

The Quick Look



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NEW POLICY PAPER BY FTC STAFF, RELYING ON EVIDENCE FROM CASE STUDIES, URGES STATES TO AVOID USING COPAs

Over the years, the FTC has issued several public comments expressing opposition to the state adopted regulatory regime known as Certificate of Public Advantage (COPA). COPAs are aimed at displacing competition between healthcare providers with state antitrust oversight, and are often issued with the goal of allowing specific provider mergers or collaborations.

In June 2019, the FTC held a public workshop to present empirical evidence on COPAs.¹ Continuing that effort to share empirical evidence with public, on August 15, 2022, the FTC released a new staff [policy paper](#) (along with a [summary](#)) that presents evidence from retrospective studies and academic literature studying COPAs. The FTC staff concludes that they are “not aware of any proven benefits of COPAs” and, based on this evidence, urge “state lawmakers to avoid using COPAs to shield otherwise anticompetitive hospital mergers.”

The policy paper focuses on evidence from three case studies: Mission Health in North Carolina (a COPA-shielded collaboration that later resulted in a merger), Benefis Health in Montana (a COPA-shielded merger to monopoly), and MaineHealth in Maine (a COPA-shielded merger that resulted in a dominant health system). Both Mission Health and MaineHealth COPAs failed at keeping the prices from rising during or after the COPA period. Benefis Health COPA did succeed at keeping the prices from rising beyond those of the peer hospitals in other markets, but the prices went up after the COPA was repealed. FTC staff argue that all three case studies highlight that not only COPA regulations can fail to keep prices in check, but also create the risk of having an unregulated monopolist after the COPA expiration.

¹ See: <https://www.ftc.gov/news-events/news/press-releases/2019/10/ftc-study-impact-copas>

The policy paper also discusses FTC staff's ongoing analysis of recent COPA instances involving Ballad Health in Tennessee/Virginia and Cabell Huntington hospital system in West Virginia. The FTC intends to "collect information over several years" and share findings from these retrospectives publicly when the analysis is complete.

FTC AND DOJ SUBMIT JOINT POSITION PAPER TO FERC CRITICIZING RIGHTS OF FIRST REFUSAL FOR ENERGY TRANSMISSION PROJECTS

On August 17, 2022, the Department of Justice and Federal Trade Commission submitted a Joint Comment to the Federal Energy Regulatory Commission ("FERC") regarding FERC's April 2022 Notice of Proposed Rulemaking ("NOPR"), *Building the Future Through Regional Transmission Planning and Cost Allocation and Generator Interconnection*.

FERC's NOPR proposes reinstating federal rights of first refusal ("ROFR"s) to incumbent energy transmission providers (entities that develop transmission facilities within their own retail distribution service territory), when such utilities partner with another entity on projects. A ROFR gives incumbent transmission providers the option to construct all new transmission facilities located within their service areas, even when a non-incumbent develops an idea for, and proposes, a new facility. FERC had eliminated ROFRs in 2011 when it issued Order 1000, the express purpose of which was to encourage competition for transmission projects. At the time, FERC reasoned that ROFRs create a barrier to entry and discourage non-incumbent transmission developers from proposing new projects, leading to a lack of competition for such projects, higher costs, and thus, unjust and unreasonable rates for electricity consumers. FERC recognized when it issued Order 1000 that with ROFRs in place "non-incumbents have no incentive to invest time and money evaluating an area's energy needs because the incumbent will get a first crack at exploiting any opportunities the non-incumbents identify." FERC Brief in Opposition, *Ameren Services Co. v. FERC*, 2017 WL 491047, at *14 (U.S.).

Now, 11 years later, in an effort to encourage more regional transmission development, FERC is proposing reinstating ROFRs. The NOPR attempts to mitigate the anticompetitive effects of ROFRs by requiring that incumbent transmission providers create a joint ownership structure with an unaffiliated entity in order to exercise a ROFR.

In their Joint Comment to FERC, the FTC and DOJ express "significant concerns" about FERC's proposed "conditional" ROFR. They explain that the proposed ROFR "threatens to displace competition where it exists today for transmission design and construction and for certain new projects selected in a regional transmission plan." Comment at 5-6. And that "allocating the design and construction of regional transmission facilities to developers through competitive processes can significantly reduce costs and drive innovation." *Id.* at 9. With respect to the joint ownership condition, the agencies explain that joint ventures between competitors can eliminate competition and cause anticompetitive effects. Although a joint venture may be procompetitive when its purpose is to better compete, the conditional ROFR proposed by FERC does not promote competition. Once the joint venture is formed and secures the right to the ROFR, it faces no competition at all.

FERC will consider replies in response to the agencies', and other, comments before making its final decision.

OTHER “QUICK LOOK” DEVELOPMENTS

FTC APPROVES THREE OMNIBUS RESOLUTIONS AUTHORIZING COMPULSORY PROCESS FOR INVESTIGATIONS. The Federal Trade Commission voted 3-2 to approve three new procedural authorizing compulsory process in investigations related to [collusive practices, mergers, acquisitions and transactions](#) and [car rental industry](#). The FTC aims to eliminate the need for FTC staff to seek compulsory process in each individual case for a period of up to ten years.

In short, the resolution regarding the use of compulsory process in non-public investigations of collusive practices authorizes the FTC to more quickly and efficiently obtain evidence in investigations involving competitors collaborating in an anticompetitive fashion, including to determine the appropriateness of the action, remedy and monetary or injunctive relief.

The mergers, acquisitions and transactions omnibus resolution relates to the use of compulsory process in all merger investigations, including those not subject to notification under HSR.

Under the scope of the car rental industry omnibus resolution, FTC staff will be allowed to investigate, “deceptive or unfair acts or practices in or affecting commerce in the advertising, marketing, promotion, sale, tracking, or distribution of rental cars.”

UPDATES ON THE BIPARTISAN JOURNALISM BILL. Senator Amy Klobuchar (D-Minnesota), Senator John Kennedy (R-Louisiana), Representative David Cicilline (D-Rhode Island), Representative Ken Buck (R-Colorado), and Senate and House Judiciary Committee Chairs Dick Durbin (D-Illinois) and Jerrold Nadler (D-New York) released a [revised bill](#) of the Journalism Competition and Preservation Act (JCPA) to address dominant online platforms’ power over news organizations.

The JCPA aims to provide news organizations safe harbor from antitrust laws, allowing them to jointly negotiate with terms from gatekeeper platforms that regularly access news content without paying for its value. The Bill also provides news publishers to demand arbitration for certain disputed terms in those negotiations.

*The views expressed in The Quick Look reflect those of the authors, and are not necessarily those of the American Bar Association, the Section of Antitrust Law, or the Joint conduct Committee.

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