role of the Commission as an unbiased decisionmaker.[10]

A third scenario is that the case is weak, respondents move to withdraw the matter from adjudication, and complaint counsel file nothing in support of the complaint.[11] In such an instance, the Commission may agree with the respondents and dismiss the adjudication, or it may disagree and order that the proceeding continue. There seems no good reason not to have this occur on the public record. Again, private discussions between the Commission and its staff can create a public perception of unfairness to the respondents arising from apparent complicity between the prosecuting attorneys and the purportedly impartial adjudicators—the very danger the separation of functions requirements of the Administrative Procedure Act and the Commission's *ex parte* rule are designed to avoid.[12]

In addition to undermining the separation of functions at the Commission, the new rule limits the Commission's discretion to decide when individual cases should be in adjudication and remain on the public record. The exercise of discretion in an adjudicative matter is a responsibility of the Commission, not an occasion for apology. This responsibility, which must be carried out consistent with the law and with fundamental fairness, should not be ceded without a reason for doing so. Here, I see none. Both the policy to maintain the separation of deliberative and prosecutorial functions and the appearance of having done so are enhanced when the Commission retains its discretion to determine the appropriate disposition of a motion to withdraw from adjudication. The shifting of a portion of that discretion in favor of the respondents may appear open-minded, but, in the long term, it will disserve the Commission and the public interest.

On balance, the Commission and the public would be better served if the Commission retained its discretion to decide which, if any, cases should be withdrawn from adjudication following denial of a preliminary injunction. The new rule is likely to undermine the integrity of the Commission and its adjudicative process by breaking down the wall between the Commission's prosecutorial and adjudicatory roles in a manner inconsistent with the separation of functions requirement of the Administrative Procedure Act and its own *ex parte* rule.

I dissent.

[10] Off-the-record discussions with the respondents, followed by dismissal of the complaint, also may create misperceptions of unfairness and favoritism, with the implication that nonpublic communications that could not bear the light of day influenced the Commission's decision.

[11] This assumes that complaint counsel find themselves unable to make a principled argument in support of the complaint. *See* Jose Calimlin, M.D., Dkt. No. 9199 (June 24, 1986) (''complaint counsel represent the Commission's prosecutorial decision as embodied in the allegations of complaint and in the notice of contemplated relief''); *accord* R.J. Reynolds Tobacco Co., Dkt. No. 9206 (interlocutory order, Dec. 1, 1986); *see also* R.J. Reynolds Tobacco Co. (interlocutory order, Dec. 10, 1986) (purpose of adjudication is ''to subject the Commission's complaint to an adversarial test'').

[12] *See* 5 U.S.C. § 552(d); 16 C.F.R. § 4.7.

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Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases

AGENCY: Federal Trade Commission.

ACTION: Notice of policy statement and request for public comment.

SUMMARY: The Federal Trade Commission has adopted a policy statement regarding the use of prior approval and prior notice provisions in Commission orders entered in merger cases. Under the policy, the Commission will no longer require prior approval of certain future acquisitions in such orders as a routine matter. The Commission will henceforth rely on the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino (HSR) Act, as the principal means of learning about and reviewing mergers proposed by such companies. Narrow prior notice or approval requirements will be retained for certain limited situations described in the Commission's Statement of Policy. The Commission also stated that it would initiate a process for reviewing the retention or modification of prior approval requirements in existing Commission orders.

Although these policies are already in effect, the Commission is soliciting comment from interested persons.

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: Daniel P. Ducore, Assistant Director for Compliance, Bureau of Competition, (202) 326–2526.

SUPPLEMENTARY INFORMATION: Under previous Commission policy, Commission orders entered in merger cases generally have required that the respondent obtain the Commission's prior approval for certain future acquisitions in the same market. The Commission has reassessed that policy and has determined that prior approval of future acquisitions by a respondent should no longer be required as a routine matter. The Commission has issued the following Policy Statement as an exercise of its discretion.

The Commission invites comments on the issues discussed in this notice, in the Policy Statement and in the separate statement of Commissioner Azcuenaga.

Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions

Introduction

Under longstanding Commission policy, Commission orders entered in merger cases generally have contained a requirement that the respondent seek the Commission's prior approval for any future acquisition over a de minimis threshold within certain markets for a ten-year period.[1] In a few cases, the Commission also has required prior notice of intended transactions that would not be subject to the premerger notification and waiting period requirements of section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino (HSR) Act.[2] Prior approval and notice requirements are imposed pursuant to the Commission's broad authority to fashion remedies to prevent the recurrence of anticompetitive conduct.

In light of its now extensive experience with the HSR Act, the Commission has reassessed whether it needs to continue regularly to impose prior approval requirements. Although prior approval requirements in some cases may save the Commission the costs of re-litigating issues that already have been resolved, prior approval provisions also may impose costs on a company subject to such a requirement. Moreover, the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur.

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

[2] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.