Concurring Statement of Commissioner J. Thomas Rosch
In re Google Buzz, File No. 1023136
March 30, 2011

I concur in accepting, subject to final approval, a consent agreement from Google Inc. ("Google") for public comment. However, it should be emphasized that this consent agreement is being accepted, subject to final approval. I have substantial reservations about Part II of the consent agreement. My concerns are threefold. Before I describe them, however, I want to make clear that I do not mean to defend Google. Google can – and should – speak for itself. However, I believe that, as a Commission, we must always be concerned that a consent agreement, like a litigated decree, is consistent with the public interest. For that reason, I am opposed to accepting consent agreements that may be contrary to the public interest because a party is willing to agree to terms that hurt other competitors as much or more than the terms will hurt that party. That may occur, for example, when a consent agreement is used as "leverage" in dealing with the practices of other competitors. Part II of the proposed consent order may be susceptible to this happening.

More specifically, the crux of the violation alleged in the Complaint is that Google represented in its general "Privacy Policy" that "When you sign up for a particular service that requires registration, we ask you to provide personal information. If we use this information in a manner different from the purpose for which it was collected, then we will ask for your consent prior to such use." However, when Google initiated its social networking service ("Google Buzz") it used personal information previously collected for other purposes without asking for users' consent prior to this use. Part II of the proposed consent order prohibits Google, without prior "express affirmative consent" (an "opt-in" requirement) from engaging in any "new or additional sharing" of previously collected personal information "with any third party" that results from "any change, addition, or enhancement" to any Google product or service.

First, Google did not represent in its general "Privacy Policy" (or otherwise, according to the Complaint) that the "consent" it would seek would require consumers to "opt in" as required by Part II. Indeed, the Complaint does not allege that Google ever asked consumers to signify their "consent" by "opting in" (as opposed to "opting out"). To be sure, insofar as Google did not seek "consent" at all, its representation in its general "Privacy Policy" was deceptive in violation of Section 5. But the "opt in" requirement in Part II is seemingly brand new. It does not echo what Google promised to do at the outset. In the separate Statement that I issued when the staff issued its preliminary Privacy Report, I expressed concern about whether an "opt in" requirement in these circumstances might sometimes be contrary to the public interest. Then, as now, I was concerned that it might be used as leverage in consent negotiations with other competitors.

Second, Part II of the proposed consent order applies whenever Google engages in any "new or additional sharing" of previously collected personal information "with any third party" for the next twenty years, not just any "material" new or additional sharing of that information. Because internet business models (and technology) change so rapidly, Google (and its competitors) are bound to engage in "new or additional" sharing of previously collected information with third parties during that period. That means that Part II is certain to apply (and

with some frequency) during that period as long as Google does not warn users or consumers in its "general Privacy Policy" that it may engage in such sharing in the future.

Third, Part II applies not just to Google's social networking services or products, but to every single Google service or product that undergoes some "change, addition, or enhancement" (terms that are not defined in Part II) that results from the sharing of certain information. As a practical matter, this means that Google is at risk that Part II will apply across the board to every existing product or service that Google offers, including any product or service that involves the tracking and sharing of identified Google users' browsing behavior.

In short, on the face of it, Part II seems to be contrary to Google's self-interest. I therefore ask myself if Google willingly agreed to it, and if so, why it did so. Surely it did not do so simply to save itself litigation expense. But did it do so because it was being challenged by other government agencies and it wanted to "get the Commission off its back"? Or did it do so in hopes that Part II would be used as leverage in future government challenges to the practices of its competitors? In my judgment, neither of the latter explanations is consistent with the public interest.

Nor am I comforted that the purpose and effect of Part II may be to "fence in" Google. I am aware of the teaching of *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946) that a "fencing in" order may cover legal conduct as long as that conduct is "reasonably related" to the violation. Even if Part II may be considered to cover conduct that is "reasonably related" to the violation here, any consent order, whether litigated or negotiated, must be consistent with the public interest. I look forward to public comment about whether Part II of the proposed consent order meets that requirement.