Federal Trade Commission

A Peek Inside: One Commissioner's Perspective on the Commission's Roles as Prosecutor and Judge

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Having been privileged to attend NERA's Santa Fe conferences for nearly two decades now, I know the tradition at the first session is for a representative from the FTC to review recent developments at the Commission. Two years ago, I departed from that tradition when I described the reasons for my votes in three matters – the closing of the Commission's investigation in *Adelphia*; the acceptance of a consent decree based exclusively on Section 5 of the FTC Act in *Valassis*; and a dissent from the Commission's joinder in the Solicitor General's *Weyerhauser* briefs to the Supreme Court.[2] I'd like to depart from tradition again today and discuss the role of the Commission as a prosecutor and its role as a judge in antitrust cases. In doing so I want to

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[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 advisor Kyle Andeer for his invaluable assistance in preparing this paper.

[2] J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint and the Weyerhaeuser Amicus Brief" before NERA's 2006 Antitrust & Trade Regulation Seminar (July 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

emphasize that my remarks are focused exclusively on the Commission, where the current Chairman, Bill Kovacic, has encouraged us to engage in self-criticism. I also want to emphasize that the views I express are strictly my own.

I. THE COMMISSION AS A LAW ENFORCEMENT BODY

Let me begin with the Commission as a law enforcer. Section 5(b) of the FTC Act makes it crystal clear that Congress intended the Commission to vigorously enforce the laws against unfair methods of competition and unfair acts or practices. That provision, by its terms, provides that "[w]henever the Commission shall have reason to believe that any…person, partnership, or corporation has been or is using any unfair method of competition or unfair act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public, it shall issue and serve upon such persons, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."[3]

I'd like to make several points respecting the Commission's antitrust law enforcement mission. First, the Commission should enforce the antitrust laws as they exist rather than as we think they ought to be. This has long been true as respects the Commission's enforcement of Section 1 of the Sherman Act. Taking its cue from the Supreme Court's decision in *Broadcast Music*, the Commission has rejected rules of *per se* illegality and *per se* legality in a host of cases.[4] For example, in *Indiana Federation of Dentists*, the Commission eschewed such *per se*

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[3] 15 U.S.C.§ 45 (b).

[4] Broadcast Music, Inc. v. CBS, 441 U.S. 1, 5 (1958).

rules in favor of a "quick look" at the practice at issue.[5] Subsequently, in *Polygram Holding*[6] and more recently in the *North Texas Specialty Physicians,*[7] the Commission applied a truncated rule of reason analysis instead of *per se* rules to practices that were "inherently suspect" under Section 1. These more nuanced analyses doubtless consumed more time and resources than application of *per se* rules would have, but in each of these cases the Commission's law enforcement efforts were blessed by federal regional appellate courts. Indeed, in *California Dental*, where the Commission's analysis edged closer to a *per se* rule, the Supreme Court held that it was too truncated.[8]

It seems to me that a nuanced approach is equally appropriate as respects the Commission's enforcement of Section 2 of the Sherman Act. Some witnesses at the joint Antitrust Division-FTC hearings on Section 2 advocated the adoption of rules of *per se* legality or safe harbors so broad that they would amount *de facto* to such rules for practices ranging from tying to refusals to deal, and from loyalty discounts to bundling and outright exclusive dealing arrangements.[9] However, that's not the law as it exists today. To the contrary, since *Jefferson*

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[5] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986).

[6] Polygram Holding v. FTC, 416 F.3d.29 (D.C. Cir. 2005).

[7] North Texas Specialty Physicians v. FTC, 2008 U.S. App. LEXIS 10457 (5th Cir. 2008).

[8] California Dental Ass'n. v. FTC, 526 U.S. 756 (1999).

[9] *See, e.g.,* Testimony of Hew Pate, Federal Trade Commission and Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Hearings of Refusals to Deal Transcript at 31 (July 18, 2006), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/60718FTC.pdf ("With respect to refusals to deal, or as I prefer to think of it, duties to assist competitors, all have the right to take a different tack. I think in the wake of Trinko, as we have seen lower courts try to make sense of, and cabin the Aspen decision, that the time has come for Aspen to be overruled, and that the law would be better with it off the books."); Testimony of Rick Rule, Federal Trade Commission and

Parish,[10] tying has been treated as a form of bob-tailed *per se* violation or as a practice that must be analyzed under the rule of reason.[11] Although tying is generally analyzed under Section 1, the Tenth Circuit has held that the practice may also violate Section 2.[12] Indeed, under *Microsoft*, unjustified technological tying may be treated as a Section 2 violation.[13] Since *Aspen Skiing*,[14] a refusal to deal with a competitor which represents an unjustified change of position has been considered a viable basis for a Section 2 claim.[15] Finally, regional appellate courts in *Microsoft*, *Dentsply*,[16] and *LePage's* [17] have repeatedly held that exclusive dealing arrangements either outright or in the form of bundling or loyalty discounts may be considered violations of Section 2.

I'd suggest that although the debate over false positives and the costs and burdens of antitrust may be appropriate in a legislative discussion over whether there should be a Section 2 –

Department of Justice Hearings on Section 2 of the Sherman Act: Single-Firm Conduct As Related to Competition, Conclusion of Hearings, Transcript at 122-123 (May 8, 2007), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/070508trans.pdf.

[10] Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16 (1984).

[11] *Compare* Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 133 n.5 (2d Cir. 2001) *with* Town Sound & Custom Tops, Inc. v. Chrysler Corp., 959 F.2d 468 (3d. Cir. 1992) (en banc).

[12] Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich, 63 F.3d 1540 (10th Cir. 1995).

[13] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[14] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U. S. 585 (1985).

[15] Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408-409 (2004).

[16] United States v. Dentsply Int'l, 399 F.3d 181 (3d. Cir. 2005).

[17] LePage's Inc. v. 3M Co, 324 F.3d (3d. Cir. 2003) (en banc).

and although it might make our job easier if these practices were governed by *de facto* or *de jure* rules of *per se* legality – as a law enforcement agency we must enforce the law as it has been defined by these cases.

I feel the same way about the Commission's enforcement of Section 7 although I may not always have expressed myself clearly in this respect. The Supreme Court has repeatedly held that a relevant market must be defined in Section 7 cases.[18] And, although the Court and the regional federal circuit courts have relaxed that requirement in Section 1 cases,[19] in the *Republic Tobacco* case, the Seventh Circuit declared that at least the "rough contours" of a relevant market must be defined in all antitrust cases.[20] In light of this Sherman Act case law, I've suggested that direct evidence that an acquisition or merger may create, enhance or facilitate the exercise of market power, and that in turn, may enable one to "back into" a market definition instead of using Merger Guidelines methodology to define the relevant market.[21] But, no Commissioner or Commission decision has suggested that market definition should be eschewed altogether in Section 7 cases.

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[18] *See, e.g.*, United States v. DuPont de Nemours & Co., 353 U.S. 586, 593 (1957); United States v. Marine Bancorp., 418 U.S. 602, 618 (1974).

[19] FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986); Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 1325, 1336 (7th Cir. 1986).

[20] Republic Tobacco Co. v. North Atlantic Trading Co., 381 F.3d 717, 736 (7th Cir. 2002).

[21] In the Matter of Evanston Northwestern Healthcare Corp., Docket No. 011 0234, concurring opinion of Commissioner J. Thomas Rosch at 8-9 (2007), *available at* http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf; *see also* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Litigating Merger Challenges: Lessons Learned," Remarks at the Bates White Fifth Annual Antitrust Conference (June 2008), *available at* http://www.ftc.gov/speeches/rosch/080602litigatingmerger.pdf.

Second, the Commission's law enforcement mandate is broader than the Sherman or Clayton Acts. Section 5 broadly proscribes "unfair acts or practices" and "unfair methods of competition."[22] The Supreme Court has repeatedly stated that Section 5 empowers the Commission "to proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[23] We had those statements in mind in issuing the complaint and accepting the consent decree in *Valassis*.[24] That matter, you'll recall, involved an invitation to collude. As such, in my view, it wasn't covered by Section 2 (there's no attempt to conspire offense in Section 2), and so the offense pleaded was a pure Section 5 violation.

That's also similar to what I had in mind when three of us voted to issue a complaint and accept a decree in the *N-Data* matter.[25] There N-Data shrugged off a commitment to license intellectual property. National Semiconductor, N-Data's predecessor in interest, had made the commitment to the standard setting body, IEEE, when the technology at issue was included in an industry standard. I didn't consider that practice to violate Section 2. There was no question that N-Data had monopoly power in that case. However, that power was a function of its inclusion in the standard and that standard's subsequent adoption by the industry. From my perspective, N-Data's conduct (a breach of the prior licensing commitment) didn't allow N-Data to acquire or

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[22] 15 U.S.C. § 45(b)(1).

[23] *See* FTC v. Sperry &Hutchinson Co., 405 U.S. 233 (1972); *see also* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (dictum).

[24] In the Matter of Valassis Communications, Inc., FTC File No. 051 0008 (March 16, 2006), *available at* http://www.ftc.gov/os/caselist/0510008/0510008.htm.

[25] In the Matter of Negotiated Data Solutions, LLC, FTC File No. 051 0094 (Jan. 2008), *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

maintain its monopoly power and thus I didn't believe it constituted "exclusionary conduct" (an essential element of a Section 2 offense). But I thought that under the very peculiar circumstances of the case (including the standard-setting context in which the commitment was made and the exploitation of "locked in" licensees – and their customers – that N-Data's conduct involved) the practice constituted both an unfair act or practice and an unfair method of competition under Section 5. Consequently, I was willing to treat it as a pure Section 5 offense.

Third, however, we're obliged to follow the limiting principles that the federal appellate courts have imposed on enforcement of Section 5. For example, in *Boise Cascade*, the Ninth Circuit rejected a Section 5 claim based on conduct, if proved, that was squarely within the ambit of Section 1.[26] As I have previously opined, in view of that case, I don't consider it appropriate to challenge conduct under Section 5 that could be challenged, if proved, under the Sherman Act.[27] In *Official Airlines Guides*[28] and *Ethyl Corp.,*[29] the Second Circuit rejected stand-alone theories of Section 5 liability, declaring that "absent a tacit agreement, at least some indicia of oppressiveness must exist…."[30] Those cases seem to me to require proof of either oppressiveness or exploitation before liability can be imposed based on a Section 5 theory of unfair methods of competition. As I say, I felt that proof existed in *N-Data*.

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[26] Boise Cascade v. FTC, 637 F.2d 573 (9th Cir. 1980).

[27] *Supra* note 2, Rosch, "Perspectives on Three Recent Votes" at 11-12 (July 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

[28] Official Airlines Guides v. FTC, 630 F.2d 920 (2d Cir.1980).

[29] E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

[30] *Id.* at 139-140.

Finally, in *Orkin,*[31] the Eleventh Circuit affirmed a Commission decision holding that Orkin's unilateral abrogation of its contractual commitments after its customers were "locked into" long-term contracts constituted an unfair act or practice under Section 2. Although the appellate court didn't suggest that its holding was limited to consumers, I read the decision as requiring that customers be truly "locked in," and I wouldn't have signed onto issuance of the complaint and acceptance of the consent decree without that proof. Specifically, the evidence showed that at least of some of the "locked in" licensees were small businesses that could not easily litigate themselves out of the "lock-in."

Fourth, we can *not*, and should *not* prosecute conduct unless we have "reason to believe" that the conduct has occurred and that it violates one of the statutes the Commission is supposed to enforce. That's apparent from the statutory language. Beyond that, a responsible exercise of prosecutorial discretion dictates that obligation. I was once asked, for example, whether I used a different standard in evaluating N-Data's conduct than I would have used had the conduct been challenged in litigation instead of resulting in a consent decree. I replied that I felt the standard was the same and that I'd used the same standard in evaluating N-Data's conduct. That was in fact the case. It would have been irresponsible, in my opinion, to have used a lower standard just because *N-Data* was not a litigated matter.

Fifth, I think we're obliged to view whether the requisite "reason to believe" exists through the eyes of a litigator. At the end of the day, the Commission should be satisfied that there's a fair ground for litigation against some of the best and brightest antitrust litigators in America, because that is what the Commission encounters in litigation. Thus, I think it's

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[31] Orkin Exterminating v. FTC, 849 F.2d 1354 (11th Cir. 1988).

incumbent on us to require a detailed description not only of the "story" that will or could be told in litigation and of the facts underlying that story, but of the *way* that story will be told – *i.e.*, whether it will be told principally through the documents or statements of the respondents, through customers or competitors, through an industry expert or through economists (and what kind of economic evidence they will use). Only then can we evaluate whether a challenge would be worth the resources that would have to be spent.

Sixth and finally, I think we're obliged to decide whether or not to prosecute promptly after the conduct at issue has occurred. Otherwise, the evidence is likely to grow stale, and, more importantly, the consumer injury that is at the root of all of the statutes we enforce is likely to have occurred to an unacceptable extent. To me, that means that compulsory process should be used upon the initiation of an investigation. I have heard it said that voluntary compliance facilitates an investigation more than does the use of compulsory process, and that may be true in some unique circumstances. But I think that generally clients and practitioners are more likely to bend every effort to comply promptly with Commission requests for information and documents if there are sanctions attached to not doing so. I also think we ought to be imposing deadlines on the duration of investigations. The HSR statute does so,[32] and I see no reason why similar deadlines should not be imposed on other Commission investigations. In fact, in some investigations the most critical issues are issues of law instead of issues of fact, and especially in those instances I think the deadlines for investigation might be truncated.

Some might say this is inconsistent with our obligation to find the requisite "reason to believe." But based on my own experience over the past two and a half years I don't think so.

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[32] 15 U.S.C. § 18(b).

The deadlines might result in shorter staff memoranda. And, it might mean that all the "i"s will not be dotted and the final "t"s may not be crossed until after a complaint has issued. But plaintiffs in private antitrust cases (and other litigation) don't have the benefit of the "one-way" discovery that our staff has prior to issuance of a complaint. Those litigants must develop their cases entirely by discovery conducted in the federal courts prior to trial. It seems to me that staff can conduct "clean-up" discovery in the plenary proceeding too without depriving the Commission of the information it needs to determine whether there is "reason to believe" a violation has occurred.[33] We have discharged that obligation in merger cases in which the HSR deadlines have applied and staff has therefore had to conduct some discovery after issuance of a complaint. We can do so in other cases as well.

II. THE COMMISSION'S JUDICIAL ROLE.

Of course, the FTC also plays an important quasi-judicial function. Congress concluded that it was in the public interest to make the Commission not just a prosecutor, but a *judge* with respect to the antitrust and consumer protection matters entrusted to it. That is evident from the language of Section 5(b) too. It provides not only that the Commission shall issue charges when it has reason to believe there is a violation of the FTC Act (which subsumes the Sherman and Clayton Acts), but that the Commission shall, after a hearing, make findings of fact, determine whether the FTC Act has been violated, and enjoin any such violation.[34] If there were any doubt on this score, it is dispelled by the legislative history. Representative Covington, author of the original bill establishing the Commission, declared:

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[33] The Commission's Rules of Practice provide ample opportunity for post-complaint discovery. *See* 16 C.F.R. § 3.31(a).

[34] 15 U.S.C. § 45(b).

> The function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair, and if it finds it to be unfair, to order discontinuance of its use. In doing this, it will exercise power of a judicial nature….It would seem clear that the determination of the question whether a method of competition is unfair is not a determination purely of fact, but necessarily involves the determination of a question of law. The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature….[35]

Second, Congress concluded that it was in the public interest to grant this judicial authority to the Commission *instead of to the federal district courts*. That too is apparent from the language of Section 5(b). Nowhere in that provision is concurrent judicial authority – or any authority to review Commission decisions – given to the federal district courts. To the contrary, the power to review Commission decisions is given *exclusively* to the federal appellate courts.[36] Again, this was no accident. In proposing the new agency to the House of Representatives, President Wilson expressed skepticism that federal district courts were equipped "to adjust the remedy to the wrong in a way that will meet all the circumstances of the case" and confidence that the Commission could and would do so.[37]

Two aspects of the enactment of Section 13(b) in 1973 also deserve emphasis. First, Congress enacted Section 13(b) to *strengthen* the Commission's historical judicial role. As the Fourth Circuit declared in an early case interpreting Section 13(b), "the district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance. The only purpose of a proceeding

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[35] Cong. Rec. 14931-33 (1914).

[36] 15 U.S.C. § 45(c).

[37] H.R. Doc. 625, 63rd Cong., 2d Sess. 5 (1914).

under Section 13 is to preserve the status quo until the FTC can perform its function."[38]

Second, Section 13(b) makes the ultimate issue in a 13(b) proceeding whether a preliminary injunction is "in the public interest" and, except in exceptional circumstances, the statute is designed to "maintain" the original conclusion of Congress that the public interest is served by vesting the adjudicatory function in the Commission. More specifically, although "likelihood of success" is *one* factor to be taken into account, it is not the *only* factor. Again, the legislative history confirms that conclusion. The House Report stated in pertinent part that the intent was "not to impose the traditional 'equity' standard of irreparable damage, probability of success on the merits, and that the balance of hardships favors the petitioner….[That standard] is not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measures the propriety and need for injunctive relief."[39] In short, Congress recognized that even when success on the merits is not likely, it's generally in the public interest that the status quo be maintained until the merits can be fully examined in a plenary trial before the Commission.

Yet for at least the last five years the Congressional intent has arguably been turned on its head. First, in *Arch Coal*,[40] and more recently in the challenges to the Western/Giant merger[41] and *Whole Foods*,[42] federal district courts in Section 13(b) proceedings made the Commission's likelihood of success on the merits at a plenary trial, instead of the public interest, the ultimate

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[38] FTC v. Food Town Stores, 539 F.2d 1339, 1342 (4th Cir. 1976).

[39] H.R. Rep. No. 624, 93rd Cong. 1st Sess. 31 (1970).

[40] FTC v. Arch Coal Inc., 329 F. Supp. 2d 109 (D.D.C. 2004).

[41] FTC v. Foster et. al., 2007-1 TRADE CAS. (CCH) ¶ 75,725 (D.N.M. 2007).

[42] FTC v. Whole Foods Market, Inc., 505 F. Supp. 2d 1 (D.D.C. 2007).

issue. Indeed, in *Arch Coal* and *Whole Foods* the courts essentially turned proceedings on the Commission's application for a preliminary injunction into plenary trials on the merits.

How did this happen? I'd offer three explanations. First, plenary proceedings at the Commission took too long.[43] Parties routinely argue that they will abandon the transaction if a preliminary injunction is granted in an effort to get courts to deny the 13(b) motion.[44] Second, though the district courts did not say so, the recent Reauthorization Bill pending markup in the Senate shows a distinct lack of confidence in the antitrust expertise of the administrative law judges in Commission plenary proceedings.[45] Third, the Commission itself has aided in this

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[43] FTC v. Freeman Hosp., 1995-1 TRADE CAS. (CCH) ¶ 71,037, at 74,893 n.8 (D. Mo. 1995) ("The average time from the issuance of a complaint by the FTC to an initial decision by an administrative law judge averaged nearly three years in 1988. Moreover, additional time will be required if that initial decision is appealed."), *aff'd*, 69 F. 3d 260 (8th Cir. 1995); *see also* National Dynamics Corp. v. FTC, 492 F.2d 1333, 1335 (2d Cir. 1974) (remarking upon the "leisurely course typical of FTC proceedings"); *see also 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):

> It is disappointing that the Commission, which ought to offer the potential for innovation and flexibility, and for custom-tailoring trial procedures, historically has lagged behind the federal courts in developing techniques for complex cases. It also is disappointing that the Commission continues to have problems of delay. The 1969 Report found that "[p]roblems of delay have vexed the FTC ever since it was established." 1969 Report at 28-32. External exigencies have prodded the Commission to move quickly in its prosecutorial role on Hart-Scott-Rodino matters and, with some exceptions, on proposed federal court consumer fraud challenges. . . . For most other matters, however, delay continues to be a problem at the FTC.

[44] *See, e.g.,* Arch Coal, 329 F. Supp. 2d at 160 ("If this court issues a preliminary injunction, on the other hand, Arch and Triton will abandon the transaction rather than undergo an administrative proceeding.").

[45] Federal Trade Commission Reauthorization Act of 2008, S. 2831, 110th Cong. (2008) (Section 4(a) of the proposed legislation reads "In appointing administrative law judges . . . to conduct hearings and render initial decisions in formal adjudicative matters before it, the Federal Trade Commission may give preference to administrative law judges who have

process by issuing a statement that has been read to mean that it generally will not pursue plenary proceedings after an adverse decision by a federal district judge in administrative proceedings.[46] Indeed the Commission has not pursued proceedings after such an adverse decision for over a decade. By so doing, the Commission has arguably abdicated its judicial responsibilities and has instead allowed federal district judges to usurp them.

The Commission's conduct in the past six months should be viewed in this light. In the *Inova* matter, the Commission designated this Commissioner to act as an administrative law judge.[47] The Commission's Order stated that the designation was based on "40 years of experience as a trial lawyer, predominantly in the context of complex competition law cases."[48] In their Motion to Recuse, Respondents alleged, *inter alia*, that it was also based on a predisposition in favor of expedited scheduling of pre-trial and trial events.[49] I haven't discussed the specific reasons for the assignment with my colleagues. But I hope the assignment helped address concerns about both the antitrust expertise of the judges conducting plenary trials at the Commission and the time it takes to prepare for and conduct such a trial. The parties decided to

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experience with antitrust or trade regulation litigation and who are familiar with the kinds of economic analysis associated with such litigation.").

[46] Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 50 Fed. Reg. 39,741 (Aug. 3, 1995); *see also* 16 C.F.R. § 3.26(d).

[47] In the Matter of Inova Health Systems Foundation and Prince William Health System, Inc., Docket No. 9326, Order Designating Administrative Law Judge (May 9, 2008), *available at* http://www.ftc.gov/os/adjpro/d9326/080509order.pdf.

[48] *Id.*

[49] *See* In the Matter of Inova Health Systems Foundation and Prince William Health System, Inc., Docket No. 9326, Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge (May 23, 2008), *available at* http://www.ftc.gov/os/adjprop/d9326/080523respmorecuseroschasalj.pdf.

abandon the transaction so the jury is still out (pardon the pun) on whether there was any improvement in antitrust expertise. However, with the help of counsel, a schedule was adopted that got the matter tried approximately five months after the complaint was issued,[50] and the Commission committed to reviewing any Initial Decision appealed in short order.[51] That compares favorably to the schedules adopted in the federal court antitrust cases in which I've been involved, including merger cases. Additionally, the Commission appealed the *Whole Foods* decision on the ground that the district court in that case applied the wrong standard in denying the Commission's application for a preliminary injunction.[52] If successful, that appeal would restore the relationship between the Commission as the judge and the federal district courts as the protector of the Commission's role in that respect that Congress intended.

Still, much remains to be done. First, the Commission must somehow institutionalize the expertise and timing that occurred in the *Inova* matter. It must also demonstrate that it can and will handle appeals from Initial Decisions expeditiously. Finally, it must abandon its practice of deferring to adverse federal district court decisions in deciding whether or not to pursue plenary trials after Section 13(b) decisions. I respectfully suggest that only then can the Commission

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[50] In the Matter of Inova Health Systems Foundation and Prince William Health System, Inc., Docket No. 9326, Scheduling Order (May 30, 2008), *available at* http://www.ftc.gov/os/adjpro/d9326/080530schedulingorder.pdf.

[51] FTC Press Release, *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.

[52] Proof Brief for Plaintiff-Appellant Federal Trade Commission, FTC v. Whole Foods, No. 07-5276 (D.C. Cir. Jan. 14, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080114ftcwholefoodsproofbrief.pdf; Proof Reply Brief for Plaintiff-Appellant Federal Trade Commission, FTC v. Whole Foods, No. 07-5276 (D.C. Cir. Feb. 27, 2008), *available at* http://www.ftc.gov/os/caselist/0710114/080227wholefoodsftcproofreplybriefpublic.pdf.

truly play the judicial role that Congress intended, and until then that role will continue to be in doubt.