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Regulation: A Defense
To Anti-Merger Litigation?

By G. E. Hale* — Rosemary D. Hale**

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

Introduction

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

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

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Among the other affirmative defenses which may be tendered are the following, none of which is surely solid:
  a. want of jurisdiction under the statutes relied upon
  b. under § 7 of the Clayton Act, that the acquisition was made from a natural person and not a corporation
  c. under the same section: a purchase for investment
  d. under the same section: the formation of a subsidiary company
  e. that the merger will enhance competition by creating larger firms to combat the giants of the industry (countervailing power)
  f. that entry into the industry is easy
  g. that demand for the industry's products is elastic.
Defendant is a member of a regulated industry; that, in that industry, regulation has supplanted competition; that, accordingly, there is no room left for application of the antitrust laws.

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

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

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


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

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

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

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

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


The doctrine of primary jurisdiction is flexible, and we should shape it and, if necessary, strain it to fit the peculiar posture of this case in order to reach a practical accommodation of court and agency. The Board approved this merger long before the Philadelphia decision. It (Continued on next page)
tion is one which can scarcely be overlooked when a regulated industry is confronted with a complaint based upon the anti-merger laws.

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

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

(Footnote continued from preceding page)

never invoked jurisdiction under Clayton § 11 for it was undoubtedly laboring under the common mistake that Clayton § 7 did not apply to bank mergers effected by an acquisition of assets. Consult Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 491, 519 (1958) (Frankfurter, J., dissenting); Jaffe, supra n. 8.

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

... It [Congress] in terms relieved participants in appropriate mergers from the requirements of those [antitrust] laws.

... In doing so, it presumably took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed. Against the background, no other inference is possible but that, as a factor in determining the propriety of motor-carrier consolidations the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.\(^1\)

As subsequent sections reveal, the obligation of administrative tribunals to apply anti-merger policy varies from industry to industry. From a bewildering array of cases derivation of coherent principles seems impossible.\(^2\) All we can conclude here is that agencies as well as courts may be directed to apply antitrust principles to regulated industries but that other, competing, principles may prevent their being given full play. The doctrine of primary jurisdiction is merely adjective in character; it selects the forum but does not choose the law to be applied. Finally, and even more confusingly, even if the administrative agency is charged with enforcement of the antitrust laws and gives consideration thereto, its adjudication may prove no bar to anti-merger litigation in the courts.\(^3\)

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

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\(^1\) McLean Trucking Co. v. United States, 321 U.S. 67, 85-86 (1944). It is, of course, true that most regulatory tribunals are not concerned with the enforcement of the antitrust statutes at all. E.g., Illinois Coal Operators' Ass'n v. Peoples Gas Light & Coal Co., 7 P.U.R. (n.s.) 403, 423 (III. App. 1934).


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

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19 Consult Hale & Hale, Competition or Control VI: Application of Antitrust Laws to Regulated Industries, supra n. 7.
20 Id. at 57-58.
22 Backman, Government Price Fixing 69 (1938); Murphy, Wartime Concentration of British Industry, 57 Q. J. Econ. 139 (1942); Stocking and Watkins, Monopoly and Free Enterprise 504 (1951).
acquisition of a broadcasting station but that its determination was a nullity in subsequent litigation before the courts.\(^2\) Thus even though regulation appears to be extensive it does not necessarily follow that anti-merger legislation cannot be applied to the industry despite the anomalous results which may be derived therefrom.\(^2\)

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

> These carriers are subject to the anti-trust laws. . . . Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. . . . Congress has not given the Commission . . . authority to remove rate-fixing combinations from the prohibitions contained in the antitrust laws. It has not placed those combinations under the control and supervision of the Commission nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not per se exempt from the Sherman Act. . . .\(^2\)

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


> While many practices, formerly in vogue, are eliminated by the legislation of Congress regulating interstate commerce, and through rates and transportation may be had under public supervision, there are elements of competition in the granting of special facilities, the prompt carrying and delivery of freight, the ready and agreeable adjustment and settlement of claims, and other elements which that legislation does not control.
conduct of railroads. Similarly, a treble damage suit may not be instituted under the provisions of the antitrust laws to recover profits lost through imposition of allegedly unreasonably high rates. In both instances the courts quickly perceived that litigation could easily disrupt the regulatory pattern prescribed by the Interstate Commerce Act. If a private litigant could establish that rates were unreasonably high and recover treble damages, he would occupy a favored position and other shippers would be discriminated against by the judgment in his favor.

Finally, the Reed-Bulwinkle Act expressly permits a certain amount of collaboration among railroads with respect to the fixing of rates. Hence it is not surprising that both the statutory and implied limitations upon the application of the antitrust laws to railroads have given rise to considerable question as to whether an absolute exemption should not be found. In several instances application of antitrust principles to railroads has been followed by proceedings before the Interstate Commerce Commission which in effect negated the judgment of the court. In another instance dissolution of common control over the Union Pacific and Southern Pacific pursuant to an antitrust decree prevented the construction of a line of railroad across the state of Oregon. Some twenty years later the Interstate Commerce Commission ordered that construction to proceed.

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

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and state statutes\textsuperscript{30} decrees have been entered preventing the acquisition of one railroad by another. In some of the older state cases that result is attributable to specific legislative or constitutional provisions\textsuperscript{37} and it should also be noted that in other state court decisions mergers of railroads have been found not opposed to the public interest.\textsuperscript{38} It is further clear that the doctrine of primary jurisdiction is applicable; no court today should entertain litigation to block a railroad merger because the matter falls within the cognizance of the Interstate Commerce Commission.\textsuperscript{39} Accordingly, we proceed to an examination of the powers and duties of that tribunal.

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

\textsuperscript{40}Interstate Commerce Act § 5(4), 49 U.S.C. § (5)(4). It should be observed, however, that the ICC does not have unlimited powers over railroads. United States v. Pennsylvania R.R., 242 U.S. 208, 231 (1916).
\textsuperscript{41}Interstate Commerce Act § 5(c), 49 U.S.C. § 5(c).
approval of such a transaction by the Commission relieves the parties from the operation of the antitrust laws. Accordingly, the courts will dismiss complaints founded upon alleged violations of the antitrust laws when such matters have received the approval of the Interstate Commerce Commission. Further, the United States Supreme Court has made it plain that the Commission is not to measure merger proposals by antitrust standards. In considering acquisitions it must accommodate the policies of the antitrust laws into the larger considerations of national transportation policy expressed in the Interstate Commerce Act. The public interest is measured by the latter enactment and the antitrust laws do not constitute measures of permissibility in such cases.

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

42 Id. § 5(11), 49 U.S.C. § 5 (11).
46 Id. at 23, 30.
1920 legislation, as indicated above, the Interstate Commerce Commission attempted to draft plans of consolidation. Upon failure of the Commission to draft an acceptable plan the Transportation Act of 1940 made it plain that initiative was to revert to the carriers and the Commission was to view mergers on grounds other than those embodied in the antitrust laws. It has done so and while it occasionally takes cognizance of facts protectionist manner. In other words, the Commission is fearful that traffic may be “diverted” from a carrier not party to the merger rather than that competition will be reduced. It therefore appears likely that the Commission will approve railroad mergers if the parties can show a prospect of improved service to shippers and reduced costs through consolidation of facilities.

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

(Footnote continued from preceding page)

ment of Justice to enforce.

49 Id. at 113; Dearing & Owen, National Transportation Policy ch. 15 (1949); Phillips, Railroad Mergers, 19 Wash. & Lee L. Rev. 1, 7-9 (1962).
62 Minneapolis & St. L. Ry. v. United States, 361 U.S. 173, 185 (1959), affirming 165 F. Supp. 893 (D. Minn. 1958); Chesapeake & O. By Purchase, 271 I.C.C. 5, 23, 39 (1948). Attention is invited to the famous decision in Lake Line Applications under Panama Canal Act, 33 I.C.C. 700 (1915). In that decision the commission forbade the eastern trunk railways to own and operate lake steamers on the grounds that they would set water rates at levels so high as to divert tonnage to the all-rail routes of the parallel carriers.
those affecting railroads.\textsuperscript{56} The antitrust laws, while to be taken into consideration, are not deemed controlling. Thus in the leading case of the \textit{McLean Trucking Company v. United States} the United States Supreme Court said:

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

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

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


\textsuperscript{57} McLean Trucking Co. v. United States, 821 U.S. 67, 84-85 (1944).

\textsuperscript{58} Fulda, op. cit. supra n. 53, at § 5.26.

\textsuperscript{59} Allied Van Lines, Inc.—Purchase—Evanston Fireproof Warehouse, 40 (Continued on next page)
The Commission therefore is likely to approve mergers of motor carriers where they promise to effect reductions in costs.\(^6\) On the other hand, it may disapprove mergers for protectionist reasons. Thus if the proposed merger promises to increase competition to the point where other carriers might be forced out of business, the Commission may well disapprove the acquisition so as to shelter such third parties.\(^6\)

**Critique of carrier mergers.** Many observers have found that mergers among railroad carriers would produce substantial economies. It has been suggested that new services, such as "piggyback", would grow more rapidly if consolidation of the railroad system were effected. Duplication of facilities among the existing carriers is thought to be wasteful.\(^6\) Not all observers, however, agree that the economies to be effected would be significant and some find diseconomies in the creation of systems too large for efficient management.\(^6\) Those who believe that regulation of carriers is no longer necessary or desirable of course, might well also take a dim view of railroad mergers.\(^6\) Whether the numerous mergers now proposed are eventually approved by the Commission and the reviewing courts may therefore depend upon the progress of the movement toward de-regulation of the transportation industry.

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

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(\textit{Footnote continued from preceding page})

\(^6\)Glendenning Motorways, Inc., 75 M.C.C. 191, 201 (1958); Best Motor Lines—Purchase—Highway Motor Freight Lines, Inc., 38 M.C.C. 199, 205 (1942); Carolina Freight Carriers Corporation—Purchase—Charles O. Lovette, 37 M.C.C. 791, 794 (1941); \textit{Re:} Short Line of Massachusetts, 1 P.U.R.3d 120-22 (Mass. 1953); Hale & Hale, \textit{supra} n. 54, at 775, 799, 803.

\(^6\)E.W.A. Peake, 59 M.C.C. 165, 184 (1953); Schein's Express—Purchase (Portion)—Central Jersey Motor Lines, Inc., 59 M.C.C. 534, 548 (1953); Hale & Hale, \textit{supra} n. 54, at 775, 802.

\(^6\)Conant, \textit{supra} n. 53, at 495; Liipfert \textit{supra} n. 48, at 106, 120, 126-28; Phillips, \textit{supra} n. 49, at 21; Troxil, Economics of Public Utilities 46 (1947); Fulda, \textit{op. cit. supra} n. 53, at \$ 4.5, 4.13.


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

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

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

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

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\textsuperscript{65} Federal Aviation Act § 408(a), 49 U.S.C. § 1378(a); Pan Am. Airways, Inc. v. United States, 371 U.S. 296, 301 (1963).
\textsuperscript{66} Allen, Section 408 of the Federal Aviation Act, 45 Va. L. Rev. 1073, 1085 (1959).
\textsuperscript{67} Pan Am. Airways, Inc. v. United States, 371 U.S. 296, 302-03, 306-07, 310 (1963). Note, however, the fantastic exception suggested in the foregoing opinion (at 305):

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


\textsuperscript{72} Federal Aviation Act, § 408(b), 49 U.S.C. § 1378(b).
\end{flushleft}
has been impressed with the economies to be achieved through combinations and accordingly permitted airlines to join forces.\textsuperscript{73} Indeed, on occasion it has almost forced carriers into combinations.\textsuperscript{74} Occasionally it has disapproved a merger on the grounds that it might reduce competition.\textsuperscript{75} More frequently it has disapproved a merger because the strength of the resulting carrier might have proved a merger because the strength of the resulting carrier might be such as to take traffic away from another certificated air carrier.\textsuperscript{76} In other words, the Civil Aeronautics Board, like the Interstate Commerce Commission, may take a protectionist point of view in passing upon a merger application. It is likely, however, to approve mergers unless the airlines involved are already inordinately large or the result of the merger will be to divert traffic from another existing airline.

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

\textsuperscript{73} Continental-Pioneer Acquisition Case, 20 C.A.B. 323 (1955); Flying Tiger-Slick Merger Case, 18 C.A.B. 326, 343 (1954); Braniff-Mid-Continent Merger Case, 15 C.A.B. 708 (1952); Delta-Chicago and Southern Merger Case, 16 C.A.B. 847 (1952); Arizona-Monarch Merger Case, 11 C.A.B. 246 (1950).

\textsuperscript{74} West Coast-Empire Merger Case, 15 C.A.B. 971, 972-73 (1952); Eastern-Colonial Acquisition of Assets, National-Colonial Integration Investigation, 18 C.A.B. 761 (1954), cc. 18 C.A.B. 453 (1954).


\textsuperscript{77} Keyes, Federal Control of Entry into Air Transportation 80 (1951); Healy, Workable Competition in Air Transportation, 95 Am. Econ. Rev., Supplement 1945, p. 237.

\textsuperscript{78} Richmond, Regulation and Competition in Air Transportation 75 (1961); Koontz, Economic and Managerial Factors Underlying Subsidy Needs of Domestic Trunk Line Air Carriers, 18 J. Air L. & Com. 127, 133-34 (1951); Bingham & Roberts, Transportation: Principles and Problems 184 (1952).
Furthermore, the protectionist attitude of the Board in sheltering one airline from the competition of another has invited adverse criticism.\textsuperscript{79} It should nevertheless be noted that one cannot reckon competition in the airline industry by merely comparing the overall size of the airlines. So far as competition is concerned the relevant market lies in specific routes.\textsuperscript{80} If American Airlines, for example, had a tremendous proportion of the New York—Chicago traffic and Eastern Airlines none of that traffic but merely a large proportion of the New York—Miami traffic, merger of the two lines would not tend to reduce competition on the New York—Chicago run. Furthermore, there is respectable authority for the proposition that there are true economies of scale in the operation of fleets of airplanes and no one has established exactly where the lowest cost may be achieved.\textsuperscript{81} Finally, the Board was long concerned with the subsidy problem and hoped to secure its elimination. Its general objective has been to reduce subsidies and to balance existing airlines, strengthening the weak ones by giving them routes already served by the larger and more successful enterprises.\textsuperscript{82}

\textbf{Broadcasting.} No license issued for radio or television broadcasting may be transferred without approval of the Federal Communications Commission.\textsuperscript{83} That tribunal, however, does not enjoy primary jurisdiction over merger\textsuperscript{84} or other cases\textsuperscript{85} wherein antitrust questions may be raised. Similarly, broadcasters are fully subject to the prohibitions of the antitrust laws\textsuperscript{86} and are not...
even protected by explicit Commission approval of a merger or acquisition.\textsuperscript{87} The Commission has nevertheless been instructed that it is to take account of antitrust policy in determining whether to approve an acquisition.\textsuperscript{88} Apart from that, the courts have given it little instruction with respect to the exercise of its powers except that they are reluctant to see a license forfeited.\textsuperscript{89} The Commission, in the apparent belief that it was implementing the antitrust laws has severely limited the issuance of licenses to one per person per area for each type of broadcast service. In other words, only a single AM broadcasting station may be owned by any one person in a broadcast area.\textsuperscript{90} Since the Commission applies the same rules with respect to transfers as it does to the issuance of licenses\textsuperscript{91} that limitation is important. It has also established by rule limitations upon the total number of licenses which a person may hold regardless of geographic location. Thus no one person may hold more than seven television licenses.\textsuperscript{92} It has attempted

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


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

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


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

\textsuperscript{92} 47 C.F.R. § 3.636 (a)(2). The regulations in question were approved in question were approved in \textit{United States v. Storer Broadcasting Co.}, 351 U.S. 192, 203-04 (1956).
to curb the broadcasting networks\textsuperscript{93} and has from time to time attempted to prevent diversification of newspaper publishers into the broadcasting business.\textsuperscript{94} On the other hand, it recognized the doctrine of countervailing power in one of the most important merger cases brought to its attention. Here its efforts appeared to be directed toward enhancing the power of the smaller of the three national networks so as to achieve a better balance among broadcasters.\textsuperscript{95} Note also that the Commission has a stringent rule against delegation of authority under broadcasting licenses: the licensee himself must determine the content of programs.\textsuperscript{96}

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

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

\begin{footnotes}
\item[94] McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956), cert. denied, 353 U.S. 918 (1957); Clarksburg Publishing Co. v. FCC, 229 F.2d 511, 518-19 (D.C. Cir. 1955); Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677, 683 (D.C. Cir. 1951); McClatchy Broadcasting Co. v. FCC, 175 F.2d 359 (D.C. Cir. 1951). A film producer, however, was not considered an improper transferee of a broadcasting license. 15 Radio Reg. 177, 183 (1957).
\item[97] Note, Diversification and the Public Interest: Administrative Responsibility of the FCC, 66 Yale L.J. 365, 367 (1957); FCC, Network Study Staff (Barrow, director), Network Broadcasting, H.R. Rep. No. 1297, 85th Cong. 2d Sess. 564 (1958), the Commission's hostility to networks reflects a strong antagonism toward vertical integration in broadcasting. See note 11, supra.
\end{footnotes}
Merger Act which directed the Board and the other two federal agencies controlling banks to consider antitrust questions in exercising their statutory power to approve bank mergers.\textsuperscript{99} Despite that legislation it appears that the banking agencies enjoy neither primary nor exclusive jurisdiction to enforce antitrust policy, the courts having at least concurrent jurisdiction.\textsuperscript{100} Furthermore, as in the case of broadcasting and pipelines, the fact that the administrative agencies have passed upon a merger and approved it confers no immunity whatsoever in litigation.\textsuperscript{101} This result is particularly surprising since for many years it was not considered that bank mergers fell within the scope of §7 of the Clayton Act by reason of its exact language.\textsuperscript{102}

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

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

\textsuperscript{(Footnote continued from preceding page)}


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


\footnotetext[102]{\textsuperscript{102} Note, \textit{Federal Regulation of Bank Mergers}, 75 Harv. L. Rev. 756, 759 (1962).}

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

overall public interest, and not the anti-competitive effect, is the governing criterion. Thus, the Bank Merger Act would appear to sanction agency approval of the merger, even though it violated the antitrust laws, if, on a balance of all the designated factors, the agency decided that, nevertheless, it was in the overall public interest. A court, however, would be obliged to invalidate a merger found to violate the antitrust laws even though it served the public interest.\footnote{United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 884 (S.D. N.Y. 1965). See generally: United States v. Chicago Mortgage Bankers Ass'n, 123 F. Supp. 251 (N.D. Ill. 1954); Peoples Sav. Bank v. Stoddard, 351 Mich. 342, 88 N.W.2d 462 (1958); People's Bank v. Lamar County Bank, 107 Miss. 852, 67 So. 961 (1915); Hall v. San Jacinto Bank, 255 S.W. 506, 510 (Tex. Civ. App. 1923) (dictum). In United States v. Philadelphia Nat'l Bank, 201 F. Supp. 348 (E.D. Pa. 1962), rev'd, 374 U.S. 321 (1965), the court said at 351 that although the comptroller of the currency was directed to consider the effect upon competition in passing upon mergers, he was not required to give that factor any particular weight.}

In view of the sweeping powers over banks enjoyed by both federal\footnote{National Bank Act § 85, 12 U.S.C. § 85; Federal Res. Act §§ 11, 150(b), 12 U.S.C. §§ 232, 371(b) (in addition to other sweeping powers, interest rates may be controlled).} and state agencies\footnote{E.g., Ill. Bank Act §§ 48, 51, Ill. Rev. Stat. ch. 16 7/2, §§ 149, 152.} it is surprising that the courts have seen fit to subject banking to the full impact of the anti-merger laws.\footnote{United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 905 (S.D. N.Y. 1965); Gruis, Antitrust Laws and Their Application to Banking, 24 Geo. Wash. L. Rev. 89, 90-93 (1955). But cf. Edwards, Concentration in Banking, 46 Rev. Econ. & Stat. 294, 300, 300 (1964).} The interpretive gymnastics employed by the United States Supreme Court to apply §7 of the Clayton Act to banks and to disregard the administrative procedure set forth in the Bank Merger Act are even more perplexing.

Insurance. It is difficult to outline the relationship between the insurance industry and the anti-merger laws in other than chronological form. Prior to 1944 the federal courts held that insurance was not "commerce" and hence that federal antitrust laws did not apply thereto. Then in the famous \textit{Southeastern Underwriters} case the United States Supreme Court reversed itself, held that the Sherman Act was fully applicable to the business of insurance, found no exemption therefrom and brushed aside the argument that state controls would be adversely affected.\footnote{United States v. South-Eastern Underwriters' Ass'n, 322 U.S. 533, 553 (1944).} In doing so it argued that states had subjected combinations of insurance companies to coerce, intimidate and boycott
competitors to the state antitrust laws and hence that no disruption of the state regulatory systems would result.\textsuperscript{110} It is true that in earlier years the state antitrust laws had been widely applied to the business of insurance.\textsuperscript{111} What the court overlooked was the fact that states had subsequently widely supplanted antitrust litigation with interventionist regulation.\textsuperscript{112} "That fact was pointed out vividly in the dissent of Chief Justice Stone."\textsuperscript{113} Mr. Justice Jackson noted that the effect of the decision was to require an extensive overhauling of state legislation at the very least.\textsuperscript{114} The Congress responded to the decision in \textit{Southeastern Underwriters} by the enactment of the McCarran law. The heart of that measure is found in §2 providing that "the [anti-trust laws] shall be applicable to the business of insurance to the extent that such business is not regulated by State law."\textsuperscript{115} Then the measure contains exceptions with respect to boycotts and other activities not related to mergers.\textsuperscript{116} Shortly thereafter, state legislatures were induced to enact new measures which the authors thought con-

\textsuperscript{110} Id. at 562.


\textsuperscript{112} Patterson, The Insurance Commissioner in the United States (1927).


\textsuperscript{114} Id. at 590.


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

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

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

\textsuperscript{117} Brook, Public Interest and the Commissioners' All-Industry Laws, 15 Law \& Contemp. Prob. 606, 611 (1950); Donovan, Regulation of Insurance Under the McCarran Act, 15 Law \& Contemp. Prob. 473, 485 (1950); Naujoks, Eight Years After S.E.A.U., 35 Marq. L. Rev. 399, 354 (1952). Note the exemption contained in Merchant Marine Act § 29(b), relating to marine insurance.


\textsuperscript{121} United States v. Chicago Title \& Trust Co., 242 F. Supp. 58, 60 (N.D. Ill. 1965).
When pressed by the defendants with the argument that insurance was regulated in the same manner as public utilities in the relevant states, the court rejected the argument and insisted that the exemption was not called into play unless there were specific anti-merger legislation of the type found in §7 of the federal Clayton Act. Since only a handful of states have enacted measures of that type, it is apparent that the decision in question, if followed by other courts, could effectively nullify the McCarran Act exemption.

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

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122 Id. at 71, 72. Knowlton, Jurisdiction of the FTC over Trade Practices of Insurers, 1955 Ins. L.J. 673, 678.
127 American Hosp. Ins. Co. v. FTC, 234 F.2d 719 (5th Cir. 1957), aff'd per curiam, 357 U.S. 560 (1958); Knowlton, supra n. 122, at 675 (contrary view). An interesting question arises as to how conflicts among the several states are to be resolved. Brook, supra n. 117, at 618. Some state statutes provide for (Continued on next page)
asserting the supremacy of the federal antitrust laws over all other considerations of public policy. Legislation of other kinds is to be disregarded through the device of interpreting the McCarran Act as narrowly as possible. Accordingly, at this writing, there may be no exemption from the federal anti-trust laws in favor of mergers among insurance companies.

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

(Footnote continued from preceding page)


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

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

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133 Id at 490, wherein the Court wrote: Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. . . . The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. But cf. Interstate Natural Gas Co. v. Southern California Co., 209 F.2d 380, 385 (9th Cir. 1953).


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


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

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

The court went on to say at 196:

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

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

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

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

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

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

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

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

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


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

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

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

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146 Sheahan, Integration and Exclusion in the Telephone Equipment Indus-
under Regulatory Constraint, 52 Am. Econ. Rev. 1052 (1962).
147 Shipping Act § 18, 46 U.S.C. § 8.18 (1916). Controls over domestic
water carriers are exercised by the Interstate Commerce Commission under the
149 American Union Transp., Inc. v. River Plate Conference, 126 F. Supp. 91,
93 (S.D. N.Y. 1954), aff'd per curiam, 222 F.2d 369 (2d Cir. 1955).
Power Comm'n, 369 U.S. 482 (1962); Grand Jury Investigation, Shipping, 186
to contracts among ocean carriers. A vertical merger might well not be pre-
ceded by such a contract.
152 E.g., Isbrandtsen Co. v. United States, 239 F.2d 933 (D.C. Cir. 1956),
153 Packers and Stockyards Act §§ 202, 305, 7 U.S.C. § 192 (1921); Securities
Packers and Stockyards Act specifically provides that both the Sherman Act and the Clayton Act shall not be deemed to have been repealed as to the persons controlled by it; but the Federal Trade Commission is ousted of its jurisdiction to the extent that similar powers are vested in the Secretary of Agriculture.\(^{154}\) Nothing to that effect appears in the Securities Exchange Act and the leading case indicates that such exchanges are fully subject to the antitrust laws despite the plenary character of regulation existing in the Securities Exchange Commission.\(^{155}\) While there appears to have been no litigation with respect to mergers of exchanges, the courts have expressly recognized that one exchange may be in competition with another (oddly enough coupling that assertion with the further statement that the exchange constituted a public utility subject to regulation).\(^{156}\)

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

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\(^{158}\) Alcoholic Liquors §§ 1, 3, Ill. Rev. Stat. ch. 43, §§ 96, 115, 121(e).
antitrust or common law provisions of the same kind.\textsuperscript{159} Since then, there appears to have been no significant litigation with respect to mergers but in several cases, without even pausing to examine the effect of regulation, the federal courts have held that the antitrust laws apply to other aspects of the conduct of persons in the alcoholic beverage industry.\textsuperscript{160} Occasionally, the courts have suggested that the detailed prescriptions of the interventionist regulation make it impossible to apply antitrust principles,\textsuperscript{161} but the weight of authority is to the contrary. It therefore appears that mergers in this industry will be governed by the principles applicable in the free sector of the economy.

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

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

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

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\textsuperscript{160} United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1945); United States v. Erie County Malt Beverage Ass'n, 284 F.2d 731, 733 (3rd Cir. 1959); Washington Brewers Institute v. United States, 137 F.2d 964, 965 (9th Cir. 1943), cert. denied, 320 U.S. 776 (1943) (This opinion, however, contains language indicating that exemption is a possibility); United States v. United Liquors Corp., 149 F. Supp. 609 (W.D. Tenn. 1956), aff'd per curiam, 352 U.S. 991 (1957).
\textsuperscript{163} People ex rel. Peabody v. Chicago Gas Trust Co., 160 Ill. App. 263, 293, 22 N.E. 798 (1899).
\end{footnotes}
companies than to those in the free sector of the economy.\(^{164}\) Now that almost all states have enacted regulatory statutes it is highly doubtful whether the same result would be achieved. In other words, it is believed that gas distribution companies are exempt from the operation of state antitrust laws insofar as mergers and acquisitions are concerned.\(^{165}\) Since gas distribution is largely a local activity it is unlikely that federal legislation would be applied to them.\(^{166}\)

**Generation and distribution of electricity.** As in the case of gas utilities, electric generating and distributing companies are thoroughly regulated both at the federal and state level. The federal statute expressly refers to mergers and acquisitions\(^{167}\) and similar provisions frequently appear in state legislation.\(^{168}\) At the federal level it appears that the Federal Power Commission enjoys primary jurisdiction over electric utilities\(^ {169}\) but that nevertheless such companies remain open to some types of antitrust

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\(^{165}\) Attorney Gen. v. Consolidated Gas Co., 124 App. Div. 401, 108 N.Y. Supp. 823 (1903). In that case the court said at 826:

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


litigation.\textsuperscript{170} If the Federal Power Commission enters an order, however, the fact that the conduct so prescribed might otherwise violate the antitrust laws will be disregarded.\textsuperscript{171} Similar rules appear to apply in the states\textsuperscript{172} and there is nothing to indicate that state commissions discourage mergers; on the contrary they appear to encourage them.\textsuperscript{173}

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

\textsuperscript{170} Pennsylavnia Water Co. v. Consolidated Gas Co., 184 F.2d 552 (4th Cir. 1950), cert. denied, 340 U.S. 906 (1950), 186 F.2d 834 (4th Cir. 1951).


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

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

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

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\item[179] Id. at 230, 231.
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less other members of the industry may be injured thereby. In other words, the commissions are apt to protect existing firms against stronger competition. Here again, consumers may well be losers. To the extent that there are elements of indivisibility in regulated business (and the coming of electronic data processing may have a bearing on that subject) it would seem desirable to encourage mergers in pervasively regulated industries.

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