Statement of Chairman Timothy J. Muris

Concerning FTC Merger Enforcement In the Oil Industry

Last week, I issued a statement criticizing the General Accounting Office's study purporting to show that certain oil mergers investigated during the tenure of my predecessor, Robert Pitofsky, led to higher gasoline prices. Although Commissioner Thompson apparently agrees with my criticisms of GAO - most of those criticisms were based on a previous Commission letter on which Commissioner Thompson had voted affirmatively - he takes issue with three sentences in my statement characterizing Commission merger policy toward the historically large mergers that occurred in this industry.

Most of Commissioner Thompson's arguments reflect charges neither made nor reasonably implied in my statement. The Commission's use of screens for the particularly large number of markets it faced in certain oil mergers was appropriate. While I was Director of the Bureau of Competition in 1984, the Commission followed the same approach, using even lower HHI screens.

Two of Commissioner Thompson's points are inconsistent with the evidence. First, Commissioner Thompson disagrees that the Commission has applied tougher standards to the oil industry than to any other industry. Data the Commission has released proves this point beyond any doubt. The Commission has undertaken challenges in 89 petroleum markets with Herfindahls below 2000. In no other industry between 1996 and 2003 (the period of the data release) did the Commission issue a challenge where concentration was this low. Moreover, the data indicates that the Commission does not normally demonstrate concern over mergers unless, post merger, there would be four or fewer competitors. In the oil industry, the data indicates enforcement actions in numerous markets where the merger has left as many as seven competitors.

The second problem is that, contrary to Commissioner Thompson's assertion, there is nothing unique for merger analysis about the economics of the oil industry. The facts that Commissioner Thompson notes from the Horizontal Merger Guidelines Section 2.12 - such as homogeneous products and transparent information - exist for many other industries, in none of which does the Commission challenge mergers at such low concentration levels.(1)

As I stated last week, one primary reason for the Commission's approach to the oil industry was the large number of markets in certain oil merger transactions. In those few oil mergers that the Commission investigated that were of smaller size, the Commission did not seek enforcement at the low levels of concentration challenged in the larger mergers. In numerous markets in smaller oil transactions, the Commission did not seek relief when the post merger HHI was in excess of

1400 and below 2000 (and the delta was in excess of 100). In each of these smaller transactions, Commissioner Thompson did not object to closing the investigation of the markets with lower HHIs. Thus, in these smaller transactions Commission enforcement was, unlike the larger transactions, more similar to other industries.

In any event, if the Commission had imposed a higher Herfindahl screen in the large oil merger transactions, it would still have required largely the same amount and kind of divestitures. Whatever threshold of concentration the Commission used as a screen, remedies requiring the divestiture of retail assets (e.g., gasoline stations) may be over-inclusive (that is, include assets in markets where anticompetitive effects are not likely) because of concerns about "viability" of a more limited package of assets. For example, a potential buyer may only be able to capture economies of scale it if operates or supplies a large number of gasoline stations. Thus, putting together a viable package of assets necessary to maintain or restore competition may require divesting a broader range of assets than those limited to the markets alleged in the complaint. In short, the imposition of the standards the Commission applied in this industry did not have as significant a practical impact as one might imagine from the HHI data.

I share the concern of other policy makers - and, indeed, all U.S. consumers - about the recent dramatic increases in gasoline prices. Thus far, however, I have seen no credible evidence to support any conclusion that merger activity over the last decade has had anything to do with price increases of gasoline.

Endnote:

1. Commissioner Thompson's point that the Commission alleged coordination in oil merger cases is unremarkable. Indeed, when challenging mergers at such low levels of concentration, coordinated effects is the only possible theory.