UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF J. THOMAS ROSCH

In the Matter of	)	
	)	
INOVA HEALTH SYSTEM FOUNDATION,	)	
a corporation, and	)	**Docket No. 9326**
	)	
	)	**PUBLIC**
PRINCE WILLIAM HOSPITAL SYSTEM, INC.	)	
a corporation.	)	
	)	

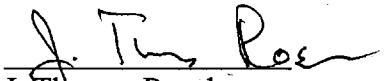
ORDER CERTIFYING RESPONDENTS' MOTION TO RECUSE TO THE COMMISSION AND ACCOMPANYING STATEMENT BY J. THOMAS ROSCH

On May 9 the Commission announced it would challenge Inova Health System Foundation's proposed acquisition of Prince William Hospital Foundation. See 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. At the same time, the Commission announced that it had designated this Commissioner to preside over the administrative proceedings in this matter. See Press Release: FTC Designates Commissioner J. Thomas Rosch as ALJ in Case Challenging Inova Health System Foundation's Acquisition of Prince William Health System, Inc. (May 9, 2008) *available at* http://www.ftc.gov/opa/2008/05/inovafyi.shtm. The order designating this Commissioner as the Administrative Law Judge stated that the decision was based on this Commissioner's expertise and experience in complex competition cases. Order Designating Administrative Law Judge (May 9 ,2008) *available at* http://www.ftc.gov/os/adjpro/d9326/080509order.pdf. This Commissioner did not participate in

either decision.

Respondents moved to recuse this Commissioner as Administrative Law Judge on May 23. Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge ("Respondents' Motion to Recuse") (May 23, 2008) *available at* http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf. Complaint Counsel filed a Response to that Motion that did not take a position on recusal. Complaint Counsel's Response to Respondents' Motion for Recusal of Commissioner Rosch (May 27, 2008) *available at* http://www.ftc.gov/os/adjpro/d9326/080527ccresponsetomorecuse.pdf. Oral argument was invited and occurred on May 29. Pursuant to 16 C.F.R. § 3.42(g)(2), this Commissioner hereby certifies Respondent's motion to the Commission and attaches a statement describing his conclusions that the Respondents have failed to demonstrate this Commissioner should be disqualified from presiding over the administrative proceedings in this matter.

ORDERED:



J. Thomas Rosch
Commissioner

ISSUED: May 29, 2008

STATEMENT OF COMMISSIONER J. THOMAS ROSCH
ACCOMPANYING ORDER CERTIFYING RESPONDENTS' MOTION TO RECUSE

The Federal Trade Commission combines within one organization a number of different responsibilities. The Commission is charged with finding whether an administrative complaint should be filed and then to decide the merits of those challenges. This combination of investigative, prosecutorial and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies. *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948); *Withrow v. Larkin*, 421 U.S. 35, 51-56 (1975) ("Plainly enough, *Murchison* has not been understood to stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications."); *FTC v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1315 (D.C.Cir. 1968); *Pangburn v. CAB*, 311 F.2d 349, 356 (1st Cir. 1962).[1]

The enactment of the Administrative Procedure Act ("APA") sixty years ago did not

---

[1] The Commission itself recognizes its unique position. Over twenty five years ago the Commission denied a motion to recuse then-Commissioner Robert Pitofsky. In the Matter of Tenneco, Inc., 96 F.T.C. 346 (1980). The Commission held it,

> [U]nassailable that the combined functions of investigator and decisionmaker in the office of the Federal Trade Commissioner do not give rise to a denial of due process. It is the duty of the commissioners to weigh the facts of investigations of acts or practices which may violate the laws entrusted to them, in order to determine whether there is reason to believe that such a violation has occurred, in contemplation of the issuance of a complaint. Because the commissioners are purposefully appointed to terms sufficiently long to allow them to accumulate and bring to bear expertness in industries as well as in the law, FTC v Cement Institute , 333 U.S. 683, 701-02 (1948), it is neither unusual nor improper that they may have occasion to perform reason-to-believe analysis of a potential violation involving a company, industry or market that is the subject of on-going litigation. When this occurs, i.e., when a commissioner has ruled on a previous complaint involving certain facts or firms, he or she is not precluded from performing further statutory duties of investigation merely because a subsequent investigation involves some of those facts or firms. Withrow v Larkin , 421 U.S. 35 (1974); FTC v Cement Institute , 333 U.S. 683 (1948)."

fundamentally alter the function of the Commission or its members. The APA explicitly recognizes that the "agency" or "one or more members of the body which comprises the agency" may preside over administrative proceedings. 5 U.S.C. § 556(b). Indeed, the Respondents concede that assigning a Commissioner as an ALJ is expressly authorized by the Commission's rules. Respondents' Recusal Motion at 8; see also 16 C.F.R. § 3.42(a) (explicitly provides that "the Commission or one or more members of the Commission" may sit as Administrative Law Judge). The exercise of this authority under the Commission's rules and the APA is not unprecedented. Indeed, there are at least three recent examples where the Commission has retained jurisdiction over administrative proceedings.[2]

Respondents suggest that the Commission's fact-finding role is less critical than that of the administrative law judge. Respondents' Recusal Motion at 8, note 3. But that gets it backward. The Commission is the ultimate arbiter of both the law and the facts in adjudicative proceedings, and its determinations are subject only to review by the federal appellate courts. See e.g., *Chicago Bridge & Iron Co., N.V. v. FTC*, 51 F.3d 445, 456 (5th Cir. 2008). Indeed, Congress contemplated that the Commission, as an expert body with respect to the matters entrusted to it, would try those matters itself when it enacted the Federal Trade Commission Act almost one hundred years ago.[3] As Representative Covington, author of the original bill

---

[2] See In the Matter of Whole Foods Market, Inc., and Wild Oats Markets, Inc., Docket No. 9324 (June 2007) *available at* http://www.ftc.gov/os/adjpro/d9324/index.shtm; In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company, Docket No. 9322 (March 2007) *available at* http://www.ftc.gov/os/adjpro/d9322/index.shtm; In the Matter of South Carolina State Board of Dentistry, Docket No. 9311 (Sept. 2003) *available at* http://www.ftc.gov/os/adjpro/d9311/index.shtm

[3] GERARD C. HENDERSON, THE FEDERAL TRADE COMMISSION – A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 22, 98 (1924) (The Commission was "conceived to be a

establishing the Commission, declared

> [T]he 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 * * * . 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 the law against unfair competition. In deciding that ultimate question the commission will exercise power of a judicial nature * * * .

Congressional Record, Sept. 10, 1914, pp. 14931-33.

I. Disqualification under the APA: Applicability of Section 554 of the APA.

Respondents contend that the APA prevents a Commissioner from presiding over administrative proceedings when he or she fails to "opt out of involvement in the investigation." Respondents' Recusal Motion at 10. That is incorrect as a matter of law. As discussed above, Congress contemplated that the Commission would "combine the functions of investigation, prosecution, and judge." *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972); *Cinderella Career*, 404 F.2d at 1315 ("agency" and "members of the body comprising the agency" are exempt from required separation of the adjudicatory and prosecutorial functions of the agency.)

Section 554(d)(2) of the APA prohibits an "employee" of the agency from presiding over administrative proceedings when that same employee was previously engaged in "investigative or prosecuting functions" related to those same proceedings. However, the APA only covers Commission "employees" not the Commission or Commissioners themselves. If there were any doubts about that, §554(d)(2)(C) expressly provides that the requirements of §554(d)(2) "does

---

body * * * especially qualified to pass on questions of competition and monopoly."); *see, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *Humphrey's Executor v. United States,* 295 U.S. 602, 624 (1935).

not apply ... to the agency or a member or members of the body comprising the agency."[4]

Respondents assert that §554(d)(2)(C) does not apply when a Commissioner sits as an administrative law judge. Respondents' Recusal Motion at 7. However, there is no statutory support for this assertion, nor is that how the statute has been construed. The leading antitrust treatise, for example, has read the APA "to prohibit any member of the FTC *staff* engaged in the investigation or prosecution in a matter from participating in the decision, or agency review of that matter." ABA Section of Antitrust Law, Antitrust Law Developments at 670 (6th Ed. 2007).

FTC v. Grolier, upon which Respondents rely, is not to the contrary. *FTC v. Grolier*, 615 F.2d 1215 (9th Cir. 1980). In *Grolier*, the Ninth Circuit was confronted with whether § 554(d)(2)(C)'s exemptions applied to an employee [a former attorney advisor to a

---

[4] 5 U.S.C. § 554(d) provides:

> The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--
>
> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
>
> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency. (emphasis added)

Commissioner] who later served as an Administrative Law Judge.[5] The FTC argued that "the close relationship between attorney-advisors and agency members requires that an advisor be extended privileges coequal with his commission member's responsibilities." Id. at 1220. The Court rejected that argument but it recognized that the statute exempted Commissioners from its prohibitions. Id. It noted that the FTC's "argument would be compelling if made on behalf of an attorney-advisor or other FTC employee who must counsel the member at both the investigative and decision-making stages of a case", reasoning that such a member is "responsible for both the investigation-prosecution and the hearing and decision of cases." Id.[6]

In sum, this Commissioner continues to serve as an active member of the Federal Trade Commission despite his designation as an administrative law judge in this proceeding. Thus, the APA does not require this Commissioner's recusal, and, as Respondents acknowledge, his participation as an administrative law judge in this proceeding is consistent both with the Commission's Rules of Practice and its past practice. Respondents' Recusal Motion at 3, 8.

II. The Allegations that there is an Appearance of Impropriety that warrants Disqualification

Respondents also allege this Commissioner should be disqualified from presiding over these proceedings as an ALJ because "the totality of events creates an impermissible and entirely avoidable appearance of impropriety." Respondents' Recusal Motion at 5. To be sure,

---

[5] On remand, the Commission denied Respondent's motion to disqualify the ALJ. It found that "Grolier has presented no evidence that [the ALJ] was actually involved with any Grolier matters." In the Matter of Grolier, Incorporated, et. al., FTC 98 F.T.C. 115 at *28 (1981).

[6] Indeed, the Respondents' interpretation of the APA would render it impossible for the Commission as a body to preside over administrative proceedings. Under the Respondents' analytical framework, the Commission could only preside over the administrative proceedings if it "opted out" of the investigation and all its members refrained from voting on the Complaint – a result that would frustrate the Commission's adjudicative function.

disqualification would be warranted if there were a demonstration of bias, prejudgment or apparent unfairness on the part of the decision-maker be he an ALJ or a Commissioner. See *Cinderella Career*, 425 F.2d at 591; *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962). There are no such allegations in this matter. Indeed, there are no allegations or evidence of bias or prejudgment by this Commissioner in this matter whatsoever.

Respondents contend that an administrative law judge should be disqualified if a "reasonable person would have had a reasonable basis for doubting the judge's impartiality." Respondents' Recusal Motion at 10 (citing *In the matter of Kellogg Company*, 96 F.T.C. 91 (July 31, 1980)). Assuming for the sake of argument that this is the correct standard, the question is whether a "reasonable person", who understands the role and purpose of the Commission described above, would doubt this Commissioner's impartiality. More specifically, appearance is a derivative concept. That is to say, there is no appearance problem unless there is an appearance of conduct that, if it occurred, would actually be improper. Thus, there can be no appearance of impropriety as matter of law if there is no appearance of conduct constituting prejudgment and there is no appearance that the designation of this Commissioner to act as an administrative law judge in this matter is actually improper under the APA or the Commission's Rules of Practice.

Thus, for example, a Commissioner that was actively engaged in an investigation or related proceeding *prior* to joining the Commission have been disqualified from participating in the adjudication of that matter. *American Cyanamid Co. v. Federal Trade Commission*, 363 F.2d 757, 768 (6th Cir. 1966) (holding that former FTC Chairman Dixon should have disqualified himself from participating in the Commission's decision because the record

demonstrated that he was deeply involved in a related proceeding when he had previously served as Chief Counsel to the Senate Subcommittee for Antitrust). As the Sixth Circuit noted in *American Cyanamid*,

> It is to be emphasized that the Commission is a fact finding body. As Chairman, Mr. Dixon sat with the other members as triers of the facts and joined in making the factual determinations upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts. Id. at 767.

As noted above, this Commissioner played no role in this investigation or related proceeding prior to his appointment to the Federal Trade Commission in 2006.

Nevertheless, Respondents advance four principal allegations that taken together, they contend, would serve as a reasonable basis for doubting the judge's impartiality. For the reasons described below, this Commissioner does not believe that Respondents's allegations meet their "reasonableness" standard.

First, Respondent's suggest that a reasonable person might conclude that the Commission's designation of this Commissioner was motivated by its track record in hospital merger litigation and several recent decisions by its own Administrative Law Judges. Respondents' Recusal Motion at 1, 9, 12. This Commissioner notes that the Commission and the Administrative Law Judges have generally agreed on questions of liability and remedy in administrative proceedings. Indeed, in two of the most recent merger challenges that have resulted in an administrative decision, it was the Commission, not the Administrative Law Judge, that took a more lenient position.[7] This Commissioner is not aware of any merger

---

[7] See, In the matter of Evanston Northwestern Healthcare Corporation Docket No. 9315 (2008) (the Commission reversed the Administrative Law Judge's divestiture order); In the matter of R.R. Donnelley & Sons Co., et. al., 120 F.T.C. 36 (1995) (the Commission reversed the Administrative Law Judge's finding of liability).

challenge in recent memory in which the Commission found liability after the ALJ dismissed the matter. Moreover, regardless of the accuracy of Respondents' observations, these allegations would appear to apply with equal force to the Commission sitting on an appeal from an Initial Decision.

Second, Respondents contend that this Commissioner should be disqualified because of his role as a Commissioner during the investigation of this case.[8] Respondents' Recusal Motion at 2, 12. Complaint is made that during that investigation this Commissioner had ex parte contacts with both Complaint Counsel and Respondents. Again, however, no claim is made that such contacts involved prejudgment of the law or facts in this case. Nor could such a claim be made. As a matter of practice, during the course of an investigation staff and the merging parties discuss their respective positions with each Commissioner. The meeting with Respondents mentioned in Respondents' motion was one of those meetings, and it occurred before the Commission decided to challenge this merger and to designate this Commissioner to preside over the administrative proceedings. Treating such a briefing as a basis for recusal would chill the practice, and ending the practice would not only rob Commissioners of potentially valuable information in deciding whether or not to challenge a practice or transaction but would create questions about the Commission's evenhandedness.

Third, Respondents imply that there have been ex parte contacts with Complaint Counsel since the issuance of the Complaint. Respondents' Recusal Motion at 3-4. Specifically, they contend that "since the appointment of Commissioner Rosch, the staff has acted as if it

---

[8] See e.g., In the Matter of Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company, and Pitt-Des Moines, Inc., 140 F.T.C. 1152 (2005); In the matter of R.R. Donnelley & Sons Co., et. al.,120 F.T.C. 36 (1995).

understands how Commissioner will rule." To support this allegation, Respondents cite Complaint Counsel's filings in the United States District Court for the Eastern District of Virginia,

> The administrative action on the merits of the proposed acquisition is moving forward on a very expedited basis. Plaintiffs have proposed to Defendants that there will be a full three week administrative trial beginning on September 4, 2008. In addition, the Commission is committed to resolving any appeal of the ALJ's decision on an expedited basis. FTC Opp'n to Motion for Scheduling Conference at 2 (May 19, 2008)

Complaint Counsel's expectation that the administrative proceedings would move forward on "a very expedited basis" appear to be based on its own scheduling proposals and the Commission's commitment to resolve an appeal on "an expedited basis." At most, Complaint Counsel's representation in its filings in the Eastern District of Virginia represent *its* position on a schedule in these administrative proceedings. Moreover, if expectations were sufficient to establish prejudgment respecting scheduling, the Eastern District of Virginia bench would be subject to recusal for prejudgment because practitioners in that court doubtless expect "fast track" pretrial and trial processes.[9]

Finally, Respondents assert that the Commission's two Administrative Law Judges are available to preside over this matter, and they suggest that there is an appearance of impropriety in not using them. Respondents' Recusal Motion at 3, 9. The Commission's ALJs undoubtedly

---

[9] Like the Eastern District of Virginia, this Commissioner has made no secret of a preference for expeditious pretrial and trial proceedings. That has been a constant theme in remarks made to diverse audiences, including practitioners attending ALI-ABA's courses in "How To Try And Win An Antitrust Case," practitioners attending the ABA Antitrust Section's Masters course, students in last year's clinical course on litigation at the Georgetown Law School, and Bureau of Competition staff. Thus, it is not surprising that Complaint Counsel would expect this Commissioner to conduct pretrial and trial proceedings in this matter expeditiously. But that does not bespeak prejudgment. *Cinderella*, 425 F.2d 583.

are highly competent as judges. However, Respondents have made no showing contradicting the Commission's determination that this Commissioner has superior antitrust expertise and experience in complex litigation of this sort.

In short, Respondents' allegations are insufficient even if one were to accept the "reasonableness" standard urged by the Respondents.

Conclusion

The Commission's May 7 order stated that its designation of this Commissioner to act as the administrative law judge in this matter was based on expertise and experience in complex litigation like this. Order Designating Administrative Law Judge (May 9 ,2008) *available at* http://www.ftc.gov/os/adjpro/d9326/080509order.pdf. There is no evidence to the contrary. As previously stated, there is likewise no evidence of prejudgment. Nor is there any evidence of actual impropriety or the appearance of impropriety in that designation. The motion to recuse is therefore denied.