



# Competition, Regulation, and the Administrative State

Federal statutes charge administrative agencies with regulating everything from consumer product safety, to energy, to telecommunications. (See reverse) At the same time, the Justice Department exercises considerable influence on

competition policy through its enforcement of the Nation's antitrust laws. The resulting disputes among regulators, industry, and members of the public are often resolved by the Courts of the District of Columbia Circuit.

## The Environment

The Environmental Protection Agency (EPA) is charged with enforcement of the Clean Air Act, Clean Water Act, and other federal environmental statutes. When reviewing the EPA's final regulatory actions, the D.C. Circuit regularly grapples with complex statutory, scientific, and technical issues. For example, that Court has been called upon to decide whether, consistent with the requirements of those statutes, the EPA may employ "cost-benefit" analysis when determining what emission levels are "safe," or what constitutes an "adequate margin of safety." Agency decisions likewise are scrutinized to ensure that the agency has considered the relevant evidence and properly supported its decision. Judicial review also ensures that the agency's actions are consistent with the substantive and procedural requirements Congress has imposed by law.



## Energy

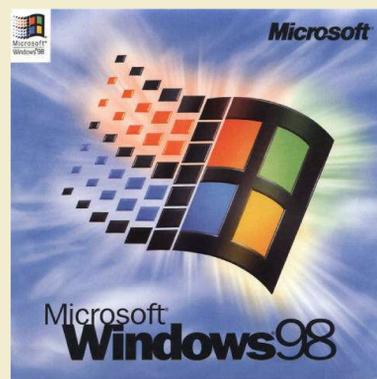
The Federal Energy Regulatory Commission (FERC) regulates the interstate transmission of natural gas, electricity, and other forms of energy. The D.C. Circuit regularly reviews the decisions of that agency. The issues range from complex ratemaking questions, to pipeline construction and placement, to market structure. FERC's decisions moving toward deregulation of natural gas delivery services, separating natural gas sales from natural gas transportation, and promoting greater industry transparency, were reviewed and largely upheld by the D.C. Circuit. FERC's more recent efforts to prohibit discrimination against particular generators and to require electric utilities to provide all generators "open access" to transmit electricity likewise were reviewed and largely affirmed by the D.C. Circuit. Review of agency decisions in the field of energy regulation continues to be a persistent, complicated, and important part of the D.C. Circuit's docket.



## Technology

On May 18, 1998, the Department of Justice filed an antitrust suit against software giant Microsoft in the District Court for the District of Columbia. The complaint alleged that Microsoft's "Windows" program dominated the market for "Operating Systems," and that Microsoft used its dominance in that market (and control over the "Windows" program) to destroy competition in markets for other software. For example, the government claimed that Microsoft had engaged in anticompetitive conduct directed at Netscape, which made Internet viewing software that competed with Microsoft's own product (Explorer). After a trial, Judge Thomas Penfield Jackson ruled that Microsoft had violated the antitrust laws. He further

ruled that, as a remedy, Microsoft should be broken into two separate companies—one to make the operating system (Windows), and the other to make the software programs that operate using Windows. Sitting en banc, the Court of Appeals issued a unanimous 125-page opinion that affirmed in part and reversed in part. It upheld Judge Jackson's ruling that Microsoft used illegal conduct to maintain a monopoly in the operating system market. But it disagreed with other rulings, and found procedural errors in the District Court's choice of remedies. The Court of Appeals remanded the case to the District Court to conduct further hearings and "fashion an appropriate remedy" that was "tailored" to the Microsoft's conduct. The case was reassigned to Judge Kollar-Kotelly, who approved a settlement that imposed some oversight and disclosure obligations on Microsoft, but that did not require the company to be broken up. The Court of Appeals unanimously approved the settlement.



The New York Times, April 4, 2000

### U.S. JUDGE SAYS MICROSOFT VIOLATED ANTITRUST LAWS WITH PREDATORY BEHAVIOR

The New York Times, June 29, 2001

### APPEALS COURT VOIDS ORDER FOR BREAKING UP MICROSOFT BUT FINDS IT ABUSED POWER

The New York Times, June 29, 2001



#### UNANIMOUS RULING

##### Sharp Rebuke Is Levelled at Judge in Charge of the Original Case

By STEPHEN LABATON

WASHINGTON, June 29 — A federal appeals court unanimously threw out a lower court's order today that the Microsoft Corporation should be broken up, although the appeals court found that the company had repeatedly abused its monopoly power in the software business.

The appeals court also sharply chastised the district judge who oversaw the Microsoft antitrust trial and removed him from any further involvement in the case because of derogatory comments he made to reporters about the company and its senior executives.

The unsigned opinion was welcomed by Microsoft, which is no longer under immediate threat of being split into two companies. The company is already preparing the release of a new version of the Windows software operating system, which has features that industry executives say could further consolidate Microsoft's dominance of the personal computer software market (Page C1).

But the opinion was also hailed by federal and state officials for affirming the antitrust laws.

William H. Gates said yesterday he hoped for new settlement talks.

**WHAT THE APPELLATE COURT SAID ABOUT THE MONOPOLY . . .**  
"We uphold the District Court's finding of monopoly power in its entirety."

**THE BREAKUP . . .**  
"The District Court must reconsider whether the use of the structural remedy of divestiture is appropriate. . . While we do not undertake to dictate to the District Court the precise form that relief should take on remand, we note again that it should be tailored to fit the wrong creating the occasion for the remedy."

**. . . AND JUDGE JACKSON'S CONDUCT . . .**  
"The violations were deliberate, repeated, egregious and flagrant. . . Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press."

Excerpts from *Wall Street Journal*