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

REPORTING PERIOD JULY-DECEMBER 2012

The Federal Trade Commission ("Commission" or "FTC") is pleased to submit this report to the Congressional Appropriations Committees ("the Committees") in response to the Report of the Senate Committee on Appropriations on the Financial Services and General Government Appropriations Bill for Fiscal Year 2012. That Report's pertinent language was carried forward by the continuing resolution under which the Commission currently operates. In the Report, the Committee expressed its concern "with the potential for market manipulation and anticompetitive behavior in the oil and natural gas industries," encouraged the FTC "to continue its investigations and other activities related to these concerns," and directed the agency "to keep the Committee apprised of findings made regarding fuel prices, as well as other planned activities and investigations regarding the oil and gas industries."[1]

Overview

The Commission pursued a number of significant activities involving petroleum and natural gas during the second half of calendar 2012, pursuant to the FTC's enduring commitment to protect American consumers from potentially anticompetitive and anti-consumer practices in the energy sector. The Commission continued to pay close attention to the energy sector during this six-month period. The FTC and its staff focused on mergers and acquisitions, possible 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, 2012, the Commission has received premerger filings under the Hart-Scott-Rodino Act for 48 proposed transactions in these industries. The agency reviewed each of these premerger filings, and also monitored the industry for nonreportable transactions that might raise antitrust concerns.[2]

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[1] Committee on Appropriations, United States Senate, Report 112-79, on the Financial Services and General Government Appropriations Bill, 2012, S. 1573, at 77 (Sept. 15, 2011), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-112srpt79/pdf/CRPT-112srpt79.pdf. As the Commission noted in previous reports to the Appropriations 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 36 Hart-Scott-Rodino filings for transactions in the oil and natural gas industries during the first half of 2012. In fact,

After issuing a consent order in January 2012 stemming from AmeriGas L.P.'s proposed acquisition of Energy Transfer Partners L.P.'s Heritage Propane business,[3] in June the Commission announced approval of Energy Transfer Partners' proposal to sell the Heritage Propane Express business to JP Energy Partners, LP.[4] The Commission took these actions in order to maintain competition in the market for propane exchange cylinders (used for such purposes as fueling barbecue grills and patio heaters). Pertinent activity since July 1 involved the respondent's discharge of its divestiture obligation.

The Commission also was active in examining transactions in the natural gas industry. As recounted in our most recent report, the Commission issued a consent order last June that required Kinder Morgan, Inc., one of the nation's largest transporters of natural gas and other energy products, to divest three natural gas pipelines and other related assets in the Rocky Mountain region. This order was designed to alleviate the likely anticompetitive effects of Kinder Morgan's acquisition of El Paso Corporation, which threatened harm to competition in markets for pipeline transportation and processing of natural gas in gas production areas in and around Wyoming, Colorado, Nebraska, and Utah.[5] On November 9, 2012, the Commission announced approval of Kinder Morgan's divestiture of the relevant assets to Tallgrass Energy Partners, LP.[6]

In addition, the Commission investigated other mergers and acquisitions that raised significant competition issues. These investigations involved crude oil transportation, terminaling, and bulk supply; petroleum refineries; refined petroleum product terminals, pipelines, and bulk supply; gasoline retailing; and natural gas exploration, production, pipeline distribution, and storage. A number of these matters involved the cooperation of state attorney general offices, which the Commission always welcomes.

For example, the Commission has been investigating Tesoro's plan to acquire BP's oil refinery in Carson, California, and related assets. In addition, the Commission investigated Hilcorp Alaska LLC's proposed acquisition of natural gas production, storage, and pipeline

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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, 2012, bringing to 38 the total number of relevant filings during the first half of 2012.

[3] *See* http://www.ftc.gov/opa/2012/01/amerigas.shtm.

[4] *See* http://www.ftc.gov/opa/2012/06/amerigas.shtm.

[5] *See* http://www.ftc.gov/opa/2012/05/elpaso.shtm; http://www.ftc.gov/opa/2012/06/kindermorgan.shtm.

[6] *See* http://www.ftc.gov/opa/2012/11/kinder.shtm.

assets from Marathon Alaska LLC.[7]

The Commission's enforcement activities also included examinations of possibly 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.[8]

The FTC also has continued to investigate other types of conduct by firms in the oil and gas industries, including inquiries related to natural gas, propane, and other natural gas liquids and investigations of possibly anticompetitive or possibly deceptive conduct involving other products or services in or affecting the oil and gas sector.[9] When appropriate, the staff continued

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[7] Notwithstanding antitrust concerns over the effects of the Hilcorp/Marathon transaction in the Cook Inlet area of Alaska, the Commission exercised its prosecutorial discretion and closed its investigation once the Alaska Attorney General's office filed its own consent decree. As the Commission said in a public statement issued in connection with the closing of this investigation: "In these unique circumstances, where the effects of the proposed acquisition are confined to consumers in Alaska, the state has concluded that the consent agreement substantially allays the potential competitive concerns arising from the proposed transaction, and the state has concluded that the transaction will mitigate energy security concerns, the Commission has decided to exercise its prosecutorial discretion and defer to the state's resolution of this matter." *See* http://www.ftc.gov/opa/2012/11/hilcorp.shtm (press release, Nov. 7, 2012); http://www.ftc.gov/os/closings/comm/121107hilcorpstmtofcomm.pdf (statement of the Commission).

[8] 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/os/2011/06/110620petroleuminvestigation.pdf. 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.

[9] As reported last June, the Commission issued consent orders settling complaints against five firms for misrepresenting the energy efficiency and energy-saving properties of their replacement windows. Those orders were designed to prevent the companies from engaging in similar deceptive marketing practices in the future. *See* http://www.ftc.gov/opa/2012/02/windows.shtm; http://www.ftc.gov/opa/2012/05/windows.shtm; *see also* "Shopping for New Windows?" (http://www.ftc.gov/bcp/edu/pubs/consumer/homes/rea20.shtm). Such FTC law enforcement actions should help consumers who rely on accurate information to save on expenditures for

to conduct this work in cooperation with local law enforcement officials.

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") last year that is intended "to foster further cooperation between the two agencies by helping them share nonpublic information."[10] 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. The FTC and the CFTC exchanged information pursuant to the MOU during the second half of 2012.

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,[11] which prohibits manipulation in wholesale markets for crude oil, gasoline, or petroleum distillates. Since July 1, 2012, the FTC's Bureau of Competition has received two complaints under the Rule. The information from one complainant did not indicate a violation of the Rule; the other complaint is under review. As always, the Commission stands ready to examine closely any complaints or

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such energy commodities as heating oil and natural gas. In August 2012, the Commission followed up by warning 14 window manufacturers and one window glass maker that they may be making unsupported energy savings claims for replacement windows. *See* http://www.ftc.gov/opa/2012/08/windows.shtm.

In addition, the Commission announced the issuance of revised "Green Guides" that are designed to help marketers ensure that the claims they make about the environmental attributes of their products are truthful and non-deceptive. *See* "FTC Issues Revised 'Green Guides'" (press release, Oct. 1, 2012), *available at* http://www.ftc.gov/opa/2012/10/greenguides.shtm. For example, the Green Guides say that marketers should not make unqualified renewable energy claims based on energy derived from fossil fuels unless they purchase renewable energy certificates ("RECs") to match the energy use. In addition, the Guides state that marketers should not make unqualified "made with renewable energy" claims unless all (or virtually all) of the significant manufacturing processes involved in making the product are powered with either (1) renewable energy or (2) non-renewable energy matched by RECs.

[10] *See* http://www.ftc.gov/opa/2011/04/ftccftc-mou.shtm (press release); http://www.ftc.gov/os/2011/04/110412ftccftc-mou.pdf (text of the MOU).

[11] 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.

other communications that it receives regarding the Rule, and to take action as appropriate.[12]

Oil and Gas Price Fraud Working Group

The work of the interagency Oil and Gas Price Fraud Working Group – established by the Attorney General in the midst of the spring 2011 oil and gasoline price increases – continued during the second half of 2012. As described in our recent semiannual reports, the Working Group consists of federal and state law enforcement agencies with oversight of oil and gasoline markets. During the second half of the year, the member agencies discussed developments and specific issues in the oil and gas sector and continued to share information and ideas about the sector. The Working Group has enhanced the possibilities for cooperative information-sharing among the member agencies, and various agencies' investigations in the petroleum sector – including those by the FTC – may benefit from information gleaned from the Working Group process. 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 relevant period, 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 help detect possible anticompetitive activities and determine whether a law enforcement investigation is warranted. This project continues to track 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 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

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[12] The "Guide to Complying with Petroleum Market Manipulation Regulations" that the Commission issued in November 2009 (http://www.ftc.gov/os/2009/11/091113mmrguide.pdf) provides addresses – including an email address – to which the public may send complaints of possible Rule violations. Complaints that evidence a serious possibility of 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. In addition, as described elsewhere in this report, FTC litigators and economists continue to employ additional techniques to monitor prices and other activity in petroleum markets.

state attorneys general to discuss the anomaly and appropriate potential actions, including the opening of an investigation.[13]

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 2012 and advised the Acting Assistant Attorney General for Antitrust regarding its assessment of proposed Lease Sale 229 in the western Gulf of Mexico. In addition, FTC staff consulted with the Department of the Interior's Bureau of Ocean Energy Management regarding the competitive implications of the new Outer Continental Shelf leasing plan for the years 2012 to 2017.

Congressionally Mandated Reports

On November 20, 2012, the Commission announced the release of its eighth 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."[14]

FTC Personnel Involved in Oil and Gas Activities

During the second half of 2012, 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

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[13] By means of this Price Monitoring Project, the FTC staff was able to track the increases in gasoline and diesel prices in the areas affected by Hurricane Sandy.

[14] In its 2012 ethanol report, *available at* http://www.ftc.gov/reports/ethanol/2012ethanolreport.pdf, 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 possibility 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."

of other Bureau divisions have been involved in addressing oil and natural gas issues as well.[15] 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 Bureau of Consumer Protection, the Office of Congressional Relations, 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 has maintained its intensive antitrust and consumer protection scrutiny of the energy sector during the second half of 2012. 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.

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[15] Additional Bureau of Competition offices whose staff participated in oil and gas matters during the second half of 2012 include the Office of the Director, the Division of Compliance, other litigation divisions, the Division of Technology and Information Management, the Division of Operations, and the Office of Premerger Notification.