MEMORANDUM

From: Exclusionary Conduct Study Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: May 4, 2005
Re: Exclusionary Conduct Study Plan

Issue Adopted by the Commission for Study

• Should the substantive standards for determining whether conduct is exclusionary or anticompetitive under either Section 1 or Section 2 of the Sherman Act be revisited?

Questions for Public Comment

1. What are the circumstances in which a firm’s refusal to deal with (or discrimination against) rivals in adjacent markets violates Section 2 of the Sherman Act? Does the Supreme Court’s decision in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004), state an appropriate legal standard in this respect?

2. Should the essential facilities doctrine constitute an independent basis of liability for single-firm conduct under Section 2 of the Sherman Act?

3. What should be the standards for determining when a firm’s product bundling or bundled pricing violates Section 2 of the Sherman Act?

4. How should the standards for exclusionary or anticompetitive conduct be determined (e.g., through legislation, judicial development, amicus efforts by DOJ and FTC), particularly if you believe the current standards are not appropriate or clear?

Hearings

• Two panels of approximately three to four hours each.

1. Refusals to deal and essential facilities
   • Representative(s) from defense bar
   • Representative(s) from business community
   • Representative(s) from plaintiffs’ bar
   • Scholar(s)

2. Product bundling and bundled pricing
   • Representative(s) from defense bar
• Representative(s) from business community
• Representative(s) from plaintiffs’ bar
• Scholar(s)