

Interview with FTC Commissioner Pamela Jones Harbour



Pamela Jones Harbour

Editor's Note: In this interview with The Antitrust Source, Commissioner Pamela Jones Harbour discusses her broad-ranging interests and goals for her tenure on the Commission, including the role of the Commission and the courts in merger enforcement, analysis of innovation markets, enforcement of vertical restraints, and petroleum industry regulation. She also provides interesting insights into the staff and workings of the Commission.

Commissioner Harbour, an independent, was sworn in as a Commissioner of the Federal Trade Commission on August 4, 2003, to a term that expires in September 2009. She joined the Commission from Kaye Scholer LLP, where she served as a partner in the litigation department, handling antitrust matters, counseling clients on Internet privacy, e-commerce, consumer protection, and a variety of competition-related matters.

Prior to joining Kaye Scholer, Commissioner Harbour was a New York State Deputy Attorney General and Chief of the Office's 150-attorney Public Advocacy Division. During her 11-year term in the Attorney General's office, she argued before the U.S. Supreme Court on behalf of 35 states in *State Oil v. Khan*, a landmark price-fixing case, and also successfully represented numerous states, in *New York v. Reebok*, *States v. Keds*, and *States v. Mitsubishi*, each resulting in multimillion-dollar national consumer settlements.

The Antitrust Source conducted this interview on February 15, 2006.

—LISL DUNLOP

THE SOURCE: You have been at the Commission now for two-and-a-half years. What do you consider to be your greatest accomplishments over that period of time?

COMMISSIONER HARBOUR: Everything I do as a Commissioner is driven by a single guiding principle: that it is my job to protect consumers. They deserve the absolute highest quality of work from those appointed to serve their interests. I owe it to consumers to be extremely vigilant on their behalf, every time a new matter lands on my desk. I believe I have developed a reputation for taking a consumer-oriented perspective, and I am proud of that. Commission staff, the other Commissioners, and outside parties all know that I'm going to ask the bottom-line question—how does this affect consumers?—and hopefully they will be able to give me a good answer when I ask.

As a Commissioner, I enjoy the freedom to express my own views and stand by my convictions, coupled with the ability to say exactly what I think through concurring statements or dissenting statements. I am proud of the separate statements that I've issued—including *Genzyme*,¹ *KFCC*,² *Arch Coal*,³ and *Time Warner/Comcast*,⁴ to name a few. I've worked hard to craft meaningful statements that clearly identify the issues of greatest importance to me. I'm hopeful that my statements have provided useful and thought-provoking guidance to Commission staff as well as to outside parties.

¹ Available at <http://www.ftc.gov/os/2004/01/harbourgenzymestmt.pdf>.

² Available at <http://www.ftc.gov/os/caselist/0423033/040603statementharbour0423033.pdf>.

³ Available at <http://www.ftc.gov/os/adjpro/d9316/050613harbourstatement.pdf>.

⁴ Available at http://www.ftc.gov/os/closings/ftc/0510151twadelphialeibowitz_harbour.pdf.

I am also pleased with my ability, on occasion, to influence the Commission's agenda. As a non-majority Commissioner, I can't set the agency's agenda. I can, however, influence it—and I take that role seriously. As I go along during this interview, I'll probably think of some examples where I have been able to influence the agenda, so I will circle back to that in a moment or two.

On a personal note, I'm also proud of my relations with Commission staff. I truly believe that our staff is very talented and that they're the Commission's greatest asset. I do my best to treat them with respect and to let them know how much I value their opinions, even if I'm constantly pushing them to do more, and even though I sometimes disagree with their ultimate recommendations.

From a micro perspective, I am very proud of my work as the Compulsory Process Commissioner. I have been delegated authority by the Chairman to rule on behalf of the Commission on all petitions to quash or modify compulsory process, CIDs, or subpoenas that are issued to obtain information during our investigations. Sometimes these petitions appear to be little more than attempts to slow down an investigation. At other times, complex and difficult issues of fact, law, and policy need to be evaluated and balanced, in order to ensure that the Commission's investigations are effectively conducted without any unwarranted injury to equally important social values. I take great satisfaction in being able to provide this kind of guidance during our investigations, usually at an early and formative stage of the process. A recent example involving Exxon Mobil and the confidentiality of sensitive corporate information illustrates the type of issues that are sometimes addressed.⁵

Another area that I view as an accomplishment is the December 2004 peer-to-peer (P2P) workshop. This is an area where I believe I was successful in influencing the agenda, as I just mentioned. By way of background, P2P file-sharing technology allows individuals to share files, including music, video, or software applications. Because the files don't rest or reside in a central location, the P2P file-sharing technology allows for faster file transfer and conservation of bandwidth. Music industry executives were concerned that peer-to-peer file sharing might impede or destroy their business model, while on the other hand, P2P representatives were concerned that the industry might attempt to destroy this nascent technology due to concerns about copyright. Congress indicated that they were thinking of possible legislation in this area. I had identified this as an area in which the Commission should be more involved. In keeping with my desire to help shape the Commission's agenda, and also because I thought this would be an excellent application of the Commission's research and scholarship function, I advocated for some sort of workshop. The Commission ultimately held a two-day workshop and issued a report. I see this as an important area where consumer protection, competition, and intellectual property intersect; I think it's very important to nurture nascent technologies, while at the same time protecting IP rights.

One other area that I'm proud of is the result in the *Aloha* acquisition. At the direction of myself and Commissioner Leibowitz, the Commission voted to send staff into court to pursue a preliminary injunction to block a potentially anticompetitive merger. Staff ultimately negotiated a settlement that allowed the deal to go forward with conditions that are beneficial to consumers, which would not have happened otherwise.⁶

⁵ See Letter from Donald Clark, Secretary, FTC, to Exxon Mobil Corp. (Jan. 10, 2006), available at http://www.ftc.gov/os/quash/0510243/responsetoexxonmobilpetition_text.pdf.

⁶ See News Release, FTC, FTC Resolves Aloha Petroleum Litigation (Sept. 6, 2005), available at <http://www.ftc.gov/opa/2005/09/alohapetrol.htm>.

THE SOURCE: What have been your biggest surprises over your two-and-a-half years as a Commissioner?

HARBOUR: I have been surprised and quite pleased by the number of current and former staff members who have been at the Commission for 25, 30, or even more years. This includes staffers at all levels, from administrative staff all the way up through senior managers. Their vast knowledge and their institutional memory is invaluable to the Commission. A few people come to mind. At the staff level, a gentleman named Stan Harewood retired in January after 33 years of service. *FTC Watch* called him the “Dean of Information Specialists” because he was so effective as a consumer response specialist. Elaine Kolish recently left the Commission after being here for 25 years. For a number of years, she was the Associate Director of the Division of Enforcement in the Bureau of Consumer Protection. Rhett Krulla of Mergers II comes to mind; he recently retired after more than 30 years of service. Ann Malester, the former Assistant Director of the Mergers I shop, also comes to mind; she was here for more than 20 years. So what surprised me is how long talented employees stay at the Commission and how devoted they are to the agency.

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THE SOURCE: What are your short-term and long-term goals as a Commissioner and how have they changed since you’ve been there?

HARBOUR: In the short term, I will continue to take a principled, substantive approach to the law. In each matter we address, as I see it, the Commission has two choices. One would be to enforce and promote the law as it currently stands; the other would be to use the tools available to us to push the law to evolve in a way that will better address the current realities of the marketplace. As always, I will continue to ask how each recommended course of action ultimately will affect consumers. Also, the Commission currently has several fascinating Part 3 matters on its agenda, and I look forward to working with my colleagues to resolve these cases by issuing thoughtful, well-written opinions.

As a long-term goal on the competition side, I will continue to advocate for the Commission to develop and bring vertical cases, where appropriate. Smoothly operating channels of distribution are very important to our economy. We know that vertical restraints may be procompetitive or anti-competitive, and this depends on numerous factors. It also depends on a complex analysis of interrelationships and incentives among various distribution channel participants. There is a need for more empirical research in this area.

The current state of empirical research makes it more difficult to distinguish procompetitive from anticompetitive vertical restraints. I strongly suspect that distribution channel participants’ incentives and interests conflict and clash to a far greater extent than most of the economic models predict or account for. There appear to be strongly held views by economists on both sides of this issue, but little effort has been directed toward finding empirically valid resolutions. I have repeatedly called upon antitrust scholars, both lawyers and economists, to take the time and invest the resources and the efforts necessary to shed more light on these important issues. There are credible economists on both sides of the debate making conflicting claims. On one side there’s concern at the prospect of too much enforcement and on the other side there’s concern at the risk of too little.

I tend to identify with the “too little” side of the debate, but I make no prediction about which side is more likely to find empirical validation if the inquiry is done in a rigorous manner. I would prefer to be able to make enforcement decisions that are solidly grounded in an informed under-

standing of the probable consequences of taking or not taking an enforcement action. What I don't want to see is enforcement decisions being made just because we are afraid of what we don't know, especially if nothing is being done to make us better informed. As I said earlier, I will continue to advocate for the Commission to develop and bring vertical cases where appropriate. I believe that the Commission would further enhance its ability to distinguish between procompetitive and anticompetitive vertical restraints if we were to conduct more investigations, closely analyze more vertical restraints, and bring cases when we believe there is a risk of anticompetitive harm. By taking no enforcement actions at all against vertical restraints, we send a message to the marketplace that all vertical practices are legal, even though some are anticompetitive.

I would like the Commission to develop more cases that will flesh out the application of the [1992 FTC/DOJ] Horizontal Merger Guidelines in cases involving pure innovation markets.

Another long-term goal I would like to pursue would be to develop policies related to the antitrust implications of standard setting. During my term I have become increasingly interested in the issue of standard setting in high-technology industries. Due to a pending Part 3 matter, I can't say very much about this. But the Commission was very deeply involved in the joint FTC/DOJ intellectual property hearings that took place over 24 days back in 2002,⁷ and then in 2003 the Commission issued a detailed report that discussed many of the findings from those earlier hearings.⁸ The Commission has amassed a great deal of expertise on issues relating to the intersection of antitrust and intellectual property law; in particular, we have individuals at the Commission who have done a lot of studying and a lot of thinking about standard-setting issues. I'm hopeful that we will find a way to convey some of that knowledge to the outside world, especially to those who have to make day-to-day decisions in fast-paced, high-technology industries.

Another long-term goal that I want to mention is that I would like the Commission to develop more cases that will flesh out the application of the [1992 FTC/DOJ] Horizontal Merger Guidelines⁹ in cases involving pure innovation markets. I raised this issue in my separate *Genzyme* statement.¹⁰

Another area of interest is the federal/state relationship. As a former state enforcer, I am constantly on the lookout for ways to further enhance the relationship between state and federal enforcers, especially with respect to industries that matter most to consumers. One example is a joint federal/state petroleum seminar that I am currently working to organize. At the recent ABA Antitrust Section Mid-Winter Meeting in Canada, I found myself sitting around the fireplace with two long-time colleagues: my fellow Commissioner, Bill Kovacic; and Bob Hubbard from the New York AG's office, who currently serves as the Chair of the NAAG Antitrust Task Force. We came up with the idea for a joint federal/state seminar on petroleum issues. We quickly expressed our ideas to Chairman Majoras, and she shared our interest. Planning is now underway and we are hopeful that that seminar will take place in the fall of 2006. I will continue to look for additional areas for federal/state cooperation, including joint training programs and greater case coordination.

Not to leave out the other side of our mission—consumer protection—as a long-term goal I am very interested in the area of privacy. One of the first speeches I gave as a Commissioner was on the subject of identity theft. I've paid very close attention to privacy issues throughout my term,

⁷ Federal Trade Comm'n & U.S. Dep't of Justice, Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (Feb. 6–Nov. 6, 2002), available at <http://www.ftc.gov/opp/intellect/index.htm>.

⁸ See News Release, FTC, FTC Issues Report on How to Promote Innovation Through Balancing Competition with Patent Law and Policy (Oct. 28, 2003), available at <http://www.ftc.gov/opa/2003/10/cpreport.htm>.

⁹ U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997) [Guidelines], available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

¹⁰ See *supra* note 1.

and I will continue to make that a top priority. Also on the consumer protection side, I would be interested in developing more national advertising cases against well-known advertisers, when appropriate. During my term thus far, the Commission has brought cases against two well-known advertisers who made unsubstantiated express health claims for their products. One of the claims was that eating fried chicken is healthy,¹¹ and another was that drinking two glasses of orange juice each day can cause specific reductions in cholesterol and blood pressure.¹² I would like to see the Commission staff look carefully to determine whether we should bring more of these cases, especially if deceptive health claims are involved. I know when Commissioner Rosch was Director of the Bureau of Consumer Protection, the Commission brought a number of significant national advertising cases involving large, nationally known companies.

Another area of interest I just want to touch on is media violence. As a parent, I am particularly concerned about issues that affect our children. Congress had asked the Commission to issue a number of reports on whether the motion picture industry, the music recording industry, and the electronic gaming industry are marketing violent entertainment to children. Our latest report was issued in the summer of 2004.¹³ While progress has been made, the Commission found that, unfortunately, all three of these industries continue to advertise violent R-rated movies, explicit content-labeled recordings, and mature-rated games in media with large teen audiences. Over the past couple of years, I've met with members of these industries. Some of them are committed to changing their practices and making them better, but I would like to continue to encourage the industry to change these practices.

THE SOURCE: Have any of your goals, short or long term, evolved during your two-and-a-half years at the Commission?

HARBOUR: I would say that during the first two years of my term I was more of a generalist. As I became more acquainted with our statutes, our cases, and our policies, as well as the capabilities and resources at the agency, my interests have become more focused, and would tend to track the long-term goals that I just articulated.

THE SOURCE: There have been a number of changes at the Commission during your two-and-a-half years there. There was a new Chairman and a Commissioner appointed in 2004. Commissioner Leary and Commissioner Swindle left in 2005, and Commissioners Kovacic and Rosch have recently been appointed. What do you see as the impact of these changes at the Commission?

HARBOUR: I believe that each Commissioner who has served during my term has left his or her own indelible mark on the Commission. Since you've asked me this, I'm not going to be able to leave out anyone who has served with me, so I'm going to start with Tim Muris. He will be forever known as the creator and proponent of the Do-Not-Call Registry, ridding us of those pesky and intrusive

¹¹ See News Release, FTC, KFC's Claims that Fried Chicken Is a Way to "Eat Better" Don't Fly (June 3, 2004), available at <http://www.ftc.gov/opa/2004/06/kfccorp.htm>.

¹² See News Release, FTC, FTC Puts The Squeeze on Tropicana's Orange Juice Claims (June 2, 2005), available at <http://www.ftc.gov/opa/2005/06/tropicana.htm>.

¹³ FEDERAL TRADE COMMISSION, MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A FOURTH FOLLOW-UP REVIEW OF INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES (2004), available at <http://www.ftc.gov/os/2004/07/040708kidsviolencrpt.pdf>.

telemarketing calls during dinner and other inconvenient times. I believe the Registry to date has more than 110 million registrants. Tim jokes that “Do Not Call” will be the epitaph on his tombstone, and he’s probably right about that. On the antitrust front, one of the most important aspects of Tim’s legacy, I think, will be the number of Part 3 cases that were litigated during his term, as well as the number of important Part 3 opinions that the Commission generated. I think it’s important to get more cases up to appellate judges so we can shape and clarify the law.

Mozelle Thompson’s mark was his leadership role in the OECD, where he served as head of the U.S. delegation on consumer policy and helped spearhead the adoption of the OECD consumer protection guidelines for e-commerce.

Orson Swindle left the Commission having created a culture of security with respect to information systems. His legacy is that good security practices helped build consumer trust and create consumer confidence. Also, as the only non-lawyer on the Commission, Orson brought a certain common sense approach to our deliberations, which I very much appreciated. He had a way of cutting to the chase and honing in on key issues, especially when it came to asking the fundamental question about how a practice will affect consumers.

Tom Leary’s legacy is simply being Tom Leary. He was the model and quintessential Commissioner, beloved by all, inside and outside of the FTC. To date, I believe that he is the most cited Commissioner for his many articles, speeches, legal insights, and witticisms. He was also part of an historic FTC/DOJ delegation that traveled to China to share U.S. competition law with Chinese officials who were, at the time, working on their own law.

Chairman Majoras brings to the Commission a diverse and well-rounded set of skills. I appreciate her intellect and her highly ethical approach to her work. She is the only FTC Chairman who has served as an official at both of the federal antitrust agencies. I believe that her litigation skills and background in both the government and in private practice will become a critical part of her legacy as Chairman. She has observed some of the recent FTC and DOJ losses in litigated cases—and when we bring cases she wants to win them. She is instilling a litigation mindset from the outset of every investigation. From day one, staff are encouraged to think about how they would frame the issues for a judge and what types of evidence they would need to present. No doubt, this will lead to better enforcement recommendations to the Commission, as well as better litigation outcomes when we do authorize staff to bring challenges. The Chairman has announced some of her major projects, which should further enhance the Commission’s reputation and effectiveness. Some of these initiatives include reviewing and improving the merger review process; issuing an in-depth commentary on the Guidelines, holding a series of joint FTC/DOJ public hearings on single-firm conduct that might raise antitrust concerns; and a brand-new consumer protection initiative, which the Chairman announced recently, which will be a set of hearings on the ways new technologies, convergence, and globalization of commerce impact consumer protection.

Jonathan Leibowitz has an excellent ability to spot issues that affect competition and are important to consumers. He has been instrumental in influencing the Commission to focus on the issue of authorized generics and to seek greater use of its civil penalty authority. Jonathan is also a true Washington insider in the best sense of the term. He understands the interplay of our various constituencies. He has excellent lines of communication with people on the Hill and various interest groups. This no doubt will help the Commission to be better-educated and more responsive to concerns and problems within our jurisdiction.

As for Bill Kovacic and Tom Rosch’s recent appointments, we all expect great things from them both. Bill, as we know, was a renowned law professor at George Washington University (and George Mason before that). He was the FTC’s highly regarded General Counsel from 2001

through 2004. He worked in the agency's Bureau of Competition planning office in the late '70s and early '80s.

Tom Rosch has a national reputation and is highly regarded for his antitrust expertise. He has more than 40 years of practice before the Bar and has led more than 100 federal and state antitrust cases. He was also the director of the agency's Consumer Protection Bureau in the late 1970s.

We all look forward to Bill's and Tom's ideas, their energy, enthusiasm, and intellect. I will say that their vast substantive knowledge in various areas of antitrust, consumer protection, and international antitrust law not only will be a tremendous asset to the Commission but also a tremendous asset to me as their colleague. It is also just plain fun to be on a Commission of this caliber. It is already apparent that the level of discourse and debate will be absolutely top-notch, and I feel privileged to be a part of it.

THE SOURCE: You previously mentioned your dissenting statements in *Genzyme* and *Arch Coal*, as well as in the *KFCC* consumer protection matter. What in your view are the role and importance of dissenting statements?

HARBOUR: Dissenting statements can provide notice to the particular company or companies involved in the case. For example, a dissent could let them know that I might have wanted a stronger remedy. Dissents can also send signals to various groups that I might prefer stronger relief in future cases. This includes the other Commissioners, Commission staff, and sometimes even other agencies, as well as the private bar, other industry participants, and companies in general. And sometimes a dissent can be used to begin or continue a debate about the propriety of a particular remedy or policy decision. The *Genzyme* dissent was a good example. My goal was to tee up some of the key issues relating to the analysis of competitive effects and innovation markets. The *Arch* dissent was intended to do the same thing with respect to coordinated interaction.

THE SOURCE: Let's turn for just a minute to federal/state antitrust enforcement. You previously mentioned your long experience with the New York State Attorney General's office. What do you see as the appropriate role of state antitrust enforcement?

HARBOUR: I have always been a strong believer in the concept of federalism. As I've said in my speeches, I view federalism as a system where state and federal governments each strive to protect the interests of their joint constituents. When Congress passed the Sherman Act in 1890, the intent was to supplement state enforcement, not supplant it. So to me federalism means more, much more, than just redundant state and federal law enforcement resources. It implies an elaborate system of checks and balances—which is just as important to our country as are the horizontal checks among the three branches of the federal government, particularly in the context of antitrust enforcement. The more individuals or agencies looking out for consumers's interests, in my view, the better.

THE SOURCE: What lessons have you taken from your many years as a state enforcer that you apply now in your role as a federal enforcer?

HARBOUR: My years as a state enforcer have given me key lessons. One that has stayed with me, and which very much influences my attitude as a Commissioner, is that all antitrust enforcement

agencies have one primary goal: to protect consumer welfare by ensuring that consumers have choices in the marketplace, as well as the ability to make informed market decisions. The other lesson is that cooperation between law enforcement agencies, either state/state or federal/state, normally produces better outcomes for consumers.

THE SOURCE: Let's turn for a minute to merger enforcement. What are your views on judicial review of mergers in a preliminary injunction context?

HARBOUR: There are many extremely intelligent and competent federal district court judges who have never tried an antitrust case before, and while I certainly would not say that antitrust is rocket science, I will say it can take awhile for judges to get up to speed, especially with respect to the nuances of merger analysis. I think the challenge for us at the federal level is to educate the judge about what the antitrust laws require us to prove, and with what degree of certainty, and to present a convincing story of why our facts are worthy of a preliminary injunction—with the emphasis on preliminary, so that we can bring the case back in-house and conduct a very detailed Part 3 adjudication. This can be difficult at times, especially with judges who are not steeped in antitrust jurisprudence. Federal court oversight is a very important part of the checks and balances system that I mentioned earlier. It is important for more antitrust cases to work their way through the federal courts because that is an important way to shape and clarify the law. Ideally this would happen by way of the Commission developing more Part 3 records and decisions that would then be reviewed by appellate courts. Evolving case law not only shapes our future enforcement decisions, but also provides important guidance for businesses.

THE SOURCE: Do you think that there should be more deference by the courts to the Commission on a preliminary injunction hearing?

HARBOUR: The short answer is yes, in many cases, but obviously there's more to it than that, particularly with judges who are less familiar with antitrust. I think we can too easily get hung up on the incipiency standard of Section 7. A judge, of course, does not want to block a transaction absent compelling evidence of competitive harm. But at the PI stage, under Section 7, the enforcement agencies are not required to prove that harm *will* occur, only that the transaction *may* substantially lessen competition. This is especially true for Commission cases, where our primary goal is to preserve the status quo ante while the case is in Part 3. We need to do a better job of explaining the "will" versus "may" distinction to the judges.

THE SOURCE: Your dissenting statement in *Arch Coal* suggested that you believe the Commission should be more ready to pursue administrative actions when a preliminary injunction is not granted by the courts. What remedies do you think will be appropriate in that context?

HARBOUR: I think there are two related questions that need to be addressed. First, is it appropriate to pursue administrative action when a court has denied a preliminary injunction? Second, if the case goes into Part 3, what remedies might the Commission seek?

As my *Arch* statement indicated, I think the answer to the first question is: yes, under some very limited circumstances, it may make sense for the Commission to pursue a Part 3 case after denial of a PI. Some might argue that this gives the Commission a proverbial second bite at the apple. I disagree. A PI proceeding is quite different from a Part 3 adjudication. It sometimes may be in

the best interest of consumers for the Commission to pursue a Part 3 case, to bring its unique expertise to bear. In *Arch*, I firmly believe that the courts did not fully understand what the law required us to establish in order to demonstrate a likelihood of coordinated effects. This was evidenced by the fact that the district court characterized our coordinated effects theory as novel. This error was later corrected by the appeals court. It also appears that the district court certainly, and the appeals court possibly, held us to a higher standard of proof than was appropriate in the PI context. For example, the district court judge faulted the Commission for failing to *prove* that coordination already had occurred. This is not the proper approach for an incipency analysis. In a full-blown Part 3 proceeding, the Commission could have done a great deal to further the development of the law of coordinated effects. We are expert antitrust fact-finders and adjudicators. The Part 3 process is designed to create an extensive factual record, far more substantial than the record in the PI proceedings. And even with respect to the facts that the district court did consider, we might have weighed them differently in light of a more complete record. We would have had an opportunity to clarify the law relating to coordinated effects, in an area where there is not much guidance.

Customer testimony is still useful in making enforcement decisions, even though the two trial court judges in

As to remedy, this is an extremely case-specific issue. In any given case, the Commission has a full panoply of remedies available to us. This includes Part 3 cases, where we can seek virtually any remedy other than money. But because we never had the opportunity to conduct a full trial on the merits, I'm unable to speculate on what remedy might have been appropriate in *Arch*.

Arch Coal and

THE SOURCE: Your dissenting statement in *Arch Coal* also was critical of the limited weight that the court gave to customer testimony concerning competitive effects, while at the same time relying on the customer testimony for assistance with market definition. What impact, if any, has this, as well as the *Oracle* decision for the Department of Justice, had on the Commission's reliance on customer testimony in making its enforcement decisions?

Oracle/PeopleSoft

chose to disregard it or

to use it inconsistently.

HARBOUR: I will provide my personal views here, but I believe that my views are entirely consistent with views that have been expressed by the Chairman and other Commissioners. These views are set forth in several speeches by Chairman Majoras,¹⁴ in the Commission opinion in *Chicago Bridge & Iron*¹⁵ and in the *Arch*¹⁶ majority statement, which was equally critical of the court's treatment of customer testimony. Customer testimony is still useful in making enforcement decisions, even though the two trial court judges in *Arch Coal* and *Oracle/PeopleSoft* chose to disregard it or to use it inconsistently. Customers are an invaluable source of information regarding a variety of merger issues, including competitive effects. Customers have the most to lose if competition is harmed. They have little incentive to provide misleading information as opposed, for example, to competitors. Customer testimony does, however, have its evidentiary limits. As someone charged with making enforcement decisions, I must assess how effectively I believe the testimony can be presented at trial. But at the end of the day, I must make the same assessment with respect to a whole range of different types of evidence—and in that respect, customer testimony is no different.

¹⁴ See, e.g., Deborah Platt Majoras, Recent Actions at the Federal Trade Commission, Remarks Before the Dallas Bar Association's Antitrust and Trade Regulation Section (Jan. 18, 2005), available at <http://www.ftc.gov/speeches/majoras/050126recentactions.pdf>.

¹⁵ Available at <http://www.ftc.gov/os/adjpro/d9300/050106opinionpublicrecordversion9300.pdf>.

¹⁶ Available at <http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf>.

THE SOURCE: Let's return for a second to your comment about the *Genzyme* case and innovation markets. In your dissenting statement in the *Genzyme* case,¹⁷ you stated that mergers to monopoly in innovation markets should be presumptively anticompetitive, which would be rebuttable with evidence of efficiencies. Can you explain what you meant by that in more detail?

HARBOUR: The *Genzyme/Novazyme* case was one of the first major cases that crossed my desk after I arrived at the Commission. It involved a merger to monopoly between the only two companies pursuing a cure for a very rare genetic disorder. The case raised fundamental questions regarding the analysis of innovation markets and the concept of innovation competition. The deal already had been consummated, which added another interesting twist. Because the investigation already was in its final stages when I joined the Commission, I decided not to participate in the vote, so my statement was not a dissent.

Even though I wasn't participating, I thought it would be useful to explain my thinking about these critical issues. I concluded that a balanced approach to innovation markets is warranted. When all competition in an innovation market has been eliminated, I believe there should be a presumption of anticompetitive effects. There is strong reason to believe that competition is vital to continued innovation. I believe that the analytical framework of the Guidelines generally is appropriate for innovation markets. The Guidelines do condemn mergers to monopoly, and the merging parties do not get a free pass just because it's an innovation market.

But even in the merger to monopoly context, the presumption of anticompetitive effects should be rebuttable when analyzing an innovation market. The Guidelines cannot be applied mechanically in any market, and this is particularly true in innovation markets, where the traditional economic assumptions that underlie the Guidelines may or may not apply. What I'm trying to say is, currently empirical evidence and economic analysis don't conclusively demonstrate a causal link between increased concentration and decreased competition. Therefore, in my view, I believe the presumption may be rebutted if (and I'm about to quote from the efficiencies section of the Guidelines) "the merging parties can prove cognizable merger specific efficiencies of such a character and magnitude that the merger is not likely to be anticompetitive."¹⁸ I have not yet been presented with another pure innovation market case, but I hope that I get the chance to consider these issues again during the remainder of my term.

THE SOURCE: Let's turn to merger process for a second. At the Antitrust Modernization Commission hearings, a number of practitioners have noted certain areas for improvement in the HSR process, including, for example, more certainty in the interagency clearance process, more transparency and accountability in the HSR process, and a more efficient and focused second request process, to name three areas. Do you see the need for improvement in the HSR process and do you see the Commission addressing that already in certain respects?

HARBOUR: Let me step back and take the three areas you named, one at a time, and I'll comment on those.

As for the need for certainty in interagency clearance, call me a skeptic, but I do not believe that any tweaks to the clearance agreement will ever solve all of the clearance issues. By way of

¹⁷ See *supra* note 1.

¹⁸ Guidelines § 4.

background, I believe that the Commission and the DOJ Antitrust Division have complementary strengths and areas of expertise. Consumers are better off when both agencies are vigilant in protecting competition, and this is exactly what Congress intended. Very interesting cases tend to arise in so called convergence markets. These cases usually involve new or rapidly changing markets that emerge from the intersection of different technologies: for example, telephony, coaxial cable, or the Internet. In these areas, both agencies legitimately may have prior expertise, but it is not always easy to predict which agency's expertise will be more relevant as the technology evolves. So, not surprisingly, these are the types of cases where clearance is most likely to be disputed. It is important to realize, though, that disputes arise with respect to a very small percentage of cases. And from an analytical perspective a clearance dispute really forces both agencies to think carefully, at an extremely early stage of the investigation, about potential theories of competitive harm. One might argue that once clearance has been resolved, the staff is in a better position to conduct a focused and efficient investigation.

As for the need for

certainty in interagency

clearance, call me a

skeptic, but I do not

believe that any

tweaks to the clearance

agreement will ever

solve all of the

clearance issues.

I think you also mentioned the need for transparency in the system, and I'll comment on that for a moment. I think that the Commission has been sufficiently transparent over the last decade or so, due to some of the following things: the transparency of the 1992 Merger Guidelines that were revised in 1997 to provide more information relating to the analysis of efficiencies; speeches by various agency managers; statements by Commissioners; the release of merger challenge data by the Commission and DOJ back in December 2003, and then the release of additional merger challenge data by the Commission in February and November 2004; more frequent issuance of closing statements that explain our analytical approach, even in cases we ultimately choose not to bring; and the recent announcement of the commentary on the Merger Guidelines. So I do think that the Commission has been quite transparent.

In relation to the second request process, I am aware that certain segments of the antitrust bar feel very strongly that the second request process should be revised to reduce the burden on private parties and cut down on the length of merger investigations. I am also aware that parties are very troubled by the cost and burden of second request compliance. It is worth noting that the Commission itself also has an interest in improving the efficiency of the second request process. In this electronic era, even a medium sized merger investigation for example, can generate many thousands and thousands of pages of e-mails, PowerPoints, and other documents for staff to review. The increased availability of electronic data often allows our economists to conduct sophisticated econometric analyses, which can be quite useful, but also take more time to design and verify. Given our limited resources and the pressures of the HSR timetable, properly focused investigations are more likely to serve the public interest.

Having said all of that, however, there is only so far we can go in reducing the real or perceived burden on merging parties. The Commission has an obligation to conduct a thorough review of each potentially problematic transaction. We need to collect sufficient information to reach an informed decision. The Commission cannot rely on staff recommendations if staff feels that access to important information has been compromised. I imagine that the Chairman's merger process review initiative is addressing precisely these types of concerns, and I expect that the Chairman's initiative will result in tangible process improvements.¹⁹ However, the Commission still must be able to perform its merger oversight function to the best of our ability.

¹⁹ See News Release, FTC, FTC Chairman Announces Merger Review Process Reforms (Feb. 16, 2006), available at http://www.ftc.gov/opa/2006/02/merger_process.htm.

THE SOURCE: Let's turn for a few moments to non-merger enforcement. In one of your earlier comments, you mentioned that vertical restraints and the development of a better understanding of the anticompetitive and competitive effects was in fact a long-term goal of yours. Do you think that the FTC should give greater attention to vertical restraints enforcement?

HARBOUR: I addressed this during my confirmation process and I will say it again—yes. The Commission should be doing more to investigate and, when warranted, prosecute vertical restraints. When I was in state government, a good part of my antitrust work involved prosecuting violations of the law relating to vertical restraints. My experience in this area taught me that some vertical restraints clearly can cause consumer harm. The harm to consumers from vertical restraints is just as clear as with horizontal restraints, upon which the federal agencies have focused almost exclusively. The Commission is not doing enough in this area. This inactivity is not justified by any lack of potentially unlawful vertical conduct in the marketplace. Nor is it sufficient to say that private or state enforcement is adequate to protect consumers. Yes, the states traditionally have taken a leading role in the vertical area, but consumers deserve an active Commission as well, because this is an important area of antitrust enforcement.

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THE SOURCE: Do you think that there are any particular industries that are in need of review? Do you see vertical restraints as a particular concern in any specific industries?

HARBOUR: I am not really able to answer meaningfully because it would divulge confidential information, but I will say this: For many years I've been a faculty member of the annual ALI-ABA Product Distribution and Marketing program. I used to provide the state perspective on vertical restraints and, now that I'm a Commissioner, I provide the federal perspective, such as it is. And every year since I became a Commissioner, I have ended my ALI-ABA presentation with a statement to the following effect: on the federal side of next year's ledger, I hope to see cutting-edge initiatives that clarify the law and impose appropriate remedies. So beyond that, I really cannot say much more regarding any non-public cases or initiatives that may be underway at the Commission. But I will say this: As one Commissioner, I have a limited ability to influence the Commission to bring more vertical cases, but if it were up to me to bring the next generation of vertical cases, I would be looking for situations where there are conflicting interests and conflicting incentives within distribution channels. For example, any area where there has been substantial investment in bricks and mortar distribution outlets, and where there are emerging Internet sale options, would be an area that I would focus on.

THE SOURCE: You abstained from voting to approve the release of a Bureau of Economics report on petroleum industry mergers in August 2004²⁰ because you wanted to see a more comprehensive study of reasons for skyrocketing gas prices. This also is a hot-button issue for Congress, as seen in the confirmation proceedings for Chairman Majoras in 2004. What is being done at the Commission on this issue? What is the timing for release of additional reports?

HARBOUR: Those are complicated questions. Let me start with the first question, the easiest one.

²⁰ See News Release, FTC, FTC Issues Staff Report on "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement" (Aug. 13, 2004), available at <http://www.ftc.gov/opa/2004/08/oilmergersrpt.htm>.

I abstained from voting on the Petroleum Mergers Report because I took issue with the timing of its release. At the time, the Commission also was in the process of drafting another report, the Price Factors Report.²¹ I wanted both reports to be issued simultaneously because I wanted the Commission to be responsive to the issues that consumers cared most about. I was listening carefully to the concerns being expressed most loudly at that time—and I thought the information in the Price Factors Report would be viewed as more relevant and informative.

The Price Factors Report has since been issued. It analyzes the full panoply of market forces that can lead to fluctuations in the prices we pay at the pump. As the report explains, it mostly comes down to the most basic economic principles of supply and demand. Gasoline is made from crude oil. U.S. refiners compete with refiners all around the world to obtain crude. Therefore, the world price of crude has a major impact on the cost to produce gasoline. Most of the world's crude, of course, is controlled by OPEC. OPEC production levels vary over time, which means that world prices do, too. On the demand side, both national and international demand for crude oil and refined petroleum products is on the rise. Our domestic consumption goes up each year. And then there's the fact that rapidly industrializing nations, such as China and India, are consuming more and more crude oil. Assuming a relatively constant supply, increased demand can be expected to lead to higher prices over time. And then there are other factors at work, as the report explains. Various federal, state, and local regulations influence the price of gasoline, such as clean fuel and boutique fuel requirements. And supply disruptions and restrictions—such as the ones we saw in the wake of the hurricanes last year—also can dramatically influence price.

As you said, it's a hot-button issue, so the Commission has been quite vigilant in this area. We look closely at all merger activity in the petroleum industry. We have called for divestitures in many transactions where we thought anticompetitive price increases were likely. We have also taken enforcement actions against nonmerger conduct that threatened to harm consumers, such as in the *Unocal*²² matter.

We are now engaged in a substantial investigation of the petroleum industry as a whole. The Energy Policy Act of 2005 requires the Commission to conduct an investigation and, I quote, "to determine if the price of gasoline is being artificially manipulated by reducing refinery capacity or by any other form of market manipulation or price gouging practices." Our 2006 Congressional appropriations statute also requires us to investigate possible price gouging in the wake of Hurricane Katrina. So, the Commission has issued CIDs to many companies, and we are also collecting and analyzing data from other sources, and the Commission expects to issue a report of its findings sometime this spring. Of course, we also have all of the data generated through our gas price monitoring project, which has been underway since May 2002.²³ We track daily retail gasoline and diesel prices in 360 cities, as well as wholesale prices in 20 major urban areas. Our economists have developed an econometric model to help ferret out potential pricing anomalies that cannot be explained by market-driven causes, like a broken pipeline or a refinery fire. And we also get occasional tips from other federal and state agencies. If there appears to be no

²¹ See News Release, FTC, FTC Releases Report on "Gasoline Price Changes: The Dynamic of Supply, Demand, and Competition" (July 5, 2005), available at <http://www.ftc.gov/opa/2005/07/gaspricefactor.htm>.

²² See News Release, FTC, Dual Consent Orders Resolve Competitive Concerns About Chevron's \$18 Billion Purchase of Unocal, FTC's 2003 Complaint Against Unocal (June 10, 2005), available at <http://www.ftc.gov/opa/2005/06/chevronunocal.htm>.

²³ See News Release, FTC, FTC Chairman Opens Public Conference Citing New Model to Identify and Track Gasoline Price Spikes, Upcoming Reports (May 8, 2002), available at <http://www.ftc.gov/opa/2002/05/gcr.htm>.

market-based explanation for a pricing anomaly, it may be cause for either the Commission or an appropriate state attorney general to open an investigation.

THE SOURCE: Do you think price-gouging legislation is necessary or desirable?

HARBOUR: I have been doing some thinking about that issue lately. At the federal level, my answer is probably no, but that requires some explanation. We have to recognize that the price-gouging debate barely scratches the surface of energy policy in this country. The United States clearly has some energy problems; we face major challenges in sustaining a viable, long-term balance between supply and demand. There are environmental problems, engineering problems, lifestyle issues—it is all-encompassing. But most of these problems are not antitrust problems. So the first thing we have to accept is that, even assuming vigorous enforcement of the antitrust laws, antitrust cannot fix all of these problems.

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But having said that, I can understand why so many people ask whether price-gouging statutes can fix some small part of the problem. I tend to believe that federal price-gouging legislation is not necessary. My views are informed in large part by my experience in the New York AG's office. I realize that many states have price-gouging statutes and routinely enforce them. However, these statutes tend to be based on a broad public interest standard, which covers far more territory than the antitrust laws. For example, some of the state price-gouging laws may be directed against perceived market opportunism, rather than legitimate market failures. The unfortunate truth is, sometimes the market needs higher prices to bring supply and demand back into balance. I realize this is not a popular view, and sometimes it is hard for me to accept it. But it is Economics 101.

I read a recent economics article that suggested a market-based argument that could be made in favor of price-gouging statutes, under limited circumstances.²⁴ The article suggested that localized market failures might occur in areas where a natural or man-made disaster causes physical damage to the infrastructure. That is an excellent example of a situation where the states would be uniquely well-suited to identify and respond appropriately to localized harm. But even under these circumstances, it would be hard to convince me that a national solution is needed.

But going back to my original mantra—I am here to protect the interests of consumers. The Commission has been vigilant in the petroleum industry, and I, personally, am doing my best to remain vigilant. If there are principled antitrust or consumer protection approaches out there that the Commission is not pursuing, or that we should be pursuing more vigorously, I would love to hear about them.

THE SOURCE: You previously mentioned the announced joint FTC/DOJ single-firm conduct hearings. Are there particular areas or issues that are of particular interest to you?

HARBOUR: Yes, fleshing out certain issues with respect to Section 2 is another area of interest. Many issues relating to Section 2 are unsettled and thus controversial. One example is the development of competing tests to determine whether conduct is exclusionary. On the one hand, you have people who believe that exclusionary conduct should be assessed in accordance with the so-called profit sacrifice or no-business-justification test. One example would be Greg Werden at

²⁴ Geoffrey Christopher Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KENTUCKY L.J. (forthcoming), available at <http://ssrn.com/abstract=800745>.

the DOJ, the proponent of the “no economic sense” test. Others are more comfortable with the sort of balancing test that was used by the D.C. Circuit in *Microsoft*. These are hot issues even beyond our own borders. For example, the EU currently is involved in a robust debate over how it should analyze abuse of dominance. The EU approach in fact may diverge from the U.S. approach in fundamental ways. In order to be fully successful, I believe that our upcoming Section 2 hearings must account for this diversity of viewpoints. It is very important that the agenda and the list of speakers be formulated in a balanced manner to ensure that all points of view are adequately presented. I am confident that the forthcoming Federal Register notice of these hearings will trigger a process that ultimately brings all of these differences to light. If anyone has suggestions for speakers or topics or would like to submit a written comment, I would encourage them to get involved in this important debate.

THE SOURCE: When are those hearings scheduled for?

HARBOUR: There is not a specific date yet. The next event will be a Federal Register notice soliciting comment.

THE SOURCE: Let’s turn for a second to antitrust remedies. We understand from your dissenting statement in the *KFCC* matter that you take an aggressive stand on antitrust remedies for violators.²⁵ Have there been any further opportunities to seek disgorgement of profits in consumer protection or other cases?

HARBOUR: *KFCC* actually involved a consumer protection issue. The FTC alleged that the company deceptively advertised its fried chicken as being compatible with low carbohydrate weight loss programs, among other things. The Commission does seek disgorgement of profits in a number of consumer protection cases, particularly when consumer redress might not be an appropriate measure of consumer harm, and where the alleged harm does not include a rule violation, which would then allow DOJ to seek a civil penalty. In certain national advertising cases against well known advertisers, it may be particularly hard to calculate either consumer redress or disgorgement. The Commission did not require a monetary component in 2005 when it settled the complaint against Tropicana. The agency alleged that Tropicana misled consumers with claims that drinking two and three glasses a day of its healthy heart orange juice would produce dramatic effects on blood pressure and cholesterol.

I have been encouraging staff to actively look to see what matters might benefit from a consumer education remedy. In August 2005, the Commission announced that Consumerinfo.com settled charges with us that it deceptively marketed free credit reports. The settlement required, among other things, the company to pay redress to deceived consumers. It also required the defendants to give up \$950,000 in ill-gotten gains. In this case monies may be used to provide consumer education. Staff knows that I am extremely interested in returning money, whenever possible, to consumers who have been harmed. And if returning money is not possible, then I am in favor of using targeted consumer education so that these consumers won’t be duped again in the future.

THE SOURCE: Your public statements have suggested that you see investigation of consummated

²⁵ See *supra* note 2.

mergers as an area for enforcement priority. What do you believe are appropriate remedies in these types of cases?

HARBOUR: Due to an ongoing Part 3 matter, I do not want to say much about the appropriate legal standard or remedies in consummated merger cases. I will note that in my view two separate questions must be considered. One is what sorts of remedies are allowable under the law. This is very different from the next question, what remedies the Commission should seek on a case-by-case basis as an exercise of prosecutorial discretion. Theoretically, the Commission can pick from the same toolbox of remedies in a consummated merger case as in any other merger case, including divestitures if need be—as the Commission did in *Chicago Bridge & Iron*, and as I might have been willing to do in *Genzyme* if, after a full review, the factual record ultimately had demonstrated that the harm from a merger to monopoly outweighed any potential efficiencies. But in each case, the Commission must conduct an exhaustive factual inquiry, really looking closely at the market and how it has evolved, before deciding how far to go in attempting to unwind a consummated transaction.

THE SOURCE: You've already spoken extensively frankly on your views on consumer protection, but I wanted to give you an opportunity to add more about interests or priorities that you have in the consumer protection area.

HARBOUR: In the area of childhood obesity, I would like staff to continue to focus on examining any marketing method that may harm children. Staff worked with the U.S. Department of Health and Human Services to generate a report relating to last year's obesity workshop. Some marketers noted that they have begun to take self-regulatory measures, adopting voluntary advertising restrictions, such as not advertising food products to children under the age of six, or not advertising less-healthy food choices in schools. I think effective self-regulation is absolutely essential in this area.

In the area of tobacco advertising and testing, I would like to explore whether consumers really understand that smoking low tar or light cigarettes does not eliminate the risks of smoking. An important part of the Commission's work is consumer education, and I am concerned about whether we are doing all that we can to warn consumers about the dangers of tobacco products. In this area, the state of the science has evolved and needs to be clarified. I'm hopeful that the Commission will work with the Department of Health and Human Services and other public health officials to give consumers the information that they need about the dangers of cigarette smoking.

THE SOURCE: You gave a speech in London last October on harmony and conflict between the U.S. and EU competition laws. What are your views on the extent of convergence and on the state of cooperation between the EU and the United States today?

HARBOUR: As I mentioned in my speech last October, as a former state enforcer and as a sitting Commissioner, I believe that there is far more harmony than there is conflict between the United States and the European Union competition enforcers, although there are differences that still remain. Some enforcers may pursue a type of competitive harm that other enforcers have found, through their experience, is seldom supported by empirical evidence. For example, the EC Merger Regulation requires the EC to consider the economic and financial power of merging parties. This

has been referred to by some as the “deep pocket theory.” The U.S. agencies find this factor unpersuasive and no longer give it much, if any, weight. European courts also have endorsed leveraging and portfolio power. These theories are also viewed more skeptically by some enforcers in the U.S. Another area of remaining divergence between the EC and the U.S., as I mentioned, involves the analysis of conduct by dominant firms. And as I suggested earlier, I hope this might be aired in the context of our upcoming Section 2 hearings.

THE SOURCE: Commissioner Harbour, thank you for your time today.

HARBOUR: It was my pleasure. ●