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The Antitrust Division, Department of Justice—The Role of Competition in Regulated Industries

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THE ANTITRUST DIVISION, DEPARTMENT OF JUSTICE: THE ROLE OF COMPETITION IN REGULATED INDUSTRIES

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Antitrust—“our own, American form of nonplanning by Government action”¹—enforces a commitment to “competition [as] our fundamental national economic policy.”² However, antitrust has not traditionally been a major factor in most sectors of the American economy subject to direct government regulations. In such industries as communications, transportation and finance there has been little, if any, active effort to promote competition. Instead, traditionally there has been a tendency to protect regulated monopolists from outside competition, and a willingness to tolerate restrictive practices ancillary to basic monopoly.³ The premise of regulation has been that governmental supervision is a sufficient method to secure reasonable economic performance by regulated enterprises.⁴ In recent years, however, the less than fully satisfactory economic performance of

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The views expressed are those of the author and do not necessarily represent the position of the Antitrust Division. The author gratefully acknowledges the assistance of Kenneth G. Robinson (also of the Evaluation Section, Antitrust Division) in preparing this paper.

¹ Fortas, Portents of New Anti-trust Policy, 10 Antitrust Bull. 41, 42 (1965).

² United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963).

³ See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws 269 (1955); Adams, Business Exemptions from the Antitrust Laws: Their Extent and Rationale, Perspectives on Antitrust Policy 273 (Phillips ed. 1965). Adams leaves no doubt as to his conclusion: “In industry after industry, regulatory rulemaking and adjudication, operating within a broad delegation of discretion and reinforced by Congressional tolerance or support, have resulted in the elimination of both actual and potential competition.” Id.

⁴ See, e.g., Economic Report of the President 107 (1970).

many, if not most, of the regulated industries has given rise to criticism of, and a challenge to, the premise supporting governmental regulation.⁵ A recurring theme in this criticism has emphasized the reluctance of regulators to utilize competition as a means of encouraging economic performance, thus permitting unnecessary inefficiency to be imposed on the economy.⁶ The Antitrust Division has come into this situation as an outsider with a visible commitment to competition, and significant responsibilities as an enforcer of the antitrust laws and as an advocate for competitive policies. Its role has been to stress the necessity for competition as a source of efficiency and innovation by regulated enterprises in a wide variety of circumstances in which competition and specific regulatory goals are not incompatible.

I. THE ANTITRUST DIVISION

A. *Organization and Responsibilities*

The Antitrust Division, the largest of the ten divisions of the Justice Department, is the executive agency responsible for antitrust enforcement. Its professional staff, headed by an Assistant Attorney General, consists of approximately 280 lawyers and economists grouped in ten sections in Washington⁷ and seven regional field offices around the country.⁸ It has an annual budget of about eight million dollars—a figure considerably below that for most regulatory agencies.⁹

The Division's mandate covers a variety of statutory provisions

⁵ Presidential Task Force, Report on Productivity and Competition, (Stigler Report) (Feb. 8, 1969) 115 Cong. Rec. S 6473 (daily ed. June 16, 1969). (Senator Talmadge requested that this unpublished report be printed in the Record.) (5 Trade Reg. Rep. ¶ 50,250.)

⁶ See L. Kohlmeir, *The Regulators* (1969); Posner, *Natural Monopoly and Its Regulation*, 21 *Stan. L. Rev.* 548 (1969); Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 *Harv. L. Rev.* 1207 (1969). This current criticism reflects part of a continuing theme. These writers also criticize the inefficiency of overly comprehensive and detailed regulations. They point out, among other things, that such regulation creates two layers of management, the executives of the regulated firms and the public officers charged with supervising them. This situation tends to produce duplication of effort and enhances the tendency of the regulators to adopt the views of "their" industry. See also *Economic Report of the President*, 107-10 (1970).

⁷ The sections are: Appellate, Economic, Evaluation, Foreign Commerce, General Litigation, Judgments & Judgment Enforcement, Public Counsel, Special Litigation, Special Trial, and Trial. Most of the Antitrust Division's activities before regulatory commissions, discussed below, have been undertaken by the Public Counsel and Evaluation sections.

⁸ These offices are located in New York, Philadelphia, Atlanta, Cleveland, Chicago, San Francisco and Los Angeles. In addition, some local antitrust violations are handled by the various United States Attorney's offices acting under the general direction of the Antitrust Division.

⁹ This Division in some years returns more in fines than its cost of operation.

designed to promote competition. It is exclusively responsible for the enforcement of the civil and criminal provisions of the Sherman Act,¹⁰ and it shares enforcement of the Clayton Act with the Federal Trade Commission.¹¹ The great bulk of its enforcement activity is concerned with specific anticompetitive practices such as price-fixing, group boycotts and tying arrangements, and with mergers which produce less competitive market structures.

Section 1 of the Sherman Act¹² provides the basic weapon against anticompetitive business practices. Tempered by the hands of generations of judges and enforcers, it now covers not only such basic restraints as price-fixing¹³ and market allocation,¹⁴ but many more subtle restraints, including implied tie-ins¹⁵ and patent licensing restraints.¹⁶ Section 1 has been supplemented by Section 3 of the Clayton Act¹⁷ which specifically prohibits tie-ins and exclusive dealing arrangements concerning tangible goods. The greater showing of anticompetitive injury thought to be required by the Sherman Act¹⁸ has largely been eliminated, as the Supreme Court's more recent decisions reflect a strong tendency to assimilate the stricter Clayton Act standards into the Sherman Act.¹⁹

¹⁰ 15 U.S.C. §§ 4, 9 (1964).

¹¹ 15 U.S.C. § 21 (1964). The use of § 5 of the Federal Trade Commission Act to supplement Clayton and Sherman Act civil charges is long-standing. *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965).

¹² 15 U.S.C. § 1 (1964). Section 1 provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . ."

¹³ See, e.g., *United States v. Container Corp. of America*, 393 U.S. 333 (1969); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956).

¹⁴ See, e.g., *Burke v. Ford*, 389 U.S. 320 (1967); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹⁵ See, e.g., *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969); *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, 83 F.2d 764 (6th Cir. 1936).

¹⁶ See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969).

¹⁷ 15 U.S.C. § 14 (1964). Section 3 provides:

It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . , or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition . . . that the lessee or purchaser . . . shall not use or deal in the goods . . . of a competitor. . . .

See *Blake & Jones, Toward a Three-Dimensional Antitrust Policy*, 65 *Colum L. Rev.* 422, 433-36 (1965).

¹⁸ See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609-10 & n.27 (1953). See also *Blake & Blum, Network Television Rate Practices: A Case Study in the Failure of Social Control of Price Discrimination*, 74 *Yale L.J.* 1339, 1383-85 (1965).

¹⁹ See, e.g., *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 (1958); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (tying arrangements); cf. *United States v. First Nat'l Bank & Trust Co.*, 376 U.S. 665 (1964) (mergers).

The principal weapons for dealing with market power and structure are Section 2 of the Sherman Act²⁰ and Section 7 of the Clayton Act.²¹ Section 2 is aimed at monopoly power within defined product markets. It outlaws anticompetitive attempts to acquire such power and probably outlaws the exercise of such power unless it is attributable solely to the defendant's skill, foresight, and industry.²² Relatively few government antitrust cases have been brought under section 2, and it has not yet proved a conspicuously successful antitrust tool. The same cannot be said of Section 7 of the Clayton Act. Since it was extensively amended in 1950, it has become an extremely effective antitrust enforcement weapon for dealing with changes in market structures. The government has secured an almost unbroken string of victories before the Supreme Court in merger cases under this section.²³ As a result, section 7 now bars almost any significant horizontal merger between direct competitors,²⁴ or vertical mergers involving any significant market foreclosure.²⁵ It also prevents conglomerate mergers involving diminution of potential competition,²⁶ creation of dangers of reciprocity,²⁷ and certain other anticompetitive effects.²⁸

These few statutory tools, and the competitive policies which lie behind them, increasingly have been applied by the Antitrust Division in the field of regulated industries. These efforts involve direct anti-

²⁰ 15 U.S.C. § 2 (1964). Section 2 provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . .

²¹ 15 U.S.C. § 18 (1964). Section 7 provides in relevant part:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

²² See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *Turner, Antitrust Policy and the Cellophane Case*, 70 Harv. L. Rev. 281 (1956).

²³ Justice Stewart emphasized this point in his dissenting opinion in *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966).

²⁴ *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

²⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Kennecott Copper Co.*, 321 F. Supp. 95 (S.D.N.Y. 1964), *aff'd*, 381 U.S. 414 (1965).

²⁶ *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

²⁷ *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966); *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa. 1963), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

²⁸ *Ekco Products Co. v. FTC*, 347 F.2d 745 (7th Cir. 1965); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543 (N.D. Ill. 1968).

trust enforcement action against regulated enterprises as well as advocacy of competitive policies before the various regulatory agencies; they appear to have produced a greater awareness of competitive issues on the part of at least some of those charged with regulatory responsibility.

B. *The Law Enforcement Role*

The Antitrust Division traditionally has brought both civil and criminal antitrust cases against regulated enterprises. These actions have challenged both particular anticompetitive conduct proscribed by Sections 1 and 2 of the Sherman Act, and merger transactions proscribed by Section 7 of the Clayton Act. Some of the merger cases have involved challenges to transactions already approved,²⁹ or subject to approval,³⁰ by the appropriate regulatory commission.

1. Anticompetitive Conduct

Several relatively recent antitrust cases have involved anticompetitive agreements among members of a regulated industry. None of the agreements had prior approval by a regulatory agency. In 1961 and 1963 the Department brought three sets of cases against commercial banks in New Jersey and Minnesota for price-fixing of bank loans and services.³¹ The Minnesota cases included criminal indictments. Similarly, in 1969 the Division challenged the collective action of a group of private utilities in refusing to sell wholesale power to municipalities or to wheel wholesale power from generating plants of other companies to such municipalities.³² This conduct, it was alleged, constituted a group boycott and an attempt to monopolize the retail distribution of electric power, in violation of Sections 1 and 2 of the Sherman Act. However, since none of these overtly anticompetitive agreements had been approved by a regulatory agency, these antitrust actions raised no direct conflict or questions of accommodation between antitrust prohibitions and the regulatory scheme.³³

²⁹ See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (involving prior approval by the Comptroller of the Currency).

³⁰ See *California v. FPC*, 369 U.S. 482 (1962) (staying FPC consideration of a pipeline merger during the pendency of a government antitrust suit challenging it).

³¹ *United States v. Hunterdon County Trust Co.*, Civ. 1100-61 (Blue Book No. 1639) (D.N.J., filed Dec. 26, 1961); *United States v. Duluth Clearing House Ass'n.*, Cr. 5-63, Cr. 6; *United States v. First Nat'l Bank*, Cr. 3-63, Cr. 8; *United States v. Northwestern Nat'l Bank*, Civ. 4-63, Civ. 52; *United States v. First Nat'l Bank*, Civ. 3-63, Civ. 37; *United States v. Duluth Clearing House Ass'n* Civ. 5-63, Civ. 4; (Blue Book Nos. 1734-1739) (D. Minn., filed Feb. 8, 1963).

³² *United States v. Otter Tail Power Co.*, Civ. No. 6-69, Civ. 139 (Blue Book No. 2065) (D. Minn., filed July 14, 1969).

³³ Cf. *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), where a private

2. Mergers

The Antitrust Division has not always been able to avoid such conflict. A considerable number of antitrust suits under Section 7 of the Clayton Act and Section 1 of the Sherman Act challenging mergers involving regulated enterprises have been brought. These cases, involving commercial banks, natural gas pipelines, and broadcast interests, generally represent a subsequent antitrust challenge to a merger transaction requiring agency approval.³⁴ Additionally, in those situations where the approving agency (typically the Interstate Commerce Commission) has statutory authority to immunize a merger from antitrust challenge, the Antitrust Division may litigate the matter before the Commission and appeal adverse determinations.³⁵

The Antitrust Division's role as a litigant has developed most fully in the bank merger field, following the Supreme Court's landmark 1963 decision in the *Philadelphia Nat'l Bank* case.³⁶ Subsequent to this decision, Congress enacted the Bank Merger Act Amendments³⁷ of 1966 as an attempt to accommodate the antitrust and regulatory policies in the banking field, while minimizing the troublesome problems of divestiture. The special rules and procedures of this Act make provisions for subsequent antitrust challenge of agency-approved bank mergers,³⁸ but require that the Department of Justice file suit within 30 days,³⁹ and make the antitrust action subject to a special "convenience and needs" defense.⁴⁰ In addition, the 1966 Act provides for a special statutory stay to prevent consummation of the

antitrust plaintiff's charge that the New York Stock Exchange had engaged in an illegal boycott was upheld in part on the ground that the challenged conduct was not subject to Securities and Exchange Commission supervision under the Securities Exchange Act of 1934.

³⁴ See the leading cases of *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (commercial banks); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (natural gas pipelines); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) (broadcast license transfer).

³⁵ See, e.g., *The Northern Line Merger Case*, 396 U.S. 491 (1970), where the Antitrust Division was unsuccessful in blocking an ICC-approved rail merger. This same approach has been taken by the Antitrust Division in at least one case where the regulatory commission did not have the authority to immunize the transaction. In the FCC's *ABC-ITT* case, *American Broadcasting Co.*, 7 F.C.C.2d 245 (1966), 9 F.C.C.2d 546 (1967), the Antitrust Division intervened before the Commission and took an appeal from its adverse decision, rather than file a separate antitrust action. The merger was abandoned while the appeal was pending in the District of Columbia Circuit.

³⁶ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

³⁷ 12 U.S.C. § 1828(c) (Supp. IV, 1969).

³⁸ 12 U.S.C. § 1828(c)(7) (Supp. IV, 1969).

³⁹ 12 U.S.C. § 1828(c)(7)(C) (Supp. IV, 1969).

⁴⁰ 12 U.S.C. § 1828(c)(5)(B) (Supp. IV, 1969).

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merger during the litigation.⁴¹ It also requires that the banking agencies apply an antitrust competitive standard in approving bank mergers.⁴² However this step does not seem to have influenced the Comptroller of Currency⁴³ in producing harmonization of standards. For example, from January, 1966 through July, 1968, the Federal Reserve Board and the Antitrust Division advised of serious anti-competitive effects in connection with 94 proposed mergers pending before the Comptroller and the Federal Deposit Insurance Corporation (of which the Comptroller is one of three directors). The Comptroller and the FDIC issued denials in only three of these cases. Ten others were stayed by antitrust suits filed by the Department of Justice and all but one of these involved approvals by the Comptroller.

A key issue in the post-1966 bank merger litigation has been to define the scope of the "convenience and needs" defense provided in the 1966 Act. The statute provides that a bank merger inconsistent with section 7 is illegal "unless . . . the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."⁴⁴ The banks and the Comptroller have unsuccessfully urged a very expansive reading of this provision. On the other hand, the Antitrust Division has urged a limited construction, in accordance with the normal treatment of antitrust defenses.

The latter approach has generally prevailed in the Supreme Court. In its 1967 *First City Nat'l Bank* decision,⁴⁵ the Court emphasized that the non-competitive benefits must "clearly" outweigh the loss of competition,⁴⁶ and it placed the burden of proving the defense on the defendant banks. The next year, in *United States v. Third Nat'l Bank*,⁴⁷ the Court construed the statute as requiring affirmative proof that the "merger was essential to secure this net gain to the public interest."⁴⁸ It specifically placed on the defendant banks the

⁴¹ 12 U.S.C. § 1828(c)(7)(A) (Supp. IV, 1969).

⁴² 12 U.S.C. § 1828(c)(5)(B) (Supp. IV, 1969).

⁴³ The Comptroller of the Currency is responsible for all mergers in which the resulting institution is a national bank, the Board of Governors of the Federal Reserve System for all mergers in which the resulting institution is a state bank member of the Federal Reserve System, and the Federal Deposit Insurance Corporation for all mergers in which the resulting institution is a federally insured state bank outside the Federal Reserve System.

⁴⁴ 12 U.S.C. § 1828(c)(5)(B) (Supp. IV, 1969).

⁴⁵ *United States v. First City Nat'l Bank*, 386 U.S. 361 (1967).

⁴⁶ *Id.* at 370.

⁴⁷ 390 U.S. 171 (1968).

⁴⁸ *Id.* at 189.

burden of demonstrating the unavailability of measures falling short of merger, for "[o]therwise, the benefits of competition, acknowledged by Congress, would be sacrificed needlessly."⁴⁹ Thus the Supreme Court has reaffirmed that the primary public need is for competitive banking structures.⁵⁰

C. *The Role as Advocate for Competitive Policy*

In the last three years the Antitrust Division has appeared with increasing frequency as an advocate for competitive policies in a wide range of regulatory proceedings. This represents an extension of its traditional role as litigant before the agencies and the appellate courts in transportation merger cases where agency approval carried with it an antitrust exemption. It also represents an extension of its role as special adviser on competitive effects under the Bank Merger Act of 1960.⁵¹

The Division's role as an advocate for competition has covered mergers, market structures, and specific anticompetitive practices in a variety of industries, including broadcasting, communications, securities, and air transportation.

1. Broadcasting

In this industry "the principle of free competition"⁵² has long been recognized and yet not been widely implemented by a Federal Communications Commission seemingly concerned primarily with financial capability as the prime determinant in broadcast licensing.⁵³ As a result, most local media markets have been highly concentrated in structure, with frequent cross-ownership arrangements between local newspapers, television and radio stations, while national networking has been limited to three alternatives.

Beginning with the celebrated *ABC-ITT* case in 1967,⁵⁴ the Antitrust Division has appeared frequently before the FCC urging more competitive policies in broadcasting. *ABC-ITT* was in form a license transfer proceeding under the Federal Communications Act; in fact,

⁴⁹ *Id.*

⁵⁰ See *Via, Antitrust and the Amended Bank Merger and Holding Company Acts*, 53 Va. L. Rev. 1115, 1131 (1967). See pp. 584-86 *infra*, for full discussion of the significance of the premise in favor of competition.

⁵¹ The Act required the Department to file a report on the competitive effect of each bank merger with the federal banking agency having jurisdiction over the merger; this was based on the premise that the Department had some expertise in measuring competition, and the more doubtful (as it turns out) premise that such reports would reduce policy conflicts between the Department and the regulatory agencies.

⁵² See, e.g., *FCC v. Sanders Radio Station*, 309 U.S. 470, 474 (1940).

⁵³ See generally Note, *Diversification in Communication: The FCC and its Failing Standards*, 1969 Utah L. Rev. 494.

⁵⁴ *American Broadcasting Co.*, 7 F.C.C.2d 245 (1966).

it was a conglomerate acquisition by International Telephone and Telegraph of American Broadcasting Company, the nation's third largest network. After the FCC had granted a routine approval in late 1966,⁵⁵ the Antitrust Division entered the proceeding and moved for a rehearing. It urged that the elimination of ITT as a potential entrant into networking was significantly anticompetitive and hence warranted Commission disapproval. While the Commission set the case for evidentiary hearing, it ultimately adhered to its original position.⁵⁶ However, the merger was abandoned while an Antitrust Division appeal was pending.

The Antitrust Division has since participated in two FCC broadcast licensing proceedings which raised competitive issues in local markets. In 1968 it opposed the transfer of a Beaumont, Texas television license to the only newspaper in the community on the grounds that it would constitute a violation of Section 7 of the Clayton Act.⁵⁷ The transaction was subsequently abandoned and the station sold to a newspaper operator in another city. In a more novel effort in early 1969, the Antitrust Division sought a full hearing on the license renewal of a monopoly television station in Cheyenne, Wyoming which was controlled by the only newspaper in the same market.⁵⁸ The Division's petition suggested that this local monopoly situation might be alleviated by issuing a qualified renewal, and giving to the applicant "a reasonable opportunity to dispose of its television station at its market value . . ."⁵⁹ The Cheyenne case has been recently set for hearing and is still pending before the Commission.

Similarly, where the issue of competition in local media markets has been raised in FCC rule-making proceedings, the Antitrust Division has offered comments. In August, 1968 it supported the Commission's so-called "one-to-a-market" proposal which would limit future broadcast licensees to control of one broadcast outlet (AM, FM, or TV) in any local market.⁶⁰ In April, 1969 it supported a

⁵⁵ American Broadcasting Co., 7 F.C.C.2d 336 (1967).

⁵⁶ For a full chronology, see American Broadcasting Co., 9 F.C.C.2d 546, 699 (1967).

⁵⁷ Beaumont Broadcasting Corp., FCC File No. BTC-5553 (1968). Later the same year, the Justice Department filed a civil antitrust complaint, under Clayton Act § 7, against the acquisition by a local television station owner in Rockford, Illinois of the monopoly newspaper in the same community. *United States v. Gannett Co.*, Civ. No. 68 C 48 (Blue Book No. 2029) (N.D. Ill., filed Dec. 5, 1968). The Rockford acquisition—unlike the Beaumont one—did not require FCC approval, since there was no change in the control over the television station. The case was settled by consent decree requiring divestiture of either the television station or the newspaper. 1968 Trade Cas. ¶ 72,644 (N.D. Ill. Jan. 6, 1969).

⁵⁸ Frontier Broadcasting Co., FCC File No. BRCT-318 (1968).

⁵⁹ Petition of the Dep't of Justice at 25 (Dec. 30, 1968).

⁶⁰ Comments of the Dep't of Justice, FCC Dkt. 18110 (Aug. 1, 1968).

similar FCC proposed rule which would prevent a television station licensee from controlling a community antenna television (CATV) system in the same market.⁶¹ The Commission has recently adopted both the "one-to-a-market" rule and the CATV rule.⁶² Basically, these rule-making filings, like the filings in specific license proceedings, sought to apply to the broadcast licensing process the basic competitive principles developed under Section 7 of the Clayton Act and, to a lesser extent, under Section 2 of the Sherman Act.

Community antenna television is an important competitive factor in broadcasting. The Antitrust Division has emphasized this in two 1969 filings in the FCC's wide-ranging *CATV Inquiry*.⁶³ It noted that CATV offers "the most promising means of achieving greater competition and diversity in local mass media communications,"⁶⁴ and urged the Commission "to take affirmative steps to assure that CATV is permitted to reach its full potential as a communications media."⁶⁵ It urged limitations on cross-ownership of CATV systems by major competing local media (namely, TV stations and newspapers) in the same market.⁶⁶ It also opposed proposals before the Commission to protect over-the-air broadcasters by (1) restricting distant signal importation by CATV systems, (2) limiting CATV program origination, and (3) preventing interconnection of CATV systems. It stressed that such proposals would severely limit the effectiveness of CATV as a new entrant in mass media communications.⁶⁷ At the same time, the Antitrust Division noted that a local CATV system generally is a monopoly and would have to provide equitable access to its cable for independent sources of programming, in accordance with established antitrust principles.

2. Common Carrier Communications

The broad competitive issue in this field has been how to confine a natural monopoly to its necessary bounds. The telephone companies have long used their control over the telephone network as a means of discouraging customer-owned communications equipment, and con-

⁶¹ FCC Dkt. 18397 (1968).

⁶² Multiple Ownership of Broadcast Facilities, FCC Dkt. 18110, — P&F Radio Reg. 2d — (1970); Second Report and Order, FCC Dkt. 18397, — P&F Radio Reg. — (1970).

⁶³ FCC Dkt. 18397 (1968).

⁶⁴ Comments of the Dep't of Justice, FCC Dkt. 18397, at 16 (April 7, 1969).

⁶⁵ *Id.* at 10.

⁶⁶ *Id.* at 15-26.

⁶⁷ Comments of Dep't of Justice, FCC Dkt. 18397 (Sept. 5, 1969).

trolling such ancillary items as dial advertising discs⁶⁸ and telephone directory covers.⁶⁹

The Antitrust Division entered this field in 1967 with an amicus brief, supporting the FCC staff, in the Commission's *Carterfone*⁷⁰ proceeding. This proceeding questioned the telephone companies' strict "foreign attachment" tariffs which prevented use of most customer-supplied communications equipment. The Division claimed that such a blanket prohibition was unnecessarily restrictive, since the telephone network could be protected from harm by less restrictive measures, and the prohibition therefore constituted an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."⁷¹ The Commission struck this tariff down in June, 1968,⁷² and since then the Antitrust Division has actively participated in the Commission's attempts to formulate a new liberal tariff.⁷³

The Antitrust Division also made a comprehensive filing in early 1967 in the FCC's broad-ranging *Computer Inquiry*.⁷⁴ This dealt both with restrictive communications carrier practices (such as the "foreign attachment" rule), and the various competitive problems posed by carrier entry into the data processing field.

The Antitrust Division has challenged restrictive telephone company practices in the CATV field. In a 1969 brief to the FCC, the Division urged that serious antitrust questions were raised by the telephone company practice of unnecessarily restricting CATV operators' access to telephone company poles and underground conduits, and the related practice of insisting that CATV operators offer no communications services other than CATV.⁷⁵ After the Bell System had announced that it would abandon these practices, the Commission issued an opinion declaring them illegal.⁷⁶

⁶⁸ *Southwestern Bell Tel. Co. v. Dialite Dial Co.*, 102 F. Supp. 872 (W.D. Okla. 1951), appeal dismissed, 197 F.2d 523 (10th Cir. 1952).

⁶⁹ *Illinois Bell Tel. Co. v. Miner*, 11 Ill. App. 2d 44, 136 N.E.2d 1 (1956).

⁷⁰ *Carterfone Device*, 13 F.C.C.2d 420 (1968).

⁷¹ Brief for the United States as Amicus Curiae (Oct. 13, 1967), quoting *Hush-a-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956).

⁷² *Carterfone Device*, 13 F.C.C.2d 420 (1968).

⁷³ See *AT&T Tariff Revisions*, 15 F.C.C.2d 605 (1968).

⁷⁴ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 7 F.C.C.2d 11 (1966); see *Response of the Dep't of Justice*, March 5, 1968.

⁷⁵ *Comments of the Dep't of Justice*, FCC Dkt. 18509, (July 11, 1969).

⁷⁶ *Letter from AT&T to FCC Chairman Hyde* (Oct. 28, 1969); *Final Report and Order*, 21 F.C.C.2d 307 (1970), modified, *Memorandum Opinion and Order*, 18 P&F Radio Reg. 2d 1799 (1970).

3. Securities

The broad problem in this area is that the nation's dominant securities market, the New York Stock Exchange, has long operated with little regard for competitive policies. It has operated on the basis of a system of collectively fixed rates, with various rules discriminating against non-members. While the Securities and Exchange Commission enjoys general supervision over the industry, the basic scheme under the Securities Exchange Act of 1934 is "self-regulation." The SEC has rarely exercised its formal powers to supervise exchange membership, procedures and rules under Section 19(b) of the Securities Exchange Act.⁷⁷

Antitrust involvement in this field began in 1963 with a private antitrust case, *Silver v. New York Stock Exch.*,⁷⁸ in which the Solicitor General filed an amicus curiae brief arguing successfully against a general antitrust exemption for securities exchanges. The Supreme Court generally sustained this position in a decision which held that, "repeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."⁷⁹

In April, 1968 the Antitrust Division questioned under the *Silver* standard the basic scheme of rate-fixing practiced by the New York Stock Exchange. This came in the form of a comment filed with the SEC in a pending proceeding on reciprocity and related practices in which the Division's basic point of argument was that the widespread reciprocal practices were the product of an artificial pricing system. This led to a general SEC investigation of commission rates. The Antitrust Division offered testimony of several leading economists covering a range of competitive issues. In January, 1969 the Division filed a comprehensive memorandum recommending the elimination of most fixed rates on the grounds that they are not "necessary to make the Exchange Act work," as required by *Silver*, and recommended that changes be made in various rules which discriminate against non-members. The rate proceeding is still pending.

A third brief was filed by the Division in late 1969 criticizing the Exchange's proposals to relax the existing restrictions on public ownership of member firms. The main thrust of the criticism is that

⁷⁷ The only example of the direct Commission action under § 19(b) involved an attempt by the New York Stock Exchange (NYSE) to undermine the regional stock exchanges by preventing NYSE members from trading NYSE-listed securities on the regional exchanges. The Commission struck down the rule in the *Multiple Trading* case, noting that "at best" it was an attempt to implement NYSE's own rate-fixing arrangement. Rules of the New York Stock Exch., 10 S.E.C. 270, 290 (1941).

⁷⁸ 373 U.S. 341 (1963).

⁷⁹ *Id.* at 357.

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the proposals do not go far enough as "they do not represent a general opening of NYSE membership to those who can meet the objective criteria of honesty, solvency, and professional skill."⁸⁰

The foregoing examples by no means exhaustively cover the Antitrust Division's increasing role as advocate for competitive policies. In 1969 alone, the Division filed two briefs with the Civil Aeronautics Board opposing, on antitrust grounds, two air carrier agreements which would have eliminated competition in non-carrier fields. The first brief involves reservation systems⁸¹ and the other involves the travel agency business.⁸² It also participated during 1969 in two Federal Power Commission proceedings involving a pipeline joint venture⁸³ and the competitive procurement practices for regulated utilities.⁸⁴ None of these issues has yet been acted on.

For the past few years the Antitrust Division has conducted a fairly intensive effort to promote greater acceptance of competition in regulated industries. It has gone beyond its traditional role as a party in adversary litigation, and become involved in general investigations, rule-making proceedings and industry inquiries. This effort has been generally recommended. The 1968 Neal Report⁸⁵ commented:

In the regulated sector of the economy, the bias of policy and its enforcement is overwhelmingly against competition. This bias manifests itself in more permissive policies toward

⁸⁰ Comments of the Dep't of Justice (Nov. 17, 1969) in response to SEC Securities Exchange Act Release No. 8717 (Oct. 8, 1969). For a record of the Division's initial actions in this proceeding, see Comments of the Dep't of Justice (April, 1968) in response to SEC Securities Exchange Act Release No. 8239 (Jan. 26, 1968); Memorandum of Dep't of Justice on the Fixed Minimum Commission Rate Structure (Jan. 17, 1969).

⁸¹ The challenged arrangement would have required all air carriers to use a common reservation system; it would thus have eliminated any meaningful competition to the computer service company proposing the system. See Comments of Dep't of Justice, CAB Dkt. 20929 (May 28, 1969) (Aug. 21, 1969) (Jan. 20, 1970) (Feb. 11, 1970).

⁸² The challenged arrangement would have required all air carriers to cease dealing with certain travel agents—mostly smaller ones—and would thereby have restricted competition in this field. See Comments of Dep't of Justice, CAB Dkt. 21305 (Sept. 12, 1969).

⁸³ Great Lakes Gas Transmission Co., FPC Dkts. CP66-110 (1969). This was a remand proceeding following the court of appeals decision that the Commission had failed to give adequate weight to competition in originally approving the scheme. *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 960 (D.C. Cir. 1968). Antitrust Division attorneys participated in evidentiary hearings and submitted briefs covering both the competitive effects of the transaction and the alleged countervailing benefits. See Reply of Dep't of Justice to Initial Brief and Motion of Michigan Wisconsin Pipeline Gas Co. and Michigan Consolidated Gas Co. (Dec. 5, 1969).

⁸⁴ The Division offered a brief and an oral argument supporting a Commission proposal to require some form of competitive procurement noted by pipeline companies and electric utilities subject to its jurisdiction.

⁸⁵ Presidential Task Force, Report on Antitrust Policy (Neal Report) (July 5, 1968).

mergers and exemption of mergers from antitrust standards We believe that this bias is contrary to the public interest . . . [and] recommend further study of regulated industries to determine the extent to which competition and the competitive standards of the antitrust laws can be substituted for at least some aspects of regulation.⁸⁶

The 1969 Stigler Report urged even greater activity by the Antitrust Division and recommended a formalization of its role as "the effective agent of the Administration in behalf of a policy of competition." It went on to emphasize that

the regulatory commissions are largely out of control. . . . The economic triviality and irrelevance of much activity of the regulatory commissions is patent and inexcusable. . . . The commissions should have the merits of competition pressed upon them. Competition is not a matter of all or none, and the fact of regulation should not exclude competition⁸⁷

The Antitrust Division's role as an advocate of competition is significant, and yet the existence of the role does not answer the question of how the interest of competition is to be balanced with other regulatory goals, before either the agencies or the courts.

II. THE SEARCH FOR A UNIFYING STANDARD

A. *The Relationship Between Competition and Regulation*

The decision to impose direct regulation on particular industries generally rests with Congress and it has based its decisions to regulate on a variety of economic, social and political considerations.⁸⁸ Typically, a government agency is given broad responsibility for a particular industry, and is charged, under the quite open-ended mandate of insuring that its industry's activities meet the "public interest," with evaluating and regulating such activities. In making its evaluation a wide variety of factors come into consideration. Competition is one such factor.

Direct regulation of course tends to eliminate competition to the extent that it imposes limitations on entry, pricing, and other commercial practices. Yet competition and regulation do not necessarily serve inconsistent goals. This point was recently emphasized by the Court of Appeals for the District of Columbia:

⁸⁶ Id. at VII-4, VII-5.

⁸⁷ Presidential Task Force, Report on Productivity and Competition (Stigler Report) (Feb. 8, 1969) (5 Trade Reg. Rep. ¶ 50,250, at 55516).

⁸⁸ See generally C. Phillips, *The Economics of Regulation* 19 (1955).

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Despite a continuing debate, it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible. For instance, whether a regulatory body is dictating the selling price or that price is determined by a market free from unreasonable restraints of trade, the desired result is to establish a selling price which covers costs plus a reasonable rate of return on capital, thereby avoiding monopoly profits.⁸⁹

The decision to impose direct regulation has been made in two basic types of situations where competition was not fully satisfactory. The first involves a natural monopoly where competition simply is not economically possible such as the local telephone network. The economies of scale are so great that direct competition would be “a costly and idle gesture.”⁹⁰ There, economic policy is the controlling consideration in the decision to regulate.⁹¹ Regulation is necessary to secure the classic marketplace goals of efficiency and innovation. However, the courts have held that the regulatory scheme does not require maintenance of an absolute telephone company monopoly over all ancillary equipment, directories, and so forth.⁹²

The second type of situation is where competition does not secure some specifically defined social goal. This is the basis for regulating both banks and securities markets. The solvency of banks is accepted as an overriding social goal, because the principle losses from bank failures fall on innocent depositors. Similarly, the issuance and trading of securities is regulated to insure full disclosure and fairness to the investing public, and continued confidence in the capital market. Regulatory supervision is directed to these specific goals. Neither scheme implies a general elimination of competition. The Supreme Court made this clear in its *Third Nat'l Bank*⁹³ and *Silver*⁹⁴ decisions; antitrust is only excluded to the extent *necessary* to make the specific regulatory scheme work.

On the other hand, where regulation is used as a means of offering protection from competition to those already subject to regulation it

⁸⁹ Northern Natural Gas Co. v. FPC, 399 F.2d 953, 959 (D.C. Cir. 1968).

⁹⁰ Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1208 (1969).

⁹¹ See C. Kaysen & D.F. Turner, *Antitrust Policy: An Economic and Legal Analysis*, 189-90 (1959).

⁹² See *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956); *Carterfone Device*, 13 F.C.C.2d 420 (1968); and discussion, pp. 580-81 *supra*.

⁹³ *United States v. Third Nat'l Bank*, 390 U.S. 171 (1968).

⁹⁴ 373 U.S. 341 (1963).

generally seems less justifiable. The two clearest examples are in the motor carrier and CATV fields. Both industries marked a new competitive challenge to existing interests—in one case the railroads and in the other the over-the-air broadcasters. This led Congress, with ICC support, to impose direct rate and entry regulation over the motor carriers,⁹⁵ and led the FCC, even without such a clear mandate, to regulate CATV programming (but not entry).⁹⁶

Competitive and regulatory policies can come into contact in several situations. The regulatory agency often determines whether new entrants will be allowed to enter the field, or it is charged with responsibility for licensing those who apply for entry. The agencies also become involved with questions of acquisitions by and mergers of industries under their control. Agency and antitrust policies may also meet when the regulator is asked to authorize or approve specific restrictive practices. When a question before a regulatory agency touches both the agency's policies and competitive questions, the courts have made clear that competition is a basic element which must be considered.

This point was recently re-emphasized in the important 1968 Supreme Court decision of *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*.⁹⁷ This decision made clear that serious anticompetitive effects "alone will normally constitute substantial evidence that the [proposal before the Commission] is 'contrary to the public interest,' unless other evidence in the record fairly detracts from the weight of this factor."⁹⁸ On this basis the Court upheld the Commission's rule requiring the proponent of an anticompetitive proposal to "demonstrate that . . . [it] was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose . . ."⁹⁹

The Supreme Court had made a broadly similar point ten years earlier in *United States v. Radio Corp. of America*,¹⁰⁰ where it held that the FCC must consider antitrust principles in applying the public interest test of the Communications Act:

Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give

⁹⁵ See, e.g., *Coordination of Motor Transportation*, 182 I.C.C. 263 (1932).

⁹⁶ See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

⁹⁷ 390 U.S. 238 (1968).

⁹⁸ *Id.* at 246.

⁹⁹ *Id.* at 243.

¹⁰⁰ 358 U.S. 333 (1959).

him a monopoly of that area's major media of mass communications.¹⁰¹

Another particularly useful discussion of the significance of competitive considerations may be found in *Northern Natural Gas Co. v. FPC*, a recent court of appeals decision dealing with a pipeline merger. The court stated:

Although the [Federal Power] Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the commission is obliged to weigh antitrust policy.¹⁰²

B. *The Regulator's Problem—An Unstructured Inquiry*

These decisions make clear that the regulator is required to consider competition as a basic element in any "public interest" determination. Yet they leave unanswered a crucial question—how is the regulator to apply competitive policy in a clear, consistent manner? Competitive issues do not generally arise in isolated abstraction, but rather as part of intensely practical proceedings to determine *who* shall be permitted to enter or merge, or *what* those in the industry shall be permitted to do. Such proceedings can, and often do, involve many complex technical questions such as, in the communications field, "spectrum conservation" or "network integrity." They also can involve economic questions of equal complexity, such as "cross subsidy," at least where the agency must deal with pricing and service offerings. Most of these questions cannot be resolved with mathematical precision, which is one reason why regulatory proceedings can be both long and indecisive from the evidentiary standpoint. Yet it is in the context of such complex proceedings that the regulator must often face crucial questions of competitive policy.

When the question of allowing more competition is in issue, those regulated can usually be counted on to present an extensive case in opposition. Monopolists, including those which are regulated, rarely welcome intrusions from the marketplace. They will press the regulator with "technical" arguments and ominous predictions that new competition will seriously impair, or even destroy, the regulatory scheme. The regulator will be strongly urged to use his "so-called 'expertise'"¹⁰³ to resolve specific issues in favor of non-competitive solutions.

¹⁰¹ Id. at 351-52 (dictum).

¹⁰² *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 958 (D.C. Cir. 1968).

¹⁰³ See Judge Frank's dissenting opinions in *Lichten v. Eastern Airlines, Inc.*, 189 F.2d 939, 946 (2d Cir. 1951); *Old Colony Bondholders v. New York, N.H. & H.R.R.*, 161 F.2d 413, 450-51 (2d Cir. 1947).

The basic problem arises from the lack of a clear method of inquiry, which presently tends to be open-ended in scope and lacking in pre-assigned weights for individual factors. Even a relatively simple case can become complex and unpredictable in such circumstances. The President's Council of Economic Advisers has emphasized this point in its recent annual report:

The fundamental problem lies in the complex and conflicting objectives that sometimes characterize economic regulation itself. Agencies are supposed to protect the present and future interests of consumers, employees, investors, and the Government. No one can begin to see the full consequences of current decisions on all these groups. As quasi-judicial bodies, the regulatory commissions tend to give much weight to precedent. As a result, change of any kind becomes hard to justify and even harder to allow when some affected group can claim immediate harm, whereas the potential beneficiaries are widely diffused and usually not represented. Yet innovation and adaptation are the dynamics of economic progress.

There is no clear safeguard against these dangers, but reliance on economic incentives and market mechanisms in regulated industries would be a step forward.¹⁰⁴

The current regulatory problem can be illustrated by trying to imagine how the famous *Charles River Bridge* case¹⁰⁵ would be decided by a regulatory agency today. The underlying issue would still be, as it was in the Supreme Court's 1837 decision, a competitive challenge to a monopoly toll bridge. But the arguments would be much more varied and complex. The Supreme Court only had to concern itself with the legal question whether the "Charles River Bridge" charter gave it an implied monopoly grant,¹⁰⁶ and hence protected it against erection of a parallel competitive span. The Court of course rejected this argument, stating that the rights of private property are to be "sacredly guarded," but the public interest must control.¹⁰⁷ Any

¹⁰⁴ Economic Report of the President 108 (1970).

¹⁰⁵ *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

¹⁰⁶ A modern version of this argument is COMSAT's assertion that the 1962 Satellite Act implicitly gave it the exclusive right to offer domestic satellite service. See COMSAT Brief at 7-8, 12-13 and Supplemental Brief at 17, 19 in *Domestic Satellite Inquiry*, 2 F.C.C.2d 668 (1966). The New York Stock Exchange (NYSE) has argued in a similar vein that the Securities Exchange Act of 1934 implicitly "mandated" a system of non-competitive minimum commission rates. See NYSE Legal Brief at ¶¶ 2, 3, 7, 12, 14 (August, 1968), Commission Rate Structure of National Securities Exchanges, SEC File No. 40144 (1968) [hereinafter cited as *SEC Commission Rate Proceeding*].

¹⁰⁷ 36 U.S. (11 Pet.) at 547.

other construction, it added, would enable the holders of "old feudal grants" to prevent the growth of new methods of transportation.¹⁰⁸

Today this case would probably arise before an independent commission charged with statutory responsibility for regulating private toll bridges, canals, and steamboats so as to serve the "public interest, convenience and necessity." The applicant for a competing span would present the commission with a proposal supported by detailed traffic estimates and projections, evidence of its financial and engineering capability, and a legal brief emphasizing the advantages of competition. The "Charles River Bridge" company would meet this challenge to its long standing monopoly with vast numbers of lawyers, engineers, accountants, and economists armed with a battery of statistics, performance tables, regression analyses, and a fine reputation for reasonable performance under the commission's continuous surveillance. Its arguments would be many and its evidence voluminous. Under the heading "economic policy," it would argue that the new service was not needed,¹⁰⁹ that it would threaten to produce "destructive pricing"¹¹⁰ and "cream-skimming,"¹¹¹ while denying the public the benefit of "economies of scale"¹¹² which could be achieved with a single bridge. Its "technical" arguments would stress the need for unified "system planning,"¹¹³ the lower technical standards of the competing applicant¹¹⁴ and the risk that the competition would promote corner-cutting on maintenance and safety requirements.¹¹⁵ Finally, there would be a variety of "public interest" or "convenience and needs" arguments, dredged up from old cases. Thus, it would be argued that a second

¹⁰⁸ *Id.* at 553; cf. *Munn v. Illinois*, 94 U.S. 113, 127 (1877).

¹⁰⁹ See, e.g., the arguments of AT&T and other carriers in the *Microwave Communications, Inc.*, 16 P&F Radio Reg. 2d 1037 (FCC 1969) [hereinafter cited as *MCI*]; and *Carterfone Device*, 5 F.C.C.2d 360 (1966), 13 F.C.C.2d 420 (1968).

¹¹⁰ See New York Stock Exchange Economic Brief, *SEC Commission Rate Proceedings*, SEC File No. 40144 (1968). Note also the ICC's position that they must regulate the motor carriers in order to eliminate "destructive competition between truckers." *Coordination of Motor Transportation*, 182 I.C.C. 263, 362 (1932).

¹¹¹ See, e.g., AT&T's arguments in *MCI*, 16 P&F Radio Reg. 2d 1057 (FCC 1969). *Allocations of Frequencies in the Bands Above 890 Mc.*, 27 F.C.C. 359, 367-68 (1959) [hereinafter cited as *Above 890 Mc.*].

¹¹² "Bell's watchword has been 'one system, one policy, universal service' . . ." *Investigation of the Telephone Industry in the United States*, H.R. Doc. No. 340, 76th Cong., 1st Sess. 145-46 (1939).

¹¹³ See AT&T's argument in *Carterfone Device*, 5 F.C.C.2d 360 (1966), 13 F.C.C.2d 420 (1968), that "[Interconnection] would inevitably result in degradation of service." Brief and Proposed Findings and Conclusions of Bell System Parties at 20.

¹¹⁴ See AT&T's arguments in *MCI*, 16 P&F Radio Reg. 2d 1037 (FCC 1969).

¹¹⁵ Cf. the New York Stock Exchange's arguments on the effect of reduced commissions on industry standards in the *SEC Commission Rate Proceedings*, SEC File No. 40144, at 20-24 (1968).

bridge would adversely affect the scenic beauty of the river basin,¹¹⁶ would complicate navigation and impede the fish.¹¹⁷

This modern version of the *Charles River Bridge* case makes clear that even a relatively simple case can become a morass. How is a diligent regulator to weigh this assortment of arguments involving so many considerations which cannot be readily measured or quantified? How can he do this in a rational manner which gives businessmen and lawyers reasonable guidance for the future? It has been suggested that an individual's capacity for making a sound judgment about a complex situation may be seriously impaired by supplying him with much information which he believes should be relevant but the influence of which on the situation is not clear.¹¹⁸ This makes it very difficult to formulate any decision having both a rational basis and meaningful precedential value. Thus, even the same agency has handled basically analogous situations in contrary ways. For example, the FCC's decisions allowing microwave competition with domestic communications common carriers have been liberal,¹¹⁹ while its decisions on satellite competition with international carriers have been highly protectionist.¹²⁰ Similarly, the SEC has been liberal in allowing competition with the New York Stock Exchange by regional exchanges in NYSE-listed securities,¹²¹ but reluctant to allow such competition by over-the-counter dealers.¹²²

Such open-ended inquiry can produce extensive delay—especially when combined with staff shortages or excessive caution—and as such can easily forestall potentially beneficial private activity, or even stop it altogether.¹²³ A mandate requiring that all innovations, however desirable, should be delayed in order to make sure that each particular

¹¹⁶ Cf. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965).

¹¹⁷ Cf. *Udall v. FPC*, 387 U.S. 428 (1967).

¹¹⁸ Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 295 & n.22 (1960); cf. the discussions of the legal and practical objections to favorable consideration of post-acquisition evidence in the Sixth Circuit Court of Appeals decision, 358 F.2d 74, 82-83 (1966), and the Supreme Court's decision in the Procter & Gamble and Clorox Bleach merger case, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 587 (1966) (concurring opinion of Harlan, J.).

¹¹⁹ See, e.g., *MCI*, 16 P&F Radio Reg. 2d 1037 (FCC 1969); *Above 890 Mc*, 277 F.C.C. 359 (1959).

¹²⁰ See, e.g., *Authorized Entities & Authorized Users Under the Communications Satellite Act of 1962*, 4 F.C.C.2d 421 (1966).

¹²¹ Rules of the New York Stock Exch., 10 S.E.C. 270 (1941).

¹²² See Schapiro, Exhibit 1, in the *SEC Commission Rate Proceedings*, SEC File No. 40144 (1968).

¹²³ See Prettyman, *Reducing the Delay in Administrative Hearings: Suggestions for Officers and Counsel*, 39 A.B.A.J. 966 (1953), where Judge Prettyman expressed his feelings that "the inexplicable delays and expense we hear about [are not] due to the incompetence of counsel [or] to lack of craftsmanship in trial [but to] the wily lawyer with a weak case . . . who creates all possible confusion so as to delay to the bitter utmost the inevitable bad tidings." *Id.* at 970.

innovation is desirable should be avoided if possible.¹²⁴ Thus, the nature of the problem is clear. Now, as in 1837, we have the same basic public interest in competition as a source of innovation, efficiency, and low toll rates, but today we have no *method* of objectively weighing these advantages against the contrary arguments favoring regulation.

C. A Suggested Resolution

A clearer method of decision-making can be devised, where competition and so-called "regulatory" goals come into conflict. To accomplish this, there must first be clear recognition by the regulators and the courts that competition is a basic national economic policy, and the cornerstone of national economic strength.¹²⁵ Secondly, the basic regulatory goals in the industry involved must be clearly defined. Having defined its goals and recognized competition as a basic policy, the regulator should then place on the proponent of a non-competitive solution the burden of showing that it is *necessary* to achieve the regulatory goals so defined. This was precisely the basis for the Supreme Court decision in *Silver*: antitrust, and hence competition, were to be displaced only to the extent necessary to make the specific regulatory scheme of the Securities Exchange Act work.¹²⁶ Similarly, regarding bank mergers, the Supreme Court has made clear that the burden of proving the "convenience and needs" justification for an anticompetitive bank merger rests on the merging banks. They must prove not only that there is a non-competitive objective which should be assigned controlling weight, but that this goal could not be achieved by a less anticompetitive arrangement.¹²⁷

It is important that the burden of showing necessity be placed on those who oppose competition, regardless of whether the question is raised by opposition to a new entry, a request for permission to merge, or a quest to institute a particular restrictive practice. The regulated enterprise has the incentive and resources necessary to raise non-com-

¹²⁴ See H. Hart & A. Sacks, *The Legal Process: Basic Problems in Making and Application of Law* 875 (tent. ed. 1958). See also President Nixon's Memorandum to FCC Chairman Dean Burch, *Domestic Satellite Inquiry*, FCC Dkt. 16495 (Jan. 1970).

¹²⁵ The Council of Economic Advisers' recent annual report which urges "more reliance on economic incentives and market mechanisms in regulated industries" specifically applies this point to regulated industries. Such "industries have been more progressive when the agencies have endeavored to confine regulation to a necessary minimum and have otherwise fostered competition. When regulation has stifled competition, performance has deteriorated. The clearest lesson of all, however, is that regulation should be narrowed or halted when it has outlived its original purpose." *Economic Report of the President* 108 (1970).

¹²⁶ 373 U.S. 341 (1963).

¹²⁷ *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967) (on general burden of proof); *United States v. Third Nat'l Bank*, 390 U.S. 171, 190 (1968) (on the requirement of least anticompetitive solution).

petitive values. It has detailed information of the operation of the particular system, be it the telephone network, the stock exchange, or a bank. To place the burden on the outside party is, in fact, to ask him to rebut a technical argument not yet made.¹²⁸ As the FCC *Carterfone*¹²⁹ and *MCI*¹³⁰ cases show, this approach necessitates diligent investigation and, even in *Carterfone* and *MCI*, the competitive solution might not have prevailed absent the active and imaginative role played by the FCC Common Carrier Bureau.

Any such method of resolving the "competitive" and "regulatory" goals will require regulatory performance of a high order, since the regulator will have to bear the burden of determining what economic activities are necessary. This will no doubt require both technical competence and administrative courage. The present non-method of inquiry has not been particularly successful. In many regulated industries, including motor carriers¹³¹ and air transport,¹³² it has been argued that progress has come not from direct regulation, but in spite of it.¹³³ Moreover, as noted above, competition and regulation are not polar extremes; competition should be affirmatively encouraged so long as it is not inconsistent with the basic regulatory scheme. Competitive alternatives offer the significant advantages to the regulator of simplified regulation, better performance, and the greater public confidence which flows from impersonal decision making by the marketplace.

CONCLUSION

The Antitrust Division has played a growing role, both as law enforcer and advocate, in industries covered by some form of governmental regulation. This has been paralleled by increasing recognition on the part of the courts that competitive policies can and should be applied as part of a regulatory scheme.¹³⁴ Thus, in *Philadelphia Nat'l Bank* the Supreme Court stated:

The fact that banking is a highly regulated industry critical

¹²⁸ See *ICC v. J-T Transp. Co.*, 368 U.S. 81, 86-87, 90 (1961); Dep't. of Justice Petition for Reconsideration of AT&T Tariff, 15 F.C.C. 2d 605 (1968), filed Jan. 23, 1969.

¹²⁹ 5 F.C.C.2d 360 (1966), 13 F.C.C.2d 420 (1968).

¹³⁰ 16 P&F Radio Reg. 2d 1037 (FCC 1969).

¹³¹ See Comment, National Transportation Policy and the Regulation of Motor Carriers, 71 Yale L. J. 307 (1961).

¹³² See Comment, Is Regulation Necessary? California Air Transportation and National Regulation Policy, 74 Yale L.J. 1416 (1965).

¹³³ Adams, Business Exemption From the Antitrust Laws: Their Extent and Rational Regulation Policy, 74 Yale L.J. 1416 (1965).

¹³⁴ See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Federal Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *Northern Natural Gas Co. v. FPC*, 399 F.2d 953 (D.C. Cir. 1968).

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to the Nation's welfare makes the play of competition not less important but more so. . . . [U]nless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy.¹³⁵

The often controversial efforts of the Antitrust Division have emphasized this message in the regulatory arena. The Division's filings with regulatory agencies have been pragmatic documents dealing with competitive policy issues in the context of particular industry situations. They have reflected a healthy skepticism toward arguments for abandoning all competition to serve some other allegedly necessary goal. This has enabled the Division to play a distinctive role as an advocate for a national economic policy, not some particular vested interest.

The ultimate success of this effort will depend largely on the agencies themselves—in particular on their willingness to enforce competitive policies on their own motion, and on their ability to develop a meaningful method for balancing competition against other policies. If the agencies instead “leave competition to Justice,” then the influence of a competitive voice will continue to be limited to the most serious cases, simply because the Antitrust Division lacks the resources to do more. In such circumstances the only alternatives available would be to increase substantially the Antitrust Division's enforcement capability, or to create some new substantial agency with such capability and interest, or to make extensive changes in the structure, procedures and standards under which regulatory agencies operate.

¹³⁵ 374 U.S. at 372.