P072104 - Parts 3 and 4 Rules of Practice Rulemaking

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The Commission's proposal to amend its Part 3 rules has become a topic of controversy. To some, the controversy may seem unexpected. Why would anyone oppose changes which expedite administrative trials? Is the controversy merely one ginned up by advocates who have a pending merger case about to be tried before the Commission?

Of course, expediting Part 3 proceedings is a step in the right direction. We are filing this comment to urge caution by the Commission as it addresses the appropriate role of Part 3 adjudication of Section 7 merger challenges.

I. The Appropriate Role for Administrative Proceedings in Merger Cases

As a general matter, the argument for administrative decision-making as superior to judicial decision-making in the antitrust area rests significantly on one's belief in the benefits of the FTC's expertise in developing and applying enforcement policies through the adjudicative process.[3] The

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[3] As the Commission noted in its Federal Register Notice ("Notice") announcing the proposed rule changes:

> "Congress determined that the Commission could use its expertise and administrative adjudicative powers as a "uniquely effective vehicle for the development of antitrust law in complex settings in which the agency's expertise [could] make a measurable difference." Certainty, consistency and accuracy in Commission decisions could serve as a tool not only to improve the resolution of individual cases, but to provide broad guidance to industry and the public and help set the policy agenda."

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argument for Part 3 trials thus is strongest in those areas of antitrust enforcement policy where consensus is lacking and the Commission can furnish expert guidance in the development of the law.

Section 2 is one such area where consensus is lacking and the development of consensus enforcement policy might well benefit by the application of the Commission's expertise in an adjudicatory setting.[4] Similarly, some vertical arrangements, including examination of rule of reason approaches to minimum resale price maintenance could benefit from careful Commission review.

Today, however, there is considerable consensus regarding the core principles which should govern Section 7 horizontal merger enforcement. This consensus is a product of the Merger Guidelines jointly adopted by the FTC and the Antitrust Division of the Department of Justice and the ensuing decades-long dialogue between the enforcement agencies and the courts which has taken place mostly in the context of preliminary injunction proceedings.

Thus, it is a subject of legitimate debate whether the Commission's expertise has a significant role to play, beyond its decision to seek judicial relief to prevent consummation of mergers. The downsides of the current FTC process have been articulated by the Antitrust Modernization Commission ("AMC"), which focused on the very different process which applies when the FTC rather than the Antitrust Division takes action to block a transaction. While noting criticisms of the time it takes to litigate before the Commission, the AMC raised broader concerns which flow from the fact that DOJ preliminary and permanent injunction proceedings in merger cases are consolidated, thus putting DOJ to its ultimate burden of proof before a court if a merger is to be blocked.[5]:

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Rules of Practice, 73 Fed. Reg. 58832, 58833 (proposed Oct. 7, 2008) (footnotes omitted).

[4] *See* Statement of Commissioners, Harbour, Liebowitz and Rosch, On the Issuance of the Section 2 Report By the Department of Justice (Sept. 8, 2008).

[5] "[T]he FTC and the DOJ take different approaches when seeking an injunction from a court to block a merger, in part because of the different statutes governing their authority in such instances. The DOJ generally seeks a permanent injunction (along with a preliminary injunction) against mergers it believes are anticompetitive, resolving the question fully and completely in a single proceeding before a judge. If the DOJ fails to obtain the permanent injunction it seeks, the parties can consummate the merger without further antitrust litigation (assuming the DOJ does not appeal). In

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The AMC made two recommendations in this regard:

> 24. The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.
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> 25. Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases**.**

Antitrust Modernization Commission, Report and Recommendations, at 131.

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contrast, the FTC seeks only preliminary injunctions—not permanent injunctions—in federal district court when challenging mergers it believes are anticompetitive. The FTC's approach permits it to seek permanent relief in administrative Part III proceedings if it fails to obtain a preliminary injunction. Thus, although the parties can consummate the proposed transaction (absent a stay), antitrust litigation may continue for the merged parties while the FTC pursues permanent relief via Part III proceedings. Such administrative litigation can be lengthy, leaving a completed transaction in the limbo of litigation for over a year. In addition, the statutory standard governing when the FTC is entitled to preliminary relief is arguably more favorable to the government than is the general standard governing motions by the DOJ for preliminary relief.

"Some believe that these differences in DOJ and FTC practices and standards result in mergers' [sic] being treated differently depending on which agency is involved. . . . Regardless of the degree of effect, these factors have led some knowledgeable practitioners to believe that companies whose mergers are investigated by the FTC are at a disadvantage as compared with those investigated by the DOJ. Any such differences—real or perceived—can undermine the public's confidence that the antitrust agencies are reviewing mergers efficiently and fairly and that it does not matter which agency reviews a given merger. "

Antitrust Modernization Commission, Report and Recommendations, at 130-31 (April 2007) (emphasis added).

Thus, the AMC opted for elimination of the Part 3 process in merger cases to avoid undermining public confidence in the fairness of the process, irrespective of which enforcement agency launched a merger challenge.

We do not agree that Congress should amend Section 13(b) in this fashion. However, it is worth recalling that the AMC was not the first to articulate these concerns. In 1995, when the Commission adopted its Policy Statement articulating five factors that it would consider in deciding whether to continue with an administrative trial after the denial of its motion for preliminary injunction, it did so in part to respond to similar concerns. The Commission stated:

> "Some commentators have suggested that because the Department of Justice lacks the ability to challenge mergers in the administrative process, the Commission's litigation should be confined to the federal courts in order to bring the two agency's enforcement powers in line with one another. The problem with such an approach is that the significant benefits of administrative litigation outlined above would be lost in such a change in enforcement policy. The business community would be denied the guidance provided by merger decisions based on a complete analysis of a full evidentiary record, and Congress' vision of the FTC's central role in merger enforcement would be subverted."[6]

Under the current rules of practice implementing the 1995 Policy Statement, when the Commission has lost a preliminary injunction proceeding, it removes the matter from Part 3 adjudication and engages, without presumptions one way or the other, in a careful case-by-case review of the adverse judicial ruling before deciding whether to continue the case. The matter is withdrawn from adjudication, and scheduling

[6] This Policy Statement articulated five factors that the Commission would address in deciding whether to continue administrative litigation: (1) the factual findings and conclusions of law of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge. Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741, 39,743 (Aug. 3, 1995).

orders presumably suspended while the Commission considers the court's ruling. In the ten years following adoption of the 1995 Policy Statement, the Commission elected not to pursue an administrative trial in each and every instance where its motion for a preliminary injunction had been denied.[7]

Under the proposed rule change, the matter is not automatically withdrawn from adjudication and the burdens of that litigation continue unless and until the Commission decides otherwise. The Notice is silent with respect to whether any or all of the five factors will continue to be considered. However, they are implicitly rendered irrelevant by the unqualified assertion that "the norm" henceforth will be continuation of the Part 3 litigation. 60 Fed. Reg. at 58,837.

The FTC's expertise in deciding merger cases is given as the explanation for establishing this presumption in favor of continuing Part 3 litigation. However, in adopting the 1995 Policy Statement, the Commission noted that *only in some cases*, would its expertise warrant continuing with a Part 3 litigation. It clearly rejected any presumption in favor of continuation of the Part 3 litigation when confronted with an adverse preliminary injunction proceeding:

> [T]he determination to continue a merger challenge in administrative litigation is not, and cannot be, either automatic or indiscriminate. In any given case, the evidence, arguments, and/or opinion from the preliminary injunction hearing may, or may not, suggest that further proceedings would be in the public interest. The Commission's guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis.

60 Fed. Reg. 39,741.

Two years ago, Commissioner Rosch told the Antitrust Modernization Commission:

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[7] "Since 1995, the FTC has had in place a policy that narrowly restricts its ability to pursue administrative litigation following a loss in federal court, and the FTC has never done so since the policy statement was issued." Statement of Thomas B. Leary Before The Antitrust Modernization Commission (December 1, 2005).

> ". . . I think the perceived difference between DOJ and FTC enforcement posed by the possibility that the FTC will initiate administrative proceedings after a federal court denies a preliminary injunction is mostly theoretical. The FTC hasn't done that for more than 15 years (the *Donnelley* case in 1990 was the last time),[5] and I see no real threat that it will do it in the future, *absent extraordinary circumstances*. . . . I think it would be a mistake to strip the Commission of the power to send matters to Part 3 *if those extraordinary circumstances exist*."

Remarks Before the Antitrust Modernization Commission, J. Thomas Rosch, Commissioner, Federal Trade Commission (June 8, 2006) (emphasis added).

We respectfully submit that those who believe that Part 3 litigation in merger cases is worth retaining best defend that position by leaving unchanged the current practice articulated in the 1995 Policy Statement and its implementing rules of practice. There is no need for erecting a "norm" which presumes the continuation of an administrative litigation. Such a view is far removed from that articulated by a unanimous Commission in 1995 as well as the view expressed by Commissioner Rosch a decade later. Most unfortunately, articulating such a "norm" leaves the impression that the Commission will take little or no notice of what preliminary injunction courts have to say.

For these reasons, the Commission should leave Rule 3.26 unchanged.

II. Expediting Part 3 Trials Will Not Prevent Abandonment of Transactions Which are Preliminarily Enjoined

One reason advanced by the Commission for the proposed rule changes is that "in merger cases . . . protracted proceedings may result in parties abandoning transactions before their antitrust merits can be adjudicated." 73 Fed. Reg. 58832 (Oct. 7, 2008). However, given the six to nine months it often takes to complete the HSR Second Request Process, plus the time for the preliminary injunction proceeding, the administrative trial, an appeal to the Commission, and possible appellate review of the Commission's decision, parties to a deal will continue to abandon it if they lose at the preliminary injunction stage.

The conditions which lead to "yes" in the context of a merger or acquisition agreement are not static. It is a rare seller whose business can withstand the destabilizing effect of years of uncertainty regarding its future ownership during the pendency of an FTC Part 3 proceeding. We are not aware of a

single instance in which the merging parties, having lost a preliminary injunction proceeding brought by the FTC, tried to preserve their deal while litigating the administrative trial on the merits before the Commission. To our knowledge, this has not happened since the adoption of the Hart-Scott-Rodino Act, and it is unlikely to occur in the future even if the proposed rule changes are adopted.

Under the Commission's proposal, it still would take something like three years from the time a deal is announced until the Commission issues its decision. An additional year or so would be necessary if the parties lose before the Commission and seek appellate court review.[8] Even if the Commission were to adopt our suggestion, infra, p. 9, to require issuance of its own decision within six months after the ALJ rules, parties to a preliminarily enjoined merger would still be looking at two years or more before it was clear whether they could consummate their transaction.

While an effort to expedite administrative proceedings is laudable, the Commission should not encourage an unrealistic sense that the currently proposed rule changes will enable parties to litigate Part 3 merger cases in circumstances where they uniformly have been abandoned in the past.

It will remain the case that "[t]he need for caution in issuing a preliminary injunction is particularly important in the merger and acquisition context, because 'the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.'" *FTC* v. *Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441, at *51 (D.N.M. May 29, 2007) (quoting *FTC* v. *Great Lakes Chem. Corp.*, 528 F. Supp. 84, 86 (N.D. Ill. 1981)). *See also, FTC* v. *Arch Coal, Inc.*, 329 F.Supp.2d 109, 116 (D.D.C. 2004)

III. The Role of an Independent Administrative Law Judge in Part 3 Proceedings

In the name of expediting Part 3 proceedings, the Commission proposes several changes which limit the role of the Administrative Law Judge ("ALJ"). Again, we urge institutional caution as the Commission considers whether to adopt these changes.

[8] In addition to the time-consuming Second Request process, the preliminary injunction litigation typically take several months, the ALJ's decision would issue a year later, assuming no extensions of time, and the Commission typically takes 18 months to issues its own ruling after the Administrative Law Judge has ruled. Geoffrey D. Oliver & Robert C. Jones, "FTC Rules Change Would Squeeze Litigants," Competition Law 360 (October 10, 2008).

More specifically, several proposed rule changes inject the Commission into areas previously considered the domain of an independent ALJ:

1. The Commission should review carefully those comments which raise questions as to whether respondents may be unfairly limited in their pretrial rights by the universally applied shortened time periods which are proposed. Perhaps it might be wiser to leave it to the independent Administrative Law Judge ("ALJ") supervising the matter to tailor pretrial procedures to the needs of individual cases and litigants, subject to an overall time limit for completion of the trial itself.

2. The proposal to amend Rule 3.22 would require all dispositive pretrial motions to be disposed of by the Commission itself, rather than an independent ALJ, as is the current practice.

3. The proposal to amend Rule 3.42 authorizes the Commission or a single Commissioner to preside over pretrial proceedings before transferring the proceedings to an independent ALJ.

4. The proposal to amend Rule 3.42 also authorizes the Commission or a single Commissioner to preside over the administrative trial itself.

For much of its history, concerns have been expressed about the Commission's dual prosecutorial and judicial roles in finding "reason to believe" that a complaint should issue and thereafter making the ultimate post-trial decision on the validity of that complaint. While those concerns are understandable, we do not share them. However, under the current rules, there is at least a significant passage of time between when the Commission issues its administrative complaint and ceases its prosecutorial role and the time when it begins to function as appellate adjudicator. The more the Commission invades what has heretofore been the province of an independent ALJ, the more it lends credence to concerns regarding the fairness of the Part 3 adjudicative process.

We do not address whether the Commission lacks the statutory authority to take on roles previously left to an independent ALJ, or whether these changes raise due process questions.[9] Rather, our point is that as a

[9] Commissioner Rosch's decision declining to disqualify himself from sitting as the ALJ in the Inova matter fairly states the argument in support of the Commission's authority to take such actions. *In re Inova Health Sys. Found. and Prince William Hosp. Sys., Inc.*, No. 9326 (F.T.C. May 29, 2008) (order certifying Respondents' Motion to Recuse to the Commission and accompanying statement by Commissioner Thomas J. Rosch), available at http://www.ftc.gov/os/adjpro/d9326/080529ordercert.pdf.

prudential matter, the Commission's interest in preserving its role as a fair-minded expert administrative adjudicator is best served if it abstains from exploring the outer limits of what is statutorily and constitutionally permissible.

IV. Time Limits for Commission Decision

The proposed changes to Part 3 do not address the absence in the present rules of any limitation on the Commission's time to render a decision in the event of an appeal from the ALJ's decision. It has been said that since 2000, it has taken the Commission an average of 18 months to render its own decision, even in those cases where no complicated remedial issues requiring further proceedings were involved.[10] This hole should be plugged with a rule change requiring the Commission to render its decision within six months of the ALJ's ruling, except in narrow and unusual circumstances.

[10] Oliver & Jones, supra, n.8.