

## FTC Will Not Shy Away From Vertical Theories Of Harm

*Law360, New York (April 28, 2015, 10:17 AM ET) --*

The Federal Trade Commission's consent decree in Par Petroleum Corp.'s \$107 million acquisition of Mid Pac Petroleum illustrates that competitive effects of a transaction may be more important than market structure and reminds us that vertical theories of harm in petroleum products mergers can take many forms.

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 downstream customer, Aloha Petroleum Ltd., 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 nonrefinery-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 Joshua 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 foreclosure victim, was concerned Par would actually park product in storage in order to



Mary Anne Mason

block its access. 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]

Another noteworthy aspect is that this is not the first time the commission took action to address competitive threats involving the Barbers Point Terminal. In 2005, the FTC brought a complaint to enjoin Aloha's bid to acquire Trustreet Properties' 50 percent interest in the Barbers Point Terminal, a transaction that was not reportable under the Hart-Scott-Rodino Act. [4] At the time, the market structure in Hawaii for bulk supply of HIBOB consisted of two refineries and three companies capable of receiving bulk imports. Two of those companies, Aloha and Trustreet, shared the Barbers Point Terminal. The FTC alleged the transaction would cause anti-competitive effects in the market for the bulk supply of gasoline in Hawaii. [5] The FTC withdrew its complaint once Aloha announced it would enter into a 20-year throughput agreement giving Mid Pac rights to the Barbers Point Terminal.

There are several lessons to draw from the commission's treatment of the Barbers Point Terminal over the last 10 years. First, in 2005, the FTC appears to have acted based primarily on the number of market participants capable of bulk-supplying the island, not on the actual ability of market participants to adopt strategies to discipline refinery pricing. Two months after the commission withdrew its complaint, Chairman Deborah Majoras testified to Congress that "[a]s a general matter, competition at the wholesale and retail levels in Hawaii benefits from the presence of *more bulk suppliers* that can credibly threaten to import." [6] (emphasis added)

This year, the commission's action in the Par/Mid Pac transaction reverses its 2005 decision that there were an insufficient number of bulk suppliers by allowing Aloha to assume 100 percent ownership of the Barbers Point Terminal. In addition, the commission explicitly discounts any concern at the loss of Mid Pac as a market participant, stating that Mid Pac was not competitively significant.

Arguably, the commission gave short shrift to the loss of a horizontal competitor because its analysis was driven by the primacy of assessments of actual competitive effects from a transaction, as articulated in the 2010 Horizontal Merger Guidelines. Thus, the commission focused on finding a remedy for diminished pricing competition in the bulk supply of HIBOB rather than addressing a presumed competitive harm resulting from increased concentration among bulk suppliers. This represents a concrete illustration that current approaches to merger analysis only begin with assessments of concentration, and that final results are driven by evidence of likely competitive effects.

Second, in the recent FTC action, the commission opted for an unusually prescriptive remedy to wall off the potential for anti-competitive behavior even though Wright questioned whether the economic record was strong enough to demonstrate the plausibility of the majority's theory of exclusionary harm. [7]

Third, 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. Although it is unclear from the public statements, one can infer that at least Wright doubts the economic evidence shows it would have been profitable for Chevron to "park" products in storage purely for the purpose of blocking a competitor's opportunity to import product.

Fourth, 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 in response to price signals.

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.[8] The Par decision indicates that despite the general economic premise that vertical integration tends to be pro-competitive, this commission will not shy away from challenging mergers on a vertical theory of harm. At least, it shows the commission may seek a remedy, as it did here, when a vertical transaction results in harm to horizontal pricing competition. While antitrust practitioners and their clients can take heart that the FTC will no longer challenge mergers based primarily on a reduction in market participants, they should closely examine claims of vertical pro-competitive effects to ensure they are sufficient to avoid the FTC's scalpel.

—By Mary Anne Mason and Mika Clark, Crowell & Moring LLP

*Mary Anne Mason is a partner and Mika Clark is an associate in Crowell & Moring's antitrust practice in Washington, D.C.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Notably, 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 at <https://www.ftc.gov/system/files/documents/cases/150318parpetroleumwrightstatement.pdf>.

[2] Dissenting Statement of Commissioner Joshua D. Wright, Par Petroleum/Koko'oha, FTC file No. 141-0171 (March 18, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150318parpetroleumwrightstatement.pdf>

[3] Statement of the Federal Trade Commission, Par Petroleum/Koko'oha, FTC file No. 141-0171 (March 18, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150318parpetroleumstatement.pdf>.

[4] Press Release of the Federal Trade Commission, Aloha/Trustreet, FTC File No. 051-0131 (Sept. 6, 2005), available at <https://www.ftc.gov/news-events/press-releases/2005/09/ftc-resolves-aloha-petroleum-litigation>.

[5] Complaint ¶ 24, Federal Trade Commission v. Aloha Petroleum Ltd., No. 1:05-cv-471-HG-KSC (D. Haw. July 27, 2005) (hereinafter Aloha/Trustreet complaint). In 2005, the FTC's complaint also alleged anti-competitive effects in the retail supply of gasoline because Aloha and Trustreet were the lowest priced integrated retailers of gasoline. Notably, this allegation of harm was missing from the 2015 public documents. Presumably, the structure of the market has changed in the interim and, although Par gained retail stations through its purchase of Mid Pac, there is no longer a need to protect competition in the retail gasoline market.

[6] Energy Prices and Profits: Hearings Before the Subcomm. on Commerce, Science and Transportation and the Subcomm. on Energy and Natural Resources, 109th Cong. 307 (2005) (statement of Deborah Majoras, chairwoman of the Federal Trade Commission).

[7] The decision and order allows Par to retain certain rights necessary to load a limited number of tanker trucks at Barbers Point Terminal truck rack. The commission concluded such rights would not interfere with the storage and handling of full cargoes of imported HIBOB, but the commission retains continuing jurisdiction to approve any modification to Par's rights to load products at the Barbers Point or any new agreement relating to storage or throughput rights. The commission will allow Par to renew or extend an agreement that permits the loading of tanker trucks at the truck rack. Decision and Order, Par Petroleum/Koko'oha, FTC file No. 141-0171 (Mar. 18, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150312parpetroleumdo.pdf>.

[8] See generally, FTC, The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement, (August 2004) pg. 16 available at <https://www.ftc.gov/sites/default/files/documents/reports/petroleum-industry-mergers-structural-change-and-antitrust-enforcement-report-staff-federal-trade/040813mergersinpetrolberpt.pdf>.

---