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What to Make of Competitors' Public Comments on Mergers

by Professor Donald J. Kochan

A variety of federal agencies, including the Federal Trade Commission, the Department of Justice, the Federal Communications Commission, and the Surface Transportation Board (STB), have authority to review merger applications. When they do, the public has an opportunity to comment. These processes are grounded in the same rationale underlying commenting periods required under the Administrative Procedure Act for informal rulemaking, also known as notice-and-comment rulemaking.

As I have analyzed elsewhere,[1] there is great utility and power in providing public comment. In *George Mason Law & Economics Working Paper No.* 26-21, released last week,[2] titled "Merger Review and the Anti-Competitive Self Interest of Competitors in the Commenting Process," I add a critically important cautionary note: The motivation of competitor comments when the relevant proceeding involves a firm's permission to take some action in the market could be less than altruistic. One market participant's negative regulatory outcome could well be a positive development for another participant. Consequently, competitors have an incentive to file comments opposing permission and to cloak their comments in the mantle of the public interest.

While many of the incentives the working paper discusses have broad application, particularly salient are merger applications and the perverse incentives of competitors of merger applicants to oppose a merger. The paper focuses on the timeliest of merger reviews currently before a federal agency—STB's review of the Union Pacific and Norfolk Southern merger application.[3] The initial public comment period ends on November 18, 2026, with expected additional stages of filings and review proceeding deep into 2027. As one would expect, firms competing with those two rail carriers have filed comments.

As agencies like the STB consider the universe of comments filed, statements in a 2018 opinion from the U.S. District Court for the District of Columbia when evaluating the vertical merger of AT&T and Time Warner are instructive.[4] In that opinion, the court acknowledged that competitor comments may sometimes provide valuable industry insight but, "particularly in the context of a vertical merger case where, as here, upstream customers are downstream competitors—there is a threat that such testimony reflects self-interest rather than genuine concerns about harm to competition,"[5] and thus the court warned that "[c]aution is therefore necessary in evaluating the probative value of the proffered

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[1] *See generally* Donald J. Kochan, *The Commenting Power: Agency Accountability through Public Participation*, 70 Oklahoma L. Rev. 601 (2018).

[2] Donald J. Kochan, *Merger Review and the Anti-Competitive Self Interest of Competitors in the Commenting Process*, George Mason Law & Economics Research Paper No. 26-21 (Nov. 12, 2026).

[3] Before the Surface Transportation Board, Finance Docket No. 36873, *Union Pacific Corporation and Union Pacific Railroad Company —Control— Norfolk Southern Corporation and Norfolk Southern Railway Company*.

[4] *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 211-12 (D.D.C. 2018).

[5] *Id.*

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third-party competitor testimony."[6]

One former FTC chairman, James Miller, made the point directly, calling "entirely correct" the antitrust scholarship that finds "the antitrust laws can be abused for purposes of seeking special advantage."[7] There are consistent and regularly surfacing patterns of behavior where competitor "firms exploit antitrust law for competitive and strategic benefit."[8] There are many ways to accomplish "the exploitation of the antitrust laws for strategic purposes," including "discourag[ing] the entry of a rival" and "prevent[ing] a successful firm from competing vigorously."[9] Each of those maneuvers is at play when a commenter files negative comments advocating for disapproval of a merger application.

These cautionary notes flow from lessons of economics as they apply to political decision making—including public choice theory and its analysis of "rent-seeking" behavior. These academic insights counsel that we should not be surprised when incumbent competitors seek to encourage government officials to prohibit another business with whom they compete from engaging in a pro-consumer activity that could then hurt the incumbent competitor. And courts have recognized these incentives in the merger space.[10] Consequently, such market manipulations should not only be discouraged but should also lead regulators to ignore or severely discount the credibility of any comments submitted by a competitor in a merger review proceeding.[11]

In opposing a merger application, for example, existing competitors will seek to conscript government regulators into denying an application of proposed merging entities. As Baumol and Ordover warn, "There is a specter that haunts our antitrust institutions. Its threat is that, far from serving as the bulwark of competition, these institutions will become the most powerful instrument in the hands of those who wish to subvert it."[12] When rivals fear that a newly merged entity might improve its market position to the benefit of consumers after the merger, making it harder for the incumbent rivals to compete without upping their game, it is rational for them to try to block the merger.[13]

When does a self-interested competitor worry about a merger? The incentive to complain and to seek to block the merger happens when competitors are worried that the merger will be pro-consumer, bringing down prices in the market or creating innovations and efficiencies that put pressure on the competitors to do the same. A competitor, quite logically, wants to avoid its own costs of doing business from going up and wants to prevent its competitors from improving. It is in their self-interest to reduce or avoid altogether that kind of pressure on its own bottom line.

Worse yet, it is very hard to see how most competitor firms' statements that a merger is anti-competitive could be genuine. Why? Because if such claims are true, the incumbent competitors would *benefit* from such anti-competitive effects on the market in which they operate too. In other words, it would be against their self-interest to call out truly anti-competitive behavior. If a merged

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[6] *Id.*

[7] James C. Miller, *Comments on Baumol and Ordover*, 28 J. L. & Econ. 267, 267 (1985).

[8] *Id.*

[9] *Id.*

[10] *See, e.g., Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours & Co.*, 826 F.2d 1235, 1239 (3d Cir. 1987) ("[c]ourts have carefully scrutinized enforcement efforts by competitors because their interests are not necessarily congruent with the consumer's stake in competition. Mergers that promote efficiency and lower prices in the marketplace, for example, may cause economic loss to competitors.").

[11] *See* Thomas Giebe & Miyu Lee, *Competitors in Merger Control: Shall They Be Merely Heard or Also Listened To?*, 49 Eur. J.L. & Econ. 431 (2020) (explaining why competitor interests in profit and not in consumer welfare call for ignoring most inputs received).

[12] William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J. L. & Econ. 247, 247 (1985).

[13] *Id.* at 247.

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entity can charge actually engage in anti-competitive behavior and higher prices to the detriment of consumers, then the incumbent competitor firms can also raise their prices and ride the coattails of the anti-competitive positioning, if any, of the merged entity.[14] Because that is the case, it would be odd for a competitor to complain that a merged entity can raise prices above competitive levels. Thus, if a competitor says that a merger is anticompetitive, we should believe the opposite. They will only say a merger is anti-competitive as a strategic lie when they know the merger is competitive and thus a threat to the incumbent's position. That is the paradox of competitor commenting.

My *George Mason Law & Economics Working Paper No.* 26-21 dives deeper into the scholarly literature and makes new extensions of it into the merger commenting space. The more extensive work explains that competitors feel threatened by mergers and therefore have a self-preservation interest in blocking mergers that improve competition and enhance consumer welfare. If competitors are opposing a merger, it is likely pro-competition, pro-innovation, and pro-consumer. Competitors see mergers as a threat to their current market position and as a cost to them because they will have to work harder to compete. And, if mergers were anti-competitive, non-merging competitors could ride the coattails of the rising prices. Thus, you would expect competitors to support anti-competitive mergers and oppose pro-competitive ones. So, when you see competitor opposition, it should be treated as a signal the merger is good public policy.

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The paper summarized here can be downloaded for free at the Social Science Research Network here: Donald J. Kochan, *Merger Review and the Anti-Competitive Self Interest of Competitors in the Commenting Process*, George Mason Law & Economics Research Paper No. 26-21 (Nov. 12, 2026), available on SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7696678.

[14] *See* David Scheffman, *Sources of Information and Evidence in Merger Investigations* (June 14, 2002) (remarks at Mergers and Acquisitions: Getting Your Deal Through in the New Antitrust Climate) (explaining why incumbent firms may favor anticompetitive mergers).

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