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Roundtable on Anticompetitive Regulations

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Thank you to Assistant Attorney General Makan Delrahim and to the staff of the Antitrust Division for providing me the opportunity to offer my thoughts on the potential anticompetitive effects of regulation. In my comments, I will address how regulation (1) can serve as an entry barrier, (2) can facilitate collusion, (3) can dampen incentives to conserve costs and to innovate, (4) can immunize conduct from antitrust scrutiny without substituting meaningful regulatory oversight, and (5) can influence the application of antitrust even when it does not strictly speaking apply.

I. Regulation as an Entry Barrier

Courts and commentators have long recognized that regulation can create barriers to entry.¹ For example, occupational licensing and the requirement that providers obtain a certificate of public necessity and convenience have long had the effect of preventing new firms from entering the marketplace.

Even regulation that does not restrict entry directly can have the effect of deterring the arrival of new competitors. As Richard Posner recognized, regulation can have the effect of serving as an alternative form of taxation.² Industry-wide regulation can benefit incumbents despite the additional costs of compliance if new entrants and fringe players find it harder to bear the

¹ See, e.g., *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 118 n.30 (1975); *United States v. Marine Bancorporation*, 418 U.S. 602, 629 (1974); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 227, 276-77, 279 (1985); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271, 293 (1987).

² Richard Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22 (1971).

regulatory burden.³ A workshop convened by the Federal Trade Commission in 1984 identified numbers specific examples where firms have actively sought regulation in order to create entry barriers.⁴

II. Regulation as a Means for Facilitating Collusion

Price regulation has long been recognized to facilitate collusion.⁵ For example, cartels are much easier to form and enforce when products are homogeneous. When products are uniform, any coordination designed to reduce competition need only focus on a single dimension: price.⁶ When products are heterogeneous, however, any price agreement must take into account all of the ways that products can vary. This makes agreements both harder to reach and to police.⁷ Indeed, if products are so customized that each is individualized, cartel cheating may be almost impossible to detect or prevent.⁸ Another practice that tends to undermine oligopoly discipline is unsystematic price discrimination.⁹ Indeed, secret price discrimination is one of the best ways for cartel members to cheat.¹⁰ Cartels also function best when demand is more or less constant, which in turn helps ensure that prices remain stable.¹¹ The filed rate doctrine makes such unsystematic discounting illegal.

Price regulation has the effect of facilitating collusion along each of these dimensions. In short, standardizing both products and prices makes cartel agreements easier to reach and any defection from the cartel cheating easier to identify.¹² Moreover, by preventing competitors from deviating pricing either up or down, price regulation can use the government to serve as an effective cartel enforcer. At the same time, entry restrictions and the ratemaking process can help stabilize demand.

Price regulation also has the effect of making all pricing information visible and easily available to all other industry participants. In addition, it requires every provider to announce to all of its

³ Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 276–77 (1985); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267, 268–69 (1983).

⁴ For a survey of this literature, see Robert E. McCormick, *The Strategic Use of Regulation: A Review of the Literature*, in THE POLITICAL ECONOMY OF REGULATION: PRIVATE INTERESTS IN THE REGULATORY PROCESS 13, 18–25 (Robert A. Rogovsky & Bruce Yandle eds., 1984) (Federal Trade Commission Law and Economics Conference).

⁵ See, e.g., Andrew F. Daughety & Robert Forsythe, *The Effects of Industry-Wide Price Regulation on Industrial Organization*, 3 J.L. ECON. & ORG. 397, 428–29 (1987).

⁶ F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 279 (3d ed. 1990).

⁷ DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 135 (3d ed. 2000); SCHERER & ROSS, *supra* note 6, at 279.

⁸ SCHERER & ROSS, *supra* note 6, at 279–80.

⁹ HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 14.5b, at 578 (3d ed. 1994); SCHERER & ROSS, *supra* note 6, at 500; W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 349–50 (4th ed. 2005).

¹⁰ HOVENKAMP, *supra* note 9, § 4.1a2, at 150–51.

¹¹ CARLTON & PERLOFF, *supra* note 7, at 137.

¹² HOVENKAMP, *supra* note 9, § 4.1a3, at 151–52.

competitors any planned changes in prices or product offerings long in advance. The loss of lead time dampens the incentive to make price cuts.¹³

Pooling of pricing information has long been recognized as a facilitating practice that makes it easier to form and maintain a cartel.¹⁴ Such information is particularly helpful to cartels if that information pertains to changes in product or changes to price.¹⁵

Finally, cartels need some means to enforce the cartel by preventing price cutting. Cartels often find them difficult to enforce, as any mechanism must not reveal to the government they are colluding. Price regulation provides for an open and legal way to enforce prices. By requiring that prices conform exactly to the published rate, price regulation prohibits any deviations from the established price.

In addition, price regulation gives any member of the public the right to challenge any proposed change to a tariff.¹⁶ Firms have routinely used this authority to oppose price reductions proposed by their competitors.¹⁷ As such, tariffing creates the same opportunity for interference as competitor suits in antitrust law, where a less efficient competitor can try to prevent its rival from competing on the merits.

The imposition of price regulation thus facilitates collusion in a wide variety of ways. The danger of expediting the formation and maintenance of a cartel provides another important reason to resist price regulation.

III. The Impact of Regulation on the Incentives to Conserve Costs and Innovate

A widely cited problem with price regulation is that the regulated firm has no incentive to economize on costs. The cost-plus nature guarantees the firm a return on its expenditures, which dampens their incentive to economize as well as their incentive to invest in cost-reducing improvements.¹⁸ Firms subject to price regulation may also avoid deploying new technologies

¹³ Scott M. Schoenwald, *Regulating Competition in the Interexchange Telecommunications Market: The Dominant/Nondominant Carrier Approach and the Evolution of Forbearance*, 49 FED. COMM. L.J. 367, 415–16 (1997).

¹⁴ HOVENKAMP, *supra* note 9, § 5.3, at 215–17.

¹⁵ CARLTON & PERLOFF, *supra* note 7, at 138; HOVENKAMP, *supra* note 9, § 4.1, at 147.

¹⁶ Schoenwald, *supra* note 13, at 411–12.

¹⁷ John Haring & Evan Kwerel, *Competition Policy in the Post-Equal Access Market* 10 (FCC Office of Plans & Pol’y, Working Paper, 1987), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp22.pdf.

¹⁸ Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd. 6786, 6789 ¶ 22 (1990), *petition for review dismissed sub nom.* Nat’l Rural Telecom Ass’n v. FCC, 988 F.2d 174, 177 (D.C. Cir. 1993); Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, 2889–90 ¶¶ 29–30; JEFFREY CHURCH & ROGER WARE, INDUSTRIAL ORGANIZATION: A STRATEGIC APPROACH § 26.2.2, at 847, § 26.2.3, at 852 (2000); ROBERT W. CRANDALL & LEONARD WAVERMAN, TALK IS CHEAP: THE PROMISE OF REGULATORY REFORM IN NORTH AMERICAN TELECOMMUNICATIONS 100 (1995); NAT’L TELECOMMS. & INFO. ADMIN., U.S. DEP’T OF COMMERCE, NTIA REGULATORY ALTERNATIVES REPORT 27–29 (1987), available at <http://www.its.bldrdoc.gov/publications/87-222.aspx>; 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 48 (1971); DANIEL F. SPULBER & CHRISTOPHER S. YOO, NETWORKS IN TELECOMMUNICATIONS: ECONOMICS AND LAW 129 (2009); Haring & Kwerel, *supra* note 17, at 1489.

that would render its investments in its rate base obsolete before they have the chance to recover those costs.¹⁹

Conversely, regulated firms may overspend on quality to avoid interruptions that would weaken political support or undertake costs that would make management processes and labor relations easier.²⁰ Regulators attempt to curb inappropriate expenditures by only allowing carriers to recover investments that were “prudent,” usually determined by whether the asset for which recovery is sought is “used and useful.”²¹ Realistically, this authority enables regulators to catch only the most egregious of excesses.²² And in any event, it can never evaluate investments that were never made but should have been.

Moreover, ex post evaluation always runs the risk of hindsight bias, denying recovery of investments and expenditures that were prudent at the time they were undertaken but ended up not panning out.²³ The problem is that once investments are sunk, regulated firms are vulnerable to regulatory opportunism should regulators arbitrarily strand costs by finding them to be imprudent.²⁴ The risk of such expropriation can cause firms to underinvest systematically in their networks.²⁵

A closer review of the literature reveals a number of subtleties. Consider the role of regulatory lag. The natural instinct is to regard it as a shortcoming because delays in updating rates can cause them to deviate from reasonable cost. During the period between rate hearings, however, prices no longer depend on costs.²⁶ As a result, the regulated firm can keep any cost savings it is able to achieve, providing some limited incentive to economize.²⁷ Of course, this incentive varies with the length of time remaining until the next rate hearing.²⁸ As the rate hearing approaches, the incentive to keep costs down weakens.²⁹

¹⁹ NAT’L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 19–20, 27, 29; CHURCH & WARE, *supra* note 18, § 26.2.3, at 848–49.

²⁰ CHURCH & WARE, *supra* note 18, § 26.2.3, at 848–49, 852, 2 KAHN, *supra* note 18, at 50, 53; NAT’L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 27. For a review of the empirical literature, see Paul L. Joskow & Nancy L. Rose, *The Effects of Economic Regulation*, in 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1450, 1484–86 (Richard Schmalensee & Robert D. Willig eds., 1989).

²¹ See, e.g., JAMES C. BONBRIGHT, ALBERT L. DANIELSEN & DAVID R. KAMERSCHEN, *PRINCIPLES OF PUBLIC UTILITY RATES* 257–58 (2d ed. 1988); SPULBER & YOO, *supra* note 18, at 129.

²² CHURCH & WARE, *supra* note 18, § 26.2.2, at 851–52; 2 KAHN, *supra* note 18, at 47; NAT’L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 27–28.

²³ Daniel F. Spulber & Christopher S. Yoo, *Toward a Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L.J. 43, 84 (2008).

²⁴ Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 YALE J. ON REG. 171, 294–95 (2002).

²⁵ Thomas P. Lyon, *Regulation with 20-20 Hindsight: “Heads I Win, Tails You Lose”?*, 22 RAND J. ECON. 581, 581–82 (1991) (citing John Panzar).

²⁶ 2 KAHN, *supra* note 18, at 48 (discussing regulatory lag).

²⁷ CARLTON & PERLOFF, *supra* note 7, at 669; 2 KAHN, *supra* note 18, at 48; VISCUSI, HARRINGTON & VERNON, *supra* note 9, at 432–33; see Paul L. Joskow, *Inflation and Environmental Concern: Structural Change in the Process of Public Utility Price Regulation*, 17 J.L. & ECON. 291, 294 (1974).

²⁸ STEPHEN G. BREYER, *REGULATION AND ITS REFORM* 48 (1982).

²⁹ *Id.*

In addition, the guarantee of a rate of return may create a moral-hazard problem that gives regulated firms excess incentives to undertake risky projects.³⁰ If so, reviewing expenditures for prudence may actually bring investment closer to optimal levels.³¹ Indeed, pre-committing a “used and useful” regime may benefit regulated entities by preventing regulatory authorities from increasing the costs they declare to be imprudent.³²

In addition, debates over price regulation have been dominated by concerns that the ratemaking formula may be creating systematic biases in firm behavior.³³ The most famous such bias is the Averch-Johnson effect, which suggests that firms will favor capital-intensive solutions over solutions that emphasize operating costs, such as labor.³⁴ This is because the ratemaking formula allows regulated firms to earn a rate of return on its capital expenses, whereas operating expenses are reimbursed dollar-for-dollar without any additional markup.³⁵ So long as the regulated rate of return exceeds the firm’s actual cost of capital, it should find it profitable to do so.³⁶

Stated slightly more formally, an unregulated firm would increase its use of both labor and capital until the marginal cost of each factor equals the marginal value that it generates.³⁷ The constraint mentioned above that the regulated rate of return exceeds the actual cost of capital exaggerates the profit signal for capital, which means that the firm will increase its use of capital beyond the socially optimal point, at which point production no longer employs the socially optimal mix.³⁸

While conceptually appealing, the Averch-Johnson effect is subject to a number of caveats.³⁹ As an initial matter, the effect may compensate for the fact that uncertainty dictates that some capital investments may not pan out.⁴⁰ In addition, the effect does not occur if management seeks to maximize revenue instead of profits.⁴¹

Moreover, a necessary condition for the effect to occur is that the regulated rate of return exceeds the firm’s cost of capital, otherwise all capital investments will be unprofitable, and the firm will exit the market.⁴² Consequently, the effect will not occur if inflation temporarily causes the

³⁰ H. Stuart Burness, W. David Montgomery & James P. Quirk, *Capital Contracting and the Regulated Firm*, 70 AM. ECON. REV. 342, 349–50 (1980).

³¹ Lyon, *supra* note 25, at 582, 584, 586–88, 591.

³² Richard J. Gilbert & David M. Newbery, *The Dynamic Efficiency of Regulatory Constitutions*, 25 RAND J. ECON. 538, 538–39, 547–48, 551 (1994) (internal quotation marks omitted).

³³ SPULBER & YOO, *supra* note 18, at 129.

³⁴ Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052, 1068 (1962).

³⁵ *Id.* at 1053–54.

³⁶ *Id.*

³⁷ *Id.* at 1055–56.

³⁸ *Id.* at 1053, 1057.

³⁹ NAT’L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 5–26.

⁴⁰ 2 KAHN, *supra* note 18, at 56–57.

⁴¹ Elizabeth E. Bailey & John C. Malone, *Resource Allocation and the Regulated Firm*, 1 BELL J. ECON. & MGMT. SCI. 129, 137–38 (1970).

⁴² Averch & Johnson, *supra* note 34, at 1054–55.

firm's cost of capital to rise above the regulated rate of return after the rate is set.⁴³ In addition, any tendency toward overcapitalization may be offset if raising larger amounts of capital causes capital costs to rise.⁴⁴

Other factors may create downward pressure on capital costs. The extent to which regulators provide higher rates of return when rates are stable or declining may give firms the incentive to reduce costs.⁴⁵ Moreover, during the lag when prices are fixed, firms can increase profits by cutting costs.⁴⁶ In addition, regulatory authorities may disallow certain capital expenditures as imprudent.⁴⁷

Another exception follows from Averch and Johnson's second finding, which is typically overlooked in the literature. If the firm can use the same inputs to make a second product, it can also earn a rate of return that exceeds its cost of capital by entering that market as well.⁴⁸ Indeed, it has the incentive to do so even if it runs a loss, so long as the difference between the regulated rate of return and the actual cost of capital exceeds the margin of the loss.⁴⁹ To the extent that regulation is imperfect and regulated firms are still able to exercise monopoly power, the tendency to expand output and price below marginal cost may actually be beneficial.⁵⁰

Given this multitude of considerations, it comes as no surprise that empirical tests of the Averch-Johnson effect are all over the map.⁵¹ Some studies confirm a tendency toward overcapitalization.⁵² Others find undercapitalization⁵³ or are inconclusive.⁵⁴

Despite these caveats, the general consensus is that the Averch-Johnson effect does affect firm behavior, even if disagreement still exists as to its direction and magnitude.⁵⁵ Whatever the

⁴³ Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint: A Reassessment*, 63 AM. ECON. REV. 90, 90, 95 (1973); see also Paul L. Joskow & Richard Schmalensee, *Incentive Regulation for Electric Utilities*, 4 YALE J. ON REG. 1, 7 & n.29 (1986) ("Due to regulatory lag, the actual rates of return . . . may be above or below the commission-determined fair rate of return at any instant.").

⁴⁴ 2 KAHN, *supra* note 18, at 57–58.

⁴⁵ *Id.* at 57.

⁴⁶ Joskow & Schmalensee, *supra* note 43, at 7–8.

⁴⁷ VISCUSI, HARRINGTON & VERNON, *supra* note 9, at 462; Joskow & Schmalensee, *supra* note 43, at 8.

⁴⁸ Averch & Johnson, *supra* note 34, at 1058–59.

⁴⁹ *Id.* at 1059.

⁵⁰ 2 KAHN, *supra* note 18, at 106–07.

⁵¹ CARLTON & PERLOFF, *supra* note 7, at 676; NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 26; Joskow & Rose, *supra* note 20, at 1477–79.

⁵² CARLTON & PERLOFF, *supra* note 7, at 676; Leon Courville, *Regulation and Efficiency in the Electric Utility Industry*, 5 BELL J. ECON. & MGMT. SCI. 53, 72 (1974); Jean Mirucki, *A Study of the Averch-Johnson Hypothesis in the Telecommunications Industry*, 12 ATLANTIC ECON. J. 121, 121 (1984); H.C. Petersen, *An Empirical Test of Regulatory Effects*, 6 BELL J. ECON. 111, 124 (1975); Robert M. Spann, *Rate of Return Regulation and Efficiency in Production: An Empirical Test of the Averch-Johnson Thesis*, 5 BELL J. ECON. & MGMT. SCI. 38, 50 (1974).

⁵³ David P. Baron & Robert A. Taggart, Jr., *A Model of Regulation Under Uncertainty and a Test of Regulatory Bias*, 8 BELL J. ECON. 151, 164–65 (1977).

⁵⁴ CARLTON & PERLOFF, *supra* note 7, at 676; Randy A. Nelson & Mark E. Wohar, *Regulation, Scale Economies, and Productivity in Steam-Electric Generation*, 24 INT'L ECON. REV. 57, 74–75 (1983); Charles W. Smithson, *The Degree of Regulation and the Monopoly Firm: Further Empirical Evidence*, 44 S. ECON. J. 568, 579 (1978).

precise impact of the effect, it does underscore that introducing regulation would distort decisions away from those that marketplace participants would make in the absence of regulation.

Firms subject to price regulation have also been criticized for their failure to innovate.⁵⁶ As an initial matter, regulated firms may be reluctant to deploy innovations when doing so would obsolete existing equipment that has not been fully amortized. Moreover, the fact that its return is capped means that it benefits little from innovations that improve profitability.⁵⁷

Moreover, innovative activity typically carries greater risks than the firm's existing lines of business, with the risk levels also varying from innovation to innovation. If the rate-of-return formula applies a single, uniform rate of return, the regulated entity has little incentive to pursue ventures in which the risk exceeds the rate-of-return benchmark imposed by the authorities. Conversely, the possibility that an investment may be declared imprudent may deter regulated firms from pursuing innovations with higher risk.⁵⁸

Other commentators find some incentive to innovate in some areas.⁵⁹ Some argue that price regulation induces firms to pursue innovations that increase the productivity of labor over capital.⁶⁰ Others find the theory to be ambiguous.⁶¹ The empirical evidence is probably best characterized as thin and inconclusive.⁶²

IV. The Potential for Partial Deregulation to Immunize Conduct from Antitrust Scrutiny

Regulation can also immunize conduct from antitrust scrutiny. State regulation can displace antitrust liability,⁶³ subject to the requirement that the state regulator be actively supervising the immunized conduct.⁶⁴ Federal regulation can displace the antitrust laws well.⁶⁵ Unlike under state regulation, the federal regulator need not be actively supervising the conduct or subjecting it to meaningful review in order to justify immunizing the conduct, effectively leaving the conduct without either antitrust or regulatory oversight.⁶⁶

⁵⁵ 2 KAHN, *supra* note 18, at 50, 59; NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 26.

⁵⁶ Haring & Kwerel, *supra* note 17, at 9.

⁵⁷ NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 19.

⁵⁸ Thomas P. Lyon, *Regulatory Hindsight Review and Innovation by Electric Utilities*, 7 J. REG. ECON. 233, 233–37 (1995).

⁵⁹ NAT'L TELECOMMS. & INFO. ADMIN., *supra* note 18, at 18–19; V. Kerry Smith, *The Implications of Regulation for Induced Technical Change*, 5 BELL J. ECON. & MGMT. SCI. 623, 628 (1974).

⁶⁰ Smith, *supra* note 59, at 628.

⁶¹ Wesley A. Magat, *Regulation and the Rate and Direction of Induced Technical Change*, 7 BELL J. ECON. 478, 478–79, 490 (1976); Koji Okuguchi, *The Implications of Regulation for Induced Technical Change: Comment*, 6 BELL J. ECON. 703, 703–05 (1975).

⁶² Joskow & Rose, *supra* note 20, at 1482–84.

⁶³ *Parker v. Brown*, 317 U.S. 341 (1943).

⁶⁴ *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

⁶⁵ *Credit Suisse v. Billing*, 551 U.S. 264 (2007).

⁶⁶ Herbert Hovenkamp, *Antitrust and the “Filed Rate” Doctrine: Deregulation and State Action* (2012), https://scholarship.law.upenn.edu/faculty_scholarship/1851/.

These problems are exacerbated when the regulated price is embodied in a filed rate. As an initial matter, agencies have ceased conducting ex ante review of tariffs and instead simply conduct ex post review in response to complaints. This review is typically not very searching. Under the filed rate doctrine, the tariff represents the entirety of the agreement, and providers are not allowed to vary from the price in either direction. Thus, a provider subject to price regulation that offers a discount to a customer can later hide behind the filed rate doctrine and refused to honor it notwithstanding its promise to do so.⁶⁷ Most importantly for the purposes of this workshop, all of this conduct is immunized from antitrust scrutiny.

V. The Shadow of Regulation

Lastly, regulation can affect the application of the antitrust laws, often in ways that exceed the proper legal authority of the federal government. For example, when Bell Atlantic and NYNEX merged in 1997 to form Verizon, approval of the merger was conditioned on the merged company's willingness to make all of its rates for interconnection, transport, termination, and access to unbundled network elements based on the forward-looking, economic cost to provide those items. Effectively, this required the merged company to forego participating in many aspects of the ongoing legal challenge to that rate methodology that would continue through the courts for the next decade.⁶⁸

In addition, the merger conditions that Comcast accepted to obtain approval of its acquisition of NBC Universal continues to bind it to the terms of the FCC's 2010 Open Internet Order⁶⁹ even though the courts declared that most of the Order fell outside the agency's regulatory authority.⁷⁰

Most interestingly, regulations can force conditions and deal changes to obtain merger approval even when they have been declared invalid. For example, the courts twice invalidated the Federal Communications Commission's (FCC's) attempt to limit the geographic area that any cable operator can serve to no more than 30% of the country an improper exercise of the agency's statutory authority.⁷¹ Yet when Comcast proposed to acquire some of the assets of Time Warner Cable, it felt compelled to give assurances that it would divest assets so that it complied with this requirement even though the agency's prior attempts to impose that requirement had failed judicial review.⁷²

Finally, the fact that conduct arises in a sphere often subject to regulation can create skewed perceptions of antitrust risk. Consider the case of the dueling offers by Disney and Comcast to

⁶⁷ Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era*, 56 VAND. L. REV. 1591 (2003).

⁶⁸ Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, Memorandum Opinion and Order, 12 FCC Rcd. 19985 ¶ 185 (1997).

⁶⁹ Applications of Comcast Corp., General Electric Co. & NBC Universal, Inc., Memorandum Opinion and Order, 26 FCC Rcd. 4238, 4275 ¶ 94 (2011).

⁷⁰ Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

⁷¹ Time Warner Entm't Co. v. FCC, 240 F.3d 1126, 1133-36 (D.C. Cir. 2001); Comcast Corp. v. FCC, 579 F.3d 1, 10 (D.C. Cir. 2009).

⁷² Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., and Spinco to Assign and Transfer Control of FCC Licenses and Other Authorizations, 29 FCC Rcd. 8272, 8273 n.6, 8274 n.12, 8278 & n.46 (2014).

acquire certain assets that 21st Century Fox plans to divest. Both proposed transactions seem likely to pass scrutiny by the antitrust regulators. That said, 21st Century Fox's proxy statement expresses the concern that the proposed acquisition by Comcast would present more significant antitrust risks than the proposed acquisition by Disney, pointing to past proposed transactions by Comcast and to the ongoing challenge to the proposed merger between AT&T and Time Warner. Interestingly, the proxy statement does not explore the possibility of antitrust risks associated with the proposed acquisition by Disney, notwithstanding the belief by many informed observers that combining Fox's assets with Disney's larger movie studio, more extensive cable programming assets, and more valuable and sports assets arguably raises more serious antitrust concerns than the proposed acquisition by Comcast.⁷³ The asymmetry in attention is probably best explained by the history of regulation. In recent years, movie studios have been subject to less extensive oversight than cable programmers and operators. The fact that the proxy statement notes that Comcast has previously faced regulatory scrutiny in a past transaction (which was horizontal in nature and thus raised very different concerns) reflects the perception that past regulation makes more intensive regulatory scrutiny more likely in the future.

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Thank you again for giving me the opportunity to share my views on anticompetitive regulation. I look forward to the discussion at the May 31 workshop.

⁷³ New Street Research, Does Fox Business Report Suggest the Message to Comcast Fox Bid is Drop Dead!? (May 10, 2018).