STATEMENT OF THE COMMISSION CONCERNING DISMISSAL OF THE ADMINISTRATIVE COMPLAINT

IN THE MATTER OF PAUL L. FOSTER, WESTERN REFINING, INC., AND GIANT INDUSTRIES, INC.
DOCKET NO. 9323

As the Commission has stated repeatedly, no other industry's performance is more deeply felt than that of the petroleum sector, and no other industry is more carefully scrutinized by the FTC.[1] The Commission's vigorous efforts to identify, prosecute, and prevent unlawful anticompetitive mergers and practices in the oil industry are longstanding and ongoing.

The Commission brought this case as part of that effort. On May 29, 2007, however, following a four and one-half day hearing and consideration of the evidence presented, the United States District Court for the District of New Mexico denied the Commission's Petition for a Preliminary Injunction to enjoin the merger of two petroleum industry companies, Western Refining, Inc. and Giant Industries, Inc.[2] The Commission now faces the difficult decision whether to remand this matter for further administrative proceedings or to dismiss the complaint. If the only consideration were whether we agree with the district court's decision and reasoning, we would remand. As our colleagues explain in their dissenting statement, the district court made a number of questionable findings. Here, as in all cases that staff files, before authorizing the district court complaint, the Commission determined that it had reason to believe that the effect of the defendants' proposed merger "may be substantially to lessen competition, or to tend to create a monopoly."[3] But the Commission must account for factors beyond disagreement with the district court's decision. After weighing all relevant factors – and recognizing that this is a close call – we conclude that continuing to pursue the case would not be in the public interest, as required by Commission Rule 3.26(d).[4] Accordingly, the Commission has determined to dismiss the complaint in this matter, rather than to remand for further proceedings.

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[1] *E.g.*, Prepared Statement of the Federal Trade Commission, *Petroleum Industry Consolidation*, presented by Dr. Michael A. Salinger, Director, Bureau of Economics, Federal Trade Commission, before the Joint Economic Committee, United States Congress (May 23, 2007), *available at* http://www.ftc.gov/os/testimony/070523PetroleumIndustryConsolidation.pdf.

[2] *FTC v. Foster*, 2007 WL 1793441 (D.N.M. Apr. 29, 2007) (public version).

[3] 15 U.S.C. § 18.

[4] 16 C.F.R. § 3.26(d).

THE PUBLIC INTEREST STANDARD OF COMMISSION RULE 3.26(d)

Commission Rule 3.26(d)[5] directs that, following the denial of a preliminary injunction, further administrative proceedings should not be pursued if "the public interest does not warrant further litigation."[6] Although the rule itself does not set out what constitutes the "public interest," the Commission Policy Statement issued contemporaneously explains the Commission's intent. It provides five factors that the Commission considers in determining whether to dismiss an administrative complaint after unsuccessfully seeking a preliminary injunction: (1) the factual findings and legal conclusions of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative proceedings; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.[7] These factors are applied on a case-by-case basis.[8]

1. The Factual Findings and Legal Conclusions of the District Court

Although this matter was litigated in a short period of time, the district court received into evidence live testimony as well as numerous documents, declarations, and deposition transcripts. In a fact-intensive, 116-page opinion, the district court found that the Commission, based upon a concentration level that was on the low end of the highly concentrated range of the Merger Guidelines, made only a "weak" *prima facie* case that the defendants then rebutted.[9]

We do not agree with the district court's view of the facts of this case. We believe that the factual and legal showing that the FTC made before the district court at least should have persuaded that court to conclude that our staff had "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and

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[5] 16 C.F.R. § 3.26(d).

[6] Policy Statement Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction (Jun. 21, 1995), *republished at* 60 Fed. Reg. 39741, 39742 (Aug. 3, 1995) ("Policy Statement").

[7] 60 Fed. Reg. at 39743.

[8] *Id.*

[9] *Foster*, 2007 WL 1793441 at *28, ¶ 264; *55-*56, ¶¶ 20-22, 28.

ultimately by the Court of Appeals."[10] Furthermore, we agree with the dissenting Commissioners that the court made numerous factual and legal errors that contributed to what we believe was an erroneous decision. These are not, however, the only issues to be considered under this factor of the Policy Statement.

Because an important benefit from administrative litigation is the creation of an enhanced record, it is essential to understand whether the court's errors resulted from a flawed record or simply from a mistaken view of a sufficient record. Before the Commission engages in potentially lengthy and resource-intensive administrative litigation in this context, there must be support for the conclusion that the additional expense will improve the evidentiary record. That does not appear to be the case here. In particular, it does not appear that the record before the district court was deficient in any serious respect. The record before the district court, although short of a fully developed trial record, is extensive, and it does not appear that the Commission was prevented from presenting any important evidence regarding the potential impact of the merger.

2. New Evidence Developed During the Course of the Preliminary Injunction Proceeding

As is often the case, some new facts came to light during discovery leading to the preliminary injunction hearing; in this case, the new information militates against continuing in administrative litigation. For example, new information suggests that the Plains Pipeline, which runs from El Paso, Texas to Albuquerque, New Mexico, may begin work on a capacity expansion project more quickly than previously thought.[11] A cornerstone of FTC staff's case at the hearing was that the Plains Pipeline was capacity-constrained and fully utilized, preventing some competitors and potential competitors from being able to respond to an anticompetitive post-merger price increase by Western. If, as appears likely, the Plains Pipeline expansion leads to increased gasoline supply and allows new bulk suppliers to deliver gasoline to the Albuquerque area, we would expect more competition and lower gasoline prices in Northern New Mexico, notwithstanding the merger.

3. Whether the Transaction Raises Important Issues of Fact, Law, or Merger Policy That Need Resolution in Administrative Proceedings

The transaction does not raise important issues of fact, law, or merger policy that need resolution in administrative proceedings. The district court's preliminary injunction ruling was highly fact-driven, and its discussion of the law generally did little more than recite established

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[10] *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *FTC v. Beatrice Foods Co.,* 587 F.2d 1225, 1229 (D.C. Cir.1978) (Appendix to Statement of MacKinnon & Robb, JJ.).

[11] *Foster*, 2007 WL 1793441 at *36, ¶¶ 341-43.

principles of competition law. The district court's opinion, therefore, should have little precedential value beyond the specific facts of this case.

As the dissenting Commissioners' statement notes, the district court's opinion referred three times to matters that should have no weight in merger adjudications. We doubt, however, that these flaws made a difference in the court's analysis or materially limit the Commission's ability to prosecute merger cases in the future.

First, in assessing whether Western was a competitor in the Northern New Mexico bulk gasoline supply market despite its neither owning nor having long-term access to a terminal there, the court cited to "inconsistencies" between the Commission's position on terminals in the case before it and the Commission's position with respect to terminals in *Aloha Petroleum*[12] and in the Commission's Bureau of Economics' August 2004 study entitled, *The Petroleum Industry: Mergers, Structural Change and Antitrust Enforcement*.[13] In *Aloha*, the Commission asserted a narrow bulk supply market that included only local indigenous refiners, terminal operators, and firms with long-term contractual access to terminals. For its part, the section of the FTC staff economists' report cited by the court merely states that terminal access is one possible "factor" in determining whether a bulk supplier is a competitor in a particular geographic market.[14] Although we disagree with the court's characterizations of such positions as inconsistent with those taken in *Foster*, that is beside the point. In fact, the terminal issue ultimately was not significant in *Foster* because the court concluded that – even without terminal access – Western was a bulk supply competitor to Giant.[15] Nevertheless, we note that the court's reliance on *Aloha* and the FTC staff economists' report in this context was improper because, while courts and agencies follow established antitrust principles, the bases for challenging mergers are individual and highly fact-specific.

Second, in one passage of its opinion, the district court noted that the Commission's 2006 report to Congress entitled *Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* concluded that the Commission staff had found no evidence of collusion in the petroleum industry in general, and no specific evidence of collusion in the Albuquerque market.[16] We believe that the Court erred in treating this part of the report as support for its conclusion that

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[12] *FTC v. Aloha Petroleum,* No. CV 05-00471 (D. Haw. 2005).

[13] *Foster*, 2007 WL 1793441 at *18-19, ¶¶ 173-81.

[14] Federal Trade Commission, Bureau of Economics, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* (Aug. 2004) 23-24, *available at* http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf.

[15] *Foster*, 2007 WL 1793441 at *18, ¶ 172.

[16] *Id.* at *49, ¶ 457.

the merger should not be enjoined. As stated above, a merger challenge must be decided on the facts of each case. In contrast, a report to Congress such as the *Gasoline Price Manipulation* report provides a broad evaluation of the competitive conditions in numerous markets at a particular time. Such a report generally does not analyze the potency of particular competitors or post-merger combinations of competitors in particular defined antitrust markets. As a result, the *Gasoline Price Manipulation* report provides no probative insight as to how the merger of Giant and Western would affect the Northern New Mexico market, either in 2007 or in the years to come. Because the court separately found that the Commission did not present any evidence that coordinated behavior between competitors existed in the Albuquerque market or would exist prospectively post-merger,[17] however, we do not believe that consideration of the *Gasoline Price Manipulation* report was dispositive.

Third, the district court's opinion referred to Bureau of Economics working papers analyzing some oil company transactions that the Commission did not challenge, as well as to a summary of Commission horizontal merger investigation data indicating that the Commission has not challenged any "8 to 7" mergers since 2001.[18] We agree with our dissenting colleagues that this is not evidence that the Western/Giant merger was not anticompetitive. The transactions analyzed in the working papers were based on the specific facts of those transactions. The observation concerning the Commission's decision not to challenge relatively recent "8 to 7" mergers is too generalized to provide guidance on the specific facts of this case. Viewed in context, however, the court used these working papers and the merger investigation data simply to bolster its point that the Commission's *prima facie* showing was "weak," as the court had already independently concluded without reference to these materials.[19]

In addition, the dissenting Commissioners are concerned that the court's ruling establishes conclusively that the elimination of a "maverick" cannot violate merger law unless the transaction would increase the likelihood of coordinated conduct by the remaining competitors in the market. At the time the Commission authorized its staff to file a complaint in district court, we believed that the evidence suggested that an independent Giant, as the output at its Four Corners refineries rose, would increase the amount of gasoline that it would supply to the Northern New Mexico market, and that this likely would cause gasoline prices in this market to decrease. Giant, thereby, would act as a maverick as that term is used in the Merger Guidelines.[20] The district court, however, found that defendants presented substantial evidence that an

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[17] *Id.* at *48, ¶¶ 454-56

[18] *Id.* at *29, ¶¶ 268-71.

[19] *Id.* at *28, ¶ 264; *see also id.* at *55-56, ¶¶ 20-21.

[20] United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 8, 1997 rev.) at § 2.12, *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm.

independent Giant would have used part of its additional output to reduce the amount that it purchased for resale in this market – leaving its supply to the market roughly constant – and would have sent its remaining additional output to other markets more profitable than Northern New Mexico.[21] We disagree with the dissenting Commissioners that the district court, on the facts presented, reached any conclusion other than that an independent Giant would not have acted as a maverick to thwart the coordinated anticompetitive behavior of its competitors.[22] The district court did not address, much less resolve, the more general legal question of whether a competitor unilaterally can act as a maverick even in the absence of coordinated behavior by its competitors.

In sum, the court's anomalous references to and conclusions about Giant's likely behavior should not establish discernable rules of law that could serve as precedent for future merger analysis. Moreover, we note that there are many established, well-reasoned, and well-articulated recent merger cases, to which courts considering future merger challenges by the Commission may look for guidance.[23]

4. Overall Assessment of the Costs and Benefits of Further Proceedings

The use of FTC resources is always an important consideration in determining whether to continue in administrative litigation. Further administrative proceedings will consume significant Commission resources. In appropriate situations, the Commission should expend those resources. The modern history of the FTC's competition programs underscores the Commission's willingness to apply substantial resources to cases and studies involving gasoline and other energy markets.

In this matter, the Commission devoted considerable resources to assessing the competitive effects of the Western/Giant merger and – after concluding that it was likely to substantially lessen competition – to proving this harm. Given the district court's finding that the Commission failed to define a geographic market,[24] and its negative assessment of our two experts' analyses,[25] we believe that an administrative proceeding would require substantially

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[21] *Foster*, 2007 WL 1793441 at *44-45, ¶¶ 425-27, 429, 435, 438.

[22] *See Foster*, 2007 WL 1793441 at *49, ¶ 458.

[23] *E.g., Heinz, supra*; *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

[24] *Foster*, 2007 WL 1793441 at *40-43, ¶¶ 386-415.

[25] *Id.* at *17-18, ¶¶ 160-71.

more resources, which should instead be reallocated to new competition matters, including in particular other gasoline matters.

5. Other Matters That Bear on Whether It Would Be in the Public Interest to Proceed with the Merger Challenge

The fact that the merger of Western and Giant has combined two petroleum refining companies necessitates that the Commission give the matter the utmost scrutiny in determining whether further administrative proceedings are in the public interest.[26] Indeed, the Commission's authority to pursue an administrative proceeding after the denial of a preliminary injunction by a district court is an important and potent tool. But, due to the significant ramifications to both the Commission and the Respondents that arise in such situations, it is crucial that the Commission exercise this authority judiciously. We conclude that this is not an appropriate case in which to continue administrative litigation following the district court's denial of the Commission's request for a preliminary injunction.

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For all of the foregoing reasons, the Commission has determined to issue the attached Order dismissing the administrative complaint in this matter.

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[26] The FTC's aggressive enforcement stance is evident in the results of a review of merger investigation data that the agency released last January. From fiscal year 1996 to fiscal year 2005, the Commission brought more merger cases at lower levels of concentration in the petroleum industry than in any other industry. Unlike in other industries, the Commission has brought enforcement actions (and, in many cases, has obtained merger relief) in petroleum markets that are only moderately concentrated. Federal Trade Commission Horizontal Merger Investigation Data, Fiscal Years 1996-2005 (Jan. 25, 2007), Table 3.1, *et seq*., *available at* http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf; *see also* FTC Horizontal Merger Investigations Post-Merger HHI and Change in HHI for Oil Markets, FY 1996 through FY 2003 (May 27, 2004), *available at* http://www.ftc.gov/opa/2004/05/040527petrolactionsHHIdeltachart.pdf.