Statement of Commissioner Jon Leibowitz Concurring in Part and Dissenting in Part

In the Matter of Carlyle Partners IV, L.P.

Commission staff has done an excellent job to try to correct the effects of an anticompetitive merger between the largest competitor in this market and the third largest – a deal that would create one firm with over 60 percent of the market and that would reduce the number of competitors from four to three. I concur with nearly all aspects of the Commission's decision to adopt staff's recommendations, and I dissent on only one point: we should require PQ Corporation *to notify* the Commission before it makes any attempt to undo the principal remedial provision of this order – the divestiture of PQ's plant in Utica, Illinois.

Prior to the Commission's 1995 Prior Approval and Prior Notice Provision Policy Statement,[1] Commission orders routinely included such notice requirements. Our orders also often required that we give prior approval to any reacquisition. That changed with the Policy Statement, which made clear that prior notice and approval was no longer necessary under most circumstances in light of the Hart-Scott-Rodino (HSR) Act. However, the Policy Statement also acknowledged that a prior notification provision "may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order engage in an otherwise unreportable anticompetitive merger."[2] The need for such a provision would depend on a number of factors "such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants and other relevant factors."[3]

In this case, PQ could reacquire the Utica plant from the Oak Hill Acquisition Company (the buyer of the plant) without triggering the HSR filing requirements, as the acquisition price for the plant is very likely to be below the HSR threshold. The issue is whether there is a "credible risk" that they would do so. Presumably, there is little likelihood that such a deal would occur immediately – otherwise the Commission would not have accepted Oak Hill as the buyer of the plant in the first place. But that doesn't protect consumers from an anticompetitive reacquisition somewhere down the road.

[1] 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.
[2] *Id.,* at 39746.
[3] *Id.*

To my mind, such a "credible risk" clearly exists. Given the ongoing relationships between Oak Hill and PQ even after the divestiture; the benefits to PQ of eliminating a potential maverick in the Midwest sodium silicate market; the apparent lack of competition between PQ and Occidental Chemicals (the only other major merchant producer of sodium silicate); and the fact that Oak Hill is not buying the plant to fit into a larger overall business plan, but rather intends to operate the plant as a stand-alone business, the order ought to ensure that we be notified if the parties consider such a transaction.[4] Moreover, the requirement would not be onerous to either party since the notice provision would only be triggered if PQ attempted to buy the plant back.

[4] Of course it is possible that, some time after the transaction, someone may complain about it to the Commission. Unfortunately, given the ability of firms to "scramble the eggs" – that is, to make it difficult for the Commission to break up the previously separate companies after the merger – there is some danger that such a complaint would not happen in time for the Commission to be able to design a remedy that is as effective at restoring competition as preventing the deal in the first place. *See, e.g., Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, Docket No. 9315, Opinion of the Commission (8/6/2007) at 89-91, *available at* http://www.ftc.gov/os/adjpro/d9315/080428commopiniononremedy.pdf (A lapse between the merger and Commission enforcement "does not preclude the Commission from ordering divestiture, but it would make a divestiture much more difficult, with a greater risk of unforeseen costs and failure.").