Date: 11/09/09

To: FTC; Horizontal Merger Guidelines Review Project

From: Robert C. Marshall, Professor of Economics, Penn State University

Leslie M. Marx, Professor of Economics, Duke University

Re: Comment

The September 22, 2009 “Questions for Public Comment” regarding the Horizontal Merger Guidelines are void of any direct queries regarding coordinated effects. Since the Arch Coal decision, it seems that the agencies have been unwilling to make a coordinated effects challenge to any proposed merger. Yet, since Arch Coal, U.S. authorities (and the European Commission) have successfully pursued many price-fixing conspiracies. In other words, the agencies remain vigorous enforcers of Section 1 of the Sherman Act, recognizing the ongoing threat to the competitive process from cartels and collusion, but somehow the agencies are unable, or currently unwilling, to map this concern to merger reviews.

It is our professional opinion that much of this stems from the emphasis in the merger guidelines on “likelihood” of post-merger coordinated interaction. The analytic tools of economics are not well suited to directly assess an increase in the probability of coordinated interaction after a merger. However, economic analysis is very well suited to directly assess the change in future potential payoffs from post-merger coordinated interaction. Since an increase in such a payoff is likely to lead to an increase in the probability of post-merger coordinated effects, the analysis can, in fact, speak to “likelihood”. Very simply, we advocate that any unilateral effects analysis that, by definition, studies the static impact on a product market from an industry going from “n” to “n-1” firms be extended to look at the coordinated effect payoffs in the post-merger industry. A large number of extensions of the unilateral effects analysis are possible, ranging from coordinated effects among a pair of firms (“n-1” to “n-2”) or larger coordinated effects (“n-1” to “n-k” where “k” post-merger firms engage in coordinated interaction). The machinery for this line of analysis is immediately available to any economist who has conducted a unilateral effects study. The analysis would only augment whatever is currently being done, would replace nothing, and could be done at relatively low cost (since it just extends analysis already conducted). The option is to continue to walk away from coordinated effects analysis as part of merger review since nothing analytically substantive is viewed as currently available. In this regard, the agencies need to be cognizant that as they abandon coordinated effects challenges to mergers they embolden firms to seek mergers where the primary motivation of those firms for merger is to engage in post-merger coordinated effects. At a minimum, if there is to be no revision to the guidelines regarding coordinated effects, that should be a conscious and deliberate decision where alternatives such as the one posed here have been weighed.