

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

In the Matter of)	
)	
Paul L. Foster,)	
an individual,)	
)	
Western Refining, Inc.,)	Docket No. 9323
a corporation,)	
)	
and)	
)	
Giant Industries, Inc.,)	
a corporation.)	
)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“FTC” or “Commission”), having reason to believe that Respondents Paul L. Foster and Western Refining, Inc. (combined “Western”) and Respondent Giant Industries Inc. (“Giant”) have entered into an agreement and plan of merger whereby Western proposes to acquire all of the outstanding common stock of Giant, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. THE PARTIES AND JURISDICTION

Paul L. Foster

- Respondent Paul L. Foster is an individual doing business at 6500 Trowbridge Drive, El Paso, Texas 77905. Mr. Foster is, and at all times relevant herein has been, the President, Chief Executive Officer, majority shareholder, and ultimate parent entity of Western Refining, Inc.

2. Respondent Foster is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is an entity whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Western Refining, Inc.

3. Respondent Western is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 6500 Trowbridge Drive, El Paso, Texas 77905. Western Refining operates primarily in the Southwest region of the United States, including Arizona, New Mexico, and west Texas.
4. Respondent Western is, and at all times relevant herein has been, an energy company engaged, either directly or through affiliates, in the refining of crude oil into refined petroleum products, including gasoline, diesel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel and other refined products; and other related businesses.
5. Respondent Western is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Giant Industries, Inc.

6. Respondent Giant is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 23722 North Scottsdale Road, Scottsdale, Arizona 85255. Giant operates primarily in Virginia, Maryland, North Carolina, New Mexico, Arizona, and Colorado.
7. Respondent Giant is, and at all times relevant herein has been, an energy company engaged, either directly or through affiliates, in the refining of crude oil into refined petroleum products, including gasoline, diesel, and other light petroleum products; the transportation, terminaling, and marketing of gasoline, diesel fuel and other refined products; and other related businesses.
8. Respondent Giant is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

9. Pursuant to an Agreement and Plan of Merger, by and among Western, Giant, and “New Acquisition Corporation,” a wholly-owned subsidiary of Western, dated August 26, 2006, Western agreed to acquire Giant for approximately \$1.4 billion in cash. The agreement was subsequently amended on November 12, 2006 (the “Acquisition”). Upon completion of the Acquisition, Giant will become a wholly-owned subsidiary of Western.
10. On April 10, 2007, the Commission authorized the commencement of an action under Section 13(b) of the FTC Act to seek a temporary restraining order and a preliminary injunction barring the Acquisition during the pendency of administrative proceedings to be commenced by the Commission pursuant to Section 5(b) of the FTC Act, 15 U.S.C. § 45(b).
11. In authorizing the commencement of this action, the Commission determined that a temporary restraining order and preliminary injunction are in the public interest and that it has reason to believe that the Acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act because the Acquisition may substantially lessen competition in the relevant markets alleged in this Complaint.
12. On April 13, 2007, United States District Judge James O. Browning of the United States District Court for the District of New Mexico issued a Memorandum Opinion and Order granting the FTC’s application for a temporary restraining order. The closing of the Acquisition is subject only to the District Court’s restraining order.

III. TRADE AND COMMERCE

Relevant Product Markets

13. Lines of commerce in which to analyze the effects of the proposed Acquisition are the bulk supply of motor gasoline, diesel fuels, and jet fuel (collectively “light petroleum products”) and narrower markets contained therein (*i.e.*, gasoline).
14. Light petroleum products are examples of fuels used in automobiles and other vehicles. They are produced from crude oil at refineries in the United States and throughout the world. There is no substitute for gasoline as a fuel for automobiles and other vehicles designed to use gasoline. Similarly, there is no substitute for diesel fuel for vehicles designed to use diesel fuel, or for jet fuel for airplanes designed to use jet fuel.

15. Light petroleum products are transported in bulk from the producing refineries to markets where the products are demanded. Bulk shipments typically involve volumes in excess of 5,000 barrels up to one million or more barrels via ocean-going tankers. The size of pipeline shipments are generally in the range of 5,000 to 50,000 barrels. Road transport of gasoline or diesel fuel is relatively expensive due to the volume and weight of the product and is not an economic substitute for water vessel or pipeline transportation of bulk shipments over great distances.
16. Bulk light petroleum products are delivered by waterborne vessels or pipelines into product terminals used for storage and distribution or further pipeline shipment. Product terminals are specialized facilities with large storage tanks used to receive light petroleum products by pipeline, by water, or direct from refinery production; for storage; and for redistribution by pipeline, water carrier, or local distribution by truck. Product terminals also perform value-added services, such as handling and injection of motor fuel additives as light petroleum products are redelivered.
17. Light petroleum products are transported from product terminals to final distribution points (retail gasoline stations or other wholesale delivery points) by tanker trucks each capable of carrying about 9,000 gallons of gasoline, the equivalent of almost 200 barrels. Producing refineries, whether or not connected to a refined products pipeline terminal, may also provide distribution services to wholesale customers from light petroleum product terminal tanks located at such refineries. Off-road diesel and jet fuel are not substitutes for on-road fuel demand.

Relevant Geographic Markets

18. Relevant sections of the country in which to analyze the proposed Acquisition include northern New Mexico, consisting of Rio Arriba, Taos, Mora, San Miguel, Los Alamos, Santa Fe, Valencia, Torraine, Bernalillo, Guadalupe, and Sandoval counties, where the merger would reduce competition among bulk suppliers of light petroleum products, and narrower markets therein, as alleged below.

Market Structure

19. Western and Giant are refiners and bulk suppliers that supply gasoline and diesel in competition to customers in northern New Mexico.
20. Giant owns and operates two refineries, and their adjacent terminals, in northern New Mexico, one in Bloomfield and the other in Ciniza, from which it supplies bulk gasoline and diesel fuel to New Mexico, Arizona, Utah, and Colorado. Giant also owns a petroleum products terminal in Albuquerque, from which it supplies bulk gasoline and diesel fuel to northern New Mexico.

21. Giant supplies its Albuquerque product terminal by truck from Giant's New Mexico refineries and from the Plains Pipeline – a common carrier pipeline transporting light petroleum products north from El Paso to Albuquerque and south from El Paso to Juarez, Mexico. The Plains Pipeline is owned by Plains All American Pipeline, L.P. and originates at the Western refinery terminal in El Paso.
22. Western owns and operates a single refinery complex located in El Paso. The refinery produces primarily high value transportation fuels, including gasoline, diesel fuel, and jet fuel. From its refinery, Western supplies these products to Albuquerque, El Paso, west Texas, Tucson, Phoenix, and Juarez, Mexico. Western supplies gasoline and diesel fuel in bulk quantities from its El Paso refinery to Albuquerque via the Plains Pipeline on which Western has historical shipping rights.
23. The Plains Pipeline currently operates at full capacity, which means that current shippers are allocated space on a pro rata basis according to their historical shipping volumes. As a result, by regulated tariff, the pipeline allocates only five percent of the pipeline's total volume to potential new shippers. Consequently, the volume available to any one individual new shipper is limited to a maximum of about 350 barrels per day.
24. Holly Corporation ("Holly") owns and operates a refinery complex (the "Navajo refinery") in Artesia, New Mexico. Holly ships light petroleum product from its Navajo refinery to northern New Mexico via the Four Corners Pipeline, a common carrier pipeline leased and operated by Holly Energy Partners, L.P. ("HEP"), a Holly affiliate. The Four Corners Pipeline originates at Holly's refinery in Artesia, delivers some product to HEP's terminal in Moriarty about 40 highway miles southeast of Albuquerque, and terminates at a HEP terminal in Bloomfield near one of Giant's refineries. Holly's refinery is the only supply source for product shipped on the Four Corners Pipeline. Holly also ships product to HEP's terminal in El Paso from its Navajo refinery via HEP's Artesia-to-Orla-to-El Paso Pipeline and a pipeline running directly from Artesia to El Paso. From HEP's El Paso terminal, Holly – like Western and Giant – uses its historical shipping rights on the Plains Pipeline to ship light petroleum products to a terminal owned by HEP in Albuquerque.
25. ConocoPhillips owns and operates a refinery at Borger, Texas. ConocoPhillips ships bulk light petroleum products to Albuquerque via the ATA Pipeline, a common carrier pipeline that ConocoPhillips co-owns with NuStar Energy, L.P. ("NuStar"), which until recently was known as Valero, L.P.
26. Valero Energy Corporation ("Valero") owns and operates a refinery in McKee, Texas. Valero ships bulk light petroleum products to northern New Mexico on the ATA Pipeline owned by ConocoPhillips and NuStar. The ATA Pipeline originates at Valero's refinery and terminates at ConocoPhillips' and NuStar/Valero L.P.'s storage terminals in

Albuquerque. ConocoPhillips' Borger refinery and Valero's McKee refinery are the only two suppliers with access to the ATA Pipeline to Albuquerque.

27. Two other firms currently supply northern New Mexico with bulk light petroleum products via pipeline. Neither firm can increase its bulk supply of all light petroleum products to northern New Mexico in response to a small output decrease by the five significant bulk suppliers (Giant, Western, ConocoPhillips, Valero, and Holly). One of the firms may be able to shift some of its diesel shipments to gasoline in response to a small output decrease in bulk gasoline supply by the five significant bulk suppliers (Giant, Western, ConocoPhillips, Valero, and Holly).

Anticompetitive Effects

28. The relevant markets are highly concentrated and would become significantly more concentrated after the Acquisition. Although there are seven bulk suppliers of light petroleum products to northern New Mexico, only five of these suppliers are currently capable of responding to a small decrease in the volume of gasoline and diesel fuel supply to Albuquerque terminals. Only these five should be counted as bulk supply competitors for light petroleum product sales to northern New Mexico: Giant, Western, ConocoPhillips, Valero, and Holly.
29. The current shippers on the Plains Pipeline could not respond to higher Albuquerque prices or reduced supply of light petroleum products by sending more total light petroleum products on that pipeline because the pipeline is already at full capacity. However, each of these firms (except one that ships only gasoline) could to some extent increase the amount of gasoline it sends to Albuquerque on the Plains Pipeline by substituting gasoline for other light petroleum products it currently ships.
30. Holly, ConocoPhillips, and Valero are large bulk suppliers of light petroleum products with large refineries in, or near, New Mexico connected to pipelines with significant unused capacity running to the Albuquerque area. However, limited supply responsiveness suggests these firms are unlikely to competitively constrain any small output reduction or price increase for light petroleum products or gasoline after the Acquisition.
31. The lack of additional shipping space on the Plains Pipeline for current shippers and the lack of economically viable volume on that pipeline for new shippers, increases the likelihood that there would be little or no supply response from the other relevant suppliers to Albuquerque to a future small reduction by the combined Western/Giant in the supply of light petroleum products or gasoline to northern New Mexico.

*Absent its Acquisition By Western, Giant Will
Soon Increase the Supply of Gasoline to Northern New Mexico*

32. Giant's two New Mexico refineries are landlocked and currently depend on a declining local crude oil supply. The reduction in crude supply has forced Giant to reduce the rate at which its refineries can refine crude oil into light petroleum products by about 30 percent over the last ten years.
33. In 2005, in an effort to solve its declining crude oil supply and utilization issues, Giant purchased from Shell Oil Company an idle 424-mile long pipeline running from Jal, New Mexico to Bisti, New Mexico, near its two refineries. With the pipeline and new crude oil supply, Giant publicly announced that the new pipeline will become operational during the second quarter of 2007, with the refineries processing the new crude supply by the end of the second quarter of 2007.
34. Once Giant brings the two refineries up to full utilization, production levels of light petroleum products at the refineries will increase significantly. Giant currently competes with pipeline deliveries to Albuquerque terminals by trucking from its New Mexico refineries. If Giant allocates the new production proportionately to its current marketing areas, this should result in Giant delivering substantially more gasoline to the Albuquerque/Santa Fe area. This substantial increase in gasoline supply to northern New Mexico would spur price competition in that market, causing the prices paid to Giant and other bulk suppliers of light petroleum products in northern New Mexico to fall significantly below where they would have been otherwise.

*Western has Both the Incentive and the Means to Limit
Any Increase in the Supply of Gasoline
to Northern New Mexico After Acquiring Giant*

35. Western historically sells more gasoline and diesel fuel at Albuquerque prices than does Giant. Consequently, a combined Western/Giant has more exposure to Albuquerque prices than does Giant alone. After acquiring Giant, Western could find it profitable to reduce, by re-directing to other areas, some volume of light petroleum products that, absent the Acquisition, would have been supplied to the northern New Mexico market. Reducing the amount of light petroleum products supplied to northern New Mexico will increase prices for those products.
36. There are a number of potential mechanisms by which Western, after acquiring Giant, could reduce the total supply of bulk light petroleum products or bulk gasoline to northern New Mexico. Included among the many possible mechanisms is diverting to other markets any of Giant's potential additional gasoline supply for Albuquerque and Santa Fe.

37. Another potential method by which Western could reduce the total supply of bulk light petroleum products or gasoline to northern New Mexico would be to shift some of its current Plains Pipeline shipments between gasoline and diesel fuel. This would allow Western to reduce the amount of gasoline or diesel fuel reaching Albuquerque without ceding space on the Plains Pipeline to other shippers who could use the space to replace Western's reduced supply.
38. The proposed Acquisition may substantially lessen competition in the relevant markets by, among other things:
 - a. combining two of the five significant bulk suppliers of light petroleum products to northern New Mexico, substantially increasing concentration in an already highly concentrated market for the bulk supply of light petroleum products to northern New Mexico, eliminating the existing substantial competition between Western and Giant, and substantially reducing competition in the market for the bulk supply of light petroleum products to northern New Mexico;
 - b. combining two of the six significant bulk suppliers of gasoline to northern New Mexico, substantially increasing concentration in a highly concentrated market for the bulk supply of gasoline to northern New Mexico, eliminating the existing substantial competition between Western and Giant, and substantially reducing competition in the bulk supply of gasoline to northern New Mexico;
 - c. eliminating Giant as a "maverick" in the bulk supply of gasoline to northern New Mexico, creating a combined firm with reduced incentives to expand its supply of gasoline to northern New Mexico;
 - d. increasing the likelihood that Western will profitably reduce the amount of bulk light petroleum products it supplies to northern New Mexico when the other bulk suppliers of light petroleum products will be unlikely to respond in a way to make Western's output reduction unprofitable; and
 - e. increasing the likelihood of competitor coordination in the bulk supply of light petroleum products (and the bulk supply of any single petroleum product contained therein, including gasoline), allowing Western to more easily coordinate profitably with one or more of the few remaining significant bulk suppliers of light petroleum products, including gasoline, to restrict output or raise prices.

Entry Conditions

39. Entry into the relevant markets is difficult and would not be likely, timely, or sufficient to remedy the anticompetitive effects of the proposed acquisition.

IV. VIOLATIONS CHARGED

COUNT 1 – ILLEGAL ACQUISITION

40. The allegations contained in paragraphs 1-40 are repeated and realleged as though fully set forth here.
41. Western's proposed acquisition of Giant, if consummated, would substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18 and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

COUNT II – ILLEGAL ACQUISITION AGREEMENT

42. The allegations contained in paragraphs 1-40 are repeated and realleged as though fully set forth here.
43. Western and Giant, through the Agreement described in paragraph 10, have engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the third day of August, 2007, at 10:00 a.m., or such later date as determined by the Commission or by an Administrative Law Judge of the Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, as the place when and where a hearing will be had on the charges set forth in this Complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission or the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an

appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under §3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under §3.52 of said Rules.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Commission or the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

An initial prehearing scheduling conference will be scheduled no later than 14 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Ave., N.W. Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition of Western by Giant, or any other Acquisition that combines them, challenged in this proceeding violates Section 7 of the Clayton Act, as amended, the Commission may order such relief against respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. An order preventing Western from acquiring Giant, if the acquisition has not occurred at the time of the Commission's decision;
2. The divestiture of Giant and any other associated or necessary assets in a manner that restores Giant as a viable, independent competitor in the relevant markets, with the ability to offer such services as Giant is now offering and planning to offer, if the acquisition has occurred at the time of the Commission's decision;
3. A prohibition against any transaction between Western and Giant that combines their operations in the relevant markets except as may be approved by the Commission;
4. A requirement that, for a period of time, Western provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations;

5. A requirement for Western to file periodic compliance reports with the Commission; and
6. Any other relief appropriate to correct or remedy the anticompetitive effects of the Acquisition or to restore Giant as a viable, independent competitor in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this third day of May, 2007.

By the Commission.

Donald S. Clark
Secretary

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