IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	
v.	)	Case No. 1:07-cv-00352-JB-ACT
PAUL L. FOSTER,	)	
WESTERN REFINING, INC.	)	
and	)	**PUBLIC VERSION**
GIANT INDUSTRIES, INC.	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

The proposed acquisition by Western Refining, Inc. ("Western") of Giant Industries, Inc. ("Giant") threatens to create significant competitive harm in northern New Mexico. The acquisition, if permitted, would significantly increase the size of one of the largest suppliers of bulk light petroleum products (gasoline, diesel fuel, and jet fuel) to northern New Mexico, and would likely reduce the total volume of bulk light petroleum products supplied to northern New Mexico. Basic economics teaches that less supply means higher fuel prices for approximately one million northern New Mexico consumers. Therefore, the Federal Trade Commission ("Commission") seeks a temporary restraining order, and ultimately, a preliminary injunction, enjoining the proposed transaction pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), pending an administrative trial on the merits.[1]

The Commission seeks to preserve the independent existence of Giant—a uniquely competitive force in the isolated northern New Mexico market for bulk light petroleum products. After several years of declining local crude oil production at the oil fields feeding its two New Mexico refineries, Giant was able to secure a new supply source for crude oil that will enable it to increase production at both refineries by this summer. Giant will then have substantially more bulk light petroleum products to sell in its primary marketing areas, which include northern New Mexico. **[Redacted**

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[1] Section 13(b) further provides that the Commission must commence its administrative proceeding within 20 days after the issuance by a federal court of any temporary restraining order or preliminary injunction.

[2] Defendants' counsel and the Commission have jointly agreed to waive the 50 page limit for exhibits in accordance with "Page Limit for Exhibits," D.N.M.LR-Civ. 10.5.

]

By contrast, Western has both the motive and means—if it is allowed to acquire Giant—to prevent some or all of Giant's additional gasoline from ever reaching the northern New Mexico market. The reason is simple. **[Redacted**

]

Western and Giant (together, "the Defendants") will argue that any post-acquisition effort by the combined Western/Giant to re-direct or otherwise restrict bulk supply to northern New Mexico and keep prices elevated there would be defeated by other suppliers who would ship additional product into the area. However, this is highly unlikely. The only pipeline capable of delivering product to Albuquerque from El Paso, a key supply center, is already full. **[Redacted**

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Unless enjoined, Western and Giant will be free to consummate the acquisition after 11:59 p.m., Eastern Daylight Time, April 13, 2007. The Commission respectfully requests that this court provide temporary and then preliminary relief under Section 13(b) of the FTC Act, which authorizes a preliminary injunction upon the court's determination, after weighing the equities and considering the Commission's likelihood of ultimate success, that such relief would be in the public interest. 15 U.S.C. § 53(b). The Commission's burden of proof is satisfied at the preliminary injunction stage if it raises "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 ultimately by the Court of Appeals." FTC v. Beatrice Foods Co., 587 F.2d 1225, 1229 (D.C. Cir. 1978). This standard is easily satisfied here, where even a one or two cent per gallon increase in prices resulting from the transaction would cause New Mexico consumers to pay millions of dollars more in higher fuel prices.

STATEMENT OF FACTS

I. THE DEFENDANTS AND THE TRANSACTION

A. Western Refining, Inc.

Western is a publicly traded company headquartered in El Paso, Texas, with 2006 annual revenues of $4.2 billion and assets of $908.5 million. PX000002 at 032-034. Western owns and operates a single major refinery in El Paso with a crude oil capacity of approximately 124,000 barrels per day, producing primarily light petroleum products (i.e., gasoline, diesel fuel, and jet fuel). From its refinery, Western supplies light petroleum products to El Paso and west Texas, Albuquerque, Tucson, Phoenix, and Juarez, Mexico. Id. at 013. Western's ultimate parent entity is Paul L. Foster who also serves as Western's President and CEO, and as a member of its Board of Directors. Western supplies the northern New Mexico market through its historic shipping rights on the Plains pipeline, which extends from Western's refining terminal in El Paso to Albuquerque.

B. Giant Industries, Inc.

Giant is a publicly traded company headquartered in Scottsdale, Arizona, with 2006 annual revenues of $4.2 billion and assets of $1.2 billion. PX00600 at 040. Giant is an independent refiner and marketer of light petroleum products with a refinery in Yorktown, Virginia, as well as two refineries in northwestern New Mexico. Giant's two New Mexico refineries are located in the Four Corners region of New Mexico, at Ciniza (near Gallup) and at Bloomfield (near Farmington).[3] The New Mexico refineries have a combined crude oil capacity of 36,800 barrels per day. However, due to depleting local crude oil production, Giant's utilization rates at the New Mexico refineries have declined consistently over the last decade from 87% in 1999 to 72% by 2002 and then to 60% by 2006. PX00600 at 025; PX00603 at 015.

To remedy the shortage in its crude oil supply, Giant acquired an idle crude pipeline system, the Texas/New Mexico pipeline, from Shell Oil Company ("Shell") in August 2005. The pipeline originates near Jal, in southeastern New Mexico, and is connected to a Giant-owned and operated pipeline network supplying local crude oil to Giant's two New Mexico refineries. **[Redacted**

.] Giant expects the increased utilization to begin before the end of the second quarter of 2007. PX00600 at 012. **[Redacted**

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[3] **[Redacted**]

]

Giant distributes its light petroleum product by truck from storage terminals adjacent to its Ciniza and Bloomfield refineries. **[Redacted**

] Giant cannot supply either its Albuquerque or its Flagstaff terminals by pipeline from its refineries. However, Giant can and does supply its Albuquerque terminal from El Paso via the Plains pipeline **[Redacted**]

C. The Transaction

On August 26, 2006, Giant, Western, and a wholly-owned subsidiary of Western entered into an Agreement and Plan of Merger by which Western agreed to acquire all of the voting securities of Giant in exchange for approximately $83 per share (subsequently reduced to $77 per share), plus $275 million in assumed liabilities.

ARGUMENT

I. SECTION 13(b) OF THE FEDERAL TRADE COMMISSION ACT ESTABLISHES A PUBLIC INTEREST STANDARD FOR GRANTING INJUNCTIVE RELIEF

In authorizing these proceedings, the Commission found reason to believe that the effect of Western's proposed acquisition of Giant "may be substantially to lessen competition or to tend to create a monopoly" for the bulk supply of gasoline and light petroleum products to northern New Mexico in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act,[4] and that

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[4] Section 7 of the Clayton Act prohibits the acquisition of stock or assets where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15

a preliminary injunction would be in the public interest. When the Commission makes such a determination, and the parties to the transaction opt to proceed nonetheless, the Commission "may seek a preliminary injunction to prevent a merger pending the Commission's administrative adjudication of the merger's legality." FTC v. H.J. Heinz Co., 246 F.3d 708, 714 (D.C. Cir. 2001) (quoting FTC v. Staples, Inc., 970 F. Supp. 1066, 1070 (D.D.C. 1997)). A preliminary injunction, pending an administrative trial on the merits, ensures that an effective remedy to that adjudication will be available by preventing the parties from merging their businesses (known as "scrambling the eggs") and preserving beneficial competition during the interim, until the conclusion of a full administrative trial on the merits.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), "provides for the grant of a preliminary injunction where such action would be in the public interest—as determined by a weighing of the equities and a consideration of the Commission's likelihood of success on the merits." Heinz, 246 F.3d at 714. The Commission is not required to establish that the proposed acquisition would in fact violate Section 7 of the Clayton Act.[5] Id. (citing Staples, 970 F. Supp. at 1071); FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976). Instead, the Commission meets its burden under Section 13(b) if the evidence "raise[s] questions going to the merits so

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U.S.C. § 18. For the purposes of this case, Section 5 of the FTC Act may be assumed to duplicate Section 7 of the Clayton Act. FTC v. PPG Indus., Inc., 798 F.2d 1500, 1501 n.2 (D.C. Cir. 1986).

[5] As courts have observed, "[t]he determination of whether the acquisition actually violates the antitrust laws is reserved for the Commission and is, therefore, not before this Court." FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998); Staples, 970 F. Supp. at 1071; see FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976) ("The 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 F.T.C. in the first instance."); FTC v. Libbey, Inc., 211 F. Supp. 2d 34, 50 (D.D.C. 2002). Thus, Section 13(b) does not contemplate a hearing in the District Court equivalent to a full-blown trial on the merits. FTC v. Lancaster Colony Corp., 434 F. Supp. 1088, 1091 (S.D.N.Y. 1977); see FTC v. PPG Indus., Inc., 628 F. Supp. 881, 883 n.3 (D.D.C. 1986), aff'd in part, 798 F.2d 1500 (D.C. Cir. 1986).

serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the [Commission] in the first instance and ultimately by the Court of Appeals." Beatrice Foods, 587 F.2d at 1229; Heinz, 246 F.3d at 714-15; FTC v. Warner Communications, Inc., 742 F.2d 1156, 1162 (9th Cir. 1984); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 45 (D.D.C. 1998); FTC v. Alliant Techsys. Inc., 808 F. Supp. 9, 19 (D.D.C. 1992).

In making this determination, Congress emphasized that the public interest standard places a lighter burden on the Commission than the traditional equity standards applicable to private litigants. See FTC v. Harbour Group Invs., L.P., 1990-2 Trade Cas. (CCH) ¶ 69,247 at *2 & n.1 (D.D.C. 1990). In balancing the public equities to determine whether a preliminary injunction should issue, the test under Section 13(b) is whether such relief would be "in the public interest." FTC v. PPG Indus., Inc., 798 F.2d 1500, 1501-02 (D.C. Cir. 1986); see H.R. CONF. REP. NO. 93-624, at 31 (1973), reprinted in 1973 U.S.C.C.A.N. 2523, 2533. The courts have found that "[w]hen the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger." FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1083 (D.C. Cir. 1981).

The paramount equity in cases brought under Section 13(b) is the public's interest in effective enforcement of the antitrust laws. Heinz, 246 F.3d at 726; Weyerhaeuser, 665 F.2d at 1083. Congress enacted Section 13(b) to preserve the status quo until the Commission can perform its statutory responsibility: determining whether, in fact, the effect of the transaction at issue "may be substantially to lessen competition" in violation of the antitrust laws. Food Town, 539 F.2d at 1345. Effective enforcement of the antitrust laws also embodies the protection of free and open competition while the case proceeds through a full administrative proceeding before the Commission. Staples, 970 F. Supp. at 1091. Later remedies, including divestiture, are

often ineffective (if not impossible as a practical matter) and do not remedy the interim harm that anticompetitive acquisitions inflict on consumers. Therefore, where the Commission demonstrates a likelihood of success on the merits, a strong presumption in favor of preliminary injunctive relief exists. Weyerhaeuser, 665 F.2d at 1085; PPG Indus., 798 F.2d at 1506-07.

II. THE PROPOSED ACQUISITION VIOLATES THE ANTITRUST LAWS AND SHOULD BE ENJOINED

Section 7 of the Clayton Act, 15 U.S.C. § 18, prohibits any merger or acquisition "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." In other words, the focus of Section 7 is on arresting anticompetitive mergers "in their incipiency" before their effects can occur, and therefore it requires a prediction as to the merger's impact on future competition. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 362 (1963); S. REP. NO. 698, at 1 (1914); Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962). Accordingly, to establish a violation, the government need only show a reasonable probability, not a certainty, that the proscribed anticompetitive effect may occur. See Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986) ("Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequences in the future.") cert. denied, 481 U.S. 1038 (1987). In fact, where, as here, prices in northern New Mexico are expected to fall post-merger because of Giant's imminent supply increase, an acquisition may nevertheless violate Section 7 if prices would have fallen further without the acquisition. See Staples, 970 F. Supp. at 1092 ("the fact that prices might be lower than current prices after the merger does not mean that the merger will not have an anti-competitive effect. Consumers would still be hurt if prices after the merger did not fall as far as they would have absent the merger.").

Here, there are three foundations supporting the conclusion that the transaction will likely lessen competition. First, Western competes directly with Giant by providing bulk supplies of light petroleum products, including gasoline, to northern New Mexico **[Redacted**], via the Plains pipeline. By acquiring Giant, Western would significantly increase its share of the bulk supply of light petroleum products to northern New Mexico and reduce the number of competitors that could respond to an output decrease or price increase in the market from five to four. In the bulk gasoline market, Western's acquisition of Giant would reduce the number of such competitors from six to five.[6] The antitrust laws instruct that an acquisition that significantly increases the degree of market concentration in a highly concentrated market creates a legal presumption that the acquisition will harm competition. To rebut the presumption the defendants must then produce evidence that shows that the market share statistics give an inaccurate picture of the acquisition's likely effects on competition. Heinz, 246 F.3d at 715.

Second, the acquisition would eliminate, in Giant, a uniquely independent "maverick" competitor. **[Redacted**] Once it is acquired by Western, however, Giant's individual incentive to supply additional gasoline to northern New Mexico will be replaced by the combined firm's different incentives. Combined, Western/Giant will have the incentive and the ability to re-direct additional gasoline available from Giant's refineries to other markets where added

[6] There is one additional competitor in the bulk gasoline market that could not increase its total bulk supply of light petroleum products yet it could shift some of its diesel supply to gasoline supply.

supply and lower prices would have less effect on the combined firm's bottom line. As a result, prices in northern New Mexico will likely be higher with the acquisition than without it.

Third, only a few remaining competitors could expand their supply to the market sufficiently to counteract the impact of any attempt by Western to re-direct additional gasoline away from northern New Mexico. However, those firms are unlikely to do so given the various marketing and supply constraints they face.

A. The Bulk Supply of Light Petroleum Products and Gasoline Are Relevant Product Markets

In evaluating whether an acquisition is likely to substantially impair competition, courts perform a three part analysis: (1) defining the "line of commerce" or product market in which to assess the transaction; (2) defining the "section of the country" or geographic market in which to assess the transaction; and (3) assessing the transaction's probable effect on competition in the product and geographic markets. See United States v. Marine Bancorp., 418 U.S. 602, 618-23 (1974); FTC v. Swedish Match N. Am., Inc., 131 F. Supp. 2d 151, 156 (D.D.C. 2000); Harbour Group, 1990-2 Trade Cas. (CCH) ¶ 69,247 at *4 n.3.

The first step in evaluating a proposed transaction is defining the relevant market. Here, the proposed transaction is likely to substantially lessen competition in the market for the bulk supply of light petroleum products, including the market for the bulk supply of gasoline, to northern New Mexico. "Light petroleum products" consist primarily of gasoline, diesel fuel, and jet fuel. "Bulk supply" refers to large volumes of light petroleum products refined locally inside a market (such as at Giant's New Mexico refineries) or transported into the market via pipeline (such as Western's bulk supply deliveries from its El Paso refinery).

The federal antitrust enforcement agencies and numerous courts have adopted a definition of the relevant product market as "a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price

regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant." PX04051 at § 1.0;[7] Swedish Match, 131 F. Supp. 2d at 160; Cardinal Health, 12 F. Supp. 2d at 46; Staples, 970 F. Supp. at 1076 n.8. The outer boundaries of a product market are delineated by the alternatives available to consumers if the existing suppliers charge unduly higher prices, i.e., by identifying if there are any other products that customers are likely to substitute for the one with increased prices. United States v. Cont'l Can Co., 378 U.S. 441, 447-49 (1964); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 394-95, 400-04 (1956).

This acquisition is likely to substantially lessen competition in the market for the bulk supply of all light petroleum products and narrower markets contained therein. The bulk light petroleum product market is supported by current bulk suppliers' ability to shift the relative volumes of products shipped on a pipeline in response to individual fuel price changes. Because customers' ability to respond to price increases in northern New Mexico bulk gasoline supply are limited, the Commission also alleges a market for the bulk supply of gasoline. Importantly, if an acquisition is likely to harm competition in any relevant product market alleged—in this case, either bulk gasoline or bulk light petroleum products—the acquisition would violate Section 7 of the Clayton Act. See Staples, 970 F. Supp. at 1075.

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[7] A copy of the U.S. DEPT. OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES (1992) (Rev. Apr. 8, 1997) [herinafter Merger Guidelines] is provided at PX04051. Courts have considered the MERGER GUIDELINES useful in determining a proposed acquisition's impact on competition. See, e.g., Cmty. Publishers, Inc. v. Donrey Corp., 892 F. Supp. 1146, 1161 (W.D. Ark. 1995) ("the approaches to market definition endorsed by the MERGER GUIDELINES and the case law are essentially consistent."); see also FTC v. Univ. Health, Inc., 938 F.2d 1206, 1211 n.12 (11th Cir. 1991); PPG Indus., 798 F.2d at 1503 n.4; Staples, 970 F. Supp. at 1076 n.8.

B. The Relevant Geographic Market is Northern New Mexico

The second area of inquiry is to identify the "section of the country," or geographic market that may be affected by the proposed transaction. In this case, the geographic market is "northern New Mexico" which includes the counties of Rio Arriba, Taos, Mora, San Miguel, Los Alamos, Valencia, Torrence, Bernalillo, Sandoval, Guadalupe, and Santa Fe.

The focus in defining a relevant geographic market is to determine the area that would be adversely affected by an acquisition. Phila. Nat'l Bank, 374 U.S. at 357. The relevant geographic market must "correspond with the commercial realities of the industry . . ." Brown Shoe, 370 U.S. at 336. If enough buyers would shift to sellers outside the area so that the hypothetical monopolist of bulk supply of light petroleum products would not find it profitable to impose a small but significant and non-transitory hypothetical price increase, the broader area of supply is included. Here, the MERGER GUIDELINES hypothetical monopolist could—facing the price level that will emerge as a result of Giant's impending refinery utilization increase—profitably impose a one or two cent price increase uniformly on all bulk supplies of gasoline and light petroleum products to northern New Mexico.

The Defendants may argue the geographic market is broader than northern New Mexico **[Redacted**

] This is due in large part to the ten to twelve cent per gallon cost of trucking the product in from El Paso and the limited ability to sustain such long hauls given driver shortages and

highway safety regulations. If prices in the northern New Mexico area fall, **[Redacted**

] "[It is] improper [ ] to include in the market substitutes that may have been attractive . . . only because the market price was far above the competitive level." United States v. Eastman Kodak Co., 853 F. Supp. 1454, 1469 (W.D.N.Y. 1994) (certain alterations in original) (quoting William M. Landes & Richard A. Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937, 970-71 (1981)), aff'd, 63 F.3d 95 (2d Cir. 1995); cf. Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp., 1995-2 Trade Cas. (CCH) ¶ 71,254 at *33 & n.10 (N.D. Cal. 1995) (discussing Cellophane fallacy and geographic market definition).

Independent of the MERGER GUIDELINES' geographic market test, **[Redacted**

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C. There is a Substantial Likelihood the Acquisition May Lessen Competition

Western's acquisition of Giant is likely to lead to less competition for three reasons. First, it significantly increases the degree of market concentration in highly concentrated markets, reducing the limited number of bulk supply firms that could effectively respond to higher prices to either four (light petroleum products market) or five (gasoline market). Second, the merger will eliminate a maverick (Giant) **[Redacted**

], and replaces it with a combined firm (Western/Giant) with economic incentives and mechanisms to re-direct supply away from

the market. Third, the few remaining competitors who could expand output sufficiently to counter an anticompetitive post-merger supply reduction by the combined Western/Giant are unlikely to do so in the face of a relatively small, yet anticompetitive, reduction in supply to the market.

1. The Proposed Transaction Will Increase Concentration Significantly in Highly Concentrated Product Markets

Mergers or acquisitions that significantly increase market concentration are presumptively unlawful because the fewer the competitors and the larger the respective market shares, the greater the likelihood that the combined firm, or a group of firms, could raise prices above competitive levels. PX0451 at § 2.0; Hospital Corp. of Am., 807 F.2d at 1389. The presumption that such concentration levels are anticompetitive may nevertheless be overcome by showing that other factors—such as ease of entry or efficiencies resulting from the transaction—make it unlikely that the merger would have an anticompetitive effect. Id. at 1385-86. As explained infra, none of the other factors are present here to counteract the prima facie case.

Courts regularly measure market concentration using the Herfindahl-Hirschman Index ("HHI") calculated by summing the squares of the individual market shares of all firms in the market. Under Section 1.51 of the MERGER GUIDELINES, an HHI over 1,800 indicates a "highly concentrated" market. If the post-merger HHI exceeds 1,800 and the HHI increase from the merger or acquisition exceeds 100, a rebuttable presumption is created that the merger would "create or enhance market power or facilitate its exercise." PX0451 at §§ 1.5, 1.51.

In the petroleum industry, the Commission has been consistent in challenging mergers involving bulk light petroleum products at this level of concentration or even lower. For example, in the merger of Shell and Texaco Inc., the Commission required the divestiture of Shell's refinery at Anacortes, Washington, when the merger would have increased the HHI for the bulk supply of CARB gasoline in California by as little as 154 to a post-merger level as low

as 1635. FTC, THE PETROLEUM INDUS.: MERGERS, STRUCTURAL CHANGE, & ANTITRUST ENFORCEMENT (Aug. 2004);[8] see Shell Oil Co., 125 F.T.C. 769 (1998).[9]

By any reasonable measure of market concentration, the acquisition of Giant by Western satisfies the thresholds for presumptive illegality. The acquisition would reduce the number of relevant suppliers of bulk light petroleum products to northern New Mexico from five to four, **[Redacted**

] After the acquisition (and incorporating Giant's increased refinery production), **[Redacted**

] Only three other firms—ConocoPhillips,[10] Valero

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[8] Available at http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf.

[9] Likewise, in the ConocoPhillips merger, the Commission required the divestiture of Phillips' Salt Lake City refinery and its northern Utah marketing assets when the merger would have increased the HHI in the bulk supply market in northern Utah by 300 to a post-merger level of 2100. The Commission also required the divestiture of Conoco's Denver refinery and all of Phillips' eastern Colorado marketing assets when the merger would have increased the HHI by 500 to a post-merger level of 2600. Complaint, Phillips Petroleum Co., (2003) (FTC Docket No. C-4058), at http://www.ftc.gov/os/2002/08/conocophillipscmp.pdf; Decision and Order (2003) (FTC Docket No. C-4058), at http://www.ftc.gov/os/2003/02/conocophillipsdo.htm.

[10] ConocoPhillips supplies the market through its 50% undivided interest in the ATA pipeline, which has a throughput capacity of 37,000 barrels per day ("bpd"), via its Borger, Texas, refinery. See PX01300, PX01301, PX01303. **[Redacted**

] The Borger refinery has a practical crude oil refining capacity of 146,000 bpd. See PX01301, PX01302.

Energy Corp. ("Valero"),[11] and Holly Corp. ("Holly")[12]—could respond to a Western output decrease or price increase by shipping additional bulk light petroleum products to the northern New Mexico market.[13] Id.

The relevant competitors and market concentration vary only slightly when one looks at the bulk supply of gasoline alone as compared to all light petroleum products. **[Redacted**

]

[11] Valero Energy Corp. supplies the market through its 50% undivided interest in the ATA pipeline via its McKee, Texas, refinery located near ConocoPhillips' Borger refinery. See PX01300, PX01301. The McKee refinery has a practical crude oil refining capacity of 170,000 bpd, of which only a small fraction could be shipped to Albuquerque. Id.; PX01351 at 007.

[12] Holly supplies the market through its ownership of the Navajo refinery, in southeast New Mexico. The refinery has a practical crude oil refining capacity of approximately 83,000 bpd, and is connected to the Four Corners pipeline, with a rated capacity of 45,000 bpd, **[Redacted**

] Holly is the only refiner that ships on the Four Corners pipeline. Id.

[13] Although seven suppliers—Western, Giant, Holly, Valero, ConocoPhillips, **[Redacted**
]—currently bring bulk light petroleum products to the northern New Mexico market, only four of those firms have the ability to increase the amount of light petroleum products supplied in response to an output decrease or a price increase across all light petroleum products. **[Redacted**

]

Courts have litigated mergers resulting in equivalent or lower HHI concentration levels or market shares than those found here.[14]

2. The Acquisition Will Remove a Maverick, Provide Western/Giant an Incentive to Reduce Output, and Increase the Risk of Coordinated Interaction

[Redacted

[14] See, e.g., FTC v. Elders Grain, Inc., 868 F.2d 901, 902 (7th Cir. 1989) (acquisition increased market share of largest firm from 23% to 32%); Warner Communications, 742 F.2d at 1163 (preliminary injunction warranted where merger combined second largest firm with sixth largest firm resulting in combined 26% market share); FTC v. Bass Bros. Enters., 1984-1 Trade Cas. (CCH) ¶ 66,041 at **18, 20 (N.D. Ohio 1984) (preliminary injunction warranted where mergers increased the HHI by 518 points to 2320); United States v. UPM-Kymmene OYJ, 2003-2 Trade Cas. (CCH) ¶ 74,101 at **24-25, 36-37 (N.D. Ill. 2003) (injunction warranted where merger resulting in three-firm concentration would account for 80% of production).

[15] **[Redacted**

] A competitor is considered a "maverick" if it can easily expand its sales because of excess capacity:

> [I]n a market where capacity constraints are significant for many competitors, a firm is more likely to be a maverick the greater is its excess or divertable capacity in relation to its sales or its total capacity, and the lower are its direct and opportunity costs of expanding sales in the relevant market.

PX004051 at § 2.12 (emphasis added) (footnotes omitted). Not surprisingly, acquisition of a maverick may make coordination among the remaining firms "more likely, more successful, or more complete." Id.

Post-acquisition, the combined Western/Giant would have different economic incentives than Giant alone, and would likely send less total gasoline supply into the northern New Mexico market than would Giant and Western acting independently. The reason is simple. **[Redacted**

] By re-directing or restricting supply away from northern New Mexico, the combined Western/Giant would capture a substantial portion of the resulting price increase due to its large post-merger share of the market **[Redacted**

]

There are at least three simple means by which the combined Western/Giant might restrict output and raise prices in northern New Mexico:

]

• divert Giant's post-expansion refinery output to destinations outside northern New Mexico (e.g., Arizona);

• run less new crude through Giant's refineries, or change the product mix at those refineries, thereby reducing gasoline supply in favor of diesel; or

• send more off-road railroad diesel to the BNSF Railway Company in Belen via the Plains pipeline, thereby reducing the amount of gasoline reaching Albuquerque without foregoing valuable line space on the pipeline.

Through any of these mechanisms, or possibly others, the combined Western/Giant could reduce the overall supply of light petroleum products and/or gasoline to northern New Mexico, thus causing market prices to increase or to fall less than they otherwise would have had Giant remained independent. See Staples, 970 F. Supp. at 1092 ("[c]onsumers would still be hurt if prices after the merger did not fall as far as they would have absent the merger."). The anticompetitive effect would include the difference between how much prices would fall after Giant's output expansion if Giant was not acquired by Western, and how much prices would fall with the combined Western/Giant redirecting or restricting the supply the combined firm sends to the market.

Eliminating a maverick competitor and reducing the overall number of competitors in a market both increase the risk of coordinated interaction among the remaining firms. The ability of firms to coordinate their actions—to pull their competitive punches, with the expectation that their competitors would do the same—depends in substantial part on the number of significant participants in the market. "The relative lack of competitors eases coordination of actions, explicitly or implicitly, among the remaining few to approximate the performance of a monopolist." FTC v. PPG Indus., Inc., 628 F. Supp. 881, 885 n.9 (D.D.C.), aff'd 798 F.2d 1500 (D.C. Cir. 1986); see, e.g., Cardinal Health, 12 F. Supp. 2d at 45, n.8. Coordination need not consist of illegal price-fixing, or agreements to allocate customers or restrict output, but may include tacit coordination and interdependent behavior. FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989) (" . . . if conditions are ripe sellers may not have to communicate or

otherwise collude overtly in order to coordinate their price and output decisions"); see also PX04051 at § 2.1.

Courts have blocked mergers where the number of competitors post-acquisition was greater than those here.[16] By reducing the number of effective bulk suppliers of light petroleum products in northern New Mexico from five to four, and the number of effective bulk suppliers of gasoline from six to five, the acquisition increases the likelihood of coordinated interaction. The post-acquisition bulk light petroleum products market would be dominated by just four relevant firms: Western, Holly, Valero, and ConocoPhillips—the only suppliers capable of responding to an output reduction or price increase. In the market for the bulk supply of gasoline alone, the post-acquisition market would be dominated by the same four firms—**[Redacted** **]** Together those five firms would account for essentially all of the bulk supply of gasoline to the market.

3. The Remaining Firms With Excess Pipeline Capacity May Not Respond Effectively to a Small Output Decrease

[Redacted

[16] See Elders Grain, 868 F.2d at 902 (reduction from 6 to 5 competitors); Hosp. Corp. of Am., 807 F.2d at 1387 (reduction from 11 to 7 competitors); Bass Bros. Enters.,1984-1 Trade Cas. ¶ 66,041 at *23 (reduction from 7 to 5 competitors); Warner Communications, 742 F.2d at 1163 (reduction from 6 to 5 competitors).

]

Finally, in addition to business reasons, physical constraints, such as refinery interruptions, pipeline problems, and terminal constraints can also prevent these firms from sending additional product to a market to respond to a small price increase. PX03503 at 023; PX03505 at 019. In sum, these firms are unlikely to act as a competitive constraint on any small output reduction or price increase after the merger—when prices will be relatively lower than they are today as a result of Giant's additional supply to the market.

4. The Relevant Market is Insulated from New Entry or Expansion

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[17] Of course, notwithstanding these potential concerns, these firms are all integrated refiner/marketers, and could easily sell additional volumes into northern New Mexico by simply lowering their wholesale and/or retail prices.

Understanding the likelihood of new entry or expansion into a relevant market is also necessary to determine the likely anticompetitive effects of an acquisition. If entry or expansion is unlikely, the merged entity can raise prices without attracting new competition or offsetting supply. California v. Am. Stores Co., 697 F. Supp. 1125, 1131 (C.D. Cal. 1988). Under the MERGER GUIDELINES, entry is considered "easy" if it would be "timely, likely and sufficient in its magnitude, character and scope to deter or counteract the [anti]competitive effects" of a proposed transaction. PX04051 at § 3.0, quoted with approval, Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1440 (9th Cir. 1995), cert. denied, 516 U.S. 987 (1995). Entry is timely if a new entrant would have a significant market impact within two years. PX04051 at § 3.2. Entry is sufficient if it would be on a large enough scale to counteract the anticompetitive effects of the transaction. Id. § 3.4.

Two pipelines, Longhorn and Magellan, bring product from Gulf Coast refineries to El Paso. However, the Plains pipeline is the only pipeline capable of delivering Gulf Coast product to the northern New Mexico market. The Plains pipeline has been full for several years and operates under proration, meaning that current shippers receive a pro rata share of the pipeline space. PX01200 at 037. New shippers are reserved 5% of the total Plains pipeline space annually, but each individual new shipper can use only 1.25% of the total line capacity. PX01200 at 002. Consequently, a new shipper could ship an average of only 350 barrels daily, the equivalent of less than two truckloads of gasoline or diesel fuel. That volume would not increase supply to northern New Mexico because it would displace an equivalent volume of shipments on the same pipeline by the other current shippers. **[Redacted**

]

In addition to the Plains pipeline already being full, the other pipelines that supply the northern New Mexico market—the ATA pipeline and the Four Corners pipeline—are not available to new suppliers. Both pipelines are owned by current suppliers to the market and, more importantly, the only access to the pipelines is through the refineries owned by the suppliers. As a result, in order to supply the northern New Mexico market, a new supplier would have to bring product in by truck from El Paso (266 highway miles) or Amarillo (288 highway miles).[18] **[Redacted**

]

Entry into the market for the bulk supply of light petroleum products to northern New Mexico is also not likely to be timely or sufficient to defeat competitive problems arising out of the proposed transaction. A potential entrant would need a source of supply, a way to transport the product into northern New Mexico, and an available base of customers to purchase the product once it arrived. New entry within the next two years by building new refineries or pipelines is extremely unlikely given the enormous cost, permitting, and construction issues involved. No announced pipeline projects serving Albuquerque are under way. Building or expanding a new pipeline is expensive and time consuming, would likely not be undertaken

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[18] The Plains pipeline tariff to transport a barrel of light petroleum products from El Paso to Albuquerque is approximately 2.5 cents per gallon. PX1200 at 050. **[Redacted**

]

without specific volume commitments by shippers, and requires surmounting onerous permitting issues. FTC, THE PETROLEUM INDUS.: MERGERS, STRUCTURAL CHANGE, & ANTITRUST ENFORCEMENT 213 (Aug. 2004). **[Redacted**

]

In short, because the entry of new bulk suppliers is unlikely and the expansion of supply to northern New Mexico by others is not likely to completely counteract a supply reduction or price increase imposed by the combined Western/Giant, there is no effective constraint if the acquisition goes through. Absent an injunction, the combined firm will have gained the power to profitably raise prices in northern New Mexico.

5. The Proposed Transaction Will Not Enhance Competition By Producing Cognizable Efficiencies

[Redacted

] Any claimed efficiencies they might proffer in this proceeding are both speculative and could be achieved without this acquisition. As a result, efficiencies do not rebut, and are not a viable defense to, the anticompetitive effects likely to result from this acquisition.

For efficiencies to be credited they must be "merger-specific" and "verifiable." PX04051 at § 4. "Merger-specific" means they must be "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects." Id. The claimed efficiencies cannot be efficiencies that could "be achieved by either company alone." Heinz, 246 F.3d at 722. Claimed efficiencies must also be verifiable. They cannot be vague, speculative, or incapable of verification through reasonable means. PX04051 at § 4; see also Staples, 970 F. Supp. at 1089 (efficiency claims must be backed by "credible evidence").

Defendants' few, half-hearted claims of efficiencies from the transaction are not merger-specific. **[Redacted**

] In short, none of the claimed efficiencies are merger specific.[19]

[19] Even if the claimed efficiencies were assumed to be specific to this acquisition, Western concedes that they are not verifiable. In a recent 10-Q filed with the Securities Exchange Commission Western admits that "We can give no assurance that our expectations with regards to integration and synergies [from the Giant acquisition] will materialize." PX00004 at 047.

CONCLUSION

Where, as here, the Commission has demonstrated a likelihood of success on the merits, Defendants face a difficult task of "justifying anything less than a full stop injunction." PPG Indus., 798 F.2d at 1506; see Heinz, 246 F.3d at 726; Staples, 970 F. Supp. at 1091. To preserve competition pending administrative adjudication the Court should grant the Commission's motions for temporary restraining order and preliminary injunction.

Dated: April 19, 2007

Respectfully submitted,

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Electronically Filed

/s/ Thomas Lang (Bar. No. 0739)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

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Thomas J. Lang, Attorney for Movant

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION, Plaintiff, v. PAUL L. FOSTER, WESTERN REFINING, INC. and GIANT INDUSTRIES, INC. Defendants.	)))))))))))))))	Case No. 1:07-cv-00352-JB-ACT **PUBLIC VERSION**

APPENDIX TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
FTC v. PAUL L. FOSTER, ET AL., CIVIL ACTION NO. 07cv352 JB/ACT
EXHIBITS TO MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Trial Exhibit No.	Document Title	Document Date	Beginning Document No.	Ending Document No.	Company
PX00002	Western Refining, Inc. Form 10-K for the fiscal year ended December 31, 2006	03/08/2007	PX00002-003	PX00002-034	Western Refining, Inc.
PX00003	Western Refining, Inc. Form 10-K for the fiscal year ended December 31, 2005	03/24/2006	PX00003-003	PX00003-013	Western Refining, Inc.
PX00004	Western Refining, Inc. Form 10-Q for the quarterly period ended September 30, 2006	11/14/2006	PX00004-003	PX00004-047	Western Refining, Inc.
PX00005	REDACTED				
PX00007	REDACTED				
PX00009	REDACTED				
PX00016	REDACTED				
PX00600	Giant Industries, Inc. Form 10-K for the fiscal year ended December 31, 2006	03/01/2007	PX00600-001	PX00600-041	Giant Industries, Inc.
PX00601	Giant Industries, Inc. Form 10-K for the fiscal year ended December 31, 2005	03/01/2006	PX00601-001	PX00601-008	Giant Industries, Inc.
PX00603	Giant Industries, Inc. Form 10-K for the fiscal year ended December 31, 2003	03/15/2004	PX00603-001	PX00603-015	Giant Industries, Inc.
PX00605	REDACTED				
PX00608	REDACTED				
PX00609	REDACTED				
PX01200	REDACTED				
PX01251	REDACTED				
PX01256	Holly Corporation Form 10-K for the fiscal year ended December 31, 2006	03/1/2007	PX01256-001	PX01256-011	Holly Corporation
PX01260	Holly Energy Partners, L.P. Form 10-K for the fiscal year ended December 31, 2006	02/26/2007	PX01260-001	PX01260-021	Holly Energy Partners, L.P.
PX01300	REDACTED				
PX01301	REDACTED				
PX01302	REDACTED				

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
FTC v. PAUL L. FOSTER, ET AL., CIVIL ACTION NO. 07cv352 JB/ACT
EXHIBITS TO MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Trial Exhibit No.	Document Title	Document Date	Beginning Document No.	Ending Document No.	Company
PX01303	REDACTED				
PX01351	Valero Energy Corporation Form 10-K for the fiscal year ended December 31, 2006	02/26/2007	PX01351-001	PX01351-011	Valero Energy Corporation
PX03201	REDACTED				
PX03202	REDACTED				
PX03502	REDACTED				
PX03503	REDACTED				
PX03504	REDACTED				
PX03505	REDACTED				
PX03506	REDACTED				
PX04000	REDACTED				
PX04050	Reuters, "Valero CEO Sees Fire-Damaged Refinery Back by May 1," (Mar. 17, 2007)	03/17/2007	PX04050	PX04050	Reuters
PX04051	U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992) (Rev. Apr. 8, 1997)	04/08/1997	PX04051-001	PX04051-025	U.S. Dep't of Justice and Fed. Trade Comm'n

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

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Thomas J. Lang, Attorney for Movant

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION, Plaintiff, v. PAUL L. FOSTER, WESTERN REFINING, INC. and GIANT INDUSTRIES, INC. Defendants.	)))))))))))))))	Case No. 1:07-cv-00352-JB-ACT **PUBLIC VERSION**

APPENDIX TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Form 10-K

☑ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2006

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to

Commission File Number: 001-32721

WESTERN REFINING, INC.

(Exact name of registrant as specified in its charter)

Delaware	20-3472415
(State or other jurisdiction of incorporation or organization)	*(I.R.S. Employer Identification No.)*
6500 Trowbridge Drive El Paso, Texas	79905
(Address of principal executive offices)	*(Zip Code)*

Registrant's telephone number, including area code:
(915) 775-3300

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
Common Stock	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No ☑

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☑

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☑ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to rule 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark if the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.

Large Accelerated Filer ☐ Accelerated Filer ☐ Non-Accelerated Filer ☑

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☑

The aggregate market value of the voting and non-voting common equity held by non-affiliates of the registrant computed based on the New York Stock Exchange closing price on June 30, 2006 was $555,396,346.

As of March 2, 2007, there were 68,254,428 shares outstanding, par value $0.01, of the registrant's common stock.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the definitive proxy statement for the registrant's 2007 annual meeting of stockholders are incorporated by reference into Part III of this report.

PX00002-003

We have contracts in place for alkylate, which is purchased from the Gulf Coast and delivered via the Magellan South System pipeline that terminates at our refinery. The high octane and low volatility of alkylate make it a premium blendstock for Phoenix CBG, a high-value gasoline produced by our refinery. Our connection to the Magellan South System pipeline allows us to purchase alkylate at a discount relative to competitors who receive it via rail from the Gulf Coast.

We purchase ethanol for seasonal blending with gasoline to meet the EPA's oxygenated fuel mandate levels. We purchase ethanol from the Midwest region of the U.S. and currently have contracts in place for the majority of our expected ethanol needs. We receive ethanol via railcar deliveries to El Paso, Albuquerque, Phoenix and Tucson.

Refined Products

Pipelines

Outside of the El Paso area, which is supplied via our product terminal, we provide refined products to other areas, including Tucson, Phoenix, Albuquerque and Juarez. Supply to these areas is achieved through pipeline systems that are linked to our refinery. Product distribution to Arizona is delivered via the Kinder Morgan East Line, which connects our refinery to product terminals in Tucson and Phoenix. We also utilize two pipelines owned by Plains to ship product: the first originates at our refinery and terminates in Albuquerque, and the second runs from El Paso to Juarez. A final pipeline owned by Kinder Morgan provides diesel to the Union Pacific railway in El Paso.

Both Kinder Morgan's East Line and the Plains pipeline to Albuquerque are interstate pipelines regulated by the FERC and currently operate near 100% capacity year-round. The tariff provisions for these pipelines include prorating policies that grant historical shippers line space that is consistent with their prior activities as well as a prorated portion of any expansions, with only a small amount allocated to new shippers. Kinder Morgan announced in 2006 that it had completed its expansion of the East Line between El Paso and Tucson to approximately 147,000 bpd, and 99,000 bpd between Tucson and Phoenix. Kinder Morgan also announced further expansion of the East Line would be completed in 2007. This expansion will initially increase the capacity by another 8% and provide the platform for further incremental expansions through horsepower additions to the system. We intend to fully utilize our prorated allotment of the increased capacity to capitalize on the higher margins typically available in the Phoenix and Tucson areas.

Customers and Refined Products

We sell a variety of refined products to our diverse customer base. Those customers accounting for more than 10% of our revenues in 2006 were Chevron at 16.7%, Phoenix Fuel at 16.7% and PMI Trading Limited (an affiliate of PEMEX), or PMI, at 10.5%. We have a five-year offtake agreement with Chevron that expires in August 2008 with certain renewal options. Our sales to Phoenix Fuel are pursuant to short-term agreements at prices based on various market indices and our sales to PMI are pursuant to spot sales agreements at prices based on various market indices.

Depending on market conditions and seasonal fluctuations, the yield of specific products may be increased to take advantage of pricing changes and to comply with various regulatory requirements. We also purchase additional refined products from other refiners to supplement supply to our customers. These products are the same grade as the products that we currently manufacture.

Gasoline. For 2006, gasoline accounted for approximately 54% of our refinery's production. Gasoline accounted for 56%, 60% and 62% of our revenues in 2006, 2005 and 2004, respectively. We produce in excess of 40 different specifications of gasoline over the course of a year to address seasonal requirements in each of the areas we serve. We sell gasoline at our product marketing terminal to the El Paso area and via pipeline to other areas, including Phoenix, Tucson, Albuquerque and Juarez. The highest value gasoline produced at our refinery is typically Premium Phoenix CBG. We also currently sell approximately 12,100 bpd of gasoline to a subsidiary of Petroleos Mexicanos, or PEMEX, the Mexican state-owned oil company, in Juarez via a pipeline that originates at our refinery. Outside of our core service areas, we have exchange agreements for limited

PX00002-013

	Premium Gasoline		
	Gulf Coast Price(1)	Phoenix Price(2)(3)	El Paso Price(2)
2006	198.7	229.8	212.7
2005	168.1	199.5	182.9
2004	122.0	164.1	134.1

Source: Oil Price Information Service (OPIS)

(1) Average spot price.

(2) Average price for products sold at product marketing terminals in the location indicated.

(3) Average price for Phoenix grade CBG gasoline.

Competition

We operate in the U.S. Southwest region, which includes the areas of West Texas, New Mexico and Arizona. Refined products are supplied from this region's seven refineries as well as from refineries located in other regions, including the Gulf Coast and the West Coast (primarily Los Angeles), via interstate pipelines.

The Southwest region has a total refining capacity of approximately 620,000 bpd. Petroleum refining and marketing is highly competitive. The principal competitive factors affecting us are costs of crude oil and other feedstocks, refinery efficiency, refinery product mix and costs of product distribution and transportation. We primarily compete with Valero Energy Corp., ConocoPhillips Company, Alon USA Energy, Inc., Holly Corporation and Giant Industries, Inc, as well as refineries in other regions of the country that serve the regions we serve through pipelines. Because of their geographic diversity, larger and more complex refineries, integrated operations and greater resources, some of our competitors may be better able to withstand volatile market conditions, to compete on the basis of price, to obtain crude oil in times of shortage, and to bear the economic risk inherent in all phases of the refining industry.

The Longhorn refined products pipeline, which was completed in late 2004, runs approximately 700 miles from the Houston area of the Gulf Coast to El Paso and has an estimated maximum capacity of 225,000 bpd. This pipeline provides Gulf Coast refiners and other shippers with improved access to West Texas and New Mexico. To date, we have not observed any material margin deterioration from the operation of the Longhorn Pipeline. Any additional supply provided by these pipelines or by the Kinder Morgan pipeline expansion could lower prices and increase price volatility in areas that we serve and could adversely affect our sales and profitability.

Governmental Regulation

All of our operations and properties are subject to extensive federal, state and local environmental and health and safety regulations governing, among other things, the generation, storage, handling, use and transportation of petroleum and hazardous substances; the emission and discharge of materials into the environment; waste management; and characteristics and composition of gasoline and diesel fuels. Our operations also require numerous permits and authorizations under various environmental and health and safety laws and regulations. Failure to comply with these permits or environmental laws generally could result in fines, penalties or other sanctions or a revocation of our permits. We have made, and will continue to make, significant capital and other expenditures related to environmental and health and safety compliance, including with respect to our air permits and the low sulfur gasoline and ultra low sulfur diesel regulations. Furthermore, we expect to make significant environmental capital expenditures in connection with the planned capacity expansion and upgrade of our refinery. For additional details on capital expenditures related to regulatory requirements and our refinery capacity expansion and upgrade; see Item 7. "Management's Discussion and Analysis of Financial Condition and Results of Operations — Liquidity and Capital Resources — Capital Spending."

PX00002-015

Item 6. *Selected Financial and Operating Data*

The following tables set forth our summary historical financial and operating data for the periods indicated below. The summary results of operations and financial position data for 2006 and 2005 have been derived from the consolidated financial statements of Western Refining, Inc. and its subsidiaries including Western Refining LP. The summary statement of operations data for the years ended December 31, 2003 and 2004, and the summary balance sheet data as of December 31, 2004 have been derived from the audited financial statements of our predecessor, Western Refining LP. The summary statement of operations data for 2002, and the summary balance sheet data as of December 31, 2002, and 2003 have been derived from the financial statements of Western Refining LP.

The information presented below should be read in conjunction with Item 7. "Management's Discussion and Analysis of Financial Condition and Results of Operations" and the financial statements and the notes thereto included in Item 8. "Financial Statements and Supplementary Data."

	Year Ended December 31,				
	2006	2005	2004	2003(1)	2002(1)
	(In thousands, except per share data)				
Statement of Operations Data:					
Net sales	$ 4,199,474	$ 3,406,653	$ 2,215,170	$ 924,792	$ 446,431
Operating costs and expenses:					
Cost of products sold (exclusive of depreciation and amortization)	3,653,174	3,001,779	1,989,917	830,667	399,290
Direct operating expenses (exclusive of depreciation and amortization)	173,900	131,218	110,006	41,986	11,700
Selling, general and administrative expenses	34,872	43,537	17,239	11,861	9,735
Maintenance turnaround expense	22,196	6,999	14,295	—	—
Depreciation and amortization	13,624	6,272	4,521	1,698	986
Total operating costs and expenses	3,897,766	3,189,805	2,135,978	886,212	421,711
Operating income	301,708	216,848	79,192	38,580	24,720
Interest income	10,820	4,854	1,022	265	350
Interest expense	(2,167)	(6,578)	(5,627)	(3,645)	(1,761)
Amortization of loan fees	(500)	(2,113)	(2,939)	(914)	(12)
Write-off of unamortized loan fees	(1,961)	(3,287)	—	—	—
Gain (loss) from derivative activities	8,783	(8,127)	(4,018)	—	—
Other income (expense), net(2)	470	(548)	(172)	6,822	2,800
Income before income taxes	317,153	201,049	67,458	41,108	26,097
Provision for income taxes(3)	(112,373)	18	—	—	—
Net income(3)	$ 204,780	$ 201,067	$ 67,458	$ 41,108	$ 26,097
Basic earnings per share	$ 3.13	—	—	—	—
Diluted earnings per share	$ 3.11	—	—	—	—
Dividends declared per common share	$ 0.16	—	—	—	—
Weighted average basic shares outstanding	65,387	—	—	—	—
Weighted average dilutive shares outstanding	65,775	—	—	—	—
Cash Flow Data:					
Net cash provided by (used in):					
Operating activities(3)	$ 245,004	$ 260,980	$ 87,022	$ 66,452	$ 25,911
Investing activities	(149,555)	(87,988)	(19,045)	(104,730)	(52)

Financing activities(3)	(13,115)	(37,116)	(86,722)	84,853	(34,825)
Other Data:					
Adjusted EBITDA(4)	$ 357,601	$ 226,298	$ 94,840	$ 47,365	$ 28,856
Capital expenditures	120,211	87,988	19,045	3,164	52
Purchase of refinery assets and inventories	—	—	—	101,566	—

	Year Ended December 31,				
	2006	2005	2004	2003(1)	2002(1)
	(In thousands, except per share data)				
Balance Sheet Data (end of period):					
Cash and cash equivalents	$ 263,165	$ 180,831	$ 44,955	$ 63,700	$ 17,125
Working capital	276,708	182,726	88,735	115,843	19,841
Total assets	908,523	643,638	359,837	305,249	86,515
Total debt	—	149,500	55,000	107,746	6,339
Partners' capital	—	177,944	107,592	68,692	37,081
Stockholders' equity	521,601	(31)	—	—	—
Key Operating Statistics:					
Total sales volume (bpd)(5)	142,280	136,015	120,324	113,004	36,643
Total refinery production (bpd)	124,988	114,431	106,587	98,588	—
Total refinery throughput (bpd)(6)	127,070	116,510	109,145	101,002	—
Per barrel of throughput:					
Refinery gross margin(7)	$ 11.78	$ 9.52	$ 5.64	$ 4.99	$ —
Gross profit(7)	$ 11.48	$ 9.37	$ 5.53	$ 4.90	$ —
Direct operating expenses(8)	$ 3.75	$ 3.09	$ 2.75	$ 2.75	$ —

(1) On August 29, 2003, we acquired certain refinery assets from Chevron. The information presented herein for 2002 and the first eight months (less two days) of 2003 does not include operations from these acquired assets.

(2) Other income for 2003 primarily consists of a reparations payment from a pipeline company as ordered by the FERC.

(3) Historically, we were not subject to federal or state income taxes due to our partnership structure. Prior to our initial public offering, our net cash provided by operating activities did not reflect any reduction for income tax payments, while net cash used by financing activities reflected distributions to our partners to pay income taxes. Since our initial public offering, we have incurred income taxes that will reduce net income and cash flows from operations, and we have ceased to make any such income tax-related distributions to our equity holders. See Item 8. "Financial Statements and Supplementary Data — Note 6 Income Taxes" elsewhere in this report.

(4) Adjusted EBITDA represents earnings before interest expense, income tax expense, amortization of loan fees, write-off of unamortized loan fees, depreciation, amortization and maintenance turnaround expense. However, Adjusted EBITDA is not a recognized measurement under generally accepted accounting principles, or GAAP. Our management believes that the presentation of Adjusted EBITDA is useful to investors because it is frequently used by securities analysts, investors and other interested parties in the evaluation of companies in our industry. In addition, our management believes that Adjusted EBITDA is useful in evaluating our operating performance compared to that of other companies in our industry because the calculation of Adjusted EBITDA generally eliminates the effects of financings, income taxes and the accounting effects of significant turnaround activities (which many of our competitors capitalize and thereby exclude from their measures of EBITDA) and acquisitions, items that may vary for different companies for reasons unrelated to overall operating performance.

Adjusted EBITDA has limitations as an analytical tool, and you should not consider it in isolation, or as a substitute for analysis of our results as reported under GAAP. Some of these limitations are:

- Adjusted EBITDA does not reflect our cash expenditures or future requirements for significant turnaround activities, capital expenditures or contractual commitments;
- Adjusted EBITDA does not reflect the interest expense or the cash requirements necessary to service interest or principal payments on our debt;
- Adjusted EBITDA does not reflect changes in, or cash requirements for, our working capital needs; and
- Our calculation of Adjusted EBITDA may differ from the Adjusted EBITDA calculations of other companies in our industry, limiting its usefulness as a comparative measure.

PX00002-034

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Form 10-K

☑ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the Fiscal Year Ended: December 31, 2005

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to

Commission File Number: 001-32721

WESTERN REFINING, INC.

(Exact name of registrant as specified in its charter)

Delaware	20-3472415
(State or other jurisdiction of incorporation or organization)	*(I.R.S. Employer Identification No.)*
6500 Trowbridge Drive El Paso, Texas	79905
(Address of principal executive offices)	*(Zip Code)*

Registrant's telephone number, including area code:
(915) 775-3300

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
Common Stock	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No ☑

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☑

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☐ No ☑

Indicate by check mark if disclosure of delinquent filers pursuant to rule 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☑

Indicate by check mark if the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.

Large Accelerated Filer ☐ Accelerated Filer ☐ Non-Accelerated Filer ☑

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☑

On June 30, 2005, the last business day of the Registrant's second fiscal quarter, no shares of the Registrant's common stock were outstanding. Accordingly, the market value of common stock held by non-affiliates was zero.

The number of shares of common stock outstanding as of March 15, 2006 was 68,407,067.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the Annual Proxy Statement for the registrant's 2006 annual meeting of stockholders are incorporated by reference into Items 10 through 14 of Part III.

season, as specifications allow, this material is returned to our refinery for gasoline blending. In addition, we supplement our produced volumes with purchases of normal butane.

We have contracts in place for alkylate, which is purchased from the Gulf Coast and delivered via the Magellan South System pipeline that terminates at our refinery. The high octane and low volatility of alkylate make it a premium blendstock for Phoenix CBG, the highest-value fuel produced by our refinery. Our connection to the Magellan South System pipeline allows us to purchase alkylate for a discount relative to competitors who receive it via rail from the Gulf Coast.

We purchase ethanol for seasonal blending with gasoline to meet the EPA's oxygenated fuel mandate levels. We purchase ethanol from the Midwest region of the U.S. and currently have contracts in place for approximately 50% of our expected ethanol needs through March 2006. We receive ethanol via railcar deliveries to El Paso, Albuquerque, Phoenix and Tucson.

Refined Products

Pipelines

Outside of the El Paso market, which is supplied via our product terminal, we provide refined products to other major regional markets, including Tucson, Phoenix, Albuquerque and Juárez. Supply to these markets is achieved through pipeline systems that are linked to our refinery. Product distribution to Arizona is delivered via the Kinder Morgan East Line, which connects our refinery to product terminals in Tucson and Phoenix. We also utilize two pipelines owned by Chevron to ship product: the first originates at our refinery and terminates in Albuquerque, and the second runs from El Paso to Juárez. A final pipeline provides diesel to the Union Pacific railway in El Paso.

Both Kinder Morgan's East Line and Chevron's pipeline to Albuquerque are interstate pipelines regulated by the Federal Energy Regulation Commission and currently operate near 100% capacity year-round. The tariff provisions for these pipelines include proration policies that grant historical shippers line space that is consistent with their prior activities as well as a prorated portion of any expansions, with only a small amount allocated to new shippers. Kinder Morgan is currently working on a two-phase expansion of its East Line, which will ultimately increase capacity from El Paso to Tucson from approximately 86,000 bpd to approximately 170,000 bpd, and from Tucson to Phoenix from approximately 50,000 bpd to approximately 100,000 bpd. Once each expansion is completed (currently scheduled for 2006 and 2007), we intend to fully utilize our prorated allotment of the increased capacity (and expect to continue to utilize our customers' allocations, including their prorated portion of future expansions) to capitalize on the higher margins available in the Phoenix and Tucson markets.

Products

We sell a variety of refined products to our diverse customer base. Those customers accounting for more than 10% of our revenues in 2005 were Chevron (18.5%) and Phoenix Fuel Company (16.3%). Our sales to Chevron are pursuant to a five-year offtake agreement, under which there are two successive five-year renewal options, for approximately 28,000 bpd of gasoline and approximately 1,900 bpd of diesel at prices based on various market indices. The initial term of the offtake agreement with Chevron expires in 2008. Our sales to Phoenix Fuel Company are under short-term agreements at prices based on various market indices. Depending on market conditions and seasonal fluctuations, the yield of specific products may be increased to take advantage of pricing changes and to comply with various regulatory requirements. We also purchase additional refined products from other refiners to supplement supply to our customers. These products are the same grade as the products that we currently manufacture.

Gasoline. For 2005, gasoline accounted for approximately 58% of our refinery's production. Gasoline accounted for 62.8%, 62.2% and 59.6% of our revenues in 2003, 2004 and 2005, respectively. We produce in excess of 40 different specifications of gasoline over the course of a year to address seasonal requirements in each of our various markets. We sell gasoline at our product marketing terminal to the El Paso market and via pipeline to other markets, including Phoenix, Tucson, Albuquerque and Juárez.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-Q

☑ QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For The Quarterly Period Ended September 30, 2006

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from__________ to__________

Commission File Number: 001-32721

WESTERN REFINING, INC.

(Exact name of registrant as specified in its charter)

Delaware (State or other jurisdiction of incorporation or organization)	20-3472415 (I.R.S. Employer Identification No.)
6500 Trowbridge Drive El Paso, Texas (Address of principal executive offices)	79905 (Zip Code)

Registrant's telephone number, including area code: (915) 775-3300

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☑ No ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.

Large accelerated filer ☐ Accelerated filer ☐ Non-accelerated filer ☑

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☑

As of November 10, 2006, there were 68,326,306 shares outstanding, par value $0.01, of the registrant's common stock.

Part II
Other Information

Item 1. Legal Proceedings

In the ordinary conduct of the Company's business, it is subject to periodic lawsuits, investigations and claims, including environmental claims and employee-related matters. Although the Company cannot predict with certainty the ultimate resolution of lawsuits, investigations and claims asserted against it, it does not believe that any currently pending legal proceedings or proceedings to which it is a party will have a material adverse effect on its business, financial condition or results of operations.

Item 1A. Risk Factors

Other risk factors are described in greater detail in our 2005 Form 10-K under Part I, Item 1A, "Risk Factors." The information presented below updates and should be read in conjunction with those risk factors and other forward-looking information presented in our 2005 Form 10-K.

Our pending acquisition of Giant Industries, Inc. may not be successful and we may not realize the anticipated benefits from this acquisition.

We may be unable to obtain the governmental and regulatory approvals necessary in order to consummate the Giant acquisition. Even if we do obtain these approvals, and even if the other conditions to the consummation of the Giant acquisition are satisfied, our acquisition of Giant may pose certain risks to our business. Giant has suffered three fires at its refineries in the past year, and as a result, their insurance costs have increased and the terms of their insurance coverage have been adversely affected. Giant has also suffered increased costs associated with several major capital projects. In addition to the risks ordinarily associated with a significant merger acquisition, we will also be exposed to risks arising from these events and other operational risks that may affect Giant differently than they currently affect us. Although we expect to realize strategic, operational and financial benefits as a result of the Giant acquisition, we cannot predict whether and to what extent such benefits will be achieved. In particular, the success of the Giant acquisition will depend, in part, on our ability to realize anticipated refinery efficiencies and cost savings from assuming the control of Giant's businesses. No assurances can be given that we will be able to achieve these efficiencies and cost savings.

In addition, we will face certain challenges as we work to integrate Giant's operations into our business. In particular, the Giant acquisition will significantly expand our geographic scope, the types of business in which we are engaged, the number of our employees and the number of refineries we operate, thereby presenting us with significant challenges as we work to manage the substantial increases in scale resulting from the acquisition. We must integrate a large number of systems, both operational and administrative. Delays in this process could have a material adverse effect on our revenues, expenses, operating results and financial condition. In addition, events outside of our control, including changes in state and federal regulation and laws as well as economic trends, also could adversely affect our ability to realize the anticipated benefits from the Giant acquisition.

We can give no assurance that our acquisition of Giant will perform in accordance with our expectations. Despite our due diligence efforts, we must necessarily base any assessment of Giant on inexact and incomplete information and assumptions with respect to operations, profitability and other matters that may prove to be incorrect. We can give no assurance that our expectations with regards to integration and synergies will materialize. Our failure to successfully integrate and operate Giant, and to realize the anticipated benefits of the acquisition, could adversely affect our operating, performing and financial results.

We could experience business interruptions caused by pipeline shutdown.

Our refinery is dependent on one pipeline, a Kinder Morgan pipeline, for the delivery of all of our crude oil. This pipeline's current capacity is 123,000 bpd. Because our crude oil refining capacity is 120,000 bpd, our ability to offset lost production due to disruptions in supply with increased future production is limited due to this crude oil

PX00004-047

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

Marc G. Schildkraut, Counsel for Defendants Paul L. Foster and Western Refining, Inc.
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Washington, DC 20036
marc.schildkraut@hellerehrman.com
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Thomas A. Outler, Counsel for Defendants
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O Box 1888
Albuquerque, NM 87103
toutler@rodey.com
(505) 768-7256

______/s/______________
Thomas J. Lang, Attorney for Movant

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION, Plaintiff, v. PAUL L. FOSTER, WESTERN REFINING, INC. and GIANT INDUSTRIES, INC. Defendants.	)))))))))))))))	Case No. 1:07-cv-00352-JB-ACT **PUBLIC VERSION**

APPENDIX TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

:PE>10-K
EQUENCE>1
:LENAME>final2006-10k.txt
ESCRIPTION>GIANT INDUSTRIES, INC. FORM 10-K
EXT>

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10-K

ark One)
| ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2006

| TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from ________ to ________.

Commission File Number: 1-10398

Giant Industries, Inc.
(Exact name of registrant as specified in its charter)

DELAWARE	86-0642718
:ate or other jurisdiction of ıcorporation or organization)	(I.R.S. Employer Identification No.)
23733 North Scottsdale Road, SCOTTSDALE, ARIZONA	85255
ddress of principal executive offices)	(Zip Code)

Registrant's telephone number, including area code:
(480) 585-8888

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
mon Stock, $.01 par value	New York Stock Exchange

:urities registered pursuant to Section 12(g) of the Act: None

dicate by check mark if the registrant is a well-known seasoned issuer, defined in Rule 405 of the Securities Act. Yes [X] No [ ]

dicate by check mark if the registrant is not required to file reports :suant to Section 13 or Section 15(d) of the Act. Yes [ ] No [X]

dicate by check mark whether the registrant (1) has filed all reports quired to be filed by Section 13 or 15(d) of the Securities Exchange Act 1934 during the preceding 12 months (or for such shorter period that e registrant was required to file such reports), and (2) has been bject to such filing requires for the past 90 days. Yes [X] No [ ]

PX00600-001

The Four Corners Markets. The majority of gasoline and diesel fuel
›duced at our Four Corners refineries is distributed in New Mexico and
.zona. The primary market area, which generally has the highest refining
:gin potential, is the Four Corners area.

Terminal Operations. We own a finished products terminal near
agstaff, Arizona, with a daily capacity of 6,000 barrels per day. This
:minal has approximately 65,000 barrels of finished product tankage and
:ruck loading rack with three loading spots. Product deliveries to this
:minal are made by truck from our Four Corners refineries.

We also own a finished products terminal in Albuquerque, New Mexico,
:h a daily capacity of 10,000 barrels per day. This terminal has
›roximately 170,000 barrels of finished product tankage and a truck
ading rack with two loading spots. Product deliveries to this terminal
e made by truck or by pipeline, including deliveries from our Ciniza and
›omfield refineries.

?INED PRODUCT SALES

Our refined products, including products our refining group acquires
›m other sources, are sold through independent wholesalers and
:ailers, commercial accounts, our own retail units, and sales and
:hanges with large oil companies. Refined products produced at the
:ineries were distributed as follows:

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	2006
>	<C>
:ect sales to wholesalers, retailers and commercial customers......	54%
:ect sales to our own retail units................................	26%
.es and exchanges with large oil companies........................	16%
ier...	4%

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ANSPORTATION

Crude oil supply for our Four Corners refineries comes primarily from
e Four Corners area and is delivered by pipelines, including pipelines
own, connected to our refineries, or delivered by our trucks to
›eline injection points or refinery tankage. Our pipeline system reaches
:o the San Juan Basin, located in the Four Corners area, and connects
:h local common carrier pipelines. We currently own approximately 250
.es of pipeline for gathering and delivering crude oil to the
:ineries. Our Ciniza refinery receives natural gas liquids primarily
:ough a 13-mile pipeline we own that is connected to a natural gas
quids processing plant.

On August 1, 2005, we acquired an idle crude oil pipeline system that

ıiza rerineries. when operational, the pipeline will have sufficient
ıde oil transportation capacity to allow us to again operate both
:ineries at maximum rates. In order to operate the pipeline, we will
re to obtain approximately 750,000 barrels of linefill.

Startup of the pipeline is subject to, among other things, a final
ȷineering evaluation of the system. The hydrotesting of the pipeline was
npleted in July 2006, and we currently are continuing to do the work
:essary to re-commission the line. As a result of project delays, it
:rently is anticipated that the pipeline will become operational in the
:ond quarter of 2007 with crude oil arriving at the refineries before
: end of the second quarter.

The majority of our Four Corners gasoline and diesel fuel production
distributed in New Mexico and Arizona. Our refining group operates a
:et of finished product trucks that we use to deliver finished products
needed by our customers.

TAIL GROUP

On December 31, 2006, our retail group operated 158 total operating
.ts, including 155 service stations, one A&W restaurant, one Party Time
:za restaurant, and one full service car wash. These operating units are
:ated in New Mexico, Arizona, and Colorado. Service station count
presents an increase of 32 units since December 31, 2005.

On December 31, 2006, our retail group had 61 units branded Conoco
:suant to a strategic branding/licensing agreement. In addition, 37
.ts were branded Giant, 38 units were branded Mustang, eight units were
anded Phillips 66, seven units were branded Shell, two units were
anded Mobil, one unit was branded Thriftway, and one unit was branded
ıdial.

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Many of our service stations are modern, high-volume self-service
:rations. Our service stations are augmented with convenience stores at
:t locations, which provide items such as general merchandise, tobacco
oducts, alcoholic and nonalcoholic beverages, fast food, and automotive
oducts. In addition, most locations offer services such as automated
.ler machines, free air, and pre-paid financial products, including
one cards, gift cards, and Visa and MasterCard cards. These stores offer
nix of our own branded foodservice/delicatessen items and some of the
ores offer nationally franchised products. Service stations with kiosks
:er limited merchandise, primarily tobacco products, but also candy and
ıer snacks, and some automotive products.

Until June 19, 2003, when it was sold, we also owned and operated a

PX00600-012

ıims, is limited to $55,000,000.

As part of the consent order cleanup plan, the facility's underground ver system will be cleaned, inspected and repaired as needed. This sewer :k is scheduled to begin during the construction of the corrective :ion management unit and related remediation work and is included in our sociated cost estimate. We anticipate that construction of the :rective action management unit and related remediation work, as well as ver system inspection and repair, will be completed approximately seven eight years after EPA approves our cleanup plan and authorizes its plementation.

WE CANNOT MAINTAIN AN ADEQUATE SUPPLY OF FEEDSTOCKS AT OUR CINIZA AND)OMFIELD REFINERIES, OUR OPERATING RESULTS MAY BE ADVERSELY AFFECTED.

The primary feedstock for our Four Corners refineries is Four Corners eet, a locally produced, high quality crude oil. We supplement the crude . used at our refineries with other feedstocks. These other feedstocks :rently include locally produced natural gas liquids and condensate as .l as other feedstocks produced outside of the Four Corners area.

These refineries continue to be affected by reduced crude oil oduction in the Four Corners area. The Four Corners basin is a mature oduction area and, as a result, is subject to a natural decline in oduction over time. This natural decline is being partially offset by drilling, field workovers, and secondary recovery projects, which have sulted in additional production from existing reserves.

As a result of the declining production of crude oil in the Four :ners area in recent years, we have not been able to cost effectively :ain sufficient amounts of crude oil to operate our Four Corners :ineries at full capacity. Crude oil utilization rates for our Four :ners refineries declined from approximately 72% in 2002 to oroximately 60% in 2006. Our current projections of Four Corners crude . production indicate that our crude oil demand will exceed the crude . supply that is available from local sources for the foreseeable future d that our crude oil capacity utilization rates at our Four Corners :ineries will continue to decline unless circumstances change.

On August 1, 2005, we acquired an idle crude oil pipeline system that .ginates near Jal, New Mexico and is connected to a company-owned oeline network that directly supplies crude oil to the Bloomfield and ıiza refineries. When operational, the pipeline will have sufficient ıde oil transportation capacity to allow us to again operate both :ineries at maximum rates. We have begun testing the pipeline and taking ıer actions related to placing it in service. Unless currently

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ınticipated obstacles are encountered, we anticipate that the pipeline .l become operational in the second quarter of 2007 with crude oil :iving at the refineries before the end of the second quarter.

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FINANCIAL AND OPERATING HIGHLIGHTS

	Year Ended December 31,			
	2006	2005	2004	200:
	(In thousands, except percentages, per share a			
>	<C>	<C>	<C>	<C>
iancial Statement Data				
itinuing Operations:				
Jet Revenues.....................	$4,198,203	$3,581,246	$2,511,589	$1,80E
Operating Income.................	150,359	199,642	78,480	6:
Earnings (Loss)..................	82,751	103,931	16,338	1:
Earnings (Loss) Per Common Share - Basic..................	$ 5.67	$ 7.71	$ 1.47	$
Earnings (Loss) Per Common Share - Diluted................	$ 5.64	$ 7.63	$ 1.43	$
scontinued Operations:				
Jet Revenues.....................	$ –	$ –	$ 1,269	$ 2:
Operating Earnings (Loss)........	–	24	(190)	
Earnings (Loss)..................	–	15	(117)	
(Loss) Earnings Per Common Share - Basic..................	$ –	$ –	$ (0.01)	$
(Loss) Earnings Per Common Share - Diluted................	–	–	(0.01)	
ıulative Effect of Change in Accounting Principle............	$ –	$ (68)	–	$
Loss Per Common Share - Basic....	$ –	$ (0.01)	–	$
Loss Per Common Share - Diluted..	$ –	$ (0.01)	–	$
ighted Average Common Shares Outstanding - Basic..............	14,597	13,486	11,105	E
ighted Average Common Shares Outstanding - Diluted............	14,680	13,629	11,358	E
rking Capital....................	$ 207,152	$ 233,847	$ 103,172	$ 9:
tal Assets.......................	1,176,177	984,472	702,406	69:
ig-Term Debt.....................	325,387	274,864	292,759	35:
ockholders' Equity...............	484,368	399,836	216,439	13:
ig-Term Debt as a Percentage of Total Capitalization(a).......	40.2%	40.7%	57.5%	
ok Value Per Common Share Outstanding(b)..................	$ 33.08	$ 27.36	$ 17.55	$:
turn on Average Stockholders' Equity(c).......................	18.72%	33.7%	9.1%	
erating Data				
fining Group:				
ir Corners Operations:				
Rated Crude Oil Capacity Utilized......................	60%	62%	61%	
Refinery Sourced Sales Barrels (Bbls/Day)....................	26,945	28,516	27,355	2:

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Total Capitalization is defined as Long-Term Debt, net of current portion plus Total Stockholders' Equity.
Book value per common share is defined as Total Stockholders' Equity divided by number of common shares outstanding, net of treasury shares.
Return on Average Stockholders' Equity is defined as Net Earnings divided by the average of Total Stockholders' Equity at the beginning of each year and Total Stockholders' Equity at the end of each year.

[ABLE>

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10-K

(Mark One)

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2005

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to .

Commission File Number: 1-10398

Giant Industries, Inc.

(Exact name of registrant as specified in its charter)

DELAWARE *(State or other jurisdiction of incorporation or organization)*	86-0642718 *(I.R.S. Employer Identification No.)*
23733 North Scottsdale Road, SCOTTSDALE, ARIZONA *(Address of principal executive offices)*	85255 *(Zip Code)*

Registrant's telephone number, including area code:
(480) 585-8888

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
Common Stock, $.01 par value	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:
None

.dicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No ☑

.dicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☑

.dicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during th ›ding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requires for the past ıys. Yes ☑ No ☐

.dicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§229.405 of this chapter) is not contained herein, and will not be ɜined, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendm is Form 10-K. ☑

.dicate by check mark whether the registrant is an accelerated filer (as defined in Exchange Act Rule 12b-2). Yes ☑ No ☐

.dicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and lar erated filer" in Rule 12b-2 of the Exchange Act (check one):

Large accelerated filer ☐ Accelerated filer ☑ Non-accelerated filer ☐

.dicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes ☐ No ☑

s of June 30, 2005, 13,424,847 shares of the registrant's Common Stock, $.01 par value, were outstanding and the aggregate market value of the voting stock he ɔn-affiliates of the registrant was approximately $483,294,492 based on the New York Stock Exchange closing price on June 30, 2005.

s of February 1, 2006, 14,617,097 shares of the registrant's Common Stock, $.01 par value, were outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

ɪrts of the Proxy Statement for the Registrant's 2006 Annual Meeting of Stockholders are incorporated by reference in Part III of this Form 10-K Report.

PX00601-001

stocks currently include locally produced natural gas liquids and condensate as well as other feedstocks produced outside of the Four Corners ar most significant of these other feedstocks are natural gas liquids, consisting of natural gasoline, normal butane, and isobutane.

Our Ciniza refinery is capable of processing approximately 6,000 barrels per day of natural gas liquids. An adequate supply of natural gas liquid: able for delivery to our Ciniza refinery primarily through a pipeline we own that connects the refinery to a natural gas liquids processing plant. ently acquire the majority of our natural gas liquids feedstocks by a long-term agreement.

We purchase crude oil from a number of sources, including major oil companies and independent producers, under arrangements that contain ket-responsive pricing provisions. Many of these arrangements are subject to cancellation by either party or have terms of one year or less. In tion, these arrangements are subject to periodic renegotiation, which could result in our paying higher or lower relative prices for crude oil.

Our Ciniza and Bloomfield refineries continue to be affected by reduced crude oil production in the Four Corners area. For a further discussion c matter, including our plans to transport crude oil through a pipeline acquired in 2005, see the discussion in our Risk Factors section in Item 1A rding feedstocks at our Ciniza and Bloomfield refineries.

Marketing and Distribution

The Four Corners Market. We group the markets for our Four Corners refineries into two tiers, which represent varying refining margin potentia. 1 has the highest refining margin potential and is the Four Corners area. Tier 2 includes both the Albuquerque, New Mexico and Flagstaff, Ariz s, the largest markets in New Mexico and Northern Arizona, respectively. The Tier 2 markets are primarily supplied from our Ciniza refinery.

Terminal Operations. We own a finished products terminal near Flagstaff, Arizona, with a daily capacity of 6,000 barrels per day. This terminal oximately 65,000 barrels of finished product tankage and a truck loading rack with three loading spots. Product deliveries to this terminal are m uck from our Four Corners refineries.

We also own a finished products terminal in Albuquerque, New Mexico, with a daily capacity of 10,000 barrels per day. This terminal has oximately 170,000 barrels of finished product tankage and a truck loading rack with two loading spots. Product deliveries to this terminal are m uck or by pipeline, including deliveries from our Ciniza refinery.

Refined Product Sales.

Our refined products, including products our refining group acquires from other sources, are sold through independent wholesalers and retailers, mercial accounts, our own retail units, and sales and exchanges with large oil companies. Refined products produced at the refineries were ibuted as follows:

	2005	200
ct sales to wholesalers, retailers and commercial customers	57%	
ct sales to our own retail units	23%	
s and exchanges with large oil companies	17%	
r	3%	

Transportation

Crude oil supply for our Four Corners refineries comes primarily from the Four Corners area and is either connected by pipelines, including lines we own, or delivered by our trucks to pipeline injection points or refinery tankage. Our pipeline system reaches into the San Juan Basin, ted in the Four Corners area, and connects with local common carrier pipelines. We currently own approximately 250 miles of pipeline for

PX00601-008

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10-K

ırk One)

☑ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHAN(ACT OF 1934

For the fiscal year ended December 31, 2003.

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period to

Commission File Number: 1-10398

Giant Industries, Inc.

(Exact name of registrant as specified in its charter)

Delaware *(State or other jurisdiction of incorporation or organization)*	86-0642718 *(I.R.S. Employer Identification No.)*
23733 North Scottsdale Road, Scottsdale, Arizona *(Address of principal executive offices)*	85255 *(Zip Code)*

Registrant's telephone number, including area code:
(480) 585-8888

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	Name of Each Exchange on Which Registered
Common Stock, $.01 par value	New York Stock Exchange

Securities registered pursuant to Section 12(g) of the Act:
None

ndicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the urities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required such reports) and (2) has been subject to such filing requirements for the past 90 days. Yes ☑ No ☐

ndicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated b

We purchase crude oil from a number of sources, including major oil companies and independent producers, under ngements that contain market-responsive pricing provisions. Many of these arrangements are subject to cancellation by er party or have terms of one year or less. In addition, these arrangements are subject to periodic renegotiation, which cc ılt in our paying higher or lower relative prices for crude oil.

Our Ciniza and Bloomfield refineries continue to be affected by reduced crude oil production in the Four Corners area. Four Corners basin is a mature production area and as a result is subject to a natural decline in production over time. Tl ıral decline is being offset to some extent by new drilling, field workovers, and secondary recovery projects, which have ılted in additional production from existing reserves.

As a result of the declining production of crude oil in the Four Corners area in recent years, we have not been able to cc ctively obtain sufficient amounts of crude oil to operate our Four Corners refineries at full capacity. Crude oil utilizatioı s for our Four Corners refineries have declined from 87% in 1999 to 67% in 2003. Our current projections of Four Corn le oil production indicate that our crude oil demand will exceed the crude oil supply that is available from local sources foreseeable future and that our crude oil capacity utilization rates at our Four Corners refineries will continue to decline. itional crude oil or other refinery feedstocks become available in the future, we may increase production runs at our Fou ners refineries depending on the demand for finished products and the refining margins attainable. To that end, we conti ssess short-term and long-term options to address the continuing decline in Four Corners crude oil production. The optic ıg considered include:

- evaluating potentially economic sources of crude oil produced outside the Four Corners area, including ways to reduce raw material transportation costs to our refineries,
- evaluating ways to encourage further production in the Four Corners area,
- changes in operation/configuration of equipment at one or both refineries to further the integration of the two refinerie and reduce fixed costs, and
- with sufficient further decline in raw material supply, the temporary, partial or permanent discontinuance of operations one or more refineries.

None of these options, however, may prove to be economically viable. We cannot assure you that the Four Corners cru supply for our Ciniza and Bloomfield refineries will continue to be available at all or on acceptable terms for the long te ause large portions of the refineries' costs are fixed, any significant interruption or decline in the supply of crude oil or r feedstocks would have an adverse effect on our Four Corners refinery operations and on our overall operations.

Transportation

Crude oil supply for our Four Corners refineries comes primarily from the Four Corners area and is either connected by lines, including pipelines we own, or delivered by our trucks to pipeline injection points or refinery tankage. Our pipeli em reaches into the Paradox and San Juan Basins, located in the Four Corners area, and connects with local common ier pipelines. We currently own approximately 250 miles of pipeline for gathering and delivering crude oil to the refiner Ciniza refinery receives natural gas liquids primarily through a 13-mile pipeline we own that is connected to a natural g ids processing plant.

Marketing and Distribution

The Four Corners Market. We group the markets for our Four Corners refineries into two tiers, which represent varyin ing margin potential. Tier 1 has the highest refining margin potential and is the Four Corners area. Tier 2 includes both uquerque and Flagstaff areas, the largest markets in New Mexico, and Northern Arizona. The Tier 2 markets are primari plied from our Ciniza refinery.

PX00603-015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

Marc G. Schildkraut, Counsel for Defendants Paul L. Foster and Western Refining, Inc.
Heller Ehrman, LLP
1717 Rhode Island Avenue, N.W.
Washington, DC 20036
marc.schildkraut@hellerehrman.com
(202) 912-2140

Tom D. Smith, Counsel for Defendant Giant Industries, Inc.
Jones Day
51 Louisiana Avenue, N.W.
Washington, DC 20001
tdsmith@jonesday.com
(202) 879-3971

Thomas A. Outler, Counsel for Defendants
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O Box 1888
Albuquerque, NM 87103
toutler@rodey.com
(505) 768-7256

______/s/_______________
Thomas J. Lang, Attorney for Movant

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION, Plaintiff, v. PAUL L. FOSTER, WESTERN REFINING, INC. and GIANT INDUSTRIES, INC. Defendants.	)	Case No. 1:07-cv-00352-JB-ACT **PUBLIC VERSION**

APPENDIX TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

X Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934
For the fiscal year ended December 31, 2006

OR

____ Transition Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934
For the transition period from ________________ to ________________

Commission File Number 1-3876

HOLLY CORPORATION

(Exact name of registrant as specified in its charter)

Delaware (State or other jurisdiction of incorporation or organization)	75-1056913 (I.R.S Employer Identification No.)
100 Crescent Court, Suite 1600, Dallas, Texas (Address of principle executive offices)	75201-6915 (Zip Code)

Registrant's telephone number, including area code (214) 871-3555

Securities registered pursuant to Section 12(b) of the Act:
Common Stock, $0.01 par value registered on the New York Stock Exchange.

Securities registered pursuant to 12(g) of the Act:
None.

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.
Yes [X] No [ ]

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15 (d) of the Act.
Yes [ ] No [X]

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes [X] No [ ]

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. [X]

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act). (Check one):
Large accelerated filer [X] Accelerated filer [ ] Non-accelerated filer [ ]

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act).
Yes [ ] No [X]

On June 30, 2006 the aggregate market value of the Common Stock, par value $.01 per share, held by non-affiliates of the registrant was approximately $2,007,000,000. (This is not to be deemed an admission that any person whose shares were not included in the computation of the amount set forth in the preceding sentence necessarily is an "affiliate" of the registrant.)

55,355,584 shares of Common Stock, par value $.01 per share, were outstanding on February 16, 2007.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the registrant's proxy statement for its annual meeting of stockholders to be held on May 24, 2007, which proxy statement will be filed with the Securities and Exchange Commission within 120 days after December 31, 2006, are incorporated by reference in Part III.

Items 1 and 2. Business and Properties

COMPANY OVERVIEW

References herein to Holly Corporation include Holly Corporation and its consolidated subsidiaries. In accordance with the Securities and Exchange Commission's ("SEC") "Plain English" guidelines, this Annual Report on Form 10-K has been written in the first person. In this document, the words "we", "our", "ours" and "us" refer only to Holly Corporation and its consolidated subsidiaries or to Holly Corporation or an individual subsidiary and not to any other person.

We are principally an independent petroleum refiner which produces high value light products such as gasoline, diesel fuel and jet fuel. We were incorporated in Delaware in 1947 and maintain our principal corporate offices at 100 Crescent Court, Suite 1600, Dallas, Texas 75201-6915. Our telephone number is 214-871-3555 and our internet website address is www.hollycorp.com. The information contained on our website does not constitute part of this Annual Report on Form 10-K. A copy of this Annual Report on Form 10-K will be provided without charge upon written request to the Vice President, Investor Relations at the above address. A direct link to our filings at the SEC web site is available on our website on the Investors page. Also available on our website are copies of our Corporate Governance Guidelines, Audit Committee Charter, Compensation Committee Charter, Nominating / Corporate Governance Committee Charter and Code of Business Conduct and Ethics, all of which will be provided without charge upon written request to the Vice President, Investor Relations at the above address. Our Code of Business Conduct and Ethics applies to all of our officers, employees and directors, including our principal executive officer, principal financial officer and principal accounting officer. On April 26, 2004, our stock began trading on the New York Stock Exchange under the trading symbol "HOC". Our stock formerly traded on the American Stock Exchange.

In July 2004, we completed the initial public offering of limited partnership interests in Holly Energy Partners, L.P. ("HEP"), a Delaware limited partnership that also trades on the New York Stock Exchange under the trading symbol "HEP". HEP was formed to acquire, own and operate substantially all of the refined product pipeline and terminalling assets that support our refining and marketing operations in west Texas, New Mexico, Utah and Arizona and a 70% interest in Rio Grande Pipeline Company ("Rio Grande"). We initially consolidated the results of HEP and showed the interest we did not own as a minority interest in ownership and earnings. On July 8, 2005, we closed on a transaction for HEP to acquire our two 65-mile parallel intermediate feedstock pipelines which connect our Lovington and Artesia, New Mexico facilities, which reduced our ownership interest in HEP to 45.0%. Under the provision of the Financial Accounting Standards Board ("FASB") Interpretation No. ("FIN") 46 (revised), "Consolidation of Variable Interest Entities," we deconsolidated HEP effective July 1, 2005. The deconsolidation has been presented from July 1, 2005 forward, and our share of the earnings of HEP from July 1, 2005 is reported using the equity method of accounting.

As of December 31, 2006, we:

- owned and operated two refineries consisting of a petroleum refinery in Artesia, New Mexico that is operated in conjunction with crude oil distillation and vacuum distillation and other facilities situated 65 miles away in Lovington, New Mexico (collectively known as the "Navajo Refinery"), and a refinery in Woods Cross, Utah ("Woods Cross Refinery");
- owned approximately 800 miles of crude oil pipelines located principally in west Texas and New Mexico;
- owned 100% of NK Asphalt Partners, which manufactures and markets asphalt products from various terminals in Arizona and New Mexico and does business under the name of "Holly Asphalt Company;" and
- owned a 45% interest in HEP (which includes our 2% general partnership interest), which has logistics assets including approximately 1,700 miles of petroleum product pipelines located in Texas, New Mexico and Oklahoma (including 340 miles of leased pipeline); eleven refined product terminals; two refinery truck rack facilities; a refined products tank farm facility; and a 70% interest in Rio Grande.

Navajo Refining Company, L.P., one of our wholly-owned subsidiaries, owns the Navajo Refinery. The Navajo Refinery has a crude capacity of 83,000 BPSD of sour and sweet crude oils, can process up to approximately 90% sour crude oils, and serves markets in the southwestern United States and northern Mexico. In June 2003, we acquired the Woods Cross refining facility from ConocoPhillips. The Woods Cross Refinery, located just north of Salt Lake City, has a crude capacity of 26,000 BPSD and is operated by Holly Refining & Marketing Company –

PX01256-007

We have approximately 800 miles of crude gathering pipelines transporting crude oil to the Artesia and Lovington facilities from various points in southeastern New Mexico and west Texas, 66 crude oil trucks and 67 trailers in addition to over 600,000 barrels of related tankage.

We distribute refined products from the Navajo Refinery to markets in Arizona, New Mexico and west Texas primarily through two of HEP's owned pipelines that extend from Artesia, New Mexico to El Paso, Texas. In addition, we use a pipeline leased by HEP to transport petroleum products to markets in central and northwest New Mexico. We have refined product storage through our pipelines and terminals agreement with HEP at terminals in El Paso, Texas; Tucson, Arizona; and Albuquerque, Artesia, Moriarty and Bloomfield, New Mexico.

In 2000, we formed a joint venture, NK Asphalt Partners, with a subsidiary of Koch Materials Company ("Koch") to manufacture and market asphalt and asphalt products in Arizona and New Mexico under the name "Koch Asphalt Solutions – Southwest." We contributed our asphalt terminal and asphalt blending and modification assets in Arizona to NK Asphalt Partners and Koch contributed its New Mexico and Arizona asphalt manufacturing and marketing assets to NK Asphalt Partners. On January 1, 2002, we sold a 1% equity interest in NK Asphalt Partners to Koch, thereby reducing our equity interest from 50% to 49%. In February 2005, we purchased the 51% interest owned by Koch in NK Asphalt Partners for $16.9 million plus working capital of approximately $5.0 million. This purchase increased our ownership in NK Asphalt Partners from 49% to 100%. Following the purchase of the 51% interest from Koch, NK Asphalt Partners does business under the name "Holly Asphalt Company."

Markets and Competition
The Navajo Refinery primarily serves the growing southwestern United States market, including El Paso, Texas; Albuquerque, Moriarty and Bloomfield, New Mexico; Phoenix and Tucson, Arizona; and the northern Mexico market. Our products are shipped through HEP's pipelines from Artesia, New Mexico to El Paso, Texas and from El Paso to Albuquerque and to Mexico via products pipeline systems owned by Plains All American Pipeline, L.P. ("Plains") and from El Paso to Tucson and Phoenix via a products pipeline system owned by Kinder Morgan's SFPP, L.P. ("SFPP"). In addition, the Navajo Refinery transports petroleum products to markets in northwest New Mexico and to Moriarty, New Mexico, near Albuquerque, via HEP's leased pipeline running from Chaves County to San Juan County, New Mexico.

El Paso Market
The El Paso market for refined products is currently supplied by a number of refiners and pipelines. Refiners include Navajo, ConocoPhillips, Valero, Alon and Western. Pipelines serving this market include Longhorn, Magellan, and HEP pipelines. We currently supply approximately 11,000 BPD to the El Paso market, which accounts for approximately 18% of the refined products consumed in that market.

Arizona Market
The Arizona market for refined products is currently supplied by a number of refiners via pipelines and trucks. Refiners include companies located in west Texas, eastern New Mexico, northern New Mexico, the gulf coast and west coast. We currently supply approximately 47,000 BPD of refined products into the Arizona market, comprised primarily of Phoenix and Tucson, which accounts for approximately 16% of the refined products consumed in that market.

New Mexico Markets
The Artesia, Albuquerque, Moriarty and Bloomfield markets are supplied by a number of refiners via pipelines and trucks. Refiners include Navajo, Valero, Western, Giant, Alon and ConocoPhillips. We currently supply approximately 21,000 BPD of refined products to the New Mexico market, which accounts for approximately 20% of the refined products consumed in that market.

The common carrier pipelines we use to serve the Arizona and New Mexico markets are currently operated at or near capacity and are subject to proration. As a result, the volumes of refined products that we and other shippers have been able to deliver to these markets have been limited. In 2006, SFPP completed an expansion of its pipeline from El Paso to the Arizona market. Additionally, SFPP has announced a further planned expansion of the capacity of this pipeline from El Paso to the Arizona market, with an expected completion date of late 2007. We expect to maintain our market share of the 2007 SFPP expansion and ship additional volume to Arizona when additional

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2006

Commission File Number 1-32225

HOLLY ENERGY PARTNERS, L.P.

Formed under the laws of the State of Delaware

I.R.S. Employer Identification No. 20-0833098

100 Crescent Court, Suite 1600
Dallas, Texas 75201-6915
Telephone Number: (214) 871-3555

Securities registered pursuant to Section 12(b) of the Act:
Common Limited Partner Units

Securities registered pursuant to Section 12(g) of the Act:
None

:ate by check mark whether the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act.
Yes ☐ N

:ate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act.
Yes ☐ N

:ate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities ıange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), ; ıas been subject to such filing requirements for the past 90 days.
Yes ☑ N

:ate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be :ained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in part III of the n 10-K or any amendments to the Form 10-K.

:ate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition :elerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act.
Large accelerated filer ☐ Accelerated filer ☑ Non-accelerated filer ☐

:ate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act).
Yes ☐ N

aggregate market value of common limited partner units held by non-affiliates of the registrant was approximately $327 million on ɜ 30, 2006, based on the last sales price as quoted on the New York Stock Exchange.

number of the registrant's outstanding common limited partners units at February 9, 2007 was 8,170,000.

DOCUMENTS INCORPORATED BY REFERENCE: None

following table details the average aggregate daily number of barrels of petroleum products transported on our pipelines in each oi periods set forth below for Holly and for third parties.

	Years Ended December 31,				
	2006	2005[1]	2004	2003	200?
ned products transported for (bpd):					
y	126,929	94,473	65,525	51,456	55,2?
d parties [2]	62,655	65,053	29,967	23,469	13,5?
otal	189,584	159,526	95,492	74,925	68,8?
otal annual barrels in thousands ("mbbls")	69,198	58,227	34,950	27,348	25,1?

Includes volumes transported on the pipelines acquired from Alon on February 28, 2005, and volumes transported on the Intermediate Pipelines acquired on July 8, 2005.

Includes Rio Grande Pipeline volumes beginning June 30, 2003, when we increased our ownership from 25% to 70% and began consolidating the results of Rio Grande Pipeline.

following table sets forth certain operating data for each of our petroleum product pipelines. Except as shown below, we own 100% efined product pipelines. Throughput is the total average number of barrels per day transported on a pipeline, but does not aggreg els moved between different points on the same pipeline. Revenues reflect tariff revenues generated by barrels shipped from an or delivery point on a pipeline. Revenues also include payments made by Alon under capacity lease arrangements on our Orla to El o pipeline. Under these arrangements, we provide space on our pipeline for the shipment of up to 20,000 barrels of refined product Alon pays us whether or not it actually ships the full volumes of refined products it is entitled to ship. To the extent Alon does not u apacity, we are entitled to use it. We calculate the capacity of our pipelines based on the throughput capacity for barrels of gasoline valent that may be transported in the existing configuration; in some cases, this includes the use of drag reducing agents.

in and Destination	Diameter (inches)	Approximate Length (miles)	Capac (bpd
ned Product Pipelines:			
sia, NM to El Paso, TX	6	156	24,0C
sia, NM to Orla, TX to El Paso, TX	8/12/8	215	70,0C
sia, NM to Moriarty, NM[2]	12/8	215	45,0C
arty, NM to Bloomfield, NM[2]	8	191	(
Spring, TX to Abilene, TX[4]	6/8	105	20,0C
Spring, TX to Wichita Falls, TX[4]	6/8	227	23,0C
hita Falls, TX to Duncan, OK[4]	6	47	21,0C
and, TX to Orla, TX[4]	8/10	135	25,0C
rmediate Product Pipelines:			
ngton, NM to Artesia, NM[5]	8	65	48,0C
ngton, NM to Artesia, NM[5]	10	65	72,0C
Grande Pipeline Company:			
Grande Pipeline[6]	8	249	27,0C

Includes 20,000 bpd of capacity on the Orla to El Paso segment of this pipeline that is leased to Alon under capacity lease agreements.

The White Lakes Junction to Moriarty segment of our Artesia to Moriarty pipeline and our Moriarty to Bloomfield pipeline is leasec from Mid-America Pipeline Company, LLC under a long-term lease agreement.

Capacity for this pipeline is reflected in the information for the Artesia to Moriarty pipeline.

Acquired from Alon on February 28, 2005.

Acquired from Holly on July 8, 2005.

We have a 70% joint venture interest in the entity that owns this pipeline. Capacity reflects a 100% interest. We increased our ownership interest in Rio Grande Pipeline Company from 25% to 70% on June 30, 2003.

the years ended December 31, 2006 and 2005, Holly shipped an aggregate of 52.6% and 50.4%, respectively, of the petroleum lucts transported on our refined product pipelines and 100% of the petroleum products transported on our Intermediate Pipelines. F same periods, these pipelines transported approximately 95% of the light refined products produced by Holly's Navajo Refinery.

PX01260-021

FORM 10-K

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

(Mark One)
☒ ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2006

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from to

Commission file number 1-13175

VALERO ENERGY CORPORATION
(Exact name of registrant as specified in its charter)

Delaware (State or other jurisdiction of incorporation or organization)	74-1828067 (I.R.S. Employer Identification No.)
One Valero Way San Antonio, Texas (Address of principal executive offices)	78249 (Zip Code)

Registrant's telephone number, including area code: (210) 345-2000

Securities registered pursuant to Section 12(b) of the Act: Common stock, $0.01 par value per share, and Preferred Share Purchase Rights, listed on the New York Stock Exchange.

Securities registered pursuant to Section 12(g) of the Act: None.

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

PX01351-001

VALERO'S OPERATIONS

REFINING

On December 31, 2006, our refining operations included 18 refineries in the United States, Canada, and Aruba with a combined total throughput capacity of approximately 3.3 million barrels per day (BPD). The following table presents the locations of these refineries and their feedstock throughput capacities. These capacities exclude any throughput enhancements completed after December 31, 2006.

As of December 31, 2006		
Refinery	Location	Throughput Capacity [a] (barrels per day)
Gulf Coast:		
Corpus Christi [b]	Texas	340,000
Port Arthur	Texas	295,000
Aruba	Aruba	275,000
St. Charles	Louisiana	250,000
Texas City	Texas	245,000
Houston	Texas	130,000
Three Rivers	Texas	100,000
Krotz Springs	Louisiana	85,000
		1,720,000
West Coast:		
Benicia	California	170,000
Wilmington	California	135,000
		305,000
Mid-Continent:		
Memphis	Tennessee	195,000
McKee	Texas	170,000
Lima	Ohio	160,000
Ardmore	Oklahoma	90,000
		615,000
Northeast:		
Quebec City	Quebec, Canada	215,000
Delaware City	Delaware	210,000
Paulsboro	New Jersey	195,000
		620,000
Total		3,260,000

(a) "Throughput capacity" represents processed crude oil, intermediates, and other feedstocks. Total crude oil capacity is approximately 2.8 million BPD.
(b) Represents the combined capacities of two refineries – the Corpus Christi East and Corpus Christi West Refineries.

We process a wide slate of feedstocks, including sour crude oils, intermediates, and residual fuel oil (resid) which can typically be purchased at differentials below West Texas Intermediate, a benchmark crude oil. In 2006, sour crude oils, acidic sweet crude oils, and resid represented 55% of our throughput volumes, sweet crude oils represented 30%, and the remaining 15% was composed of blendstocks and other feedstocks. Our ability to process significant amounts of sour crude oils enhances our competitive position in the industry relative to refiners that process primarily sweet crude oils because sour crude oils typically can be purchased at differentials below sweet crude oils.

PX01351-007

MID-CONTINENT

The following table presents the percentages of principal charges and yields (on a combined basis) for the four refineries in this region for the year ended December 31, 2006. Total throughput volumes for the Mid-Continent refining region averaged 559,000 BPD for the twelve months ended December 31, 2006.

Combined Mid-Continent Region Charges and Yields
Fiscal 2006 Actual

	Percentage
Charges:	
sour crude oil	6%
sweet crude oil	86%
other feedstocks	1%
blendstocks	7%
Yields:	
gasolines and blendstocks	53%
distillates	34%
petrochemicals	4%
other products (includes vacuum gas oil, No. 6 fuel oil, petroleum coke, asphalt, and other)	9%

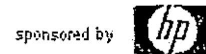
Memphis Refinery. Our Memphis Refinery is located in Tennessee along the Mississippi River's Lake McKellar. It processes primarily light sweet crude oils. Almost all of its production is light products, including regular and premium gasoline, diesel, jet fuels, and petrochemicals. Crude oil is supplied to the refinery via the Capline Pipeline and can also be received, along with other feedstocks, via barge. The refinery's products are distributed via truck racks at our three product terminals, barges, and a pipeline directly to the Memphis airport.

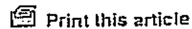
McKee Refinery. Our McKee Refinery is located in the Texas Panhandle. It processes primarily sweet crude oils and produces conventional gasoline, RBOB, low-sulfur diesel, jet fuels, and asphalt. The refinery has access to crude oil from Texas, Oklahoma, Kansas, and Colorado through third-party pipelines. The refinery also has access at Wichita Falls, Texas to third-party pipelines that transport crude oil from the Texas Gulf Coast and West Texas to the Mid-Continent region. The refinery distributes its products primarily via Valero L.P.'s pipelines to markets in Texas, New Mexico, Arizona, Colorado, and Oklahoma.

Lima Refinery. Our Lima Refinery is located in Ohio between Toledo and Dayton. It currently processes primarily light sweet crude oils. The refinery produces conventional gasoline, RBOB, diesel, jet fuels, and petrochemicals. Crude oils are delivered to the refinery through the Mid-Valley and Marathon pipelines. The refinery's products are distributed through the Buckeye and Inland pipeline systems and by rail and truck to markets in Ohio, Indiana, Illinois, Michigan, and western Pennsylvania.

Ardmore Refinery. Our Ardmore Refinery is located in Ardmore, Oklahoma, approximately 90 miles from Oklahoma City. It processes medium sour and light sweet crude oils into conventional gasoline, low-sulfur diesel, and asphalt. Crude oil is delivered to the refinery through Valero L.P.'s crude oil gathering and trunkline systems, other third-party pipelines, and trucking operations. Refined products are transported via pipelines, railcars, and trucks.

PX01351-011





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Valero CEO sees fire-damaged refinery back by May 1

Sat Mar 17, 2007 8:08 PM ET

(Adds detail, background throughout, byline)

By Robert Gibbons and Erwin Seba

SAN ANTONIO, March 17 (Reuters) - Valero Energy Corp. <VLO.N Chairman and Chief Executive Bill Klesse said on Saturday initial products from the company's fire-damaged 170,000 barrel per day Sunray, Texas, refinery should begin flowing in the first week of April.

"We will have this initial startup in the 85,000-95,000 barrel a day range," Klesse told Reuters.

All units except a destroyed residual crude oil processing unit, which have been shut since a Feb. 16 fire, should be back in operation by May 1, with total output between 85,000-115,000 bpd.

The distillate hydrotreater at the Sunray refinery is expected to come on line two weeks after initial start-up. Until that hydrotreater is back, the refinery won't be able to produce ultra-low sulfur diesel.

Klesse said the propane deasphalting unit, which processes residual crude oil and where the fire originated, was completely destroyed.

It will be "eight months to a year" before they restore the capacity to process residual crude oil at the McKee refinery.

Klesse estimated property damage at the refinery to be between $30 million and $40 million. He did not have an estimate of lost revenue due to the refinery shutdown.

Leading U.S. refiner Valero sees per-barrel crude oil prices running "in this $55-$65 range," Klesse said.

"It's fairly clear OPEC is defending an OPEC-basket price in the mid-$50s, which puts (benchmark U.S. cash crude West Texas Intermediate) in the $60s," he said.

Valero sees the world "adequately supplied" with crude oil currently, Klesse said. "We're not seeing any shortage."

Rich, gasoline-producing light, sweet crude is being bid up in relation to other crudes because of high gasoline demand, according to Klesse.

U.S. ethanol production should meet a mandated target for annual gasoline blendstock supply of 7.5 billion gallons by no later than 2009 and perhaps as early as 2008, well in advance of a 2012 target, Klesse said.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

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/s/
Thomas J. Lang, Attorney for Movant

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION, Plaintiff, v. PAUL L. FOSTER, WESTERN REFINING, INC. and GIANT INDUSTRIES, INC. Defendants.	)	Case No. 1:07-cv-00352-JB-ACT **PUBLIC VERSION**

APPENDIX TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

1992 HORIZONTAL MERGER GUIDELINES
[WITH APRIL 8, 1997, REVISIONS TO SECTION 4 ON EFFICIENCIES]

The U.S. Department of Justice ("Department") and Federal Trade Commission ("Commission") today jointly issued Horizontal Merger Guidelines revising the Department's 1984 Merger Guidelines and the Commission's 1982 Statement Concerning Horizontal Merger Guidelines. The release marks the first time that the two federal agencies that share antitrust enforcement jurisdiction have issued joint guidelines.

Central to the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines is a recognition that sound merger enforcement is an essential component of our free enterprise system benefitting the competitiveness of American firms and the welfare of American consumers. Sound merger enforcement must prevent anticompetitive mergers yet avoid deterring the larger universe of procompetitive or competitively neutral mergers. The 1992 Horizontal Merger Guidelines implement this objective by describing the analytical foundations of merger enforcement and providing guidance enabling the business community to avoid antitrust problems when planning mergers. The Department first released Merger Guidelines in 1968 in order to inform the business community of the analysis applied by the Department to mergers under the federal antitrust laws. The 1968 Merger Guidelines eventually fell into disuse, both internally and externally, as they were eclipsed by developments in legal and economic thinking about mergers.

In 1982, the Department released revised Merger Guidelines which, reflecting those developments, departed dramatically from the 1968 version. Relative to the Department;s actual practice, however, the 1982 Merger Guidelines represented an evolutionary not revolutionary change. On the same date, the Commission released its Statement Concerning Horizontal Mergers highlighting the principal considerations guiding the Commission's horizontal merger enforcement and noting the "considerable weight" given by the Commission to the Department's 1982 Merger Guidelines.

The Department's current Merger Guidelines, released in 1984, refined and clarified the analytical framework of the 1982 Merger Guidelines. Although the agencies' experience with the 1982 Merger Guidelines reaffirmed the soundness of its underlying principles, the Department concluded that there remained room for improvement.

The revisions embodied in the 1992 Horizontal Merger Guidelines reflect the next logical step in the development of the agencies' analysis of mergers. They reflect the Department's experience in applying the 1982 and 1984 Merger Guidelines as well as the Commission's experience in applying those guidelines and the Commission's 1982 Statement. Both the Department and

to create or enhance market power or to facilitate its exercise.

1. MARKET DEFINITION, MEASUREMENT AND CONCENTRATION

1.0 Overview

A merger is unlikely to create or enhance market power or to facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured. Mergers that either do not significantly increase concentration or do not result in a concentrated market ordinarily require no further analysis.

The analytic process described in this section ensures that the Agency evaluates the likely competitive impact of a merger within the context of economically meaningful markets—i.e., markets that could be subject to the exercise of market power. Accordingly, for each product or service (hereafter "product") of each merging firm, the Agency seeks to define a market in which firms could effectively exercise market power if they were able to coordinate their actions.

Market definition focuses solely on demand substitution factors—i.e., possible consumer responses. Supply substitution factors—i.e., possible production responses—are considered elsewhere in the Guidelines in the identification of firms that participate in the relevant market and the analysis of entry. See Sections 1.3 and 3. A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test. The "small but significant and non-transitory" increase in price is employed solely as a methodological tool for the analysis of mergers: it is not a tolerance level for price increases.

Absent price discrimination, a relevant market is described by a product or group of products and a geographic area. In determining whether a hypothetical monopolist would be in a position to exercise market power, it is necessary to evaluate the likely demand responses of consumers to a price increase. A price increase could be made unprofitable by consumers either switching to other products or switching to the same product produced by firms at other locations. The nature and magnitude of these two types of demand responses respectively determine the scope of the product market and the geographic market.

In contrast, where a hypothetical monopolist likely would discriminate in prices charged to different groups of buyers, distinguished, for example, by their uses or locations, the Agency may delineate different relevant markets

corresponding to each such buyer group. Competition for sales to each such group may be affected differently by a particular merger and markets are delineated by evaluating the demand response of each such buyer group. A relevant market of this kind is described by a collection of products for sale to a given group of buyers.

Once defined, a relevant market must be measured in terms of its participants and concentration. Participants include firms currently producing or selling the market's products in the market's geographic area. In addition, participants may include other firms depending on their likely supply responses to a "small but significant and nontransitory" price increase. A firm is viewed as a participant if, in response to a "small but significant and nontransitory" price increase, it likely would enter rapidly into production or sale of a market product in the market's area, without incurring significant sunk costs of entry and exit. Firms likely to make any of these supply responses are considered to be "uncommitted" entrants because their supply response would create new production or sale in the relevant market and because that production or sale could be quickly terminated without significant loss.[(7)]

Uncommitted entrants are capable of making such quick and uncommitted supply responses that they likely influenced the market premerger, would influence it post-merger, and accordingly are considered as market participants at both times. This analysis of market definition and market measurement applies equally to foreign and domestic firms.

If the process of market definition and market measurement identifies one or more relevant markets in which the merging firms are both participants, then the merger is considered to be horizontal. Sections 1.1 through 1.5 describe in greater detail how product and geographic markets will be defined, how market shares will be calculated and how market concentration will be assessed.

1.1 Product Market Definition

The Agency will first define the relevant product market with respect to each of the products of each of the merging firms.[(8)]

1.11 General Standards

Absent price discrimination, the Agency will delineate the product market to be a product or group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a "small but significant and nontransitory" increase in price. That is, assuming that buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough

of their relative advantages in serving different buyers or groups of buyers. Physical capacity or reserves generally will be used if it is these measures that most effectively distinguish firms.(15) Typically, annual data are used, but where individual sales are large and infrequent so that annual data may be unrepresentative, the Agency may measure market shares over a longer period of time.

In measuring a firm's market share, the Agency will not include its sales or capacity to the extent that the firm's capacity is committed or so profitably employed outside the relevant market that it would not be available to respond to an increase in price in the market.

1.42 Price Discrimination Markets

When markets are defined on the basis of price discrimination (Sections 1.12 and 1.22), the Agency will include only sales likely to be made into, or capacity likely to be used to supply, the relevant market in response to a "small but significant and nontransitory" price increase.

1.43 Special Factors Affecting Foreign Firms

Market shares will be assigned to foreign competitors in the same way in which they are assigned to domestic competitors. However, if exchange rates fluctuate significantly, so that comparable dollar calculations on an annual basis may be unrepresentative, the Agency may measure market shares over a period longer than one year.

If shipments from a particular country to the United States are subject to a quota, the market shares assigned to firms in that country will not exceed the amount of shipments by such firms allowed under the quota.(16)

In the case of restraints that limit imports to some percentage of the total amount of the product sold in the United States (i.e., percentage quotas), a domestic price increase that reduced domestic consumption also would reduce the volume of imports into the United States. Accordingly, actual import sales and capacity data will be reduced for purposes of calculating market shares. Finally, a single market share may be assigned to a country or group of countries if firms in that country or group of countries act in coordination.

1.5 Concentration and Market Shares

Market concentration is a function of the number of firms in a market and their respective market shares. As an aid to the interpretation of market data, the Agency will use the Herfindahl-Hirschman Index ("HHI") of market concentration. The HHI is calculated by summing the squares of the individual market shares of all the participants.(17) Unlike the four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the

top four firms. It also gives proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions.

The Agency divides the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated (HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800). Although the resulting regions provide a useful framework for merger analysis, the numerical divisions suggest greater precision than is possible with the available economic tools and information. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues.

1.51 General Standards

In evaluating horizontal mergers, the Agency will consider both the post-merger market concentration and the increase in concentration resulting from the merger.[18]

Market concentration is a useful indicator of the likely potential competitive effect of a merger. The general standards for horizontal mergers are as follows:

a) Post-Merger HHI Below 1000. The Agency regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis.

b) Post-Merger HHI Between 1000 and 1800. The Agency regards markets in this region to be moderately concentrated. Mergers producing an increase in the HHI of less than 100 points in moderately concentrated markets post-merger are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 100 points in moderately concentrated markets post-merger potentially raise significant competitive concerns depending on the factors set forth in Sections 2-5 of the Guidelines.

c) Post-Merger HHI Above 1800. The Agency regards markets in this region to be highly concentrated. Mergers producing an increase in the HHI of less than 50 points, even in highly concentrated markets post-merger, are unlikely to have adverse competitive consequences and ordinarily require no further analysis. Mergers producing an increase in the HHI of more than 50 points in highly concentrated markets post-merger potentially raise significant competitive concerns, depending on the factors set forth in Sections 2-5 of the Guidelines. Where the post-merger

HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in Sections 2-5 of the Guidelines make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.

1.52 Factors Affecting the Significance of Market Shares and Concentration

The post-merger level of market concentration and the change in concentration resulting from a merger affect the degree to which a merger raises competitive concerns. However, in some situations, market share and market concentration data may either understate or overstate the likely future competitive significance of a firm or firms in the market or the impact of a merger. The following are examples of such situations.

1.521 Changing Market Conditions

Market concentration and market share data of necessity are based on historical evidence. However, recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance. For example, if a new technology that is important to long-term competitive viability is available to other firms in the market, but is not available to a particular firm, the Agency may conclude that the historical market share of that firm overstates its future competitive significance. The Agency will consider reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data.

1.522 Degree of Difference Between the Products and Locations in the Market and Substitutes Outside the Market

All else equal, the magnitude of potential competitive harm from a merger is greater if a hypothetical monopolist would raise price within the relevant market by substantially more than a "small but significant and nontransitory" amount. This may occur when the demand substitutes outside the relevant market, as a group, are not close substitutes for the products and locations within the relevant market. There thus may be a wide gap in the chain of demand substitutes at the edge of the product and geographic market. Under such circumstances, more market power is at stake in the relevant market than in a market in which a hypothetical monopolist would raise price by exactly five percent.

2. THE POTENTIAL ADVERSE COMPETITIVE EFFECTS OF MERGERS

2.0 Overview

Other things being equal, market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. The smaller the percentage of total supply that a firm controls, the more severely it must restrict its own output in order to produce a given price increase, and the less likely it is that an output restriction will be profitable. If collective action is necessary for the exercise of market power, as the number of firms necessary to control a given percentage of total supply decreases, the difficulties and costs of reaching and enforcing an understanding with respect to the control of that supply might be reduced. However, market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Before determining whether to challenge a merger, the Agency also will assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.

This section considers some of the potential adverse competitive effects of mergers and the factors in addition to market concentration relevant to each. Because an individual merger may threaten to harm competition through more than one of these effects, mergers will be analyzed in terms of as many potential adverse competitive effects as are appropriate. Entry, efficiencies, and failure are treated in Sections 3-5.

2.1 Lessening of Competition Through Coordinated Interaction

A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers. Coordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behavior includes tacit or express collusion, and may or may not be lawful in and of itself.

Successful coordinated interaction entails reaching terms of coordination that are profitable to the firms involved and an ability to detect and punish deviations that would undermine the coordinated interaction. Detection and punishment of deviations ensure that coordinating firms will find it more profitable to adhere to the terms of coordination than to pursue short-term profits from deviating, given the costs of reprisal. In this phase of the analysis, the Agency will examine the extent to which post-merger market conditions are conducive to reaching terms of coordination, detecting deviations from those terms, and punishing such deviations. Depending upon the circumstances, the following market factors, among others, may be relevant: the availability of key information concerning market conditions, transactions and individual competitors; the extent of firm and product heterogeneity; pricing or marketing practices typically employed by firms in the market; the characteristics of buyers and sellers; and the characteristics of typical transactions.

Certain market conditions that are conducive to reaching terms of

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

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______/s/______________
Thomas J. Lang, Attorney for Movant

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FEDERAL TRADE COMMISSION, Plaintiff, v. PAUL L. FOSTER, WESTERN REFINING, INC. and GIANT INDUSTRIES, INC. Defendants.	)))))))))))))))	Case No. 1:07-cv-00352-JB-ACT **PUBLIC VERSION**

APPENDIX TO PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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coordination also may be conducive to detecting or punishing deviations from those terms. For example, the extent of information available to firms in the market, or the extent of homogeneity, may be relevant to both the ability to reach terms of coordination and to detect or punish deviations from those terms. The extent to which any specific market condition will be relevant to one or more of the conditions necessary to coordinated interaction will depend on the circumstances of the particular case.

It is likely that market conditions are conducive to coordinated interaction when the firms in the market previously have engaged in express collusion and when the salient characteristics of the market have not changed appreciably since the most recent such incident. Previous express collusion in another geographic market will have the same weight when the salient characteristics of that other market at the time of the collusion are comparable to those in the relevant market.

In analyzing the effect of a particular merger on coordinated interaction, the Agency is mindful of the difficulties of predicting likely future behavior based on the types of incomplete and sometimes contradictory information typically generated in merger investigations. Whether a merger is likely to diminish competition by enabling firms more likely, more successfully or more completely to engage in coordinated interaction depends on whether market conditions, on the whole, are conducive to reaching terms of coordination and detecting and punishing deviations from those terms.

2.11 Conditions Conducive to Reaching Terms of Coordination

Firms coordinating their interactions need not reach complex terms concerning the allocation of the market output across firms or the level of the market prices but may, instead, follow simple terms such as a common price, fixed price differentials, stable market shares, or customer or territorial restrictions. Terms of coordination need not perfectly achieve the monopoly outcome in order to be harmful to consumers. Instead, the terms of coordination may be imperfect and incomplete -- inasmuch as they omit some market participants, omit some dimensions of competition, omit some customers, yield elevated prices short of monopoly levels, or lapse into episodic price wars--and still result in significant competitive harm. At some point, however, imperfections cause the profitability of abiding by the terms of coordination to decrease and, depending on their extent, may make coordinated interaction unlikely in the first instance.

Market conditions may be conducive to or hinder reaching terms of coordination. For example, reaching terms of coordination may be facilitated by product or firm homogeneity and by existing practices among firms, practices not necessarily themselves antitrust violations, such as standardization of pricing or product variables on which firms could compete. Key information about rival firms and the market may also facilitate reaching terms of coordination. Conversely, reaching terms of coordination may be limited or impeded by product heterogeneity or by

firms having substantially incomplete information about the conditions and prospects of their rival's businesses, perhaps because of important differences among their current business operations. In addition, reaching terms of coordination may be limited or impeded by firm heterogeneity, for example, differences in vertical integration or the production of another product that tends to be used together with the relevant product.

2.12 Conditions Conducive to Detecting and Punishing Deviations

Where market conditions are conducive to timely detection and punishment of significant deviations, a firm will find it more profitable to abide by the terms of coordination than to deviate from them. Deviation from the terms of coordination will be deterred where the threat of punishment is credible. Credible punishment, however, may not need to be any more complex than temporary abandonment of the terms of coordination by other firms in the market.

Where detection and punishment likely would be rapid, incentives to deviate are diminished and coordination is likely to be successful. The detection and punishment of deviations may be facilitated by existing practices among firms, themselves not necessarily antitrust violations, and by the characteristics of typical transactions. For example, if key information about specific transactions or individual price or output levels is available routinely to competitors, it may be difficult for a firm to deviate secretly. If orders for the relevant product are frequent, regular and small relative to the total output of a firm in a market, it may be difficult for the firm to deviate in a substantial way without the knowledge of rivals and without the opportunity for rivals to react. If demand or cost fluctuations are relatively infrequent and small, deviations may be relatively easy to deter.

By contrast, where detection or punishment is likely to be slow, incentives to deviate are enhanced and coordinated interaction is unlikely to be successful. If demand or cost fluctuations are relatively frequent and large, deviations may be relatively difficult to distinguish from these other sources of market price fluctuations, and, in consequence, deviations may be relatively difficult to deter.

In certain circumstances, buyer characteristics and the nature of the procurement process may affect the incentives to deviate from terms of coordination. Buyer size alone is not the determining characteristic. Where large buyers likely would engage in long-term contracting, so that the sales covered by such contracts can be large relative to the total output of a firm in the market, firms may have the incentive to deviate. However, this only can be accomplished where the duration, volume and profitability of the business covered by such contracts are sufficiently large as to make deviation more profitable in the long term than honoring the terms of coordination, and buyers likely would switch suppliers.

In some circumstances, coordinated interaction can be effectively prevented

or limited by maverick firms--firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals (e.g., firms that are unusually disruptive and competitive influences in the market). Consequently, acquisition of a maverick firm is one way in which a merger may make coordinated interaction more likely, more successful, or more complete. For example, in a market where capacity constraints are significant for many competitors, a firm is more likely to be a maverick the greater is its excess or divertable capacity in relation to its sales or its total capacity, and the lower are its direct and opportunity costs of expanding sales in the relevant market.(19)

This is so because a firm's incentive to deviate from price-elevating and output-limiting terms of coordination is greater the more the firm is able profitably to expand its output as a proportion of the sales it would obtain if it adhered to the terms of coordination and the smaller is the base of sales on which it enjoys elevated profits prior to the price cutting deviation.(20) A firm also may be a maverick if it has an unusual ability secretly to expand its sales in relation to the sales it would obtain if it adhered to the terms of coordination. This ability might arise from opportunities to expand captive production for a downstream affiliate.

2.2 Lessening of Competition Through Unilateral Effects

A merger may diminish competition even if it does not lead to increased likelihood of successful coordinated interaction, because merging firms may find it profitable to alter their behavior unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition.

2.21 Firms Distinguished Primarily by Differentiated Products

In some markets the products are differentiated, so that products sold by different participants in the market are not perfect substitutes for one another. Moreover, different products in the market may vary in the degree of their substitutability for one another. In this setting, competition may be non-uniform (i.e., localized), so that individual sellers compete more directly with those rivals selling closer substitutes.(21)

A merger between firms in a market for differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the premerger level. Some of the sales loss due to the price rise merely will be diverted to the product of the merger partner and, depending on relative margins, capturing such sales loss through merger may make the price increase profitable even though it would not have been profitable premerger. Substantial unilateral price

repositioning their product lines.[23]

In markets where it is costly for buyers to evaluate product quality, buyers who consider purchasing from both merging parties may limit the total number of sellers they consider. If either of the merging firms would be replaced in such buyers, consideration by an equally competitive seller not formerly considered, then the merger is not likely to lead to a unilateral elevation of prices.

2.22 Firms Distinguished Primarily by Their Capacities

Where products are relatively undifferentiated and capacity primarily distinguishes firms and shapes the nature of their competition, the merged firm may find it profitable unilaterally to raise price and suppress output. The merger provides the merged firm a larger base of sales on which to enjoy the resulting price rise and also eliminates a competitor to which customers otherwise would have diverted their sales. Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.

This unilateral effect is unlikely unless a sufficiently large number of the merged firm's customers would not be able to find economical alternative sources of supply, i.e., competitors of the merged firm likely would not respond to the price increase and output reduction by the merged firm with increases in their own outputs sufficient in the aggregate to make the unilateral action of the merged firm unprofitable. Such non-party expansion is unlikely if those firms face binding capacity constraints that could not be economically relaxed within two years or if existing excess capacity is significantly more costly to operate than capacity currently in use.[24]

3. ENTRY ANALYSIS

3.0 Overview

A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels. Such entry likely will deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects of concern.

Entry is that easy if entry would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern. In markets where entry is that easy (i.e., where entry passes these tests of timeliness, likelihood, and sufficiency), the merger raises no antitrust concern and ordinarily requires no further analysis.

The committed entry treated in this Section is defined as new competition that requires expenditure of significant sunk costs of entry and exit.[25] The Agency employs a three step methodology to assess whether committed entry would deter or counteract a competitive effect of concern.

The first step assesses whether entry can achieve significant market impact within a timely period. If significant market impact would require a longer period, entry will not deter or counteract the competitive effect of concern.

The second step assesses whether committed entry would be a profitable and, hence, a likely response to a merger having competitive effects of concern. Firms considering entry that requires significant sunk costs must evaluate the profitability of the entry on the basis of long term participation in the market, because the underlying assets will be committed to the market until they are economically depreciated. Entry that is sufficient to counteract the competitive effects of concern will cause prices to fall to their premerger levels or lower. Thus, the profitability of such committed entry-must be determined on the basis of premerger market prices over the long-term.

A merger having anticompetitive effects can attract committed entry, profitable at premerger prices, that would not have occurred premerger at these same prices. But following the merger, the reduction in industry output and increase in prices associated with the competitive effect of concern may allow the same entry to occur without driving market prices below premerger levels. After a merger that results in decreased output and increased prices, the likely sales opportunities available to entrants at premerger prices will be larger than they were premerger, larger by the output reduction caused by the merger. If entry could be profitable at premerger prices without exceeding the likely sales opportunities—opportunities that include pre-existing pertinent factors as well as the merger-induced output reduction—then such entry is likely in response to the merger.

The third step assesses whether timely and likely entry would be sufficient to return market prices to their premerger levels. This end may be accomplished either through multiple entry or individual entry at a sufficient scale. Entry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, make it impossible for entry profitably to achieve the necessary level of sales. Also, the character and scope of entrants' products might not be fully responsive to the localized sales opportunities created by the removal of direct competition among sellers of differentiated products. In assessing whether entry will be timely, likely, and sufficient, the Agency recognizes that precise and detailed information may be difficult or impossible to obtain. In such instances, the Agency will rely on all available evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency.

3.1 Entry Alternatives

The Agency will examine the timeliness, likelihood, and sufficiency of the means of entry (entry alternatives) a potential entrant might practically employ, without attempting to identify who might be potential entrants. An entry alternative is defined by the actions the firm must take in order to produce and sell in the market. All phases of the entry effort will be considered, including, where relevant, planning, design, and management; permitting, licensing, and other approvals; construction, debugging, and operation of production facilities; and promotion (including necessary introductory discounts), marketing, distribution, and satisfaction of customer testing and qualification requirements.[26]

Recent examples of entry, whether successful or unsuccessful, may provide a useful starting point for identifying the necessary actions, time requirements, and characteristics of possible entry alternatives.

3.2 Timeliness of Entry

In order to deter or counteract the competitive effects of concern, entrants quickly must achieve a significant impact on price in the relevant market. The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.[27] Where the relevant product is a durable good, consumers, in response to a significant commitment to entry, may defer purchases by making additional investments to extend the useful life of previously purchased goods and in this way deter or counteract for a time the competitive effects of concern. In these circumstances, if entry only can occur outside of the two year period, the Agency will consider entry to be timely so long as it would deter or counteract the competitive effects of concern within the two year period and subsequently.

3.3 Likelihood of Entry

An entry alternative is likely if it would be profitable at premerger prices, and if such prices could be secured by the entrant.[28] The committed entrant will be unable to secure prices at premerger levels if its output is too large for the market to absorb without depressing prices further. Thus, entry is unlikely if the minimum viable scale is larger than the likely sales opportunity available to entrants.

Minimum viable scale is the smallest average annual level of sales that the committed entrant must persistently achieve for profitability at premerger prices.[29] Minimum viable scale is a function of expected revenues, based upon premerger prices,[30]

and all categories of costs associated with the entry alternative, including an *appropriate rate of return on invested capital given that entry could fail and* sunk costs, if any, will be lost.[31]

Sources of sales opportunities available to entrants include:

(a) the output reduction associated with the competitive effect of concern,[(32)]

(b) entrants' ability to capture a share of reasonably expected growth in market demand,[(33)]

(c) entrants' ability securely to divert sales from incumbents, for example, through vertical integration or through forward contracting, and (d) any additional anticipated contraction in incumbents' output in response to entry.[(34)] Factors that reduce the sales opportunities available to entrants include: (a) the prospect that an entrant will share in a reasonably expected decline in market demand, (b) the exclusion of an entrant from a portion of the market over the long term because of vertical integration or forward contracting by incumbents, and (c) any anticipated sales expansion by incumbents in reaction to entry, either generalized or targeted at customers approached by the entrant, that utilizes prior irreversible investments in excess production capacity. Demand growth or decline will be viewed as relevant only if total market demand is projected to experience long-lasting change during at least the two year period following the competitive effect of concern.

3.4 Sufficiency of Entry

Inasmuch as multiple entry generally is possible and individual entrants may flexibly choose their scale, committed entry generally will be sufficient to deter or counteract the competitive effects of concern whenever entry is likely under the analysis of Section 3.3. However, entry, although likely, will not be sufficient if, as a result of incumbent control, the tangible and intangible assets required for entry are not adequately available for entrants to respond fully to their sales opportunities. In addition, where the competitive effect of concern is not uniform across the relevant market, in order for entry to be sufficient, the character and scope of entrants' products must be responsive to the localized sales opportunities that include the output reduction associated with the competitive effect of concern. For example, where the concern is unilateral price elevation as a result of a merger between producers of differentiated products, entry, in order to be sufficient, must involve a product so close to the products of the merging firms that the merged firm will be unable to internalize enough of the sales loss due to the price rise, rendering the price increase unprofitable.

4. Efficiencies

Competition usually spurs firms to achieve efficiencies internally. Nevertheless, mergers have the potential to generate significant efficiencies

by permitting a better utilization of existing assets, enabling the combined firm to achieve lower costs in producing a given quantity and quality than either firm could have achieved without the proposed transaction. Indeed, the primary benefit of mergers to the economy is their potential to generate such efficiencies.

Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products. For example, merger-generated efficiencies may enhance competition by permitting two ineffective (e.g., high cost) competitors to become one effective (e.g., lower cost) competitor. In a coordinated interaction context (see Section 2.1), marginal cost reductions may make coordination less likely or effective by enhancing the incentive of a maverick to lower price or by creating a new maverick firm. In a unilateral effects context (see Section 2.2), marginal cost reductions may reduce the merged firm's incentive to elevate price. Efficiencies also may result in benefits in the form of new or improved products, and efficiencies may result in benefits even when price is not immediately and directly affected. Even when efficiencies generated through merger enhance a firm's ability to compete, however, a merger may have other effects that may lessen competition and ultimately may make the merger anticompetitive.

The Agency will consider only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed *merger-specific efficiencies*.[35] Only alternatives that are practical in the business situation faced by the merging firms will be considered in making this determination; the Agency will not insist upon a less restrictive alternative that is merely theoretical.

Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, the merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific. Efficiency claims will not be considered if they are vague or speculative or otherwise cannot be verified by reasonable means.

Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.

The Agency will not challenge a merger if cognizable efficiencies are of a

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of April, 2007, I filed the foregoing electronically through the CM/ECF system.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

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