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Before the Antitrust Modernization Commission

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My name is Michael Sohn. I am currently the Chairman of the law firm of Arnold & Porter LLP and a partner in the firm's Antitrust Practice Group. I have practiced antitrust law for over twenty-five years, both in the public sector as General Counsel of the Federal Trade Commission ("FTC") and in private practice. My private practice has centered around representation of clients before the FTC and the Antitrust Division of the U.S. Department of Justice ("Antitrust Division"). I wish to thank the Commission for inviting me to testify.

The United States is unusual in having two separate agencies – the Antitrust Division and the FTC – with largely coextensive jurisdiction over the enforcement of our nation's antitrust laws, including the review of mergers and acquisitions. This system of shared responsibility has generally worked well. I have however been asked to provide my views as to two aspects of this dual enforcement system which warrant the attention this Commission is giving them.

The first area is the process by which the FTC and the Antitrust Division decide which of them should proceed with a given law enforcement investigation. Known as the "clearance process," this interagency allocation of responsibility has its most visible, and potentially most troublesome, aspect when it comes to deciding whether the FTC or the Antitrust Division will investigate a proposed merger or acquisition. Here, the problem is easily defined as is the cure.

The second area is more elusive. It relates to the differing standards and procedures which seem to apply depending upon whether it is the FTC or the Antitrust Division which is seeking a preliminary injunction to block a merger.

I. The Clearance Process

The problems experienced with the DOJ-FTC clearance process are already well documented, as are the events that surrounded the unraveling of the agencies' short-lived attempt to resolve these problems in 2002. Thus, only a brief overview of the problem and the recent history is necessary. The bottom line, in my view, is that the FTC and the Antitrust Division had it right in 2002; the opponents had it wrong. This Commission should urge both the enforcement agencies and Congress to try again.

A. Overview

Traditionally, clearance decisions have been made on the basis of prior experience in leading substantial investigations relating to the product or industry segment in question.[1] This relatively simple guide has become increasingly complex, however, in light of the increasing convergence of industry sectors due to both deregulation as well as the rapid pace of technological change. This in turn led to more disputed clearance matters and growing delays in achieving clearance decisions.

Statistics released by the FTC in February 2002 demonstrate the seriousness of the problem at that time. During a 28 month period between October 1999 and February 2002, there were 300 matters where clearance was delayed either due to an actual

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[1] DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL (3d Ed. 1998) (stating that "the principal ground for clearance is expertise in the product in question gained through a 'substantial investigation' of the product within the last five years").

clearance contest or because of delay from one agency in deciding whether to resist clearance to the other. On average, these 300 matters were delayed by approximately 15 business days – well over *half* the statutory 30-calendar-day waiting period provided for under the Hart-Scott-Rodino ("HSR") Act.[2]

I have not seen current agency statistics, so it is hard to gauge from the outside whether the problem has diminished. As a practitioner, I can only report that the problem is still with us to some degree. I have just finished working on a merger where a clearance dispute between the enforcement agencies consumed the entire 30-day initial waiting period, obliging the parties to withdraw their HSR filing and start again. The experience was wasteful both monetarily and in terms of the length of the investigation contemplated by Congress when it enacted the HSR Act. Under the agencies' 2002 agreement, it is very clear which agency would have investigated the acquisition. Anecdotally, I believe this is not a unique experience. We can do better.

Delays in the clearance process impose serious costs. In the merger context, the statutory 30-day waiting period after an HSR filing is meant to be a time for substantive discussions and negotiations between the agency and the merging parties. The agency uses this valuable time to consider the merits of the proposed transaction, to analyze information provided by the merging parties, and to reach a judgment as to whether a more searching investigation requiring the issuance of a Second Request is needed. As anyone who practices in this area can tell you, the cost of compliance with a Second Request has grown astronomically over the past several years, driven largely by the need

[2] Federal Trade Commission Press Release, Clearance Delays (Feb. 27, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/cleardelaystats.htm.

to organize and produce responsive email and electronically stored documents. The cost to the enforcement agency to review these voluminous materials is also considerable. Those costs rise steeply for every overlap area included in the Second Request. Therefore, it is in the interest of the merging firms and the enforcement agencies for the latter to learn as much as they can during the initial 30-day waiting period in order to make sure that a Second Request is necessary and if so, that it is limited only to those overlap areas which raise significant concerns. This opportunity to focus the merger investigation during the initial waiting period is lost to the extent the clearance process is prolonged.

Where the clearance decision consumes all or almost all of the initial 30-day waiting period, the agencies have little choice but to issue a burdensome, time-consuming Second Request which may end up being unwarranted. Merging parties faced with this prospect will often pull their HSR notification and refile, thereby turning what Congress intended to be a 30-day initial waiting period into one which is twice as long. These unseemly outcomes are what the FTC and the Antitrust Division tried to avoid in 2002.

B. The 2002 Experience

Much to their credit, former FTC Chairman Timothy J. Muris and former DOJ Assistant Attorney General for Antitrust Charles A. James negotiated an agreement designed to reform the clearance process. The January 2002 Memorandum of Agreement reached between the FTC and the Antitrust Division contained a variety of substantive and procedural changes.[3] The main provisions included:

[3] *See* Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Concerning Clearance Procedures

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- the maintenance of a common database to track HSR filings and clearance matters;

- the designation of a dedicated clearance officer at each agency;

- strict timelines for reaching clearance decisions such that, in the vast majority of non-contentious matters, decisions would be reached within 48 hours by the clearance officers without reference to line staff;

- "negative option" provisions such that, if one agency fails to submit its written position regarding a clearance dispute within 96 hours, the matter is automatically cleared to the other agency;

- referral of contentious matters to the Chairman of the FTC and the Assistant Attorney General in charge of the Antitrust Division within 144 hours for resolution within a further 48 hours or referral to a neutral arbitrator;

- binding resolution of disputes by a neutral arbitrator selected from a panel of experts within 48 hours of referral from the agency heads such that, in sum, all clearance disputes would be resolved within at most 240 hours (or 10 working days); and

- formal allocation of particular industries or sectors between the agencies to be used as the "principal criterion" for resolving clearance disputes.

Despite the broad support that greeted the 2002 agreement – including favorable comment from former antitrust enforcement officials; the American Bar Association's Section of Antitrust Law; various leaders of the business community; and the Chairman and Ranking Minority Member of the Senate Judiciary Committee's Antitrust, Competition, and Business and Consumer Rights Subcommittee – the agreement was short-lived. Under pressure from Capitol Hill, most prominently from former Senator Fritz Hollings of South Carolina, the agencies were forced to rescind their agreement on May 20, 2002.[4] Objections were raised as to the process by which the Memorandum of

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For Investigations (Mar. 5, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf.

[4] *Agencies Antitrust Market Division Deal Kaput*, FTC WATCH, June 3, 2002.

Agreement was reached – specifically, without adequate congressional involvement – and Senator Hollings in particular objected to the presumptive allocation of media and entertainment mergers to the Antitrust Division.

C. Lessons and Recommendations

During the brief period the Memorandum of Agreement was in force, the average time for a clearance decision was reduced to only 1.5 days.[5] This demonstrates that the problem *can* be fixed and the remedies put in place by the agencies in 2002 *did* work.

One reason for opposition advanced by then Senator Hollings and others was a failure of consultation. This Commission should urge the enforcement agencies to re-endorse the 2002 agreement in consultation with the relevant congressional committees.

Senator Hollings also was concerned about the agencies' agreement that media mergers should be allocated to the Antitrust Division. This objection seems to have had little to do with any clear superiority of the FTC to the Antitrust Division respecting expertise with the media sector.[6] However, even if one thought the FTC had some marginal comparative advantage respecting media mergers, the more important consideration was that the two enforcement agencies had agreed upon a reasonable overall division of responsibility. I agree with those who said at the time that *speed* is the

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[5] *Id.*

[6] Five of the seven entertainment and media mergers that took place prior to the enactment of the 2002 agreement were in fact cleared to the DOJ. William J. Baer et al., *Taking Stock: Recent Trends in U.S. Merger Enforcement*, ANTITRUST (Spring 2004) at 21, *available at* http://www.arnoldporter.com/pubs/files/Article-Taking_Stock(4-04).pdf. And based on statistics released by the agencies in 2002, the DOJ conducted 154 substantial investigations in the media and entertainment industry since FY1997 versus 22 such investigations by the FTC. Federal Trade Commission Press Release, Number of Enforcement Actions and Substantial Investigations by DOJ and FTC, by Industry FY1997-Present (Feb. 27, 2002), *available at* http://www.ftc.gov/opa/2002/02/clearance/clearchart.htm.

"most important goal" of the clearance process, and that "in the vast majority of situations the allocation of matters between agencies is not likely to have critical substantive effects."[7] What matters most is not which agency receives clearance but rather that a clearance decision is reached promptly, so that a substantive investigation of the merger begins at the outset of the thirty-day waiting period prescribed by Congress.

This Commission should advise the Congress that consistent with its willingness to grant the enforcement agencies discretion to enforce this nation's antitrust laws, it should respect their judgment about their relative expertise in doing so, at least in the absence of a clearly erroneous allocation of responsibility.

II. Differential Preliminary Injunction Standards

When the FTC or the Antitrust Division seek to enjoin a merger pending a trial on the merits, the stakes are high on both sides. From the enforcement agency perspective, a failure to obtain a preliminary injunction often means an inability to remedy the anticompetitive effect of the combination even if it ultimately prevails at the trial on the merits. From this perspective, the merging firms will "scramble the eggs", i.e., integrate and rationalize the merged firm, in a way which makes post-trial divestiture difficult, if not impossible. From the perspective of the merging firms, the grant of a preliminary injunction usually is a death blow to the transaction and the hoped for synergies and cost-savings which the transaction would have brought.[8]

[7] Kevin Arquit et al., *Initial Recommendations Joint Letter* (Dec. 21, 2001), *available at* http://www.ftc.gov/opa/2002/02/clearance/clearideas.htm.

[8] More about this a bit later.

Since the stakes are high and the substantive antitrust law being enforced -- Section 7 of the Clayton Act -- is the same, the outcome should not be determined by which agency happens to be seeking the preliminary injunction. However, the standards for granting or denying a preliminary injunction are contained in different statutes whose terms are not identical. Perhaps more importantly, the fact that the trial on the merits takes place before the agency itself when the FTC is involved means that the procedural posture and the burden of proof in the district court usually is quite different depending upon which enforcement agency is seeking preliminary relief.

A. The Applicable Preliminary Injunction Standards

As noted, the Antitrust Division and the FTC are authorized by different statutes to seek a preliminary injunction to prevent consummation of a merger pending trial on the merits. Under Section 13(b) of the Federal Trade Commission Act, the court is required to grant a preliminary injunction "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[9] In adopting Section 13(b), Congress intended this "public interest" standard to deviate from the "traditional 'equity' standard" by not requiring the agency to make a showing of "irreparable harm" resulting from a denial of relief.[10] Courts adjudicating FTC motions for preliminary injunctions generally focus on the "likelihood of ultimate success" prong of the inquiry, and tend to minimize the weight

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[9] 15 U.S.C. § 53(b).

[10] *See* H.R. Rep. No. 93-624, at 31 (1973). *See also FTC v. University Health, Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991) (noting that "the FTC need not prove irreparable harm.").

of private equities as balanced against the public's interest in effective enforcement of the antitrust laws.[11]

The Antitrust Division is authorized to seek injunctive relief under Section 15 of the Clayton Act, which does not specify a relevant standard for the reviewing court other than what is "deemed just in the premises."[12] Some courts have noted that difference and concluded that the traditional four-part test, including a showing of "irreparable injury," is required when the Antitrust Division seeks a preliminary injunction.[13] However, in

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[11] *See, e.g., University Health, Inc.*, 938 F.2d at 1225 (noting that "[w]hile it is proper to consider private equities in deciding whether to enjoin a particular transaction, we must afford such concerns little weight…."); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976) (concluding that private equities "are not proper considerations for granting or withholding injunctive relief" under section 13(b)).

[12] 15 U.S.C. § 25.

[13] *See, e.g., United States v. Gillette Co.*, 828 F. Supp. 78, 80 (D.D.C. 1993):

> This case is before the court on plaintiff's motion for a preliminary injunction. Often in Clayton Act cases, the suit is brought by the Federal Trade Commission (FTC) pursuant to 15 U.S.C. § 53(b). In those cases, the standard for a preliminary injunction is the statutory "public interest" test: whether "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). *See, e.g., FTC v. Owens-Illinois, Inc.*, 681 F.Supp. 27, 33 (D.D.C.), *vacated as moot*, 850 F.2d 694 (D.C.Cir.1988).
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> This case, however, is not brought pursuant to § 53(b) and therefore the court must apply this circuit's fundamental four-part preliminary injunction standard. That test requires that the court balance:
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> (1) the likelihood of the plaintiff's success on the merits;
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> (2) the threat of irreparable injury to the plaintiff in the absence of an injunction;

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practice, the courts generally have not required such a showing where the Antitrust Division demonstrates a reasonable likelihood it will ultimately prevail on the merits.[14] And, as in FTC actions, the courts will not give much weight to the merging parties' private interests in motions brought by the Antitrust Division to enjoin a transaction, once the reasonable probability of success on the merits test is satisfied.[15]

Nonetheless, many practitioners believe the FTC is accorded more deference than the Antitrust Division at the preliminary injunction stage.[16] This belief is reinforced by deferential language used in some of the cases. For example, one District of Columbia District Court judge has held that the FTC's burden in showing a reasonable likelihood of success on the merits was satisfied if the FTC's concerns were "plausible," stating that:

> The Court is not convinced that the acquisition as presented will in fact violate the antitrust laws; however, the facts as presented to the Court make the FTC's concerns *plausible*

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> (3) the possibility of substantial harm to other interested parties from a grant of injunctive relief; and
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> (4) the interests of the public.
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> *See, e.g., Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 151-52 (D.C. Cir. 1985).

[14] *See, e.g., United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) (holding that irreparable harm should be presumed once the government demonstrates a reasonable probability of a section 7 violation); *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 524 (3rd Cir. 1963).

[15] *See Siemens Corp.*, 621 F.2d at 506 (noting that "private interests must be subordinated to public ones"); *United States v. Atlantic Richfield Co.*, 297 F.Supp. 1061, 1073-74 (S.D.N.Y. 1969) (stating that defendants' claims of harm "entitled to serious consideration" but "cannot outweigh the public interest in preventing this merger from taking effect pending trial.").

[16] *See, e.g.*, Robert A. Skitol, *How the Agencies' Clearance Agreement Can Affect Merger Review Outcomes*, FTC WATCH, May 22, 2002.

> and therefore sufficient to establish its prima facie case that the acquisition may have an anti-competitive effect on the market.

FTC v. Libbey, Inc., 211 F.Supp.2d 34, 50 (D.D.C. 2002) (emphasis added).

One hopes that the impulse to water down the FTC's merits burden at the preliminary injunction stage does not stem from a lack of understanding of the consequences to the parties, and potentially to the public interest, of granting a preliminary injunction. Following the D.C. Circuit's lead in *FTC v. H.J. Heinz, Co.*, 246 F.3d 708 (2001), the district court in *Libbey* seemed cynical about the parties' assertion that a preliminary injunction would kill their deal, noting:

> [D]efendants have argued that if this Court issues a preliminary injunction the acquisition will effectively die. Although the Court is cognizant of the hurdles this injunction may pose to the defendants, "if the [acquisition] makes economic sense now, the [defendants] have offered no reason why it would not do so later."

Libbey, 211 F.Supp.2d at 54 (*quoting Heinz*, 246 F.3d at 727).

The conditions which lead to "yes" in the context of a merger or acquisition agreement are not static. Market dynamics which cause parties to contemplate a merger or acquisition can change quickly. More fundamentally, it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty regarding its future ownership while an administrative trial and subsequent appeals go forward. I am 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. Nor have I ever encountered a client who seriously contemplated this option.

To be sure, other courts have held the FTC to a higher order of proof than "plausibility" in deciding whether it has shown a reasonable likelihood of success on the merits. Indeed, a different District of Columbia District Court judge recently stated, "the FTC's burden is not insubstantial, and 'a showing of a fair or tenable chance of success on the merits will not suffice'." *FTC v. Arch Coal, Inc.*, 329 F.Supp.2d 109, 116 (D.D.C. 2004) (quoting *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999)).

Interestingly, and perhaps not coincidentally, the *Arch Coal* court was considerably more realistic about the costs of granting a preliminary injunction, noting: "If this Court issues a preliminary injunction, Arch [Coal] and Triton will abandon the transaction rather than undergo an administrative proceeding, and any cost savings or output enhancements that the transactions will create will be lost." *Arch Coal*, 329 F.Supp.2d at 116. While not in itself dispositive, the consequences to the parties and to consumers of losing the "cost savings and output enhancements" created by a merger or acquisition are entitled to weight in a preliminary injunction proceeding. They should not be swept aside as unimportant because they can easily be recreated at the parties' whim after an administrative trial before the FTC. For all practical purposes to merging parties' after losing in a preliminary injunction proceeding brought by the FTC, "preliminary" relief means *final*.[17]

[17] It was final in *Heinz*. As the District Court noted upon remand, "Notwithstanding the skepticism of the Court of Appeals that an injunction would 'kill this merger,' *see FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726-27 (D.C.Cir.2001), H.J. Heinz, Co. announced publicly within hours of the Court of Appeals' decision that it had abandoned its plans to acquire Beech-Nut Foods." *FTC. v. H.J. Heinz Co.*, 164 F.Supp.2d 659 (D.D.C. 2001).

B. The Real Difference

In my view, the real difference between litigating a preliminary injunction proceeding in a merger case with the FTC as compared to the Antitrust Division are the procedural consequences of being sued by an administrative agency which has both prosecutorial and adjudicative functions on the one hand, and an unalloyed prosecutor on the other. When litigating with the FTC, a preliminary injunction is granted, pending a trial on the merits before an FTC Administrative Law Judge with an appeal to the Commission by either FTC Complaint Counsel or the parties. Where the Antitrust Division is concerned, the trial on the merits takes place in the same court assigned to hear the preliminary injunction. To avoid unnecessary duplication of efforts, the Antitrust Division regularly agrees at the outset of a judicial proceeding to consolidate the hearing on its preliminary injunction motion with a full trial on the merits before the judge who would ultimately hear it in any event.[18]

Consolidation of the preliminary injunction application with a trial on the merits dramatically changes the standard of proof imposed on the enforcement agency. As one court put it recently, consolidation "provid[es] a means of ensuring prompt consideration of the full merits of plaintiff's claims rather than the 'likelihood' of their success." *U.S. v. Long Island Jewish Medical Center*, 983 F.Supp.121, 125 (E.D.N.Y. 1997). Thus, merging firms faced by a DOJ challenge to their deal can put their Section 7 enforcer to its ultimate burden of proof before their deal is lost.

[18] Rule 65(a)(2) of the Federal Rules of Civil Procedure authorizes the district courts to consolidate the application for a preliminary injunction with the trial on the merits.

That opportunity does not exist when the FTC is involved. Because the preliminary injunction is aimed at preserving the status quo pending a trial before an FTC Administrative Law Judge, the opportunity provided by Rule 65 to consolidate a hearing on the application for preliminary relief with a trial on the merits is unavailable. In contrast to *Long Island Jewish Medical Center*, a challenge to a hospital merger where the Antitrust Division was put to its ultimate burden of proof before it could obtain an injunction, the FTC has an easier road when it brings a challenge to a merger involving the same sector of the economy. Thus, in reversing a district court denial of a preliminary injunction in *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991), the Court of Appeals emphasized that "our present task is not to make a final determination on whether the proposed acquisition violates section 7, but rather to make a *preliminary assessment* of the acquisition's impact on competition." *Id.* at 1218 (*citing FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (emphasis added).

It is easier to identify this anomaly flowing from dual enforcement of Section 7 than to remedy it. Congressional action requiring the FTC to try the merits of its Section 7 cases in district court rather than administratively would address the anomaly. However, such a fundamental restructuring of the FTC's role seems unlikely. A more modest step in the right direction would involve amendments to Section 13(b) of the FTC Act which made it clear that the FTC does not satisfy its burden of showing a likelihood of success on the merits by simply advancing "plausible" reasons why the merger might be anticompetitive. Congress could also require courts, in weighing the equities, to consider some of the "real world" factors which carried weight in *Arch Coal*. For example, the court could be required to consider, along with the likelihood of success on the merits, (1) the likelihood that the proposed transaction would be abandoned should injunctive relief be granted; and (2) the harm to consumers in the form of lost cost-savings and other synergies should the transaction be abandoned.

Finally, this Commission could encourage the FTC to seek a permanent injunction in the same Section 13(b) proceeding in which it seeks to preliminarily enjoin a merger.[19] While the FTC strongly asserts the benefits of a post-injunction administrative proceeding in which it can bring its expertise to bear, duplication of effort is not required in all cases. Indeed, the FTC itself recognizes that there are instances where nothing is to be gained by an administrative trial. After the district court denied a preliminary injunction in *Arch Coal*, the FTC declined to proceed with an administrative trial. Applying the criteria laid out in its 1995 policy statement,[20] the FTC emphasized that "the district court conducted a lengthy preliminary injunction hearing that amounted to nearly a full trial on the merits" and therefore administrative litigation would "essentially duplicate its prior efforts."[21] The FTC should be encouraged to identify in advance those Section 7 cases where it can follow the Antitrust Division's practice of avoiding duplicative proceedings by consolidating preliminary injunction proceedings with trials on the merits.

[19] In addition to authorizing the FTC to seek preliminary injunctions, Section 13(b) provides that "in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction."

[20] *See* Federal Trade Commission, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39741 (1995).

[21] *See* Federal Trade Commission Press Release, FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine, *available at* http://www.ftc.gov/opa/2005/06/archcoal.htm.