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ANTITRUST ENFORCEMENT AND SECTORAL REGULATION IN THE UNITED STATES TELECOMMUNICATIONS INDUSTRY

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I. Introduction

The question of how to distribute and coordinate regulatory powers between sectoral regulators and competition authorities has been an important topic for policy-makers in the United States for more than a century.[2] Starting in the late twentieth century, the United States established regulatory agencies that governed prices, costs, and entry in a wide range of industries, including electricity, natural gas, telecommunications, and transportation. In recent decades, however, as a result of new technology and greater understanding of the increased costs

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[1] The views expressed in this paper are those of the author and do not necessarily reflect the views of the Department of Justice.

[2] *See* Dennis W. Carlton & Randal C. Picker, *Antitrust and Regulation* 2 (John M. Olin Law & Economics Working Paper No. 312, 2006), *available at* https://www.law.chicago.edu/Lawecon-/wkngpprs_301-350/312.pdf (noting that following passage of the Interstate Commerce Act to regulate the railroad industry in 1887 and the Sherman Antitrust Act in 1890, "policy makers have been forced repeatedly to work through how to interleave a fully general approach to competition under the antitrust laws with industry-specific approaches to competition under regulatory statutes").

and market distortions caused by regulation,[3] the United States has moved towards deregulation in almost all regulated industries. These reforms have led to demonstrable results and striking benefits to consumers.[4]

Of course, regulation continues to play a role in a number of U.S. industries. For example, regulation may be appropriate to address important goals that go beyond pure competition goals – for example, to implement a policy of universal access to basic services – or to ameliorate structural impediments or market failures.[5] Thus, the question of how to balance sectoral regulation and antitrust enforcement continues to generate intense interest today. For example, the President and Congress recently received a report from the Antitrust Modernization Commission, which was appointed "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues," including antitrust enforcement in

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[3] "[I]t often turned out that the principal beneficiaries of industry regulation were the regulated firms themselves, who were shielded from competition and guaranteed profit margins. Regulation also distorted the mix of capital and other resources and the incentives for cost reduction and innovation." Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 357 (2004) (footnote omitted). Moreover, "[o]ne fundamental critique of regulation is that the process costs too much in proportion to any benefits it produces, and that bad results are magnified by chronically inadequate commitment of resources." *Id.* at 361.

[4] Deregulation in just three United States industries – airlines, motor carriers, and railroads – is estimated to have increased U.S. GDP by about one-half of one percent each year. *See* Economic Report of the President 63 (2002), *available at* http://www.gpoaccess.gov/usbudget/fy03/pdf/-2002_erp.pdf. Another survey based on empirical evidence found that the U.S. economy has gained at least $36 to $46 billion annually (in 1990 dollars) from deregulation, primarily in the transportation industries. *See* Clifford Winston, *Economic Deregulation: Days of Reckoning for Microeconomists*, 31 J. Econ. Literature 1263, 1284 (1993); *see also* Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, Econ. Persp., Summer 1998, at 89, 98–102 (noting that each industry studied – airlines, trucking, railroads, banking, and natural gas – substantially improved its productivity and achieved real operating cost reductions ranging from 25 percent to 75 percent, and consumers have been the principal beneficiaries).

[5] *See* Hovenkamp, *supra* note 3, at 340-41.

regulated industries.[6]

This paper examines the United States's experience with antitrust enforcement and regulation in the telecommunications industry. After a general overview describing the varying approaches that the United States takes with respect to different industries, this paper will go into more detail on the telecommunications industry. It will discuss the respective enforcement roles taken since passage of the Telecommunications Act of 1996[7] by the Federal Communications Commission (FCC), the regulatory agency charged with regulating interstate and international communications by radio, television, wire, satellite and cable, and the Department of Justice (DOJ), the antitrust enforcement agency that handles most telecommunications matters. The paper goes on to discuss various assessments of the costs and benefits of having telecommunications merger review be conducted by two separate federal agencies. The paper concludes with a discussion of the recommendations recently made by the Antitrust Modernization Commission as to what it sees as the proper allocation of responsibility between regulators and antitrust enforcers.

II. General Considerations Regarding Antitrust Enforcement in Regulated Industries

The boundaries between antitrust enforcement and regulation are difficult to set or sometimes even discern.[8] In many respects, economic regulation can be the opposite of

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[6] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, at § 11053(1), 116 Stat. 1856 ("AMC Act").

[7] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[8] *See* Hovenkamp, *supra* note 3, at 336 ("we are never certain about where the boundary lies" between antitrust and regulation).

competition, since when regulation controls price or output, "market forces no longer govern."[9] When a regulated industry is in the process of being deregulated, competition becomes increasingly prevalent in the industry and antitrust enforcement therefore becomes increasingly important. However, the "precise point at which an industry passes from regulation to competition requiring antitrust enforcement typically is not easy to discern," and questions arise as to how antitrust law should apply to regulated industries, "particularly those undergoing transition from regulation to deregulation."[10] Antitrust law "generally has a more significant role to play as an industry moves toward less direct regulation."[11]

The specific boundaries of regulation and competition (and hence antitrust) thus are driven in part by the degree of deregulation within the industry, but also by whether Congress has given instructions regarding where that boundary should be set. Sometimes statutes explicitly state whether they preclude application of the antitrust laws.[12] Congress has adopted various types of antitrust exemptions, ranging from a limited immunity for specific conduct to broad immunity for entire areas or types of commerce.[13]

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[9] *Id.* at 341.

[10] Antitrust Modernization Commc'ns, Report and Recommendations 358 (2007) ("AMC Report"), *available at* http://www.amc.gov/report_recommendation/toc.htm.

[11] *Id.* at 359; *see* Hovenkamp, *supra* note 3, at 366 ("The natural effect of deregulation is to enlarge the domain of antitrust by removing or narrowing antitrust immunities.").

[12] *See* Hovenkamp, *supra* note 3, at 344 ("When the antitrust immunity is express, the role of the court is mainly to ensure that the statute's requirements have been satisfied."). *Compare, e.g.,* Webb-Pomerene Act of 1918, 15 U.S.C. § 62 (2000) (expressly providing antitrust immunity) *with* Telecommunications Act of 1996 § 601(b)(1), 47 U.S.C. § 152 (2000) (stating that antitrust laws remain applicable).

[13] *See generally* AMC Report, *supra* note 10, at 348-49. For example, the Standards Development Organization Advancement Act of 2004, § 102, 15 U.S.C. §§ 4301–05, grants a

Where Congress has not given instructions as to the existence or extent of full antitrust immunity in a regulated industry, courts are called upon to determine where regulation ends and competition and antitrust enforcement begin – put another way, whether antitrust claims should be permitted to proceed with respect to arguably regulated conduct. Such determinations "may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws."[14] Just last month, the Supreme Court reiterated several fundamental principles describing the boundary between regulation and antitrust: (1) where possible, courts should reconcile the operation of both antitrust and regulatory statutory schemes, "rather than holding one completely ousted"; (2) repeal of the antitrust laws "is to be regarded as implied only if necessary" to make the regulatory regime in question work; and (3) even then, immunity is to be implied "'only to the minimum extent necessary.'"[15]

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narrow exemption, limiting antitrust damages to actual damages for certain kinds of standards development organizations that form joint ventures or engage in standards development activities, while the McCarran-Ferguson Act grants a broad exemption to "the business of insurance" to the extent it is regulated by state law, unless the conduct involves an agreement or act to boycott, coerce, or intimidate. *See* 15 U.S.C. §§ 1012(b), 1013(b) (2000). Other statutes provide broader immunity for a limited type of conduct, e.g., Charitable Donation Antitrust Immunity Act of 1997, 15 U.S.C. §§ 37–37a (2000) (giving antitrust immunity to charitable institutions that set the annuity rate for gift annuities or charitable remainder trust agreements), or provide limited immunity for a broad area of conduct. *See, e.g.,* Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34–36 (2000) (precluding treble damages actions against local governments, their officers, and their employees while they are acting in an official capacity).

[14] *Credit Suisse Sec. (USA) LLC v. Billing*, No. 05-1157, 2007 WL 1730141 at *6 (U.S. June 18, 2007) (holding that under the facts securities laws addressing conduct giving rise to plaintiff's antitrust claims were "clearly incompatible" with antitrust laws and that securities law implicitly precludes such claims).

[15] *Id.*, 2007 WL 1730141 at *6 (citing *Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963)).

Immunity will not be implied where the regulatory agency lacks jurisdiction to review the particular conduct in question, where the regulatory agency does not perform the antitrust function of insuring that rules that injure competition are nonetheless justified by furthering legitimate regulatory ends, where the conduct would clearly violate the antitrust laws unless justified under the regulatory scheme, and where there was in fact no justifying purpose under the regulation.[16] But immunity may be implied where (1) regulatory authority exists to supervise the activities in question; (2) the responsible regulatory entity exercises that authority; (3) the regulatory regime and the antitrust laws, if both applied, would produce conflicting guidance or requirements, and (4) the conflict affects practices that lie squarely within an area that the regulatory regime seeks to regulate.[17]

With respect to merger review, four industries remain in which a regulatory agency also has merger review authority: these include certain aspects of the electric power industry (regulated by the Federal Energy Regulatory Commission); telecommunications/media (regulated by the FCC); banking (regulated by various banking agencies); and railroads (regulated by the Surface Transportation Board).[18] In those industries, the regulatory authority typically reviews a proposed transaction under its statutory public interest standard. This standard, which varies by industry, usually requires the agency to review both likely competitive effects and likely public interest effects.[19]

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[16] *Id.*, 2007 WL 1730141 at *6 (discussing *Silver*).

[17] *See id.*, 2007 WL 1730141 at *9.

[18] *See* AMC Report, *supra* note 10, at 363.

[19] *Id.*

The inter-agency interplay during merger review between regulatory authorities and antitrust agencies also varies with the regulatory framework established by Congress for the particular industry. In electricity and telecommunications, "the DOJ has full enforcement authority to investigate and challenge a proposed merger under the Clayton Act," and the "regulatory agencies also consider competition as one part of their broader public interest review."[20]

In banking, the DOJ provides its competitive analysis to the banking agency, which also considers likely "competitive effects, along with financial soundness and other banking-specific concerns."[21] Although the banking agency and the DOJ usually work closely together to agree on the proposed transaction's likely competitive effects, "the banking agency has authority to depart from the DOJ's competition-based recommendations."[22] If the "banking agency approves the merger over the DOJ's objections, the DOJ has full independent authority to challenge the banking agency's decision in court."[23]

For railroad mergers, Congress gave responsibility for railroad merger review to the Surface Transportation Board (STB) in 1995.[24] The STB reviews mergers under a public interest standard that incorporates several considerations, including whether the proposed transaction

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[20] *Id.* For more on merger review in telecommunications, *see infra* at Section V.

[21] *Id.*

[22] *Id.*

[23] *Id.* Moreover, the court applies a standard that differs from Section 7 of the Clayton Act, in that it permits the court to approve the merger "if the merging parties demonstrate that the anticompetitive effects are 'clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.'" *Id.*

[24] *See id.* at 364.

would have an "adverse effect on competition."[25] By statute, the STB must give "substantial weight" to the DOJ's views on whether the transaction will adversely affect competition, but the STB makes the final decision on whether to allow the merger.[26] The DOJ does not have independent authority to challenge a transaction in this industry, and the STB has approved at least one merger despite the DOJ's objections that the merger was anticompetitive.[27]

III. Antitrust and Regulation in Telecommunications

The telecommunications industry in the United States has journeyed far from its heavily regulated origins early in the last century, but many telecom sectors continue to be subject to extensive regulatory control.[28] I will briefly summarize aspects of this story in order to show where some of the boundaries lie between regulation and competition today, and how they came to be set.

Under the Federal Communications Act of 1934, a single firm, American Telephone and Telegraph (AT&T), owned and operated the United States telecommunications system. For decades, someone buying phone service in the United States did not have a real choice of local or

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[25] *See* 49 U.S.C. § 11324(b) (2000).

[26] *See id.* § 11324(d).

[27] AMC Report, *supra* note 10, at 364 n.210 (citing discussion at an AMC hearing of disagreements that arose between the STB and the DOJ during the STB's review of the Union Pacific/Southern Pacific merger in 1996).

[28] 2 ABA Section of Antitrust Law, Am. Bar Ass'n, Antitrust Law Developments 1321 (6th ed. 2007) ("ALD 6th") ("Although there has been a general decrease in regulation and a concomitant increase in reliance on market forces to shape this industry, telecommunications common carriers remain extensively regulated by both the FCC and state regulatory agencies.").

long distance carriers, and in most areas AT&T was the only supplier. In 1974, the Justice Department sued AT&T for monopolization of the long distance market, challenging, among other things, AT&T's refusal to provide interconnection on reasonable terms between the long distance networks of competitors and the local networks of the Bell Operating Companies (BOCs), on which most long distance calls originated or terminated.[29] AT&T settled that lawsuit in 1982, and the resulting consent decree required AT&T to divest the BOCs, thereby separating its local service businesses from AT&T's long distance business, and prohibited the BOCs from providing long distance services.[30] The BOCs kept their monopoly of local services, but long distance services were provided by multiple interexchange carriers, including the residual AT&T, MCI, Sprint, and later others. The entry of the decree began a long process of having the DOJ and the decree court engaged in lengthy review and decision-making regarding the BOCs' and AT&T's conduct complying with the decree.

The Telecommunications Act of 1996 substantially amended the 1934 Act (and in the process caused the AT&T consent decree to be terminated),[31] with the "overriding goal of promoting competition in all telecommunications markets."[32] The 1996 Act promoted competition in local services by seeking to eliminate technological, economic and regulatory

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[29] *See United States v. Am. Tel. & Tel. Co.,* 524 F. Supp. 1336 (D.D.C. 1981).

[30] *United States v. Am. Tel. & Tel. Co.,* 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983).

[31] Immediately following passage of the 1996 Act, the AT&T decree was terminated as of February 8, 1996. *See United States v. Western Elec. Co.*, No. 82-0192, 1996 WL 255904 (D.D.C. Apr. 11, 1996).

[32] ALD 6th, *supra* note 28, at 1321.

barriers to entry, by imposing a general duty on telecommunications carriers to interconnect their facilities with other carriers, and by ordering the local BOCs to open their networks up to competition by other carriers.[33] The 1996 Act also led to a wave of mergers in high tech and telecommunications companies that resulted in a huge increase in the number of transactions to be reviewed at the FCC and at the antitrust agencies.

The 1996 Act thus highlighted two arenas in which to observe the interplay between antitrust and regulation: (1) the process by which RBOCs were required to open up local markets, and (2) merger review of telecommunications transactions since 1996.

IV. Antitrust and Regulation in Opening Local Telephone Markets to Competition

In order to achieve the goal of opening local telephone markets to competition, Congress needed to provide an incentive to the incumbent local exchange carriers (ILECs) to open their physical telephone networks to competitive local exchange carriers (CLECs). The ILECs' reward for opening their networks to CLECs was approval to enter the market to provide interstate long distance services originating from the newly-opened local market.[34] Thus arose

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[33] *See generally id.* at 1321-24.

[34] The 1996 Act provided that, in order for ILECs to enter the long-distance market, they would have to satisfy, among other things, a 14-item checklist of statutory requirements. These requirements included compliance with the Act's network-sharing duties, including "[n]ondiscriminatory access to network elements," which would have to be provided on an unbundled basis. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402-03 (2004) (internal quotation marks omitted). The unbundled services were not previously marketed or available to the public. "The sharing obligation imposed by the 1996 Act created 'something brand new' – 'the wholesale market for leasing network elements.'" *Id.* at 410. These unbundled elements were "brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and . . . [n]ew systems [had to be] designed and implemented simply to make that access possible . . . . " *Id.*

two issues relating to the boundaries between antitrust and regulation. First, what federal agency would review and approve the ILECs' applications for entry into long distance and certification that their local markets were open to competition? Second, would an ILEC's failure to meet the Act's obligations to open its markets give rise to antitrust liability?

A. Agency roles in evaluating whether local markets had been opened

Congress ultimately decided to give final authority to the FCC for determining when a Bell company had sufficiently opened its local market to competition that it would be permitted to provide long distance services from that local market. Although it also required the FCC consult with the DOJ and to give "substantial weight" to the DOJ's evaluation, the FCC was not required to follow the DOJ's recommendation.[35] Thus, the DOJ's role was changed significantly from what it had been as the plaintiff regularly working with the court to enforce the AT&T consent decree.

Nevertheless, it was clear that Congress intended for the DOJ to continue to play a role, and in fact the DOJ's role under Section 271 was strengthened on the eve of passage of the bill.[36] Moreover, in his signing statement, President Clinton noted that he considered the DOJ's role to be "essential [to] ensure[] that the FCC and the courts will accord full weight to the special competition expertise of the Justice Department's Antitrust Division -- especially its expertise in

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[35] 47 U.S.C. § 271 (d)(2)(A) (2000); *see also* ALD 6th, *supra* note 28, at 1325.

[36] David Turetsky, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, "Bell Operating Company Interlata Entry under Section 271 of the Telecommunications Act of 1996: Some Thoughts" 13 (July 22, 1996), *available at* http://www.usdoj.gov/atr/public/speeches/0732.pdf (DOJ role strengthened in the House-Senate conference on the bill, "making even clearer that the policy context in which the FCC would be conducting its public interest analysis under section 271 was to include a serious focus on competition, as informed by the principles of antitrust").

making predictive judgments about the effect that entry by a Bell company into long distance may have on competition in local and long distance markets."[37]

What the Act did was give the DOJ "broad consultative authority" under Section 271.[38] The DOJ did not "have independent compulsory process under the Section 271 process to gather evidence" on its own, as it does in an ordinary antitrust investigation.[39] Instead, the review process for determining whether a Bell company satisfied the requirements of Section 271 began with the state public utility commission,[40] and the state commissions would be expected to "develop a detailed factual record on which to base their assessments."[41] But although section 271 "contemplates that the State commissions and the Department will be integrally involved, and that their -- and our -- assessments will be important to the FCC's decision,"[42] the decision

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[37] Statement on Signing the Telecommunications Act of 1996, 32 Weekly Comp. Pres. Doc. 218 (Feb. 8, 1996); *see also* Joel I. Klein, Acting Assistant Attorney Gen., U.S. Dep't of Justice, "Preparing for Competition in a Deregulated Telecommunications Market" at (March 11, 1997) ["Klein, *Preparing for Competition*"], *available at* http://www.usdoj.gov/atr/public/speeches/-1070.pdf ("[T]elephone regulation has historically been a shared function of the FCC and the state agencies and, quite naturally, both of them are necessary to the deregulatory process as well. And we also belong there, essentially because the goal of the process is competition and we have expertise in that area generally and with respect to telephony, in particular, because of our extensive involvement in the AT&T case.").

[38] Turetsky, *supra* note 36, at 6.

[39] *Id.* at 10.

[40] The "new law envisions that [states] will be the first to review a Bell operating company's interconnection agreements or statements of general terms and conditions to gauge the Bell's compliance with the competitive checklist." *Id.* at 7; *see also* Philip J. Weiser, Senior Counsel, U.S. Dep't of Justice, "The Long Road to Local Competition" at 10 (April 22, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/1760.pdf, (DOJ is a "supporting player" in the state's work to open local markets).

[41] Turetsky, *supra* note 36, at 8.

[42] *Id.* at 4.

ultimately was the FCC's.[43]

In fact, the objective of opening long-regulated markets may be perhaps better seen as an essentially regulatory function. As a former Assistant Attorney General for Antitrust put it near the start of the 271 process, "the paradox of this kind of deregulatory effort is that it depends upon a series of regulatory steps -- all taken, to be sure, in the name of deregulation -- and those regulatory steps, in turn, can significantly affect the long-term prospects for full-scale competition in telephony."[44] AAG Klein called it a "fact of life" that, "as Congress wisely recognized, antitrust remedies are not well suited to serve as the first line method for opening the local market."[45] In fact, the 1996 Act charted "a very different course" from the AT&T consent decree, using "regulatory, contractual, and antitrust oversight to ensure that the local companies

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[43] *See, e.g.,* Evaluation of the United States Department of Justice, *In re Application of SBC Comm's, Inc.*, No. 03-167 (F.C.C. Aug. 26, 2003) (noting that the DOJ was not in a position to support the application based on the current record, but that DOJ did not foreclose the possibility that the FCC may be able to satisfy itself regarding the remaining questions prior to conclusion of its review). SBC's Application was approved by the FCC soon after. ORDER, *In re SBC,* (Oct. 15, 2003).

[44] Klein, *supra* note 37, at 7; *see also* Weiser, *supra* note 40 at 2 ("[B]ecause the local incumbents have every incentive to make life difficult for the new competitors, the role of government in facilitating competition is a necessary step along the road to competitive markets."); *see also* Marius Schwartz, Econ. Dir. of Enforcement, U.S. Dep't of Justice Antitrust Division, "Conditioning the Bells' Entry Into Long Distance: Anticompetitive Regulation or Promoting Competition?" 19, 25 (Dec. 30, 1999), *available at* http://www.usdoj.gov/atr/public/-speeches/3996.pdf ("It is much harder for outside enforcers to mandate the creation of such new systems than it is to prevent degradation of existing ones. . . . Like any other company, a Bell does not wish to act against its own self interest by making things any easier for competitors.").

[45] *See* Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, "The Race For Local Competition: A Long Distance Run, Not A Sprint" 6 (Nov. 5, 1997), *available at* http://www.usdoj.gov/atr/public/speeches/1268.pdf.

share their essential inputs with their would-be competitors."[46] Furthermore, "shared inputs must be priced," and "as is always the case with price regulation, there is, by definition, no market-based solution, so government agencies must serve as an imperfect substitute for the market."[47]

Indeed, aspects of the DOJ's role in formulating the standard by which it would assess whether a Bell company applicant had satisfied its 271 responsibilities seem reminiscent of those of a regulatory agency engaged in rule-making.[48] But this role was recognized as being unusual for an antitrust enforcement agency. As the Division's Director of Economics Enforcement observed at the time, the Division understood that it was "ill equipped to be regulators, nor is this our mandate or desire."[49] Instead, the Division was "mindful that our role is not to prescribe the

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[46] *Id.* at 5-6.

[47] *Id.* at 6.

[48] *See* Klein, *supra* note 37, at 9. The DOJ was given authority to evaluate a Bell company's application using any standard it deemed appropriate. 47 U.S.C. § 271(d)(2)(A) (2000). To develop the standard, DOJ "engaged in an extensive inquiry, soliciting comments from all interested parties and meeting with virtually all the affected players. We received almost seventy-five comments and have met with countless industry officials." *See* Klein, *supra* note 37, at 9. The Department went on to conclude that it would support Section 271 applications when an RBOC demonstrated that local markets in a state were "fully and irreversibly open to competition." *See* Marius Schwartz, Competitive Implications of Bell Operating Company Entry into Long-Distance Telecommunications Services (May 14, 1997), *available at* www.usdoj.gov/atr/statements/Affiwp60.htm, affidavit filed with Evaluation of the United States Department of Justice, *In re Application of SBC Commc'ns Inc.*, No. 97-121 (F.C.C. May 16, 1997, *available at* http://www.usdoj.gov/atr/public/comments/sec271/sbc/sbc.htm.

[49] Schwartz, *supra* note 44, at 28; *see also* R. Hewitt Pate, Assistant Attorney Gen. U.S. Dep't of Justice, Telecommunications Competition 15-16 (Dec. 4, 2003), available at http://www.usdoj.gov/atr/public/speeches/201734.pdf. ("It must be kept in mind that the imposition of forced cooperation is among the most difficult areas for antitrust. It not only raises judicially difficult problems of setting prices and terms for cooperation, but also presents the potential for conflict with the basic antitrust goal that firms compete against each other rather than share monopolies.").

evolution of local competition, but to help establish conditions that will allow market forces to operate with minimal impediments."[50]

The 271 process is now complete, and as of December 2003, the FCC granted Section 271 approvals to the RBOCs in all 49 states plus the District of Columbia for which applications had been filed.[51] The DOJ has played a "major role" in the Section 271 process, by "provid[ing] extensive comments to assist the FCC in developing appropriate standards to use in reviewing applications," by "interact[ing] with state PUCs, CLECs, RBOCs, and the FCC to discuss and resolve issues raised in applications," and by "fil[ing] evaluations with the FCC that analyzed the potential for competition by examining whether the local market was fully and irreversibly open to competition."[52] The DOJ's analysis "featured prominently in the FCC's decisions.[53]

Competition has also grown. During the time of the 271 review regime, competing firms entered and grew their shares in both local[54] and long distance markets,[55] and long distance rates

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[50] Schwartz, *supra* note 44, at 28. The Division's work in the Section 271 process may be best understood as competition advocacy. *See* Statement of J. Bruce McDonald before the Antitrust Modernization Commission Hearing on Antitrust and Regulated Industries at 2 (December 5, 2005), *available at* http://www.amc.gov/commission_hearings/pdf/McDonald_Statement.pdf (describing competition advocacy as where "antitrust enforcers . . . advocate that . . . regulatory agencies avoid approving conduct that may harm competition and consumers, or that the agencies eliminate obstacles that prevent competition in the markets they oversee").

[51] *See* Federal Communications Commission, RBOC Applications to Provide In-region, InterLATA Services Under § 271, *available at* http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications.

[52] Pate, *supra* note 49, at 4.

[53] Schwartz, *supra* note 44, at 17 (noting that the FCC "generally agreed with DOJ's assessments in turning down the five applications to date").

[54] Pate, *supra* note 49, at 5 (by 2002, CLECs served over 13% of local lines nationwide, and that in some states, CLECs serve over 33% of business customers using their own facilities), *see also* FCC Wireline Competition Bureau, "Trends in Telephone Service" at 8-11(Feb. 2007) (as of

decreased by about two-thirds, even before widespread Bell company entry into long distance.[56]

B. Availability of antitrust claims for failure to open local markets

A second issue arising from the 1996 Act's requirement that ILECs open their markets to competition was this: would an ILEC's failure to meet the Act's obligations to open its markets give rise to antitrust liability? In *Trinko*, the Supreme Court said no. After finding that the Act's savings clause precluded a finding of implied immunity,[57] the Court nevertheless went on to discuss the ways that the regulatory framework established by the Act informed its analysis as to whether to permit the plaintiff to proceed with an antitrust claim.[58]

The Supreme Court noted that in considering the question of whether "traditional antitrust principles" would permit extending antitrust law to recognize a claim based on the

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2004, CLECs had won 15.8% of local service revenue).

[55] *Id.* at 4 (from 2000-02, "Verizon's share of households for long distance services increased from 13 to 28% in the northeast region [and] SBC's shares in the Southwest region increased from 3% to 24% over the same period").

[56] *Id.* at 3 (noting that "average revenue per minute fell from 32 cents at the time of the MFJ to about 10 cents in 2001").

[57] The 1996 Act's antitrust "savings clause" provided that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 1996 Act, *supra* note 7, 47 U.S.C. at § 152. The Court found that this savings clause barred a finding of implied immunity. After deciding that the savings clause "preserves those claims that satisfy existing antitrust standards [but] does not create new claims that go beyond existing antitrust standards," 540 U.S. at 406-07, the Court went on to hold that the plaintiff's allegations did not state "a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.* at 410.

[58] "Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of [Sherman Act] § 2." *Id.* at 412 (citation omitted) (citing *United States v. National Assn. of Sec. Dealers, Inc.*, 422 U.S. 694, 730-735 (1975)).

ILECs' statutory duty to aid competitors, "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue," and that "careful account must be taken of the pervasive federal and state regulation characteristic of the industry."[59] One factor of "particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[60]

In *Trinko*, the Supreme Court found that the 1996 Act's regulatory framework demonstrated how, in certain circumstances, "regulation significantly diminishes the likelihood of major antitrust harm."[61] Given lengthy review and approval by the FCC and the state regulatory body of Verizon's application to enter the long distance market, the FCC's and the state's decision to fine Verizon a total of $12 million for the same failures to comply with the Act that gave rise to Trinko's claim, the FCC's and the state's decision to terminate their enforcement orders against Verizon for these failures, and the FCC's ongoing power to investigate and penalize violations of the 1996 Act, the Court found that "the additional benefit to competition provided by antitrust enforcement" would be small.[62]

Moreover, the Court noted that "[e]ffective remediation of violations of regulatory

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[59] *Id.*, at 411-12 (internal quotation marks omitted).

[60] *Id.* at 412.

[61] *Id.* (internal quotation marks omitted).

[62] *Id.* So far as I am aware, the DOJ has never filed an antitrust action against a Bell company for its failure to have complied with the requirements of the 1996 Act.

sharing requirements will ordinarily require continuing supervision of a highly detailed decree," and that the "'problem should be deemed irremedia[ble] by antitrust law when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'"[63] The relief requested would require a court to ensure that Verizon provided "access to the local loop market . . . to [rivals] on terms and conditions" as favorable as those that Verizon enjoys, and the Court recognized that "an antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations." [64]

V. Dual DOJ and FCC Review of Telecommunications Mergers' Impact on Competition

Although telecommunications transactions have been subject to both antitrust and regulatory review since before the 1996 Act, the wave of mergers in high tech and telecommunications companies that began following passage of the Act led to a huge increase in the number of transactions to be reviewed at the FCC and at the DOJ.[65] A number of commentators later raised questions about increased costs and delay as a result of dual review. This section will explain how merger review by the FCC and the DOJ differs and discuss some of the reasons commentators have cited for advocating that telecommunications merger review

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[63] *Id.*, at 414 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1990).

[64] *Id.* at 415.

[65] Because the FTC does not have jurisdiction over common carriers, "the vast majority of telecommunications mergers have historically been reviewed by the DOJ." Donald J. Russell & Sherri Lynn Wolson, *Dual Antitrust Review of Telecommunications Mergers by the Department Of Justice and the Federal Communications Commission,* 11 Geo. Mason L. Rev. 143, 143 n.1 (2002).

be assigned to just one agency.

There are a number of differences between the FCC's and the DOJ's merger review, both substantively and procedurally. First, the substantive standard is different. The DOJ reviews proposed mergers under Section 7 of the Clayton Act, which prohibits mergers if the "effect of such acquisition may be substantially to lessen competition."[66] The FCC reviews a proposed transaction to judge whether it is in "the public interest, convenience and necessity."[67] The FCC has explained that under this standard it may consider other factors besides the effect on competition, including (1) whether the transaction would result in a violation of the Communications Act, another applicable statutory provision, or the FCC's rules, (2) whether the transaction "would substantially frustrate or impair" the FCC's implementation or enforcement of the Communications Act or would interfere with the objectives of that and other statutes, and (3) whether the merger "promises to yield affirmative public interest benefits."[68]

Procedurally, if the DOJ determines that a merger will substantially lessen competition, in order to block the transaction from going forward the DOJ must file suit in federal court and

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[66] *See* 15 U.S.C. § 18 (2000).

[67] *See* 47 U.S.C. §§ 214, 310 (2000). The FCC and DOJ have "concurrent jurisdiction under Section 7 with respect to common carriers engaged in wire or radio communications or radio transmissions of energy, but "the FCC generally chooses not to exercise this jurisdiction." Russell & Wolson, *supra* note 65, at 144-45 (footnotes omitted).

[68] *See In re Application of GTE Corp.,* 15 F.C.C.R. 14,032, 14,046 (2000). The last consideration is where the FCC considers the "potential competitive effects of the transaction." *Id.* Although the FCC has long acknowledged that "competitive considerations are an important element of the 'public interest' standard" that governs its decision making," *see* ALD 6th, *supra* note 28, at 1316 (citing *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc)), the FCC has also noted that its "overriding responsibility is not to foster the maximum level of competition in the industry but rather to promote the public interest." *Id.* (citing *In re Application of United States Cellular Operating Co.*, 3 F.C.C.R. 5345, 5346 n.3 (1988)).

obtain an injunction from the court. In that litigation, the DOJ bears the burden of proving that the transaction would violate the antitrust laws.[69] The court must reach an independent judgment on both the facts and the law, and DOJ's conclusions are entitled to no special deference from the court.[70]

Because "virtually every significant telecommunications firm requires the use of FCC licenses," merger transactions typically involve the transfer of ownership of these licenses, for which prior FCC approval is required. License transfers associated with large mergers . . . typically draw intensive and lengthy FCC review."[71] The FCC's investigation culminates in an order from the Commission. Although the FCC's public interest determinations on license transfers are judicially reviewable,[72] the standard of review is generally deferential to the agency.[73]

Notwithstanding these different approaches, DOJ officials have observed that in general "there is much more consonance than dissonance between the [DOJ's] review and the FCC's."[74]

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[69] *See, e.g.*, *United States v. SunGuard Data Sys., Inc.*, 172 F. Supp. 2d 172, 180 (D.D.C. 2001).

[70] *See id.* at 180-81 (describing the standard of review applied by the court).

[71] Russell & Wolson, *supra* note 65, at 148.

[72] *See In re: 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Servs.*, 16 F.C.C.R. 22,668, 22,700 (2001).

[73] *See SBC Commc'ns Inc. v. FCC,* 56 F.3d 1484, 1490 (D.C. Cir. 1995) (reviewing an FCC decision "only to determine whether it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'") (quoting 5 U.S.C. § 706(2)(A)).

[74] J. Bruce McDonald, U.S. Dep't of Justice, Statement at the Antitrust Modernization Comm. Hearing on Antitrust and Regulated Industries 6 (Dec. 5, 2005), *available at* http://www.amc.gov/commission_hearings/pdf/051205_Regulated_Industries_Transcript_reform.pdf.

Although the DOJ and the FCC have reached "divergent outcomes" on some transactions,[75] in the "vast majority of cases, the Division and the FCC reach a similar outcome when reviewing the same merger."[76] And even where the DOJ and FCC reach different conclusions,

> those conclusions are reached within very different frameworks and from very different perspectives. The Division asks, "Is there a violation of the antitrust laws?" The FCC asks, "Have the parties shown a positive effect for the public?" Congress has concluded that both of these considerations are important for protecting American consumers in these specific industries.[77]

There are, however, additional costs that result from a system of dual review. As noted by the International Competition Policy Advisory Committee ("ICPAC") in its February 2000 report,[78] parties incur "increased transaction costs flowing from the need to defend a proposed transaction before multiple agencies," while agencies incur "duplicative expenditure[s]" resulting in an "inefficient allocation of scarce resources."[79] In addition, multiple agency review generates

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[75] *Id.* at 6 (noting that in the 1997 proposed merger of Bell Atlantic and NYNEX, the Division "determined that the proposed merger would not substantially lessen competition and did not challenge it, while the FCC imposed conditions on its approval").

[76] *Id.* at 6-7 (going on to note that the "informal cooperation" on mergers between the DOJ and FCC in reviewing mergers "ensures more efficient use of resources, . . . lessens the likelihood of conflicting enforcement decisions, . . . and allows us better to share our respective expertise – the Division with competition issues and the FCC with the regulatory framework and technical knowledge of the telecommunications industry as a whole").

[77] *Id.* at 7.

[78] *See* Int'l Competition Policy Advisory Comm., Final Report (2000) ("ICPAC Final Report"), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm. Then-Attorney General Reno and then-Assistant Attorney General Klein formed the Committee in November 1997 in order to study "multi-jurisdictional merger review; the interface of trade and competition issues; and future directions in enforcement cooperation between U.S. antitrust authorities and their counterparts around the world, particularly in their anticartel prosecution efforts." *Id.* at 1.

[79] *Id.* at 146; *see also* Rachel E. Barkow & Peter W. Huber, *A Tale of Two Agencies: a Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 U. Chi. Legal F. 29, 31 (having two decision-makers wrestle with the same issue is "highly inefficient"

uncertainty as to timing, and from "having more than one standard and more than one agency applying a competition standard, where the agencies actually are free to reach different results."[80] In addition, "inefficiencies (and perhaps bad policy) can be created when one agency has the ultimate authority to make decisions that fall within another agency's area of comparative advantage."[81] The costs resulting from a system of multiple review should be considered along with the perceived benefits from such a system.[82]

Given these and other costs from dual merger review commentators have argued that there is a problem that needs to be addressed, but there is disagreement as to the solution. Some commentators have argued that the FCC "need not go beyond the particular license transfer before it"[83] and does not need to conduct a competitive effects analysis when the DOJ "is already charged with the same task."[84] Others have argued that "the FCC should be the agency with sole merger review authority."[85] Although a bill was introduced in the U.S. Senate in 1999 to strip the FCC of all merger review authority except for the ability to file comments in proceedings

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when "one can do the job alone," and it results in "delay, uncertainty, and wasted resources").

[80] Antitrust Modernization Commission Public Hearing: Regulated Industries Hr'g Tr. 55 (Dec. 5, 2005) (J. Bruce McDonald) , *available at* http://www.amc.gov/commission_hearings/pdf/051205_Regulated_Industries_Transcript_reform.pdf.

[81] ICPAC Final Report, *supra* note 78, at 146-47.

[82] *See id.* at 146; Regulated Industries Hr'g Tr. At 55 (McDonald).

[83] *See* Barkow & Huber, *supra* note 79, at 82.

[84] *See id.* at 34.

[85] David A. Curran, *Rethinking Federal Review of Telecommunications Mergers*, 28 Ohio N.U. L. Rev. 747, 771 (2002).

before the DOJ or FTC, that bill was eventually tabled.[86]

VI. The Antitrust Modernization Commission Recommendations

The AMC issued its Report and Recommendation issued in early April.[87] The Department of Justice noted when the report was issued that it "contains valuable analyses of U.S. antitrust laws and enforcement procedures."[88] The Division also noted that it was "in the process of reviewing" all of the recommendations, and thus it has taken no position on the specific recommendations with respect to regulated industries that I will discuss below. As to one issue relevant here, however, the Division did, however, explicitly praise the Commission's conclusions:

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[86] *See id.* at 770 and nn.155-56 (citing draft Telecommunications Merger Review Act of 1999, S. 1125, 106th Cong. § 2(5), § 4(e) (2000)). "The FCC eventually adopted a streamlined merger review procedure, likely in an effort to head off legislative 'reforms.'" *Id.* at 770 n.157 (citing Issues Memorandum for March 1, 2000 Transactions Team Public Forum on Streamlining FCC Review of Applications Relating to Mergers (Mar. 1, 2000), at www.fcc.gov/transaction/issuesmemo.html).

[87] *See* AMC Report, *supra* note 10. The Antitrust Modernization Commission was created in 2002 and consisted of 12 members, four of which were appointed by the President, 4 of which were appointed by the leadership of the Senate, and four of which were appointed by the leadership of the House of Representatives. *See* Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11055(a), 116 Stat. 1856. As part of its mission, the Commission was charged to "solicit views of all parties concerned with the operation of the antitrust laws[,] evaluate the advisability of proposals and current arrangements with respect to any issues so identified[,] and to prepare and submit to Congress and the President a report." *Id.* at § 11053. The report is to "contain a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate." *Id.* § 11058.

[88] Press Release, U.S. Dep't of Justice, Antitrust Division Statement Regarding the Release of the Antitrust Modernization Commission Report 1 (Apr. 3, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/222344.pdf.

> The Division commends the AMC for [concluding] that [f]ree-market competition should remain the touchstone of United States' economic policy. The Commission's conclusion in this regard is a fundamental starting point for policy makers. Over a century of experience has shown that robust competition among businesses, each striving to be increasingly successful, leads to better quality products and services, lower prices, and higher levels of innovation.[89]

In its specific recommendations, the AMC has set forth its own vision of the boundaries between regulation and competition in regulated industries. Because public policy "should favor free-market competition over industry-specific regulation of prices, costs, and entry," economic regulation "should be reserved for the relatively rare cases of market failure, such as the existence of natural monopoly characteristics in certain segments of an industry, or where economic regulation can address an important societal interest that competition cannot address."[90] Moreover, "[i]n general, Congress should be skeptical of claims that economic regulation can achieve an important societal interest that competition cannot achieve."[91]

When the government does adopt economic regulation, "antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular,

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[89] *Id.* In other respects, however, the Division has not taken a position on the Commission's specific recommendations, and my discussion of any of its recommendations in this paper does not represent an endorsement by the DOJ.

[90] AMC Report, *supra* note 10, at 358 (Recommendation 62); *see also* Hovenkamp, *supra* note 3, at 362 ("Avoiding excessive regulation consists of two things: First, the policy maker must avoid or abandon regulation in markets where it is unnecessary. . . . Second, the domain of regulation must be no broader than necessary to cover the natural monopoly or other 'market failure' that justifies the regulation.").

[91] AMC Report, *supra* note 10, at 358 (Recommendation 62); *see also* Hovenkamp, *supra* note 3, at 362 ("[C]omprehensive price and service rate making offers, at best, a very rough approximation of the competitive price, deters innovation, perhaps significantly, and costs much to administer. These arguments are generally thought to be quite robust, and to counsel against regulation unless it is very clear that competition simply cannot work in a certain market.").

antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals."[92] Statutory regulatory regimes "should clearly state whether and to what extent Congress intended to displace the antitrust laws, if at all,"[93] and courts should "give deference to the antitrust laws, and ensure that congressional intent is advanced in such cases by giving the antitrust laws full effect."[94] The AMC endorsed current legal standards that create implied immunities "only when there is a clear repugnancy between the antitrust law and the regulatory scheme at issue."[95]

With respect to dual merger review, the AMC recommends that "even in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act."[96] For regulated industry mergers, the "antitrust agency should perform the competition analysis," and the "relevant regulatory authority should not re-do the competition analysis of the antitrust agency."[97]

Finally, given that regulation is considered an exception to the fundamental U.S. policy of

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[92] AMC Report, *supra* note 10, at 358 (Recommendation 63).

[93] *Id.* (Recommendation 64).

[94] *Id.* at 359 (Recommendation 65).

[95] *Id.* at 360 (Recommendation 66). In this respect, the AMC noted that the Supreme Court's *Trinko* decision is "best understood only as a limit on refusal-to-deal claims under Section 2 of the Sherman Act," and that "it does not displace the role of the antitrust laws in regulated industries." *Id.* (Recommendation 67).

[96] *Id.* at 364 (Recommendation 69).

[97] *Id.* at 364 (Recommendation 70). This does not mean that the presence of regulation is irrelevant to antitrust analysis. The AMC recommends that "federal antitrust agencies and other regulatory agencies should consult on the effects of regulation on competition," and that "antitrust enforcement agencies and courts should take account of the competitive characteristics of regulated industries, including the effects of regulation." *Id.* (Recommendations 71 and 72).

favoring free markets, the AMC recommends that "Congress should periodically review all instances in which a regulatory agency reviews proposed mergers or acquisitions under the agency's 'public interest' standard to determine whether in fact such regulatory review is necessary."[98] In such a reevaluation, Congress "should consider whether particular, identified interests exist that an antitrust agency's review of the proposed transaction's likely competitive effects under Section 7 of the Clayton Act would not adequately protect. Such 'particular, identified interests' would be interests other than those consumers interests—such as lower prices, higher quality, and desired product choices—served by maintaining competition."[99]

VII. <u>Conclusion</u>

It is not for me to say what lessons policy makers in Korea should draw from these U.S. experiences with moving our telecommunications system towards less regulation and greater competition. The United States has not finished that journey, and the recent recommendations from the AMC arguably represent the best advice a group of private antitrust lawyers can give.

One point, however, does seem unexceptionable: this journey will not be a swift one. "We've had a regulated system of telephony in this country for over a century; it won't be deregulated in a year and even after it is deregulated, it'll take time for competition to [wring] all the fat out of the system so that consumers truly get the best service at the lowest prices."[100] I would suggest this is likely true in Korea as well.

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[98] *Id.* at 366 (Recommendation 74).

[99] *Id.* at 366 (Recommendation 74).

[100] Klein, *supra* note 37, at 14.