ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of Irving Oil Limited and Irving Oil Terminals Inc.
File No. 101-0021

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Irving Oil Terminals Inc. and Irving Oil Limited (collectively "Irving"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects resulting from Irving and Irving Oil Transportation Company LLC's proposed acquisition of certain petroleum products storage and transportation assets located in Maine from ExxonMobil Oil Corporation ("ExxonMobil"). As originally structured, Irving would have acquired ExxonMobil's petroleum products terminals located in South Portland and Bangor, Maine, as well as ExxonMobil's intrastate pipeline connecting these two terminals.

The Commission's Complaint alleges that this, if consummated, would violate 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, by lessening competition in the gasoline and distillates terminaling services markets in the South Portland and Bangor/Penobscot Bay areas of Maine. To resolve these competitive concerns raised by the original transaction, Irving will divest its acquisition rights to the ExxonMobil Bangor terminal and intrastate pipeline as well as fifty percent of ExxonMobil's South Portland terminal to Buckeye Partners, L.P. and its affiliate Buckeye Pipe Line Holdings, L.P. (collectively "Buckeye"), retaining only the right to acquire the remaining fifty percent of the South Portland terminal. Buckeye and Irving will form a joint venture that will purchase ExxonMobil's South Portland terminal. Under this proposal, Buckeye alone will manage and operate this terminal on behalf of the Irving-Buckeye joint venture. Buckeye will purchase and operate ExxonMobil's pipeline and Bangor terminal. Irving will enter into a throughput agreement with Buckeye at each of the petroleum products terminals. The Commission's Consent Agreement is intended to assure that Irving does not control the pipeline and terminals and does not threaten Buckeye's ability to competitively operate the South Portland terminal.

The proposed Consent Agreement, to govern for a period of ten years, prevents Irving from acquiring additional share in, managing, or operating the South Portland terminal absent the Commission's prior approval. The Consent Agreement also requires prior notification should Irving acquire any form of additional ownership interests in petroleum products transportation or storage assets located in Maine. Finally, the proposed Consent Agreement imposes firewall and monitor provisions to prevent Irving from accessing and using confidential customer information. This remedy preserves competition in the gasoline and distillates terminaling services markets in both the Bangor/Penobscot Bay and South Portland areas of Maine.

The proposed Consent Agreement has been placed on the public record for thirty days to allow interested persons to comment. Comments received during this period will become part of the public record. After thirty days, the Commission will review the proposed Consent Agreement and the comments received, and will decide whether to withdraw the proposed Consent Agreement, modify it, or make it final.

II. Parties

Irving is a family-owned business based in St. John, New Brunswick, Canada. Irving owns the largest refinery in Canada and owns, in whole or in part, six terminals in Canada and the northeastern United States. Irving supplies branded and unbranded petroleum products in Canada and throughout New England to third-party distributors, retailers, various other re-sellers, and governmental and commercial end users. Irving also owns retail travel plazas that sell gasoline and diesel petroleum products. In Maine, Irving owns a terminal in Searsport and co-owns a terminal with CITGO Petroleum Corporation in South Portland.

ExxonMobil is the world's largest publicly traded petroleum and natural gas company worldwide. ExxonMobil produces crude oil and natural gas, refines petroleum products, and transports and sells crude oil, natural gas, and refined petroleum products. ExxonMobil owns terminals located in South Portland and Bangor, Maine, as well as an intrastate pipeline that connects these two terminals.

Buckeye is a publicly traded partnership that owns and operates one of the largest independent refined petroleum products pipeline systems in the United States. Buckeye owns or manages approximately 7,500 miles of pipeline, owns approximately 70 active refined petroleum products terminals, and markets refined petroleum products in some of the geographic areas served by its pipeline and terminal operations. Buckeye is not a party to the original transaction and does not currently market, transport, or store light petroleum products in Maine.

III. The Relevant Markets and their Structure

The Commission's Complaint alleges that the original transaction would pose substantial antitrust concerns in the gasoline and distillates terminaling services markets in the Bangor/Penobscot Bay and South Portland areas of Maine.

Terminals generally consist of a number of storage tanks and loading "racks" that pump fuels into tanker trucks for further delivery. Terminals are specialized facilities connected to one or more fuel supply sources, have the capacity to store fuel shipments, and must be configured properly to distribute the fuel to customers. Light petroleum products terminals are specialized facilities that receive gasoline, diesel fuel, heating oil, kerosene, and jet fuel, among other products, by pipeline, by water, by rail, or directly from refinery production. These products are stored or redistributed by pipeline, water, rail, or truck. Terminals are critical to the sale and distribution of transportation fuels and perform value-added services, such as handling and injection of motor fuel additives (including ethanol) as petroleum products are redelivered across the truck rack. Terminaling services consist of a cluster of services related to the delivery, storage, and throughput of petroleum products.

The Commission's Complaint alleges that relevant product markets within which to analyze the original transaction are gasoline terminaling services and distillates terminaling services. Terminals that store gasoline compete in both the gasoline terminaling services and distillates terminaling services markets. However, terminals that store only distillates compete only in the distillates terminaling services market. Two relevant geographic areas in which to analyze the effects of the original transaction on gasoline and distillates terminaling services are the Bangor/Penobscot Bay and the South Portland areas of Maine. The Bangor/Penobscot Bay area encompasses the state of Maine north of Waterville, including Bangor, Searsport, and Bucksport, Maine. The South Portland area encompasses the state of Maine south of Waterville, including South Portland.

Irving and ExxonMobil are two of three firms that can independently offer gasoline terminaling services in the Bangor/Penobscot Bay area and two of four in the South Portland area. Additionally, these companies are two of four firms independently offering distillates terminaling services in the Bangor/Penobscot Bay area and two of six in the South Portland area. The original acquisition would have substantially increased concentration in each of the above markets.

IV. Effects of the Acquisition

The Commission believes that the original transaction would eliminate the actual, direct, and substantial competition between Irving and ExxonMobil, both: (1) increasing the likelihood that Irving would unilaterally exercise market power in the Bangor/Penobscot Bay area gasoline terminaling services market, and (2) enhancing the likelihood of collusion or coordinated interaction among the remaining firms in the South Portland area gasoline terminaling services market and both the Bangor/Penobscot Bay and South Portland area distillates terminaling services markets.

The ExxonMobil pipeline, which originates in South Portland and whose only access point is the ExxonMobil South Portland terminal, supplies the terminals located in Bangor, Maine. Marine vessels supply the remaining Bangor/Penobscot Bay area terminals as well as the South Portland area terminals. Because importing gasoline from Europe on large cargo vessels is generally less costly than shipping it from domestic ports on smaller barges, most Maine suppliers import gasoline from outside the United States.

Controlling the South Portland terminal would allow Irving to control the price of bulk gasoline deliveries to the Bangor/Penobscot Bay area. Irving would likely be able unilaterally to raise the price for or restrict the availability of gasoline terminaling services in the Bangor/Penobscot Bay area and raise gasoline prices to customers served from this area's terminals. Additionally, the original transaction would provide Irving with sufficient terminal capacity to restrict alternative suppliers' ability to import gasoline into South Portland area terminals at current prices. The ability to restrict these imports would allow Irving to increase the cost of gasoline supplied to retail stations and other consumers from the Bangor/Penobscot Bay area terminals.

Because the ExxonMobil assets carry both gasoline and distillates, the original transaction also would likely enhance the likelihood of coordination to raise fees for and reduce the quality and availability of terminaling services among the remaining firms that could independently provide distillates terminaling services in the Bangor/Penobscot Bay area and provide gasoline or distillates terminaling services in South Portland area.

Entry into the gasoline and distillates terminaling services markets in the Bangor/Penobscot Bay and South Portland areas would not be timely, likely, or sufficient to prevent or defeat the anticompetitive effects of the original transaction. Entering these markets is costly, difficult, and unlikely due to, among other things, the difficulty of obtaining regulatory approvals and the presence of excess terminal capacity in both markets. Facing substantial sunk costs, a new entrant would not likely invest in a new terminal in these markets, all of which presently have sufficient capacity. Further, due to the significant cost and limited ability to attract large customer volumes, a terminal that cannot currently store gasoline would not likely reconfigure its tanks to store gasoline in response to a small but significant price increase in gasoline terminaling services.

V. The Proposed Consent Agreement

For a duration of ten years, the proposed Consent Agreement addresses the competitive risk that Irving may: (1) gain control of the Irving-Buckeye South Portland terminal in the future, allowing it to restrict supply to the Bangor terminals and imports into South Portland, or (2) access and use confidential business information in an anticompetitive manner. By imposing certain prior approval and prior notice provisions on Irving and prohibiting it from taking certain actions, the remedy ensures that the Irving-Buckeye South Portland terminal will continue to operate independently of, and in competition with, other Maine terminals. Further, by imposing firewall and monitor provisions, the remedy guards against Irving accessing and using confidential information in an anticompetitive manner.

Pursuant to the proposed Consent Agreement, Irving must obtain Commission approval prior to: (1) acting as either manager of the Irving-Buckeye joint venture or operator of the joint venture terminal, with a limited sixty-day exception in the event that Buckeye is unable to serve in either capacity, (2) acquiring additional storage or throughput rights at the joint venture terminal, with a limited one-month exception, or ownership interests in the joint venture, or (3) modifying its assignment agreements with Buckeye. Paragraphs II.B. and II.E. Further, the Consent Agreement requires Irving to notify the Commission prior to acquiring any form of additional ownership interests in petroleum products transportation or storage assets located in Maine. Paragraph IV. Additionally, the Consent Agreement prohibits Irving from taking action that would discourage or prevent Buckeye from offering third parties terms equal to Irving's terms at the South Portland terminal. Paragraph II.C.

The proposed Consent Agreement also prohibits Irving from receiving, sharing, or using any confidential business information with limited exceptions that allow the information to be shared where required and only to those with written agreements to maintain the information's confidentiality. Paragraph III. To this end, the Consent Agreement places an enforcement obligation on Irving and provides for the appointment of a monitor to oversee the implementation of these provisions. Paragraphs III.C. and V. Such a monitor will review Irving's compliance proposals and assist in evaluating their adequacy. Paragraph V.

The proposed Consent Agreement includes the standard divestiture trustee provision pursuant to which the Commission may appoint a trustee if Irving fails to effectuate the divestiture in a manner that complies with the Consent Order. Paragraph VI.A. In this case, the trustee will divest the assets, subject to Commission prior approval, within twelve months. Paragraph VI.E.

VI. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the comments received, and decide whether to withdraw from the proposed Consent Agreement, modify it, or make it final. By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to inform and invite public comment on the proposed Consent Agreement, including the proposed remedy, and to aid the Commission in its determination of whether to make the proposed Consent Agreement final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement, nor to modify the terms of the proposed Consent Agreement in any way.