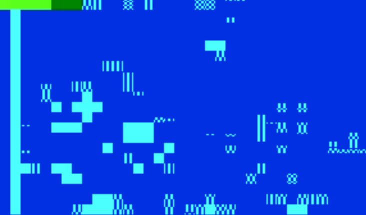

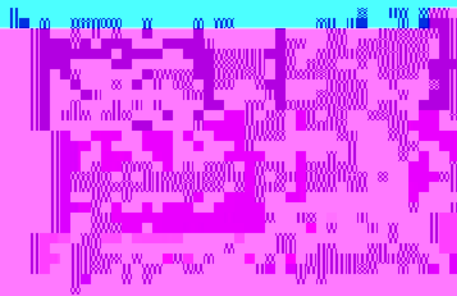

Commentary on the Horizontal Merger Guidelines

Federal Trade Commission

U.S. Department of Justice

Commentary on the Horizontal Merger

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Foreword

Mergers between competing firms, i.e., "horizontal" mergers, are a significant dynamic force in the American economy. The vast majority of mergers pose no harm to consumers, and many produce efficiencies that benefit consumers in the form of lower prices, higher quality goods or services, or investments in innovation. Efficiencies such as these enable companies to compete more effectively, both domestically and overseas.

Fourteen years ago, to describe their application of the antitrust laws to horizontal mergers, the Federal Trade Commission and the U.S. Department of Justice (collectively, the "Agencies")—the two federal Agencies responsible for U.S. antitrust law enforcement—jointly issued the 1992 Horizontal MergETBT/T1_1 1 Tf9.96 0 0 9.96 82.559y9614 Tm(Mer371.4ir7n2>BI

Introduction

Governing Legal Principles

The principal federal antitrust laws applicable to mergers are section 7 of the Clayton Act, section 1 of the Sherman Act, and section 5 of th

directories and publications, and Internet resources. For some transactions, the parties volunteer additio

Agencies ask whether the merger may increase market power by facilitating coordinated interaction among rival firms and whether the merger may enable the merged firm unilaterally to rais

1. Market Definition and Concentration

The Agencies evaluate a merger's likely competitive effects "within the context of economically significant markets—i.e., markets that could be subject to the exercise of market power." Guidelines § 1.0. The purpose of merger analysis under the Guidelines is to identify those mergers that are likely to create or enhance market power in any market. The Agencies therefore examine all plausible markets to determine whether an adverse competitive effect is likely to occur in any of them. The market definition process is not isolated from the other analytic components in the Guidelines. The Agencies do not settle on a relevant market definition before proceeding to address other issues. Rather,

brands and of key distribution assets.

***UPM–MACtac* (DOJ 2003)** UPM-Kymmene Oyj sought to acquire (from Bemis Co.) Morgan Adhesives Co. ("MACtac"). They were two of the three largest producers of paper pressure-sensitive labelstock, from which "converters" make pressure-sensitive labels. End users peel pressure-sensitive labels off a silicon-coated base material and directly apply them to items being labeled. The Department challenged the acquisition on the basis of likely anticompetitive effects in two relevant product markets. One was paper labelstock used to make pressure sensitive labels for "variable information printing" ("VIP"). Some or all of the printing on VIP labels is done by end users as the label is applied. A familiar example is the price labeling of fresh meat sold in supermarkets. Although paper labelstock for VIP labels competes with plastic film labelstock, the Department found that film labels are of sufficiently higher cost that a hypothetical monopolist of paper labelstock for VIP labels would raise price significantly. The other relevant product market was paper labelstock used for "prime" labels. Prime labels are used for product identification and are printed in advance of application. Paper labelstock for prime labels, competes not just with film labelstock, but also with pre-printed packaging and other means of product identification. Nevertheless, the Department found that a hypothetical monopolist of paper labelstock for prime labels would raise price significan

***Quest–Unilab* (FTC**

employ a broader market definition that encompasses many products or geographic areas to avoid redundancy in presentation. The Guidelines describe this practice of aggregation "as a matter of convenience." Guidelines § 1.321 n.14.

Evidentiary Sources for Market Definition

The Importance of Evidence from and about Customers

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> constitut [illegible] product market that does
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> a high sha [illegible] evant market for loose
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> successfully [illegible] he merger in federal
> district court.

In determining [illegible] hallenge a transaction, the Agenc [illegible] number of customers tha [illegible] and the number of customers th [illegible] Agencies take into acco

consumable office supplies through office supply superstores, in those metropolitan areas where Staples and Office Depot competed prior to the merger. The Commission successfully challenged the merger in federal district court.

In some cases, competitive effects analysis may eliminate the need to identify with specificity the appropriate relevant market definition, because, for example, the analysis shows that anticompetitive effects are unlikely in any plausibly defined market.

Federated–May **(FTC 2005)** Federated Department Stores, Inc. proposed to acquire The May Department Stores Co., thereby combining the two largest chains in the United States of so-called "traditional" or "conventional" department stores. [illegible] shopping malls, feature products in the mid-range of price and quality, and sell a wide range of products. The transaction would create high levels of concentration among conventional department stores in many me

stor

Thrifty–PayLess

Department found to be an entirely separate competition. Thus, the Department defined 55 relevant markets, each consisting of a sc

Integrated Analysis Takes into Account that Defined Market Boundaries Are Not Necessarily Precise or Rigid

For mergers involving relatively homogeneous products and distinct, identifiable geographic areas, with no substitute products or locations just outside the market boundaries, market definition is likely to be relatively easy and uncontroversial. The boundaries of a market are less clear-cut in merger cases that involve products or geographic areas for which substitutes exist along a continuum. The simple dichotomy of "in the market" or "out of the market" may not adequately capture the competitive interaction either of particularly close substitutes or of relatively distant substitutes.

Even when no readily apparent gap exists in the chain of substitutes, drawing a market boundary within the chain may be entirely appropriate when a hypothetical monopolist over just a segment of the chain of substitutes would raise prices significantly. Whenever the Agencies draw such a boundary, they recognize and account for the fact that an increase in prices within just that segment could cause significant sales to be lost to products or geographic areas outside the segment. Although these lost sales may be insufficient to deter a hypothetical monopolist from raising price significantly, combined with other factors, they may be sufficient to make anticompetitive effects an unlikely result of the merger.

Significance of Concentration and Market Share Statistics

Section 2 of the Guidelines explains that "market share and concentration data provide only the starting point for analyzing the competitive impact of a merger." Indeed, the Agencies do not make enforcement decisions solely on the basis of market shares and concentration, but both measures nevertheless play an important role in the analysis. A merger in an industry in which all participants have low shares—especially low shares in all plausible relevant markets—usually requires no significant investigation, because experience shows that such mergers normally pose no real threat to lessen competition substantially. For example, if the merging parties are small produsETBT/T1_0 1 Tf9.96 0

lue emphasis on market share and centration statistics—determines whether the ency will challenge a particular merger. As cussed in section 1.521 of the Guidelines, orical market shares may not reflect a firm's ure competitive significance.

Boeing–McDonnell Douglas **(FTC 1997)** The Boeing Co., the world's largest producer of large commercial aircraft with 60% of that market, proposed to acquire McDonnell Douglas Corp., which through Douglas Aircraft had a share of nearly 5% in that market. Airbus S.A.S. was

2. The Potential Adverse Competitive Effects of Mergers

Section 2 of the Guidelines identifies two broad analytical frameworks for assessing whether a merger between rival firms may substantially lessen competition: "coordinated interaction" and "unilateral effects." A horizontal merger is likely to lessen competition substantially through coordinated interaction if it creates a likelihood that, after the merger, competitors would coordinate their pricing or other competitive actions, or would coordinate them more completely or successfully than before the merger. A merger is likely to lessen competition substantially through unilateral effects if it creates a likelihood that the merged firm, without any coordination with non-merging rivals, would raise its price or otherwise exercise market power to a greater degree than before the merger.

anticompetitive merger between sellers would harm at least some buyers. Most markets with large buyers also have other buyers against which market power can be exercised even if some large buyers could protect themselves. Moreover, even very large buyers may be unable to thwart the exercise of market power.

Although they generally focus on the likely effects of proposed mergers on prices paid by consumers, the Agencies also evaluate the effects of mergers in other dimensions of competition. The Agencies may find that a proposed merger would be likely to cause significant anticompetitive effects with respect to innovation or some other form of non-price rivalry. Such effects may occur in addition to, or instead of, price effects.

The sections that follow address in greater detail the Agencies' application of the Guidelines' coordinated interaction and unilateral effects frameworks.

Coordinated Interaction

A horizontal merger changes an industry's structure by removing a competitor and combining its assets with those of the acquiring firm. Such a merger may change the competitive environment l90 Tm(quiring)TjETBT/T1_0 1 Tf0.0m(e 35 08.2391 Tm(s)TjETBT/T1_0 1 Tf9.15/T63 9.96 82.5463 395.99

the more transparent are the identities of particular customers' suppliers. It may be relatively more difficult for firms to coordinate on multiple dimensions of competition in markets with complex product characteristics or terms of trade. Such complexity, however, may not affect the ability to coordinate in particular ways, such as through customer allocation. Under Guidelines analysis, likely coordination need not be perfect. To the contrary, the Agencies assess whether, for example, it is likely that coordinated interaction will be sufficiently successful following the merger to result in anticompetitive effects.

***LaFarge–Blue Circle* (FTC 2001)** A merger of LaFarge S.A. and Blue Circle Industries PLC raised coordinated interaction concerns in several relevant markets, including that for cement in the Great Lakes region. In that market, the merger would have create [illegible] with a combined market sha [illegible] and a market in [illegible] four [illegible] would [illegible] mately 90% [illegible] merger HHI wo [illegible] than 3,000, with a cha [illegible] over 1,000. Cement is wi [illegible] a homogeneous, highly [illegible] zed commodity product over [illegible] oducers compete principally [illegible] Industry practice was th [illegible] informed custome [illegible] onths before th [illegible] making prices a [illegible] ppliers relatively [illegible] nspare [illegible]

[illegible] tended [illegible] ent, [illegible] gul [illegible] elatively sma

Coordination that reduces competition and consumer welfare could be accomplished using many alternative mechanisms. Coordinated interaction can occur on one or m

nor a sufficient basis for the Agencies to determine whether successful coordination is likely following a merger. In other words, these factors are not simply put on the left or right side of a ledger and balanced against one another. Rather, the Agencies identify the specific factors relevant to

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to a settlement with the parties that required Diageo to divest its worldwide Malibu rum business to a third party.

Role of Evidence of Past Coordination

Facts showing that rivals in the relevant market have coordinated in the past are probative of whether a market is conducive to coordination. Guidelines § 2.1. Such facts are probative because they demonstrate the feasibility of coordination under past market conditions.

Pont de Nemours & Co.’s hydrogen pe

majority of doorskins, however, were produced by Masonite and by a third party that was also Premdor's only large riva

firms—MACtac, UPM's Raflatac, I

elasticities) of the industry in which the merger occurs and uses the calibrated model to predict the outcome of the competitive process after the merger. Merger simulation can be a useful tool in determining whether unilateral effects are likely to constitute a substantial lessening of competition when a particular model mentioned above fits the facts of the i

districts was entirely separate from the others, so each constituted a separate geographic market. The Department sought to enjoin the proposed merger of the two companies after finding that it threatened competition in 55 school districts in south central Kentucky and would have created a monopoly in 23 of those districts. The matter was resolved by a consent order, pursuant to which the merged firm was required to divest the dairy in Kentucky owned by Broughton.

Unilateral Effects Relating to Capacity and Output for Homogeneous Products

In markets for homogeneous products, the Agencies consider whether proposed mergers would, once consummated, likely provide the incentive to restrict capacity or output significantly and thereby drive up prices.

***Georgia-Pacific–Fort James* (DOJ 2000)** Georgia-Pacific Corp. and Fo

the merging firms need only be sufficiently close to each other (that is, have sufficiently high diversion ratios) that recapturing the portion of the lost sales indicated by the diversion ratios provides a significant incentive to raise prices. Significant unilateral effects are unlikely if the diversion ratios between pairs of products brought together by a merger are sufficiently low.

A merger may produce significant unilateral effects even though a non-merging product is the "closest" substitute for every merging product in the sense that the largest diversion ratio for every product of the merged firm is to a non-merging firm's product. The unilateral effects of a merger of differentiated consumer products are largely determined by the diversion ratios between pairs of products combined by the merger, and the diversion ratios between those products and the products of non-merging firms have at most a secondary effect.

In ascertaining the competitive relationships in mergers involving diff

competition from incumbent superpremium firms. Econometric analysis showed that the diversion ratios between the Nestle and Dreyer's superpremium brands were sufficient to make a significant unilateral price increase by the merged firm likely. The diversion ratios with Unilever's superpremium brands also were high. The analysi

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the other's most significant competitive constraint. Hence, the Department concluded that acquiring Scott's facial tissue and baby wipes businesses likely would give Kimberly-Clark an incentive to increase prices significantly for the merging brands. The Department's challenge to the proposed merger was settled by a consent decree requiring the divestiture of assets relating to facial tissue and baby wipes.

Interstate Bakeries–Continental **(DOJ 1995)**
The Department undertook significant analysis of scanner data in evaluating Interstate Bakeries Corp.'s purchase of Continental Baking Co. from Ralston Purina Co. At the time, Continental, with its Wonder brand, was the largest baker of fresh bread in the United States, and Interstate was the third-largest. The Department's investigation focused on white pan bread. White pan bread is the primary sandwich and toasting bread in the United States, and market participants viewed it as a highly differentiated product. Price differences were a clear indication of consumer preference for premium brands over supermarket private label brands; the price of the premium brands was at least twice the price of the private label products. Econometric evidence confirmed that there was only limited competitive interaction9.96 113.499 360.6037 Tm(m)TjETBT/T1680 177.57m(o Tm(f)TjETBT

Inc., a leading U.S. cosmetics company, and
Cosmair, Inc., the U.S. subsidiary of

bids and to reduce innovation. The Commission resolved the competitive concerns by requiring divestitures in the relevant markets o

paid health plans.

An auction model best

strength of a hospital's bargaining position with respect to MCOs is determined in large part by the proximity of other hospitals offering a similar or broader package of services with a similar or higher perceived quality. For example, close head-to-head competition between two hospitals allows an MCO credibly to threaten both that it will contract with, and steer its patients to, only the other. The elimination of such competition through a merger, therefore, can enable the hospitals to negotiate higher prices.

Carilion–Centra **(FTC 2005)** The Commission investigated a consummated joint venture between Carilion Health System, the largest hospital system in southwest Virginia, and Centra Health, Inc. Carilion owns and operates two large hospitals in Roanoke, Virginia, while Centra owns two hospitals in Lynchburg, Virginia. Prior to the transaction, Carilion also was the sole owner of a small community hospital located in Bedford County, halfway between Roanoke and Lynchburg, about 30 miles from each city. In connection with the joint venture transaction, Carilion sold half of its interest in Bedford to Centra, so that the two hospital systems eTf9.96 0 0 9.96 125.7587 430.4422 Tm751.63.7227 Tm(s e)TjETBT/T1_0 1 Tf9.9

that payers demanded on behalf of t

3. Entry Analysis

As explained by section 3.0 of the Guidelines, an anticompetitive merger can create "sales opportunities available to entrants," and consequently a "merger having anticompetitive effects can attract . . . entry, profitable at premerger prices, that would not have occurred" without the merger. In evaluating the competitive effects of a proposed merger, the Agencies therefore ask whether the merger would attract entry that "would be timely, likely, and suf

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legally barred, or because entrants' efforts would be stymied by the intellectual property rights of incumbents or by the unavailability of essential inputs. An anticompetitive merger also may not attract entry because entrants would suffer significant cost disadvantages in competing with incumbents. This situation can occur for a variety of reasons, but tends to be most important when entrants would be unlikely to achieve the economies of scale (i.e., reductions in average cost from operating at a higher rate of output) and scope (i.e., reductions in cost from producing several pro

advertising and distribution.

Kimberly-Clark–Scott **(DOJ 1995)**

merger was settled by a consent decree requiring divestiture of brands and related assets in the five metropolitan ar

***Precision Castparts–Wyman-Gordon* (FTC 1999)** Precision Castparts Corp. and Wyman-Gordon Co., two leading manufacturers of titanium, stainless steel, and nickel-based superalloy cast components for jet engine and airframe applications, proposed to merge. Several companies worldwide had the capability of manufacturing these types of cast parts, but customers were not likely to purchase them from companies lacking a proven, years-long track record of producing products that did not fail. The Commission concluded that entry would not be timely, likely, and sufficient to thwart anticompetitive effects from the merger. It resolved its competitive concerns in a consent order that, among other things, required divestiture of a titanium foundry and a large cast parts foundry.

The Agencies have sometimes found that sunk costs did not pose a significant entry obstacle. In such cases, expected returns justified any required investment in new productive facilities, and successful entry typically did not require the establishment of a brand or reputation for quality.

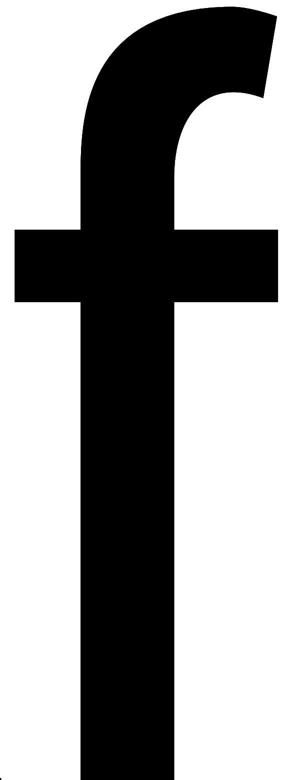
***ADS–Hancor* (FTC 2005)** The FTC closed its

found that theaters could contract directly with printers and some had done so. Finally, the Department found that prices of theater programs had not increased. Consequently, the Department took no action against the acquisition.

Although many purchasers of differentiated consumer products are reluctant to switch from brands they know and trust, purchasers of industrial commodities may be more likely to switch and be willing to sponsor entry when they perceive a lack of competition.

***National Oilwell–Varco* (DOJ 2005)** Entry considerations were a major factor in the Department's decision not to challenge the acquisition OE Tm(nt's d)T84

acquisition would not attract entry, including environmental regulation at the local, state, and federal levels that made it very difficult to open a new aggregate or silica sand production facility in the area. The Department's challenge to the merger was resolved by a consent decree requiring the divestiture of a quarry and sand



> period of many years with no assurance that a viable commercial product would result. The time required to enter the relevant markets could be further lengthened by the need to obtain U.S. Department of Agriculture approvals to sell the vaccines. Significantly, the existence of broad patents governing the manufacture of each of the relevant products enhanced the difficulty of entry. As a result, the Commission issued a complaint challenging the proposed acquisition, and ultimately reached a settlement with the parties that called for, among other things, divestiture of Solvay's intellectual property rights relating to the three vaccines.

Patents need not impose a significant obstacle to entry, even in a high-tech industry with many important patents. The Agencies may find that the requisite technology is nevertheless reasonably available, for example, because required patents could easily be licensed or invented around.

***Cinram–AOL Time Warner* (DOJ 2003)**

Cost Disadvantages of Entrants

A merger may lead to price increases but not attract entry because entrants would suffer a significant cost disadvantage r

***Healthtrust–Holy Cross* (FTC 1994)** In a merger between Healthtrust, Inc. - The Hospital

to restore the competition lost as a result of the transaction.

The Agencies' reasons for concluding that entry would not face significant obstacles also can be relevant to determining whether entry would be sufficient.

***Sherwin-Williams–Duron* (FTC 2004)** The Sherwin-Williams Co., the nation's largest manufacturer of architectural paint, proposed to acquire Duron, Inc., a leading architectural paint manufacturer in the eastern United States. The firms were head-to-head competitors in several metropolitan areas where each had a relatively large number of store

practical in the business situation faced by the merging firms will be considered in making this determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical."

The Agencies recognize that the merging parties often have information with respect both to how they plan to integrate after the merger and to the effect of the integration on the merged firm. Accordingly, the Agencies give full consideration to the parties' reasonable and well-supported explanations of merger-specific cost savings.

Any efficiency that enables the combined firm to achieve lower costs for a given quantity and quality of product than the firms likely would achieve without the proposed merger is merger-specific. For example, if a merged firm would combine the production from two small or underutilized facilities (one from each of the merging firms) at one facility that has lower costs, and if such a cost reductio1_0 1 Tf9.96 0 0 9.96 221.4423 519.cBT/T1_0 1 Tf9.96 0 0 9.96 230.5404 440 9.96 221.4423 519.cBT/

by adopting each other's "best practices" or by modernizing outdated equipment. But, in many cases, these efficiencies can be achieved without the proposed merger. The presence of other firms in the industry unilaterally adopting similar "best practices" would suggest that such cost savings are not merger-specific. By contrast, if a "best practice" is protected by intellectual property rights, then it could be the basis for a merger-specific efficiency claim.

Merging parties also may claim cost savings from combining sales and realizing economies of scale. These types of economies, however, might be realized from internal growth. If such unilatera

little more than unsupported speculation with

remaining PFs. In the case of the 15 Fine Look PFs projected to be closed, the parties provided reasonable substantiation of these cost savings derived from Fine Look cost records. Nonetheless, the parties' estimates assumed that, in each case of a closing, the remaining post-merger PFs would retain 100% of the customers of the closed PFs. The parties provided no analysis respecting how sensitive their estimates were to this key assumption.

In addition, at least some of the consolidations for which the parties claimed efficiencies were purely intra-Snazzy (i.e., closing one Snazzy PF in proximity to another Snazzy PF). Staff concluded that such consolidations would not be merger-specific. Furthermore, the claimed savings from closings of the Snazzy PFs were not substantiated from cost records, but instead were conjecture. Staff could not accept these claims.

Based on all of the claims respecting PF consolidation, staff concluded that only savings associated with the 15 Fine Look closings for which substantiation was provided were cognizable. But because no sensitivity analysis was performed regarding the assumption on the retention of customers, staff considered the estimated savings from the closing of the Fine Look PFs to be only an upper bound on the potential savings.

Second, the staff considered the corporate savings. The parties made a very rough calculation of projected savings through consolidation of various corporate functions. They contended that 75% of one party's corporate expenses would be eliminated by this consolidation. The calculation, however, was unsubstantiated conjecture rather than an analysis based on objective data that Agency staff could evaluate. Staff thus found the claim

basis for, and to substantiate claims made about, efficiency claims arising from combining distribution centers after a proposed merger.

If the parties cannot point to similar efficiencies achieved in the recent past, they should use the best information available to substantiate their efficiency claims. For example, the parties might do an internal study and analysis of expected efficiencies using recent cost records and other pertinent objective data. In addition, some parties

the claimed efficiencies were merger-specific and cognizable.

The Commission ultimately decided not to challenge the merger on the grounds that it posed no substantial threat to competition, irrespective of any efficien

slightly reduced the likely price increase from the proposed acquisition. A second source of claimed efficiencies was a quality improvement; by combining the two services, it would be possible to offer local programming in many additional metropolitan areas with the available satellite bandwidth. The Department's analysis indicated that the consumer benefits from this quality improvement were far from sufficient to prevent the merger from harming consumers and also would be realized without the merger.

Enerco–KleenBurn **(Disguised FTC Matter)**

anticompetitive effects.

Genzyme–Ilex **(FTC 2004)** Genzyme Corp. proposed to acquire Ilex Oncology, Inc. Ilex had one FDA-approved product, Campath, an oncology product used off-label in the solid organ transplant field. Genzyme did not compete with Campath in oncology but had a drug that was Campath's closest competitor in the market for solid organ transplant acute therapy drugs. The acquisition would have eliminated direct competition between Genzyme's market-leading drug, Thymoglobulin, and Campath.

The companies as

reductions in overhead, management, or administrative costs) usually accrue to firm profits.

Exceptions to this general rule, however, exist. For example, under certain market or sales circumstances, fixed-cost savings may result in lower prices in the short term. Selling prices that are determined on a "cost-plus basis" (e.g., cost-based contracts) can be influenced by changes in fixed costs. Contractual arrangements also may allow fixed-cost savings to be passed through.

The Agencies consider merger-specific, cognizable reductions in fixed costs, even if they cannot be expected to result in direct, short-term, procompetitive price effects because consumers may benefit from them over the longer term even if not immediately. As with any other type of efficiency, reductions in fixed costs must be substantiated by the parties and verified by reasonable means.

***Verizon–MCI*; *SBC–AT&T* (DOJ 2005)** In 2005 Verizon Communications, Inc. and SBC Communications, Inc., the nation's two largest regional Bell operating companies, sought to acquire MCI Inc. and AT&T Corp., the nation's two largest inter-exchange (long distance) and competitive local exchange (local service) carriers. To a significant extent, the pairs of firms proposing to merge were engaged in complementary activities. Verizon and SBC dominated local exchange and access service in their respective territories but had limited long-haul networks and only moderate success with large enterprise customers. MCI anCu4s.96 0 0 9.96 2161.2ti.96 0 0 9.96 19983.676 3.2548 Tw 9.96 0 0 9.9

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other things, the study concluded that IMC would avoid substantial costs by transporting the Western-Ag ore through its mine to its pro56 686.0397 3tETBT/T1_0 1 Tf9.96/We 0 9.96 145.305ETe2014 Tc 0.0044 Tw 9.96 0 0 9.96 86.398851.196 145.305ETe2ssting(

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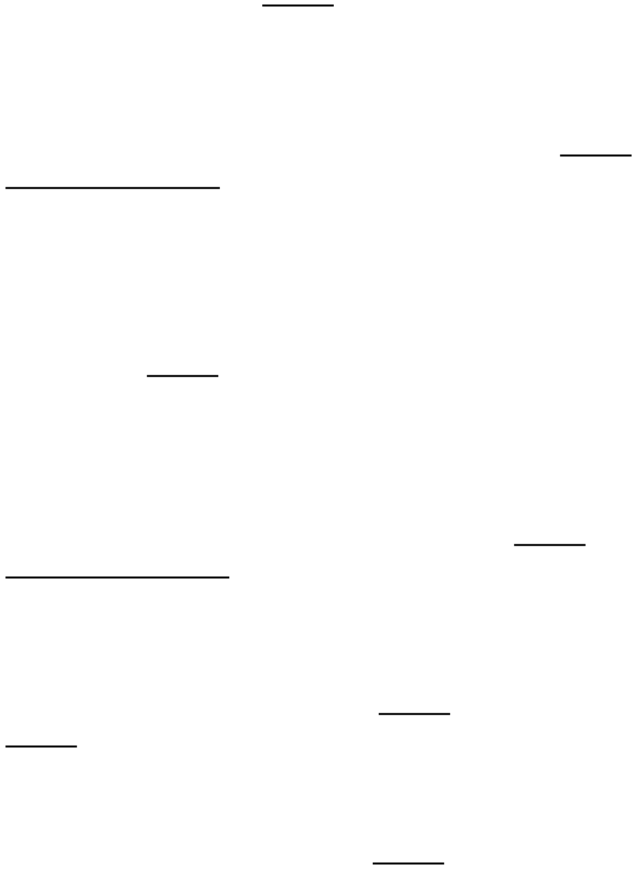

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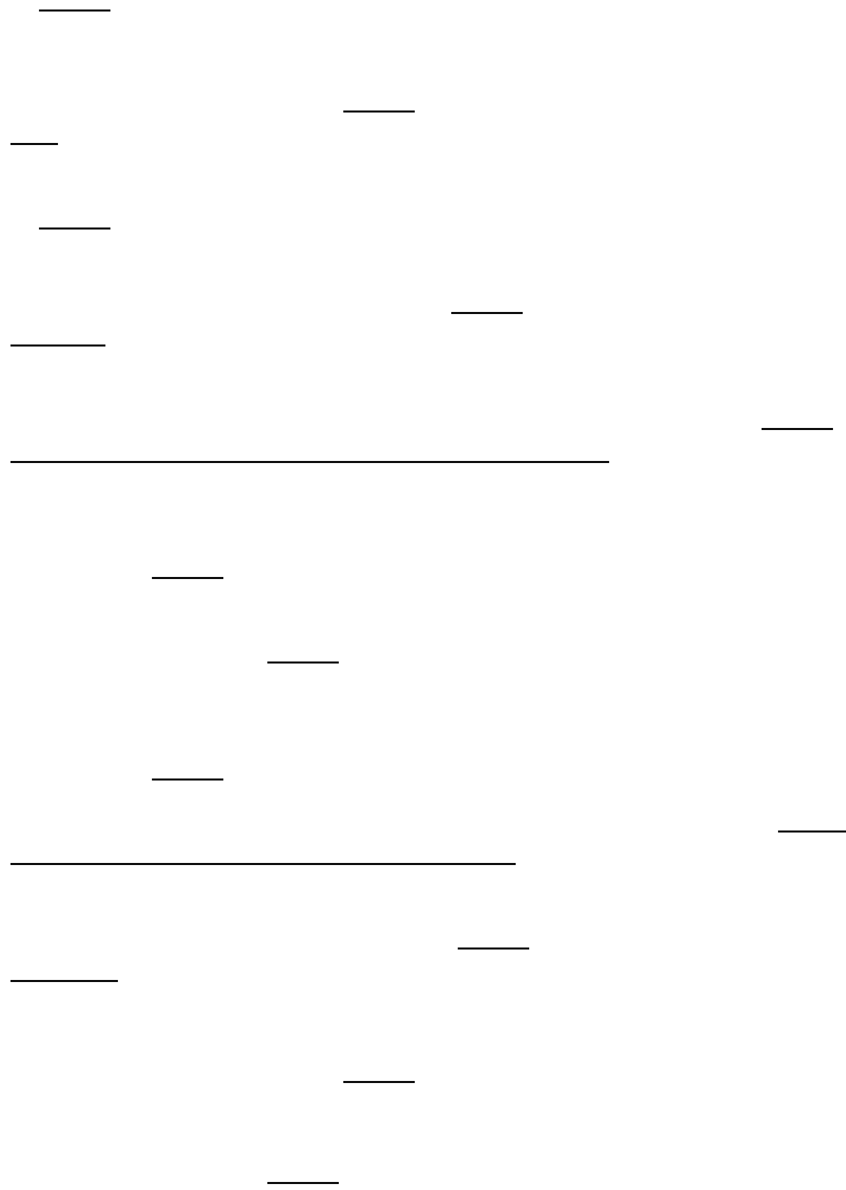

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