Statement of Commissioner Joshua D. Wright,
Dissenting in Part and Concurring in Part
In the Matter of Holcim Ltd. and Lafarge S.A.
FTC File No. 141-0129

May 8, 2015

The Commission has voted to issue a Complaint and a Decision & Order against Holcim Ltd. ("Holcim") and Lafarge S.A. ("Lafarge") to remedy the allegedly anticompetitive effects of the proposed merger of the two companies. I dissent in part from and concur in part with the Commission's decision because the evidence is insufficient to provide a reason to believe the proposed transaction is likely to substantially lessen competition, in violation of Section 7 of the Clayton Act, in several of the portland cement markets identified in the Complaint.[1]

The Commission articulates coordinated effects and unilateral effects theories of harm arising from the proposed transaction in all of the fourteen relevant geographic markets defined in the Complaint (the "Relevant Markets").[2] Additionally, and untethered to these two theories of harm articulated in the 2010 *Horizontal Merger Guidelines* ("*Merger Guidelines*"), the Commission asserts that mergers, such as the proposed transaction, that reduce the number of competitors to three or fewer are likely to harm competition. The Commission's structural presumption is economically unfounded and inappropriate in the vast majority of Relevant Markets. Furthermore, there is insufficient evidence to support a coordinated effects theory in any Relevant Market and insufficient evidence to support a unilateral effects theory in several of the Relevant Markets.

In those markets in which I conclude the record evidence supports neither a coordinated nor a unilateral effects theory, the Commission relies upon little more than the change in market structure to support each of its allegations. Without particularized evidence substantiating a unilateral effects or coordinated effects theory

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[1] As I explain below, I concur with the Commission as to the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/Providence, the Mid-Atlantic region, and the western Great Lakes region; I dissent with the Commission as to eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids.

[2] *See* Analysis of Agreement Containing Consent Orders to Aid Public Comment 3, Holcim Ltd., FTC File No. 141-0129 (May 4, 2015) ("For many customers in these markets, the merger would . . . leav[e] the merged entity with the power to increase prices . . . unilaterally. Further, . . . it would enhance the likelihood of collusion or coordinated action between the remaining competitors.").

of harm arising from the proposed transaction, a structural theory alone cannot provide a sufficient basis to establish reason to believe a transaction violates the Clayton Act. It follows, in my view, that the Commission should refrain from imposing a remedy in the markets for which the evidence is insufficient to support either a coordinated effects theory or a unilateral effects theory.

I. The Commission's Structural Theory and Presumption Are Unsupported by Economic Evidence

The Commission argues mergers that reduce the number of competitors in a relevant market to three or two are unique in the sense that they warrant a presumption of competitive harm and illegality,[3] but it cannot defend its structural presumption upon the basis of economic evidence or accumulated empirical knowledge.

The Commission cites in support of its structural theory and presumption three academic articles written by economists.[4] Only two offer economic evidence, and the proffered substantiation fails to support the claim. The first is an important early entrant into the static entry literature examining the relationship between market size and the number of entrants in a market, focusing upon isolated rural markets.[5] It strains credulity to argue that Bresnahan and Reiss's important analysis of the impact of entry in markets involving doctors, dentists, druggists, plumbers, and tire dealers in local and isolated areas, where they find the competitive benefits of a second competitor are especially important, apply with generality sufficient to support a widely applicable presumption of harm based upon the number of firms. Indeed, the authors warn against precisely this interpretation of their work.[6]

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[3] *Id.* at 3.

[4] *Id.* at 3 n.9.

[5] Timothy F. Bresnahan & Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J. POL. ECON. 977 (1991). While Bresnahan and Reiss is an important early contribution to the static entry literature, it cannot possibly bear the burden the Commission wishes to place upon it. Abstracting from the complexities of market definition was necessary for the researchers to isolate entry decisions. This is possible when studying the effects of entry by a second dentist in a town with a population of less than 1,000, but not in most real-world antitrust applications. The authors of the study make this point themselves, noting that "whether this pattern appears in other industries remains an open question." *Id.* at 1007.

[6] In earlier research using similar empirical techniques and data – namely, small rural markets – Bresnahan and Reiss plainly reject the notion that the findings should inform views of market structure and competition generally: "We do not believe that these markets 'stand in' for highly concentrated industries in the sectors of the economy where competition is national or global." Timothy F. Bresnahan

The second article is a laboratory experiment and does not involve the behavior of actual firms and certainly cannot provide sufficient economic evidence to support a presumption that four-to-three and three-to-two mergers in real-world markets will result in anticompetitive coordination.[7] Once again, the authors warn against such an interpretation.[8]

Finally, the Commission cites a draft article, authored by Steve Salop, in support of its view that economic evidence supports a presumption that four-to-three and three-to-two mergers are competitively suspect.[9] The article does not purport to study or provide new economic evidence on the relationship between market structure and competition. Thus, it cannot support the Commission's proposition.[10]

There is simply no empirical economic evidence sufficient to warrant a *presumption* that anticompetitive coordination is likely to result from four-to-three or three-to-two mergers. Indeed, such a presumption would be inconsistent with modern economic theory and the analysis endorsed by the *Merger Guidelines*, which deemphasize inferences of competitive harm arising from market structure in favor of

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& Peter C. Reiss, *Do Entry Conditions Vary Across Markets*, 3 BROOKINGS PAPERS ECON. ACTIVITY 833, 868 (1987).

[7] Steffen Huck et al., *Two Are Few and Four Are Many: Number Effects from Experimental Oligopolies*, 53 J. ECON. BEHAVIOR & ORG. 435 (2004).

[8] *Id*. at 436 ("The number of firms is not the only factor affecting competition in experimental markets. This implies that there exists no unique number of firms that determines a definite borderline between non-cooperative and collusive markets irrespective of all institutional and structural details of the experimental markets.").

[9] Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach* (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1304/.

[10] Nevertheless, to the extent Salop argues in favor of legal presumptions in merger analysis, he clarifies that they "obviously should be based on valid economic analysis, that is, proper economic presumptions," which should be updated "based on new or additional economic factors besides market shares and concentration." *Id.* at 37, 48. I agree. Additionally, Salop explains that "[c]ontemporary economic learning suggests that concentration be considered when undertaking competitive effects analysis – in conjunction with other factors suggested by the competitive effects theory – but not treated as the sole determinant of post-merger pricing." *Id.* at 13-14. Notably, Salop does not endorse a distinction between four-to-three mergers or three-to-two mergers and mergers in less concentrated markets that justifies a presumption that the former are anticompetitive; rather, he merely observes that empirical evidence and economic theory do not warrant "*ignoring* market shares and concentration in merger analysis." *Id.* at 12 (emphasis in original).

greater reliance upon particularized evidence of changes in post-merger incentives to compete.[11]

To the contrary, this approach is inconsistent with Agency practice and the letter and spirit of the more economically sophisticated approach adopted in the *Merger Guidelines*.[12] Section 2.1.3 of the *Merger Guidelines* does, as the Commission observes, state that "mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power."[13] The *Merger Guidelines* insure against reverting to naked structural analysis by making clear that the role of market shares and market concentration is "not an end in itself," but rather "*one* useful indicator of likely anticompetitive effects," and that market concentration is not to be used to "provide a rigid screen to separate competitively benign mergers from anticompetitive ones," but rather to provide one way to distinguish competitively benign mergers from *those that warrant closer scrutiny.*[14] To the extent these passages evince an ambiguity in the *Merger Guidelines* with respect to the minimum evidentiary burden that must be satisfied to support a merger challenge, the Commission should embrace the interpretation more consistent with a modern economic approach rather than with the obsolete and discredited structural analysis of a prior era.

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[11] *See* Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 707-08 (2010) (acknowledging the role of market concentration in the analysis endorsed in the *Merger Guidelines* and observing that they place less weight upon market concentration and market shares, instead emphasizing the importance of direct evidence of changes in post-merger incentives to compete and competitive effects). To the extent the Commission relies upon Shapiro's caveat that "changes in market concentration are more probative in some cases than others," Statement of the Federal Trade Commission 3 n.8, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015), they fail to explain why, nor have I been provided any evidence attempting to establish that, markets for portland or slag concrete fit within the subset of cases for which it has been established that there is a reliable a relationship between market structure and competition. I do not quarrel with the notion that such markets exist. We identify them over time using economic analysis, empirical evidence, and accumulated learning. For example, substantial research has identified empirical regularities in the relationship between structure and price in generic pharmaceutical markets. *See* David Reiffen & Michael R. Ward, *Generic Drug Industry Dynamics*, 87 REV. ECON. & STAT. 37 (2005).

[12] Comments of the ABA Section of Antitrust Law on the Horizontal Merger Guidelines Revision Project (June 4, 2010), *available at* https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-proposed-new-horizontal-merger-guidelines-548050-00026/548050-00026.pdf (urging the agencies to "remove the presumption of illegality keyed to the level and increase in the HHI" because "[t]he presumption does not reflect how the Agencies conduct investigations [and] is not theoretically warranted").

[13] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [hereinafter MERGER GUIDELINES].

[14] *Id.* §§ 4, 5.3.

Rather than relying upon economic evidence to defend the Commission's structural presumption, the Commission highlights case law supporting a presumption of illegality for mergers to duopoly or that substantially increase concentration.[15] As a preliminary matter, case law that endorses a wholly structural approach to merger analysis – an approach clearly rejected by the *Merger Guidelines* – does not constitute relevant economic evidence. Judicial opinions adopting this approach are orthogonal to the proposition in need of *economic substantiation*: that mergers resulting in three- or two-firm markets are likely to result in coordination. Indeed, one can find a variety of economically dubious propositions adopted in antitrust case law blessed by no less a legal authority than the Supreme Court.[16] But courts' observations about the relationship between market structure and competition are not relevant to the Commission's adoption of a structural presumption in this case.

I therefore find any reliance upon structural changes alone to be economically untenable and insufficient to give me reason to believe the proposed transaction will violate Section 7 in the vast majority of Relevant Markets.

II. Coordinated Effects Are Unlikely in Any Relevant Market

The *Merger Guidelines* describe the conditions under which the antitrust agencies will challenge a proposed merger on the basis that it is likely to result in anticompetitive coordination. Specifically, the *Merger Guidelines* articulate three necessary conditions that must *each* be satisfied to support a coordinated effects theory: (1) a significant increase in concentration, leading to a moderately or highly concentrated market, (2) a market vulnerable to coordinated conduct, and (3) a credible basis for concluding the transaction will enhance that vulnerability.[17] Thus, the *Merger Guidelines* establish clearly that a highly concentrated market that is already vulnerable to coordinated conduct is necessary but not sufficient to support a coordinated effects theory. Critically, the Commission must also have evidence sufficient to provide a credible basis to conclude the transaction will *enhance* the market's vulnerability to coordinated

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[15] Statement of the Federal Trade Commission, *supra* note 11, at 3 (citing *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) and *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 (D.C. Cir. 2001)).

[16] For example, well-established case law endorses the economic proposition that mergers that result in post-merger shares of greater than 30% are likely to harm competition, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364-65 (1963), and that mergers resulting in post-merger shares of less than 10% harm competition when coupled with a trend toward concentration, *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

[17] MERGER GUIDELINES, *supra* note 13, § 7.1; *see also* Dissenting Statement of Commissioner Joshua D. Wright 3, Fidelity National Financial, Inc., FTC File No. 131-0159 (Dec. 23, 2013) [hereinafter Wright, *Fidelity Dissent*].

conduct. Such evidence must evince a change in the post-merger competitive market dynamics and, in particular, post-merger incentives to engage in coordinated pricing. The *Merger Guidelines* provide the elimination of a maverick firm as an illustrative example of the type of evidence that would satisfy the third condition and warrant a presumption of adverse coordinated effects.[18] Importantly, the *Merger Guidelines* explain evidence that a merger will eliminate a maverick is given weight precisely because it changes post-merger incentives to coordinate.[19]

The first and second elements of the *Merger Guidelines*' coordinated effects analysis are not at issue in this case. The Commission's investigation revealed evidence supporting a conclusion that the Relevant Markets are already highly concentrated and the proposed transaction will increase concentration.[20] Furthermore, the evidence supports a conclusion that the markets are vulnerable to coordinated conduct.[21] Nevertheless, the investigation failed to uncover any evidence to suggest the proposed transaction will increase post-merger incentives to coordinate – that is, there is no record evidence to provide a credible basis to conclude the merger alters the competitive dynamic in any Relevant Market in a manner that enhances its vulnerability to coordinated conduct.

The Commission asserts that the facts that the market is highly concentrated, that it is vulnerable to coordination, and that the merger reduces "the number of significant competitors to only two or three"[22] jointly satisfy the third necessary element that "the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability."[23] The Commission's analysis can be read in one of two ways. Each is tantamount to the application of a structural presumption for coordinated effects claims involving markets with three or two firms, each is problematic because it adopts an outdated and obsolete structural approach to coordinated effects, and each is in significant tension with the economic approach to coordinated effects embodied in the *Merger Guidelines*.

The first interpretation is that the satisfaction of the first and second elements of the *Merger Guidelines* analysis – and particularly the demonstration that the merger

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[18] MERGER GUIDELINES, *supra* note 13, § 7.1.
[19] *Id.* § 2.1.5.
[20] *See* Analysis of Agreement Containing Consent Orders to Aid Public Comment, *supra* note 2, at 2.
[21] *See* Statement of the Federal Trade Commission, *supra* note 11, at 2 (describing the characteristics of the Relevant Markets that render them vulnerable to coordination).
[22] *Id.* at 2.
[23] MERGER GUIDELINES, *supra* note 13, § 7.1

significantly increases concentration in an already concentrated market – is sufficient to simultaneously satisfy the third element that the merger enhance post-merger incentives to coordinate. This interpretation renders the third element of Section 7.1 entirely superfluous. The more logical explanation of the third element is that a crucial, additional type of information is required to illuminate how the merger changes the merged firm's incentives to coordinate. The Commission's application completely overlooks the economic relevance of the third element.

The second plausible interpretation of the Commission's analysis is that the reduction in the number of competitors in a market is itself sufficient evidence to provide a credible basis that a merger will enhance a market's vulnerability to coordination and thus satisfy the third element of the *Merger Guidelines*' coordinated effects analysis. Under this reading, the Commission relies upon the fact that the proposed transaction reduces the number of competitors in each Relevant Market by one firm, either from four to three or from three to two.[24] For example, the Majority Statement asserts that the proposed transaction might enhance the likelihood of coordination by "mak[ing] it easier for the remaining firms to coordinate, monitor compliance with, and retaliate against potential deviation from, a coordinated scheme."[25] These are generic observations that are true of any merger that reduces the number of firms in a market; they are not particularized to the proposed transaction or to any Relevant Market nor do they establish a credible basis to conclude that post-merger incentives to coordinate will increase. The observation that a market with N firms will, after the merger, have N-1 firms is simply insufficient without more to establish the required credible basis. This is true even when a merger reduces the number of firms from four to three or from three to two. The Commission offers no explanation as to why the *Merger Guidelines* would go through the trouble of requiring a credible basis to believe a merger will change the market's competitive dynamics that *enhances* the market's vulnerability to coordinated conduct, *in addition to* an increase in market concentration, in order to substantiate a coordinated effects merger challenge if the latter were considered sufficient to satisfy both elements.

As I have stated previously, "there is no basis in modern economics to conclude with any modicum of reliability that increased concentration – without more – will increase post-merger incentives to coordinate."[26] Janusz Ordover, in a leading

[24] *See* Statement of the Federal Trade Commission, *supra* note 11, at 2 (taking the view that a reduction of competitors to three or two firms in the relevant market justify a presumption of competitive harm).
[25] *Id.* at 2.
[26] Wright, *Fidelity Dissent*, *supra* note 17, at 3.

treatment of the economics of coordinated effects, similarly explains that "[i]t is now well understood that it is not sufficient when gauging the likelihood of coordinated effects from a merger to simply observe that because the merger reduces the number of firms, it automatically lessens the coordination problem facing the firms and enhances their incentives to engage in tacit collusion; far from it."[27] Without particularized evidence that the proposed transaction will enhance incentives to coordinate post-merger, I am unable to conclude there is reason to believe it is likely to substantially lessen competition in violation of Section 7.

III. Unilateral Effects Are Unlikely in Some of the Relevant Markets

The Commission alleges the proposed transaction is likely to result in unilateral price effects in the Relevant Markets. Unilateral effects arise when the reduction in direct competition between merging firms is sufficient to create post-merger market power. The *Merger Guidelines* articulate a variety of potential unilateral effects theories, including merger to monopoly, merger of firms producing very close substitutes in a differentiated products market, merger of sellers competing in bargaining and auction markets, and mergers in homogeneous goods markets making post-merger output suppression strategies more profitable.[28] The unifying theme of the unilateral effects analysis contemplated by the *Merger Guidelines* is that a particularized showing that post-merger competitive constraints are weakened or eliminated by the merger is superior to relying solely upon inferences of competitive effects drawn from changes in market structure.[29]

The potential unilateral effects theories in this case fall broadly within one of three categories. The first category involves straightforward merger-to-monopoly markets. In these markets, the theory of harm is that Holcim and Lafarge are the only two meaningful suppliers for all customers in the Relevant Market. The second category involves markets in which Holcim and Lafarge face some competition, but the proposed transaction will result in a merger to monopoly for a substantial subset of customers and will allow the merged entity to unilaterally increase market prices. The third category includes markets where the proposed transaction will reduce the number

[27] Janusz A. Ordover, *Coordinated Effects*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1359, 1367 (ABA Section of Antitrust Law 2008) ("It is quite clear . . . that a reduction in the number of firms and concomitant increases in concentration do not necessarily make collusion inevitable or even more likely, stable, or complete.").

[28] MERGER GUIDELINES, *supra* note 13, § 6.

[29] *See* Shapiro, *supra* note 11, Part III (explaining the *Merger Guidelines*' unilateral effects analysis, the types of evidence that support such analysis, and the relative analytical weakness of inferences of competitive harm drawn from changes in market structure).

of competitors in the Relevant Market to three or two, and the remaining competitors will be unable or unwilling to compete for market share – for example, because of capacity constraints, leaving the merged entity with the ability to unilaterally raise prices. Each of these theories requires particularized evidence sufficient to establish reason to believe the proposed transaction violates Section 7 of the Clayton Act. I conclude the available evidence is sufficient to do so in some Relevant Markets and insufficient in others.

Unilateral price effects are "most apparent in a merger to monopoly in a relevant market."[30] Basic economic theory provides a robust and reliable inference that a merger to monopoly or near monopoly is likely to result in anticompetitive effects. A rational firm with little or no competitive constraints will set prices or choose output to maximize its profits; it can be expected that a rational firm acquiring such monopoly power will adjust prices and output accordingly. No further economic evidence is required to substantiate an enforcement action based upon likely unilateral price effects and to establish reason to believe a merger to monopoly or near monopoly is likely to violate Section 7 of the Clayton Act. This analysis applies to at least one of the Relevant Markets.

The analysis is necessarily more nuanced for theories falling within the second category of theories of unilateral price effects. These theories involve Relevant Markets where the proposed transaction would reduce the number of competitors from four to three or three to two, and the market share for the merged entity would not be large enough to infer it would have the power to raise market prices unilaterally. In these markets, particularized evidence is required to establish reason to believe the merged firm will gain unilateral pricing power. In many Relevant Markets, staff was successful in uncovering the required evidence. For example, in some Relevant Markets, there was evidence of a significant subset of customers for whom a sole market participant would be the only remaining acceptable supplier, due either to physical proximity or to some other preference rendering alternatives an unacceptable source of portland or slag cement. The Commission's example of ready-mix concrete producers,[31] a relevant subset of customers, is an illustrative example here. In some Relevant Markets, the evidence supports a finding that such customers would continue to find their vertically integrated rivals to be an unacceptable source of portland cement, even if the sole remaining vertically unintegrated portland cement producer raised its prices after the merger. In the Relevant Markets for which credible evidence of this type is available, I

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[30] MERGER GUIDELINES, *supra* note 13, § 6.

[31] *See* Statement of the Federal Trade Commission, *supra* note 11, at 2 n.5.

find it sufficient to create reason to believe the merger is likely to result in competitive harm. Several other Relevant Markets fall into this category.

In other Relevant Markets, the allegation that there will remain only one acceptable supplier for a significant subset of customers after the proposed transaction lacks evidentiary support. Specifically, in these markets, the record evidence does not indicate that a material number of customers view Holcim and Lafarge as closest supply alternatives or that they view other potential suppliers as unacceptable supply sources and would continue to do so in the face of a post-merger unilateral price increase.[32]

The final category of potential unilateral effects theories, like the second category, also involves Relevant Markets where the proposed transaction would reduce the number of competitors from four to three or three to two, but the post-merger market share would not be large enough to infer it would have the power to raise market prices unilaterally. However, unlike the second category, in these Relevant Markets, it is not customer preference that limits the number of available competitors to one. Rather, in these Relevant Markets, the proposed transaction is effectively a merger to monopoly or near monopoly because alternative suppliers would be unwilling or unable to compete with the merged entity in the face of a price increase. In some Relevant Markets, the investigation uncovered particularized evidence sufficient to establish a reason to believe such unilateral effects are likely, including evidence that other competitors are experiencing, or soon will experience, capacity constraints, rendering them unable or unwilling to compete for market share, or that other suppliers will not constrain the merged entity's prices. Several Relevant Markets fall into this third category.

Relevant Markets where the "reason to believe" standard is not satisfied lacked record evidence necessary to corroborate any of these three theories.[33] Indeed, with respect to the Relevant Markets for which I dissent from the Commission's decision, it is my view that the investigation failed to adduce particularized evidence to elevate the

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[32] The role of ready-mix customers in the competitive analysis is again illustrative. In some Relevant Markets the available evidence indicates there are some ready-mix customers that purchase from rivals and others that do not, but the totality of the evidence fails to establish the existence of a significant set of customers that view vertically integrated suppliers as unacceptable or would continue to do so in the face of a post-merger unilateral price increase.

[33] One other potentially plausible theory is that customers refuse to sole source their product, and therefore that two or more competitors are necessary to prevent post-merger unilateral effects. There is insufficient record evidence to indicate customers would be unwilling to switch from dual- to single-sourced supply in the event of a post-merger price increase.

anticipated likelihood of competitive effects from "possible" to "likely" under any of these theories. Without this necessary evidence, the only remaining factual basis upon which the Commission rests its decision is the fact that the merger will reduce the number of competitors from four to three or three to two. This is simply not enough evidence to support a reason to believe the proposed transaction will violate the Clayton Act in these Relevant Markets.

IV. Conclusion

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. A presumption that such reason to believe exists when a merger decreases in the number of competitors in a market to three or two is misguided. Additionally, when the Commission alleges coordinated or unilateral effects arising from a proposed transaction, this standard requires more than a mere counting of pre- and post-merger firms. In particular, reason to believe a proposed transaction is likely to result in coordinated effects requires evidence – absent from the record here – that the merger will *enhance* a market's vulnerability to coordinated pricing, and not just that it takes place in a market that is already concentrated. In the absence of such a particularized showing, the Commission's approach to coordinated effects here reduces to a strict structural presumption unsupported by modern economics and at odds with the *Merger Guidelines*.

Similarly, substantiating a unilateral effects theory requires particularized evidence – also absent from the record here in some Relevant Markets – that a merger will reduce or eliminate competitive constraints, permitting the merged entity to increase prices. Without such evidence, a unilateral effects theory reduces to little more than a complaint about market structure coupled with speculation about the circumstances under which unilateral effects might occur in a post-merger world. The *Merger Guidelines* contemplate a more rigorous analysis.

This is not to suggest the "reason to believe" standard requires access to every piece of relevant information and a full and complete economic analysis of a proposed transaction, regardless of whether the parties wish to propose divestitures before complying with a Second Request. Rather, the standard requires only evidence sufficient to establish that competitive harm is likely. Such evidence, although quite minimal – indeed, a handful of facts in most instances – is indeed available in some Relevant Markets in this matter, and it is in those markets that I concur with the Commission's decision. While I appreciate the practical complications of requesting additional information during the course of a merger investigation, as well as the desire to conduct efficient investigations, these important pragmatic considerations do not trump the Commission's primary obligation to collect evidence sufficient to establish reason to believe the merger will harm competition before issuing a complaint and accepting a consent.

For the reasons I explain above, I find reason to believe the proposed transaction is likely to result in unilateral price effects, and thus violate the Clayton Act, in the Twin Cities, Duluth, western Wisconsin, New Orleans, western Montana, Boston/Providence, the Mid-Atlantic region, and the western Great Lakes region. I conclude there is no reason to believe the proposed transaction will violate Section 7 in eastern Iowa, Memphis, Baton Rouge, Detroit, northern Michigan, and Grand Rapids; it follows that I believe the Commission should refrain from imposing a remedy in these markets.