



Federal Trade Commission

“One Retrospective View of the Commission’s Activities”

Remarks of J. Thomas Rosch¹

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I'd like to muse this morning about what has happened with respect to the Federal Trade Commission's competition mission during the last six-plus months. There are several reasons for this. First, it has been an enormously productive period for the Commission. In fact, I would suggest that it has been the most productive six- plus months in the Commission's history. And I say that as one who has been an inveterate Commission-watcher for decades, pre-dating even the Commission headed by Chairman Janet Steiger, whom I once described as the "angel" of the FTC for her role in energizing it in the late 1980s. Second, this phenomenal period has occurred during the period that Bill Kovacic has been the Chairman of the Commission, and his leadership has been instrumental in what has been achieved during this relatively brief period of time. Yet he is too modest to admit it, and so it falls to me to give credit where credit is due. Third, I am very proud to have served as a Commissioner during this period. When Bill and I were sworn in at the beginning of 2005, the Commission was described as a "dream" Commission because the five of us had about a century of collective antitrust experience, and during the last six months, we arguably came close to justifying the label.

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 advisors Holly Vedova and Kyle Andeer for their invaluable assistance in preparing this paper.

² See Statement of Commissioner J. Thomas Rosch, Concurring in Part and Dissenting in Part, *In the Matter of Rambus, Inc.*, Docket No. 9302, available at: <http://www.ftc.gov/os/adjpro/d9302/070205roschstmt.pdf>.

³ See Dissenting Statement of Commissioner Pamela Jones Harbour and Commissioner J. Thomas Rosch, *In the Matter of Western Refining, Inc.*, Docket No. 9323, available at: <http://www.ftc.gov/os/adjpro/d9323/071003dissenting.pdf>.

⁴ See Dissenting Statement of Chairman Majoras, *In the Matter of Negotiated Data Solutions LLC*, File No. 051-0094,

⁵ See *FTC v. Foster et. al.*, 2007-1 TRADE CAS. (CCH) ¶ 75,725 (D.N.M. 2007); *FTC v. Equitable Res., Inc.*, 512 F.Supp. 2d 361 (W.D. Pa. 2007); *FTC v. Whole Foods Market, Inc.*, 505 F. Supp. 2d 1 (D.D.C. 2007).

⁶ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705; 168 L.Ed. 2d 623; 2007 U.S. Lexis 8668 (2007).

required it to report on the results of its use of the practice for several years.⁷ We also invited input on what the post-*Leegin* analysis should be, and, at the suggestion of Chairman Kovacic, the Commission will shortly conduct a workshop under the leadership of Commissioner Harbour on that subject.⁸

Finalization of the *N-Data* consent decree was also another highlight of the last six-plus months. The background of that decree was as follows. National Semiconductor successfully persuaded a standard-setting organization to include its patented interconnection technology in a standard that was adopted by most computer manufacturers, offering to license that technology for a one-time upfront fee of \$500. National's technology was assigned and then re-assigned to N-Data. N-Data sought to renege on the commitment that National had made. I, for one, didn't think there was a violation of Sherman Act Section 2. There was no doubt in my mind that incorporation in the standard had given whoever owned the National technology monopoly power. But I didn't think N-Data had engaged in an "exclusionary practice" – which is another element of a traditional Section 2 violation – because N-Data had not engaged in deception or any other form of manipulation of the ex ante competition for incorporation of the standard, which was responsible for the monopoly power. Nevertheless, I felt--and so did two of my colleagues--that N-Data's attempted renege constituted an "unfair act or practice" and an "unfair method of competition," both of which are prohibited by Section 5 of the Federal Trade

⁷ *In the Matter of Nine West Group Inc.*, Docket No. C-3937, Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, available at: <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>.

⁸ See FTC Announces Workshops For Next Year on Resale Price Maintenance, FTC Press Release dated October 28, 2008, available at: <http://www.ftc.gov/opa/2008/10/rpmwksp.shtm>.

¹⁴ Dissenting Statement of Commissioner William E. Kovacic, *In the Matter of Negotiated Data Solutions, LLC*, File No. 051-0094, available at: <http://www.ftc.gov/os/caselist/0510094/080122kovacic.pdf>.

Commission or any individual Commissioner can conduct the trial. The second phase consists of appeals from the initial decision made at the plenary trial, which are decided by the

¹⁷ See 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>; J. Robert Robertson, *FTC Part III Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare*, 20 ANTITRUST ABA 12 (Spring 2006); *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 116 n.168 (1989).

¹⁸ See, e.g., *FTC v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 144 (D.D.C. 2004).

the Commission within a year,¹⁹ and various OGC tasks forces have studied changes to the Commission's Part 3 Rules of Practice for years. Prior to the adoption of the Fast Track Procedures, under Chairman Steiger's leadership, the Commission had adopted internal procedures to expedite appeals of initial decisions.²⁰ But unfortunately these efforts didn't change things materially. Both phases of the process continued to be subjected to criticism. There were three reasons why they were said to be unacceptable. The first was that an adjudicatory process that takes a long time is simply not a viable process. Or, as the adage goes, "justice delayed is justice denied." The second was that it is especially unacceptable for Part 3 to be a "black hole" in merger cases, lest legitimate transactions simply crater because of the time it takes to decide whether or not they violate the law. The third was that the "black hole" argument can be a convenient excuse for denying a preliminary injunction that should be granted.

When Bill Kovacic became the Chairman in yreebe granted. change thingsSussion e. Bor

¹⁹ See FTC Rules of Practices, Sec. 3.11a, Fast Track Proceedings, *available at*: <http://www.ftc.gov/os/rules/3sec11a.shtm>.

²⁰ See Federal Register Notice dated Sept. 26, 1996, FTC Rules of Practice Amendments; Final Rule, *available at*: <http://www.ftc.gov/os/1996/09/part3rul.htm>.

²¹ See Order Designating Administrative Law Judge, *In the Matter of Inova Health System Foundation and Prince William Health System, Inc.*, Docket No. 9326, *available at*:

Commission's intention all along has been to adopt rules to better insure that its administrative trials will be conducted that way by administrative law judges themselves. To that end, in early October the Commission issued proposed revised Rules of Practice for comment.²² The comment period ends today, and the Commission will consider those comments immediately. I hope and expect that that process will be concluded shortly.

The plenary trial process is not the only phase of Part 3 that has been subject to re-examination by the Commission. In the first matter in which the Commission assigned a Commissioner to act as the administrative law judge, the Commission also issued a declaration of its intention to decide any appeal from the initial decision within 90 days after issuance of the initial decision or within 120 days thereafter in the event there were cross-appeals.²³ It has recently issued the same declaration of intent in the second matter.²⁴ It is my hope that the Commission will issue such a declaration that will apply in all Part 3 proceedings when it acts on the comments it has received with respect to the plenary trial phase of the process. Indeed, the Commission has issued two extraordinarily prompt unanimous decisions in the past six-plus

<http://www.ftc.gov/os/adjpro/d9326/080509order.pdf>; Order Rescinding Stay of Administrative Proceedings, Setting Scheduling Conference, and Designating Presiding Official, *In the Matter of Whole Foods Market, Inc.*, available at: <http://www.ftc.gov/os/adjpro/d9324/080808wholefoodsorder.pdf>.

²² See FTC Seeks Comments on Proposed Amendments to its Rules of Practice Regarding Adjudicative Proceedings, Federal Register Notice Dated Oct. 7, 2008, available at: <http://www.ftc.gov/opa/2008/09/nprmp3.shtm>.

²³ See 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>.

²⁴ See Order Designating Administrative Law Judge, October 20, 2008, *In the Matter of Whole Foods Market, Inc.*, Docket No. 9324, available at: <http://www.ftc.gov/os/adjpro/d9324/081020order.pdf>.

months--the remedy decision in the Evanston Hospital merger case and a revision of the remedy decision in the North Texas joint contracting case.²⁵ So we can do it.

But that will not always be easy. In fact, we have one appeal that, despite our best efforts to act expeditiously, has been pending for longer than 180 days. The reason for the time it takes to decide some appeals is that consensus is highly prized in fashioning appellate decisions at the Commission. That can lead to decision-writing by committee which, at best, can take a lot of time, and, at worst, can produce less than ideal decisions. That is especially so when the decision-makers are all smart individuals who don't like to be taken for granted, which is true of the current Commission. But the Supreme Court manages to get its decisions out expeditiously by tolerating more concurring and dissenting decisions. We could do the same thing. One way or the other, I expect the Commission to reform both phases of the Part 3 process. That will be a very significant achievement.

In the meantime, the Commission has vigorously discharged its law enforcement responsibilities by initiating investigations, challenging mergers, and pursuing appeals. Most of the investigations are non-public in nature, which means that I can't identify them. An exception is the Intel investigation. It is a public investigation because Intel has reported its pendency to the SEC in its SEC filings.²⁶ I will say, however, that that investigation is by no means the only one that is ongoing. With respect to both merger and single firm investigations, the Bureau of

²⁵ See Opinion of the Commission on Remedy, *In the Matter of Evanston Northwestern Healthcare Corporation*, Docket No. 9315, available at: <<http://www.ftc.gov/os/adjpro/d9315/080428commopiniononremedy.pdf>>; Order on Remand, *In the Matter of North Texas Specialty Physicians*, Docket No. 9312, available at: <<http://www.ftc.gov/os/adjpro/d9312/080912orderonremand.pdf>>.

²⁶ See Intel Corporation, SEC 10-Q filing dated August 1, 2008, available at: <<http://investing.businessweek.com/research/stocks/financials/secfilings.asp?symbol=INTC.O>>.

Competition staff is fully engaged. It is also fully prepared to litigate. It has commenced Part 3 or federal court litigation in four matters since the first of the year,²⁷ and it may commence litigation in several more before the year ends.

The Commission has also vigorously defended itself in the federal appellate courts. After the federal district court in Washington, D.C. denied its application for a preliminary injunction in the *Whole Foods* merger case, the Commission appealed that decision to the D.C. Court of Appeals, urging, among other things, that the district court applied the wrong standard. The D.C. Circuit court reversed the decision.²⁸ Whole Foods has filed a motion for rehearing en banc, but it has conceded that critical ground of our appeal. The Commission also sought a rehearing en banc of a D.C. Circuit's panel decision vacating the Commission's liability decision in *Rambus*.²⁹ That petition was denied by the D.C. Circuit,³⁰ and the Commission is currently considering whether to challenge that decision or to adjudicate liability under Section 5, as the panel indicated it might do. One of the panels at the ABA Antitrust Section's Fall Forum next week is entitled "The Litigious FTC." I don't think it's fair to describe the Commission as having been "litigious" during the last six-plus months, but it is certainly accurate to say that the

²⁷ See *FTC v. Cephalon, Inc.*, 551 F.Supp. 2d 21 (D.D.C. 2008); *FTC v. Inova Health System Foundation and Prince William Health System*, Civil Action No. Civil Action No. 1:08CV460-CMH/JFA, File No.: 061 0166 (E.D.Va. 2008); *In the Matter of Whole Foods Market, Inc.*, Docket No. 9324 (Order Rescinding Stay of Administrative Proceedings dated August 8, 2008); *In the Matter of Polypore International, Inc.*, Docket No. 9327 (Complaint filed Sept. 10, 2008).

²⁸ *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

²⁹ *Rambus Inc. v. Federal Trade Commission*, 522 F.3d 456, 468 (D.C. Cir. 2008).

³⁰ *Rambus Inc. v. Federal Trade Commission*, Denial of Petition for Rehearing En Banc, per curiam, Aug. 26, 2008, Docket No. 07-1086, 07-1124 (D.C. Cir. 2008).

³¹ Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act, U.S. Department of Justice, September, 2008, *available at*: