with the proposal. First, the agreement undermined Questar's incentives to discount its own pipeline because it would hold a fifty percent interest in its only competitor. Questar's fifty percent interest in Kern River would have diminished its incentives to engage in unfettered competition with Kern River. Even if Questar lost a bid, it would still have a big share of the business through its interest in Kern River, so it was less likely to bid aggressively. Second, Kern River shipped all the way to California, and the remedy would not diminish Questar's incentives or ability to direct Kern River's capacity away from Salt Lake City. Third, although the competitive rules had a capital forcing mechanism in which Williams theoretically could have secured Questar's commitment for capital expansion projects, it was unclear that this mechanism could work. The Bureau rejected the remedy as inadequate and too regulatory. The Commission authorized a preliminary injunction action, and Questar abandoned the transaction.[57] Ultimately, Tenneco sold its share of the pipeline to Williams, which competes aggressively with Questar today.

2. *Barnes & Noble/Ingram*

Barnes & Noble's 1999 attempt to buy Ingram Book Group raised a different set of issues. Barnes & Noble is the largest book retailer, and Ingram is the largest wholesaler of books in the United States. Thus, it was largely a vertical transaction.[58]

The transaction raised concerns principally under the raising rivals cost theory. The Bureau was concerned that the acquisition of an important upstream supplier such as Ingram might enable Barnes & Noble to raise the costs to its bookselling rivals, such as independent book retailers or Internet retailers, by foreclosing access to Ingram's books and services or denying access on competitive terms. The rivals would be less able to compete, and Barnes & Noble could increase its profits at the retail level or prevent its profits from being eroded as a result of competition from new business forms such as Internet retailing. The FTC staff was concerned that the combined Barnes & Noble/Ingram could do that in a number of ways, including strategies short of an outright refusal to sell to the non-Barnes & Noble bookstores. For example, Barnes & Noble/Ingram could choose to: (1) sell to non-Barnes & Noble bookstores at higher prices; (2) slow down book shipments to rivals; (3) restrict access to hot titles; (4) restrict access to Ingram's extended inventory or back list; or (5) price services higher or discontinue or reduce these services. Vertical integration concerns permeated throughout the proposed transaction.

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[57] *Id.*

[58] Although the firms stood principally in a vertical relationship, the transaction also had horizontal implications. At the horizontal level, there were two competitive concerns. First, Barnes & Noble, which had its own distribution centers, could compete directly with Ingram by wholesaling to other bookstores. In fact, Barnes & Noble had announced publicly that it was considering providing wholesale services to other book retailers. Second, Ingram wanted to retain Barnes & Noble as a customer and so offered competitive prices, expanded its range of titles, and improved service. All of Ingram's customers, including independent bookstores, were beneficiaries of this competition, and there were concerns that the acquisition would have eliminated that stimulus to competition.

The parties did not present a complete settlement proposal, which makes a discussion of remedies hypothetical. There were reasons to be skeptical that the deal could have been fixed. The nature of the competitive problem would have made it very difficult to address from a remedy standpoint. Structural relief would seem to require the creation of a substitute for Ingram but that did not seem to be a realistic possibility. The only remedy that might have addressed the situation is a set of behavioral rules—essentially, a set of nondiscrimination or fair dealing provisions. Those kinds of rules, however, can be problematic because they are susceptible to evasion and difficult to monitor, particularly in a transactional setting where discrimination could be exercised in subtle ways on several different variables. While the Commission has on occasion accepted some forms of behavioral relief in mergers, those approaches may not have worked in this context. Recall the Supreme Court's admonition in *Du Pont* that "the public interest should not in this case be required to depend upon the often cumbersome and time-consuming injunctive remedy" to enforce behavioral rules.[59]

Another concern about the merger was that Barnes & Noble could use Ingram to obtain competitively sensitive information about its bookselling rivals. Independent booksellers raised concerns about two types of information they provide to Ingram in the course of their supplier-customer relationship: the financial information they supply to obtain credit, and the titles and quantities of books they purchase from Ingram. Barnes & Noble might use this information for such purposes as targeting promising store locations, identifying competitors' weaknesses, and reaping the fruits of others' marketing efforts. Whether or not the fears were realistic, the fact that they existed could have had its own dampening effect on competition. For example, independents may have less incentive to develop a market for special interest books if they believe Barnes & Noble would simply free-ride on their efforts or might have returned their usage of Ingram and been forced to rely on other higher cost book wholesalers.

This concern has been addressed in other cases by obtaining a remedy commonly called a firewall. Could a firewall work effectively in this case? Most of the cases in which a firewall has been used are situations, such as defense mergers, where there is a regulator who can identify violations of the firewall.[60] Even if a firewall could address the information access problem, there was the discriminatory access problem discussed earlier. In the end, the staff did not have to decide these remedy issues because there was no proposal on the table, but it would have been difficult to find a satisfactory solution. The parties chose to abandon the transaction following press reports that Bureau staff would recommend a preliminary injunction.[61]

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59 United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 333-34 (1961).

60 *See, e.g.*, *In re* Eli Lilly & Co., 120 F.T.C. 243 (1995); *In re* Martin Marietta Corp., 115 F.T.C. 1039 (1994).

61 *See, e.g.*, Stephen Labaton, *Staff of FTC Is Said to Oppose Barnes & Noble Bid to Wholesaler*, N.Y. TIMES, June 1, 1999, at A1; Patrick M. Reilly & John R. Wilke, *FTC Staff to Fight Barnes & Noble Bid for Wholesaler*, WALL ST. J., June 1, 1999, at B16.