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Regulation: A Defense To Anti-Merger Litigation?

By G. E. HALE* — ROSEMARY D. HALE**

The authors gratefully acknowledge the assistance of Paul S. Gerding and Kelyvn H. Lawrence, members of the Illinois bar. This article will form a chapter of a book to be entitled *The Anti-Merger Laws* by the same authors.

Introduction

Mergers and acquisitions by business enterprises are severely affected by the federal antitrust laws.¹ Some observers have gone so far as to indicate that there now is scarcely such a thing as a legal "horizontal" merger (*i.e.*, a joinder of competing firms).² Burdens on plaintiffs seem minimal: pleading and proof that the acquisition will increase "concentration" by something more than an insignificant percentage in a relevant product and geographic market will just about suffice.³

Nevertheless, a defendant is not wholly helpless. In varying degrees, several affirmative defenses may be available to him. If the acquired firm, for example, has been adjudicated a bankrupt, the antitrust laws may not be applicable.⁴ Several other defenses may be tendered.⁵ Prominent among them is the plea that the de-

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¹ *E.g.*, *United States v. Aluminum Co. & Rome Cable Co.*, 377 U.S. 271 (1964).

² *E.g.*, Markham, *The New Antitrust Policy*, 30 *Law & Contemp. Prob.* 607, 616 (1965).

³ *E.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

⁴ Hale & Hale, *Failing Firms and the Merger Provisions of the Antitrust Laws*, 52 *Ky. L.J.* 597 (1964).

⁵ Among the other affirmative defenses which may be tendered are the following, none of which is surely solid:

- a. want of jurisdiction under the statutes relied upon
- b. under § 7 of the Clayton Act, that the acquisition was made from a natural person and not a corporation
- c. under the same section: a purchase for investment
- d. under the same section: the formation of a subsidiary company
- e. that the merger will enhance competition by creating larger firms to combat the giants of the industry (countervailing power)
- f. that entry into the industry is easy
- g. that demand for the industry's products is elastic.

feudant is a member of a regulated industry; that, in that industry, regulation has supplanted competition; that, accordingly, there is no room left for application of the antitrust laws.

*Nature of regulation.*⁶ All business is subject in some degree to governmental regulation. We are all familiar, of course, with statutes prescribing standards of health and safety: an enterprise utilizing a truck to make delivery of its products is subject to motor traffic codes. Such controls, of course, do not give rise to an exemption from the antitrust laws. If, however, the industry is subject to "interventionist" regulation such an exemption may be expressed or implied in the regulatory enactment. By "interventionist" is meant that type of control which affects the fundamental decisions of the enterprise. Familiar are the controls over prices and products applicable to public utilities. Whether such interventionist measures should constitute an exemption from the antitrust laws generally—and, of course, anti-merger legislation in particular—has been the subject of careful scrutiny. After a review of several loosely and tightly regulated industries a test was proposed: if the industry is "pervasively" regulated then, subject to some limitations, the operation of the antitrust laws should be suspended.⁷ A merger in such an industry should not be subject, for example, to the provisions of § 7 of the Clayton Act. If, on the other hand, the regulation is less than "pervasive", anti-merger legislation should enjoy full play.

Primary jurisdiction. Before examining the subject of exemption itself we should pause to consider the doctrine of primary jurisdiction. That is the rule under which courts decline to entertain litigation on subjects which lie within the appointed responsibility of administrative tribunals.⁸ Closely related thereto is the rule of exclusive jurisdiction. It is, for example, elementary

⁶ An earlier version of this chapter appeared in article form in 59 Nw. U.L. Rev. 49 (1964). It has been greatly expanded and brought up to date.

⁷ Hale & Hale, *Competition or Control I: The Chaos in the Cases*, 106 U. Pa. L. Rev. 641 (1958); Hale & Hale, *Competition or Control II: Radio and Television Broadcasting*, 107 U. Pa. L. Rev. 585 (1959); Hale & Hale, *Competition or Control III: Motor Carriers*, 108 U. Pa. L. Rev. 775 (1960); Hale & Hale, *Competition or Control IV: Air Carriers*, 109 U. Pa. L. Rev. 311 (1961); Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. Pa. L. Rev. 46 (1962). As to the adoption of the proposed test, consult *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 300 (1963). Cf. *California v. Federal Power Comm'n*, 369 U.S. 482 (1962).

⁸ Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L. Rev. 577, 579 (1954).

that the courts will not entertain suits with respect to the level of railroad rates: the Interstate Commerce Commission enjoys exclusive jurisdiction to determine their reasonableness.⁹

Origins of the doctrine lie in rate reparation cases which should have been brought before the Interstate Commerce Commission but the principle is now widely applied to proceedings which could be instituted before many types of regulatory tribunals.¹⁰ It has been applied, for example, to a suit for damages for refusal to serve by a common carrier gas pipeline: the court held that primary jurisdiction lay in the Federal Power Commission.¹¹ It is true that the doctrine is often disregarded. Sometimes the courts seem to be whimsical and retain suits which would ordinarily appear to fall within the jurisdiction of the administrative tribunals.¹² However that may be, the doctrine of primary jurisdic-

⁹ *United States v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956). As to the distinction between primary and exclusive jurisdiction, consult Mitchell, *Primary Jurisdiction*, 13 A.B.A. Rep. (Antitrust Sect.) 26, 29, 38 (1958). Among the cases in which doctrines of primary or exclusive jurisdiction have been applied are *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296 (1963); *Far E. Conference v. United States*, 342 U.S. 570, 574, 576 (1952); *United States Nav. Co. v. Cunard Co.*, 284 U.S. 474, 481 (1932); *United States v. Alaska S.S. Co.*, 110 F. Supp. 104 (W.D. Wash. 1952). In *United States v. Radio Corp. of America*, 358 U.S. 334, 348 (1959), the Court wrote:

That some resolution is necessary when the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate regulatory scheme, and would throw existing rate structures out of balance.

¹⁰ As to the origins of the doctrines, consult Jaffe, *supra* n. 8, at 577, 581, 593; Trienens, *Types of Questions Subject to the Primary Jurisdiction of Administrative Agencies*, 13 A.B.A. Rep. (Antitrust Sect.) 42, 44 (1958). In some cases exclusive jurisdiction lies in the Court. *California v. Federal Power Comm'n*, 369 U.S. 482 (1962). Query: whether a commission would have jurisdiction if no case were pending before the Court.

¹¹ *Interstate Natural Gas Co. v. Southern California Co.*, 209 F.2d 380, 384 (9th Cir. 1953). Note also that in some instances courts may refer litigation to a commission to determine whether the defendant's conduct has been immunized from the antitrust laws. *T. & S. F. Ry. v. Aircoach Ass'n*, 253 F.2d 877, 886 (D.C. Cir. 1958). Consult generally, Davis, *Administrative Law Treatise* § 19.08 (1958).

¹² *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499 (2d Cir. 1956); *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 882 (S.D. N.Y. 1965); *Riss & Co. v. Association of Am. R.Rs.*, 170 F. Supp. 354, 365, 366 (D.D.C. 1959). In *Manufacturers Hanover Trust Co.*, *supra*, at 883, the court wrote:

The doctrine of primary jurisdiction is flexible, and we should shape it and, if necessary, strain it to fit the peculiar posture of this case in order to reach a practical accommodation of court and agency. The Board approved this merger long before the Philadelphia decision. It

(Continued on next page)

tion is one which can scarcely be overlooked when a regulated industry is confronted with a complaint based upon the anti-merger laws.

Supplementary antitrust sanctions. Application of the doctrine of primary jurisdiction does not necessarily mean that a regulated industry will not be subject to the substantive provisions of the antitrust laws. It may well be the case that the administrative tribunal has been directed to enforce antitrust sanctions. Section 11 of the Clayton Act indeed explicitly provides that § 7 of that legislation, among others, shall be enforced by the several regulatory tribunals mentioned therein.¹³ Thus the Federal Communications Commission has been expressly designated as the appropriate tribunal for the enforcement of § 7 of the Clayton Act with respect to common carriers of communications. The Civil Aeronautics Board is similarly directed to apply the substance of anti-merger legislation to air carriers.¹⁴ It does not, however, follow that the agency must apply antitrust principles in disregard of directives contained in its organic legislation. As we shall see, the contrary may well be true. Take, for example, the Interstate Commerce Commission. Pursuant to § 11 of the Clayton Act it is directed to enforce § 7 of the Clayton Act as to rail and motor carriers. Under the terms of the Interstate Commerce Act, however, it must take into account many factors other than the antitrust laws. Thus in considering the merger of motor carriers the Interstate Commerce Commission must consider much more than the prohibitions of § 7. In the leading case on the subject the United States Supreme Court wrote:

. . . the Commission is not to measure proposals for all-rail or all-motor consolidations by the standards of the antitrust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectua-

(Footnote continued from preceding page)
never invoked jurisdiction under Clayton § 11 for it was undoubtedly laboring under the common mistake that Clayton § 7 did not apply to bank mergers effected by an acquisition of assets. Consult *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 518 (1958) (Frankfurter, J., dissenting); Jaffe, *supra* n. 8.

¹³ Clayton Act § 11, 15 U.S.C. § 21 (1914).

¹⁴ *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 309-10 (1963). *Accord*, *Mansfield Journal Co. v. Federal Communication Comm'n*, 180 F.2d 28, 33 (D.C. Cir. 1950); *Luckenbach S.S. Co. v. United States*, 179 F. Supp. 605, 613-14 (D. Del. 1959), *aff'd per curiam*, 364 U.S. 280 (1960). *Cf.* *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 493 (1958).

tion of the national transportation policy. It was informed that this policy would be hurt by "encouraging the organization of stronger units" in the motor carrier industry. And in authorizing those consolidations it did not import the general policies of the antitrust laws as a measure of their permissibility.

... It [Congress] in terms relieved participants in appropriate mergers from the requirements of those [antitrust] laws. ... In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against the background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aides in the attainment of the objectives of the national transportation policy.¹⁵

As subsequent sections reveal, the obligation of administrative tribunals to apply anti-merger policy varies from industry to industry. From a bewildering array of cases derivation of coherent principles seems impossible.¹⁶ All we can conclude here is that agencies as well as courts may be directed to apply antitrust principles to regulated industries but that other, competing, principles may prevent their being given full play. The doctrine of primary jurisdiction is merely adjective in character; it selects the forum but does not choose the law to be applied. Finally, and even more confusingly, even if the administrative agency is charged with enforcement of the antitrust laws and gives consideration thereto, its adjudication may prove no bar to anti-merger litigation in the courts.¹⁷

Exemption, express or implied. We return to the substance of the matter. The question is whether a regulated industry should enjoy an exemption from the anti-merger legislation applicable to the free sector of the economy. In many cases the question is easily answered by reference to an express statutory exemption. Such a provision is found, for example, in the Interstate Commerce

¹⁵ McLean Trucking Co. v. United States, 321 U.S. 67, 85-86 (1944). It is, of course, true that most regulatory tribunals are not concerned with the enforcement of the antitrust statutes at all. *E.g.*, Illinois Coal Operators' Ass'n v. Peoples Gas Light & Coal Co., 7 P.U.R. (n.s.) 403, 423 (Ill. App. 1934).

¹⁶ Schaffer Transp. Co. v. United States, 355 U.S. 83, 92 (1957).

¹⁷ United States v. Radio Corp. of America, 358 U.S. 334 (1959).

Act.¹⁸ Difficulty arises when no such provision is found in express form and the courts must determine whether it was the legislative intent to place the industry beyond the scope of antitrust legislation. Here the touchstone is the word "pervasive". As indicated above,¹⁹ if the interventionist regulation is "pervasive" in character, the courts are apt to find that the antitrust laws have been supplanted.²⁰ It follows that mergers may be consummated without reference to § 7 of the Clayton Act and other legislation considered in this book.²¹ Such a result is logical because the existence of pervasive regulation is thought to protect the public from whatever ill consequences might attend the consummation of mergers. Furthermore, it is well established that it is easier to regulate fewer firms.²² If, therefore, regulation is relied upon to produce the results which competition is thought to produce in the free sector of the economy, there is no reason to disapprove a merger.²³ If, on the other hand, the regulation is non-pervasive in character, then mergers continue to be subject to § 7 of the Clayton Act and related statutes. Here the courts have surprised the bar by declaring that much regulation is non-pervasive in character.²⁴ Two leading examples include the Federal Power Commission's authority over pipelines²⁵ and the Federal Communication's Commission control of broadcasting. In the latter case the court declared the Communications Commission was under a duty to consider the antitrust laws in approving the

¹⁸ Interstate Commerce Act § 5, 49 U.S.C. § 5 (1887); *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 304 (1963).

¹⁹ Consult Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, *supra* n. 7.

²⁰ *Id.* at 57-58.

²¹ *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 305, 309-310 (1963) (*semble*); but *cf.* *Trans-World Airlines v. Hughes*, 332 F.2d 602, 610 (2d Cir. 1964).

²² Backman, *Government Price Fixing* 69 (1938); Murphy, *Wartime Concentration of British Industry*, 57 Q. J. Econ. 139 (1942); Stocking and Watkins, *Monopoly and Free Enterprise* 504 (1951).

²³ *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173 (1959), *affirming* 165 F. Supp. 893 (D. Minn. 1958) (express exemption in statute).

²⁴ Hale & Hale, *Mergers in Regulated Industries*, 59 Nw. U.L. Rev. 49, 55 (1964). On March 6, 1963, an inter-agency committee of the federal government published a report generally favorable to the application of antitrust standards to mergers in regulated industries. Fula, *Antitrust Aspects of Recent Transportation Mergers*, 48 Minn. L. Rev. 723, 727 (1964). Whatever the outcome in the federal courts, it is believed that the state courts are less likely to apply antitrust standards to such mergers. *E.g.*, *State Pub. Util. Comm'n v. Romberg*, 275 Ill. App. 432, 114 N.E. 191 (1916).

²⁵ *California v. Federal Power Comm'n*, 369 U.S. 482 (1962).

acquisition of a broadcasting station but that its determination was a nullity in subsequent litigation before the courts.²⁶ Thus even though regulation appears to be extensive it does not necessarily follow that anti-merger legislation cannot be applied to the industry despite the anomalous results which may be derived therefrom.²⁷

Rail carriers. In approaching the topic of railroad mergers we should first note that rail carriers are not wholly exempt from the antitrust laws. Despite the fact that they appear to be pervasively regulated the courts have repeatedly held that antitrust legislation generally is applicable to them. In the famous case of *Georgia v. Pennsylvania Railroad*, for example, the United States Supreme Court wrote:

These carriers are subject to the anti-trust laws. . . . Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. . . . Congress has not given the Commission . . . authority to remove rate-fixing combinations from the prohibitions contained in the antitrust laws. It has not placed those combinations under the control and supervision of the Commission nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not per se exempt from the Sherman Act. . . .²⁸

In spite of such bold language the courts have long found that there were a number of implied limitations upon the application of antitrust to railroads. Thus it was early held that a private party may not bring a bill under § 16 of the Clayton Act to enjoin mis-

²⁶ *United States v. Radio Corp. of America*, 358 U.S. 334, 351 (1959).

²⁷ Consult generally, Hyeman, *Public Encouragement of Monopoly in the Utility Industries*, 147 *Annals* 160, 165-66 (1930); Note, *Judicial Application of Antitrust Law to Regulated Industries*, 64 *Harv. L. Rev.* 1154, 1160-61 (1951).

²⁸ *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456 (1945). *Accord*, *Chicago & Northwestern Ry. v. Peoria & P. Union Ry.*, 319 F.2d 117, 122 (7th Cir. 1963). The reasoning behind such decisions is presumably that stated in *United States v. Southern Pac. Co.*, 259 U.S. 214, 231 (1922), *on remand*, 290 Fed. 443 (D. Utah, 1923), wherein it was said:

While many practices, formerly in vogue, are eliminated by the legislation of Congress regulating interstate commerce, and through rates and transportation may be had under public supervision, there are elements of competition in the granting of special facilities, the prompt carrying and delivery of freight, the ready and agreeable adjustment and settlement of claims, and other elements which that legislation does not control.

conduct of railroads.²⁹ Similarly, a treble damage suit may not be instituted under the provisions of the antitrust laws to recover profits lost through imposition of allegedly unreasonably high rates.³⁰ In both instances the courts quickly perceived that litigation could easily disrupt the regulatory pattern prescribed by the Interstate Commerce Act. If a private litigant could establish that rates were unreasonably high and recover treble damages, he would occupy a favored position and other shippers would be discriminated against by the judgment in his favor.³¹ Finally, the Reed-Bulwinkle Act³² expressly permits a certain amount of collaboration among railroads with respect to the fixing of rates. Hence it is not surprising that both the statutory and implied limitations upon the application of the antitrust laws to railroads have given rise to considerable question as to whether an absolute exemption should not be found. In several instances application of antitrust principles to railroads has been followed by proceedings before the Interstate Commerce Commission which in effect negated the judgment of the court.³³ In another instance dissolution of common control over the Union Pacific and Southern Pacific pursuant to an antitrust decree prevented the construction of a line of railroad across the state of Oregon. Some twenty years later the Interstate Commerce Commission ordered that construction to proceed.³⁴

However that may be, it is plain that absent approval by the Interstate Commerce Commission, railroad mergers may be and have been attacked under the antitrust laws. Under both federal³⁵

²⁹ *Central Transfer Co. v. Terminal Ry. Ass'n*, 238 U.S. 469, 474-75 (1933); *Wheeling & L. E. Ry. v. Pittsburgh Ry.*, 33 F.2d 390, 393 (6th Cir. 1929). Cf. *Fleetway, Inc. v. Public Serv. Transp. Co.*, 72 F.2d 761 (3d Cir. 1934), *cert. denied*, 293 U.S. 626 (1935).

³⁰ *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922). See *Georgia v. Pennsylvania R.R.* 324 U.S. 439, 453 (1945) (dictum).

³¹ *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907).

³² Interstate Commerce Act § 5 (a) (6), 49 U.S.C. § 5 (1887).

³³ *United States v. Terminal R.R. Ass'n of St. L.*, 224 U.S. 383 (1912), 266 U.S. 17 (1924); *United States v. Southern Pac. Co.*, 290 Fed. 443, 450 (D. Utah 1923); Jansen, *Railroad Mergers*, Barron's, Dec. 17, 1956, pp. 11, 13-14.

³⁴ *Interstate Commerce Comm'n v. Oregon-Washington R.R.*, 288 U.S. 14, 28-29 (1933). Consult Alderman, *How Shall the Railroad Rate Structure be Regulated in the Public Interest?*, 12 Law & Contemp. Prob. 579, 594 (1947).

³⁵ *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922), *on remand*, 290 Fed. 443 (D. Utah 1923); *United States v. Union Pac. R.R.*, 226 U.S. 61 (1912); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); Phillips, *Railroad Mergers*, 19 Wash. & Lee L. Rev., 1, 3-7 (1962). Cf. *Chicago & Northwestern Ry. v. Peoria & P. Union Ry.*, 319 F.2d 117, 122-23 (7th Cir. 1963).

and state statutes³⁶ decrees have been entered preventing the acquisition of one railroad by another. In some of the older state cases that result is attributable to specific legislative or constitutional provisions³⁷ and it should also be noted that in other state court decisions mergers of railroads have been found not opposed to the public interest.³⁸ It is further clear that the doctrine of primary jurisdiction is applicable; no court today should entertain litigation to block a railroad merger because the matter falls within the cognizance of the Interstate Commerce Commission.³⁹ Accordingly, we proceed to an examination of the powers and duties of that tribunal.

Interstate Commerce Commission; its powers and standards. In considering the role of the Interstate Commerce Commission in passing upon railroad mergers we should first note that no such acquisition may be carried out without submission of the matter to the Commission for its approval. Section 5 of the Interstate Commerce Act so provides and then sets forth the standards which the Commission is to apply in determining whether the merger should be approved.⁴⁰ Interestingly enough, nothing in the statute refers to the maintenance of competition.⁴¹ It is, however, abundantly plain from the express language in the same section that

³⁶ Pearsall v. Great No. Ry., 161 U.S. 646 (1896); Evansville Ry. v. Evansville Elec. Ry., 50 Ind. App. 502, 98 N.E. 649 (1912); Eel River R.R. v. State, 155 Ind. App. 433, 57 N.E. 388, 396 (1900).

³⁷ Hamilton v. Savannah, Fla. & W. Ry., 49 Fed. 412, 422-23 (C.C.S.D. Ga. 1892); Langdon v. Branch, 37 Fed. 449, 462-63 (C.C.S.D. Ga. 1888); Central R.R. v. Collins, 40 Ga. 582, 640 (1869); Louisville & N. Ry. v. Commonwealth, 97 Ky. 675, 31 S.W. 476 (1895), *aff'd*, 161 U.S. 677, 698 (1896); Pennsylvania Ry. v. Commonwealth, 3 Sad. 83, 7 Atl. 368 (Pa. 1886). See American Loan & Trust Co. v. Minnesota R.R., 157 Ill. App. 641, 650-51, 42 N.E. 153 (1895) (dictum); Ill. Const. art. 11, § 11; Martin, State Antitrust Laws LII (1940).

³⁸ Lisman v. Knickerbocker Trust Co., 21 Fed. 413, 421 (4th Cir. 1914); Venner v. New York Cent. R.R., 177 N.Y. Dep't R. 296, 164 N.Y. Supp. 626, 632-33 (1917), *aff'd per curiam*, 226 App. Div. 583, 123 N.E. 893 (1919), *cert. denied*, 249 U.S. 617 (1919). See Chicago, M. & St. P. Ry. v. Franzen, 287 Ill. App. 346, 352, 122 N.E. 492 (1919) (dictum); State *ex rel.* Thompson v. Nashville Ry. & Light Co., 151 Tenn. 77, 268 S.W. 120, 124 (1925) (dictum). *Cf.* Bartonville Bus Line v. Eagle Motor Coach Line, 326 Ill. App. 200, 157 N.E. 175, 176 (1927).

³⁹ Chicago So. Shore Ry. v. Monon Ry., 235 F. Supp. 984, 986 (N.D. Ill. 1964). *Cf.* United States v. Railway Express Agency, 89 F. Supp. 981, 101 F. Supp. 1008, 1012 (D. Del. 1951). Even after entry of an antitrust decree it may be necessary to proceed before the ICC. United States v. Terminal R.R. Ass'n of St. L., 224 U.S. 383 (1912), 266 U.S. 17 (1924).

⁴⁰ Interstate Commerce Act § 5(4), 49 U.S.C. § (5)(4). It should be observed, however, that the ICC does not have unlimited powers over railroads. United States v. Pennsylvania R.R., 242 U.S. 208, 231 (1916).

⁴¹ Interstate Commerce Act § 5(c), 49 U.S.C. § 5(c).

approval of such a transaction by the Commission relieves the parties from the operation of the antitrust laws.⁴² Accordingly, the courts will dismiss complaints founded upon alleged violations of the antitrust laws when such matters have received the approval of the Interstate Commerce Commission.⁴³ Further, the United States Supreme Court has made it plain that the Commission is not to measure merger proposals by antitrust standards. In considering acquisitions it must accommodate the policies of the antitrust laws into the larger considerations of national transportation policy expressed in the Interstate Commerce Act. The public interest is measured by the latter enactment and the antitrust laws do not constitute measures of permissibility in such cases.⁴⁴

More recently, in approving another ICC order allowing a merger, a district court spoke of a merger trend in the transportation industry as a necessity in order to secure adequate transportation service.⁴⁵ It reviewed the 1920 legislation which directed the Interstate Commerce Commission to prepare a plan of consolidation and the 1940 Act which relieved the Commission of that responsibility and left the matter to the initiative of the carriers.⁴⁶ While an amazing recent decision of another district court appears to take a wholly different view of the Commission's responsibility,⁴⁷ it is not believed that the prohibitions of § 7 of the Clayton Act are to be literally applied to railroad mergers. As a matter of fact, mergers and consolidations have long been routine in that industry. The Pennsylvania Railroad alone is composed of what were once 600 separate carriers.⁴⁸ After the

⁴² *Id.* § 5(11), 49 U.S.C. § 5 (11).

⁴³ *United States v. Railway Express Agency*, 89 F. Supp. 981, 101 F. Supp. 1008, 1013-14 (D. Del. 1951). *Contra*, *Chicago & Northwestern Ry. v. Peoria & P. Union Ry.*, 319 F.2d 117, 122 (7th Cir. 1963).

⁴⁴ *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 186-87 (1959), *affirming* 165 F. Supp. 893 (D. Minn. 1958); *McLean Trucking Co. v. United States*, 321 U.S. 67, 83 (1944).

⁴⁵ *Brotherhood of Maintenance of Way Employees v. United States*, 221 F. Supp. 19, 22 (E.D. Mich. 1963), *affirming* 317 I.C.C. 261 (1962).

⁴⁶ *Id.* at 23, 30.

⁴⁷ *Florida E. Coast Ry. v. United States*, 242 F. Supp. 14, 18, 20 (M.D. Fla. 1965), *reversed sub. nom.*, *Seaboard Airline Ry. v. United States*, 382 U.S. 154 (1965).

which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. . . . Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined. We, therefore, refuse to hold that there are no antitrust violations left to the Depart-

(Continued on next page)

1920 legislation, as indicated above, the Interstate Commerce Commission attempted to draft plans of consolidation. Upon failure of the Commission to draft an acceptable plan the Transportation Act of 1940 made it plain that initiative was to revert to the carriers and the Commission was to view mergers on grounds other than those embodied in the antitrust laws.⁴⁹ It has done so⁵⁰ and while it occasionally takes cognizance of facts protectionist manner. In other words, the Commission is fearful that traffic may be "diverted" from a carrier not party to the merger rather than that competition will be reduced.⁵² It therefore appears likely that the Commission will approve railroad mergers if the parties can show a prospect of improved service to shippers and reduced costs through consolidation of facilities.⁵³

Motor carriers. There is little difference between the rules applicable to railroads and those affecting motor carriers.⁵⁴ One difference lies in the exemption in favor of motor carriers of minimal size. Such small operators need not submit merger applications for the Interstate Commerce Commission's approval.⁵⁵ Otherwise the standards applicable are substantially identical to

(Footnote continued from preceding page)

ment of Justice to enforce.

⁴⁸ Liipfert, *Consolidation and Competition in Transportation*, 31 Geo. Wash. L. Rev. 106, 110 (1962).

⁴⁹ *Id.* at 113; Dearing & Owen, National Transportation Policy ch. 15 (1949); Phillips, *Railroad Mergers*, 19 Wash. & Lee L. Rev. 1, 7-9 (1962).

⁵⁰ Pere Marquette Ry. Merger, 267 I.C.C. 207, 246-47 (1947); *Hearings Before the Subcommittee on Antitrust of the Senate Committee on the Judiciary*, 81st Cong., 2d Sess. 474 (1956); Phillips, *supra* n. 49, at 10, 13. For a description of pending railway merger, including the giant Pennsylvania-New York Central proposal, consult Fulda, *supra* n. 24, at 729-42.

⁵¹ Chesapeake & O. Ry. Purchase, 271 I.C.C. 5, 17, 22, 38 (1948); Pere Marquette Ry. Merger, 267 I.C.C. 207, 233 (1947); III-A Sharfman, *The Interstate Commerce Commission*, 458, 474, 500 (1931).

⁵² *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 185 (1958), *affirming* 165 F. Supp. 893 (D. Minn. 1958); Chesapeake & O. Ry. Purchase, 271 I.C.C. 5, 28, 39 (1948). Attention is invited to the famous decision in Lake Line Applications under Panama Canal Act, 33 I.C.C. 700 (1915). In that decision the commission forbade the eastern trunk railways to own and operate lake steamers on the grounds that they would set water rates at levels so high as to divert tonnage to the all-rail routes of the parallel carriers.

⁵³ Conant, *Railroad Consolidations and the Antitrust Laws*, 14 Stan. L. Rev. 489, 510 (1962); Fulda, *Competition in the Regulated Industries* §§ 4.10, 4.11, 4.12 (1961).

⁵⁴ Interstate Commerce Act § 5(2)(a); 49 U.S.C. § 5(5)(2)(a); Meck & Bogue, *Federal Regulation of Motor Carrier Unification*, 50 Yale L.J. 1376, 1381 (1941); Hale & Hale, *Competition or Control III: Motor Carriers*, 108 U. Pa. L. Rev. 797 (1960).

⁵⁵ Interstate Commerce Act § 5(10), 49 U.S.C. § 5(10); *Ship-by-Truck Co. v. United States*, 208 F. Supp. 847 (D. Kan. 1962).

those affecting railroads.⁵⁶ The antitrust laws, while to be taken into consideration, are not deemed controlling. Thus in the leading case of the *McLean Trucking Company v. United States* the United States Supreme Court said:

[T]here can be little doubt that the Commission is not to measure proposals for . . . consolidation by the standards of the antitrust laws. Congress authorized such consolidations because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by "encouraging the organization of stronger units". . . [I]n determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.⁵⁷

In conformance with those instructions the Interstate Commerce Commission has approved numerous mergers of motor carriers.⁵⁸ In one instance such a merger was approved despite the fact that the consolidated operation of the several separate carriers by contract means had previously been enjoined under the antitrust laws. In that case the Interstate Commerce Commission wrote:

While it is undoubtedly true that consummation of the instant transaction will result in the elimination of some competition among the transferor-applicants, that alone is not the controlling consideration. Nearly every unification approved by us serves to reduce competition by eliminating it between, or among, the carriers involved. . . . Under section 5 (2) (c) . . . we are required to give weight, among other things, to the effect such transaction would have upon adequate transportation Allied would render . . . to the public. The transaction, therefore, must be viewed in the light of whether, if consummated adequate service to the public, and, more important, whether it would injuriously affect the service of remaining carriers of household goods by reason of the detrimental effects on them through competition, monopolistic or discriminatory practices or otherwise.⁵⁹

⁵⁶ Mergers of intrastate carriers are similarly controlled by state commissions. *E.g.*, Illinois Motor Carrier of Property Act § 13, Ill. Rev. Stat. c. 95 ½ §§ 282.1 ff; Harper, *Economic Regulation of the Motor Trucking Industries by the States* 178 (Illinois Studies in the Social Sciences Vol. 43, 1959).

⁵⁷ *McLean Trucking Co. v. United States*, 321 U.S. 67, 84-85 (1944).

⁵⁸ Fulda, *op. cit. supra* n. 53, at § 5.26.

⁵⁹ *Allied Van Lines, Inc.—Purchase—Evanston Fireproof Warehouse*, 40

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The Commission therefore is likely to approve mergers of motor carriers where they promise to effect reductions in costs.⁶⁰ On the other hand, it may disapprove mergers for protectionist reasons. Thus if the proposed merger promises to increase competition to the point where other carriers might be forced out of business, the Commission may well disapprove the acquisition so as to shelter such third parties.⁶¹

Critique of carrier mergers. Many observers have found that mergers among railroad carriers would produce substantial economies. It has been suggested that new services, such as "piggy-back", would grow more rapidly if consolidation of the railroad system were effected. Duplication of facilities among the existing carriers is thought to be wasteful.⁶² Not all observers, however, agree that the economies to be effected would be significant and some find diseconomies in the creation of systems too large for efficient management.⁶³ Those who believe that regulation of carriers is no longer necessary or desirable of course, might well also take a dim view of railroad mergers.⁶⁴ Whether the numerous mergers now proposed are eventually approved by the Commission and the reviewing courts may therefore depend upon the progress of the movement toward de-regulation of the transportation industry.

Air carriers. As in the case of ground transport, no merger of airlines may be consummated without submission thereof to and

(Footnote continued from preceding page)

M.C.C. 557, 592 (ICC 1946).

⁶⁰ Glendenning Motorways, Inc., 75 M.C.C. 191, 201 (1958); Best Motor Lines—Purchase—Highway Motor Freight Lines, Inc., 38 M.C.C. 199, 205 (1942); Carolina Freight Carriers Corporation—Purchase—Charles O. Lovette, 37 M.C.C. 791, 794 (1941); *Re: Short Line of Massachusetts*, 1 P.U.R.3d 120-22 (Mass. 1953); Hale & Hale, *supra* n. 54, at 775, 799, 803.

⁶¹ E.W.A. Peake, 59 M.C.C. 165, 184 (1953); Schein's Express—Purchase (Portion)—Central Jersey Motor Lines, Inc., 59 M.C.C. 534, 548 (1953); Hale & Hale, *supra* n. 54, at 775, 802.

⁶² Conant, *supra* n. 53, at 495; Liipfert *supra* n. 48, at 106, 120, 126-28; Phillips, *supra* n. 49, at 21; Troxil, *Economics of Public Utilities* 46 (1947); Fulda, *op. cit. supra* n. 53, at §§ 4.5, 4.13.

⁶³ Healy, *The Merger Movement in Transportation*, 52 Proc. Am. Econ. Ass'n 436, 439, 441 (1962). The author further claimed (at 444) that mergers might impair technical innovation in railroading. Cf. Roberts, *Discussion* (of Healy's preceding paper), 52 Proc. Am. Econ. Ass'n 445 (1962).

⁶⁴ Mitchell, *Let's Bring Regulation to Date*, 22 ICC Prac. J. 187-93 (1954). We cannot here embark on the long history of attempted railroad diversification into motor carrier operations. Consult Cramton, *Diversification of Ownership in the Regulated Industries*, 19 A.B.A. Rep. (Antitrust Sect.) 362, 364-65 (1961).

approval of the Civil Aeronautics Board.⁶⁵ (It is interesting to note that the Board controls acquisition of physical property, such as aircraft, in addition to acquisitions of other airlines.)⁶⁶ Exclusive jurisdiction over such matters is vested in the Board, which means, of course, that the courts must dismiss a complaint seeking to attack an airline merger. The United States Supreme Court has expressly held that all relief against division of territories, allocation of routes or combinations between common carriers, air carriers and their affiliations must be sought from the Board.⁶⁷ Some old authorities to the contrary should no longer be regarded as controlling.⁶⁸ A merger approved by the Board enjoys express exemption from the operation of the antitrust laws.⁶⁹ Here again one may disregard older decisions.⁷⁰

Like the Interstate Commerce Commission again, the Board is vested with authority to enforce § 7 of the Clayton Act.⁷¹ Furthermore, its organic statute provides:

[T]he Board shall not approve any consolidation, merger . . . which would result in creating a monopoly . . . and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger. . . .⁷²

In practice the Board has tended to approve many mergers. It

⁶⁵ Federal Aviation Act § 408(a), 49 U.S.C. § 1378(a); *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 301 (1963).

⁶⁶ *Allen, Section 408 of the Federal Aviation Act*, 45 Va. L. Rev. 1073, 1085 (1959).

⁶⁷ *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 302-03, 306-07, 310 (1963). Note, however, the fantastic exception suggested in the foregoing opinion (at 305):

While the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems, those expressly entrusted to it encompass only a fraction of the total. Apart from orders which give immunity from the antitrust laws by reason of § 414, the whole criminal law enforcement problem remains unaffected by the Act. . . . Moreover, on the civil side violations of antitrust laws other than those enumerated in the Act might be imagined. We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce.

⁶⁸ *American Airlines v. Forman*, 204 F.2d 230, 233 (3d Cir. 1953), *cert. denied*, 346 U.S. 806 (1953); *S.S.W., Inc. v. Air Transp. Ass'n*, 91 F. Supp. 269 (D.D.C. 1950), *rev'd*, 191 F.2d 658, 661 (D.C. Cir. 1951); *Slick Airways v. American Airlines*, 107 F. Supp. 199, 209 (D. N.J. 1952); *Hawaiian Airlines, Ltd. v. Trans-Pacific Airlines, Ltd.*, 78 F. Supp. 1, 8 (D. Hawaii 1948).

⁶⁹ Federal Aviation Act, § 414, 49 U.S.C. § 1384; *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 304 (1963).

⁷⁰ *S.S.W., Inc. v. Air Transp. Ass'n*, 91 F. Supp. 269 (D. D.C. 1950), *rev'd*, 191 F.2d 658, 661 (D.C. Cir. 1951).

⁷¹ *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 304 (1963).

⁷² Federal Aviation Act, § 408(b), 49 U.S.C. § 1378(b).

has been impressed with the economies to be achieved through combinations and accordingly permitted airlines to join forces.⁷³ Indeed, on occasion it has almost forced carriers into combinations.⁷⁴ Occasionally it has disapproved a merger on the grounds that it might reduce competition.⁷⁵ More frequently it has disapproved a merger because the strength of the resulting carrier might be such as to take traffic away from another certificated air carrier.⁷⁶ In other words, the Civil Aeronautics Board, like the Interstate Commerce Commission, may take a protectionist point of view in passing upon a merger application. It is likely, however, to approve mergers unless the airlines involved are already inordinately large or the result of the merger will be to divert traffic from another existing airline.

Critique of CAB merger policy. Several observers have found fault with the Civil Aeronautics Board for approving mergers too readily. In their view the Board has not paid sufficient attention to the preservation of competition.⁷⁷ In addition, some observers believe that undue emphasis has been placed upon economies of scale in airline merger proceedings. It is said, for example, that medium size companies can achieve costs as low as the larger.⁷⁸

⁷³ Continental-Pioneer Acquisition Case, 20 C.A.B. 323 (1955); Flying Tiger-Slick Merger Case, 18 C.A.B. 326, 343 (1954); Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952); Delta-Chicago and Southern Merger Case, 16 C.A.B. 647 (1952); Arizona-Monarch Merger Case, 11 C.A.B. 246 (1950).

⁷⁴ West Coast-Empire Merger Case, 15 C.A.B. 971, 972-73 (1952); Eastern-Colonial, Acquisition of Assets, National-Colonial Integration Investigation, 18 C.A.B. 781 (1954), cc. 18 C.A.B. 453 (1954).

⁷⁵ Staff of Antitrust Subcomm., House Comm. on the Judiciary, 85th Cong., 2d Sess., Report on Airlines 254-56 (April 5, 1957); Fulda, *Antitrust Aspects of Recent Transportation Mergers*, 48 Minn. L. Rev. 742-43 (1964) (description of disapproval of American-Eastern merger); Gellman, *The Regulation of Competition in United States Domestic Air Transportation*, 24 J. Air L. & Com. 410, 25 *id.* 148, 168 (1958).

⁷⁶ North Cent. Airlines, Inc. v. Civil Aeronautics Bd., 265 F.2d 581, 583 (D.C. Cir. 1959), *cert. denied*, 360 U.S. 903 (1959); American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 C.A.B. 365 (1946); Arizona-Monarch Merger Case, 11 C.A.B. 246, 247-48 (1950); South-West-West Coast Merger Case, 14 C.A.B. 356 (1951). For mergers involving other modes of transportation consult Hale & Hale, *Competition or Control IV: Air Carriers*, 109 U. Pa. L. Rev. 311, 336-39 (1961).

⁷⁷ Keyes, Federal Control of Entry into Air Transportation 80 (1951); Healy, *Workable Competition in Air Transportation*, 35 Am. Econ. Rev., Supplement 1945, p. 237.

⁷⁸ Richmond, Regulation and Competition in Air Transportation 75 (1961); Koontz, *Economic and Managerial Factors Underlying Subsidy Needs of Domestic Trunk Line Air Carriers*, 18 J. Air L. & Com. 127, 133-34 (1951); Bingham & Roberts, *Transportation: Principles and Problems* 184 (1952).

Furthermore, the protectionist attitude of the Board in sheltering one airline from the competition of another has invited adverse criticism.⁷⁹ It should nevertheless be noted that one cannot reckon competition in the airline industry by merely comparing the overall size of the airlines. So far as competition is concerned the relevant market lies in specific routes.⁸⁰ If American Airlines, for example, had a tremendous proportion of the New York—Chicago traffic and Eastern Airlines none of that traffic but merely a large proportion of the New York—Miami traffic, merger of the two lines would not tend to reduce competition on the New York—Chicago run. Furthermore, there is respectable authority for the proposition that there are true economies of scale in the operation of fleets of airplanes and no one has established exactly where the lowest cost may be achieved.⁸¹ Finally, the Board was long concerned with the subsidy problem and hoped to secure its elimination. Its general objective has been to reduce subsidies and to balance existing airlines, strengthening the weak ones by giving them routes already served by the larger and more successful enterprises.⁸²

Broadcasting. No license issued for radio or television broadcasting may be transferred without approval of the Federal Communications Commission.⁸³ That tribunal, however, does not enjoy primary jurisdiction over merger⁸⁴ or other cases⁸⁵ wherein antitrust questions may be raised. Similarly, broadcasters are fully subject to the prohibitions of the antitrust laws⁸⁶ and are not

⁷⁹ Levi, *Section 7 of the Clayton Act and the Regulated Industries*, NYSBA Symposium 136, 144-45 (CCH 1959); Gellman, *The Regulation of Competition in United States Domestic Air Transportation*, *supra* n. 75, at 180; Hale & Hale, *supra* n. 76, at 311, 321.

⁸⁰ West Coast-Empire Merger Case, 15 C.A.B. 971, 992 (1952); Richmond, *op. cit. supra* n. 78.

⁸¹ Gill & Bates, *Airline Competition: A Study of the Effects of Competition on the Quality and Price of Airline Service and the Self-sufficiency of the United States Domestic Airlines* 179, 182 (1949).

⁸² Richmond, *op. cit. supra* n. 78.

⁸³ Communications Act of 1934 § 3.10(b), 47 U.S.C. § 3.10(b).

⁸⁴ *United States v. Radio Corp. of America*, 358 U.S. 334 (1959), *reversing* 158 F. Supp. 333, 348-49 (E.D. Pa. 1958).

⁸⁵ *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708, 709-10 (3d Cir. 1958). Cf. *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922).

⁸⁶ The leading case is *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). In that case the Court wrote (at 474):

In contradistinction to communication by telephone and telegraph,
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even protected by explicit Commission approval of a merger or acquisition.⁸⁷ The Commission has nevertheless been instructed that it is to take account of antitrust policy in determining whether to approve an acquisition.⁸⁸ Apart from that, the courts have given it little instruction with respect to the exercise of its powers except that they are reluctant to see a license forfeited.⁸⁹ The Commission, in the apparent belief that it was implementing the anti-trust laws has severely limited the issuance of licenses to one per person per area for each type of broadcast service. In other words, only a single AM broadcasting station may be owned by any one person in a broadcast area.⁹⁰ Since the Commission applies the same rules with respect to transfers as it does to the issuance of licenses⁹¹ that limitation is important. It has also established by rule limitations upon the total number of licenses which a person may hold regardless of geographic location. Thus no one person may hold more than seven television licenses.⁹² It has attempted

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which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes the field of broadcasting is one of free competition.

Accord, *Television Transmission, Inc. v. Public Util. Comm'n*, 47 Cal. App. 2d 82, 301 P.2d 862, 865 (1956).

⁸⁷ *United States v. Radio Corp. of America*, 358 U.S. 334 (1959). Similar views are expressed in Staff of Subcomm. on Antitrust, House Comm. on the Judiciary, 85th Cong., 1st Sess., Report on Television Broadcasting Industry 95 (March 13, 1957). In some earlier cases the courts suggested that an exemption might exist. *Yankee Network, Inc. v. F.C.C.*, 107 F.2d 212, 222 (D.C. Cir. 1939). *Cf. Federal Broadcasting Sys. v. American Broadcasting Co.*, 167 F.2d 349, 352 (2d Cir. 1948), *cert. denied*, 335 U.S. 821 (1948). Some doubts of the same nature were expressed in F.C.C. Network Study Staff (Barrow, director), *Network Broadcasting*, H.R. Doc. No. 1297, 85th Cong., 2d Sess. 624 (1958); Hansen, *Broadcasting and the Antitrust Laws*, 22 Law & Contemp. Prob. 572, 575 (1957).

⁸⁸ *United States v. Radio Corp. of America*, 358 U.S. 334, 351-52 (1959).

⁸⁹ *Churchill Tabernacle v. FCC*, 160 F.2d 244, 247 (D.C. Cir. 1947). In testifying before a congressional committee, an attorney who later became head of the Antitrust Division of the Department of Justice commented that the Attorney General and the Federal Communications Commission were unsure of their respective roles in the enforcement of the antitrust laws against broadcasters. *Hearings on Television Network Practices Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess. (1956).

⁹⁰ 47 C.F.R. §§ 3.35, 3.636. *Cf. Jefferson Standard Broadcasting Co.*, 11 Radio Reg. 1059, 1060 (1955).

⁹¹ *Hale & Hale, Competition or Control II: Broadcasting*, 107 U. Pa. L. Rev. 585, 615 (1959). Note also that licenses are renewed every three years, giving the Commission some power to take advantage of hindsight. *Id.* at 591.

⁹² 47 C.F.R. § 3.636 (a)(2). The regulations in question were approved in question were approved in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203-04 (1956).

to curb the broadcasting networks⁹³ and has from time to time attempted to prevent diversification of newspaper publishers into the broadcasting business.⁹⁴ On the other hand, it recognized the doctrine of countervailing power in one of the most important merger cases brought to its attention. Here its efforts appeared to be directed toward enhancing the power of the smaller of the three national networks so as to achieve a better balance among broadcasters.⁹⁵ Note also that the Commission has a stringent rule against delegation of authority under broadcasting licenses: the licensee himself must determine the content of programs.⁹⁶

However well-intentioned some of the Commission's regulations do not appear to meet antitrust standards. The multiple ownership rules, for example, take no account of geographic dispersion. Again, it is apparent that the Commission's reluctance to permit newspaper publishers to diversify into broadcasting is largely based on a protectionist desire to shelter existing broadcasters from more vigorous competition.⁹⁷

Banking. A mystery surrounds the application of the antitrust laws to banks. In the first place, §11 of the Clayton Act expressly empowered the Federal Reserve Board to enforce § 7 of the Clayton Act against banks.⁹⁸ Then in 1960 Congress enacted the Bank

⁹³ *E.g.*, 47 C.F.R. § 3.136; FCC, Report on Chain Broadcasting 46-47, Commission Order No. 37, Doc. No. 5060 (May, 1941).

⁹⁴ *McClatchy Broadcasting Co. v. FCC*, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 518-19 (D.C. Cir. 1955); *Scripps-Howard Radio, Inc. v. FCC*, 189 F.2d 677, 683 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 830 (1951); *Plains Radio Broadcasting Co. v. FCC*, 175 F.2d 359 (D.C. Cir. 1949). A film producer, however, was not considered an improper transferee of a broadcasting license. 15 Radio Reg. 177, 183 (1957).

⁹⁵ *Paramount Television Prods.*, 8 P & F Radio Reg. 541, 624-25 (1953); FCC, Network Study Staff (Barrow, director), Network Broadcasting, H. R. Rep. No. 1297, 85th Cong., 2d Sess. 79-81 (1958); *Fortune*, April, 1957, pp. 132-33.

⁹⁶ *Massachusetts Universality Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950); *Regents of New Mexico College v. Albuquerque Broadcasting Co.*, 158 F.2d 900, 906 (10th Cir. 1947); *Albuquerque Broadcasting Co. v. Regents of New Mexico College*, 70 F. Supp. 198, 202 (N.D. Mex. 1945); *Voliva v. WCBD, Inc.*, 313 Ill. App. 177, 183, 39 N.E.2d 685 (1942). *Cf. Bay Radic Inc.*, 15 Radio Reg. 211, 226 (1957).

⁹⁷ Note, *Diversification and the Public Interest: Administrative Responsibility of the FCC*, 66 Yale L.J. 365, 367 (1957); FCC, Network Study Staff (Barrow, director), Network Broadcasting, H.R. Rep. No. 1297, 85th Cong. 2d Sess. 564 (1958), the Commission's hostility to networks reflects a strong antagonism toward vertical integration in broadcasting. See note 11, *supra*.

⁹⁸ Clayton Act § 11, 15 U.S.C. § 21 (1914); *Transamerica Corp. v. Bd. Govs. Fed. Reserve Sys.*, 206 F.2d 163 (3d Cir. 1953), *cert. denied*, 346 U.S. 301 (1953). See *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348

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Merger Act which directed the Board and the other two federal agencies controlling banks to consider antitrust questions in exercising their statutory power to approve bank mergers.⁹⁹ Despite that legislation it appears that the banking agencies enjoy neither primary nor exclusive jurisdiction to enforce antitrust policy, the courts having at least concurrent jurisdiction.¹⁰⁰ Furthermore, as in the case of broadcasting and pipelines, the fact that the administrative agencies have passed upon a merger and approved it confers no immunity whatsoever in litigation.¹⁰¹ This result is particularly surprising since for many years it was not considered that bank mergers fell within the scope of §7 of the Clayton Act by reason of its exact language.¹⁰²

The authorities indicate that the rules applicable in the free sector of the economy apply directly to mergers of banks; indeed, it is possible that the courts may apply the statutes more rigorously because the banks are so heavily regulated.¹⁰³ While the views of the administrative agencies will be received by the courts, they are not controlling.¹⁰⁴ The agencies themselves may, of course, deny merger applications on other grounds such as that the acquisition would tend to create conditions which would be unsafe for depositors. As a district court recently put it:

[T]he sole standard for determining the validity of a merger under the Sherman and Clayton Acts is the actual or potential anti-competitive effect, while under the Bank Merger Act, the

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(E.D. Pa. 1962), *rev'd*, 374 U.S. 321, 345 (1963). *Cf.* *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 879 (S.D. N.Y. 1965).

⁹⁹ Fed. Deposit Ins. Act (Bank Merger Act), 74 Stat. 129 (1960), 12 U.S.C. § 1828(c) (1950); Note, *Federal Regulation of Bank Mergers*, 75 Harv. L. Rev. 756, 757 (1962). *Cf.* Bank Holding Company Act § 3, 12 U.S.C. §§ 1841-48 (1956).

¹⁰⁰ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 880 (S.D. N.Y. 1965); *United States v. Third Nat'l Bank*, 36 F.R.D. 7 (M.D. Tenn. 1964).

¹⁰¹ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 878 (S.D. N.Y. 1965); *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 350-51 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1963).

¹⁰² Note, *Federal Regulation of Bank Mergers*, 75 Harv. L. Rev. 756, 759 (1962).

¹⁰³ *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348, 368-69 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321, 355-56 (1963). In that case it was said that concentration in banking will particularly curb the alternatives of small businessmen and hence would tend to create concentration in business generally.

¹⁰⁴ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 878, 886 (S.D. N.Y. 1965); *United States v. Third Nat'l Bank*, 36 F.R.D. 7, 9 (M.D. Tenn. 1964).

overall public interest, and not the anti-competitive effect, is the governing criterion. Thus, the Bank Merger Act would appear to sanction agency approval of the merger, even though it violated the antitrust laws, if, on a balance of all the designated factors, the agency decided that, nevertheless, it was in the overall public interest. A court, however, would be obliged to invalidate a merger found to violate the antitrust laws even though it served the public interest.¹⁰⁵

In view of the sweeping powers over banks enjoyed by both federal¹⁰⁶ and state agencies¹⁰⁷ it is surprising that the courts have seen fit to subject banking to the full impact of the anti-merger laws.¹⁰⁸ The interpretive gymnastics employed by the United States Supreme Court to apply §7 of the Clayton Act to banks and to disregard the administrative procedure set forth in the Bank Merger Act are even more perplexing.

Insurance. It is difficult to outline the relationship between the insurance industry and the anti-merger laws in other than chronological form. Prior to 1944 the federal courts held that insurance was not "commerce" and hence that federal antitrust laws did not apply thereto. Then in the famous *Southeastern Underwriters* case the United States Supreme Court reversed itself, held that the Sherman Act was fully applicable to the business of insurance, found no exemption therefrom and brushed aside the argument that state controls would be adversely affected.¹⁰⁹ In doing so it argued that states had subjected combinations of insurance companies to coerce, intimidate and boycott

¹⁰⁵ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 884 (S.D. N.Y. 1965). See generally: *United States v. Chicago Mortgage Bankers Ass'n*, 123 F. Supp. 251 (N.D. Ill. 1954); *Peoples Sav. Bank v. Stoddard*, 351 Mich. 342, 88 N.W.2d 462 (1958); *People's Bank v. Lamar County Bank*, 107 Miss. 852, 67 So. 961 (1915); *Hall v. San Jacinto Bank*, 255 S.W. 506, 510 (Tex. Civ. App. 1923) (dictum). In *United States v. Philadelphia Nat'l Bank*, 201 F. Supp. 348 (E.D. Pa. 1962), *rev'd*, 374 U.S. 321 (1965), the court said at 351 that although the comptroller of the currency was directed to consider the effect upon competition in passing upon mergers, he was not required to give that factor any particular weight.

¹⁰⁶ *National Bank Act* § 85, 12 U.S.C. § 85; *Federal Res. Act* §§ 11, 150(b), 12 U.S.C. §§ 232, 371(b) (in addition to other sweeping powers, interest rates may be controlled).

¹⁰⁷ *E.g.*, *Ill. Bank Act* §§ 48, 51, *Ill. Rev. Stat. ch. 16½*, §§ 149, 152.

¹⁰⁸ *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867, 905 (S.D. N.Y. 1965); *Gruis, Antitrust Laws and Their Application to Banking*, 24 *Geo. Wash. L. Rev.* 89, 90-93 (1955). *But cf. Edwards, Concentration in Banking*, 46 *Rev. Econ. & Stat.* 294, 300, 1964).

¹⁰⁹ *United States v. South-Eastern Underwriters' Ass'n*, 322 U.S. 533, 553 (1944).

competitors to the state antitrust laws and hence that no disruption of the state regulatory systems would result.¹¹⁰ It is true that in earlier years the state antitrust laws had been widely applied to the business of insurance.¹¹¹ What the court overlooked was the fact that states had subsequently widely supplanted antitrust litigation with interventionist regulation.¹¹² That fact was pointed out vividly in the dissent of Chief Justice Stone.¹¹³ Mr. Justice Jackson noted that the effect of the decision was to require an extensive overhauling of state legislation at the very least.¹¹⁴ The Congress responded to the decision in *Southeastern Underwriters* by the enactment of the McCarran law. The heart of that measure is found in §2 providing that "the [anti-trust laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State law."¹¹⁵ Then the measure contains exceptions with respect to boycotts and other activities not related to mergers.¹¹⁶ Shortly thereafter, state legislatures were induced to enact new measures which the authors thought con-

¹¹⁰ *Id.* at 562.

¹¹¹ *Hartford Fire Ins. Co. v. State*, 76 Ark. 303, 89 S.W. 42 (1905); *Atlanta Ass'n of Fire Ins. Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822 (1935); *Agricultural Ins. Co. v. Aetna Ins. Co.*, 119 Kan. 452, 239 Pac. 974, 979 (1925); *State v. Phipps*, 50 Kan. 609, 31 Pac. 1097 (1893); *Huston v. Rentlinger*, 91 Ky. 333, 15 S.W. 867, 869 (1891); *Opinion of the Justices*, 271 Mass. 582, 171 N.E. 294, 299 (1930); *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N.W. 474 (1888); *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883, 888, 889 (1921); *Miller v. Fidelity Union Fire Ins. Co.*, 126 Miss. 301, 88 So. 711 (1921); *State ex rel. Barker v. Assurance Co.*, 251 Mo. 278, 158 S.W. 640, 645-46 (1913); *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S.W. 595, 603 (1899); *State v. American Sur. Co.*, 91 Neb. 22, 135 N.W. 365 (1912); *McCarter v. Firemen's Fund Ins. Co.*, 74 N.J. Eq. 372, 73 Atl. 80 (1909); *Potomac Fire Ins. Co. v. State*, 18 S.W.2d 929, 932 (Tex. Civ. App. 1929); *Griffin v. Palatine Ins. Co.*, 238 S.W. 637 (Tex. Com. App. 1922); *LV State Antitrust Laws* (Martin ed. 1940). See *Beechley v. Mulville*, 102 Iowa 603, 70 N.W. 107, 109, *rehearing denied*, 71 N.W. 428 (1897); *Aetna Ins. Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624, 630 (1899); *American Fire Ins. Co. v. State*, 75 Miss. 24, 22 So. 99, 103 (1897) (dicta). Some authorities looked in the opposite direction: *Aetna Ins. Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624 (1899); *Board of Ins. Comm'rs v. Sproles Motor Lines*, 94 S.W.2d 769, 773 (Tex. Civ. App. 1936); *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S.W. 397, 404, 406 (1893); *Harris v. Commonwealth*, 113 Va. 746, 73 S.E. 561 (1912).

¹¹² *Patterson*, *The Insurance Commissioner in the United States* (1927).

¹¹³ *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 581 (1944), *reversing* 51 F. Supp. 712 (N.D. Ga. 1943).

¹¹⁴ *Id.* at 590.

¹¹⁵ McCarran Act of March 9, 1945 § 2(b), 59 Stat. 33, 15 U.S.C. § 1013(b) (1945). A brief history of the legislation will be found in Senate Committee on Judiciary, Subcommittee on Antitrust & Monopoly, *The Insurance Industry*, S. Rep. No. 1334, 86th Cong., 2d Sess., 2, 4 (1960).

¹¹⁶ *California League of Ins. Producers v. Aetna Cas. Co.*, 179 F. Supp. 65, 66 (N.D. Cal 1959); *United States v. New Orleans Ins. Exch.*, 148 F. Supp. 915, 922 (E.D. La. 1957).

formed to the requirements of the McCarran Act.¹¹⁷ Thus in anti-merger litigation brought under the federal laws at the present time, the defendant will rely on the existence of state regulation.

Whether that reliance is well-founded may depend upon what the word "regulated" in the McCarran Act means. In drafting the state legislation mentioned above, it was widely assumed that the federal exemption would apply if interventionist type legislation were in effect in the several states. Accordingly, most of the states undertook to regulate rates, to control the forms of policies and the like.¹¹⁸ For a time it appeared that the courts would regard such legislation as ample to bring the business within the scope of the McCarran Act exemption.¹¹⁹ And it was said that no particular amount of administrative activity upon the part of the states was required to bring the exemption into play; it sufficed if the enactment were on the state statute books.¹²⁰ More recently, however, the idea has arisen that regulation within the meaning of the McCarran Act must consist of antitrust type legislation. A recent district court case involving an acquisition makes that position abundantly plain. The court there wrote:

The respective states here involved have not acted pursuant to the McCarran Act empowering them to legislate on insurance matters, in that they do not have a provision precisely comparable to §7 [of the Clayton Act] proscribing acquisition of stock of another corporation. It is not sufficient that a state have legislated on other insurance or antitrust matters.¹²¹

¹¹⁷ Brook, *Public Interest and the Commissioners' All-Industry Laws*, 15 *Law & Contemp. Prob.* 606, 611 (1950); Donovan, *Regulation of Insurance Under the McCarran Act*, 15 *Law & Contemp. Prob.* 473, 485 (1950); Naujoks, *Eight Years After S.E.A.U.*, 35 *Marq. L. Rev.* 339, 354 (1952). Note the exemption contained in Merchant Marine Act § 29(b), relating to marine insurance.

¹¹⁸ Illinois Insurance Code § 454-56, Ill. Rev. Stat. ch. 73 § 1065; Naujoks, *supra* n. 117, at 351, 355.

¹¹⁹ Federal Trade Comm'n v. National Cas. Co., 357 U.S. 560 (1958). See California League of Ins. Producers v. Aetna Cas. Co., 175 F. Supp. 857, 860, 179 F. Supp. 65 (N.D. Cal. 1959) (dictum); Donovan, *supra* n. 117, at 490. *But cf.* SEC v. Variable Annuity Ins. Co., 359 U.S. 65 (1959) (narrow construction of statute).

¹²⁰ Federal Trade Comm'n v. National Cas. Co., 357 U.S. 560, 564-65 (1958).

¹²¹ United States v. Chicago Title & Trust Co., 242 F. Supp. 58, 60 (N.D. Ill. 1965).

When pressed by the defendants with the argument that insurance was regulated in the same manner as public utilities in the relevant states, the court rejected the argument and insisted that the exemption was not called into play unless there were specific anti-merger legislation of the type found in §7 of the federal Clayton Act.¹²² Since only a handful of states have enacted measures of that type, it is apparent that the decision in question, if followed by other courts, could effectively nullify the McCarran Act exemption.

Another difficulty with the exemption lies in the geographic scope of state regulatory power. It is clear that domiciliary states may exercise controls over insurance companies. Furthermore, nondomiciliary states may regulate foreign insurance companies who solicit business within the state only by mail.¹²³ Nevertheless, it has been held that the Federal Trade Commission has jurisdiction over activities in non-domiciliary states, the court saying that exemption requires regulation by those states who citizens are solicited to buy insurance.¹²⁴ It follows that the exemption may only apply when each state where business is done has a complete roster of antitrust statutes to meet the requirements of the McCarran Act.¹²⁵ Finally, to the extent that insurance business is done "in" interstate commerce and not merely within several states, state regulation may not suffice because of lack of state power over such interstate commerce.¹²⁶ At best, therefore, the states may have merely concurrent jurisdiction over the insurance business.¹²⁷ As in other fields, therefore, the courts seem bent on

¹²² *Id.* at 71, 72. *Knowlton, Jurisdiction of the FTC over Trade Practices of Insurers*, 1955 Ins. L.J. 673, 678.

¹²³ *Travelers' Health Ass'n v. Virginia*, 339 U.S. 643 (1950).

¹²⁴ *Federal Trade Comm'n v. Travelers' Health Ass'n*, 362 U.S. 293, 298 (1960); *Grand Jury Investigation, Aviation Insurance*, 183 F. Supp. 374, 380 (S.D. N.Y. 1960). *But cf. National Cas. Co. v. Federal Trade Comm'n*, 245 F.2d 883 (6th Cir. 1957).

¹²⁵ *American Hosp. Ins. Co. v. FTC*, 243 F.2d 719 (5th Cir. 1957), *aff'd per curiam*, 357 U.S. 560 (1958).

¹²⁶ *American Hosp. Ins. Co. v. FTC*, 243 F.2d 719 (5th Cir. 1957), *aff'd per curiam*, 357 U.S. 560 (1958); *United States v. Chicago Title & Trust Co.*, 242 F. Supp. 56, 70 (N. D. Ill. 1965) (*semble*); *Lilly, Insurance as Commerce*, 11 Md. L. Rev. 81, 97 (1950). *But cf. Grand Jury Investigation, Aviation Insurance*, 183 F. Supp. 374, 379 (S.D. N.Y. 1960).

¹²⁷ *American Hosp. Ins. Co. v. FTC*, 243 F.2d 719 (5th Cir. 1957), *aff'd per curiam*, 357 U.S. 560 (1958); *Knowlton, supra* n. 122, at 675 (contrary view). An interesting question arises as to how conflicts among the several states are to be resolved. *Brook, supra* n. 117, at 618. Some state statutes provide for

(Continued on next page)

asserting the supremacy of the federal antitrust laws over all other considerations of public policy. Legislation of other kinds is to be disregarded through the device of interpreting the McCarran Act as narrowly as possible.¹²⁸ Accordingly, at this writing, there may be no exemption from the federal anti-trust laws in favor of mergers among insurance companies.

Natural gas pipe lines. Under the provisions of §7 of the Natural Gas Act acquisitions by licensed pipe lines must be approved by the Federal Power Commission.¹²⁹ In passing upon such applications the Commission has been directed to take account of antitrust considerations on the ground that the public convenience and necessity includes the maintenance of competition. There has also been a hint that the Commission should assume a protectionist viewpoint in so doing.¹³⁰ In the leading case the Federal Power Commission approved the end-to-end merger of the El Paso and Pacific Northwest pipe lines.¹³¹ For that conduct the Commission was sternly rebuked by the United States Supreme Court.¹³² It noted that the Attorney General had instituted a proceeding under §7 of the Clayton Act before the Commission heard the merger application. While invited to do so, the Attorney General declined to participate in hearings before the Federal Power Commission. The district court continued the antitrust case pending resolution of the Federal Power Commission proceeding. The Supreme Court held that the Commission should not even have considered the application while the

(Footnote continued from preceding page)

reciprocity and retaliation, *e.g.*, Ill. Ins. Code §§ 443, 444, Ill. Rev. Stat. ch. 73 §§ 1055, 1056.

¹²⁸ Cf. *Wilburn v. Firemen's Fund Ins. Co.*, 348 U.S. 310, 319 (1955); *Dirlam & Stelzer, The Insurance Industry: A case Study in the Workability of Regulated Competition*, 107 U. Pa. L. Rev. 199, 214 (1958). As to the impact of state regulation, consult *Stelzer, The Insurance Industry and the Antitrust Laws*, 1955 Ins. L.J. 137, 151. In some old cases the recitals suggest the feasibility of price competition, *e.g.*, *Huston v. Rentlinger*, 91 Ky. 333, 15 S.W. 867 (1891). The contrary view is presented in *Stelzer, supra* at 141.

¹²⁹ Natural Gas Act § 7(c), 15 U.S.C. § 717(c) (1962).

¹³⁰ *California v. Federal Power Comm'n*, 369 U.S. 482, 484-85 (1962). The protectionist viewpoint is suggested by the citation therein of *City of Pittsburgh v. Federal Power Comm'n*, 237 F.2d 741 (D.C. Cir. 1956). Further proceedings in the last cited matter are reported as *Texas Eastern Transmission Corporation*, 19 P.U.R.3d 76 (F.P.C. 1957). The Federal Power Commission did not take a protectionist viewpoint therein (at 88-89).

¹³¹ *Pacific Northwest Pipeline Co.*, 31 P.U.R.3d 456, 461 (F.P.C. 1959).

¹³² *California v. Federal Power Comm'n*, 369 U.S. 482, 487-88 (1962).

complaint was pending in the courts.¹³³ The Commission was told that it had exceeded its jurisdiction and undertaken to decide a question which could only be determined by the federal courts. Here again, national policy, as expressed in decisions of the United States Supreme Court, appears to make the antitrust laws paramount over all other legislation. Section 7 of the Clayton Act expressly provided that it should not be applicable to transactions duly consummated pursuant to authority of the Federal Power Commission.¹³⁴ Notwithstanding the express language of the statute, which was disposed of through "interpretation,"¹³⁵ it was held that there was no exemption from the antitrust laws in favor of natural gas pipe line companies.¹³⁶ It follows that operators of gas pipe lines are fully subject to the anti-merger laws. They must apply to the Federal Power Commission for permission to make an acquisition but cannot do so if a complaint is pending in the district court under §7 of the Clayton Act or some other antitrust statute. It is not clear how long the parties to such a merger must wait for a complaint to be filed in the courts prior to the institution of an application before the Commission. Here again, we find an almost incredible situation in that the Federal Power Commission has been directed to consider antitrust issues but has no authority to decide such matters in a final manner.

Communications. Carriers by wire or radio are subject to interventionist regulation at the hands of the Federal Communications Commission and state agencies.¹³⁷ Under the terms of federal

¹³³ *Id.* at 490. wherein the Court wrote:

Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. . . . The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission.

But cf. *Interstate Natural Gas Co. v. Southern California Co.*, 209 F.2d 380, 385 (9th Cir. 1953).

¹³⁴ Clayton Act § 7(4), 15 U.S.C. § 18 (1914).

¹³⁵ *California v. Federal Power Comm'n*, 369 U.S. 482, 486-89 (1962).

¹³⁶ *Id.* at 485. *Accord*, *Columbia Gas & Elec. Corp. v. United States*, 151 F.2d 461 (6th Cir. 1945), *modification denied*, 153 F.2d 101 (6th Cir. 1946), *cert. denied*, 329 U.S. 737 (1946); *American Fuel & Power Co.*, 122 F.2d 223, 223 (6th Cir. 1941); *McClellan v. Montana-Dakota Util. Co.*, 95 F. Supp. 977 (D. Minn. 1951), *aff'd*, 204 F.2d 166 (8th Cir. 1953). *But cf.* *Panhandle E. Pipeline Co.*, 92 P.U.R. (n.s.) 370, 381-82 (Ill. 1951).

¹³⁷ Communications Act of 1934 § 205(a), 47 U.S.C. § 506(a); Public Utilities Act, Ill. Rev. Stat. ch. 111 ½, § 10.3 (1921).

legislation telephone and telegraph companies may consolidate only with approval of the Federal Communications Commission.¹³⁸ Similar controls exist in the states. Federal legislation contains an express exemption from application of the antitrust laws to mergers thus approved by the Commission¹³⁹ and, unlike some other express exemptions, this one appears not yet to have been interpreted away by the courts. Under state law the modern view is that acquisitions in the communications field are no longer subject to the antitrust laws and that commission approval suffices to validate such a transaction.¹⁴⁰ No major merger decision by the Federal Communications Commission has yet been reviewed by

¹³⁸ Communications Act of 1934 § 221, 47 U.S.C. § 522.

¹³⁹ *Id.* § 221(a). An interesting sidelight on the communications industry is afforded by the proceedings reported as *United States v. Western Elec. Co.*, CCH Trade Reg. Rep. (No. 17-49, consent decree) ¶ 68,246 (C.D. N.J. Jan. 24, 1956). The consent decree therein entered appears to recognize that the telephone business is regulated and not subject to the antitrust laws. Staff of Antitrust Subcommittee, House Comm. on the Judiciary, 86th Cong., 1st Sess., Report on Consent Decree Program of Dept. of Justice 317 (Comm. Print 1959).

¹⁴⁰ *State Pub. Util. Comm'n v. Romberg*, 275 Ill. App. 432, 114 N.E. 191 (1916). In that case the court said at 196:

The public policy of the State . . . is not opposed to the elimination of competition in all cases, but only applies where a monopoly, in the sense in which that word was used in the common law, would be thereby created. . . . No such consequences can follow the purchase by the American Company of a controlling interest in the Inter-State Company under the authority conferred upon it by the State Public Utilities act. The American Company will not by this purchase acquire the right to exclude any other person or corporation from engaging in the telephone business in the same field of operation, nor will it be within its power to arbitrarily limit the service to be furnished the public or fix the rates to be charged for the service rendered. The State possesses the right to exercise supervision over public utilities with reference to such matters, and has made provision for the exercise of such right through the State Public Utilities Commission. Instead of resulting in injury to the public, the tendency of the elimination of the Inter-State Company as a competitor of the Bell system would be to benefit the public.

The court went on to say at 196:

The interests of the public are not best served by competition in the telephone business, but by the consolidation and merger of the competing lines and regulation as to rate and service by the State or some agency thereof.

In the same vein are *Palmyra Tel. Co. v. Modesto Tel. Co.*, 336 Ill. App. 158, 164-65, 167 N.E. 860 (1929); *Mitchell v. Public Serv. Comm'n*, 276 Pa. 390, 120 Atl. 447 (1923); *Perry Tel. Co. v. Public Serv. Com'n*, 265 Pa. 274, 108 Atl. 659, 660 (1919); *McKinley Tel. Co. v. Cumberland Tel. Co.*, 152 Wis. 359, 140 N.W. 38 (1913). See *State ex rel. Thompson v. Nashville Ry. & Light Co.*, 151 Tenn. 77, 268 S.W. 120, 124 (1925) (dictum). In the older law the contrary view was often taken: *United States Tel. Co. v. Central Union Co.*, 171 Fed. 130, 146-47 (C.C.N.D. Ohio 1909), *aff'd*, 202 Fed. 66, 70 (6th Cir. 1913); *Dunbar v. American Tel. & Tel. Co.*, 238 Ill. App. 456, 485-86, 87 N.E. 521 (1909); *Cochranon Tel. Co. v. Public Serv. Comm'n*, 263 Pa. 506, 107 Atl. 23 (1919); *Jones v. Carter*, 45 Tex. Civ. App. 450, 101 S.W. 514 (1907).

the courts.¹⁴¹ In a leading case involving licensing of competitive service, however, the United States Supreme Court instructed the Commission that it was not to give much weight to antitrust considerations. Denying that competition of itself constituted a national policy in the communications field, the court went on to say:

The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications.¹⁴²

The court also said: "Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough."¹⁴³

Subsequently the Commission nevertheless granted a license for a competitive service and was sustained on appeal.¹⁴⁴ Most of the commentary on the communications industry has focused upon incorporation of manufacturing elements, and particularly Western Electric Company, into regulated utilities.¹⁴⁵ The problem of vertical integration in a controlled industry is, of course, different

¹⁴¹ A merger was approved in *New Jersey Bell Tel. Co.*, 9 F.C.C. 261, 267 (1943). Note that under the Communications Act of 1934 (§ 314) a wireless licensee is not authorized to acquire a telephone business if the effect is substantially to lessen competition.

¹⁴² *Federal Communications Comm'n v. R.C.A. Communications, Inc.*, 346 U.S. 86, 93 (1953). The court also said at 92:

Prohibitory legislation like the Sherman Law, defining the area within which 'competition' may have full play, of course loses its effectiveness as the practical limitations increase; as such considerations severely limit the number of separate enterprises that can efficiently, or conveniently, exist, the need for careful qualification of the scope of competition becomes manifest. Surely it cannot be said in these situations that competition is of itself a national policy. To do so would disregard not only those areas of economic activity so long committed to government monopoly as no longer to be thought open to competition, such as the post office . . . and those areas, loosely spoken of as natural monopolies or—more broadly—public utilities, in which active regulation has been necessary to compensate for the inability of competition to provide adequate regulation. It would most strikingly disregard not only those areas of economic activity so long committed on competition to one of providing relief from the rigors of competition, as has been true of railroads.

¹⁴³ *Id.* at 97. *Accord*: *Mackay Radio Co. v. Federal Communications Comm'n*, 97 F.2d 641, 643-44 (D.C. Cir. 1938).

¹⁴⁴ *R.C.A. Communications, Inc. v. Federal Communications Comm'n*, 238 F.2d 24, 27 (D.C. Cir. 1956), *cert. denied* 352 U.S. 1004 (1957).

¹⁴⁵ House Report on Consent Decree Program, *supra* note 139, ch. 2.

from that faced in the free sector of the economy.¹⁴⁶ Mergers in and of themselves have not aroused much comment.

Ocean carriers. Under the terms of the Shipping Act common carriers by water are subject to rate regulation at the hands of the Federal Maritime Commission.¹⁴⁷ While all contracts among ocean carriers must be filed with the Commission and are subject to its approval,¹⁴⁸ that section of the statute does not appear to contemplate that the Commission shall control mergers as such. Accordingly, acquisitions may be unregulated. At one time, it was widely thought that the Commission enjoyed primary jurisdiction over ocean carriers¹⁴⁹ but even that rule is now subject to doubt.¹⁵⁰ Accordingly, the anti-merger laws applicable in the free sector of the economy may be fully in effect with respect to ocean carriers despite the fact that any contract approved by the Commission is the subject of an express exemption.¹⁵¹ Actually, mergers and acquisitions do not appear to have been the subject of important litigation in this industry. Here the focal point has been the "dual rate" system and exclusion from "conferences" of carriers.¹⁵²

Organized exchanges. Under several federal statutes organized exchanges are subject to rigorous controls. Among those statutes are the Packers and Stockyards Act and the Securities Exchange Act.¹⁵³ Under both those statutes the controls over the exchanges and the members thereof are indeed extensive. Nothing therein, however, appears to apply to mergers among exchanges. The

¹⁴⁶ Sheahan, *Integration and Exclusion in the Telephone Equipment Industry*, 70 Q. J. Econ. 267 (1956). Cf. Averch & Johnson, *The Behavior of Firms under Regulatory Constraint*, 52 Am. Econ. Rev. 1052 (1962).

¹⁴⁷ Shipping Act § 18, 46 U.S.C. § 8.18 (1916). Controls over domestic water carriers are exercised by the Interstate Commerce Commission under the provisions of Interstate Commerce Act, Part III, 49 U.S.C. §§ 901-23.

¹⁴⁸ Shipping Act § 15, 46 U.S.C. § 8.15 (1916).

¹⁴⁹ *American Union Transp., Inc. v. River Plate Conference*, 126 F. Supp. 91, 93 (S.D. N.Y. 1954), *aff'd per curiam*, 222 F.2d 369 (2d Cir. 1955).

¹⁵⁰ *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 496 (1958); *Grand Jury Investigation, Shipping*, 186 F. Supp. 298, 308-09 (D.D.C. 1960); *Davis, Administrative Law Treatise* § 19.06 (1958).

¹⁵¹ Shipping Act § 15, 46 U.S.C. § 8.15 (1916). *But cf. California v. Federal Power Comm'n*, 369 U.S. 482 (1962); *Grand Jury Investigation, Shipping*, 186 F. Supp. 298, 307 (D.D.C. 1960). Note that Commission approval only extends to contracts among ocean carriers. A vertical merger might well not be preceded by such a contract.

¹⁵² *E.g., Isbrandtsen Co. v. United States*, 239 F.2d 933 (D.C. Cir. 1956), *aff'd*, 356 U.S. 481 (1958).

¹⁵³ *Packers and Stockyards Act* §§ 202, 305, 7 U.S.C. § 192 (1921); *Securities Exchange Act* §§ 6, 19, 15 U.S.C. §§ 78f, 78s (1934).

Packers and Stockyards Act specifically provides that both the Sherman Act and the Clayton Act shall not be deemed to have been repealed as to the persons controlled by it; but the Federal Trade Commission is ousted of its jurisdiction to the extent that similar powers are vested in the Secretary of Agriculture.¹⁵⁴ Nothing to that effect appears in the Securities Exchange Act and the leading case indicates that such exchanges are fully subject to the antitrust laws despite the plenary character of regulation existing in the Securities Exchange Commission.¹⁵⁵ While there appears to have been no litigation with respect to mergers of exchanges, the courts have expressly recognized that one exchange may be in competition with another (oddly enough coupling that assertion with the further statement that the exchange constituted a public utility subject to regulation).¹⁵⁶

Alcoholic beverages. Both at the federal and state level the business of distilling, brewing, distributing and retailing alcoholic beverages is subject to close controls. Several of the provisions of the Federal Alcohol Administration Act sound as if they were copied from the federal antitrust laws.¹⁵⁷ State legislation is frequently designed to enforce a rigid pattern of separation among the several vertical layers of the industry. Thus under the Illinois statute direct sales from distillers to retailers are prohibited and the services of an independent wholesaler are made mandatory.¹⁵⁸ No specific provisions appear with respect to mergers. Prior to the enactment of modern liquor legislation, following repeal, the state courts held that combinations and acquisitions were subject to

¹⁵⁴ Packers and Stockyards Act §§ 405, 406, 7 U.S.C. §§ 206, 207 (1921). Cf. *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). A case of considerable interest is *United States v. Swift & Co.*, 46 F. Supp. 848, 850 (D. Colo. 1942), *remanded on other grounds*, 318 U.S. 442 (1943). There the meat packers were indicted for allegedly agreeing to buy land only at the Denver market. Noting that the market was regulated, the court held the indictment insufficient but did not comment directly on the conflict between regulation and the Sherman Act.

¹⁵⁵ *Silver v. New York Stock Exch.*, 196 F. Supp. 209, 220 (S.D. N.Y. 1961), *aff'd*, 373 U.S. 341 (1963).

¹⁵⁶ *Denver Union Stockyard Co. v. Producers Livestock Marketing Ass'n*, 356 U.S. 282, 288, 289 (1958). Several interesting cases have concerned the allocation of selling time at tobacco auctions by local boards of trade. E.g., *Asheville Tobacco Bd. of Trade v. Federal Trade Comm'n*, 263 F.2d 502, 509-11 (4th Cir. 1959). Some light on the relationship between the investment banking business and regulation under the federal securities law is shed by *United States v. Morgan*, 118 F. Supp. 621, 691, 693, 697 (S.D. N.Y. 1933).

¹⁵⁷ Federal Alcohol Administration Act §§ 5(a), 8, 27 U.S.C. §§ 205, 208 (1935).

¹⁵⁸ Alcoholic Liquors §§ 1, 3, Ill. Rev. Stat. ch. 43, §§ 96, 115, 121(e).

antitrust or common law provisions of the same kind.¹⁵⁹ Since then, there appears to have been no significant litigation with respect to mergers but in several cases, without even pausing to examine the effect of regulation, the federal courts have held that the antitrust laws apply to other aspects of the conduct of persons in the alcoholic beverage industry.¹⁶⁰ Occasionally, the courts have suggested that the detailed prescriptions of the interventionist regulation make it impossible to apply antitrust principles,¹⁶¹ but the weight of authority is to the contrary. It therefore appears that mergers in this industry will be governed by the principles applicable in the free sector of the economy.

Gas distribution. Supplying gas to industrial, commercial and residential patrons through mains is an old and closely regulated business. Almost all states regulate that industry through commissions and the organic statutes frequently provide for commission approval of mergers, acquisitions and consolidations.¹⁶² Before enactment of such legislation it was common to hold that antitrust principles applied to the gas distribution business. A colorful decision with respect to the consolidation of rival gas companies in the city of Chicago held such conduct unlawful, saying:

Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy.¹⁶³

In such opinions the view often expressed was that antitrust principles should be applied more stringently to public utility

¹⁵⁹ *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N.W. 155 (1890). See *Dittman v. Distilling Co.*, 64 N.J. Eq. 537, 54 Atl. 570, 573 (1903) (dictum).

¹⁶⁰ *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945); *United States v. Erie County Malt Beverage Ass'n*, 264 F.2d 731, 733 (3rd Cir. 1959); *Washington Brewers Institute v. United States*, 137 F.2d 964, 968 (9th Cir. 1943), *cert. denied*, 320 U.S. 776 (1943) (This opinion, however, contains language indicating that exemption is a possibility); *United States v. United Liquors Corp.*, 149 F. Supp. 609 (W.D. Tenn. 1956), *aff'd per curiam*, 352 U.S. 991 (1957).

¹⁶¹ *Dundalk Liquor Co. v. Tawes*, 201 Md. 58, 92 A.2d 560, 564 (1953); *United States v. Maryland State License Ass'n, Inc.*, 138 F. Supp. 685, 699-700 (D. Md. 1956).

¹⁶² Public Utilities Act, Ill. Rev. Stat. ch. 111 2/3, § 22 (1921).

¹⁶³ *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. App. 268, 293, 22 N.E. 798 (1889).

companies than to those in the free sector of the economy.¹⁶⁴ Now that almost all states have enacted regulatory statutes it is highly doubtful whether the same result would be achieved. In other words, it is believed that gas distribution companies are exempt from the operation of state antitrust laws insofar as mergers and acquisitions are concerned.¹⁶⁵ Since gas distribution is largely a local activity it is unlikely that federal legislation would be applied to them.¹⁶⁶

Generation and distribution of electricity. As in the case of gas utilities, electric generating and distributing companies are thoroughly regulated both at the federal and state level. The federal statute expressly refers to mergers and acquisitions¹⁶⁷ and similar provisions frequently appear in state legislation.¹⁶⁸ At the federal level it appears that the Federal Power Commission enjoys primary jurisdiction over electric utilities¹⁶⁹ but that nevertheless such companies remain open to some types of antitrust

¹⁶⁴ *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396, 408-09 (1889). Cf. *McKinny v. Kansas Natural Gas Co.*, 206 Fed. 772, 777 (D. Kan. 1913); *City of Okmulgee v. Okmulgee Gas Co.*, 140 Okla. 88, 282 Pac. 640, 650-51 (1939); *People v. Union Gas Co.*, 254 Ill. App. 395, 409, 412, 98 N.E. 768 (1912) (dictum). In another case the court appeared to find no exemption for a gas distribution system from a statute which only forbade monopoly pricing. *Gathright v. H. M. Byllesby & Co.*, 154 Ky. 106, 154 S.W. 45, 55 (1913).

¹⁶⁵ *Attorney Gen. v. Consolidated Gas Co.*, 124 App. Div. 401, 108 N.Y. Supp. 823 (1908). In that case the court said at 826:

That a single company thus regulated by law as to price and production does not offend against the anti-monopoly laws, even although its field of operation extends over a whole city, seems to be quite clear. Competition between two or more companies, each occupying exclusively a separate field of operation, which would benefit no one. A competition which would operate to reduce prices must be between companies occupying the same field, and, while the consolidation of control effected by the purchases of stock in other companies by the Consolidated Company does not necessarily prevent such competition, it is the settled policy of the state to discourage competition of this character. . . .

Cf. *Rafferty v. Buffalo City Gas Co.*, 37 App. Div. 618, 56 N.Y. Supp. 288, 291 (1899); *State ex rel. Thompson v. Nashville Ry. & Light Co.*, 151 Tenn. 77, 268 S.W. 120, 124 (1925) (dictum). There is often an express exemption for mergers approved by a commission. E.g., *Public Utilities Act*, Ill. Rev. Stat. ch. 111 2/3, § 27 (1921). There has also been legislation specifically permitting the consolidation of gas companies. *People ex rel. Deneen v. Peoples Gas, Light & Coke Co.*, 205 Ill. App. 482, 68 N.E. 950 (1903).

¹⁶⁶ *Thomason v. United Gas Pub. Serv. Co.*, 20 F. Supp. 598, 599 (W.D. La. 1937), *aff'd*, 98 F.2d 526 (5th Cir. 1938).

¹⁶⁷ *Federal Power Act* §§ 8, 203, 16 U.S.C. §§ 801 (1920), 824(b) (1935).

¹⁶⁸ Ill. Rev. Stat. ch. 111 2/3, § 27(d) (1921); *Twentieth Century Fund, Electric Power and Government Policy* 254 (1948).

¹⁶⁹ *Pennsylvania Water & Power Co. v. Federal Power Comm'n.*, 343 U.S. 414, 422-24 (1952).

litigation.¹⁷⁰ If the Federal Power Commission enters an order, however, the fact that the conduct so prescribed might otherwise violate the antitrust laws will be disregarded.¹⁷¹ Similar rules appear to apply in the states¹⁷² and there is nothing to indicate that state commissions discourage mergers; on the contrary they appear to encourage them.¹⁷³

A landmark of electric utility control is the Public Utility Holding Company Act of 1935. That legislation was designed to break up electric utilities into smaller and geographically cohesive units.¹⁷⁴ And while under state law the combining of different forms of utility service (gas, electricity, water, heat and the like) is not discouraged,¹⁷⁵ the Securities and Exchange Commission in administering the Holding Company Act frequently required the separation of electric from gas and other utilities.¹⁷⁶ Thus while there has been little litigation of the conventional anti-merger type we have seen a considerable disintegration of electric companies under the impact of the holding company statute. To some extent, of course, that disintegration has been costly in that economies of scale may have been sacrificed. Contractual arrangements for interconnection of the companies

¹⁷⁰ *Pennsylvania Water Co. v. Consolidated Gas Co.*, 184 F.2d 552 (4th Cir. 1950), *cert. denied*, 340 U.S. 906 (1950), 186 F.2d 934 (4th Cir. 1951).

¹⁷¹ *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414, 421-22 (1952). *Cf. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 252-53 (1951). A different view with respect to the same utility company was expressed in *Montana-Dakota Util. Co. v. Williams Cooperative*, 263 F.2d 431, 433, 436 (8th Cir. 1959).

¹⁷² *Phelan v. Edison Elec. Co.*, 24 Misc. 109, 53 N.Y. Supp. 305 (1898); *York Haven Water Co. v. Public Serv. Comm'n*, 287 Pa. 241, 134 Atl. 419 (1926); *Motter v. Kennett Elec. Co.*, 212 Pa. 613, 62 Atl. 104 (1905). Sometimes state statutes contain an express exemption. *E.g.*, Public Utilities Act, Ill. Rev. Stat. ch. 111 3/4, § 27 (1921). Contrary results were reported in *Keene Syndicate v. Wichita Power Co.*, 69 Kan. 284, 76 Pac. 834 (1904); *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S.W. 289, 293 (1899).

¹⁷³ *In re Scranton Elec. Co.*, 13 P.U.R.3d 552 (F.P.C. 1956); *Puget Sound Power & Light Co.*, 100 P.U.R. (n.s.) 129 (Wash. 1953); *In re Pennsylvania Water and Power Co.*, 9 P.U.R.3d 167 (F.P.C. 1955); McDonald, *Let There Be Light: The Electric Utility Industry in Wisconsin, 1881-1955*, 94 (1957); *Twentieth Century Fund*, *op. cit. supra* n. 168, at 342.

¹⁷⁴ Public Utility Holding Company Act § 1(b), 15 U.S.C. § 79 (1935).

¹⁷⁵ *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930), *opinion revised*, 282 U.S. 187, *per curiam*, (1930); *People ex rel. Municipal Gas Co. v. Rice*, 138 N.Y. Civ. Proc. 151, 33 N.E. 846, 848 (1893); *Motter v. Kennett Elec. Co.*, 212 Pa. 613, 62 Atl. 104 (1905); *Troxel*, *Economics of Public Utilities* 202-03 (1947).

¹⁷⁶ *Louisiana Gas Serv. Co.*, 21 P.U.R.3d 463, 470-71 (SEC 1957); *In re Electric Bond and Share Co.*, 95 P.U.R. (n.s.) 259 (SEC 1952); *In re New England Electric System*, 88 P.U.R. (n.s.) 47 (SEC 1951); *Lynn Gas & Electric Co.*, 31 P.U.R.3d 209, 212 (Mass. Dept. Pub. Util. 1959).

are now replacing the older linkage through mergers and holding companies. Again, whether prohibition by the SEC of the combination of gas, electric and similar services in a single company has been beneficial may also be questioned.¹⁷⁷

Local transit. While streetcars, buses and taxis are extensively controlled at the state or local level, there appears to be no anti-trust exemption in their favor within the federal system.¹⁷⁸ On the other hand, most such services are local in character and will be controlled by state law.¹⁷⁹ Here the weight of authority indicates that regulation has supplanted competition and suggests that mergers will be valid even though they might otherwise violate anti-merger statutes.¹⁸⁰

Regulated industries in perspective. Given the penchant of the United States Supreme Court for declaring anti-trust policy to override all other considerations, statutory or otherwise, it appears likely that only an express exemption will free regulated businesses from the full impact of the anti-merger legislation for the free sector of the economy.¹⁸¹ The wisdom of any such rule is, of course, open to question. If regulation is pervasive in character there would seem no need to attack mergers; indeed, perhaps mergers should be encouraged. There also appears to be a trend among regulatory tribunals toward the approval of mergers un-

¹⁷⁷ Troxel, *Economics of Public Utilities* 207 (1947). Cf. Cramton, *Diversification of Ownership in the Regulated Industries*, 19 A.B.A. Rep. (Anti-trust Sect.) 362, 373 (1961). Little authority has been found with respect to water companies. The two cases discovered suggest that mergers are not subject to the antitrust laws. *Cameron v. New York Water Co.*, 133 N.Y. Civ. Proc. 336, 31 N.E. 104 (1892); *State ex rel. Thompson v. Nashville Ry & Light Co.*, 151 Tenn. 77, 268 S.W. 120, 124 (1925) (dictum).

¹⁷⁸ *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), 80 F. Supp. 936 (N.D. Ill. 1948), *aff'd*, 338 U.S. 338 (1949).

¹⁷⁹ *Id.* at 230, 231.

¹⁸⁰ *Continental Sec. Co. v. Interborough Co.*, 207 Fed. 467 (S.D. N.Y. 1913); *Venner v. Chicago C. Ry.*, 258 Ill. App. 523, 101 N.E. 949, 955 (1913); *Wood v. Seattle*, 23 Wash. 1, 62 Pac. 135, 142 (1900). See *State ex rel. Thompson v. Nashville Ry. & Light Co.*, 151 Tenn. 77, 268 S.W. 120, 124 (1925) (dictum). Cf. *Capitol Taxicab Co. v. Cermak*, 60 F.2d 608, 612 (N.D. Ill. 1932); *Yellow Cab Co. v. City of Chicago*, 396 Ill. App. 388, 71 N.E.2d 652, 657-58 (1947). See also *People v. City of Chicago*, 349 Ill. App. 304, 326, 182 N.E. 419 (1932) (dictum). Several state statutes, however, were specifically directed at street railroads. *LIV State Antitrust Laws* (Martin ed. 1940). Some decisions also look in that direction. *North Little Rock Co. v. City*, 207 Ark. 976, 184 S.W.2d 52, 55 (1945); *Southern Elec. Sec. Co. v. State*, 91 Miss. 195, 44 So. 785 (1907). Cf. *Scott v. Farmers & Merchants Bank*, 97 Tex. Civ. App. 31, 75 S.W. 7, 16 (1903) (dictum).

¹⁸¹ E.g., *California v. Federal Power Comm'n*, 369 U.S. 482 (1962).

less other members of the industry may be injured thereby. In other words, the commissions are apt to protect existing firms against stronger competition. Here again, consumers may well be losers.¹⁸² To the extent that there are elements of indivisibility in regulated business (and the coming of electronic data processing may have a bearing on that subject) it would seem desirable to encourage mergers in pervasively regulated industries.

¹⁸² Hale & Hale, *Mergers in Regulated Industries*, 59 Nw. U.L. Rev. 49, 61 (1964). A different view is suggested in Hall & Phillips, *Antimerger Criteria: Power, Concentration, Foreclosure and Size*, 9 Vill. L. Rev. 211, 228 (1964). Those authors take the position that the courts may consider "performance" criteria in regulated industries as opposed to relying solely on "measures of concentration."