FTC v. Inova:
A Preview of the FTC's New Plan for Merger Review?

By Mark J. Botti, Esq.
David E. Altschuler, Esq.[1]

On September 25, 2008, the Federal Trade Commission (FTC) issued a Notice of Proposed Rulemaking proposing a comprehensive overhaul of the agency's rules governing Part 3 proceedings.[2] The reforms seek to reduce significantly the time it takes for merger challenges to proceed from complaint issuance to initial decision, dramatically expand the role of the agency's Commissioners in the early stages of Part 3 adjudication, and clarify and streamline the discovery process.[3]

While the antitrust bar analyzes and debates the proposed revisions in the upcoming weeks, the FTC's recent challenge to the acquisition of Prince William Health System by not-for-profit hospital chain Inova Health System Foundation provides an instructive case study of what merger challenges under the FTC's new regime might look like. In that case, the FTC employed many of the procedural tactics that have been codified in the new rules to great success, culminating in Inova's June 6, 2008 announcement that it was abandoning its acquisition of Prince William in response to "unusual process changes by the [FTC]."[4]

These "process changes"—which included tapping a sitting Commissioner (and outspoken critic of district court merger review) to serve as ALJ and proposing an expedited schedule that would bring the challenge before an agency tribunal within four months — helped convince U.S. District Court Judge Claude M. Hilton to adopt the FTC's position that an upcoming preliminary injunction hearing be narrowly confined as provided in *Food Town*.[5] "I believe that the defendant's motion here . . . is an invitation for me to get involved in trying this case," Judge Hilton explained, referring to Inova's request for a three-day evidentiary hearing with live witnesses. "That is an invitation I'm going to decline. This case needs to be tried before the Commission."[6]

Judge Hilton's endorsement of the FTC's effort to navigate substantive review of the merger away from the district court and towards its Part 3 tribunal effectively ended the transaction and allowed the FTC to claim its first victory in a hospital merger challenge in years.[7] However, while the FTC's procedural moves paid immediate dividends in Inova, it remains to be seen whether the FTC can actually deliver on a promise of expedited review (whether through the new rules or otherwise) and displace district courts in the process.

Judge Hilton's ruling was also significant because it reflected deferential scrutiny under Section 13(b) at a time when the standard for Section 13(b) preliminary injunctions is undergoing important review. As the Inova merger challenge played out before Judge Hilton, the FTC was awaiting word from the D.C. Circuit in the *Whole Foods* case, where the agency had argued that the district court had applied the wrong standard under Section 13(b) in denying its preliminary injunction.[8] The D.C. Circuit has since reversed the district court's determination, but its opinion largely sidestepped the FTC's arguments and provides little concrete guidance to district courts for future cases. The uncertainty regarding Section 13(b) that remains in *Whole Foods'* wake may frustrate the FTC's efforts to wrest merger review from district courts and return it to the agency.

This article explores these topics.

Inova Health System is the largest hospital system in Northern Virginia, with five general acute care inpatient hospitals and nearly 1,900 licensed beds. On August 1, 2006, Inova announced that it had entered into an agreement with Prince William Health System to acquire Prince William and integrate its 180-bed Manassas, Virginia facility into the Inova system. The company claimed the merger would result in a capital investment of over $200 million in Prince William, expand access to high-quality services, and significantly improve quality of care.[9] The transaction—which followed Inova's 2005 acquisition of Loudoun Hospital in Leesburg, Virginia—would have allegedly given Inova control of 73 percent of the licensed beds in Northern Virginia and left four other competing hospitals in the region.[10]

On May 9, 2008, the FTC announced that it had unanimously approved the filing of an administrative complaint and a parallel proceeding in federal district court to block the merger, which the FTC represented was set to close on August 4, 2008.[11] The announcement followed an 18-month investigation that involved the gathering of testimony from over 70 non-parties and the turnover of millions of pages of documents.

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1 Mr. Botti and Mr. Altschuler practice antitrust law at Akin Gump Strauss Hauer & Feld LLP.

2 Press Release, Fed. Trade Comm'n, FTC Seeks Comments on Proposed Amendments to its Rules of Practice Regarding Adjudicative Proceedings (Sept. 25, 2008), *available at* http://www.ftc.gov/opa/2008/09/nprmpt3.shtm.

3 See id.

4 Press Release, Inova Health System, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), *available at* http://www.inova.org/news/2008/inovapwhsmergerstatement.jsp.

5 *FTC v. Food Town Stores, Inc*, 539 F.2d 1339 (4th Cir. 1976).

6 Transcript of Hearing at 12, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 30, 2008) ("May 30 Tr.").

7 *See, e.g.*, *FTC v. Tenet Healthcare Corp.*, 17 F. Supp. 2d 937 (E.D. Mo. 1998), *rev'd*, 186 F.3d 1045 (8th Cir. 1999); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, No. 96-2440, 121 F.3d 708, 1997 WL 420543 (6th Cir. July 8, 1997); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995). The Justice Department also suffered hospital merger defeats in *United States v. Long Island Jewish Medical Center.*, 983 F. Supp. 121 (E.D.N.Y. 1997) and *United States v. Mercy Health Services.*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997).

8 *See FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 28 (D.D.C. 2007), *rev'd*, No. 07-5276, ___ F.3d ___, 2008 WL 2890688, at *6-*9 (D.C. Cir. July 29, 2008).

9 Press Release, Inova Health System, Statement of Inova Health System Regard the Initial FTC Merger Challenge (May 9, 2008), *available at* http://www.inova.org/news/2008/statement_regarding_initial_ftc_merger_challenge.jsp.

10 Complaint for Preliminary Injunction ¶ 28, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 12, 2008) ("District Court Compl.").

11 *Id.* ¶ 11. The State of Virginia joined the FTC as a plaintiff in the federal court action.

"There is no question that Northern Virginia residents have benefited from the robust competition between Inova and Prince William Hospital through better services and lower prices," said Jeffrey Schmidt, Director of the FTC's Bureau of Competition, in a statement issued in connection with the filing of the complaints. "If Inova acquires Prince William Health System, this vital competition will be lost, health care prices will increase, and many residents will be forced to accept reduced health care coverage or no coverage at all."[12]

The same day the FTC filed its complaints, the agency entered an order designating J. Thomas Rosch, one of the FTC's four commissioners, as Administrative Law Judge. The order pointed to Rosch's "40 years of experience as a trial lawyer, predominantly in the context of complex competition law cases" and claimed that this experience "[made] him the best available candidate to sit as a trier of fact in this case." The order further noted that Rosch's appointment was fully consistent with Commission rules and the Administrative Procedure Act.[13]

B. Inova and FTC Submit Competing Plans for Conduct of Preliminary Injunction Hearing and Administrative Proceeding

On May 16, 2008, Inova moved in the district court for a scheduling order and expedited status conference. The motion, which caught the FTC by surprise, proposed that the district court conduct a three-day preliminary injunction hearing with eight hours of live testimony for each side.[14] In support, Inova argued that it was "essential that [the] Court hear directly from the people who work at Prince William" and suggested that the court would benefit from live testimony so it could better assess the credibility of the FTC's claims.[15] Inova urged the court to follow the lead of the court in *FTC v. Butterworth Health Corp.*, which heard live testimony and even toured the merging hospitals.[16]

Inova also asked the court to immediately authorize independent discovery in the district court action instead of channeling discovery exclusively through the FTC proceeding. Inova complained that the "procedures afforded in the administrative context [were] not sufficient for the short schedule required by the government's preliminary injunction action" and argued that authorizing fact discovery in connection with the preliminary injunction would be more efficient.[17]

The FTC filed a lengthy opposition to Inova's proposal on May 20. The opposition argued that the district court proceeding was only "a collateral preliminary injunction action . . . to maintain the *status quo* while the ALJ hears the full case on the merits" and noted that the agency was proposing a "very expedited" schedule with a full administrative trial to begin on September 4, 2008.[18] In light of the "inherently limited" scope of the district court's review, the FTC requested that the district court forgo live testimony and decide the preliminary injunction motion on papers and declarations alone.[19] With respect to discovery, the FTC declared itself open to negotiation, but pointed to the large amount of discovery already produced in the administrative proceeding and concluded that "a district court would be well-justified in denying any additional discovery in a preliminary injunction proceeding."[20]

At the same time it sought an expansive preliminary injunction proceeding, Inova took aggressive steps to try and shut down the FTC proceedings before Commissioner Rosch. On May 23, 2008, Inova filed a motion to stay discovery and "all other aspects" of the FTC proceeding pending resolution of the federal court action.[21] Relying on the FTC's Rules of Practice, as well as the agency's purported course of conduct in prior merger challenges, Inova argued that the federal "action should take priority over—and indeed inform the scope, nature, of timing of—the administrative proceeding."[22]

Inova also moved to recuse Commissioner Rosch as ALJ. Noting the FTC's recent string of hospital merger defeats and adverse rulings from its own ALJs, Inova charged that the circumstances surrounding Rosch's appointment left the "palpable impression of unfairness" and suggested that the appointment would "damage the legitimacy of the Commission's work in the eyes of the antitrust bar, the business community, and the general public."[23] Inova further complained that Rosch's appointment was a "deviat[ion] from standard procedure" that was particularly problematic given his involvement in the investigation of the merger prior to the complaint's filing.[24]

The FTC opposed Inova's bid to stay the administrative proceedings. The agency argued that its policies required it to conduct its proceedings "expeditiously" and claimed that all parties would benefit from speedy agency resolution.[25] The FTC acknowledged that unsuccessful preliminary injunction motions had spelled the end of merger

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12 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.shtm.

13 Order Designating Administrative Law Judge at 1-2, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 9, 2008), *available at* http://www.ftc.gov/opa/2008/05/inovafyi.shtm.

14 *See* Defendants' Memorandum in Support of Motion for a Schedule Order and Expedited Status Conference at 5-6, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 16, 2008) ("Inova Mem.")

15 *Id.* at 5.

16 946 F. Supp. at 1300.

17 Inova Mem. at 7-8.

18 Plaintiffs' Memorandum of Points and Authorities In Opposition to Defendants' Motion for a Scheduling Order and an Expedited Status Conference at 1-2, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 20, 2008) ("Plaintiffs' Mem.").

19 *Id.* at 3, 12.

20 *Id.* at 13.

21 Respondents' Motion to Stay Discovery and All Other Aspects of this Proceeding Pending Resolution of Preliminary Injunction Action at 1, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 23, 2008) ("Inova Stay Mot.").

22 *Id.* at 1. "[T]he federal court must be afforded the opportunity to make its own independent judgment, based on as much discovery as is practicable, without interference from the administrative proceeding adjudicating the merits of the case," the health system claimed. *Id.* at 5.

23 *Id*.

24 Respondents' Motion to Recuse Commissioner J. Thomas Rosch as Administrative Law Judge at 1, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 23, 2008) ("Inova Recusal Mot.").

25 Complaint Counsel's Opposition to Respondents' Motion to Stay Discovery and All Other Aspects of this Proceeding at 2, 6, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 27, 2008) (FTC Mem. in Opp'n to Stay").

challenges in other cases, but asserted that "[r]ather than supporting a stay of the administrative proceeding here, those cases are indicative of the difficulty the Commission has recently found in fashioning effective relief once the preliminary injunction is denied and the parties are permitted to close the transaction."[26] Meanwhile, the agency took no "formal position" on Inova's recusal motion, but nonetheless filed a six-page brief disputing all of Inova's arguments.[27]

C. Rosch and District Court Adopt FTC's Proposals

With the parties' dueling litigation plans on the table, the FTC and the district court held status conferences on consecutive mornings to determine which they would adopt. The FTC emerged the clear winner before both tribunals.

First, on May 29, 2008, Commissioner Rosch denied Inova's motion to stay the FTC proceeding. Adopting the FTC's arguments, Rosch explained that the FTC's procedures "encourage[d] an expeditious resolution of administrative proceedings" and rejected Inova's contention that a stay was required by the agency's "Fast Track" procedures.[28] Rosch also rejected Inova's suggestion that "the preliminary proceedings in federal district court are of greater importance than the plenary proceedings at the Commission," noting that this formulation "ha[d] it backward." "Congress enacted Section 13(b) of the Federal Trade Commission Act to strengthen the Commission's adjudicative powers not abrogate them," Rosch wrote.[29] Rosch then set a trial date of October 6, 2008.[30]

The next day, Judge Hilton rejected Inova's request for a three-day evidentiary hearing with live witnesses and denied it independent discovery.[31] Adopting the FTC's arguments on scope, Hilton declared the merger challenge "need[ed] to be tried before the Commission," not the district court, and emphasized that "[t]he issue before me is a *very narrow one*, as to whether or not a preliminary injunction should be issued."[32] In reaching his decision, Hilton ignored Inova's plea that a robust preliminary injunction hearing was necessary because the FTC proceeding would take at least a year to reach resolution.[33]

The back-to-back decisions dealt a devastating blow to Inova, which would now face a narrowly-constrained preliminary injunction hearing and a fast-approaching three-week administrative trial before Commissioner Rosch. Within a week, Inova and Prince William jointly announced the abandonment of the transaction.

II. Can a New Procedural Strategy Restore the FTC's Role in Merger Review?

The FTC's effort to prosecute simultaneously the federal court and administrative proceedings and promise an expedited Part 3 trial date was indeed, as Inova claimed, "unusual." In prior challenges, the agency was often content to forgo its own proceedings while an expansive federal district court preliminary injunction hearing ran its course.[34] For example, in *FTC v. Tenet Health Care Corp.*, the FTC filed its preliminary injunction action, litigated a five-day court hearing with live witnesses, and awaited the district court's ruling before even *filing* the administrative complaint.[35] Alternatively, in other challenges, the agency would file its administrative complaint early in the proceedings, but either affirmatively seek or fail to oppose an administrative proceeding stay pending resolution of the preliminary injunction.[36]

The FTC's willingness to put its own proceedings on hold had allowed federal district courts to cast the deciding vote on merger challenges—just as they do with

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[26] *Id.* at 3.

[27] The FTC's brief left no doubt regarding its actual position on the recusal: "To credit Respondents' arguments, one must disregard a clear and long-standing FTC rule authorizing appointments like this, an explicit exemption for Commissioners from the cited provision of the Administrative Procedure Act, and routine Commission practice. Respondents' arguments do not warrant recusal of Commissioner Rosch in this matter, or any future Commissioner appointed to sit as presiding official in an adjudicative proceeding under circumstances similar to those presented herein." Complaint Counsel's Response to Respondents' Motion for Recusal of Commissioner Rosch at 6, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 27, 2008) ("FTC Recusal Statement").

[28] "The Fast Track procedures were an effort by the Commission to expedite, not delay proceedings" and were not "designed . . . as a substitute for an Administrative Law Judge's own efforts to expedite the proceedings," Rosch wrote in a decision formalizing the opinion he issued in open court. Order Denying Respondents' Motion to Stay Administrative Proceedings at 3, 4, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 29, 2008) ("Rosch Stay Order").

[29] *Id.* at 5.

[30] *See* Scheduling Order, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 30, 2008). Rosch also issued a statement denying Inova's recusal motion, but certified the motion to the full Commission. In the statement, Rosch disputed Inova's argument that the Administrative Procedure Act and the appearance of impropriety warranted his disqualification; to the contrary, Rosch concluded that there was "no evidence" of prejudgment or of actual or the appearance of impropriety in his designation. Statement of Commissioner J. Thomas Rosch Accompanying Order Certifying Respondents' Motion to Recuse at 12, *In re Inova Health Sys. Found. et al.*, Docket No. 9326 (F.T.C. May 29, 2008).

[31] May 30 Tr. at 12.

[32] *Id.*

[33] *Id.* at 6.

[34] An ALJ has the discretion to stay an administrative proceeding pending the resolution of collateral district court proceedings under 16 C.F.R. § 3.51 (2008).

[35] Although the district court granted the preliminary injunction, the Sixth Circuit overturned the injunction and the FTC dismissed its complaint. *See FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (6th Cir. 1999). The FTC pursued the same strategy in *FTC v. Butterworth Health Corp.*, litigating a five-day preliminary injunction hearing with live witnesses before the district court prior to filing its administrative complaint. 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (unpublished opinion). *See also FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998) (granting FTC injunction prior to issuance of administrative complaint).

[36] For example, in *Whole Foods*, the FTC filed its administrative complaint three weeks after its preliminary injunction motion and the Commission exercised its discretion to stay the proceedings shortly after the respondents filed their answers. *See* Order Staying Administrative Proceedings, *In re Whole Foods Market, Inc. et al.*, No. 9324 (F.T.C. Aug. 7, 2007). In *Arch Coal*, the agency affirmatively moved to stay the proceedings pending the completion of the district court's preliminary injunction hearing, though the motion was ultimately denied by the ALJ. *See* Complaint Counsel's Motion to Stay This Proceeding Or, In the Alternative, To Stay Discovery, *In re Arch Coal, Inc., et al.*, No. 9316 (F.T.C. May 12, 2004). The FTC's arguments in *Arch Coal* largely echoed Inova's arguments in the Inova case. *See generally id.* The FTC's practices with respect to stays and the timing of administrative proceedings have not been uniform, however. In *In re Equitable Resources, Inc.*, the agency filed the administrative complaint prior to the federal court injunction motion and initially opposed the respondent's request for a stay of administrative proceedings pending the district court's resolution of the preliminary injunction. *See* Joint Case Management Statement, *In re Equitable Resources, Inc., et al.,* No. 9322 (F.T.C. Apr. 19, 2007). The agency subsequently consented to the stay. *See* Revised Joint Case Management Statement at 6-7, *In re Equitable Resources, Inc., et al.,* No. 9322 (F.T.C. Apr. 24, 2007).

Justice Department challenges.[37] If the FTC lost its preliminary injunction motion before the federal court, the merger was typically consummated and the agency proceedings abandoned (if they had even started).[38] The result was a string of defeats, including losses in *In re Tenet Healthcare Corp.*, *In re Butterworth Health Corp.*, *In re Freeman Hospital*, *In re Arch Coal*, and *In re Foster*.[39]

In the Inova case, the FTC signaled from the start that it was not going to allow its own proceedings to take a back seat. In its first public statement issued in connection with the filing of the dual complaints, the FTC went out of the way to note that Inova would be offered the FTC's "Fast Track" administrative trial procedure and that the FTC's Commissioners "[were] committed, subject to the bounds of reasonableness and fairness, to a just and expeditious resolution of any potential appeal that may be taken to the full Commission."[40] The statement further noted that if there was an appeal, "the commissioners [would] 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)."[41]

Over the next few weeks, the FTC argued repeatedly for simultaneous prosecution of the two actions, pursued an aggressive discovery strategy in the administrative proceeding, and promised a full agency trial in four months.[42] The agency also suggested that it intended to continue with the merger challenge even if it lost the district court proceeding. To this end, the FTC emphasized that speedy prosecution of the administrative proceedings would preserve the agency's ability to "fashion effective relief" in the event of a district court defeat and expounded at length regarding its difficulties in "unscrambling the eggs" in prior cases where mergers were consummated because the FTC's proceedings could not move quickly enough.[43]

The most important component of the FTC's new strategy, however, was the appointment of Commissioner Rosch as ALJ. While Inova sought to cast Rosch's surprise appointment as an attempt to install a more favorable decision-maker, the appointment is more plausibly explained by the agency's desire to regain control of merger review and expedite the merger review process.[44] Rosch has been a vocal critic of the outsized role that federal district courts play in FTC merger challenges and has made no secret of his disdain for the way unfair competition cases are litigated. For example, just a month after Inova and Prince William withdrew their merger, Rosch stated that merger review by federal courts had turned congressional intent "on its head" and claimed that by abandoning merger challenges after failed preliminary injunction motions, the Commission had "arguably abdicated its judicial responsibilities and has instead allowed federal district courts to usurp them."[45]

Rosch's determination to return substantive merger review to the agency surfaced repeatedly in his denial of Inova's motion to stay. During the May 29, 2008 conference, Rosch bristled at Inova's attempt to convince the district court to conduct an expansive injunction hearing on the grounds that the FTC proceedings moved too slowly and chided Inova's attorney for a statement made in a district court brief that the agency's trial might take "years." Similarly, in his written opinion, Rosch took note of the fact that "[t]he pace of the FTC's administrative proceedings has long been criticized by the courts and the outside bar" and noted that "[c]ounsel for the merging parties will often cite the 'leisurely pace' of administrative proceedings in an effort to convince a federal district court that it, not the Commission, is the de facto ultimate arbiter of the merger challenge."[46] Rosch then reiterated his view regarding the superiority of the FTC's review and set a trial date for October 2008.

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[37] For an extended discussion of how the Inova case demonstrates that the FTC and the Justice Department "have different standards in blocking deals," *see* Cecile Kohrs Lindell, *Reconcilable Differences*, THE DEAL NEWSWEEKLY, June 13, 2008, *available at* http://www.thedeal.com/newsweekly/2008/06/reconcilable_differences/print/. Lindell observes that the FTC had previously maintained that its review did not differ from DOJ's as a practical matter, but in the wake of Inova, "the FTC's official line has changed." *Id.* One of Inova's lawyers also recently noted that the Inova case revealed a "stark contrast" in the way DOJ and FTC conduct merger reviews. *See* Amanda Ernst, *FTC, Virginia Hospitals' Attorney Debate Broken Deal*, Competition Law 360, July 22, 2008.

[38] In 1995, the FTC issued a policy statement outlining five factors that the agency would consider in determining whether to continue with its administrative proceeding after a preliminary injunction defeat. *See* Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 50 Fed. Reg. 39,741-45 (Aug. 3, 1995). The agency routinely relies on the statement when announcing its intention to end its investigation after a preliminary injunction denial. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), *available at* http://www.ftc.gov/opa/2005/06/archcoal.shtm; Press Release, Fed. Trade Comm'n, FTC Ends Administrative Litigation in Western Refining Case (October 3, 2007), *available at* http://www.ftc.gov/opa/2007/10/western.shtm. The most notable recent exception to the FTC's practice of suspending proceedings after a preliminary injunction denial is its continued prosecution of the *Whole Foods* challenge, discussed *infra.*

[39] *See supra* notes 7, 35, 36.

[40] 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.shtm.

[41] *Id*.

[42] In fact, Rosch found that the FTC's aggressive bid for pre-conference discovery in the administrative proceeding was premature and held that discovery would commence as of the date of the May 29, 2008 scheduling conference. Rosch Stay Order at 6 n.4.

[43] FTC Mem. in Opp'n to Stay at 2-5.

[44] Indeed, in an August 2008 interview with the Antitrust Source, FTC Chairman William E. Kovacic affirmed that the "central objective" of appointing Rosch as ALJ was to "ensure that the Commission would expedite its administrative process." *Interview with William E. Kovacic, Chairman, Federal Trade Commission*, THE ANTITRUST SOURCE, Aug. 2008, at 6.

[45] *Rosch: FTC, Not Courts, Should Judge Competition Cases,* FTC: Watch, July 14, 2008, at 1-2. Rosch's frustration with the FTC's ceding of merger review to federal district courts also surfaced in his recent dissent in the *Western Refining* case. In a statement filed jointly with Commissioner Jones Harbour in opposition to the Commission's determination to abandon its merger challenge, Rosch noted that there was a "vast difference between a preliminary injunction hearing and a plenary trial," underscored that the federal court review is "necessarily truncated," and stressed that "regardless of how that [plenary] trial were to come out, we are concerned with letting the district court's flawed opinion stand as the last word in this case." Dissenting Statement of Commissioner Pamela Jones Harbour and Commissioner J. Thomas Rosch at 3, *In re Western Refining, Inc., et al.*, No. 9323 (F.T.C. Oct. 3, 2007).

[46] Rosch Stay Order at 3-4.

Taken together, the "unusual process changes" instituted by the FTC in the Inova case—largely codified in the FTC's new proposed rules for Part 3 proceedings—are a signal that the FTC would like to put federal district courts out of the substantive merger review business. Because Inova and Prince William prematurely abandoned their merger plans, the strategy, as well as the agency's promise of expedited review, remains untested. [47] Also untested is whether expedited agency review can actually enable meaningful relief in cases where the FTC loses before the district court; even with expedited proceedings, the agency might not be able to fashion an effective remedy after a transaction is consummated.[48] Subsequent merger challenges should provide some answers to these questions.

III. Will Whole Foods Help the FTC's Ability to Displace District Courts?

The Inova case also demonstrates that the success of the FTC's new strategy will also hinge on another factor: the standard of review the district court applies to the agency's preliminary injunction motion.

At issue here is the proper interpretation of Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), which entitles the FTC to 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." In many merger challenges, district courts have cited this standard but proceeded to conduct expansive preliminary injunction hearings that resemble full plenary trials.

In the Inova case, the FTC was determined to change this. To help, it enlisted the Fourth Circuit's decision in *FTC v. Food Town Stores*, a 30-year-old opinion that articulates a limited role for district courts in FTC merger reviews. Specifically, the *Food Town* court held that "[t]he district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in [the] FTC in the first instance."[49] Then, in a sentence relied upon heavily by the FTC, the court stated that "[t]he *only purpose* of a proceeding under [§] 13 is to *preserve the status quo* until the FTC can perform its function."[50]

Food Town's "preserve the status quo" standard was repeatedly cited by the FTC in pleadings and in open court to emphasize the "collateral" and "inherently limited" nature of the district court's adjudication.[51] Ultimately, it found a receptive audience in Judge Hilton (who stated that his own review was "very narrow" and rejected Inova's request for an evidentiary hearing with live witnesses) and Commissioner Rosch (who specifically cited *Food Town* in rejecting Inova's motion for a stay).[52]

Whether the FTC can repeat its success in invoking *Food Town*'s deferential standard will likely depend on how courts interpret the D.C. Circuit's recent decision in *FTC v. Whole Foods Market*. In that case, the FTC had appealed the district court's failure to enjoin the Whole Foods-Wild Oats merger on the grounds that the district court had applied the wrong standard of review under Section 13(b). Specifically, the FTC claimed that the court had required the agency to "prove" relevant market instead of assessing whether it had raised "serious, substantial" questions on the merits that made them "fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance."[53]

On July 29, 2008, a divided D.C. Court of Appeals reversed the district court's decision and remanded for further proceedings. The decision turned on the district court's improper focus on the "marginal" consumer in determining relevant market and largely sidestepped the FTC's arguments regarding standard of review.[54] However, what the court *did* say about the district court's inquiry under Section 13(b) is likely to be invoked by the FTC and merging parties alike.

On one hand, the court affirmed *Heinz's* "serious, substantial" standard, recognized that the FTC was not required to "prove the merits" of its case to the district court, cited *Food Town* with approval, and reiterated that "Section 53(b) injunctions are meant to be readily available to preserve the status quo while the FTC develops its ultimate case . . . ."[55]

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47 For example, on an ABA teleconference held a month after the merger was withdrawn, FTC Assistant Director Matt Reilly conceded that "[f]rom our perspective, having Commissioner Rosch serve as ALJ was, under the current rules, the *only way* to reach a quick decision." Amanda Ernst, *FTC, Virginia Hospitals' Attorney Debate Broken Deal*, Competition Law 360, July 22, 2008 (emphasis added). This sentiment likely explains the agency's recent decision to again turn to Rosch to oversee the renewed administrative proceedings in the *Whole Foods* case. *See* Cecile Kohrs Lindell, *In Whole Foods Trial, FTC Aims to Keep ALJ Moving*, TheDeal.com, Aug. 28, 2008, *available at* http://www.thedeal.com/dealscape/2008/08/in_whole_foods_trial_ftc_aims.php. The decision prompted Whole Foods to file a motion to recuse Rosch, which was denied by the Commission on September 5, 2008. *See id; see also* Order Denying Respondent's Motion to Disqualify the Commission, *In re Whole Foods Market, Inc.*, No. 9234 (F.T.C. Sept. 5, 2008). On September 10, 2008, the Commission entered a scheduling order setting out an expedited discovery schedule culminating in a full administrative trial on February 16, 2009. Scheduling Order at 9, *In re Whole Foods Market, Inc.*, No. 9324 (F.T.C. Sept. 10, 2008).

48 The FTC's decision to proceed with its administrative trial in *Whole Foods*, as well as recent statements by Commissioner Rosch, suggest that the FTC is prepared to put this question to the test. *See* J. Thomas Rosch, Remarks at the NERA 2008 Antitrust & Trade Regulation Seminar 13-14 (July 3, 2008), *available at* http://www.ftc.gov/speeches/rosch/080703nera.pdf (criticizing FTC's 1995 policy statement and FTC's practice of suspending its administrative proceedings after preliminary injunction defeat).

49 *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1342 (4th Cir. 1976).

50 *Id.* (emphasis added).

51 Plaintiff's Mem. at 1-5; May 30 Tr. at 8, 9.

52 May 30 Tr. at 12; Rosch Stay Order at 5.

53 *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001) (internal quotation marks omitted). The FTC's brief noted the differences between Section 13(b)'s "in the public interest" and the more "stringent, traditional equity standard for injunctive relief," cited *Food Town*'s "preserve the status quo" standard, and argued that the proper district court inquiry was whether the FTC had offered "fair ground" that it would ultimately be able to show in the *agency proceeding* that the merger would substantially lessen competition. Proof Brief for Appellant Federal Trade Commission at 30-33, *FTC v. Whole Foods Market, Inc., et al.*, No. 07-5276 (D.C. Cir. Jan. 14, 2008) ("FTC Moving Br."). Largely echoing Commissioner Rosch's rhetoric in the Inova case, the agency underscored the fact that Congress had given it "primary adjudicatory authority" over merger challenges and complained that the district court's approach had "ignore[d] the statutory scheme" and "effectively usurp[ed] the adjudicative role of the Commission." *Id.* at 27, 28.

54 *FTC v. Whole Foods Market, Inc.*, No. 07-5276, ___ F.3d ___, 2008 WL 2890688, at *6-*9 (D.C. Cir. July 29, 2008).

55 *Id.* at *3-*5. Judge Kavanaugh's dissent, meanwhile, had harsh words for the FTC's claim that the district court applied the wrong standard of review under Section 13(b): "With all due respect, I do not believe that the law allows the FTC to just snap its fingers and block a merger." *Id.* at *20. Kavanaugh further rejected any "hint" by the majority that the FTC need not demonstrate a likelihood of success to obtain a preliminary injunction, explaining that such a conclusion would "enhance the FTC's power to torpedo mergers well beyond what Congress has authorized." *Id.* at *20 n.3.

The court also clarified that preliminary injunction motions are to be evaluated using a "sliding scale" that balances "the likelihood of the FTC's success against the equities."[56]

On the other hand, the court held that the district court had "applied the *correct* legal standard to the FTC's request for a preliminary injunction" and cautioned against district courts applying a "rubber-stamp" to injunction requests "whenever the FTC provides some threshold evidence."[57] Instead, the court instructed district courts to "exercise *independent judgment* about the questions § 53(b) commits to it" and "evaluate the FTC's chance of success on the basis of *all the evidence before it*, from the defendants as well as from the FTC."[58]

Whole Foods thus does little to clarify what, exactly, a district court is to do when faced with a Section 13(b) injunction request. The FTC will surely use language from the decision to support the "very narrow" review successfully urged upon Judge Hilton in Inova, but the decision preserves significant latitude for the district court to conduct a Section 13(b) proceeding as it sees fit.[59] As a result, merging parties seeking expansive district court review of their transaction should still have ample grounds to support a request for a robust preliminary injunction hearing and independent assessment of the transaction.[60]

IV. Conclusion

The Inova merger challenge was certainly a significant victory for the FTC, but its broader ramifications remain to be seen. If the FTC can deliver on a promise of expedited review (though the new proposed rules or otherwise) and convince district courts to follow the lead of Judge Hilton, the agency may be able to fulfill Commissioner Rosch's goal of seizing substantive merger review back from federal district courts and returning it to the agency. These are big "ifs," however, and there is no guarantee that federal district courts will willingly enlist themselves in the effort—particularly if the agency's proceedings continue to engender significant delay.

In the meantime, the FTC's new strategy poses interesting choices for merging parties who now find themselves in the agency's crosshairs. One option for these parties would be to follow Inova's lead, continue to push for expansive district court review, and quickly "scramble the eggs" upon an injunction's denial to make it difficult for the FTC to fashion effective relief in its own proceedings. Another would be to try and put the agency's promise of expedited review to the test by offering to suspend the transaction at issue until a date certain if the FTC forgoes a preliminary injunction altogether. The guarantee of meaningful agency review and the ability to eliminate district court interference could make such an offer difficult for the FTC to refuse. However, the FTC would then have to commit itself to meeting the expedited schedule it promised—something that it has not yet demonstrated the ability to do.

Only time will tell whether the Inova case is an isolated victory or the beginning of a new chapter in FTC merger review.

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56 *Id.* at *3.

57 *Id.* at *3-*4.

58 *Id.* at *4 (emphasis added). Dissatisfied with the three-judge panel's decision, Whole Foods has petitioned for *en banc* reconsideration by the full D.C. Circuit. *See* Lindell, *supra* note 47. As of the time of writing, *Whole Foods*' petition had not yet been resolved; at the request of the court, the FTC filed its response to Whole Foods' petition on September 12, 2008.

59 Indeed, the FTC is already characterizing the D.C. Circuit's decision as a major victory with respect to Section 13(b) review. *See, e.g.*, J. Thomas Rosch, Reflections on Procedure at the Federal Trade Commission 2-3 (Sept. 25, 2008), *available at* http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf (arguing that the D.C. Circuit had adopted the FTC's "core argument" with respect to Section 13(b)).

60 For example, the district court in *Whole Foods* conducted a two-day hearing with live expert testimony and reviewed 22 deposition transcripts, 13 witness transcripts from FTC investigational hearings, 16 fact witness declarations, voluminous briefing, and over 1,500 exhibits. *Whole Foods*, 502 F. Supp. 2d at 4.