

ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

Wednesday, March 24, 2005

Federal Trade Commission Conference Center
Conference Rooms A and B
601 New Jersey Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice, at 10:14 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
SANFORD M. LITVACK, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

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ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and
General Counsel
WILLIAM F. ADKINSON, JR., Counsel
TODD ANDERSON, Counsel
MICHAEL W. KLASS, Economist
HIRAM ANDREWS, Law Clerk

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity.

P R O C E E D I N G S

CHAIRPERSON GARZA: Can we convene this meeting of the Antitrust Modernization Commission, then? We have – how many Commissioners do we have here? We have nine Commissioners, which is a quorum. We have a relatively short agenda for our meeting. Specifically, we have two issues: The first is a discussion of the Civil Non-Merger and Criminal Timelines *Ad Hoc* Group Recommendation; and the second is discussion of the Empirical Study of Antitrust Efficacy *Ad Hoc* Group Recommendation.

At our last meeting, on January 13, at which the Commissioners decided on an initial slate of issues for study, there were a handful of issues that we determined merited some additional research and thought. Two *ad hoc* groups were assigned to do that and to report to the Commissioners today so that we could hear the recommendations, deliberate, and make a decision on those issues. That's what we're here to do today.

There was another set of issues that had been held over from the January 13 meeting, and that related to issues concerning convergence of international antitrust procedures. That will undergo further study and, so, won't be addressed at today's meeting.

Because we've been somewhat delayed, let us start right away with a discussion of the Civil Non-Merger and Criminal Timelines *Ad Hoc* Group Recommendations. Andrew, who was presenting on that?

MR. HEIMERT: Commissioner Litvack.

CHAIRPERSON GARZA: Commissioner Litvack, can you do that?

COMMISSIONER LITVACK: Yes, this *ad hoc* group was put together, as the Chairman said, to consider whether or not we should investigate further the question of timelines for civil and criminal investigations by the various agencies.

Members of the group met with Assistant Attorney General Pate, as well as Chairman Majoras, to get their points of view and consider whether or not this was something we should be doing.

Basically, both agencies recognize the issue and the importance of the issue and specifically recognize they are trying to expedite, as much as possible, various investigations, particularly in the merger and non-merger area — particularly in the non-merger area. However, both agencies felt that trying to apply hard-and-fast timelines would probably be a mistake.

Certainly, from a legislative standpoint, the notion of trying to adopt a single, one-size-fits-all guideline or timeline for investigations simply would not work. We discussed with them the possibility of having an internal guideline developed by the agency itself, which could be self-enforcing.

Some of the issues with that were the question of factors that affect the timeline in a given matter that would just make it impossible to comply with any particular guideline. Also, the notion that if the timelines were well established and known, people could delay so as to frustrate the purpose of the investigation.

While, obviously, the Commission or the Antitrust Division could develop mechanics to deal with those kinds of things, the notion was — and the *ad hoc* group came to the conclusion that — these were matters best left to the agencies themselves, being mindful of the fact that there is an issue, that it is a constant problem that needs attention, internally, to develop and impose upon the staffs, as appropriate, timelines for particular investigations.

With that, the *ad hoc* study group recommends, as did the groups before, that we not undertake this as an issue to be studied by the Commission, but, rather, that we do

include in any final report a comment or paragraph or a statement along the lines just stated; namely, that this is an area of concern, that it is important that the agencies move as expeditiously as possible, and that they should continue to devote efforts to making that a reality. That's the report, Madam Chair.

CHAIRPERSON GARZA: Does anybody have any questions or observations about that report or the recommendations?

COMMISSIONER VALENTINE: I would like to probe this a little further. And this is not to say I was not initially sympathetic with the report, but I do think that it's a very simple good housekeeping matter, and I'm not suggesting that we devote lots of time to it. But, you know, historically, it has always been true for all competition agencies that investigations without timelines drag on. We have often hit upon the European Community because its non-merger investigations, when we refer them over for positive comity reasons, drag on and on and on. And they have now, actually, reshaped their entire enforcement staff so that merger groups, which operate under strict guidelines and are very disciplined, are combined with non-merger staff, they look at matters by industry.

I guess I don't see why it wouldn't be equally good

housekeeping on the U.S. side to have non-merger investigations subject to deadlines.

I do agree that arbitrary, outside-imposed deadlines make absolutely no sense. But I think maybe it's more than a paragraph that we want to encourage, but some real push to say that we do think that investigations should be subject to timelines and, particularly because now we don't have a huge merger wave. You know, there are always reasons why you may fall behind on your non-merger investigations, if you're in the middle of a merger wave. But this has been a time when they really could have gotten that under control. It would be different if there had been a fair number of Internet joint ventures, a variety of things working in very fast-moving worlds, people who want to do IPOs. If you're waiting and waiting, and there's no indication the staff is moving, it would feel a lot better if you could know that, at least someone at the top was saying, you've got a black mark and you've got to move and do something, at least send out a request for information in the next 30 days, if you're just sitting.

COMMISSIONER LITVACK: For my own part, I don't disagree with that in concept. I think that really is up to the Chairman or up to the Assistant Attorney General to do.

And I have no problems with more than a paragraph trying to set forth the notion that this is something that ought to be done. I just don't think that this Commission can or should, properly, try to either study it or even attempt to impose or set forth potential guidelines.

CHAIRPERSON GARZA: Let me raise one thing that's a little bit in line with what Debra suggested. But I come at it from the perspective of having heard from staff on the Hill that this is an issue that continually gets raised to them. I assume it's because their constituents who happen to be involved in investigations, either at the Federal Trade Commission or at the Justice Department, have complained about the timelines.

Given that part of our job is to advise the President and Congress on the state of antitrust law enforcement and things that might be changed, and that the Congress, from time to time, does have this issue put to them, and obviously is considering whether something is appropriate to be done, even if it doesn't require a lot of study or a conclusion that guidelines should be adopted, it still may be that something more than a paragraph would be a good idea for us to include in our report, so that Congress has a sense of what this body believes are the potential

downsides, as you've articulated in the *ad hoc* memo, of doing something like imposing a strict legislative timeline, so that they're aware of the kinds of things that can be done, concerns about gaming of the system, why a one-size-fits-all solution may not work, that kind of thing.

But, maybe if we gave it some more thought, we might be able to think of some things to encourage the agencies to do – you know, having some kind of an internal deadline that says, if you haven't done anything within a year, and it's not the parties' fault because they haven't been producing documents, you will make an effort to either close the investigation or advance it.

Or, maybe it's something like requiring the agencies to maintain data and maybe when they do their annual report on the number of civil non-merger investigations, for example, they also indicate – and they may already do this – the average length of time that civil non-merger investigations have been pending. This is a way of kind of exposing the issue, gaining some transparency. Then, if it were ever the case that they had to report that they had five non-merger civil investigations pending and that some of them had been pending 18 or 24 months, it may be something that would then cause the Assistant Attorney General or the Chair

of the FTC to say, what's going on, or we'd like to, unless we can explain a good reason for it, get that number down below 24 months to an average of 12 or something like that.

I don't know that we need to spend a lot of resources on it, but I think I come out with wanting more than a paragraph.

COMMISSIONER LITVACK: Again, as I said — having been on both sides of this issue, and being very sympathetic, obviously, to both sides of the issue — I have no problem with something more than a paragraph. By the way, to the best of my knowledge, the Division certainly does keep track of how long investigations are pending. I think the Assistant Attorney General is answerable or should be answerable for how long and why, and I suspect he is.

The only thing I would caution is that, at the end of the day, these things are no better than the top people at the agency who are doing this. We know this. And it's true whether it's a corporation, the government, or a law firm. At the end of the day, someone is in charge, and someone has got to make these things work. One can set forth all the guidelines they want — there will be exceptions to them whenever someone feels there should be. At the end of the day, as I say, it's about people. So, I have no issue with

trying to do more than a paragraph in setting forth the concerns. I just think that the solution probably lies in the good faith of the people doing it.

VICE CHAIR YAROWSKY: I'd just like to make another suggestion, that the Commission maybe respond in a short letter to Senators Kohl and DeWine, not saying what we're going to say in the report, but expressing what Sandy and others have said, that we recognize that this is a serious concern and that we will be addressing it. Both the Senate Judiciary Committee and the House Judiciary Committee are coming up to authorization season. They actually often call the Division and the Commission up to ask a number of questions. When I was on the Committee, we certainly would do this; Makan, as well, did it. Stephen Cannon did it. And we often had written questions. If we all agree here, adding our voices collectively that this is a concern, that helps keep this as a top-tier issue in terms of running the Department. I'm not saying exert pressure on people. I think people understand that this is an important concern. But, I think it would be a multiplier effect to what the House and Senate Judiciary Committees are trying to do in their own way. If that's possible, I would suggest we just have a short letter addressed to the folks that have

requested us to look at this.

CHAIRPERSON GARZA: And what would the letter say?

VICE CHAIR YAROWSKY: It would reconfirm what we've just said here, that we recognize this is a real and serious concern, we encourage the agencies to move as expeditiously as they can, and that we will be addressing this in our final report. I think it may be useful in the oversight period coming up and in future years.

CHAIRPERSON GARZA: Commissioner Delrahim, do you have any thoughts?

COMMISSIONER DELRAHIM: No. As far as relations with Capitol Hill, I don't know if it's necessary because it'll be part of the report and basically, letting them know we've heard their concerns and we'll address it. They'll appreciate that. But, you know, whether we need to send a letter or communicate that one way or the other, that'll be good.

CHAIRPERSON GARZA: Is there any other discussion? All right. I take it then that what's coming out of this discussion is that, while it won't be a separate issue for study, the sense of the Commissioners is that we want to address the issue in our final report. We will consider drafting a letter to the Hill, setting forth the sense of the

Commission. Can I have a show of hands of agreement with that approach, then?

[Commissioners, by show of hands, vote 9-0.]

CHAIRPERSON GARZA: Okay, that's the approach we will take. Thank you, Commissioner Litvack.

The next thing we wanted to go to, and the final matter on our agenda for today, is discussion of the recommendation that we received from Assistant Attorney General Hew Pate with respect to an empirical study or studies relating to the effectiveness of antitrust policy and enforcement programs.

This was something that had been mentioned in a letter from the Assistant Attorney General that we received shortly before the January 13 meeting that was of great interest to a number of the Commissioners. But because we hadn't had adequate time to think about how that suggestion might relate to the Commission's work, we formed an *ad hoc* group to examine the issue and help to frame it for discussion by the Commissioners today. Commissioner Burchfield, you'll be presenting the recommendations of that *ad hoc* group?

COMMISSIONER BURCHFIELD: Thank you. As the Chairman just mentioned, in a January 5 letter from Assistant

Attorney General Pate on his recommendations was, and I'll quote from the letter to characterize it appropriately: "Some antitrust commentators contend that there is no empirical foundation for the conviction that antitrust enforcement benefits consumers and the economy. It seems plain to me that combating cartels and forestalling perceived needs for regulation have alone provided great benefits, but more empirical evaluation of the effects of antitrust enforcement would certainly be desirable. The Commission should consider engaging respected experts (including those who do not earn their living providing antitrust services) to design a rigorous study of the effects of antitrust enforcement."

As the Chairman noted, a number of us – and I include myself in this category – were taken with this proposal and thought that it merited careful consideration by the Commission.

In subsequent conversations, the Assistant Attorney General made it clear that his proposal was to design and propose a study, not to conduct the study.

An *ad hoc* group consisting of Commissioners Carlton, Jacobson, Valentine, and me interviewed Assistant Attorney General Pate and the Chairman of the FTC, Deborah Majoras. The staff conducted a survey of recent literature

involving empirical studies of antitrust enforcement and critiques of those studies. They focused especially on a study by Robert Crandall and Clifford Winston that was published in the fall of 2003 in the *Journal of Economic Perspectives*. After that review, the *ad hoc* committee came to the following conclusions and recommendations:

It was our view that the scope and complexity of an officially sanctioned study presents extremely difficult issues. That statement includes a number of components. This Commission acting as an official body proposing a particular study would probably carry some weight. There was concern about whether we had the time and the resources to propose a study that would merit, perhaps, the attention and the weight that it would receive as a proposal coming from this Commission.

It was also noted that studies are currently being designed and funded in the private sector, and that academia does have an incentive to undertake and, apparently, has obtained funding to undertake, such studies. Finally, as our conclusion, the *ad hoc* group observed that the workload that we've undertaken for ourselves at our January meeting was sufficiently large, and this proposal is sufficiently potentially time consuming, that we did not think we could do

it justice with the resources and the time that we have.

The group does not rule out the possibility of proposing or even undertaking more targeted studies within the areas of study that we've already taken on. But a comprehensive review of antitrust enforcement seemed like it was something that was a bit beyond the capacity of this Commission, given everything else that we're doing.

That is the recommendation.

CHAIRPERSON GARZA: Does anybody wish to comment or to put a question? Commissioner Jacobson?

COMMISSIONER JACOBSON: I think Commissioner Burchfield articulated the *ad hoc* group's conclusions completely and accurately. Let me just underscore a couple of points that are important to me in this regard.

Gathering the data necessary to conduct a study of antitrust enforcement at large seems to me to be an impossible task. Were we to try to do so or, more narrowly, to try to design a project that would aim in that direction, we would necessarily be focusing on those industries, those parts of the economy, for which there are data.

This is the old problem that Steve Salop describes of looking for the keys under the lamppost because there's light there, rather than looking for the keys where they

actually have been dropped. My concern is that, if you focus solely on those sectors where there are data necessary or appropriate to do the study, you'll reach some conclusions that may, if the study is done well, have some application to those industries, but that it will not necessarily shed any light at all on the value or lack of value of enforcement in this area to the economy at large.

That's why I completely concur in the conclusions of the *ad hoc* group.

CHAIRPERSON GARZA: Commissioner Valentine?

COMMISSIONER VALENTINE: I think what's also persuasive here is that, as a theoretical matter, this would be a fascinating issue, and all of us would love a wonderful empirical answer as to whether antitrust enforcement is effective and how effective or not it might be.

I don't have any sense that this is exactly what Congress intended us to be doing. And, at least to the extent that Assistant Attorney General Pate's concept has evolved, we would simply be designing it. I actually think that the true people, who actually perform any such study, really should be involved in the design. Hence, you end up with sort of an elephant and a donkey being stuck together, if we do the designing and someone else is doing the

implementation. I really think that we should focus our efforts on the huge morass of issues we've got before us, rather than trying to pass this on to someone else.

Finally, I think that – and this was interesting, it was something that Commissioner Carlton noted – there really is a lot of both money and brain power available in the private academic community. In a sense, that gets at one of Assistant Attorney General Pate's issues, which is, it actually would be nice to see this done by someone whose life is not either spent in enforcing the laws or getting money to defend people against whom those laws are being enforced. All in all, I think it's a good resolution that we abandon this admittedly ambitious venture.

CHAIRPERSON GARZA: Any other comments?
Commissioner Burchfield?

COMMISSIONER BURCHFIELD: Yes, if this issue had been before us at the time we were selecting the entire range of issues, I might have come out differently. But having already assumed a very ambitious agenda – maybe even a too ambitious agenda for this group – to me, it ceased to be that close a call.

CHAIRPERSON GARZA: Before we take a vote, let me, for the record, try to express, as I understand it, what the

recommendation of the group is, quoting from the working group memorandum: "As with regard to any regulatory regime, it could be of substantial value periodically to assess the effectiveness of enforcement through empirical study. Indeed, this Commission may benefit from such empirical analysis in assessing some of the issues it has selected to study...This Commission, after three years of work, may well be in a position both to offer limited assessments about particular areas of antitrust enforcement and to offer possible directions for additional empirical research. Accordingly, the *ad hoc* group recommends that the Commission restrict its efforts to undertaking limited empirical studies and suggesting avenues for further development, as appropriate in the course of considering issues already selected for further study."

May I have a show of hands of agreement with that recommendation?

[Commissioners, by show of hands, vote 9-0.]

CHAIRPERSON GARZA: Thank you. I think that completes our agenda for today and we can adjourn the meeting.

[Whereupon, at 10:39 a.m., the meeting was adjourned.]