

Interlocutory Orders, Etc.

IN THE MATTER OF

**PAUL L. FOSTER,
WESTERN REFINING, INC.,
AND
GIANT INDUSTRIES, INC.**

Docket No.9323. Order, October 2, 2007

Order returning this matter to adjudication for the purpose of dismissing the complaint in light of the district court's refusal to grant a preliminary injunction enjoining the merger of Western Refining and Giant Industries.

**ORDER RETURNING MATTER TO ADJUDICATION AND
DISMISSING COMPLAINT**

On June 7, 2007, the Secretary issued an Order withdrawing this matter from adjudication pursuant to Rule 3.26(c) of the Commission Rules of Practice, 16 C.P.R. § 3.26(c) (2007) --and staying all proceedings before the Chief Administrative Law Judge-- in order to permit the Commission to assess the public interest in further litigation, and to allow the Respondents and Complaint Counsel the opportunity to discuss the matter with the Commission. For the reasons discussed in the attached Statement of the Commission, the Commission has now determined to return this matter to adjudication for the sole purpose of dismissing the complaint. Accordingly,

IT IS ORDERED that this matter be, and it hereby is, returned to adjudication; and

IT IS FURTHER ORDERED that the complaint in this matter be, and it hereby is, dismissed.

By the Commission, Commissioner Harbour and Commissioner Rosch dissenting.

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**STATEMENT OF THE COMMISSION CONCERNING
DISMISSAL OF THE ADMINISTRATIVE COMPLAINT**

As the Commission has stated repeatedly, no other industry's performance is more deeply felt than that of the petroleum sector, and no other industry is more carefully scrutinized by the FTC.¹ The Commission's vigorous efforts to identify, prosecute, and prevent unlawful anticompetitive mergers and practices in the oil industry are longstanding and ongoing.

The Commission brought this case as part of that effort. On May 29, 2007, however, following a four and one-half day hearing and consideration of the evidence presented, the United States District Court for the District of New Mexico denied the Commission's Petition for a Preliminary Injunction to enjoin the merger of two petroleum industry companies, Western Refining, Inc. and Giant Industries, Inc.² The Commission now faces the difficult decision whether to remand this matter for further administrative proceedings or to dismiss the complaint. If the only consideration were whether we agree with the district court's decision and reasoning, we would remand. As our colleagues explain in their dissenting statement, the district court made a number of questionable findings. Here, as in all cases that staff files, before authorizing the district court complaint, the Commission determined that it had reason to believe that the effect of the defendants' proposed merger "may be substantially to lessen competition, or to tend to create a monopoly."³ But the Commission must account for factors beyond disagreement with the district court's decision. After weighing all relevant factors -

¹ *E.g.*, Prepared Statement of the Federal Trade Commission, *Petroleum Industry Consolidation*, presented by Dr. Michael A. Salinger, Director, Bureau of Economics, Federal Trade Commission, before the Joint Economic Committee, United States Congress (May 23, 2007), available at: <http://www.ftc.gov/os/testimony/070523PetroleumIndustryConsolidation.pdf>.

² *FTC v. Foster*, 2007 WL 1793441 (D.N.M. Apr. 29, 2007) (public version).

³ 15 U.S.C. § 18.

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and recognizing that this is a close call - we conclude that continuing to pursue the case would not be in the public interest, as required by Commission Rule 3.26(d).⁴ Accordingly, the Commission has determined to dismiss the complaint in this matter, rather than to remand for further proceedings.

**THE PUBLIC INTEREST STANDARD OF COMMISSION
RULE 3.26(D)**

Commission Rule 3.26(d)⁵ directs that, following the denial of a preliminary injunction, further administrative proceedings should not be pursued if “the public interest does not warrant further litigation.”⁶ Although the rule itself does not set out what constitutes the “public interest,” the Commission Policy Statement issued contemporaneously explains the Commission’s intent. It provides five factors that the Commission considers in determining whether to dismiss an administrative complaint after unsuccessfully seeking a preliminary injunction: (1) the factual findings and legal conclusions of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative proceedings; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.⁷ These factors are applied on a case-by-case basis.⁸

⁴ 16 C.F.R. § 3.26(d).

⁵ 16 C.F.R. § 3.26(d).

⁶ Policy Statement Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction (Jun. 21, 1995), *republished at* 60 Fed. Reg. 39741, 39742 (Aug. 3, 1995) (“Policy Statement”).

⁷ 60 Fed. Reg. at 39743.

⁸ *Id.*

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1. The Factual Findings and Legal Conclusions of the District Court

Although this matter was litigated in a short period of time, the district court received into evidence live testimony as well as numerous documents, declarations, and deposition transcripts. In a fact-intensive, 116-page opinion, the district court found that the Commission, based upon a concentration level that was on the low end of the highly concentrated range of the Merger Guidelines, made only a “weak” *prima facie* case that the defendants then rebutted.⁹

We do not agree with the district court’s view of the facts of this case. We believe that the factual and legal showing that the FTC made before the district court at least should have persuaded that court to conclude that our staff had “raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.”¹⁰ Furthermore, we agree with the dissenting Commissioners that the court made numerous factual and legal errors that contributed to what we believe was an erroneous decision. These are not, however, the only issues to be considered under this factor of the Policy Statement.

Because an important benefit from administrative litigation is the creation of an enhanced record, it is essential to understand whether the court’s errors resulted from a flawed record or simply from a mistaken view of a sufficient record. Before the Commission engages in potentially lengthy and resource-intensive administrative litigation in this context, there must be support for the conclusion that the additional expense will improve the

⁹ *Foster*, 2007 WL 1793441 at *28, ¶ 264; *55-*56, ¶¶ 20-22, 28.

¹⁰ *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *FTC v. Beatrice Foods Co.*, 587 F.2d 1225, 1229 (D.C. Cir.1978) (Appendix to Statement of MacKinnon & Robb, JJ.).

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evidentiary record. That does not appear to be the case here. In particular, it does not appear that the record before the district court was deficient in any serious respect. The record before the district court, although short of a fully developed trial record, is extensive, and it does not appear that the Commission was prevented from presenting any important evidence regarding the potential impact of the merger.

2. New Evidence Developed During the Course of the Preliminary Injunction Proceeding

As is often the case, some new facts came to light during discovery leading to the preliminary injunction hearing; in this case, the new information militates against continuing in administrative litigation. For example, new information suggests that the Plains Pipeline, which runs from El Paso, Texas to Albuquerque, New Mexico, may begin work on a capacity expansion project more quickly than previously thought.¹¹ A cornerstone of FTC staff's case at the hearing was that the Plains Pipeline was capacity-constrained and fully utilized, preventing some competitors and potential competitors from being able to respond to an anticompetitive post-merger price increase by Western. If, as appears likely, the Plains Pipeline expansion leads to increased gasoline supply and allows new bulk suppliers to deliver gasoline to the Albuquerque area, we would expect more competition and lower gasoline prices in Northern New Mexico, notwithstanding the merger.

¹¹ *Foster*, 2001 WL 1793441 at *36, ¶¶ 341-43.

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3. Whether the Transaction Raises Important Issues of Fact, Law, or Merger Policy That Need Resolution in Administrative Proceedings

The transaction does not raise important issues of fact, law, or merger policy that need resolution in administrative proceedings. The district court's preliminary injunction ruling was highly fact-driven, and its discussion of the law generally did little more than recite established principles of competition law. The district court's opinion, therefore, should have little precedential value beyond the specific facts of this case.

As the dissenting Commissioners' statement notes, the district court's opinion referred three times to matters that should have no weight in merger adjudications. We doubt, however, that these flaws made a difference in the court's analysis or materially limit the Commission's ability to prosecute merger cases in the future.

First, in assessing whether Western was a competitor in the Northern New Mexico bulk gasoline supply market despite its neither owning nor having long-term access to a terminal there, the court cited to "inconsistencies" between the Commission's position on terminals in the case before it and the Commission's position with respect to terminals in *Aloha Petroleum*¹² and in the Commission's Bureau of Economics' August 2004 study entitled, *The Petroleum Industry: Mergers, Structural Change and Antitrust Enforcement*.¹³ In *Aloha*, the Commission asserted a narrow bulk supply market that included only local indigenous refiners, terminal operators, and firms with long-term contractual access to terminals. For its part, the section of the FTC staff economists' report cited by the court merely states that terminal access is one possible "factor" in determining whether a bulk supplier is a competitor in a particular geographic market.¹⁴

¹² *FTC v. Aloha Petroleum*, No. CV 05-00471 (D. Haw. 2005).

¹³ *Foster*, 2007 WL 1793441 at *18-19, ¶¶ 173-81.

¹⁴ Federal Trade Commission, Bureau of Economics, *The Petroleum Industry*:

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Although we disagree with the court's characterizations of such positions as inconsistent with those taken in *Foster*, that is beside the point. In fact, the terminal issue ultimately was not significant in *Foster* because the court concluded that - even without terminal access - Western was a bulk supply competitor to Giant.¹⁵ Nevertheless, we note that the court's reliance on *Aloha* and the FTC staff economists' report in this context was improper because, while courts and agencies follow established antitrust principles, the bases for challenging mergers are individual and highly fact-specific.

Second, in one passage of its opinion, the district court noted that the Commission's 2006 report to Congress entitled *Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases* concluded that the Commission staff had found no evidence of collusion in the petroleum industry in general, and no specific evidence of collusion in the Albuquerque market.¹⁶

We believe that the Court erred in treating this part of the report as support for its conclusion that the merger should not be enjoined. As stated above, a merger challenge must be decided on the facts of each case. In contrast, a report to Congress such as the *Gasoline Price Manipulation* report provides a broad evaluation of the competitive conditions in numerous markets at a particular time. Such a report generally does not analyze the potency of particular competitors or post-merger combinations of competitors in particular defined antitrust markets. As a result, the *Gasoline Price Manipulation* report provides no probative insight as to how the merger of Giant and Western would affect the Northern New

Mergers, Structural Change, and Antitrust Enforcement (Aug. 2004) 23-24, available at <http://www.ftc.gov/os/2004/08/040813mergersinpetrolberpt.pdf>.

¹⁵ *Foster*, 2007 WL 1793441 at *18, ¶ 172.

¹⁶ *Id.* at *49, ¶ 457.

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Mexico market, either in 2007 or in the years to come. Because the court separately found that the Commission did not present any evidence that coordinated behavior between competitors existed in the Albuquerque market or would exist prospectively post-merger,¹⁷ however, we do not believe that consideration of the *Gasoline Price Manipulation* report was dispositive.

Third, the district court's opinion referred to Bureau of Economics working papers analyzing some oil company transactions that the Commission did not challenge, as well as to a summary of Commission horizontal merger investigation data indicating that the Commission has not challenged any "8 to 7" mergers since 2001.¹⁸ We agree with our dissenting colleagues that this is not evidence that the Western/Giant merger was not anticompetitive. The transactions analyzed in the working papers were based on the specific facts of those transactions. The observation concerning the Commission's decision not to challenge relatively recent "8 to 7" mergers is too generalized to provide guidance on the specific facts of this case. Viewed in context, however, the court used these working papers and the merger investigation data simply to bolster its point that the Commission's *prima facie* showing was "weak," as the court had already independently concluded without reference to these materials.¹⁹

In addition, the dissenting Commissioners are concerned that the court's ruling establishes conclusively that the elimination of a "maverick" cannot violate merger law unless the transaction would increase the likelihood of coordinated conduct by the remaining competitors in the market. At the time the Commission authorized its staff to file a complaint in district court, we believed that the evidence suggested that an independent Giant, as the output at its Four Corners refineries rose, would increase the amount of gasoline that it would supply to the Northern New Mexico market,

¹⁷ *Id.* at *48, ¶¶ 454-56

¹⁸ *Id.* at *29, ¶¶ 268-71.

¹⁹ *Id.* at *28, ¶ 264; *see also id.* at *55-56, ¶¶ 20-21.

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and that this likely would cause gasoline prices in this market to decrease. Giant, thereby, would act as a maverick as that term is used in the Merger Guidelines.²⁰

The district court, however, found that defendants presented substantial evidence that an independent Giant would have used part of its additional output to reduce the amount that it purchased for resale in this market - leaving its supply to the market roughly constant - and would have sent its remaining additional output to other markets more profitable than Northern New Mexico.²¹ We disagree with the dissenting Commissioners that the district court, on the facts presented, reached any conclusion other than that an independent Giant would not have acted as a maverick to thwart the coordinated anticompetitive behavior of its competitors.²² The district court did not address, much less resolve, the more general legal question of whether a competitor unilaterally can act as a maverick even in the absence of coordinated behavior by its competitors.

In sum, the court's anomalous references to and conclusions about Giant's likely behavior should not establish discernable rules of law that could serve as precedent for future merger analysis. Moreover, we note that there are many established, well-reasoned, and well-articulated recent merger cases, to which courts considering future merger challenges by the Commission may look for guidance.²³

²⁰ United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 8, 1997 rev.) at § 2.12, available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

²¹ *Foster*, 2007 WL 1793441 at *44-45, ¶¶ 425-27, 429, 435, 438.

²² See *Foster*, 2007 WL 1793441 at *49, ¶ 458.

²³ E.g., *Heinz*, *supra*; *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

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4. Overall Assessment of the Costs and Benefits of Further Proceedings

The use of *FTC* resources is always an important consideration in determining whether to continue in administrative litigation. Further administrative proceedings will consume significant Commission resources. In appropriate situations, the Commission should expend those resources. The modern history of the FTC's competition programs underscores the Commission's willingness to apply substantial resources to cases and studies involving gasoline and other energy markets.

In this matter, the Commission devoted considerable resources to assessing the competitive effects of the Western/Giant merger and - after concluding that it was likely to substantially lessen competition - to proving this harm. Given the district court's finding that the Commission failed to define a geographic market,²⁴ and its negative assessment of our two experts' analyses,²⁵ we believe that an administrative proceeding would require substantially more resources, which should instead be reallocated to new competition matters, including in particular other gasoline matters.

5. Other Matters That Bear on Whether It Would Be in the Public Interest to Proceed with the Merger Challenge

The fact that the merger of Western and Giant has combined two petroleum refining companies necessitates that the Commission give the matter the utmost scrutiny in determining whether further administrative proceedings are in the public interest.²⁶ Indeed, the Commission's authority to pursue an

²⁴ *Foster*, 2007 WL 1793441 at *40-43, ¶¶ 386-415.

²⁵ *Id.* at *17-18, ¶¶ 160-71.

²⁶ The FTC's aggressive enforcement stance is evident in the results of a review of merger investigation data that the agency released last January. From fiscal year 1996 to fiscal year 2005, the Commission brought more merger cases at lower levels of concentration in the petroleum industry than in any other industry.

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administrative proceeding after the denial of a preliminary injunction by a district court is an important and potent tool. But, due to the significant ramifications to both the Commission and the Respondents that arise in such situations, it is crucial that the Commission exercise this authority judiciously. We conclude that this is not an appropriate case in which to continue administrative litigation following the district court's denial of the Commission's request for a preliminary injunction.

For all of the foregoing reasons, the Commission has determined to issue the attached Order dismissing the administrative complaint in this matter.

Unlike in other industries, the Commission has brought enforcement actions (and, in many cases, has obtained merger relief) in petroleum markets that are only moderately concentrated. Federal Trade Commission Horizontal Merger Investigation Data, Fiscal Years 1996-2005 (Jan. 25, 2007), Table 3.1, *et seq.*, available at <http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf>; see also FTC Horizontal Merger Investigations Post-Merger HHI and Change in HHI for Oil Markets, FY 1996 through FY 2003 (May 27, 2004), available at <http://www.ftc.gov/opa/2004/05/040527petrolactionsHHIdeltachart.pdf>.

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

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

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

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

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

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

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consumers millions of dollars annually. In this sensitive area of the economy that is a substantial injury to consumers.

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

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

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

⁶ FED. TRADE COMM'N AND U.S. DEP'T OF JUSTICE, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES, at p.3 (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf>.

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

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

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

⁹ See, e.g., *United States v. Cinemette Corp. of Am.*, 687 F. Supp. 976, 982 (W.D. Pa. 1988) ("[T]he government is under no obligation to pursue a history of

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

Indeed, the district court even drew an inference that anticompetitive effects were unlikely here from the Commission's Report to Congress as to whether "price-gouging" occurred in the wake of Hurricane Katrina.¹² That report had nothing to do with

civil enforcement proceedings in a particular industry in advance of bringing criminal prosecutions for anti-competitive conduct.").

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

¹¹ See *supra* note 9.

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

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Giant's unique incentives in the northern New Mexico market or whether this transaction violated Section 7 by eliminating Giant as a potential maverick. It was concerned with whether there was questionable pricing (as defined by the authorizing legislation) by refiners or retailers in the wake of Katrina. Using (or, more accurately, misusing) that Report to ascertain the likelihood of success in this merger case goes beyond drawing illegitimate inferences from exercises of prosecutorial discretion. It has the potential to chill the kind of unfettered communication that Congress -and the public -expect from this agency.

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

Similarly, the district court took complaint counsel's economic expert to task for not considering alternatives to his relevant geographic market and even opined at one point that he did not

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

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

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

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

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support any relevant geographic market.¹⁶ However, the expert defined the relevant geographic market in accordance with the Horizontal Merger Guidelines, which provide that alternatives need not be considered once the SSNIP test is satisfied.¹⁷ Again, the court ultimately reversed himself, holding that the record established a relevant geographic market.¹⁸ Indeed, the court found that complaint counsel established a prima facie case that the transaction would likely result in anti-competitive effects in the

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

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

A: My conclusion was that the relevant antitrust market is the supply of bulk delivery of gasoline in the Albuquerque MSA.

Q: Did you look at other candidate markets?

A: I didn't have time or data to look at other candidate markets. Instead, I found that was a -- I'm not saying it was the only, but it was a relevant product in geographic market for this study.

//

Q: And how does -- How does finding a relevant market square with your understanding of the [Guidelines]

A: My understanding is that once one finds a relevant market one can then proceed to analyze the likely antitrust impact in that market.

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

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market for gasoline in northern New Mexico.¹⁹ However, having done so and despite recognizing that respondents had the burden of producing evidence to dispel that presumption, the court engaged in a relatively uncritical analysis of respondents' evidence.

For example, the district court concluded that Giant was unlikely to act as a maverick because it believed it would have been contrary to Giant's self-interest to do so.²⁰ The court not only dismissed Giant's internal planning documents in reaching that conclusion but it also ignored the representations that Giant made to governmental officials and the press about its intentions to increase price competition for gasoline sales in Albuquerque. In contrast, the court concluded that, if Western diverted Giant's incremental production to other markets instead of distributing it in Northern New Mexico post-transaction, Flying J and/or other suppliers would have trucked enough extra gasoline in from Texas to make up the difference.²¹ That conclusion, however, was contrary to the logic of the court's earlier conclusion: if it made no sense for Giant to act as a maverick, it would make no sense for Flying J to do so (especially since, as the court elsewhere recognized, the cost of trucking gasoline from Texas generally

¹⁹ *Id.* *146 (Conclusion of Law ¶ 127 "The FTC attempted to establish a likelihood of success on the merits by submitting evidence demonstrating that the proposed merger would have an anti-competitive impact through unilateral effects. The Court finds that the FTC made a prima facie showing that the market is presently concentrated and that the proposed merger would result in an increase in market concentration.").

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

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

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made that supposed alternative unfeasible).²² Similarly, the court concluded that existing suppliers such as Holly, ConocoPhillips, and Valero had the same incentives as Giant to act as a maverick in the relevant market. However, the court failed to explain their incentives to ship additional amounts of gasoline in the market or address the undisputed fact that those refiners had historically failed to increase their shipments to the market in response to sustained price increases.²³

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

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

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

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

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

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

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

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

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IN THE MATTER OF

**EVANSTON NORTHWESTERN HEALTHCARE
CORPORATION**

AND

ENH MEDICAL GROUP, INC.*Docket No. 9315 Order, October 3, 2007*

Order granting Complaint Counsel's motion for an extension of the deadline for filing any objections or comments on Respondent's Proposed Final Order.

ORDER GRANTING MOTION FOR EXTENSION OF TIME

On August 2, 2007, the Commission issued an Order in this matter that, *inter alia*, requires Respondent Evanston Northwestern Healthcare Corporation to file with the Commission, on or before September 10, 2007, a detailed proposal for implementing the type of injunctive relief that the Commission has selected, as described by the Opinion of the Commission and the Commission Order; that requires Complaint Counsel to file with the Commission any objections to or comments on that proposal within thirty calendar days thereafter; and that requires Respondent to file any response to Complaint Counsel's filing within ten calendar days thereafter. On September 10, 2007, the Commission issued an Order granting Respondent an extension until September 17, 2007, by which to file its proposal, and Respondent filed its Submission In Explanation and Support of Its Proposed Final Order, and the Proposed Final Order itself, on that date.

Complaint Counsel have now filed a Motion requesting an extension of the deadline for filing any objections or comments on Respondent's Proposed Final Order from October 17, 2007, until October 29, 2007. Complaint Counsel advise that, as a consequence of previously-scheduled travel, lead Complaint Counsel will be out of the office until two days before the current filing deadline, and that