ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of Marathon Petroleum Corporation, Express Mart Franchising Corp., Petr-All Petroleum Consulting Corporation, and REROB, LLC, File No. 181-0152, Docket No. C-4661

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Marathon Petroleum Corporation ("Marathon") and Express Mart Franchising Corp., Petr-All Petroleum Consulting Corporation, and REROB, LLC ("Express Mart" and collectively, the "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from Marathon's proposed acquisition of retail fuel outlets and other interests from Express Mart.

Under the terms of the proposed Consent Agreement, Marathon must divest to the upfront buyer Sunoco LP ("Sunoco") retail fuel outlets and related assets in five local markets in New York. Marathon must complete the divestiture within 90 days after the closing of Marathon's acquisition of Express Mart. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date Sunoco acquires the outlet.

The Commission has placed the proposed Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent Marathon, a publicly traded company headquartered in Findlay, Ohio, operates a vertically integrated refining, marketing, retail, and transportation system. Marathon's wholly owned subsidiary, Speedway LLC ("Speedway"), owns and operates 2,740 convenience stores located in 21 states, making it the second-largest chain of company-owned and -operated gasoline and convenience stores in the United States. In addition, independent entrepreneurs own and operate 5,600 Marathon-branded retail fuel outlets in 20 states and the District of Columbia.

Respondent Express Mart is a collection of closely held New York State S Corporations and limited liability companies headquartered in Syracuse, New York. Express Mart owns and operates convenience stores and retail fuel outlets stations primarily along the I-90 corridor in the Syracuse-Rochester-Buffalo region of upstate New York. Express Mart's network includes 77 convenience stores with attached fuel stations, as well as 11 franchise locations owned by independent contract dealers operating under the Express Mart banner. Express Mart's convenience stores operate under the Express Mart name, while its retail fuel stations operate primarily under the Sunoco banner.

III. The Proposed Acquisition

On April 13, 2018, Marathon, through its wholly owned subsidiary Speedway, entered into an agreement to acquire certain retail fuel outlets and other interests, from Express Mart (the "Transaction"). The Transaction would expand Speedway's presence across upstate New York.

The Commission's Complaint alleges that the Transaction, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the Transaction agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline and the retail sale of diesel in five local markets in New York.

IV. The Retail Sales of Gasoline and Diesel

The Commission's Complaint alleges that the relevant product markets in which to analyze the Transaction are the retail sale of gasoline and the retail sale of diesel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel for their diesel-powered vehicles and can purchase diesel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel constitute separate relevant markets because the two are not interchangeable – vehicles that run on gasoline cannot run on diesel and vehicles that run on diesel cannot run on gasoline.

The Commission's Complaint alleges the relevant geographic markets in which to assess the competitive effects of the Transaction include five local markets within the following cities: Farmington, Fayetteville, Johnson City, Rochester, and Whitney Point in New York.

The geographic markets for retail gasoline and retail diesel are highly localized, ranging up to a few miles, depending on local circumstances. Each relevant market is distinct and fact-dependent, reflecting a number of considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel may be similar to the corresponding geographic markets for retail gasoline as many diesel consumers exhibit the same preferences and behaviors as gasoline consumers.

The Transaction would substantially increase the market concentration in each of the five local markets, resulting in five highly concentrated markets for the retail sale of gasoline and the retail sale of diesel. In four of the five local gasoline retail markets, the Transaction would reduce the number of competitively constraining independent market participants from three to two. In the fifth local gasoline retail market, the Transaction would reduce the number of competitively constraining independent participants from four the three. In three of the five retail diesel markets, the Transaction would result in a merger to monopoly. In the fourth diesel market, the Transaction would reduce the number of competitively constraining independent participants from three to two. In the fifth diesel market, the Transaction would reduce the number of competitively constraining independent participants from four to three.

The Transaction would substantially lessen competition for the retail sale of gasoline and the retail sale of diesel in these local markets. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics. The combined entity would be able to raise prices unilaterally in markets where Marathon and Express Mart are close competitors. Absent the Transaction, Marathon and Express Mart would continue to compete head to head in these local markets.

Moreover, the Transaction would enhance the incentives for interdependent behavior in local markets where only two or three competitively constraining independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors to observe each other's fuel prices without difficulty. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how changing prices affect their sales.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

V. The Proposed Consent Agreement

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring Marathon to divest certain Speedway and Express Mart retail fuel outlets and related assets to Sunoco in five local markets.

The proposed Consent Agreement requires that the divestiture be completed no later than 90 days after Marathon consummates the Acquisition. This Agreement protects the Commission's ability to obtain complete and effective relief given the small number of outlets to be divested. The proposed Consent Agreement further requires Marathon and Express Mart to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestiture to Sunoco is complete. For up to twelve months following the divestiture, Marathon and Express Mart must make available transitional services, as needed, to assist the buyer of each divestiture asset.

In addition to requiring outlet divestitures, the proposed Consent Agreement also requires Respondents to provide the Commission notice before acquiring designated outlets in the five local areas for ten years. The prior notice provision is necessary because acquisitions of the designated outlets likely raise competitive concerns and may fall below the HSR Act premerger notification thresholds.

Presently, in Rochester, New York, one local market of concern, Sunoco serves as the wholesale supplier to a retail fuel outlet that is an independent competitor to Speedway and Express Mart. By purchasing the Speedway outlet, Sunoco will also become a competitor to the outlet for which it is currently a wholesale supplier. To address this concern, Sunoco has agreed to implement a firewall between its wholesale and retail fuel pricing businesses in that local market. The firewall will restrict Sunoco retail pricing personnel's access to wholesale information, prohibiting Sunoco retail from knowing, among other information, how its pricing decisions affect the competing location's volumes.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business, through the date the Respondents' complete divestiture of the outlet. During this period, and until such time as the buyer no longer requires transitional assistance, the Order to Maintain Assets authorizes the Commission to appoint an independent third party as a Monitor to oversee the Respondents' compliance with the requirements of the proposed Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.