such further action as may be appropriate.

DATES: The policy statement was effective on June 21, 1995. Comments will be received until September 5, 1995.

ADDRESSES: Comments should be sent to the Secretary, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580. Comments will be entered on the public record of the Commission and will be available for public inspection in Room 130 during the hours of 9 a.m. until 5 p.m.

FOR FURTHER INFORMATION CONTACT: William Baer, Director, Bureau of Competition, (202) 326–2932, or Ernest Nagata, Deputy Assistant Director for Policy and Evaluation, Bureau of Competition, (202) 326–2714.

SUPPLEMENTARY INFORMATION: 1. On June 21, 1995, the Commission issued the following statement to accompany its policy statement:

Commission Statement to Accompany Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction

Introduction

The Federal Trade Commission is charged with ensuring that U.S. consumers are protected from higher prices, lower quality, and lessened innovation that could result from anticompetitive mergers.[1] Historically, the Commission has resolved merger cases through administrative trials or consent orders. In recent times, most of the Commission's antitrust complaints have been settled through administrative consent orders.[2] For those relatively few merger cases in which the Commission has litigated, the Commission's usual practice in recent years has been first to seek a preliminary injunction in federal district court to prevent the consummation of the proposed transaction.[3] The Commission has won most of its challenges at the federal district court level.[4]

There have been five instances in the last ten years in which a federal district court has refused to grant a preliminary injunction sought by the Commission, and the Commission then proceeded with a challenge to the merger in administrative litigation.[5] In such circumstances, the determination to continue a merger challenge in administrative litigation is not, and cannot be, either automatic or indiscriminate. In any given case, the evidence, arguments, and/or opinion from the preliminary injunction hearing may, or may not, suggest that further proceedings would be in the public interest. The Commission's guiding principle is that the determination whether to proceed in administrative litigation following the denial of a preliminary injunction and the exhaustion or expiration of all avenues of appeal must be made on a case-by-case basis.

The Commission is issuing the attached Statement to clarify the process it follows in deciding whether to pursue administrative litigation following denial of a preliminary injunction. The Statement also notes that, if necessary, the Commission will adopt certain procedures to ensure parties to a transaction the opportunity to have their views heard by the Commission before it makes its determination.

In order to place these issues in context, this Statement begins by addressing the value of administrative litigation and why a preliminary injunction proceeding, regardless of its outcome, may not in and of itself provide a sufficient basis for the resolution of complex merger litigation.

The Value of Administrative Litigation

The Federal Trade Commission was created in part because Congress believed that a special administrative agency would serve the public interest by helping to resolve complex antitrust questions. Congress intended that the Commission would play a ''leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission.'' [6] It was expected that an administrative agency was especially suited to resolving difficult antitrust questions, and that the FTC should be the principal fact finder in the process: it is ''within the Commission's primary responsibility'' to draw inferences of competitive consequences from the underlying facts.[7]

The Commission has fulfilled that special role in a number of important merger cases.[8] Administrative cases provide valuable guidance on how the Commission applies the relevant legal standards and analytical principles as they evolve over time. Application of these standards and principles to concrete factual situations, developed in a full record, can provide insight into why certain mergers are likely to harm competition and result in consumer injury, and why others may not. Especially because the Supreme Court has addressed substantive issues of merger law only rarely in recent decades,[9] and because antitrust law during that time has evolved in response to economic learning, the Commission's opinions have been an important vehicle to provide guidance to the business community on how to analyze complex merger issues.

---

[1] As used herein, the term ''merger'' includes mergers, acquisitions, joint ventures, and equivalent transactions.

[2] For FY 1990 through FY 1994, the Commission resolved complaints through administrative consent orders, without authorizing either federal court or administrative litigation, in 67% of the merger enforcement actions that the Commission authorized.

[3] For FY 1990 through FY 1994, the Commission authorized preliminary injunction actions in 29% of the merger enforcement actions that it authorized; in 4% of its merger enforcement actions, the Commission authorized administrative trials without first proceeding to federal court for a preliminary injunction.

[4] During the five-year period covered by fiscal years 1990–1994, five out of seven of the Commission's motions for a preliminary injunction were granted. In one case, *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991), the district court's denial of a preliminary injunction was reversed on appeal. For fiscal years 1985–1989, the Commission was successful in six out of nine motions for a preliminary injunction.

[5] *R.R. Donnelley & Sons*, Dkt. 9243, is currently before the Commission on respondents' appeal from the Initial Decision of the administrative law judge. In *Owens-Illinois, Inc.*, Dkt. No. 9212, the Administrative Law Judge (''ALJ'') found liability but the Commission reversed. 1987–1993 Transfer Binder (CCH) ¶ 22,731 (Sept. 11, 1989) (Initial Decision), *rev.d*, 1987–1993 Transfer Binder (CCH) ¶ 23,162 (Feb. 26, 1992). In *Promodes, S.A.*, Dkt. No. 9928, the administrative complaint was settled. 113 F.T.C. 372 (1990). In *Occidental Petroleum Co.*, Dkt. No. 9205, both the ALJ and the Commission found liability. 1987–1993 Transfer Binder (CCH) ¶ 22,603 (Sept. 30, 1988) (Initial Decision), *aff'd*, 5 Trade Reg. Rep. (CCH) ¶ 23,370 (Dec. 22, 1992), *appeal dismissed pursuant to stipulation and modified order*, 5 Trade Reg. Rep. (CCH) ¶ 23,531 (Jan. 14, 1994). In a fifth case, *Lee Memorial Hospital*, Dkt. No. 9265, the administrative proceeding, which was filed prior to the district court's denial of a preliminary injunction, has been stayed pending appeal.

[6] *Hospital Corp. of America* v. *FTC*, 807 F. 2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) (''*HCA*'').

[7] *HCA*, 807 F. 2d at 1386.

[8] For example, the Commission's decision in *Occidental Petroleum* provided important guidance on supply side substitution and coordinated interactions in merger analysis. The Commission's decision in *HCA* explained how coordination could occur in an industry with differentiated and non-homogeneous products. Judge Posner, writing for the Seventh Circuit affirming that decision, called it a ''model of lucidity.'' 807 F. 2d at 1385. The Commission's decision in *American Medical International, Inc.*, 104 F.T.C. 1 (1984) examined in detail the dimensions of price and non-price competition in the hospital industry and discussed efficiencies considerations in analyzing a merger.

[9] The Supreme Court's last opinion on substantive merger law was *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974).