SEPARATE STATEMENT OF
COMMISSIONER J. THOMAS ROSCH IN
FEDERAL TRADE COMMISSION v. LUNDBECK, INC.

Dkt. Nos. 10-3458 and 10-3459; FTC File No. 0810156

October 3, 2011

Today the Commission has petitioned the United States Court of Appeals for the Eighth Circuit to rehear *en banc* the August 19, 2011 panel decision,[1] which affirmed the district court's conclusion that Indocin IV ("Indocin") and NeoProfen—the only two FDA-approved drugs for the treatment of patent ductus arteriosus ("PDA"), a potentially fatal heart condition afflicting seriously premature infants—were not in the same relevant product market and thus did not violate the antitrust laws.[2] I concur in the decision to petition for rehearing of this case, which involves what can be characterized only as a merger to monopoly through defendant Lundbeck, Inc.'s ("Lundbeck") acquisition of the rights to both Indocin and NeoProfen, immediately followed by its exercise of monopoly power over the price of the two drugs.[3] I write separately, however, to express my view that the petition is not as crisp and direct as it could—and should—be in explaining why the district court and the Eighth Circuit panel erred, as a matter of law, insofar as they held that cross-price elasticity of demand between the two drugs was "essential" to proof of a relevant product market, so that findings of fact demonstrating reasonable interchangeability of use between the two drugs could be ignored.

The district court concluded that Indocin and NeoProfen were not in the same relevant product market despite making factual findings (1) that the two drugs were functionally interchangeable; (2) that a single firm, namely, Lundbeck, ended up controlling the production and distribution of both drugs after Lundbeck's acquisition of

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[1] *FTC v. Lundbeck, Inc.*, Nos. 10-3458 & 10-3459, 2011-2 Trade Cas. (CCH) ¶ 77,570, 2011 U.S. App. LEXIS 17231 (8th Cir. Aug. 19, 2011), *affirming* Nos. 08-cv-6379 & 08-cv-6381, 2010 U.S. Dist. LEXIS 95365 (D. Minn. Aug. 31, 2010).

[2] *FTC v. Lundbeck, Inc.*, Nos. 08-cv-6379 & 08-cv-6381, 2010 U.S. Dist. LEXIS 95365, at *4–5, *6–9, *57–58 (D. Minn. Aug. 31, 2010) (¶¶ 4, 14–17, 116).

[3] *Id.* at *10, *14, *21, *23 (¶¶ 22, 33, 57, 62).

NeoProfen; (3) that Lundbeck thereafter increased the price of Indocin nearly 1300 percent and then priced NeoProfen at a similar level; and (4) that Lundbeck's own business documents showed it priced the two drugs near parity so that one drug would not "cannibalize" the sales of the other.[4] Ignoring its own findings, the district court instead based its conclusion about the relevant product market on only two pieces of testimony: (1) the opinion of Lundbeck's economic expert that the cross-price elasticity of demand between the two drugs was "very low"; and (2) the views of a handful of neonatologists that they did not consider the prices of the two drugs in deciding which drug to use.[5]

The Eighth Circuit panel affirmed. It agreed at the outset that after acquiring NeoProfen, Lundbeck owned all of the drugs for treating PDA and increased the price of Indocin "thirteen-fold."[6] Nevertheless, the panel deferred to the district court's conclusion about the relevant product market, holding that the district court's reliance on the testimony of Lundbeck's economic expert and the neonatologists did not constitute "clear error."[7] The panel so held even though it recognized that deference was not required when a district court's finding of fact "is predicated on a misunderstanding of the governing rule of law."[8] Moreover, one of the panel members, in a concurring opinion, questioned the district court's reliance on the testimony of neonatologists that they would use one drug or the other without regard to price when the trial record established without contradiction that hospitals, not doctors, paid for the drugs.[9]

Both the district court and panel decisions were classic examples of economic theories (and specifically price theory) preventing a fair and rational judgment based on the undisputed and indisputable facts and in accordance with governing legal principles. The Commission has filed a petition for rehearing *en banc* in order to give the Eighth Circuit an opportunity to correct the district court and panel decisions' legal errors, which include, among other things, (1) allowing the opinion of Lundbeck's economic expert on cross-price elasticity to trump

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[4] *Id.* at *9–10, *13–14, *21, *23–24, *29–31, *39 (¶¶ 21–22, 33, 57, 61–63, 79–80, 94).

[5] *Id.* at *56–57 (¶¶ 115–16).

[6] *Lundbeck*, 2011 U.S. App. LEXIS 17231, at *4–5.

[7] *Id.* at *10–11, *16.

[8] *Id.* at *7 (quoting *Bose Corp. v. Consumers Union Inc.*, 466 U.S. 485, 501 (1984)).

[9] *Id.* at *18–19 (Kopf, D.J., sitting by designation, concurring).

uncontested facts that Lundbeck, after its acquisition of NeoProfen, controlled both drugs and exploited the monopoly position it had thus obtained (contrary to Supreme Court and Eighth Circuit case law);[10] (2) holding that evidence of price cross-elasticity of demand was "essential" to proof of a relevant product market, so that the district court's findings of fact on reasonable interchangeability of use between the two drugs could be ignored (an economic theory also contrary to Supreme Court and Eighth Circuit case law);[11] and (3) ignoring Lundbeck's own business documents recognizing the substitutability of, and competition between, the two drugs (yet another legal error under Supreme Court and court of appeals case law).[12]

To be sure, the petition for rehearing *en banc* that the Commission has filed today identifies the above (and other) errors of law that the Eighth Circuit can and should correct without having to defer to the district court's factual findings. With respect to the panel's assertion that cross-price elasticity was "essential" to product market definition, and that findings on reasonable interchangeability could therefore be ignored, however, the petition could—and should—have pointed out more clearly that insofar as the panel so held, its holding directly contravenes an unbroken line of Supreme Court cases starting with *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). These cases instructed the lower courts that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use *or* the cross-elasticity of demand between the product itself and substitutes for it." *Id.* at 325 (emphasis added).

Specifically, Section III of the petition includes the following statement: "It is well accepted that the boundaries of a market are determined by the degree to which customers would switch between products in response to changes in prices or non-price terms, which is

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[10] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 393, 394 (1956); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000); *Morgenstern v. Wilson*, 29 F.3d 1291, 1297 (8th Cir. 1994).

[11] *See United States v. Continental Can Co.*, 378 U.S. 441, 453, 455–56 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 326 (1962); *du Pont*, 351 U.S. at 395–96; *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988).

[12] *See Brown Shoe*, 370 U.S. at 329 n.48; *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1045, 1047 (D.C. Cir. 2008) (Tatel, J., concurring); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 n.4 (D.C. Cir. 1986) (Bork, J.).

measured by a broad interpretation of the economic notion of 'cross-elasticity.'" It is not clear to me what this statement means.

On the one hand, insofar as this statement is meant to imply that "cross-elasticity" may be based on non-price factors, then it is irrelevant to the district court's conclusion. That is so because the panel decision and concurring opinion (as well as the district court's findings that there was reasonable interchangeability) established that the district court's conclusion that the two drugs were not in the same relevant product market was based exclusively on price factors, namely, the testimony of Lundbeck's economist and a handful of neonatologists that price cross-elasticity between the two drugs was "very low."

On the other hand, if this statement is meant to suggest that the boundaries of a relevant product market are to be determined only by price cross-elasticity, then it overlooks the teaching of *Brown Shoe*—specifically, the Supreme Court's use of the disjunctive "or"—that reasonable interchangeability and price cross-elasticity are separate and alternative tests that may be used to prove a relevant product market. Furthermore, in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), the Supreme Court defined "reasonable interchangeability" separately and distinctly from "cross-elasticity," to refer to "reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *Id.* at 404. "Price" is thus not the only factor to be taken into account in determining whether there is reasonable interchangeability requiring that products be considered in the same relevant product market.