REPORT FROM THE BUREAU OF COMPETITION

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I. Introduction

It's my pleasure to appear here this morning on behalf of Susan Creighton to present our report on the FTC's competition activities over the past year. Susan extends her regrets at not being able to be here with us this morning. While I have worked closely with Susan in preparing our report, I must mention that my remarks today represent my own views, and not necessarily those of the Commission or any individual Commissioner.

Helping Susan manage the Bureau of Competition has been more interesting and exciting than I imagined when I came on board last summer. We've had and continue to have an extensive and broad array of matters on our agenda, including a significant number of cases in administrative adjudication that raise a variety of cutting edge legal and policy issues. We are pursuing important cases at various stages of litigation, developing new investigations, and applying the most recent economic learning to the factual circumstances we encounter in the marketplace.

I'd like to start with some general observations before proceeding with a more systematic review of our activities. First, when Tim Muris and Joe Simons rejoined the agency in June of 2001, they laid out the policy agenda that we intended to pursue, and our work since then has followed that blueprint closely. You've no doubt heard us use the term "positive agenda," and that accurately characterizes what we're doing. That is, rather than simply reacting to events, we've set goals and priorities, and are making a series of deliberate choices with those ends in mind.

Second, we've taken on some tough challenges, because an important part of our role is providing leadership in the development of antitrust law and policy. To fulfill that latter role, we've looked at some areas where antitrust principles have not previously been applied, along with some areas where the law is muddled or has evolved in a way that seems inconsistent with the underlying principles. This largely explains the significant number of cases we now have in Part 3. In other words, we are working to clarify and shape antitrust law, as well as to apply it in those cases that are more straightforward. It will take a while before we can judge our contributions with any certainty, since many of our cases will wind their way up the chain of appeals before ultimately being resolved.

Third, our policy agenda integrates the full range of policy tools uniquely available to the Commission. Together with our colleagues in the Bureau of Economics, the Office of General Counsel, and the Office of Policy Planning, we've used our research and reporting capabilities, competition advocacy, amicus briefs, and other means in a coordinated way to advance the positive agenda.

With those thoughts in mind, I'll first briefly recapitulate the key elements of the policy agenda that we set out to accomplish in 2001 to provide a framework for assessing our accomplishments since then. Next, I'll focus on our Part 3 matters, including two important decisions issued by the Commission in the past year, four other matters currently pending before the Commission, and the new Part 3 matters initiated in the past year. From there, we'll look at the nonmerger area, reviewing a substantial list of enforcement matters initiated this year. Next is mergers. Merger enforcement is less amenable to planning, of course, but still we're nevertheless pursuing certain priorities in that area. One of our overall goals is to make what we do more transparent, and I'll address our ongoing efforts toward that objective. Finally, I'll review a number of important non-enforcement activities that we are pursuing as part of our integrated overall strategy.

II. The Positive Agenda

The expression "what's past is prologue" could aptly be applied in comparing the Bureau of Competition under Director Tim Muris in the mid-1980's and the Bureau of Competition today under Chairman Muris. The Bureau focused its attention 20 years ago on several areas that make up much of our agenda, including professions, health care, antitrust exemptions and immunities, public restraints on competition, and clarifying the analytical approach to horizontal restraints.

Shortly after his arrival at the FTC, Chairman Muris laid out the competition agenda for the agency in a speech before this Section at the ABA's Annual Meeting,[1] an interview in this Section's Antitrust magazine,[2] and Congressional testimony.[3] In so doing, he outlined the framework that has since been filled out into a full roster of accomplishments and initiatives in

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[1] Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word-- Continuity ("Continuity Speech")*, Remarks Before the American Bar Association Antitrust Section Annual Meeting, (Chicago, Il., Aug. 7, 2001), available at <http://www.ftc.gov/speeches/muris/murisaba.htm>.

[2] Interview with Timothy J. Muris, Chairman of the FTC ("Muris Interview"), *Antitrust* (Fall 2001).

[3] Timothy J. Muris, *FTC Law Enforcement and Programmatic Priorities ("Programmatic Priorities Testimony")*, Prepared Testimony of the Federal Trade Commission, Before the Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee (Nov. 7, 2001), available at <http://www.ftc.gov/os/2001/11/muris011107.htm>.

the agency's competition mission, including those of the past year. The topics he addressed included:

- Professions – indicating renewed emphasis on horizontal restraints among professionals;[4]
- Standards Setting – praising the Dell Computers consent and reporting that the staff would look for other cases involving abuse of the standards setting process;[5]
- Pharmaceutical Industry – stating that the agency was looking into anticompetitive exploitation of the Hatch-Waxman Act and referencing a study of competition from generic drugs;[6]
- *Noerr-Pennington* – identifying the doctrine as one that has been applied too broadly, and stating that a task force was studying the issues;[7]
- State Action – referencing another doctrine that, like *Noerr*, has been read too broadly, and disclosing a task force on this issue as well;[8]
- Intellectual Property – calling for an in-depth study of the relationship between antitrust and IP, and reporting on plans for hearings in this issue;[9]
- High-Tech Mergers – opining that, while antitrust analysis involving high-tech markets is essentially the same as for other markets, the arena is constantly changing;[10]
- Retrospective Studies – asserting that reviewing the impact and efficacy of past enforcement decisions is an important function for the FTC;[11]
- Categorization of Horizontal Restraints – articulating a need for an approach that is workable and consistent with the law, adding that one of the FTC's principal purposes is to address sophisticated questions like this;[12]

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[4] *Continuity Speech* at 9, *Antitrust* Magazine Interview at 53.

[5] *Antitrust* Magazine Interview at 53, *Programmatic Priorities Testimony* at 3.

[6] *Continuity Speech* at 9, *Antitrust* Magazine Interview at 53, *Programmatic Priorities Testimony* at 3-4.

[7] *Continuity Speech* at 9, *Antitrust* Magazine Interview at 54.

[8] *Id.*

[9] *Antitrust* Magazine Interview at 55, *Programmatic Priorities Testimony* at 3.

[10] *Continuity Speech* at 7-8.

[11] *Continuity Speech* at 6, *Antitrust* Magazine Interview at 57.

[12] *Continuity Speech* at 9, *Antitrust* Magazine Interview at 57-8.

- Development of Merger Policy – forecasting no significant change in policy and continued reliance on the Horizontal Merger Guidelines, emphasizing the importance of facts, and indicating need for continued economic research,[13] and
- Smaller mergers – noting that mergers below the filing threshold can still be harmful, and that the agency will not limit its attention to reported mergers.[14]

As I proceed through the remainder of my remarks, I think you find that we have addressed each of these areas over the past year.[15]

III. Administrative Adjudication

During Fiscal Year 2003, our last fiscal year, and in the first half of this fiscal year, we have brought a large number of cases in administrative adjudication. Indeed, during the past fiscal year, the Commission approved more Part 3 complaints (eleven) than in any year since 1985, and more than three times the annual average over the previous ten years. The Commission has approved two additional complaints so far this year. As a result, we are now preparing for trial in five adjudicative matters, have four cases pending before the Commission, and two on appeal in Federal circuit courts. In addition, we have since settled three Part 3 cases that were active in Fiscal 2003. In short, we've been busy.

The volume of Part 3 litigation is no accident. It reflects our belief in administrative litigation as a way to take advantage of the FTC's expertise in the development of antitrust jurisprudence, particularly in the kind of complex matters that the FTC was created to address.[16] Moreover, it demonstrates our willingness to take on difficult cases we believe should be brought as a matter of public policy, but in which the outcome is more uncertain than usual because of the novel or unsettled legal issues involved.

Our pursuit of matters in Part 3 is also based on our interest in leveraging our resources to maximize our impact. In an adjudicative proceeding, the Commission can fully and carefully deliberate the complex questions that our cases often raise, and can then explicate in detail the legal and economic policy principles upon which it is relying in deciding the case. As a result,

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[13] *Continuity Speech* at 2-5, *Antitrust* Magazine Interview at 55, *Programmatic Priorities Testimony* at 6-7.

[14] *Continuity Speech* at 7, *Antitrust* Magazine Interview at 58, *Programmatic Priorities Testimony* at 7.

[15] Chairman Muris also identified other topics that the Bureau has addressed previously, such as merger remedies and the merger review process.

[16] D. Bruce Hoffman and M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust Law Journal 319, 319-320 (2003); *see also Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, Apr. 7, 1989 at 2, 17-20.

both the precedent and the underlying reasoning serve as guideposts for competitors who may face similar factual circumstances. Moreover, if endorsed on appeal, an FTC case can become a precedent affecting antitrust jurisprudence more generally, rather than just FTC cases. Three of our Part 3 cases from the mid-1980's, for example, ultimately reached the U.S. Supreme Court, which upheld the Commission in each instance.[17]

A. Commission Decisions

The Commission issued decisions in two of our cases in the past year, issuing important opinions as it upheld the charges in the complaints. In *Polygram* ("*Three Tenors*"),[18] the Commission synthesized Supreme Court decisions dealing with agreements among competitors and set out a coherent methodology for analyzing cases of that type. The Commission's *Schering-Plough* decision[19] further addressed that issue, and also represents the Commission's first decided antitrust case involving patent settlements between pharmaceutical patent holders and generic drug manufacturers – an area that has emerged as one of the most significant components of our work.

1. Polygram Holdings, Inc. (Three Tenors).

Last July, the Commission, in an opinion authored by Chairman Muris, found that PolyGram Holdings improperly agreed with a competitor to restrict discounting and advertising on certain audio and video products featuring "The Three Tenors." Specifically, after they formed a joint venture for a new Three Tenors recording, Polygram and Warner Communications later agreed that during a promotional period they would not discount or advertise previous Three Tenors recordings for which they separately owned distribution rights.[20]

This case illustrates the notion that small cases can have an impact on the law that significantly transcends the immediate matter in dispute. A key issue before the Commission was the appropriate method of analysis for the agreement, because earlier horizontal restraints cases had applied summary condemnation under a *per se* rule, a full-blown rule of reason

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[17] *Ticor Title Insurance Co.*, Dkt. 9190, 112 F.T.C. 334 (1989), *rev'd, Ticor Title Insurance Co. v. FTC*, 922 F.2d 1122 (3rd Cir. 1991), *rev'd*, 504 U.S. 621 (1992), *on remand*, 998 F.2d 1129 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994); *Ticor Title Insurance Co.*, Dkt. 9190 (April 22, 1994) (modified cease and desist order); *Superior Court Trial Lawyers Ass'n*, Dkt. 9171, 107 F.T.C. 510 (1986), *rev'd, Superior Court Trial Lawyers Ass'n v. FTC*, 856 F.2d 226 (D.C.Cir.1988), *rev'd in part*, 493 U.S. 411 (1990), *on remand*, 897 F.2d 1168 (D.C.Cir 1990), *cert. denied*, 498 U.S. 1025 (1991); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

[18] *Polygram Holding, Inc.* Dkt. No. 9298 (July 28, 2003) (Opinion of the Commission).

[19] *Schering-Plough Corp.*, Dkt. No. 9297 (Dec. 18, 2003) (Opinion of the Commission).

[20] *Polygram Holding, Inc.* Dkt. No. 9298 (July 28, 2003) (Opinion of the Commission) at 2-3.

analysis, or something in between. After tracing the development of the law governing horizontal restraints,[21] the Commission synthesized recent Supreme Court precedent regarding the proper analytical method that should be used to determine the competitive effects of agreements between competitors.[22]

As explained in *Polygram*, the plaintiff, after showing an agreement, can avoid the burden of proving a violation under a full rule of reason by establishing that the agreement is "inherently suspect" because of its likely tendency to suppress competition,[23] according to "past judicial experience and current economic learning."[24] The burden then shifts to the defendant, who can avoid summary condemnation by demonstrating a legitimate justification, that is, one that is cognizable and plausible.[25] A justification that is cognizable under the antitrust laws explains how the restraint helps to increase output, quality, service, or innovation.[26] A plausible justification demonstrates that a specific link exists between the restraint and the justification.[27] If the defense is able to establish a legitimate justification, then the plaintiff must provide more specific evidence that the restraint is likely to harm competition, including identifying the theoretical basis for the alleged anticompetitive effects. Significantly, the plaintiff may do so by alternative means, perhaps by showing that a less restrictive means could accomplish the intended purpose of the restraint; by conducting a full market analysis; or by presenting economic learning about the effects of the practice in question.[28]

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[21] *Id*. at 13-29.

[22] *Id*. at 29-35.

[23] As stated in the Commission's appeal brief in this matter, *Polygram Holding, Inc. v. FTC*, No. 03-1293 (D.C. Cir.) (Mar. 8, 2004), the term "inherently suspect" is "simply a short-hand means of expressing a principle that the Supreme Court has repeatedly recognized – i.e., that practices that 'facially appear[] to be one[s] that would always or almost always tend to restrict competition and decrease output,' or practices 'the great likelihood of anticompetitive effects [of which] can easily be ascertained' are subject to condemnation without elaborate economic analysis or a showing of actual effects. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979), *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)."

[24] *Polygram Holding, Inc.* Dkt. No. 9298 (July 28, 2003) (Opinion of the Commission) at 29.

[25] *Id.* at 30.

[26] *Id.* at 30-31.

[27] *Id.* at 31-32.

[28] *Id.* at 32-33.

In the case before it, the Commission found that the "restraints on price discounting and advertising are inherently suspect, because experience and economic learning consistently show that restraints of this sort dampen competition and harm consumers."[29] It rejected the proffered free-rider justification because "it displaces market-based outcomes regarding the mix of products to be offered with collusive determinations that certain new products will be offered under a shield from direct competition."[30] The Commission added that the outcome would remain unchanged even if a more elaborate analysis was applied.[31]

Polygram has appealed the decision to the U.S. Court of Appeals for the D.C. Circuit. This case is one that every antitrust lawyer – even those who are not opera fans – should watch as it makes its way through the appeal process.

2. Schering

In December, the Commission decided the *Schering-Plough* case, in which it considered the antitrust consequences of a patent settlement between a branded and a generic manufacturer for the first time in an adjudicative matter.[32] Schering manufactures brand-name pharmaceutical products, including K-Dur-20, a potassium chloride supplement used to treat high blood pressure. After Upsher indicated that it planned to market a generic version of the drug under the Hatch-Waxman Act process, Schering sued for patent infringement. The parties subsequently settled the litigation, with Schering agreeing to pay Upsher $60 million in exchange for Upsher's agreement to defer its market entry, and to license several of its products to Schering. The complaint alleged that the payment was fundamentally in exchange for Upsher's agreement not to compete rather than for the licenses.[33]

The Commission, in a opinion by Commissioner Leary, overturned Administrative Law Judge ("ALJ") Michael Chappell's dismissal of the complaint. Commissioner Leary's opinion identified two key errors of law in the ALJ's Initial Decision. First, the Commission found that it was unnecessary to prove the patent was invalid or not infringed to show that the particular settlement agreement was anticompetitive.[34]

Second, the Commission rejected the ALJ's assertion that a formal market definition was necessary to establish a violation in the case. The Commission's opinion followed recent Supreme Court jurisprudence, as outlined in the Commission's *Three Tenors* decision,

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[29] *Id.* at 61.

[30] *Id.* at 41.

[31] *Id.* at 50.

[32] *Schering-Plough Corp.*, Dkt. No. 9297 (Dec. 18, 2003) (Opinion of the Commission).

[33] *Id.* at 3-4.

[34] *Id.* at 6-7, 30.

specifically noting that antitrust analysis of horizontal restraints is not delineated by bright line demarcations, but instead ranges along a continuum, based on the facts of each case. In this case, the Commission did not find that the settlement agreement was inherently suspect, because a payment by the branded company could be procompetitive in some circumstances. It found it unnecessary, however, to define a relevant market and compute market shares to infer competitive effects, because the record provided direct evidence of anticompetitive effects.[35]

The *Schering* decision provides important guidance on how the agency analyzes potentially anticompetitive patent settlement agreements. The matter is on appeal before the U.S. Court of Appeals for the Eleventh Circuit. The outcome of this case is likely to become an important milestone in the development of public policy relating to the intersection of the intellectual property and antitrust laws.

B. Part 3 matters pending before Commission

With four important Part 3 matters pending before it, the Commission's adjudicative output is likely to be at least as important and illuminating in the year to come as it was in the year past. The issues involved in these cases include unscrambling the eggs in a consummated merger, application of the "clear articulation" prong of the state action doctrine, the scope of the misrepresentation exemption to the *Noerr-Pennington* doctrine, and the obligations of a participant in the standards-setting process who holds relevant intellectual property rights.

1. Chicago Bridge

ALJ Chappell found that Chicago Bridge & Iron Company N.V. ("Chicago Bridge") illegally acquired a competitor in the design and construction of various types of field-erected specialty industrial storage tanks in his Initial Decision, released last June.[36] The complaint alleged that the acquisition resulted in either a monopoly or a dominant firm in four U.S. markets, including markets for field-erected thermal vacuum chambers and storage tanks for various liquified gases. After a three month trial, the ALJ upheld the complaint, and ordered Chicago Bridge to unwind the acquisition within 180 days.[37]

We had a brief flurry of excitement in this case in December when we learned that Chicago Bridge had notified employees of a plant it obtained as part of the acquisition that it intended to close the plant – a development that might have seriously compromised the possibility of recreating a viable competitor should we eventually prevail in the litigation. After we filed an emergency motion for an injunction, the company agreed to an "interim consent agreement" providing that Chicago Bridge may not alter any of the acquired assets in any way,

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[35] Id. at 7-8, 16-19.

[36] *Chicago Bridge & Iron Company N.V.*, Dkt. No. 9300 (June 27, 2003) (Initial Decision).

[37] *Id.*

except in the ordinary course of business or through ordinary wear and tear. The Commission approved the consent on January 2.[38]

This matter is on appeal before the Commission. Because very few merger cases have been litigated in recent years, this matter may provide the Commission with an opportunity to address new economic learning that affects merger law and policy, and to address issues relating to remedies in the unwinding of a consummated merger.

2. South Carolina Board of Dentistry

An administrative complaint against the South Carolina Board of Dentistry charges that the Board, comprised mainly of dentists practicing in South Carolina, illegally acted to restrict dental hygienists from providing basic dental care (cleaning, sealing, and fluoride treatments) in schools and, as a consequence, denied preventive dental care to school children in South Carolina.[39] The South Carolina legislature, seeking to promote competition, amended state law in 2000 to delete a requirement that had placed certain restrictions on the provision of preventive oral health care by a licensed dental hygienist in a school setting. The Board then reinstated precisely the same restrictions via an emergency regulation. The Board now claims that its action was protected by the state action doctrine. We contend that the state could not have clearly articulated an intent to displace competition when it had expressly acted to *remove* the restriction in question. The Board's motion to dismiss the complaint is now before the Commission.

3. Unocal

On March 10, the Commission heard oral argument on complaint counsel's appeal of ALJ Chappell's dismissal of the complaint in *Union Oil Company of California* ("*Unocal*").[40] The Commission's complaint alleges that Unocal's fraudulent behavior subverted rulemaking proceedings by the California Air Resources Board ("CARB") concerning the development of "summertime" reformulated gasoline by failing to disclose its ownership of relevant patents and affirmatively misrepresenting to both the CARB and private parties that its technology was in the public domain. After the CARB and the industry had adopted a standard that incorporated this technology, and other refiners had adopted it, the complaint alleges that Unocal asserted its patent rights and sought royalties amounting to hundreds of millions of dollars.

In granting Unocal's motion to dismiss, the ALJ concluded that Unocal's alleged deceptions are insulated from antitrust challenge by the *Noerr-Pennington* doctrine.[41] The ALJ also held that its conduct directed toward private groups is not subject to FTC jurisdiction under

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[38] *Chicago Bridge and Iron Co., N.V.*, Dkt No. 9300 (Jan. 2, 2004) (proposed interim consent order accepted for public comment).

[39] *South Carolina State Board of Dentistry*, Dkt. No. 9311 (Sept. 12, 2003) (complaint).

[40] *Union Oil Co. of California*, Dkt. No. 9305 (Nov. 25, 2003) (Initial Decision).

[41] *Id.* at 31.

a statute that bars "courts of the states" from hearing "civil actions" arising under the patent laws.[42] Complaint counsel have argued that *Noerr* is inapplicable to Unocal's actions because, *inter alia*, it falls within the misrepresentation exception to *Noerr*. Complaint counsel also argued that the law relied upon by the ALJ does not apply because the FTC is not a "court of the states," its adjudicative proceedings are not "civil actions," and the proceeding does not "arise under" the patent laws.

In light of the issues in this case, the Commission's decision will need to address a number of important aspects of the *Noerr* doctrine, as well as its jurisdiction to reach antitrust violations involving the misuse of intellectual property.

4. Rambus

In late February, Chief ALJ Stephen McGuire released his initial decision dismissing the Commission's complaint charging that Rambus, Inc. violated the antitrust laws by knowingly failing to disclose its relevant intellectual property holdings to a standards setting organization in which it was a participant.[43] According to the complaint, Rambus failed to disclose to the Joint Electron Device Engineering Council ("JEDEC") patents or patent applications covering critical technologies that were the subject of that standard-setting organization's work at the time, in violation of JEDEC goals, policies, rules, and procedures, thereby allowing Rambus to obtain monopoly power over technology covered by JEDEC standards.

The ALJ concluded that Rambus' conduct did not amount to deception or violation of Rambus' duties to JEDEC,[44] that there was no causal link betwen JEDEC standardization and Rambus' acquisition of monopoly power,[45] and that the challenged conduct did not result in anticompetitive effects because JEDEC likely would have selected Rambus technology in any event.[46] Complaint counsel have filed a notice of appeal to the Commission.

C. New Part 3 Complaints

In addition to the Part 3 matters discussed above, the Commission issued complaints in eight additional cases during the past year. Three of those cases have since settled, and we are preparing for or are in trial in the remaining five.

1. Movers Cases

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[42] *Id*. at 60.

[43] *Rambus Incorporated*, Dkt. No. 9302 (Feb. 24, 2004) (Initial Decision).

[44] *Id.* at 261.

[45] *Id.* at 303.

[46] *Id.* at 312.

This past year, the Commission approved complaints against associations of household goods movers in Alabama, Mississippi, and Kentucky.[47] The complaints charge that the associations, consisting of competing firms, each violated the FTC Act by jointly filing tariffs containing collective rates on behalf of their members. Because the states regulate rates for intrastate household moves, these cases present issues under the state action doctrine, particularly with respect to the "active supervision" prong. The Alabama and Mississippi associations have agreed to consent orders which bar them from filing tariffs containing collective intrastate rates, consistent with the relief sought in the complaints.[48] The Kentucky case, which is now under submission before the ALJ, may provide an opportunity for the Commission to address state action issues in the context of a fully developed record.

2. Health Care Professionals

The Commission also authorized three Part 3 matters involving health care profesionals, one of which has since settled, and two of which are still in litigation. The first of these cases, against *Brown & Toland Medical Group*, charges the organization with fixing prices and terms under which its doctors would contract with payors to provide services to Preferred Provider Organization ("PPO") enrollees. According to the complaint, Brown & Toland organized an agreement among its competing member physicians concerning price and other terms for contracts with health plans or other third-party payors. Brown & Toland also allegedly directed its members to terminate pre-existing contracts with payors, required its members to charge specified prices in all PPO contracts, and approached other physician organizations to solicit their participation in similar price-fixing schemes.[49] Brown & Toland has agreed to a consent order barring it from negotiating on behalf of physicians with payors and other conduct consistent with anticompetitive bargaining.[50]

Complaints issued in *North Texas Specialty Physicians* ("*NTSP*") and *Piedmont Health Alliance* ("*PHA*") each charge groups of physicians with unlawfully restraining competition that increased the cost of health care to consumers in their respective areas. Specifically, NTSP, a group of 600 physicians in the Fort Worth area, allegedly negotiated agreements among its participating physicians on price and other terms, refused to deal with payors except on

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[47] *Alabama Trucking Association, Inc.*, Dkt. No. 9307 (Jul.y8, 2003) (complaint); *Movers Conference of Mississippi, Inc.*, Dkt. No. 9308 (July 8, 2003) (complaint); *Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309 (July 8, 2003) (complaint).

[48] *Alabama Trucking Association, Inc.*, Dkt. No. 9307 (Dec. 5, 2003) (consent order); *Movers Conference of Mississippi, Inc.*, Dkt. No. 9308 (Dec. 5, 2003) (consent order).

[49] *California Pacific Medical Group, Inc., dba Brown & Toland Medical Group*, Dkt. No. 9306 (July 8, 2003) (complaint).

[50] *California Pacific Medical Group, Inc., dba Brown & Toland Medical Group*, Dkt. No. 9306 (Feb. 9, 2003) (proposed consent order accepted for public comment).

collectively agreed-upon terms, and refused to submit payor offers to participating physicians unless the terms complied with NTSP's minimum fee standards.[51]

PHA, consisting of about 450 physicians in Western North Carolina, is alleged to have collectively set the prices it demanded for physician services from payors, and required its members to participate in all PHA contracts and to accept PHA negotiated prices.[52] This case will address, among other issues, the legitimacy of the "modified messenger model" used by PHA.

3. Consummated Mergers

In August, the Commission approved a complaint challenging the consummated merger of Aspen Technology, Inc. and Hyprotech, Ltd., two of the three leading providers of engineering process simulation software for process industries.[53] The transaction was exempt from the HSR reporting requirements.

This case reflects the agency's active role in matters involving high-technology. The complaint alleges that the merger lessened competition in seven product markets involving batch and continuous process engineering simulation software. The notice of proposed relief calls for Aspen to rescind the acquisition, and to divest Hyprotech software, intellectual property, contract rights, and other assets necessary to recreate a viable competitor.

The Commission's most recently issued administrative complaint charges that the acquisition of Highland Park Hospital by Evanston Northwest Healthcare Corporation ("ENH") in January 2000 resulted in large price increases that were far beyond those occurring at comparable hospitals during the same time period.[54] The complaint also alleges that after the merger, the merged firm negotiated prices for several hundred independent physicians as well as its physician employees. This conduct constitutes illegal price fixing, according to the complaint, and therefore denied commercial payors, employers, and individuals the benefits of competition for physician services. This case arises out of the Commission's retrospective review of a series of hospital mergers.

IV. Nonmerger Enforcement

A. General Observations

We've been extremely active in the nonmerger area. In Fiscal Year 2003, our last full fiscal year, the Commission initiated 21 nonmerger enforcement actions. That's more than in

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[51] *North Texas Specialty Physicians*, Dkt. No. 9312 (Sept. 24, 2003) (complaint).

[52] *Piedmont Health Alliance, Inc., et al.*, Dkt. No. 9314 (Dec. 22, 2003) (complaint).

[53] *Aspen Technology, Inc.*, Dkt. No. 9310 (Aug. 6, 2003) (complaint).

[54] *Evanston Northwestern Healthcare Corporation, et al.*, Dkt. No. 9315 (Feb. 10, 2004) (complaint).

any year since 1976, and about two and a half times as many as the average annual total over the past 25 years. That total includes *Unocal*[55], *Bristol-Myers Squibb* (which resolved three investigations in one consent)[56], and *South Carolina Board of Dentistry*[57], as well as two consents involving associations of professionals. The most recent association case was *Institute of Store Planners*, which involved a group that agreed to remove from its mandatory Code of Ethics provisions that prohibited members from providing services for free and competing with other members on the basis of price.[58] And so far this year, we obtained consent agreements in two more physician cases[59] and one household movers case[60], as well as commencing Part 3 proceedings in the *Piedmont Health Alliance* matter.[61]

Collectively, our nonmerger enforcement accomplishments closely reflect many of the priorities set out by Chairman Muris in 2001: health care, associations, state action, standards setting, and *Noerr-Pennington*.

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[55] *Union Oil Co. of California*, Dkt. No. 9305 (Mar. 4, 2003) (complaint).

[56] *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003) (consent order).

[57] *South Carolina State Board of Dentistry*, Dkt. No. 9311 (Sept. 12, 2003) (complaint).

[58] *The Institute of Store Planner*, Dkt. No. C-4080 (May 27, 2003) (consent order).

[59] *Memorial Hermann Health Network Providers*, Dkt. No. C-4104 (Jan. 8, 2004) (consent order); *Tenet Healthcare Corporation, et al.*, Dkt. No. C-4106 (Jan. 29, 2004) (consent order).

[60] *New Hampshire Motor transport Association*, Dkt. No. C-4102 (Dec. 4, 2003) (consent order).

[61] *Piedmont Health Alliance, Inc., et al.*, Dkt. No. 9314 (Dec. 22, 2003) (complaint).

B. Seeking to Remove Public Restraints on Competition

Challenging public restraints on competition, or private actions that misuse public instrumentalities to restrain competition, is an important part of our enforcement agenda. As Chairman Muris explained in a speech last fall, "public restraints deserve as much attention as private restraints. Public restraints harm consumer welfare just as much as private restraints, and the harmful effects of public restraints often last much longer."[62]

While we recognize that broader principles – expressed in the form of the State Action and *Noerr-Pennington* doctrines – insulate some public restraints from the antitrust laws, a key part of our focus on public restraints is making sure that we do not read these doctrines more broadly than necessary and as a result fail to challenge conduct that significantly harms consumers.

I have already discussed major enforcement actions that touch on this area, so I will just briefly mention them here. The clear articulation prong of the State Action doctrine is the key issue before the Commission in *South Carolina Board of Dentistry*.[63] The other key component of State Action, active supervision, is involved in the *Kentucky Movers* matter[64] now under submission before the ALJ, as well as in the Movers cases that we have been able to settle.

In *Unocal*, the Commission will confront the *Noerr* doctrine, as the ALJ dismissed the complaint largely on *Noerr* grounds.[65]

C. Focus on Areas Most Important to Consumers

Besides focusing on selected substantive issues, we focus on sectors of the economy that have the biggest impact on individual consumers. This past year, this focus particularly included significant non-merger enforcement in the health care area. In addition to the *Bristol-Myers Squibb*[66], *South Carolina Board of Dentistry*[67], and the three Part 3 physician cases mentioned

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[62] Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective,* Remarks before Fordham Annual Conference on International Antitrust Law & Policy, (New York, NY, Oct. 24, 2003) available at <http://www.ftc.gov/speeches/muris/fordham031024.pdf>.

[63] *South Carolina State Board of Dentistry,* Dkt. No. 9311 (Sept. 12, 2003) (complaint).

[64] *Kentucky Household Goods Carriers Association, Inc.*, Dkt. No. 9309 (July 8, 2003) (complaint).

[65] *Union Oil Co. of California*, Dkt. No. 9305 (Nov. 25, 2003) (Initial Decision).

[66] *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003) (consent order).

[67] *South Carolina State Board of Dentistry*, Dkt. No. 9311 (Sept. 12, 2003) (complaint).

earlier[68], we obtained consent agreements with eight separate groups of physicians alleged to be engaged in price fixing.[69]

One notable aspect of these recent physician cases is the size of the entities involved. All of the respondent groups represent either a very large number of physicians, a very high percentage of the physicians practicing in the local area, or both. For example, one case involved a physician group with about 3,000 members,[70] while a respondent group in another case represents about 90 percent of the physicians practicing in the local area.[71]

We also expanded our reach to include groups including hospitals as well as physicians. One consent involved a group of 325 physicians and 11 hospitals;[72] another involved 500 physicians and 15 hospitals.[73] These cases broke new ground because we had never before challenged a provider organization consisting of hospitals as well as physicians. Most recently, in December, we named an individual hospital as a participant in an alleged price-fixing arrangement.[74] All in all, our physician cases over the past year have stopped anticompetitive behavior involving several thousand doctors practicing medicine in communities encompassing millions of consumers. Moreover, we think they've indirectly had a far wider impact, by sending a clear signal that we will not tolerate price-fixing in this very important part of the economy.

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[68] *California Pacific Medical Group, Inc., dba Brown & Toland Medical Group*, Dkt. No. 9306 (Feb. 9, 2003) (proposed consent order accepted for public comment); *North Texas Specialty Physicians*, Dkt. No. 9312 (Sept. 24, 2003) (complaint); *Piedmont Health Alliance, Inc., et al.*, Dkt. No. 9314 (Dec. 22, 2003) (complaint).

[69] *SPA Health Organization d/b/a Southwest Physician Associates*, Dkt. No. C-4088 (July 17, 2003) (consent order); *Washington University Physician Network*, Dkt. No. C-4093 (Aug. 22, 2003) (consent order); *Physician Network Consulting, LLC*, Dkt. No. C-4094 (Aug. 27, 2003) (consent order); *The Maine Health Alliance*, Dkt. No. C-4095 (Aug. 27, 2003) (consent order); *South GA Health Partners (SGHP)*, Dkt. No. C-4100 (Oct. 31, 2003) (consent order); *Surgical Specialists of Yakima, PLLC, et al.*, Dkt. No. C-4101 (Nov. 14, 2003) (consent order); *Memorial Hermann Health Network Providers*, Dkt. No. C-4104 (Jan. 8, 2004) (consent order); and *Tenet Healthcare Corporation, et al.*, Dkt. No. C-4106 (Jan. 29, 2004) (consent order).

[70] *Memorial Hermann Health Network Providers*, Dkt. No. C-4104 (Jan. 8, 2004) (consent order).

[71] *South GA Health Partners (SGHP)*, Dkt. No. C-4100 (Oct. 31, 2003) (consent order).

[72] *The Maine Health Alliance*, Dkt. No. C-4095 (Aug. 27, 2003) (consent order).

[73] *South GA Health Partners (SGHP)*, Dkt. No. C-4100 (Oct. 31, 2003) (consent order).

[74] *Tenet Healthcare Corporation, et al.*, Dkt. No. C-4106 (Jan. 29, 2004) (consent order).

V. Merger Enforcement

We continue to devote significant effort to merger enforcement. Our merger activity during the past year is notable for the breadth of issues we encountered.

A. Consummated Mergers

One clear message that should emerge from our merger enforcement during the past year is that we will not hesitate to challenge a consummated merger. In addition to *Chicago Bridge*, in which the ALJ upheld the allegations in the complaint[75], the Commission has issued two new Part 3 merger complaints, challenging the *Aspen/Hyprotech* and *Evanston/Highland Park* consummated mergers.[76] *Aspen* involves the sort of high-tech market that is making up an increasing proportion of our work. In *Evanston*, we believe there is considerable potential benefit to be gained from examining the merger's actual competitive effect, not only for the purposes of this merger, but also advancing the economic learning regarding hospital mergers more generally.

As these cases attest, the mere fact of nonreportability will not act as a cloak protecting against a Section 7 challenge. Moreover, it may well be to the *parties'* advantage for us to review a proposed merger in advance, even if the deal is not subject to HSR. The pendency of a merger challenge, with the looming potential for required divestiture, can result in significant uncertainty that limits business flexibility. It is essential that assets that would be needed to reform a viable competitor be maintained so that divestiture can be accomplished, if necessary. And we demonstrated in *Chicago Bridge* that we can and will act decisively if significant action that would undermine a potential remedy is contemplated.[77]

B. Mergers Reportable under HSR

Pfizer/Pharmacia. The largest merger reviewed by the agency in the past year, the $60 billion merger of Pfizer, Inc. (the world's largest pharmaceutical company) and Pharmacia Corporation, had implications for the price of certain prescription drugs – a major concern for many consumers. Based on our investigation, the Commission determined that the proposed merger threatened to harm competition in nine pharmaceutical product markets, including drugs to treat overactive bladder, symptoms of menopause, skin conditions, coughs, motion sickness, erectile dysfunction, and three different veterinary conditions. We negotiated a consent

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[75] *Chicago Bridge & Iron Company N.V.*, Dkt. No. 9300 (June 27, 2003) (Initial Decision).

[76] *Aspen Technology, Inc.*, Dkt. No. 9310 (Aug. 6, 2003) (complaint); *Evanston Northwestern Healthcare Corporation, et al.*, Dkt. No. 9315 (Feb. 10, 2004) (complaint)

[77] *Chicago Bridge and Iron Co., N.V.*, Dkt No. 9300 (Jan. 2, 2004) (proposed interim consent order accepted for public comment).

agreement requiring divestitures to preserve competition in those markets and permitted the remaining aspects of the transaction to proceed.[78]

Genzyme/Novazyme. The Commission also reviewed a merger of two firms engaged in early-stage research into possible enzyme replacement therapies treatment ("ERT") for Pompe disease, an often fatal disease that strikes infants and children. Though this investigation resulted in no enforcement action, it was noteworthy because the Commission's statements showed how the agency analyzes mergers in a potential innovation market.[79] Although the agency has previously considered innovation markets, it had never previously reviewed the merger of R&D projects at such an early stage of pre-clinical research.

Southern Union/CMS. In the energy sector, also of high importance to consumers, the Commission investigated Southern Union Company's $1.8 billion purchase of the Panhandle pipeline from CMS Energy Corporation. Finding that the acquisition threatened competition in the market for the delivery of natural gas to the Kansas City area, we obtained a settlement requiring Southern Union to terminate an arrangement under which it controlled a competing pipeline.[80] Absent the consent, we believe that common control of the two pipelines by Southern Union would likely have raised natural gas prices in the Kansas City area.

Sunoco/Eagle Point. Relying on its experience in investigating numerous petroleum industry mergers, the Commission reviewed Sunoco's proposed acquisition of a fourth Philadelphia area refinery. In this case, however, our investigation showed that numerous gasoline supply sources, as well as a nearby terminal of a major petroleum products pipeline from the Gulf Coast area would prevent any anticompetitive effects. In addition, we found that a number of efficiencies would result from the merger.[81]

Arch Coal. The Commission voted out another energy industry matter just this week, when it authorized the staff to seek an injunction to block the proposed acquisition of the assets of Triton Coal Company, LLC (Triton) by Arch Coal Inc. (Arch) (Commissioner Leary voting in the negative).[82] Our interest in the transaction focuses on Triton's North Rochelle and Buckskin mines, located in the Southern Powder River Basin (SPRB) in Wyoming, which supplies one-

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[78] *Pfizer/Pharmacia Corp.*, Dkt. No. C-4075 (Apr. 11, 2003) (consent order).

[79] FTC Press Release, *FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004), *available at* <http://www.ftc.gov/opa/2004/01/genzyme.htm>.

[80] *Southern Union Company, et al.*, Dkt. No. C-4087 (July 16, 2003) (consent order).

[81] FTC Press Release, *FTC Closes Investigation of Sunoco's Proposed Acquisition of Coastal Eagle Point Oil Company* (Dec. 29, 2003), *available at* <http://www.ftc.gov/opa/2003/12/eastpoint.htm>.

[82] FTC Press Release, *FTC To Challenge Arch Coal's Proposed Acquisition of Triton Coal Company* (Mar. 30, 2004), *available at* <http://www.ftc.gov/opa/2004/03/archcoal.htm>.

third of U.S. coal production. The Commission is acting to protect consumers from higher electricity prices that would result from less competition in SPRB coal, a key fuel for electricity generation.

We are alleging that SPRB coal is a relevant market. It is low in sulphur, making it one of the few coal types that comply with Clean Air Act requirements. In addition, SPRB coal has low ash and sodium content, and is inexpensive to mine. These traits make it advantageous for many electric generators. If the acquisition were to take place, the top three firms in the SPRB would control 86 percent of production, significantly increasing the risk of coordinated interaction among them to restrict output.

The Commission took this action after rejecting Arch's proposed remedy. Arch had proposed divestiture of the Buckskin mine, but the Commission's competition concerns would remain even if Arch acquired only the North Rochelle mine.

DSM/Roche. We obtained a consent agreement that protects competition in the market for phytase, while allowing DSM N.V. to proceed with its $1.89 billion acquisition of Roche Holding AG's Vitamin and Fine Chemical Division.[83] The settlement requires DSM to divest its phytase business. Phytase is an enzyme that is added to poultry and swine feed to promote digestibility of phosphorous and other nutrients that are vital to livestock production.

GenCorp/ARC. The Commission approved a settlement allowing GenCorp, Inc. to proceed with its $133 million acquisition of Atlantic Research Corporation while preserving competition in markets for four varieties of in-space propulsion thrusters, by requiring divestiture of ARC's in-space liquid propulsion business.[84]

GE/AGFA. We obtained a consent requiring General Electric Company to divest its ultrasonic nondestructive testing (NDT) business within 20 days of its $437 acquisition of Agfa-Gevaert N.V.'s NDT assets.[85] The settlement protects competition in the market for ultrasonic NDT equipment, which is used for quality control and to inspect the tolerance of materials in manufacturing applications.

VI. Transparency and Process Improvements

We have continued our ongoing efforts to make what we do and how we do it more transparent. Allowing the public to be more aware of the characteristics of a merger or the kind of conduct we are likely to challenge enables companies to make more informed business decisions.

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[83] *Koninklijke DSM N.V., Roche Holding AG, and Fritz Gerber*, Dkt No. C-4098 (Jan. 9, 2004) (consent order).

[84] *GenCorp Inc.*, Dkt No. C-4099 (Dec. 30, 2003) (consent order).

[85] *General Electric Company*, Dkt No. C-4103 (Jan. 30, 2004) (consent order) (Chairman Muris not participating, Commissioner Harbour recused).

A. Public Statements in Closed Investigations

This year, the Commission once again issued statements in selected instances explaining the reasons it declined to initiate enforcement action, including the following:

- **Sunoco/Eagle Point.** The Commission issued a statement when it closed its investigation of Sunoco's proposed acquisition of El Paso Corporation's Coastal Eagle Point Oil Company, which would give it a fourth Philadelphia area refinery. According to the statement, the investigation revealed several sources of supply of RFG to the Philadelphia area, including pipeline shipments, that would prevent area refiners from increasing gasoline prices, as well as merger-specific efficiencies.[86]

- **Genzyme/Novazyme.** Three Commissioners issued statements expressing their views on this consummated merger of Novazyme Pharmaceuticals and Genzyme Corporation, two firms engaged in early-stage research regarding the enzyme replacement therapies treatment ("ERT") for Pompe disease, an often fatal disease that strikes infants and children.[87] This matter involved an unusual split vote of the Commission (3-1-1), and the Commission focused on the potential effect of the merger on the pace and scope of development of a treatment. Coverage of this rare disease under the Orphan Drug Act, which grants a period of market exclusivity to the first treatment approved by the FDA, was a key factor in the analysis. Chairman Muris noted that unlike earlier Commission cases, this matter involved early pre-clinical research rather than products already in clinical trials. He cited a lack of economic evidence linking increased concentration to reduced incentives to innovate, as well as the absence of evidence from the investigation indicating reduced spending or progress in Pompe Disease ERT R&D.[88] Commissioner Thompson, dissenting, urged that the merger be challenged as presumptively anticompetitive under the Horizontal Merger Guidelines.[89] Commissioner Harbour issued a statement expressing her general views on competition and innovation, but did

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[86] Federal Trade Commission, *Statement of the Commission, In the Matter of Sunoco Inc./Coastal Eagle Point Oil Company, File No. 031 0139* (Dec. 29, 2003), *available at* <http://www.ftc.gov/os/caselist/0310139/031229stmt0310139.pdf>.

[87] *See* FTC Press Release, *FTC Closes its Investigation of Genzyme Corporation's 2001 Acquisition of Novazyme Pharmaceuticals, Inc.* (Jan. 13, 2004) (Commissioner Thompson dissenting, Commissioner Harbour not participating), *available at* <http://www.ftc.gov/opa/2004/01/genzyme.htm>.

[88] Timothy J. Muris, *Statement of Chairman Timothy J. Muris in the matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc.*, File No. 021-0026 (Jan. 13, 2004), *available at* <http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf>.

[89] Mozelle W. Thompson, *Dissenting Statement of Commissioner Mozelle W. Thompson Genzyme Corporation's Acquisition of Novazyme Pharmaceuticals Inc.*, File No. 021-0026 (Jan. 13, 2004), *available at* <http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf>.

not participate in the decision.[90] Though this investigation resulted in no enforcement action, it was noteworthy because the statements discussed how the agency analyzes mergers involving early-stage R&D.

- **Caremark/AdvancePCS.** The Commission issued a statement explaining its decision to close its investigation of the proposed combination of Caremark and AdvancePCS, two of the largest U.S. providers of prescription benefit management (PBM) services.[91] The Commissioners concluded that other national regional PBMs, as well as health plans and pharmacy chains offering similar services, would preclude any anticompetitive effects.

B. Release of Data on Horizontal Mergers and Merger Guidelines Workshop

To shed light on how we determine whether or not to challenge a particular merger, we released two collections of data on recent merger matters. The first, issued jointly with the Antitrust Division, classifies all FTC and DOJ merger enforcement actions from 1999 to 2003 by Herfindahl-Hirschman Index ("HHI") and change in HHI categories.[92] The second data collection, covering 151 FTC merger investigations from 1996 to 2003, involves 780 markets and includes HHI data, as well as information on the presence of "hot documents" or customer complaints.[93] We expect that this information will assist in making our decisions more predictable and understandable.

In addition to the release of merger investigation and enforcement data, we conducted a workshop on the Horizontal Merger Guidelines with the Antitrust Division spanning three days in February.[94] The workshop was designed as a vehicle for two-way communication – information from the agencies to the public to provide additional understanding of how we apply the Guidelines, and feedback from the public to us on what works and what doesn't in the current Guidelines.

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[90] Pamela Jones Harbour, *Statement of Commissioner Pamela Jones Harbour, Genzyme Corporations's Acquisition of Novazyme Pharmaceuticals Inc.*, File No. 021-0026 (Jan. 13, 2004), *available at* <http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf>.

[91] Federal Trade Commission, *Statement of the Federal Trade Commission, In the Matter of Caremark Rx, Inc./AdvancePCS*, File No. 031 0239 (Feb. 11, 2004), *available at* <http://www.ftc.gov/os/caselist/0310239/040211ftcstatement0310239.pdf.

[92] See FTC Press Release, *FTC and Department of Justice Issue Merger Challenges Data, Announce Upcoming Merger Enforcement Workshop* (Dec. 18, 2003), *available at* <http://www.ftc.gov/opa/2003/12/mergereffects.htm>.

[93] *See* FTC Press Release, *FTC Issues Horizontal Merger Investigation* Data (Feb. 2, 2004), *available at* <http://www.ftc.gov/opa/2004/02/horizmerger.htm>.

[94] The agenda for the workshop and prepared statements of participants are available on the FTC's website at <http://www.ftc.gov/bc/mergerenforce/presentations/index.html>.

C. Clearer Statements in Consents

We have continued to pay more attention to the Analyses to Aid Public Comment that we publish with each proposed consent agreement to explain the reasoning behind the Commission's decision to accept the agreement for public comment. Like Part 3 decisions, these statements can inform more generally about the agency's enforcement policies, standards, and analytical methodology in particular types of cases. In the Household Movers cases, discussed above, the Commission explained in detail how it will assess whether or not the state actively supervises a course of conduct that might otherwise be subject to the antitrust laws.[95]

D. Statement on Disgorgement

The Commission conveyed its views on the use of disgorgement in antitrust cases as part of the overall effort to reduce uncertainty about its policies. The statement makes clear that the Commission will seek disgorgement in competition cases only rarely, in cases involving a clear violation, under circumstances where a monetary penalty can easily be computed, and where such relief makes sense in the context of other FTC and non-FTC remedies.[96]

E. HSR Process Improvements

We have continued to refine and improve our HSR investigations process. Last year, for example, we developed a model second request specifically adapted for grocery industry mergers, in which we need different kinds of information. We anticipate making this variation of our model second request publicly available soon.

In addition, we remain interested in greater use of electronic production of second request responses, which we view as a win-win approach for us and for respondents. If technology can reduce the logistical burdens associated with copying, producing, and managing large responses, then both we and the parties can spend more of our time and energy analyzing the substantive merits of the underlying transaction.

We have heard from some parties in merger investigations that electronic production can reduce copying and processing costs by more than the cost of converting the documents to electronic format, can speed compliance, and can help make review more efficient by eliminating the need to move paper. Making review more efficient and reducing storage and handling costs are obviously attractive to us as well. Thus, we welcome further development of electronic production methods, with two caveats. First, the technology must be compatible with available systems at the FTC. Web-based approaches, which some firms have used, simplifies

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[95] *See, e.g.* Analysis of Proposed Consent Order to Aid Public Comment, *Alabama Trucking Association, Inc*., Dkt. No. 9307 (Dec. 8, 2003) (consent order); Analysis of Proposed Consent Order to Aid Public Comment, *Movers Conference of Mississippi, Inc*., Dkt. No. 9308 (Dec. 9, 2003) (consent order).

[96] Federal Trade Commission, *Policy Statement on Monetary Equitable Remedies in Competition Cases*, (July 31, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.

the process greatly. Second, we need assurance that the technology is workable and reliable. With the time pressures associated with HSR investigations, we cannot afford to deal with software that crashes our computers, or databases that become inaccessible without warning. On balance, we are quite receptive to discussing electronic productions, and anticipate that it may start becoming the norm in the not-too-distant future.

VII. An Integrated Approach to Competition Law and Policy Issues

A. The FTC's Unique Collection of Capabilities

Though we tend to think first of the Bureau's enforcement agenda when we do this sort of review of our efforts, we do much more. Those of you who are students of FTC history know that the agency, from the beginning, was not conceived of as solely an enforcement agency. President Wilson saw the FTC as "an indispensible instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings shall be guided . . ."[97]

Today's FTC has fully integrated all of the agency's various capabilities and applies them in a strategic and sensible way to accomplish our goals. This approach allows us to select the tool best suited for the job at hand, and also produces economies of scope that strengthen all of our work.

Our involvement in the proposed acquisition of Slidell Memorial Hospital by Tenet Healthcare is a notable, but perhaps not obvious, example of our selecting the tool best suited for the job at hand. The sale of Slidell, a nonprofit hospital, required voter and state Attorney General approval under Louisiana law. In carrying out his responsibilities, the Attorney General asked for the staff's analysis of the proposed transaction. In our response to that request, we explained our conclusion that the combination of the only two full-service hospitals in the area would likely increase the prices paid by health care plans, which are responsible for the cost of most hospital services obtained by those insured.[98] The proposed acquisition did not take place because the voters declined to approve it.

Second, the work we do in one aspect of our mission informs the others. What we learn in our investigations, for example, adds to the expertise we can apply in commenting on a regulatory proposal, and conversely, our research efforts often strengthen our case selection and prosecution.

Because of the synergies that derive from an integrated approach to the issues, our enforcement activities take place within a broader context. Thus, the cases we pursue, and even

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[97] Message of President Wilson to Congress, January 20, 1914, cited in Henderson, *The Federal Trade Commission: A Study in Administrative Law and Procedure* 24 (1924).

[98] Letter from Joseph J. Simons, Director, Bureau of Competition, et al. to The Honorable Richard P. Ieyoub, Attorney General of Louisiana (Regarding Acquisition of Slidell Memorial Hospital by Tenet Healthcare Corporation) (Apr. 1, 2003), *available at* <http://www.ftc.gov/be/v030008.htm>.

the case generation activities we conduct, are set within the framework of the agency's overall policy agenda.

Before I get to specifics, I should mention that the non-enforcement initiatives described below represent the joint efforts of the Bureau of Economics, under Director Luke Froeb, the Office of Policy Planning, under Director Todd Zywicki, and the Office of General Counsel, under General Counsel Bill Kovacic, along with the Bureau. The talented staff within those offices within the Commission deserve much of the credit for our efforts in this area.

B. The FTC's Multi-Dimensional Approach in Key Substantive Areas

1. Intellectual Property and Technology

Following extensive public hearings on the relationship between the antitrust and intellectual property laws, the Commission issued its report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, last fall.[99] The underlying thesis of the Report is that both competition policy and the patent system can foster innovation, but that the two regimes must be harmonized to avoid adverse effects. The Report makes ten recommendations to address this issue. Among those are:

- creating a new administrative procedure to simplify challenges to a patent's validity,
- allowing courts to find patents invalid based on a preponderance of the evidence, rather than a "clear and convincing" evidentiary standard,
- limiting treble damage awards for willful patent infringement, and
- integrating economic learning into patent law and policy.

The Report's findings, while not directly affecting our enforcement activities, will nevertheless improve our overall understanding of how antitrust and IP interact, a matter of growing importance given increasing numbers of enforcement actions involving IP, exemplified by *Rambus*[100], *Unocal*[101], *Schering*[102], and *Bristol-Myers Squibb*[103].

We continue to have a significant interest in preventing or removing restrictions on commercial activities via the Internet. In the past year, we released two reports on the impact on consumers of restrictions on competition by online sellers, including the contact lens report

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[99] Federal Trade Commission, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, A Report by the Federal Trade Commission* (October 2003), *available at* <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

[100] *Rambus Incorporated*, Dkt. No. 9302 (Feb. 24, 2004) (Initial Decision).

[101] *Union Oil Co. of California*, Dkt. No. 9305 (Nov. 25, 2003) (Initial Decision).

[102] *Schering-Plough Corp.*, Dkt. No. 9297 (Dec. 18, 2003) (Opinion of the Commission).

[103] *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003) (consent order).

discussed below, and a report entitled *Possible Anticompetitive Barriers to E-Commerce: Wine*.[104] The wine report concludes that permitting wine sales over the Internet provides consumers lower prices and greater choice. Acknowledging the need to limit sales of wine to minors, the report suggests alternatives, such as obtaining an adult signature upon delivery, that could accomplish that objective while still permitting the beneficial aspects of online wine purchasing.

2. Health Care

The health care sector, including subsets for horizontal agreements among health care professionals, hospital mergers, and the pharmaceutical industry, accounts for the single largest commitment of resources in our competition mission.

Hearings on Health Care and Competition Policy. In recognition of the significance of health care to American consumers, the unusual features of dynamic health care markets, and the FTC's major commitment to promoting competition in markets for health care services, the Commission's recent hearings on Health Care and Competition Law and Policy are highly relevant. Commencing on February 26, 2003, and continuing through October 1, the FTC, together with the DOJ Antitrust Division, held 27 days of hearings covering a comprehensive range of subjects, including specific challenges and complications involved in applying competition law and policy to health care; issues involved in hospital merger cases and other joint arrangements, including geographic and product market definition; horizontal hospital networks and vertical arrangements with other health care providers; the competitive effects of mergers of health insurance providers; and consumer information and quality of care issues.[105] The staff is compiling the enormous volume of information obtained from the hearings for a future report.

Competition Advocacy. The agency regularly applies its expertise relating to competition in health care markets to share comments with other government entities, and to respond to requests for advisory opinions. In addition to our letter concerning the Tenet/Slidell hospital merger, the staff submitted a letter to the Tennessee legislature cautioning that a bill to restrict agreements between optometrists and commercial firms from which they lease space would increase consumer costs and contribute nothing to increase the quality of eye care.[106]

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[104] Federal Trade Commission Staff, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), *available at* <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

[105] FTC Press Release, *FTC Chairman Announces Public Hearings on Health Care and Competition Law and Policy to Begin in February 2003* (Nov. 7, 2002), *available at* <http://www.ftc.gov/opa/2002/11/murishealthcare.htm>. The agenda, transcripts, public comments, and other materials from the Hearings are available at <http://www.ftc.gov/ogc/healthcarehearings/index.htm>.

[106] Letter from Timothy J. Muris, Chairman, Federal Trade Commission to The Honorable Ward Crutchfield, Majority Leader, Tennessee Senate (Regarding Senate Bill 855, proposed amendments to Tenn. Code Ann. § 63-8, regulating the practice of optometry.) (Apr.

Advisory Opinions. We also prepare advisory opinions for those considering a business venture who seek some assurance concerning the legality of their plans. For example, the staff responded to a request concerning the legality of conducting and publishing the results of a physician survey including information about amounts that health plans pay for physician services. Based on the plan to publish the results only in aggregated form, the staff advised that it did not intend to recommend enforcement action.[107] Another recent advisory opinion responded to a request concerning a plan to establish a common "messenger" arrangement to minimize the costs associated with contracting with health plans and other third-party payors. As the proposed arrangement did not appear to involve any threat to competition, the staff advised that it did not intend to recommend enforcement action.[108]

Contact Lens Report. Just this week, the Commission released a staff report examining restrictions on e-commerce involving contact lens providers.[109] The report found that Internet providers and other non-traditional contact lens suppliers provide important benefits for consumers, and that requirements such as state licensing of online sellers unduly burdened this channel, to the detriment of consumers, with no offsetting benefits.[110]

Hospital Merger Retrospective. As noted above, the agency's administrative action challenging the Evanston/Highland Park hospital merger resulted from a project to assess the competitive effects of a number of recent hospital mergers. Besides producing possible enforcement leads, this study will provide information that will assist the staff in reviewing and possibly challenging future hospital mergers.

3. Pharmaceuticals

It is well known that competition from generic equivalents of brand-name pharmaceutical products can bring the cost savings to consumers that are particularly important in light of the rapidly rise in prescription drug costs. The FTC has been conducting a coordinated campaign to

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29, 2003), *available at* <http://www.ftc.gov/be/v030009.htm>.

[107] Letter from Jeffrey W. Brennan, Assistant Director, Bureau of Competition to Gerald Niederman, Esq. (Regarding proposal to conduct and publish results of physician survey.) (Nov. 3, 2003), *available at* <http://www.ftc.gov/bc/adops/mgma031104.pdf>.

[108] Letter from Jeffrey W. Brennan, Assistant Director, Bureau of Competition to Martin J. Thompson (Regarding a proposed physician network.) (Sept. 23, 2003), *available at* <http://www.ftc.gov/bc/adops/bapp030923.htm>.

[109] FTC Press Release, *FTC: E-commerce Increases Choice and Convenience for Contact Lens Wearers* (March 29, 2004), *available at* <http://www.ftc.gov/opa/2004/03/clrreport.htm>.

[110] Federal Trade Commission Staff, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (March 2004), *available at* <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>.

remove impediments to competition from generic products. Our efforts have included a number of enforcement actions challenging various abuses of the Hatch-Waxman Act procedures governing the approval process for generic drugs. Notably, the Commission's *Bristol-Myers Squibb* consent order addressed both bilateral agreements between branded and generic manufacturers to delay generic competition, as well as abuse of FDA regulatory procedures for the same purpose.[111] And, of course, the *Schering* case, described above, represents an important milestone in this area.[112]

Competition Advocacy. Using its information gathering and reporting capabilities, the FTC conducted a study and published a well-received report on *Generic Drug Entry Prior to Patent Expiration*, in July 2002.[113] The report would have represented a useful contribution to our collective knowledge on this subject had we then moved on to something else. Instead, however, we followed up with related activities to maximize the report's contribution to our overall policy goal. The President cited the FTC study in announcing the FDA would proceed with regulatory action to implement an FTC recommendation[114], and the FDA approved the final rule in June 2003.[115]

Congressional Testimony. In addition, we supported legislative efforts in this area, providing testimony before Congressional committees on several occasions in recent years, both on the general subject of competition pharmaceutical markets and on specific proposals to implement our report's two major recommendations through legislative action.[116] Last year,

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[111] *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003) (consent order).

[112] *Schering-Plough Corp.*, Dkt. No. 9297 (Dec. 18, 2003) (Opinion of the Commission).

[113] Federal Trade Commission, *Generic Drug Entry Prior to Patent Expiration: An FTC Study* (July 2002), *available at* <http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm>.

[114] White House Press Release, *President Takes Action to Lower Prescription Drug Prices by Improving Access to Generic Drugs* (Oct. 21, 2002), *available at* <http://www.whitehouse.gov/news/releases/2002/10/20021021-2.html>.

[115] Applications for FDA Approval to Market a New Drug: Patent Submission and Listing Requirements and Application of 30-Month Stays on Approval of Abbreviated New Drug Applications Certifying That a Patent Claiming a Drug Is Invalid or Will Not Be Infringed, 68 Fed. Reg. 36675 (2003); see also FTC Press Release, *Statement of FTC Chairman Supporting FDA's Final Generic Drug Rule* (June 12, 2003), *available at* <http://www.ftc.gov/opa/2003/06/030612murisstmtgdr.htm>.

[116] *See, e.g.* Timothy J. Muris, *Federal Trade Commission Testimony on Competition in the Pharmaceutical Industry*, Prepared Statement Before the Committee on Judiciary, United States Senate (June 17, 2003), *available at* <http://www.ftc.gov/os/2003/06/030617pharmtestimony.htm>; Timothy J. Muris, *Testimony of the Federal Trade Commission on the "Greater Access to Affordable Pharmaceuticals Act,"*

Congress passed and the President signed the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, which included provisions to implement those recommendations.[117]

***Amicus* Brief.** Finally, the Commission has used its authority to file friend of the court briefs to help shape policy relating to generic pharmaceuticals. On Wednesday, the Commission filed an amicus brief in *Teva Pharmaceuticals USA v. Pfizer*, a case having important ramifications for operation of the Hatch-Waxman Act.[118] In 2002, Teva filed an "Abbreviated New Drug Application" ("ANDA") with the FDA, seeking approval to market a generic equivalent for Pfizer's branded drug, Zoloft (which is used to treat mood and anxiety disorders), following another firm that had previously filed an ANDA. Teva certified that its generic drug would not infringe on a Pfizer patent, or that the patent was invalid. But Pfizer did not sue Teva and refused Teva's request for a covenant not to sue, so Teva brought an action for a declaration of non-infringement or invalidity of the patent. The court granted Pfizer's motion to dismiss on the ground that there was no justiciable controversy between the parties. The Commission's brief argues that the district court erred by focusing narrowly on whether Teva faced a reasonable apprehension of suit by Pfizer in assessing whether there was an actual controversy sufficient to create jurisdiction. Rather, according to the brief, Teva's action involves an actual controversy under Article III of Constitution when evaluated within the context of Hatch-Waxman's 180-day exclusivity provisions. More important, if subsequent generic applicants cannot bring declaratory action cases under the facts presented in this case, then brand-name drug manufacturers and the first generic applicant for a drug product will have the ability to "park" the 180- day exclusivity provision – a concern addressed in the Commission's generic drug study. Such "parking" could delay any generic applicant from entering the market, and thus harm consumers as well.

4. State Action

We have also used a coordinated approach in seeking to clarify and improve aspects of antitrust law. Because the scope of antitrust exemptions and immunities can have a significant impact on consumer welfare, Chairman Muris formed a task force to examine current law applying the state action doctrine and suggest ways in which the application of the doctrine might be improved.

Prepared Statement Before the Committee on Judiciary, United States Senate (Aug. 1, 2003), *available at* <http://www.ftc.gov/os/2003/08/030801pharmtest.htm>.

[117] Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Title XI, Access to Affordable Pharmaceuticals, PL 108-173, 117 Stat. 2066 (Dec. 8, 2003).

[118] *Teva Pharmaceuticals USA v. Pfizer*, No. 04-1186, Brief of Amicus Curiae Federal Trade Commission Supporting Appellant and Urging Reversal (Fed. Cir. Mar. 31, 2004)

The task force issued its report last September.[119] Concluding that some courts have applied the doctrine in a manner inconsistent with its original objectives, the report made a series of detailed recommendations as to how application of the state action doctrine might be improved as to both the "clear articulation' and "active supervision" prongs. The report also outlines specific actions the FTC could pursue to facilitate improvements in this area. Cases we have concluded or are currently pursuing, such as the household movers cases and *South Carolina Board of Dentistry* will likely provide opportunities to address these issues.[120] In addition, we submitted an amicus brief in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, a case in which we believe the district court improperly applied the state action doctrine to shield anticompetitive conduct.[121]

5. *Noerr-Pennington*

Chairman Muris formed a similar task force to examine the *Noerr-Pennington* doctrine and its report should be forthcoming soon. To date, our initiatives in this area have been primarily in the context of our law enforcement work, with the *Bristol-Myers Squibb* consent[122] and *Unocal*[123] being the primary examples. In addition, our amicus brief in the *In re Buspirone* matter, which we filed in 2002, focused on application of *Noerr*.[124]

6. Energy

The FTC has played a major role in protecting competition in petroleum and natural gas markets for many years. In addition to our recent enforcement activities, notably *Unocal*[125] and

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[119] Federal Trade Commission Staff, *Report of the State Action Task Force, Recommendations to Clarify and Reaffirm the Original Purposes of the State Action Doctrine To Help Ensure That Robust Competition Continues to Protect Consumers* (September 2003), *available at* <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

[120] *See supra* notes 39, 47-48 and accompanying text.

[121] *Brentwood Academy v. Tennessee Secondary School Athletic Association*, Nos. 03-5245, 03-5278, Brief of Federal Trade Commission as *Amicus Curiae* Supporting Cross-appellant and Urging Reversal (6th Cir., Nov. 13, 2003), *available at* <http://www.ftc.gov/os/2003/11/brentwoodbrief03114.pdf>.

[122] *Bristol-Myers Squibb Co.*, Dkt. No. C-4076 (Apr. 14, 2003) (consent order).

[123] *Union Oil Co. of California*, Dkt. No. 9305 (Nov. 25, 2003) (Initial Decision).

[124] *In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation*, MDL Dkt. No. 1410, Memorandum of Law of *Amicus Curiae* the Federal Trade Commission in Opposition to Defendant's Motion to Dismiss (S.D.N.Y. Jan. 8, 2002), *available at* <http://www.ftc.gov/os/2002/01/busparbrief.pdf>.

[125] *Union Oil Co. of California*, Dkt. No. 9305 (Nov. 25, 2003) (Initial Decision).

Southern Union/CMS Energy[126], we are pursuing a number of non-enforcement initiatives. First, we have two major reports in the works, one updating earlier work on oil industry mergers and one reporting on our examination of the factors that contribute to volatility in gasoline prices. Both should be out sometime soon. Our gasoline price monitoring project, which we reported on last year, is ongoing. The Bureau of Economics recently released a paper on zone pricing and territorial restrictions in gasoline marketing[127] and another reporting on a retrospective examination of the Marathon/Ashland joint venture.[128] This work exemplifies the sort of scholarship that not only broadens our knowledge generally, but sharpens our focus in evaluating possible enforcement action.

Also this year, we prepared and submitted comments on legislative proposals in several states to shield gasoline dealers from competition at the expense of consumers.[129] Such proposals often define the concept of "below cost" pricing in an unrealistic and overly broad way, with the likely effect of deterring dealers from competing by cutting their prices. We also continued our work in support of ongoing efforts to move toward more competition in electricity

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[126] *Southern Union Company, et al.*, Dkt. No. C-4087 (July 16, 2003) (consent order).

[127] David W. Meyer and Jeffrey H. Fischer, *The Economics of Price Zones and Territorial Restrictions in Gasoline Marketing*, Bureau of Economics Working Paper (Mar. 2004), *available at* <http://www.ftc.gov/be/workpapers/wp271.pdf>.

[128] Christopher T. Taylor and Daniel S. Hosken, *The Economic Effects of the Marathon - Ashland Joint Venture: The Importance of Industry Supply Shocks and Vertical Market Structure*, Bureau of Economics Working Paper (Mar. 17, 2004), *available at* <http://www.ftc.gov/be/workpapers/wp270.pdf>.

[129] *See, e.g.* Letter from Susan A. Creighton, Director, Bureau of Competition, *et al.* to The Honorable Les Donovan, Assistant Majority Leader, Kansas Senate (Regarding Kansas House Bill No. 2330, concerning the sale of motor fuel) (Mar. 12, 2004), *available at* <http://www.ftc.gov/be/v040009.pdf>; Letter from Susan A. Creighton, Director, Bureau of Competition, *et al.* to The Honorable Demetrius C. Newton, Speaker Pro Tempore, Alabama State House of Representatives (Regarding the Alabama Motor Fuels Marketing Act) (Jan. 29, 2004) *available at* <http://www.ftc.gov/be/v040005.htm>; Letter from Susan A. Creighton, Director, Bureau of Competition, *et al.* to The Honorable Shirley Krug, State Representative, Wisconsin State Assembly (Regarding Wisconsin Unfair Sales Act) (Oct.15, 2003), *available at* <http://www.ftc.gov/be/v030015.htm>.

and natural gas distribution markets, through comments submitted to the Federal Energy Regulatory Commission[130], as well as to several state public utility commissions.[131]

7. Professions

We continued our ongoing efforts to foster more competition among professionals through advocacy, an *amicus* filing, and a published report, as well as law enforcement. In addition to the *South Carolina Board of Dentistry* matter[132] and the contact lens report[133], discussed above, we submitted comments to the Indiana State Bar Association and the Rhode Island House of Representatives, and an *amicus* brief to the Georgia Supreme Court addressing proposed restrictions on the ability of non-lawyers to conduct real estate closings.[134] In each instance, we noted that there is no evidence indicating that allowing non-lawyers to perform closings would harm consumers. To the contrary, opening this area to more competition would likely result in lower prices and greater consumer choice.

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[130] *See, e.g.* Comments of the Federal Trade Commission, Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, Docket Nos. EL01-118-000 and EL-01-118-001(Federal Energy Regulatory Commission, Aug. 28, 2003), *available at* <http://www.ftc.gov/be/v030014.pdf>.

[131] *See, e.g.* Comments of the Federal Trade Commission Staff, Standards for Determining Whether Natural Gas Prices Are Constrained by Market Forces, Docket Number 15640-U (Georgia Public Service Commission Apr. 25, 2003), *available at* <http://www.ftc.gov/be/v030010.htm>.

[132] *South Carolina State Board of Dentistry*, Dkt. No. 9311 (Sept. 12, 2003) (complaint).

[133] Federal Trade Commission Staff, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* (March 2004), *available at* <http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf>.

[134] Letter from Timothy J. Muris, Chairman, Federal Trade Commission and R. Hewitt Pate, Assistant Attorney General, Department of Justice, *et al.* to Indiana State Bar Association Unauthorized Practice of Law Committee (Regarding Comments On Draft Proposed Amendment To Indiana Supreme Court Admissions & Discipline Rule 24 Regarding Unauthorized Practice Of Law) (Oct. 1, 2003), *available at* <http://www.ftc.gov/os/2003/10/uplindiana.htm>; Letter from Timothy J. Muris, Chairman, Federal Trade Commission and R. Hewitt Pate, Assistant Attorney General, Department of Justice to Majority and Minority Leadership and Members of the Committee on the Judiciary, Rhode Island House of Representatives (Regarding Proposed Restrictions on Competition From Non-Attorneys In Real Estate Closing Activities) (Mar. 28, 2003), *available at* <http://www.ftc.gov/be/v020013.htm>; *On Review of UPL Advisory Opinion No. 2003-2*, Case No. S03U1451, Brief Amici Curiae of the United States of America and the Federal Trade Commission (Georgia Supreme Court, July 28, 2003), *available at* <http://www.ftc.gov/os/2003/07/georgiabrief.pdf>.

Conclusion

As I hope I've been able to convey, we've been quite active on a number of fronts over the past year. We expect to remain quite busy in the coming year pursuing matters I've described this morning and initiating related efforts in the framework of our positive agenda. I appreciate your interest in our ongoing work