

## **TRINKO AND CREDIT SUISSE REVISITED: THE NEED FOR EFFECTIVE ADMINISTRATIVE AGENCY REVIEW AND SHARED ANTITRUST RESPONSIBILITY**

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**Synopsis:** Over the course of antitrust and regulatory development, it had become generally accepted that both courts and agencies have a substantial, necessary role in developing and applying antitrust policy to regulated companies. These companies are among our largest and most important. They sell products and services that are essential to the public. Regulated companies often have substantial market power. However, in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, *Credit Suisse Securities (USA) LLC v. Billing*, and other cases, the courts have signaled a movement away from potentially coordinated responsibility between courts and agencies to protect against antitrust abuse, suggesting that in monopolization and perhaps other cases, administrative agency antitrust supervision may suffice.

Before agencies are given a more predominant antitrust responsibility, careful analysis is needed of whether agencies are capable of exercising the task and whether they are likely to do so. Examination shows that if antitrust enforcement is to be protected, we cannot rely mainly on agencies. Agencies often face statutory limitations, have other non-antitrust priorities, and may be subject to political and other influences that limit their ability and willingness to apply antitrust policy. Moreover, agencies have moved away from deciding major competition and other cases based upon hearings, limiting their fact-finding abilities. Compared with judicial antitrust cases, process is often limited.

The authors conclude that agencies must continue to have significant antitrust roles but that judicial antitrust enforcement must also be fully available. This result is consistent with *Trinko* and *Credit Suisse*, which do not require courts to leave antitrust enforcement entirely to agencies. The authors recommend that courts and administrative agencies exercise shared or coordinated responsibility over antitrust policies in regulated industries.

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## I. INTRODUCTION<sup>1</sup>

Effective antitrust application in regulated industries is crucial to the nation's economic well-being. These industries are some of our most important, including segments of electricity, public transportation, communications, health care, banking, trading markets, and securities. Although in recent years aspects of these industries have been deregulated, regulated industries have a history of monopolization, and companies in them often have a continued ability to exercise market power.<sup>2</sup>

Early in the history of regulated industries, courts were the major protectors of antitrust principles. Most regulatory agencies limited themselves, sometimes consistent with their statutes and their purposes, to enforcing their authorizing statutes, excluding any significant consideration of antitrust issues or

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1. This article follows in part upon two earlier articles: Robert A. Jablon, Mark S. Hegedus & Sean M. Flynn, *Dispelling Myths: A Real World Perspective on Trinko*, 50 ANTITRUST BULL. 589 (2005) [hereinafter Jablon et al., *Dispelling Myths*], and Robert A. Jablon & Katharine M. Mapes, *What Can You Do When the Markets Do Not Work?*, PUB. POWER, Sept. 2010, available at [http://www.spiegelmcld.com/files/20100917\\_Markets.pdf](http://www.spiegelmcld.com/files/20100917_Markets.pdf) [hereinafter Jablon et al., *What Can You Do*].

2. See generally Jablon et al., *Dispelling Myths*, supra note 1, at 597-99.

consequences.<sup>3</sup> However, somewhat coextensive with the movement towards deregulation, agencies took on greater responsibility for considering antitrust issues, often under some duress, leading to a model of shared judicial and agency antitrust responsibility.<sup>4</sup>

Elements in the Supreme Court's 2004 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* (*Trinko*) decision represent a shift away from shared judicial and agency antitrust responsibility in which courts and agencies both exercise parallel antitrust review.<sup>5</sup> In a decision, which may be fairly characterized as largely dictum, the Supreme Court interpreted that substantial regulated industry antitrust formulation and enforcement is often best left to administrative agencies to the exclusion of the courts.<sup>6</sup> This presumption of agency primacy was reinforced in the Court's 2007 *Credit Suisse Sec. (USA), LLC v. Billing* decision.<sup>7</sup> Lower court cases have generally followed this direction, albeit with significant variations.<sup>8</sup>

The Supreme Court appears to have been influenced by the view that administrative competition regulation may reduce the need for the strict judicial antitrust enforcement of pre-*Trinko* cases.<sup>9</sup> The Court expressed concerns that the complex and technical nature of antitrust enforcement may require expert knowledge that courts lack and that antitrust cases may be overly burdensome and expensive to defendants.<sup>10</sup> In moving towards giving agencies antitrust enforcement priority, the Court cites the complicated nature and agencies' presumed specialized knowledge of regulated industries' problems.<sup>11</sup> The Court implied that rigid antitrust enforcement may limit company investments in

3. *Id.* at 611-12.

4. Examples include the Interstate Commerce Commission (*McLean Trucking Co. v. United States*, 321 U.S. 67 (1944)); Federal Communications Commission (FCC) (*FCC v. RCA Commc'ns, Inc.*, 346 U.S. 86 (1953)); Federal Maritime Commission (Federal Mar. Comm'n v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968)); Federal Power Commission (FPC) (*Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973), *reh'g denied*, 412 U.S. 944 (1973); *FPC v. Conway Corp.*, 426 U.S. 271 (1976)); and Securities & Exchange Commission (SEC) (*Municipal Elec. Ass'n v. SEC*, 413 F.2d 1052 (D.C. Cir 1969)).

5. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

6. *Id.* at 414-15.

7. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

8. *Compare, e.g., New York Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 570 (S.D.N.Y. 2004) (which followed *Trinko* in holding that "the CFTC is in a better position than a general antitrust court to determine the scope and terms of any forced sharing of settlement prices among the exchanges that it regulates, and then to oversee and enforce any such sharing of settlement prices."), with *Stand Energy Corp. v. Columbia Gas Transmission Corp.*, 373 F. Supp. 2d 631, 641 (S.D. W. Va. 2005) (holding that "[t]hrough [the] FERC regulates the rates for transporting and selling natural gas in interstate commerce, Defendants have not demonstrated that this case involves the same level of regulatory overlay and unique market found in *Trinko*"), *on reconsideration in part*, 521 F. Supp. 2d 537 (S.D. W. VA. 2007).

9. *See, e.g., Credit Suisse*, 551 U.S. at 271-73 (noting the move from *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963), narrowly construing the implied preclusion doctrine "only if necessary to make the Securities Exchange Act work" towards the perhaps broader preclusion standard of *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975), finding implied preclusion "where there is a 'plain repugnancy between the antitrust and regulatory provisions'" (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963)).

10. *Credit Suisse*, 551 U.S. at 280-83; *Trinko*, 540 U.S. at 414, 417; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

11. *Trinko*, 540 U.S. at 414, 417.

innovative technology or create other market inefficiencies and suggested that “the existence of a regulatory structure designed to deter and remedy anticompetitive harm” means that “the additional benefit to competition provided by antitrust enforcement will tend to be [sufficiently] small [so that] it will be less plausible that the antitrust laws contemplate such additional scrutiny.”<sup>12</sup> Similarly, one part of the *Credit Suisse* implied repeal test was whether there was “clear and adequate [U.S. Securities and Exchange Commission (SEC)] authority to regulate.”<sup>13</sup> The Court said that in view of the active SEC enforcement of the “rules and regulations that forbid the conduct in question[,] . . . any enforcement-related need for an antitrust lawsuit is unusually small.”<sup>14</sup> However, it must be stressed that the Court’s stated premises were that in some instances administrative agencies can substitute for courts in carrying out the antitrust function, not that regulated companies are granted a free pass to violate antitrust laws.<sup>15</sup>

The direction of *Trinko*, *Credit Suisse*, and their progeny suggest movement towards an abdication of the courts’ traditional role of antitrust enforcement in regulated industries. Such an abdication could be perilous for consumers. Contrary to assumptions that may underlie *Trinko* and *Credit Suisse*, agencies are not adequate or complete substitutes for courts in antitrust enforcement. There are structural and procedural barriers that prevent or limit agencies from properly implementing antitrust standards even where, as for example, in the case of *Trinko* and *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.*, they may be deemed to be enforcing statutory competitive norms.<sup>16</sup> Most significantly, because antitrust market structures and conduct raise factual competitive issues, by its nature effective antitrust enforcement often requires thorough factual development.<sup>17</sup> Agencies are often either unwilling or unable to provide processes, including adequate discovery and hearings, to bring necessary facts to light.<sup>18</sup>

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12. *Id.* at 411-12.

13. *Credit Suisse*, 551 U.S. at 285. The Court’s four-step test to determine whether there is implied preclusion also inquires if: (a) the “area of conduct [in question falls] squarely within the heartland of securities regulations;” (b) there is “active and ongoing agency regulation;” and (c) there would be “a serious conflict between the antitrust and regulatory regimes.” *Id.* at 285 (citing *Gordon*, 422 U.S. 659).

14. *Credit Suisse*, 551 U.S. at 283 (stating that “a failure to hold that the alleged conduct was immunized . . . would have a ‘chilling effect’ on ‘lawful joint activities . . . of tremendous importance to the economy of the country’”); *Trinko*, 540 U.S. at 414 (explaining that “[m]istaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws are designed to protect’”) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 229-31 (1978).

15. *Credit Suisse*, 551 U.S. at 283 (“[T]he SEC actively enforces the rules and regulations that forbid the conduct in question . . . [and] is itself required to take account of competitive considerations . . . . And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior.”); *Trinko*, 540 U.S. at 412-13 (“The regulatory framework that exists in this case demonstrates how, in certain circumstances, ‘regulation significantly diminishes the likelihood of major antitrust harm.’ . . . In short, the regime was an effective steward of the antitrust function.”).

16. *Trinko*, 540 U.S. at 411-15; *New York Mercantile Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559, 568-69 (S.D.N.Y. 2004).

17. See generally Jablon et al., *Dispelling Myths*, *supra* note 1, at 613.

18. *Id.* at 611, 618-19, 622-23.

*Trinko* and *Credit Suisse* do not require courts to leave antitrust enforcement entirely to agencies. Although *Trinko*, and to a lesser extent *Credit Suisse*, suggest greater court deference to agencies,<sup>19</sup> their holdings are limited. The cases each have text and subtext: their texts require deference only where, as in *Trinko*, an agency is enforcing its own rules and there is no clear, separate antitrust violation and where, as in *Credit Suisse*, there is agency authority and an exercise of jurisdiction so that implied antitrust repeal is necessary to avoid judicial and agency conflicts.<sup>20</sup> By its terms, *Trinko* merely leaves enforcement of Federal Communications Commission (FCC) antitrust requirements to the FCC.<sup>21</sup> It does not purport to open a new area of implied antitrust repeal. *Credit Suisse* articulates standards to determine whether regulatory statutes effect implied repeal.<sup>22</sup> Therefore, neither case precludes courts and agencies from playing their proper antitrust roles and, where appropriate, courts and agencies from reinforcing each other in applying antitrust policies. However, the subtext of these and other cases must be recognized as at least suggesting that courts should grant agencies greater deference premised on the belief that where agencies are actively protecting against antitrust abuse, there is reduced benefit from strict judicial antitrust enforcement.<sup>23</sup> Taken together, *Trinko* and *Credit Suisse* have a flavor that courts should be more restrained in antitrust application in regulated industries and more deferential to agencies.

Thus, *Trinko*, *Credit Suisse*, and their progeny warrant a close examination of how agencies function in enforcing competition policy. In this context, this article examines the capabilities of agencies to perform the antitrust role. It recommends that in antitrust enforcement, courts should limit deference to where it is justified. This is consistent with *Trinko* and *Credit Suisse*, which, in fact, allow courts and agencies to engage in complementary antitrust enforcement, resulting in more effective antitrust policy implementation.<sup>24</sup> In the last part of this article, we propose recommendations to appropriately draw the boundaries between court and agency authority to protect consumer interests.

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19. *Trinko*, 540 U.S. at 414-15; *Credit Suisse*, 551 U.S. 283-85.

20. *Trinko*, 540 U.S. at 406; *Credit Suisse*, 551 U.S. at 272-73.

21. *Trinko*, 540 U.S. at 414-15.

22. *Credit Suisse*, 551 U.S. at 272-76. The authors suggest that of principal concern are not technical questions of implied repeal, including those that are addressed in *Credit Suisse* and *Trinko*, but, instead, are the broader questions of the appropriate *fora* and means to ensure proper review of the structure of regulated markets as well as the competitive conduct of companies in those markets. Appropriately, lawyers, including judges, look at these types of problems through the lens of legal doctrine, such as when implied repeal of the antitrust laws is appropriate in light of agencies' governing statutes. But there is much in *Trinko*, *Credit Suisse*, and also in *Twombly* to suggest that in addition to legal doctrine, the Supreme Court has been motivated by a sense that the transactional and other costs of litigation, especially in antitrust, ought to be reined in. *Trinko*, 540 U.S. at 414, 416-17; *Credit Suisse*, 551 U.S. at 282-84; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007). Agencies are typically, but not always, protective of their jurisdictions; however, there is no evidence that they generally think in terms of doctrines, such as implied repeal. Where the Supreme Court acts to shift the balance between courts and agencies towards agencies, as it has, it is important to consider whether agencies can competently do the antitrust job with which they are being tasked. Such consideration may, of course, be useful in delineating the appropriate scope of the implied repeal and other doctrines.

23. *Trinko*, 540 U.S. at 412.

24. *Trinko*, 540 U.S. at 414-15; *Credit Suisse*, 551 U.S. at 283.

## II. EVOLUTION OF ANTITRUST APPLICATION IN REGULATED INDUSTRIES

### A. *Historic Antitrust Application*

The importance of the antitrust laws (or something like them) to ensure economic freedom has been repeatedly acknowledged from before the formation of this country<sup>25</sup> to the present time.<sup>26</sup> The importance of antitrust enforcement holds particularly true for regulated industries.<sup>27</sup> These industries provide essential public services, and despite the recent trend in such industries towards deregulation and a greater reliance on markets instead of strict regulation to control prices and services, these industries have a history of monopolization.<sup>28</sup> Companies in them often have a continued ability to exercise market power.<sup>29</sup>

Many, if not all, regulated industries are undergoing a transformation, in whole or in part, from monopoly to more competitive industry structures.<sup>30</sup> Perhaps because of their history as regulated monopolies as well as industry characteristics (e.g., essential services produced by high-cost investments), such industries often have structures susceptible to the exercise of monopoly power. Therefore, the movement toward competition should lead to an increased need for antitrust enforcement in regulated industries. As one scholar has noted:

[D]eregulation has given antitrust an expanding role in many markets, such as telecommunications, electric power, and commercial aviation, to name a few. As an increasing number of activities in these markets pass out of the realm of strict agency control and into the realm of private, market-based decision making, antitrust picks up where the regulatory regime leaves off.<sup>31</sup>

25. See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 137 (R.H. Campbell, A.S. Skinner & W.B. Todd eds., Oxford Univ. Press 1976) (1776). "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." *Id.* Many authorities who cite to Smith's famous "invisible hand" observations have failed to absorb the remainder of Smith's work in this area.

26. See, e.g., *Trinko*, 540 U.S. at 415 ("The Sherman Act is indeed the 'Magna Carta of free enterprise'" (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) ("Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."); *Topco Assocs.*, 405 U.S. at 610 (1972) ("Antitrust laws . . . are the Magna Carta of free enterprise."); *Northern. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty . . ."); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) (Chief Justice Hughes, writing for the Court, declaring the Sherman Act a "charter of freedom").

27. Jablon et al., *Dispelling Myths*, *supra* note 1, at 606.

28. *Id.* at 597-98.

29. See, e.g., Elise Caplan & Stephen Brobek, *Have Restructured Wholesale Electricity Markets Benefitted Consumers?*, ELEC. POLICY, Dec. 2012, at 8, available at [http://www.publicpower.org/files/PDFs/CFA\\_APPA\\_RTO\\_Article\\_12\\_12\\_12.pdf](http://www.publicpower.org/files/PDFs/CFA_APPA_RTO_Article_12_12_12.pdf). (describing how, among other things, merchant generators in restructured electricity markets reap supra-competitive prices because of barriers to entry); see also Jablon et al., *What Can You Do*, *supra* note 1, at 32-33 (arguing that the superimposition of a competitive market model on a highly monopolized market structure adds to the use of the transmission system, providing greater possibility of constraints and therefore market power).

30. See, e.g., Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CALIF. L. REV. 1059, 1063-64 (1987).

31. Herbert Hovenkamp, *The Areeda-Turner Treatise in Antitrust Analysis*, 41 ANTITRUST BULL. 815, 832 (1996). Cf. Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CALIF. L. REV. 1059 (1987) ("While prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement."); Robert Pitofsky, Chairman, Fed. Trade Comm'n, Prepared Remarks at Glasser LegalWorks Seminar on Competitive Policy in Communications

Recognizing that antitrust laws are the cornerstones for ensuring economic freedom, Congress passed the principal antitrust laws, the Sherman and Clayton Acts nearly 125 years ago in grandly absolute terms.<sup>32</sup> Although staying grounded in the philosophy that antitrust laws play an important role in ensuring protection of a well-functioning market for the public good, courts have nevertheless nuanced the application of these laws as companies, economic activities, markets, and even theories in vogue have changed.<sup>33</sup>

It is not surprising then, that as the application of antitrust laws has evolved, the interpretation applicable to those in regulated industries has also changed, including the theories of responsibility for the enforcement of those laws.<sup>34</sup> In the early years, if they thought about antitrust issues at all, most regulatory agencies concluded that their job was to enforce their authorizing statutes and to leave antitrust issues to the courts.<sup>35</sup> The Court agreed, defining the judiciary's function as "see[ing] that the policy *entrusted to the courts* is not frustrated by an administrative agency."<sup>36</sup>

Furthermore, historically agencies have not been appreciative of being asked to take into account the perceived intricacies of antitrust policy nor of having antitrust doctrine interfere with agency support for perceived industry needs (satisfaction of which agencies may well have felt served public interests).<sup>37</sup> As late as the 1970s, agencies often continued to ignore antitrust

Industries: New Antitrust Approaches (Mar. 10, 1997), available at <http://www.ftc.gov/speeches/pitofsky/newcomm.shtm>.

32. Sherman Act, 15 U.S.C. §§ 1-7 (2012); Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 1 (2012)). For example, section 1 of the Sherman Act declares: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. It would be difficult to imagine a broader statutory phrasing.

33. For a discussion on Congressional use of deliberately vague language to ensure antitrust policies can be adaptively applied to changing economic conditions, see generally JOHN H. SHENEFIELD & IRWIN M. STELZER, *THE ANTITRUST LAWS: A PRIMER* (AEI Press, 4th ed. 2001).

34. See, e.g., *Trinko*, 540 U.S. 398; *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

35. Rather it was as if they had focused only on the first line of Rudyard Kipling's *The Ballad of East and West* without looking at the remainder of the poem:

OH, East is East, and West is West, and never the twain shall meet,  
Till Earth and Sky stand presently at God's great Judgment Seat;  
But there is neither East nor West, Border, nor Breed, nor Birth,  
When two strong men stand face to face, tho' they come from the ends of the earth!

RUDYARD KIPLING, *The Ballad of East and West*, COMPLETE VERSE 233 (1940).

For examples of agencies' reluctance to recognize that their statutory "public interest" mandates (and like language) encompass recognition of public policy that is reflected in other statutes, including the antitrust laws, see, for example, *Trinko*, 540 U.S. at 406. See also *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

36. *California v. Federal Power Comm'n*, 369 U.S. 482, 489 (1962) (emphasis added). In *California*, the old Federal Power Commission (FPC, now the Federal Energy Regulatory Commission, or FERC) authorized the transfer of facilities under the public interest standard in section 7 of the Natural Gas Act as part of a merger while the Department of Justice was challenging the same merger under the Clayton Act in court. *Id.* at 484. The Supreme Court stepped in to block the Federal Power Commission stating, "[T]he orderly procedure is for the Commission to await decision in the antitrust suit before taking action." *Id.* at 489.

37. See, e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659-60 (1964).

policy as it applied to their areas of expertise, and courts had to ultimately force them into doing so, kicking and screaming, as it were.<sup>38</sup> This was so, even though it was clear that the agency was not to enforce the antitrust laws as such, but to apply the principles of those laws as their principles affected the tasks committed to the agencies in their own statutes.<sup>39</sup>

Courts did refer matters to agencies under the doctrine of “primary jurisdiction” where agencies had subject matter jurisdiction or necessary knowledge.<sup>40</sup> However, in doing so, they gave agencies deference generally only in those circumstances “where protection of the integrity of a regulatory scheme dictate[d] preliminary resort to the agency which administers the scheme.”<sup>41</sup> The courts generally required a clear showing of “plain repugnancy between the antitrust and regulatory provisions” as to “the precise ingredients of a case subject to the [agency’s] broad regulatory and remedial powers” before they would defer to agency enforcement.<sup>42</sup> Even when courts deferred, appellate courts would continue to provide review of agency decisions, thereby helping to maintain antitrust review.<sup>43</sup> And in those cases where agencies had completed their proceedings prior to the commencement of the judicial antitrust enforcement action, the judiciary sometimes found it unnecessary to invoke the doctrine of primary jurisdiction.<sup>44</sup> A fair conclusion, we believe, is that courts maintained their primacy over antitrust enforcement except when their doing so would be in direct conflict with an agency statutory requirement.

#### *B. The Effect of Trinko and Credit Suisse on the Court’s Role in Antitrust Enforcement*

Contrary to the above, in recent years the Supreme Court, through its opinions in *Trinko* and *Credit Suisse*, has ruled that courts should not decide certain antitrust cases brought in federal courts by directing dismissal of

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38. See, e.g., *Trinko*, 540 U.S. 398.

39. *Gulf States Utils. Co. v. Federal Power Comm’n*, 411 U.S. 747, 757-62 (1973).

40. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 353 (1963).

41. *Id.* at 353 (citations omitted).

42. *Id.* at 350-51 (comparing *Pan Am. World Airways v. United States*, 371 U.S. 296 (1963) with *California v. Federal Power Comm’n*, 369 U.S. 482). In *Pan American*, the Court found a clear repugnancy between the antitrust laws and the Civil Aeronautics Act of 1938 as applied to the specific situation being litigated because the (now defunct) Civil Aeronautics Board (CAB) “had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws . . .” *Id.* at 351; see also Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, repealed by Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. §§ 40101-40130 (2012)). In contrast, the Court found no clear repugnancy in *California v. Federal Power Comm’n*, even though the FPC had taken competitive factors into account when deciding a merger application. *Philadelphia Nat’l Bank*, 374 U.S. at 351. The FPC was not required to give any particular weight to antitrust concerns, and did not have the broad enforcement authority granted to the CAB. *Id.* at 351-52.

43. *Id.* at 353 (stating that even in those cases where courts defer to agency antitrust enforcement at the outset, “[c]ourt jurisdiction is not thereby ousted, but only postponed”); *Federal Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958).

44. See generally *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 65-70 (1956); *Retail Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 756 (1963).



proceedings where it believes that the issues could and should have been raised before regulatory agencies.<sup>45</sup> This is a turnabout from traditional, primary court enforcement of antitrust laws or, at the very least, agency enforcement complementing court jurisdiction.<sup>46</sup>

At the outset, we note that the conclusions of *Trinko* and *Credit Suisse*'s antitrust deference to regulatory agencies may be a significant overstatement of the decisions' scopes. In *Trinko*, the Court defined the question as "whether a complaint alleging breach of the incumbent's duty under the 1996 [Telecommunications] Act to share its network with competitors states a claim under [section] 2 of the Sherman Act."<sup>47</sup> Its holding was: "We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents."<sup>48</sup> Fundamentally, the Court held that a breach of a statutory access mandate does not, in itself, make out an antitrust violation and that it is for the FCC to enforce its own rules.<sup>49</sup> And in *Credit Suisse*, the case did not involve issues of damages to particular plaintiffs. Rather, it involved the formulation of rules, which the SEC was apparently well-suited to make.<sup>50</sup> Thus, viewed in their specifics, the Court's holdings are limited and may be fairly interpreted as rendering unto Caesar that which is Caesar's. The Court's expansive dicta in *Trinko* and its four-step standard for determining when an agency statute implicitly precludes court enforcement in *Credit Suisse*<sup>51</sup> suggests that, at least in some circumstances, courts may adopt a diminished antitrust enforcement role in regulated industries.<sup>52</sup> The dicta in *Trinko* and the four step test of *Credit Suisse* rest on interrelated but potentially erroneous presumptions, including that agencies can and are effectively policing violations of antitrust principles in

45. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Credit Suisse*, 551 U.S. at 275-76; *see, e.g., Pennsylvania Ave. Funds v. Borey*, 569 F. Supp. 2d 1126, 1130 (W.D. Wash. 2008); *ASAP Paging, Inc. v. Centurytel of San Marcos, Inc.*, 137 F. App'x 694, 696, 699 (5th Cir. 2005).

46. *See generally* Jablon et al., *Dispelling Myths*, *supra* note 1, at 632-33.

47. *Trinko*, 540 U.S. at 401.

48. *Id.* at 410.

49. *Id.* at 415. Moreover, the *Trinko* preclusion would appear to be limited at least largely to section 2 monopolization and attempted monopolization cases, and its language may have been influenced by the case's appearances of a "strike suit" brought by lawyers where the most immediate injured party, allegedly precluded from the market, was not complaining. *Id.* at 415-16 (Stevens, J., concurring).

50. *Credit Suisse*, 551 U.S. at 276 ("[T]he antitrust complaints before us concern practices that lie at the very heart of the securities marketing enterprise.").

51. *Id.* at 285.

52. *Trinko*, 540 U.S. at 412-15. Lower courts have had a mixed reaction towards extending *Trinko* and *Credit Suisse* beyond the facts in those situations. *See, e.g., In re Western States Wholesale Natural Gas Antitrust Litig.*, 661 F. Supp. 2d 1172, 1183 (D. Nev. 2009) (finding no implied preclusion in alleged antitrust violations of the natural gas market under the theory that the Commodity Exchange Act and the antitrust laws are "reconcilable" and "no legal line drawing requiring particular regulatory expertise will be required to determine if Defendants conspired to engage in the alleged intentional price manipulations."); *Energy Mktg. Servs. v. Columbia Gas Transmission Corp.*, 639 F. Supp. 2d 643, 652 (S.D. W. Va. 2009) (finding "an 'enforcement-related need for . . . antitrust lawsuit[s]'" in the natural gas context because the "FERC appears to wield somewhat less authority to remedy anticompetitive behavior than the SEC") (citation omitted); *but see Electronic Trading Grp. v. Banc of Am. Sec.*, 588 F.3d 128, 134-35 (2d Cir. 2009) (finding implied preclusion when the SEC had authority to regulate and had engaged in ongoing regulation of prime brokers in short selling).

regulated industries and, especially where there are agency competition requirements, that courts are ill-suited to examine the complexities of antitrust conflicts in highly technical fields.<sup>53</sup> Because the Court's dicta is largely based on flawed assumptions, it would be most unfortunate for American consumers and the place of antitrust law as the "Magna Carta of free enterprise"<sup>54</sup> if these suggestions of a limited judicial antitrust role were institutionalized.

A 2010 written statement before the House Committee on the Judiciary, which was stated to represent the views of the Federal Trade Commission (FTC), addressed the current state of the law in these areas, as relevant for these purposes:

[T]he combined effect of *Credit Suisse* and *Trinko* is to make it more difficult than before for either private plaintiffs or public agencies to bring important antitrust cases in regulated sectors of the American economy.<sup>55</sup>

The viewpoint expressed in the FTC statement is not uncommon. As government regulation expands, the category of entities that can claim that direct antitrust actions should be foregone in favor of continued "supervision" by often friendly agencies will expand as well.<sup>56</sup> Thus, the issues discussed are addressed to crucial, and not necessarily limited, segments of the economy.

### III. POTENTIAL IMPACTS OF *TRINKO* AND *CREDIT SUISSE* ON ANTITRUST GOVERNANCE

*Trinko* and *Credit Suisse* counsel deference to regulatory agencies' determinations over substantial areas of antitrust policy formulation and enforcement.<sup>57</sup> Leaning towards a deferral to agency action on a theory that agency process *must be* more efficient for society without an examination of the alternative process and structure *as it actually works* would be an example of a beautiful theory submerging gritty actuality.<sup>58</sup> And, of course, the costs and burdens of excessive litigation to which the Court refers in cases like *Trinko* and *Twombly* may well be greatly overstated compared with the undoubtedly huge costs to society from non-antitrust enforcement.<sup>59</sup> The Court's apparent view in

53. *Trinko*, 540 U.S. at 414-15; *Credit Suisse*, 551 U.S. at 281-83.

54. *Trinko*, 540 U.S. at 415 (citation omitted); *see also* Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (referring to the Sherman Act as "a comprehensive charter of economic liberty").

55. *Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) [hereinafter FTC, *Is there Life After Trinko and Credit Suisse?*] (citations omitted) (statement of the FTC).

56. *See, e.g.*, Robert A. Jablon & Mark S. Hegedus, *The Trinko Ruling: The Sky Is Not Falling, But It Is Getting Cloudy*, PUB. POWER MAG. (May 1, 2004), <http://www.publicpower.org/Media/magazine/ArticleDetail.cfm?ItemNumber=9476>.

57. *Trinko*, 540 U.S. at 415; *Credit Suisse*, 551 U.S. at 277-78.

58. *Trinko*, 540 U.S. at 415; *Credit Suisse*, 551 U.S. at 275.

59. *Compare Trinko*, 540 U.S. at 414, 417, and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007), with Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 62-63 (2010) ("But the extent of the costs may be somewhat overstated—or partially self-inflicted—and certainly they are not universally imposed across the litigation universe. The excessive costs of discovery cited in *Twombly* seem to occur in a rather small percentage of cases."). *See also Twombly*, 550 U.S. at 596 (Stevens, J., dissenting) ("Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their Rule 12(b) motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners, that concern would not provide

*Trinko* and *Credit Suisse* that regulatory agencies can displace courts as the enforcers of antitrust norms does not come to grips with how agencies function.

*Trinko* has an undercurrent suggesting that there is a strict demarcation of authority between antitrust courts and administrative agencies with the former being largely confined to enforcement of antitrust rules in unregulated industries and the latter primarily enforcing antitrust policy in industries that agencies regulate.<sup>60</sup> For example, referring to the FCC and New York State Public Service Commission, in *Trinko*, the Court stated:

The regulatory framework that exists in this case demonstrates how, in certain circumstances, “regulation significantly diminishes the likelihood of major antitrust harm.”<sup>61</sup>

....

[The Court further said:]

Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. . . . An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.<sup>62</sup>

After reviewing the FCC’s regulation of Verizon, including a “competitive checklist, which . . . includes the nondiscriminatory provision of access” as well as “continuing oversight,” the Court concluded that the regulatory “regime was an effective steward of the antitrust function.”<sup>63</sup>

The *Trinko* decision *does not say*, but may come close to saying, that courts need not enforce the existing section 2 monopolization provisions where agencies have jurisdiction over the day-to-day enforcement of competitive access conditions.<sup>64</sup> The reference to the doctrine of implied immunity in this regard is particularly troublesome.<sup>65</sup> The Court’s judgment may be viewed as a signal to lower courts that they should apply similar reasoning in implied immunity contexts and back off from antitrust enforcement in network and infrastructure industries, even those subject to deregulation mandates or policies. For these industries, the Court appears to view antitrust principles as being served adequately by leaving enforcement of section 2 policies to agencies that allegedly have more specialized knowledge and greater oversight capability than courts.<sup>66</sup> The importance of applying antitrust principles to these industries and

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an adequate justification for this law-changing decision.”) (citation omitted). The cost to society of non-antitrust enforcement is, of course, difficult to quantify, but regulated industries—including energy, telecommunications, and banking—make up a very significant portion of the nation’s economy. It is reasonable to assume that antitrust violations in these industries could have very significant adverse cost to society. One only has to look to the 2000 California energy market crisis for evidence that collusive actions by a few can create severe impacts on the larger public. See generally FED. ENERGY REGULATORY COMM’N, ADDRESSING THE 2000-2001 WESTERN ENERGY CRISIS: CHRONOLOGY AT A GLANCE (2006), available at <http://www.ferc.gov/industries/electric/indus-act/wec/chron/print.asp>.

60. *Trinko*, 540 U.S. at 411.

61. *Id.* at 412 (citations omitted).

62. *Id.* at 414-15.

63. *Id.* at 412-13.

64. *Trinko*, 540 U.S. at 415-16.

65. *Id.* at 412 (citing *United States v. National Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694, 730-35 (1975)).

66. *Id.* at 414, 417; *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

the regulatory inadequacies discussed below would make applying an unnecessarily expanded interpretation of *Trinko* and *Credit Suisse* unconscionable. Because of the political power of many industry market participants, once exemptions are allowed, they are difficult to remove.<sup>67</sup> Moreover, it is legally unnecessary to withhold enforcement because the issue in *Trinko* was narrowly stated to be limited to “deciding whether to recognize an expansion of the contours of [section] 2” of the Sherman Act and the *Credit Suisse* test would rarely be preclusive.<sup>68</sup> Both cases are structured to allow the law to develop as factual proofs may compel.<sup>69</sup>

The Court seems to view antitrust courts and administrative agencies as performing much the same function. In fact, a major component of the *Credit Suisse* implied immunity test is that agencies have the authority to regulate and actively do so.<sup>70</sup> Therefore, the *Credit Suisse* Court appears comfortable leaving substantial antitrust enforcement in regulated industries to administrative agencies.<sup>71</sup> To the extent that it exists, this comfort would be misplaced not only because courts are *required* to apply the law, but also because courts and administrative agencies often act far differently both in procedural and substantive decision-making. Deference would often mean antitrust abandonment.

#### A. Agencies May Have No Power to Order Important Antitrust Remedies

Agencies are not authorized to enforce the antitrust laws but are required to consider applicable antitrust policies.<sup>72</sup> Although such policies must be fully taken into account, they must also be harmonized with agencies’ substantive statutes.<sup>73</sup> Therefore, leaving antitrust enforcement in regulated industries largely to agencies precludes strict antitrust enforcement.<sup>74</sup>

One very important difference between court enforcement of antitrust laws and agency enforcement of regulatory statutes is in allowed remedies. Although some agencies, such as the FERC and the Commodity Futures Trading Commission (CFTC), may levy very substantial fines for specific types of

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67. See, for example, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-94, FREIGHT RAILROADS: INDUSTRY HEALTH HAS IMPROVED, BUT CONCERNS ABOUT COMPETITION AND CAPACITY SHOULD BE ADDRESSED (2006), available at <http://www.gao.gov/assets/260/252473.pdf>, regarding the attempts to repeal antitrust exemptions for railroads that vastly overcharge for coal deliveries. Despite this 2006 Government Accountability Office study, and despite the introduction of the “Railroad Antitrust Enforcement Act” in one or both sides of Congress annually since at least 2006 and some alternate version for at least half a decade before that, the exemption still has not been repealed. For the most recent version, see Railroad Antitrust Enforcement Act, S. 638, 113th Cong. (2013).

68. *Trinko*, 540 U.S. at 412 (emphasis added). Compare *id.* at 401 (“we consider whether a complaint alleging breach . . . under the 1996 Act [also] states a claim under §2 of the Sherman Act”).

69. *Trinko*, 540 U.S. 398; *Credit Suisse*, 551 U.S. 264.

70. *Credit Suisse*, 551 U.S. at 276-77, 285.

71. See generally *id.* at 285.

72. *Antitrust Enforcement and the Consumer*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/atr/public/div\\_stats/antitrust-enfor-consumer.pdf](http://www.justice.gov/atr/public/div_stats/antitrust-enfor-consumer.pdf) (last visited Nov. 4, 2013).

73. See, e.g., *Gulf States Utils. v. FPC*, 411 U.S. 747, 763 (1973); *Federal Mar. Comm’n v. Svenska Amerika Linien*, 390 U.S. 328, 245-46 & 245 n.4 (1968); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1994).

74. See, e.g., *FCC v. RCA Commc’ns*, 346 U.S. 86, 90 (1953).

regulated conduct, e.g. market manipulation,<sup>75</sup> agencies generally face procedural and substantive limitations in the relief that they may order. In antitrust enforcement the availability of judicial remedies continues to be especially important where the prospect of treble damages and potential liability for opposing party legal fees create important deterrents to illegal conduct.<sup>76</sup> Although it may be robust, where applicable, the FERC and the CFTC penalty authority exists only over a small spectrum of potential industry antitrust violative conduct and, as to the FERC, in less robust form for some other violations.<sup>77</sup>

The administrative record preceding the *Trinko* decision is an excellent example of how administrative agencies often have inadequate tools to deter anticompetitive conduct. In December, 1999, the FCC granted Verizon's (then Bell Atlantic's) application to enter the long distance market in New York State based upon its "conclusion that Bell Atlantic ha[d] taken the statutorily required steps to open its local exchange and exchange access markets to competition."<sup>78</sup> But within several months Verizon was admitting that it was breaching its open access commitments for which it paid a "voluntary contribution" of \$3 million to the FCC, and \$10 million to competitive local exchange carriers.<sup>79</sup>

The *Trinko* Court portrayed the FCC action against Verizon as showing that the regulatory structure was sufficient to remedy and deter anticompetitive conduct.<sup>80</sup> But then FCC Chairman Powell drew a markedly different conclusion in a subsequent communication to Congress.<sup>81</sup> He explained that "given the 'vast resources' of many of" the nation's incumbent local exchange carriers, the Commission's maximum fine "is insufficient to punish and to deter violations in many instances."<sup>82</sup> He advised increasing the forfeiture limits "to enhance the deterrent effect of Commission fines" and also to give the Commission the authority to award punitive damages, attorneys' fees, and costs in formal complaint cases filed under section 208 of the Communications Act.<sup>83</sup>

Congress has not provided new remedies under the Communications Act.<sup>84</sup> Of course, the kind of remedies that Chairman Powell was requesting is judicially available under the antitrust laws. But the result of *Trinko* was to

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75. 15 U.S.C. §§ 1-2 (2012); 16 U.S.C. § 825o (2012); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 753, 124 Stat. 1376, 1752-53 (to be codified at 7 U.S.C. §§ 9, 15) (2010); see, e.g., *Amaranth Advisors*, 128 F.E.R.C. ¶ 61,154 at P 19 (2009) (\$7.5 million settlement).

76. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

77. 7 U.S.C. § 9(10)(C) (2012).

78. *In re Application by Bell Atl. N.Y. for Authorization Under Section 271 of the Commc'ns Act to Provide In-Region, InterLATA Serv. in the State of N.Y.*, 15 F.C.C.R. 3953, 3955 (1999); see also *Verizon Comm. Inc. v. Trinko*, 540 U.S. 398, 403 (2004).

79. *Trinko*, 540 U.S. at 403-04.

80. *Id.* at 412.

81. Letter from Michael Powell, Chairman, Fed. Commc'ns Comm'n, to Leaders of the Senate & House Commerce & Appropriations Comms. (May 4, 2001), available at [http://transition.fcc.gov/Bureaus/Common\\_Carrier/News\\_Releases/2001/nrcc0116.html](http://transition.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0116.html).

82. *Id.* (internal quotation marks omitted)

83. *Id.* (internal quotation marks omitted); see also 47 U.S.C. § 208 (2012).

84. See generally 47 U.S.C. §§ 201-31.

prevent courts from using their powers to provide appropriate deterrents.<sup>85</sup> Such a model should not be applied elsewhere.<sup>86</sup>

Moreover, as we discuss in Section IV, which considers the advantages of complementary agency and court jurisdiction, defendant companies often trumpet the availability of agency relief when appearing in court, but when appearing before agencies, those opposing antitrust relief have argued that the underlying agency statutes do not permit the relief sought and that agency remedial authority is otherwise limited.<sup>87</sup>

#### *B. Agencies Often Make Major Decisions Based upon Less Stringent Due Process Considerations Than Courts*

At the time of an early series of decisions allocating tasks between courts and agencies, the Administrative Procedure Act (APA)<sup>88</sup> divided administrative tasks into two basic groupings: rulemakings and adjudications.<sup>89</sup> Under those categories it was generally understood that most administrative agencies would have a decisional process for most, if not all, issues involving antitrust policy questions that tracked reasonably closely the decisional process that could be expected in courts.<sup>90</sup> This process could involve reasonable discovery, including depositions, and a trial or hearing including cross-examination, in which parties' contentions could be tested in accordance with traditional legal principles.<sup>91</sup>

In some ways, the *Trinko* and *Credit Suisse* decisions seem animated by a view of the administrative process that conforms to the adjudicatory ideal that many of the 1970s reformers were trying to implement. Critiques of agency capture problems in the 1970s prompted movement to increase the effectiveness of regulatory bodies and to make them function more in accord with legal norms.<sup>92</sup> Thus, in a series of important decisions, federal courts required agencies to afford more due process and reasoned decision-making in their decisions.<sup>93</sup> And public policy advocates pushed, sometimes successfully, for more vigorous open hearing rules, stricter ex parte contact regulations, abolishment of "secret law" advisory opinions, and changes designed to increase

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85. *Trinko*, 540 U.S. at 412.

86. In *Trinko*, the Court found there was no underlying antitrust violation from Verizon's refusal to deal with AT&T. *Id.* at 411. However, this determination was expressly influenced by the Court's determination that additional court scrutiny was unnecessary as a result of agency oversight. *Id.* at 412-13. More centrally, for future cases the question is the adequacy of agency oversight, which *Trinko* appears to overstate.

87. A primary example can be seen by comparing the seminal cases of *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372, 376-77 (1973) and *Gulf States Utils. v. FPC*, 411 U.S. 747, 753, 757 (1973), decided contemporaneously and discussed *supra* note 52. In both cases, defendants asserted the lack of authority of the forum where their conduct was being challenged, positions that current litigators would not find unique.

88. 5 U.S.C. §§ 551-59 (2012).

89. *Id.* §§ 553-54.

90. *Id.* § 556(c)-(e).

91. *Id.*

92. See generally Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-51 (1997).

93. See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 440 (D.C. Cir. 1973); *Natural Res. Def. Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633, 643, 653-554 (D.C. Cir. 1976).

citizen and public interest participation in hearings through proxy advocates and intervener funding programs.<sup>94</sup>

But today “agencies do not act like courts over a broad range of regulated agency decision-making and enforcement.”<sup>95</sup> Increasingly, they

inform themselves and make decisions not through administrative hearings [advised by hearing records] but through more informal rulemakings, policy statements, and various forms of conferences, meetings and communications with interested parties of all stripes, including those who are regulated, and with those who [benefit] or [are] hurt [from] regulation or nonregulation.<sup>96</sup>

And even proceedings that are treated as adjudicatory may be decided on a “paper” hearing basis without the allowance of discovery and the holding of traditional hearings.<sup>97</sup>

Agency policy is negotiated in both subtle and non-subtle ways. Traditional cases are increasingly avoided or relegated to the background. This process may be applauded, decried, or both, but the facts are that regulatory bodies are increasingly avoiding adjudicatory procedures, and the general public, including their representatives, will generally have a lesser voice than they would have in more neutral courts. Some agency determinations may, of course, be best determined through use of less formal procedures. However, where agencies decide factual, contested issues without parties having access to discovery and therefore to basic facts and without the defining of issues that depositions and cross-examination can bring, rigor is lost.

Notwithstanding the Court’s assumption that agencies can adequately police antitrust principles, agency procedural practices raise serious questions of agencies’ abilities to uncover antitrust violations. Courts are required to follow civil and criminal rules of procedure allowing parties to conduct discovery, participate in hearings, and cross-examine witnesses. By contrast, evidentiary proceedings are no longer the norm in agency proceedings. The Administrative Procedure Act does not require live hearings, and courts have routinely granted

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94. See generally WILLIAM T. GORMLEY, JR., TAMING THE BUREAUCRACY: MUSCLES, PRAYERS, AND OTHER STRATEGIES 74-76 (1989); Robert B. Leflar & Martin H. Rogol, *Consumer Participation in the Regulation of Public Utilities: A Model Act*, 13 HARV. J. ON LEGIS. 235, 264 (1976); WILLIAM T. GORMLEY, JR., THE POLITICS OF PUBLIC UTILITY REGULATION 37-39 (1983); WORKING ON THE SYSTEM: A COMPREHENSIVE MANUAL FOR CITIZEN ACCESS TO FEDERAL AGENCIES (James R. Michael & Ruth C. Fort eds., 1974); Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359-60, 372-73 (1972); Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L.J. 777, 784-785 (1971); Nicholas Johnson, *A New Fidelity to the Regulatory Ideal*, 59 GEO. L.J. 869, 873, 880 (1971); Arthur E. Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

95. Jablon et al., *Dispelling Myths*, *supra* note 1, at 619.

96. *Id.*

97. Unlike traditional oral hearings, a paper hearing is decided solely on the contents of the written materials. As is discussed *infra* text accompanying note 107, major cases may be decided before agencies on the pleadings and scripted, pre-filed evidence without *any* discovery. However labeled, antitrust and other important issues are being decided by agencies using informal processes, which agencies would have at one time decided using adjudicatory processes.

deference to agency decisions made without the opportunity for discovery or other “trial-like” procedures.<sup>98</sup>

Like courts, agencies may hear from experts. However, no less than in courts, there is often a “cacophony of experts” before agencies on either side of any substantive issue.<sup>99</sup> The perceived superior *expertise* of industry-specific regulators cannot appropriately be used as subterfuge for an abdication of judicial responsibility for antitrust enforcement.<sup>100</sup> Moreover, the *expertise* of courts may be understated. A reading of the District Court decision in *United States v. Microsoft Corp.*,<sup>101</sup> dealing with the highly technical computer software industry, demonstrates the capability of courts to deal with complex issues through focused attention, expert and fact witnesses, evidence, and other vehicles. Court decision after court decision shows that courts can handle complex economic matters. In any event, it would be difficult to conclude that regulators’ greater focus on particular industry problems have led to wiser competition policy or that the policies reached have, in fact, flowed from true expert knowledge. Courts have additional tools available, including agency referrals under primary jurisdiction or similar doctrines and inviting agency and amici briefs.<sup>102</sup>

The FERC is one of the agencies where this tendency to avoid court-like processes is significant. The FERC has embarked on a restructuring of the electric power industry, departing from a traditional cost of service regulatory model under which electric companies sell wholesale power based upon their costs.<sup>103</sup> In terms of its magnitude of change, this restructuring effort is comparable to the FPC’s natural gas producer rate regulation efforts. But, unlike in natural gas cases, there have been few electricity restructuring hearings to determine significant matters. The major electric restructuring orders came about through rulemakings and paper hearings without probing discovery.<sup>104</sup>

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98. See, e.g., *Pacific Gas & Elec. Co. v. FERC*, 746 F.2d 1383, 1387-88 (9th Cir. 1984) (“courts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings”) (citing *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979)).

99. Louis B. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 472 (1954).

100. *Id.* at 471 (commenting that “[e]xpertness has been oversold in this country”).

101. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000).

102. See generally *infra* Section IV.A.

103. See, e.g., *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 119 F.E.R.C. ¶ 61,295 at PP 7-11 (2007) (describing the FERC’s twenty-year process of moving towards market-based rates).

104. For example, FERC Order Nos. 888 and 2000 were both promulgated without hearing. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540 (1996) (to be codified at 18 C.F.R. pts. 35, 385) [hereinafter Order No. 888], *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, STATS. & REGS. ¶ 31,048, 62 Fed. Reg. 12,274 (1997) (to be codified at 18 C.F.R. pt. 35), *order on reh’g*, Order No. 888-B, 62 Fed. Reg. 64,688 (1997), *order on reh’g*, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff’d in part and remanded in part sub nom.* Transmission Access Policy Study Grp. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom.* New York v. FERC, 535 U.S. 1 (2002); Order No. 2000, *Regional Transmission Organizations*, F.E.R.C. STATS. & REGS. ¶ 31,089 (1999), 65 Fed. Reg. 809 (2000) (to be codified at 18 C.F.R. pt. 35), *order on reh’g*, Order No. 2000-A, F.E.R.C. STATS. &



Regulation has been implemented mainly by agency suasion and negotiations. Virtually all significant orders affecting regional transmission organizations resulted from filings by those organizations and a comment and reply process.<sup>105</sup>

Similarly, other market changes have taken place through FERC-sponsored “conferences” attended by Commissioners, key staff, and agency-selected representatives from various industry groups. Examples of conference topics include new transmission construction and incentives to promote such construction, market power and market rates, as well as a range of market power-related topics.<sup>106</sup> Such conferences are common and include all segments of the industry, including those represented by the authors of this article.<sup>107</sup>

Although written comments are allowed and encouraged, the presentations and submissions are not under oath or subject to cross-examination. Thus, the FERC is not informing itself or making decisions based upon traditional due process trial type hearings, as was formerly more frequent.

A recent paper describes how the FERC’s electric merger policy favors simple rules based upon market concentration screens, rather than a more open-ended inquiry to determine whether a merger is likely to result in anticompetitive effects.<sup>108</sup> The FERC’s streamlined approach “reduces the cost to the agency and others of assessing competitive effects . . . but increases the likelihood of incorrectly assessing a merger’s competitive effects.”<sup>109</sup> In contrast, the paper argues, the Department of Justice engages “in a relatively complex inquiry into competitive effects that considers many factors” depending upon the theory of harm and the particular characteristics of the industry and firms involved.<sup>110</sup> If the FERC were to adopt a more rigorous policy to ensure mergers are not anticompetitive, it would no doubt have to allow for additional process and discovery, but would have greater factual analysis and, likely, more accurate determinations of mergers’ competitive effects.

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REGS. ¶ 31,092 (2000), 65 Fed. Reg. 12,088 (2000), *appeal dismissed for want of standing sub nom.* Public Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001).

105. See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 F.E.R.C. ¶ 61,043 (2005); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 F.E.R.C. ¶ 61,280 (2003).

106. See, e.g., Transcript of the Technical Conference on Transmission Barriers to Entry, FERC Docket No. AD08-13-000 (Oct. 14, 2008); Transcript of the Technical Conference on Transmission Independence and Investment, FERC Docket Nos. AD05-5-000 and PL03-1-000 (Apr. 22, 2005); Transcript of the Technical Conference on Demand Response Compensation in Organized Wholesale Energy Markets, FERC Docket No. RM10-17-000 (Sept. 13, 2010).

107. The D.C. Circuit has referred to these informal meetings between the agency officials and members of the industry as “the ‘bread and butter’ of the process of administration,” and has deemed them appropriate both to facilitate settlement and to maintain the agency’s knowledge of the industry it regulates “so long as they do not frustrate judicial review or raise serious questions of fairness.” *Louisiana Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977)).

108. Mark J. Niefer, *Explaining the Divide Between DOJ and FERC on Electric Power Merger Policy*, 33 ENERGY L.J. 505 (2012). The paper argues that greater analysis is needed of the transactional and regulatory costs of the Department of Justice’s assessing a wider range of evidence and the benefits of likely reduced error costs compared with the FERC’s primary reliance on market screens with the opposite effects.

109. *Id.* at 508.

110. *Id.* at 514.

In addition to the conferences discussed above, representatives of virtually all interested parties may, and are often encouraged to, meet freely with the FERC commissioners and key staff to discuss issues that they deem important. Meetings with commissioners are permitted before cases are filed even though the commissioners will have to rule on the filings and opponents' objections, once they are made. Needless to say, opponents have less practical access to express their concerns. As a practical matter, they may not be alert to proposed actions before they are filed for agency review. Additionally, the FERC broadly permits off-the-record-communications for notice and comment rulemakings; many investigations, technical, policy and other conferences; and many compliance matters.<sup>111</sup> To take one example, discussed further below, before Exelon and PSEG filed with the FERC for approval of their mega-merger, all four sitting FERC commissioners met privately with Exelon-PSEG executives to discuss parameters of the companies' proposed merger application.<sup>112</sup> A FERC spokeswoman would not comment directly on the accusation of improper commissioner contacts because the case was pending but did say the agency has "a long-standing practice of being available to market participants and members of the general public for pre-filing meetings."<sup>113</sup> Although courts like agencies encourage alternative dispute resolution, and judges nearly always encourage settlements, in adjudication the triers of fact are not expected to have participated in extensive ex parte discussions with private parties on factual matters that they will decide.<sup>114</sup>

Conferences may be useful in providing information for the FERC commissioners and key staff and allowing regulators to communicate agency needs to regulated entities. They may even be arguably necessary under an industry structure where deregulated sales of power amount to billions of dollars per year. The FERC may be unable to regulate individual transactions directly and may have to rely on general rules and focus on securing competitive market structures.<sup>115</sup> Regardless, agencies decide major antitrust issues with little process. Conferences and informal procedures do not ensure antitrust enforcement. Even in deciding major merger cases, decisions normally result based upon pleadings and accompanying affidavits or testimony without any party discovery, interrogatories, depositions, requests for admissions or the like

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111. Order No. 607, *Regulations Governing Off-the-Record Communications*, F.E.R.C. STATS. & REGS. ¶ 31,079, at p. 30,878-79 (1999), 64 Fed. Reg. 51,222 (1999), *order on reh'g*, Order No. 607-A, F.E.R.C. STATS. & REGS. ¶ 31,112 (2000), 65 Fed. Reg. 71,247 (2000) (codified at 18 C.F.R. pt. 385).

112. *Citizen Groups Slam Exelon-PSEG Merger, Rip FERC Meetings with Company Officials*, INSIDE FERC, Apr. 4, 2005, at 3.

113. *Id.* (internal quotation marks omitted).

114. Special masters appointed in litigation to make certain factual analyses can sometimes communicate with the judges ex parte. Unlike private party ex parte contacts, special masters are regarded as neutral fact-finding bodies and form part of the decisional process. See, e.g., Thomas Willging, et al., *Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters*, FED. JUDICIAL CTR., 7-8 (2000), available at [http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/\\$file/specmast.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/specmast.pdf/$file/specmast.pdf).

115. To the extent that abbreviated procedures are necessary or sensible, this does not mean that important, contested cases should be decided without more process than is often provided. Certainly, where key facts are at issue, some discovery and cross-examination of facts that interested parties may prefer to keep hidden is required. *Id.* at 74-78.

where real motivation and the likely effects of merger approvals can be determined.<sup>116</sup>

This failure to follow rudimentary traditional procedures has not gone unnoticed by the appellate courts. In *Electric Power Supply Ass'n v. FERC*,<sup>117</sup> the D.C. Circuit overturned the FERC's contention that market monitors could communicate directly with the Commission on contested case matters.<sup>118</sup>

We use the FERC as an example of regulation by negotiation, but this phenomenon of agencies departing from hearings even where facts necessary to be decided are at issue is not limited to the FERC. A 1999 report from the General Counsel of the Nuclear Regulatory Commission (NRC) on re-examining the Commission's hearing process states:

We have also identified the trend in statute law and in much administrative practice to move away from formalized adjudication, with its winner-take-all courtroom model, toward alternative procedures, aimed at finding solutions that both satisfy legal requirements and accommodate a variety of interests.

In the last several years, moreover, the Chairman and other Commissioners have created a number of opportunities outside the agency's [s]ection 189 hearing processes to conduct informal meetings with members of the public and other stakeholders, both in Washington, and in communities close to nuclear power plants that were experiencing performance problems.<sup>119</sup>

In some cases, the courts have shown disquietude with this trend away from adjudicatory models of rulemaking and law enforcement. For example, starting in the early 1990's, the D.C. Circuit became increasingly frustrated with the Environmental Protection Agency's (EPA) reliance on informal policy development, and chastised the EPA for failing to use notice and comment rulemaking procedures.<sup>120</sup>

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116. In its Order on Disposition of Jurisdictional Facilities and Merger, in which Duke and Progress sought approval for one of the largest mergers in U.S. history, the FERC determined that because Duke and Progress failed certain Carolina screens, the companies had to mitigate Carolina merger effects. *Duke Energy Corp.*, 136 F.E.R.C. ¶ 61,245 at P 1 (2011). On the basis of the paper submissions, the FERC, however, agreed with the companies that it need not consider Florida impacts or require Florida screens because Duke was not selling significantly in Florida. *Id.* at PP 150-51. It came to this decision in the face of contrary evidence that an earlier merger that led to the creation of Progress Energy had similar facts and had shown potential market impacts. *Id.* at P 151. In its Order Accepting Revised Compliance Filing, As Modified, and Power Sales Agreements, the Commission accepted the merger applicants' revised compliance filing allowing the merger to go forward. *Duke Energy Corp.*, 139 F.E.R.C. ¶ 61,194 (2012). Although the FERC stated that it would "address the [failure to consider Florida market issues] on rehearing of the Merger Order," and parties in the case filed a rehearing application (including those represented by authors of this paper), as of this date, no rehearing order has issued. *Id.* at P 111. See also *Exelon Corp.*, 138 F.E.R.C. ¶ 61,167 at PP 2, 18-19 (2012) (approving the merger between Constellation Energy and Exelon Corporation without holding an oral hearing; although, one was requested by intervenors including the Illinois Attorney General).

117. *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004).

118. *Id.* at 1260, 1266.

119. KAREN D. CYR, U.S. NUCLEAR REGULATORY COMM'N, RE-EXAMINATION OF THE NRC HEARING PROCESS V (1999), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/secys/1999/secy1999-006/1999-006scy.pdf>.

120. See generally *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) ("Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations."); see also *General Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002).

But in other cases courts have blessed the avoidance of formal adjudicatory processes.<sup>121</sup> It may be that to some extent the use of more limited procedures within the agencies and in courts are better suited for regulation of the modern economy (although one may have skepticism). Mistrust of the traditional processes runs high. Trials can be costly, inefficient, and slow. However, the issue is whether agencies can substitute for courts in meaningfully enforcing antitrust principles. Where there is no assurance that agencies will give focused examinations of factual situations in light of antitrust principles, free of undue industry influence, agencies can only substitute for courts at the risk of abandoning antitrust enforcement.<sup>122</sup>

*C. The Political Nature of Agencies Compromise Their Role As Impartial Adjudicators*

Further reasons for not unduly favoring agency over court enforcement of antitrust law are institutional. Courts and agencies are very different decision-making bodies with different roles, strengths and weaknesses.

One of the pillars of the rule of law is expressed by Justice John Marshall's statement that we live under "a government of laws, and not of men."<sup>123</sup> Legislatures are primarily responsible for generally applicable laws that result from a balancing of interests within the political process. Ideally, courts apply law in individual cases neutrally through a reasoning process that is at least theoretically divorced from political influences.

The institutional structure and processes of courts, including lifetime appointments, strict ex parte communications rules, and requirements that decisions be justified by factual records and elaborations of neutral legal norms, are all designed to encourage reasoned and impartial judicial decision-making.<sup>124</sup> Agencies are structured very differently, perhaps due to the fact that they often perform both policy-making and adjudicatory functions.

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121. See, e.g., *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013) (rejecting state regulatory commission requests for hearings, declaring that based on "the highly technical character of the data and analysis . . . the technical knowledge and experience of [the] FERC's members and staff, and the petitioners' access to [the Respondent's] studies, [the court] would be creating gratuitous delay to insist at this late date on the Commission's resorting to litigation procedures designed long ago for run-of-the-mine legal disputes"). The court appeared to be coming close to saying that hearings are impractical for today's regulatory structure. See also *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1480 (D.C. Cir. 1989) (holding that formal adjudication need not be held on issuance by the EPA of orders to specific parties requiring cleanups of toxic waste, and that a public hearing was sufficient); *Coalition for Fair & Equitable Regulation of Docks on Lake of the Ozarks v. FERC*, 297 F.3d 771, 780 (8th Cir. 2002) (approving of FERC's adjudication on basis of paper pleadings); *Dr. Pepper/Seven-Up Cos. v. FTC*, 991 F.2d 859, 863-64 (D.C. Cir. 1993) (upholding the FCC's rejection of an acquisition that would violate antitrust laws when FCC provided only notice, and comments procedures and no formal hearing was conducted).

122. Some cited examples do not deal exclusively with antitrust issues. Issues of agency processes apply to both antitrust and other cases. Thus, they are relevant to multiple agency jurisdictions and subject matters. It may be that the balance between appropriate adjudicatory and more informal processes, including rulemaking, would vary among agencies, subject matters, and cases. In any event, the process problems raised are especially important to antitrust because of its importance and the need for factual determinations in antitrust cases.

123. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

124. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 146-48 (1994).

At the top tier of many regulatory agencies is a bipartisan commission of political appointees, who serve for set, limited terms. Agency heads and commissioners sometimes come from industries that they regulate or aligned industries. They often seek employment in those industries after their terms and the many legal, financial, and lobbying firms that represent them.<sup>125</sup> Some agencies are headed by a single political appointee; all appointees must obtain Senate confirmation and lack lifetime tenure to separate them from further political influence. Agency budgets and expenditures of money go through the executive review process and must be congressionally approved. Agencies are subject to congressional oversight and the possibility of new statutory enactments. In short, their actions are deeply affected by the political process.

The political structure of regulatory commissions makes them more susceptible than courts to the influence of their regulated industries as well as other interested parties. Thus, even at the genesis of many regulatory commissions, prominent commentators were predicting that “the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things.”<sup>126</sup> In 1960, James Landis, the late dean of Harvard Law School and a prominent advocate of administrative authority,<sup>127</sup> reported to President-Elect Kennedy on the tendency of agency tribunals to reflect industry positions because of the “daily machine-gun-like impact” of industry lobbyists and lawyers in formal and informal agency processes.<sup>128</sup> Others have attributed regulatory “capture” to the tendency of agencies to consider themselves responsible for the health of the industries that they regulate, leading them to sometimes favor industry demands over consumer concerns and interests.<sup>129</sup>

Stark examples of the influence of politics over regulatory agency decision-making could be seen in the widespread political debate over Federal Reserve

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125. For example, former FERC Chairwoman, Elizabeth Moler, became Executive Vice President, Government and Environmental Affairs and Public Policy of Exelon Corporation. Former FERC Chairman, Curt L. Hébert, Jr., is Executive Vice President, External Affairs, of Entergy Corporation. Former FERC Chairman, Joseph T. Kelliher became Executive Vice President, Federal Regulatory Affairs, overseeing FPL Group federal energy regulatory policy, and former FERC Commissioner Marc Spitzer is a partner with Steptoe and Johnson, a law firm whose clients include some of the largest investor-owned utilities in the country. Former Federal Power Commission Chairman Lee C. White was associated with the authors' law firm. The authors deem their firm to be consumer-oriented.

126. Letter from Richard Olney, 40th U.S. Attorney General, to Charles Perkins, President of the Chicago, Burlington and Quincy Railroad (Dec. 28, 1892), in Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1109 n.7 (1954).

127. See generally JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* (Yale Univ. Press 1938).

128. In a letter to President-Elect Kennedy (Dec. 21, 1960), Landis wrote:

Irrespective of the absence of social contacts and the acceptance of undue hospitality, it is the daily machine-gun-like impact on both agency and its staff of industry representation that makes for industry orientation on the part of many honest and capable agency members as well as agency staffs.

JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 71* (1960), available at [http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960\\_1221\\_Landis\\_report.pdf](http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1960/1960_1221_Landis_report.pdf).

129. See, e.g., John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 726 (1986).

policy.<sup>130</sup> Discussions of the need to ensure the Federal Reserve's newly granted enhanced consumer protection function remains independent from its other functions and criticisms that the Federal Reserve's closeness to the banks deterred it from exercising prior authority that it had to illustrate the point.<sup>131</sup> Similar criticisms have been made against the CFTC and manifold other agencies whose inactions led to the banking crisis and recession.<sup>132</sup>

None of this is to say that agencies and commissions do not often resist against such influence. Certainly, many agency decisions may be deemed responsive to public interests. However, officials who do not bend to industry desires may find themselves subject to retribution. For example, Leland Olds, first Chairman of the Federal Power Commission after the enactment of part 2 of the Federal Power Act, covering wholesale power sales and transmission regulation, was famously subject to fierce industry condemnation and ultimate defeat of his renomination confirmation.<sup>133</sup> Currently, EPA officials are subject to congressional attack. Legislation has been introduced to curtail the EPA's promulgation of clean air and other regulations.<sup>134</sup> The emphasis here is not the fact that agency officials are subject to political influence and pressure or the merits of particular criticisms, although some are clearly deleterious to administrators and commissioners' ability to regulate independently, but a recognition that agencies are *inherently* less judicial than courts. They may, therefore, be *incapable* of performing the antitrust enforcement roles that the Court appears to assume.

Moreover, members of Congress have been known to insert provisions in bills bearing on agencies' jurisdiction or funding to discourage them from pursuing unwelcome policy initiatives.<sup>135</sup> Such political interference has been legion.<sup>136</sup> The very potential of political retaliation for unpopular action may

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130. See, e.g., Paul Wiseman et al., *Big Job Looms for New Consumer Protection Agency*, USA TODAY (June 24, 2010), [http://usatoday30.usatoday.com/money/companies/regulation/2010-06-24-consumeragency24\\_CV\\_N.htm](http://usatoday30.usatoday.com/money/companies/regulation/2010-06-24-consumeragency24_CV_N.htm).

131. *Id.*

132. E.g., Jerry W. Markham, *Merging the SEC and CFTC - A Clash of Cultures*, 78 U. CIN. L. REV. 537, 538 (2009).

133. 3 ROBERT A. CARO, *MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON* 84-85 (2002).

134. E.g., Ensuring Affordable Energy Act, H.R. 153, 112th Cong. (2011); EPA Regulatory Relief Act of 2011, H.R. 2250, 112th Cong. (2011); Transparency in Regulatory Analysis of Impacts on the Nation Act of 2011, H.R. 2401, 112th Cong. (2011).

135. See generally David Ivanovich, *Energy Agency Leader on Hot Seat with Critics*, HOUS. CHRONICLE WASH. BUREAU, Jan. 16, 2005, <http://www.chron.com/business/energy/article/Energy-agency-leader-on-hot-seat-with-critics-1563172.php>; Jeff Barber, *Southern Senators 'Troubled' by FERC's Recent Moves Advancing Restructuring*, INSIDE ENERGY WITH FEDERAL LANDS, July 26, 2004. Southern Company and Entergy Corporation, for example, opposed certain forms of regional transmission organization membership and control that were before the FERC. Ivanovich, *supra*; Barber, *supra*. Senators Trent Lott (R-Miss.) and Richard Shelby (R-Ala.) consistently fought the FERC's efforts to make such membership mandatory, including the insertion of language into the failed November 2003 Energy Bill that would have prevented the FERC from forcing any company to participate in its Standard Market Design until 2007. Ivanovich, *supra*; Barber, *supra*.

136. Sen. Phil Gramm (R-Tex.) added what came to be known as the notorious "Enron Exception" to the 2000 Commodity Futures Modernization Act, exempting electronic derivative traders from disclosing the details of their trades. Eric Lipton, *Gramm and the 'Enron Loophole'*, N.Y. TIMES (Nov. 14, 2008), [http://www.nytimes.com/2008/11/17/business/17grammside.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/11/17/business/17grammside.html?pagewanted=all&_r=0); Commodity Futures Modernization Act, Pub. L. No. 106-554, § 1(a)(5), 114 Stat. 2763, 2763A-365 (2000) (codified as amended in scattered sections of 7, 11, 12, 15 U.S.C.). The result was to prevent regulation of some of the derivatives that

itself caution agency officials from getting too far out on the limb. Although political questioning may not be inappropriate when an agency is engaged in policymaking, its influence is certainly not the hallmark of ensuring independent adjudication of antitrust claims.

The ability of agencies to impartially adjudicate cases is further hampered by the conflicting interests that many agencies must consider. Even where agencies have pro-competitive agendas, antitrust or other issues will not be decided in a vacuum that ignores the implication of decisions on other agency functions. Agencies need some industry support for policies that they advance, lest they find themselves under severe congressional and executive push back.

The power of privately-owned utilities and their capture of regulatory agencies is not new.<sup>137</sup> There have been periods of unfriendly courts and regulators to antitrust enforcement before. What is new is the development and complexity of “deregulated markets” with monopolistic attributes.<sup>138</sup> This complexity itself can lead regulators, courts, and the public to a laissez-faire non-interference with market results, lest their intervention with less than full knowledge make things worse.

Of course, it is true that judges are politically appointed and, whatever the ideal may be, they cannot be said to be completely cloistered from political and social influences. As Finley Peter Dunne’s Mr. Dooley declared, “[N]o matter whether th[e] constitution follows th[e] flag or not, th[e] [S]upreme [C]o[u]rt follows th[e] [e]l[e]ction returns.”<sup>139</sup> And certainly, agencies have reached enforcement decisions and other determinations quite contrary to company hopes, including levying substantial penalties for statutory violations. Day-in and day-out Commissioners and Administrators respond to public interests and well-being, as they understand them. Nonetheless, agencies have built in constraints that often limit their abilities to apply antitrust principles in an equivalent manner to courts. Although there are certainly advantages in some situations to agencies being able to act more informally, and even politically, in carrying out their missions, these advantages can also limit agencies’ ability to substitute for courts in appropriately performing the antitrust role.

#### *D. Agency Focus on Other Functions Deters Full Consideration of Antitrust Violations*

Even where agencies have express authority to include antitrust considerations within their regulatory functions, they often neglect to enforce antitrust principles fully in deference to other priorities that they deem more

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led to the financial meltdown. *See, e.g.*, Transcript of Hearing at 1, The Role of Derivatives in the Financial Crisis, (Fin. Crisis Inquiry Comm’n June 30, 2010), available at [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-testimony/2010-0630-Transcript.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0630-Transcript.pdf); *see also* Tim Fleck & Brian Wallstin, *Enron’s End Run*, DALL. OBSERVER (Feb. 7, 2002), <http://www.dallasobserver.com/2002-02-07/news/enron-s-end-run/1/>. The Energy Policy Act of 2005 contains numerous provisions that put political pressure on the FERC to accommodate congressional concerns on a range of issues. *See, e.g.*, Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1236, 1824, 119 Stat. 594, 961, 1134 (2005).

137. *See generally* Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

138. *See generally* ANDREJ JURIS, THE EMERGENCE OF MARKETS IN THE NATURAL GAS INDUSTRY 3 (1998), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-1895>.

139. FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1901).

important as well as to needs that they consider more immediate. As agency processes tilt away from consumer interests in “just and reasonable” rate reviews towards claimed industry needs for investment, agencies may also focus away from antitrust problems.<sup>140</sup> Indeed, agencies sometimes view antitrust issues as distractions. For example, the NRC had been given express antitrust authority because nuclear power had been developed by the taxpayer and should not be used to further monopolization.<sup>141</sup> However, even the NRC, which has conducted highly judicialized antitrust proceedings, severely curtailed its antitrust activities, finding such reviews “not a sensible use of our limited resources needed to fulfill our primary mission . . . .”<sup>142</sup> Ultimately, with commission support, section 625 of the Energy Policy Act of 2005 limited the NRC’s antitrust jurisdiction in the grant of new licenses.<sup>143</sup> The Commission

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140. For example, although citing no evidence that revenues in the Midwest are insufficient to allow owners of generating facilities to recover investment costs, the FERC cited the need to ensure that “rates are just and reasonable for buyers and sellers” in accepting mitigation measures that could allow sellers to double or triple prices over competitive levels. *Midwest Indep. Transmission Sys. Operator, Inc.*, 109 F.E.R.C. ¶ 61,157 at PP 215-21 (2004), *order on reh’g*, 111 F.E.R.C. ¶ 61,043 (2005). Similar revenue sufficiency claims, including the need to generate enough revenues to recover fixed-costs, are made in support of bid caps of \$1,000 per megawatt hour (MWh) on spot market energy sales, even though utilities typically recover fixed costs through separate capacity payments or through regulated rate-base recovery. 109 F.E.R.C. ¶ 61,157, at P 302. *See, e.g.*, CAL. INDEP. SYS. OPERATOR CORP., FIFTH REPLACEMENT FERC ELECTRIC TARIFF § 39.6.1.1 (2013) (bid cap for energy at \$1,000/MWh); PJM INTERCONNECTION, L.L.C., PJM OPEN ACCESS TRANSMISSION TARIFF § 1.10.1A.d.viii (2013) (bid cap of \$1,000/MWh for generation resources in the day-ahead market); MIDCONTINENT INDEP. SYS. OPERATOR, FERC ELECTRIC TARIFF § 39.2.5B.d (2013) (bid cap of \$1,000/MWh for External Asynchronous Resources in the day-ahead market). These amounts are greatly above the incremental costs of producing energy, which averages in the range of \$25-\$50. The price cap amounts reflect a FERC premise that in times of shortage, it is permissible for market prices to reflect shortage market clearing prices even though company market power is a consequence and sometimes a cause of shortage. The results call for full factual examination and question the FERC’s fulfillment of its role to guard against the exercise of market power and to ensure “just and reasonable” rates, as well 16 U.S.C. §§ 824d-e (2012). Determinations that increases in short-term capacity or energy prices are necessary to elicit long-term capacity are *factual*. The FERC has also ordered capacity market minimum price offers and limited sellers’ ability to offer capacity at the market clearing price out of a concern that market prices may be too low and to encourage new generation, notwithstanding well-placed skepticism of limiting businesses freedom “to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.” *Pacific Bell Telephone Co. v. Linkline Commc’ns Inc.*, 555 U.S. 438, 448 (2009), *vacated sub nom.* *Linkline Communications, Inc. v. SBC California, Inc.*, 563 F.3d 853 (9th Cir. 2009) (emphasis added); *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). *See also* *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221-223 (1993), *reh’g denied*, 509 U.S. 940 (1993) (predatory or forms of too low pricing must show both below cost pricing and a resultant injury to competition; low prices benefit consumers so long as they are above predatory levels). *Accord*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“[C]utting prices in order to increase business often is the very essence of competition”) (internal quotation marks omitted).

141. *See generally* Atomic Energy Act, 42 U.S.C. § 2135(c) (2012); *Consumers Power Co. (Midland Plant, Units 1 & 2)*, 6 N.R.C. 892, 897 (1977).

142. *Kansas Gas & Elec. Co.*, 49 N.R.C. 441, 463 (1999), 64 Fed. Reg. 33,916, 33,925 (June 24, 1999) (discontinuing review of license transfer applications for antitrust considerations); *see also* *Florida Power & Light Co. (St. Lucie Plant, Unit No. 2)*, 14 N.R.C. 1167, 1171-72 (1981), *vacated as moot*, 15 N.R.C. 639, 642 (1982).

143. Energy Policy Act of 2005, Pub. L. No. 109-58, § 625, 119 Stat. 594 (2005) (amending 42 U.S.C. § 2135(c)).



viewed that other agencies could adequately perform the antitrust role.<sup>144</sup> However, the Commission's abnegation meant that instead of having a required NRC antitrust review (in conjunction with the Department of Justice),<sup>145</sup> again, a requirement that arose because the government was licensing the private use of technology that was developed by government research and investment,<sup>146</sup> potentially aggrieved parties must now convince agencies, that would have a reduced sensitivity to nuclear issues and multiple other priorities, to make a discretionary review.<sup>147</sup> Although the openness of the NRC's avoidance of antitrust enforcement is striking, even in *Gulf States Utilities Co. v. FPC*, which reversed the FPC for failing to consider the anticompetitive effect of granting approval of a security issuance under a "compatible with the public interest" standard, the Supreme Court recognized that the FPC had to harmonize its consideration of antitrust allegations with the need for the particular security issuances.<sup>148</sup>

Agencies giving priority to their missions under the statutes that they administer continues although perhaps to a lesser degree than in the time of *Gulf States*. Recently, in *City of Pella, Iowa v. Midwest Independent Transmission System Operator, Inc.*, the FERC refused to address antitrust claims, stating:

As the parties acknowledge, the Commission does not have jurisdiction to determine violations of the antitrust laws and is not strictly bound to the dictates of these laws. Thus, [the party's] claims in this regard are more appropriately addressed in other forums. Moreover, while we do "have a responsibility to consider, in appropriate circumstances, anticompetitive effects" when reviewing matters under the FPA, . . . we find that Midwest ISO and MidAmerican have acted in accordance with the provisions of the Tariff and the Transmission Owners Agreement, which we have determined to be just and reasonable.<sup>149</sup>

Similarly, in situations in which it adopted specific ownership limits for proposed transactions, the FCC held that it "may refuse to consider allegations of anti-competitive effects of the transaction. It has, for instance, refused to consider claims that a radio license assignment would increase Herfindahl-Hirschman Index (HHI) levels in a local radio market."<sup>150</sup> Commentators have noted that "[e]ven when the FCC concludes (or assumes) that a transaction would have potential anti-competitive consequences, it may nevertheless approve the transaction, finding that other public interest benefits will outweigh the competitive harms."<sup>151</sup>

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144. Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649, 44,656 (July 19, 2000) (codified at 10 C.F.R. pts. 2, 50) ("[T]here are other antitrust authorities and forums with far greater antitrust expertise than the Commission to address potential antitrust problems with proposed mergers and acquisitions of owners of nuclear power facilities.").

145. 42 U.S.C. § 2135(c).

146. Consumers Power Co. (Midland Plant, Units 1 and 2), 6 N.R.C. 892, 897 (1977).

147. 10 C.F.R. § 2.309 (2013).

148. *Gulf States Utils. Co. v. Federal Power Comm'n*, 411 U.S. 747, 749, 762-64 (1973).

149. *City of Pella, Iowa v. Midwest Indep. Transmission Sys. Operator, Inc.*, 134 F.E.R.C. ¶ 61,081 at P 108 (2011).

150. Ilene Knable Gotts, Jack N. Goodman & Nathaniel L. Asker, *US Antitrust and FCC Treatment of Acquisitions of Distressed Communications Businesses*, 6 COMPETITION L. INT'L 11, 14 (Apr. 2010), available at <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.17354.10.pdf>.

151. *Id.* at 14-15.

### *E. Antitrust Enforcement Requires Full Factual Development*

Antitrust issues tend to be fact based.<sup>152</sup> Fact intensive issues often may not be properly resolved in non-adjudicatory proceedings, unless the deciding entity has compulsory process requirements and its own investigative and enforcement capabilities.<sup>153</sup> Even there, facts must be uncovered and factual issues must often be determined under an adjudicatory process.<sup>154</sup>

Entities that choose to break the law usually do not publicize their decisions or actions towards that end. The Sherman Act has been in place for over a century, and power companies, natural gas pipelines, and other regulated entities have become aware that they should not admit, and certainly should not publicize, actions to restrain trade or to monopolize.<sup>155</sup> Any trial lawyer who has had more than a smattering of litigation practice understands that large organizations have stated policies which may or may not correlate with the reality of what people acting for the organization do on the ground. Virtually every organization that uses heavy transportation equipment, for example, will have a policy asserting that it is very conscious of safety, but that policy may or may not comport with its actual behavior.<sup>156</sup> Thus, organizations engaged in offshore petroleum drilling may have a public policy asserting something like:

We are in a hazardous business, and are committed to excellence through the systematic and disciplined management of our operations. We follow and uphold the rules and standards we set for our company.<sup>157</sup>

Although we use BP as an example because of its relatively recent notoriety, most of the other participants in these and other industries would have similar published policies.<sup>158</sup> But in many cases, company personnel do not

152. See generally *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007).

153. See generally *Otter Tail Power Co. v. United States*, 410 U.S. 366, 391 (1973).

154. See generally *id.*

155. The *Otter Tail* case may be inapposite, however, because the executives of that organization may not have believed that the antitrust laws applied to them. *Id.* at 373-74. Since that decision, executives at utilities may generally be more clever in hiding efforts to monopolize or conspire.

156. E.g., *Moving Forward on Safety*, WASH. METROPOLITAN AREA TRANSIT AUTHORITY, [http://www.wmata.com/about\\_metro/incidents\\_investigations.cfm?](http://www.wmata.com/about_metro/incidents_investigations.cfm?) (last visited Sept. 17, 2013) (“Safety is the number one priority at Metro.”).

157. BP, SUSTAINABILITY REVIEW (2011), available at [http://www.bp.com/assets/bp\\_internet/globalbp/STAGING/global\\_assets/e\\_s\\_assets/e\\_s\\_assets\\_2010/downloads\\_pdfs/bp\\_sustainability\\_review\\_2011.pdf](http://www.bp.com/assets/bp_internet/globalbp/STAGING/global_assets/e_s_assets/e_s_assets_2010/downloads_pdfs/bp_sustainability_review_2011.pdf).

158. For example, in July of 2011, a portion of ExxonMobil’s pipeline ruptured in Montana releasing 1,000 barrels of crude oil into the Yellowstone River. Miles Grant, *Exxon Mobil Oil Pipeline Ruptures Under Montana’s Yellowstone River*, WILDLIFE PROMISE (July 3, 2011), <http://blog.nwf.org/2011/07/exxon-mobil-oil-pipeline-ruptures-under-montanas-yellowstone-river/>. The company’s response and communication efforts have been severely criticized by the Governor of Montana and critically questioned by members of the U.S. Senate Committee on Environment and Public Works. See, e.g., *Montana, Exxon-Mobil at Odds over Oil Spill*, NATIONAL PUBLIC RADIO (July 12, 2011), <http://www.npr.org/2011/07/12/137799688/montana-exxon-mobil-at-odds-over-oil-spill>; *Yellowstone River Oil Spill Oversight, Hearing Before the Subcomm. on Transp. & Infrastructure of the S. Comm. on Envy’s & Pub. Works*, 112th Cong. (2011). Nevertheless, ExxonMobil stated:

What makes our business successful is our commitment to carefully and systematically identify, plan for, and manage risk. We do this through a rigorous management approach—our *Operations Integrity Management System*, or OIMS . . . OIMS integrates safety, security, health, environmental, and social risk management into every aspect of our business.

always follow the official policies (occasionally with the actual or constructive knowledge of management).<sup>159</sup> As organizations become larger and more complex, this disconnect between management assertions (and perhaps belief) and fact may become even more pronounced.

Even in the “old days” agencies with a “special concern” for an industry found it difficult to permit injured parties to obtain the proof needed to make a case when tinged with antitrust issues.<sup>160</sup> Today’s exercise of “fact finding” works even less well for establishing the facts of what actually occurred. If an agency does not permit inconvenient facts to get in the way of its preferred policy directions, there likely will be people willing to state their company’s “policy,” and smaller entities making contrary statements will tend to be overridden in the interests of claimed efficient decision-making.<sup>161</sup> Where motivation is at issue, absent an ability to test factual assertions, anticompetitive motivations can be buried.

Anyone who has ever been in a trial knows that where there is discovery, motives can be uncovered far different from those that are “officially” presented. Interrogatories, hearings, and the opportunity to cross-examine are just a few of the discovery tools needed to ferret out the truth from sophisticated parties whose actions monopolize regulated markets. Similarly, prior to the adoption of FERC Order No. 888 that provides for open access transmission service,<sup>162</sup> municipalities and cooperatives frequently found the opportunities for documentary discovery and cross-examination the primary means to expose the

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2011 *Corporate Citizenship Report*, EXXON MOBIL 1 (2011), available at [http://www.exxonmobil.com/Corporate/Files/news\\_pub\\_ccr2011.pdf](http://www.exxonmobil.com/Corporate/Files/news_pub_ccr2011.pdf).

159. It often takes probing inquiry to uncover the disparity between what is claimed on paper and what is actually taking place. See, e.g., *The Role of BP in the Deepwater Horizon Explosion and Oil Spill: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 111th Cong. 114-15 (2010) (testimony of Tony Hayward, CEO, BP):

[Rep. Bruce Braley (D-Iowa)]: Mr. Hayward, . . . explain to us why between June of 2007 and February of 2010, the Occupational Health and Safety Administration [OHSA] checked 55 oil refineries operating in the U.S.; 2 of those 55 are owned by BP, and BP’s refineries racked up 760 citations for egregiously willful safety violations accounting for 97 percent of the worst and most serious violations that OSHA monitors in the workplace. That doesn’t sound like a culture of safety. Mr. Hayward: We acknowledge we had very serious issues in 2005 and 2006.

[Rep. Braley]: I am not talking about 2005 and 2006. I’m citing from an OSHA study between June of 2007, on your watch, and February of 2010 where OSHA said BP has a systemic safety problem. And of those 760 that were classified as egregious and willful, it is important to note that that is the worst violation that OSHA can identify. And their definition is a violation committed with plain indifference to or intentional disregard for employee safety and health; 97 percent of all of those egregious violations at U.S. refineries on your watch were against your company. That doesn’t sound like a company that, to use your words, is committed to safe, reliable operations as your number one priority. There is a complete disconnect between your testimony and the reality of these OSHA findings; do you understand that?

160. See generally *Starr v. Sony BMG Music Entm’t*, 592 F.3d 314, 325-327 (2d Cir. 2010).

161. This problem may be exacerbated by the pleading requirements suggested by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), but see *Starr*, 592 F.3d 314. The additional question of how stricter pleading requirements would apply, if at all, in a regulatory agency is beyond the scope of this discussion. However, in many agencies, smaller entities filing complaints or protests must virtually prove their case through pleadings in order to get the right to discovery of facts even where those facts are in the control of companies having adverse positions.

162. Order No. 888, *supra* note 106.

discriminatory practices of large investor-owned utilities that were refusing to transmit for or otherwise deal fairly with these dependent, competing cities and cooperatives in the electric business.<sup>163</sup> The following is a transcript excerpt from a cross-examination conducted by one of the authors of this paper during the deposition of the Chief Executive Officer of Consumers Power Company on antitrust issues that shows the need for cross-examination and other discovery:

Q. "Just to be clear about it, if, say, a municipal entity in the State of Ohio desired to buy wholesale power from Consumers Power, would you sell to it?"

A. *"I don't think so.*

...

Q. "Assume that . . . some other entity were willing to sell power to a municipality within your service territory, would you sell transmission services to get the power there?"

A. *"The matter has never come up and I think I would want to know more of the details of the transaction.*

Q. "What kinds of things would you want to know?"

A. *"I would want to know, for one thing, whether or not our lawyers felt we were obligated to do so. For another, I would want to know for what purpose the power was being sold and at what rate –*

Q. "Sold by whom?"

A. *"By a selling firm. At what rate, what the receiving utility intended to do with it, what impact it would have in the long run on the ability of Consumers Power Company to maintain its present markets.*

Q. "Is it fair to say that your judgment would be based at least in part on your judgment of the extent to which the purchase of this power by the municipality or cooperative within your service territory enabled it to reduce its rates in competition with Consumers Power?"

A. *"I think that would be a factor.*

Q. "A large factor?"

A. *"I think so.*

Q. "Apart from the question of your legal obligation, are there any other major factors?"

A. *"Well, I think the size of the transaction would be a factor.*

Q. "Why is that?"

A. *"Well, it might be a matter that all things considered wasn't too significant. I think whether the receiving utility actually was going to use it to invade our present market area would be a factor.*

Q. "What do you mean by 'invade our present market area?'"

A. *"Well start taking away our customers which we have invested a great deal of money in order to serve them . . . [W]e do concern ourselves with the relative rates at which we are able to supply service to our customer as compared with those of other entities. Frankly, we don't like to put ourselves in a position where we are increasing the extent to which our performance looks bad in relationship to that of other entities.*

Q. "Does that complete your answer?"

A. *"Just one final thought on that and that is to the extent that we do we increase our exposure to losing our markets."<sup>164</sup>*

One knows that one would never have obtained such evidence of refusals to deal and their motivations in a rulemaking or as a result of a conference.

163. 18 C.F.R. § 35.28 (2013).

164. Brief on Exceptions of Mich. Cities & Cooperatives, Deposition of A.H. Aymond, Chief Executive, President and Chairman of the Board of Directors of Consumers Power Company at 77-79, Consumers Power Co., (Midland Plant Units 1 & 2), N.R.C. Docket Nos. 50-329A, 50-330A (Nov. 13, 1975) (emphasis added) (on file with the author).

In another similar situation, the vice president of an investor-owned utility was pointedly asked by both municipal counsel and the presiding judge whether the company would provide service to a municipality under its existing tariff in a case involving claims of anticompetitive refusals to deal.<sup>165</sup> In responding, the vice president stated:

[Mr. Gardner:] Your Honor, I would have to abide by the Commission's decision on the matter. As I said, I think that the request is inequitable to [Florida Power & Light Co. (FP&L)] and its other customers. I think the tariff is inappropriate to the service required. And if the Commission decides that we should render it, obviously we will. But I am very reluctant to do it under the circumstances of the perceived injury that I see will occur to FP&L because of the inappropriateness of the rate.

Presiding Judge: So could I characterize your answer in a way that might be a little more dogmatic . . . in the absence of direction by this Commission Florida Power & Light would not provide service [under its existing tariff]?

[Mr. Gardner:] *FP&L is reluctant to provide the service, and I guess in the absence we probably won't. But as I say, we are very reluctant to do so.*<sup>166</sup>

These companies settled the cases in question, agreeing to no longer follow such practices. However, these examples demonstrate the necessity of discovery and cross-examination to antitrust and other agency determinations.<sup>167</sup> In the latter case, it was the first time the company *admitted* it was refusing to sell wholesale power to competitors, as opposed to its previous evasions that the matter had to be studied and the like.

Today, even in theoretically adjudicative proceedings, such as merger or complaint cases, discovery and cross-examination would rarely be available in antitrust cases at the FERC because the FERC tends to decide cases on the pleadings or after paper hearings. Discovery is generally unavailable unless a traditional hearing is ordered.<sup>168</sup> Paper hearings containing statements drafted or scrutinized by lawyers, conferences, etc. do not bring the same results. Through these, one merely gets a carefully scripted company position without the process needed to ferret out the truth. We stress that the issue is not the correctness of any particular decision or the appropriate application of antitrust policy in specific cases, but that, as the preceding subsections show, agency decisions are plainly influenced by factors divorced from antitrust concerns.<sup>169</sup> Where market contours are being determined, major mergers are being approved, minimum prices are being imposed, and other competitive actions are being decided with minimum process, a more probing antitrust inquiry is required than that which is generally available before agencies.

#### IV. AN OPTIMAL SOLUTION: COMPLEMENTARY AND EFFECTIVE ANTITRUST RESPONSIBILITY

*Trinko's* strict holding only addresses the question of whether, if the FCC promulgates an access rule, violation of that rule creates a section 2 refusal to

165. Testimony by Robert J. Gardner, Senior Vice President, Florida Power & Light Company at 611-12, Florida Power & Light Co., F.E.R.C. Docket Nos. ER78-19, ER78-81 (Mar. 16, 1978).

166. *Id.*

167. *See generally* Jablon et al., *What Can You Do*, *supra* note 1.

168. 18 C.F.R. § 385.401.

169. *See generally supra* Section III.A-E.

deal claim, and *Credit Suisse* establishes a four part test that arguably seeks to avoid direct judicial-agency conflicts.<sup>170</sup> However, to the extent that the Supreme Court, other courts, or commentators suggest that lower courts should avoid section 2 or other antitrust enforcement in areas where agencies have jurisdiction, this dicta and commentary should be rejected because in regulated industries critical to the Nation's welfare, antitrust enforcement is "not less important but more so."<sup>171</sup> Such an either-courts-or-agencies-should-exercise-jurisdiction approach to antitrust enforcement can too easily result in no enforcement. Agencies and courts can and should complement each other in providing effective antitrust consideration. Such complementary consideration of anticompetitive issues would avoid much of the potential for conflict that concerned the Court in *Trinko* and *Credit Suisse* while better ensuring full antitrust consideration.<sup>172</sup>

To some extent the concept of complementary jurisdiction reflects an attitude that recognizes that *both* courts and agencies have important and sometimes parallel antitrust responsibilities. It assumes that under their conjoint responsibilities both are expected to protect against anticompetitive abuse within their jurisdictions. As Judge Skelly Wright put the matter,

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. . . . Another example of their common purpose is that both types of regulation seek to establish an atmosphere which will stimulate innovations for better service at a lower cost. This analysis suggests that the two forms of economic regulation complement each other.<sup>173</sup>

As is discussed herein, under these standards, except where there is a direct conflict, judicial antitrust and agency cases would both move forward within their jurisdictions. Through doctrines of primary jurisdiction, where appropriate, a court could refer questions or matters to agencies or agencies could defer to courts, with the non-lead forum holding the case in abeyance.<sup>174</sup> Sometimes court and agency preclusion rules would apply.<sup>175</sup> A court could make its relief subject to companies making tariff or other filings with agencies to avoid conflict and achieve efficiencies in oversight, as occurred, for example, in *Otter Tail Power Co. v. United States*.<sup>176</sup> Although a parallel court or agency claim might lead to a deferral of one of the actions, if we are to give a primacy to antitrust policy as it affects regulated industries, the fact of a deferral would not justify a dismissal as occurred in *Credit Suisse* except where (1) full agency antitrust consideration is assured; (2) agency duplicative statutory authority and

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170. *Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407-08 (2004); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 285 (2007).

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

172. *See generally Trinko*, 540 U.S. 398; *Credit Suisse*, 551 U.S. 264.

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

174. *See, e.g., California v. FPC*, 369 U.S. 482, 490 (1962); *Gulf States Utils. Co. v. Federal Power Comm'n*, 411 U.S. 747, 761 (1973).

175. *See, e.g., United States v. Utah Constr. & Mining*, 384 U.S. 394, 416-15 (1966); *University of Tenn. v. Elliot*, 478 U.S. 788, 795-96 (1986).

176. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 375-76, *reh'g denied*, 411 U.S. 910 (1973).

actions would be contradictory to a court or agency moving forward, which mandates such dismissal under properly applied *Credit Suisse* and *Midcal* standards, as are discussed *infra*; and (3) the authority of the court or agency which proceeds under deferral has jurisdictional or subject matter priority and knowledge.<sup>177</sup> Agencies would be responsible to exercise their authority to implement antitrust policy to the maximum possible extent, granting the most limited feasible antitrust exclusions consistent with their responsibilities under their enabling statutes.<sup>178</sup>

The place of regulated industries in our economy warrants an appropriate emphasis on antitrust policy. These standards provide such emphasis. Notwithstanding suggestions to the contrary in the *Trinko* dicta, antitrust enforcement is essential in these industries because, as the FERC analysis exemplifies, such industries almost always lack sufficient competitive response potential to prevent the sustained exercise of market power.<sup>179</sup> This deficiency can be attributed to, among other things, preexisting and continuing industry concentration, historic monopoly positions of certain market participants, and the industries' intensive capital structures which impede non-incumbent entry.<sup>180</sup>

Due to political and institutional pressures as well as agencies' continuing to move away from adjudicatory processes, regulatory agencies cannot, by themselves, adequately provide necessary antitrust enforcement.<sup>181</sup> Agencies often have broad jurisdictions over particular industry market structures and transactions and also particularized knowledge of industries that fall under their jurisdictions, including an ability to enforce day to day implementation of court remedies.<sup>182</sup> However, courts have direct antitrust adjudicatory jurisdiction and broad remedial authority.<sup>183</sup> Agencies and courts should work together to prevent violations of antitrust law and policy and to ensure consumer welfare.

#### A. *Suggestions That Courts and Agencies Cannot Exercise a Complementary Antitrust Role Are Inapt*

As we show in Section III, today's electricity industry provides a ready, but hardly exclusive, example of where antitrust courts and regulatory agencies can and should play complementary and reinforcing roles. Such complementary,

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177. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980); *Credit Suisse*, 551 U.S. at 275-76.

178. *Gulf States Utils.*, 411 U.S. at 761.

179. *See generally supra* Section III.A.

180. The Commission itself has recognized the problem of preferred incumbent rights impeding inter-regional transmission planning and has sought to open entry in planning across regions. Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. STATS. & REGS. ¶ 31,323 at P 320, 76 Fed. Reg. 49,842 (2011), *reh'g denied*, Order No. 1000-A, 139 F.E.R.C. ¶ 61,132 (2012), *on reh'g*, Order No. 1000-B, 141 F.E.R.C. ¶ 61,044 (2012), *review docketed sub nom.* South Carolina Pub. Serv. Auth. v. FERC, No. 12-1232 (D.C. Cir. filed May 25, 2012).

181. Especially because agencies make competition decisions with limited process, the deference that appellate courts give to agency decisions provide additional reasons for the need for independent judicial involvement in antitrust cases. *See generally* *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1867 (2013); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

182. *Chevron*, 467 U.S. at 843-44.

183. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004).

non-exclusive jurisdiction would tend to ensure the likelihood of necessary antitrust enforcement and the application of agency experience and knowledge in addition to maintaining both *fora*'s advantages.

The *Trinko* and *Credit Suisse* Courts raise concerns that such dual jurisdiction can lead to duplicative proceedings and conflicting requirements and that courts cannot fashion appropriate antitrust relief in regulated industries.<sup>184</sup> However, these objections are more theoretical than real. Complementary jurisdiction has not posed problems to date or, if it has, the Supreme Court does not cite evidence of such problems. In fact, there has been no real showing that agencies do not welcome court antitrust enforcement, which expends none (or hardly any) of their resources and can lead to pro-competitive results for which they cannot be politically blamed.<sup>185</sup> For example, we have never heard of any NRC objection to the idea that the courts can also enforce NRC antitrust license conditions.<sup>186</sup> By the same token, agencies can implement judicial (and other administrative) remedies.<sup>187</sup>

Of course, coordinate jurisdiction may, to some extent, allow for forum shopping or create duplicative costs. But if there is a primacy to preventing and correcting anticompetitive conduct, the fact that a court or agency may pass on a particular questionable company action does not automatically justify allowing that action to be continued. Courts and agencies have different roles and priorities: if a company's conduct is contrary to competition rulings in either judicial or administrative *fora*, it probably should be disallowed.

On balance, the availability of duplicate *fora* is preferable to non-enforcement risks. Because of the importance of antitrust to national economic policy, both agencies and courts could act in harmony, taking similar directions in applying antitrust policy. At minimum, one could be neutral during the pendency of the other's more aggressive antitrust enforcement.<sup>188</sup>

Treating courts and agencies as complementary bodies permits more effective remedies than if courts and agency jurisdictions are deemed inherently separate. Regulated industries, including electricity, natural gas and oil pipelines, telecommunications and transportation, tend to be among our most important and, frequently, those where antitrust problems are most likely to

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184. *Id.* at 407; *Credit Suisse Sec. (USA) LLC v Billing*, 551 U.S. 264, 281-82 (2007).

185. The FERC has recognized the role that antitrust enforcement has played in wholesale customers' gaining transmission access. *See generally* Order No. 888, *supra* note 106.

186. *United States v. Pacific Gas & Elec. Co.*, 714 F. Supp. 1039, 1051 (N.D. Cal. 1989); *Florida Mun. Power Agency v. Florida Power & Light Co.*, 64 F.3d 614, 617 (11th Cir. 1995), *mandate enforced*, 81 F. Supp. 2d 1313 (M.D. Fla. 1999). The cited cases enforced NRC antitrust nuclear plant license conditions, a task that the NRC itself has not appeared anxious to do. For example, in the Florida Municipal Power Agency (FMPA)-Florida Power & Light Company (FP&L) litigation, FMPA claimed that FPL's refusal to sell its network transmission service violated the NRC antitrust conditions. *Florida Power & Light Co. (St. Lucie Plant, Unit No. 2)*, 41 N.R.C. 361, 362 (1995). The NRC declined to order FPL to sell network transmission service *on the grounds that relief is available at the FERC*. *Id.* at 368. The NRC cited *City of Holyoke Gas & Electric Department v. SEC*, 972 F.2d 358, 363 (D.C. Cir. 1992), in which the SEC deferred to FERC merger jurisdiction.

187. *See generally* *Otter Tail Power Co. v. United States*, 410 U.S. 366, 376-77 (1973).

188. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 353 (1963) (stating that even in those cases where courts defer to agency antitrust enforcement at the outset, "[c]ourt jurisdiction is not thereby ousted, but only postponed").



occur. These are industries that often have had monopoly structures, but are now evolving towards competition. Their products and services are vital. If there are any segments of the economy where one would want strict antitrust enforcement, it is in regulated industries.

*B. Allowed Deference to Agencies Must be Narrowly Tailored to Only Those Instances Where Agencies Actually Adequately Perform Antitrust Functions*

The foregoing review of agency decision-making demonstrates the risk of antitrust non-enforcement associated with turning antitrust over to administrative agencies; significant anticompetitive activity could be countenanced or even immunized from antitrust attack.<sup>189</sup> It would be extremely harmful for the country and the economy if agencies and courts are to both defer from antitrust or antitrust policy enforcement in a grotesque parody of the old “You first, my dear Gaston! After you, my dear Alphonse!” routine which entertained comic strip readers for years in the old *New York Journal*<sup>190</sup> as a polite excuse for never getting anything done. The opportunities for very costly mischief in such an enforcement lacuna are manifold.

And it would be equally harmful if the courts were simply to defer to agencies which have no direct antitrust enforcement authority or which have been largely captured by and are sympathetic to “their” industries. So it is important that to the extent there is to be an “implied preclusion,” both courts and agencies use clearer and more sophisticated analyses for this purpose than has sometimes been the case.

The Supreme Court has held that the antitrust laws do not condemn state action that monopolizes or regulates industry in ways that permit private parties to engage in anticompetitive conduct.<sup>191</sup> This state action immunity from antitrust enforcement has permitted private parties, who act pursuant to state law, to claim antitrust protection for otherwise unlawful, anticompetitive conduct.<sup>192</sup> So concerned was the Supreme Court that this immunized private anticompetitive conduct should really be state action that it has insisted that for immunity to apply, the state authorization for the anticompetitive conduct must be “clearly articulated . . . [as] state policy” and “actively supervised.”<sup>193</sup> Although we emphatically do not advocate a comparable immunity associated with federal agency action, the Supreme Court should be at least as demanding of anticompetitive actions taken pursuant to federal administrative proceedings as anticompetitive actions taken pursuant to state policy, where the potential

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189. See *infra* Section IV.B.

190. Frederick Burr Opper, *You First, My Dear*, N.Y. J. (1901).

191. *Parker v. Brown*, 317 U.S. 341, 351 (1943).

192. *Id.* at 351-52.

193. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007 (2013) (for state action immunity to apply, governmental entity must act “pursuant to a clearly articulated and affirmatively expressed state policy to displace competition . . . . Because Georgia’s grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, . . . the clear-articulation test is not satisfied[,] and state-action immunity does not apply.”); *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

result is to immunize private actors from antitrust enforcement.<sup>194</sup> Thus, if *Trinko* and *Credit Suisse* or other decisions intend a significant (or any) deferral to regulatory agencies on antitrust matters, there ought to be a clear demonstration that any immunized anticompetitive conduct is necessary to the agency's mission,<sup>195</sup> that the regulatory immunity is articulated and intended rather than implied, and that the agency involved is in fact *effectively* regulating industry conduct in pursuit of an appropriate competition policy.<sup>196</sup>

At the forefront of the analysis of these factors is the initial deference that courts paid to state authority under the state action doctrine.<sup>197</sup> This deference is somewhat analogous to the deference that many recommend or suggest exists based upon *Trinko* and *Credit Suisse*.<sup>198</sup> The state action doctrine comes from a 1943 case, *Parker v. Brown*, in which it became established that federal antitrust courts would defer to state actions in antitrust enforcement, thus allowing states to effectively override the application of the antitrust laws because those laws were designed to control private conduct, not governmental regulatory or other actions.<sup>199</sup> In *Parker*, California established a state sanctioned grape cartel modeled after the New Deal Agricultural Adjustment Act.<sup>200</sup> California sought to stabilize (and increase) grape prices.<sup>201</sup> There was little question that absent state authorization, those acting under the policy would have violated section 1 of the Sherman Act.<sup>202</sup> Undoubtedly sensitive to the desirability of allowing states to implement economic policies, especially those consistent with then current federal policy, the Court held that private actions pursuant to a state policy were immune from federal antitrust enforcement.<sup>203</sup>

However correct or desirable *Parker v. Brown* and its progeny may be, it became apparent that, if unqualified, the doctrine would allow states to immunize clearly anticompetitive conduct and to eviscerate a good deal of federal antitrust law.<sup>204</sup> The most extreme, although never tried, example would be state legislation that created a policy that the antitrust laws do not apply in

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194. *City of Lafayette*, 435 U.S. at 431-32.

195. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 285 (2007). Part one of the *Credit Suisse* test says that the "area of conduct" involved must be "within the heartland" of the agency's jurisdiction for implied preclusion to apply. For there to be an antitrust override, the authors submit that the interference with antitrust application also ought to be the minimum necessary to fulfill the agency's mission.

196. *Id.* at 270-71.

197. *Parker*, 317 U.S. at 351, 363.

198. See generally *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Credit Suisse*, 551 U.S. 264.

199. *Parker*, 317 U.S. at 367. Technically, *Parker* held that the antitrust laws did not cover state actions so that in acting to immunize private conduct, state action and implicitly private party action implementing state action is not covered by the federal antitrust laws. *Id.* at 368.

200. *Id.* at 344-46; Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (codified as amended in scattered sections of 7, 12, 15, 31 and 43 U.S.C. (2012)).

201. *Parker*, 317 U.S. at 364.

202. 15 U.S.C. § 1 (2012).

203. *Parker*, 317 U.S. at 367 ("The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent.").

204. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 730-35 (1986).

that state.<sup>205</sup> However, in many states, compliant legislatures have authorized policies protecting particular businesses or interests, freeing them from antitrust requirements.<sup>206</sup>

When the implications of state action immunity, allowing states to immunize private anticompetitive conduct, became clear (and perhaps influenced by less governmentally-oriented attitudes), the Court imposed strict limitations.<sup>207</sup> Antitrust immunity would be available only where the state had both expressed a clearly articulated intent to supplant competition with regulation or monopoly service, where any allowed private anticompetitive conduct was “actively supervised” by the state, and where the policy immunizing private conduct generally had come from a legislative act.<sup>208</sup> In this context, the Court emphasized that the decision to allow the anticompetitive conduct in question had to be that *of the state*, not merely permissive private conduct that might be arguably allowed.<sup>209</sup> Because regulatory actions under *Trinko* and *Credit Suisse* have the same potential for eliminating wide areas of antitrust application, and again ones affecting our most important industries, the limitations to the state action doctrine under which courts allow state regulatory policies to be made effective through private anticompetitive acts ought to equally limit federal regulatory policies under which anticompetitive conduct is allowed.

State (and federal) legislation is often written broadly. Under such legislation, private parties making volitional choices to act anticompetitively often claim protection under federal or state regulatory policies where governments have never considered the antitrust implications of the allegedly protected private actions.<sup>210</sup> Thus, parties could not seek immunity by merely

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205. In *Parker*, the Court held that California’s Agricultural Adjustment Act setting up an extensive grape cartel was outside of antitrust purview as reflective of “state action or official action directed by a state.” 317 U.S. at 345-49, 351, 356-59.

206. Shepard, *supra* note 207, at 734-35.

207. See, e.g., *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 417 (1978).

208. E.g., *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (“the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’” and “the policy must be ‘actively supervised’ by the State itself”) (internal citations omitted).

209. *Id.* at 106 (“The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”).

210. E.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Detroit Edison’s claim that its conduct giving away light bulbs without making separate charges from its electric bills was immunized from antitrust review by its inclusion in a regulatory tariff was rejected by the Court. *Id.* at 581. Although the Michigan Public Service Commission had approved the program, the Court found that “the option to have, or not to have, such a program is primarily respondent’s, not the Commission’s.” *Id.* at 594. Additionally, the “filed rate doctrine” generally gives utility tariffs binding effects precluding private party suits that contrary utility conduct violates antitrust or even contract law. E.g., *Keogh v. Chicago & Northwestern R.R.*, 260 U.S. 156, 161-62 (1922); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 573 (1981). Courts have held that the filed rate doctrine applies to bar suits where sellers have market rate authority under a regulatory tariff so that the sellers themselves in large part totally fix the rates and terms of their contracts (sometimes with buyer consent or acquiescence). *Id.* at 578. In this situation the buyers use the regulatory agency as a shield, but the potential anticompetitiveness of their conduct may be largely or totally unexamined and in any event is insulated from court review. *Id.* at 578-79.

citing to some allegedly consistent state statute or regulatory action that might conceivably cover their conduct.<sup>211</sup>

The same considerations would apply to immunization or decisions not to judicially enforce potential antitrust violations due to the availability of regulatory oversight or permissive regulatory activity.<sup>212</sup> It is important that any use of implied preclusion be limited to areas where there is effective and operative competition policy articulation and regulation that fully substitutes for enforcement of the antitrust laws to discipline corporate anticompetitive behavior. “[T]he federal courts should not be able to use those decisions to impose an unwarranted bar on public antitrust enforcement in regulated industries.”<sup>213</sup>

To the extent (or if) *Trinko* and *Credit Suisse* really signify a significant movement in the direction of deferral by courts to administrative agencies (or a prudential lifting of antitrust obligations that otherwise would apply to regulated industries), the first question must be to what extent the Court has moved or will move the legislatively determined bar which measures those industries’ conduct. We are not as convinced that the Court has chosen to override legislation in these areas as some others may be. But there could be no excuse for a judicial test that simply left those industries to the “supervision” of agencies, which the industries themselves tend to capture, especially in those areas where an agency’s writ does not clearly run or in areas directly affected by those “regulation free” operations of the industry. It is one thing to ignore congressional savings clauses when it is clear that a much more detailed congressional regulatory scheme substitutes for the discipline imposed upon the remainder of the economy by competition and the antitrust laws.<sup>214</sup> It is quite another to do so when the regulatory scheme covering antitrust matters is partial or does not touch at all on the conduct asserted to violate the antitrust laws. Further, where the agency itself determines that pricing or other matters are regulated by the market (i.e., through private pricing or other decisions), no judicial antitrust immunity ought to be allowed. And at least until the Court is to overrule *California v. FPC*<sup>215</sup> and *United States v. Radio Corp. of America*,<sup>216</sup> we think it is safe to say that the courts should retain control over the shifting meaning of the antitrust laws.

*C. Implied Preclusion Should Only be Found in the Limited Circumstances Where There is an Actual Conflict Between the Authority Granted to an Agency and the Antitrust Laws*

A certain creative tension in situations where both courts and agencies have overlapping jurisdiction can be helpful in keeping the entities from falling into intellectual somnolence in their analyses and in avoiding adopting theories that do not have factual bases. As Justice Thomas quite correctly noted in his dissent

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211. *Cantor*, 428 U.S. at 590-91.

212. *See, e.g., supra* note 214. Arguably, examples are in *Trinko* and *Credit Suisse* themselves.

213. FTC, *Is There Life After Trinko and Credit Suisse?*, *supra* note 55.

214. *See generally* *Credit Suisse Sec. (USA) LLC v. Billing* 551 U.S. 264, 287 (Thomas, J., dissenting); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406-07 (2004).

215. *California v. FPC*, 369 U.S. 482 (1962).

216. *United States v. Radio Corp. of Am.*, 358 U.S. 334 (1959).

in *Credit Suisse*, Congress provided a savings clause in each of the Securities Act of 1933 and the Securities Exchange Act of 1934.<sup>217</sup> Each provides that “the rights and remedies [provided in the Act] shall be in addition to any and all other rights and remedies that may exist at law or in equity.”<sup>218</sup> So it is clear that the Court’s “implicit preclusion” conclusion is certainly not one that is required by Congress but rather is a judicially imposed prudential analysis, which can and should be adapted to meet the exigencies of the cases coming before it.<sup>219</sup>

The core basis for regulation in the first place should not be forgotten: for the most part an industry is regulated because it (1) provides an essential service, (2) has a monopoly and certainly inadequate competition for at least some portion of its service, and (3) the normal market competition model to discipline prices and services will not fully operate or operate effectively. Although the business model is one of very long standing,<sup>220</sup> the explicit monopoly rights given in the process have for centuries been clear enough so that no rational government has ever thought the public could escape abuse if the use of consequent economic and market power were not regulated.<sup>221</sup> Recent partial deregulation has greatly magnified rather than decreased the potential for damage to the public from the exercise of such monopoly powers that remain (if for no other reason than the decline of regulatory oversight in a partially deregulated market).<sup>222</sup>

In areas where there is no obvious federal or state authority directly in conflict, courts have not been averse to asserting antitrust jurisdiction.<sup>223</sup> Absent

217. *Credit Suisse*, 551 U.S. at 287 (Thomas, J., dissenting); Securities Exchange Act of 1933, 15 U.S.C. §§ 77a-77bbbb (2012); Securities Exchange Act of 1934, 15 U.S.C. §§ 78b-78mm (2012).

218. *Id.* at 287-88 (citing 15 U.S.C. §§ 77p(a), 78bb(a) (2012)). We do not here opine on whether that argument was properly preserved by the respondents in that case. Justice Thomas also notes that the Telecommunications Act of 1996, at issue in *Trinko*, contains a similar savings clause expressly focusing on the antitrust laws. *Id.* at 288-89 (citing 47 U.S.C. § 152 note (2012) (Applicability of Consent Decrees and Other Law § (b)(1); *Trinko*, 540 U.S. at 406).

219. If one were to consider what Congress would have to do to reject the implicit preclusion conclusion, it would be hard to think of language more specific than the savings clause in the Telecommunications Act of 1996 cited by Justice Thomas. *Id.* at 288-89. If all members of the Court considered legislative history to be relevant, a reenactment of the savings clause with a joint report saying something to the effect of “we reenact the savings clause *in haec verba* and this time we really mean it” might accomplish that result even though legislative history might be considered irrelevant by some members of the Court.

220. Thus, there was in effect what has been known as a “regulatory compact” in which privately-owned utilities had an obligation to provide “essential services” to all in their territory, at a rate regulated by a state public utilities commission, and were provided the state power of eminent domain to enable them to do that. This is a business model that was initially developed in Medieval England as to entities given a Crown monopoly to provide an “essential service” such as ferries, wharfingers, toll roads and bridges, and the like. For more historical detail, see generally Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L. J. 35 (2005).

221. *Id.* at 109-10.

222. *Id.* at 81-82.

223. *E.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973). That Court held:

Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions. . . . Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.

*Id.* (internal citations omitted).

actual conflicts, there is every reason to continue such policies. In the energy area, the Court in *Otter Tail* noted:

When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.<sup>224</sup>

And where the agency clearly does have authority to regulate related issues, as stated in *Gulf States*:

Consideration of antitrust and anticompetitive issues by the Commission, moreover, serves the important function of establishing a first line of defense against those competitive practices *that might later be the subject of antitrust proceedings*.<sup>225</sup>

Thus, the Court in *Gulf States* rightly had no problems with the concept of a subsequent antitrust proceeding in federal court.<sup>226</sup>

In *Credit Suisse*, the Court found, through its four-part test, that the securities laws were “clearly incompatible” with the application of the antitrust laws.<sup>227</sup> However, the *Credit-Suisse* test should not be undertaken lightly by the courts, especially where the doctrine is prudential rather than statutory. The four part test must, to effectively protect the public, be understood to mean (1) that the agency has complete authority to act, (2) that it *is actually and continuously doing so*, and (3) that court action would create direct and unavoidable conflict with agency action.<sup>228</sup> In doing so, the Court can avoid the kind of imminent disaster it was forced to block in *California v. FPC*,<sup>229</sup> in which the old Federal Power Commission believed that it could simply override the antitrust laws by approving a merger by itself, deciding:

There are other factors which outweigh the elimination of Pacific as a competitor. In any case, it appears that any lessening of competition is not substantial.<sup>230</sup>

Thus, the *California v. FPC* Court properly held that:

Although the impact on competition is relevant to the Commission’s determination . . . there was “no ‘*pervasive regulatory scheme including the antitrust laws that ha[d] been entrusted to the Commission.*’”<sup>231</sup>

A proper respect for the roles of the agency or court should not mean a mindless deferral of the courts to an agency that claims authority to approve

224. *Id.* at 374; *see also* *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351 (1959).

225. *Gulf States Utils. Co. v. Federal Power Comm’n*, 411 U.S. 747, 760 (1973) (emphasis added).

226. *Id.* Recent cases, such as that of Brian Hunter of Amaranth fame, show that the concern for overlapping jurisdiction is both unnecessary and unwarranted. The FERC and the Court were both properly able to carry out their missions in a parallel fashion. *Brian Hunter*, 130 F.E.R.C. ¶ 63,004 (2010) (ALJ Initial Decision finding Hunter violated 18 C.F.R. § 1c.1), *aff’d*, 135 F.E.R.C. ¶ 61,054 (2011), *reh’g denied*, 137 F.E.R.C. ¶ 61,146 (2011); *Hunter v. FERC*, 348 Fed. Appx. 592 (D.C. Cir. 2009); *see also In re Amaranth Natural Gas Commodities Litig.*, 711 F. Supp. 2d 301 (S.D.N.Y. 2010).

227. *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 285 (2007).

228. *Id.*

229. *California v. FPC*, 369 U.S. 482 (1962).

230. *Id.* at 488 (quoting *Pacific Nw. Pipeline Corp.*, 22 F.P.C. 1091, 1095 (1959)).

231. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373 (1973) (quoting *California v. Federal Power Comm’n*, 369 U.S. at 485) (emphasis added). Similarly, in *United States v. Radio Corp. of America*, the Court held that an exchange of radio stations that had been approved by the FCC as in the “public interest” was subject to attack in an antitrust proceeding. *United States v. Radio Corp. of Am.*, 358 U.S. 334, 351-52 (1959).

conduct but misreads or ignores the antitrust laws in doing so.<sup>232</sup> Nor, as has been just discussed in Section III.B., should it mean deferral to what may be plainly lip service on the part of the agency to antitrust policy. Unless the agency *directs* specific action which the application of the antitrust laws would preclude, no person is subject to conflicting governmental directives.<sup>233</sup> Authorization does not require action; it simply removes an impediment imposed by one set of regulations. Moreover, the fact that an antitrust court may bar certain conduct as anticompetitive that a regulatory agency might approve on regulatory or even competition grounds or *vice versa* cannot create a cognizable conflict.<sup>234</sup> We are all bound to follow the law, which is created by multiple legislatures and other bodies under delegated authority and enforced by multiple bodies and officials. For these reasons, non-action or even approval by one body does not generally give parties a pass against the authority of other laws and agencies. Although there may be genuine conflicts that may need resolution, a party has no entitlement to act contrary to the requirements of *any* juridical body. And although somewhat more credence should be accorded a federal agency decision under doctrines of preclusion, and where a direct conflict would be likely,<sup>235</sup> there clearly should be a requirement of inconsistency in fact before agency decisions or processes should be permitted to block court enforcement of “the Magna Carta of free enterprise.”<sup>236</sup>

Justice Breyer, writing for the Court in *Credit Suisse*, addressed a part of this point with respect to the four part standard, by noting that the securities laws grant the SEC authority to supervise all the activities at issue in *Credit Suisse* and also provide for damages to private individuals who suffer harm as a result of those statutes and regulations. The court also noted that “the SEC has continuously exercised its legal authority to regulate conduct of the general kind now at issue.”<sup>237</sup> Thus, the question before the Court was only whether an antitrust suit on the claims made would be “likely to prove practically incompatible with the SEC’s administration of the [n]ation’s securities laws[.]”<sup>238</sup> With respect, although it may well be that the Court expects agencies to look to their responsibility to be the “first line of defense” in some matters involving antitrust issues,<sup>239</sup> the dicta in *Trinko* does not suggest that the Court, as expressed by Justice Scalia writing for the majority, is enthusiastic about the benefits of antitrust enforcement in at least some aspects of section 2

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232. The same acquisition reached the Court again on the merits of the antitrust case in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The Court unanimously (Justice White did not take part in the decision) decided that there was a violation of the Clayton Act, and, over a single dissent, directed that an order of divestiture be entered without delay. *Id.*

233. *Credit Suisse*, 551 U.S. at 272-73.

234. *E.g.*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 590-93 (1976).

235. *University of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 414 (1966).

236. *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004); *Cantor*, 428 U.S. at 595.

237. *Credit Suisse*, 551 U.S. at 277.

238. *Id.*

239. *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 760 (1973).

monopolization and perhaps other cases as carried out in practice.<sup>240</sup> Nonetheless, neither *Trinko* nor *Credit Suisse* suggests that the Court intends to block the functional application of those laws.<sup>241</sup> In spite of their sometimes less than full-throated embrace of the antitrust laws, the cases maintain a respectful affirmation of the central place of antitrust law in controlling market structures and bounding permissible economic behavior.

#### V. CONCLUSION

Regulated industries are our most important. They are also industries that are prone to antitrust abuse and non-competitiveness. Although *Trinko* and *Credit Suisse* suggest that antitrust considerations for these industries may often be left to regulators and that in many instances, especially in monopolization cases, courts may safely hold their hands, effective antitrust review requires that both courts and agencies act within their jurisdictions to fully implement antitrust policy. Practitioners must continue to demand that both courts and agencies uphold their public trust responsibilities. Competition and consumer well-being require no less.

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240. *Trinko*, 540 U.S. at 411-15.

241. *Id.* at 411-12; *Credit Suisse*, 551 U.S. at 283.