Statement of Commissioner Mozelle W. Thompson
Concerning the Staff Report

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

The Commission has authorized the release of the Bureau of Economics staff report, "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement." I voted to authorize the release of this staff report, and I strongly support the Commission's ongoing efforts

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

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

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

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

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

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

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

[7] *See* Table 2-5, “Enforcement Actions in the Petroleum Industry 1981-2003" (data also