Concurring Statement of Commissioner Jon Leibowitz
Regarding the Commission's Report, "Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases"
File No. 051-0243

The Federal Trade Commission has been studying anticompetitive practices in the petroleum industry literally since our creation in 1914,[1] and this Report offers valuable insights into factors and practices that affect the price of gasoline. Commission staff should be commended for producing a thorough analysis that deepens our understanding of the oil industry. As the Report demonstrates, price gouging is a phenomenon that is hard to nail down. Indeed, price gouging is the obscenity of antitrust law: difficult to define in theory but easily recognized at the pump. Nonetheless, it is worth noting that using the Congressionally mandated definition,[2] the Commission found price gouging at multiple levels of the petroleum industry.

In particular, among refiners, the Report found price gouging: a handful more than doubled their operating margins in ways not attributable to increased costs following the

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[1] The Commission has had a long history with the petroleum industry. In fact, ten percent of the Commission's budget for its first two years was devoted to a Congressionally-requested investigation of Oklahoma pipelines. In the first decade of its existence, the Commission issued several reports concerning the petroleum industry, including one focused on pricing issues. *See, e.g.*, Federal Trade Commission, *Advance in the Price of Petroleum Products: Report in Response to House Resolution No. 501* (June 1, 1920); Federal Trade Commission, *Report on the Pacific Coast Petroleum Industry, Parts, I and II* (Apr. 7, 1921 and Nov. 28, 1921); Federal Trade Commission, *Report on Foreign Ownership in the Petroleum Industry*, (Feb. 12, 1923). The Commission released additional Reports analyzing gasoline pricing in 2001, 2005, and 2006. *See* Federal Trade Commission, *Midwest Gasoline Pricing Investigation*, (March 29, 2001), Federal Trade Commission, *Gasoline Price Changes: the Dynamics of Supply, Demand, and Competition* (June 2005), Federal Trade Commission, *Federal Trade Commission Interim Report on Gasoline Pricing: A Report to Congress* (March 2006). *See also* Federal Trade Commission, *FTC Petroleum Industry Investigation* [1969-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,179. (July 23, 1973)

[2] The definition of price gouging for purposes of this Report is set forth in Section 632 of the Science, State, Commerce, Justice and Related Agencies Appropriations Act 2006. (H.R. 2862 at 55). Different definitions of price gouging are proposed, for example, in the "Federal Energy Price Protection Act of 2006" (H.R. 5253, authored by Ms. Wilson and Mr. Barton, passed by the House on May 3, 2006), and an amendment, proposed by Senator Cantwell, to the Budget Reconciliation Bill (S. 2020, November 18, 2005).

hurricanes. It is equally troubling, however, that most other refiners, who did not technically meet the price gouging test, enjoyed markups of similar magnitude.[3]

In the wake of Katrina and Rita, the vast majority of retailers raised prices based on what they paid for supply or in anticipation of increased replacement costs. Some retail stations, however, actually raised their prices significantly without satisfactory cost or adequate market-based explanations. Not surprisingly, thousands of complaints have been received at the local level and dozens of cases brought under state laws prohibiting price-gouging.[4] These statutes, which almost invariably require a declared state of emergency or other triggering event, may serve a salutary purpose: discouraging outliers from profiteering in the aftermath of a disaster.

If there is any villain in the long lasting saga of high oil prices, though, it is OPEC. For the past 30-plus years, this cartel has caused massive transfers of wealth from the United States to oil-exporting nations. The conduct of its members would be criminal if undertaken by private companies. OPEC is not the only reason for this year's steep climb in prices: other contributing factors to the current rise in gasoline prices include increased demand in China and India, complicated environmental requirements, and American over-dependence on both foreign oil sources and fuel-inefficient automobiles. But OPEC's permissible price fixing will surely continue to bedevil American businesses and consumers well into the future.

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[3] Other sources report that twelve of the U.S. oil companies that list on the S&P 500 reported an average 48% increase in earnings for the fourth quarter of 2005. *See* CNN Money.com *Exxon Mobil Sets Profit Record*, (January 30, 2006) http://money.cnn.com/2006/01/30/news/companies/exxon_earns/ (May 18, 2006). Industry profits for 2005 totaled almost $140 billion. Congressional Research Service, *Oil Industry Profit Review 2005* (April 18, 2006). Moreover, the combined first-quarter 2006 revenue of Exxon, Chevron and ConocoPhillips totaled $191.5 billion. This is more than the individual gross domestic products of 189 different countries -- Chile, Denmark, Peru and Venezuela among them. *See* Washington Post, *Oil Industry Unapologetic for High Profits*, (April 20, 2006) (citing statistics compiled by the Central Intelligence Agency.)

Of course, there are petroleum companies that did make community-based relief efforts. For example, one small refiner, recognizing the hardships inflicted on consumers in the wake of Hurricane Rita, apparently offered FEMA all the free heating oil it could 'cart away.' FEMA, however, failed to take the company up on its offer.

[4] As noted in the Report, twenty-nine states and the District of Columbia have price gouging laws that provide for either civil or criminal penalties and, in some situations, both. Six of these states and the District of Columbia expressly are permitted by their statutes to cap prices increases during an emergency. Though many complaints about retailer pricing were received and investigated at the state level in the wake of Hurricanes Katrina and Rita, charges were brought only against a select few. In other words, current state price gouging laws appear to have been used judiciously post disaster in a manner entirely unthreatening to the operation of the free market.

In sum, petroleum industry pricing and gas price manipulation are enormously complicated matters – ones not subject to simple explanation, even absent the disruptive effects of a major natural disaster. Still, the behavior of many market participants, on balance, leaves much to be desired. Our Report sheds some light on market practices after the hurricanes and, hopefully, it will be put to good use.