[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissi

fact, some of the thoughts I'm going to voice come from that colleague). I voice these thoughts now out of fairness. I don't think it's appropriate for me to spring them on parties or their counsel who are completely unaware of them.

This is not the first time I've questioned the way business has been conducted at the Commission. Our Chairman, Bill Kovacic, has encouraged all of us at the Commission to engage in self-criticism. In that spirit, I have explored several provocative questions at recent conferences held by the Bates-White and NERA. One question is whether the Commission spends too much time investigating matters pre-complaint and arguably over-prepare our cases.[2] Another question is whether we at the Commission have arguably ceded our judicial role to the federal district courts in some cases in recent years.[3]

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[2] J. Thomas Rosch, Commissioner, A Peek Inside: One Commissioner's Perspective on the Commission's Role as Prosecutor and Judge, Remarks before the NERA 2008 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico, July 3, 2008, at 9-10, *available at:* <http://www.ftc.gov/speeches/rosch/080703nera.pdf>.

[3] *Id.* at 14.

[4] FTC v. Whole Foods Market, Inc., 533 F.3d 869 (D.C. Cir. 2008); *see also* FTC v. H.J. Heinz Co. 246 F.3d 708, 714 (D.C. Cir. 2001).

[5] *See, e.g.,* FTC v. Freeman Hosp., 1995-1 Trade Cas. (CCH) 71,037, at 74,893 n.8

Indeed, merger cases (which don't require jury trials) take even less time from complaint through federal court judgment. For example, in *United States v. Oracle*, Judge Walker issued his opinion approximately 7 months after the complaint was filed. Discovery in that case was global in scope and the parties took nearly a hundred depositions in less than three months. Judge Walker did a masterful job in managing the case from beginning to end. Counsel for the parties routinely seek expedited pre-trial proceedings in preliminary injunction (section 13(b)) proceedings because they want to close the deal as soon as possible. I don't blame counsel for doing that but the lessons to be drawn from those cases is that when the stakeholders involved in the litigation – the parties *and* the judge – are motivated, even the most complicated matters can move quickly.

The disparity between federal courts and administrative litigation exists despite the fact that federal district court dockets are much more substantial than the docket handled by Commission administrative law judges or by the Commission. It is also important to note that antitrust cases in federal district courts may have the added complexity of jury trials. This has led some, including the Antitrust Modernization Commission, to suggest that all Commission merger challenges be tried in the federal district courts instead of in part 3 proceedings.[6] I disagree with that suggestion. It conflicts with the intent of Congress to entrust antitrust cases, including merger cases, to the Commission as a specialized and expert tribunal best equipped to adjudicate those cases.[7] Moreover, the Commission believes the part 3 process can be made

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[6] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, , Ch. II.A at 131 (April 2007) *available at:* <http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf>.

[7] *See, e.g.*, FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986); GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION - A STUDY IN

more expeditious without undercutting that Congressional intent.

To that end, in the *Inova* case the Commission appointed a Commissioner to preside over

ADMINISTRATIVE LAW AND PROCEDURE 22, 98 (1924) (The Commission was "conceived to be a body . . . especially qualified to pass on questions of competition and monopoly.").

[8] FTC Press Release "FTC and Virginia Attorney General Seek to 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>.

be adjudicated. In fact, that argument is sometimes advanced as a reason for federal district courts to deny preliminary injunctive relief in Section 13 (b) proceedings.[9] Second, in all antitrust cases, protracted Part 3 proceedings may result in substantially increased litigation costs for the Commission and for the clients whose transactions or practices are challenged. More specifically, protracted discovery schedules and pretrial proceedings may be good for the litigators, but they can result in nonessential discovery and motion practice that can be very costly to both the Commission and those clients. Third, I'm not convinced that protracted part 3 proceedings improve the quality of decisions. To the contrary, there is probably some truth to the adage that often "justice delayed is justice denied."

In sum, one way or the other, Part 3 is likely to become an effective and viable adjudicatory process. But I would suggest that the Commission not stop with Part 3 reforms, and the balance of my remarks will focus on other aspects of the Commission's modus operandi that should be re-examined.

III. Part II Proceedings: What is the meaning of "reason to believe"?

A friend and former colleague challenged some of my thoughts about the use of Part 3 and administrative litigation at the Commission. He told me I'd missed the point – that the issue was not time it took to resolve administrative litigation but the perception that the deck was stacked against Respondents in those proceedings. He suggested that I seemed to be saying "trust us to get it right" and that the outside bar didn't trust us to do that. How could we claim to be objective arbiters when we almost always seemed to resolve the cases in favor of Complaint

[9] *See, e.g.*, FTC v. Staples, 970 F.Supp.1066, 1093 (D.D.C. 1997) (the court noted that its decision to grant the Commission's motion for a preliminary injunction would "most likely kill the merger.").

Counsel. My first reaction was "how dare you accuse us of being unfair to Respondents?" But then I got to thinking about whether he was right about the perception of the outside bar, and more importantly, about whether the perception was reality. I began to ponder whether we at the Commission were handling competition cases in a fashion that was fundamentally wrong and why that might be so. It is those thoughts that I voice today.

Whether you are the Assistant Attorney General of the Antitrust Division or a Commissioner at the Federal Trade Commission, a critical question is your standard for issuing a complaint. I know many of you in the audience may hold out hopes for one of these positions in the new administration next year. I would urge you to think about this question – and

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[10] 15 U.S.C. 45(b).

[11] *See, e.g.*, In the Matter of Hoechst Marion Roussel, Inc., Carderm Capital L.P., Andrx Corp., Docket No. 9293, 2000 FTC LEXIS 137 (2000); In the matter of Boise Cascade Corp., Docket No. 9133, 97 F.T.C. 246 (1981); Exxon Corp., 83 F.T.C. 1759-60 (1974).

FTC v. Standard Oil Co. of California, 449 U.S. 232, 246 (1980).

[15] *See* Jonathan B. Baker and Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*," 22 ANTITRUST ABA 29 (Summer, 2008).

In 2007, the Commission filed and litigated three lawsuits. *See* FTC vSE," 22 ATCS 12 4.3600 0.00

to the Commission table after they have conducted a pre-complaint investigation in which they have left no stone unturned. Depending on the staff attorneys involved, it may

[17] The investigatory process is sometimes a "black box" for the Commission too.

recommendation unless there is a very high degree of certitude that Complaint Counsel is likely to prevail, it is natural that the staff would focus first and foremost on the recipes in the Commission's own cookbook. The problem is that, as the experienced trial lawyers told us at the hearings on Unilateral Effects, while those economic analyses have value, what matters the most to lay trial judges considering antitrust cases (and what they most clearly understand) is the competitive effects story told by non-economic evidence. The decision in the *Staples* case seems to bear out this observation.[18]

Finally, by far the most important consequence of the use of that very high "reason to believe" standard is that it has arguably skewed our decision-making process at the Commission. Let me put it to you bluntly. Do you believe that if the Commission has ten cases on its docket which are voted out on the premise that there's a 60% chance Complaint Counsel will prevail, Complaint Counsel is likely to prevail with the same frequency that it will likely prevail if the Commission has two cases per year on its litigation docket which are voted out on the premise that there is a 90% prospect that Complaint Counsel will prevail? (That's a rhetorical question.) Putting a sharper point on it, isn't it probable that in the latter scenario the decision to issue the Complaint will morph into the dispositive decision respecting liability? (That's another rhetorical question.)

IV. THOUGHTS

Let me turn now to my radical thoughts. What would happen if a 60% probability were

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[18] *See* The Enforcer Tapes: Colorado, Comments, Questions and Answers, Charles James and Timothy J. Muris, ABA Section of Antitrust Law Post Annual Meeting, Colorado Springs, August 9, 2001, at 3, the AntitrustSource, Nov. 2001, *available at:* <http://www.abanet.org/antitrust/at-source/01/11/colorado.pdf> (then Chairman Muris stating that while Judge Hogan regarded the extensive econometric in *Staples* "as a wash.").

deemed a sufficient reason to believe to vote out an antitrust complaint? What would be the consequences? The first consequence is that there would almost certainly be a hue and cry in the bar (and the business community). It would be said that the Commission was opening the floodgates to questionable and costly antitrust litigation. But think about it further.

To begin with, we would still have to be mindful of the Supreme Court's admonition in *Standard Oil* that we have "a well-grounded reason that unlawful conduct has occurred" before issuing a complaint.[19]

[19] Standard Oil, 449 U.S. 247 n.14.