Federal Trade Commission

A Peek Inside:
One Commissioner's Perspective on
the Commission's Roles as Prosecutor and Judge

J. THOMAS ROSCH[1]
COMMISSIONER, FEDERAL TRADE COMMISSION

presented at the
NERA 2008 Antitrust & Trade Regulation Seminar
Santa Fe, New Mexico
July 3, 2008

Having been privileged to attend NERA's Santa Fe conferences for nearly two decades now, I know the tradition at the first session is for a representative from the FTC to review recent developments at the Commission. Two years ago, I departed from that tradition when I described the reasons for my votes in three matters – the closing of the Commission's investigation in *Adelphia*; the acceptance of a consent decree based exclusively on Section 5 of the FTC Act in *Valassis*; and a dissent from the Commission's joinder in the Solicitor General's *Weyerhauser*

---

[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor Kyle Andeer for his invaluable assistance in preparing this paper.

[2] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint and the Weyerhaeuser Amicus Brief" before NERA's 2006 Antitrust & Trade Regulation Seminar (July 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

emphasize that my remarks are focused exclusively on the Commission, where the current Chairman, Bill Kovacic, has encouraged us to engage in self-criticism. I also want to emphasize that the views I express are strictly my own.

I. THE COMMISSION AS A LAW ENFORCEMENT BODY

Let me begin with the Commission as a law enforcer. Section 5(b) of the FTC Act makes it crystal clear that Congress intended the Commission to vigorously enforce the laws against unfair methods of competition and unfair acts or practices. That provision, by its terms, provides that "[w]henever the Commission shall have reason to believe that any…person, partnership, or corporation has been or is using any unfair method of competition or unfair act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public, it shall issue and serve upon such persons, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."[3]

I'd like to make several points respecting the Commission's antitrust law enforcement mission. First, the Commission should enforce the antitrust laws as they exist rather than as we think they ought to be. This has long been true as respects the Commission's enforcement of Section 1 of the Sherman Act. Taking its cue from the Supreme Court's decision in *Broadcast Music*, the Commission has rejected rules of *per se* illegality and *per se* legality in a host of cases.[4] For example, in *Indiana Federation of Dentists*, the Commission eschewed such *per se*

---

[3] 15 U.S.C.§ 45 (b).

[4] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 5 (1958).

[5] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986).

[6] Polygram Holding v. FTC, 416 F.3d.29 (D.C. Cir. 2005).

[7] North Texas Specialty Physicians v. FTC, 2008 U.S. App. LEXIS 10457 (5th Cir. 2008).

[8] California Dental Ass'n. v. FTC, 526 U.S. 756 (1999).

[9] *See, e.g.*, Testimony of Hew Pate, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Hearings of Refusals to Deal Transcript at 31 (July 18, 2006), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/60718FTC.pdf ("With respect to refusals to deal, or as I prefer to think of it, duties to assist competitors, all have the right to take a different tack. Is TDm0.0808ent ta70, 476 U.S. 447, 458of,TD(cer)Tj228.2000 0.0000 TDb000 0.00000 1.00000 0.0000 0.000

Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Conclusion of Hearings, Transcript at 122-123 (May 8, 2007), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/070508trans.pdf.

[10] Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16 (1984).

[11] *Compare* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 133 n.5 (2d Cir. 2001) *with* Town Sound & Custom Tops, Inc. v. Chrysler Corp., 959 F.2d 468 (3d. Cir. 1992) (en banc).

Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich, 63 F.3d 1540 (

and although it might make our job easier if these practices were governed by *de facto* or *de jure* rules of *per se* legality – as a law enforcement agency we must enforce the law as it has been defined by these cases.

I feel the same way about the Commission's enforcement of Section 7 although I may not always have expressed myself clearly in this respect. The Supreme Court has repeatedly held that a relevant market must be defined in Section 7 cases.[18] And, although the Court and the regional federal circuit courts have relaxed that requirement in Section 1 cases,[19] in the *Republic Tobacco* case, the Seventh Circuit declared that at least the "rough contours" of a relevant market must be defined in all antitrust cases.[20] In light of this Sherman Act case law, I've suggested that direct evidence that an acquisition or merger may create, enhance or facilitate the exercise of market power, and that in turn, may enable one to "back into" a market definition instead of using Merger Guidelines methodology to define the relevant market.[21] But, no Commissioner or Commission decision ha

---

[18] *See, e.g.*, United States v. DuPont de Nemours & Co., 353 U.S. 586, 593 (1957); United States v. Marine Bancorp., 418 U.S. 602, 618 (1974).

[19] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1336 (7th Cir. 1986).

[20] Republic Tobacco Co. v. North Atlantic Trading Co., 381 F.3d 717, 736 (7th Cir. 2002).

[21] In the Matter of Evanston Northwestern Healthcare Corp., Docket No. 011 0234, concurring opinion of Commissioner J. Thomas Rosch at 8-9 (2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf; *see also* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Litigating Merger Challenges: Lessons Learned," Remarks at the Bates White Fifth Annual Antitrust Conference (June 2008), *available at* http://www.ftc.gov/speeches/rosch/080602litigatingmerger.pdf.

Second, the Commission's law enforcement mandate is broader than the Sherman or Clayton Acts. Section 5 broadly proscribes "unfair acts or practices" and "unfair methods of competition."[22] The Supreme Court has repeatedly stated that Section 5 empowers the Commission "to proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[23] We had those statements in mind in issuing the complaint and accepting the consent decree in *Valassis*.[24] That matter, you'll recall, involved an invitation to collude. As such, in my view, it wasn't covered by Section 2 (there's no attempt to conspire offense in Section 2), and so the offense pleaded was a pure Section 5 violation.

That's also similar to what I had in mind when three of us voted to issue a complaint and accept a decree in the *N-Data* matter.[25] There N-Data shrugged off a commitment to license intellectual property. National Semiconductor, N-Data's predecessor in interest, had made the commitment to the standard setting body, IEEE, when the technology at issue was included in an industry standard. I didn't consider that practice to violate Section 2. There was no question that N-Data had monopoly power in that case. However, that power was a function of its inclusion in the standard and that standard's subsequent adoption by the industry. From my perspective, N-Data's conduct (a breach of the prior licensing commitment) didn't allow N-Data to acquire or

---

[22] 15 U.S.C. § 45(b)(1).

[23] *See* FTC v. Sperry &Hutchinson Co., 405 U.S. 233 (1972); *see also* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (dictum).

[24] In the Matter of Valassis Communications, Inc., FTC File No. 051 0008 (March 16, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/0510008.htm.

[25] In the Matter of Negotiated Data Solutions, LLC, FTC File No. 051 0094 (Jan. 2008), *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

[26] Boise Cascade v. FTC, 637 F.2d 573 (9th Cir. 1980).

Supra note 2, Rosc

Finally, in *Orkin*,[31] the Eleventh Circuit affirmed a Commission decision holding that Orkin's unilateral abrogation of its contractual commitments after its customers were "locked into" long-term contracts constituted an unfair act or practice under Section 2. Although the appellate court didn't suggest that its holding was limited to consumers, I read the decision as requiring that customers be truly "locked in," and I wouldn't have signed onto issuance of the complaint and acceptance of the consent decree without that proof. Specifically, the evidence showed that at least of some of the "locked in" licensees were small businesses that could not easily litigate themselves out of the "lock-in."

Fourth, we can *not*, and should *not* prosecute conduct unless we have "reason to believe" that the conduct has occurred and that it violates one of the statutes the Commission is supposed to enforce. That's apparent from the statutory language. Beyond that, a responsible exercise of prosecutorial discretion dictates that obliga

[31] Orkin Exterminating v. FTC, 849 F.2d 1354 (11th Cir. 1988).

incumbent on us to require a detailed description not only of the "story" that will or could be told in litigation and of the facts underlying that story, but of the *way* that story

[32] 15 U.S.C. § 18(b).

The deadlines might result in shorter staff memoranda. And, it might mean that all the "i"s will not be dotted and the final "t"s may not be crossed until after a complaint has issued. But plaintiffs in private antitrust cases (an

[33] The Commission's Rules of Practice provide ample opportunity for post-complaint discovery. *See* 16 C.F.R. § 3.31(a).

[34] 15 U.S.C. § 45(b).

> The function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair, and if it finds it to be unfair, to order discontinuance of its use. In doing this, it will exercise power of a judicial nature….It would seem clear that the determination of the question whether a method of competition is unfair is not a determination purely of fact, but necessarily involves the determination of a question of law. The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature….[35]

Second, Congress concluded that it was in the public interest to grant this judicial authority to the Commission *instead of to the federal district courts*. That too is apparent from the language of Section 5(b). Nowhere in that provision is concurrent judicial authority – or any authority to review Commission decisions – given to the federal district courts. To the contrary, the power to review Commission decisions is given *exclusively* to the federal appellate courts.[36] Again, this was no accident. In proposing the new agency to the House of Representatives, President Wilson expressed skepticism that federal district courts were equipped "to adjust the remedy to the wrong in a way that will meet all the circumstances of the case" and confidence that the Commission could and would do so.[37]

Two aspects of the enactment of Section 13(b) in 1973 also deserve emphasis. First, Congress enacted Section 13(b) to *strengthen* the Commission's historical judicial role. As the Fourth Circuit declared in an early case interpreting Section 13(b), "the district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance. The only purpose of a proceeding

---

[35] Cong. Rec. 14931-33 (1914).

[36] 15 U.S.C. § 45(c).

[37] H.R. Doc. 625, 63rd Cong., 2d Sess. 5 (1914).

under Section 13 is to preserve the status quo until the FTC can perform its function."[38]

Second, Section 13(b) makes the ultimate issue in a 13(b) proceeding whether a preliminary injunction is "in the public interest" and, except in exceptional circumstances, the statute is designed to "maintain" the original conclusion of Congress that the public interest is served by vesting the adjudicatory function in the Commission. More specifically, although "likelihood of success" is *one* factor to be taken into account, it is not the *only* factor. Again, the legislative history confirms that conclusion. The House Report stated in pertinent part that the intent was "not to impose the traditional 'equity'0000t.0000 0.0000 cm0.00 0.00 0.00 rgBT72.0000 510.4800 TI

---

38 FTC v. Food Town Stores, 539 F.2d 1339, 1342 (4th Cir. 1976).

39 H.R. Rep. No. 624, 93rd Cong. 1st Sess. 31 (1970).

40 FTC v. Arch Coal Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

41 FTC v. Foster et. al., 2007-1 TRADE CAS. (CCH) ¶ 75,725 (D.N.M. 2007).

42 FTC v. Whole Foods Market, Inc., 505 F. Supp. 2d 1 (D.D.C. 2007).

process by issuing a statement that has been read to mean that it generally will not pursue plenary proceedings after an adverse decision by a federal district judge in administrative proceedings.[46] Indeed the Commission has not pursued proceedings after such an adverse decision for over a decade. By so doing, the Commission has arguably abdicated its judicial responsibilities and has instead allowed federal district judges to usurp them.

The Commission's conduct in the past six months should be viewed in this light. In the *Inova* matter, the Commission designated this Commissioner to act as an administrative law judge.[47] The Commission's Order stated that the designation was based on "40 years of experience as a trial lawyer, predominantly in the context of complex competition law cases."[48] In their Motion to Recuse, Respondents alleged, *inter alia*, that it was also based on a predisposition in favor of expedited scheduling of pre-trial and trial events.[49] I haven't discussed the specific reasons for the assig

---

experience with antitrust or trade regulation litigation and who are familiar with the kinds of economic analysis associated with such litigation.").

[46] Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 50 Fed. Reg. 39,741 (Aug. 3, 1995); *see also* 16 C.F.R. § 3.26(d).

[47] In the Matter of Inova Health Systems Foundation and Prince William Health System, Inc., Docket No. 9326, Order Designating Administrative Law Judge (May 9, 2008), *available at* http://www.ftc.gov/os/adjpro/d9326/080509order.pdf.

[48] *Id*.

[49] *See* In the Matter of Inova Health Systems Foundation and Prince William Health System, Inc., Docket No. 9326, Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge (May 23, 2008), *available at* http://www.ftc.gov/os/adjprop/d9326/080523respmorecuseroschasalj.pdf.

abandon the transaction so the jury is still out (pardon the pun) on whether there was any improvement in antitrust expertise. However, with the help of counsel, a schedule was adopted that got the matter tried approximately five months after the complaint was issued,[50] and the Commission committed to reviewing any Initial Decision appealed in short order.[51] That compares favorably to the schedules adopted in the federal court antitrust cases in which I've been involved, including merger cases. Additionally, the Commission appealed the *Whole Foods* decision on the ground that the district court in that case applied the wrong standard in denying the Commission's application for a preliminary injunction.[52] If successful, that appeal would restore the relationship between the Commission as the judge and the federal district courts as the protector of the Commission's role in that respect that Congress intended.

Still, much remains to be done. First, the Commission must somehow institutionalize the expertise and timing that occurred in the *Inova* matter. It must also demonstrate that it can and will handle appeals from Initial Decisions expeditiously. Finally, it must abandon its practice of deferring to adverse federal district court decisions in deciding whether or not to pursue plenary trials after Section 13(b) decisions. I respectfully suggest that only then can the Commission

---

[50] In the Matter of Inova Health Systems Foundation and Prince William Health System, Inc., Docket No. 9326, Scheduling Order (May 30, 2008), *available at* http://www.ftc.gov/os/adjpro/d9326/080530schedulingorder.pdf.

[51] FTC Press Release, *FTC and Virginia Attorney General Seek to Block Inova Health System Foundation's Acquisition of Prince William Health System,* (May 9, 2008), *available at* http://www.ftc.gov/opa/2008/05/inova.shtm.

[52] Proof Brief for Plaintiff-Appellant Federal Trade Commission, FTC v. Whole Foods, No. 07-5276 (D.C. Cir. Jan. 14, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf; Proof Reply Brief for Plaintiff-Appellant Federal Trade Commission, FTC v. Whole Foods, No. 07-5276 (D.C. Cir. Feb. 27, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080227wholefoodsftcproofreplybriefpublic.pdf.

truly play the judicial role that Congress intended, and until then that role will continue to be in doubt.