

Complaint

111 F.T.C.

In the Matter of

PACIFIC RESOURCES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.
5 OF THE FEDERAL TRADE COMMISSION ACT & SEC. 7 OF THE
CLAYTON ACT

Docket 9211. Complaint, Nov. 25, 1987—Decision, Nov. 4, 1988

This consent order prohibits, among other things, Pacific Resources, Inc. ("PRI") from acquiring, without prior Commission approval, any substantial Hawaiian wholesale terminal from a competitor or from entering into any terminalling agreement for more than fifty percent of the capacity of such terminal.

Appearances

For the Commission: *Arthur J. Nolan.*

For the respondent: *John Herfort and Stuart D. Karle, Gibson, Dunn & Crutcher, New York City and Phillip H. Rudolph, Gibson, Dunn & Crutcher, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Pacific Resources, Inc. ("PRI"), a corporation subject to the jurisdiction of the Federal Trade Commission, has entered into an agreement with Shell Oil Company ("Shell"), described in paragraph 5 herein, that, 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, 15 U.S.C. 45; that said agreement and the actions of the respondent to implement that agreement constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; 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. PACIFIC RESOURCES, INC.

1. Respondent PRI is a corporation organized and existing under the laws of the State of Hawaii, with its principal place of business at 733 Bishop Street, Honolulu, Hawaii.

2. PRI 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. SHELL OIL COMPANY

3. Shell is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at One Shell Plaza, Houston, Texas.

4. Shell 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.

III. THE ACQUISITION

5. On or about March 17, 1987, PRI entered into a purchase agreement with Shell pursuant to which PRI agreed to purchase the petroleum terminalling and distribution assets and operations of Shell in the State of Hawaii. The total value of the proposed transaction is approximately \$32 million. On November 6, the United States District Court for the Western District of Washington preliminarily enjoined the proposed transaction. On November 12, 1987, PRI and Shell terminated the acquisition agreement and withdrew their Hart-Scott-Rodino filing.

IV. TRADE AND COMMERCE

A. *Relevant Line of Commerce*

6. Two relevant lines of commerce in which to analyze PRI's acquisition of the Hawaiian assets of Shell Oil Company are the distribution of gasoline and diesel fuel from terminals.

B. *Relevant Section of the Country*

7. The relevant sections of the country are the individual islands of Oahu, Maui, Hawaii, and Kauai in the State of Hawaii.

V. MARKET STRUCTURE

8. Distribution of gasoline and diesel fuel from terminals in each relevant market is extremely concentrated, whether measured by

Herfindahl-Hirschmann Indices ("HHI") or by two-firm and four-firm concentration ratios.

VI. BARRIERS TO ENTRY

9. Entry into the relevant markets set out in paragraphs 6 and 7 herein, is very difficult.

VII. ACTUAL COMPETITION

10. PRI and Shell are actual competitors in the distribution of gasoline from terminals on the island of Oahu. PRI and Shell are actual and potential competitors in the distribution of diesel from terminals on the islands of Oahu and Hawaii.

VIII. POTENTIAL COMPETITION

11. PRI and Shell are potential competitors in the distribution of gasoline from terminals on the islands of Hawaii, Maui and Kauai. PRI and Shell are potential competitors in the distribution of diesel from terminals on the islands of Maui and Kauai.

IX. EFFECT

12. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition in the product markets in relevant sections of the country described above in paragraphs 6 and 7 in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. eliminating actual competition between Shell and PRI;
- b. eliminating potential competition between Shell and PRI;
- c. creating a dominant firm;
- d. increasing the degree of vertical integration and thereby the difficulty of entry; and
- e. facilitating anticompetitive interdependent conduct, nonrivalrous behavior, collusion, or parallel policies of mutual advantage.

All of the above increase the likelihood that firms in the market will increase prices and decrease the likelihood that they will decrease prices both in the near future and in the long term.

X. VIOLATION CHARGED

13. The acquisition agreement described in paragraph 5 herein

constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

14. The proposed acquisition described in paragraph 5 herein would, if consummated, violate Section 7 of the Clayton Act as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondent Pacific Resources, Inc. ("PRI") with violation of 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 respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent PRI, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by PRI of all jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now, in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent PRI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Hawaii with principal offices at 733 Bishop Street, Honolulu, Hawaii.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent PRI, and the proceeding is in the public interest.

ORDER

I.

As used in this order, the following definitions shall apply:

(a) "*Exchange agreement*" means any arrangement or transaction or series of arrangements or transactions, other than a terminalling agreement as defined in subparagraph (j) of this paragraph, in which two or more persons or firms reciprocally transfer to each other or their respective consignees or assignees, quantities of petroleum products, without collecting a monetary price, except possibly some monetary accounting or settlement for the difference for differentials between quantity, transportation, storage, or handling of the exchanged products. An exchange agreement also includes a buy-sell arrangement or a purchase-and-sale transaction or any series of transactions or arrangements in which two or more firms or persons, at or about the same time, reciprocally agree to sell to and purchase from each other at some price but pursuant to mutual understanding, that one party's sale to the other is dependent or contingent upon the latter's reciprocal sale to the former.

(b) "*Gasoline station*" means a facility at which retail marketing is or has been conducted. "Gasoline station" does not include a facility that is closed and has not been used to sell gasoline to the public for a year or more.

(c) "*Petroleum products*" means any grade of leaded or unleaded gasoline and diesel fuel #2.

(d) "*Refining*" means converting crude oil into various refined petroleum products such as gasoline, diesel fuel and jet fuel.

(e) "*Refinery*" means a facility that converts crude oil into various refined petroleum products such as gasoline, diesel fuel and jet fuel.

(f) "*Respondent*" means Pacific Resources, Inc. ("PRI"), its predecessors, parent companies, subsidiaries, divisions, groups and affiliates controlled by respondent, and all their respective directors, officers, employees, agents and representatives and all their respective successors and assigns.

(g) "*Retail marketing*" means selling gasoline to the public.

(h) "*Terminal*" means any petroleum product facility in the State of Hawaii, not owned or operated by respondent on the date this order becomes final, that has a total petroleum products storage capacity exceeding 10,000 barrels (42 U.S. gallons per barrel) and that has or

had in the past two (2) years equipment to dispense smaller quantities from the storage tanks into tank trucks. "Terminal" does not include (i) an entire facility that has been closed and has not been used to store petroleum products for at least two (2) years prior to its proposed acquisition by respondent or (ii) any part of a facility that is used and has been used for the last two (2) years exclusively for the storage of products other than petroleum products.

(i) "*Terminalling*" means storing petroleum products at a terminal. A party is "engaged in terminalling" if it stores petroleum product at a facility that it owns or operates in whole or in part.

(j) "*Terminalling agreement*" means any arrangement whereby respondent (i) purchases or leases any part of a terminal, (ii) becomes the operator of any part of a terminal, or (iii) contracts for the use of any part of a terminal.

(k) "*Throughput agreement*" means any arrangement, other than a terminalling agreement as defined in subparagraph (j) of this paragraph, for receipt, storage and dispensing of petroleum products at a terminal owned or operated by another person or firm.

II.

It is ordered, That for a period commencing on the date this order becomes final and continuing through March 31, 1997, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without prior approval of the Federal Trade Commission, any part of the stock or share capital of any person or firm engaged in terminalling, refining, or retail marketing in the State of Hawaii, or any assets of, or interest in a refinery, terminal or gasoline station in the State of Hawaii.

It is further ordered, That for a period commencing on the date this order becomes final respondent shall cease and desist from entering into, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, any terminalling agreement in the State of Hawaii that takes effect before March 31, 1997.

Provided, however, That nothing in paragraph II of this order shall require prior approval of the Federal Trade Commission for, or prohibit respondent from:

(a) acquiring in a transaction (not part of a series of transactions involving the acquisition for \$375,000 or more of all or part of a

terminal) a terminal the acquisition price of which is not more than \$375,000;

(b) acquiring any gasoline stations from any party who neither owns nor operates all or part of a terminal on the island of the State of Hawaii where such gasoline station or stations are located and has neither owned nor operated a terminal on that island within two (2) years of the time of the proposed acquisition;

(c) acquiring from any one party any of the following: (i) not more than ten (10) gasoline stations on the Island of Oahu; (ii) not more than four (4) gasoline stations on the Island of Maui; (iii) not more than three (3) gasoline stations on the Island of Hawaii; (iv) not more than two (2) gasoline stations on the Island of Kauai; (v) not more than one (1) gasoline station on the Island of Molokai;

(d) leasing or contracting for the use of the petroleum products capacity of a terminal, provided that the lease or contract does not have the effect of excluding others from the use of 50 percent of the petroleum products capacity of the terminal;

(e) making any lease or contract for the use of a terminal where neither the owner nor operator of that terminal has owned within two (2) years of the lease or contract any gasoline stations located on the same island as the terminal; or

(f) making any lease or contract for the use of a terminal where the owner and the operator retains ownership of at least the same number of gasoline stations that it owns on the same island as the terminal for at least five (5) years after the lease or contract is consummated.

III.

One (1) year from the date this order becomes final and annually thereafter, respondent shall file with the Commission a verified written report of its compliance with this order, as well as a summary of the date, parties, location, volumes, duration and terms of each agreement respondent entered during the year concerning (i) any acquisition or lease from another party of a gasoline station in the state of Hawaii, (ii) any acquisition of a terminal in the state of Hawaii, and (iii) any arrangement that provides respondent with petroleum product storage at a terminal in the state of Hawaii not owned or operated by respondent, including exchange agreements, throughput agreements, leases or similar arrangements.

IV.

Nothing in this order shall apply to, require Federal Trade Commission prior approval for the exercise of, or otherwise limit the respondent's rights under any terminalling or other agreement in effect prior to the date this order becomes final, or to any extension of these rights if the assets, capacity, and throughput (as appropriate) available to respondent do not increase as a result of such extension.

V.

For the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent made to its principal offices, respondent shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and
2. Upon five (5) days' notice to respondent and without restraint or interference from them, to interview officers or employees of respondent, who may have counsel present, regarding such matters.

VI.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure that may affect compliance obligations arising out of this order including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change.

