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CLIENT ALERT

Par Petroleum/Mid Pac: Adrift in a Vertical Merger, A Case Study on Foreclosure on an Island

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Recently, the FTC published its consent decree in Par Petroleum Corporation's (Par) $107 million acquisition of Mid Pac Petroleum (Mid Pac) illustrating that vertical theories of harm in petroleum products mergers may have new life.

The Commission's complaint alleged that Par, a refiner, bulk supplier, transporter, and marketer of Hawaii-grade gasoline blendstock (HIBOB) would be able to foreclose a potential downstream customer, Aloha Petroleum, Ltd. (Aloha) after Par acquired Mid Pac. The FTC concluded that, before the transaction, Aloha and Mid Pac each were able to discipline the price of bulk-supplied HIBOB by importing product into the only non-refinery-owned storage terminal, Barbers Point Terminal, capable of accepting waterborne imports of HIBOB from out of state. Mid Pac and Aloha each own storage rights at Barbers Point Terminal. They typically purchase bulk supply of HIBOB from the refiners, Par and Chevron, and can discipline the refiners' pricing by threatening to use their import capabilities. Post-merger, Aloha would share the terminal with one of the two local refiners. The Commission asserted a theory of harm that assumed post-merger anti-competitive behavior by the merged company as well as by its direct competitor, Chevron. According to the FTC's analysis, Par would have the incentive and the ability to "park" petroleum products at the terminal thereby reducing or eliminating Aloha's ability to discipline bulk supply prices. In addition, the FTC alleged that Chevron, the only other Hawaiian refiner, would follow Par's exclusionary strategy.

To remedy the potential for competitive harm, the Commission voted 4-1 to require Par to terminate its acquired storage and throughput rights at the Barber Point Terminal. Commissioner Wright voted against the proposed consent order and issued a dissenting statement that posited an alternative interpretation of the facts. To him, the economic evidence did not support the Commission's assertion that Par would have an incentive to foreclose Aloha.[1] In addition, he did not believe the factual record demonstrated Aloha, the potential injured party, believed Par would adopt the anticompetitive strategy. Commissioner Wright's statement noted that "the record evidence [] indicates Aloha, the potential victim of the strategy, does not have any reason to believe Par would adopt this potentially anticompetitive strategy."[2] In direct contrast, the rest of the Commissioners stated that "[c]ontrary to Commissioner Wright's assertion, the evidence shows that market participants, including Aloha itself, believe Par might profitably seek to adopt this strategy."[3]

There are several lessons to be drawn from this latest Commission action. First, the Commission opted for an unusually prescriptive remedy to wall off the potential for anti-competitive behavior even though Commissioner Wright questioned whether the economic record was strong enough to demonstrate the plausibility of the majority's theory of exclusionary harm. Second, the need for a remedy at all was predicated on the Commission's apparent conclusion that Chevron likely would follow Par's lead to implement a post-merger foreclosure strategy. Third, the outcome suggests that parties to transactions in regions that depend on imports for pricing discipline need to be mindful the Commission will want to assure a transaction does not impede the physical flow of imports.

Lastly, it is worth noting that plunging oil and gas prices are driving consolidation in the petroleum products sector. Consolidation by mid-stream oil and gas companies continues to be targeted for close Commission scrutiny.[4] The *Par* decision teaches that despite the premise that vertical integration tends to be procompetitive, *this* Commission will not shy away from challenging mergers on a vertical theory of harm. Antitrust practitioners and their clients should closely examine claims of vertical procompetitive effects to ensure they are sufficient to avoid the FTC's scalpel.

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[1] Notably, Commissioner Wright's dissent contained a strong caveat regarding the viability of vertical theories of harm noticing that while "competitive concerns involving the potential for exclusion are commonly invoked in transactions with vertical dimensions, [] empirical evidence demonstrates vertical transactions are generally, but not always, procompetitive or competitively benign." Dissenting Statement of Commissioner Joshua D. Wright, Par Petroleum/Koko'oha, FTC file No. 141-0171 (Mar. 18, 2015), *available here.*

[2] Dissenting Statement of Commissioner Joshua D. Wright, Par Petroleum/Koko'oha, FTC file No. 141-0171 (Mar. 18, 2015), *available here.*

[3] Statement of the Federal Trade Commission, Par Petroleum/Koko'oha, FTC file No. 141-0171 (Mar. 18, 2015), *available here*.

[4] *See generally,* FTC, *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement*, (August 2004) pg. 16 *available here.*

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