Dissenting Statement of J. Thomas Rosch
In the Matter of Pool Corporation, FTC File No. 101-0115
November 21, 2011

This case presents the novel situation of a company willing to enter into a consent decree notwithstanding a lack of evidence indicating that a violation has occurred. The FTC Act requires that the Commission find a "reason to believe" that a violation has occurred and determine that Commission action would be in the public interest any time it issues a complaint. 15 U.S.C. § 45(b). In my view, the same standard applies regardless of whether the Commission is seeking a litigated decree or a consent decree for the charged violation. Accordingly, I would reject the proposed consent decree and close the investigation.

After a year and a half of investigation, we have not been able to identify any harm to consumers or competition as a result of actions by Pool Corporation, Inc. ("PoolCorp"), and further investigation appears unlikely to uncover such effects. As an initial matter, it is important to note that, even accepting the allegations in the complaint, PoolCorp did not engage in a general pattern of exclusionary conduct. Rather, the complaint alleges that PoolCorp threatened manufacturers not to supply an entering distributor in various local markets. There is no allegation that PoolCorp sought to restrict supply to (1) incumbents in any of these local markets, (2) established distributors seeking to expand into markets dominated by PoolCorp, or (3) established distributors in any of the dozens of other local markets across the country.

The limited scope of PoolCorp's alleged exclusionary conduct is, of course, no defense. PoolCorp's alleged threats to manufacturers would, if they been successful, may well have violated the antitrust laws. But that is not what happened. The investigation revealed that PoolCorp's demands were not honored by manufacturers. Instead, the evidence showed that manufacturers made unilateral decisions not to supply the de novo entrants in the various local markets.

There were legitimate reasons for pool equipment manufacturers not to sell to these entrants. A manufacturer will typically accept a new distributor only if the distributor will add to the value of the distribution network by, for example, improving growth opportunities or increasing promotional activities. Manufacturers often require a de novo entrant to have adequate facilities, a history of successful operations, and a favorable credit history before supporting it. In this case, many of the allegedly excluded de novo entrants did not satisfy these requirements. The lack of evidence establishing causation between PoolCorp's requests and action by the manufacturers, combined with plausible justifications for the manufacturers' actions, should be fatal to this case.

Another problem with this case is that no entrants were actually excluded.[1] That is because the entrants were able to obtain supplies from other manufacturers or distributors. The

[1] The majority statement purports to be based on the Complaint. However, the majority statement ignores the central theory of the Complaint – exclusion

only claim to the contrary is in Paragraph 28 of the complaint, which alleges that in Baton Rouge, "the new entrant's business ultimately failed in 2005" because of the lack of "direct access to the manufacturers' pool products." The complaint neglects to mention that this entrant was able to secure supplies from other sources and later sold itself to an established out-of-state distributor. Since then, that distributor, which has had full access to supplies, has been a highly effective rival to PoolCorp. Thus, to the extent PoolCorp's threats had an effect in Baton Rouge, they may have led to more, not less, competition.

A third problem with this case is that there was no consumer injury. The investigation did not uncover price increases, service degradation, or other anticompetitive effects in any local markets.[2] Economic analysis corroborated these results and suggested that even if PoolCorp had completely foreclosed its rivals, the pricing effects would have been minimal. The lack of consumer harm should not be surprising given that PoolCorp's actions, at most, raised the costs of a single competitor in each local market, without affecting other incumbents or the entry prospects of established out-of-market dealers.

The lack of consumer injury is also corroborated by the very low entry barriers in this industry. Opening a pool supply distributorship requires access to one or more of the major equipment suppliers, a few trucks, a medium-sized warehouse, access to credit, and no more than ten employees. There are hundreds of pool supply distributors, and entry and expansion are frequent events. Thus, any effort to exclude a competitor would become a game of whack-a-mole: as soon as one competitor is driven from the market, another would pop up.

Accordingly, I cannot find that there is a "reason to believe" that a violation occurred or that accepting the proposed consent decree would be in the public interest. 15 U.S.C. § 45(b). Furthermore, I question whether this investigation represented a wise use of Commission resources, particularly given the austere climate in which we are operating. Even accepting all of the allegations in the complaint as true, the likely consumer injury would have amounted to just a few thousand dollars.

---

for this theory, the majority statement relies on an article by Krattenmaker and Salop. See Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 YALE L.J. 209, 224 (1986). As these authors note, however, a raising rivals' costs strategy is unlikely to be successful in a market with low entry barriers. Id. at 225 (entry must "be difficult"); 236 n.85 ("Obviously, some barriers to entry and expansion must exist for price to rise."). Here, neither the complaint nor the majority statement alleges that there are any significant barriers to entry in this industry.