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Dispelling Myths: A Real World Perspective on Trinko

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INTRODUCTION

The Supreme Court’s January 13, 2004 decision in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP\(^1\) has spawned the usual debate about its impact on antitrust law.\(^2\) Unlike those who take the

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\(^1\) 540 U.S. 398 (2004) [hereinafter Trinko].

\(^2\) Because the Supreme Court does not often decide cases directly involving the Sherman Act, when it does so its rulings engender much discussion. In addition to the articles in this special issue of The Antitrust Bulletin, see, e.g., John Thorne, A Categorical Rule Limiting Section 2 of the Sherman Act: Verizon v. Trinko, 72 U. Chi. L. Rev. 289 (2005); Herbert Hovenkamp, Exclusion and the Sherman Act, 72 U. Chi. L. Rev. 147 (2005); Anthony J. Lazzaro, Monopoly Leveraging in Verizon Communications v. Law Offices of Curtis V. Trinko, LLP: Why the United States Supreme Court Should Draw a Clear Line for Anticompetitive Behavior Violative of the Sherman Act, 51 Cleve. St. L. Rev. 235

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view that the case's "regulated telecom context was unimportant," a view that suggests that the case's impact will extend to other industries, we believe that the Court's holding is narrow and that it should not be extended within, much less outside of, its regulated industry context.

The Court defined the question that it decided as "whether a complaint alleging breach of the incumbent's duty under the [Telecommunications Act of 1996] to share its network with competitors states a claim under § 2 of the Sherman Act." Its holding in this regard is unremarkable: "We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." Fundamentally, the Court held that a breach of a statutory access mandate does not, in itself, make out an antitrust violation and that it is for the Federal Communications Commission (FCC) to enforce its own rules. The Trinko decision thus may be viewed as one of rendering unto Caesar that which is Caesar's.

Despite the narrow holding of the Trinko decision, the Court's expansive dicta suggesting that courts should not enforce antitrust statutes in regulated industries has given rise to concern that courts will adopt a diminished antitrust enforcement role, thereby failing to protect competition in regulated industries. Because the Court's dicta are largely based on two flawed assumptions, it would be most unfortunate for American consumers and the place of antitrust law as the "Magna Carta of free enterprise" if this concern proved valid.

The Court's first flawed assumption is that the potential for a competitive response, regardless of a market's characteristics, suffices

See, e.g., Thorne, supra note 2, at 292.

Trinko, 540 U.S. at 401.

Id. at 410.

Id. at 415; see also N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (referring to the Sherman Act as "a comprehensive charter of economic liberty").
to defeat an exercise of monopoly power. The second concerns the role of administrative agencies as substitutes for antitrust courts. Competitive responses cannot be assumed where a monopolist can maintain its dominant position, not because of business acumen, superior skill, foresight or industry, but because it lacks exposure to credible competitive threats due to market conditions, including market conditions that the monopolist itself creates. Further, administrative agencies are not institutionally equipped with adequate operating procedures, enforcement tools, authority, and independence to displace antitrust courts. Rather than being viewed as substitutes for one another, agencies and courts should be viewed as playing complementary roles in maintaining economic competition.

We use as our template the electricity industry, which shares some of the industry characteristics the Trinko Court claimed to consider: a historically regulated industry, a regulated access regime, and a market where the access regime is supposed to support the functioning of competitive forces. The first half of this article focuses on the inapplicability of the "contestable markets theory," which animates (at least implicitly) the Trinko opinion, to important segments of the electricity industry, such as transmission and generation. After describing the current regime in electricity, we show that these segments of the industry do not exhibit the characteristics of contestability assumed by the Court's benign view of monopoly power.

The second half of the article turns to the Court's view that a regulatory agency may serve as an effective stand-in for the antitrust court. We examine institutional differences between courts and regulatory agencies, with particular attention to remedial authority and the phenomenon of regulatory capture. We also describe how regulatory agencies' decreasing reliance on adjudicated decisionmaking and increasing reliance on informal procedural mechanisms lacking due

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7 See United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966); United States v. Aluminum Co. of America, 148 F.2d 416, 429–30 (2d Cir. 1945) (holding that the antitrust laws are not intended to punish success earned through superior business skill or acumen).

8 However, as we note below, the market characteristics that give rise to regulation in the first instance counsel for a robust, not a weak, antitrust court role.
process protections render the agencies inadequate substitutes to carry out the antitrust function.

We close with some thoughts about how antitrust enforcement can and must continue to play a critical role in protecting the electricity industry (and other infrastructure industries) from competitive harms. We argue that regulatory agencies and antitrust courts can play complementary roles in advancing consumer welfare through competitive markets.

I. MYTH #1: THE POSITIVE ROLE OF MONOPOLY

A. The regulated access regime in the electricity industry

The electricity industry is broadly divided into three segments: generation of electricity by power plants, higher voltage transmission of electricity from the power plants to local areas (e.g., cities and towns), and lower voltage distribution of electricity to ultimate consumers. The traditional model of the industry involved a vertically integrated utility that generated electricity at power plants it owned, transported the electricity that it produced across its own transmission lines, and then distributed the electricity on its own lines to its customers. All segments of generation, transmission, and distribution were presumed to be natural monopolies. The Federal Power Act of 1935 (FPA) instituted federal regulation of wholesale


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generation and transmission in interstate commerce, leaving the states as the principal regulators of distribution and sales to the end-users.\textsuperscript{12}

For the most part, vertically integrated electric utilities were privately owned corporations. With the passage of the Public Utility Holding Company Act of 1935 (PUHCA),\textsuperscript{13} many such companies were under legal strictures to operate within a single, relatively confined geographic area.\textsuperscript{14} However, not all electricity was produced and sold by investor-owned utilities (IOUs). A significant minority was produced and sold by utilities owned by municipalities and, after the enactment of the Rural Electrification Act in 1936,\textsuperscript{15} rural electric cooperatives. These consumer-owned systems operated on a not-for-profit basis to generate electricity themselves, purchase generation and transmission as a single, "bundled" product from an adjacent or surrounding investor-owned system, or both.\textsuperscript{16} The sales were regulated by the Federal Power Commission (FPC), later renamed the Federal Energy Regulatory Commission (FERC).

Traditionally, vertically integrated IOUs tended not to compete with one another, but some competition occurred between the IOUs and the


\textsuperscript{15} 7 U.S.C. §§ 901–950(b) (1936).

\textsuperscript{16} They also purchased significant amounts of federally generated power in some areas of the United States from U.S. government-owned generation facilities, such as Tennessee Valley Authority and Western Area Power Administration projects.
consumer-owned utilities.\textsuperscript{17} For example, a municipal utility might compete against an IOU by convincing a new factory to locate on the municipal system rather than on an IOU's system. In addition, municipal systems would form, displacing the IOU's service, or IOUs would acquire the assets of municipal systems, displacing the public power service. In fact, the Supreme Court's decision in \textit{Otter Tail Power Co. v. United States} arose against the backdrop of an IOU's policy of acquiring municipal systems and its efforts to prevent the formation of new ones.\textsuperscript{18}

During the 1960s and 1970s, several factors led to the conclusion that at least some parts of the electricity industry could operate on a competitive basis.\textsuperscript{19} One important factor was that consumer-owned utilities looked for possible supply alternatives from sellers other than the vertically integrated utility to which their transmission or distribution facilities were directly connected. Municipally owned utilities that wanted to buy from entities other than their immediately adjacent and almost always dominant private power supplier had, however, to have access to neighboring utilities' transmission systems to reach those alternative sources of power supply. It was in this context that the district court in \textit{Otter Tail}, affirmed by the Supreme Court, found Otter Tail's refusal to transmit for competitors to be an act of monopolization under section 2 of the Sherman Act.\textsuperscript{20} As a remedy for Otter Tail's violation of the antitrust laws, the district court enjoined Otter Tail from refusing to transmit or "wheel" power for competing municipal systems. In affirming, the Supreme Court emphasized that the relief ordered remained subject to subsequent FPC regulatory authority, thereby avoiding jurisdictional conflicts.\textsuperscript{21}

License conditions imposed on the construction or operation of nuclear power plants also sometimes included obligations that

\textsuperscript{17} Consumer-owned utilities are often referred to as "public power."


\textsuperscript{19} See, e.g., \textsc{Paul Joskow} and \textsc{Richard Schmalensee}, \textit{Markets for Power: An Analysis of Electric Utility Deregulation} (1983).


\textsuperscript{21} \textit{Otter Tail}, 410 U.S. at 375–77, 381–82.
licensees transmit electricity across their transmission lines for other, usually smaller, utilities. Utilities also began increasing their interconnections with neighboring utilities in order to share generation resources, initially because one or another utility system could experience a generation outage, but increasingly because one utility could produce electricity more cheaply than its neighbor and had excess to sell.

Besides the growth of utility-to-utility sales of electricity, two congressional enactments helped spawn the development of a nonutility generator sector and the idea that competition instead of regulated monopolies might be relied upon to determine prices, at least for the generation of electricity. The Public Utility Regulatory Policies Act (PURPA), passed in 1978, required traditional utilities to interconnect with and purchase power from nonutility generators, known as "qualifying facilities," at the rate at which the utility could avoid

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23 See Bush & Mayne, supra note 12, at 217; Kelliher, supra note 10, at 6.

24 Order No. 888, 61 Fed. Reg. at 21,544-45. Here, too, antitrust courts became involved, because of utility refusals to deal with smaller, public power competitors. In Gainesville Utilits. Dep't v. Fla. Power & Light Co., 573 F.2d 292 (5th Cir. 1978), the court affirmed a verdict finding Florida Power & Light's refusal to interconnect with the City of Gainesville utility violated sections 1 and 2 of the Sherman Act. Gainesville Utilits. Dep't v. Fla. Power Corp., 402 U.S. 515 (1971), an FPC case on appellate review, deals with the problems of IOU refusals to "interconnect" their transmission systems with municipal systems and enter into power sales and purchases on a basis of equality. In City of Lafayette v. SEC, 454 F.2d 941, 952 (D.C. Cir. 1969), aff'd sub nom. Gulf States Utilits. Co. v. FPC, 411 U.S. 747, Judge Leventhal described the Supreme Court's affirmance of the FPC in Gainesville v. Florida Power Corp. as rejecting "the claim of a private utility to make an interconnection with a municipally-owned utility on terms more onerous than those required of other investor-owned utilities." A physical electrical interconnection and interconnection agreements provided the mechanisms under which transmission and various forms of power sales and purchases could take place.

producing or purchasing its next increment of power.\textsuperscript{26} Even though promoting competition in generation was not a goal of PURPA, it had that effect by creating new nonutility generators. At the same time, high electricity rates, including high avoided-cost rates, put pressure on regulators to deregulate markets in the hope of reducing electricity rates.\textsuperscript{27}

The second legislative enactment, the Energy Policy Act of 1992 (the Energy Policy Act),\textsuperscript{28} explicitly sought to advance development of competitive power supply markets by authorizing a new generation of power producers, "exempt wholesale generators." These generators were exempted from numerous regulations imposed on utilities. The Energy Policy Act also provided FERC with expanded authority to order that utilities provide access to transmission lines.\textsuperscript{29}

During the 1980s and early 1990s, FERC itself began to authorize utilities to sell wholesale power at rates set by market forces rather than by cost-of-service regulation under the theory that competition would encourage efficiency and lead to lower rates than traditional regulated monopoly pricing.\textsuperscript{30} Among other criteria, FERC allowed market-based rates only if the seller had opened its transmission system to competitors.\textsuperscript{31} It also began applying its expanded authority under the Energy Policy Act to order public utilities to provide trans-

\begin{footnotes}
\textsuperscript{26} Order No. 888, 61 Fed. Reg. at 21,545.


\textsuperscript{29} Bush & Mayne, \textit{supra} note 12, at 219–20; Kelliher, \textit{supra} note 10, at 7–8.

\textsuperscript{30} Kelliher, \textit{supra} note 10, at 8–9.

\textsuperscript{31} Order No. 888, 61 Fed. Reg. at 21,546.
\end{footnotes}
mission access to wholesale customers, but it found that the substantial time delays involved in processing requests for service impeded the development of competitive markets. Ultimately, FERC concluded that the development of competitive markets required that all public utilities have open access transmission tariffs on file with the Commission. Using its authority under the FPA to remedy undue discrimination in the provision of transmission services, FERC instituted the tariff obligation and prescribed a detailed pro forma tariff to be filed by all public utilities.

As a result of the foregoing developments, all transmission facilities coming under FERC’s jurisdiction are now subject to open access tariffs that require public utilities to provide transmission access to third parties in order to promote wholesale electricity competition. In setting rates for sales of wholesale power, FERC has continued the shift away from cost-of-service ratemaking and toward reliance on market forces, so that today cost-based rates are the exception rather than the rule for most wholesale electricity sales. FERC has assumed the authority to rely upon market-based pricing rather than cost-based ratemaking whenever a seller lacks market power or has taken adequate steps to mitigate that power. FERC policy now relies upon the theory that “[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.”

Although FERC’s move away from cost-of-service ratemaking is often referred to as “deregulation,” in legal theory FERC’s actions

32 Id. at 21,547.
33 Id. at 21,560.
34 Id. at 21,597.
35 Id. at 21,693–94.
37 Kelliher, supra note 10, at 9 (quoting Tejas Power Corp. v. FERC, 908 F.2d 998, 1004 (D.C. Cir. 1990)).
represent more of a shift away from regulating the price of power supplied toward regulating the structure of the market in which the price is set.\textsuperscript{38} Thus, FERC has established rules for assessing whether or not a seller has market power,\textsuperscript{39} as well as measures to mitigate market power.\textsuperscript{40} FERC's rules require the reporting of transactions entered into pursuant to a seller's market-based rate authorization.\textsuperscript{41} FERC requires reporting of any changes in the seller's status that bear on the circumstances FERC relied upon in approving market based-rates.\textsuperscript{42} FERC also requires that all market-based rate tariffs incorporate a set of market behavior rules that prohibit, for example, withholding power supplies in order to manipulate prices or failing to follow electricity market rules.\textsuperscript{43} Sellers found to have violated the rules face potential disgorgement of profits associated with their behavior and, in certain cases, revocation of their FERC authorization to sell at market-based rates.\textsuperscript{44} In addition, sellers participating in what FERC

\textsuperscript{38} Kelliher, \textit{supra} note 10, at 11; Bush & Mayne, \textit{supra} note 12, at 208-09.

\textsuperscript{39} See \textit{AEP Power Marketing}, \textit{supra} note 36. FERC's rules, announced in \textit{AEP Power Marketing}, \textit{id.}, may be the subject of further development pursuant to the generic rulemaking it initiated in April 2004. \textit{Market-Based Rates For Public Utilities}, RM04-7-000, 107 F.E.R.C. \textsuperscript{\textcopyright} 61,019 (2004).


\textsuperscript{44} \textit{Id.} At least for traditionally vertically integrated utilities that revert to cost-based tariffs, the loss of market-based rate authority may not be conse-
describes as "organized" markets operated by Independent Transmission System Operators (ISOs) and Regional Transmission Organizations are subject to a broad array of rules governing, among other things, bidding behavior, price setting, and the monitoring of markets for exercises of market power.\footnote{Kelliher, supra note 10, at 14.}

With its rules for network access and policies seeking to promote competitive markets, FERC's regulatory regime appears similar to the telecommunications regime that prompted the \textit{Trinko} Court to refuse to create what it called a new exception to the right of a business to refuse to deal or cooperate with rivals.\footnote{See \textit{Trinko}, 540 U.S. at 408–09.} However, general application of the limited antitrust role underlying the \textit{Trinko} decision would wrongly assume that all regulated industries exhibit the kinds of competitive characteristics that might argue against antitrust intervention. As the next section explores, such characteristics cannot be assumed in markets such as electricity and perhaps in most infrastructure industries.

\section*{B. Contestable markets theory does not apply to electricity markets}

The \textit{Trinko} decision reflects an expectation that monopoly power can be procompetitive and that antitrust intervention can be counterproductive. According to the Court:

\begin{quote}
The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first sequential given FERC's tendency to approve high price caps under these cost-based rate tariffs. Pursuant to FERC's cost-based tariffs, utilities are permitted to negotiate prices below the cap, but the caps can be quite exorbitant. See Detroit Edison Co., 78 F.E.R.C. ¶ 61,149 (1997) (cap set at capacity cost of most expensive plant on system). The negotiating flexibility afforded utilities under these cost-based tariffs is significant, and the sellers are not subject to FERC's market behavior rules, which are imposed only on market-based rate tariffs.
\end{quote}
place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.47

Later, in discussing the potential cost of antitrust intervention, the Court quotes its decision in *Matsushita Electric Industries Co. v. Zenith Radio Corp.* in observing: "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'"48 In *Matsushita*, the Court noted that such conduct includes "cutting prices to increase business."49

Under the Court’s "monopoly is good" view, competition, whether by pricing or other means such as innovation, is promoted by monopoly power. An attempt by a monopolist to charge supra-competitive prices will invite price cutting by more efficient rivals, regardless of whether the rivals are already in the market or whether they are induced to enter as a result of incumbents' high prices and the prospect of acquiring market share. In addition, the promise of earning monopoly profits—"at least for a short period of time"50—encourages innovation, whether by the seller who brings its product to the market first, or by its rival who later contests that market through the introduction of a new or better product.

Implicit in the Court’s view of the procompetitive role played by monopoly power is the assumption that even monopolists face competition because of the threat of entry or innovation by rivals and

47 Trinko, 540 U.S. at 407-08.
49 *Matsushita*, 475 U.S. at 594.
50 Trinko, 540 U.S. at 407.
potential rivals. In other words, a monopoly market may be deemed potentially competitive, because of the credible threat that a rival may displace the monopolist by innovating or by performing more efficiently and under-cutting the monopolist’s price. In this respect, the Court’s view reflects elements of contestable markets theory.

Under contestable markets theory,51 “even a monopolist must operate in an efficient manner and must earn no more than a normal rate of return on its capital investments,” because of the competitive pressure exerted by potential entrants.52 According to Professor Reza Dibadj:

The key element of contestability is that a market is vulnerable to competitive forces even when it is currently occupied by an oligopoly or a monopoly. That is, if any incumbent is inefficient or charges excessive prices or exploits consumers in any other way, successful entry must be possible and profitable.53

In the words of leading proponents of contestable markets theory:

A contestable market may contain only a single monopoly enterprise whose as-yet unidentified competitors are nevertheless in the wings awaiting their entry cue. . . . Monopolists and oligopolists who populate such markets are sheep in wolves’ clothing, for under this arrangement potential rivals can be as effective as actual competitors in forcing pro social behavior upon incumbents, whether or not such behavior is attractive to them.54

Core features of the theory include ease of entry and exit, with the latter—also called “reversibility”—being a critical factor. “With reversibility, this process involving entry, the earning of possibly temporary profits at the initial prices of incumbents, and then exit will be profitable overall to the entrant.”55 Bailey and Baumol underscore the role played by freedom of entry and exit. A contestable market is

52 Id. at 6.
54 Baumol, et al., supra note 51, at 350.
55 Id. at 6–7.
characterized by the "availability of a pool of potential entrants able to respond quickly to an entry opportunity and to choose the timing, place, and manner of entry that best suits the circumstances." Further, "preclusion of, or restraints on, exit discourage entry and thereby reduce the competitive threat posed by the availability of potential entrants."  

Similar to the Trinko Court's view that monopoly power can be a good thing, contestable markets theory supposes that "concentration, price discrimination, conglomerate mergers, or vertical or horizontal integration . . . can be desirable and should, indeed, be presumed so, with the burden shifted to those who in any particular case maintain the contrary." That supposition is very similar to the Trinko Court statement that "mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful, it is an important element of the free-market system," because it "induces risk-taking that produces innovation and economic growth."  

The Court's assumption of contestable markets appears to apply regardless of the market. The opinion draws no distinction between those markets for which such contestability may be factually assumed and those for which it may not. Unlike, perhaps, the Court or those who claim that Trinko announces a rule of general applicability, the authors of contestability theory do not see it applying across the board nor do they envision a necessarily limited antitrust role in all circumstances:

In fields where technological conditions and other unavoidable circumstances impose heavy sunk costs and other obstacles to exit and entry, markets will not be contestable and the market mechanism cannot always be trusted to produce benign results. In such circumstances, one may, for example, still not wish to preclude single-firm production in an industry that is clearly a natural monopoly. But this monopoly will be a legitimate candidate for regulation or antitrust scrutiny.

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57 Id.
58 Baumol, et al., supra note 51, at 477.
59 Trinko, 540 U.S. at 407.
60 Baumol, et al., supra note 51, at 477–78.
Substantial entry barriers impede entry by firms that could undermine monopoly prices and profits, while significant sunk costs that cannot be recouped without substantial delay present additional impediments to contestability.\(^6\)

[T]here are in many industries what may be described as "natural" barriers, *i.e.*, barriers that arise out of technological circumstances. For example, the technology of an industry may require heavy sunk investments on the part of entrants, as we have seen. An investment that cannot easily be moved elsewhere is an impediment to exit, which, as has been shown, is in turn a prime obstacle to entry.\(^1\)

Because the characteristics of contestability are not found in all markets, "a market-by-market analysis within the industry may have to be undertaken."\(^2\) In this respect, the *Trinko* Court correctly observed that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."\(^3\) Thus, a conclusion that the Court's benign attitude towards monopoly power applied to the *Trinko* facts should represent antitrust policy across all markets and industries ignores the Court's admonition to be sensitive to the particularities of an industry.

Electricity markets are clearly candidates for noncontestability. As Professor Dibadj points out, because of significant sunk costs "many large-scale infrastructure industries, such as transportation and energy, are noncontestable."\(^4\) Transmission readily comes to mind as a noncontestable segment of the electricity industry where one should not diminish antitrust scrutiny under the naive expectation that potential rivals are standing ready to build competing transmission facilities.\(^5\)

\(^6\) Bailey & Baumol, *supra* note 56, at 113–14. It is important to distinguish between "sunk costs" and "fixed costs." Significant cost outlays that can be readily recovered by moving the capital asset to another market are not sunk. A classic example is a commercial airplane, which costs lots of money, but can be readily moved to another market if its current use is not profitable. **Baumol, et al., supra** note 51, at 283–84.

\(^1\) Bailey & Baumol, *supra* note 56, at 123–24.

\(^2\) *Id.* at 137.

\(^3\) *Trinko*, 540 U.S. at 411.

\(^4\) Dibadj, *supra* note 53, at 765.
systems. Transmission projects involve substantial sunk costs. Even if, in theory, one could move transmission equipment, such as lines, switches and towers, to other markets, in the event entry into the original market did not prove profitable, the same does not apply to the investment associated with acquiring rights-of-way to build lines across property owned by others. Such rights-of-way cannot be transferred and used on other pieces of land. Further, the transmission grid itself is a highly complex mechanism, and additions to it require engineering studies, the results of which are also not readily transferable to other markets.

Entry in the form of duplication of a rival’s grid is also unlikely. The sunk costs associated with transmission, described above, would remain. Transmission siting itself is difficult because of the public resistance to having transmission lines built near homes, schools, and other sensitive locations. Further, transmission has characteristics of a network industry where a product’s value depends, in part, on the number of buyers and sellers that the network can link.\(^6^6\) A transmission line connecting a single generator to a single customer has value only to those two entities. However, if the line connects to other lines, its value increases.\(^6^7\) Innovation also seems unlikely to render current transmission systems obsolete.\(^6^8\)

Entry barriers are not limited to transmission. Generation facilities usually involve significant sunk costs associated with site approval and acquisition, as well as engineering design. A plant may require the construction of additional transmission facilities to connect the

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\(^{66}\) Network industries are those “in which the value of a good or service increases as it is more widely used by others. For example, the telephone system becomes more valuable as the number of other users becomes greater.” PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW ¶ 776c (2d ed. 2002) (footnote omitted).

\(^{67}\) See supra notes 23 and 24 and accompanying text.

\(^{68}\) Dibadj, supra note 53, at 836–37. So far, only Mother Nature has figured out how to transmit electricity using clouds. While research continues on developing superconducting materials that can transmit large amounts of electricity, such technologies are aimed at enlarging the capacity of the existing grid, not at building a new, competing system that would displace the current one.
plant to the grid. Once incurred, these costs cannot be recouped by building the plant elsewhere if the original investment turns out not to be profitable. While some pieces of equipment at a generating station, such as the turbine, might be used elsewhere (however, often only by making significant, additional expenditures), such equipment represents only a portion of the total investment and is less likely to be reusable elsewhere in the case of larger, more efficient facilities that require specialized design.69

Entry in the electricity industry also usually involves regulatory approvals. Describing impediments to contestability, Bailey and Baumol note that a "regulatory process in which lengthy hearings and evidence of public convenience and necessity are prerequisites to entry is precisely what is not required."70 Such approvals involve not only governmental authorizations regarding land use and air emissions, for example, but also engineering approvals from the operator of the transmission system regarding the ability of the transmission grid to accommodate the new facility. In many cases, the transmission grid operator is also the utility against whose generation the new entrant seeks to compete. Regulatory approvals can also be required to exit a market.71

The absence of contestability in sectors of the electricity industries is aggravated by the incentives for incumbents to discourage entry. In the Trinko Court's idealized world, the monopolist, threatened by entry, should compete harder. It should use its business acumen to innovate, produce its products more efficiently and, as a result, cut prices or bring new and improved products to market. However, in

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69 For example, large coal plants are frequently built at the mouths of coal mines in order to save fuel transportation costs. However, most markets do not enjoy proximity to coal deposits, making it impractical to move coal-fired generation plants to another market if the investment in the original market proves unprofitable.

70 Bailey & Baumol, supra note 56, at 120.

electricity markets, many incumbents enjoy the ability to thwart competition, not by competing harder, but by blocking the efforts of others to compete.

For example, some electricity markets experience high prices because of the absence of more efficient plants, whether located on the system or capable of selling into the system over transmission lines. Often the monopoly owner of the transmission grid also owns generation facilities producing power that is sold in the same, high-priced markets. It has an interest in maintaining high prices by keeping new, more efficient entrants out. The transmission owner thus has an incentive to maintain a transmission system with capacity inadequate to accommodate new entry and the means to do so by refusing to expand the grid, or by rejecting offers by those seeking to do so. Such a market cannot be deemed contestable.

In sum, Trinko's premise that the need for antitrust enforcement in modern infrastructure industries has been lessened because regulatory open access regimes will support contestable markets is wrong. Because of inherent impediments to contestability, the electricity industry is one example where monopoly power remains a significant concern, despite (and perhaps due to) "deregulation." Further, incumbents often have the ability to keep competitors out, not through competing harder, but by erecting barriers. It would be a mistake to rely on Trinko to diminish antitrust enforcement in such industries.

II. MYTH #2: ADMINISTRATIVE AGENCIES CAN FULFILL THE ANTITRUST ROLE

In addition to espousing a benign view of market power in regulated industries, the Court's dicta in Trinko are troublesome in their apparent endorsement of the view that regulatory agencies can displace courts as the enforcers of antitrust norms.

As we noted earlier, the actual holding of Trinko, leaving to the FCC the responsibility to enforce the access mandates in laws directly entrusted to its jurisdiction and in its own regulations rather than "adding the present case to the few exceptions from the proposition

72 See infra note 140 and accompanying text.
that there is no duty to aid competitors," is relatively unremarkable. But the *Trinko* decision has an undercurrent, perhaps an undertow, suggesting that there is a strict demarcation of authority between antitrust courts and administrative agencies with the former being confined to enforcement of antitrust rules in unregulated industries and the latter having principal (if not sole) authority to enforce antitrust policy in the industries that they regulate.74

The Court begins with the unexceptional premise that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue."75 Thus, in analyzing possible antitrust violations in the telecommunications industry, an antitrust court would have to take "careful account of the pervasive federal and state regulation characteristic of the industry."76 The Court then explains:

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, "[t]here is nothing built into the regulatory scheme which performs the antitrust function," the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2.

. . . .

The regulatory framework that exists in this case demonstrates how, in certain circumstances, regulation significantly diminishes the likelihood of major antitrust harm.77

After reviewing the FCC’s regulation of Verizon, including a "competitive checklist, which . . . includes the nondiscriminatory provision of access" as well as "continuing oversight," the Court concludes that

73 *Trinko*, 540 U.S. at 399.
74 *Id.* at 411.
75 *Id.*
76 *Id.* (quoting United States v. Citizens & S. Nat’l Bank, 422 U.S. 86, 91 (1975)).
77 *Trinko*, 540 U.S. at 412 (citations omitted).
the regulatory "regime was an effective steward of the antitrust function." The Court further says, "[e]ffective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. . . . An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations." 

It is worth noting again that the issue in Trinko was narrowly stated to be limited to "deciding whether to recognize an expansion of the contours of § 2." The Trinko decision does not say, but comes close to saying, that courts need not enforce the existing section 2 monopolization provisions where administrative agencies have jurisdiction over the day-to-day enforcement of competitive access conditions. The reference to the doctrine of implied immunity in this regard is particularly troublesome. The Court's judgment may be viewed by federal judges as a signal to apply similar reasoning in the implied immunity context and back off antitrust enforcement in network and infrastructure industries, even those subject to deregulation mandates or policies. For these industries, the Court appears to view antitrust as being served adequately by leaving section 2 enforcement to the agencies that allegedly have more specialized knowledge and greater oversight capability than courts. This approach must be rejected.

78 Id. at 412–13.
79 Id. at 414–15.
80 See id. at 412. See also id. at 401 ("we consider whether a complaint alleging breach . . . under the [Telecommunications Act of 1960 also] states a claim under § 2 of the Sherman Act.").
81 Id. at 412 (citing United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U. S. 694, 730–35 (1975)).
82 Many, if not all, regulated industries are undergoing a transformation, in whole or in part, from monopoly to more competitive industry structures. However, perhaps because of their history as regulated monopolies as well as industry characteristics (e.g., essential services produced by high-cost investments), such industries are often found to have structures susceptible to the exercise of monopoly power. In this context, the Court's statement that antitrust enforcement by courts is less important in these industries is
A. The law requires courts to enforce the Sherman Act in regulated industries

The most fundamental reason not to create judicial limitations on section 2 enforcement in regulated industries is that doing so would adopt a policy not to enforce the antitrust laws or to enforce them weakly. Because antitrust law is basic national policy, it has long been held that antitrust exemptions are disfavored. Indeed, such implications would be contrary to the clear language of the many regulatory statutes, including the Telecommunications Act of 1996 (the 1996 Act) and the FPA, that have antitrust savings clauses.

This is not to say that antitrust courts cannot, or should not, take regulatory policies and actions into account. As the Court in *Trinko* points out, regulation is part of the structure of the markets in which regulated industries operate, so it is relevant to any antitrust analysis contrary to the more common view that movement toward competition should lead to an increased role for antitrust in the regulated industries.

[Deregulation has given antitrust an expanding role in many markets, such as telecommunications, electric power, and commercial aviation, to name a few. As an increasing number of activities in these markets pass out of the realm of strict agency control and into the realm of private, market-based decision making, antitrust picks up where the regulatory regime leaves off.


in the field. Courts have mechanisms to consider regulatory policies ranging from giving precedential or even preclusive effect to regulatory decisions to primary jurisdiction referrals. But courts are no more free than agencies to ignore violations of the law on the premise that enforcement may be burdensome or inconvenient.

Nor should the perceived superior expertise of industry-specific regulators be used as subterfuge for an abdication of judicial responsibility for antitrust enforcement. Like courts, agencies may hear from experts. However, it would be difficult to conclude that regulators' greater focus on particular industry problems has led to wiser competition policy or that the policies reached have, in fact, flowed from expert knowledge. In agencies no less than in courts, there are

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85 Trinko, 540 U.S. at 411–12 (quoting Citizens & S. Nat'l Bank, 422 U.S. 86, 91 (1975) ("careful account must be taken of the pervasive federal and state regulation characteristic of the industry") and Town of Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) ("antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies").


88 See FPC v. Texaco Inc., 417 U.S. 380, 400 (1974) ("It may be . . . that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today . . . [,]" but "[i]t is not the Court's role . . . to overturn congressional assumptions embedded into the framework of regulation. . . .")

89 Louis B. Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 471 (1954) (commenting that "[e]xpertness has been oversold in this country").

90 The issue may be less one of knowledge and more one of whether one wants the antitrust laws to be followed or whether one wants them to be one factor among many that contribute to administrative policy judgments.

91 Likewise, the expertise of courts may be understated. A reading of the district court decision in United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000), dealing with the highly technical computer software industry, demonstrates the capability of courts to deal with complex issues through focused attention, expert and fact witnesses, evidence, and other vehicles. Court
often a "cacophony of experts" on either side of any substantive issue and decisions therefore call for the kind of balancing and reasoned analysis of a record that courts are well adept at performing.\textsuperscript{92}

**B. Agencies are not effective substitutes for courts**

The Court seems to view antitrust courts and administrative agencies as performing much the same function. Therefore, it appears comfortable leaving antitrust enforcement in regulated industries to administrative agencies. This comfort is misplaced not only because courts are required to apply the law, as is discussed above, but also because courts and administrative agencies often act far differently in both their procedural and substantive decisionmaking. Deference will often mean abandonment of antitrust enforcement.

1. **AGENCIES HAVE NO POWER TO ORDER IMPORTANT ANTITRUST REMEDIES** One very important difference between court enforcement of antitrust laws and agency enforcement of regulatory statutes, including where agencies promote competition, is in the area of remedies. Agency statutes often do not provide for (or have limitations on) retrospective damages and other kinds of relief that are available to antitrust courts.\textsuperscript{93} This is especially important in enforcement of the antitrust laws where the prospect of treble damages creates an important deterrent to illegal conduct. Nor can agencies impose criminal penalties, another powerful deterrent available under antitrust statutes.\textsuperscript{94} Moreover, agencies often have other procedural and substantive limitations on the relief that they may order.\textsuperscript{95}

decision after court decision shows that courts can handle complex economic matters. And courts have additional tools available, including agency referrals under primary jurisdiction or similar doctrines and inviting agency and amici briefs.

\textsuperscript{92} Schwartz, *supra* note 89, at 472.


\textsuperscript{94} 15 U.S.C. §§ 1, 2 (1890).

\textsuperscript{95} See, *e.g.*, Bonneville Power Admin. v. FERC, 422 F.3d 908, 911 (9th Cir. 2005) (limitation on FERC's refund authority).
The administrative record preceding the *Trinko* decision is an excellent example of how administrative agencies often have inadequate tools at their disposal to deter anticompetitive conduct. In December 1999, the FCC granted Verizon's (then Bell Atlantic's) application to enter the interLATA long distance market in New York State based on its "conclusion that Bell Atlantic has taken the statutorily required steps to open its local exchange and exchange access markets to competition." But within several months Verizon was already admitting that it was breaching its open access commitments for which it paid a $3 million fine to the FCC, and $10 million to competitive local exchange carriers.

The *Trinko* court portrayed the FCC action against Verizon as showing that the regulatory structure was sufficient to remedy and deter anticompetitive conduct. But then-FCC Chairman Powell drew a markedly different conclusion in a subsequent communication to Congress. He explained that "[g]iven the vast resources of many of the nation's [incumbent local exchange carriers]," the FCC's maximum fine "is insufficient to punish and to deter violations in many instances." He advised both increasing the forfeiture limits "to enhance the deterrent effect of [FCC] fines" and giving the FCC the authority to award punitive damages, attorneys fees, and costs in formal complaint cases filed under Section 208 of the 1996 Act.

Congress has not provided new remedies under the 1996 Act. Of course, the kinds of remedies that Powell was requesting are already available under the antitrust laws. But the result of *Trinko* was to prevent courts from using these powers to provide appropriate deter-

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99 *Id.*

 rents to Verizon in that case. Such a model should not be extended elsewhere.

2. THE POLITICAL STRUCTURES OF AGENCIES COMPROMISE THEIR ROLE AS IMPARTIAL ADJUDICATORS A second reason for not unduly privileging agency over court enforcement of antitrust law is institutional. Courts and agencies are very different decisionmaking bodies with different strengths and weaknesses.

One of the pillars of the rule of law is expressed by Justice John Marshall's statement that we live under "a government of laws, and not of men." Legislatives are primarily responsible for generally applicable laws that result from a balancing of interests within the political process. Ideally, courts apply law in individual cases neutrally through a reasoning process that is at least theoretically divorced from political influences.

The institutional structure and processes of courts, including lifetime appointments, strict ex parte communications rules, and requirements that decisions be justified by factual records and elaborations of neutral legal norms, are all designed to encourage reasoned and impartial decisionmaking. Agencies are structured very differently, perhaps due to the fact that they perform both legislative and adjudicatory functions.

At the top tier of many regulatory agencies is a bipartisan commission of political appointees, who serve for set terms and afterward often seek employment in the industries that they regulate or in the many legal, financial and lobbying firms that represent them. Some agencies are headed by a single political appointee; all appointees must obtain Senate confirmation and lack the lifetime tenure that would separate them from further political influence.

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103 For example, former FERC chairwoman, Elizabeth Moler, is Executive Vice President, Government and Environmental Affairs and Public Policy, of Exelon Corporation. Former FERC chairman, Curt L. Hébert Jr., is Executive Vice President, External Affairs, of Entergy Corporation.
Agency budgets and expenditures of money go through the executive review process and must be congressionally approved. Agencies are subject to congressional oversight and the possibility of new statutory enactments. In short, their actions are deeply affected by the political process.

The political structure of regulatory commissions makes them more susceptible than courts to the influence of the industries that they regulate as well as of other interested parties. Thus, even at the genesis of many regulatory commissions, prominent commentators were predicting that "the older the commission gets to be, the more inclined it will be found to take the business and railroad view of things." In 1960, James Landis, the late dean of Harvard Law School and a prominent advocate of administrative authority, reported to President-elect Kennedy on the tendency of agency tribunals to reflect industry positions because of the "daily machine-gun-like impact" of industry lobbyists and lawyers in formal and informal agency processes. Others have attributed regulatory "capture" to the tendency of agencies to consider themselves responsible for the health of the industry they regulate, which can lead them to favor industry demands over consumer concerns and interests.

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106 Landis wrote:

Irrespective of the absence of social contacts and the acceptance of undue hospitality, it is the daily machine-gun-like impact on both agency and its staff of industry representation that makes for industry orientation on the part of many honest and capable agency members as well as agency staffs.


Further, officials who do not bend to industry desires may find themselves subject to retribution. Unhappy with Justice Department positions in the Microsoft case, for example, Microsoft mounted a campaign against the Department of Justice Antitrust Division budget.\footnote{108} Recently, apparently against their legal judgments, Justice Department attorneys were forced to limit claims against the cigarette industry.\footnote{109} As a result of these and other factors, administrative agencies by their nature tend to perform a less judicial role than courts. FERC finds itself subject to similar political pressures. Members of Congress have been known to insert provisions in bills bearing on agencies' jurisdiction or funding to discourage FERC from pursuing unwelcome policy initiatives.\footnote{110} Political interference with agency decision-making has been legion.\footnote{111} Although such political pressure may not always be inappropriate when an agency is engaged in policymaking, it is certainly not the hallmark of an independent adjudication of antitrust claims.


\footnote{110} Southern Company and Entergy Corporation, for example, are opposed to certain forms of Regional Transmission Organization membership and control. Sens. Trent Lott (R-Miss) and Richard Shelby (R-Ala) have consistently fought FERC's efforts to make such membership mandatory, including the insertion of language into the failed November 2003 Energy Bill that would have prevented FERC from forcing any company to participate in its Standard Market Design until 2007. \textit{See} David Ivanovich, Wood is on a hot seat; Federal Energy Agency's Leader has Powerful Critics, HOUSTON CHRON., Jan. 16, 2005 (Star Edition), at Business 1; Jeff Barber, Southern Senators "Troubled" by FERC's Recent Moves Advancing Restructuring, Inside Energy/with Federal Lands, July 26, 2004, Electric Power at 7.

The ability of agencies to adjudicate cases impartially is further hampered by the conflicting interests that many agencies must consider. Even where agencies have procompetitive agendas, antitrust or other issues will not be decided in a vacuum that ignores the implications of decisions on other agency functions. Agencies need some industry support for policies that they want to advance, lest they find themselves under congressional and executive attack.

Even where agencies have express authority to include antitrust considerations within their regulatory functions, they often neglect to fully enforce antitrust principles in deference to other functions on which they place a higher priority. As agency processes tilt away from the consumer interests that the agencies theoretically protect and toward claimed industry needs for investment, agency judgments may not reflect consideration of antitrust concerns. Indeed, agencies often view antitrust issues as distractions. For example, the Nuclear Regulatory Commission (NRC) had express antitrust authority on the theory that, having been developed by the taxpayer, nuclear power should not be subject to further monopolization. However, even the NRC, which has conducted highly judicialized antitrust proceedings, had severely curtailed its antitrust enforcement, finding such reviews "not a sensible use of our limited

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112 For example, while citing no evidence that revenues in the Midwest are insufficient to allow owners of generating facilities to recover investment costs, FERC has noted the need to ensure that "rates are just and reasonable for buyers and sellers" in accepting mitigation measures that could allow sellers to double or triple prices over competitive levels. See Midwest Indep. Transmission Sys. Operator, Inc., 109 F.E.R.C. ¶ 61,157, at ¶¶ 215–21 (2004), order on reh’g, 111 F.E.R.C. ¶ 61,043 (2005). Similar revenue sufficiency claims, including the need to generate enough revenues to recover fixed costs, are made in support of bid caps of $1,000 per megawatt hour and higher on spot market energy sales, even though utilities typically recover fixed costs through separate capacity payments or through regulated rate-base recovery. Id. at ¶ 302. The variable cost of producing electricity is usually far less than $1,000 per megawatt hour.

resources needed to fulfill our primary mission.”\textsuperscript{114} Although the openness of the NRC’s avoidance of antitrust enforcement was striking, even in \textit{Gulf States}, which reversed the FPC for failing to consider the anticompetitive effect of granting approval of a security issuance under a “compatible with the public interest” test, the Supreme Court recognized that the FPC had to harmonize its consideration of antitrust allegations with the exigencies of the need for the particular security issuances.\textsuperscript{115}

Other agencies have primary missions that may conflict with their antitrust enforcement role. For example, FERC may deem it more important to advance a particular vision of industry structure rather than to limit accretions of market power that result from conduct within such a structure. A recent example is FERC’s approval of the merger of Exelon Corporation and Public Service Enterprise Group (PSEG) to create the nation’s largest utility. FERC allowed the concentration under common ownership of an unprecedented amount of generation capacity in part because the merging companies are members of the PJM Interconnection, a Regional Transmission Organization that has been a poster-child for the Commission’s vision for future.\textsuperscript{116} And the FCC has been notably acquiescent in, indeed a facilitator of, potentially harmful consolidation in communications industries.\textsuperscript{117}

\textsuperscript{114} Kan. Gas & Elec. Co., CLI-99-19, 49 N.R.C. 441 (1999), 64 Fed. Reg. 33,916, at 33,925 (June 24, 1999) (discontinuing review of license transfer applications for antitrust considerations); see also Antitrust Review Authority: Clarification, 65 Fed. Reg. 44,649 at 44,656 (July 19, 2000) (codified at 10 C.F.R. pts. 2 and 50) (“[T]here are other antitrust authorities and forums with far greater antitrust expertise than the Commission to address potential antitrust problems with proposed mergers and acquisitions of owners of nuclear power facilities.”).


3. GIVING AGENCIES EXCLUSIVE ANTITRUST AUTHORITY FOR REGULATED INDUSTRIES WILL RESULT IN ANTITRUST NONENFORCEMENT

Critiques of agency capture problems in the 1970s prompted movement to increase the effectiveness of regulatory bodies and to make them function more in accord with legal norms. Thus, in a series of important decisions, federal courts required agencies to afford more due process and reasoned decisionmaking in their decisions.118 And public policy advocates pushed, sometimes successfully, for more vigorous open hearing rules, stricter ex parte contact regulations, abolition of "secret law" advisory opinions, and changes designed to increase citizen and public interest participation in hearings through proxy advocates and intervenor funding programs.119

(3d Cir. 2004), cert. denied, 125 S.Ct. 2904 (2005); Applications of Nextel Commc’ns, Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, FCC 05-148 (rel. August 8, 2005) (approving merger effectively reducing to three the number of national wireless providers); Applications of AT&T Wireless Servs. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, 19 F.C.C.R. 21,522 (2004) (approving transfer of all AT&T Wireless licenses to Cingular Wireless, combining the nation’s second and third largest wireless telecommunications carriers); Applications for Consent to Transfer of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee, Memorandum Opinion and Order, 17 F.C.C.R. 23, 246 (2002) (approving merger of the nation’s largest and third largest cable operators). The FCC also currently has pending before it applications for consent to SBC Communications Inc.’s acquisition of AT&T (FCC Public Notice, DA 05-656 (rel. March 11, 2005)), and Verizon’s acquisition of MCI Corp. (FCC Public Notice, DA 05-762 (rel. March 24, 2005)), which most observers believe that the FCC will grant.


In some ways, the *Trinko* decision seems animated by a view of the administrative process that conforms to the adjudicatory ideal that many of the 1970s reformers were trying to implement. But the modern agencies do not act like courts over a broad range of regulated agency decisionmaking and enforcement. Increasingly, agencies inform themselves and make decisions not through administrative hearings or an official record, but through more informal rulemakings, policy statements, and various forms of conferences, meetings and communications with interested parties of all stripes, including those who are regulated, and with those who are benefited or hurt by regulation or nonregulation. Agency policy is negotiated in both subtle and nonsubtle ways. Traditional cases are increasingly avoided or relegated to the background. This process may be applauded, decried, or both, but the fact is that regulatory bodies are increasingly avoiding adjudicatory procedures.

One of the agencies where this tendency is most pronounced is the FCC. It is notable that the FCC decision referred to by the Court in *Trinko* as providing a "regulatory framework" that "diminishes the likelihood of major antitrust harm" did not result from an adjudicatory hearing process, but from an informal rulemaking process of written comments, written reply comments, and ex parte contacts with the FCC by interested parties. Whatever can be said of the enforcement process followed by the agency in the case, *Trinko* was not a vibrant example of due process.

Examples may convey the problem better than text. During the 1960s the FPC, the predecessor to FERC, acquired the daunting task of regulating the prices of nonpipeline as well as pipeline interstate natu-
This meant that the FPC had to regulate the prices of thousands of individual gas producers, wells and contracts, each of which had different costs and rates. After hearings, the FPC imposed ceiling price conditions to new certificates to sell gas based on the "in line" contracted prices in areas of proposed sales. These prices were to generally remain effective until rate case hearings could take place, subject to refund of charges that were later determined to be excessive. With limited exceptions, the FPC regulated gas prices through massive area rate cases for each producing area. Ceiling prices were set by hearing processes, which included discovery, testimony of fact and expert witnesses, cross-examination, briefing, and judicial review.

More recently, FERC has embarked on a restructuring of the electric power industry, departing from a traditional cost-of-service regulatory model under which electric companies sell wholesale power based upon their costs. The magnitude of this restructuring effort is comparable to the FPC's natural gas producer rate regulation efforts. But, unlike in producer rate regulation, there have been few electricity restructuring hearings to determine significant matters. The major electric restructuring orders came about through rulemakings without hearings. Regulation has been implemented mainly by agency suasion and negotiations. Virtually all orders affecting Regional Transmission Organizations result from filings by those organizations and a comment and reply process.

125 See Part I.A. supra.
A parallel process takes place under which FERC holds conferences attended by commissioners, key staff, and representatives from various industry groups and their opponents that are selected by the agency. Written comments are allowed and encouraged, but presentations and submissions are neither under oath nor subject to cross-examination. Examples of conference topics include new transmission construction and incentives to promote such construction, as well as a range of market power-related topics. Thus, FERC is not informing itself or making decisions based upon traditional due process trial-type hearings, as it had in the past.

Additionally, representatives of virtually all interested parties meet freely with FERC commissioners and key staff to discuss issues that they deem important. Meetings with commissioners are permitted before cases are filed. Additionally, FERC broadly permits off-the-record communications for notice and comment rulemakings, many investigations, technical, policy and other conferences, and in many compliance matters. To take one recent example, before Exelon and PSEG filed with FERC for approval of their mega-merger, all four FERC commissioners met privately with Exelon and PSEG executives to discuss the parameters of the companies’ proposed merger application. A FERC spokeswoman would not comment directly on the accusation of improper commissioner contacts because the case was pending, but did say the agency has “a longstanding practice of being available to market participants and members of the general public for pre-filing meetings.”

128 FERC Docket Nos. AD05-5-000 (initiated March 21, 2005) and PL03-1-000 (initiated January 7, 2003).

129 FERC Docket Nos. RM04-7-000 (initiated April 14, 2004) and PL04-9-000 (initiated May 11, 2004).


131 Citizen groups slam Exelon-PSEG merger, rip FERC meetings with company officials, INSIDE FERC, at 4 (Apr. 4, 2005).
Such conferences are common and include all segments of the industry, including those represented by the authors of this article. They may be useful in providing information for FERC commissioners and key staff and allow regulators to communicate agency needs to regulated entities. They may even be necessary under an industry structure where deregulated sales of power amount to billions of dollars per year. FERC may be unable to regulate individual transactions directly and may have to rely on general rules in securing competitive market structures. But these functions do not ensure proper antitrust enforcement.

This failure to follow rudimentary traditional procedures has not gone unnoticed by the appellate courts. In Electric Power Supply Ass’n v. FERC,132 the D.C. Circuit overturned FERC’s contention that market monitors could communicate directly with FERC on contested case matters.

We use FERC as an example of regulation by negotiation, but this phenomenon of departing from case regulation is not limited to FERC and the FCC. A 1999 report from the general counsel of the NRC on re-examining the NRC’s hearing process states:

We have also identified the trend in statute law and in much administrative practice to move away from formalized adjudication, with its winner-take-all courtroom model, toward alternative procedures, aimed at finding solutions that both satisfy legal requirements and accommodate a variety of interests.

In the last several years, moreover, the Chairman and other Commissioners have created a number of opportunities outside the agency’s Section 189 hearing processes to conduct informal meetings with members of the public and other stakeholders, both in Washington, and in communities close to nuclear power plants that were experiencing performance problems. The feedback on such informal meetings has been, by most accounts, extremely positive. This experience has raised the question of whether some of the elements of the give and take in these settings could be productively introduced into the agency’s Section 189 processes. The foregoing discussion as well as observations such as those of the Advisory Committee on External Regulation of [the Department of Energy], that “trials are not always ... useful in the regulatory context”, and that they “consume a disproportionate amount of time in highly formal pro-

132 391 F.3d 1255, 1260 (D.C. Cir. 2004).
cesses such as discovery and cross-examination which are expensive for all concerned" suggest that the formality of NRC hearings is not only unnecessary legally, but may even be counterproductive in terms of providing an appropriate vehicle for participation by affected individuals or an understanding of the issues by a broader public.133

Other agencies have been embarking on similar journeys away from adjudicatory models of rulemaking and law enforcement.134

Although courts have shown disquietude with this trend away from adjudication, they have also blessed it.135 It may be that use of some of the new processes, in addition to some of the litigation remedies within the agencies and in courts, are better suited to the regulation of the modern economy. Mistrust of the traditional processes runs high. Trials can be costly, inefficient, and slow. However, the issue is whether agencies can substitute for courts in meaningfully enforcing antitrust law. Where there is no assurance that agencies will give focused examinations of factual situations in light of antitrust principles, free of undue industry influence, the substitution of agencies for courts will result in the abandonment of antitrust enforcement.

The foregoing review of agency decisionmaking demonstrates the risk of antitrust nonenforcement associated with turning antitrust


134 Starting in the early 1990s, the D.C. Circuit became increasingly frustrated with the Environmental Protection Agency’s (EPA) reliance on informal policy development, and chastised EPA for failing to use notice and comment rulemaking procedures. See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (“Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations.”); see also Gen. Elec. Co. v EPA, 290 F. 3d 377 (D.C. Cir. 2002).

135 E.g. Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989) (holding that formal adjudication need not be held on issuance by EPA of orders to specific parties requiring cleanups of toxic waste, and that a public hearing was sufficient); Penobscot Air Servs. Ltd. v. FAA, 164 F.3d 713 (1st Cir. 1999) (approving FAA’s dismissal of a complaint without an oral hearing).
over to administrative agencies: significant anticompetitive activity could be immunized from antitrust attack. The Supreme Court has held that the antitrust laws do not condemn state action that monopolizes or regulates industry in ways that permit private parties to engage in anticompetitive conduct. This state action immunity from antitrust enforcement (on the ground that the antitrust laws are directed against private and not state action) has permitted private parties who act pursuant to state law to claim antitrust protection for otherwise unlawful, anticompetitive conduct. So concerned was the Supreme Court that this immunized private anticompetitive conduct should really be state action, it insisted that for immunity to apply the state authorization for the anticompetitive conduct must be "clearly articulated . . . as state policy" and "actively supervised." Although we do not here advocate a comparable immunity associated with federal agency action, the Supreme Court should be at least as demanding of federal administrative proceedings if the result is to immunize the private actor from antitrust enforcement. There ought to be a clear demonstration that any immunized anticompetitive conduct is necessary to the agency's mission; that the regulatory immunity is articulated and intended rather than implied; and that the agency involved is in fact regulating industry conduct in pursuit of an appropriate competition policy.

III. CONCLUSION: ANTITRUST ENFORCEMENT THROUGH THE COMPLEMENTARY EXERCISE OF COURT AND AGENCY AUTHORITY SHOULD BE MAINTAINED

As we have seen, Trinko's strict holding only addresses the question of whether, if the FCC promulgates an access rule, violation of that rule creates a section 2 refusal to deal claim. To the extent that the Court suggests that lower courts should avoid section 2 enforcement in areas where agencies have jurisdiction, this either-courts-or-agencies


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approach to antitrust enforcement will often result in no enforcement. Instead, agencies and courts can and should complement each other in providing effective antitrust controls.

We have seen in Part I that despite suggestions to the contrary in the Trinko dicta, antitrust enforcement is necessary in regulated industries because such industries lack sufficient competitive response potential to prevent the sustained exercise of market power; in Part II we have seen that due to political and institutional pressures, as well as the continuing move away from adjudicatory processes, regulatory agencies cannot, by themselves, adequately provide necessary enforcement. However, agencies often have broad jurisdiction over particular industry market structure and transactions and particularized knowledge of the industries. Thus, agencies and courts should work together to prevent violations of the antitrust laws and to ensure consumer welfare.

Today's electricity industry provides a ready example of where antitrust courts and regulatory agencies can and should play complementary roles. A consensus presently exists that the U.S. transmission grid is inadequate to accommodate the demands of buyers and sellers in the wholesale electricity markets that are spawned by FERC's open access policies. Over the past 25 years, transmission investment has lagged far behind the growth in electricity demand. In addition, increased transmission usage results from technology and market structures that now permit generation to serve distant markets and a concomitant increased reliance on competitive markets to supply electricity.

A principal impediment to new investment in the transmission grid is the reluctance of vertically integrated utilities to expand the grid, thereby exposing their generation assets to increased competition. FERC has recognized this problem:

Market participants also complain that companies that own both transmission and generation under-invest in transmission because the resulting competitive entry often decreases the value of their generation assets.

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139 Id. at 6.
Much of this problem is directly attributable to the remaining incentives and ability of vertically integrated utilities to exercise transmission market power to protect their own generation market share.140

In other words, the transmission monopolist uses its control over transmission to protect its generation investments from the competition that would be facilitated by an expanded grid.

The refusal or reluctance to expand the transmission grid persists despite the opportunity to receive attractive, guaranteed returns on transmission investments.141 Moreover, many transmission owners have rebuffed efforts by other market participants, such as municipal and cooperative utilities, to invest in and own portions of the transmission grid,142 even though these new investors would bring capital to a transmission grid in great need of expansion.

These refusals to build and to allow others to participate in transmission ownership and investment injure competition. They limit the availability of transmission itself. Investments that should be made are not made, and the resulting transmission sales that the expanded grid could support do not occur. Inadequate transmission also limits the output of generation. Power that can be produced from existing generating plants cannot reach potential customers due to transmission constraints, as a result of which the plants produce less than they


141 Because it remains subject to cost-based regulation that ensures an opportunity to earn a steady return, usually in excess of 10%, the transmission business remains profitable. See Transmission Access Policy Study Group, supra note 138, at 9–10. For example, FERC has allowed a 12.88% equity return (in addition to congressionally allowed tax benefits) for nearly risk-free investments during a period when money costs have been near an all-time low. See Midwest Indep. Transmission Sys. Operator, Inc., 100 F.E.R.C. ¶ 61,292 (2002), reh’g denied, 102 F.E.R.C. ¶ 61,143 (2003), order on remand, 106 F.E.R.C. ¶ 61,302 (2004), aff’d sub nom. Pub. Ser. Comm’n of Ky. v. FERC, 397 F.3d 1004 (D.C. Cir. 2005).

might otherwise. Developers of new plants may be unable to build or be forced to build less efficient plants.\textsuperscript{143} In some parts of the country, plant developers have been forced to sell their facilities to the transmission owner/competitor, often at distressed prices, resulting in a diminution of competition and an increase in market concentration.\textsuperscript{144} The vertically integrated incumbent also benefits from the resulting higher prices, while consumers are worse off.\textsuperscript{145}

Vertically integrated transmission owners may defend their actions, alleging that they acquired their monopoly position as a result of historical accident or acumen.\textsuperscript{146} Regardless of how they obtained their transmission monopolies, maintaining them through

\textsuperscript{143} Approximately 94\% of new generation facilities are natural gas units that, unlike larger coal burning plants or renewables such as hydroelectric and wind, can be sited close to load and are therefore less dependent on transmission. See Transmission Access Policy Study Group, supra note 138, at 5–6.

\textsuperscript{144} Such concerns have been particularly pronounced with respect to Entergy Corporation, a large electric utility operating in the southern United States, in whose service territory a number of nonutility generating companies constructed plants in recent years because of proximity to natural gas fuel sources from the Gulf of Mexico. Despite the existence of a FERC-mandated open access tariff, allegations have been made that generators have been unable to secure firm transmission paths to deliver the output of their generation to market. These concerns are set forth in the records of several FERC cases examining Entergy’s transmission practices and their effects. See, e.g., Entergy Servs., Inc., 109 F.E.R.C. ¶ 61,282 (2004), order on reh’g, 111 F.E.R.C. ¶ 61,145 (2005), reh’g pending; Entergy Servs., Inc., 111 F.E.R.C. ¶ 61,507 (2005); Perryville Energy Partners, LLC, 109 F.E.R.C. ¶ 61,019 (2004), reh’g denied, 111 F.E.R.C. ¶ 61,006 (2005).

\textsuperscript{145} In recent years, FERC has encouraged the development of centrally clearing electricity spot markets in which prices are set by the offer of the marginal generating unit. All sellers whose offers are at or below the clearing price are paid the clearing price, and an increase in that clearing price yields higher revenues to those sellers. See generally SALLY HUNT, MAKING COMPETITION WORK IN ELECTRICITY, at 121–91 (2002). Thus, although control over transmission operations is not allowed (in theory) to be used to self-advantage in power sales competition, companies owning both generation and transmission in the same market benefit from higher electricity prices usually found in markets with constrained transmission.

\textsuperscript{146} United States v. Aluminum Co. of America, 148 F.2d 416, 429–30 (2d Cir. 1945).
anticompetitive output restrictions and refusals to deal should not be tolerated. The harm associated with these output restrictions and refusals to deal is demonstrated by the monopolists' willingness to forgo expansion that would increase their transmission revenues and profits in order to protect their generation sales from competition. Furthermore, because the modern transmission grid requires transmission monopolists to work with adjacent systems, such monopolists have invariably entered into agreements to govern grid

\[\text{See Areeda, supra note 66, at ¶ 756b2; Robert H. Bork, The Antitrust Paradox 229-31 (1978); Town of Concord v. Boston Edison Co., 915 F.2d 17, 23-24. (1st Cir. 1990). On the basis of this theory, some may be tempted to argue that there is no harm in allowing generation monopolists to gain or maintain a transmission monopoly. Leaving aside the limitations of the single monopoly profit theory (for which see, e.g., Louis Kaplow, Extension of Monopoly Power through Leverage, 85 Colum. L. Rev. 515 (1985); Michael D. Whinston, Tying, Foreclosure, and Exclusion, 80 Am. Econ. Rev. 837 (1990); Dennis W. Carlton and Michael Waldman, The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries, 33 RAND J. Econ. 194, 205, 212 (2002)), it does not apply to the use of monopoly power in one market to prevent competition in another, as is the case here: because transmission is a natural monopoly, as discussed in Part I.B., it would be highly difficult (and inefficient) for a competitor to enter at both levels by building its own transmission facilities to reach the monopolist's generation market. Thus, maintaining a stranglehold on transmission effectively prevents competition from outside generation, and, as Steven Salop has explained, when a monopolist faces potential competition and attempts "an exclusionary strategy in order to deter or destroy that emerging competition," then "the single monopoly profit theory, and its strong policy implications about the efficiency of integration, clearly would not apply." Steven C. Salop & R. Craig Romaine, Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft, 7 Geo. Mason L. Rev. 617, 625-26 (1999). If, as the Supreme Court said of Kodak's parts and service strategy, a transmission owner's output restrictions and refusals to deal are "part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated" section 2 of the Sherman Act. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482 (1992) (citations omitted).}
operations that may include provisions to expand the transmission grid. Yet such monopolists often refuse participation by those who do not currently own transmission.\textsuperscript{148}

In the face of this competitive harm, antitrust courts should not sit on the sidelines in fear of interfering with innovation or risktaking. Monopolists are standing in the way of innovation and risktaking by those who seek to expand the transmission grid. The result is lower output and impaired competition, both in transmission as well as generation. Moreover, when one is considering the transmission grid, it is fair to ask exactly what innovation the incumbent monopoly owners are likely to promote that the entry of other owners might impede. In most cases it is doubtful whether business acumen played any role in the monopolist's acquiring its domination other than the business acumen associated with acquiring monopoly rights.\textsuperscript{149} Moreover, once transmission owners acquire dominance, business acumen and innovation rarely play any role in maintaining that dominant position. Rather, the monopolist is standing in the way of those who could offer a better product through their own business acumen, thereby maintaining monopolization of the generation and power sales markets.

\textsuperscript{148} There are examples, especially in parts of the Midwest, where transmission incumbents have opened the grid to municipal and cooperative ownership. These arrangements are described in the appendix to \textit{Effective Solutions for Getting Needed Transmission Built at Reasonable Cost}, supra note 138. In Wisconsin, the American Transmission Co., created pursuant to state law, allows participation in the grid by all load-serving entities. Recently, MidAmerican Energy Co., which operates largely in Iowa and parts of Illinois, Nebraska and the Dakotas, entered into an agreement with the Midwest Municipal Transmission Group to permit such participation. See MidAmerican Energy Co., FERC Docket Nos. ER96-719-000, EL05-59-000 (Aug. 1, 2005, Filing Letter at 3-4, Att. A); FERC Docket No. ER05-1235-000 (July 22, 2005, Filing Letter at 9).

\textsuperscript{149} Monopoly electric utility companies have mainly obtained their dominance as a result of governmental franchises, control of transmission itself (which blocks alternatives to would-be competitors), mergers and often monopoly power abuse. See, e.g., Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Gainesville Utils. Dep't v. Fla. Power Light & Co., 573 F.2d 292 (5th Cir. 1978); Fla. Power & Light Co. (St. Lucie Plant, Unit No. 2), 14 N.R.C. 116 (1981), \textit{vacated}, 15 N.R.C. 639 (1982); Consumers Power Co., 6 N.R.C. 892 (1977).
It may be argued that antitrust intervention will require a court to maintain continuing oversight of the shared ownership or operation of the transmission grid. However, *Otter Tail* shows that this need not be the case. There, the antitrust court ordered remedial access to the transmission grid while the regulatory agency oversaw its implementation. Similarly, in *Florida Municipal Power Agency v. Florida Power & Light Co.*, antitrust license condition violations were alleged, and the court referred the matter to FERC for advice before making a ruling. In the case of today's transmission grid, an antitrust court could enjoin the transmission monopolist's refusal to deal with entities looking to invest in transmission. It could require the monopolist to file a joint rate with other parties who own transmission that would contribute to an integrated grid, or who want to invest in such transmission. FERC would have regulatory oversight of the resulting arrangements. The regulatory standards applied by FERC in such a case would help ensure that the joint arrangements achieve their purpose.

It may also be argued that if FERC can regulate the arrangements once entered into, it can order such arrangements in the first instance. A short answer is that FERC has not yet ordered such relief. Furthermore, the transmission owners subject to such a regulatory challenge might well argue that FERC may only regulate arrangements entered into in the first instance by private parties, not order parties, ab initio, to do something they would not otherwise have

150 See *Trinko*, 540 U.S. at 414.

151 *Otter Tail*, 410 U.S. at 375. Similarly, in a series of antitrust cases under its statutory antitrust authority, Atomic Energy Act, § 105(c), 42 U.S.C. 2135(c), the NRC ordered monopoly companies to grant transmission access and other relief under tariffs that were to be administered by FERC. See, e.g., *Consumers Power Co.*, 6 N.R.C. 892.

152 81 F. Supp. 2d 1313 (M.D. Fla. 1999).


155 See infra note 164 and accompanying text.
done. They may seek to use influence to prevent such relief. By contrast, an antitrust court can use its considerable remedial powers to order such a filing as relief for Sherman Act violations without the obstacles confronting regulatory agencies. As shown above, where an antitrust violation exists, the antitrust court should not abdicate its obligation to remedy it.

Finally, it may be claimed that an antitrust court’s requiring joint participation in the transmission grid “compel[s] negotiation between competitors [, which] may facilitate the supreme evil of antitrust: collusion.” Here, too, implementation of the remedy by the regulator will provide a supervision mechanism that should help to prevent exclusionary conduct. Further, as suggested above, transmission monopolists, through joint operating and similar arrangements, are already acting in concert with other utilities, only they are excluding disfavored, willing market participants, clearly contrary to the antitrust laws. Even the Trinko Court views such exclusionary, concerted action as appropriate for antitrust enforcement, because it “presents greater anticompetitive

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156 See Mobile-Sierra United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 338-39 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348, 352-53, 355 (1956) (relations between parties may be set initially by voluntary contracts that are subject to subsequent regulation). We disagree, however, that FERC, had it the will, would not have had the authority to find that transmission arrangements that exclude certain market participants violate the FPA’s requirements for just and reasonable and not unduly discriminatory rates. Central Iowa Power Coop. v. FERC, 606 F.2d 1156 (D.C. Cir. 1979) (Mid-Continent Area Power Pool ordered to admit smaller public power members on nondiscriminatory basis). FERC has broad authority to remedy discriminatory and anticompetitive practices. Order No. 888, 61 Fed. Reg. at 21,560-21,570. Further, FERC has broad power to correct wrongdoing or to condition the grant of a privilege. Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967). See also Permian Basin Area Rate Cases, 390 U.S. 747, 766-67, 777-84 (1968) (FERC has broad authority to impose moratoria and other limitations on rate filings necessary to preserve rate stability).

157 See Part II.B., supra.

158 See Part II.A., supra.

159 See Trinko, 540 U.S. at 408.

concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club. In ordering expanded transmission ownership as an antitrust remedy, the antitrust court can leave to FERC implementation of the resulting arrangements.

The desirability of complementary court and agency enforcement is not limited to the electricity industry, and the concept is not a new one. The benefits of such an approach were noted years ago, as Judge J. Skelly Wright put the matter:

Despite a continuing debate, it appears that the basic goal of direct governmental regulation through administrative bodies and the goal of indirect governmental regulation in the form of antitrust law is the same—to achieve the most efficient allocation of resources possible. . . . This theory of complementary regulation appears to borne out by the Supreme Court cases holding that regulated industries must, to some degree at least, accommodate the antitrust laws.

Antitrust scholars echo this view.

Because antitrust provides central, legal principles that underlie our economy, courts have determined that "public interest," "public convenience and necessity," "just and reasonable," and similar regulatory statutory language must be deemed to incorporate references to antitrust policy. As the Supreme Court put the matter in Southern Steamship Co. v. NLRB, a non-antitrust case, "[f]requently the entire

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161 Trinko, 540 U.S. at 410 n.3.


165 316 U.S. 31, 47 (1942).
scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

Likewise, antitrust courts may certainly take into account regulatory requirements applied to particular industries in determining whether antitrust violations have occurred and assessing appropriate remedies.\(^{166}\) However, especially in view of the fact that regulatory agencies rarely, if ever, directly enforce the antitrust laws, and given the obstacles to effective agency enforcement described above, it makes little sense not to permit court remedies that are parallel and complementary to agency regulation. This is especially true when modern regulatory agencies are conducting fewer and fewer trials and are often regulating by negotiation.

The *Trinko* Court raises concerns that such dual jurisdiction can lead to duplicative proceedings and conflicting requirements and that courts cannot fashion appropriate antitrust relief in regulated industries.\(^{167}\) However, these objections are more theoretical than real. Complementary jurisdiction has not posed problems to date or, at least if it has, the Supreme Court does not cite evidence of such problems. In fact, there has been no real showing that agencies do not welcome court antitrust enforcement, which expends none of their resources and can lead to procompetitive results for which they cannot be politically blamed.\(^{168}\) We have never heard of any NRC objection to the idea that the courts can enforce NRC antitrust license conditions.\(^{169}\) By the

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166 *Trinko*, 540 U.S. at 406.

167 *Id.* at 406, 415.

168 FERC has recognized the role that antitrust enforcement has played in wholesale customers' gaining transmission access. *See Order No. 888*, 61 Fed. Reg. at 21,546 n.51.

same token, agencies can implement judicial (and other administrative) remedies.\textsuperscript{170}

Treating courts and agencies as complementary bodies permits more effective remedies than if courts and agency jurisdictions are deemed inherently separate. Regulated industries, including electricity, natural gas and oil pipelines, telecommunications and transportation, tend to be among our most important and most vulnerable to antitrust problems, if for no other reason than that historically they often have had monopoly structures, but they are now evolving toward competition. Their products and services are essential; if there were any segments of the economy where one would want strict antitrust enforcement, it is in regulated industries. \textit{Trinko} gives no reason to abandon court-enforced antitrust in such industries.

\footnote{\textit{In re Fla. Power & Light Co. (St. Lucie Plant, Unit No. 2), 41 N.R.C. 361 (1995). The NRC cited City of Holyoke Gas & Elec. Dep't v. SEC, 972 F.2d 358 (D.C. Cir. 1992), in which the SEC deferred to FERC merger jurisdiction.}}