

FTC Hospital Merger Challenges: Is a “Fast-Track” Administrative Trial the Answer To the FTC’s Federal Court Woes?

Robert C. Jones and Aimee E. DeFilippo

When former FTC Chairman Timothy J. Muris began his tenure as Chairman of the FTC in 2001, federal antitrust enforcement agencies had lost a staggering seven consecutive hospital merger cases over an eight-year period.¹ Determined to reinvigorate the Commission's hospital merger program, the FTC embarked on a retrospective review of consummated hospital mergers in several cities across the country with an eye toward determining whether those mergers had, in fact, been anticompetitive. The plan was to publish the results in a report, with the expectation that those published results could be used as the foundation for reinvigorated enforcement.² The retrospective investigations were completed four years ago, but with one recent exception no report has thus far been issued, let alone vetted publicly. Consequently, we do not know which, if any, of the mergers the FTC challenged unsuccessfully actually harmed competition.³

One of the mergers the FTC investigated during the pendency of its retrospective evaluations was a consummated merger of two hospitals in Evanston, Illinois. The Evanston merger was not a true retrospective evaluation because it had not been investigated or challenged before consummation. Nevertheless, armed with post-acquisition evidence that the FTC believed showed the transaction had resulted in supracompetitive prices, the FTC brought an administrative complaint challenging the merger on February 10, 2004.⁴ Twenty months later, an administrative law judge (ALJ) issued a decision concluding that the transaction had been anticompetitive.⁵ The case was

¹ *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd mem.*, 121 F.3d 708 (6th Cir. 1997); *United States v. Mercy Health Servs.*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir. 1995); *FTC v. Hosp. Bd. of Directors of Lee Cty.*, 1994-1 Trade Cas. (CCH) ¶ 70,593 (M.D. Fla.), *aff'd*, 38 F.3d 1184 (11th Cir. 1994). The California Attorney General also failed in a hospital merger challenge in the Oakland-Berkeley area of California. *California v. Sutter Health Sys.*, 84 F. Supp. 2d 1057 (N.D. Cal.), *aff'd mem.*, 217 F.3d 846 (9th Cir. 2000).

² Timothy J. Muris, *Everything Old Is New Again: Health Care and Competition in the 21st Century*, Remarks Before the 7th Annual Competition in Health Care Forum (Nov. 2002), available at <http://www.ftc.gov/speeches/muris/murishhealthcarespeech0211.pdf>.

³ In August 2007, FTC spokesman Mitchell Katz stated that the FTC will eventually issue a report summarizing the results of the retrospective study. He noted that the Commission “is working on it now.” Greg Blesch, *Finding Victory in Legal Defeat*, MODERN HEALTHCARE, Aug. 13, 2007, at 6. While this article was being prepared, the FTC published a Bureau of Economics working paper on the 1999 acquisition of Summit Medical Center by Sutter Health, a transaction that was challenged unsuccessfully by the California Attorney General's Office but not by the FTC. (Author Robert Jones was part of the Jones Day team that represented Sutter Health in that litigation.) This preliminary working paper states that the merger may have been anticompetitive but notes that a full determination would require analysis of additional issues not addressed in the paper. See Steven Tenn, *The Price Effects of Hospital Mergers: A Case Study of the Sutter-Summit Transaction* 2 n.3 (Fed. Trade Comm'n Bureau of Econ. Working Paper No. 293, Nov. 2008), available at <http://www.ftc.gov/be/workpapers/wp293.pdf>.

⁴ *Evanston Nw. Healthcare Corp.*, FTC Docket No. 9315 (Feb. 10, 2004) (complaint), available at <http://www.ftc.gov/os/caselist/0110234/040210emhcomplaint.pdf>.

⁵ *Evanston Nw. Healthcare Corp.*, FTC Docket No. 9315 (Oct. 21, 2005) (initial decision), available at <http://www.ftc.gov/os/adjpro/d9315/051021idtextversion.pdf>.

■ **Robert C. Jones** is a Partner and **Aimee DeFilippo** is an Associate in the Washington office of Jones Day.

appealed to the Commission, and twenty-two months later the Commission affirmed the ALJ's conclusion.⁶

As soon as the Commission announced its decision in *Evanston*, antitrust practitioners began debating what influence the case would have on future FTC federal court challenges of prospective hospital transactions. Due to the Commission's retrospective review, its heavy reliance on postmerger pricing evidence, and its decision to forgo divestiture, the *Evanston* decision left many open questions about future merger enforcement. Thus, when the FTC announced in early May of 2008 that it was challenging the proposed merger of Inova Health Foundation and Prince William Health System (PWHS) in federal court,⁷ it was widely expected that at least some of those questions would finally be answered.

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As the first FTC challenge to a hospital merger in federal court since 1998, and the first since the Commission's *Evanston* decision, it was reasonable to expect that the FTC had chosen the long-awaited *Inova* case carefully (i.e., that it had chosen what it believed was a strong substantive case with robust evidence of anticompetitive effects) to convince a federal district court to enter a preliminary injunction. The FTC staff had ample time to prepare their merger challenge given that the pre-complaint investigation had been ongoing for one-and-a-half years.⁸ Indeed, the FTC staff claimed to have a strong case against the merging hospitals, supported by over seventy signed fact affidavits and five experts ready to testify.⁹

But the FTC was not satisfied to rely upon that evidence and pursue a preliminary injunction in the type of federal court evidentiary hearing that had occurred in past hospital merger cases. Instead, the Commission engaged in a series of unusual procedural steps in an effort to move the case into its administrative process promptly, with a much more limited federal court review.¹⁰ One conclusion clearly reached by the FTC from its history of failure in federal court was that the legal standard courts had been imposing on the FTC for a preliminary injunction was too high. The FTC wanted to lower that standard and move the *Inova* case quickly to an accelerated Commission administrative process.

⁶ *Evanston Nw. Healthcare Corp.*, FTC Docket. No. 9315 (Aug. 6, 2007) (Commission opinion), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>. However, instead of affirming the ALJ's divestiture order, the Commission required the hospitals to establish separate managed care negotiating teams so that the merger efficiencies could be maintained but the ability of the hospitals to coordinate pricing would be constricted.

⁷ *FTC v. Inova Health Sys. Found.*, No. 1:08CV460-CMH/JFA (E.D. Va. May 12, 2008) (complaint).

⁸ In *Inova*, the parties took an unusually long period of time to respond to the Request for Additional Information and Documentary Material issued pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Second Request). The parties announced the proposed transaction in April 2006 but did not file their premerger notification submissions until September 29, 2006. They then took fourteen months to comply with the Second Request, certifying substantial compliance in mid-November 2007. See Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for a Scheduling Order and an Expedited Status Conference, *Inova*, No. 1:08-cv-460-CMH/JFA, at 5–6 (E.D. Va. May 20, 2008). By contrast, the FTC had just under four months to review the *Whole Foods* transaction before filing its complaint. See *Whole Foods Market, Inc.*, FTC Docket. No. 9324 (June 27, 2008) (complaint), available at <http://www.ftc.gov/os/adjpro/d9324/070628admincmplt.pdf> (announcing the merger challenge on June 27, 2007, and noting the merger's announcement in late February 2007).

⁹ See Memorandum in Support of Motion for a Scheduling Order and an Expedited Status Conference, *Inova*, No. 1:08CV460-CMH/JFA (E.D. Va. May 16, 2008); Transcript of Hearing Before the Honorable Claude M. Hilton, *Inova*, No. 1:08CV460-CMH/JFA (E.D. Va. May 30, 2008).

¹⁰ The FTC has the authority to initiate administrative proceedings under which it adjudicates whether the effect of a particular merger is to substantially lessen competition in a relevant market. But the FTC's general practice for mergers that have not been consummated is to seek a preliminary injunction in federal court pending a full evidentiary trial in an agency administrative proceeding. See FTC Rules of Practice, 16 C.F.R. §§ 3.1–3.72 and discussion *infra* pp. 3–7.

However, the FTC's efforts did not result in an administrative trial on the merits as the FTC said it had contemplated. While the FTC was successful in curtailing the federal court proceeding—the federal court decided to grant only a one-hour hearing, with no discovery—the prospect of thirteen months of administrative litigation on top of the twenty-one months of investigation that already had occurred in the case proved too much for Inova and Prince William. The parties abandoned their merger without a trial.¹¹ *Inova* thus potentially creates a new example, to be added to past cases, of what may happen if a federal court enters a preliminary injunction or defers judicial review of a pending merger in anticipation of the FTC's administrative process.

Evolution of FTC Injunctive Authority

When the FTC was established over ninety years ago, Congress envisioned an antitrust agency with the ability to function “not simply as an antitrust prosecutor or analytical ‘think tank,’ but also as an adjudicator trying its own cases and rendering its own decisions.”¹² The FTC was thus empowered with an adjudicative function in which it files and litigates cases before agency administrative judges.

The FTC's enabling statutes, however, provided no mechanism for the agency to obtain an injunction to stop a merger before it was consummated. Given the well-recognized problems obtaining effective relief for consummated mergers (particularly when assets are scrambled after the merger)¹³ and the potential harm to consumers while litigation challenging a consummated merger is pending,¹⁴ the FTC had attempted to seek injunctions using existing authority, with mixed results.¹⁵ Finally, in 1973, Congress enacted Section 13(b) of the FTC Act, which empow-

¹¹ See Joint Motion to Dismiss Complaint, *Inova Health Sys. Found. & Prince William Health Sys. Inc.*, FTC Docket No. 9326 (June 11, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080611jointmodismisscmplt.pdf>; Press Release, *Inova Health System & Prince William Health System* (June 6, 2008), available at <http://www.inova.org/news/2008/inovapwhsmergerstatement.jsp> (citing as the reason for dissolving the merger the FTC's “unusual process changes . . . [which] threatened to prolong completion of the merger by as much as two years”).

¹² D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319 (2003).

¹³ See, e.g., *FTC v. Nat'l Tea Co.*, 603 F.2d 694, 697 (8th Cir. 1979) (“[a]dministrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture”). In the *Inova* case, the FTC itself acknowledged the challenge that the Commission has faced in fashioning effective relief after the parties are allowed to consummate their merger:

During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged. In these ways, the acquiring and acquired firms are, in effect, irreversibly “scrambled” together. The independent identity of the acquired firm disappears. “Unscrambling” the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.

Complaint Counsel's Opposition to Respondents' Motion to Stay Discovery and All Other Aspects of this Proceeding, *Inova Health Sys. Found. & Prince William Health Sys. Inc.*, FTC Docket No. 9326, at 4 (May 27, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080527ccopprespmostaydiscov.pdf> (citing William J. Baer, Remarks Before The Conference Board (Oct. 29, 1996)). See also Statement of Chairman Steiger in Support of Final Issuance of Consent Order, *Dominican Santa Cruz Hosp.*, 118 F.T.C. 382, 391 (1994) (concluding that divestiture was not an “appealing remedy” in the case of a consummated hospital merger where the acquired hospital had been converted to a skilled nursing facility and “the costs of conversion back to a hospital would, even under the best of circumstances, be substantial, with no guarantee of success”).

¹⁴ See, e.g., FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 3–4, 11 (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>; see also Statement of Chairman Timothy J. Muris on Closing of Investigation of Genzyme Corporation Acquisition of Novazyme Pharmaceuticals, Inc. FTC File No. 021 0026, at 20 (Jan. 13, 2004), available at <http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf> (concluding that litigating a challenge to the consummated merger of Genzyme and Novazyme raised significant possibilities that the remedy may cause more harm to consumer welfare than the merger itself).

¹⁵ Until Section 13(b) was enacted, the FTC could obtain preliminary injunctions only through a federal appellate court via the All Writs Act, 28 U.S.C. § 1651(a), or through one of three labeling statutes. See, e.g., *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).

ers the Commission to obtain injunctive relief in federal court for violations of any provision of law that the Commission enforces.¹⁶ Under this authority, the FTC can temporarily halt consummation of a proposed merger or acquisition pending completion of an administrative proceeding at the Commission. Under Section 13(b), a district court may grant a preliminary injunction “[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.”¹⁷

Courts usually have interpreted Section 13(b) to impose a fairly stringent standard on the FTC, requiring the Commission to “raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.”¹⁸ While the FTC often argued that it need only show a “fair and tenable chance of success on the merits,” courts generally held that such a standard would not suffice for injunctive relief because it effectively reduces the judicial function “to a rubber stamp procedure” in violation of the congressional intent that courts exercise their “independent judgment” in reviewing the FTC’s preliminary injunction applications.¹⁹ These courts also insisted that the FTC identify a credible relevant market and raise questions going to the “ultimate merits in a Clayton Act case—the lessening of competition,” in order to demonstrate to the court that the Commission will likely prevail on its challenge to the proposed acquisition.²⁰

In adopting and applying these interpretations of Section 13(b), courts have recognized that the preliminary injunction hearing would ultimately decide the case because of the notoriously slow pace of FTC administrative proceedings.²¹ In reality, if a party loses at the preliminary injunction stage, it “very often means the proposed deal will be scuttled, given the costs, delay, and uncertainty of a full-blown Section 7 trial.”²² Many courts themselves have acknowledged that “[a] preliminary injunction may kill, rather than suspend, a proposed transaction.”²³ Indeed, no firm has continued to litigate a merger against the FTC after losing the preliminary injunction motion and

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¹⁶ H.R. Rep. No. 624, 93d Cong., 1st Sess. 116 (1971) (Conference Report).

¹⁷ 15 U.S.C. § 53(b).

¹⁸ *National Tea*, 603 F.2d at 698 (quoting *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir. 1978)); see also *Tenet Health Care*, 186 F.3d at 1051; *FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217–18 (11th Cir. 1991).

¹⁹ *Tenet Health Care Corp.*, 186 F.3d at 1051. See also *Freeman Hosp.*, 69 F.3d at 267; *National Tea*, 603 F.2d at 698.

²⁰ *University Health*, 938 F.2d at 1217–18; see also *Tenet Health Care*, 186 F.3d at 1051 (noting that “Section 7 [of the Clayton Act] deals in probabilities not ephemeral possibilities”); *Freeman Hosp.*, 69 F.3d at 267 (requiring the FTC to actively define the relevant market instead of just raising serious or substantial questions about that market).

²¹ See, e.g., *FTC v. Occidental Petroleum Corp.*, No. 86-900, 1986 WL 952, at *13 (D.D.C. Apr. 29, 1986) (“No substantial business transaction could ever survive the glacial pace of an FTC administrative proceeding.”).

²² ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS 547 (3d ed. 2008). See, e.g., *Mo. Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974) (“Experience seems to demonstrate that . . . the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger.”); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980) (“[T]he issuance of a PI blocking an acquisition or merger may prevent the transaction from ever being consummated.”). In fiscal year 2005, the Commission authorized FTC staff to seek one preliminary injunction, which was later dismissed at the Commission’s request when the parties entered into a consent decree alleviating the Commission’s concerns. In 2003, FTC staff sought three preliminary injunctions; none of these cases made it to trial. In 2002, FTC staff sought five preliminary injunctions. Only one made it to trial, and the parties abandoned the transaction after entry of the preliminary injunction. ABA SECTION OF ANTITRUST LAW, FTC PRACTICE & PROCEDURE MANUAL 131 (2007) [hereinafter *FTC PRACTICE & PROCEDURE MANUAL*].

²³ *FTC v. Weyerhaeuser Co.*, 665 F.2d 1072, 1087 (D.C. Cir. 1981). See also *United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990) (noting that in antitrust cases, “a court ought to exercise extreme caution because judicial intervention in a competitive situation can itself upset the balance of market forces, bringing about the very ills the antitrust laws were meant to prevent”); *FTC PRACTICE & PROCEDURE*

its appeal, if any. The results of preliminary injunction proceedings effectively have been outcome determinative. Parties routinely argue that they must abandon their transaction if a preliminary injunction is granted.²⁴

Because of the critical importance of preliminary injunction motions for the merging parties, courts traditionally have given the parties in FTC injunction cases considerable opportunity to present the merits of their cases. In one hospital merger, for example, the district court entered a preliminary injunction only after conducting a five-day evidentiary hearing and receiving the live or sworn written testimony of more than forty witnesses and approximately one hundred documentary exhibits.²⁵ Such cases are not isolated. In fact, preliminary injunction motions have effectively become mini-trials on the merits, with fact witnesses, expert testimony, and multiple-day proceedings in federal court.²⁶

Given the magnitude of the preliminary injunction process, and the resources needed to litigate the motion, the FTC's administrative review traditionally has been stayed until resolution of the 13(b) action. In a recent speech, however, Commissioner Rosch lamented the emphasis on preliminary injunctions in merger cases at the expense of the FTC's administrative review, noting that such cases as *Arch Coal*²⁷ and *Western/Giant*²⁸ have resulted in federal courts making the

MANUAL, *supra* note 22, at 131 ("Due to the time sensitive nature of mergers and acquisitions, a preliminary injunction may have the effect of permanently terminating a transaction."); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1093 (D.D.C. 1997) ("This decision [to grant a preliminary injunction] will most likely kill the merger.").

²⁴ See, e.g., *FTC v. Arch Coal Inc.*, 329 F. Supp. 2d 109, 160 (D.D.C. 2004) ("If this court issues a preliminary injunction, on the other hand, Arch and Triton will abandon the transaction rather than undergo an administrative proceeding."). While the rationales are different, the FTC, for its part, has opted to dismiss the administrative complaint in every case since 1995 where a preliminary injunction was not issued and sustained on appeal. See Respondent's Motion to Stay Discovery and All Other Aspects of this Proceeding, *Inova Health Sys. Found. & Prince William Health Sys. Inc.*, FTC Docket No. 9326 (May 23, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080523respmo-staydiscov.pdf> (citing Statement of the Commission Concerning Dismissal of the Administrative Complaint, *Foster*, FTC Docket No. 9323 (Oct. 3, 2007); Statement of the Commission, *Arch Coal Inc.*, FTC Docket No. 9316 (June 13, 2005); Order Dismissing Complaint, *Tenet Healthcare Corp.*, FTC Docket No. 9289 (Dec. 23, 1999); Order Granting Motion to Dismiss, *Butterworth Health Corp.*, FTC Docket No. 9283 (Sept. 25, 1997); Order Dismissing Complaint, *Freeman Hosp.*, FTC Docket No. 9273 (Nov. 30, 1995)). In *Whole Foods*, the Commission stayed the administrative proceedings while it appealed the district court's denial of a preliminary injunction. It rescinded the stay in August 2008 after the appellate court reversed the district court's decision and remanded the case. See *Whole Foods Market, Inc.*, FTC Docket No. 9324, available at <http://www.ftc.gov/os/adjpro/d9324/index.shtm>.

²⁵ Brief for Plaintiff-Appellee Federal Trade Commission, *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999) (No. 98-3123).

²⁶ FTC PRACTICE & PROCEDURE MANUAL, *supra* note 22, at 134 (citing Redacted Memorandum Opinion, *FTC v. Swedish Match*, No. 00-1501 (TFH), slip op. (D.D.C. Dec. 14, 2000) (granting preliminary injunction motion after five days of hearings and consideration of briefs, exhibits, and witnesses); *Butterworth Health Corp.*, 946 F. Supp. 1285 (denying preliminary injunction motion by FTC to block hospital merger after review of five full days of testimony and more than 900 exhibits)). Most recently, the FTC's challenges of *Arch Coal's* acquisition of *Triton Coal Company*, *Western Refining's* acquisition of *Giant Industries*, and *Whole Food's* acquisition of *Wild Oats Market* each involved extensive hearings in federal court. See *Arch Coal*, 329 F. Supp. 2d 109 (district court conducted ten days of preliminary injunction hearings, including testimony from eighteen witnesses, five experts, 1,067 exhibits, and seven substantive briefs); *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725 (D.N.M. May 29, 2007) (district court conducted four and one-half days of hearings and received into evidence numerous documents, declarations, and deposition transcripts); *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007) (district court conducted two days of hearings and received into evidence numerous transcripts, declarations, expert reports, exhibits, and the examination and cross-examination of two expert witnesses in court), *rev'd*, 533 F.3d 869, *reh'g denied en banc*, No. 07-5276, *op. amended & superseded*, 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008). In each preliminary injunction action lost by the FTC, the district court concluded that the FTC had failed to demonstrate a likelihood of success in proving that the proposed merger may substantially lessen competition or tend to create a monopoly. *But see* *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008) (reversing district court's ruling), *reh'g denied en banc*, No. 07-5276, *op. amended & superseded*, 2008 WL 5101226 (D.C. Cir. Nov. 21, 2008).

²⁷ *Arch Coal*, 329 F. Supp. 2d 109.

²⁸ *Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725.

Commission's likelihood of success on the merits the ultimate issue, rather than focusing on whether it is in the public interest for the FTC to review the case further.²⁹

In keeping with Commissioner Rosch's comments, the FTC itself recently has voiced its unhappiness with the 13(b) standard used by the courts. In its challenge of the Inova/PWHS merger, the FTC urged the federal court to adopt a deferential view of the 13(b) standard the FTC was obliged to meet, arguing that the merits of the case should not be seriously addressed at the preliminary injunction stage but should instead be taken up by the FTC in its administrative trial.³⁰ The FTC insisted that merger challenges are best resolved through administrative litigation, and that the federal court action need only be a summary proceeding, based on the preexisting evidentiary record, to preserve the status quo pending the administrative review. By deciding to deny the merging parties' discovery request, granting only a one-hour hearing, and announcing that he was declining Inova's "invitation for me to get involved in trying this case" as it "needs to be tried before the Commission," the federal court in *Inova* made it clear that the FTC's petition would get only a cursory review and likely would be granted.³¹

Since the *Inova* case, Judges Brown and Tatel of the U.S. Court of Appeals for the D.C. Circuit separately have adopted a substantially reduced standard for preliminarily enjoining a merger under Section 13(b) that is consistent with the standard advocated by the FTC in *Inova*.³² In the much publicized *Whole Foods* case, these two judges emphasized that the district court's obligation in a 13(b) case is not to demand that the FTC prove that a merger will undoubtedly violate the antitrust laws, but rather to weigh the Commission's chances of succeeding based on the evidence presented.³³ The judges concluded that, under Section 13(b), the FTC creates a presumption in favor of an injunction just by raising serious and substantial questions going to the merits of the case.³⁴ According to both judges, the FTC is entitled to this presumption unless it fails to show a likelihood of success, and the court can say with certainty that the merger would not substantially lessen competition.³⁵ *Whole Foods* petitioned the D.C. Circuit on August 26, 2008,

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²⁹ J. Thomas Rosch, Commissioner, FTC, A Peek Inside: One Commissioner's Perspective on the Commission's Roles as Prosecutor and Judge, Remarks Before the NERA 2008 Antitrust and Trade Regulation Seminar 13 (2008) available at <http://www.ftc.gov/speeches/rosch/080703nera.pdf> (asserting that courts in such cases "essentially turned proceedings on the Commission's application for a preliminary injunction into plenary trials on the merits").

³⁰ Complaint Counsel's Opposition to Respondents' Motion to Stay Discovery and All Other Aspects of This Proceeding, *Inova Health Sys. Found. & Prince William Health Sys. Inc.*, FTC Docket No. 9326 (May 27, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080527ccopprespmostaydiscov.pdf>.

³¹ See Transcript of Hearing at 12–13, *Inova*, No. 1:08-cv-460-CMH/JFA (E.D. Va. May 30, 2008). Indeed, the court refused to allow live testimony or cross-examination of experts in the federal court proceeding.

³² The court of appeals originally issued an opinion with one judge dissenting. But in November, the court amended and reissued its July 2008 opinion to reflect that Judge David S. Tatel—while still concurring with Judge Janice Brown in her judgment to reverse the trial court's ruling and in her articulation of a lower legal standard for the FTC to obtain a preliminary injunction—no longer concurred with her opinion in support of that judgment. *FTC v. Whole Foods Market, Inc.*, 533 F.3d 869 (D.C. Cir. 2008), *reh'g denied en banc*, No. 07-5276, *op. amended and superseded*, 2008 WL 510226 (D.C. Cir. Nov. 21, 2008). As a result, there is no single opinion of the court.

³³ *Whole Foods Market*, 2008 WL 510226 at *4 ("If, and only if, the district court's certainty was justified, it was appropriate for the court not to balance the likelihood of the FTC's success against the equities. However, the court's conclusion was in error."). See also *id.* at *10–*11 (concurring opinion).

³⁴ *Id.* at *3. See also *id.* at *10–*11 (concurring opinion).

³⁵ *Id.* at 877. The *Whole Foods* majority even concluded that the FTC need not "settle on a market definition at this preliminary stage" because preliminary injunctions sought under Section 13(b) "are meant to be readily available to preserve the status quo while the FTC develops its ultimate case[.]" *Id.* at *5. See also *id.* at *10–*11 (concurring opinion).

for a rehearing en banc; the court declined Whole Foods' request on November 21, 2008.³⁶ While there may be no citable opinion of the court in either instance, it appears there is an inclination of some judges in the D.C. Circuit and the Eastern District of Virginia to lower the bar for the FTC to obtain preliminary injunctions to block mergers.

The lower legal threshold for a preliminary injunction advocated by the Commission raises the issue of whether the FTC can provide the parties to an enjoined merger with a practical opportunity to address the merits in the FTC's administrative process. The *Inova* case was the first test of the FTC's new efforts to do so, and—as the parties abandoned their transaction in response to the anticipated delay—it seems to have failed.

The FTC's Process Innovations in *Inova*

The procedures adopted by the FTC in the *Inova* case appeared to have had two objectives. First, the FTC wanted to adopt procedures it could use to help convince the federal court that an administrative trial on the merits would occur quickly, so that entry of a preliminary injunction would not automatically spell abandonment of the transaction. Second, independent of any federal court process, the FTC wanted to exercise increased control over the speed and substantive quality of the trial conducted before an administrative law judge. To do so, the FTC adopted procedural positions that departed drastically from past protocol.

1. Commencing Administrative Litigation While Federal Court Proceeding Pending. The FTC in *Inova* insisted that its administrative proceeding be commenced right away, rather than waiting for completion of the federal court process. While there have been some past cases in which the administrative process began before the federal court case was completed,³⁷ these have been rare, and discovery or other significant activity typically has awaited completion of the federal court case. Pressing forward with immediate discovery in the *Inova* administrative proceeding while the federal court action was pending may have helped the FTC convince the district court to severely limit its own review of the merits, but the court never said so.

It is not obvious, however, how moving forward immediately in the administrative case would move the administrative process to a quicker resolution, given that the common practice is for discovery conducted in the federal court proceeding to be available in the follow-on administrative trial. If that is done, waiting for completion of the preliminary injunction proceeding need cause no delay in the administrative litigation. Of course, it is possible that a district court would limit discovery more than the FTC administrative law judge, but that could be handled by supplementing the federal court discovery. Indeed, the FTC's existing fast-track procedures (discussed below)

³⁶ Order Denying Reh'g En Banc, *FTC v. Whole Foods Market, Inc.*, No. 07-5276 (D.C. Cir. Novv. 21, 2008). In denying the petition for a rehearing en banc, two circuit judges expressly stated that the judgment sets no precedent beyond the facts of the case. *Id.* at 2. Two weeks after the D.C. Circuit's refusal to rehear the case en banc, Whole Foods filed a lawsuit against the FTC, asking for an injunction barring the FTC from holding an administrative trial or from reviewing the case further. In the complaint, Whole Foods argues that the Commission violated Whole Foods' due process rights to a fair and impartial proceeding based on the Commission's "prejudgment biases," as well as its "unreasonable scheduling order" and failure to disqualify itself. Complaint, *Whole Foods Market, Inc. v. FTC*, No. 1:08-cv-02121, at 27–34 (D.D.C. Dec. 8, 2008).

³⁷ For example, the respondents in *Arch Coal* filed their answers, submitted declarations, negotiated a protective order and scheduling order, and engaged in preliminary discovery with the Commission during the pendency of the federal court action. *Arch Coal*, FTC Docket No. 9316, available at <http://www.ftc.gov/os/adjpro/d9316/index.shtm>.

explicitly contemplate administrative discovery conducted *after* completion of the preliminary injunction case to supplement the federal court discovery.³⁸

The merging parties in the *Inova* case, for their part, sought to put more importance on the preliminary injunction hearing before the district court. They moved for a stay of the administrative proceedings pending the outcome of the preliminary injunction action, and they sought additional discovery and a three-day evidentiary hearing in federal court.³⁹ But Commissioner Rosch, sitting as ALJ, denied the parties' motion and insisted upon dual track proceedings.⁴⁰ The FTC staff took full advantage of Commissioner Rosch's decision, serving upon the merging parties "numerous deposition notices (one for nearly every business day in the first three weeks of June), requests for production, and requests for inspection,"⁴¹ despite the lengthy and extensive investigation already conducted by FTC staff.⁴²

2. Imposition of Fast-Track Schedule. The Commission also sought to assure the district court that the administrative action would move quickly, at least compared to the normal pace of Commission cases. Indeed, even before proceedings in front of Commissioner Rosch commenced, it was clear that the FTC had decided to accelerate the administrative process. In its press release announcing the filing of its complaint against Inova, the FTC pledged to accelerate the timing of its administrative hearing and the Commission appeal process. Specifically, the Commission committed to "make every effort" to review the initial decision, if appealed, within ninety days of its issue.⁴³ This commitment is particularly interesting in light of Commission history. A review of the last seven matters in which the Commission issued a decision reveals that the average time on appeal—from the initial decision to the Commission's final order—has been 21.6

³⁸ 16 C.F.R. § 3.11A (a) ("Scope and applicability. This section governs the availability of fast-track procedures in administrative cases where the Commission files a collateral district court complaint that seeks preliminary injunctive relief . . ."). To qualify for a fast-track proceeding, there must either be a preliminary injunction already entered in the case, or there must be an evidentiary record developed *in a federal court proceeding* in which an injunction was not entered, that is sufficient to facilitate expedited review at the Commission. *Id.* § 3.11A (b)(1) (emphasis added). Either way, it seems clear that the fast-track rules contemplate on their face that the administrative case starts after the preliminary injunction is concluded.

³⁹ See Respondents' Motion to Stay Discovery and All Other Aspects of this Proceeding Pending Resolution of Preliminary Injunction Action, Inova Health Sys. Found. & Prince William Health Sys. Inc., FTC Docket No. 9326 (May 23, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080523respmostaydiscov.pdf>.

⁴⁰ Rosch stated that the Commission's Rules of Practice "encourage an expeditious resolution of administrative proceedings" and that moving forward with the administrative action was in the public interest and would benefit the parties regardless of the outcome of the federal court proceeding. Order Denying Respondent's Motion to Stay Administrative Proceedings, Inova Health Sys. Found. & Prince William Health Sys. Inc., FTC Docket No. 9326 (May 29, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf> ("The Rules governing these proceedings begin by articulating the Commission's policy that '[administrative] proceedings shall be conducted expeditiously.' 16 C.F.R. § 3.1."). See also Rules of Practice Amendments, 61 Fed. Reg. 50,640, 50,640 (Sept. 26, 1996) ("The agency's longstanding policy has been that, to the extent practicable and consistent with requirements of law, adjudicative proceedings shall be conducted expeditiously and that both the Administrative Law Judge and litigants shall make every effort to avoid delay at each stage of a proceeding.").

⁴¹ Joint Case Management Statement, Inova Health Sys. Found. & Prince William Health Sys. Inc., FTC Docket No. 9326, at 3 (May 28, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080528jointcasemngmntstmnt.pdf>.

⁴² See *supra* note 9.

⁴³ Press Release, Fed. Trade Comm'n, FTC and Virginia Attorney General Seek to Block Inova Health System Foundation's Acquisition of Prince William Health System (May 9, 2008), available at <http://www.ftc.gov/opa/2008/05/inova.shtml> ("Should there be an appeal, the commissioners commit to make every effort to issue an appellate decision approximately 90 days after receiving a notice of appeal (assuming no cross-appeal) or 120 days (assuming a cross-appeal).")

months, and the shortest took a full year.⁴⁴ Thus, the Commission in *Inova* was promising dramatic improvement over its actual prior performance. Considering that the parties would need to be given time to prepare their briefs on appeal and to ready themselves for oral argument before the Commission—and considering that the Commission hears all appeals *de novo*—the Commission’s ninety-day promise seems particularly ambitious.

At the commencement of the *Inova* administrative proceeding, Commissioner Rosch ordered that the FTC’s fast-track schedule be used in the case.⁴⁵ Under fast track, the ALJ must file an initial decision within fifty-six days following the conclusion of the evidentiary hearing and no later than 195 days after a “triggering event.”⁴⁶ The Commission must issue its final order within thirteen months after the triggering event.⁴⁷

The fast-track

procedure adopted by

Commissioner Rosch

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Fast-track proceedings are not automatic. To qualify for a fast-track proceeding under the Commission’s existing rules, one of two conditions must be met: (1) a federal court enters a preliminary injunction, or (2) a federal court proceeding results in an evidentiary record that facilitates expedited review.⁴⁸ If either of these conditions is satisfied, a respondent may elect to proceed under the fast-track rules.⁴⁹ The Federal Register entry codifying fast track explicitly states that a fast-track proceeding is appropriate in cases where both parties have obtained full discovery through the preliminary injunction proceeding, and the incorporation of the district court’s evidentiary record “is likely materially to facilitate prompt resolution of the adjudicatory proceeding.”⁵⁰

The fast-track procedure adopted by Commissioner Rosch in *Inova* was a hybrid procedure that was actually contrary to FTC rules. First, as explained above, fast track was intended to speed up administrative review by giving the ALJ the discretionary authority to accept “discovery from

⁴⁴ See Schering-Plough Corp., FTC Docket No. 9297, available at <http://www.ftc.gov/os/adjpro/d9297/> (18 months between initial decision and Commission’s final order); PolyGram Holding, Inc., FTC Docket No. 9298, available at <http://www.ftc.gov/os/adjpro/d9298/index.shtml> (13 months between initial decision and Commission’s final order); Chicago Bridge & Iron Co., FTC Docket No. 9300, available at <http://www.ftc.gov/os/adjpro/d9300/index.shtml> (26 months between initial decision and Commission’s final order); Rambus Inc., FTC Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/> (38 months between initial decision and Commission’s final order); Ky. Household Goods Carriers Ass’n, FTC Docket No. 9309, available at <http://www.ftc.gov/os/adjpro/d9309/index.shtml> (12 months between initial decision and Commission’s final order); N. Tex. Specialty Physicians, FTC Docket No. 9312, available at <http://www.ftc.gov/os/adjpro/d9312/index.shtml> (14 months between initial decision and Commission’s final order); Evanston Nw. Healthcare Corp., FTC Docket No. 9315, available at <http://www.ftc.gov/os/adjpro/d9315/> (30 months between initial decision and Commission’s final order).

⁴⁵ The FTC’s fast-track rules were adopted in 1995 in response to criticisms regarding the slowness of the FTC administrative process. Then-FTC Chairman Robert Pitofsky established a Special Task Force on Administrative Adjudication in an effort to find ways to streamline the adjudicative process, and the result was the decision to afford respondents the opportunity to have their administrative trial proceed under a fast-track procedure. 61 Fed. Reg. 50,640 (Sept. 26, 1996).

⁴⁶ 16 C.F.R. § 3.11A(c)(2)(iii). A triggering event is the latest of (1) the entry of a preliminary injunction, (2) service on the last respondent of the Commission’s determination with respect to whether there is an adequate evidentiary record, (3) service on the first respondent of the Commission’s administrative complaint, or (4) filing with the Secretary by the last respondent of a notice electing fast-track procedures. *Id.* § 3.11A(c)(1). Once the ALJ has issued his initial decision, parties must notify the Commission of an intent to appeal within three days after service of the ALJ’s decision. The appellant then has twenty-one days to file its appeal brief; reply briefs are due within fourteen days from the filing of the appeal brief. *Id.* § 3.11A(c)(2)(iv)–(vi).

⁴⁷ *Id.* § 3.11A(c)(3). The Commission may extend its thirteen-month deadline if (1) it intends to disclose in camera material in its opinion, or (2) it determines that adhering to the deadline would “result in a miscarriage of justice due to circumstances unforeseen at the time of the respondent’s election of the fast-track proceeding.” *Id.* § 3.11A(2)(c)(3).

⁴⁸ *Id.* § 3.11A(b)(1). Respondents must make this election within three days after the latest of (1) entry of a preliminary injunction, or (2) being served with notice of the Commission’s determination with respect to whether there is an adequate evidentiary record, or (3) being served with the Commission’s administrative complaint. *Id.* § 3.11A(b)(2).

⁴⁹ FTC PRACTICE & PROCEDURE MANUAL, *supra* note 22, at 136.

⁵⁰ 63 Fed. Reg. 7526, 7527 (Feb. 13, 1998).

Notably, despite being available to respondents in merger cases for almost a decade, no respondent has ever elected the fast-track process. Perhaps this is because fast track is not fast enough to make a meaningful difference.

the preliminary injunction hearing . . . as if the material had been discovered and presented in the administrative proceeding;” it was never intended by the FTC to be a substitute for a preliminary injunction.⁵¹ Indeed, entry of a preliminary injunction is identified in the rules as the “triggering event” if one is entered.

Additionally, the fast-track process was set up to be an alternative that respondents in FTC proceedings could elect, not a process that would be forced upon them. The rules are clear that only the respondents in an FTC administrative proceeding are permitted to elect the fast-track schedule.⁵² Indeed, to emphasize the elective nature of the fast-track process, the rules provide that—in cases where there are multiple respondents—each and every respondent must elect to proceed under fast track in order for a case to be subject to such expedited proceedings.⁵³ Commissioner Rosch, however, imposed fast-track procedures on the *Inova* respondents over their objections,⁵⁴ insisting that fast track was in the hospitals’ best interest because it would expedite, rather than delay, the proceedings.⁵⁵

Notably, despite being available to respondents in merger cases for almost a decade, no respondent has ever elected the fast-track process. Perhaps this is because fast track is not fast enough to make a meaningful difference. Even under fast track, thirteen months would pass before the Commission renders a decision, and only then would the parties have an opportunity to present their case to a neutral trier of fact on appeal to a federal appellate court. By contrast, the preliminary injunction process—despite often functioning as a full trial on the merits—has generally proceeded rather quickly in FTC merger cases. In the last three preliminary injunction hearings sought by the Commission, the district court issued its decision an average of eighty-four days after the FTC filed its complaint in federal court.⁵⁶

⁵¹ 16 C.F.R. § 3.11A(b)(1)(ii).

⁵² *Id.* § 3.11A(a). (“The Commission will afford the respondent the opportunity to elect such fast-track procedures . . .”). The FTC effectively acknowledged that the merging parties must elect a fast-track proceeding in their press release announcing the merger challenge. *See* Press Release, *supra* note 4 (“*Inova* and PWHS will be offered FTC’s ‘Fast Track’ administrative trial procedure.”) (emphasis added).

⁵³ 61 Fed. Reg. 50,640, 50,641 n.3 (Sept. 26, 1996).

⁵⁴ Order Denying Respondents’ Motion to Stay Administrative Proceedings, *Inova Health Sys. Found. & Prince William Health Sys. Inc.*, FTC Docket No. 9326 (May 29, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080530orderdenying.pdf>. The merging parties in *Inova* argued that only they had the right to elect a fast-track proceeding, and that they had not chosen to do so in this case. Respondents’ Motion to Stay Discovery and All Other Aspects of this Proceeding Pending Resolution of Preliminary Injunction Action, *Inova Health Sys. Found. & Prince William Health Sys. Inc.*, FTC Docket No. 9326 (May 23, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080523respmostaydiscov.pdf>.

⁵⁵ Joint Case Management Statement, *Inova Health Sys. Found. & Prince William Health Sys. Inc.*, FTC Docket No. 9326, at 3 (May 28, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080528jointcasemngmntstmnt.pdf>.

⁵⁶ In *Whole Foods*, the district court opinion was issued seventy-two days after the FTC filed its complaint in federal court. *Whole Foods*, 502 F. Supp. 2d 1. In *Western/Giant*, the district court opinion was issued forty-seven days after the filing of the complaint in federal court. *Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725. Finally, in *Arch Coal*, the district court opinion was issued 134 days after the FTC filed its complaint. 329 F. Supp. 2d 109. In DOJ cases, the timing for a preliminary injunction is similar, but often slightly longer due to the fact that the DOJ often agrees at the outset to consolidate proceedings on its preliminary injunction motion with a trial on the merits of its demand for a permanent injunction. *See, e.g.*, *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (district court opinion issued 196 days after filing of the complaint); *United States v. UPM-Kymmene Oyj*, No. 03-C-2528, 2003 WL 21781902 (N.D. Ill. 2003) (district court opinion issued 101 days after filing of the complaint); *United States v. Sungard Data Sys. Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001) (district court opinion issued 23 days after filing of the complaint on account of acquired party in bankruptcy, thus necessitating an expedited trial).

The Commission, for its part, seems committed to applying the *Inova* schedule to future cases.⁵⁷ In a recent speech, Commissioner Rosch suggested that the FTC should play more of a judicial role in trying merger cases in administrative litigation before the FTC, regardless of the result of any preliminary injunction motion.⁵⁸ The FTC is now going forward with administrative proceedings at the Commission in the *Whole Foods* matter despite the fact that the case has been remanded to (and is now pending before) the district court to determine if enjoining the now-consummated merger is in the public interest.

Recently, the FTC proposed amendments to its rules to speed administrative discovery and hearings before ALJs, without regard to the pendency of federal court proceedings.⁵⁹ These rule changes should make the Commission's rules consistent with its practice in *Inova* and *Whole Foods*. However, the most significant problem with the Commission's attempt to impose an accelerated administrative proceeding as a substitute for a meaningful preliminary injunction hearing in federal court is that there is no evidence that it will work. No studies, reports, or analyses have been conducted (at least publicly) to support the conclusion that the sort of accelerated process attempted in the *Inova* case or proposed under the new rules is fast enough to enable parties to mergers to have their day in court at all. Instead, *Inova* stands as an example of the failure of the process contemplated by the FTC.

3. Appointment of Commissioner Rosch as Administrative Law Judge. The third unusual procedure in the *Inova* case was the appointment of Commissioner Rosch, a sitting Commissioner, as the administrative law judge. It appears that this was done, at least in part, to assure that the fast-track schedule would be imposed and the case would proceed rapidly. The *Inova* case represented the first time the FTC has taken the extraordinary step of designating a sitting Commissioner as the

⁵⁷ See Rosch, *supra* note 29, at 15 (“the Commission must somehow institutionalize the expertise and timing that occurred in the *Inova* matter”); Matthew Reilly, Comments at ABA Section of Antitrust Law Brown Bag Teleconference, An Autopsy of the FTC’s Challenge to the *Inova* Deal (July 22, 2008).

⁵⁸ See Rosch, *supra* note 29, at 16.

⁵⁹ Notice of Proposed Rulemaking and Request for Comment, Federal Trade Commission Rules of Practice 16 CFR Parts 3 and 4, 73 Fed. Reg. 58,832 (proposed Oct. 7, 2008). The proposed new rules would significantly affect the litigation schedule of merger and non-merger cases that come before the Commission. Included among the proposed changes are requirements that trials occur five months after the complaint is filed in merger cases, that respondents file an answer within fourteen days of service of the complaint, that the Commission—not the ALJ—decide dispositive pre-hearing motions, and that the length of trial be limited to the equivalent of thirty trial days. *Id.* Notably, the proposed rule changes do nothing to curtail the length of time that the Commission has to issue decisions on appeal, which is typically the most significant source of delay in Part 3 litigation. The new rules seem likely to disadvantage respondents in Commission administrative cases. See Geoffrey D. Oliver & Robert C. Jones, *FTC Rule Changes Would Squeeze Litigants*, COMPETITION LAW 360, Oct. 10, 2008, available at <http://competition.law360.com/articles/72262>.

Part of the problem with the use of fast track as an alternative to a federal court preliminary injunction process is that it typically follows a lengthy Hart-Scott-Rodino investigation. See Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. The HSR Act requires that most mergers be notified to the FTC and the DOJ, and the merging firms are precluded from closing their transaction until thirty days after such notification. If the investigating agency asks for more information (i.e., the agency issues a Second Request), then the merging firms may not close their transaction until thirty days after substantially complying with the request. Compiling a Second Request response often takes several months and several million dollars, during which FTC staff has ample time to prepare a case properly for presentation to a federal district court in a preliminary injunction proceeding. Indeed, FTC staff working on *Inova* acknowledged having compiled “tens of thousands of pages of documents” from third parties during the pendency of the Second Request response. Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendants’ Motion for a Scheduling Order and an Expedited Status Conference, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460-CMH/JFA, at 14 (E.D. Va. filed May 20, 2008). Unlike the FTC, the first opportunity for the merging parties to use compulsory process to gather information from the agency and from third parties occurs after the FTC files its motion for a preliminary injunction or its administrative complaint. See FTC PRACTICE & PROCEDURE MANUAL, *supra* note 22, at 132.

presiding ALJ in an FTC administrative proceeding.⁶⁰ In a recent postmortem teleconference discussing *Inova*, Inova's attorney contended that appointing a sitting Commissioner to oversee the matter was "inappropriate" and raised questions about the Commissioner's impartiality.⁶¹ Inova also objected that the appointment would leave the Commission short a Commissioner when the case is appealed.⁶² FTC staff, however, defended Rosch's appointment as ALJ, saying that—from the Commission's perspective—it was "the only way to reach a quick decision."⁶³

Appointment of Commissioner Rosch as administrative law judge in the *Inova* case may well have served the Commission's objective of assuring the federal court that the administrative litigation would move along quickly. An ALJ might have been less likely than Commissioner Rosch to ignore the Commission's own rules to impose fast-track procedures over respondents' objections. However, it would seem more appropriate for the Commission to change its rules to meet its objectives, and that is what the Commission now proposes to do, albeit after the fact.⁶⁴

Conclusion

The *Inova* case has been touted as a victory by the FTC.⁶⁵ It was a victory in the sense that the FTC successfully blocked a hospital merger, something it had been unable to do for many years. Indeed, it may be that consumers are better off as a result, as the FTC claimed in its press release

⁶⁰ Since *Inova*, the FTC has appeared to be following a similar approach in the *Whole Foods* administrative case that has been in progress while appeals have been pending in federal court. Commissioner Rosch initially acted as the administrative law judge and presided over the case's schedule. Whole Foods opposed Rosch's involvement, arguing that he must recuse himself on account of his vote to investigate the merger in June 2007. Respondent's Motion to Disqualify the Commission as Administrative Law Judge, Whole Foods Market, Inc., FTC Docket No. 9324, at 2 (Aug. 22, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/080822respmodisqualifycomm.pdf>. The Commission, with Commissioner Rosch participating, denied Whole Foods' recusal motion. Order Denying Respondent's Motion to Disqualify the Commission, Whole Foods Market, Inc., FTC Docket No. 9324 (Sept. 5, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/080905order.pdf>. On September 10, in an unprecedented step, the Commission itself set the schedule for the case, requiring—among other things—that the hearing commence on February 16, 2009, and last no more than thirty days. Scheduling Order, Whole Foods Market, Inc., FTC Docket No. 9324 (Sept. 10, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/080910schedulingorder.pdf>. However, a month later, the Commission issued an order designating Acting Chief Administrative Law Judge D. Michael Chappell as the ALJ for the administrative hearing set to begin in February 2009; the Commission also promised to make every effort to issue a decision in the case—if appealed—within forty-five days from the date of oral argument. Order Designating Administrative Law Judge, Whole Foods Market, Inc., FTC Docket No. 9324 (Sept. 5, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/081020order.pdf>.

⁶¹ Deborah Feinstein, Comments at ABA Section of Antitrust Law Brown Bag Teleconference, An Autopsy of the FTC's Challenge to the Inova Deal (July 22, 2008). See also Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, Inova Health Sys. Found. & Prince William Health Sys. Inc., FTC Docket No. 9326 (May 23, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf>.

⁶² Indeed, in *Inova*, the respondents noted that appointing a sitting Commissioner to act as ALJ precludes that Commissioner from further service in the capacity of a Commissioner with respect to that case. Due to a current vacancy at the Commission, Inova concluded that this "creates the distasteful prospect that approval or disapproval of this merger by the Commission might ultimately be determined by a mere two-person majority of three sitting commissioners." Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge, Inova Health Sys. Foundation and Prince William Health Sys. Inc., FTC Docket No. 9326, at 4 (May 23, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080523respmorecuseroschasalj.pdf>.

⁶³ Reilly, *supra* note 57.

⁶⁴ Notice of Proposed Rulemaking and Request for Comment, Federal Trade Commission Rules of Practice 16 CFR Parts 3 and 4, 73 Fed. Reg. 58,832 (proposed Oct. 7, 2008).

⁶⁵ Press Release, Fed. Trade Comm'n, Statement of FTC's Bureau of Competition regarding Inova Health System's Announced Withdrawal of Plans to Merge with Prince William Health System (June 6, 2008), available at <http://www.ftc.gov/opa/2008/06/inova.shtml> ("We believe our success in stopping this proposed deal is a major victory for Northern Virginia consumers and affirms the critical importance of competition in the health care industry.")

after the transaction was abandoned.⁶⁶ But that claim was never proven because there was no trial. However, as an example of how hospital mergers can be challenged and tried administratively before they are consummated, *Inova* was a failure. There was, in fact, no trial under any standard before any trier of fact.

There are a number of potential reasons why the FTC may have lost hospital preliminary injunction cases in the past. Perhaps the theories of anticompetitive harm in those cases were not sound, so that the FTC should have lost them. Or perhaps the FTC staff did a poor job of presenting the cases and convincing the courts of the likely effects of the mergers. It is also plausible that the federal courts put more weight on issues that the FTC believes deserve little or no weight. Former Chairman Muris appears to have concluded that the problem is with the federal judges themselves—that these judges simply have failed to properly analyze the evidence the FTC presented.⁶⁷ The present Commission may well agree or may believe, as Commissioner Rosch suggests, that a preliminary injunction process simply provides insufficient time to develop and present the necessary evidence. The Commission's actions in the *Inova* case are a logical response to such perceptions. The goal was to limit the role of the federal court proceeding substantially and to instead try the case at the FTC through various procedural changes that seek to hasten the pace of administrative review. But if anything, the *Inova* case raises more questions than it answers:

- Was there any basis from the hospital merger retrospective study (or otherwise) to conclude that the federal courts in those cases had been wrong? If they were not wrong, then was there a need to change how these cases have been handled and the legal standard used?
- Does the *Inova* case provide any reason to modify the historic view that a preliminary injunction will doom a merger because it will not be able to endure the time required for a full trial on the merits, even under the FTC's fast-track process or its proposed new rules?
- Regardless of the answers to the questions above, is there a good reason for the FTC to commence administrative litigation while a federal court case is pending and discovery is occurring in that case, if the merging parties themselves would prefer to wait?
- Should the FTC evaluate its HSR investigation processes and procedures in conjunction with its administrative litigation rules, considering the combined time a merger would be pending if it is challenged and the extensive combined discovery and trial preparation time available in both steps?
- Why should the legal standard for federal court review of a merger turn on whether the merger happens to be investigated by the FTC rather than the Department of Justice?

The answers to these questions are likely to emerge as the Commission challenges further mergers in federal courts in various circuits, pursues its proposed rule changes, and attempts to conduct administrative hearings on an accelerated schedule. ●

⁶⁶ *Id.*

⁶⁷ See William M. Sage, *Protecting Competition and Consumers: A Conversation with Timothy J. Muris*, 22 HEALTH AFF. 101, 103 (2003) (suggesting that judges do not always understand how to evaluate evidence in hospital merger cases and noting that “[c]ourts have used the Elzinga-Hogarty patient flow test to define geographic markets, which I think doesn’t make a lot of sense in a health care context”). Muris has also noted that the hospital merger retrospective will “allow the Commission to give guidance on what it thinks is the appropriate methodology for evaluating a hospital merger.” *Id.* Additionally, Muris notes that “at the margin, being in front of the local judge [in a preliminary injunction hearing] may make a difference” in the outcome of the case. *Id.* at 104.