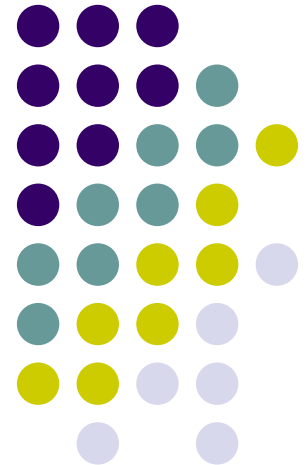


“Competition Policy After PUHCA”

**Diana L. Moss, Ph.D.
Vice-President and Senior Fellow
American Antitrust Institute**

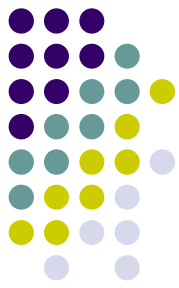
**NARUC Winter Committee Meetings
Panel on PUHCA Repeal
Washington, D.C.
February 14, 2005**



Major Issues After PUHCA



- ***Identifying competitive problems***
 - potentially bigger doses of traditional harms
 - in horizontal and vertical merger contexts
- ***Revisiting enforcement***
 - rebalancing the roles of regulation and antitrust
 - encouraging thorough, independent agency review
- ***Refocusing policy***
 - putting merger efficiency claims to the test
 - improving market structure



Identifying Competitive Problems

- ***A possible wave of bigger mergers:*** between (1) geographically disparate companies and (2) complex vertical or conglomerate combinations
- ***Already concentrated markets:*** due to the 1990s merger wave that concentrated regional markets
- ***Stronger anticompetitive incentives:*** to control price and exclude competitors
- ***Difficult remedy issues:*** that limits enforcement flexibility and choices

Identifying Competitive Problems (cont.)



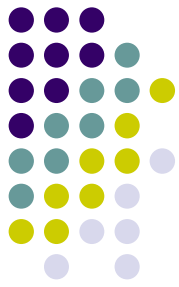
- ***Exercise of market power:***
 - requires: (1) ability--control of resources and (2) incentive--profitable strategy
 - and results in adverse affects on price and quantity
- ***Horizontal mergers:***
 - increase market concentration
 - raise concerns about withholding through coordinated or unilateral action
- ***Vertical mergers:***
 - link ownership of resources in complementary markets
 - raise concerns about: (1) raising rivals' costs and foreclosure, (2) anticompetitive coordination, and (3) evasion of rate regulation

Revisiting Enforcement: Pre-Repeal

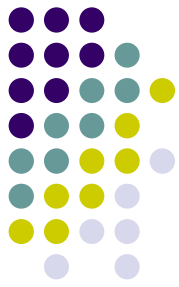


- ***FERC reliance on:***
 - market shares and concentration
 - applicant-filed analysis
 - conduct-based remedies
- ***DOJ/FTC focus on:***
 - competitive effects (e.g., coordination or unilateral effects)
 - confidential discovery
 - structural remedies
- ***State emphasis on:***
 - ratepayer protections
 - deference to FERC analysis, findings, or remedies

Revisiting Enforcement: Post-Repeal



- ***FERC as involved as before:***
 - little deviation from past focus, even with new authorities
 - with increasingly bigger transactions, runs risk of becoming another STB
- ***DOJ/FTC more involved:***
 - see Exelon/PSEG
 - comparative advantage in dealing with complex competitive issues (strategic motivation, coordination, and vertical issues)
- ***States challenged:***
 - lack the legal-economic resources necessary for adequate analysis
 - may need help (training and support)



Refocusing Policy

- ***Learning from the past:*** most mergers do not prove up the claimed benefits (see: Sherer, Kwoka and Pollitt)
- ***Raising the bar:*** the greater the anticompetitive effects, the larger should be the countervailing efficiencies (merger-specific, cognizable, passed through to consumers)
- ***Focusing on market structure:*** structural reforms will facilitate more competitive markets