Antitrust Tales in the Tech Sector:
Goldilocks and the Three Mergers and
Into the Muir Woods

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Antitrust in the Technology Sector:
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I. Introduction

Good afternoon. Thank you to Steve Sunshine and the folks at Skadden and Charles River Associates for inviting me to speak about antitrust in the tech industry. Giving this speech to those of you in the heart of fabled Silicon Valley called to mind the role of fables overall, which is to entertain and instruct us. Thus, I am

II. Goldilocks and the Three Tech Mergers

Transactions combining tech firms can raise some of the most interesting and difficult issues in merger review, such as defining the relevant market in a certain way for the very first time or evaluating

when you tech savvy folks read your children Goldilocks these days, the porridge is cooked in an RF oven.

In any case, the Commission concluded that the merger of NXP and Freescale would combine two of only three competitively meaningful suppliers of RF power amplifiers. In addition, the evidence showed that NXP and Freescale were each other's closest competitor. As a result, we thought the deal was anticompetitive or, in my antitrust fairy tale, the porridge was too hot. As we explained in our Analysis to Aid Public Comment, the merger raised the prospect of significant unilateral competitive harm through both higher prices and reduced innovation, particularly in the wireless infrastructure segment.[4] Higher prices are obviously a fundamental concern in reviewing mergers of close competitors. The loss of competition to innovate and to develop better, faster, more efficient products, however, can be just as concerning – particularly in the technology area, where the essential competition often is not on price, but rather on product features.

To remedy these competitive concerns, NXP agreed to divest its RF power amplifier assets to a Commission-approved buyer, Jianguang Asset Management Co., Ltd (JAC), a Chinese private equity fund management company, whose ultimate parent entity is China's sovereign wealth fund (China Investment Corporation). Although one can imagine some concerns about a Chinese state-owned company supplying the wireless infrastructure industry, nonetheless, JAC received CFIUS approval for the acquisition,[5] and, importantly, potential

[4] NXP Analysis, supranote 2, at 3.

[5] Press Release, NXP Semiconductors N.V., NXP and JAC Capital Receive CFIUS Clearance (Nov. 24, 2015), http://investors.nxp. JXitalp..9(or)nti9O1 Td [(h1)9.4(i-2(i9O1MC 95(29Td ?EMC /c1 Td =)6.7))19p.=p.1&(a)i-2(i9d=)6.3(21170.)

ads with their photograph and contact information adjacent to properties for sale in that zip code.[8]

One of the threshold issues in the Zillow-Trulia investigation was whether the particular

increase its advertising revenue. Second, the combined firm will continue to face significant competition for consumer traffic from the remaining real estate portals, including Realtor.com, online brokerage services such as Redfin, and other online, consumer-facing real eser-

head-to-head with Steris' gamma offerings.[13] Thus, we alleged that the merging parties were potential competitors in the radiation sterilization market and their combination would likely result in a substantial lessening of competition.[14]

Our complaint alleged that Synergy's CEO determined in 2012 that the company should develop a U.S. x-ray business to differentiate itself from the other major sterilization suppliers and that the company took numerous steps over the next two years leading up to its acquisition by Steris to further that plan.[15] The Commission further alleged that Synergy's leadership continued to support the x-ray strategy after the FTC began investigating the proposed merger. It was only after the Commission began to focus on the potential competition from Synergy's x-ray entry that Synergy reversed course and took steps to abandon that entry.[16]

Thus, based in large part on apparent customer interest in x-ray as an alternative option to gamma radiation,[17] the Commission alleged that the Steris-Synergy merger would result in the termination of Synergy's x-ray entry and thus the resulting price reductions and non-price benefits that otherwise would have flowed to sterilization customers in the relevant markets.[18] All five Commissioners voted to challenge the Steris-Synergy transaction under a potential competition theory.

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[13] Complaint at 29-41, Fed. Trade Comm'n v. Steris Corp., No. 1:15-cv-

The district court hearing this case, however, took a different view of the evidence. Following three days of hearings, in which the court heard testimony from key employees of the merging parties, as well as potential x-ray customers, the court issued an order denying the Commission's motion for a preliminary injunction.[19] Although the merging parties challenged the potential competition theory underlying the FTC's case,[20] the district court assumed the

a potential competition case is to win – even assuming the validity of that theory. The outcome in that case ought to give the agency pause in pursuing potential competition cases in the future – though, to be fair, they are neither considered nor pursued very often.

My own view is that the appropriate standard for a potential competition case is "clear proof that independent entry would have occurred but for the merger or acquisition."[23] That is the standard the Commission laid out in its 1984 *B.A.T. Industries* decision and which some courts have adopted.[24] In meeting this admittedly demanding standard, as the Commission has noted, the best evidence concerning a firm's incentive to enter a market "is likely to be subjective; this is, how did the firm evaluate its independent entry prospects? Did it find them to be sufficiently attractive to warrant preparing concrete capital investment plans? Did its corporate management approve those plans?"[25] In contrast, relying solely or primarily on objective evidence – for example, evidence showing a firm was capable of entering, and that it would have been profitable for a firm to enter, a market, regardless of any steps toward entry taken by such firm – runs the serious risk of the Commission (or any other plaintiff) substituting its judgment for that of the businesspeople who must make these complex decisions.

A rigorous standard helps to overcome one of the greatest shortcomings of some earlier potential competition cases brought by the antitrust agencies: the tendency to second-guess business judgment.[26] When I voted to support the *Steris* complaint, I had reason to believe that

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[23] B.A.T. Indus., 104 F.T.C. 852, 926 (1984).

[24] *See id.* at 926-28; FTC v. Atl. Richfield Co., 549 F.2d 289, 294-95 (4th Cir. 1977). Other courts typically inquire whether the independent entry was likely or reasonably probable. *See, e.g.*, Tenneco, Inc. v. FTC, 689 F.2d 346, 352 (2d Cir. 1982) (requiring evidence that the acquiring firm "would likely" have entered the relevant market); Yamaha Motor Co. v. FTC, 657 F.2d 971, 977-79 (8th Cir. 1981) (adopting reasonable probability standard).

[25] B.A.T. Indus., 104 F.T.C. at 927.

[26] *See, e.g.*, *Atl. Richfield*, 549 F.2d at 295 (fact that firm had "strong economic incentives" to enter market insufficient to support potential competition theory); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729, 755-60 (D. Md. 1976) (fact that firm had "ample incentive to enter" insufficient).

that clear proof standard was met in that case.[27] Going forward, that is the standard I will apply to any potential competition cases recommended by staff. The potential competition theory generally and the Steris decision in particular could fill up an entire panel, but I hope I have given you a sense of this relatively novel theory and my views on how and when it ought to be applied.

And so the Goldilocks tale ends with a cautionary note, that whatever views the agency may have about the relative temperature of porridge or mergers, the federal courts are the ultimate tasters and they may have a different appetite than does the Commission.

III. Into the Muir Woods

Let me leave now turn briefly to another tale, where the narrative is less familiar and the plot anything but straightforward. I call this Into the Muir Woods.

A. The Commission's Section 5 Policy Statement

One of the most significant Commission actions from the past year implicating primarily conduct matters but also possibly mergers is the agency's issuance of a policy statement on the use of its FTC Act Section 5 authority.[28]

I have argued frequently that the Commission's Section 5 authority should be very limited in scope and reach very little beyond antitrust violations.[29] One reason is the need to avoid false positives – that is, the condemning of business conduct that is procompetitive or competitively neutral – and the resulting chilling of efficient conduct. A frequent use of our Section 5 authority is challenging invitations by one competitor to another competitor to collude.[30] Putting aside these relatively non-controversial invitation-to-collude cases, however, the Commission's standalone Section 5 cases over the past decade have been focused virtually entirely on the technology space. Those cases have included allegations of wrongdoing by N-Data, Intel, Bosch, and Google's Motorola Mobility subsidiary.[31] Thus, you companies who dwell near Muir Woods may be particularly interested in this tale.

It is in the technology space, where our application of any competition law – whether it is the Sherman Act or the FTC Act – is going to be most challenging, given the dynamic nature of competition in that area. Although I am not arguing that antitrust has no place in technology markets, with a statute as elastic as Section 5, I think the Commission ought to tread extremely lightly in that space. Otherwise, it runs a serious risk of chilling innovation in what are arguably some of the most important industries in our economy.

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[29] See, e.g., Maureen K. Ohlhausen, Section 5 of the FTC Act: Principles of Navigation, 1 ANTITRUST ENFORCEMENT 1, 17-21 (2014).

[30] We have entered into consent orders with several parties over the past two decades who we alleged attempted to, but did not in fact, fix prices, allocate markets, or something comparable. See, e.g., In re Step N Grip, LLC, FTC File No. 151-0181, Analysis to Aid Public Comment (Oct. 27, 2015), https://www.ftc.gov/system/files/documents/cases/151027stepngripanalysis.pdf.

[31] See In re Negotiated Data Solutions LLC, FTC File No. 051-0094, Complaint (Jan. 23, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/01/080122complaint.pdf; In re Intel Corp., FTC File No. 061-0247, Complaint (Dec. 16, 2009), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf; In re Robert Bosch GmbH, FTC File No. 121-0081, Complaint (Nov. 26, 2012), https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcmpt.pdf; In re Motorola Mobility LLC & Google Inc., FTC File No. 121-0120 (Jan. 3, 2013), https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolacmpt.pdf.

No policy statement can anticipate all issues or questions that are likely to arise in the enforcement of a statute. However, this statement raised many more questions than it answered. Thus, I see a lingering cloud of uncertainty for U.S. businesses about when and where the Commission will use its broad Section 5e d[np1oo(r)3(i)-2d[np12(y)10(.)]TJ -0.004 Tc 0.004 Tw[(At)-2(s)52(v

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