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VIA OVERNIGHT COURIER

Stephen Calkins, Esquire
General Counsel
Federal Trade Commission
Pennsylvania Avenue at Sixth Street
Washington, D.C. 20580

Re: Comments on FTC Adjudicative Process

Dear Steve,

You have asked me, based on my experience in handling matters that the FTC has investigated or challenged, to provide you with suggestions and comments I might have with regard to improving the FTC's adjudicative processes.

1. Investigation stage.

In the investigation stage, I have always been frustrated by the lack of mutuality of disclosure. The respondents to a second request or informal investigation produce documents and witnesses and then seek to meet to resolve the competitive issues. However, the FTC staff often declines to put any cards face up on the table. This makes resolution and compromise difficult.

For example, in the lengthy saga of the *Ukiah* case (*In re Adventist Health System/West)*, from the inception, we asked the staff to explain their view of the geographic market and to discuss the basis of their analysis. It was not until a few months before trial that we ever were provided with an economic analysis and then we learned that Glen Melnick had only just been hired and asked to validate ex post the geographic market as stated earlier in the adjudicative complaint. As you know, this analysis was ultimately found to be deficient.

I recognize the need for not revealing trial strategy and the need to shield confidential sources. There may also be some reluctance on the staff's part to state a theory without having approvals from higher-ups. Nevertheless, I believe that a considerable amount of time and effort could be saved for both the FTC and the respondents by encouraging a more frank exchange of information supporting or rebutting the theory of the complaint. It seems to me that the normal rules governing settlement conferences (see, for example, F. R. Evid. 408) would permit the staff to describe their theory or the hypothetical basis for the complaint without jeopardizing later

prosecution or revealing sources. This would lead to a more informed analysis of competitive effects. I have had one experience with the FTC that represents this approach - the review by the Boston regional office of the merger between Rhode Island Medical Center and The Miriam Hospital - and it seemed to work quite well.

It seems to me that there is an additional reason for moving toward a greater degree of disclosure in the investigatory stage. The staff cannot know the localized facts as well as the parties. By articulating a (non-binding) theory of the case, the parties would surely respond with all the facts favorable to them. This would help the staff avoid being surprised later or getting committed to a case they later find is not as strong as they thought.

2. Supervision of Ongoing Adjudications.

I think the new rule (§3.26(c)) that was invoked in the *Freeman* case which permitted reconsideration of whether the adjudicative case should continue is a step in the right direction. However, the agency's dual role of being both judge and prosecuting attorney causes continual difficulties. Once a prosecution gets going, it often appears to outsiders as if the agency has launched a rocket that can never be called back or redirected. I remember Jim Egan testifying before Congressman Stark in a hearing of the Joint Economic Committee. If I remember his remarks correctly, he disclaimed any oversight responsibility for the Ukiah case prosecution which was then in its third or fourth year. Apparently, the San Francisco regional office enjoyed some autonomy from his office.

I do not know what the reporting lines are or ought to be. However, in *Ukiah*, I had the feeling that there was no ongoing review by an experienced trial attorney to evaluate whether the information being amassed in discovery or any other preparation was sufficient to prove the violation alleged.

Throughout the preparation of the *Ukiah* and *Freeman* cases, it was not always clear to me who was in charge of the prosecution. When trial came, some new people stepped forward to be the lead trial lawyers. It seems to me that it would be preferable to designate the lead trial lawyer early on and make sure that he or she had the authority and responsibility for the case to make the necessary decisions about what avenues to pursue and which ones to drop. In my view, the lead trial attorney has to know the case and be thoroughly involved in the preparation. It's nice to have a team of people to divide up tasks and draw on different strengths, but someone needs to be in charge.

3. Shortening the Gestation Period.

In my view, antitrust litigation like most other major business litigation is capable of being resolved expeditiously. I think it would be reasonable to set a goal that a case should be prepared and tried within two years of being filed. I have always been amused with Dave Burda's assertions in *Modern Healthcare* that the reason the *Ukiah* case took five years was that

espondents raised jurisdictional issues all over the place. Actually, interposing the dictional defense can only account for one year in the delay between issuance of the plaint and trial, the period from Administrative Law Judge Parker's dismissal to the reversal t decision. The excursions to other forums never produced a TRO or injunction preventing dministrative case from proceeding. In conferences with Judge Parker, the respondents r asked for a continuance. The staff simply never appeared to be in any hurry to move rd with the case.

I think that the length of time that the FTC takes to resolve matters should be seriously ssed. The *Ukiah* case was a merger between two 50 bed hospitals. The *Coke/Dr Pepper* r was a fight over a transaction that never took place. How can these issues become five or ear litigation sagas?

I participated in a commission that reviewed the procedures in the Illinois state court m following a scandalous episode of corruption there a few years ago. The FBI stigation was dubbed *Operation Greylord* and it produced some notable prosecutions. When roup looked at the civil side of the court system, we discovered that jury cases took seven s or longer to get to trial. While all cases need some gestation period from filing to trial for ssary preparation, we thought this was way too long and disserved the public. We made a s of recommendations aimed at reducing that backlog.

The central theme in this effort was to enhance case management. The Illinois court m, at the time, had cases meandering through the system that no single judge was onsible for until the case was sent out for trial at the six or seven year point. Judges hearing ions and discovery issues had no incentive to rule dispositively on a summary judgment on or to curb discovery because they were not the judge that would ultimately hear the case. y did not want to decide something that the ultimate trier might view differently. This boiled n to a lack of accountability. I have been impressed with the Administrative Law Judges that ve encountered and know that they have certain deadlines they try to meet. I do not know the nt to which Commissioners also are accountable as cases move up the ladder. The mere fact there are recent examples of cases taking five or ten years to get through the system suggests this judicial machinery is not working as quickly as it should.

Merger Guidelines.

I have never been enamored of the Merger Guidelines. This is not out of any dispute over economic theory or theories that they are based on, but rather the fact that they are incapable eing used by a reasonably informed person to define a market or predict the agency's onse. I find the attempt to distill competitive analysis down to an HHI number as daunting unsatisfying. I suggest that the Merger Guidelines have probably been a handicap to your , which gets preoccupied with trying to cram a case into the precepts of the Guidelines. For mple, in the *Freeman* case, the staff actually interviewed hospital administrators, asking them

ill-formed and ambiguous questions about whether they would see more patients if the Joplin hospitals raised their prices. The court did not find this exercise persuasive.

I think the FTC should examine existing markets that have certain characteristics that can then serve as a yardstick for other proposed mergers in similar markets. I think most triers of fact would find this approach more satisfying. There may be other similar approaches that give a greater sense of reality to the prediction that a trier of fact is being asked to make in merger cases.

5. Burden of Proof.

I think the FTC's often extreme position on what is required to establish an antitrust "defense" is often counter-productive. Then Judge Clarence Thomas's opinion in *Baker-Hughes,* the case Bill Baer tried, is probably a good example of the limitations of these positions. The FTC's proclamation that "efficiencies are not a defense" or that the failing company defense must be established by some Herculean level of proof or other demands of "clear and convincing" evidence depreciate the trier of fact's role. The danger that reliance on an extreme formulation of the respective burdens creates is that the staff may rely on its view of the burden and stop without meeting the proof offered by the other side. In *Ukiah,* the staff never sought to rebut the post-acquisition performance of the hospitals, relying instead on the formulation that post-acquisition evidence was irrelevant because it was capable of being manipulated by the parties. In *Freeman,* the staff dismissed the post-complaint weakened financial condition of Oak Hill as not meeting the failing company requirements. Yet our evidence on these matters was considered by the judges in both cases. Too often, in the give and take of negotiating with the staff in the investigation stage, these formulations with enhanced burdens get in the way of a realistic analysis of the competitive situation.

6. Market Studies.

I like the availability of consent decrees and advisory opinions. However, these are often hypothetical and harder to rely on in fashioning antitrust advice than a decided case. I would favor the use of the FTC's investigatory powers to go back and look at some transactions it has approved to see what observations can be made about impact on competition. However, I would favor public reports. Several years ago, the FTC conducted a study of the hospital industry but never released its findings. It would be a shame to develop information that might elevate the analysis of competitive situations and not have it be available for scrutiny by commentators both inside and outside the antitrust agencies. Also, conducting such studies is particularly within the purview of the FTC and would provide an opportunity for the FTC to make a contribution to the development of antitrust distinct from the exercise of its enforcement jurisdiction which, for the most part, overlaps that of the Justice Department.

7. Costs Incurred by Respondents.

Most of my clients would also stress that they are astounded that they can be put to the enormous expense of having to respond to an investigation or challenge with only limited avenues for recourse back against the FTC for their expenses if they ultimately prevail. For example, the Equal Access to Justice Act is a remedy unavailable to most litigants. There is a view that many transactions are abandoned or consent decrees entered into because the respondents simply cannot afford to fight.

Judge Whipple, in the February 23, 1995 hearing on the TRO in the *Freeman* case, asked Jan Charter, representing the FTC, whether the FTC would reimburse Oak Hill Hospital for its losses while the TRO or preliminary injunction was pending, if the FTC ultimately lost. Oak Hill was losing $300,000 a month then and those losses climbed later. The staff did not agree to dissolve the stay order after Judge Whipple's decision and it remained in place until the Eighth Circuit ruled on June 2, 1995. In other words, Oak Hill incurred nine months of losses that, in its view, were unnecessary.

Just as there is a need for a greater sense of urgency with regard to the pace of litigation at the FTC, there is also a need for a greater appreciation of the costs that investigations and the conduct of litigation impose on parties. This is true whether the question is the scope of a second request or whether to depose every director of a respondent hospital.

I hope these comments and observations are of some assistance to you.

Very truly yours,

Thomas Campbell