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# DUAL ENFORCEMENT OF ELECTRIC UTILITY MERGERS AND ACQUISITIONS

*Garry A. Gabison* *

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## ABSTRACT

The Federal Trade Commission (FTC) and Department of Justice (DOJ) oversee most mergers and acquisitions. The Federal Energy Regulatory Commission (FERC) oversees electric utility mergers and acquisitions. In the last ten years, policy efforts have attempted to align FERC with the FTC/DOJ – including from within the FTC/DOJ. However, FERC continues to enforce its own public interest standards and use methods that the FTC/DOJ see as antiquated. In 2016, FERC has opened the door again to align with the FTC and DOJ. This paper compares the merger and acquisition procedures and methods used by the agencies. It argues that FERC should keep its identity because it casts a wider net and hence it is more likely to fail to identify mergers as not harmful when they are (false negative) even if it can over-identify mergers as harmful when they are not (false positives).

## I. INTRODUCTION

Justice Breyer once stated: “When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.”[1]

His statement relies on the basic assumption that markets function efficiently through competition. Markets for utilities epitomize non-competitive markets; as such, they are heavily regulated. This paper looks more closely at the dual authority (and enforcement) over mergers and acquisitions (M&A) of electricity utility companies. It makes two arguments. First, dual enforcement can be repetitive and inefficient. Second, the Federal Energy Regulatory Commission (FERC) antitrust standard should apply to other sectors.

In 1890, Congress passed the Sherman Act.[2] This act declared that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”[3] As such, mergers became regulated. In 1914, Congress passed the Clayton Act.[4] Section 7 of the Clayton Act prohibits the company acquisition or merger where

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[1] Pac. Bell Tel. Co. v. Linkline Communications, Inc., 555 U.S. 438, 459 (2009) (concurring opinion).
[2] 15 U.S.C. §§ 1-7.
[3] 15 U.S.C. § 1
[4] 15 U.S.C. §§ 12–27; see 29 U.S.C. §§ 52–53.

"the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[5] The Federal Trade Commission (FTC) was entrusted to enforce the Clayton Act[6] and regulations of mergers fell upon both the FTC and the Department of Justice (DOJ).[7] The Clayton Act, however, carved out an exemption. The Clayton Act did not "apply to transactions duly consummated pursuant to authority given by the … Federal Power Commission."[8]

In 1934, the Securities and Exchange Commission (SEC) was created. The Securities and Exchange Act of 1934 grants authority to the SEC of merger review.[9] Under this Act, the SEC reviews mergers of publicly listed companies,[10] including publicly listed companies with electricity producing assets. While the SEC reviews some public utility mergers,[11] this paper focuses on FERC and DOJ/FTC review dichotomy.

In 1977, FERC replaced the Federal Power Commission.[12] FERC "is responsible for determining whether merger and corporate applications are consistent with the public interest"[13] under the Federal Power Act.[14]

The authority to regulate utility mergers is shared between the FERC, the SEC, the FTC, and the DOJ.[15] This overlap in the electricity

[5] 15 U.S.C. § 18.
[6] *Id.*
[7] 15 U.S.C. § 18(a).
[8] *Supra* note 5.
[9] 15 U.S.C. § 78(a); *see* 15 U.S.C. § 79(j). Specifically, 15 U.S.C. § 79(j) requires acquiring parties to file an application for approval of with the SEC.
[10] 15 U.S.C. § 79(i) (focusing on public utility acquisitions and mergers).
[11] The Public Utility Holding Company Act of 1935 gave the SEC the authority to review mergers of holding companies that own shares into public utility companies. This law was effectively repealed by the Energy Policy Act of (Pub.L. 109–58); *see* Aaron M. Flynn et al., *Federal Merger Review Authorities and Electric Utility Restructuring*, CONG. RESEARCH SERV., No. Rl32133 (2003). Utility holding companies need no longer register with the SEC; Nidhi Thakar, *The Urge to Merge: A Look at the Repeal of the Public Utility Holding Company Act of 1935*, 12 LEWIS & CLARK L. REV. 903 (2008) (The SEC still reviews publicly listed companies – irrelevantly of their industry – through its proxy statement review Section 14(a) of the Exchange Act and Regulation) (codified as 17 CFR 240.14a-1 - 240.14b-2)).
[12] 42 U.S.C. §§ 7101-7352.
[13] FERC, *Mergers and Sections 201 and 203 Transactions*, *available at* https://perma.cc/MK94-6574 (last visited Nov. 30, 2015).
[14] 16 U.S.C. §§ 791-828; *see* 16 U.S.C. §§ 824(b) (2006) (addressing mergers).
[15] Otter Tail Power Co. v. U.S., 410 U.S. 366 (1973) (the Supreme Court ruled that regulation under the Federal Power Act did not immunize companies from

market has created inefficiencies and inconsistency. This paper investigates the inconsistent investigation standard.[16] FERC enforces a *public interest* standard for merger regulations.[17] The FTC and DOJ merger standards focus on *competition*.[18] The SEC enforces "the public interest or for the protection of investors and consumers" standard.[19]

These four overlapping authorities can create inefficiencies, conflicts, and inconsistencies. Inefficiencies occur when more than one agency investigate the same merger. Conflicts occur when these agencies battle over merger jurisdiction. Inconsistencies occur when different agencies treat merger differently, setting inconsistent precedents.

To resolve conflicts, merger regulators can either turn to (1) the courts to arbitrate the boundaries of their jurisdiction; (2) the Congress to clarify their intent and who they thought has jurisdiction; or (3) themselves to delegate who does what.[20] Courts have not resolved this issue.[21] Merger regulators have not yet resolved the issues. Instead, all

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antitrust law enforcement. Therefore, stating that the DOJ also had jurisdiction over the antitrust law in the electric industry).

[16] FERC also has concurrent jurisdiction with the FTC/DOJ to review mergers of natural gas companies under 15 U.S.C. § 717f(c) (1988). However, this paper focuses solely on the mergers of electric utility producing companies.

[17] 16 U.S.C. §824b(a)(4)(203).

[18] The FTC asserts that it "is committed to preventing mergers and acquisitions that are likely to reduce competition and lead to higher prices, lower quality goods or services, or less innovation." Federal Trade Commission, *Merger Review*, *available at* https://perma.cc/N85W-Q4DE (last visited Nov. 30, 2015); *see* United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (August 19, 2010).

[19] 15 U.S.C. § 79(j).

[20] Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 198-211 (2011) (explaining that duplicative costs can be avoided either: by Congressional communication to the agencies; Presidential communication; Court rulings).

[21] Courts have deliberated in the overlap between FERC and the SEC. Gary D. Levenson, *FERC-SEC Overlapping Jurisdiction and the Ohio Power Litigation: A Loss for Ratepayers*, 68 IND. L.J. 1417, 1428, 1445 (1993) (discussing how the SEC and the FERC have claimed jurisdiction over the same non-merger transaction. The court was called to intervene and ruled that the SEC had precedent when the rulings of the two agencies conflicted. The article goes on to argue that "[i]n merger and acquisition cases involving utilities that are part of public utility holding company systems, recent developments indicate that FERC's jurisdiction might be threatened as a result of the construction of section 318 made in the trio of Ohio Power cases.")

merger authorities have retained jurisdictions.[22]

Congress has considered clarifying the merger jurisdictions. In 2007, the American Modernization Commission suggested four solutions to Congress:[23] (1) have FERC regulate mergers in the electric industry on its own; (2) give sole and complete authority to FTC and DOJ to regulate the mergers in this industry;[24] (3) leave the *status quo* and have multiple merger investigators with the associated inefficiencies; (4) grant immunity to the industry from merger supervision.[25] In 2015, Congress considered some of these recommendations.[26]

This paper argues that FERC should remain the superior agency to address merger issues in the electricity industry. While the SEC has a part to play in merger regulation, its stated standard resembles the FERC's sufficiently that this paper focuses on the conflict between FERC and DOJ/FTC.

Part II describes how FERC approaches horizontal merger

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[22] "About 100 mergers involving electric utilities were proposed in the United State between 1992 and 2006. Two-thirds of these were electric mergers; the remainder were [sic] electric-gas combinations. FERC reviewed about 80 mergers, conditioning approval in 6 percent of the cases by accepting applicants' conditions or imposing new conditions. In 9 percent of mergers, the antitrust agencies imposed remedies." *American Bar Association. Section of Antitrust Law*, ENERGY ANTITRUST HANDBOOK: A GUIDE TO THE ELECTRIC & GAS INDUSTRIES, at 100 (2d ed. 2009).

[23] Antitrust Modernization Commission, *Reports and Recommendations*, April 2007, *available at* https://perma.cc/Q2SS-NJ7V (last visited Nov. 30, 2015).

[24] As will be explained in more details below, this only solves the problem of the FERC. The DOJ and the FTC still would both have power to regulate merger in that market, and hence some efficiencies will remain as will be discussed below.

[25] The Supreme Court held that if Congress created an agency to regulate a certain industry, this industry should be exempted from antitrust litigation, but this immunity from antitrust regulation was not absolute. Credit Suisse v. Billing, 551 U.S. 264, 278 (2007) (holding that securities laws were incompatible with antitrust laws, such that securities law implicitly precluded antitrust claims). The Supreme Court recognizes that Congress may assure that immunity is not granted to the regulated industry by adding a saving clause in the statute creating the regulation. In the energy industry, in Otter Tail Power Co. v. U.S., 410 U.S. 366, 375-76 (1973), the Supreme Court has ruled that the antitrust law still applies.

[26] US House Judiciary Committee*, House Judiciary Committee Approves SMARTER Act to deliver predictability to the merger review process*, Press Release (Sept. 30, 2015), *available at* https://perma.cc/8ZAJ-46FS (last visited Nov. 30, 2015). The SMARTER Act would harmonize merger review done by the FTC and DOJ but does not address other review process inconsistencies.

enforcement and contrasts FERC's enforcement standards and goals with the FTC's and DOJ's. Part II discusses how the 2010 Horizontal Merger Guidelines may affect FERC's enforcement of mergers after looking at how FERC had addressed previous Merger Guidelines. Part III looks at the problems and benefits associated with dual enforcements. Part IV argues that the FERC should be granted sole custody of the electricity market, whether it is to regulate prices or mergers. This recommendation improves the efficiency of the merger review process; nonetheless, it may require some changes to FERC's merger review process.

## II. MULTIPLE AGENCIES REVIEW ELECTRIC UTILITY MERGERS

The FTC and DOJ have prosecutorial discretion to investigate all mergers – including electric utility company mergers. The FERC's authority is limited to (electric) utility companies. Other agencies may also get involved.[27] The FERC and the FTC/DOJ have different approaches to merger investigation. These approaches reflect their different goals.

To better decide who should oversee mergers, this section

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[27] Transactions involving energy companies are subject to competition policy review or challenge by:

- One of the federal antitrust agencies (both DOJ and the FTC have reviewed transactions involving electric power producers);"
- The Federal Energy Regulatory Commission (FERC);
- For some transactions, the Securities and Exchange Commission (exercising powers granted by the Public Utility Holding Company Act);
- The public service commission (PSC) of each state in which the parties do business (although it is not clear under the law of several states whether remedial action can be ordered by a single PSC over a multistate company);
- As with other mergers, the attorney general of each state in which the parties do business (the attorney general may develop a policy position independent from and inconsistent with the position adopted by the public service commission); and
- As with other mergers, private entities, such as competitors to the merging parties.

The Relationship Between Antitrust Agencies and Sectoral Regulators, at i-ii, *available at* https://perma.cc/AD47-VJ48 (last visited Nov. 30, 2015).

investigates the differences. Section II.A discusses why the electricity market ought to be treated differently. Section II.B discusses how the FERC investigate mergers. Section II.C describes how the FTC and the DOJ investigate mergers. Section II.D examines the FTC criticisms of FERC's approach and explains how FERC has attempted to follow the FTC recommendations.

## A. Uniqueness of the Electricity Market

Electricity is a unique market. Electricity has become so essential to society that demand does not respond well to price change. In economic terms, the demand for electricity is inelastic: the price elasticity of demand for electricity is low.[28] The National Renewable Energy Laboratory reported that price elasticity of demand for electricity for residential use was low in the short[29] and long run.[30] Even though the results vary depending on the region,[31] the demand for electricity remains inelastic. The demand for electricity intended for commercial use was comparably inelastic.[32]

The electricity production process exhibits large economies of scale.[33] Most of the cost comes from the fixed cost of building a unit, the

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28 Mark A. Bernstein, and James Griffin, *Regional Differences in the Price-Elasticity of Demand for Energy*, NATIONAL RENEWABLE ENERGY LABORATORY (2006), *available at* https://perma.cc/KKL8-KCUD (last visited 25 Nov. 2011).

29 *Id.* at 76. Table D.5 (using a fixed effect estimation to derive these results and deal with region heterogeneity the authors found that the short run demand price elasticity was between -0.32 and -0.05 in the short run).

30 Bernstein et al., *supra* note 28, at 76 Table D.5. (finding that the long run demand price elasticity was between -0.62 and -0.06. The long-run elasticity is lower than the short run elasticity because in the long run consumer can switch to more cost-efficient appliances or switch to cheaper source of heat (e.g. natural gas)).

31 The regional analysis attempts to address state specific variation such as temperature, daylight, etc., which affects electricity use. They include other variables like income, which affects electricity use. Bernstein et al., *supra* note 28, at 14-17.

32 Bernstein et al., *supra* note 28, at 77 In the short run, the price elasticity of demand for commercial use ran from -0.31 to -0.16 and in the long run from -0.76 to -0.22 depending on the region.

33 Laurits R. Christensen and William H. Greene, *Economies of Scale in U.S. Electric Power Generation*, 84 J. OF POL. ECON. 655 (1976) (using a translog cost function and different models, found that electric producing firms experience large economies of scale. They found that these firms operate at the flat portion of the cost curve); *see* John E. Kwoka Jr, *Electric power*

network of cables, and starting up the unit. Large fixed costs (and regulation) limit possible entries. In economic terms, these types of market are referred to as a natural monopoly.[34]

Contrary to other energy resources (e.g. gas or oil), electricity cannot be stored. Supply is limited by the capacity of the producing units in the short run: consumers and producers cannot store during low price periods to use during high price periods. Therefore, poorly anticipating needs for electricity is very costly for the producer. Interestingly, the demand process is fairly predictable from one year to the next; however, it follows an upward trend.[35]

Since the demand for electricity does not respond to price change and entry is limited, electricity producers could increase prices to increase revenues. To avoid this abuse of market power, the prices are kept low through regulations. The California electricity crisis following its electricity deregulation underlines the need for continued regulation.[36]

Even "small changes in the competitive conditions can lead to substantial wealth transfers from consumers to producers as well as significant deadweight losses."[37] In other words, even small M&A can trigger dramatic change in the competitive landscape.[38] The California electricity crisis also underlines the need for merger and acquisition regulation.

Therefore, M&A regulations need to occur to protect consumers from abusive behaviors. The next two sections discuss the merger regulating entities.

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*distribution: economies of scale, mergers, and restructuring*, 37 APPLIED ECON. 2373 (2007).

[34] *See, e.g.,* Richard A. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548, 604 (1969).

[35] Using data from the Energy Protection Agency, one can do a kernel of the current usage (as a ratio of capacity) of the electric plant-producing unit as a function of the previous year production. *See* Table 1.

[36] The FTC has pointed out this short-sight problem in its discussion of adoption of merger guidelines. However, unless the Congress told them to plan for the future, it seems counter-intuitive for an agency to plan in case of its own demise, and it could present some end-game issues if the agents are not accountable. FTC Comments, *infra* note 94.

[37] Marisam, *supra* note 20, at 32.

[38] The FTC discusses the impact of marginal capacity being merged with inframarginal. Horizontal Merger Guidelines, *supra* note 18. They describe what occurs to competition and market power when the marginal supplier merges with other entities; *See* DOJ & FTC Joint Comments, *infra* note 94.

## B. Federal Energy Regulatory Commission's Review Process

"FERC unquestionably has superior knowledge of the electric power industry by virtue of its oversight of transmission and wholesale electric generation markets."[39] Therefore, it seems almost natural that FERC would oversee electricity utility mergers.

When energy utility companies want to merge, they have to complete and file an application with the FERC. This application must include "all the information necessary to explain how the merger is consistent with the *public interest*, including an evaluation of the merger's effect on competition, rates, and regulation."[40] Third parties may also intervene and volunteer information during a 60-day comment period.[41] The FERC then reviews the application.[42]

The FERC's review process ambiguously incentivizes applicants. On the one hand, applicants are incentivized to provide only favorable or partial evidence. First, applicants want to provide only favorable evidence because they know that the FERC has no subpoena power for merger proceedings and so it may heavily weigh the applicants' self-disclosed information. To gather merger related information, the FERC must seek subpoenas from a federal district court.[43] This process slows the information gathering process and increases merger review costs for FERC.

Second, applicants are incentivized to provide partial information because FERC merger applications are subject to the Freedom of Information Act.[44] Applicants can "claim confidentiality for

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[39] Milton A. Marquis, *DOJ, FTC and FER Electric Power Merger Enforcement: Are There Too Many Cooks in the Merger Review Kitchen?*, 33 LOY. U. CHI. L.J. 783, 787 (2002).
[40] Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act; Policy Statement, 61 FR 68595-01, 68605, 51 (1996) (emphasis added) [hereinafter "1996 Inquiry"].
[41] *Id*. at 27.
[42] "The burden is upon the applicant to show that the proposal is consistent with the public interest." Pac. Power & Light Co. v. Fed. Power Comm'n, 111 F.2d 1014, 1016 (9th Cir. 1940).
[43] "Subpoenas issued by the FERC are not self-executing; rather, to enforce them the FERC must seek an order from a federal district court compelling compliance with all or part of the subpoenas." Belle Fourche Pipeline Co. v. United States, 751 F.2d 332, 334 (10th Cir. 1984) (holding that the agency did not have subpoena power in order to investigate).
[44] 18 C.F.R. § 388.112 (2017).

certain information included in their merger applications at the time the application is filed."[45] This procedure can keep competitors from accessing sensitive information. But co-applicants will gain access to this information because "parties to the proceeding may seek access to that information pursuant to § 388.107 of the Commission's regulations."[46] If the merger fails, applicants could have gained important information about their competitors' business model. So, merging parties may not disclose some strategic information central to the FERC's merger assessment.

On the other hand, applicants are incentivized to provide as much as supporting evidence as possible to avoid information request delays. Substantial changes and supplemental supporting information can lead the Commission's review process to restart.[47] Applicants also want to avoid the FERC blocking the merger because consumer associations volunteered contradicting evidence.[48] Merging parties have to weigh the costs and benefits of incompleteness.

After this investigation, the Commission emits an initial order "requesting additional information from the applicants or intervenors; setting some or all issues for a trial-type or paper hearing; approving the merger; or rejecting the merger."[49] Table 1 shows the decisions that the FERC took between 2006 and 2014 about ownership changes of electric utilities. The FERC classifies change of ownership cases according to acquisition, disposition, and merger.[50] The cases are not mutually exclusive: some cases may involve acquisitions and dispositions.[51]

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[45] *Revised Filing Requirements Under Part 33 of the Comm'n's Regs.*, 94 FERC ¶ 61289 (2001).
[46] *Id.*
[47] 1996 Inquiry, *supra* note 40, at 51.
[48] Marquis, *supra* note 39, at 786.
[49] Marquis, *supra* note 39, at 786.
[50] Acquisition and disposition refer to asset transfers where the two entities transferring assets continue to exist. The two entities end up with different portfolio pre- and post-transfer. Mergers refer to two entities joining their portfolio and becoming a single entity.
[51] For example, the FERC approved together the merger, acquisition, and disposition of facilities in case EC12-145-000 & EL12-107-000 involving ITC Holdings Corp and Entergy Corporation in 2013. *ITC Corp. & Entergy Corp.*, 143 FERC ¶ 61,256 (2013).

**Table 1: FERC ownership change decisions for electric utility companies 2006-2014**

| Year | Authorized acquisitions | Denied acquisitions | Authorized dispositions | Denied dispositions | Authorized mergers | Denied mergers | Request further information | Energy Information Administration reported mergers |
|---|---|---|---|---|---|---|---|---|
| 2006 | 73 | 3 | 113 | 0 | 8 | 0 | 2 | N/A |
| 2007 | 45 | 1 | 98 | 2 | 4 | 0 | 0 | 33 |
| 2008 | 48 | 0 | 99 | 0 | 4 | 0 | 0 | 16 |
| 2009 | 26 | 0 | 72 | 1 | 1 | 0 | 0 | 12 |
| 2010 | 38 | 0 | 75 | 0 | 3 | 0 | 2 | 11 |
| 2011 | 19 | 0 | 98 | 0 | 4 | 0 | 0 | 14 |
| 2012 | 33 | 0 | 124 | 0 | 3 | 0 | 0 | 13 |
| 2013 | 42 | 0 | 118 | 1 | 1 | 0 | 1 | 9 |
| 2014 | 41 | 0 | 111 | 0 | 2 | 0 | 0 | 11 |
| Total | 365 | 4 | 908 | 4 | 30 | 0 | 5 | 119 |
| Average | 40.6 | 0.4 | 100.9 | 0.4 | 3.3 | 0 | 0.6 | 14.9 |

Sources: FERC Orders all columns except Energy Information Administration (EIA) reported mergers; EEIA File 86 last column.

Mergers are rarer than acquisitions and dispositions. Disposition is the most frequent change of ownership request. Requests for further information remain negligible over the whole period. Thus, either the parties involved do not wish to delay rulings and disclose sufficient information or the FERC makes a ruling based on the potentially biased information provided. The last column shows the Energy Information Administration (EIA) reported mergers. The EIA uses a different form to consider mergers. As such the reported number of mergers does not match the FERC classification. Because of its classification, the reported number of mergers by the FERC in the electric utility market is probably underestimated.

### C. Federal Trade Commission's and the Department of Justice's Review Process

The DOJ and the FTC have agreed on jurisdiction for some industries.[52] In the electric utility industry, both agencies regulate mergers. For instance, the FTC was involved in the merger between DTE Energy and MCN Energy[53] while The DOJ was involved in the merger between Exelon Corp. and Public Service Enterprise Group.[54] In theory, the FTC retains jurisdiction over the energy industry;[55] but in practice, the DOJ still uses its authority to regulate energy mergers.

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[52] The FTC and the DOJ have divided their jurisdiction according to experience in the industry. For instance, the FTC has jurisdiction over the automobile

The FTC and the DOJ merger review processes are more similar than different.[56] When two entities want to merge and when these entities meet a certain threshold, they must submit a Hart-Scott-Rodino (HSR) filing to the FTC and the DOJ.[57] These filings are strictly confidential[58] and are triggered by the amount of merger involved.[59]

The investigating agency can issue a second request for information if it cannot rule on the merger based on information provided.[60] The investigating agency allows third parties to intervene (e.g. industry participants) and provide information.[61]

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industry where as the DOJ has jurisdiction over the steel industry. FTC & ANTITRUST DIV. OF U.S. DEPT. OF JUSTICE, MEMORANDUM OF AGREEMENT BETWEEN THE FEDERAL TRADE COMMISSION AND THE ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE CONCERNING CLEARANCE PROCEDURES FOR INVESTIGATIONS, (Mar. 5, 2002), *available at* https://perma.cc/6F6W-7EXE (last visited Nov. 30, 2015).

[53] The FTC ruled that the merger would be approved given easement over some of the gas distribution. United States v. Exelon Corp., No. 1:06CV01138 (D.D.C 2006) (proposed final judgment), *available at* https://perma.cc/2MNM-TNUX (last visited Nov. 30, 2015).

[54] The DOJ required some divestiture before accepting the merger. *Id.*

[55] *Id.*

[56] The Hart-Scott-Rodino Act, Public Law 94-435 codified as 15 U.S.C. § 18(a) (2000), dictates the timing and procedures of the review process.

[57] 15 U.S.C. § 18(a) (2000).

[58] 15 U.S.C. § 1313 (1976); *e.g. In re* Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1023 (D. Conn. 1981) *aff'd*, 665 F.2d 24 (2d Cir. 1981) (holding that "the Attorney General of the United States is directed to retain, until further order of this court, all materials which were subpoenaed or created by the grand jury in the course of its investigation of Cuisinarts").

[59] As of February 2016, if the mergers involve assets over $78.2 million, the merging entities must file an HSR filing. 81 Fed. Reg. 16, 4159, 4300 (Jan. 26, 2016).

[60] Milton A. Marquis, *Antitrust and Market Power*, 7 RICH. J.L. & TECH. 20 (2000).

[61] U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines*, § 2.2.2-3 at 5 (Aug. 19, 2010), *available at* https://perma.cc/XBM3-J7EC (last visited Nov. 30, 2015) [hereinafter Horizontal Merger Guidelines].

**Table 2: Hart-Scott Rodino pre-merger filing 2006-2014**

| *Fiscal Year* | HSR Merger Transactions Reported | Percentage of Transactions Resulting in Second Request* |
|---|---|---|
| 2006 | 1,768 | 2.6% |
| 2007 | 2,201 | 3.0% |
| 2008 | 1,726 | 2.5% |
| 2009 | 716 | 4.5% |
| 2010 | 1,166 | 3.7% |
| 2011 | 1,450 | 3.9% |
| 2012 | 1,429 | 3.5% |
| 2013 | 1,326 | 3.7% |
| 2014 | 1,663 | 3.2% |
| **Total** | **13,445** | **439 second requests** |
| *Average* | *1,494* | *3.3%* |

* includes second request from both the DOJ and FTC
Sources: *Federal Trade Commission Bureau of Competition & Department of Justice Antitrust Division*

Table 2 shows the number of HSR filing over the same period. The FTC received more inquiries than the FERC. The second requests for information remain rare; however, they are higher than for the FERC cases.

The investigating agency must request an injunction in Federal court[62] if it decides to challenge the merger. Both of the investigating agencies carry the burden of proof that the merger is likely to substantially lessen competition.[63] But, the injunction processes differ

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[62] 15 U.S.C. § 18(a) (2000).
[63] For instance, in *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963), the Supreme Court ruled that the government was successful in proving that the merger will lessen competition and granted the preliminary injunction: “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the

between the FTC and the DOJ. On the one hand, the FTC must seek a preliminary injunction in federal district court.[64] Then, the FTC may seek a permanent injunction.[65] The FTC can also seek a permanent injunction through its administrative court.[66] On the other hand, the DOJ must seek either types of injunction in federal court under Section 15 of the Clayton Act.[67]

The procedural differences have been interpreted to mean that "the FTC enjoy[s] . . . a lower standard of proof for injunctive relief" because of its administrative option.[68] This exemplifies the differences between the FTC and the DOJ merger review process.[69]

Policy efforts have been pursued to harmonize the differences between the FTC and the DOJ. In 2002, the Antitrust Modernization Commission Act of 2002 created the Antitrust Modernization Commission (AMC).[70] The AMC Commission had:

> (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
> (2) to solicit views of all parties concerned with the operation of the antitrust laws;
> (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and
> (4) to prepare and to submit to Congress and the President a report.[71]

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merger is not likely to have such anticompetitive effects."

[64] Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1994).

[65] *Id.*

[66] John D. Carroll, *The Widening Gap Between FTC, DOJ Merger Review*, Law360: A LexisNexis Company (Jan. 6, 2009), *available at* https://perma.cc/3AGY-7YXA (last visited Nov. 30, 2015).

[67] *Id.*

[68] Shepard Goldfein & James A. Keyte, *Merger Review at FTC and Department of Justice*, 252 N.Y. L. J. 110 (2014).

[69] There are fundamental differences that are not addressed in this paper. For instance, the FTC is a bipartisan Commission whereas the DOJ is a cabinet agency. This section focuses mostly on the differences that affect mergers due to an objective standard of process.

[70] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§11051-60, 116 Stat. 1856.

[71] Antitrust Modernization Comm'n, Report and Recommendation A.1 (2007), *available at* https://perma.cc/R2D5-XDZ5 (last visited Nov. 29, 2015). [hereinafter AMC Report].

The report was submitted to the President in 2007.[72] This report describes the divergence between the FTC and the DOJ review standards.[73] It recommended that Congress acted to realign these standards.[74] In 2015, Congress considered the passage of the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act.[75] This Act aimed at harmonizing the differences between the FTC and the DOJ by elevating the FTC's standard to the DOJ's.[76] As of December 2016, the Act was passed by Congress but has not been considered by the Senate.[77]

The SMARTER Act, however, does not address the FERC's authority and possible merger inconsistencies. In many respect, the SMARTER falls short of reaching its aim and fails to harmonize merger and acquisition review process.

### D. The FERC's Attempt at Following the FTC's and the DOJ's Merger Review Approach

This section compares the different merger processes. The FERC followed some of the guidelines put in place by the FTC and the DOJ. These agencies attempted to provide the guidance with mergers. In many ways, the review processes are already somewhat similar but the standards remain different.

The FERC reviews utility mergers, a subset of all mergers. Courts recognized that the FERC's standard of review differ from other Antitrust Agencies. [78] They have also acknowledged that merger review

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[72] *Id.*
[73] *Id.* at 200-01.
[74] *Id.* at 14.
[75] Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, H.R. 2745, 114th Cong. § 4 (2016).
[76] "Under existing law, the Federal Trade Commission and the Department of Justice can review proposed mergers and acquisitions. However, the two antitrust agencies face different standards in court and utilize different processes when reviewing these transactions. The way a reviewing agency is chosen can appear random, as if it is decided by the flip of a coin. The SMARTER Act eliminates the existing disparities between the two antitrust enforcement agencies and ensures that companies face the same standards and processes regardless of which federal agency reviews the merger." US House Judiciary Committee, *supra* note 26.
[77] 114 CONG. REC. H1560-61(2016).
[78] *Analysis of Horizontal Mkt. Power Under the Fed. Power Act*, 134 FERC ¶

was not meant to be shared with the FTC and the DOJ.

The FERC follows a *consistent-with-the-public-interest* standard. In 1996, the FERC released an *inquiry* to explain its merger review process.[79] The FTC criticized this FERC merger investigation process. In 1998, the FTC formalized its criticisms.[80]

The FTC made three broad criticisms. First, it claimed that the information gathering was maladapted to merger enforcement. It recommended that the "FERC may wish to consider altering its information-gathering processes to ensure that it obtains the information needed to conduct merger investigations."[81] The FTC asserted that the FERC needs to be able to subpoena accurate data from the merging parties and from other industry participants.[82] Second, the FTC criticized the fundamental approach to mergers. The FTC claimed that the FERC needs to broaden their definition of customers to potential customers.[83] Finally, the FERC needed to go beyond market share analysis.[84] The FTC recommended that the FERC consider other factors that affect coordination.[85] In other words, the FTC recommended that the FERC aligned with the FTC.

The FTC may, however, overstate the differences. FERC had already followed the FTC recommendations. The FERC had already aligned its merger process with its 1992 Horizontal Merger Guidelines, the DOJ/FTC joint guidelines, and used it as its analytic framework.[86] The FERC had also already adopted similar filing requirement.[87] For example, applicants could submit four type of information in order to

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61191, 5 (2011) [henceforth FERC Analysis].

79 U.S. FEDERAL ENERGY REGULATORY COMM'N, *Policy Statement Establishing Factors the Commission Will Consider in Evaluating Whether a Proposed Merger is Consistent with the Public Interest* (1996).

80 Federal Trade Commission, Comments of the Staff of the Bureau of Economics (Sept. 1998), *available at* https://perma.cc/2CLK-AJQL (last visited Dec. 19, 2016) [hereinafter FTC 1998 Comments].

81 *Id.*

82 *Id.* at 2-3.

83 *Id.* at 3.

84 *Id.*

85 *Id.*

86 Am. Bar Ass'n Section of Antitrust Law, Am. Bar Ass'n, ENERGY ANTITRUST HANDBOOK: A GUIDE TO THE ELECTRIC & GAS INDUSTRIES, 85 (2002).

87 Order No. 642, *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, FERC STATS. & REGS. ¶ 31,111 (2000) (to be codified at 8 C.F.R. pt. 33).

show that the merger would produce no-adverse effect on competition Applicants could submit information with regard to "(1) the potential adverse competitive effects of the merger; (2) whether entry by competitors can deter anticompetitive behavior or counteract adverse competitive effects; (3) the effects of efficiencies that could not be realized absent the merger; and (4) whether one or both of the merging firms is failing and, absent the merger, the failing firm's assets would exit the market."[88]

The FERC often follows the lead of the FTC and the DOJ. When they revised the guidelines in 2010, the FERC called in March 2011 for an inquiry to assess "what impact the 2010 Guidelines should have, if any, on the Commission's analysis of horizontal market power in its electric market-based rate program."[89] The 2011 notice of inquiry specified four queries: (1) the Commission asked whether it should follow the de-emphasized market definition approach or incorporate the new elements brought in by the FTC/DOJ guideline;[90] (2) the Commission asked whether to adopt the higher advocated HHI thresholds;[91] (3) the Commission asked what other aspects of the 2010 guidelines should be adopted;[92] and (4) the Commission asked whether it should change its process for considering mergers.[93]

The FTC answered the inquiry and encouraged the FERC to adopt the 2010 guidelines entirely instead of just revising portion of the

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[88] Notice of Inquiry, *Analysis of Horizontal Market Power under the Federal Power* Act, 134 FERC ¶ 61,191 (2011) (internal quotations omitted).
[89] *Id*.
[90] *Id*. (The guidelines take a more fact-specific approach); *Supra* note 18, at 7-14 ("Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis").
[91] 1996 Inquiry, *supra* note 40 (The 1992 guidelines state that a market with an Herfindahl–Hirschman Index (HHI) below 1000 was not concentrated whereas 2010 guidelines state that a market with an Herfindahl–Hirschman Index (HHI) below 1500 was not concentrated) ; *Supra* note 18, at 18-19.
[92] 1996 Inquiry, *supra* note 40. The inquiry actually divides the question in two aspects: (1) Which aspects of the guidelines should the Commission adopt and how? (2) How should the guideline impact the Commission's investigation considering the market-based rate program? While these questions overlap, the last question refocuses the problem on the current system, and avoids any discussion of future deregulation.
[93] *Id.* (This issue of the process goes back to the criticism from the FTC 1998 Comments, *supra* note 80, and the Commission refusing to change its approach).

previous FERC approach to mergers.[94] The FTC answered (1) that "[s]trict market definition, however, is not the only an appropriate starting point for merger analysis, and in some situations it may not even be a required element of the analysis."[95] The FTC comments highlight that the antitrust enforcing agencies encourage a focus on *substitutability* instead of market definition;[96] hence, the FTC implies that a market approach is outdated and the FERC should overhaul its approach.

Commentators disagreed about the market definition inquiry. For instance, economists at the Brattle Group asserted that "the Commission provides a reasonable guideline for merger applicants to define their relevant product and geographic markets"[97] and should focus on applying its own tools. On the other hand, economists at the American Economic Institute stated that the market definition should be only one of many inquiries because, by focusing on market definition, the inquiry becomes too narrow.[98]

The FTC answered (2) that the use of the HHI is insufficient and leads to errors when evaluating the impact of a merger on competition.[99] The FTC argued that the characteristics of the electricity market do not allow for an approach relying on the HHI.[100] The FTC argued that the FERC should not change the HHI thresholds in a vacuum.[101]

Commentators also disagreed on the topic. The Electric Consumer Resource Council and the National Association of State

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[94] Federal Energy Regulatory Commission, *Comment of the Staff of the Federal Trade Commission*, 1, *available at* https://perma.cc/X7DL-AMUV (last visited Nov. 28, 2011) [hereinafter FTC comments].
[95] *Id.* at 6.
[96] *Id.*
[97] The Brattle Group, *Comments of Romkaew Broehm, Peter Fox-Penner, Oliver Grawe, and James Reitzes*, 10 (2011), *available at* https://perma.cc/9VJ6-9LR3 (last visited Nov. 28, 2011) [hereinafter The Brattle Group Comments]. The comments define the current market definition as: "Suppliers are considered to be in the same market if their products can reach the same potential buyers." *Id.*
[98] American Antitrust Institute, Comments of the American Antitrust Institute on Horizontal Merger Analysis and the Role of Concentration in the Merger Guidelines, (2001), *available at* https://perma.cc/6LYU-WHV6 (last visited Nov. 28, 2011) [hereinafter AAI comments].
[99] FTC comments, *supra* note 94, at 2.
[100] The FTC cites the inelastic demand, capacity constrain, transmission congestion, and long-term contracts as such characteristics. FTC comments, *supra* note 99, at 2.
[101] The FTC argues that changing the FTC must be accompanied by other changes. FTC comments, *supra* note 94, at 2.

Utility Consumer Advocates[102] (NASUCA) commented that the HHI threshold should not be changed at all.[103] The Independent Market Monitor encouraged no change and support keeping these lower thresholds because the inelastic demand for electricity requires more conservative thresholds.[104] Economists at the Battle Group stated that the FERC should abandon the HHI test and focus on its own Delivered Price Test.[105]

The FTC argued (3) that FERC should consider powerful buyers, entry and efficiencies, and partial acquisitions.[106] Commentators disagreed once more. On the one hand, the comments from the American Antitrust Institute argued both the partial acquisition investigation and the monopsony buyer investigation as well.[107] On the other hand, the Brattle Group comments pointed out that bilateral markets and single-price auction have different characteristics that should be addressed differently.[108]

The FTC did not respond to the fourth question.[109] Other commentators, like the American Antitrust Institute, recommended a more confidential process[110] whereas the NASUCA comments claimed that the nature of the process is irrelevant.[111]

Various commentators disagreed on all questions. These disagreements emphasize that merger analysis is anything but clear-cut. In 2012, the FERC elected to retain its existing policies regarding

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[102] The comments cite that the high barriers to entry, the transmission constraints that create local sub-markets, and the highly varying demand. Comments of the Electric Consumer Resource Council (ELCON) and the National Association of State Utility Consumer Advocates (NASUCA), 4 (2011), *available at* https://perma.cc/RNP2-VQ9T (last visited Nov. 28, 2011) [hereinafter NASUCA comments].

[103] The comment argues that the FTC can change the threshold because of their different approach to mergers that given them "greater latitude to challenge transaction." Hence agreeing with the FTC comment that the HHI cannot be changed in a vacuum. *Id.* at 5.

[104] Monitoring Analytics, LLC, Comments of the Independent Market Monitor for PJM, 6-7 (2011), *available at* https://perma.cc/BPM2-CRJR (last visited Nov. 28, 2011) [hereinafter Pennsylvania-New Jersey-Maryland].

[105] The Brattle Group Comments, *supra* note 97, at 5.

[106] FTC comments, *supra* note 94, at 8-9.

[107] AAI comments, *supra* note 98.

[108] The Brattle Group Comments, *supra* note 97, at 7.

[109] FTC comments, *supra* note 94, at 2.

[110] AAI comments, *supra* note 98, at 7-8.

[111] NASUCA comments, *supra* note 102, at 5.

horizontal mergers focusing its inquiry on the effects on competition, on rates, and on regulation.[112] As such, the FERC review process keeps mirroring the 1992 merger guidelines.[113]

In 2016, the FERC emitted another notice of inquiry to request comments on its market power assessment methods.[114] Specifically, the FERC asked whether they should harmonize how they analyze market power during mergers and wholesale electric sales.[115]

The DOJ and FTC welcomed this initiative and took this opportunity to offer joint comments.[116] They encourage FERC once more to align their merger analysis with their own: use market

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[112] U.S. FEDERAL ENERGY REGULATORY COMMISSION, *Order Reaffirming Commission Policy and Terminating Proceeding*, Docket No. RM11-14-000, 138 FERC ¶ 61,109 RM11-14-000 (2012), *available at* https://perma.cc/KU83-7XHT.

[113] *Id.*

[114] U.S. FEDERAL ENERGY REGULATORY COMMISSION, *Modifications to Commission Requirements for Review of Transactions under Section 203 of the Federal Power Act and Market-Based Rate Applications under Section 205 of the Federal Power Act*, Docket No. RM16-21-000, 156 FERC ¶ 61, 214, 23 (2016), *available at* https://perma.cc/G6AV-FY75.

[115] FERC specifically asked

> [W]hether the Commission should: (1) establish a simplified analysis for certain section 203 transactions that are unlikely to raise market power concerns; (2) add a supply curve analysis to section 203 evaluations; (3) improve the Commission's single pivotal supplier analysis in reviewing market-based rate applications, and add a similar pivotal supplier analysis to section 203 evaluations; (4) add a market share analysis to review of section 203 transactions; (5) modify how capacity associated with long-term power purchase agreements (PPAs) should be attributed in section 203 transactions; and (6) require submission of applicant merger-related documents.

*Id.* at 1-2.

[116] U.S. DEP'T OF JUSTICE AND THE FED. TRADE COMM'N, *Comment of The U.S. Department of Justice and The Federal Trade Commission*, *Modifications to Commission Requirements for Review of Transactions Under Section 203 of the Federal Power Act and Market-Based Rate Applications Under Section 205 of the Federal Power Act*, Docket No. RM16-21-000, 1-2 (Nov. 28, 2016) *available at* https://perma.cc/J7HN-842J (last visited Dec. 20, 2016) [hereinafter DOJ & FTC Joint Comments].

share/concentration only as the starting point instead of as screens.[117] The FTC and the DOJ endorse the FERC's harmonization efforts and encourage the FERC to adopt multiple changes.[118] Most of all, they encouraged the FERC to use a supply curve analysis because it allows the FERC to better test for competitive effects and help shape better remedies.[119] This supply analysis resembles their 2010 guidelines. These guidelines incorporate more factors into merger analysis in the hope to reach a more accurate market power assessment.[120]

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[117] *Id.*
[118] [T]he Agencies respectfully suggest that FERC consider taking the following actions:

- Add a supply curve analysis to its examination of mergers under section 203. A supply curve analysis can give greater insight into competitive effects than traditional measures of market concentration.
- Account for transmission constraints when defining a geographic market to assess market power. When binding, constraints can limit the size of the relevant geographic market to an area smaller than [Regional Transmission Organizations and Independent System Operators] or balancing authority areas.
- Make its section 205 market power analysis as consistent as possible with its section 203 competitive effects analysis. In particular, FERC should use the same approach to defining geographic markets under both sections.
- Account for incremental acquisitions in its merger analysis. If an applicant has made multiple acquisitions over a period of years, FERC may wish to analyze the competitive effects of the series of acquisitions.
- Take a more flexible approach to assessing the competitive effects of power purchase agreements (PPAs). Because a PPA's competitive effect will depend on several factors, FERC may wish to incorporate a wider range of information into its analysis of PPAs.
- Require that applicants under section 203 submit certain merger-related documents. However, before it adopts such a requirement, FERC should be certain that it can protect confidential information from public disclosure.

*Id.* at 4.
[119] *Id.* at 7-11.
[120] *Id.* at 22.

## III. THE CASE AGAINST AND FOR DUAL ENFORCEMENT

This section focuses on the advantages and disadvantages of having multiple agencies reviewing utility mergers. The Antitrust Modernization Commission (AMC) report states that the disadvantages outweigh the advantages. It recommends that the FTC/DOJ should be reviewing all mergers – including in regulated industries like the electric utility industry. This section analyzes this statement in more detail.

### A. Dual Reviews Enable More Complete Enforcement

In the electric utility market, most mergers are reviewed twice, if not more. Dual reviews allow enforcing agencies to (1) complement each other and (2) leverage specialized expertise.

Complementarity in the M&A review process occurs in two ways. First, agencies may oversee different mergers. Second, agencies may have different procedures and remedies that lead to a complete enforcement.

All merger regulating agencies have different merger investigatory thresholds. The FERC regulates the "[p]urchase, lease or otherwise acqui[sition of] an existing generation facility—(i) that has a value in excess of $10,000,000."[121] The DOJ and FTC review all mergers under Section 7 of the Clayton Act. HSR premerger notification is required for transactions involving more than $78.2 million in assets.[122] After HSR notification, the DOJ/FTC can decide to investigate further. While the DOJ/FTC can insert themselves into any merger regardless of size, their limited resources constrains their reach. The FERC casts a wider net than the DOJ/FTC with respect to their threshold that requires notification. It likely investigates more electric utility mergers as such.

The FERC only regulates public utilities mergers.[123] The FERC's public utility limitation has raised problems about the authority of the FERC in the past.[124] For instance, in *U.S. v. City of Stilwell*,[125] the DOJ

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[121] Federal Power Act of June 10, 1920, ch. 285, 45 (Amended through P.L. 114–94, 2015), *available at* https://perma.cc/D4ZG-7HZS.
[122] Sunshine Act Meetings, 81 Fed. Reg. 4299 (Jan. 26, 2016), *available at* https://perma.cc/USC9-HDDY.
[123] 16 U.S.C. § 824(b) (2005).
[124] In *Jersey Cent. Power & Light Co. v. Fed. Power Comm'n*, 319 U.S. 61, 78 (1943), Justice Reed and Justice Roberts disagree whether the plaintiff should fall under the definition of public utility. In its dissent, Justice Roberts claims that because the plant on generates electricity in the State of New Jersey and

challenged a tying arrangement between a sewage and electric power company.[126] Tying arrangement can be anticompetitive; however, in this case, it would fall outside the FERC's jurisdiction if such companies wanted to merge. The FTC/DOJ have a broad reach: they can regulate non-horizontal mergers and prevent tying arrangement or other anti-competitive conglomerates.

Besides investigating different targets, the FTC/DOJ and the FERC have different remedies. The FTC/DOJ focus on structural remedies to enforcement mergers: blocking mergers, requiring divestures, etc.[127] The FERC has used these structural remedies and it also used other administrative enforcements.[128] Since the FERC regulates the industry with other state actors regardless of mergers, the FERC can ensure that post-merging firms abide by price caps/ceilings and pass cost savings down to the consumers as part of the merger agreement. The FTC/DOJ cannot easily (and do not want to) implement such remedies.

The U.S. Congress gives each federal agency narrow domain(s) to exploit division of labor and specialization in dealing with a particular industry. The FTC/DOJ operate across industries and through the court system – albeit sometimes administrative courts. Courts are ill-fitted to serve as regulators because regulation requires constant monitoring and specialized knowledge. The Supreme Court has recognized courts' limitations in dealing with some industries. In *Pac. Bell Tel. Co. v.*

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because it does not sell outside of state, this should not be construed as interstate commerce. *Id.* at 78. In the majority opinion, Justice Roberts points that the electricity was produced for the purpose to be transmitted out of state and therefore falls under the jurisdiction of the FERC. *Id.* at 71-72. The FTC/DOJ may have been able to challenge the merger without having to argue all the way to the Supreme Court whether the plaintiff fell under the public utility.

[125] U.S. v. City of Stilwell, CIV-96-196-B, 1998 WL 1120779, at *1 (E.D. OK 1998).

[126] Joel I. Klein discusses this example and others in *Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process of Electric Power Restructuring*, FERC Distinguished Speaker Series (Jan. 21, 1998), *available at* https://perma.cc/M3FX-Y6MU (last visited Nov. 27, 2011).

[127] The FTC has mostly implemented structural remedies such as divestiture or not enabling the merger. The FERC has opted for more administrative solutions such as price supervision. For more details, *see* Table 2 of Diana L. Moss, *Antitrust Versus Regulatory Merger Review: The Case of Electricity*, 32 REV. IND. ORGAN. 241, 254 (2008).

[128] *Id.* at 254-55.

*Linkline Communications, Inc.*,[129] the Supreme Court has recognized that courts are a poor substitute for regulatory agencies.[130] Courts have often deferred to these agencies and their specialized knowledge.[131] The Supreme Court has acknowledged the benefit of specialization.

The FERC and the FTC/DOJ have complementary expertise. The former has more experience with public utilities and natural monopolies. The FTC and the DOJ have more M&A expertise.[132] Comparing Table 1 and Table 2, the FTC and the DOJ receive on average as many HSR notification in a year than the FERC investigate M&A over the eight-year period. The FERC benefit from the FTC/DOJ's expertise and cost save by adapting their merger guidelines to the energy market.[133]

## B. Problems with Dual Enforcement

The principal problems with a dual enforcement are (1) the potential inconsistencies and (2) the cost duplication.

Inconsistency has a recurring theme around dual enforcement.[134]

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[129] 555 U.S. 438, 446 (2009).
[130] *Id*. at 452-53.
[131] *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 838 (1984) (holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations").
[132] The FTC and DOJ precede the FERC and was able to enforce mergers before the FERC. They have more institutional knowledge. The FTC started regulating mergers at its onset in 1914. The FTC has 80 economists and 600 lawyers on staff ready to investigate anticompetitive behavior. *Federal Trade Commission Performance & Accountability Report Fiscal Year 2010*, at 6, *available at* https://perma.cc/2WMV-7LGL (last visited Nov. 26 2011). FERC was created in 1977 after the Federal Power Commission was dissolved and started regulated mergers after 1935.
[133] FERC, *supra* note 16. The FERC Analysis also addresses the adoption of the merger guidelines discussed above in more details.
[134] A number of commentators have pointed out that having dual enforcement leads to inconsistencies. J. Bruce McDonald, U.S. Department of Justice, Antitrust Division, Testifying in front of the Antitrust Modernization Commission, at 55 (Dec. 5, 2005), *available at* https://perma.cc/A29F-Z7DB (last visited Nov. 28, 2011). Also, the American Bar Association submitted a comment to the request for public comment by the Antitrust Modernization Commission. Comments to the Antitrust Modernization Commission Regarding the Allocation of Authority for Review of Electric Power Mergers (July 17, 2016), *available at* https://perma.cc/AYS4-Q8Q6 (last visited Nov. 28, 2011).

For instance, the merger between American Electric Power Company and Central and South West Corporation received inconsistent treatment from both merger reviewing authorities:[135] the DOJ cleared the merger whereas the FERC approved it conditionally. The FERC required that the merger applicants "amend the pricing formula to adopt the rate that the seller could have charged if it could have sold the power elsewhere. This will satisfy the principle of holding the selling company harmless, but will not result in a price above market for the buying company."[136] This treatment could result in having different remedies applied to the same merger.[137] But, implicitly, the FERC saw a danger in the merger that the DOJ did not recognize or found *de minimis*.[138]

Inconsistencies go both ways. The DOJ has also opposed mergers that the FERC approved. For instance, the merger between Exelon Corporation and Public Service Enterprise Group Incorporated was approved by the FERC whereas the DOJ opposed the merger.[139] Because of their different concerns and risk propensities, the merger reviewing agencies may come to different conclusions based on the same or different evidence.

The Supreme Court has recognized that overlapping authority does not necessarily lead to inconsistencies.[140] However, the Court weighs "the potential for bureaucratic duplication and conflict."[141] Even without inconsistencies, when two agencies investigate the same merger, they both expend scarce resources.

Because these agencies do not share budgets, [142] they have little

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[135] *Id.* at 7.
[136] Am. Elec. Power Co. & Cent. & S. W. Corp., 90 FERC ¶ 61,242, 26-27 (Mar. 15, 2000), *available at* https://perma.cc/EW6V-Z37D.
[137] The Commission describes the formula for the range of prices that the applicants may use. *Id*. at 27.
[138] *See* Moss, *supra* note 127, at 253 (testing how the HHI for instance varies depending on whether the mergers are investigated using different models). This analysis shows that having different analyses will lead to inconsistent HHIs and hence inconsistent merger enforcement. *Id.*
[139] *Id*. at 242. This transaction is discussed in more detail below.
[140] Massachusetts v. E.P.A., 549 U.S. 497, 532, (2007) (addressing the potential conflict between the EPA and DOT in regulating emission of buses).
[141] Marisam, *supra* note 20, at 210.
[142] The FERC "is funded through costs recovered by the fees and annual charges from the industries it regulates." *Available at* https://perma.cc/K8AJ-LRYA (last visited, Dec. 3, 2011); *see Federal Trade Commission Performance & Accountability Report Fiscal Year 2010*, *supra* note 132, at 31 (HSR filing cost $45,000 as of February 2016. The FTC received its funding from general fund

interest to behave efficiently. First, they may want to free-ride on the other's investigation. After all, they can gain from leaving the other agency dealing with the merger. Second, these agencies do not internalize the cost of dual investigation. Thus, they have little incentive to share information. Instead, to justify their budget, they are incentivized to reproduce investigations.

These dual investigations increase the cost for the merging parties as well. Because the FERC is an administrative regulating body and the FTC/DOJ is a judicial body, the problem of double jeopardy does not arise.[143] First, this dual governmental process can wear down merging parties.[144] Most electric utility mergers will also need to clear the state regulating authority. Second, this dual process can lead to delays if one agency investigates after it finds the previous agency's investigation unsatisfactory.

The next section weighs the cost of dual enforcements against its benefits. It discusses how costs can be cut. The next section argues that if the costs remain greater than the benefits the FERC should be the electric utility merger enforcer – and not the DOJ/FTC.

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appropriation and other fees the FTC collects for its services. The "spending authority derived from offsetting collections totaled $88 million ($73 million for HSR fees, $14 million for DNC Registry and $1 million from reimbursable agreements) and general fund appropriations totaled $205 million, comprising 30 and 70 percent of new budget authority, respectively.").

[143] Even if one agency approves the merger, the other agency may still stop it. However, because the FTC and DOJ have to argue an injunction in front of court of law, then only of the two can block the merger, but they might still investigate separately. Dual enforcement raises Fifth Amendment double jeopardy issues. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V.

[144] Electric utility mergers are also regulated by other governmental bodies. THE U.S. DEP'T OF JUSTICE, ANNEX 3-B: THE RELATIONSHIP BETWEEN ANTITRUST AGENCIES AND SECTORAL REGULATORS, 1-2, (Updated June 25, 2015), *available at* https://perma.cc/ZN9N-FX2N (last visited Dec. 8, 2011).

## IV. LOOKING FORWARD: WHO SHOULD BE THE SOLE REGULATOR?

In their report, 11 of the 12 Antitrust Modernization commissioners recommended that "[e]ven in industries subject to economic regulation, the antitrust agencies generally should have full merger enforcement authority under the Clayton Act." [145] The report argues that that only one agency[146] should do the merger analysis to avoid dual cost and inconsistencies.[147] The regulatory agency should participate and help the DOJ or the FTC in its analysis.[148] The report encourages Congress to move away from the public interest standard toward the antitrust standard.[149]

This recommendation is not new.[150] This solution to the problem of dual enforcement has been used in the past. The regulation of mergers in the trucking industry and the airline industry moved from the regulating agency (Department of Transportation) to the DOJ in 1989.[151]

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[145] Antitrust Modernization Commission, *supra* note 23, at 364. The block in this case is really 3 folds, because even if the FTC decides not investigate, the DOJ can and vice versa.

[146] Marisam, *supra* note 20, at 244 (makes the opposite argument that duplicate delegation is a necessarily bad because Congress cannot "easily or cheaply avoid drafting duplicative delegations *ex ante*." However, here the Congress can easily avoid this problem with a saving clause in the FPA or not granting the FERC with that power).

[147] Antitrust Modernization Commission, *supra* note 23, at 364. ("Review by two different government agencies can impose substantial and duplicative costs. It can also lead to conflict. The Commission recommends that the DOJ or the FTC should have full antitrust merger enforcement authority with respect to regulated industries.").

[148] *Id.* at 364-65

[149] "In addition, Congress should review whether separate review under a public interest standard is needed to protect particular interests that cannot be adequately protected under application of an antitrust standard." *Id.* at x.

[150] For instance, Joel I. Klein recommended in 1998 that the Clayton Act and the DOJ remain involve in the merger regulation in *Making the Transition from Regulation to Competition: Thinking About Merger Policy During the Process of Electric Power Restructuring*, FERC Distinguished Speaker Series, 2, (Jan. 21, 1998), *available at* https://perma.cc/CP3Y-8Q3K (last visited Nov. 28, 2011). He condemns based "any relief that requires judges or regulators to take on the role of constantly policing the industry. Relief generally should eliminate the incentive or the opportunity to act anticompetitively rather than attempt to control conduct directly." *Id.* at 16.

[151] *Id.* at n.198.

While these markets differ from the electricity market, a number of lessons can be drawn from the deregulation of the airline industry: (1) the industry experienced entries followed by mergers, alliances, and bankruptcies;[152] (2) competition increased somewhat but barriers to entry kept most markets concentrated;[153] (3) the DOJ had to address price coordination post-deregulation.[154] The most interesting observation is that the Department of Transportation has been criticized for its little oversight of mergers after the deregulation.[155] These lessons have not fallen on deaf ears and they were raised during the testimony before the AMC.

The FTC, DOJ, and FERC have not come to a voluntary agreement on how to deal with mergers in the electricity market. This section argues that contrary to the AMC if Congress ought to revisit who should be investigating mergers in the electricity market, it should be the FERC and not the FTC/DOJ.

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[152] Amalia R. Miller, *Did the Airline Tariff Publishing Case Reduce Collusion?*, 53 J.L. & ECON. 569, 570-71 (2010).

[153] *Id*. at 571.

[154] *Id.* at 571, 577-79, 583. Miller addresses this issue and test whether the consent decree in *United States v. Airline Tariff Pub. Co.*, CIV. A. 92-2854 (GHR), 1993 WL 95486 (D.D.C. Mar. 8, 1993) had an effect on prices. She first observed that prices first decrease than increase after the filing of the suit; however, she says the effect was not lasting. *Id.* at 577-78.

> "A natural interpretation of the pricing results is that the defendant airlines lowered their fares because of the heightened government attention during the investigation. However, once the settlement was in place, pricing strategy reverted and airfares returned to their initial levels. This pattern of relative price movement--a drop during the investigation and rise after its conclusion--may be more suggestive of an ineffective settlement than of a lack of coordination."

*Id.* at 579.

[155] Alfred E. Kahn, *Surprises of Airline Deregulation*, 78 AM. ECON. REV. 316, 318 (1988), *available at* https://perma.cc/D9WW-FG8B. The DOT approved all 21 mergers submitted during the 1980s. It almost gave antitrust immunity to code sharing, which prompted the 1992 DOJ suit.

## A. Defenses Against Merger Inefficiencies

If the FTC is to become the sole merger review enforcer, the efficiency argument should be granted more weight.[156] The 2010 Horizontal Merger Guidelines have acknowledged this efficiency defense but it remains merger specific.[157] In the electricity market, this defense will crop up more often than not. A manufacturer can see its profit margin increase while price would also decrease for all consumers. Such a merger would be welfare improving and in the public interest.[158] Yet, it is unlikely to be sufficient for the FTC to approve the merger.

Courts have slowly recognized an efficiency defense.[159] But, this defense has not been very successful. For instance, this defense did not rescue the merger in *FTC v. H.J. Heinz Co.*.[160] In this merger, two producers of baby-food in a triopoly market attempted to merge.[161] The merging parties attempted to make an efficiency argument.[162] They argued that the market would benefit from Heinz closing its competitor's

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[156] Efficiencies are central part of natural monopoly: fewer competitors can more efficiently serve the market. Of course, this assumes that the competitors are unable to take advantage of their newly found market powers, which will depend on barrier to entry. *See* Frank A. Wolak and Shaun D. McRae, *Merger Analysis in Restructured Electricity Supply Industries: The Proposed PSEG and Exelon Merger* (2006), *reprinted in* THE ANTITRUST REVOLUTION 30, 40 (John E. Kwoka, Jr and Lawrence J. White, eds., 5th ed.) (2009) which explains the step supply functions associated with capacity and economies of scale.

[157] Horizontal Merger Guidelines, *supra* note 18, at 29.

[158] Also known as a *Pareto* superior equilibrium.

[159] In *U.S. v. Aluminum Co. of America*, 148 F.2d 416, 435 (2d Cir. 1945) an aluminum producer (ALCOA) was punished for becoming too big via mergers, *id*. at 435, and attempting to take advantage of economies of scale. *Id*. at 431. ALCOA was found guilty of monopolization however in dictum Judge Learned Hand talks of natural monopolies and states that "[a] market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand." *Id.* at 430. While not directly stating it would seem that Judge Hand recognized the potential for an efficient defense. In *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 604 (1967), the Supreme Court accepted that the merger efficiencies should be weighed against anticompetitive effect but rejected the merging parties' argument that efficiencies from advertising constituted efficiencies that could be achieved by creating its own product.

[160] 246 F.3d 708, 722, 727 (D.C. Cir. 2001).

[161] *Id.* at 711-13.

[162] *Id*. at 720.

plant and moving its production into one plant.[163] The court found that the cost savings offered by this merger were not sufficient.[164] The court argued that such savings can be achieved by each merging party alone by competing harder.[165]

In the electricity industry, fixed costs are large. Starting up a new plant is costly. Firing up an existing plant is also costly. A merging party may wish to merge to shut down a competing plant to take greater advantage of economies of scale. It can be more cost efficient to have one large electric producing plant than one large and one small competing for the same market because the cost would be maintained artificially high and the regulator would maintain the price cap higher than it needs to be.

The FTC will likely oppose such mergers in the electric market. Those mergers can decrease prices for consumers and increase profits for producers.[166] The FTC does not regulate prices and the cap is outside of its control after all. Opposition to such mergers will occur for the sake of consistency, which is discussed in the next section.[167]

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[163] *Id*. at 721.
[164] *Id*.
[165] *Id*.
[166] This argument was made in *FTC v. Butterworth Health Corp*., 946 F. Supp. 1285, 1305 (W.D. Mich. 1996), *aff'd sub nom.,* Fed. Trade Comm'n v. Butterworth Health Corp., 121 F.3d 708 (6th Cir. 1997). The defendant argues that high concentration does not lead to price increase and that its statute as a nonprofit hospital should assure the FTC that they will act in the public interest. The court recognized that "more highly concentrated markets could be home to both lower prices and higher profit margins due to lower costs." *Id*. at 1295. However, the court ruled against this merger, stating that the nonprofit statute was not enough. *Id*. at 1296.
[167] Another defense that may require some adjustment is the powerful buyer defense: commercial purchasers of electricity are large and sophisticated buyer. This defense to market power of the merging parties is discussed in section 8 of the 2010 Horizontal Merger Guidelines, *supra* note 18. However, like the efficiency defense, this defense has not been very successful. In *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1381, 1390 (7th Cir. 1986), Judge Posner recognized that "the hospital industry is undergoing rapid technological and economic change, that the payors for most hospital services ... are large and knowledgeable," in the form of insurance or the government. However, he finds that "these facts do detract from a conclusion that collusion in this market is a serious danger." He defers to the FTC for weighing the different facts to determine the seriousness of the danger.

## B. Inconsistency

Inconsistencies between the FTC/DOJ and the FERC may be overstated. The FERC adopted in part the 1992 DOJ/FTC merger guidelines. Faced with a new guideline, it decided to retain the older guidelines because of the uniqueness of the energy market. The FERC separates itself from the other two merger regulators because it was given a different goal and it regulates the industry beyond mergers.

Thus, removing the FERC as a merger enforcer removes one source of inconsistency. It does not resolve all sources of the inconsistencies. The FTC and the DOJ continue to both enforce mergers in electricity. Table 3 shows the number of HSR filing that the DOJ and the FTC received from the years 2006 to 2014 for utility companies, which include electric, gas, and sanitary services companies. While the FERC has only review power over a subsection of these mergers, the results show interesting patterns. Table 3 shows the number of clearances to investigate that were granted by one antitrust agency to the other. Clearances are granted in about 10% of cases. In other words, in 90% of cases the DOJ and FTC keep investigating in parallel or at least did not yield jurisdiction.

The SMARTER Act and the AMC favors aligning the FTC with the DOJ.[168] It does not argue in dispossessing the FTC or the DOJ of their merger authority. Appointing the FERC as sole enforcer will circumvent any turf battle between the DOJ and the FTC over these mergers, which will continue even if the FTC and DOJ have the same procedures and the same review standards.

**Table 3: HRS filings for utility companies**

| | Industry of acquiring entity | | | | | | | | Industry of acquired entity | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Clearance granted to FTC or DOJ | | | Second request investigations | | | | | Clearance granted to FTC or DOJ | | | d request investig | | | |
| Fiscal Year | Number | Percentage of total | FTC | DOJ | Total | FTC | DOJ | Total | Number | Percentage of total | FTC | DOJ | Total | FTC | DOJ | Total | Number of 3 Digit Intra-Industry Transactions |
| 2006 | 52 | 3.00% | 3 | 4 | 7 | 1 | 0 | 1 | 44 | 2.50% | 4 | 6 | 10 | 1 | 0 | 1 | 33 |
| 2007 | 54 | 2.60% | 0 | 3 | 3 | 0 | 0 | 0 | 112 | 5.30% | 0 | 6 | 6 | 0 | 2 | 2 | 53 |
| 2008 | 42 | 2.50% | 0 | 3 | 3 | 0 | 0 | 0 | 59 | 3.60% | 0 | 3 | 3 | 0 | 0 | 0 | 27 |
| 2009 | 19 | 2.80% | 1 | 1 | 2 | 0 | 1 | 1 | 29 | 4.20% | 0 | 2 | 2 | 0 | 1 | 1 | 14 |
| 2010 | 39 | 3.50% | 1 | 5 | 6 | 0 | 3 | 3 | 45 | 4.00% | 1 | 6 | 7 | 0 | 3 | 3 | 26 |
| 2011 | 35 | 2.50% | 2 | 3 | 5 | 0 | 2 | 2 | 48 | 3.40% | 3 | 3 | 6 | 0 | 2 | 2 | 26 |
| 2012 | 34 | 1.40% | 0 | 1 | 1 | 0 | 0 | 0 | 36 | 2.60% | 0 | 1 | 1 | 0 | 0 | 0 | 17 |
| 2013 | 26 | 2.00% | 1 | 1 | 2 | 0 | 0 | 0 | 33 | 2.60% | 1 | 1 | 2 | 0 | 0 | 0 | 19 |
| 2014 | 34 | 2.10% | 0 | 6 | 6 | 0 | 0 | 0 | 42 | 2.60% | 1 | 6 | 7 | 0 | 0 | 0 | 22 |
| Total | 335 | | 8 | 27 | 35 | 1 | 6 | 7 | 448 | | 10 | 34 | 44 | 1 | 8 | 9 | 237 |
| Average | 37 | 2.5% | 1 | 3 | 4 | 0 | 1 | 1 | 50 | 3.3% | 1 | 4 | 5 | 0 | 1 | 1 | 26 |

Utility companies include electric, gas and sanitary services companies. NAICS Code 221

[168] Antitrust Modernization Commission, *supra* note 23, at 14.

*Source: Federal Trade Commission Bureau of Competition & Department of Justice Antitrust Division*

However, the FTC/DOJ broad powers over all mergers give them a reach that the FERC does not have.[169] They can investigate mergers with conglomerate effects that involve electric utility; nonetheless, the FTC has rarely investigated conglomerate mergers.[170] Thus, this argument fails to support empowering the FTC/DOJ over the FERC.

Specialization in mergers instead of specialization in the market seems counter-intuitive. The electricity market is unique. The FTC/DOJ are to enforce consistently across all industries, they will harm consumers at the expense of encouraging competition. The FTC/DOJ would protect inefficient producers at the expense of consumers.

This sheltering of competition contradicts the public interest standard that Congress wanted. It cannot be accomplished without putting price regulation and merger regulation in the hands of the same agency.[171] Of course, the FTC/DOJ could regulate mergers and the FERC could regulate the market, and both could coordinate. Assuming that they can coordinate, such an approach still requires using different evidence or even a different standard of review in this industry.

An alternative solution to this inconsistency problem is to create an Antitrust Court or Merger Court. Specialized courts are not

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[169] *See,* Levenson, *supra* note 21, at 1452-53 ("Concern emanates from *Missouri Basin Municipal Power Agency v. Midwest Energy Co.*, where FERC disclaimed jurisdiction over the merger of two holding companies that owned public utilities. FERC claimed that under FPA section 203 it did not have jurisdiction because the holding companies were not "public utilities" and thus not within the statute. ... Eventually, the new holding company merged its two subsidiary utilities and FERC, over the holding company's challenge, asserted jurisdiction. FERC approved the merger. While the jurisdictional issue in this case seems like a clear winner for FERC, the new holding company, Midwest Resources, may have been emboldened to challenge jurisdiction because of the recent erosion in FERC's authority.").

[170] Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J. L. & PUB. POL'Y 557, 596 (2010) ("Conglomerate mergers, which are combinations of firms that are neither vertically nor horizontally related, do not bear the potential for unilateral or coordinated price effects and have not been an object of U.S. antitrust concern in this generation.").

[171] To reach this goal, the FERC considers three factors: "(1) the effect on competition, (2) the effect on rates, and (3) the effect on regulation." Wolak, *supra* note 156, at 36.

uncommon.[172] An M&A court can create more consistencies, avoid double jeopardy issues, and compensate for the perceived lacked of the FERC merger enforcement experience. Specialized judges can align enforcement methods in different markets. They can use their experience to encourage best practices and set antitrust specific procedures. The FERC would need to change its review process and move it from an administrative judge to court of justice;[173] nonetheless, moving to a court system assures a better review of all the necessary evidence.

### C. Public Interest Standard

Microeconomics modeling shows that the perfectly competitive market maximizes consumer welfare and minimizes deadweight loss. However, consumer welfare can also be maximized by a well-regulated monopoly. Even if competition avoids constant regulation, competition in itself is not the end goal but a proxy for maximizing consumer welfare.

The public interest standard is another proxy for consumer welfare maximization and it applies to a broader range of the market including a natural monopoly. Thus, the public interest standard is not only a more general standard than encouraging competition, but it is also a more accurate statement of what a benevolent social planner, like Congress, wants to accomplish.

If Congress wanted the electric market to be under the same standard as other markets, it would have used the same drafting language for the FPA and the Clayton Act. It could also have let the FTC and the DOJ enforce these mergers under the older Clayton Act. Thus, Congress may have understood that encouraging competition was not an appropriate standard in this market.

The AMC report ignores this and argues that competitive standard is the gold standard adaptable to all situations.

Arguably, the public interest standard is more adapted to the electricity market because electric utility producers behave like a natural monopoly. In this market, preserving competition for the sake of competition harms consumers and society at large. Moreover, electricity has become a necessity for consumers and the economy. Reliance on electricity leaves consumers at the mercy of electric utility companies.

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[172] *See, e.g.,* Bankruptcy Court or the Tax Court.
[173] The change in the process should be the first modernization of the merger review in the electric industry: having a more confidential process would enable to have a more complete process as well and will enable to plan for the future.

The existence of regulators is almost certain in the future because the electric utility producers could abuse their market power.

## V. CONCLUSION

Congress opened the door for multiple entities reviewing the same mergers. If these entities were capable of coordinating, inefficiencies would be avoided. Even if the FERC was no longer a merger enforcer, the FTC and the DOJ do not coordinate well together.

The FERC conducts a public interest inquiry whereas the FTC/DOJ perform a competition inquiry. While different in theory, the FERC has aligned closely with the FTC/DOJ. The FTC has criticized the FERC for focusing on the short-term effects of price competition, without integrating potential competitors, and the changes in technology in their price evaluation, or potential entries.[174] The FTC resonates as shortsighted. The FERC acts on the basis that it will keep regulating whereas the FTC thinks that de-regulation is an option. Unfortunately, the California experiment shows that the market is not ready for deregulation.

The FERC has been criticized for its lack of regulation during the California electricity crisis.[175] However, the FERC has undoubtedly learned from the California experiment and can use this experience to better regulate mergers. The AMC recommendation could harm consumers because the natural monopolies are ill-adapted to competitive environments.

The FTC/DOJ is a better merger regulator and the FERC is better equipped at dealing with the electricity market. Congress could revisit this in new iterations of the SMARTER Act or the FERC's merger review power or process and should keep in mind that not all industries are equal.

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[174] Comments of the Staff of the Federal Trade Commission, *supra* note 94.

[175] J. Bruce McDonald, U.S. Department of Justice, Antitrust Division, Testifying in front of the Antitrust Modernization Commission, at 7 (Dec. 5, 2005), *available at* https://perma.cc/X6JA-VFHD (last visited Nov. 28, 2011). ("Not much had changed in the marketplace in terms of generation assets, demand, transmission, and so forth, and yet the market became extremely volatile when California partially deregulated, FERC moved to market-based wholesale tariffs, and all of a sudden, we saw this extreme volatility that had not been present before which was very puzzling, and some of it was caused, we believe, by market manipulation by Enron.").