Prepared Statement of the Federal Trade Commission

Presented by
Robert Pitofsky, Chairman

Before the

Committee on the Judiciary

Merger enforcement is an important part of our work, not only because we have specific statutory responsibilities with respect to mergers, but also because merger enforcement serves to prevent the creation of market conditions that are likely to lessen competition and harm consumers. The current merger wave has made this an even larger part of the Commission's antitrust mission. Through productivity gains and old fashioned hard work, the Commission -- more specifically, its dedicated staff -- has handled the increased workload with basically the

In hospital mergers, the vast majority of transactions do not raise substantial antitrust concerns, and we do not challenge them; but we do take action when the evidence indicates that consumers are likely to be harmed. The Commission issued consent orders in several cases,[(11)] but there were also disappointments in preliminary injunction actions in two other cases involving mergers of local hospitals.[(12)] Despite those setbacks, we have an obligation to review each transaction on its own merits.

In the information and technology area, one of the more important enforcement actions involved the acquisition of Turner Broadcasting Corporation by Time Warner.[(13)] This merger made Time Warner a powerhouse in the production of video programming (such as HBO, CNN and TBS) for cable television and other non-broadcast distribution, and it also increased the level of vertical integration in the industry by linking Turner Broadcasting's video programming with Time Warner's cable operations. After an extensive investigation of some very complicated issues, a majorit

natural gas industry has made possible the emergence of competition in the sale and transportation of natural gas to industrial customers. These changes were starting to occur in Salt Lake City, but competition could have been nipped in the bud if the acquisition had been permitted. Antitrust enforcement preserved the benefits of that emerging competition.

In the defense sector, our staff has maintained a productive working relationship with Department of Defense staff in accordance with the Defense Science Advisory Board guidelines for antitrust review of defense industry mergers. The Commission has been careful not to interfere unnecessarily with the positive, procompetitive aspects of defense mergers, and we take careful account of special characteristics of defense procurement. However, we have taken action when a merger, or certain aspects of a merger, threatened to increase market power and result in higher prices, lower output, or reduced quality, service or innovation. The product markets involved in recent cases in which we negotiated consent orders include high altitude endurance unmanned air vehicles and space launch vehicles,[(17)] military tactical fighter aircraft,[(18)] satellite communications systems,[(19)] a component for an anti-missile program,[(20)] and Aegis destroyers.[(21)]

The Commission also reviewed the defense industry aspects of the Boeing/McDonnell Douglas merger.[(22)] Although both companies develop fighter aircraft, the evidence indicated that there are no current or future procurements of fighter aircraft by the Department of Defense in which the two firms would likely compete. Therefore, the merger was not likely to lessen competition in defense procurement.

B. Non-Merger Enforcement

The FTC also plays a special role in antitrust enforcement because it engages in administrative litigation, primarily in non-merger cases. In substantial part, the FTC was created because Congress believed that it would be helpful to have the assistance of an agency with specialized expertise in analyzing complex business transactions to resolve the difficult competition issues that may arise. The Commission has applied this expertise on numerous occasions over the years, resulting in important antitrust decisions such as the American Medical Association[(23)] case in 1979, which opened the door for alternative forms of health care delivery at a time when the AMA's actions deterred change from more expensive fee-for-service health care delivery, which was then the predominant system. Later cases established the principle that consumers can be harmed by collusive and unjustified denials of important services as well as by collusive arrangements that more directly affect price competition. For example, in FTC v. Indiana Federation of Dentists,[(24)] the Supreme Court upheld the Commission's finding that a group of dentists had harmed their patients by refusing to provide their dental x-rays to insurance companies to facilitate the insurers' pretreatment review.

A current case provides another example of the Commission's adjudicatory function.[(25)] In late September, an administrative law judge issued a decision upholding an FTC complaint that charged Toys "R" Us, the nation's largest toy retailer, with using market power to force toy manufacturers to stop selling their popular toys to warehouse clubs, or to sell the clubs only combination packs so consumers could not easily compare prices.[(26)] I cannot discuss the merits of the case since it is pending on appeal before the full Commission, but the ALJ's decision

addresses a number of interesting issues. The case alleges that a buyer, rather than a seller, exercised market power and that the buyer orchestrated agreements among the sellers to adhere to the restrictions on sales to the buyer's competitors. Resolution of these kinds of complex

the enforcement interests of both the states and the Commission.[34] Another example is the *Staples/Office Depot* merger case, where a number of states cooperated with our investigation and filed an amicus brief in support of the Commission's case.

While the Commission continues to apply the rule of *per se* illegality to minimum resale price agreements, it no longer supports the application of the *per se* rule with respect to vertical restrictions on the maximum price downstream sellers may charge. In April of this year, the Commission joined with the Department of Justice in urging the Supreme Court to abandon the rule of *per se* illegality for maximum resale price agreements.[35]

Finally, in what may have been the first case of its kind, a majority of the Commission decided in 1996 to issue a consent order involving charges that a computer manufacturer had abused a standard-setting process by certifying that it had no patent or other intellectual property claims to a technology that was being proposed as a standard, and then asserting patent claims after the standard had been adopted.[36] Knowledge of those patent claims might have allowed the standards organization to make an informed choice that may have resulted in the selection of a different standard. The manufacturer's conduct, if successful, would have imposed costs on its rivals, either in the form of royalties or in the form of costs to redesign their products to use another standard. To prevent those effects, the Commission's order prohibits the respondent from enforcing its patent rights against computer manufacturers that have adopted the standard. The Commission's order is consistent with the common law doctrine of equitable estoppel, and it serves to protect the integrity of the standard-setting process.

In sum, the Commission has been active in reviewing and, when necessary, challenging a wide variety of non-merger conduct. That is not to say that the Commission has achieved the optimal level of enforcement. The resource demands of dealing with the merger wave have forced the reassignment of some staff from non-merger investigations to merger work. As a result, the number of new non-merger investigations has decreased since the merger wave began -- there is a clear and predictable inverse relationship. This will have effects in the future because non-merger investigations can take a significant amount of time to develop. As a result, over the next few years these resource constraints may cause us to experience a drop in the number of non-merger cases and some delays in bringing these cases to fruition. Nonetheless, we will attempt to maintain a healthy level of non-merger enforcement that produces major benefits for consumers. A broad-ranging benefit is the deterrence of other persons from engaging in anticompetitive conduct similar to that challenged in our cases.

III. Enforcement Strategies

The success of the enforcement program depends on its implementation. The Commission employs multiple strategies to ensure antitrust enforcement that best serves the public interest and achieves the twin goals of making antitrust enforcement effective, while keeping it efficient and minimally burdensome.

Foremost is an insistence on rigorous analysis, to ensure that reasons for competitive concern are valid and well-supported by the evidence. Our goal is to stop real threats to competition, but to refrain from intervening unless it is necessary. That policy is exemplified by the Commission's

that would protect consumers from unwanted mail and telephone solicitation. The program would require DMA members to honor requests by consumers to have their names removed from

reportable transactions is about 7-10% lower than it would have been without the new exemptions. Incidentally, these exemptions reduced the agencies' revenues from HSR filing fees, on which they are dependent for a substantial part of their funding. The staff is exploring the possibility of additional exemptions, as well as a revision to the premerger reporting form to eliminate the need to provide certain information. The staff is also seeking to provide additional guidance on specific information requirements, to ensure that merging parties understand their obligations.

The Commission also broadened its policy of terminating orders after 20 years. As adopted in 1994, this "sunset" policy applied only to competition orders, and respondents under existing orders that met the 20-year requirement had to file a petition to terminate the order. In 1995, the Commission made the sunset policy applicable to both competition and consumer protection orders, and the sunsetting of old orders was made automatic; respondents no longer have to file a petition to make it happen. These steps removed remedial requirements that were no longer necessary and may even have been counterproductive by constraining business conduct unnecessarily.

These efforts to reduce burdens are part of a larger Commission-wide effort to remove unnecessary regulatory burdens. For example, since 1994 the Commission has eliminated 42% of its trade regulation rules, primarily in the consumer protection area, which are no longer necessary because industry or state requirements exist or technology has changed.

B. Administrative Litigation Rules Reform

In September 1996, the Commission announced a set of procedural rule changes designed to streamline the Commission's administrative trial procedures for both antitrust and consumer protection cases. The perception, and sometimes the reality, was that administrative litigation took too long. The amendments establish new and shorter deadlines, streamline pre-trial

make clear that a wider range of physician networks will be reviewed under the more flexible

downward pressure on profit margins resulting from competition between

16. *FTC v. Questar Corp.*, No. 2:95CV 1137S (D. Utah 1995) (transaction abandoned).

17. *The Boeing Co.*, Dkt. C-3723 (consent order, Mar. 5, 1997) (acquisition of Rockwell's Aerospace and Defense business).

18. *Lockheed Martin Corp.*, Dkt. C-3685 (consent order, Sept. 18, 1996) (acquisition of Loral Corp.; the transaction also involved air traffic control systems and commercial satellites).

19. *Raytheon Co.*, Dkt. C-3681 (consent order, Sept. 3, 1996) (acquisition of Chrysler Technologies Holding).

20. *Hughes Danbury Optical Systems*, Dkt. C-3652 (consent order, Apr. 30, 1996).

21. *Litton Industries, Inc.*, Dkt. C-3656 (consent order, May 7, 1996).

22. *Boeing/McDonnell Douglas*, FTC File No. 971 0051. The commercial aircraft part of the merger is discussed later in this testimony.

23. 94 F.T.C. 701 (1979), *enforced as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam by an equally divided Court*, 455 U.S. 676 (1982).

24. 476 U.S. 447 (1986).

25. *Toys "R" Us*, Dkt. 9278 (complaint issued, May 16, 1997) (Comm'rs Azcuenaga and Starek dissenting).

26. *Toys "R" Us, Inc.*, Dkt. 9278 (Initial Decision, Sept. 25, 1997).

27. *FTC v. College of Physicians-Surgeons of Puerto Rico*, Civ. No. 97-2466HL (D.P.R. 1997) (stipulated final judgment for permanent injunction).

28. *Montana Associated Physicians, Inc.*, Dkt. C-3704 (consent order, Jan. 13, 1997).

29. Other cases involving medical practitioners in recent years include *Physicians Group, Inc.*, Dkt. C-3610 (consent order, Aug. 11, 1995); *Puerto Rican Physiatrists*, Dkt. C-3583 (consent order, June 2, 1995). Another important case involved the use of "most favored nation" clauses by RxCare of Tennessee, the leading provider of pharmacy network services in that state, in contracts with pharmacies. *RxCare of Tennessee, Inc.*, Dkt. C-3664 (consent order, June 10, 1996). These clauses required that, if a pharmacy in the network agreed to accept a lower reimbursement rate for providing prescription drugs to any other plan's subscribers, the pharmacy had to give RxCare the lower rate as well. Ordinarily, one might think that the subscribers to pharmacy benefit plans served by RxCare would benefit from the most favored nation clause, since they would benefit from lower reimbursement rates offered to competing plans. In this case, however, RxCare's network had such a large market share that member pharmacies had more to lose than to gain from seeking additional business through lower reimbursement rates for other plans. In effect, the most favored nation clause established a price floor and prevented lower-priced networks from being able to enter the market.

30. *California Dental Ass'n v. FTC*, No. 96-70409 (9th Cir. Oct. 22, 1997), *affirming California Dental Ass'n*, Dkt. 9259 (final order, Mar. 24, 1996) (Comm'r Azcuenaga dissenting; Comm'r Starek concurring in part and dissenting in part). The Court of Appeals affirmed the finding of illegality of price-related advertising restraints based on a "quick look" rule of reason analysis rather than the *per se* analysis applied by the Commission.

31. *American Medical Ass'n*, 94 F.T.C. 701 (1979), *supra* n.23.

32. New Balance Athletic Shoe, Inc., Dkt. C-3683 (Sept. 10, 1996) (Comm'r Starek dissenting); Reebok Internat'l, Ltd., Dkt. C-3592 (July 18, 1995) (Comm'r Starek dissenting).

33. American Cyanamid, Dkt. C-3739 (consent order, May 12, 1997) (Comm'r Starek dissenting). In part, the consent order prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for American Cyanamid products.

34. For example, in the American Cyanamid matter, a multi-state task force consisting of all 50 states, the District of Columbia and the Commonwealth of Puerto Rico obtained a settlement valued at $7.3 million in a companion case.

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