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4 Antitrust Tips For Bidding On Land For O&G Production

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It is no secret that new oil and gas development opportunities are expanding across the country. The shale gas boom alone has opened new areas of exploration on federal and private lands. Some new plays are being explored by companies already in pre-existing joint venture or joint development structures, but new players are entering the business, and existing players are seeking new development partners. As these new business development arrangements evolve, it is important for participants to review the ground rules for joint activities among competitors.

Joint development activities have long been a feature of the oil and gas industry. However, where prospective participants in a new oil and gas play are not already involved in well-designed and structured joint ventures, new opportunities can create potential antitrust liability for developers who may be tempted to share, or requested to share, commercially sensitive information with their competitors.

Those requests may come from various sources. For example, even before the land is offered for lease, the Bureau of Land Managementhas to conduct the requisite analysis under the National Environmental Policy Act to determine the environmental impacts associated with the proposed lease sale and development. Utilities want to know how much electricity developers will need to run the operations. Pipeline companies need to understand the volume of gas or oil likely to be extracted to build takeaway capacity. There are auctions for leases and perhaps swaps of plots among developers to provide for contiguous operations or to take best advantage of geologic formations. And, separate from those requests, companies may want to form new joint ventures or joint bidding arrangements, which can create antitrust liability if not done correctly. Each of these instances may create pressure to present an aggregated development plan representing all of the participants.

Many companies are rightly puzzled by the tension created by the need to provide third parties with collective information necessary for development of these lands and the potential antitrust liability that attaches to competitors sharing information outside of a joint venture or joint bidding arrangement. Despite the best of intentions, companies can inadvertently (or intentionally) exchange information that creates exposure under the antitrust laws.

That exposure is significant. It includes the possibility of criminal prosecution by federal and state governments and civil suits by competitors or customers. Criminal enforcement can result in large fines and other remedial orders. As the industry has seen this year, antitrust enforcement in this sector by federal and state agencies resulted in criminal charges and seven-figure settlements. Civil judgments in actions brought by government entities or private parties are automatically trebled and the winning party is entitled to their attorney's fees from the losing party. And, in both criminal and civil actions, the cost of defense alone can be exorbitant.

So how can companies reduce the threat of antitrust suits while pursuing these public and private land leases? How can they avoid exposure under the antitrust laws while at the same time providing the necessary information for the BLM or state government review, utility development, pipeline planning, and all of the other planning that has to be taken into consideration when full field development involves not just one company's wells? Here are a few suggestions that can reduce the antitrust exposure when dealing with competing firms in these situations:

1. Get legal counsel early to assist with establishing a structure and guidelines for collaboration with competitors that avoids antitrust concerns.

Formal and informal joint ventures are a familiar business format for infrastructure and resource development projects. In addition to oil and gas fields, pipelines, gathering and storage facilities, processing plants and refineries are often developed and operated by competing market participants who want to share risk and take advantage of complementary assets and skills. Such alliances are generally viewed as pro-competitive under the antitrust laws unless they increase market concentration levels. But they must be structured and governed in a manner that fully commits the parties to a common business objective and, at the same time, avoids unintentional "spillover" effects on competitive activities outside the scope of the joint project.

It is critical that those joint ventures be formally established and inked before the parties exchange sensitive information. Antitrust counsel should be involved from the outset to provide guidance on information sharing, structure, governance and interactions between personnel committed to the joint venture and personnel of the parent companies.

2. If a third party needs aggregated data on development, consider having the government collect it rather than sharing the information among competitors for aggregation.

For example, when the BLM is trying to analyze a plan of development, it often wants to see not only what the individual players want to do, it wants to know how the field as a whole will be developed. The BLM may request that the potential developers submit a joint plan of development, including numbers of wellheads, expected production capacity, etc., that would require competitors to exchange competitively sensitive information. If the BLM seeks this kind of joint development information from competitors not already in a joint venture or joint bidding structure, one potential solution is to have the parties submit the development proposals in blind submissions to the BLM and have the BLM aggregate those proposals into the plan. That way, the parties are not put in the awkward position of sharing their plans among themselves, which may open them up to ex post allegations of bid rigging, market allocation, price-fixing, or another antitrust theory.

The same process may be employed when dealing with a state government agency or if the local utility needs information on electricity demands. One important caveat, though, is to make sure that there is a strong commercial records exception to the state's sunshine laws so as to protect sensitive business information, project plans and trade secrets from public disclosure.

3. If a government agency is urging competitors to submit a joint bid or joint development plan — again, outside of a pre-existing joint venture — the participants may request that the agency order the companies to do so.

That way the participants may claim state action immunity in response to any second-guessing by other parties. In a recent example, a public utilities commission urged several investor-owned utilities ("IOUS") to enter power purchase agreements with the developer of an electric generating plant using cutting-edge, alternative technology. The plant would serve commercial, industrial and residential customers. Before the IOUS could negotiate a commercial arrangement that would involve the sharing of competitively sensitive information among competitors, the public utilities commission had to be requested to provide explicit authorization for the competing parties to share competitively sensitive information and to work together to negotiate a joint development and commercialization agreement. The law on state action immunity has evolved recently so consultation with legal counsel is important to ensure that such agreements pass muster.

4. Set up internal controls that raise red flags any time business interactions with competitors are proposed.

In the absence of an established joint venture or joint bidding arrangement, companies should be very careful in their communications with competitors about their development plans or upcoming auctions. Written communications with competitors, as well as agendas and notes from meetings between competitors, can be easily misconstrued as showing anti-competitive conduct, even when the intent is benign or pro-competitive. Early and consistent involvement of antitrust counsel can greatly reduce the risk of antitrust exposure.

Development projects across the spectrum of energy sectors are enjoying welcome growth spurts. As they move forward, it is important to ensure that antitrust compliance is "baked in" to the business process to avoid unintended violations or business practices that attract enforcement scrutiny. Prompt vetting by counsel can assess the potential antitrust risk and develop guidelines and procedures to avoid or minimize such risk while limiting any burden on business activity.

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