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Federal Trade Commission
Office of the Secretary, Room H-135 (Annex P)
600 Pennsylvania Avenue NW,
Washington, D.C. 20580

RE: *Project No. P092900; Horizontal Merger Guidelines Review Project*

The Horizontal Merger Guidelines have been a useful tool for companies thinking about mergers, for agency staffs reviewing mergers, and for courts deciding merger challenges. They have served their stated function of improving the predictability of DOJ and FTC merger enforcement policies. I offer the following brief comments in response to Question 15: "Should the Guidelines be updated to address more explicitly the non-price effects of mergers, especially the effects of mergers on innovation?"

The Guidelines define seller market power as "the ability profitably to maintain prices above competitive levels for a significant time." *See* Section 0.1. This focus on price effects continues throughout the Guidelines. And many times, price effects will be the competitive effects of greatest interest. But in some mergers, and in some industries, the focus on price effects may miss the real action.

The Guidelines acknowledge that there may be times when issues other than price are relevant. Footnote 6 states: "Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation." I suggest, at a minimum, that these issues be discussed in more than a footnote.

One obvious difficulty in looking at merger effects other than price is that they can be difficult or in some cases impossible to quantify. But that does not make non-price effects any less real or important. As former FTC Commissioner Leary noted, "facts cannot be ignored simply because present methods do not permit them to be described with full scientific rigor." *See* Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, 68 Antitrust L.J. 545, 556 (2000). In the same speech, Commissioner Leary went on to say that "[m]easures of output and price do not capture the total economics of consumer welfare." *Id.*

Thus, for example, innovation is considered one of the primary drivers of U.S. economic growth. Yet it is notoriously difficult to measure. *See, e.g., Innovation Measurement: Tracking the State of Innovation in the American Economy*, The Advisory Committee on Measuring Innovation in the 21st Century Economy, 2008, *available at* www.innovationmetrics.gov. Although the antitrust agencies have at times considered "innovation markets" in merger analysis, innovation is generally not a focus of merger reviews, and even when it is, it is often viewed as subsidiary to price competition. The Guidelines should be amended to give innovation a larger role, as befits its importance to the overall economy. There is a growing body of economic literature – as well as agency experience – on how competition affects innovation, and some of this work should be incorporated into the revised Guidelines.

Further, in some industries, the focus on price competition completely misses other crucial features. For example, in media markets, the antitrust analysis has often centered around price (e.g. the price paid by advertisers, the price of programming) to the exclusion of all else. Yet research has shown that mergers in media markets may have a significant anticompetitive effect on the quality of the product. Several examples of this are discussed in Maurice Stucke and my recent article, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 Connecticut Law Review (forthcoming November 2009), *available at* http://ssrn.com/abstract=1330681. In media markets, quality competition may be more important than price competition.

Media markets are a good illustration of two other points. First, there may be values at stake that are either non-economic or economic only in a broad sense. News media is important to the "marketplace of ideas" which is necessary for a healthy democracy. *See, e.g.*, Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 Antitrust L. J. 249 (2001). In the marketplace of ideas, a premium is placed on diversity of ideas. Many competing independent news and information sources may confer a greater benefit to society than a more concentrated industry structure with fewer owners. Consequently, a lower level of concentration may be appropriate for challenging mergers in the news media than in other markets.

Second, the assertion of efficiencies should be viewed with some caution in mergers involving news and information sources. As former FTC Chairman Pitofsky noted, "an occasional loss of efficiency as a result of antitrust enforcement can be tolerated and is to be expected if antitrust is to serve other legitimate values." Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1074 (1979). Consideration should be given to revising or qualifying the discussion of efficiencies in the Guidelines when other important social policy interests are at stake, as is true in mergers involving news and information sources.

Thank you for giving me the opportunity to submit these comments.

Sincerely,

Allen P. Grunes