Dissenting Statement of Commissioner Jon Leibowitz
Regarding the Federal Trade Commission and Department of Justice Antitrust Division
Report on Spring/Summer 2006 Nationwide Gasoline Price Increases

The oil industry, which posted record profits in 2006,[1] should not view this Report as in any way a vindication of its behavior. Commission staff identified some plausible justifications for the unexpected and dramatic price spikes that bedeviled consumers in the Spring and Summer of 2006, and that raised the average price of gasoline to more than $3.00 per gallon in August of that year. The fact remains, though, that most of what we did here was develop a theoretical model for why gasoline prices likely increased. This is not an unreasonable approach, given that just last year we completed an exhaustive investigation into gasoline pricing in the aftermath of hurricanes Katrina and Rita.[2] That investigation found price gouging by refiners under the Congressionally mandated definition and, beyond that, disturbing conduct by even more petroleum companies. But the question you ask determines the answer you get: whatever theoretical justifications exist don't exclude the real world threat that there was profiteering at the expense of consumers.

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[1] *See, e.g.,* Chevron, Inc., 2006 Annual Report 2 (2007) ("We reported record net income of $17.1 billion..." in 2006); BP, Inc., Annual Review 2006 5 (2007) ("In terms of financial performance, the year was a record one..."); *see also* CNN.com, *Exxon Posts Biggest Annual Profit Ever* (February 1, 2007) *available at* *http://money.cnn.com/2007/02/01/news/companies/exxon/index.htm* (Exxon "reported the biggest annual profit on record for a U.S. corporation - earning more than $75,000 every minute of 2006 on the back of record oil prices.").

[2] Moreover, a recent court's misuse of our 2006 Katrina Report to bolster its decision to approve a merger that the Commission unanimously believed to be anticompetitive raises the question of whether Congress (or the President) will want to ask us to do these reports in the future. See F.T.C. v. Foster, No. 07-352, slip op. at 49, 2007 WL 1793441, 2007-1 Trade Cases P 75,725 (D.N.M. May 29, 2007) (approving the acquisition of Giant Industries, Inc. by Western Refining, Inc.) ("In 2006, the FTC represented to Congress that the bulk petroleum supply markets within the United States were operating in a competitive manner.... To support its investigation, the FTC analyzed a large volume of wholesale and retail pricing data, including data on gasoline prices in the Albuquerque area."). Nobody wants to see one of our principal enforcement priorities – that is, blocking petroleum company mergers that reduce competition and harm American consumers – undermined by such judicial misunderstandings.