



CPI Antitrust Chronicle

August 2012 (1)

Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Successes

Tara Isa Koslov

U.S. Federal Trade Commission

Competition Advocacy at the Federal Trade Commission: Recent Developments Build on Past Successes

Tara Isa Koslov¹

I. INTRODUCTION

Section 5 of the Federal Trade Commission Act broadly empowers the Federal Trade Commission (“FTC” or “Commission”) to prevent the use of “unfair methods of competition in or affecting commerce.”² The Commission is primarily a law enforcement agency and, in fulfilling its competition mission,³ the agency targets its enforcement efforts against alleged anticompetitive conduct by private actors.

But competition also may be affected by the actions of *public* entities, including regulators and legislators. As a resource-constrained government entity itself, the FTC recognizes how difficult it can be for any conscientious public actor—seeking in good faith to protect the interests of American citizens—to solicit, analyze, and weigh the views of myriad stakeholders. Despite widespread agreement that competition policy is a fundamental organizing tenet of the American economy, principles of competition sometimes appear to, or actually do, conflict with other public policy objectives. As an expert competition agency, we believe consumers are better off when competition perspectives do not get lost in complex policymaking debates.

Fortunately the Commission has multiple tools at its disposal, beyond litigation and enforcement, to share its competition expertise with other public actors. Section 6 of the FTC Act authorizes the FTC to “gather and compile information” and to “make public from time to time such portions of the information obtained by it . . . as are in the public interest.”⁴ In part pursuant to this authority, the FTC has a long history of engaging in competition advocacy before federal regulators, state legislatures, courts, foreign enforcers, international multilateral organizations, and other decision makers whose actions may affect competition.

When engaging in competition advocacy to inform the decisions of others, the Commission and its staff do not pretend to have all the answers. But, in our experience, anticompetitive outcomes sometimes can be mitigated or prevented by encouraging policymakers to ask the right questions:

¹ Deputy Director, Office of Policy Planning (“OPP”), Federal Trade Commission (“FTC”). The author is serving as OPP Acting Director for several months during Summer 2012. The views expressed herein are the author’s own, and do not reflect the views of the Commission or any individual Commissioner.

² 15 U.S.C. § 45(a).

³ This article focuses exclusively on advocacy efforts relating to the Commission’s competition mission. While beyond the scope of this article, it is well worth mentioning that the Commission and its staff also engage in many important advocacy activities in support of the agency’s consumer protection mission.

⁴ 15 U.S.C. § 46(a), (f).

- What is the likely competitive impact of the proposed regulation or other contemplated action, and how would this affect consumers?
- What justifications exist for any restrictions on competition?
- Are there alternatives that would protect consumers and fulfill other important public policy goals, without restricting consumer choice or unduly burdening legitimate business activity?

Whatever the format and whomever the audience, all of our competition advocacy efforts share a common goal: to provide a framework for thinking about public policy issues from a competition perspective. In so doing, we seek to enhance understanding of the competitive process, and also to persuade decision makers to deliver the benefits of competition to as many consumers as possible.

The academic literature includes several comprehensive reviews of the theory and history of FTC competition advocacy,⁵ and Commission officials also have spoken and written about the value of competition advocacy,⁶ so I will provide only a brief overview of our competition advocacy philosophy and mechanics. I will then highlight two substantive areas—the competition/intellectual property interface, and health care—where, in the last few years, the Commission’s competition advocacy program has been particularly active and successful.

⁵ See, e.g., James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005); Arnold C. Celnicker, *The Federal Trade Commission’s Competition and Consumer Advocacy Program*, 33 ST. LOUIS U. L.J. 379 (1989); Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN’S L. REV. 951 (2008).

⁶ See, e.g., Timothy J. Muris, Chairman, Federal Trade Commission, *Creating a Culture of Competition: The Essential Role of Competition Advocacy*, Prepared Remarks before the International Competition Network Panel on Competition Advocacy and Antitrust Authorities, Naples, Italy (Sept. 28, 2002), available at <http://www.ftc.gov/speeches/muris/020928naples.shtm>; Deborah Platt Majoras, Chairman, Federal Trade Commission, *Promoting A Culture of Competition*, Remarks Before the Chinese Academy of Social Sciences, Beijing, China (April 2006), available at <http://www.ftc.gov/speeches/majoras/060410chinacompetitionadvocacy.pdf>; THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY, THE CONTINUING PURSUIT OF BETTER PRACTICES, A REPORT BY FEDERAL TRADE COMMISSION CHAIRMAN WILLIAM E. KOVACIC (Jan. 2009), available at <http://ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf> (see especially competition advocacy discussion at 121-24); James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555 (2010) (respectively, former FTC OPP Director and former FTC Chairman) (see especially discussion of U.S. competition advocacy at 1581-84); Maureen K. Ohlhausen, *Identifying, Challenging, and Assigning Political Responsibility for State Regulation Restricting Competition*, 2 COMPETITION POL’Y INT’L 151 (2006), available at <https://www.competitionpolicyinternational.com/file/view/6289> (former FTC OPP Director, now FTC Commissioner). See also Note of the United States, Roundtable on Evaluation of the Actions and Resources of Competition Authorities, Competition Committee, Directorate for Financial and Enterprise Affairs, Organisation for Economic Co-operation and Development (May 25, 2007), available at <http://www.ftc.gov/bc/international/docs/evalauth.pdf> [hereinafter OECD Note].

II. THE “WHY” OF FTC COMPETITION ADVOCACY

Competition advocacy allows the Commission to leverage its generalized competition and economic expertise, as well as its substantive industry expertise gained via investigations and other activities. Working together, staff from throughout the agency⁷ can explore the links between legal and economic theory, apply theory to specific marketplace facts, incorporate the context of broader industry dynamics, offer predictions regarding likely effects, and translate that entire thought process into a framework to aid decision makers who are not necessarily steeped in competition policy. In effect, the Commission can serve as the voice of competition and consumers, articulating a viewpoint that otherwise might not be heard.

Competition advocacy is a cost-effective way to further the FTC’s competition mission. First, it is far more efficient to stop potentially anticompetitive conduct before it happens. Second, because certain factors may prevent the Commission from reaching some forms of allegedly anticompetitive conduct via enforcement, competition advocacy may be the Commission’s only viable option to address the conduct.⁸ Third, unlike a fully investigated and litigated enforcement matter, a targeted advocacy comment can be researched and written by a few staff members within a relatively short time frame, and with few or no additional costs.⁹

Yet, when an advocacy comment, amicus brief, or other advocacy document is submitted at the right time, to the right entity, and has been carefully crafted to raise the right questions, it often has a significant impact on subsequent discussion and debate. In some cases, outcomes do change as a direct result of our advocacy pieces.¹⁰ And even in situations where results are other

⁷ Competition advocacy comments typically are signed jointly by the FTC’s Office of Policy Planning, Bureau of Competition, and Bureau of Economics. The Office of General Counsel also plays a significant role with respect to advocacy comments on certain subjects, as well as all amicus briefs.

⁸ For example, law enforcement actions may not be possible because of issues of standing, immunities, application of the state action doctrine, etc.

⁹ A 1989 study by the American Bar Association addressed the cost-effectiveness of the FTC’s competition advocacy program and suggested that “[b]ecause ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission’s entire budget.” REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, *reprinted in* 58 ANTITRUST L.J. 43, 116 (1989). That conclusion was confirmed more recently in a Note submitted by the U.S. delegation to the OECD Competition Committee: “Given the substantial burdens that anticompetitive regulation can impose on consumers, advocacy is a cost-effective way to promote competition, requiring a small amount of resources relative to the Agencies’ other tools.” OECD Note, *supra* note 6, at 2.

¹⁰ One clear example is then-Governor Schwarzenegger’s 2004 veto of a California bill that would have required pharmacy benefit managers to disclose certain contract terms. An FTC staff advocacy comment noted that the bill might have the unintended consequence of confusing consumers, frustrating cost-savings measures, and fostering collusion among drug manufacturers. Letter to [California] Assembly Member Greg Asharian from FTC Bureau of Competition, Bureau of Economics, and Office of Policy Planning (Sept. 7, 2004), *available at* <http://www.ftc.gov/be/V040027.pdf>. In his veto announcement, Governor Schwarzenegger directly cited the FTC letter and the potential for competitive harm. Governor Arnold Schwarzenegger, Veto Message to the Members of the California State Assembly, Sept. 29, 2004. *See also* Granholm v. Heald, 544 U.S. 460 (2005) (striking down laws regulating out-of-state wine sales in ways that gave in-state wineries a competitive advantage, citing FTC report on barriers to e-commerce); Fed. Trade Comm’n Staff Comment to the Louisiana State Board of Dentistry Concerning Proposed Modifications to Louisiana’s Administrative Rules on the Practice of Portable and Mobile Dentistry (Dec. 18, 2009), *available at* <http://ftc.gov/os/2009/12/091224commentladentistry.pdf> (raising concerns regarding

than we might have hoped, we consistently hear that FTC advocacies are influential—likely as a result of the agency’s credibility as an independent, bipartisan agency with a unique combination of legal and economic expertise.

FTC staff engages in ongoing review of the efficacy of our advocacy program, which includes conducting an annual survey¹¹ as well as collecting anecdotal feedback. While it is a constant challenge to accurately measure the effectiveness of FTC competition advocacy, we believe it is important to try, which is why advocacy efforts are scored as part of the agency’s annual Performance and Accountability Report.¹²

III. THE “HOW” OF FTC COMPETITION ADVOCACY

The FTC’s competition advocacy takes many forms—including amicus briefs,¹³ workshops,¹⁴ reports,¹⁵ and testimony.¹⁶ These actions have had a tremendous impact on legal and policy development in recent years, and are familiar to antitrust practitioners and policymakers.

Perhaps less visible, and not as well understood, are advocacy comments submitted to state or federal legislators or regulators,¹⁷ and the process by which they are generated. In the case of state-level competition advocacy, FTC staff typically responds to a formal request for comment from a state legislator, in a situation where a “live” bill is pending and legislative action is expected soon, or in the context of a state legislative hearing or sunset review. Occasionally a proposed state regulation will be subject to an open public comment period, which provides an opportunity for FTC advocacy even without a formal request.

With respect to advocacy before other federal agencies, FTC staff submissions almost always respond to a call for public comments on a proposed regulation that may, either intentionally or unintentionally, affect competition.¹⁸ This type of advocacy comment is usually the culmination of an ongoing and iterative dialogue with our sister agency, especially in areas where the FTC’s interest is known. Often FTC staff will have provided informal input before the proposed rulemaking is published, and the respective agency staffs will discuss the scope and

unnecessary barriers to care for poor children who might only receive dental care in schools; advocacy comment later cited by President of Louisiana State Board of Dentistry as influential on rulemaking).

¹¹ See, e.g., FED. TRADE COMM’N, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2011 at 44, 87, available at <http://www.ftc.gov/opp/gpra/2011parreport.pdf> (reporting results of annual survey of recipients of competition advocacy comments and amicus briefs; all who responded found the comments “useful”).

¹² *Id.*

¹³ A complete listing of FTC amicus briefs is available at <http://ftc.gov/ogc/briefs.shtm>.

¹⁴ A complete listing of FTC conferences and workshops is available at <http://ftc.gov/ftc/workshops.shtm>. A related listing of FTC hearings (typically held over several days) is available at <http://ftc.gov/ftc/hearings.shtm>.

¹⁵ A combined listing of Commission and staff reports, covering both competition and consumer protection topics, is available at <http://ftc.gov/reports/index.shtm>.

¹⁶ A complete listing of Commission Congressional testimony and statements, organized by Congressional session, is available at <http://ftc.gov/ocr/testimony/index.shtml>.

¹⁷ A complete listing of FTC staff advocacy comments, indexed by date as well as subject, is available at http://ftc.gov/opp/advocacy_date.shtm and http://ftc.gov/opp/advocacy_subject.shtm.

¹⁸ See, e.g., Fed. Trade Comm’n Staff Comment Before the Fed. Energy Regulatory Comm’n Concerning Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based Participant-Funded Transmission Projects (June 14, 2012), available at <http://ftc.gov/os/2012/06/120619ferc.pdf>.

content of a likely FTC comment as it is being developed. Indeed, these informal discussions represent their own kind of competition advocacy, even before a formal written comment is submitted.

When formulating a recommended¹⁹ advocacy position, FTC staff seeks to engage with stakeholders on all sides of an issue, to ensure an understanding of real-world market dynamics. In addition to background research from public sources, staff will reach out to industry participants and experts to gather facts, ask questions, and test assumptions. Staff is careful to focus on potential harm to competition and the competitive process, rather than the interests of individual competitors (especially those who may be well-represented by advocates and lobbyists). It is worth noting that incumbents often support restrictive regulations as a low-cost way to shield themselves from new entry—which is precisely why FTC staff pays close attention to the incentives of market participants, and evaluates their input accordingly.

Due to tight time frames and limited resources, FTC staff focuses primarily on gathering and presenting existing information, including publicly available data, empirical studies, and relevant academic literature. Particularly in the state legislative context, where legislators often work part-time and have small generalist staffs, we try to highlight information sources that might not otherwise come to legislators' attention, especially credible empirical analyses. In this role, FTC staff usually does not conduct exhaustive data analysis or new empirical work. Where appropriate, our comments point out the limitations of existing information sources, and sometimes we suggest areas where decision makers might benefit from additional studies or data analysis.

IV. RECENT EXAMPLES OF FTC COMPETITION ADVOCACY

In recent years, FTC competition advocacy has been particularly active in two major areas of great significance to the American economy: patents and intellectual property ("IP"), and health care. In each of these realms, the Commission and its staff have utilized a broad range of competition advocacy tools. These advocacy efforts have not only complemented the agency's enforcement efforts, but also enhanced the Commission's credibility and extended its influence.

A. Intersection of Competition and IP Policy

Since the early 2000s, the Commission has led the exploration of issues at the intersection of competition and IP law and policy, especially with regard to patents.²⁰ The Commission has hosted or co-hosted multiple series of hearings and issued several seminal reports, offering recommendations to promote innovation and improve the patent system so as to maintain a

¹⁹ Virtually all FTC competition advocacies must be approved by the Commission on some level. Amicus briefs, Congressional testimony, and certain reports are voted on by the Commission and become official statements of the Commission itself. In other situations, including advocacy comments to state legislators and some federal regulatory agencies, the Commission votes to authorize the submission of staff-level comments.

²⁰ Links to most of the Commission's competition work relating to patents and intellectual property are available at <http://www.ftc.gov/bc/tech/property/index.htm>.

proper balance between competition and patent law and policy, especially as the IP marketplace has evolved.²¹

In June 2011, the Commission held a one-day workshop specifically to explore legal and policy issues relating to potentially anticompetitive patent “hold-up”—demanding higher royalties or other more costly licensing terms after a collaborative standard has been adopted and patented technologies have been included in the standard.²²

In recent months, the Commission has relied on its extensive knowledge base and prior policy efforts to engage in competition advocacy on the issue of standard-essential patents (“SEPs”), particularly with respect to the impact on competition of possible injunctive relief, such as an International Trade Commission (“ITC”) exclusion order. In June 2012 advocacy comments to the ITC, the Commission expressed its concern that a SEP holder could use the threat of an ITC exclusion order to engage in anticompetitive hold-up after a standard has been implemented, even if the SEP holder previously committed to license its intellectual property on reasonable and non-discriminatory terms.²³ The Commission’s ITC comments recommended that the ITC has the statutory authority to order remedies that limit the potential for hold-up, thus promoting the beneficial and efficient operation of IP and competition law.

The Commission engaged in further competition advocacy when, in July 2012, it submitted testimony before the Senate Committee on the Judiciary regarding the ITC filings and recommendations, and suggested that Congressional action might be warranted if the ITC finds that its statutory authority is not flexible enough to limit hold-up.²⁴

B. Health Care

The Commission’s competition advocacy efforts relating to the health care marketplace are too extensive to do them justice here. Suffice it to say, for several decades, the Commission and its staff have used every possible tool in the agency’s advocacy arsenal to promote the

²¹ See especially FED. TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (April 2007), available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>; FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (March 2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

²² Detailed materials relating to the June 2011 standards workshop are available at <http://www.ftc.gov/opp/workshops/standards/index.shtml>.

²³ See Third Party United States Federal Trade Commission’s Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, available at www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf and in *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, available at <http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf>.

²⁴ Prepared Statement of the Fed. Trade Comm’n, Before the U.S. Senate Comm. on the Judiciary, Concerning Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents (July 11, 2012), available at <http://www.ftc.gov/os/testimony/120711standardpatents.pdf>. The Commission’s oral testimony was delivered by Commissioner Edith Ramirez.

application of sound competition principles to a broad array of markets for health care products and services, including pharmaceuticals and biologics.²⁵

Among the Commission's most recent health care competition advocacy efforts at the federal level, FTC staff (and their DOJ counterparts) were deeply engaged with the Centers for Medicare and Medicaid Services ("CMS") in developing the implementing regulations for new Medicare Shared Savings Program Accountable Care Organizations ("MSSP ACOs") authorized under the Affordable Care Act. In particular, the CMS criteria for MSSP ACO eligibility are "broadly consistent with the indicia of clinical integration" that the antitrust enforcement agencies previously have endorsed, such that joint pricing in commercial markets by MSSP ACO participants is presumed to be reasonably related to achieving efficiencies, and thus will receive rule of reason treatment under the antitrust laws.²⁶ Whatever one's views on health care reform, the infusion of sound competition principles can only help to promote greater efficiency and higher quality in the delivery of health care, and the FTC is committed to maintaining a close relationship with CMS going forward.

Our state-level competition advocacy efforts in the past few years have focused heavily on health care as well. FTC staff has been particularly active in promoting competition by non-physician providers of health care services such as advanced practice registered nurses, certified registered nurse anesthetists, and dental hygienists.²⁷ Our advocacies have taken the position that, in the absence of safety concerns, eliminating or reducing restrictions on these types of providers tends to lower health care costs and improve access to health care services, especially in underserved areas facing provider shortages. Given that provider shortages are expected to worsen as more consumers gain health insurance and seek access to primary health care services, our advocacy comments have urged state legislatures to ensure that statutory limits on non-physician health care providers are no stricter than patient protection requires. Removing unwarranted impediments to practice by these providers is likely to improve access and consumer choice, and may also encourage beneficial price competition that could help contain health care costs.

²⁵ Links to most of the Commission's competition work relating to health care markets—including numerous workshops, reports, studies, advocacy comments, testimonies, and amicus briefs—are available at <http://www.ftc.gov/bc/healthcare/index.htm>.

²⁶ Fed. Trade Comm'n & U.S. Dep't of Justice, Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67,026 (Oct. 28, 2011), available at <http://ftc.gov/os/fedreg/2011/10/111020aco.pdf>.

²⁷ See, e.g., Fed. Trade Comm'n Staff Comment Before the Louisiana House of Representatives on the Likely Competitive Impact of Louisiana House Bill 951 Concerning Advanced Practice Registered Nurses (April 20, 2012), available at <http://ftc.gov/os/2012/04/120425louisianastaffcomment.pdf>; Fed. Trade Comm'n Staff Letter to the Honorable Representative Jeanne Kirkton, Missouri House of Representatives, Concerning Missouri House Bill 1399 and the Regulation of Certified Registered Nurse Anesthetists (March 27, 2012), available at <http://ftc.gov/os/2012/03/120327kirktonmissouriletter.pdf>; Fed. Trade Comm'n Staff Letter to the Honorable Paul Hornback, Senator, Commonwealth of Kentucky State Senate, Concerning Kentucky Senate Bill 187 and the Regulation of Advanced Practice Registered Nurses (March 26, 2012), available at http://ftc.gov/os/2012/03/120326ky_staffletter.pdf; Fed. Trade Comm'n Staff Comment Before the Maine Board of Dental Examiners Concerning Proposed Rules to Allow Independent Practice Dental Hygienists to Take X-Rays in Underserved Areas (Nov. 16, 2011), available at <http://ftc.gov/os/2011/11/111125mainedental.pdf>.

V. CONCLUSION

On a personal note, as someone who has proudly served at the FTC for over fifteen years,²⁸ I appreciate the competition advocacy program because it exemplifies the Commission's unique bipartisan and collaborative spirit. Based on my observations under five FTC Chairs (appointed by three U.S. Presidents), most Commission votes on competition advocacy matters are unanimous, and the core messages of our advocacies have been consistent over time. Yes, tone and subject focus may shift slightly when agency leadership changes. But, in my experience, the overall goals and values of modern FTC competition advocacy have not. Optimistically, I think that means we are doing something right.

²⁸ I spent almost eleven of those years as an Attorney Advisor to three different Commissioners, providing me with a close-up view of many Commission votes during that time.