

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

Conversely, the district court implied that the Court's inclusion of Western as a competitor was inconsistent with the position it took in *F. C. I. A., 1991* 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 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

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 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

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

and retail pricing 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”).

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.

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

A: My understanding is that once one findGuideli ine6rade Commiy07u looad it waeencluoevaah

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).
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.”).
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.”).