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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

(October 1, 2002 - September 30, 2003)

This report is submitted by the Delegation from the United States to the Competition Committee FOR INFORMATION at its forthcoming meeting (8-9 June 2004).

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE UNITED STATES

(October 1, 2002 through September 30, 2003)

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Introduction

1. This report describes federal antitrust developments in the United States for the period October 1, 2002, through September 30, 2003 ("FY 2003"). It summarises the activities of both the Antitrust Division ("Division") of the U.S. Department of Justice ("Department" or "DOJ") and the Bureaus of Competition and Economics of the Federal Trade Commission ("Commission" or "FTC").

2. Following the departure of Assistant Attorney General Charles James on November 22, 2002, Deputy AAG R. Hewitt Pate served as Acting AAG until his confirmation as AAG on June 16, 2003. David S. Sibley began serving as the DAAG for Economic Analysis on May 6, 2003, and J. Bruce

consumers through a better understanding of the antitrust laws. In addition, transparency of analysis encourages international convergence and helps to prevent non-competition issues from influencing antitrust enforcement.

8. Use of Monetary Equitable Remedies: On July 31, 2003, the Commission issued a policy statement on the use of monetary equitable remedies such as disgorgement and restitution in competition cases, specifically, those involving violations of the HSR Premerger Notification Act, the FTC Act, and the Clayton Act. While the decision to seek such remedies will be determined on a case-by-case basis, the Commission stated that disgorgement and restitution can play a useful role in some competition cases. In determining whether to seek disgorgement or restitution, three factors will be considered. First, the Commission will ordinarily seek monetary relief only where the underlying violation is clear. Second, there must be a reasonable basis for calculating the amount of-by-2.7l .0016T5ug-.3(s)n7th or8t.7(t, the 4(14.8(7tC8.

C. International Antitrust Cooperation Developments

12. The International Competition Network (ICN) was launched in October 2001 as a network for antitrust officials from around the world to address proposals for procedural and substantive convergence in antitrust enforcement. In its third year, the ICN has grown from 15 founding members to include over 80 antitrust agencies in over 70 jurisdictions and has experienced increased participation from both international organisations, such as the OECD, and non-governmental advisors, including academics, industry groups, legal practitioners and consumer grou Tw [ioItor pory.4(eTw [)1f s seTw [N for[acade1.8(I3(ud))-2.8

16. During FY 2003, the Division opened 282 investigations and filed 55 civil and criminal cases in federal district court. The Division was party to three antitrust cases decided by the federal courts of appeals.

17. During FY 2003, the Division filed 41 criminal cases in which it charged 16 corporations and 28 individuals. Seventeen corporate defendants and sixteen individuals were assessed fines totalling $64.2 million and 15 individuals were sentenced to a total of 9,341 days of incarceration. Another six individuals were sentenced to spend a total of 1,025 days in some form of alternative confinement.

18. During FY 2003, 1,014 proposed mergers and acquisitions were reported for review under the HSR Act. In addition, the Division screened a total of 994 bank mergers. The Division further investigated 95 mergers and challenged 9 of them in court. An additional six transactions were restructured or abandoned prior to the filing of a complaint as a result of the Division's announcement that it would otherwise challenge the transaction. The Division opened 128 civil investigations (merger and non-merger), and issued 631 civil investigative demands (a form of compulsory process). The Division filed five non-merger civil complaints. Also during FY 2003, the Division responded to twelve requests for review of written business proposals.

2) FTC Staffing and Enforcement Statistics

19. At the end of FY 2003, the FTC's Bureau of Competition had 269 employees: 186 attorneys, 36 other professionals, 25 paralegals and 22 clerical staff. The FTC also employed about 58 economists who participate in its antitrust enforcement activities. In FY 2003, $45,333,900 was directly allocated to the Commission's competition mission, and an overall $75,998,300, which includes indirect support for the mission, was attributed to the mission.

13, 2004, the Supreme Court ruled in favour of Verizon, concluding that the 1996 Telecommunications Act did not create a duty to deal with rivals enforceable under Section 2 of the Sherman Act, and that the plaintiff had failed to adequately allege the anticompetitive conduct element of a Section 2 offence. 2004 WL 51011. The government was not a party to this private case, but the United States and the FTC filed as *amici curiae*, advocating the result the Court reached.

23. The Court denied a petition for *certiorari* in a case where the United States submitted a brief *amicus curiae* opposing review (*Dee-K Enterprises, Ine1-0.001Hev]TJ /(nt (afs,)1ilSect)8.4dn. Bh/F2 1 Tf 11.04 0 8*

27. In *United Phosphorus, Ltd. v. Argus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc), the court held that the requirements of the FTAIA involve the subject matter jurisdiction of the court (the alternative possibility being that the FTAIA states an additional element of a Sherman Act claim). Thus, satisfaction of the FTAIA requirements can be tested early in litigation, on a motion to dismiss for lack of

director of JO Tankers B.V., based in the Netherlands, pleaded guilty to the same charges and agreed to serve three months in jail and pay a fine of $75,000.

2) DOJ Civil Non-Merger Enforcement

38. Microsoft: The DOJ's complaint and the subsequent proceedings against Microsoft have been described in prior years' reports. In November 2002, the district court approved the settlement, finding that entry of the Final Judgment was in the public interest. The court emphasised that, "[w]hile the proposed final judgment, in general, is appropriately crafted to address the anticompetitive conduct, ... the

43. NT Media/Village Voice Media

- A settlement with 900 faculty physicians and 600 community physicians serving St. Louis, Missouri and surrounding areas;

- An administrative complaint against an organisation with more than 1,500 San Francisco physicians, and the subsequent settlement with that organisation; and

- A settlement with two San Diego County, California anaesthesiologists groups whose

Carolina state legislature passed a law in 2000 that eliminated a statutory requirement for a dentist to examine a child before a hygienist was permitted to provide preventive care in schools, and the Board

anticompetitive agreement not to advertise or discount certain older albums and video recordings in an effort to channel consumers toward purchasing the newly released album and video recordings of the 1998 Three Tenors concert. The unanimous Commission opinion, upholding the ALJ's finding of illegality, provided a blueprint of how the Commission will analyse "inherently suspect" horizontal restraints, based on established case law principles. The Commission found that the respondents' agreements not to discount or advertise Three Tenors products were inherently suspect, and thus "presumptively anticompetitive" even absent a showing of market power -- because restrictions of this sort generally pose significant competitive hazards. The Commission also determined that there was no legitimate efficiency justification for the challenged restraints. Respondents have appealed, and the case is now pending before the U.S. Court of Appeals for the District of Columbia Circuit.

56. Schering-Plough: On December 18, 2003, the Commission reversed and vacated an initroduco hx1(ent)

of PriMed Physicians, a physician group practice with 55 physician employees located in Dayton, Ohio, that the Commission has no present intention to recommend law enforcement action against the group's creation, with other Dayton-area physicians, of an advocacy group to collect and disseminate information about Dayton health care market conditions.

III. Enforcement of antitrust laws and policies: mergers and concentrations

Enforcement of Premerger Notification Rules

60. On February 6, 2003, the Department filed a civil antitrust complaint and proposed consent decree resolving its allegations that Gemstar and TV Guide had fixed prices, allocated customers, and violated pre-merger waiting period requirements (a practice known as "gun-jumping") prior to their merger in July 2000. On July 11, 2003, the court entered a final judgment ordering Gemstar-TV Guide to pay a record $5.67 million in civil penalties and to comply with certain restrictions to prevent it from engaging in similar conduct in the future. Prior to mid-1999, Gemstar and TV Guide competed to provide interactive program guides, or IPGs, to cable and satellite television service providers. IPGs allow television viewers to use a television remote control device to view program schedule information and select programs for viewing. Gemstar and TV Guide stopped competing for some customers in June 1999, when they were negotiating a possible joint venture, and subsequently announced that they would merge in October 1999, and filed a pre-merger notification under the HSR Act. Pending consummation of the transaction, and while the DOJ conducted its review of the transaction, Gemstar and TV Guide secretly agreed to allocate markets and customers, agreed on the prices and material terms that customers would be offered, and began jointly conducting their IPG business.

61. On February 28, 2003, the Department filed a civil lawsuit against Smithfield Foods Inc., the largest U.S. hog producer and pork packer, for twice failing to comply with premerger notification requirements before making certain acquisitions of stock of its competitor, IBP Inc., the second largest pork packer. The complaint, which is still pending, seeks a civil penalty of $5.5 million. The HSR Act exempts from its premerger filing requirements and the mandatory waiting period certain stock acquisitions that are "solely for the purpose of investment." The Department alleges that Smithfield's acquisitions were not exempt because Smithfield was also considering and taking steps toward a Smithfield-IBP combination.

Significant Merger Cases

1) DOJ Merger Challenges or Cases

62. <u>Hughes/Echostar</u>: On October 31, 2002, the Department filed an antitrust lawsuit in U.S. District Court in Washington, D.C., to block the proposed acquisition of Hughes Electronics Corp. by Echostar Communications Corp. The Department was joined in its lawsuit by the Attorneys General of 23 states, the District of Columbia and the Commonwealth of Puerto Rico. The Federal Communications Commission had previously announced its objection to the proposed merger on October 10, 2002, and ordered the matter set for an administrative hearing. The Department's Complaint alleged that if the

63. Alcan/Pechiney: On September 29, 2003, the Department reached a settlement with Alcan Inc. that requires Alcan to divest Pechiney S.A.'s aluminum rolling mill in Ravenswood, West Virginia, if Alcan's pending $4.6 billion tender offer for Pechiney is successful. Alcan and Pechiney are among the world's leading aluminum producers, producing a similarly wide range of rolled aluminum products. The Department said the acquisition, as originally proposed, would substantially lessen competition in the development, production, and sale of brazing sheet and would likely result in higher prices. Brazing sheet is a class of custom-engineered aluminum alloy used in fabricating the major components of heat exchangers for motor vehicles, including radiators, heaters, oil coolers, and air conditioners.

64. GE/Instrumentarium: On September 16, 2003, the Department reached a settlement with General Electric Corporation (GE), requiring the divesture of two Instrumentarium OYJ businesses – its Spacelabs patient monitor business and its Ziehm C-arm business – in order for GE to proceed with its acquisition of Instrumentarium. The Department said the acquisition, as originally proposed, would have lessened competition in the sale of monitors for patients requiring critical care and mobile C-arms used for basic surgical and vascular procedures, and would likely have resulted in higher prices or reduced quality for consumers. Critical care patient monitors are medical devices used by hospitals and other healthcare facilities to measure and display the vital physiologic signs of patients in serious medical condition. Mobile C-arms developed for basic surgical and vascular procedures are full-size, fluoroscopic x-ray machines that provide continuous, real-time viewing of patients during those procedures. GE and Instrumentarium are two of only a few competitors that provide these important medical devices to healthcare providers and have competed head to head on price, product features, and service. The DOJ communicated and cooperated extensively with the EU in the course of this investigation.

65. DFA/Southern Belle: On April 24, 2003, the Department filed a lawsuit against Dairy Farmers of America Inc. (DFA) and Southern Belle Dairy Co. LLC to compel DFA to divest its interests in Southern Belle Dairy in order to prevent higher milk prices in more than 100 school districts in Kentucky and Tennessee. The Department said DFA's acquisition eliminated the only other independent bidder for school milk – resulting in a monopoly – in 47 school districts, and reduced the number of independent bidders from three to two in 54 school districts, in Kentucky and Tennessee. The litigation is ongoing.

66. Northrop Grumman/TRW: On December 11, 2002, the Department announced that it would require Northrop Grumman Corporation to agree to certain restrictions to ensure continued competition for reconnaissance satellite systems in order for Northrop Grumman to proceed with its proposed $7.8 billion acquisition of TRW Inc. Reconnaissance satellites obtain information important to the nation's defence that is unavailable by other means, through key components called payloads that detect radar signals that bounce off of objects, and that detect radiation emitted or reflected by an object. Northrop is one of only two U.S. companies that design, develop, and produce the payload used in reconnaissance satellites. TRW is one of only a few companies with the ability to serve as a prime contractor on U.S. government reconnaissance satellite programs. Northrop's acquisition of TRW will allow it to be both the prime contractor and the payload provider for reconnaissance satellites. Absent the requirements proposed by the consent decree, the vertical integration created by this merger would give Northrop the ability and incentive to lessen competition by favouring its in-house payload to the detriment or foreclosure of its payload competitors and by refusing to sell, or selling at disadvantageous terms, its payload to competing prim i

among the three remaining producers of large graphite electrodes for sale in the United States, and would have substantially reduced competition in the production of large graphite electrodes. On May 8, 2003, the Department filed a voluntary notice of dismissal after receiving notice that the alternative bidder at the bankruptcy auction had purchased the assets on May 2, 2003.

68. Univision/HBC: On March 26, 2003, the Department announced that it would require Univision

b. Commission Administrative Decisions

73. Aspen Technology**:** On August 7, 2003 the Commission authorised staff to file an administrative complaint alleging that Aspen Technology’s acquisition of Hyprotech in 2002 was anticompetitive and led to the elimination of a significant competitor in the provision of proTf 1de f0’ ng26.1(T)-8.2(e)1(D-1.151i 133is)adeny

impact on the pace and scope of research into the development of a treatment for Pompe disease. There are three separate statements on the decision to close the investigation. The Chairman's statement recognised the limitations on innovation market analysis, noting that economic theory and empirical investigations have not established a general causal relationship between innovation and competition.

U.S. to consumers for travel or shipments to and for the U.S., as well as with respect to IATA agreements on airline fares, rates and charges in other contexts in which U.S. national interests are strong. The Department argued that such agreements are contrary to fundamental U.S. competition policy as set forth in the antitrust laws, and any foreign policy or international comity justifications for immunising such agreements have further eroded as other countries increasingly adopt policies more reliant on market competition.

81. On June 9, 2003, the DOJ filed comments with the DOT concerning regulatory supervision of the travel agent computer reservations systems (CRS) industry. The DOJ noted that many of the regulations, in effect for nearly twenty years, had failed to make the CRS industry more competitive, may have imposed costs of their own on consumers, and should not be extended. The DOJ also noted that two recent developments – domestic airlines no longer own CRSs and now use the internet to sell tickets – have reduced the need for extensive regulation. Adopting the Division's analytical approach and most of its factual findings and recommended regulatory responses, the DOT decided to allow most of its rules to lapse3(e1.TD)12.2.8(e4(tory)12.131,7(24rs,)10.n wle k b)12.1(e)-0.ep bings str reie4(t(i)-3.i(t)7.7(n)2(ing)12.19(toyco)

2) FTC Staff Activities: Federal and State Regulatory Matters

86. Intellectual Property: Competition and patents can foster innovation, but errors or systematic biases in one policy's rules can harm the other policy's effectiveness in promoting innovation. A failure to strike the proper balance between them can harm innovation. The FTC and DOJ held 24 days of hearings on this topic, with more than 300 expert panellists and 100 written submissions generating over 5,000 pages of transcripts. During the hearings many participants reported that, although competition and patents often work well together, too many questionable patents are harming innovation and competition. To address these concerns, the FTC issued a report in October 2003 entitled "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy." The Commission's report makes ten recommendations to reduce the proportion of questionable patents. Among other steps, the report recommends new procedures for challenging patent validity, careful application of patent law to prevent or invalidate obvious patents, and thoughtful integration of economic insights into patent law and policy.

87. Health Care Advocacy: Although the FTC typically uses its law enforcement authority to challenge potentially anticompetitive hospital mergers, the agency employed another of its tools to comment on the potential anticompetitive effects of the proposed acquisition of Slidell Memorial Hospital by Tenet Healthcare. Under Louisiana law, both the voters and the state Attorney General must approve the sale of a nonprofit hospital, such as Slidell, and the Attorney General requested the FTC's views on the transaction. In response, the FTC staff explained that the proposed merger of the Slidell area's only two full-service hospitals raised concerns ag12.5(is)-0.3(a)11.3(o)29(e)0.2(rg)1o(law2(g12.)103)]TJ 0911.3TJ 091t(l)-2.i

the purpose of identifying such movements. The staff incorporates into their analysis customer complaint data received from the states and the Department of Energy and also examines movements in the level of gasoline prices and the spread between the price of crude oil and the price of gasoline. If the staff detects unusual price movements, they research the possible causes, including, if appropriate, consulting with the staff of various federal and state agencies. The FTC staff also contacts the appropriate State Attorney General's Office to discuss the pricing anomaly and to discuss the appropriate course for further inquiry, including the possible opening of a law enforcement investigation.

91. Energy - Motor Fuel: The FTC staff submitted comments to the North Carolina Attorney General stating that amendments to the state's Motor Fuel Marketing Act could have significant potential to harm consumers by causing higher gasoline prices at the pump. Under current North Carolina law, it is illegal to sell gasoline below cost as a regular business practice with the intent to injure competition. Proposed amendments to the statute would have eliminated the "intent" and "business practice" requirements and would have redefined "cost" in a way that would not always reflect discounts to retailers. Because the proposal could make dealers liable for procompetitive price-cutting, the staff was concerned that it would deter aggressive competition, to the detriment of consumers. The FTC staff filed comments on similar proposals pending in Alabama, New York, and Kansas, and an existing law in Wisconsin.

92. Energy - Electricity and Natural Gas: The FTC continued to provide its expertise and assistance in connection with the ongoing process of opening electricity markets to competition. In FY 2003, agency staff submitted comments to the Federal Energy Regulatory Commission on Market-Based Rates and Authorisations, and on Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design. In addition, the staff submitted comments to the Illinois Commerce Commission on Asset Transfers Among Affiliated Companies, to the California Public Utilities Commission on Exit Fees and Distributed Generation, and to the Georgia Public Service Commission on Standards for Determining Whether Natural Gas Prices Are Constrained by Market Forces.

93. Professional Services: In addition to the joint DOJ/FTC letters noted above, the FTC staff provided comments to the Indiana State Bar Association opposing proposals that would unduly limit the ability of non-lawyers to compete in the market for real estate closings. The FTC staff also provided comments to the Tennessee legislature on proposed regulations for the practice of optometry, noting that consumers could end up paying more for eyeglasses because the operation of commercial optometry practices, especially chain optical stores, could be more difficult.

94. Financial Services: The agency recently submitted a letter urging the Commodity Futures Trading Commission (CFTC) to support more competition in the market for futures trading by allowing a

V. New Studies related to antitrust policy

A. Antitrust Division Economic Analysis Group Discussion Papers

101. The Economic Analysis Group issued the following papers during FY2003. Copies may be obtained by contacting Janet Ficco at 600 E Street, N.W., Suite 10000, Washington, D.C. 20530 or at (202) 307-3779 (janet.ficco@usdoj.gov). Other Division public materials may be obtained through the Antitrust Documents Group of the Division's Office of Operations. Requests should be directed to Ms. Janie Ingalls, Room 215, Liberty Place Building, 325 7th Street, N.W., Washington, D.C. 20530. Ms. Ingalls may be reached via fax at (202) 514-3763 or e-mail (janie.ingalls@usdoj.gov).

Eric Emch, GECAS and the GE/Honeywell Merger: A Response to Reynolds and Ordover, EAG 03-13, August 2003.

Charles J. Romeo, Estimating Discrete Joint Probability Distributions for Demographic Characteristics at the Store Level Given Store Level Marginal Distributions and a Market-Wide Joint Distribution, EAG 03-12, August 2003.

Dean V. Williamson, Renegotiation, Dynamic Efficiency, and Vertical Restraints in Electricity Marketing Contracts, EAG 03-11, August 2003.

Russell Pittman, Railways Reform and Electricity Reform in Russia, and the Role of the Ministry for Antimonopoly Policy, EAG 03-10, August 2003.

Russell Pittman, Regulatory Reform: Lessons for Korea, EAG 03-9, August 2003.

Gregory J. Werden, The *American Airlines* Decision: Not with a Bang but a Whimper, EAG 03-8, August 2003.

William W. Nye, Jumping the Gun: The Cellophane Strategy and the Incentives of Firms Contemplating Merger, EAG 03-7, April 24, 2003.

W. Tom Whalen, Constrained Contracting and Quasi-Mergers: Price Effects of Code Sharing and Antitrust Immunity in International Airline Alliances, EAG 03-6, April 24, 2003.

Russell Pittman, A Note on Non-Discriminatory Access to Railroad Infrastructure, EAG 03-5, April 24, 2003.

Jeffrey Wilder, Competing for the Effort of a Common Agent: Contingency Fees in Commercial Insurance, EAG 03-4, February 21, 2003.

Fred Gramlich, Coupon Remedies in Antitrust Cases: The Form of the Discount Also Matters, EAG 03-3, February 10, 2003.

Gregory J. Werden, The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook, EAG 03-2, January 2003.

Craig Peters, Evaluating the Performance of Merger Simulation: Evidence from the U.S. Airline Industry, EAG 03-1, January 2003.

Sheldon Kimmel, The Supreme Court's Efficiency Defense, EAG 02-13, September 2002. Forthcoming in the *Supreme Court Economic Review*.

B. Commission Studies, Reports and Economic Working Papers

1) Commission Conferences and Workshops

102. Merger Efficiencies: In December 2002, the Bureau of Economics held a two-day roundtable on merger efficiencies, entitled "Understanding Mergers: Strategy & Planning, Implementation and Outcomes." The roundtable brought together experts on mergers from economics departments, business schools, M&A consulting, antitrust law practice, and business. The goals of the roundtable included: (1) better understanding the M&A process from the development of a corporate strategic plan through the various stages to the end of the implementation; and (2) obtaining a broader perspective on mergers that might shed light on the factors that make mergers succeed or fail. A unique aspect of the roundtable was the participation of several business executives from firms who have been action in M&A for over a decade. Materials from the roundtable are available at: http://www.ftc.gov/be/rt/mergerroundtable.htm.

103. E-Commerce: In October 2002 the Commission held a three-day workshop on possible anticompetitive efforts to restrict competition on the Internet. The goal of the conference was to address the growing concern about possible anticompetitive efforts to restrict competition on the Internet either by state regulations enacted to aid existing bricks-and-mortar businesses at the expense of new Internet competitors, or practices where private companies are curtailing e-commerce by employing tactics such as collectively pressuring suppliers or dealers to limit sales over the Internet. The workshops featured testimony regarding industries that have experienced substantial growth in commerce via the Internet, but that also may have been hampered by anticompetitive restrictions. In particular, the workshop had panels on the following industries: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles; (5) caskets; (6) online legal services; (7) health care (telemedicine and online pharmaceutical sales); (8) auctions; (9) real estate, mortgages, and financial services; and (10) retailing. Materials from the workshop are available at: http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm.

Christopher P. Adams and Laura L. Bivins, Focusing on Demand: Using eBay Data to Analyse the Demand for Telescopes, January 2003.

David J. Balan, Have Lazear-Style Implicit Contracts Disappeared?, January 2003.

Daniel P. O'Brien and Abraham L. Wickelgren, A Critical Analysis of Critical Loss Analysis, January 2003.

Martin Gaynor and William Vogt, Competition Among Hospitals, January 2003.

Christopher P. Adams, Agent Discretion, Adverse Selection and the Risk-Incentive Trade-Off, December 2002.

Christopher P. Adams Does Size Really Matter? Empirical Evidence on Group Incentives, October 2002.

Appendices

Department of Justice: Fiscal Year 2003 FTE and Actual Amount by Enforcement Activity

	FTE	AMOUNT
CRIMINAL ENFORCEMENT	269	$41,656,000
Civil Enforcement	500	$77,362,000
TOTAL	769	$119,018,000

Federal Trade Commission: Fiscal Year 2002 Competition Mission FTE and Dollars by Program by Bureau/Office

Nonmerger Compliance	1.4	$152.6
Bureau of Competition	1.4	$152.6
Bureau of Economics	--	--
Regional Offices	--	--
Antitrust Policy Analysis	10.3	$1,282.4
Bureau of Competition	--	--
Bureau of Economics	10.3	$1,282.4
Regional Offices	--	--
Other Direct Mission Resources	20.1	$2,671.5
Bureau of Competition	15.2	$2,019.2
Bureau of Economics	4.4	$553.2
Regional Offices	0.5	$99.1