PUBLIC

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
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In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

DOCKET NO. 9374

COMPLAINT COUNSEL'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DECISION DISMISSING RESPONDENT'S FOURTH AFFIRMATIVE DEFENSE

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Dated: June 11, 2018

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INTRODUCTION

The Complaint in this case alleges that the Louisiana Real Estate Appraisers Board ("LREAB" or "Respondent") unreasonably restrained price competition among licensed appraisers by adopting and enforcing Rule 31101. Complaint Counsel has moved for partial summary decision dismissing Respondent's Fourth Affirmative Defense (referred to as "good faith regulatory compliance" or simply "regulatory compliance"). Complaint Counsel submits this supplemental memorandum to address the questions posed in the Federal Trade Commission's Order dated April 24, 2018. These responses confirm the thesis of Complaint Counsel's pending motion: That the regulatory compliance defense is categorically inapplicable to the antitrust claim asserted in this lawsuit.

Viewed in their entirety, these responses also address a larger question: Does the regulatory compliance defense have *any* significance outside of the context of 1980s-era antitrust cases addressing the interconnection of third-party equipment to the AT&T telephone network? As discussed below, the regulatory compliance defense developed in a period when a monopolist's duty to deal was broader, and the implied immunity defense was narrower, than under current law. Due to developments in antitrust jurisprudence since the 1980s, the regulatory compliance defense has largely lost its function.

1. How do the elements of the regulatory compliance defense differ from those applicable to implied immunity from the antitrust laws?

Answer: Implied antitrust immunity and the regulatory compliance defense have distinct requirements. The doctrines overlap in the following sense: Both defenses require the defendant to show that antitrust enforcement and the relevant federal regulatory regime, if both applicable, would impose upon the defendant conflicting standards of conduct (a "statutory conflict").

Absent a statutory conflict, neither defense excuses a firm that operates in a regulated industry from complying with the antitrust laws.

Discussion: The implied immunity doctrine addresses the impact of industry-specific regulation on antitrust enforcement. The good faith regulatory compliance defense is a seldom-invoked offshoot of implied immunity. The impetus for the development by courts of the regulatory compliance defense was a perceived problem in the way that implied immunity played out in the 1980s telecommunications cases.

(a) The Fundamentals of Implied Immunity[1]

The crux of the implied immunity defense is that, with regard to the challenged conduct, Congress intended a partial repeal of the antitrust laws. *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 389 (1981). Courts will find implied immunity (also referred to as implied repeal) only where there is a plain repugnancy or clear incompatibility between a regulatory statute and antitrust enforcement. *Credit Suisse Securities (USA) v. Billing*, 551 U.S. 264, 271–72 (2007) ("*Billing*").

In general, conduct that is specifically compelled by a federal agency acting within its jurisdiction is deemed immune from antitrust liability. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 243a2 (2018 Cum. Supp.) ("Hovenkamp"); *see, e.g.*, *Horisons Unlimited v. Santa Cruz-Monterey- Merced Managed Med. Care Comm'n*, No. 1:14-CV-00123-LJO-MJS, 2014 U.S. Dist. LEXIS 93330 (E.D. Cal. July 1, 2014). "But the case for immunity is weaker when the agency merely approves conduct without requiring it, and weaker still when the

[1] Note that LREAB has expressly disavowed any reliance on the implied immunity defense. Memorandum of Respondent Louisiana Real Estate Appraisers Board in Opposition to Complaint Counsel's Motion for Partial Summary Decision On Respondent's Fourth Affirmative Defense, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, at 1–2 (Feb. 26, 2018) ("Resp. Br.").

agency fails to object to private conduct, thereby acquiescing in it. It is weakest of all when private conduct is surreptitious and not even presented to the agency." Hovenkamp ¶ 243a2.

Where Congress includes in a regulatory statute an express instruction that antitrust claims are preserved, a judicial finding of implied immunity is precluded. *Verizon Communications Inc. v. Trinko*, 540 U.S. 398, 406–07 (2004) ("*Trinko*"). The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), upon which LREAB relies, contains an express antitrust savings clause, and so implied immunity is inapplicable here. *Cf. In re Interest Rate Swaps Antitrust Litig*., 261 F. Supp.3d 430, 498 (S.D.N.Y. 2017) (Dodd-Frank antitrust savings clause preserves plaintiffs' Sherman Act claim); *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476, 2014 U.S. Dist. LEXIS 123784, at *46 (S.D.N.Y Sept. 4, 2014) (same).

Courts have not embraced a single standard, relevant in all contexts, for applying the implied immunity defense. As the leading antitrust treatise explains: "The implied immunity cases resist definitive harmonization . . . . To some extent, the inconsistent *sui generis* approach taken in the decisions reflects the uniqueness of each separate regulatory statute or occasionally the unique facts of each regulated market." Hovenkamp ¶ 243c.[2] Below we discuss the requirements for implied immunity in the telecommunications industry (circa 1980) and in the securities industry.

(b) Implied Immunity in the 1980s Telecommunications Industry

The implied immunity standard applied in the 1980s telecommunications cases was narrower than the standard employed today. For purposes of discussion, we will focus on the

[2] *Accord Phonetele, Inc. v. American Tel. & Tel. Co*., 664 F.2d 716, 727 (9th Cir. 1981) ("*Phonetele I*") ("[W]e must recognize that there is no simplistic and mechanically universal doctrine of implied immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved . . . . [T]he uncritical transfer of abstract characterizations about the implied immunity of one industry to the different circumstances of another industry is not a reliable method of analysis.").

Phonetele litigation, one of the leading telecom cases from that era. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716 (9th Cir. 1981) ("*Phonetele I*"), *subsequently appealed*, 889 F.2d 224 (9th Cir. 1989) ("*Phonetele II*"). This description of the *Phonetele* litigation will be relevant to all five of the Commission's questions.

Plaintiff Phonetele manufactured a device that connected to a telephone and prevented the user from placing calls beyond a predetermined area. In 1968, the Federal Communications Commission issued its *Carterphone* decision: the FCC required AT&T to develop standards to permit the interconnection of ancillary equipment to the telephone system, except where the interconnection would adversely affect the safety, reliability, and efficiency of the network. *Phonetele I* at 732 (citing *In re Use of the Carterfone Device in Message Toll Telephone Service,* 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968)).

Importantly, the electrical interconnection of ancillary devices posed technical problems of "considerable complexity."*Phonetele II*, 889 F.2d at 226. However, the FCC "offered [AT&T] no specific guidance" as to how to comply with its directive. *Phonetele I*, 664 F.2d at 724. In late 1968, AT&T filed tariffs with the FCC providing for the direct electrical connection of customer-provided equipment to the telephone but only with a protective connecting device supplied by AT&T. *Id*. The FCC allowed AT&T's tariffs to go into effect, but declined to approve them expressly. *Id*. Instead, the agency "embarked on an extensive" seven-year investigation of the interconnection issue. *Id*. at 725. The principal question in this inquiry was whether to require connecting devices (the option selected by AT&T), or instead to develop and police certification standards for attachments. In 1975, the FCC developed a certification system, and Phonetele registered its device under this program. *Id.*

Phonetele's antitrust suit alleged that, between 1968 and 1975, AT&T's requirement that third-party equipment employ a connecting device impeded Phonetele's entry into the market. AT&T's first line of defense was to claim implied immunity. The Ninth Circuit explained that "[a] regulatory mandate sufficient to confer implied antitrust immunity may in some cases exist in the presence of the following three elements":

> (1) explicit Congressional approval of the ultimate anticompetitive effect of the challenged conduct;
>
> (2) explicit authorization by Congress to an agency or private entity to order the challenged anticompetitive conduct; and
>
> (3) no inconsistency between the challenged conduct and an express policy of the governing agency.

Id. at 731–32.

The court disallowed the implied immunity defense because, after long regulatory delay, the FCC had disapproved AT&T's interconnection policy. This agency action showed that there was no conflict between the antitrust laws and the regulatory regime. *Id*. at 732. According to the Ninth Circuit: "Conduct is exempt from the antitrust laws only when the regulated entity is *required* to pursue a particular course of action" in order to comply with a "specific mandate of the regulatory statute." *Id.* at 735 (emphasis added).

In sum, under the then-existing implied immunity doctrine, AT&T was required to comply with an FCC directive concerning interconnection, and to disregard the conflicting antitrust standard. The program developed by AT&T addressed complex technical issues in a reasonable manner. But because AT&T ultimately failed to anticipate the FCC's preferred solution to the interconnection problem, the company forfeited the implied immunity defense and was now potentially liable for antitrust sanctions. The Ninth Circuit viewed this as an

inequitable outcome, and (as discussed next) developed for AT&T an alternative antitrust defense that would take into account its good faith effort to comply with FCC regulations.

(c) Good Faith Regulatory Compliance Defense in the 1980s Telecommunications Industry

As described above, *Phonetele* and related telecommunications cases created a significant antitrust problem for AT&T due to a narrow reading of the implied immunity defense. *Id.* at 733–35; *see also Southern Pacific Commc'ns v. AT&T*, 740 F.2d 980, 999 (D.C. Cir. 1984) (rejecting AT&T's implied immunity defense). However, these courts ameliorated this problem by developing a new defense.

The good faith regulatory compliance defense offers a degree of protection from antitrust liability where a common carrier engages in anticompetitive conduct that it reasonably believes is required in order to comply with a conflicting federal regulatory statute. This defense applies only where multiple conditions are satisfied, including:

(1) the defendant is a regulated entity;

(2) antitrust law and the federal regulatory statute, if both applicable, would impose upon the defendant conflicting standards of conduct;

(3) the defendant had an objectively reasonable basis to conclude that its challenged conduct was required by the regulatory statute (note: this is a factual justification and excludes reliance on any mistake of law);

(4) the defendant also had a good faith subjective belief that its challenged conduct was required by the regulatory statute; and

(5) a federal agency has the authority to review and, if appropriate, to correct the defendant's performance of its obligations.

See Southern Pacific, 740 F.2d at 1009–10; *Phonetele I*, 664 F.2d at 737–38.

In *Phonetele II*, AT&T defeated antitrust liability by satisfying the requirements of the regulatory compliance defense. 889 F.2d at 229–31. Even though the FCC ultimately

disapproved AT&T's interconnection program, AT&T showed, *inter alia*, that it had a reasonable basis to conclude that the interconnection policies challenged in the antitrust action were necessary to protect its equipment and to avoid the disruption of signal transmissions, as required by federal communications law. *Id.* at 225–26, 229–30.

(d) Implied Immunity in the Securities Industry

Several Supreme Court cases address the implied immunity doctrine in the context of the securities industry, including most recently *Billing*. In *Billing*, plaintiffs alleged that the defendant underwriting firms conspired to fix the terms and conditions of sale for initial public offerings (IPOs). *Billing*, 551 U.S. at 269–71. The underwriting firms argued that securities law implicitly precluded application of the antitrust law to this conduct, and the Court upheld this defense. *Id.* at 270. The Court identified four factors as critical to finding "sufficient incompatibility" between antitrust and securities regulation to warrant a finding of implied immunity:

(1) that the responsible regulatory authority (in this case, the Securities and Exchange Commission) has clear and adequate statutory authority to supervise the activities in question;

(2) the existence of active and ongoing agency regulation;

(3) a resulting risk that the securities and antitrust laws, if both applicable, "would produce conflicting guidance, requirements, duties, privileges, or standards of conduct"; and

(4) this possible conflict affects "practices that lie squarely within an area of financial market activity that the securities law seeks to regulate."

Id. at 275–76.

The Securities and Exchange Commission had previously disapproved the IPO sales practices challenged in this lawsuit. The Supreme Court held that federal agency disapproval of the defendants' challenged conduct did *not* establish the absence of a statutory conflict (factor

three), or otherwise preclude a finding of implied immunity. *Id.* at 279–82. The Court explained that to hinge antitrust liability on the federal agency's decision would chill lawful conduct. *Id.* at 282 (antitrust exposure would force private actors to avoid "not simply conduct that the securities law forbids . . . , but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuits and the risk of treble damages)").

Recall that in *Phonetele I*, the Ninth Circuit concluded that the FCC's disapproval of the AT&T tariffs necessarily precluded implied immunity. On this issue, *Billing* may be viewed as overruling *Phonetele I*. *Billing* therefore expands the reach of the implied immunity defense, and calls into question the need for and validity of a separate regulatory compliance defense.

2. What are the consequences of successful application of the regulatory compliance defense? Does successful invocation of the defense universally bar antitrust liability or can it represent a factor to be considered as part of a rule of reason inquiry?

Answer: Successful invocation of the regulatory compliance defense would likely require a finding of no antitrust liability and dismissal of the Complaint. On the other hand, if this affirmative defense fails, the terms of industry regulation may still be relevant to the Commission's analysis of competitive effects under the rule of reason.[3]

The Commission should dismiss LREAB's Fourth Affirmative Defense because the requirements of the regulatory compliance defense are not satisfied. *See infra* response to Question 3. For purposes of resolving the present motion, the Commission need not decide whether or how Dodd-Frank affects competition among appraisers.

Discussion: Good faith regulatory compliance is an affirmative defense to certain antitrust claims. *Phonetele II*, 889 F.2d at 225, 229. This means that even if a plaintiff proves all of the elements of its antitrust claim, certain additional facts (if adduced by the defendant) would

[3] The following discussion assumes *arguendo* application of a rule of reason (as opposed to per se) analysis.

be sufficient to defeat liability. *See E.E.O.C. v. Mach Min.*, 738 F.3d 171, 184 (7th Cir. 2013); 5 Wright & Miller, Federal Practice and Procedure § 1271, at 585 (3d ed. 2004). Courts have not considered whether there are any exceptions to the regulatory compliance defense (akin to the sham exception to the *Noerr-Pennington* defense). *Cf. Professional Real Estate Investors v. Columbia Pictures Industries*, 508 U.S. 49 (1993) (discussing sham exception).[4]

Where the regulatory compliance defense is inapplicable or fails, the existence of regulation and/or the defendant's regulatory compliance may still be a factor relevant to a rule of reason inquiry – but only in a specific and limited way. A rule of reason inquiry is a consideration of the effect of challenged conduct upon the competitive process. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 691–92 (1978). The relevant question is: Does the challenged conduct tend to benefit consumers and competition, or does the conduct tend to harm consumers and competition? *See California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 781 (1999); *NSPE*, 435 U.S. at 691. Government regulation is a "fact of market life," and as such may be relevant to this competitive analysis.

> [For regulated industries] [p]ertinent Supreme Court decisions require that a line be drawn with painstaking care between exempt and nonexempt activity. If an activity is nonexempt, the antitrust laws apply with undiminished force, whether or not the activity is regulated . . . .
>
> This is not to say that the nature and extent of regulation is, in the absence of an exemption, irrelevant from a factual perspective. The impact of regulation on pricing and other competitive factors is too obvious to be ignored. In the absence of an exemption claim, the fact of regulation is significant, not because it embodies a doctrinal scheme different from the antitrust law; the sole legal perspective is that afforded by the antitrust law. Rather, the impact of regulation must be assessed simply as another fact of market life.

[4] For example, courts have not considered whether the regulatory compliance defense is inapplicable to a claim brought by the Federal Trade Commission seeking only injunctive relief. *Cf.* Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 Mich. L. Rev. 365 (2016) (arguing that the scope of the state action defense is narrower as applied to a claim brought under the FTC Act as compared to a private claim brought under the Sherman Act). Also courts have not considered whether the regulatory compliance defense is inapplicable where the relevant regulatory statute contains an express antitrust savings provision. *Cf. Trinko*, 540 U.S. at 406–07 (antitrust savings clause precludes implied immunity defense).

IT&T v. General Telephone & Electronics Corp., 518 F.2d 913, 935–36 (9th Cir. 1075). For example, in *McWane*, government regulation requiring the use of domestically-produced pipe fittings for certain waterworks projects was relevant to defining the contours of the relevant market. *McWane, Inc. v. F.T.C.*, 783 F.3d 814, 829 (11th Cir. 2015). *See also Compact v. Metro. Gov't of Nashville v. Davidson County, Tn*., 594 F. Supp. 1567, 1571–72 (M.D. Tenn. 1984) (regulation a factor in defining market). In *In re N.C. State Bd. of Dental Exam'rs*, Docket No. 9343, 152 F.T.C. 640 (Final Comm'n Op. and Order, Dec. 2, 2011) ("*Dental Board*"), government regulation requiring a license in order to provide dental services was relevant to evaluating the market power of the respondent, the state regulatory board responsible for issuing such licenses.

Except insofar as it relates to the analysis of competitive conditions, a defendant's claim that it complied with government regulation is not relevant to a rule of reason analysis. *NSPE*, 435 U.S. at 690 (rule of reason inquiry "is confined to a consideration of impact [of challenged conduct] on competitive conditions").

3. **Do the differences between the facts in this proceeding and those in telecommunications litigation, where regulatory compliance considerations have received the most extensive treatment, suggest differences in the availability or application of a federal regulatory compliance defense?**

Answer: Yes, the present proceeding is vastly different from the 1980s telecommunications cases in terms of the relevant facts and the regulatory environment. The federal regulatory compliance defense was dispositive in certain 1980s telecommunications cases, but has no bearing on the price-fixing activity engaged in by LREAB.

Discussion: The undisputed facts and the regulatory context in which LREAB operates are set forth in Complaint Counsel's Motion. Very briefly, the most salient facts are as follows.

The Dodd-Frank Act encourages but does not require States to oversee, in limited ways, the operation of the real estate appraisal industry. Dodd-Frank does not require or contemplate that a State shall delegate this regulatory function to private market participants. Also, a State may fully participate in the Dodd-Frank program without regulating appraiser fees. Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, at 5 (Feb. 6, 2018) ("CC's Motion"). In fact, the Federal Reserve has expressly instructed States "that the marketplace should be the primary determiner" of the fees paid by AMCs to appraisers. Federal Reserve System; Interim Final Rule, 75 Fed. Reg. 66,554 (Oct. 28, 2010) (codified at 12 C.F.R. Pt. 226).

LREAB is a state agency whose members are primarily licensed real estate appraisers. CC's Motion at 6. LREAB is empowered by the Louisiana AMC Act to regulate aspects of the real estate appraisal industry in Louisiana. *Id.* In 2013, LREAB adopted Rule 31101, requiring appraisal management companies (AMCs) to pay to appraisers "customary and reasonable" fees, as that term is defined and interpreted by LREAB. *Id.* at 7. The Complaint alleges that the adoption and enforcement by LREAB of Rule 31101 is a form of price fixing, and unreasonably restrains price competition among appraisers.

The following chart identifies crucial differences between the *Phonetele* cases and the FTC's antitrust claim against LREAB (organized by the elements of the regulatory compliance defense). At least four separate elements of the regulatory compliance defense are not satisfied here: (i) LREAB is not a regulated entity; (ii) antitrust law and Dodd-Frank do not impose upon LREAB conflicting standards of conduct; (iii) one could not reasonably conclude that Dodd-Frank requires regulation of appraiser fees by market participants; and (iv) no federal agency has the authority to correct LREAB's misconduct – antitrust offers the only remedy.

Elements of Regulatory Compliance Defense	**Phonetele v. AT&T**	**In re LREAB**
The defendant is a regulated entity.	AT&T was regulated by a federal agency, the FCC, and was subject to sanctions for non-compliance with agency directives.[5]	LREAB is not regulated by federal statute, and is not regulated by a federal agency.[6]
	AT&T was required by the FCC to develop a program that provided for the interconnection of certain third-party devices to the telephone network. This program was the target of plaintiffs' antitrust claim.[7]	This case challenges LREAB's adoption and enforcement of Rule 31101 (a regime of price regulation for appraiser fees). LREAB is not required by Dodd-Frank to set a fee schedule or otherwise to regulate appraiser fees.[8]
Antitrust law and the federal regulatory statute, if both applicable, would impose upon the defendant conflicting standards of conduct.	In developing its interconnection program, AT&T was obligated to comply with a communications law standard of conduct, in lieu of a conflicting antitrust standard of conduct.[9]	LREAB is not subject to conflicting statutory standards. LREAB can readily comply with both Dodd-Frank and the antitrust laws. For example, LREAB may forbear from price regulation where there is no active supervision by the State. Alternatively, Louisiana may regulate rates directly, in lieu of delegating rate-setting authority to market participants.[10]
The defendant had an objectively reasonable basis to conclude that its challenged conduct was required by the regulatory statute (note: this is a factual justification and excludes reliance on any mistake of law).	In developing its interconnection program, and drawing on its technical expertise, AT&T reasonably concluded that requiring use of a protective device was the most reasonable, narrowly focused mechanism then available to prevent real harm to the telephone network. (AT&T committed an error of fact.)[11]	LREAB does not claim that the challenged conduct, the adoption and enforcement of Rule 31101, reflects an error of fact. Instead, LREAB asserts that it committed an error of law: it believed that federal law (and state law) required LREAB to regulate appraiser fees.

[5] *Phontele I*, 664 F.2d at 721–23.
[6] CC's Motion at 5, 17.
[7] *Phontele I*, 664 F.2d at 724, 731–33.
[8] CC's Motion at 3–5.
[9] *Phontele I*, 664 F.2d at 724, 731–33.
[10] CC's Motion at 3–5, 14–15.
[11] *Phontele II*, 889 F.2d at 229–31; *Phontele I*, 664 F.2d at 738.

The defendant had an objectively reasonable basis to conclude that its challenged conduct was required by the regulatory statute (note: this is a factual justification and excludes reliance on any mistake of law) (cont'd).	FCC offered no specific guidance to AT&T on the content of its interconnection tariffs.[12]	Federal agencies publicly advise that States are not required to participate in the Dodd-Frank program; States electing to participate are not required to set minimum appraiser fees; and competition should be the primary determiner of appraiser fees.[13]
	Technical complexity: FCC required seven years to determine that a certification program was preferable to employing a connecting device as the method for safeguarding the telephone network.[14]	LREAB and Louisiana failed to implement obvious and patently less anticompetitive alternatives to competitor price fixing: relying on competition to determine customary and reasonable appraiser fees, regulation by non-market participants, or active supervision of market participants by the state.[15]
A federal agency has the authority to review and, if appropriate, to correct the defendant's performance of its obligations.	FCC reviewed, disapproved, and modified AT&T's interconnection program.[16]	No federal agency has the authority to review or correct Rule 31101.[17]

Two additional distinguishing features of the 1980s telecommunications cases are relevant here. First, the Complaint in this case alleges that LREAB engaged in concerted conduct that restrains price competition (violating Section 1), whereas the telecom cases challenged a monopolist's refusal to deal with a rival (violating Section 2). A defense to a unilateral refusal to deal claim is not necessarily a defense to price fixing. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768–69 (1984) (concerted conduct is treated "more strictly" than is

[12] *Phontele I*, 664 F.2d at 724.
[13] CC's Motion at 3–5.
[14] *Phontele II*, 889 F.2d at 226–28.
[15] CC's Motion at 14–15.
[16] *Phontele II*, 889 F.2d at 227–28.
[17] CC's Motion at 4–5, 18–19 (discussing authority of the Appraisal Subcommittee).

unilateral conduct). The telecommunications cases may reasonably be read as endorsing the regulatory compliance defense for refusal-to-deal claims *only*. *Southern Pacific*, 740 F.2d at 1009–10 (regulatory compliance may justify AT&T's refusal to interconnect with rival); *Mid-Texas Commc'ns Systems v. AT&T*, 615 F.2d 1372, 1381 (5th Cir. 1980) (regulatory compliance may negate allegation that, in denying interconnection, AT&T acted with monopolistic purpose or intent).

Second, the Section 2 liability theories advanced in the telecom cases likely would be judged invalid today, and thus AT&T would not be required to establish an affirmative defense. In *Phonetele II*, the court "assumed . . . that AT&T's restrictions on interconnection would be an antitrust violation unless AT&T could justify the restrictions." 889 F.2d at 226. A similar assumption governed in *Mid-Texas Commc'ns Systems*, 615 F.2d at 1388. In *Southern Pacific*, AT&T's interconnection practices were challenged as a violation of its duty to share an "essential facility." 740 F.2d at 1007–08.

These Section 2 liability theories are likely inconsistent with subsequent Supreme Court cases, *Trinko*[18] and *Pacific Bell Telephone Co. v. Linkline Commc'ns*[19]:

> In *Trinko*, the Supreme Court held that a monopolist exchange carrier, Verizon, had no duty to share access to system services it owned and competitors needed to operate their business effectively. The Supreme Court explained that "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." A few years later, in *Linkline*, the Court repeated the principle. It held that another telecommunications monopolist, AT&T, had no antitrust duty to deal – let alone a duty to deal on favorable terms – in selling services to its competitors in the retail market.

Authenticom, Inc. v. CDK Global, LLC, 18 CV 864, slip op. at 34 (N.D. Ill. May 14, 2018).

[18] 540 U.S. 398 (2004).
[19] 555 U.S. 438 (2009).

To be clear, we do not contend that a monopolist's refusal to deal with a rival is always lawful. Rather, the point is that the scope of antitrust liability where a monopolist denies a rival access to its facility has been substantially narrowed in recent years. *See generally* ABA Section of Antitrust Law, *Antitrust Law Developments* at 260–69 (7th ed. 2012). The liability theories employed in the 1980s telecom cases are today highly suspect.

4. **How should the extant regulatory compliance case law be read in conjunction with more recent Supreme Court authority establishing the requirements of the state action defense? Can the two strands of case law be successfully harmonized, or are they in conflict today?**

Answer: When correctly interpreted, regulatory compliance case law and the state action defense do not conflict. The regulatory compliance defense is relevant where there is a conflict between federal antitrust law and a federal regulatory scheme. The state action defense is relevant where there is a state policy to displace competition in favor of state regulation.

On the other hand, as erroneously interpreted by LREAB, the regulatory compliance defense conflicts with the state action defense. According to LREAB, a defendant may escape antitrust liability by misconstruing state law and then acting consistent with this error. In effect, LREAB proposes to nullify the Supreme Court's two-prong test for establishing the state action exemption.

Discussion: To determine whether the anticompetitive acts of private parties are state action and exempt from antitrust liability, courts employ a two-part test. The defendant must establish first that "the challenged restraint . . . [was] clearly articulated and affirmatively expressed as state policy," and second that "the policy . . . [was] actively supervised by the State." *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). Recent Supreme Court cases clarify the application of the *Midcal* test. In *F.T.C. v. Phoebe Putney Health System*, 568 U.S. 216, 219–20 (2013), the

Supreme Court held that a State's grant of "general corporate power" to a sub-state governmental entity (including the power to make acquisitions) does not sufficiently articulate a state policy to authorize anticompetitive acquisitions. In *N.C. State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015), the Court held that for antitrust purposes a state regulatory board controlled by active market participants is a private (non-state) actor that must be actively supervised by the State.

The good faith regulatory compliance case law, properly understood, recognizes a limited antitrust defense for a defendant that is governed by a *federal* regulatory statute that conflicts with federal antitrust law. Complaint Counsel is aware of no case holding that a defendant's good faith compliance with state law gives rise to an antitrust defense (that is, gives rise to an antitrust defense that is separate from the state action doctrine).

With this foundation, Complaint Counsel's view is that the state action defense and the good faith federal regulatory compliance defense (when properly understood) are readily harmonized, and that no conflict is apparent. Where federal regulation is at issue, courts may consider the regulatory compliance defense. When state regulation is at issue, the state action defense may apply. The two defenses operate in different domains. Furthermore, we are aware of no plausible scenario in which a state agency (such as LREAB) can legitimately claim that its regulatory activity is shielded by the regulatory compliance defense. The reason is, in part, that under constitutional principles of federalism, the regulatory activity of state agencies is not directed by Congress. Therefore, a state agency cannot show that it was required to regulate in conformity with a federal statute.[20]

[20] *Murphy v. NCAA*, No. 16-476, slip op. at 14 (U.S. May 14, 2018) (the Constitution "withhold[s] from Congress the power to issue orders directly to the States"); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (federal legislation may not "commandeer[] a State's legislature or administrative apparatus for federal purposes");

The questions posed by the Commission would require a very different answer if one considers the regulatory compliance defense as construed – incorrectly – by Respondent. According to LREAB, if market participants have a good faith belief that price fixing represents "a reasonable attempt to comply with the *perceived requirements* of a regulatory scheme," then such respondents have a complete defense to antitrust liability. Resp. Br. at 18 (emphasis added). There is in LREAB's world no requirement that the State actually authorize the defendant's anticompetitive conduct (*cf. Phoebe Putney*, 568 U.S. at 227), and no requirement that the State actively supervise the defendant's anticompetitive conduct (*cf. Dental Board*, 135 S. Ct. at 1110). In this world, an ill-informed or poorly-counseled cabal of market participants may conjure for itself an antitrust exemption for conduct that does not advance Congressional policy, and also does not advance a bona fide state policy. Of course, this broadly conflicts with the legal standards and policy objectives identified by the Supreme Court in *Phoebe Putney* and in *Dental Board*.

LREAB's good-faith-alone standard also contravenes the bedrock principle that a defendant's benign intent is *not* a valid defense to an antitrust claim. *See Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 101 n. 23 (1984) ("While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nonetheless well settled that good motives will not validate an otherwise anticompetitive practice.") (citing cases). To be sure, the defendant's good faith is an element of the regulatory compliance defense, but it is not alone sufficient to defeat liability.

The conflict between LREAB's proposed defense and Supreme Court precedent is discussed further in our response to Question 5.

New York v. United States, 505 U.S. 144, 166 (1992) (Commerce Clause "does not authorize Congress to regulate state governments' regulation of interstate commerce").

5. How would a defense based on "compliance in good faith with . . . state regulation" relate to the state action and preemption doctrines?

Answer: An antitrust defense based on a private actor's good faith compliance with state regulation, if credited, would conflict with that the state action and preemption doctrines. This would undermine federal competition policy.[21]

Discussion: Antitrust preemption of state law is an application of the Supremacy Clause. *See Murphy*, No. 16-476, slip op. at 15 (U.S. May 14, 2018) ("the Supremacy Clause [directs] that federal law is the 'supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,' Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted."). A state law is preempted by federal antitrust law "if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places an irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). For example, "[a] state cannot shield private parties from the federal antitrust laws by enacting a statute saying no more than that competing grocery stores may agree to fix prices; through the Supremacy Clause, the Sherman Act would preempt such a law." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 564 (1st Cir. 1999).

The state action doctrine has been characterized as an exception or defense to preemption. *Chamber of Commerce v. City of Seattle*, No. 17-34540, slip op. at 19 n. 9 (9th Cir. May 11, 2018). A State may authorize or direct private conduct inconsistent with the Sherman Act, but only if two conditions are satisfied: the State must articulate a deliberate policy to displace competition, and the State must actively supervise the challenged conduct. *See Midcal*,

[21] Further, LREAB did not plead in its Answer a defense (separate from the state action doctrine) predicated on compliance with state (as opposed to federal) regulation. *See* Answer of Respondent to the Complaint, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, at 12 (Affirmative Defense No. 4) (June 19, 2017) ("LREAB has acted in good faith to comply with *federal* regulatory mandates.") (emphasis added).

445 U.S. at 105–06. If a State authorizes or directs private conduct but fails to provide active supervision, then the state action defense fails. *See generally F.T.C. v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992).

LREAB proposes to upend well-settled legal principles.

(a) LREAB appears to be arguing that its price-fixing activity is lawful because the state agency is "fulfilling the requirements" of Louisiana law. Resp. Br. at 1. This defense contravenes the principle that, per the Supremacy Clause, a State cannot simply authorize competitors to fix prices or otherwise violate the Sherman Act. *See Dental Board*, 135 S. Ct. at 1111 (state may not delegate unsupervised authority to market participants); *Midcal*, 445 U.S. at 105–06 (The challenged state statute "simply authorizes price setting and enforces the prices established by private parties . . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"); *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful").

(b) LREAB has cited not a single case holding that otherwise unlawful private conduct is exempt from the antitrust laws because the defendant was complying in fact (or was complying in good faith) with state law. In fact, the case law is overwhelmingly to the contrary. Where a state law authorizes private actors to engage in anticompetitive conduct, but the state fails to provide active supervision, private actors that comply with the state law are subject to antitrust liability. *See, e.g.*, *Dental Board*, 135 S. Ct. at 1110–11; *Ticor*, 504 U.S. at 633–35; *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592–93 (1976); *In re Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 489–90 (Comm'n Op., June 21, 2005) ("*Kentucky Movers*").

(c) As the Commission recognized in *Dental Board*, crediting a new antitrust defense based on good faith compliance with state regulation (without more) would severely disrupt the accommodation between federal competition policy and state law that the Supreme Court has developed under the aegis of the state action doctrine. Furthermore, whatever the merits of state law compliance as a defense in some other context, its application to the enforcement activities of state regulatory boards controlled by market participants (*i.e.*, its application in this case) would amount to overruling the Supreme Court's decision in *Dental Board*.

In *Dental Board*, a state regulatory board controlled by licensed dentists acted to exclude non-dentists from providing teeth-whitening services. The Commission rejected the dental board's state action defense. The Commission then proceeded to reject the claim (advanced again here by LREAB) that a state regulatory board's compliance with state law constitutes a valid antitrust defense. Specifically, the dental board urged the Commission to "recognize a defense, separate and apart from the state action defense, based upon a state agency's enforcement of a state statute." 152 F.T.C. at 675. As proposed, this defense would require a respondent to establish prong one of the state action doctrine (*i.e.*, that the state agency's anticompetitive actions were authorized by state law), but would dispense with the second prong of the state action defense (active supervision). The Commission disallowed this defense citing two principal reasons. First, the Commission stated, "we are aware of no authority for such a defense." *Id.* at 677. Second, the Supreme Court has already established an antitrust defense for state officials carrying out the State's regulatory program. Thus, the dental board's "'enforcement of state law defense' has the potential to seriously undermine the state action doctrine." *Id.* at 678.

Exempting LREAB from antitrust compliance on the basis of the Louisiana AMC Law, as proposed here by LREAB, is simply to overrule the Supreme Court's decision in *Dental*

Board: LREAB's proposal would nullify the active supervision requirement for a state board controlled by market participants.

(d) According to LREAB, good faith compliance with a state statute should be exempt from antitrust liability to the same degree as is good faith compliance with federal regulation. As discussed, the federal regulatory compliance defense itself rests on shaky ground. In any event, this assumed equivalence (federal regulation vs. state regulation) is plainly erroneous as it ignores the reality that under the United States Constitution federal law is supreme. Symmetrical antitrust treatment of federal and state law is not required.[22]

Furthermore, the policy rationale for the federal regulatory compliance defense does not translate to the state law context. As discussed above, in the pre-*Billing* era, a firm regulated by a federal agency could be ensnared by the following trap. The firm is required to comply with the mandate of a federal agency, and thus required to disregard any conflicting antitrust obligation. And yet, a reasonable error in complying with the federal regulation exposes the firm to antitrust liability (on top of whatever sanctions are available for non-compliance with the regulation). In the telecommunication context, the Ninth Circuit considered this outcome to be inequitable. *Phonetele I*, 664 F.2d at 737–38.

But where the defendant's conflicting obligation stems from state regulation (rather than federal law), this inequity does not arise. The conflicting state regulation must be disregarded, and the firm's obligation is simply to comply with the federal antitrust requirement (similar to the burden imposed on any non-regulated firm). *See, e.g.*, *Dental Board*, 135 S. Ct. at 1110–11;

[22] For example, where there is a clear incompatibility between federal antitrust law and a federal regulatory statute the antitrust law is deemed to have been partially repealed. *Billing*, 551 U.S. at 272. In contrast, where there is a clear incompatibility between federal antitrust law and state law, it is the state statute that is preempted. *See generally Rice v. Norman Williams, Co*., 458 U.S. 654 (1982): *Midcal*, 445 U.S. 97 (1980); *Schwegmann Bros. v. Calvert Distillers Corp*., 341 U.S. 384 (1951). *See also Cantor*, 428 U.S. at 629 (Stewart, J., dissenting) ("The 'implied immunity' doctrine . . . comes into play only when two arguably inconsistent federal statutes are involved . . . . 'Implied repeal' of federal antitrust laws by inconsistent state regulatory statutes is not only 'not favored,' it is impossible.") (internal citations omitted).

Ticor, 504 U.S. at 633–35; *Cantor v. Detroit Edison Co.*, 428 U.S. at 592–93; *Kentucky Movers*, 139 F.T.C. at 489–90.

In *Kentucky Movers*, the Commission expressly confirmed that, absent a valid state action defense (*e.g.*, absent active state supervision), a private actor is obliged to disregard a conflicting, anticompetitive state regulation and to comply with the FTC Act:

> Private interests can assess whether a state is in compliance with the requirements of the state action doctrine, and can urge the state to adopt the necessary practices. If a state, for whatever reason, declines to follow the requirements of the state action doctrine, then private interests can alter their behavior to comply with the antitrust laws.

139 F.T.C. at 434.

We return, then, to Question 5 posed by the Commission's Order: Q: How would a defense based on good faith compliance with state regulation relate to the state action doctrine? A: The proposed defense would seriously undermine the state action doctrine. Q: How would a defense based on good faith compliance with state regulation relate to the preemption doctrine? A: The proposed defense would reverse the preemption doctrine (based on the Supremacy Clause) and illegitimately make state law supreme over federal law.

CONCLUSION

The Commission should rule that Respondent's good faith regulatory compliance defense fails, and enter an Order dismissing Respondent's Fourth Affirmative Defense.

Dated: June 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, and sent notification of such filing to:

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Date: June 11, 2018

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