“PERSPECTIVES ON THREE RECENT VOTES: THE CLOSING OF THE ADELPHIA COMMUNICATIONS INVESTIGATION, THE ISSUANCE OF THE VALASSIS COMPLAINT & THE WEYERHAEUSER AMICUS BRIEF”

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before

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Rather than recount everything the Commission has done since I joined it six montO12 310.6 7 6 BT/TT

Network ("RSN") offerings and thereby foreclose rivals from competing effectively for consumers who regarded RSN offerings as a "must have" offering in the Adelphia service areas.

Commissioners Harbour and Leibowitz voted against closing the investigation and issued a statement describing their reasons.[2] The Chairman, Commissioner Kovacic and I voted to close it.[3] These are my reasons for voting to close.

The threshold issue in any merger investigation is whether there is reason to believe the transaction would violate Section 7 of the Clayton Act because it was *likely* to result in anticompetitive effects. This is a prophylactic standard. Under Section 7, the Commission does not have to show there *already is* an anticompetitive effect. That said, however, the Commission *always* bears the burden of proving that the transaction is *likely* to have anticompetitive effects (*i.e.*, that it will likely injure consumers). I had doubts that the Commission could sustain that burden for the following reasons:

First, the consolidation efficiencies were not challenged, and Comcast and Time Warner's track record for innovation was better than Adelphia's, an additional benefit of the transaction in my mind. Arguably, both as a matter of law (under the Supreme Court's decision

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[2] Statement of Commissioners Pamela Jones Harbour and Jon Leibowitz (concurring in part and dissenting in part), Concerning the Closing of the Investigation into the transactions involving Comcast, Time Warner Cable, and Adelphia Communications (January 31, 2006), available at http://www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz_harbour.pdf

[3] Statement of Chairman Deborah Platt Majoras, Commissioner William Kovacic, and Commissioner J. Thomas Rosch, Concerning the Closing of the Investigation into the transactions involving Comcast, Time Warner Cable, and Adelphia Communications(January 31, 2006) available at http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoras_kovacic_rosch.pdf

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transaction presented by third parties used projections of the *total* number of contestable subscribers in certain markets where there had been – or were going to be – RSN exclusives post-transaction. In my view, the analysis should have focused instead on the number of subscribers *for which RSN was "must have" programming*. However, the third parties did not focus on *that* number. One could not extrapolate that number from the larger number of overall subscribers. Thus, in the few markets where there had been/or were going to be RSN exclusives, the economic data purporting to demonstrate harm – even to competitors – did not hold up.

Third, *Paddock Publications v. Tribune Co.*[5] teaches that exclusives can help firms differentiate themselves and compete more effectively. In this case, it was possible that MSVDs that were cut off from a RSN might compete harder with differentiated programming, and at a minimum compete harder for the RSN contract the next time it is available (if there were no vertical integration). There was nothing in the record to demonstrate that these pro-competitive effects would not occur.

The Commission would have been confronted with all of the above even if it could establish consumer harm. As to competitive injury, it is a fundamental tenet of antitrust law that injury to competitors is not necessarily injury to competition. I found convincing none of the theories of consumer harm ultimately convincing in this case.

It was argued that RSN exclusives would reduce subscriber choice. However, the Supreme Court in *Jefferson Parish v. Hyde*[6]

theory to situations where there are high switching costs – which do not exist when switching between cable and satellite television.

There were also complaints about raising rivals' costs, but there was no suggestion that it would competitors would be eliminated. Nor was it suggested that the higher costs for RSN would be passed on to subscribers in the local markets – given the competitors' national pricing model.

Finally, some forecasted an increase in the rates Comcast and Time Warner charged its subscribers for RSN. However, there was no evidence that subscribers who "must have" RSN in any local market would be so numerous that such a strategy would be profitable (and there was scant evidence of ability to discriminate). In other words, an increase in RSN prices would only be profitable if enough customers continued to subscribe to the service; if enough subscribers abandoned the service when faced with a price increase then the increase would be unprofitable.

Net, net, the Commission had the burden to show:

- - foreclosure was likely; and

- - it could not just harm rivals, but would have an anticompetitive effect (on consumers)

In the end, I did not believe that the Commission could bear that burden. The battle continues before the FCC, which has a different statute that may be more forgiving to som RSN in

VALASSIS (March 2006)

In March 2006, the Commission voted 5-0 to issue a complaint that challenged an invitation to collude by Valassis in a duopoly market (newspaper inserts) *solely* on the basis that its conduct constituted an unfair method of competition under Section 5 of the FTC Act.[8] Because there was a consent decree and the Aid To Public Comment focused primarily on the context in which the invitation to collude occurred – namely in an analyst conference call – the significance of the *way* the conduct was iCom

commentators to suggest that the unfair methods of competition prohibition was a dead letter and that the Commission would not challenge conduct on that basis alone.

I do not believe it is a dead letter. The Supreme Court's decision in *FTC v. Sperry & Hutchinson Co.*,[9] endorses an expansive reading of Section 5 and unfair methods of competition. In that case, the Supreme Court held that Section 5 empowered the FTC to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws" and to "proscribe practices as unfair or deceptive in their effect on competition."[10] This expansive reading of Section 5 was not surprising. About two decades earlier the Court declared that "[t]he 'unfair methods of competition' which are condemned by Section 5(a) of the Act, are not confined to those that were illegal as common law or that were condemned by the Sherman Act."[11]

An expansive reading of Section 5 is not only supported by Supreme Court precedent but it also seems sound as a matter of policy. A Commission decision finding conduct to be an unfair method of competition under Section 5 is not given collateral estoppel or prima facie evidentiary effect in a subsequent antitrust treble-damages action against the respondent, based on the same conduct.[12] Nor is such a finding a basis, even theoretically, for follow-on federal or state criminal actions based on the Sherman Act or its state law equivalents. Consequently, a Commission conclusion that an act or practice is an unfair method of competition under Section

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[9] 405 U.S. 233 (1972)

[10] *Id.* at 239.

[11] *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394-95(1953).

[12] *See, In re Antibiotic Antitrust Actions*, 333 F. Supp. 317, 322 (S.D.N.Y. 1971); 15 U.S.C. § 16(a) (2006).

5 is less likely than a finding that an act or practice is a Sherman Act violation to do collateral damage.

I believe that S&H is alive and well, notwithstanding the trilogy of appellate cases decided in the early 1980s that rejected Commission decisions challenging conduct as unfair methods of competition under Section 5.[13]

In the first of these cases, *Boise Cascade v. FTC*[14], the Ninth Circuit overturned the Commission's decision that the plywood industry's use of a non-collusive delivered price system was an unfair method of competition. The Ninth Circuit held that, absent proof of overt collusion (which would have made the practice a *per se* violation of Section 1 of the Sherman Act), the Commission could not use Section 5 to get around the lack of evidence of actual anticompetitive effect.[15] The court rejected a *standalone* unfair methods of competition claim when there was "well forged" Sherman Act case law governing the conduct, lest it "blur the distinction between guilty and innocent commercial behavior."[16]

Subsequently, in *Official Airline Guides v. FTC* ("OAG")[17], the Second Circuit overturned a Commission decision holding that it was an unfair method of competition for the then sole provider of airline flight schedule information to refuse to publish listings of

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[13] *See, Boise Cascade v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Official Airline Guides ("OAG") v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

[14] 637 F.2d 573 (9th Cir. 1980)

[15] *Id*. at 579.

[16] *Id*. at 581-82.

[17] 630 F.2d 920 (2d Cir. 1980)

connecting flights of commuter airlines. The practice was not proscribed by Section 2 of the Sherman Act because *OAG* was not a participant in the airline market in which competition was allegedly affected. The court acknowledged that the refusal was arbitrary and that it had an adverse effect on competition between certificated and commuter air carriers. However, the court held that treating the practice as an "unfair method of competition," notwithstanding its legality under the Sherman Act, "would give the Commission too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."[18]

In the third of these cases, *E.I. duPont de Nemours & Co. v. FTC* ("Ethyl"),[19] the Second Circuit overturned a Commission decision holding that various parallel "price-signalingue89403E7C /P ETEM7

Second, the Ninth Circuit's decision in *Boise Cascade* appears to teach that in the absence of *per se* illegal conduct, proof of actual or incipient anticompetitive *effect* is also required.[26] Indeed, former Chairman Tim Muris has written that sound antitrust analysis must always be grounded in anticompetitive effects.[27] His focus was on single firm conduct cases under Section 2, but his views would seem to apply with equal force to an unfair method of competition claim under Section 5. It may be that the effect element of the claim can be inferred from clear evidence of anticompetitive intent (and lack of legitimate business purpose). The Analysis to Aid Public Comment in *Valassis*, for example, stated that an invitation to collude could be treated as an unfair method of competition where there 72 98.5893 52 0 0 12 28ads536485.04 Tm(p)Tj

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American Airlines[29] is the only decision that has blessed treating an invitation to collude as a Section 2 offense. Numerous decisions have held that there is no such offense--that the monopolization referred to in Section 2 is inherently a single firm concept.

WEYERHAEUSER (May 2006)

I suspect many of you know that Commissioner Leibowitz and I voted *against* the joining the United States' *amicus* brief filed in the *Weyerhaeuser* case.[31] The brief recommended that the Supreme Court grant cert. Here's why I voted the way I did.

The central premise of the *amicus* brief was said to be the passage at page 12, asserting that the Sherman Act protects sellers in an input market as well as buyers in an output market. The brief cited the Supreme Court's 1948 decision in *Mandeville Farms*[32] as its support for this premise. Based on that premise, the government's brief argued that *Brooke Group*[33] applied foursquare to a buyer case alleging predatory pricing as well as to a seller case alleging predatory pricing. However, I believe this premise is wrong and would create bad law for the following reasons.

First, it has long been settled that the antitrust laws do not protect buyers or sellers, as such. They protect *consumers*.

Second, the Guidelines adopted by *both* agencies have made it clear that agreements among competitors as buyers (which would probably be condemned as per se illegal if engaged in by those same competitors as sellers) will be treated as illegal only when the agreements are likely to injure consumer welfare.[34] The Guidelines for Collaborations Among Competitors, for

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[31] *See,* Brief for the United States as Amicus Curiae, No. 05-381 (May 31, 2006); *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.,* 411 F.3d 1030 (9th Cir. 2005);

[32] *Mandeville Farms, Inc. v. American Sugar Co.*, 334 U.S. 219 (1948)

[33] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993)

[34] *See,* United States Department of Justice and Federal Trade Commission, Guidelines for Collaborations Among Competitors (April 7, 2000), *reprinted in* 4 Trade Reg.

example, identifies three situations where buy-side agreements can have that effect.[35] The first is where the buyers enjoy monopsony power such that their buying agreement can depress output and thereby produce supra-competitive prices in the long run (to the detriment of consumers). The second is where the buy-side agreement can standardize costs of an input that is so important in output prices that they can effectively fix sell-side prices (to the detriment of consumers). The third is where the buy-side agreement will enable participants to monitor important input prices so as to facilitate prediction of competitor production levels and thereby influence output and pricing decisions on the sell-side (to the detriment of consumers).

The Health Care Guidelines likewise treat threats to consumer welfare as the defining characteristics of buy-side agreements that should be condemned and challenged.[36] Absent evidence of consumer injury, buy side conduct – whether unilateral or concerted – that reduces input costs and thus is efficiency-enhancing is likely to help, not harm, consumer welfare, and thus should not be condemned or challenged. In short, there is nothing in the government Guidelines to suggest that we should be concerned about seller (rather than consumer) welfare,

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Rep. (CCH) ¶ 13,160; United States Department of Justice and Federal Trade Commission, Policy Statements on Health Care Antitrust Enforcement (August 18, 1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153. *But cf.,* Federal Trade Commission and United States Department of Justice, IMPROVING HEALTH CARE : A DOSE OF COMPETITION, Chapter 6 at pp.13-20 (July 2004), available at http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf

[35] *See,* United States Department of Justice and Federal Trade Commission, Guidelines for Collaborations Among Competitors, § 3.31(a) at p. 14 (April 7, 2000)

[36] *See,* United States Department of Justice and Federal Trade Commission, Policy Statements on Health Care Antitrust Enforcement, Statement 7 on Joint Purchasing Arrangements Among Health Care Providers (August 18, 1996), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,153.

much less to support the sweeping assertion made in the *amicus* brief that the antitrust laws are designed to protect sellers and buyers equally.

Third, *Mandeville Farms* does not compel that conclusion either. As previously stated, the government's brief argued that the Supreme Court's 1948 decision in *Mandeville Farms* supported its position. It does, to be sure, contain the language quoted in the brief. However, *Mandeville Farms* is nearly a half century old, and that language was written long before consumer welfare became the lodestar of antitrust analysis for the courts (including the Supreme Court) and commentators. Moreover, even in *Mandeville Farms*, the Supreme Court said in its analysis of the facts that the defendant sugar beet processors enjoyed monopsony power on the buy-side *and* market power on the sell-side so that their buy-side agreement had the potential to impact sell-side prices (and thus injure consumers).[37]

In short, I thought this critical portion of the *amicus* brief was not just out of step with modern (and proper) antitrust analysis. By suggesting that the antitrust laws broadly protect sellers, I was concerned that it would chill buy-side conduct that would reduce input costs and thereby advantage, not hurt, consumers.

This is not to say that I thought the Ninth Circuit's decision affirming the judgment against Weyerhaeuser was right. Ironically, I think it was dead wrong. In the jury verdict underlying the judgment, the jury found that Weyerhaeuser lacked any market power in the alleged relevant product market (namely lumber). If that is so, its buy-side conduct could not harm consumers. But a wrong result in an appellate court decision, standing alone, is usually not

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[37] *Mandeville Farms* at 240-41.

a sufficient basis for *certiorari*. I, therefore, could not join the Commission majority in recommending that it be granted.