

**“PERSPECTIVES ON THREE RECENT VOTES:  
THE CLOSING OF THE ADELPHIA COMMUNICATIONS  
INVESTIGATION, THE ISSUANCE OF THE VALASSIS COMPLAINT &  
THE WEYERHAEUSER AMICUS BRIEF”**

**J. THOMAS ROSCH<sup>1</sup>  
COMMISSIONER, FEDERAL TRADE COMMISSION**

**before**

**THE NATIONAL ECONOMIC RESEARCH ASSOCIATES  
2006 ANTITRUST & TRADE REGULATION SEMINAR  
Santa Fe, New Mexico  
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Rather than recount everything the Commission has done since I joined it six months ago, I thought I would discuss my votes in three significant antitrust matters, and, since I did not explain them at the time, explain why I cast those votes.

*ADELPHIA COMMUNICATIONS* (January 2006)

A few days after I was sworn in, the Commission was forwarded a staff recommendation to close the investigation of the purchase by Comcast and Time Warner of the assets of Adelphia, a bankrupt cable operator that provided cable service in a variety of local markets. The staff concluded that the transaction was efficiency-enhancing because of the overhead/administrative savings realized from consolidating adjacent service areas and services. However, staff and the Commission considered arguments that the transaction would facilitate exclusive dealing arrangements of Comcast and Time-Warner with respect to Regional Sports

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<sup>1</sup> The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners.



in *Cargill v. Monfort*<sup>4</sup>) and as a matter of policy, where – because of efficiencies – it is doubtful that a transaction is likely to have a *net* anticompetitive effect (*i.e.*, cause injury to consumers), it is better to wait and see if those net anticompetitive effects occur and challenge the transaction under Sherman Act § 2 if they do. It was acknowledged that § 2 would afford a post-transaction remedy if there were exclusive dealing arrangements that injured consumers. However it was claimed that “soft” foreclosure (foreclosure resulting from the licensing of RSN broadcasts to rivals on exorbitant terms) might be hard to detect.

Second, it was doubtful on the record that *the transaction* would increase the likelihood of *either* “soft” or “hard” foreclosure. Several examples of hard and soft RSN exclusives were cited as evidence that the transaction was likely to increase that likelihood in the future. However, it was acknowledged that this phenomenon can occur *whether or not the cable company is vertically integrated*. A cable company can engage in “hard” foreclosure in a contract with an independent provider of RSN – just like Direct TV has done with the NFL Ticket. Moreover, it was striking that there was no allegation of any current or past foreclosure in the 7 or 8 different markets where it was argued the post-merger market shares would be high. There was no suggestion that Comcast or Time Warner had engaged in foreclosure in any of those markets – with or without vertical integration – and there was nothing to suggest that the *transaction* would alter the incentives for the firms to engage in such foreclosure.

Additionally, it was acknowledged that the cable companies would have an incentive to deny their RSN offerings to rivals *only if* their subscriber revenues from not licensing would exceed the revenue they received from rivals for the licenses. Some of the arguments against the

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<sup>4</sup> 479 U.S. 104 (1986)









5 is less likely than a finding that an act or practice is a Sherman Act violation to do collateral damage.

I believe that S&H is alive and well, notwithstanding the trilogy of appellate cases decided in the early 1980s that rejected Commission decisions challenging conduct as unfair methods of competition under Section 5.<sup>13</sup>

In the first of these cases, *Boise Cascade v. FTC*<sup>14</sup>, the Ninth Circuit overturned the Commission's decision that the plywood industry's use of a non-collusive delivered price system was an unfair method of competition. The Ninth Circuit held that, absent proof of overt collusion (which would have made the practice a *per se* violation of Section 1 of the Sherman Act), the Commission could not use Section 5 to get around the lack of evidence of actual anticompetitive effect.<sup>15</sup> The court rejected a *standalone* unfair methods of competition claim when there was "well forged" Sherman Act case law governing the conduct, lest it "blur the distinction between guilty and innocent commercial behavior."<sup>16</sup>

Subsequently, in *Official Airline Guides v. FTC* ("OAG")<sup>17</sup>, the Second Circuit overturned a Commission decision holding that it was an unfair method of competition for the then sole provider of airline flight schedule information to refuse to publish listings of

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<sup>13</sup> See, *Boise Cascade v. FTC*, 637 F.2d 573 (9<sup>th</sup> Cir. 1980); *Official Airline Guides ("OAG") v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

<sup>14</sup> 637 F.2d 573 (9<sup>th</sup> Cir. 1980)

<sup>15</sup> *Id.* at 579.

<sup>16</sup> *Id.* at 581-82.

<sup>17</sup> 630 F.2d 920 (2d Cir. 1980)















