DISSENTING STATEMENT OF
COMMISSIONER PAMELA JONES HARBOUR
AND COMMISSIONER J. THOMAS ROSCH

IN THE MATTER OF WESTERN REFINING, INC., ET AL.
DOCKET NO. 9323 / FILE NO. 061-0259

We would submit to a Part 3 plenary trial complaint counsel's claim that this transaction violated Section 7 because it eliminated Giant as a potential maverick who had the ability and intent to reduce gasoline prices in Albuquerque.[1]

First, we emphatically reject the district court's conclusion that even assuming Giant increased supply to Albuquerque as a result of its new crude oil source (as Giant represented to state and local officials that it would do in order to secure their approval for that plan),[2] that expansion would have had a *de minimus* effect on Albuquerque gasoline prices.[3] There is substantial evidence that the loss of Giant's incremental production would cost Albuquerque consumers millions of dollars annually. In this sensitive area of the economy that is a substantial injury to consumers.

Second, we also reject the district court's view that, as a matter of law, the elimination of a maverick cannot violate Section 7 unless the transaction would enhance the likelihood of coordinated conduct by the remaining competitors in the market.[4] No court has ever held that the elimination of a maverick is only a concern in coordinated effects cases, and there is no support for that conclusion in the language of Section 7. To be sure, the Horizontal Merger Guidelines treat the elimination of a maverick as most apt to cause anti-competitive effects when the maverick would disrupt coordination among competitors in a highly concentrated market.[5] However, the Guidelines do not say those are the only circumstances in which the elimination of a maverick may increase prices significantly. Indeed, as the Commentary to the Merger Guidelines make clear "the Guidelines were never intended to detail how the Agencies would assess every set of circumstances that a proposed merger may present. As the Guidelines themselves note, the specific standards set forth therein must be applied to a broad range of possible factual circumstances."[6]

Third, these fundamental errors are compounded by the court's references to prior Commission actions and inactions vis-a-vis the petroleum industry. For example, the court infers that competitive effects are unlikely from the Commission's decisions not to challenge two prior refiner mergers that court said were similar.[7] That is error both as a matter of fact and as a matter of law. Even if one were to assume that the market conditions in those earlier cases were similar to those in northern New Mexico, there is no evidence that the acquired party was a putative maverick in either of the earlier cases.[8] Moreover, and most fundamentally, as a matter of law no inference respecting the legal merits of the agency's legal challenge in this matter can be drawn from an exercise of its discretion not to challenge other transactions.[9]

Conversely, the district court implied that the Court's inclusion of Western as a competitor was inconsistent with the position it took in *FTC v. Aloha Petroleum* that terminal ownership was critical to competition in bulk supply of gasoline in Oahu.[10] That compares apples and oranges too. Even assuming that the market conditions in Oahu and Albuquerque were similar, the challenge here was not focused on Western's acquisition of Giant's Albuquerque terminal but on the elimination of Giant as a potential maverick in the northern New Mexico market. Beyond that, again as a matter of law, the Commission's exercise of prosecutorial discretion – this time to challenge the terminal acquisition in Aloha – creates no inference respecting the merits of its challenge in this case.[11]

Indeed, the district court even drew an inference that anticompetitive effects were unlikely here from the Commission's Report to Congress as to whether "price-gouging" occurred in the wake of Hurricane Katrina.[12] That report had nothing to do with Giant's unique incentives in the northern New Mexico market or whether this transaction violated Section 7 by eliminating Giant as a potential maverick. It was concerned with whether there was questionable pricing (as defined by the authorizing legislation) by refiners or retailers in the wake of Katrina. Using (or, more accurately, misusing) that Report to ascertain the likelihood of success in this merger case goes beyond drawing illegitimate inferences from exercises of prosecutorial discretion. It has the potential to chill the kind of unfettered communication that Congress – and the public – expect from this agency.

Fourth, these errors cannot be shrugged off as harmless dicta. The district court would not have included them in his opinion if he did not consider them relevant to his ultimate ruling denying the preliminary injunction. Moreover, it is hard to explain the numerous anomalies in the court's opinion on any other basis. For example, the court seemed to opine at one point that Western did not even compete with Giant before the merger.[13] That conclusion was apparently influenced by the court's finding that Western did not have rights to an Albuquerque terminal.[14] Although the court reversed itself in this regard,[15] the court's doubts on this score are apparent.

Similarly, the district court took complaint counsel's economic expert to task for not considering alternatives to his relevant geographic market and even opined at one point that he did not support any relevant geographic market.[16] However, the expert defined the relevant geographic market in accordance with the Horizontal Merger Guidelines, which provide that alternatives need not be considered once the SSNIP test is satisfied.[17] Again, the court ultimately reversed himself, holding that the record established a relevant geographic market.[18] Indeed, the court found that complaint counsel established a prima facie case that the transaction would likely result in anti-competitive effects in the market for gasoline in northern New Mexico.[19] However, having done so and despite recognizing that respondents had the burden of producing evidence to dispel that presumption, the court engaged in a relatively uncritical analysis of respondents' evidence.

For example, the district court concluded that Giant was unlikely to act as a maverick because it believed it would have been contrary to Giant's self-interest to do so.[20] The court not

only dismissed Giant's internal planning documents in reaching that conclusion but it also ignored the representations that Giant made to governmental officials and the press about its intentions to increase price competition for gasoline sales in Albuquerque. In contrast, the court concluded that, if Western diverted Giant's incremental production to other markets instead of distributing it in Northern New Mexico post-transaction, Flying J and/or other suppliers would have trucked enough extra gasoline in from Texas to make up the difference.[21] That conclusion, however, was contrary to the logic of the court's earlier conclusion: if it made no sense for Giant to act as a maverick, it would make no sense for Flying J to do so (especially since, as the court elsewhere recognized, the cost of trucking gasoline from Texas generally made that supposed alternative unfeasible).[22] Similarly, the court concluded that existing suppliers such as Holly, ConocoPhillips, and Valero had the same incentives as Giant to act as a maverick in the relevant market. However, the court failed to explain their incentives to ship additional amounts of gasoline in the market or address the undisputed fact that those refiners had historically failed to increase their shipments to the market in response to sustained price increases.[23]

The district court's analysis of the incentives of the other suppliers to act as a maverick in the relevant market was flawed. It focused on whether entry or expansion was possible, not on whether it was profitable or likely.[24] For example, the court cited the fact that firms were already trucking into the market to support his conclusion that these firms could discipline future price increases post-merger. Yet the court did not analyze the relative costs of these various producers. In this market the marginal suppliers were those who could truck product into the market. Giant's location placed it in a unique position to serve this market – the geographic proximity of its refineries to the northern New Mexico market gave it a cost advantage over other firms trucking product. That gave it a greater ability – and incentive – to discipline a price increase or in the alternative disrupt the market equilibrium than those other firms.

Fifth, these flaws in the opinion of a distinguished federal district judge are not surprising. As Justice Ginsburg has observed, there is a vast difference between a preliminary injunction hearing and a plenary trial. The former is necessarily truncated and is followed by issuance of an opinion that must be crafted quickly out of fairness to the parties.[25] It is because of these differences and because of the paramount importance of "getting it right" when gasoline refinery mergers are at issue that we believe a full plenary trial, at which complaint counsel's claim that this transaction threatened anti-competitive effects can be thoroughly analyzed, is warranted.

We consider such a plenary trial to be essential for several reasons. For one thing, regardless of how that trial were to come out, we are concerned with letting the district court's flawed opinion stand as the last word in this case. Moreover, we have pledged vigorous merger enforcement in this area of the economy generally and with respect to refinery mergers specifically. We do not consider a preliminary injunction hearing to be any substitute for a plenary trial in this respect.

Finally, we know that a plenary trial requires the commitment of significant Commission resources. However, the Commission's decision to issue the complaint was unanimous. Nothing in the district court's opinion gives us reason to second-guess that decision.

NOTES

1. Giant's ability and willingness to increase gasoline supply to Albuquerque and Santa Fe, despite causing lower prices, makes it a "maverick" in antitrust terms. See U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 2.12 (1992) *reprinted in* 4 Trade Reg Rep. (CCH) ¶ 13,104 ("Horizontal Merger Guidelines").

2. See Federal Trade Commission v. Foster, et al.,2007-1 Trade Cas. (CCH) ¶ 75,670 (D.N.M. 2007) (In granting the Commission's TRO motion, the court noted that "The FTC's Exhibit 5 is styled "New Mexico Crude Oil Pipeline Fact Sheet" and indicates that Giant prepared the document. The document indicates that Giant believes additional product marketed to Albuquerque and Santa Fe will spur price competition. The fact sheet states: "Price Competition. Additional production of petroleum products will help spur price competition in northern New Mexico markets, including Albuquerque and Santa Fe." Exhibit 5."); see also Wendy Brown, The Whys' Behind the 'Highs', Santa Fe New Mexican, May 7, 2006 ("Gould said gasoline prices are currently higher in northwest New Mexico because both of Giant's refineries are running at 50 percent capacity.").

3. See Federal Trade Commission v. Foster et al., 2007-1 Trade Cas. (CCH) ¶ 75,725, *80 (D.N.M. 2007) (Finding of Fact ¶ 286 "The amount of gasoline that the FTC alleges would be diverted from Albuquerque is small and would have little or no significant impact on price. See id. at 881:11-15 (Stevens)." Finding of Fact ¶ 287 "The Court does not believe these few additional barrels will significantly impact the market, or reduce the price as much as the FTC projects.").

4. See Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725, *124 (Finding of Fact ¶ 458 "Under the Merger Guidelines, the concept of a maverick is used in cases premised on tacit or coordinated behavior to describe competitors that, because of structural conditions or unique incentives, can prevent or limit anti-competitive coordinated interaction by other firms and 'are unusually disruptive and competitive influences in the market.' Defendants' Hearing Exhibits, CG at § 2.12. The FTC has not, however, presented evidence of past competitor coordination or the ability of firms to coordinate in the future.").

5. See supra note 1, Horizontal Merger Guidelines § 2.12.

6. Fed. Trade Comm'n and U.S. Dep't of Justice, Commentary on the Horizontal Merger Guidelines, at p.3 (2006), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

7. See Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725, *73-74 (Finding of Fact ¶ 268 "While Professor White's concentration analysis satisfies the minimum levels set out in the Merger Guidelines, his findings, based on recent studies by the FTC and the FTC's recent enforcement record, do not appear to represent substantial proof of anti-competitive effect. For example, two FTC Bureau of Economics working papers analyzed two petroleum industry mergers that the FTC did not challenge to determine whether the mergers adversely affected gasoline prices and consumers. See Defendants' Hearing Exhibits, CV (Economic Effects of the Marathon-Ashland Joint Venture, dated May 7, 2007); Defendants' Hearing Exhibits, CW (Michigan Gasoline Pricing and the Marathon-Ashland and Ultramar Diamond Shamrock Transaction, dated July 2005).").

8. See, John Simpson and Christopher T. Taylor, Michigan Gasoline Pricing and the Marathon-Ashland and Ultramar Diamond Shamrock Transaction, at p. 5 (July 2005) *available at* http://www.ftc.gov/be/workpapers/wp278.pdf ("Given the environment described above, MAP's acquisition of UDS's Michigan gasoline stations could lead to higher prices in several ways: The acquisition could eliminate localized competition between gasoline stations supplied by MAP and gasoline stations supplied by UDS; the acquisition could also facilitate coordinated interaction by reducing the number of competitors; and the acquisition could lead to higher prices by prompting the combined firm to restrict access to its terminals thereby raising the costs of its independent rivals."); John Simpson and Christopher T. Taylor, The Economic Effects of the Marathon-Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure (May 7, 2004) *available at* http://www.ftc.gov/be/workpapers/wp270.pdf.

9. See e.g., United States v. Cinemette Corp. of Am., 687 F. Supp. 976, 982 (W.D. Pa. 1988) ("[T]he government is under no obligation to pursue a history of civil enforcement proceedings in a particular industry in advance of bringing criminal prosecutions for anti-competitive conduct.").

10. See Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725, *46-48 (Finding of Fact ¶ 174 "In Aloha Petroleum, the FTC asserted a narrow bulk supply market that included only local indigenous refiners, terminal operators, and firms with long-term contractual access to terminals. The FTC represented to the United States District Court for the District of Hawaii that access to a local product terminal was indispensable to bulk supply competition. "[O]wnership of a [local] refinery or ownership of, or unfettered access to, a terminal on Oahu is necessary to make a bulk sale of gasoline." Defendants' Hearing Exhibits, CK (Petroleum: Plaintiffs' Aloha Proposed Findings of Fact) ¶ 21, at 11.)").

11. See supra note 9.

12. See Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725, *124 (Finding of Fact ¶ 457 "In 2006, the FTC represented to Congress that the bulk petroleum supply markets within the United States were operating in a competitive manner. See Defendants' Hearing Exhibits, EJ (FTC, Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases, dated Spring 2006) at vi. To support its investigation, the FTC analyzed a large volume of wholesale

and retail pricing data, including data on gasoline prices in the Albuquerque area. See id. at v, 95-96, 125, 131, 134, 136. The FTC's investigation concluded that there was no evidence suggesting that any refiner was manipulating prices by any of the means the FTC's staff investigated. See id. at viviii.").

13. Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725, *53 (Finding of Fact ¶ 195 "[t]he FTC has not provided evidence that Western and Giant compete in the relevant market.").

14. For example, the court noted in finding of fact 178 that "[w]ithout its own terminal in Albuquerque, Western can only deliver gasoline over the Plains pipeline with the consent of its existing customers." Id. *49.

15. Id. *50 (Finding of Fact ¶ 182 "Giant and Western are competitors").

16. The court's found that "[t]he FTC's economic expert did not endorse the relevant geographic market alleged in the FTC's Complaint. Instead, he defined a different geographic market: the Albuquerque MSA, which encompasses four counties." Id. *44 (Finding of Fact ¶ 163).

17. See Federal Trade Commission v. Foster et al., Trial Transcript at 550:13-551:14 (May 9, 2007). Testimony of Dr. Hal White:

> A: My conclusion was that the relevant antitrust market is the supply of bulk delivery of gasoline in the Albuquerque MSA.
>
> Q: Did you look at other candidate markets?
> A: I didn't have time or data to look at other candidate markets. Instead, I found that was a -- I'm not saying it was the only, but it was a relevant product in geographic market for this study.
> //
> Q: And how does -- How does finding a relevant market square with your understanding of the [Guidelines]
> A: My understanding is that once one finds a relevant market one can then proceed to analyze the likely antitrust impact in that market.

18. "While the Court agrees with the FTC that the relevant geographic market is limited to firms that provide bulk supply in northern New Mexico, the FTC's proposed market does not include all current suppliers of bulk supply of gasoline to Albuquerque." See Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725, *144-45 (Conclusion of Law ¶ 23).

19. Id. *146 (Conclusion of Law ¶ 27 "The FTC attempted to establish a likelihood of success on the merits by submitting evidence demonstrating that the proposed merger would have an anti-competitive impact through unilateral effects. The Court finds that the FTC made a prima facie showing that the market is presently concentrated and that the proposed merger would result in an increase in market concentration.").

20. Id. *117 (Finding of Fact ¶ 438 "Chasing customers in Albuquerque at a deep discount -- as the FTC asserts Giant will do -- is inconsistent with Giant's business practices. Giant seeks to sell its refinery production, not to resell products that others refine. See Hearing Transcript at 845:1-4 (Matthew)("I'm in the refining business."). Giant has no economic incentive to purchase product from Western at market prices and then resell the same barrels at a discounted price. See id. at 973:17-19 (Kalt)").

21. Id. *35-37 (Finding of Fact ¶ 135-141 discussing the ability of Flying J and other firms to truck gasoline to the Albuquerque market from Texas).

22. Id. at *37 (Finding of Fact ¶ 141 "For Flying J, the added costs of trucking product are eight cents per gallon when trucking to Albuquerque from El Paso, and ten to thirteen cents per gallon when trucking from El Paso to Phoenix or to Tucson. Additional costs place Flying J at an economic and competitive disadvantage relative to firms transporting from and to the same locations via pipeline. See Plaintiff's Hearing Exhibits, PX04011 (Declaration of J. Phillip Adams, executed April 26, 2007) ¶ 8, at 2.")).

23. Id. at *82-83 (discussing ConocoPhillips), *87 (discussing Valero).

24. See supra note 1, Horizontal Merger Guidelines § 3 ("Entry is easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.").

25. See FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1083 (D.C.Cir. 1981) (observing that the district court's ruling in a preliminary injunction case "must be made under time pressure and on incomplete evidence" and "the risk of an erroneous assessment is therefore higher than it is after a full evidentiary presentation.").