the FCC. No time limits constrain the FCC's analysis of mergers which require the Commission's approval.[9]

For reasons of policy and practical reality, the scope of competition policy review by the federal antitrust agencies is a subset of the scope of competition policy review that the FCC can exercise under its public interest mandate. The FCC applies a public interest standard under the Federal Communications Act in evaluating specific transactions. This test allows the

[9] Senator Herbert Kohl has proposed legislation that would require the FCC to issue decisions on mergers within six months.

Commission to account for competition policy concerns as well as a host of social and economic policy factors extending beyond the bounds of traditional antitrust analysis. Non-competitive policy factors include the impact of the merger on the parties' incentives and ability to serve vulnerable user groups (such as low-income individuals), the parties' commitment to sustain high levels of residential service quality while pursuing business customers, and the parties' willingness to provide service and business opportunities to historically disadvantaged minorities and other social groups. FCC decisions in evaluating competition and non-competition factors are reviewed by the courts of appeals under the deferential standard of review according to administrative bodies.

In examining competition policy factors, the FCC sometimes has the benefit of a completed antitrust agency review of the same transaction. For example, where DOJ and the parties resolve DOJ's competition policy concerns by settlement, the FCC ordinarily will know of the settlement terms when they are published for public comment. The HSR statute bars DOJ from giving the FCC material obtained from the parties as part of the premerger notification and second request process. However, the FCC sometimes insists that the parties provide such material to enable the Commission to perform its analysis of the transaction. As FCC approval is essential for the transaction to proceed, parties typically provide the requested HSR documents. These materials become part of the record of the FCC proceeding and are available for review by those who sign protective orders.

Compared to Clayton Act oversight by the federal antitrust agencies, FCC exercise of competition policy oversight under the Communications Act's public interest standard is potentially more restrictive in several respects. The public interest test seems to impose a more expansive substantive liability standard than the Clayton Act's antimerger provision. FCC officials have stated that, to satisfy the public interest standard, the merging parties must show that a proposed transaction will boost competition. By contrast, federal antitrust officials bring actions to challenge mergers only when, to paraphrase § 7 of the Clayton Act, they may substantially reduce competition. The Clayton Act test imposes no duty on the merging parties to demonstrate that a transaction will increase competition. Since its decisions are reviewed as administrative decisions, whereas the FTC or DOB bears the burden of proof in an antitrust action, the FCC can avail itself of a more favorable evidentiary standard than DOJ or the FTC can use in a federal district court proceeding.

The FCC's competition policy review also derives distinctive power from the nature of its procedures and time-sensitive quality of many mergers. Because there is no time limit on its review of transactions, parties to mergers under FCC review have stronger incentives to make concessions to the FCC than they have to make concessions to the federal antitrust agencies. This is true even when the FCC relies on analytical concepts of doubtful validity. Mergers often are time-sensitive when the FCC relies on analytical concepts of doubtful validity. Mergers often are time-sensitive transactions, and long delays in achieving approval are costly. Among other adverse effects, delay limits the parties' ability to implement new strategies and increases the risk that employees who are uncertain about their future position with the new entity will seek other jobs.

In theory, the parties could elicit an unfavorable FCC decision and challenge questionable enforcement theories before the court of appeals. In practice, the prospect of spending a year or more to obtain a negative ruling from the Commission and then taking an additional year to gain an appellate decision is unacceptable. Consequently, the FCC can rely on debatable competition policy enforcement theories (such as expansive notions of potential competition) safe in the knowledge that such theories are unlikely to be tested before an appellate tribunal.

3. Review by State Sectoral Regulators

The merging parties usually approach state public service commissions at the same time that they begin seeking approval from the FCC. The competition policy reviews conducted by state public service commissions resemble the review by the FCC. State PSCs operate under a public interest standard that embraces a large collection of competition policy factors and other considerations. State PSC reviews ordinarily are not subject to time constraints, and the delay associated with seeking judicial review of PSC decisions tends to impel the merging parties to make desired concessions.

4. Review by the State Attorneys General

The preferences of the state PSC sometimes, but not always, reflect the preferences of the state attorney general. Merging parties must account for the possibility that the state attorney general may insist on concessions that exceed the concessions demanded by the state PSC.

5. Challenges by Competitors

A final element in the calculus for the merging parties is to assess the possibility that a merger proposal will elicit a private antitrust suit by a competitor. Competitors must surmount opposition based on standing and antitrust injury requirements.