

Interview with FTC Commissioner Maureen Ohlhausen

Editor's Note: In this interview with The Antitrust Source, Commissioner Maureen Ohlhausen discusses the importance of transparency in Commission decision making, her consumer protection and privacy priorities, the role of industry self-regulation, the state action doctrine, enforcement in technology markets, and relations with other agencies.

Commissioner Ohlhausen, a Republican, was sworn in as a Commissioner of the Federal Trade Commission on April 4, 2012, to a term that expires in September 2018. She joined the Commission from Wilkinson Barker Knauer, LLP, where she served as a partner focusing on privacy, data protection, and cybersecurity issues.

Prior to joining Wilkinson Barker, Commissioner Ohlhausen served in a variety of roles at the FTC, including Director and Deputy Director of the Office of Policy Planning, an attorney advisor for former Commissioner Orson Swindle, and a staff attorney in the Office of General Counsel. Before her time at the FTC, Commissioner Ohlhausen spent five years at the U.S. Court of Appeals for the D.C. Circuit, serving as a law clerk for Judge David B. Sentelle and as a staff attorney.

Editors Randy Shaheen and Kristin McPartland from The Antitrust Source conducted this interview on September 25, 2012.

ANTITRUST SOURCE: Let's start with a couple of background questions. Before becoming a Commissioner, you held a variety of roles at the Commission, including in the Office of Policy Planning, the Office of General Counsel, and a Commissioner's office. How have those experiences shaped your thinking as a Commissioner?



OHLHAUSEN: These experiences have shaped my thinking in several ways. One of the ways was the ability to see how the different parts of the agency are meant to work together, how we get the best outcomes, and how important it is to use all the tools at our disposal.

The FTC is primarily a law enforcement agency; that is our main business. At the same time, it is important for us to use other tools, such as our economic research, industry-level research, or outreach to business and consumer groups. Using our non-enforcement tools allows us to both inform and explain our enforcement perspectives to our various constituencies, including consumers, the American Bar Association, Congress, and other stakeholders. I was fortunate in that all the different jobs that I had at the agency involved both enforcement and non-enforcement functions.

Secondly, I was exposed to the different strengths that we can bring from the different parts of the agency. For example, we have a Bureau of Economics to inform all the work that we do here in our enforcement and policy efforts. Of course it is very natural for economics to inform the competition side of the agency; however, economics ought to play an important role on the consumer protection side as well.

There is also the interaction between the Bureau of Consumer Protection and Bureau of Competition. The antitrust and consumer protection missions should really work hand in hand; they should complement each other. Sometimes, however, they tend to fall into separate silos.

I have never had a job at this agency that was particularly "siloed." That was something that helped me to prepare to be a Commissioner because Commissioners, of course, are responsible for overseeing all activities at the agency on both the competition and consumer protection sides.

ANTITRUST SOURCE: In one of your prior roles at the agency you were involved in the “FTC at 100” project,¹ and you referenced that report in your swearing-in ceremony. What do you consider to be the key recommendations from that report, and do you anticipate advocating for those as a Commissioner?

OHLHAUSEN: My involvement in the “FTC at 100” report was a culmination of the different roles that I had played at the agency, including my work on the agency’s reports under the Government Performance and Results Act (GPRA) and my oversight of the agency’s 2006–2011 strategic plan. That work led up to me heading the “FTC at 100” project for then-Chairman Kovacic.

The goal of the FTC at 100 endeavor was not to say, “We are on the right track on healthcare cases, or we are on the wrong track on merger cases,” or something along those lines. It was focused more on the question of, if the agency were issued a report card, what subjects should be included on that report card? That is, rather than give us a particular grade in any particular subject, what should those subjects be?

There were several important principles that came out of the FTC at 100 effort that I will try to emphasize in my tenure as a Commissioner. One is that the FTC has to be very clear about what its mission is, and it has to articulate that mission clearly to others. It is important that our stakeholders, including the parties we sue, as well as Congress, consumer groups, and the business community, all understand what we’re doing and why we’re doing it.

Those stakeholders don’t all necessarily have to agree on what we’re doing in a particular case. That’s not the expectation. The expectation is that they have an understanding that this is the FTC’s mission and this is how we are going to carry it out.

Another important principle is, as I have already mentioned, the use of all of our tools. That includes offering guidance when we do seek enforcement, such as a clear and informative analysis to aid public comment. Alternatively, if we decide not to enforce, we have in certain cases issued a closing statement that provides guidance on why we don’t think it’s appropriate to move forward on a particular matter.

Also among those tools are policy R&D, with which we make sure our work, as much as possible, is supported by economic research and taking us in the right policy direction, and our outreach efforts, including consumer and business education.

Another important principle coming out of the FTC at 100 effort is the notion of paying very close attention to outcomes. Success should not be measured solely by activity. Bringing more cases doesn’t necessarily mean better outcomes for consumers than bringing a fewer number of cases that focus more on where the most consumer harm is occurring.

We need to focus on improving consumer welfare, and not just rely on the easy measurements, which ask how many cases you brought, how many reports you issued, and how many times you filed advocacy letters. Those numbers are interesting and we need to look at them, but we need to understand more about the effects of our efforts.

Finally, and I’ve already touched on this, it is crucial to maintain support for the agency’s mission through outreach. A big role of a Commissioner is to go out and be the public face of the agency, to talk to groups in the U.S. and internationally, and, frankly, to give interviews, such as this one.

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¹ William E. Kovacic, Chairman, Fed. Trade Comm’n, *The Federal Trade Commission at 100: Into Our 2nd Century, The Continuing Pursuit of Better Practices* (Jan. 2009), available at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

ANTITRUST SOURCE: You also said at your swearing in ceremony that “the Commission [should] pay close attention to outcomes and to examine whether agency activity is actually improving consumer welfare and whether it can be done more effectively.”² Were you referring to retrospective studies, and do you think more needs to be done in this area?

OHLHAUSEN: Retrospective studies are a very good tool, both to see whether we’ve made the right decisions and to see whether what we predicted would happen has actually happened. They are also a good tool, for example, when we haven’t been successful in a certain enforcement program to convince others that, notwithstanding our lack of success, our predictions were correct. Our hospital merger retrospective from the early 2000s is a very good example of that.

I think retrospectives can be very useful to look back at our predictions. For example, suppose we said that we were going to challenge a merger because we saw the market going in a certain direction. Did the market really go in that direction? Perhaps the merging parties were saying, “No, you’re missing the point: we’re moving to a completely different market structure or distribution model.” We should ask whether we got it right. Were we correct? If we weren’t correct, let’s get a better understanding of why we weren’t correct and factor that into our analysis in the future.

ANTITRUST SOURCE: In between your current role as a Commissioner and your prior roles at the FTC you spent several years at a law firm. Did representing companies before the FTC give you a different perspective on the agency?

OHLHAUSEN: Private practice was a very valuable part of my experience. I was at Wilkinson Barker Knauer, a telecommunications boutique law firm, and I headed up the firm’s FTC practice. I worked mainly on the consumer protection side, but I did some antitrust counseling as well.

My experience at the firm was very useful to see from the outside the effects of the FTC’s pronouncements and enforcement efforts on businesses. It also gave me some perspective on the burdens imposed on companies receiving information requests from the agency. We may say, “Give us this information,” but may not realize the burden that the request imposes on a company to provide that information. So it was very useful to me to have seen the world from both sides.

ANTITRUST SOURCE: What advice do you have for parties that are meeting with Commissioners to persuade them not to follow an adverse enforcement recommendation from agency staff?

OHLHAUSEN: Personally, I like to read things first. So if I can get papers or a white paper—of course, it doesn’t have to be a treatise—in advance of the meeting, that’s very helpful to me.

I would also recommend having a specific goal in mind. Come into the meeting and tell me why the market is changing, why these efficiencies really will happen, why the market should be defined differently, or something along those lines. Come in and say, “Here are the three things I want to tell you.”

Commissioners, of course, cooperate a lot with staff. They’re on the ground providing the Commission information. If a party has a new theory or idea or fact it wants to introduce into the dialogue, it’s helpful for the party to run that by the staff first. That’s not a hard and fast rule

² Remarks of Maureen K. Ohlhausen on the Occasion of her Swearing-in as Commissioner, Federal Trade Commission (Apr. 16, 2012), available at <http://www.ftc.gov/speeches/ohlhausen/120416ohlhausenswearingin.pdf>.

because, if there is a development at the last minute, I certainly want to hear about it. But, it's not an effective technique to come in to a meeting with a Commissioner with a totally new theory or data that hasn't already been provided to staff.

Also, good advice for everybody is not to overreach in your facts or legal arguments. You may have a legitimate point, but if it's exaggerated, it tends to undercut your credibility.

ANTITRUST SOURCE: Many federal agencies permit respondents to deny liability or to “neither admit nor deny” liability in settlement agreements. Recently, some judges have pushed back against that practice. Do you have a view on the appropriateness of permitting a respondent to expressly deny liability when entering into an FTC consent agreement?

One of the top priorities of the FTC should always be fraud and, particularly in this kind of economy, last dollar fraud that preys upon financially depressed consumers.

OHLHAUSEN: I do. At the FTC, our role is to stop harm that's occurring in the market and to get the best result for consumers. We are not an agency that has authority to punish parties. With that goal in mind, I think whatever preserves the most flexibility for staff to be able to stop the conduct as soon as possible and get the best redress for consumers should be our priority.

Requiring defendants to admit liability would be a problem, as most well-counseled defendants would not settle on those terms and it's not fair to impose this only on the less well-counseled defendants, who may not be any more guilty than the well-counseled. If we were to go to a standard under which parties had to admit liability, that would make it extremely difficult to reach settlements, which often are very efficient options to stop the bad conduct and get redress for consumers.

Even the courts, in the *Circa Direct* case for example, said they don't want semantics—what's really the difference between “neither admit nor deny” and a denial of liability?³ And so even if we make a change, I'm not sure how much that's going to satisfy the courts.

I believe this issue is merely a skirmish that should not impel us to expend resources to change our practice, which is currently consistent with that of DOJ and other agencies. Our proper focus is on stopping bad practices and obtaining redress for consumers, which is best achieved by preserving some bargaining leverage for staff on the wording in settlements.

ANTITRUST SOURCE: We'd like to turn now to some consumer protection questions. What is your view on what the Commission's consumer protection priorities should be going forward?

OHLHAUSEN: One of the top priorities of the FTC should always be fraud and, particularly in this kind of economy, last dollar fraud that preys upon financially depressed consumers. Fraud of any kind is a big problem for consumers.

It's also a problem for the market overall and for legitimate competitors who may be disadvantaged because consumers are choosing the fraudulent provider, based on erroneous information. In addition to the loss of business, the legitimate competitor often has to spend more in marketing and advertising to overcome consumers' mistrust after they've been defrauded.

The FTC has had a very active fraud enforcement program for a long time. It's a big part of our work, and I think it's something we should definitely continue to make a priority.

ANTITRUST SOURCE: Are there other areas for which the Commission should be issuing guides or providing other forms of guidance?

³ *FTC v. Circa Direct LLC*, No. 11-CV-2172, 2012 WL 3987610, at *6 n.3 (D.N.J. Sept. 11, 2012).

OHLHAUSEN: The Commission just released the revised Green Guides,⁴ which I think are a good example of how the FTC can play a beneficial role in the regulatory arena. I remember when they were revised in 1998, and this is an area of marketing that continues to grow. In connection with the revised Guides, the FTC did research about what messages consumers were taking away from environmental claims, which showed that they are confused about some of them. The FTC provided common sense guidance based on the research that we did, which asked: what do consumers understand, what do they take away, where are they confused?

The revisions continue to push the guidance in the right direction. For example, the new Guides include additional qualifications for the use of broad, unqualified claims like “environmentally friendly” or “eco-friendly,” which will help consumer understanding of such claims. Thus, the Guides will help ensure that the information conveyed is truthful and clear. I am also pleased that the revised Guides provided real-world examples of claims that do and don’t qualify as deceptive.

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ANTITRUST SOURCE: Privacy is another important area. What do you view as the most pressing privacy issues that the Commission needs to address?

OHLHAUSEN: As I stated during my confirmation hearing and again in congressional testimony that I gave in May before the Senate Commerce Committee, the FTC has done a very good job in choosing its enforcement targets in the privacy area, focusing on traditional areas of deception and unfairness in addressing types of harm that have been well recognized under FTC precedent as being appropriate areas, such as financial and medical harm.

There’s actually a recent case I want to mention, which involves rent-to-own stores that rented laptops to people, as well as the software company that helped design monitoring programs for the stores.⁵ At the request of the stores, but unbeknownst to consumers, the software company collected information from those laptops, including consumers’ financial and medical information. The software could also activate the computer’s webcam and take pictures of people, including pictures of them in the privacy of their bedrooms. The FTC brought the case against the software design company, not just the rent-to-own stores, because it played an active role in collecting the sensitive information and sent a deceptive software registration form to collect additional information. I think this case is a very good example of the kind of deception and unfairness enforcement that the FTC should continue to pursue.

I have concerns when we start to broaden the kind of harms that are deemed unfair. In deception, that’s a different case. The harm in deception is not as big an issue because we are basically enforcing promises that the business chose to make.

If I’m a particularly privacy-sensitive consumer and I visit a site that promises, “I’m going to protect the information that your hair is brown and you’re five foot two,” they need to keep that promise. Even though anybody who sees me would know those two facts, if a site commits to protecting that information, that promise should be enforced.

In the unfairness area—where the business hasn’t made an overt promise—the types of harm that we traditionally consider unfair involve finances, health and safety, and information about children. I’m concerned about some of the statements the Commission made in the Privacy Report

⁴ Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (2012).

⁵ Press Release, Fed. Trade Comm’n, FTC Halts Computer Spying (Sept. 25, 2012), available at <http://www.ftc.gov/opa/2012/09/designware.shtm>.

to expand unfairness to cover intangible or reputational harms.⁶ Once you depart from the traditional areas of harm, consumer preferences about sharing such information start to vary widely, however, and we need to be careful about recognizing those variations.

ANTITRUST SOURCE: You just anticipated our next question. In your May 2012 statement, you indicated some concern about harm occurring now that might not be reached under Section 5 and how to study those harms. Have you developed your thoughts further on how the Commission might look at these issues?

Before we jump in and say there should be “do not track” legislation, I think it’s important for the self-regulatory process to continue because it may be the best way to give consumers the tools to express their preferences.

OHLHAUSEN: One of the questions that I’ve been asking is what harms are occurring that we can’t currently reach? For example, when you have a case like the one that I described in my previous answer, those are some pretty obvious harms. It was intrusive behavior, but we were able to stop it under our traditional unfairness and deception principles.

What I meant by my testimony in May was that I wanted to see what harms are occurring that Section 5 could not reach. So far, it appears that we can protect the kinds of information that most people and Congress agree should be private. Thus, I do not believe we need to expand the types of harm we should consider unfair. With that said, we should use our deception authority when companies break their promises to keep any type of information private.

ANTITRUST SOURCE: The FTC’s privacy report called for a “do not track” option in Internet browsers, which several major browsers are now working to implement. Do you agree with that recommendation and do you see a need for or expect legislation in this area?

OHLHAUSEN: I think that self-regulation generally can play a very useful role in protecting consumers, and there are many self-regulatory organizations that have been quite effective over the years. There’s a lot of self-regulatory activity going on both in the browser space and with advertisers, and those efforts should be allowed to play out. Before we jump in and say there should be “do not track” legislation, I think it’s important for the self-regulatory process to continue because it may be the best way to give consumers the tools to express their preferences.

The bottom line is giving consumers meaningful choice. If a consumer has concerns about being tracked, can self-regulation produce an option that allows them to express their preference and not be tracked? I think the self-regulatory process holds a lot of promise for those issues to be worked out in a more flexible way than legislation.

ANTITRUST SOURCE: One area that is generating a lot of discussion is disclosures on mobile devices. How much leeway do you think the Commission should give advertisers when they are working with platforms with some inherent limitations?

OHLHAUSEN: We had a workshop in May on disclosures and mobile devices.⁷ Mobile devices may take disclosures or wording that was developed for a desktop monitor and push it down to a small

⁶ FED. TRADE COMM’N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICY-MAKERS (Mar. 2012), available at <http://ftc.gov/os/2012/03/120326privacyreport.pdf>.

⁷ Press Release, Fed. Trade Comm’n, FTC Announces Final Agenda and Panelists for Workshop About Advertising and Privacy Disclosures in Online and Mobile Media (May 28, 2012), available at http://www.ftc.gov/opa/2012/05/dotcomdiscl_ma.shtml.

screen on the handset, and that's a challenge. But, technology is moving to meet consumer demands, so industry must develop appropriate new models that will provide the information consumers need. The FTC's role is using our outreach and other tools to help meet this challenge. I think this workshop was a good way to get the key stakeholders in the room and talking to each other.

Consumers need to have an understandable disclosure that can be viewed on the small screen, which is clear about what information is being collected and how it's being used. There may be a variety of ways that that can be achieved, perhaps through an icon system like the Care Labeling Rule tag on your clothes or some other way to condense that information and convey it to consumers on their handsets.

It's interesting to see some of the developments that are actually happening at the handset level, where Apple and Android are making significant progress in notifications. There's not just one way to do it.

ANTITRUST SOURCE: You've spoken before about having a layered approach where consumers can see the high points and allow those who care more to read further. It sounds like you're already seeing that, or will the Commission need to get more involved to move industry towards that approach?

OHLHAUSEN: I do think that's the case. In the Privacy Report, which came out in March, the FTC did recommend as a best practice that companies consider using a layered approach. When I was in private practice talking to my clients, they were definitely interested in moving to that.

You want to give consumers the information that they need, but you don't want to give them too much information such that it becomes a useless morass. It's necessary to strike a balance. But again, we need to have a dialogue about it, and the mobile disclosure workshop was a good way to hear the views of many interested people.

ANTITRUST SOURCE: We'd like to turn now to some antitrust-related questions. You have described the importance of transparency in Commission decision making. Do you think the Commission and the Bureau of Competition issue enough closing statements and, if not, are there other things the Commission might do to improve transparency in competition matters?

OHLHAUSEN: I think the Bureau does a pretty good job of identifying cases in which they think there should be a closing statement. Occasionally I'll ask staff whether there should be a closing statement in a given matter. But overall, in my tenure here, I think they've gotten it right.

ANTITRUST SOURCE: The Commission recently decided to withdraw its 2003 Disgorgement Statement,⁸ a decision from which you dissented.⁹ Even though you give the Commission a pretty good grade overall on transparency, was that a step in the wrong direction?

OHLHAUSEN: I think so. We had the 2003 Disgorgement Statement, which was a bipartisan state-

⁸ Fed. Trade Comm'n, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), available at <http://www.ftc.gov/os/2012/07/120731Commissionstatement.pdf>.

⁹ Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), available at <http://www.ftc.gov/os/2012/07/120731ohlhausenstatement.pdf>.

ment. It was endorsed by the Antitrust Modernization Commission.¹⁰ When initially adopting the statement, the Commission put it out for public comment. I was troubled that we didn't follow a similar process in rescinding it, or even in deciding whether it should be revised.

I was also troubled that, in withdrawing the statement, we simply stated that case law provides sufficient guidance as to how we might use our disgorgement authority going forward. If you take that approach too far, that's a reason not to give guidance on anything. For example, you can always be concerned that, if we give guidance during the merger review process, such as through the Horizontal Merger Guidelines, a court could decide that the Guidelines say one thing but the Commission is trying to do something different.

In terms of the process, the idea, of course, is to give interested parties an opportunity to weigh in on a proposed change in Commission policy. Perhaps they would have told us something that we don't know—either in favor of or against rescinding the statement.

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ANTITRUST SOURCE: You just mentioned the Horizontal Merger Guidelines, which were revised about two years ago.¹¹ Do you see a need to update or issue any other competition enforcement guidelines, such as with regard to vertical mergers?

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OHLHAUSEN: So far, in my limited experience as a Commissioner, I have not seen a reason to revise the guidelines on vertical mergers. It may be something to consider if we see considerably more vertical mergers, but I just haven't seen that many yet.

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ANTITRUST SOURCE: Some have argued that the antitrust agencies and antitrust law generally are not well suited for evaluating transactions and conduct that occur in rapidly changing markets, such as technology markets. What are your thoughts on this?

disgorgement authority going forward. If you

OHLHAUSEN: First of all, I would be curious for people who raise that to say what would be better. To paraphrase Winston Churchill, it's the worst system except for all the rest. But I do think antitrust is sufficiently well suited to the task.

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Obviously, technology markets move quickly and often. As a result, the agency needs to stay informed about what's going on, and that's one of the benefits of our policy function. When I was the head of the Office of Policy Planning—and I think this continues today—one of its roles was to ask what is over the horizon, what do we need to know about so that the Commission is sufficiently informed to be able to address problems when they arise in a given technology market.

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I think it is very important for the Commission to dedicate resources for studying market dynamics, technology changes, and the accompanying legal and economic issues. Having a chief technologist on staff now is a very good resource for doing that.

But I think we've actually done a pretty good job of enforcement in technology markets and recognizing the competitive importance of changes in technologies or market dynamics. Of course, a change can occur even while we're looking at a transaction, as evidenced in the closing of the

¹⁰ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS, Recommendation 49 (2007) ("The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.").

¹¹ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), available at <http://ftc.gov/os/2010/08/100819hmg.pdf>.

Google/Admob investigation in 2010.¹² So, we need to be sensitive to these dynamics, and I think we need to keep our knowledge up to date, but I think antitrust is still a very effective tool.

ANTITRUST SOURCE: You spoke earlier about the need to do retrospective studies to see how prior enforcement decisions played out. Do you think the technology sector would be a good place for those types of studies?

OHLHAUSEN: I do. I think that could be very useful because there may well be opportunities to learn from our efforts in that sector.

One matter that comes to mind is the Blockbuster/Hollywood Video merger, which was ultimately abandoned in the face of FTC opposition. One of the questions there was the expected effect of a transaction that would have resulted in a firm with significantly more brick-and-mortar video stores. But, even then (in 2005), the industry was moving toward streaming, and I don't know if we as an agency really understood the magnitude of that change in video distribution during the investigation. These are the kinds of things that we need to do in evaluating fast-changing industries—really understand what's happening in terms of changing business models and consumer preferences.

ANTITRUST SOURCE: There are two pending cases right now that the FTC has involving state action: the *North Carolina Dental* case before the Fourth Circuit and the *Phoebe Putney* merger before the U.S. Supreme Court.¹³ The state action doctrine is an issue with which you have been long familiar, given your prior role on the FTC's State Action Task Force. What effect do you think the State Action Report¹⁴ has had, and do you think the courts are doing a better job of applying the state action doctrine as a result of that report?

OHLHAUSEN: I think the report helped focus some thinking on the proper application of the state action doctrine by the courts. There is a certain amount of anticompetitive activity that is being inappropriately sheltered under this doctrine.

And when we issued the report, we didn't just describe the case law. We also worked to develop cases in this area, including *North Carolina Dental*, *South Carolina Board of Dentistry*,¹⁵ and some other cases.

I think we have been making some progress in getting commentators and courts to think more clearly about the proper application of the doctrine. They are asking what is at stake: is it a regulatory scheme enacted by the state that is clearly articulated and actively supervised, or is it really competitors getting together and stepping into the shadow of the state to pursue their own private interests?

ANTITRUST SOURCE: Obviously, the Commission disagreed with the way the Eleventh Circuit

¹² Statement of the Commission Concerning Google/AdMob, FTC File No. 101-0031 (May 21, 2010), available at <http://ftc.gov/os/closings/100521google-admobstmt.pdf>.

¹³ FTC v. Phoebe Putney Health Sys., Inc., No. 11-1160 (U.S.); North Carolina State Bd. of Dental Examiners v. FTC, No. 12-1172 (4th Cir.).

¹⁴ FED. TRADE COMM'N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

¹⁵ Complaint, South Carolina State Bd. of Dentistry, FTC Docket No. 9311 (Sept. 15, 2003), available at <http://www.ftc.gov/os/2003/09/socodentistcomp.pdf>.

applied the state action doctrine in the *Phoebe Putney* case.¹⁶ Do you have a wish list in terms of how you would like to see the Supreme Court clarify the state action doctrine in that case?

OHLHAUSEN: The question in *Phoebe Putney* is whether a grant of general corporate powers includes the power to restrict competition or effectively give a monopoly to a private healthcare provider. If so, that's problematic. I think it would be a very good outcome to have the Court say that an authorization of general corporate powers does not constitute a clear articulation to displace competition. About twenty states have joined an amicus brief saying an opposite conclusion would impose a big burden on states and undermine their authority to decide when competition ought to be displaced in a particular area.

I also think it's important for the Court to decide this way to make a point that exemptions from the antitrust laws should be drawn very narrowly and should be tied back to the reason that they were created in the first place. The state is a sovereign. If it says, "We're going to set the prices here, and we think that's in the state's interest," that's generally fine. But if the state is saying, "We're going to displace competition, but we're not going to really pay any attention to how it's done," the interests of the state's citizens are not being furthered.

ANTITRUST SOURCE: You have also written about the *Noerr-Pennington* doctrine, which is another limitation on the reach of the antitrust laws. Do you see the need for the Commission to bring some cases to help clarify the boundaries of this defense the way it has done in the state action area?

OHLHAUSEN: I think that would be a useful thing if you find the right case. We don't want to bring one that's not quite right because we could be worse off than if we had not brought it at all. I am particularly interested in the issues surrounding repetitive petitioning and the so-called pattern exception to *Noerr*. There's a pretty stringent sham litigation standard right now, and I'm not sure if it makes sense to apply such a high standard if there are multiple suits brought by a party alleged to be engaging in sham litigation. There is also the misrepresentation exception. The FTC applied that in its 2004 *Unocal* decision,¹⁷ and I think that was a very valuable contribution to *Noerr* precedent. So I think that if we could find something similar that could bring that kind of clarity to repetitive petitioning, that would be helpful. But we have to find the right case.

ANTITRUST SOURCE: There has been a lot of discussion about making sure that consumers have cost-effective access to the Internet and the latest technologies, whether from their homes or from mobile handsets. As you know, the Commission shares jurisdiction with the FCC in this area. Do you see opportunities for the FTC to help advance the goals of having broader cost-effective access to those technologies?

OHLHAUSEN: I certainly am a big supporter of the FTC playing a role, on both the competition and the consumer protection side, in the Internet access area. But ultimately with respect to cost-effectiveness, the market sets the price for Internet access, as with any other product or service. Internet access is an important market, and it raises important antitrust issues. We should therefore pay attention to it. That was certainly our intention when we formed the Internet Access Task

¹⁶ *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369 (11th Cir. 2011), cert. granted, 80 U.S.L.W. 3707 (U.S. June 25, 2012) (No. 11-1160).

¹⁷ *Union Oil Co. of Cal.*, 138 F.T.C. 1 (2004).

Force and issued our “Broadband Connectivity Competition Policy” report in 2007.¹⁸ We tried to address some of the most pressing Internet access issues under consideration at the time.

But it’s also a consumer protection issue. Right now we certainly have an interest in ensuring that consumers get the service—whether it’s the costs or other features of the plan—that they have signed up for. So our antitrust and consumer protection focus in the Internet access area is largely the same as in more traditional areas of the economy: protecting competition in the marketplace and making sure that promises to consumers are being respected.

ANTITRUST SOURCE: You are the first Commissioner confirmed after passage of Dodd-Frank and after the birth of the Consumer Financial Protection Bureau.¹⁹ As a Commissioner, how does the presence of the CFPB and your shared jurisdiction with them on a number of issues inform your perspective on consumer protection issues involving financial products?

It makes sense for us

to coordinate with the

CFPB to share some of

our expertise, and the

evidence I’ve seen is

that both agencies are

committed to doing

that.

OHLHAUSEN: Dodd-Frank preserved the FTC’s enforcement authority, although rulemaking in the financial arena was generally transferred to the CFPB.

It makes sense for us to coordinate with the CFPB to share some of our expertise, and the evidence I’ve seen is that both agencies are committed to doing that. For example, we just filed comments with the CFPB providing them advice on their work on mortgage disclosure statements. The FTC’s Bureau of Economics has done studies in this area, and those efforts can significantly benefit the CFPB’s work. We have several joint agency working groups and joint investigations underway.

It’s common knowledge that the FTC doesn’t have—and has never had—jurisdiction over banks. But it makes sense for us to continue to focus on non-bank lenders. For the CFPB to have the authority in areas where the FTC does not makes a lot of sense. The memorandum of understanding between the two agencies spells out the parameters of how the coordination will work. We want to avoid, for example, conflicts where there are two different standards applied or duplication of effort or double burdens on industry. It will take careful coordination between the CFPB and the FTC to make sure those don’t happen, but I think that commitment is there.

ANTITRUST SOURCE: Your predecessor was a vocal proponent of making sure that the FTC was a five-star, elite agency amongst the various global competition agencies. Do you see particular things that the FTC ought to do to maintain its leadership role on the international stage?

OHLHAUSEN: Yes, the way the agency got to that status was by investing its resources in engaging with foreign competition authorities and also global organizations such as the ICN and the OECD. We continue to play that leadership role.

I was just in Vietnam for a meeting of ASEAN members to address merger and acquisition regulation. And the thing that really came through to me was how much the members of the Vietnamese delegation appreciated the FTC’s commitment, including sending people to do technical assistance in Vietnam. The FTC really has put in the work and the time to help other countries as well.

¹⁸ BROADBAND CONNECTIVITY COMPETITION POLICY: A FEDERAL TRADE COMMISSION STAFF REPORT (2007), available at <http://www.ftc.gov/reports/broadband/v070000report.pdf>.

¹⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

We're reaching out more to other key players in growing economies in countries like China and India. In fact, we're signing a competition-related Memorandum of Understanding with India this week.²⁰ There are also the international consumer protection efforts that we have undertaken and will continue to pursue. So I think that's how we got to the point where we are, and that's certainly how we'll maintain it. ●

²⁰ Press Release, Fed. Trade Comm'n, FTC and DOJ Sign Memorandum of Understanding with Indian Competition Authorities (Sept. 27, 2012), available at <http://www.ftc.gov/opa/2012/09/indiamou.shtm>.