The Sedona Conference Journal

Volume 14 2013

Administrative Trials at the Federal Trade Commission in Competition Cases

J. Robert Robertson

Recommended Citation: J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 SEDONA CONF. J. 101 (2013).

For this and additional publications see:
https://thesedonaconference.org/publications

ADMINISTRATIVE TRIALS AT THE FEDERAL TRADE COMMISSION IN COMPETITION CASES

*J. Robert Robertson**
Hogan Lovells US LLP
Washington, DC

Unlike the Department of Justice ("DOJ"), which can seek relief only in federal court, the Federal Trade Commission ("FTC") has its own internal administrative hearing process as an alternative. Cases are heard by an administrative law judge ("ALJ") in a trial setting that is more comprehensive and thorough than one might see in an antitrust case brought in a federal or state court. The FTC's Rules of Practice for these adjudicative proceedings, commonly called "Part 3" proceedings,[1] detail most of the applicable rules. Counsel on both sides can easily be disadvantaged if they are not thoroughly familiar with these rules and the FTC's and the ALJ's interpretations of them.[2]

Compared to a typical federal court case, the FTC's adjudicative procedure is cumbersome and tedious. Yet, with recent rule changes at the FTC, the pre-trial proceedings move rapidly – often in tandem with parallel federal court proceedings. Both sides must be prepared to move at a high speed beginning with the first status hearing, held within ten days of the answer, which is due fourteen days after the complaint is issued.[3] Often, at that first status hearing, the parties give abbreviated opening statements to the ALJ, discuss discovery, and within a few days, the ALJ will issue a protective order and scheduling order, and the race will have begun. Within five months from the complaint (eight months in conduct cases), the trial of often two-to-three months commences. This may seem like a long time to prepare for trial. But considering that a mere ten weeks after that initial conference with the ALJ, fact discovery is usually concluded – often including dozens of depositions and millions of documents produced in discovery – one has to be prepared for battle very early in the game.

---

* Partner at Hogan Lovells US LLP; formerly the Chief Trial Counsel at the Bureau of Competition of the Federal Trade Commission and was lead counsel for the FTC in the matters of *CCC Holdings, Chicago Bridge, Union Oil Co. of California (Unocal), Polypore,* and was lead counsel for the defendants in *Laboratory Corporation of America (LabCorp).* This paper expresses the author's views and not those of any other party. Some of the author's views were previously expressed in J. Robert Robertson, *FTC Part 3 Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare*, 20 ANTITRUST, at 12, Spring 2006, before major amendments to the Part 3 Rules were implemented by the FTC beginning in 2009. The author also participated in the drafting of the 2009 amendments. Special thanks to Henry Su for his comments.

1 The term arises from the placement of the Rules in the third part of Title 16 of the Code of Federal Regulations, at 16 C.F.R. § 3.1 *et seq.* ("Rules").

2 It is difficult for a respondent to find ALJ opinions related to procedure or evidence. The FTC Staff usually has its own precedent file with such rulings. The best way is to do a targeted search in the ftc.gov web site in the folder for adjudicative proceedings.

3 Rule § 3.21.

In the past, the Part 3 procedure was extraordinarily slow. Cases often dragged on for years.[4] These delays harmed the FTC's ability to persuade federal courts to enjoin mergers to maintain the status quo pending the Commission's decision on the merger. Parties often argued (and still do) that it made no business sense to allow a merger to languish pending the FTC's slow process to a decision.[5] To most merging companies and many courts, it appeared unreasonable to allow the FTC to take a case through an injunction proceeding, potentially obtain an inconsistent ruling from the ALJ, and then, potentially, years later, for the Commission itself to rule to allow or decide against the merger.[6]

To help resolve the timing problem, the Commission revised its Rules of Practice in 2009 to guarantee a fast proceeding (from complaint to initial ALJ decision) in every case.[7] The abbreviated schedule has worked in the few cases that have gone through the process. The schedule is still much longer than schedules typically used by federal courts in similar cases,[8] but the discovery phase follows nearly the same timing as a parallel federal proceeding. The result of the change usually requires parties to combine the discovery in Part 3 with a parallel federal proceeding. The intended effect of the change was to put pressure on federal courts not to dig too deep into the FTC's complaint, especially in merger challenges, but the courts still have not bought into that concept.[9] The main reason for that reluctance is that the FTC process still has the added layer of an FTC appeal and decision that seems to add 6-12 months to a final decision.

The FTC still has not solved this issue and may never do so. The only two apparent solutions to the problem are (i) that the FTC trim back the time it takes to render a final Commission decision or (ii) create a formal policy, similar to the one that it uses for federal preliminary injunction decisions, to decide quickly that it will not proceed forward on a case that FTC complaint counsel lost before the ALJ, except when it is the public

---

4 FTC has had a rule limiting its own time for decisions since at least 1994 (currently 45 days); however, it has often not followed its own timing constraints in antitrust cases. *See, e.g.,* Federal Trade Commission, *Notice of Federal Trade Commission Approval of Procedures to Govern the Preparation of Final Orders and Opinions in Adjudicative Proceedings* (Apr. 7, 1994), *available at* http://ftc.gov/os/adjpro/adjpropreppprocedures.pdf; *cf. In re Rambus*, FTC Docket No. 9302, docket *available at* http://ftc.gov/os/adjpro/d9302/index.shtm (first opinion issued twenty-three months after oral argument; final opinion issued eight months later); *In re Chicago Bridge*, FTC Docket No. 9300 ("*Chicago Bridge*"), docket *available at* http://ftc.gov/os/adjpro/d9300/index.shtm (first opinion issued fourteen months after oral argument; final opinion with divestiture issued five years after oral argument); *In re Polypore*, FTC Docket No. 9327 ("*Polypore*"), docket *available at* http://ftc.gov/os/adjpro/d9327/index.shtm (complaint was filed on September 10, 2008 and a final Opinion issued on December 10, 2010), *aff'd,* 686 F.3d 1208 (11th Cir. July 11, 2012). Prior to the amendment to the Rules, cases often took longer than a year just to get through the discovery process. *See Chicago Bridge* (discovery lasted two years).

5 Delays at the FTC are not always caused by the Commission or its Staff. For example, in pre-merger challenges, merging parties have an incentive to give the federal court schedule priority if they believe they have a better chance at winning before the court rather than the ALJ. In post-merger cases, the merged party is often reaping the rewards of the merger and a delay in a potential divestiture may be in its interest. In both *Chicago Bridge* and in *Polypore*, most of the delays were at the request of the respondent, not complaint counsel. In both cases, the respondent moved repeatedly to reopen the record.

6 The *Donnelley* case is the best example of how the system worked before 2009. *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 431, 433–34 (7th Cir. 1991). The Commission lost the preliminary injunction case in federal court; the case was then tried in Part 3, where the ALJ ordered divestiture; yet, on appeal, the Commission reversed the ALJ and ruled in favor of Donnelley— four years after the proceedings began. *See In re R.R. Donnelley & Sons Co.*, FTC Docket No. 9243, 1995 WL 17012641, 120 F.T.C. 36 (1995).

7 *See* Federal Trade Commission, *FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice* (Apr. 27, 2009), http://www.ftc.gov/opa/2009/04/part3.shtm. FTC Rules of Practice, §§ 3.41 (allowing a hearing of 210 hours in a merger case, typically lasting between six and nine weeks), 3.46 (post-hearing briefing – 31 total days), 3.51 (initial 70-day decision and 30-day extension), 3.52 (appeal to FTC – minimum of 55 days), and 3.54 (FTC decision – 45 days). More recently, *In re Promedica Health System*, FTC Docket No. 9346, the case began on January 6, 2011 and reached a Commission decision on June 25, 2012. *See* docket *available at* http://www.ftc.gov/os/adjpro/d9346/index.shtm. Similarly, *In re North Carolina Bd. of Dental Examiners*, FTC Docket No. 9343, the FTC took the case from a complaint to a Commission decision in about 18 months. Docket *available at* http://www.ftc.gov/os/adjpro/d9343/index.shtm.

8 In *United States v. H&R Block, et al.*, for example, the case went from the complaint through a trial on the merits and a final opinion in less than six months. 833 F. Supp. 2d 36 (D.D.C. 2011).

9 In *FTC v. Lab. Corp. of Am.,* No. SACV 10-1873 AG (MLGx), 2011 WL 3100372 (C.D. Cal. 2011), the court said that the time to a final decision was still too far off for it to ignore the need for it to decide the case; in *FTC v. Graco,* No. 12-CV-307 (D. Minn. 2012), the court likewise set a full schedule and hearing to hear the matter, although it would have taken place after the scheduled Part 3 trial. *But see FTC v. ProMedica Health Sys., Inc.*, No. 3:11-CV-47, 2011 U.S. Dist. LEXIS 33434, at *3, *164 (N.D. Ohio Mar. 29, 2011) (making a decision based on summaries of testimony and no live witnesses and recognizing that an administrative trial was scheduled to begin in two months with an initial decision expected in seven months).

interest to continue the challenge.[10] Such a rule would put Part 3 proceedings on nearly an equal footing with parallel federal proceedings.

The Advantages and Disadvantages of Part 3 Versus Federal Court.

It is important to understand why the FTC uses Part 3 proceedings rather than federal court in certain cases. The choice between these two forums appears to be driven more often by statute than by strategy. Under both Section 5 of the FTC Act and Section 7 of the Clayton Act (in a merger case), the FTC has "wide discretion in its choice of a remedy."[11] Yet neither of these statutes expressly authorizes the FTC to seek anything but equitable relief (e.g., an injunction, divestiture, or prohibition) in a Part 3 case. In a post-acquisition case, the FTC also may ask a federal court to order a preliminary injunction requiring an immediate divestiture,[12] but typically the FTC has used federal courts in merger cases only for pre-acquisition injunctive relief to maintain the status quo, with the threat of a Part 3 proceeding to hear the actual merits of the case.

Under Section 13(b) (usually in merger cases), the FTC may seek injunctive relief in court only "pending the issuance of a complaint" in Part 3 for a hearing on the merits.[13] When the FTC seeks preliminary relief from a federal court under Section 13(b) for a pending merger, it has advantages that the DOJ lacks.

First, unlike the DOJ, the FTC can attempt to obtain preliminary relief in court and then – win or lose – can try the case again in a Part 3 proceeding. Second, in an FTC merger case brought under Section 13(b), a federal court is authorized only to grant preliminary relief rather than combine a preliminary injunction with a permanent injunction hearing and decide the merits of the case, as courts often do in DOJ cases.[14] Thus, the FTC can almost always argue for a lesser standard – especially in "sliding-scale" jurisdictions[15] – at a preliminary hearing; whereas, the DOJ must be prepared to argue the case on the merits much earlier in the process.

In a post-acquisition case, however, the FTC gains little advantage by filing in federal court, unless it can convince the court to order divestiture as preliminary relief, which may be extremely rare but not impossible. In non-merger cases, it may be a closer call for the FTC whether to go to federal court or to stay within its own adjudicative forum. On the one hand, in Part 3, the FTC has the advantage that appellate courts must, in most cases, defer to the Commission's fact-finding and policy decisions. This can be helpful if the FTC is trying to articulate and apply Section 5 in a novel way.[16] On the other

10 *Policy Statement on Administrative Litigation Following the Denial of a Preliminary Injunction* and accompanying statement of the Commission (June 21, 1995), reprinted at 60 Fed. Reg. 39741 (Aug. 3, 1995), *available at* http://www.ftc.gov/os/fedreg/1995/august/950803administrativelitigation.pdf.

11 *See, e.g., North Texas Specialty Physicians*, FTC Docket No. 9312, Commission Opinion 37 (Nov. 29, 2004), *available at* http://www.ftc.gov/os/adjpro/d9312/051201opinion.pdf (*citing, inter alia, FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957)).

12 *See FTC v. Elders Grain, Inc.*, 868 F.2d 901, 907 (7th Cir. 1989) (Posner, J.) (affirming an order of rescission of an acquisition as a form of preliminary injunctive relief).

13 15 U.S.C. § 53(b) (Commission may seek an injunction if it has "reason to believe" that any person is "violating, or about to violate, any provision of law enforced by the Federal Trade Commission, and . . . that the enjoining thereof pending the issuance of a complaint by the Commission . . . would be in the interest of the public").

14 *See, e.g., United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011); *United States v. SunGard Data Sys., Inc., et al.,* 172 F. Supp. 2d 172, 179 (D. D.C. 2001) (relying on Fed. R. Civ. P. 65(a)(2)).

15 Some circuits allow for a lesser showing of the likelihood of success on the merits, in all cases, for a preliminary injunction when there is a higher showing of either irreparable harm or the equities. *See, e.g., FTC v. Whole Foods Market*, 548 F. 3d 1028, 1035 (D.C. Cir. 2008).

16 *See, e.g., N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 360–63 (5th Cir. 2008) (adopting an "inherently suspect" standard fashioned by the Commission in Part 3), *cert. denied*, 129 S. Ct. 1313 (2009); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36–37 (D.C. Cir. 2005) (same).

hand, a losing respondent can appeal to any appellate court in which the respondent does business. This can put the FTC at a disadvantage in circuits that have already expressed opposition to the FTC's legal position.[17] In short, there are many reasons why the FTC might choose to go to federal court for some kinds of cases and to Part 3 for others. But for post-acquisition cases and cases in which the FTC is trying to clarify the law (*e.g.,* to clarify the law of *Noerr-Pennington* in the *Unocal* case), Part 3 is likely the most suitable forum under the statutory scheme.

From a trial lawyer's perspective, witness examination and general trial strategy is often the same whether the case is tried in federal court or in Part 3. But there is one significant difference that drives trial strategy: in federal court, a trial attorney must simplify the case to focus the judge on core issues; in a Part 3 hearing, the trial attorney and the ALJ have the additional burden of creating an administrative record for the FTC to hear the case *de novo* and to support an administrative decision.[18] In a perfect world, these two strategies should lead to identical results, but in the real world, they do not. Over the last twenty years, a typical merger trial in federal court has lasted approximately 5-9 days – even on the merits. At the FTC, even under the new Rules of Practice, a hearing on a merger case is likely to last as long as 30 trial days, stretched over two months. In a conduct case, a federal court is likely to try a civil antitrust case in a matter of weeks; whereas, an FTC conduct case can last as long as 3-4 months (*i.e., Rambus* and *Unocal*), even under the new Rules.[19]

Due to the nature of the administrative proceeding, each Part 3 case tends to require enormous resources and time to present, during which time counsel must persuade initially one of the ALJs, who have been extremely independent. An outsider to the Commission might think that the ALJs simply report to the Commission and do what they are told. While the FTC Staff often wishes that were the case, it simply is not so. In the past, the Commission has reversed ALJs both when they have ruled against *and* even for the Staff.[20] This divide between the Commission and the ALJs creates one benefit: a potential for a fairer hearing for respondents. Under the Administrative Procedures Act, 5 U.S.C. § 500, *et seq.*, an ALJ is an independent Article I judge and while he or she is employed by the Commission, he or she does not work for or report to the Commissioners.[21] The ALJs at the FTC[22] have made their independence extraordinarily clear. Indeed, respondent or complaint counsel would make a serious mistake if either believes that the ALJ speaks for the Commission. My own experience is that the ALJs more often turn to their own decisions, the Federal Rules of Evidence, federal court opinions, and other APA decisions

17 *See, e.g.*, *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065–66 (11th Cir. 2005) (rejecting the Commission's rule-of-reason approach to "pay-for-delay," pharmaceutical settlement agreements, enunciated in a Part 3 case, based on prior precedent in *Valley Drug Co. v. Geneva Pharms.*, 344 F.3d 1294, 1312 (11th Cir. 2003)). But the FTC finally defeated the 11th Circuit's position in *FTC v. Actavis, Inc., et al.* (U.S., dkt. 12-416, June 17, 2013).

18 5 U.S.C. §§ 556(e), 557(c); Rule § 3.54(a).

19 The *Intel* case, FTC Docket No. 9341, was scheduled to take as many as 322 hours (45-50 trial days, or nearly three months with scheduled holidays and other hearings). *See* Complaint, *available at* http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf. In the last year, multiple cases were scheduled for the same time period and were set for 2-3 days per week, which would have further extended the length of the trial. The trial in the recent case of *Matter of McWane, Inc.*, et al., Dkt. 9351 (Comm'n appeal pending), began on September 4, 2012 and concluded on November 2, 2012. It included over 2,000 exhibits, 53 witnesses, 6,045 pages of trial transcript, and 3,052 pages of post-trial briefs. Initial Decision (May 8, 2013) *available at* http://www.ftc.gov/os/adjpro/d9351/130509mcwanechappelldecision.pdf.

20 The Commission reversed the ALJ in *Schering* and in *Rambus*, but has also reversed ALJ decisions that were in favor of the Staff. The best example is the *Donnelley* case, *infra* note 17. *See also Beltone Elecs. Corp.*, FTC Docket No. 8928, 1982 WL 608293, 100 F.T.C. 68 (July 6, 1982) (Reversing ALJ and dismissing its original complaint); *Int'l Ass'n of Conf. Interpreters*, FTC Docket No. 9270, 1997 WL 33483304, 123 F.T.C. 465, 660–61 (Feb. 19, 1997) (reversed in part). But this strategy can backfire when a regional circuit does not defer to the Commission's judgment. *See, e.g.*, *Schering Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005) (court of appeals choosing the fact finding of the ALJ over that of the Commission); *see also McWane*, *supra,* n. 19 (After trial, the ALJ rejected three of the seven counts, including the conspiracy and invitation to collude counts).

21 5 U.S.C. § 3105; Rule § 3.42(f).

22 There is currently only one ALJ appointed. *See About the Office of Administrative Law Judges*, FEDERAL TRADE COMMISSION, http://www.ftc.gov/ftc/alj.shtm (last visited Sept. 27, 2012).

for procedural and sometimes even substantive precedent before considering the Commission's views on the matter – unless the issue is clearly decided by the Rules of Practice or the law of the case.

During this entire process, in addition to following an order of proof, examining witnesses, and arguing the case, the parties typically create a huge record of thousands of exhibits, dozens of witness examinations, and thousands of pages of post-trial findings of fact, attachments, and other briefing that are better measured in pounds, rather than pages. So how does one get from day one to the end? Without going over each and every Rule and interpretation, the following should give the uninitiated a broad overview of the Part 3 process.

Pre-Complaint.

Every Part 3 case begins with an initial pre-complaint investigation called "Part 2" proceedings.[23] Typically, during this period, potential respondents present their own arguments informally, not only to the FTC Staff but also, in some cases, to each Commissioner in the hope of preventing the issuance of a complaint. During this initial time period, the Staff will seek documents and conduct numerous investigational hearings, which are similar to depositions. It is often critical at this stage for litigation counsel for respondents to be involved in preparing the case for possible litigation for three reasons: First, testimony from investigational hearings will likely be admitted at a Part 3 trial,[24] and it is therefore foolish to ignore case preparation at this stage of an investigation. Second, once a complaint is filed, discovery moves so quickly that a potential respondent who does not prepare a case for potential litigation during the commencement of investigational hearings will likely never catch up. Finally, those final discussions with Commissioners will likely be the last time the potential respondents will be allowed to discuss the case with them until the Part 3 proceeding is completed or suspended.[25] Once a complaint is issued, even the FTC's complaint counsel and staff cannot communicate with the Commission until the end or withdrawal of the proceeding, except by written motion.[26]

At the conclusion of this investigation process, the Staff then recommends to the Commission, with additional recommendations from the Bureaus of Competition and Economics, a proposed disposition of the matter.[27] If the Commission decides to issue a litigation complaint,[28] under the Part 3 rules, the Commission could hear the case on its own, assign one commissioner to hear the case, or assign the case to an ALJ, which is almost always the case.[29]

23 As their name suggests, these investigative proceedings are governed by a set of rules that can be found in the second part of Title 16 of the Code of Federal Regulations.

24 Rule § 3.43(b). Recently, one respondent unsuccessfully attempted to keep investigational hearings out of evidence. *See In re McWane, Inc., et al,* Dkt. No. 9351, *available at* http://www.ftc.gov/os/adjpro/d9351/120815aljorddenyrespmoprecludecc.pdf.

25 *See* 5 U.S.C. § 557(d)(1).

26 *See* 5 U.S.C. § 554(d); *cf. William Jefferson & Co. v. Bd. of Appeals & Assessment No. 3*, No. 11-55223, 2012 U.S. App. LEXIS 18323, at *17 (9th Cir. Aug. 29, 2012) (approving use of an ethical wall between attorneys representing the county assessor and attorneys advising the board of appeals).

27 For example, after a ten-month extensive inquiry by the Staff, the Commission decided not to issue a complaint in *Royal Caribbean Cruises, Ltd.*, FTC File No. 021 0041 (Statement of the Commission) (Oct. 4, 2002), *available at* http://www.ftc.gov/os/2002/10/cruisestatement.htm. Some have been critical of the fact that a Commissioner may be approached by both the Staff and a potential respondent before the complaint and then later become the final adjudicator after a trial. But the alternative, a lack of access to the Commissioners prior to a complaint being issued, would be far more troublesome.

28 Even in cases that involve a consent order that the Staff has already negotiated with the respondent, the Commission still issues a complaint.

29 Rule § 3.42(a).

Commencement of the Case.

In normal practice, the Commission will vote for a complaint but then wait until the next morning to tell the respondents of the decision.[30] Once that notice has been given, if the case requires a federal complaint, the FTC Staff, through the Counsel Supporting the Complaint (commonly referred to as Complaint Counsel) will file a federal complaint in court. Often that complaint is filed with a motion to file it under seal.[31] Typically, that motion to seal is decided by a judge before the complaint is accepted for filing. Then, the assigned federal judge often will call the parties in for a scheduling conference, and the federal case begins.

While the federal case is beginning, the Part 3 case clock starts once the respondent has been served with the administrative complaint, which is filed in the FTC Secretary's office and is typically posted on the FTC website. An answer is then due within 14 days.[32] Unlike federal procedure, a respondent cannot just move to dismiss and ignore the duty to answer. Any "motion to dismiss, … motions to strike, and motions for summary decision" will be referred to the Commission for decision and usually will not delay the schedule.[33] In most cases, unless a party is willing to have the Commission decide a case on the pleadings, such early motions are usually a complete waste of effort.

Within five days of the answer, the parties must have their first discovery conference, exchange initial disclosures (Rule § 3.31(b)) and be prepared to offer the ALJ their comments on a proposed schedule.[34] During these initial few days, appearances should be filed, which will allow the ALJ to know the counsels' email and other contact information.

Generally, the ALJ will then send the parties a proposed scheduling order, which includes the Judge's own rules for discovery and procedure that may not be found in the Rules of Practice. Then, within 10 days of the filing of the answer, the ALJ will hold a scheduling conference (usually in the Commission Hearing Room, where the trial will also occur) to discuss the schedule, pending motions and other topics set forth in Rule § 3.21.

At the end of the scheduling conference, the ALJ then allows the parties to make a brief opening statement about the case. This presentation is critical because it is likely that this will be the last time either party will actually see the ALJ before the final pre-trial conference, and it is always important for the parties to make sure that the ALJ understands the parties' positions in the case in order to decide the dozens of motions that usually follow.

Within two days of the scheduling conference, the ALJ will have delivered to the parties a scheduling order and a standard protective order (that is set forth in Rule § 3.31). No discovery can commence until the scheduling order has been issued. It is critical for the parties to follow the ALJ's rules in the Scheduling Order, especially in how to file pleadings. The Secretary of the FTC's office is like the clerk of court for almost all filings, but the ALJ usually has his own preference on how pleadings should be copied or filed with his chambers.

30 This notice is most often given by the Bureau Director by phone to counsel of record.
31 In some jurisdictions, as is the case in the District of D.C., the FTC must file the complaint with its motion and supporting evidence as well. *See* D.D.C. Local Rule 65.1(c).
32 Rule § 3.12.
33 Rule § 3.22.
34 Rule § 3.21.

As one can see, moving through the first two weeks of a Part 3 case is like racing through a maze; and I have not gone through all the details of each and every one of the Rules of Practice. A case becomes even more complicated if it involves a preliminary injunction proceeding.

Coordinating Parallel Proceedings.

In many FTC competition cases, especially pre-merger challenge cases, the agency files a request for a preliminary injunction in federal court and a complaint in Part 3 simultaneously. Federal courts have historically been willing and interested in hearing the facts of the case with live testimony at a preliminary injunction hearing. Discovery is often truncated, but allowed. But even that process still may take 2-3 months to get to such a hearing. During that period, the Part 3 process will not only start, but fact discovery will nearly be completed.

Thus, it is common for the parties to coordinate the discovery between these two proceedings, so that one does not have to do everything twice. To help accommodate this necessary coordination, the FTC amended its Rules to allow for the admission of "[r]elevant, material, and reliable" testimony and expert reports (and other hearsay) from related proceedings where "the Commission and at least one respondent did participate."[35] Such evidence includes depositions and testimony from a federal case in which the FTC and one party participated and even investigational hearings in Part 2 investigations. This is meant to include proceedings like a related preliminary injunction case, but not a civil case in which the FTC did not participate.

Venue of Part 3 and Federal Proceedings.

Under the Rules, the ALJ can order that the trial occur in "more than one place."[36] The reality is that this almost never happens.[37] The apparent reason is that it is difficult for an ALJ at the FTC to hold hearings outside of DC when the same judge is managing other matters simultaneously. There is no ability for a respondent to ask for a different location due to convenience or expense.

Nevertheless, federal courts have often been willing to transfer preliminary injunction cases for forum non conveniens reasons.[38] Thus, in the appropriate case and even when the FTC refuses to file a case in a location that is convenient to the respondents and third parties, a respondent may be able to persuade a court to transfer the federal case to a more convenient location. Often a more convenient forum is also where the merging parties will find a court more sympathetic to their positions because it is more familiar with the local issues that may be relevant to the case. Transfer of venue may also help clarify that most of the actual discovery (*i.e.,* depositions) will occur locally and not in Washington, D.C.

Pre-Trial Discovery.

Part 3 discovery is fairly similar to that found in any complex federal court case, except that the ALJs typically allow for more motion practice and argument than most

35 Rule § 3.43(b).
36 Rule § 3.41(b)(1).
37 The current ALJ typically denies any such request unless both parties agree. *See, e.g., Polypore, available at* http://www.ftc.gov/os/adjpro/d9327/090324aljorddentrespmochangehearing.pdf.
38 A recent example is the *FTC v. Graco Inc.,* FTC Docket No. 9350, decision *available at* http://www.ftc.gov/os/adjpro/d9350/2120126gracomemo.pdf; *see also FTC v. Cephalon,* 551 F. Supp. 2d 21, 25 (D.D.C. 2008); *FTC v. Lab. Corp. of Am.*, No. 10-2053-RWR, 2010 U.S. Dist. LEXIS 141320 (D.D.C. Dec. 3, 2010).

federal judges would tolerate. Nevertheless, the ALJs have recently become quite responsive to motions and will rule quickly on every pending motion. In some rare cases, the ALJs will hear an emergency motion by phone but are not known to hear any motions in person or in the courtroom, except during the scheduled pre-trial conferences.

Depositions, requests to admit, interrogatories, depositions of company representatives and other standard discovery tools are quite typical.[39] Often depositions are videotaped, and much of the deposition record will be designated for the record at trial.[40] Depositions are often treated as evidence depositions (usually as admissions of an adverse party or of "unavailable" witnesses) that may be used extensively throughout the proceedings. As in federal court, counsel may sign subpoenas for witnesses (forms are provided by the Secretary's office). Document discovery is fairly normal, with a recent emphasis on imaging exhibits, which is also becoming more common in federal court.

Due to the fast pace of discovery, one must be careful not to wait until all documents are produced to begin depositions. The discovery period is just too abbreviated to stage each kind of discovery in that way. Moreover, one must be diligent to push for discovery responses, and if responses are not forthcoming, meet/confer and if necessary move to compel quickly. It is common for parties to find themselves at the end of discovery and find that the Rules and the ALJ will simply not allow them any more time.

The ALJ can limit the scope of discovery, upon motion, but, in general, discovery in Part 3 is far more expansive than one would typically see in federal court.[41] Third parties are often surprised by the difficulties they encounter in attempting to quash or limit discovery in response to a Part 3 subpoena. It would probably be more sensible for discovery not to be as broad as it is in most Part 3 proceedings, but the parties' and the ALJ's desire to create a record for the Commission and for an eventual appeal tends to expand the record and hence the discovery that creates it.

One note about expert discovery: It usually occurs after fact discovery and is also very quick. If a party is not preparing for expert discovery throughout the case, it will be caught short at the end. The ALJs are very diligent about excluding expert opinions that were not properly disclosed during the discovery period.

Other Pre-Trial Procedures.

Due to the bureaucratic nature of Part 3, it has become common for parties and third parties to file numerous motions during the discovery phase. Most of these motions are, frankly, useless and most are denied. The ALJs usually do not hear any argument on motions but are very quick to decide them (although they have 14 days to do so) and typically write multi-page opinions explaining the reasons for the decision.[42] Non-dispositive motions that go to the substance of the case (e.g., excluding experts or limiting evidence) are usually treated as motions in limine and are often decided at the final pre-trial conference or deferred until the issue arises at trial.[43]

---

39 *See* Rules §§ 3.31-3.39.
40 My own view is that videotaped depositions in Part 3 are usually a waste of money. Depositions are not read or played at trial, except in impeachment or perhaps at closing argument.
41 *See* Rule § 3.31(c)(2).
42 *See* Rule § 3.22, especially the page limits and timing for motions.
43 The current view of what motions in limine are in the Part 3 context is best described in a recent ALJ order in *McWane*, *available at* http://www.ftc.gov/os/adjpro/d9351/120814aljordgrantanddenyinpart.pdf.

Dispositive motions are generally referred to the Commission for decision. Due to the time limits for filing and for the Commission's response, it is almost impossible for either party to file and receive a decision on such a motion before the commencement of trial.[44]

Motions to settle the case through consent are also referred to the Commission for decision. If complaint counsel does not agree to the proposed settlement, a respondent may still file a motion to the ALJ who then will forward it to the Commission if the ALJ believes there is a reasonable possibility of settlement.[45] Then, only the Commission can decide to withdraw the case from Part 3 in order to discuss a potential consent order. If both complaint and respondent's counsel agree to the motion, and the motion complies with Rule 3.25, the Secretary will issue an order that withdraws the case from Part 3, usually for a set period of time so that the Commission and its staff can discuss the proposed consent order with the parties.[46]

There are some critical motions that one might need to make regarding exclusions of evidence or motions to compel (which are usually granted), but the bottom line is that the Rules of Practice were written in a way that makes it difficult, if not impossible, for the parties to use motion practice to avoid or delay a trial.[47] Thus, in my view, the parties should use motion practice sparingly and spend their time preparing for trial.

After fact discovery is concluded, the ALJ will hold a final pre-trial conference.[48] Those conferences have usually been quite lengthy, mostly because the ALJ is supposed to resolve evidentiary issues at that conference. Parties usually show up with their final witness lists and exhibits, along with hundreds of objections, and motions in limine. The ALJs have been quite diligent in moving through each and every issue. But one litany of discourse seems to occur in almost every pre-trial conference: parties often believe they can argue for the admission of each and every one of the thousands of exhibits on the proposed exhibit list. This is a foolish exercise. For good cause, the ALJ will exclude a category of evidence, but this is rare. Instead, after the parties argue for a few hours, the ALJ will undoubtedly tell the parties to work it out and come back with 2-3 narrow categories of argument, which will be heard and usually denied.

In the majority of cases, most relevant evidence will come in – even reliable hearsay. Under the current Rules of Practice § 3.43(b), ***all:***

> Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair.

44 *See* Rule § 3.22(a). In *McWane*, however, the Commission did provide its decision within the 45-day deadline set by Rule 3.22(a), and before the scheduled trial. *See* Commission Order, *available at* http://www.ftc.gov/os/adjpro/d9351/120809mcwaneorder.pdf.
45 Rule § 3.25(c).
46 *Id.*
47 As Rule 3.1 makes clear, the Commission's stated policy is to conduct Part 3 proceedings expeditiously and make every effort to avoid delay at any stage of the proceedings.
48 *See* Rule § 3.21(e).

> … If otherwise meeting the standards for admissibility described in this paragraph, depositions, investigational hearings, prior testimony in Commission or other proceedings, expert reports, and any other form of hearsay, shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay.

In other words, unless there is a good reason to keep evidence out,[49] the ALJ is likely to allow for its admission. Documents from the parties are likely to be admitted (as admissions or business records), and third-party documents can easily be admitted with an appropriate declaration.[50]

The Trial and Aftermath.

Trials in Part 3 are often long and, with some exceptions, similar to bench trials in federal court. Most trials are held in the Commission's large hearing room, which looks like an older court room, but which has good video (LCD and plasma screens) and audio equipment and is supported by an excellent staff. The acoustics however are poor, and the large room is so packed with seating (usually empty chairs) that it has little space for any visual exhibit displays. But the electronic trial presentation system works well with trial presentation software.

The trial begins with opening statements of no more than 2 hours for each side, after which complaint counsel calls the first witness.[51]

Witnesses testify from a chair stuck in the far side of the front of the room, and counsel must question the witness from a large podium about thirty-five feet away. The witness, the ALJ, and each counsel table have LCD screens to see documents. But it is still common to give the witness a binder of hard copies of exhibits.

The day-to-day procedure in the hearing room is much like any bench trial. Nevertheless, trial in a Part 3 proceeding is generally a slow process. Trial days usually begin at 9:00 or 9:30 and end at 5:00-5:30, unless the ALJ agrees to continue the hearing to finish a witness's testimony. The ALJ will usually allow for a break in the morning, a lunch break, and one break in the afternoon. It is uncommon for counsel to put on more than two witnesses in a day. Counsel (against their own interest, in my view) often make numerous objections, which the ALJs often deal with in detail, allowing sometimes unnecessary and lengthy argument by counsel.

Witnesses are usually called just once, meaning that adverse witnesses called by complaint counsel are typically put on as witnesses on direct by respondent's counsel in the same session. Experts are usually not allowed to pretend they are fact witnesses (giving a second closing argument, as one might see in a jury case). Experts are usually confined to what work they actually did. Counsel are allowed to cross-examine any adverse party or witness.[52]

---

49 *See, e.g., Intel Corp.*, Dkt. No. 9341, 2010 FTC LEXIS 45 (F.T.C. May 6, 2010) (ALJ order denying motion to admit the European Commission's decision on grounds of unfair prejudice, undue delay, and cumulativeness).
50 *See* Rule § 3.43(c).
51 Rule § 3.41(b)(5).
52 *See* Rule § 3.41(d).

As for the rules of evidence, the Commission's Rules of Practice give little guidance except to explain in Rule § 3.43(b) that "relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded." One simply has to accept that the hearing is an administrative hearing under the APA, under which even reliable, relevant hearsay can be admitted.[53]

In the absence of a Rule or precedent, however, the ALJ will defer to the Federal Rules of Evidence and relevant case law from the federal courts or similar administrative tribunals. However, the purpose of Part 3 proceedings is to create the record for the Commission and thus it is more likely that evidence will be admitted.[54]

There are other reasons for voluminous records. For example, both complaint counsel and respondents know that the Commission will hear the case de novo, regardless of what the ALJ does, and also understand that even evidence that is rejected by the ALJ can still be used by the Commission.[55] It is also usually unclear which circuit court of appeals may have jurisdiction over an appeal, because under Section 11(c) of the Clayton Act[56] and Section 5(c) of the FTC Act,[57] a respondent may appeal to any circuit where the "violation occurred" (Clayton Act), where the "method of competition or the act or practice in question was used" (FTC Act), or where it "resides or carries on business." Moreover, in typical cases, that could include many, if not all, of the regional circuits. Thus, it is common for complaint counsel to attempt to put on evidence to support different theories of the case to ensure that the case will be affirmed on appeal.[58]

Despite the length of a typical trial, one must remember that it is a timed trial of approximately 30 trial days, unless extended by the Commission itself.[59] In the initial complaint, and in the Rules, the parties are given a limit of hours for the trial and are allowed an equal amount of time for asking questions, arguing motions, etc. A rebuttal case is almost always not allowed. Closings are generally scheduled for 2 hours per side no more than 5 days after the last filed proposed findings after trial.

Post-Trial Procedures.

At the conclusion of the trial (within 21 days of the closing of the hearing record), the parties must file proposed findings of fact and conclusions of law as well as a brief.[60] These are typically huge sets of documents that collectively number in the thousands of pages. It is critical for counsel to work with the court reporter to get daily transcripts and prepare the post-trial filings during the trial. There is simply not enough time to prepare such voluminous pleadings after closing argument.

---

53 *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948) ("[A]dministrative agencies like the Federal Trade Commission have never been restricted by the rigid rules of evidence."); *In re Am. Home Prods. Corp.*, 1981 WL 389401, 98 F.T.C. 136 (Sept. 9, 1981) (Initial Decision) ("[U]nder the Commission's Rules of Practice, all relevant and material evidence – whether it is hearsay or not – is admissible, as long as it is reliable.").

54 The need for a record has also driven the ALJs to demand briefing on nearly every issue, even on small evidentiary issues that might be ruled on by a district judge during trial without even an argument. The lengthy findings of fact and conclusions of law are often several hundred pages long for each side. For example, the Proposed Findings of Fact and Conclusions of Law in *Chicago Bridge* (not including the briefs) were 214 pages (Complaint Counsel), *available at* http://www.ftc.gov/os/adjpro/d9300/030225cc findfactandconoflaw.pdf and 335 (Respondents), *available at* http://www.ftc.gov/os/adjpro/d9300/030327respcorrectfindoffact.pdf. Even recent cases, such as *Polypore* and *North Carolina Bd. of Dental Examiners*, FTC Docket No. 9343 (a less fact-intensive case), yielded post-trial briefing of 2,350 and 1,501 pages respectively.

55 *See* Rule § 3.43(i) (Offers of Proof).

56 15 U.S.C. § 21(c).

57 15 U.S.C. § 45(c).

58 *See, e.g., Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 826-27 (6th Cir. 2011) (affirming the Commission's opinion based on the alternative full rule-of-reason analysis, rather than the principal quick-look analysis).

59 The general hearing rules are found in Rule § 3.41.

60 *See* Rule § 3.46, which contains numerous requirements for the filing.

Within 70 days (with some exceptions) of the filing of the last reply findings,[61] the ALJ issues what is called an Initial Decision, which because of the typically voluminous underlying record is usually lengthy as well.

Commission Appeal.

Once the trial has finished and an Initial Decision has issued, the process has only just begun. The Initial Decision is not binding on the Commission, which hears all cases de novo after briefing and oral argument.[62] The rules for appeal are quite detailed and must be followed strictly.[63] If the respondent loses the appeal, it may then appeal to any circuit court of appeals in which the "violation occurred" or in which they "reside or conduct business."[64] Factual findings by the Commission, "if supported by evidence, shall be conclusive."[65] Moreover, courts will generally defer to the Commission's choice of a remedy.[66]

Conclusion.

This brief overview should give the reader a hint that Part 3 procedures are complex, and the process begins with a rapid discovery process and ends with a lengthy trial and potentially, a lengthy process for appeal. But the process can be quite fair if one understands the rules well and prepares for trial early in the case – optimally, before the complaint is even issued.

61 Rule § 3.51(a).
62 Rule § 3.54(b) (Commission "will adopt, modify, or set aside the findings, conclusions and rule or order contained in the initial decision").
63 *See* Rule § 3.52.
64 15 U.S.C. § 21(c). *See also* 15 U.S.C. § 45(c).
65 *Id.*; *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934). *Cf. Schering Plough Corp. v. FTC,* 402 F.3d 1056 (11th Cir. 2005) (court choosing the fact finding of the ALJ over that of the Commission).
66 *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *Polypore Int'l, Inc. v. FTC,* 686 F.3d 1208, 1218-19 (11th Cir. 2011).