Comments of Whole Foods Market, Inc.
Parts 3 and 4 Rules of Practice Rulemaking -- P072104

Whole Foods Market, Inc. respectfully submits the following comments on the new and amended regulations to its adjudicative procedures proposed by the Federal Trade Commission on October 7, 2008.[1]

Summary

The Commission's proposals are egregious government regulation that should not be adopted. The proposed rules are unnecessary, ill-advised, and unfair. If adopted, they would create administrative procedures that are unjust and deprive parties litigating before the Commission of their due process rights.

Both the rules and the process by which they are proposed reflect a rush-to-judgment mentality that ill-serves the public interest, as well as a hostility to the open adversarial process that is fundamental to the American legal system. Given the importance of the issues at stake, the Commission should immediately extend the deadline for comment on the proposal to no earlier than January 6, 2009. A thirty-day comment period is wholly inadequate to deal with changes in the number and of the magnitude proposed.

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[1] 73 Fed. Reg. 58,832 (October 7, 2008), *hereinafter* "Notice" or "Commission Notice." These comments are directed to the proposals as applied to merger cases, but would also apply, in relevant part, to any complex competition case adjudicated administratively by the Commission.

Analysis

I. A 30-Day Comment Period For The Radical Changes Proposed By The Commission Is Wholly Inadequate And Should Be Extended To 90 Days.

We agree that the Commission can and should subject its adjudicatory process to periodic review and improvement. But, given the importance of the issues raised by the proposal, far more time than 30 days should be provided for public comment to changes as radical as those proposed in this instance.

Whether or not formal notice-and-comment procedures are required for proposed regulations of this kind,[2] Whole Foods submits that the extreme about-face proposed by these particular proposals merits an extended comment period and serious re-evaluation. As will be seen, these proposals reverse a longstanding policy of the Commission to invest ALJs with plenary authority to manage their cases, seriously compromising their independence, with unfortunate implications for the integrity of the Commission's adjudicatory process. A thirty-day comment period – the absolute minimum allowed for substantive regulations under the Administrative Procedure Act[3] – is wholly inadequate to allow these concerns to be fully brought to light and considered. The last time the Commission proposed changes of this scope to its adjudicatory process, it allowed sixty days for comment[4] for changes that proved less controversial than these.[5]

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2 *See* 5 U.S.C. § 553(b)(A).

3 5 U.S.C. § 553 (d).

4 61 Fed. Reg. 50,640 (Sep. 26, 1996).

5 From the public record, the Commission appears to have solicited suggestions for changes before publishing the 1996 proposal and received four responses. The Commission does not appear to have received any comments on the 1996 proposals once they were published The present proposal has already generated uniformly negative comments. *See, e.g.,* comments of Linda Blumkin and Richard Hallberg. The comments of Ms. Blumkin, a respected antitrust lawyer, also urge the Commission to adopt a longer comment period. *See* http://www.ftc.gov/os/comments/part3and4rules/index.shtm.

If it is appropriate for 180 days to be provided for public comment to an amendment to the platinum section of the Guides for the Jewelry, Precious Metals, and Pewter Industries,[6] and 75 days to the energy labeling requirements for ceiling fans,[7] then the fundamental changes to the process of administrative litigation contemplated by the proposed regulations should require at least a 90-day comment period to ensure thoughtful and useful comments.

II. The Commission's Proposals To Reduce The Authority and Discretion of The ALJs To Manage And Initially Decide The Case Creates An Adjudicatory Process That Is Inherently Unfair To Respondents.

The Commission's proposed rule changes represent a wholesale abandonment of its longstanding practice of investing its Administrative Law Judges (ALJs) with increasing authority and discretion to manage the trials they have been appointed to conduct. In multiple ways, the Commission's proposal has either stripped the ALJs altogether of authority to make decisions previously entrusted to them or eliminated their discretion in favor of inflexible, mandatory dictates.

An independent hearing officer has long been recognized as an essential guarantee of actual and perceived fairness in administrative proceedings, particularly in agencies, such as the Commission, in which the prosecutorial and adjudicatory functions are combined. One of the most serious consequences of implementing these changes will therefore be to compromise the integrity of the Commission's adjudicative proceedings not only in fact, but in the public mind as well.

A. The Independence of The ALJ Is Fundamental To The Integrity of The Commission's Adjudicatory Process.

The structure of Part III adjudication permits the commissioners to act as both prosecutor and judge in the cases they choose to bring. It is the commissioners who, after delving *ex parte* into the evidence developed by the staff's investigation, make the policy decision to

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6 73 Fed. Reg. 22,848 (April 28, 2008).

7 71 Fed. Reg. 35584 (June 21, 2006).

issue a complaint, and it is the same commissioners who act as the ultimate adjudicators of the complaints they have issued.

This combination of prosecutorial and judicial functions has been a continual source of criticism. In 1989 the American Bar Association's Antitrust Section observed that "[t]he debate about the merits of the FTC's dual roles as prosecutor and adjudicator has raged for years."[8] Most important among the commentaries on this subject is the Final Report of the Attorney General's Committee on Administrative Procedure.[9] Issued in 1941 but still authoritative, this Report played a pivotal role in the development of the Administrative Procedure Act under which the Commission and other agencies now operate. The Attorney General's Report found the "commingling of functions of investigation or advocacy with the function of deciding" to be "plainly undesirable."[10] In this regard, the Report singled out the Federal Trade Commission, noting its enforcement role in the "controversial" field of unfair methods of business competition, as an agency "peculiarly in danger of being charged with bias by those against whom the prohibitions are sought to be enforced."[11]

While not advocating a complete separation of prosecutorial and adjudicative functions at the top level of the agency, the Report did recommend "internal but nevertheless real and

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8 REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION 118 (1989) *hereinafter 1989 ABA Report.*

9 Attorney General's Committee on Administrative Procedure, Final Report (1941), *hereinafter Attorney General's Final Report.* As for the continued authoritativeness of the Report, the Commission itself purports to rely on it, 73 Fed. Reg. 58,833 (2008), although, as will be seen, violates its fundamental principles.

10 *Attorney General's Final Report*, 56, noting how an individual "who has buried himself in one side of an issue is disabled from bringing to its [sic] decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."

11 *Id.*, 58.

actual separation of the adjudicating and the prosecuting functions" within the agency. The key element in this separation was an independent hearing officer (predecessor to today's Administrative Law Judges), fully empowered to preside at hearings and make findings of fact and conclusions of law, whose findings should not be disturbed "unless error is clearly shown."[12] Courts have subsequently reinforced the importance of the hearing officer as an independent voice by requiring his or her initial decision to be considered in any judicial review of the agency's decision.[13]

As the Attorney General's Report further recognized, effective independence must include plenary power over procedural matters. The Report recommended that hearing officers "should be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, [and] carry out other duties incident to the proper conduct of hearings."[14] Indeed, the Supreme Court has observed that the quality of the examiner's decision is enhanced not only by his opportunity to observe the witnesses, but by the fact that he has "lived with the case."[15] The District of Columbia Circuit Court of Appeals has likewise noted the importance of giving the Commission's ALJs plenary control over the adjudicative process as a critical element of a fair process. In *FTC v.*

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12 *Id.*, 51. *See also,* Universal Camera Corp. v. NLRB, 340 U.S. 474, 494 (1951), *hereinafter Universal Camera.* (Legislative history of the Administrative Procedure Act confirms "that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.").

13 *Universal Camera,* 340 U.S. at 493-97; Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1063 (11th Cir. 2005), *cert. denied,* 126 S.Ct. 2929 (2006). The importance of ALJ independence is further reflected by courts' general reluctance to accept an agency's desire to dispense with an examiner's report without showing a satisfactory justification (i.e. demonstrated urgency) for doing so. *See, e.g.*, Cent. & S. Motor Freight Tariff Ass'n v. United States, 273 F. Supp. 823, 833 (D. Del. 1967).

14 *Attorney General's Final Report,* 50.

15 *Universal Camera,* 340 U.S. at 496.

Atlantic Richfield Co.,[16] the court noted that Part III of the Commission's regulations "endeavors to create for the Administrative Law Judge control over the adjudicatory process, including all aspects of discovery, and to make the FTC adjudicatory process as fair to each side in every respect as in a federal court." The court's opinion criticized the Commission's attempt in that case to use materials from an investigation in a separate adjudicative proceeding against the same company as "seemingly tend[ing] to undercut the role of the Administrative Law Judge," which "would subvert completely the essential separation of the adjudicatory and investigatory functions of the Federal Trade Commission...."[17]

Although the Commission's Notice does not rely on this power expressly, we recognize that in the abstract the Administrative Procedure Act allows the Commission or one or more commissioners to act as an Administrative Law Judge.[18] But any effort to justify the current proposals on that basis would miss the point. The fact that the Commission may act as an ALJ does not mean that it is wise as a matter of policy to do so. The APA embodies a set of general principles applicable to all agencies. Many of those agencies do not have the same structure of combined judicial and administrative functions which the Attorney General's Report specifically identified with the Federal Trade Commission.[19] That problem, according to the Report, is best mitigated by plenary delegation to independent hearing officers. Moreover, the proposed rules do not contemplate having the Commission assume the entire role of the ALJ. Instead, it contemplates a hybrid proceeding in which the Commission or individual commissioners can participate in the proceeding at various times for various purposes, but not for others. Such a procedure severely compromises ALJ independence, while, despite the Commission's contrary assertion, likely impairing efficiency as well.

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16 567 F.2d 96 (D.C.Cir. 1977).

17 *Id.*, 103-104.

18 5 U.S.C. § 556 (b) (1)-(2).

19 *See* discussion at p.4 & n. 11, *supra.*

In sum, the Attorney General's Report and the courts have viewed the independence of the hearing examiner (now ALJ) in both substantive and procedural matters as an important safeguard against the potential for prejudgment and bias from the combination of the Commission's prosecutorial and adjudicative functions. Unfortunately, the Commission's effort to overhaul its adjudicative processes eviscerates this function by depriving the ALJ of much of his or her most critical discretion and authority.

B. The Proposed Regulations Severely Compromise The Independence of The ALJ To Manage The Case And To Provide An Unbiased View of The Merits.

The Commission's proposal consistently withdraws from the ALJ previously granted authority to conduct pretrial and trial procedures and to rule initially on the merits of the case.

Proposed Regulation 3.11 requires that the evidentiary hearing in merger cases must commence five months from issuance of the complaint, even though the hearing in other proceedings need only commence within eight months. Relief from this regulation can only be granted by the Commission. This reverses current practice, which allows the ALJ to determine, based on the circumstances of a particular case, the time necessary for discovery and, therefore, the appropriate date on which to commence the evidentiary hearing.

As the Commission and the Department of Justice observed in the introduction to the *Commentary on the Horizontal Merger Guidelines*, merger investigations are "intensely fact driven" and "merger analysis depends heavily on the specific facts of each case."[20]

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[20] Federal Trade Commission and U.S. Department of Justice, *Commentary on the Horizontal Merger Guidelines* 3 (March 2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf. *See also*, U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 0 (1992 rev. 1997) (merger analysis must be applied "reasonably and flexibly to the particular facts and circumstances of each proposed merger"), *available at* http://www.ftc.gov/bc/docs/horizmer.htm.

Imposing the same pretrial and trial schedule cannot possibly serve all merger cases adequately.

The proposed regulation, by truncating fact discovery, would also give a distinct litigation advantage to complaint counsel, who have had months to conduct *ex parte* discovery during their investigation. Respondents do not share this power of the staff to obtain facts via broad, pre-complaint, compulsory process, but must rely entirely on discovery during the period allotted by the Commission's adjudicative rules. This tilt in the playing field is exacerbated by the fact that in many cases the most important defense evidence – on potential entrants, product substitution, customer power and behavior, for example -- is in the hands of third parties, whose cooperation may not be easily or promptly obtained.

Experience strongly suggests that five months is not enough time to overcome this disadvantage. In fact, in the most recent merger case filed for adjudication in Part III the ALJ provided an eight-month discovery period.[21] Whether even this will turn out to be adequate remains to be seen. The Commission has adjudicated two Part III merger cases in the last ten years.[22] The time between complaint and start of hearing in both of these cases was approximately one year. The Commission now proposes to cut that time in all cases by **more than half**. Yet the Commission's request for public comment contains no analysis of its prior experience in those two cases or any other effort to justify this extraordinary truncation.

The assault on ALJ independence is magnified by **Proposed Regulation 3.42**, which expressly provides "authority for the Commission or an individual Commissioner to preside over discovery and other prehearing proceedings before transferring the matter to the ALJ." When exercised, this extraordinary power will curtail the ALJ's independence and greatly risk depriving litigants of a fair trial. Discovery and other pre-hearing

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21 Scheduling Order, Polypore International, Inc., Dkt. No. 9327 (Sep. 9, 2008).

22 Evanston Northwestern Healthcare Corp., Dkt. No. 9315; Chicago Bridge & Iron N.V., Dkt. No. 9300.

proceedings can be outcome-determinative if they deny respondents a fair opportunity to develop their defense. For example, although an independent ALJ was recently appointed in *Whole Foods Market*, the ALJ's independence has been compromised because the Commission issued a scheduling order that, by rushing to trial with only five months for discovery, will deeply compromise Whole Foods Market's ability to mount an adequate defense. Whole Foods Market cannot even ask the ALJ to amend the scheduling order, because the Commission dictated that only it can modify the order.

Proposed Regulation 3.22 gives the Commission the authority to decide all dispositive prehearing motions. Under the proposed regulation, the same Commission members who voted to charge the respondent with a legal violation would also rule on pre-trial motions – including fact-intensive motions for summary decision -- to terminate the charges.

The role of the ALJ, including his or her ability *independently* to assess the merits of the FTC's case, should be preserved. This is especially true of motions for summary decision, which are based in significant part on an interpretation of the facts – a core function of the ALJ. Because such motions usually require extensive parsing of the evidentiary record, they can provide the ALJ with knowledge of the case that can facilitate his or her handling of the trial and in preparation of the initial decision, if one is necessary.

Having summary decision motions decided by the Commission in the first instance deprives the ALJ of that crucial element of "living with the case" that reinforces independent judgment.[23] It also undermines the ALJ's ability to manage discovery in the case. As Congress recognized in structuring the legislation for multidistrict litigation, the ability to rule on dispositive motions is intimately tied to the ability to manage

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[23] *See Universal Camera*, 340 U.S. at 496.

discovery.[24] By depriving the ALJ of the former, the Commission will inevitably compromise the latter.

Equally worrisome is the threat which a Commission summary decision poses to the independence of the ALJ's initial decision. If the Commission denies a motion for summary decision, the ALJ is no longer writing on a clean slate when preparing the initial decision. His or her views will inevitably be skewed by the now entirely transparent views of the Commission delivered on less than a full record. Ruling on such an interim motion thus allows the Commission prior to trial to influence the ALJ's views in a very direct way that further compromises the separation between the Commission's dual role as prosecutor and judge.[25]

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[24] *See* Richard L. Marcus, *The Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Panel's Transfer Power*, 82 TULANE L. REV. 2245 (2008):

> One view in Congress was that the transferee judge could only handle and coordinate discovery. But merely as a matter of discovery supervision, a narrow grant of authority would be insufficient. The scope and topics of discovery could not easily be separated from the question whether certain claims could withstand scrutiny on a motion to dismiss; if not, discovery about them would not be warranted. And discovery might well be limited or tailored by rulings on summary judgment....As a result, the statute [28 U.S.C. section 1407] as enacted authorizes the transferee court to conduct all pretrial proceedings.'

Id., 2262-63 (footnotes omitted, *citing* Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 805-08 (1985)).

[25] The only situation in which it would even arguably be appropriate for the Commission to bypass the ALJ on a dispositive motion would appear to be in the limited situation of a motion to dismiss raising purely legal defenses at the outset of a case, *see, e.g.,* Union Oil Co. of Cal., 138 F.T.C. 1 (2004) – a situation which the Commission has recognized as "undoubtedly rare." 66 Fed. Reg. 17,622 (April 3, 2001). But even here, the Commission is eliminating the important function of the ALJ to act as an independent check on the Commission's potential prejudgment of the case it has already decided to prosecute.

Consistent with the overall theme, the Commission seeks to bridle the ALJ's discretion in other ways. **Proposed Regulation 3.31A** eliminates the ALJ's discretion over the number of experts who can testify, regardless of the nature and complexity of the case. **Proposed Regulation 3.22(e)** requires the ALJ to rule on all motions, regardless of complexity, within 14 days of briefing. Tellingly, the Commission imposes no such time limit on motions it decides to rule on. **Proposed Regulation 3.42** imposes a 210-hour limit on the length of the hearing. The current rule leaves the length of the hearing to the ALJ's discretion. Most recently, on October 22, 2008 the ALJ entered a scheduling order in *Polypore* that contained no limit on the number of trial days – a recognition of the injudiciousness of boxing in the trial schedule so early in the proceeding. **Proposed Regulation 3.46** revokes the ALJ's discretion over the timing of proposed findings of fact, conclusions of law and briefs in favor of rigid, one-size-fits-all time schedules.

Thus, in numerous ways, the Commission will deprive the ALJs of essential authority to perform the managerial functions they have been appointed to perform. When an ALJ cannot exercise basic adjudicative functions such as scheduling (Proposed Regulation 3.11) or ruling on dispositive pre-hearing motions (Proposed Regulation 3.42), any appearance of independence is illusory. By compromising that independence, the Commission has weakened one of the essential pillars supporting the integrity and efficiency of its decision-making process.

C. The Commission Has Offered No Convincing Justification For Revoking The ALJs' Discretion and Authority.

The Commission offers no convincing rationale for any of these provisions beyond conclusory generalizations – generally untethered to particular provisions – that do not withstand scrutiny.

Importantly, the Commission acknowledges that expeditious adjudications "may impose costs on the parties or the agency that they may not need to bear" under a "more leisurely process" and that attempts to improve efficiency and cut costs could impair the decisional

quality.[26] The Commission cites several considerations that supposedly offset these admitted disadvantages of potentially higher costs and lower quality : (1) the possibility that parties faced with protracted proceedings in a merger case may abandon their transaction; (2) a desire to squeeze out "nonessential discovery and motion practice"; (3) the shibboleth – unexamined in this context -- that "justice delayed is justice denied"; (4) the importance of inserting the commissioners' "expertise" earlier into the decisional process; and (5) the limited ability – often exercisable solely by the Commission and not by the ALJ – for a party to obtain relief from provisions "in extraordinary circumstances." These considerations do not survive even a cursory examination.

Transaction abandonment. Abandonment of a transaction because of delays in the Commission's Part III procedures is only relevant where the parties have not yet closed. Yet the only two Commission Part III merger proceedings in the past ten years have been litigated after the parties have closed. Possible transaction abandonment does not offer a justification for the Commission's proposed regulation in these situations. Nevertheless the proposal treats both situations identically.

Moreover, for pre-closing situations in which the parties wish an expedited proceeding to avoid having to abandon their transaction, the Commission already has an **optional** fast-track procedure in place that will produce an earlier decision than under the present rules.[27] While this is currently available only where the Commission files a collateral case in federal court seeking preliminary injunctive relief, there is no reason why the Commission cannot amend its rules to provide a similar option in all merger cases. That would adequately deal with any abandonment concern without forcing all of the

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[26] 73 Fed. Reg. 58,883.

[27] The fast-track procedure commits the Commission to issue its final decision within 13 months after the Part III litigation essentially commences. 16 C.F.R. § 3.11A (c) (3). Even assuming the Commission takes only 6.5 months (the time it effectively allows itself under fast-track) to decide an appeal under the new proposed regulations (the actual appeal time in *Evanston Hospital* and *Chicago Bridge* cases was roughly three times that long), the fast track procedure is at least four months faster than the new proposal.

Commission's merger respondents into the Procrustean bed constructed by these proposals.

The Commission offers no evidence that shortening the process to the length contemplated by the proposals will make it any less likely that parties will abandon transactions. There has been in place since 1996 a "fast track" procedure for mergers that guarantees a Commission decision in thirteen months, which has never been invoked. The Commission's proposal, even under the most optimistic assumption about the length of time required for its own appellate opinion, would take nearly eighteen months. The Commission fails to explain why parties who have been abandoning transactions when faced with a thirteen-month "fast-track" procedure will not abandon them when faced with an eighteen-month procedure under its latest proposals. On the contrary, if anything, the perceived inequity of the proposed procedures would be more likely to contribute to transaction abandonment, with no offsetting benefit from a possible shortening of what will still be a drawn-out process.

Eliminating "Non-Essential" Discovery And Motion Practice. The Commission's apparent notion is that forcing complaint counsel and respondents into a mandatory compressed discovery schedule will leave them no time to take "non-essential" discovery and file motions – and that this is a good thing. Of course, there is no reason to think that an inflexible five-month discovery period represents just the right point beyond which – presumptively **in every case** -- discovery requests and motion practice become "non-essential." In fact, there is every reason to believe, based on recent experience, that a five-month cut-off might preclude essential discovery. Pretrial proceedings took approximately **twelve** months in *Evanston Northwestern* and *Chicago Bridge*. The Commission has offered no reason to believe, based on the experience of these cases, that these periods were excessive.

If the Commission is concerned about excessive discovery and motion practice, it is the proper job of the ALJ -- who ought to be in the best position to separate the wheat from the chaff – to control it on a case-by-case basis. The Commission can provide guidance in its decisions and internally promulgate best practices that attack the problem directly.

Imposing an arbitrary, grinding discovery schedule that bears little logical relation to the problem in order simply to preempt discovery and motions -- regardless of merit -- will not solve the problem. It will, however, risk depriving the parties of essential discovery necessary for due process.

Whole Foods Market[28] is a prime example of the unfairness inherent in the Commission's "one-size fits all" approach, regardless of a particular matter's complexity. The complaint in *Whole Foods Market* refers to 29 distinct "geographic markets" across the country. By contrast , a merger complaint filed earlier this year against Inova Health System alleges only a single relevant market.[29] Yet the Commission in *Whole Foods Market*, and Commissioner Rosch, acting as ALJ in *Inova*, imposed nearly identical five-month periods for discovery and other pretrial activities in the two cases. Contrast this further with the eight-month discovery period allowed by Administrative Law Judge Chappell in *Polypore*, involving only five markets,[30] and the potential for arbitrary and unfair treatment becomes apparent. Requiring respondents to file a motion with the Commission to secure a scheduling order that fairly provides an opportunity to defend against claims in the administrative complaint, as the proposed regulation would do, is a costly and ineffective solution to this systemic infringement of fundamental due process that the regulation itself creates.

"Justice Delayed Is Justice Denied." Summary justice is not justice. The Commission, of course, has a legitimate interest in seeing that truly anticompetitive mergers are remedied without undue delay. But the key to fulfilling this mission, as the Commission recognizes, is "high quality decisionmaking."[31] This requires not only an adequate

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28 Whole Foods Market, Inc., Dkt. No. 9324

29 Complaint, Inova Health System Found., Dkt. No. 9326 (May 8, 2008).

30 Scheduling Order, Polypore International, Inc., Dkt. No. 9327 (Sept. 9, 2008). The complaint alleged four narrower markets and, alternatively, one broader market.

31 73 Fed. Reg. 58,833.

factual record coupled with due process to the respondents, but also public confidence in the integrity of the decision-making process. A slogan is no substitute for factual and logical analysis of that trade-off. The Commission has failed to demonstrate, or even articulate, the extent to which existing adjudicatory procedures have failed to produce timely "justice," or how its arbitrary deadlines will correct that problem – assuming it exists – while still preserving respondents' due process rights.[32]

Applying The Commission's Expertise. The Commission suggests that its proposed changes are intended to "bring the Commission's expertise into play earlier and more often during the Part 3 process."[33] If the Commission is referring to its *substantive* expertise, then this is the very type or intrusion into the function of the ALJ -- to act as an independent filter of the Commission's prosecutorial decision -- which the Attorney General's Report and the Administrative Procedure Act decry. If, on the other hand, the Commission is referring to some sort of *procedural* expertise, then the Commission has it backwards. The expertise to manage pretrial and trial procedures clearly resides in the ALJs; it is their core business. It does not reside in the commissioners, who historically have no experience in managing pretrial and trial procedures.[34]

Availability of Relief From The Commission. The proposals often provide the theoretical availability for the Commission, or occasionally the ALJ, to grant relief from certain provisions. The relief is often illusory. In **Proposed Regulation 3.1**, for example,

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32 By further shortening the adjudicatory timetable, the Commission has unwittingly eliminated another safeguard to the prosecutor/adjudicator problem. The ABA Antitrust Section's 1989 report on the Commission felt that the combination of prosecutorial and adjudicative functions was tolerable in part because the length of Commission proceedings reduced the possibility that the same commissioners who voted out the complaint would still be serving when the case was appealed after trial. *1989 ABA Report* 124. That source of comfort would of course be less available under the FTC's proposed "rocket docket."

33 73 Fed. Reg. 58,834.

34 In contrast with the Judge Chappell, who has had nine years' experience as an ALJ at the Commission, we are aware of no sitting commissioner or any recent commissioner who has had any experience as a judge.

the only "relief" permitted from the Commission's tight time lines is to "shorten" them further; there appears to be no right to have those deadlines extended. In many other situations, the relief is available only from the Commission, not the ALJ. Of course, this expands the intrusion of the Commission into the day-to-day management of the case in a way that is precisely what the Attorney General's Report and the Administrative Procedure Act did not intend. It creates a mechanism by which the commissioners – having already decided that the respondents should be prosecuted – can, through critical procedural decisions, influence the outcome of the proceedings long before the matter comes before them on appeal.

In sum, the Commission's purported rationales do not support the radical changes it is proposing to its adjudicative rules.

III. The Commission's Acknowledgement That It Has Reversed Its Formal Policy Statement On Follow-On Part III Proceedings Without Any Public Discussion Is Procedurally Inexcusable And Substantively Insupportable.

The Commission's Notice contains the following statement concerning its policy of filing a Part III case when it has unsuccessfully sought a preliminary injunction:

> [T]he Commission believes the **norm** should be that the Part 3 case can proceed even if a court denies preliminary relief.[35]

This is an extraordinary statement. It represents a stark, unjustifiable about-face from the Commission's prior policy statement on this subject and a reversal of its prior practice.

On June 21, 1995, the Commission issued a formal statement of its policy on whether to proceed with administrative litigation following denial of a preliminary in merger cases.[36] The Commission declared that "the determination to continue a merger challenge in administrative litigation [after a federal district court has refused to grant a preliminary injunction sought by the Commission] is not, and cannot be, either automatic or

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35 73 Fed. Reg. 58,837 (emphasis added).

36 60 Fed. Reg. 39,741 (Aug. 3, 1995), *hereinafter the Policy Statement.*

indiscriminate."[37] Rather, the Policy Statement is absolutely clear that there is to be no presumption either for or against proceeding with a Part III litigation, and the Commission intended to look to five factors in making its decision.[38] There is nothing in the Commission's formal Policy Statement suggesting that a follow-on Part III proceeding after denial of a preliminary injunction would be the "norm." In fact, the Policy Statement incontestably rejected that notion.

Nor is there any basis in prior practice for concluding that follow-on Part III proceedings following an unsuccessful preliminary injunction challenge have become the "norm." On the contrary, one recent Chairman of the Commission and at least one sitting commissioner have stated that the Commission should do so only in highly unusual circumstances, if at all.[39]

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37 *Id.*, 39,742.

38 *Id*, 39,743. ("[T]he Commission believes that it would not be in the public interest to forego an administrative trial solely because a preliminary injunction has been denied. Nor would it be in the public interest to require an administrative trial in every case in which a preliminary injunction has been denied.").

The five factors were: ("(i) the factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings , and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge."

39 "Assessing Part III Administrative Litigation: Interview with Timothy J. Muris," *Antitrust* 6, 9 (2006) (When asked whether the Commission should "ever take a merger case into Part III after losing a preliminary injunction trial," the former Chairman responded: "In almost all cases, the answer is no."); Remarks of J. Thomas Rosch, Commissioner, Federal Trade Commission, at the ABA Antitrust Modernization Commission Conference, Georgetown University Law Center 4 (June 8, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-AMC%20Remarks.June8.final.pdf ("no real threat" the Commission will initiate administrative proceedings after a federal court denies a preliminary injunction

The Commission's record further contradicts the notion of a "norm" that favors Part III challenges following a preliminary injunction denial. From at least fifteen years prior to 2007 the Commission had never pursued a full administrative trial after denial of a preliminary injunction.[40] More recently, the Commission has declined to proceed into Part III in two out of four cases following denial of a preliminary injunction[41] – a statistic hardly indicating that proceeding is the "norm."

Nor should the pursuit of follow-on Part III proceedings after the Commission has lost a preliminary injunction be the "norm." The 2007 Report and Recommendations of the Antitrust Modernization Commission (the AMC) strongly recommended that the Commission adopt a policy to forswear administrative litigation in merger cases governed by the Hart-Scott-Rodino Act and resort entirely to the federal courts for preliminary and permanent injunctive relief.[42] The AMC found that the threat of follow-on administrative litigation creates a disparity in treatment between enforcement by the FTC and by the Department of Justice which "undermines the public trust" and "can impose unreasonable costs and uncertainty on parties whose mergers are reviewed by the FTC, as compared to the DOJ."[43] The AMC dismissed the argument made by the Commission's General Counsel[44] that administrative litigation gives the FTC "an avenue

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"absent extraordinary circumstances – for example, where a court decision is obviously a home town decision").

40 Antitrust Modernization Commission: Report and Recommendations 139-40 (2007) *hereinafter AMC Report.*

41 The Commission decided not to pursue Part III adjudication in Arch Coal, Inc., Dkt. 9316 (Statement of the Commission, June 13, 2005); and Western Refining, Inc., Dkt. 9323 (Statement of the Commission, Oct. 3, 2007). It has pursued Part III adjudication in Equitable Resources, Inc., Dkt. No. 9322 (transaction abandoned by the parties) and Whole Foods Market, Inc., Dkt. 9324 (Order Rescinding Stay of Administrative Proceeding, Aug. 8, 2008).

42 *AMC Report*, 139-40.

43 *Id.*

to develop the law" as "unlikely to add significant value" and "significantly outweighed by the costs it imposes on merging parties in uncertainty and in litigation costs."[45]

As the five factors in the Policy Statement suggest, and the *Arch Coal* and *Western Refining* matters confirm, the injunction proceeding will often have thoroughly examined the issues raised by the complaint based upon an adequate evidentiary record. Moreover, there is a significant probability – higher than would justify a presumption in favor of proceeding in Part III -- that the Commission will ultimately conclude after a full administrative trial that the merger was not unlawful.[46]

Finally, the Commission's creation of a "norm" is not only substantively without foundation. It is procedurally remarkable. If the Commission intends to reverse an explicit, previously issued policy statement, it should follow the same procedure used to implement the policy it is reversing. It should announce the policy change directly and explicitly, with supporting analysis and public comment specifically directed at the proposal. It should not – as it has done here – silently change the policy; slip "notice" of it into a peripheral document; and then present what is a clear reversal of policy as if it has always been the "norm." It should particularly not do so having represented to the Antitrust Modernization Commission "that follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual contexts" – a representation that several AMC commissioners relied on in making their

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44 *See* Comments of William Blumenthal, General Counsel, Federal Trade Commission, to the Antitrust Modernization Commission 3-4 (Nov. 5, 2005).

45 *Id.*, 140-41.

46 Of the five cases cited in the Commission's statement accompanying the Policy Statement in which in the prior ten years the Commission had proceeded in Part III following denial of a preliminary injunction, the Commission dismissed the complaint after a full administrative trial in two (R.R. Donnelley & Sons, Dkt. 9243, and Owens-Illinois, Inc., Dkt. No. 9212); one resulted in a consent order for divestiture (Promodes, S.A., Dkt. No 9928); and one was dismissed after the transaction was restructured to eliminate the competitive problem (Lee Memorial Hospital, Dkt. No. 9265).

recommendations.[47] Ultimately, if there is to be any regulatory change to reform the administrative litigation process, it should be change that will implement rather than ignore the AMC recommendations and that will minimize rather than exacerbate the differences between FTC and DOJ merger enforcement.

IV. The Cumulative Effect of The Commission's Proposals Creates An Indefensible Double Standard In Merger Enforcement Between The Commission And The Department of Justice.

The double standard between merger enforcement by the Commission and the Justice Department created by the Commission's reversal of its Policy Statement is amplified by the cumulative effect of the Commission's other proposals, which exacerbate the procedural differences between the two agencies. If a company happens to be under FTC jurisdiction, it will face a rushed administrative hearing, without a truly independent ALJ, that carries serious risks of due process violations. Companies under Department of Justice jurisdiction will get a completely independent trial on the merits, conducted according to a reasonable schedule, presided over by an independent federal judge, and guided by the Federal Rules of Evidence. There is no justification for affording unmitigated due process rights to companies in the airline, financial institution, steel and other industries that are subject to DOJ merger review, but not to supermarkets and companies in other industries subject to FTC merger review.

Conclusion

The proposed regulations should not be adopted. If the Commission is inclined to adopt these regulations, either in whole or in part, it should act only after a more extensive comment period than contemplated in the proposal. A deadline for comments of no earlier than January 6, 2009 is required to ensure proper consideration of the important issues implicated by the proposal.

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[47] *AMC Report*, 140 fn.

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