Dissenting Statement of Commissioner Joshua D. Wright
In the Matter of Par Petroleum Corporation/Koko'oha Investments, Inc.
(Mid Pac Petroleum, LLC)
FTC File No. 141-0171
March 18, 2015

The Commission has voted to issue a Complaint and a Decision & Order against Par Petroleum Corporation ("Par") to remedy the allegedly anticompetitive effects of Par's proposed acquisition of Mid Pac Petroleum, LLC ("Mid Pac"). I dissented from the Commission's decision because the evidence is insufficient to provide reason to believe Par's acquisition will substantially lessen competition in bulk supply of Hawaii-grade gasoline blendstock ("HIBOB") in the state of Hawaii, in violation of Section 7 of the Clayton Act.[1] I commend Staff for their hard work in this matter. Staff has worked diligently to collect and analyze evidence related to numerous product markets within the Hawaiian gasoline industry. Indeed, Staff's thorough investigation has narrowed the scope of potential competitive concerns arising from the proposed transaction to the single theory of harm alleged in the Complaint. Based upon the evidence, I concluded there is no reason to believe the proposed transaction is likely to lessen competition in any relevant market. It follows, in my view, that the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.

The Complaint articulates a theory of competitive harm arising from the proposed transaction based upon the possibility that Par, a bulk supplier of HIBOB, will foreclose a potential downstream customer, Aloha Petroleum, Ltd. ("Aloha"), from its ability to import to discipline the prices of bulk-supplied HIBOB. Par's acquisition of Mid Pac includes the latter's storage rights at Barbers Point Terminal. Mid Pac and Aloha each currently have storage rights at Barbers Point Terminal sufficient to allow them to import HIBOB. After the merger, Par and Aloha would share access to the terminal. The theory of harm articulated in the Complaint is that Par would have the incentive and ability to use its newly acquired Mid Pac storage rights to "park" petroleum products at Barbers Point Terminal, and that this strategy would reduce or eliminate Aloha's ability to discipline bulk supply prices by threatening to import HIBOB, thus resulting in higher HIBOB prices which would ultimately be passed on to Hawaii consumers.

The theory that Par might exclude Aloha in this way is certainly a plausible basis for further investigation. Indeed, competitive concerns involving the potential for exclusion are commonly invoked in transactions with vertical dimensions, though empirical evidence demonstrates vertical transactions are generally, but not always, procompetitive or competitively benign.[2] The question, however, is whether the record evidence supports the theory. In short,

[1] The Complaint alleges Mid Pac and Aloha participate in the bulk supply of HIBOB by virtue of the fact that they could command import parity pricing. While I am not persuaded by that assertion, my analysis of the transaction's likely competitive effects does not turn upon whether Mid Pac and Aloha are classified as bulk suppliers. Nor does the theory of harm articulated in the Complaint depend upon a reduction in the number of competitors in the bulk-supplied HIBOB market. I assume, *arguendo*, that the market definition articulated in the Complaint is correct and use it throughout this statement without loss of generality.

[2] *See generally* James C. Cooper, et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi, ed., 2008).

the answer is no. For Par to have the incentive and ability to engage in this strategy, it must be profitable for it to do so. Neither economic analysis nor record evidence gives me reason to believe this is so. The evidence strongly suggests such an exclusionary strategy would not be profitable without Chevron Corporation's ("Chevron's") cooperation. Chevron is the only other Hawaiian refiner aside from Par capable of selling bulk supplies of HIBOB to Aloha. Such tacit or explicit coordination to exclude Aloha is highly unlikely in the HIBOB market. Furthermore, the record evidence also indicates Aloha, the potential victim of the strategy, does not have any reason to believe Par would adopt this potentially anticompetitive strategy. Thus, I have no reason to believe that post-acquisition, Par will have the incentive and ability to raise prices of the bulk supply of HIBOB.

Prior to entering into a consent agreement with the merging parties, the Commission must first find reason to believe that a merger likely will substantially lessen competition under Section 7 of the Clayton Act. The fact that the Commission believes the proposed consent order is costless is not relevant to this determination. A plausible theory may be sufficient to establish the mere possibility of competitive harm, but that theory must be supported by record evidence to establish reason to believe its likelihood. Modern economic analysis supplies a variety of tools to assess rigorously the likelihood of competitive harm. These tools are particularly important where, as here, the conduct underlying the theory of harm – that is, vertical integration – is empirically established to be procompetitive more often than not. Here, to the extent those tools were used, they uncovered evidence that, consistent with the record as a whole, is insufficient to support a reason to believe the proposed transaction is likely to harm competition. Thus, I respectfully dissent and believe the Commission should close the investigation and allow the parties to complete the merger without imposing a remedy.