PART ONE

Market Structure

From Monopolies to Competition—Who Can Sell What to Whom?

A market is a place where sellers and buyers meet to exchange goods or services for value. A market is defined by geography and product, viewed from the customer's perspective: vegetarian restaurants in downtown Baltimore, non-firm wholesale electricity in New England, firm transportation of wholesale gas in the Midwest, wireless service in Wisconsin. A market can also have a time element, when time is essential to the consumer: restaurants serving Sunday brunch, taxi service available after extra-inning baseball, firm gas transportation needed for winter weekdays.

Market structure, in turn, describes (a) the geographic area in which transactions occur; (b) the products and services being sold in that geographic area; (c) the identities, characteristics and market shares of the sellers and buyers of those products and services in that geographic area; and (d) the entry costs and entry barriers, including any "bottleneck facilities"—assets essential for competition, controlled by one competitor but not economically duplicable by other competitors.

In the abstract, there are three types of market structures: perfect competition (many sellers, with none able to influence price or supply because customers can freely shop); monopoly (single seller able to control price and supply); and oligopoly (small number of sellers able to influence price and supply). The same concepts exist from the buyer side: Monopsony and oligopsony are markets with a single buyer or few buyers, respectively. In reality, the spectrum from perfect competition to monopoly or monopsony has many possible points. A given market's location on that spectrum depends on facts: the number of buyers and sellers, their relative shares of the sales made, their control of resources essential to competitive viability (such as raw materials and transportation), buyers' access to alternatives, and the ease with which sellers can enter and exit.

Given this range of possibilities, policymakers use law to shape market structures to their preferences. If they prefer a monopoly structure, they enact laws and rules that determine its features: the process for granting the franchise; the franchisee's powers, responsibilities and rights; the factors, if any, allowing entry by alternative suppliers; and the criteria for revoking and transferring the franchise. If policymakers prefer competition, they use law to specify who is eligible to compete in which product markets, what quality and safety standards competitors must meet, what actions constitute unfair competition or consumer abuse, and what penalties will follow.

These policy preferences can change. For most of the 20th century, utility service was dominated by monopolies—often vertically integrated entities that controlled the final sale to the consumer and the inputs to that sale. To convert these monopoly markets into potentially competitive markets requires legal change: removing statutory barriers to competition, allocating and pricing access to "bottleneck facilities," defining unfair competition and creating the enforcement tools necessary to prevent it.

Part 1 describes the law that supports these markets' structures and policymakers' efforts to convert them. Chapter 2 describes the traditional monopoly model. That model comprises the seven legal dimensions that define the powers, responsibilities and rights of the utility and its consumers: exclusive service territory, obligation to serve, consent to regulation, quality of service, the power of eminent domain, limited liability for negligence, and the right to charge "just and reasonable" rates.

The ensuing chapters then describe the three legal steps necessary to convert a traditional monopoly market into a competitive market. The first step, discussed in Chapter 3, is to authorize competition: by amending the statutes that prohibited competition and by determining the right competition analog for each of the traditional monopoly's seven dimensions. But authorizing competition does not guarantee effective competition. Chapter 4 therefore discusses the actions regulators take—"unbundling" competitive from noncompetitive services and reducing entry barriers in the markets for competitive services—to prevent the incumbent from blocking the new competitors. And because every zealous competitor aspires to be a monopoly, successful conversion requires a third step: monitoring markets to prevent the behaviors that weaken competition. That is the subject of Chapter 5.

Together, these four chapters reflect not only the legal developments of the past half century, but also today's world: a layering of traditional monopolies, effective competition, potential competition, and competitors striving to dominate competition, all made continuously unpredictable by changes in technology, customer preferences and political directions.