Statement of Commissioner Mozelle W. Thompson
Concerning the Staff Report

"The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement"

The Commission has authorized the release of the Bureau of Economics staff report, "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement." I voted to authorize the release of this staff report, and I strongly support the Commission's ongoing efforts to provide Congress and the American public with insightful information and analysis about specific industries, business practices, and important consumer policy issues. While I believe that the report provides useful information for policymakers and the public in assessing merger policy for the petroleum industry, I must disagree with at least one aspect of the report. The Bureau of Economics staff report fails to show research or documentation supporting its suggestions that the Commission has applied a more stringent antitrust standard than usual and taken excessive enforcement actions when challenging petroleum mergers. This lack of substantiation and my experience in reviewing petroleum mergers over the past six years cause me to disagree with these specific conclusions.[1]

In suggesting that the Commission has applied a different enforcement standard to petroleum mergers, the report[2] hypothesizes that because some of these mergers are large and

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[1]I take particular exception to the passages, "The FTC has taken a strict approach on reviewing petroleum-related mergers and has obtained relief in markets at lower concentration levels than it has in other industries [footnote omitted]," (Chapter One at 13), and, ". . . in mergers involving petroleum markets, the Commission has obtained relief at lower levels of concentration. [footnote omitted]" (Chapter Two at 27). I object to these passages because I disagree with their conclusion and because the Bureau of Economics report does not fully explore and explain to the public why the Commission has taken enforcement actions at these levels, including explaining the relevant industrial organization economics, the relevant conditions in petroleum markets, and the Commission's application of the Horizontal Merger Guidelines. Instead, the report, in the text following these two passages, only discusses two factors affecting at which market concentration levels the Commission takes enforcement actions: (1) the Commission's concerns about noncompetitive conduct in the petroleum industry, and (2) the Commission's merger review process. More should be expected from a Bureau of Economics staff report.

[2]*See* Chapter One (Section IV. "FTC Law Enforcement Activities in the Petroleum Industry") and Chapter Two (Section II.C.3. "HHIs In Petroleum Mergers the FTC Has Challenged").

take considerable time for the Commission to investigate, the merging parties "surrender" during the Commission review process and agree to divestitures that the report unfortunately mislabels as "over-inclusive."[3] These statements imply that the Commission has required remedies that it was not entitled to obtain for the benefit of American consumers. I strongly disagree. In the proposed petroleum mergers I have reviewed, the Commission appropriately addressed potential anticompetitive harm, and for each enforcement action that the Commission undertook I had reason to believe that consumer harm would occur absent Commission action. Further, remedies ordered by the Commission have included the appropriate package of tangible and intangible assets to get the job done – that is, the Commission replaced the competition that would be lost due to an anticompetitive petroleum merger.

Three reasons strengthen my objection to the report's suggestions. First, the Bureau of Economics' report failed to test its hypothesis that the Commission's merger review process and the size of petroleum transactions leads the Commission to take enforcement actions in the petroleum industry at lower market concentration levels. Because no data in this report assesses the range of possible factors that may lead merging parties in the petroleum industry to settle Commission cases, the report over-reaches where it suggests that the Commission unfairly forces petroleum merger parties to "surrender" where lower market concentration levels are present.

Second, I suspect that time and cost, relative to transaction size, are practical considerations for any merging party regardless of the industry involved. In my view, most merging companies that appear before the Commission assess whether they are likely to satisfy the Commission's merger review without having to defend a Commission lawsuit or enter into a settlement. Such analysis presumably affects the merging parties' strategies before the Commission and/or a court – whether to argue the merits, negotiate a settlement, or defend a lawsuit – should the Commission continue to have concerns about the merger. These factors are likely considered by all parties proposing a merger transaction, not just parties to a petroleum merger. Moreover, these considerations necessarily vary according to the particular facts presented by the proposed transaction and the parties involved, rather than by the particular

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[3]The report uses the term "over-inclusive" in two discernible contexts, both of which I believe to be inappropriate. First, in Chapters One and Two where the report discusses the Commission's use of HHI screens, the term is used to characterize some Commission remedies in large petroleum mergers as possibly excessive, suggesting that relief is unwarranted in those cases. I disagree with this characterization. Second, in Chapter Two at 28, the term is used to characterize remedies (at "whatever threshold of concentration the Commission uses as a screen") that include a package of assets beyond those involved in an overlap market so that the package will ensure that a new competitor will be viable in the markets of concern. In the second context – which I raise in this portion of my statement – the report's thrust would have been better served by avoiding a label that may give the public the mis-impression that the Commission forces parties to divest packages of assets that are broader than what is necessary to protect competition.

industry being reviewed. Regardless of the strategies employed by petroleum merger proponents and the inadequacy of this report, as a Commissioner, I focus my review on the risk that these transactions pose to consumers and whether the Commission should seek appropriate relief.

Finally, although the report's data[4] does show that the Commission at times has obtained relief from petroleum mergers in markets with lower levels of market concentration, this observation does not necessarily lead to an inference that the Commission has forced petroleum companies into inappropriate settlements. Instead, the data more likely reflects appropriate enforcement decisions for mergers in markets characterized by the relevant antitrust factors identified by the Horizontal Merger Guidelines. For example, various market conditions in the petroleum industry increase the likelihood that a merger will result in reduced competition through coordinated interaction,[5] and a fair number of the petroleum industry's relevant antitrust markets may be more likely to suffer a lessening of competition as a consequence of coordinated interaction at lower levels of market concentration.[6] The data set forth in the table describing the

[4]Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2003* (Feb. 2, 2004), *available at* http://www.ftc.gov/os/2004/02/040202horizmergereffects.pdf.

[5]These include: product homogeneity, the characteristics of typical transactions, existing business practices, the characteristics of buyers, and the availability of key information concerning market conditions, transactions, and individual competitors. Horizontal Merger Guidelines, § 2.12. The relevant market conditions in the petroleum industry's antitrust markets may significantly differ from those market conditions in other industries that the Commission has investigated and taken enforcement actions, such as computer hardware and software, acute care hospitals, pharmaceuticals, defense, and media and entertainment.

[6]It is well-established that "coordinated interaction" does not require market concentration levels to be as high as those present in markets in which mergers may generate unilateral market power. This fact is true because market share is spread across multiple, coordinating firms instead of being controlled by just one dominant firm with a large percentage of market sales. A firm that acquires unilateral market power in a computer software market may, for example, have a market share of 80%, which would result in a market concentration level above at least 6400 out of a possible 10,000 Herfindahl-Hirschman Index ("HHI") points. On the other hand, a market of five equal competitors that coordinate in a gasoline marketing market would only have a concentration of 2000 HHI points. *See* Horizontal Merger Guidelines, § 1.5 ("The HHI is calculated by summing the squares of the individual market shares of all the participants." [footnote omitted]). Yet, the potential consumer harm that can be caused by coordinated interaction can be just as great.

Commission's petroleum industry enforcement actions actually reflects the appropriate application of the Horizontal Merger Guidelines.[7]

I unfortunately must note that the Commission Statement, which is authored by Chairman Muris and Commissioners Leary and Swindle, fails to acknowledge and respond to the key substantive points I make in my statement. Regardless of how their statement attempts to re-cast my concerns, the report does raise the suggestion that the Commission's enforcement actions in the petroleum industry have been inappropriate. However, the report fails to substantiate this implication and it fails to assess the full range of explanations – including the application of the Horizontal Merger Guidelines – why the Commission has taken actions against mergers in petroleum-related markets that have lower concentration than in other markets where the Commission has taken action.

For these reasons, I object to those portions of the report that suggest that the Commission placed inappropriate conditions on petroleum industry mergers. I believe that the Commission in reviewing proposed petroleum mergers has been rightfully concerned about their anticompetitive effects and fashioned relief that appropriately addressed the threatened harm to consumers. Finally, I am compelled to note that two months ago I called upon Chairman Muris to expedite the release of this and another staff report concerning the petroleum industry because I believed that these reports would give the public a fuller picture of the petroleum marketplace. Regrettably, the report on gas pricing factors[8] is not being released today. Accordingly, I reiterate my request to the Chairman to expedite the release of this second report so that Congress and the American public will have fuller information before them to help guide federal antitrust policy relating to petroleum industry mergers in the future.

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[7] *See* Table 2-5, "Enforcement Actions in the Petroleum Industry 1981-2003" (data also reported in *FTC Enforcement Actions in the Petroleum Industry 1981-2002, available at* http://www.ftc.gov/opa/2004/05/040527petrolactions81to02.pdf [attached to FTC Press Release, May 27, 2004]). The data shows that while the Commission alleged coordination as the sole theory of competitive harm for 22 market groupings, it alleged unilateral market power as the sole theory for only 11 market groupings. For 38 market groupings, the table shows that the Commission alleged both unilateral and coordinated interaction theories of harm. Thus, a remarkable 60 out of 71 market groupings included an allegation of coordinated interaction.

[8] Statement of Commissioner Mozelle W. Thompson Concerning the FTC's Merger Enforcement Actions in the Oil Industry (June 2, 2004), *available at* http://www.ftc.gov/speeches/thompson/mtwoilmergers.htm; "FTC to Hold Second Public Conference on The U.S. Oil and Gasoline Industry in May 2002," FTC Press Release (Dec. 21, 2001), *available at* http://www.ftc.gov/opa/2001/12/gasconf.htm.