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Working Party No. 2 on Competition and Regulation

EXCESSIVE PRICES

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The attached document is submitted to Working Party No.2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 17 October 2011.

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1. This paper responds to the Working Party No. 2 Chair's letter of 11 August 2011, inviting submissions for the Working Party's upcoming roundtable on excessive pricing. The U.S. Federal Trade Commission ("FTC") and Antitrust Division of the U.S. Department of Justice ("DOJ") (collectively, "the Agencies") are pleased to provide our perspective on this issue, and explain why U.S. antitrust law does not proscribe excessive pricing as an independent antitrust violation, although high prices may be indicative of other anticompetitive activities.

1. U.S. antitrust law does not prohibit "excessive pricing" in and of itself

2. U.S. antitrust law allows lawful monopolists, and *a fortiori* other market participants, to set their prices as high as they choose. This central tenet of U.S. antitrust law is well supported by court decisions that have held, for example, that "[a] pristine monopolist…may charge as high a rate as the market will bear"[1] and that "[a] natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of 'monopolizing' in violation of the Sherman Act…and can therefore charge any price that it wants,… for the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute."[2] The reasons that U.S. law does not deem "excessive pricing" to be an antitrust violation are examined below.

1.1. Limiting the Freedom to Set Prices Would Diminish Incentives to Compete and Innovate

3. Denying a lawful monopolist the fruits of its monopoly can diminish its incentive to compete in the first place. As Judge Learned Hand aptly put it: "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[3] The Supreme Court further elaborated on this notion in its 2004 *Trinko* decision, noting that "[t]he 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 place; it induces risk taking that produces innovation and economic growth."[4] Therefore, limiting the freedom to set prices may well conflict with the underlying premise of antitrust policy, *i.e.* promoting a robust competitive process that produces high-quality, innovative goods at low prices.

1.2. Institutional Difficulty in Determining What Constitutes An "Excessive" Price

4. An equally important reason for not condemning "excessive" pricing, as such, is institutional. U.S. courts and antitrust agencies have found that determining the reasonableness of prices charged by a lawful monopolist goes beyond their competence. This notion goes back to early U.S. antitrust jurisprudence, when then Court of Appeals Judge William Taft suggested that basing antitrust decisions on

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1 *Berkey Photo, Inc. v Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979).

2 *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), citing *National Reporting Co. v. Alderson Reporting Co.,* 763 F.2d 1020, 1023-24 (8th Cir. 1985); *U.S. v. Aluminum Co. of America,* 148 F.2d 416, 430 (2d Cir. 1945)*; Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc.,* 784 F.2d at 1325, 1339 (7th Cir. 1986); *Berkey Photo*, 603 F.2d at 296-98.

3 *Aluminum Co. of America*, 148 F.2d at 430 ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although the result may expose the public to the evils of monopoly, the [Sherman] Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.").

4 *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

the reasonableness of the prices charged by an alleged monopolist or cartel would be to "set sail on a sea of doubt."[5] A more recent rejection of the proposition that courts construing competition laws are not sufficiently equipped to determine what constitutes a "fair" or "excessive" price, can be found in the Supreme Court's 2009 decision in *Pacific Bell Telephone Co. dba AT&T v. linkLine Communications, Inc.*[6] In that case, which involved what is called a "price-cost squeeze," the plaintiffs offered high-speed DSL Internet service. The U.S. Federal Communications Commission's regulations required AT&T to provide interconnection service to competing DSL providers, such as linkLine. Plaintiffs alleged that AT&T squeezed their profit margins by charging a high wholesale price for DSL transport and a low retail price for DSL service.

5. Earlier lower court cases suggested that a vertically integrated monopolist, such as AT&T, should be required to leave a "fair" or "adequate" margin between the wholesale price and the retail price, and that failure to do so could be viewed as illegal exclusionary conduct.[7] Dismissing the price squeeze claims, the *Pacific Bell* Court, quoting an earlier opinion by Justice Breyer, asked rhetorically:

> *"[H]ow is a judge or jury to determine a 'fair price?' Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition 'would have set' were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit,' no matter how inefficient they may be? . . . And how should the court respond when costs or demands change over time, as they inevitably will?"*[8]

6. Antitrust agency officials have similarly expressed skepticism as to their agencies' ability to determine which prices constitute "excessive prices." For example, former FTC General Counsel, William Blumenthal, has noted that:

> *"[I]n cautioning against even limited intervention by competition agencies against high prices, I am focusing…principally on considerations of institutional design…. Simply put, we need to question whether competition agencies have the competence to engage in classical price-and-profits public-utility-style regulation."*[9]

7. The difficulty in determining what price constitutes an "excessive" price means that it is inherently difficult to set up an accurate "excessive pricing" antitrust enforcement standard that will guide agencies both as to when to intervene and, if intervening, how to set up a remedy for that price.[10]

5 *United States v. Addyston Pipe & Steel Co.,* 85 F. 271, 283-284 (6th Cir. 1898) *("It is true that there are some cases in which the courts, mistaking...the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt....").*

6 *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009), 129 S. Ct. 1109 (2009).

7 *Pacific Bell*, 129 S. Ct. at 1121, citing See *Town of Concord, Town of Concord v. Boston Edison Co*., 915 F.2d 17, 23-25 (1st Cir. 1990); and *United States v. Aluminum Co. of America,* 148 F.2d at, 437-438.

8 *Pacific Bell* 129 S. Ct. at 1121, quoting *Town of Concord v. Boston Edison Co*., 915 F.2d at 25.

9 William Blumenthal, FTC General Counsel, DISCUSSANT COMMENTS ON EXPLOITATIVE ABUSES UNDER ARTICLE 82 EC, Remarks before the European University Institute Twelfth Annual Competition Law and Policy Workshop: "A Reformed Approach to Article 82 EC" (June 9, 2007), *available at* http://www.ftc.gov/speeches/blumenthal/070731florence.pdf.

10 See further treatment of the remedies issues below in ¶ 9.

1.3. Interfering With Market Pricing Mechanisms Interferes with the Proper Functioning of Markets to the Detriment of Consumers

8. A third rationale for not intervening in firms' pricing is related to the crucial role prices play in determining the allocation of scarce resources among competing uses. One common definition of economics is "the study of how societies use scarce resources to produce valuable commodities and distribute them among different people."[11] In a free market economy, prices determine these allocations in two ways. First, they serve a signaling function, demonstrating where more resources are required and where they are not. For example, rising consumer demand typically raises prices, thus signaling to suppliers to expand their production (output) to meet the growing demand. High prices also typically attract new market entry, by producers lured by the lucrative profits to be made, thus promoting output. Conversely, lower demand typically results in falling prices, signaling suppliers to reduce production or allocate resources to other uses. In other words, prices allow consumers to express their preferences, thus sending important information to producers about the changing nature of their needs and wants. Second, prices serve to **ration scarce resources** when demand exceeds supply in a market. Under such **shortage** conditions, the price of the product at stake typically rises – leaving only those who are sufficiently **willing and able to pay** for it to purchase the product. Thus, the market price acts as a **rationing device** ensuring that market demand and supply are at the same levels, and preventing shortages.

9. This market pricing mechanism promotes the most efficient allocation of resources in a free market economy, and this same efficient allocation of resources is the bedrock of antitrust policy and enforcement in the U.S., as well as other OECD member jurisdictions. "There is general consensus that the basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation of resources—and thus efficient market outcomes—in free market economies."[12] In the U.S., the concern is that proscribing "excessive pricing" may interfere with markets' price-setting mechanism, and with the important signaling and rationing functions it carries out.[13]

2. The Difficulty of Crafting an Antitrust Remedy for "Excessive Pricing"

10. If excessive pricing were an antitrust violation, the Agencies would need a procedure for determining what constitutes an "excessive" price. A similar procedure would also be necessary for crafting a remedy, which presumably would require firms to set prices that the authority would not consider excessive. The Agencies are not in a good position to determine these prices. For example, the theoretical "best" price for society in a market with competing firms balances the consumer benefits of lower prices against the need to provide firms with incentives to invest and enter the market. These prices generally depend on cost and demand factors that the Agencies cannot observe.[14] Absent evidence of collusion, there is no reason to believe that the prices that arise from the competitive process among firms

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11 Paul A. Samuelson and William D. Nordhaus, *Microeconomics* 3 (McGraw-Hill, 14th Ed. 1992).

12 See Organization for Economic Co-operation and Development, COMPETITION POLICY AND EFFICIENCY CLAIMS IN HORIZONTAL AGREEMENTS, OECD/GD (96) 65, Paris (1996), *available at* http://www.oecd.org/dataoecd/1/4/2379526.pdf.

13 See, e.g., Blumenthal, *supra* note 9, "[c]onsidered in terms of the particular market, high prices are a signal indicating that the market may currently be characterized by undersupply, and suppressing that signal will deprive the economy of warranted entry and capacity expansion."

14 Technically, the optimal prices under (potentially imperfect) competition and free entry depend on the *global properties* of the firms' cost and demand functions. The Agencies do not have access to this information

will exceed the theoretical "best" prices. Therefore, any remedial action the authority takes to lower prices could easily discourage entry and investment and harm consumers.

3. Some Higher Prices May Be Addressed as an Anti-Competitive Effect of Other Underlying Antitrust Violations, and Help the Agencies Prove These Violations

11. Although prices lawfully set by market participants, no matter how high they are, generally do not raise antitrust concerns among U.S. enforcers, high prices may be a potential result of conduct that otherwise violates the antitrust laws. In such cases, the remedy prescribed for the underlying antitrust violation typically also results in lowering the price. The U.S. approach to antitrust analysis is based on a conduct's potential to create anticompetitive effects. The most powerful evidence of such potential occurs when a price increase (not associated with a quality increase) actually comes about. Thus, although a high price charged by a law-abiding market participant does not violate U.S. antitrust law in and of itself, the existence of a high price can be an important element in proving a separate antitrust violation (for example an anticompetitive merger, or monopolistic and other exclusionary unilateral practices).[15] The following paragraphs give a few examples.

12. In the context of unilateral conduct, for example, the *Berkey* court decision notes: "[T]here can be no unfairness in preventing a monopolist that has established its dominant position by **unlawful** conduct from exercising that power in later years to extract an excessive price. After all, it is only a pristine 'origin,'…that may save a monopoly so long as it continues to refrain from anticompetitive activity from the condemnation of *§ 2* [of the Sherman Act]. The taint of an impure origin does not dissipate after four years if a monopolist continues to extract excessive prices because of it."[16]

13. In the context of an action based on the FTC's authority under Section 5 of the FTC Act,[17] that did not amount to a Sherman Act Section 2 violation, the FTC's majority statement accompanying the complaint against N-Data[18] focused on the company's reneging on its prior licensing commitment to a standard-setting body, which enabled it to increase the price of a specific Ethernet technology used by almost every American consumer owning a personal computer. The price increase was an important element in the majority opinion's characterization of N-Data's conduct as an "unfair method of competition" in violation of Section 5 of the FTC Act. The case settled through a consent agreement.[19]

14. In the merger review context, predicted anticompetitive effects such as higher prices similarly play a key role in the agencies' analysis and decision to challenge anticompetitive mergers under Section 7 of the Clayton Act.[20] For example, the FTC's objection in 1997 to a proposed merger of Staples and Office Depot was based on a "competitive problem that would lead to…higher prices," and on data

15 Setting a very high price could also theoretically amount to a refusal to deal.

16 *Berkey Photo, supra* note 1, at 296 [emphasis added], quoting *Aluminum Co. of America*, 148 F.2d at 429.

17 15 U.S.C. §45. Section 5 of the FTC Act prohibits, and gives the FTC enforcement authority against "unfair methods of competition," and "unfair or deceptive acts or practices.

18 *Available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf; dissenting statements *available at* http://www.ftc.gov/opa/2008/01/ethernet.shtm.

19 Press release announcing the consent *available at* http://www.ftc.gov/opa/2008/01/ethernet.shtm.

20 15 U.S.C. §18.

showing that "in markets where three superstores compete, prices are significantly lower than in two chain markets."[21]

4. Examples of High and Rising Prices as Potential Indicators of Anticompetitive Activities

15. While high prices are often simply a reflection of the market aggregate supply and demand curves, sustained high (or even rising) prices may serve as indicators of a possible competitive problem, especially if there does not appear to be a supply response from industry participants. Therefore sustained high prices may bring about an antitrust investigation. A few examples of where high prices have been a basis for antitrust investigations are described below. It should be noted that these investigations often do not uncover any anticompetitive activities which suggests that without these high prices, the lack of market signals could reduce economic efficiency.

4.1. The FTC Gasoline and Diesel Price Monitoring Project

16. In 2002, the FTC announced a project to monitor wholesale and retail prices of gasoline in an effort to identify possible anticompetitive activities.[22] Today, this project tracks retail gasoline and diesel prices in some 360 cities across the U.S. and wholesale prices in 20 major U.S. urban areas. The FTC's Bureau of Economics staff regularly receives and reviews data from a private oil price data collection company, as well as from the U.S. Department of Energy and other relevant information. An econometric model is used to determine whether current retail and wholesale prices each week are anomalous compared to historical data.

17. The Monitoring Project alerts FTC staff to unusual changes in gasoline and diesel prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to result from market-driven causes, staff consults with the Energy Information Administration of the Department of Energy. FTC staff also contacts the offices of the appropriate state Attorneys General to discuss the anomaly and appropriate potential actions, including the opening of an investigation.

4.2. A Pending Investigation in Light of Increases in Crude Oil and Fuel Product Prices and Profit Margins

18. On June 20, 2011, in light of recent increases in crude oil and refined petroleum product prices and profit margins, the FTC disclosed an investigation to determine whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others (1) have engaged or are engaging in practices that have lessened or may lessen competition – or have engaged or are engaging in manipulation – in the production, refining, transportation, distribution, or wholesale supply of crude oil or petroleum products; or (2) have provided false or misleading information related to the wholesale price of crude oil or petroleum products to a federal department or agency.[23] This pending investigation serves as an example of how pricing behavior may trigger an investigation of whether anticompetitive practices are involved.

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21 *See* "FTC Rejects Proposed Settlement in Staples/Office Depot Merger," Press Release, *available at* http://www.ftc.gov/opa/1997/04/stapdep.shtm; see more analysis of the price-raising effects of the proposed Staples/Office Depot merger in the Public version of the FTC's Memorandum of Points and Authorities in Support of Motions for Temporary Restraining Order and Preliminary Injunction, *available at* http://www.ftc.gov/os/1997/04/pubbrief.pdf.

22 *See* http://www.ftc.gov/ftc/oilgas/gas_price.htm.

23 *See* http://www.ftc.gov/os/2011/06/110620petroleuminvestigation.pdf.

4.3. The investigation into the spring/summer 2006 U.S. Gasoline Price Increase

19. In response to higher gasoline prices that occurred during the spring and summer of 2006, that also raised concern from Congress and the public, on April 25, 2006, President George W. Bush directed the "Department of Justice to work with the [Federal Trade] Commission and the Department of Energy to conduct inquiries into illegal manipulation or cheating related to [then-] current gasoline prices."[24] These targeted inquiries "revealed no evidence that refiners conspired to restrict supply or otherwise violated the antitrust laws" [25] finding, rather, that the "price increases were caused by a confluence of factors reflecting the normal operation of the market."[26]

5. Non-Antitrust Pricing Rules

5.1. Price Gouging and the FTC's Post-Katrina Gasoline Price Investigation

20. "Price gouging" is a term that lacks a formal definition, although the term usually refers to significant and rapid price increases, typically after some type of demand or supply shock.[27] One example of such a shock occurred in late summer 2005, when hurricanes Katrina and Rita (hereinafter referred to together as "Katrina") hit major portions of the U.S. Gulf Coast region, causing significant losses to the nation's crude oil production and refining capacity.[28] The immediate period following the hurricanes was characterized by a sharp increase in U.S. consumer fuel prices, leading the U.S. Congress to direct the FTC to investigate "whether these developments resulted from market manipulation or price gouging practices in the sale of gasoline."[29]

21. There is no Federal statute prohibiting price gouging. Twenty-nine States and the District of Columbia, however, prohibit excessive pricing of motor fuels and other commodities during periods of abnormal supply disruption (normally triggered by a declaration of emergency by the President, the governor, or local officials). These laws provide for civil penalties, criminal penalties, or both.[30] In the absence of any accepted definition of the terms "price gouging" and "price manipulation," the FTC post-Katrina Report defined "**price manipulation**" as:

> *"(1) all transactions and practices that are prohibited by the antitrust laws, including the Federal Trade Commission Act, and (2) all other transactions and practices, irrespective of their legality under the antitrust laws, that tend to increase prices relative to costs and to reduce*

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24 President George W. Bush, *Remarks to the Renewable Fuels Summit 2006* (Apr. 25, 2006), *available at* http://www.presidentialrhetoric.com/speeches/04.25.06.html.

25 Federal Trade Commission, *Report on Spring/Summer 2006 Nationwide Gasoline Price Increases*, at 3, *available at* http://www.ftc.gov/reports/gasprices06/P040101Gas06increase.pdf.

26 *Id.* at 26.

27 *Id;see* also Federal Trade Commission, *Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Prices Increases,* iii [hereinafter: FTC Post-Katrina Report] *available at* http://www.ftc.gov/ftc/oilgas/competn_reports.htm.

28 *Id.* at 62-64.

29 *Id.* at 183. The FTC's mandate was based on (1) §1809 of the Energy Policy Act of 2005, which required the Commission to "conduct an investigation to determine if the price of gasoline is being artificially manipulated by reducing refinery capacity or by any other form of market manipulation of price gouging practices;" and (2) §632 of the Commission's appropriations legislation for fiscal year 2006, in which Congress directed the Commission to investigate nationwide gasoline prices and possible price gouging in the aftermath of Hurricane Katrina. See i*d.*, at i.

30 FTC Post-Katrina Report, supra note 27 at 190.

output. Transactions and practices that violate the antitrust laws include anticompetitive mergers, acquisitions, and joint ventures, collusion among competitors to fix prices or output, and monopolization or attempts to monopolize."[31]

22. In the FTC Post-Katrina Report, Congress directed the FTC to define "**price gouging**" as:

"any finding that 'the average price of gasoline available for sale to the public in September, 2005, or thereafter . . . exceeded the average price of such gasoline in that area for the month of August, 2005, unless the Commission finds substantial evidence that the increase is substantially attributable to additional costs in connection with the production, transportation, delivery, and sale of gasoline in that area or to national or international market trends.'"[32]

23. Based on these two definitions, FTC staff examining the post-Katrina U.S. oil market found no evidence of price manipulation,[33] and a very small number of price gouging incidents, only one of which was not explained by local or regional market trends.[34]

24. On the policy level, the FTC Post-Katrina Report highlighted a number of the propositions described earlier in this note. It recognized that, while consumers might be better off in the short run if they did not have to pay higher prices for the same quantity of goods, distortions caused by controls on prices would harm their economic well-being in the long run. Such harm would result from price controls' distortion of the price signaling mechanism described earlier,[35] which in turn may lead producers to manufacture and distribute an inefficient amount of goods and services and may deny consumers the information necessary to properly value one product against another.[36] In addition, the Report noted that even in periods of severe supply shock, such as during a major reduction in production or distribution caused by natural disasters, higher prices signal consumers to conserve and producers to reconfigure operations to better prepare for the next supply shock. Thus, the right price for a commodity is not necessarily the low price; rather, it is the competitively determined market price.[37] The Report explained that keeping prices artificially low will prevent consumers from curbing their demand, while eliminating other suppliers' incentive to send new supplies to areas affected by the disasters -- an incentive that would have existed had the price increased. The result of such dynamics, explained the Report, may be long gasoline lines and shortages.[38]

25. As former FTC Chairman Deborah Platt Majoras stated before the U.S. Senate Commerce Committee:

"[A]ny price gouging statute should attempt to account for the market-clearing price. Holding prices too low for too long in the face of temporary supply problems risks distorting the price signal that ultimately will ameliorate the problem. If supply responses and the market-clearing

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31 FTC Post-Katrina Report, supra note 27, at ii-iii.

32 FTC Post-Katrina Report, supra note 27 at iii.

33 FTC Post-Katrina Report, supra note 27, at vi-viii.

34 FTC Post-Katrina Report, supra note 27 at x.

35 See ¶7 of this submission, supra.

36 FTC Post-Katrina Report, supra note 27, at 183.

37 *Id.*

38 FTC Post-Katrina Report, supra note 27, at 183.

price are not considered, wholesalers and retailers will run out of gasoline and consumers will be worse off."[39]

26. The Report also referred to the institutional difficulty of detecting "gouging," noting the challenge of distinguishing "gougers" from market players who are reacting in an economically rational manner to the temporary shortages resulting from the emergency.[40] In addition, the Report underscored that "[t]he antitrust laws are not designed to prevent prices from increasing; rather, they are designed to prevent firms from using market power to raise prices artificially."[41]

5.2. The FTC's Price Manipulation Rule

27. In August 2009, exercising authority granted to it by Congress under the Energy Independence and Security Act of 2007,[42] the Federal Trade Commission issued a rule prohibiting market manipulation -- that is, fraudulent or deceptive acts, practices, or courses of business -- in the wholesale petroleum industry.[43] The rule, which took effect on November 4, 2009, prohibits fraud or deceit in wholesale petroleum markets, as well as omissions of material information that are likely to distort petroleum markets. In presenting the new rule, FTC Chairman Jon Leibowitz said it "will allow [the FTC] to crack down on fraud and manipulation that can drive up prices at the pump," noting that the FTC "will police the oil markets – and if we find companies that are manipulating the markets, we will go after them."[44]

28. The rule prohibits any person, directly or indirectly, in connection with the purchase or sale of crude oil, gasoline, or petroleum distillates at wholesale, from a) knowingly engaging in any act, practice, or course of business – including making any untrue statement of material fact – that operates or would operate as a fraud or deceit upon any person; or b) intentionally failing to state a material fact that under the circumstances renders a statement made by such person misleading, provided that such omission distorts or is likely to distort market conditions for any such product. Violators face civil penalties of up to $1 million per violation per day, in addition to any relief available to the Commission under the FTC Act.

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39 Deborah Platt Majoras, FTC INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES, Statement before the Senate Committee on Commerce, Science and Transportation (May 23, 2006), at 24, *available at* http://www.ftc.gov/os/testimony/0510243CommissionTestimonyConcerningGasolinePrices05232006Senate.pdf.

40 FTC Post-Katrina Report, supra note 27, at 183; See also the Statement of Deborah Platt Majoras, *id.* at 23, noting that "it can be very difficult to determine the extent to which price increases are greater than 'necessary.' Our examination of the federal gasoline price gouging legislation…. and enforcement efforts indicate that the offense of price gouging is difficult to define. Moreover, throughout antitrust jurisprudence, one area into which the courts have refused to tread is the question of what constitutes a 'reasonable price.'"

41 FTC Post-Katrina Report, supra note 27, at 185.

42 Pub. L. 110-140, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ140.110.pdf.

43 The full text of the rule is *available at* http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf; an FTC staff guide for complying with the rule is *available at* http://www.ftc.gov/os/2009/11/091113mmrguide.pdf.

44 *See* Press Release, *New FTC Rule Prohibits Petroleum Market Manipulation* (August 6, 2009), *available at* http://www.ftc.gov/opa/2009/08/mmr.shtm.

6. Regulatory Price Setting

29. While U.S. antitrust law typically does not constrain the pricing behavior of unregulated firms, U.S. legislative bodies have recognized that some industries are not conducive to competition and have chosen to regulate prices in these industries through an administrative legal process.[45] For example, most states regulate the distribution of electricity and natural gas to residential homes.[46] The rationale for price regulation in these industries is that they are considered *natural monopolies*, which means that a monopolist can provide service at a lower cost than can two or more firms. For example, running two or more power lines or gas pipelines to every home would involve an unnecessary duplication in costs. In such industries, competition might not materialize even when it is permitted, leaving customers with monopoly prices. Moreover, even if some competition were possible, allowing it would lead to higher industry costs than serving the market with a monopolist. Although the regulation process itself is costly, state legislative bodies believe the benefits of regulation (lower prices and production costs) outweigh the administrative costs of regulation in these industries.

30. Historically, when legislative bodies in the U.S. have chosen regulation over competition, they have established regulatory agencies or commissions staffed with employees that develop substantial expertise in the industry. This expertise includes a deep understanding of the regulated firm's cost structure, which is important for determining the prices that encourage continued investment and provide maximum benefits to consumers. Although regulatory agencies face some of the same difficulties determining prices that antitrust authorities would face if they enforce rules prohibiting excessive pricing, regulators are in a better position to do this because of their specialized expertise.

31. U.S. experience has been that price regulation in markets that are conducive to competition, *i.e.*, not natural monopolies, has often harmed consumers. For example, the deregulation of airlines and long distance telecommunications led to lower consumer prices for both of these services. This shows that a regulator can also make mistakes – by setting prices too high or too low, or as a result of inability to adjust rapidly to changing market conditions. Therefore, for markets that are conducive to competition, there is no good reason to bear the risk of having the regulator set inefficient prices. Competition is more likely to generate efficient prices.

7. Conclusion

32. U.S. antitrust law does not recognize "excessive pricing" as an antitrust violation in and of itself, thus allowing legitimate market participants to set their prices as high as they choose. This policy choice stems from the difficulty in identifying what prices are excessive; as well as from concerns that antitrust enforcement against "excessive pricing" may chill incentives to compete and innovate in the first place, and interfere with the proper functioning of markets subject to such enforcement.

33. Market participants who otherwise violate the antitrust laws, may be subject to remedies that also affect their ability to charge supra-competitive prices. In addition, high or rapidly increasing prices often play an important role in the Agencies' antitrust investigations, to the extent they either constitute

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45 *See* generally, Michael Crew and Paul Kleindorfer, *The Economics of Public Utility Regulation, (*MIT Press, 1987).

46 *See* the web site of the Federal Regulatory Energy Commission*, available at* http://www.ferc.gov/about/ferc-does.asp; and DAFFE/CLP/WP2/WD(2000)11, *Competition in the Natural Gas Industry* (U.S. Submission to Working Party No. 2 on Competition and Regulation (2000) *available at* http://www.ftc.gov/bc/international/docs/compcomm/2000--Competition%20in%20the%20Natural%20Gas%20Industry.pdf.

anticompetitive effects of other alleged antitrust violations, or serve as potential indicators of anticompetitive practices that can lead to further an investigation.