Federal Trade Commission

"One Retrospective View of the Commission's Activities"
Remarks of J. Thomas Rosch[1]
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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.

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

Before getting to the topic though, I'd like to pay tribute to Bill's predecessor as Chairman, Debbie Majoras, who now heads up Proctor & Gamble's legal department in Cincinnati but who was the Chairman until April of this year. Chairman Majoras was a prodigious worker. There wasn't a single day that I came to work when her car wasn't already in the FTC garage with a cool engine, and there wasn't a single evening that I went home when that car wasn't in the exact same spot, except for the few days she was out of town. She was an extraordinarily bright antitrust lawyer. I practiced antitrust law for more than four decades, but she more than held her own in the many discussions we had about the law. She also had remarkable litigation instincts. I spent those four decades litigating cases, but Chairman Majoras caused me to rethink a number of my visceral instincts about trial tactics and strategy. We didn't always agree – for example about the remedy in the *Rambus* case;[2] about whether or not to pursue a plenary trial in the *Giant-Western* petroleum merger case after we lost a district court preliminary injunction;[3] about whether to appeal the district court's decision denying a preliminary injunction in the *Whole Foods* case; and whether to accept the *N-Data* consent decree that I'll discuss later.[4] But she understood that it is each Commissioner's prerogative to

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[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/d9302/070205roschstmnt.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, *available at:* <http://www.ftc.gov/os/caselist/0510094/080122majoras.pdf>.

make up his or her own mind about things like that. And most important, she was a vigorous law enforcement officer. During her last year we voted unanimously to litigate three difficult merger cases,[5] and she didn't clean out our cupboard when she left.

Let me start with the Commission's decision respecting resale price maintenance in the *Nine West* case. As most of you know, Nine West makes and sells women's shoes throughout the United States. It had entered into a consent decree more than a decade ago that prohibited it from using resale price maintenance (except pursuant to a valid *Colgate* program) in the sale of its products. As most of you also know, last year the Supreme Court held that resale price maintenance was not per se illegal, reversing decades of precedent dating back to the *Dr. Miles* decision at the beginning of the last century.[6] Nine West promptly moved for the elimination or modification of the consent decree, citing changed circumstances. Thus, the Commission was squarely faced with how to evaluate the legality of resale price maintenance post-*Leegin*. In June of this year, the Commission unanimously held that the Supreme Court left the door open to truncated rule of reason analysis instead of a full blown rule of reason analysis requiring precise definition of the relevant market. However, we also agreed unanimously that the evidence that Nine West submitted showing that it lacked market power precluded continuation of a prohibition against Nine West's use of the practice under a truncated analysis. That said, we

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[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 organaization 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

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[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>.

Commission Act.[9]

More specifically, the Supreme Court had held in the *S&H* case back in 1972 that Section 5 was broader in scope than the Sherman or Clayton Acts.[10] Moreover, in the *Orkin* case, the Commission held that a unilateral breach of the contracts that Orkin had with thousands of consumers constituted an "unfair act or practice" under Section 5 when those consumers could not defend themselves, as a practical matter, and that decision was affirmed by a federal court of appeals.[11] To be sure, I understood that Section 5 was not unbounded. Several decades ago, the Ninth Circuit held in the *Boise Cascade* case that it could not be applied where the contours of the Sherman Act were well-settled,[12] and the Second Circuit held in the *Official Airlines Guides* and the *DuPont* cases that conduct challenged under Section 5 had to be "oppressive" or deliberately anticompetitive in nature.[13] But I felt that N-Data's renege, exploiting as it did licensees who were "locked in" to the standard by virtue of the investments they had made, satisfied these limiting principles. And again, two of my collegues agreed with those conclusions. Then Chairman Majoras and current Chairman Kovacic dissented from acceptance of the *N-Data* consent decree. Chairman Majoras was concerned that the Commission majority

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[9] *In the Matter of Negotiated Data Solutions LLC*, File No. 051 0094, Analysis of Proposed Consent Order to Aid Public Comment, *available at:* <http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf>.

[10] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

[11] *In the Matter of Orkin Exterminating Co., Inc.*,108 F.T.C. 341 (1986); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1364 (11th Cir. 1988).

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

[13] *Official Airline Guides v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. ("Ethyl") v. FTC*, 729 F.2d 128 (2d Cir. 1984).

was reading Section 5 too broadly, and Chairman Kovacic was also concerned that the decree might expose N-Data to burdensome and expensive private litigation under state laws that were similar to Section 5. In short, it was a controversial decree.[14] Pursuant to the Commission's Rules of Practice the consent decree was issued for comment, and it drew more comments than any other consent decree in recent memory. However, many of those comments were favorable and, as it turned out, as of the close of the comment period at least, N-Data had not been sued under any state laws (perhaps because the consent decree's relief was prospective only). The Commission recently voted 3-1 to finalize the decree.[15] It is a mark of Chairman Kovacic's leadership style that although he dissented from acceptance and finalization of the decree, he encouraged a public debate about what the scope of Section 5 should be. Thus, the Commission has just concluded a Washington DC workshop on that subject, under the leadership of Commissioner Leibowitz.[16]

That brings me to another highlight of this period, which is the reform of the Commission's process for the administrative adjudication of competition disputes, including merger cases. That process is known at the Commission and among afficiandoes as Part 3. There are really two phases of that process. The first is a plenary trial, generally before an administrative law judge, although the Commission's Rules of Practices declare that the

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[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>.

[15] Commission Approves Final Consent Order *In the Matter of Negotiated Data Solutions, LLC,* File No. 051-0094 (Sept. 23, 2008), *available at:* <http://www.ftc.gov/opa/2008/09/nds.shtm>.

[16] *See* Section 5 of the FTC Act as a Competition Statute, Public Workshop, October 17, 2008, *available at:* <http://www.ftc.gov/bc/workshops/section5/index.shtml>.

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 Commission itself. The Commission's decision can then be appealed to a federal appellate court. The antitrust bar and the Antitrust Modernization Commission have long criticized the Part 3 process as taking far too long.[17] The statistics backed up those criticisms. The plenary trial phase has generally taken much longer than the federal district courts take to try antitrust cases, and the Commission has sometimes taken much longer than the federal appellate courts normally take in antitrust cases to decide appeals from the initial decisions in those plenary trials. Moreover, respondents in merger cases have used that delay to argue that federal district courts should deny preliminary injunctions in merger cases, contending that Part 3 is a "black hole" and that if a preliminary injunction is granted against a merger pending a plenary trial the merger will crater regardless of its merits.[18]

The Commission has long been concerned about the delay in both phases of the Part 3 process. Under the leadership of a former General Counsel, Steve Calkins, the Commission's Office of General Counsel (otherwise known as OGC) established a "fast track procedure" under which respondents could opt to have challenges to their practices or transactions adjudicated at

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[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 April of this year, he called for critical evaluation of the way the Commission did business – an initiative called “FTC 100" because the Commission will celebrate its 100th anniversary in a few years. Responsive to that call, in the Summer of this year, the Commission signaled its determination to reform the Part 3 process. Initially, the Commission appointed a Commissioner as the administrative law judge in order to insure that the pretrial and plenary trial were conducted expeditiously and by a judge with expertise in complex antitrust cases. It did that in two antitrust cases.[21] However, the

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[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

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<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/nprmpt3.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

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[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/d9315/080428commopinionremedy.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

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[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 curium, Aug. 26, 2008, Docket No. 07-1086, 07-1124 (D.C. Cir. 2008).

Commission has not been afraid to litigate when it thought it was right to do so.

Finally, I must mention the Commission's responses to the Antitrust Division's Report on Section 2 of the Sherman Act. Briefly, the Commission and the Antitrust Division jointly conducted a series of hearings in 2006-2007 on how Section 2 ought to be enforced. Subsequently, the two agencies tried to draft a Report to which both could subscribe. In a word, that proved to be impossible. The Division then decided to publish its own Report.[31] That of course was its prerogative. But, speaking only for myself (although I was one of three Commissioners issuing a joint Statement respecting the Report), I found myself in substantial disagreement with the Division's Report. I don't want to go into the specifics because I think our Statement speaks for itself in that regard.[32] I will only say that whether the positions we took in our Statement were right or wrong, I am convinced that it was in the public interest that we speak out in order to make it clear that there is more than one side to how Section 2 ought to be enforced. Too often in the past, I'm afraid, the federal government has taken only one side in the debate about how the federal antitrust laws should be enforced. And I will add that it is to Chairman Kovacic's credit that although he did not join in our Statement, he made no effort whatever to stifle our voices.

In sum, the last six-plus months have been an extraordinarily rich period of thought and law enforcement action at the Commission, and I feel blessed to have been a part of it.

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[31] Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act, U.S. Department of Justice, September, 2008, *available at:* <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

[32] Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice, September 8, 2008, *available at:* <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.