

REPORT OF THE FEDERAL TRADE COMMISSION ON ACTIVITIES IN THE OIL AND NATURAL GAS INDUSTRIES

REPORTING PERIOD JULY-DECEMBER 2013

The Federal Trade Commission (“Commission” or “FTC”) is pleased to submit this report to the Congressional Appropriations Committees (“the Committees”) in response to directions, carried forward through various continuing resolutions, for the Commission to keep the Committees apprised of findings made regarding fuel prices, as well as other planned activities and investigations regarding the oil and natural gas industries.¹

Overview

The Commission undertook or continued a number of significant activities involving petroleum and natural gas during the second half of calendar 2013, pursuant to the agency’s enduring commitment to protect American consumers from potentially anticompetitive and anti-consumer practices in the energy sector. As it always does, the energy sector commanded the Commission’s close attention during this six-month period. The FTC and its staff focused on mergers and acquisitions, potentially anticompetitive or deceptive conduct, and other activities involving pricing and competition in the petroleum and natural gas industries.

Law Enforcement Activities

The analysis of mergers and acquisitions is a primary component of the Commission’s work in the oil and natural gas sector. Since July 1, 2013, the Commission has received premerger filings under the Hart-Scott-Rodino Act for 31 proposed transactions in these industries. The agency reviewed each of these premerger filings, and also monitored the energy sector for nonreportable transactions that might raise antitrust concerns.²

The Commission investigated a number of mergers and acquisitions that raised significant competition issues. These investigations involved crude oil pipeline transportation;

¹ As the Commission noted in previous reports to the Committees, because this is a public report, it is drafted to exclude sensitive details of ongoing investigations, which the Commission is prohibited by law from revealing.

² The Commission’s previous report stated that the agency received 33 Hart-Scott-Rodino filings for transactions in the oil and natural gas industries during the first half of 2013. In fact, the Commission received two additional Hart-Scott-Rodino filings in these industries between the date on which that report was approved for submission to Congress and June 30, 2013, bringing to 35 the total number of relevant filings during the first half of 2013.

petroleum refineries; refined petroleum product pipelines and terminals; crude oil and petroleum products merchant wholesaling; natural gas liquids; and natural gas exploration, production, transportation, storage, and distribution. As always, the Commission welcomed the cooperation of state attorney general offices in certain investigations.

For example, the Commission issued a final consent order in August that stemmed from its investigation of Tesoro Corporation's acquisition of pipeline and terminal assets from Chevron Corporation. The Commission's complaint, issued in June 2013, alleged that the acquisition, if consummated as originally proposed, would have substantially lessened competition in terminaling services for light petroleum products in Boise, Idaho, and the surrounding area. The FTC's final order required the respondents to divest Tesoro's light products terminal in the Boise area within 180 days to an FTC-approved buyer. The settlement included an Order to Maintain Assets to protect the competitive status quo pending the divestiture.³

Other FTC oil and gas merger activities during the second half of 2013 included the modification of a previously issued consent order arising from Kinder Morgan, Inc.'s acquisition of El Paso Corporation. The modified consent order extends Kinder Morgan's Transition Services Agreement with Tallgrass Energy Partners, LP.⁴ In addition, the Commission completed an intensive investigation of Magellan Midstream Partners' acquisition of certain refined petroleum product pipelines from Plains All American Pipeline.

The Commission's enforcement activities also included examinations of potentially anticompetitive conduct in the petroleum and natural gas industries. For instance, the Commission continued its investigation of whether certain oil producers, refiners, transporters, marketers, physical or financial traders, or others have engaged or are engaging in anticompetitive or manipulative practices or have provided any federal department or agency with false or misleading information related to the wholesale price of crude oil or petroleum products.⁵

³ See <http://www.ftc.gov/opa/2013/08/chevron.shtm>.

⁴ See <http://www.ftc.gov/opa/2013/10/kinder.shtm>.

⁵ For the Commission's announcement of the initiation of this investigation, see "Information To Be Publicly Disclosed Concerning the Commission Petroleum Industry Practices and Pricing Investigation," File No. 111 0183 (June 20, 2011), available at <http://www.ftc.gov/public-statements/2011/06/information-be-publicly-disclosed-concerning-commission-petroleum-industry>. The investigation (including the use of compulsory process) has focused on such issues as utilization and maintenance decisions, inventory holding decisions, product supply decisions, product margins and profitability, and capital planning.

The FTC also has continued to investigate other types of conduct by firms in the oil and gas industries, including investigations of possibly anticompetitive or possibly deceptive conduct involving products or services in or affecting the oil and gas sector. For example, the Commission announced a settlement in November under which marketers of a fuel additive called “EnviroTabs” will pay \$800,000 for consumer redress and are prohibited from making false, misleading, or unsubstantiated claims that EnviroTabs, when added to any type of fuel, will increase fuel efficiency, reduce emissions, and save consumers money.⁶

Further, the Commission has remained active in other markets that have a bearing on the energy sector. In September, the Commission obtained a federal court order in *FTC v. Lights of America, Inc., et al.*, a case in which the agency alleged that defendants made false and unsubstantiated claims about the light output and lifetime of Lights of America’s light-emitting diode (“LED”) bulbs. The Commission’s action to put an end to deceptive marketing practices in the growing market for LEDs makes it less likely that consumers will be discouraged from purchasing a product that promises to save the United States significant costs for electricity – much of it produced by gas-fired generators – in the years ahead.

Memorandum of Understanding with the CFTC

As discussed in our recent semiannual reports, the FTC and the Commodity Futures Trading Commission (“CFTC”) signed a Memorandum of Understanding (“MOU”) in 2011 designed “to foster further cooperation between the two agencies by helping them share nonpublic information.”⁷ By facilitating the sharing of such information in investigations of wholesale oil and gasoline markets, the MOU is meant to help each agency carry out its authority to detect and prevent manipulation in those markets. In furtherance of this goal, the FTC and the CFTC exchanged information pursuant to the MOU during the second half of 2013.

Petroleum Market Manipulation Rule

As mentioned in previous reports, the Commission established a process in November 2009 to monitor compliance with the Petroleum Market Manipulation Rule,⁸ which prohibits fraud or deception aimed at manipulating wholesale markets for crude oil, gasoline, or petroleum distillates. Although the FTC’s Bureau of Competition received no communications from the

⁶ FTC Press Release, *Green Foot Global, L.L.C., et al.* (Nov. 22, 2013), available at <http://www.ftc.gov/opa/2013/11/envirotabs.shtm>.

⁷ See <http://www.ftc.gov/news-events/press-releases/2011/04/ftc-cftc-agree-share-information-energy-investigations> (press release); <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-cftc-agree-share-information-energy-investigations/110412ftccftc-mou.pdf> (text of the MOU).

⁸ The Commission issued this Rule under the authority of Section 811 of the Energy Independence and Security Act of 2007, 42 U.S.C. § 17301.

public under the Rule since July 1, 2013, the Commission will examine closely any complaints, communications, or other information that it receives regarding potential violations of the Rule, and will take action as appropriate.⁹

Oil and Gas Price Fraud Working Group

As we have discussed in previous semiannual reports, the Oil and Gas Price Fraud Working Group – established by the Attorney General in the midst of the spring 2011 oil and gasoline price increases, and consisting of federal and state agencies with oversight of oil and gasoline markets – has provided a forum for interagency sharing of information and ideas about the oil and gas sector. The various member agencies’ investigations in the petroleum sector – including those by the FTC – may benefit from information gleaned from the Working Group. As one of the co-chairs of the Working Group, the Commission helps ensure that American consumers are not harmed by unlawful conduct.

Gasoline and Diesel Price Monitoring

During the second half of 2013, the FTC also continued a decade-old project that has provided valuable information in connection with the agency’s efforts to police conduct in the petroleum industry. Begun in 2002, the Gasoline and Diesel Price Monitoring Project involves monitoring by the Bureau of Economics of the wholesale and retail prices of gasoline and diesel fuel in order to track trends and developments in the pricing of gasoline and diesel fuel. The Monitoring Project is just one of a number of tools available to help detect possible anticompetitive activities and determine whether a law enforcement investigation is warranted. This project tracks retail gasoline and diesel prices in 360 cities across the nation and wholesale (terminal rack) prices in 20 major urban areas. The staff of the Bureau of Economics receives daily data from the Oil Price Information Service (except on Sundays) and reviews other relevant information that the Commission might receive directly from the public or from other government agencies or Members of Congress. The staff reviews the data and uses an econometric model to determine whether current retail and wholesale prices each week are anomalous in comparison with historical data. This alerts FTC staff to unusual changes in

⁹ The “Guide to Complying with Petroleum Market Manipulation Regulations” that the Commission issued in November 2009 (<http://www.ftc.gov/sites/default/files/documents/rules/prohibition-energy-market-manipulation-rule/091113mmrguide.pdf>) provides addresses to which the public may send complaints of possible Rule violations. Complaints that evidence a Rule violation are referred to the FTC litigation units that specialize in maintaining competition in energy industries. Complaints that concern activity in futures markets are shared with the CFTC (through the FTC’s working relationship with that agency) to ensure that consumers are protected against fraud and deception in whatever form they take. Moreover, as described elsewhere in this report, FTC litigators and economists continue to employ additional techniques to monitor prices and other activity in petroleum markets.

gasoline and diesel prices so that further inquiry can be undertaken expeditiously. When price increases do not appear to result from market-driven causes, the staff consults with the Energy Information Administration. FTC staff also contacts the offices of the appropriate state attorneys general to discuss the anomaly and appropriate potential actions, including the opening of an investigation.

Outer Continental Shelf Leasing

The FTC has an ongoing responsibility to conduct an antitrust review of proposed oil and natural gas leases on the Outer Continental Shelf, pursuant to the Outer Continental Shelf Lands Act Amendments of 1978. The Commission undertook one such review during the second half of 2013 and advised the Assistant Attorney General for Antitrust regarding its assessment of proposed Lease Sale 233 in the western Gulf of Mexico.

Congressionally Mandated Reports

On November 26, 2013, the Commission announced the release of its ninth annual Report on Ethanol Market Concentration. The Commission's ethanol reports, issued pursuant to Section 1501(a)(2) of the Energy Policy Act of 2005 (45 U.S.C. § 7545(o)), entail an analysis of ethanol industry concentration to determine whether there is sufficient competition among ethanol industry participants "to avoid price-setting and other anticompetitive behavior."¹⁰

Economic Analysis of Oil and Gas Issues

In September 2013, the FTC's Bureau of Economics published a working paper on Western Refining's May 2007 acquisition of Giant Industries – a transaction that the Commission unsuccessfully challenged on the ground that it would substantially lessen competition for the bulk supply of light petroleum products in northern New Mexico. According to the abstract of the working paper, which set out to "compare[] estimates of the post-merger price effect to the price effects predicted by economic experts on both sides of the case," there was "little scope to interpret the evidence as consistent with an anticompetitive post-merger price effect." The working paper also "highlight[ed] difficulties involved in econometrically identifying small effects even with an abundance of pricing data."¹¹

¹⁰ In its 2013 ethanol report, available at <http://www.ftc.gov/reports/2013-federal-trade-commission-report-congress-ethanol-market-concentration-november-2013>, the Commission concluded that "[r]egardless of the particular measure of market share or the market share allocation method used to calculate concentration, the low concentration levels that characterize the U.S. ethanol production industry have persisted." The industry dynamics described in the report – including potential entry by new firms and the availability of ethanol imports – "make it extremely unlikely that a single ethanol producer or marketer or a group of such firms could exercise market power to set prices or coordinate on price or output levels."

¹¹ Nicholas Kreisle, Working Paper No. 319, *Merger Policy at the Margin: Western*

FTC Personnel Involved in Oil and Gas Activities

During the second half of 2013, personnel from many parts of the Commission continued their involvement in the agency's activities in the oil and natural gas industries. The Commission's Associate General Counsel for Energy engaged in virtually all aspects of the agency's work in these industries. Personnel from the Mergers III division of the Bureau of Competition (which is devoted primarily to petroleum and natural gas issues) and from a number of other Bureau divisions have been involved in addressing oil and natural gas issues as well.¹² In addition to the Bureau of Competition, one division of the Commission's Bureau of Economics bore major responsibility for conducting economic analysis of pricing and other competition issues in the petroleum and natural gas industries. Staff from the Commission's Office of the General Counsel, the Office of Congressional Relations, the Bureau of Consumer Protection, the Commissioners' offices, the FTC's Regional Offices, and other FTC organizations also contributed to oil and natural gas matters during the second half of the year.

Conclusion

The Commission continued its intensive antitrust and consumer protection scrutiny of the energy sector during the second half of 2013. In view of the fundamental importance of oil, natural gas, and other energy resources to the overall vitality of the United States and world economy, we expect that FTC review and oversight of the oil and natural gas industries will remain a centerpiece of our work for years to come.

Refining's Acquisition of Giant Industries (Sept. 2013), available at <http://www.ftc.gov/reports/merger-policy-margin-western-refinings-acquisition-giant-industries>.

¹² Additional Bureau of Competition offices whose staff participated in oil and gas matters during the second half of 2013 include the Office of the Director, the Division of Anticompetitive Practices, the Division of Compliance, the Division of Technology and Information Management, the Division of Operations, and the Office of Premerger Notification.