SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 21 | Issue 4 Article 12

1970

Recent Decisions: Public Utilities Holding Company Act of 1935 - Section 10(b)(1) - Public Interest Determinations [*Municipal Electric Association v. SEC*, 413 F.2d 1052 (D.C. Cir. 1969)]

Michael R. Oker

PUBLIC UTILITIES HOLDING COMPANY ACT OF 1935 — SECTION 10(b)(1) — PUBLIC INTEREST DETERMINATIONS

Municipal Electric Association v. SEC, 413 F.2d 1052 (D.C. Cir. 1969).

A look at American economic history reveals a national policy in favor of competition.[1] This policy, embodied in the antitrust laws, was founded on the premise that competition is uniquely able to reward innovation, promote efficiency, and deter their opposites.[2] For centuries, however, the common law has recognized certain callings or occupations as "affected with public interest" and which do not function well in a competitive climate.[3] Because these callings were under a duty to meet certain demands — providing maximum service and safety at the lowest possible cost — which were best met through economies of scale,[4] regulation was necessary to insure public benefit normally achieved through competition.[5] Where mergers, acquisitions, and consolidations were at issue, the regulatory agencies operated under a theory of restricted competition, encouraging consolidations and discouraging new competitors if in the public interest it was deemed necessary to promote safety, increase service, and eliminate severe price discrimination.[6] Although

[1] *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963); Small Business Act, 15 U.S.C. § 631(a) (1964).

[2] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); *Antitrust and Regulated Industries*, Address by Donald I. Baker (Head of the Evaluation Section of the Policy Planning Group, Antitrust Div., Dep't of Justice), Third Annual New England Antitrust Conference, Boston, Oct. 3, 1969.

[3] Munn v. Illinois, 94 U.S. 113 (1877); M. GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM 196-201 (1957); C. PHILLIPS, THE ECONOMICS OF REGULATION 51-55 (1965); Hale & Hale, *Competition or Control I: The Chaos in the Cases*, 106 U. PA. L. REV. 641 (1958).

[4] Economies of scale is an economic concept under which an industry is deemed best able to achieve a lower cost of operation if placed in the position of a monopolist in a given market. *See* C. PHILLIPS, *supra* note 3, at 21. Synonomous with large-scale production, economies of scale is held to have certain advantages which are enjoyed not only by the firm itself but also by the *industry*. Such advantages include: "[O]verhead spread over a larger output; more funds available for advertising, research, etc; . . . and the ability to have greater continuity of operations." P. TAYLOR, A NEW DICTIONARY OF ECONOMICS 166 (1966). Economies of scale is desirable in terms of cost to the public for it makes little economic sense, for example, to have four different airlines simultaneously flying half-empty planes to the same destination.

[5] Regulation was designed to serve as a substitute for competition only where competition did not secure some specifically defined social goal or was not economically feasible. Antitrust considerations were to be excluded only to the extent necessary to make the specific regulatory scheme work. *See generally* Address by Donald I. Baker, *supra* note 2.

[6] Restricting competition was especially necessary where rate maintenance was to

this theory of restricted competition was inherently inconsistent with the national economic policy, its goals and those of the antitrust laws were set at achieving the same end — the best allocation of economic resources.

With two divergent concepts aimed at accomplishing a single objective, the question raised was to what extent, if at all, the regulatory agencies were to consider antitrust principles in determining whether a proposed acquisition or consolidation would be in the public interest. Looking to their enabling legislation, the agencies found that Congress had not always provided the answer. Some statutes clearly directed agencies to consider the antitrust laws,[7] others required only that the proposed transaction be consistent with the public interest, convenience, and necessity.[8] Where the latter has been true, not only have regulators been criticized as giving inadequate weight to competitive factors,[9] but courts, when forced to interpret these statutes, have often arrived at inconsistent results.

In the recent case of *Municipal Electric Association v. SEC*,[10] the Court of Appeals for the District of Columbia faced the problem of defining the role of antitrust principles in public interest determinations.[11] The main issue presented in the case was whether the Securities and Exchange Commission (SEC), in making a determination of "public interest" under section 10(b)(1) of the Public

---

be achieved. Unregulated competition in the otherwise regulated industries had grave consequences. Rate wars or severe price discrimination among competitors perpetuated low rates often resulting in bankruptcy; service offered by firms suffered; adequate outlays for improvements could not be made; maintenance was neglected; and, finally, when competitors took steps to reduce the severity of rate competition by making agreements, the firms could extract a very high rate from the consumer. C. PHILLIPS, *supra* note 3, at 40-41.

[7] *E.g.*, Federal Aviation Act of 1958, § 408(b), 49 U.S.C. § 1378(b) (1964).

[8] *E.g.*, Natural Gas Act § 7, ch. 556, § 7, 52 Stat. 824 (1938), *as amended*, 15 U.S.C. § 717f(c) (1964).

[9] One of the most recent expressions of this criticism recommended that "the President should issue a general policy statement on competition and public regulation . . . [t]o encourage and urge the regulatory bodies . . . to enlarge the role of competition in their respective industries." REPORT OF PRESIDENT NIXON'S TASK FORCE ON PRODUCTIVITY AND COMPETITION, 115 CONG. REC. 6472 (daily ed. June 16, 1969). For a penetrating critique of the overall scheme of direct regulation, see Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969).

[10] 413 F.2d 1052 (D.C. Cir. 1969).

[11] As used herein, the term "public interest" determinations means findings by regulatory agencies that mergers, acquisitions, and other transactions do provide public benefit. However, the factors supporting such findings of public benefit are those which relate to matters other than possible violations of the antitrust laws.

Utilities Holding Company Act of 1935,[12] should have considered evidence of anticompetitive effects in light of the public policy in favor of competition. The court also considered the issue of which agency is best equipped to evaluate antitrust issues when there appears to be an overlap in regulatory responsibility.

Within its authority under section 10(b)(1) of the Holding Company Act, the SEC approved the acquisition of stock by certain New England electric utility companies of two nuclear-power electric generating companies — Vermont Yankee Power Corp. and Maine Yankee Atomic Power Corp. The nuclear generating companies were expected to produce low-cost electric energy and distribute it to the sponsors in proportion to their share of stock ownership. Municipal Electric Association of Massachusetts (Municipals), an organization of officials representing municipal electric utility companies in Massachusetts and Maine, sought an evidentiary hearing before the SEC to support their position that approval of the sponsors' stock acquisition, to the exclusion of Municipals' ability to obtain low-cost power directly from Maine Yankee, was anticompetitive and, thus, not consistent with the statutory standard of public interest as prescribed by section 10(b)(1) of the Act. After the SEC denied Municipals' request for the hearing, Municipals contended on appeal[13] that for the SEC to deny them the opportunity to be heard on the anticompetitive consequences flowing from SEC approval of the stock acquisition would be inconsistent with section 10(b)(1) of the Act which implicitly requires consideration of the antitrust laws when making a determination in the public interest.[14] The SEC, however, argued that section 10(b)(1) did not require an interpretation of public interest beyond a finding that the stock acquisition would result in the efficient development of an integrated public utility system. The court of appeals, rejecting the Commission's argument, reasoned that in the absence of express authority to the contrary, the SEC in the exercise of its juris-

---

[12] 15 U.S.C. § 79j(b)(1) (1964) [hereinafter cited as Holding Company Act]. Section 10(b)(1) provides:

> [T]he [Securities and Exchange] Commission shall approve the acquisition unless the Commission finds that —
>
> (1) [T]he concentration of control of public-utility companies [is] of a kind or to an extent detrimental to the public interest or the interest of investors or consumers.

[13] Municipals sought review of the SEC orders approving the stock acquisitions under section 24(a) of the Holding Company Act, which provides that aggrieved parties may obtain review in the United States Courts of Appeals which may order that additional evidence be heard. 15 U.S.C. § 79x(a) (1964).

[14] 413 F.2d at 1057.

diction under section 10 of the Act was to give adequate consideration to anticompetitive consequences when making its public interest determination. Notwithstanding this finding, the SEC further argued that inasmuch as Municipals' complaint was directed at the anticompetitive effects resulting from the allocation of bulk power, the Federal Power Commission (FPC) and not the SEC was the responsible agency before whom a hearing should have been sought. Rejecting this argument, the court held that the SEC was the proper agency to review Municipals' complaint.[15]

The statutory framework within which administrative agencies are to make public interest determinations concerning mergers, acquisitions, and consolidations has not been fashioned according to any readily apparent scheme. The extent to which agencies must consider anticompetitive effects in passing upon proposed transactions varies with the specific regulatory statute under which they operate. One group of agencies such as the Interstate Commerce Commission (ICC)[16] and the Federal Communications Commission (FCC)[17] are required by statute to consider the public interest

---

[15] *Id.* at 1060-61.

[16] Section 5, paragraph 11 of the Interstate Commerce Act of 1887 provides:

> [A]ny carriers or other corporations . . . participating in a transaction [consistent with the public interest and] approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws .... Ch. 104, § 5, 24 Stat. 380, *as amended*, 49 U.S.C. § 5, par. (ii) (1964) [hereinafter cited as Interstate Commerce Act].

The Interstate Commerce Commission (ICC), the first regulatory agency, was created by Congress in 1887 to protect the public from monopolization of the transportation industry by the railroad barons of the era. With the ICC as a model, Congress subsequently enacted the enabling legislation for other such agencies. To many businessmen, elimination of competition was desirable because competition only increased risk and decreased profit:

> It is important to note, however, that the reforms . . . might never have succeeded in imposing regulatory controls had not many carriers and utilities perceived reasons of self-interest to welcome them .... [S]ome farsighted business leaders saw regulation as the only alternative to government expropriation. Others saw it as protection against competition. Posner, *supra* note 9, at 622.

[17] With respect to telephone communication, section 221(a) of the Communications Act of 1934 provides:

> If the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. 47 U.S.C. § 221(a) (1964).

With respect to telegraph communications, section 222(c)(1) of the Communications Act provides:

> If the Commission finds that the proposed consolidation or merger . . . is in the public interest, the Commission shall enter an order approving . . . such . . . and thereupon any law or laws making consolidations and mergers unlawful shall not apply .... *Id.* § 222(c)(1).

but are not provided with specific statutory guidance concerning the weight to be given anticompetitive effects in passing on proposed transactions. Such agencies exercise broad discretion as to the proper weight that should be accorded anticompetitive effects in their deliberations. First, they are empowered under section 11 of the Clayton Act[18] to enforce[19] compliance with section 7 of that act.[20] Second, transactions approved under the public interest standard are immune from subsequent antitrust attack by private parties or the Justice Department.[21] This combination of exclusive enforcement power and transactional immunity operates, in effect, to raise a presumption that probable anticompetitive effects have been adequately considered.[22] Consequently, the question of

---

It is important to note that under the Communications Act immunity from antitrust laws is given only to telephone and telegraph communications and *not* television or radio broadcast systems. For a comparison of the language contained in the Communications Act pertaining to television and radio broadcasting, see note 24 *infra.*

[18] Ch. 323, § 11, 38 Stat. 734 (1914), *as amended,* 15 U.S.C. § 21(a) (1964). The pertinent language reads:

> Authority to enforce compliance with sections 13, 14, 18, and 19 of this title . . . is vested in the Interstate Commerce Commission . . . Federal Communications Commission . . . Civil Aeronautics Board . . . Federal Reserve Board . . . and in the Federal Trade Commission . . . . *Id.*

[19] Clayton 11 enforcement power is construed to give primary jurisdiction in the antitrust area to any agency having that power, and primary jurisdiction carries with it the doctrine that one must exhaust his remedies before seeking judicial relief. This jurisdictional doctrine requires, in brief, that the litigant resort to the administrative tribunal created by the regulatory legislation before seeking to enforce the antitrust laws in court. Its origins lay in rate reparation cases wherein relief was held to be available before the Interstate Commerce Commission and not the courts. Later on the primary jurisdiction concept spread into other areas of regulation and now finds widespread application. Jaffe, *Primary Jurisdiction Reconsidered: The Anti-Trust Laws,* 102 U. PA. L. REV. 577, 581-83 (1954).

[20] Ch. 25, § 7, 38 Stat. 731 (1914), *as amended,* Clayton Act § 7, 15 U.S.C. § 18 (1964).

[21] *See* Interstate Commerce Act § 5, 49 U.S.C. § 5, par. (11) (1964); Communications Act §§ 221(a), (c)(1), 47 U.S.C. §§ 221(a), (c)(1) (1964); Federal Aviation Act § 408(b), 49 U.S.C. § 1378(b) (1964).

[22] Because the enforcement provisions of section 11 of the Clayton Act confer primary jurisdiction on agencies such as the ICC and FCC [*see* note 18 *supra*] and their approvals are given antitrust immunity, once the agency has shown that the "public interest" factors of service, safety, and low rates exist, the courts are reluctant to question agency discretion with respect to probable anticompetitive effects:

> [T]he Commission must estimate the scope and appraise the effects of curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, etc. . . . Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the . . . industry. Congress left that task to the Commission . . . . If the Commission did not exceed the statutory limits within which Congress confined its discretion . . . it is not our function to upset its order. McLean Trucking Co. v. United States, 321 U.S. 67, 87-88 (1944).

See also United States v. Borax Consol., Ltd., 141 F. Supp. 396 (N.D. Cal. 1955),

the weight accorded anticompetitive effects is left in the hands of the particular agency. A second group of agencies however, such as the Civil Aeronautics Board (CAB), are given more explicit guidelines by Congress. They are required to consider competitive factors and only upon finding the public interest to *clearly outweigh* any anticompetitive effects can they approve the proposed transaction.[23] A third group of agencies, such as the SEC,[24] oper-

---

where the court held that the government could not maintain an antitrust action against a defendant where a rate agreement had been approved by the Federal Maritime Commission. The jurisdiction to determine whether the rate agreement had been correctly interpreted was vested in the Maritime Commission and any acts done pursuant to their approval are exempt from the antitrust laws.

[23] Section 408(b) of the Federal Aviation Act provides:

> Unless . . . the Board finds that the consolidation, merger . . . or acquisition of control will not be consistent with the public interest . . . it shall by order approve such consolidation, merger . . . or acquisition of control . . . *Provided*, That the Board shall not approve any consolidation, merger . . . or acquisition of control which would result in creating a monopoly . . . and thereby restrain competition . . . . 49 U.S.C. § 1378(b) (1964).

Section 414 of the Federal Aviation Act provides:

> Any person affected by any order made under section 1378 . . . shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 12 of Title 15 . . . . *Id.* § 1384.

Although the Act does not specifically use terms that reflect balancing, the proviso has been interpreted to require such an approach. *See* Butler Aviation Co. v. CAB, 389 F.2d 517 (2d Cir. 1968). In *Butler*, petitioner sought review of an acquisition by Eastern Airlines of all the stock of another aircraft corporation. The court, denying review, stated that where a transaction involves antitrust issues, the Aviation Act prevents CAB approval of a transaction if the transaction's effects will be so extreme as to violate the proviso, but requires approval if "it finds the disadvantage of any curtailment of competition to be *outweighed* by 'the advantages of improved service.'" *Id.* at 519 (emphasis added).

With respect to the Federal Reserve Board, the Bank Merger Act, 12 U.S.C. § 1828(c)(5)(B) (Supp. IV, 1969), more clearly expresses the balancing approach:

> The responsible agency shall not approve — any . . . proposed merger transaction whose effect . . . may be substantially to lessen competition, or tend to create a monopoly . . . unless it finds that the anticompetitive effects of the proposed transaction 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.* (emphasis added).

See United States v. Third Nat'l Bank, 390 U.S. 171 (1968). There the United States challenged a bank merger approved under the Bank Merger Act as being a violation of section 7 of the Clayton Act. The Court, denying the merger, stated: "Congress intended bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny, it was to be permissible only if the merging banks could establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages." *Id.* at 182.

[24] In addition to the SEC [in the exercise of its jurisdiction under section 10(b)(1) of the Holding Company Act, 15 U.S.C. § 79j(b)(1) (1964)], the FPC, and the FCC (with respect to radio and television broadcasting systems) fit into this grouping.

The Natural Gas Act, which is under the jurisdiction of the FPC, provides:

> No natural-gas company . . . shall . . . acquire or operate any such facilities or extension thereof, unless there is in force . . . a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . . 15 U.S.C. § 717f(c) (1964).

ate under statutes which, like those in the first group, are conspicuously silent as to the applicability of the antitrust laws and require only that the agency find the proposed transaction consistent with the public interest. However, unlike the first group, these agencies are neither given specific enforcement powers under section 11 of the Clayton Act nor are transactions accomplished pursuant to their approval immune from later antitrust attack.

Without specific or implied congressional mandates requiring the agencies in the third group to consider competition, the courts have searched for bases to ascertain the extent to which the public interest standard necessitates consideration of antitrust principles. Some courts have applied the doctrine of primary jurisdiction[25] when transactions have been challenged as violating the antitrust laws, and have required the parties to seek agency resolution of the issues before entertaining the suits.[26] Such action tends to emphasize agency discretion with respect to the weight to be given anticompetitive effects because the doctrine is based on the notion that the agency has particular expertise to examine the public interest. Thus, if the public interest determination is questionable, presumably the agency decision will stand, notwithstanding probable antitrust violations. In other instances the primary jurisdiction doctrine has been rejected.[27] Many courts have insisted on applying antitrust laws to regulated industries unless barred by a statutory exemption for the type of conduct under judicial scrutiny. Other courts, reasoning that regulation and competition are mutually exclusive concepts, have concluded that the introduction of one neces-

---

The Communications Act, with respect to radio and television broadcasting, provides:

> [N]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon finding by the Commission that public interest, convenience and necessity will be served thereby. 47 U.S.C. § 310(b) (1964).

Neither of the above Acts contain any language pertaining to the applicability of the antitrust laws.

[25] *See* Jaffe, *supra* note 19, at 581-83.

[26] *See* Interstate Natural Gas Co. v. Southern Cal. Gas Co., 209 F.2d 380 (9th Cir. 1953); Pennsylvania Water & Power Co. v. FPC, 193 F.2d 230 (D.C. Cir.), *aff'd*, 343 U.S. 414 (1951); McClellan v. Montana-Dakota Util. Co., 104 F. Supp. 46 (D. Minn. 1952). *See generally* W. JONES, CASES ON REGULATED INDUSTRIES 824-918 (1967); Hale & Hale, *Competition or Control VI: Application of the Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962).

[27] *See* United States v. Radio Corp. of America, 358 U.S. 334 (1959); Northern Natural Gas Co. v. FPC, 399 F.2d 953 (D.C. Cir. 1968); Pittsburgh v. FPC, 237 F.2d 741 (D.C. Cir. 1956). *See generally* W. JONES *supra* note 26, at 824-918.

sitates disappearance of the other.[28] In short, where Congress has failed to delineate precise standards establishing the applicability of antitrust principles for this third group of agencies, upon judicial review "[s]ome courts hold business subject to [regulatory] enactments to be free from rules prohibiting restraints of trade; others do not. New cases are decided without reference to old precedents and the courts in general have been unable to explain coherently the conclusions they have reached."[29]

With this confusing and unsettled array of authority as a background, the first question confronting the *Municipal* court was whether the SEC, in making its public interest determination, adequately considered the probable anticompetitive effects which would ensue from the approved stock acquisition. The court's holding that section 10(b)(1) required a more definitive evaluation of anticompetitive factors prior to its approval of a stock acquisition may be representative of a judicial trend to require agencies making public interest determinations pursuant to statutes silent as to the applicability of the antitrust laws to give greater weight to anticompetitive effects. The court found support for its holding in *SEC v. New England Electric System*,[30] where the Supreme Court, construing section 11(b)(1) of the Holding Company Act, stated that "the theme of elimination of 'restraint of free and independent competition' " is a theme that runs throughout the Act.[31] This dictum, however, while constituting an expression of the broad policy running throughout the Holding Company Act,[32] was only aimed at an interpretation of the public interest standard as *generally* requiring the consideration of competitive factors when approving any particular acquisition under the Holding Company Act. The *Municipal* court found added support for its position in *California v. FPC*[33] by drawing an analogy between the statutory

[28] *See* Hale & Hale, *supra* note 3, at 642.

[29] *Id.* at 681.

[30] 384 U.S. 176 (1966). The Court, interpreting the "single-integrated" public utility requirement of section 11(b)(1) of the Holding Company Act [15 U.S.C. § 79k(b)(1) (1964)], held that the SEC was warranted in ruling that the Act prohibits a public utility holding company from retaining an integrated gas utility system in addition to its integrated electric utility system, unless the gas utility system sought to be retained could not be soundly and economically operated independently of the principal system.

[31] 384 U.S. at 183.

[32] Section 1(b) of the Holding Company Act provides:

> [I]t is declared that the national public interest . . . may be adversely affected . . . when subsidiary public-utility companies are subjected to . . . restraint of free and independent competition . . . . 15 U.S.C. § 79a(b) (1964).

[33] 369 U.S. 482 (1962).

standard of public interest expressed in section 7 of the Natural Gas Act,[34] and that expressed in section 10(b)(1) of the Holding Company Act. In the *California* case the Supreme Court found that a merger approved by the FPC pursuant to its authority under section 7 of the Natural Gas Act did not carry with it actual or implied immunity from the antitrust laws. The Court held further that evidence of antitrust violations is *plainly relevant* in determining whether a particular transaction is within the public interest.[35] Continuing the analogy, the court of appeals also relied upon *Northern Natural Gas Co. v. FPC*,[36] where the FPC's approval of the construction and operation of a gas line was challenged as being detrimental to the public interest. The court, remanding for further consideration of the probable anticompetitive effects, concluded:

> [A]lthough the Commission is not bound by the dictates of the antitrust laws, it is clear that antitrust concepts are intimately involved in a determination of what action is in the public interest, and therefore the Commission is obliged . . . to make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations.[37]

Thus, applying the dictum in the *New England Electric* case, and drawing support through analogy from the *California* and *Northern Natural Gas* cases, the *Municipal* court reasoned that a determination of public interest made pursuant to section 10(b)(1) required a more adequate consideration of probable anticompetitive effects than had been given by the SEC in passing on the sponsors' acquisition of Yankees' stock. The court further reasoned that the exemption given under section 7 of the Clayton Act[38] to transactions duly consummated pursuant to the SEC's authority under section 10(b)(1), was a clear expression of congressional intent to

---

[34] 15 U.S.C. § 717f(c) (1964).

[35] 369 U.S. at 485-86.

[36] 399 F.2d 953 (D.C. Cir. 1968).

[37] *Id.* at 958-59.

[38] 15 U.S.C. § 18 (1964). Clayton 7 contains an exemption from its effects as follows:

> Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, *the Securities and Exchange Commission in the exercise of its jurisdiction under* [the Holding Company Act], the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. *Id.* (emphasis added).

have the SEC adequately consider the probable anticompetitive consequences of its decisions.[39]

Although adopting an interpretation of public interest which demands a more detailed examination of anticompetitive factors, the court limited its finding to the *inadequate* examination conducted by the SEC in the case before it. In doing so, the court failed to delineate any meaningful guidelines with respect to the depth of an adequate inquiry into anticompetitive factors. Thus, a weakness of the decision is its failure to answer the question of what *weight* should be accorded antitrust policy when an agency is directed to appraise a transaction pursuant to a statute requiring no more than a finding in the public interest.

Analysis of the regulatory scheme patterned by Congress suggests a congressional trend toward maximizing the weight to be given antitrust principles in public interest determinations. In dealing with the first group of regulatory agencies, Congress provided that they be given antitrust enforcement power and transactional immunity from the antitrust laws. As a result, such agencies need only attach *minimal* weight to antitrust principles when making public interest determinations. Some of the agencies comprising this group were among the first administrative agencies created by Congress.[40] The statutes vesting authority in agencies falling into the second group, however, were enacted more recently.[41] These agencies are given specific congressional directives to balance the factors normally present in public interest determinations with possible anticompetitive effects and approve transactions only if the anticompetitive effects are clearly outweighed. This constitutes an apparent shift in congressional attitude toward emphasizing the importance of antitrust considerations at the agency level in the context of public interest determinations. It further suggests that the courts in establishing public interest determination standards for the third group of agencies might properly require them to give more weight to antitrust factors. Perhaps agencies in this group should approve transactions as being in the public interest only if *no probable* anticompetitive effects would result.[42] The *Municipal* court's simple holding that the SEC's consideration of anticompeti-

---

[39] 413 F.2d at 1057.

[40] *See* note 16 *supra.*

[41] *See* Federal Aviation Act § 201, 49 U.S.C. § 1321 (1964).

[42] *Cf.* United States v. Third Nat'l Bank, 390 U.S. 171 (1968).

tive effects was inadequate[43] fails to explore such alternatives, and as a result the decision leaves this troublesome question untouched.

The second issue confronting the *Municipal* court was whether, in this case, the SEC was the proper agency to pass on the antitrust issues presented. The SEC asserted that inasmuch as the alleged anticompetitive effects were directly related to the allocation and fixing of costs for the purchase and transmission of electric power, the FPC was the proper agency to adjudicate Municipals' complaint. Rejecting the SEC's assertion, the court found that in addition to its responsibility under section 10(b)(1) to consider competition when determining whether the acquisition was in keeping with the public interest, the SEC also had the authority under section 10(e)[44] to impose, if necessary, conditions which would tailor the acquisition to meet antitrust requirements. The court indicated that such authority under section 10(e) included directing a reallocation of power to be produced by Vermont and Maine Yankees. The court also found that if such a reallocation were necessary, it was the express responsibility of the SEC and did *not* constitute an invasion of the FPC's jurisdiction.[45] However, in remanding without considering whether the SEC was in fact the most *qualified* agency to review Municipals' complaint, the court may have sidestepped the thorniest issue raised by the case.

In view of the manifest problems associated with an agency's having to delve into areas outside the scope of its expertise, it would seem that the court might have done well to have directed review of Municipals' complaint to the agency best equipped to handle questions related to the power industry. To require review of a complaint directed at the anticompetitive effects resulting from the transmission of low-cost bulk power by an agency whose primary responsibility is regulating the issuance of securities would appear to be inconsistent with the congressional purpose underlying the creation of a specialized agency responsible for regulating the transmission of power. Notwithstanding this criticism, however, it may be implied from the opinion that the court ordered the SEC to reevaluate the anticompetitive effects because of the potential difficulties which

---

[43] 413 F.2d at 1059.

[44] Section 10(e) of the Holding Company Act, provides:
The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition . . . as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers. 15 U.S.C. § 79j(e) (1964).

[45] 413 F.2d at 1060.

later would have confronted the FPC in an effort to unscramble the new corporate structure.[46] Or, perhaps the court was motivated more by a desire to avoid similar problems in future acquisitions. Given the proper exercise of administrative power by the SEC, the court probably reasoned that such problems need never materialize.

The most fundamental policy question underlying the decision in *Municipal* concerns whether the consideration of antitrust principles should be an integral part of the regulatory function and, if so, are the agencies adequately equipped to consider such matters. In answer to this question, some economists staunchly advocate that a policy favoring competition, however slightly, is repugnant to the theory of restricted competition under which regulated industries are geared to operate.[47] The strong national policy in favor of competition, however, does not yield to such a suggestion. The fact that this policy is not specifically set out in regulatory statutes as a standard to be followed is not to be interpreted as a license to ignore competition. The policy is too well rooted in American economic history to be ignored. It would seem clear, therefore, that unless there exists a specific exemption from following the norm of competition, national antitrust policy must be observed. Unfortunately, however, the requisite proficiency to consider anticompetitive factors does not always follow the responsibility to do so. Regulators who are picked for their special knowledge of the industries which they regulate will often lack the necessary background to deal with complex antitrust issues outside the scope of their particular expertise. Complicating this lack of expertise is the failure of the agencies to coordinate and develop meaningful inter-agency policy standards. This leaves regulators unable to easily identify their particular areas of responsibility when confronted with overlapping jurisdictional problems.[48] In addition, Congress insistence on using broad leg-

[46] Under section 20(a) of the Natural Gas Act [15 U.S.C. § 717s(a) (1964)], the FPC may bring an action against a party for violating its orders or it may submit evidence to the Attorney General of these or antitrust violations.

[47] With regard to regulation and the antitrust laws, some observers think in terms of a "hard" competition model, expressing the view that the antitrust laws should be used to eliminate all monopolies and restraints of trade and to keep competition free at all times. *See* Hale & Hale, *supra* note 26, at 51-52. Other observers advocate a system of "soft" competition under the antitrust laws, advocating that unfair practices should not be allowed to thrive and to foreclose existing companies from the market. Still others would apply a policy of pure laissez-faire advocating that the high profits obtained through monopoly would be the most beneficial stimulant to innovation and efficiency. *See also* G. HALE & R. HALE, MARKET POWER 440-80 (1958).

[48] *See* McFarland, *Landis' Report: The Voice of One Crying In The Wilderness*, 47 VA. L. REV. 373 (1961).

islative mandates of "public interest, convenience, and necessity" has left agencies with such wide discretion that uniform application of antitrust principles in administrative determinations is virtually nil.[49] Thus, although there may be a duty on the part of regulatory agencies to observe national policy by giving adequate consideration to anticompetitive factors where Congress has not seen fit to provide transactional immunity,[50] there is some doubt as to an agency's ability to effectively implement antitrust policy.

This problem has not gone unrecognized, however, and some valid solutions have been proposed. One such proposal concerns the enactment of more explicit statutory standards.[51] Although this would seem to be the most desirable solution, congressional action is slow and today's need for a practical solution is much more immediate than the long-range potential afforded by new legislation. Probably the best proposal advanced is that of having the Justice Department engage in more extensive and systematic participation in proceedings before the regulatory agencies. This would not only insure that adequate weight would be given to anticompetitive considerations but would also assist in the assessment of other aspects of the public interest.[52] The practical advantages of this proposal are numerous: It would provide a means to a more complete and efficient examination of all issues; provide the element of expertise in the area of antitrust where the regulators may be unqualified; and, cut down on the considerable time, cost, and litigation represented by suits brought by the government and private parties challenging agency approvals.[53]

At present, however, the approach taken by the court in remanding Municipals' complaint to the SEC for further consideration of anticompetitive effects is somewhat limited. Nonetheless, the de-

---

[49] *See* G. WILCOX, PUBLIC POLICIES TOWARD BUSINESS 771 (rev. ed. 1960).

[50] *See* text accompanying note 21 *supra.*

[51] *See* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 5-6 (1962); C. PHILLIPS, *supra* note 3, at 722; Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1237-38 (1969).

[52] Although more specific statutory standards are needed in most all regulatory legislation of the past, some of the newer acts such as the Bank Merger Act [12 U.S.C. § 1828(c) (Supp. IV, 1969)] and the Atomic Energy Commission Act [42 U.S.C. § 2135 (1964)] have taken this approach. The following provision from the Bank Merger Act may prove to be a legislative model:

> In the interest of uniform standards, before acting on any application for approval of a merger transaction, the responsible agency . . . shall request reports on the competitive factors involved from the Attorney General . . . . 12 U.S.C. § 1828(c)(4) (Supp. IV, 1969).

[53] *See* Turner, *supra* note 51, at 1238.

cision offers a solution whereby agencies — acting under the authority of statutes couched only in terms of public interest and silent as to the applicability of the antitrust laws — may be required to display a higher standard of performance in analyzing, explaining, and justifying particular decisions than has been considered adequate in the past. The *Municipal* decision also may reflect a trend of reemphasizing our national policy in favor of competition and redirecting regulation to its proper perspective in today's economic climate — as a substitute and not a replacement for competition.[54] Although the *Municipal* case still leaves the regulators without the adequate tools to examine competitive issues, until such time as more constructive action is taken by the legislature, "the courts are at least experienced enough in these matters to know the kind of analysis that must be made for a rational judgment, to know what economic issues are relevant, and to insist that the agency decision reflect adequate analysis and adequate attention to those issues."[55]

MICHAEL R. OKER

[54] "[R]egulation is a substitute for competition and should attempt to put the regulated industries under the same restraints competition places on nonregulated industries." C. PHILLIPS, *supra* note 3, at 127.

[55] *See* Turner, *supra* note 51, at 1240.