

Antitrust Enforcement in the Energy Sector: Will the Obama Administration Turn Up the Heat?

The Future of Energy Sector Enforcement

Scott Perlman, Mayer Brown LLP

202-263-3201

sperlman@mayerbrown.com



May, 2009

Obama on Antitrust Enforcement



- “Antitrust is the American way to make capitalism work for consumers”
- Bush Administration “weakest record of antitrust enforcement” in 50 years
- Bush DOJ enforcement of Section 2
 - Brought no monopolization cases
 - Report on Section 2 enforcement viewed as too lenient on single firm conduct
 - Reflects no “real interest in antitrust prosecutions”
 - Suggests “need for a more aggressive approach” towards monopolies
- Lax in enforcing merger law
 - DOJ and FTC challenged only 33 mergers between 2001 and 2006
 - During Clinton Administration average of challenges 70 per year

Obama's Antitrust Goal: "Reinvigorate" enforcement



- Stop or restructure mergers that are likely to harm consumer welfare
- Increase Section 2 enforcement
- Strengthen antitrust authorities' competition advocacy programs
- Curb growth of international cartels
- Increase international coordination of antitrust laws

Key Industries for Antitrust Enforcement



- During campaign, Obama identified industries that require more vigorous merger and monopolization enforcement, including:
 - Health care
 - Insurance
 - Pharmaceuticals
 - Media
 - Telecom
 - Technology
 - **Energy**
 - Air delivery services

DOJ Antitrust Division



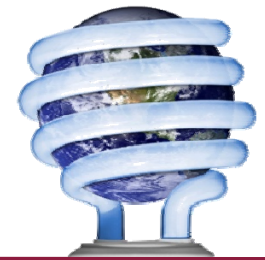
- On January 22, 2009 Obama nominated Christine Varney as Assistant Attorney General for the DOJ's Antitrust Division – confirmed April 20, 2009
- Varney served as FTC Commissioner from 1994 to 1997
 - Involved in developing innovation market analysis of mergers
 - Aggressively pursued enforcement against resale price maintenance
 - Concerns about vertical mergers
- Advocates aggressive enforcement of antitrust laws to curb monopolistic behavior
- Has sought help of outside advocacy groups, including the American Antitrust Institute, to help the Obama administration enforce Section 2 “in a meaningful way”

Varney Confirmation Hearing



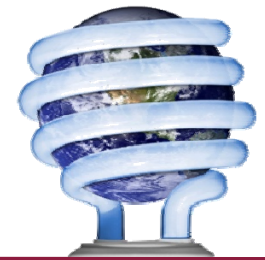
- Predicted a reinvigorated antitrust review of all industry sectors “to ensure that anticompetitive behavior, including those activities resulting from monopsonistic and monopolistic behavior, can be thwarted”

Antitrust Oversight and Enforcement: DOJ Antitrust Division



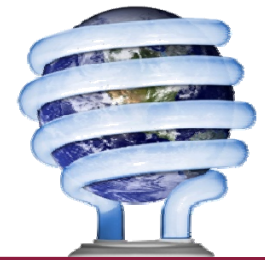
- Nomination may signal resurgence in
 - Innovation market analysis
 - Vertical merger review
 - Enforcement against anticompetitive unilateral conduct under Section 2 of the Sherman Act
 - Enforcement against vertical restraints, e.g., Resale Price Maintenance enforcement post-*Leegin*

Federal Trade Commission



- On March 2, 2009 Obama appointed Jon Leibowitz as FTC Chairman
- Obama will have the opportunity to appoint two additional Commissioners by Fall 2009
 - Commission then will be composed of three Democrats, two Republicans – will have a clear pro-enforcement majority
- Leibowitz has served as FTC Commissioner since 2004
- In public statement, he indicated that he agrees “with 95 percent” of his predecessor’s agenda and initiatives
- Described FTC agenda in coming years as “about both change and continuity”
- Anticipates working closely with Varney to “accomplish remarkable things for consumers”

FTC Chairman Leibowitz



- Asserts the FTC must “vigorously enforce antitrust laws” and “rigorously scrutinize” transactions
- Believes, where a transaction substantially lessens competition, “a high burden should be placed on the parties” to prove harm is outweighed by efficiencies or potential relief restores competition
- Advances use of Section 5 of the FTC Act to address anticompetitive conduct that does not violate the Sherman Act (*In re Negotiated Data Solutions, LLC*)

Energy Industry Scrutiny



- Energy Industry Is Closely Watched
 - Consolidated Appropriations Act for 2008 directs FTC to submit a report to Committees on Appropriations summarizing its activities dealing with Oil & Gas industries.
 - Mergers & Acquisitions and other transactions
 - Pricing Behavior
 - Other Potential Anticompetitive Actions

Energy Industry Scrutiny



- “[N]o other sector of the economy is subject to more antitrust scrutiny by the FTC than the energy industries...”
 - Special Associate General Counsel for Energy.
 - Mergers III devoted primarily to petroleum and natural gas industries.
 - FTC’s Gasoline and Diesel Price Monitoring Project

Energy Industry Scrutiny



- Recent FTC Challenges to Proposed Acquisitions in the Energy Sector
 - Paul L. Foster, Western Refining/Giant Industries
 - Bulk supply of light petroleum products in northern New Mexico.
 - Dist. Ct. denies injunctive relief and 10th Cir. denies FTC injunction pending appeal.
 - Parties consummate transaction on May 31, 2007. Commission dismisses its complaint.

Energy Industry Scrutiny



- Recent FTC Challenges to Proposed Acquisitions in the Energy Sector
 - Equitable Resources/Dominion Resources
 - Market for distribution of natural gas to nonresidential customers in Pittsburgh and surrounding areas.
 - Dist. Ct. denies preliminary injunction, but 3rd Cir. Grants motion for injunction pending appeal.
 - Parties abandon transaction on January 15, 2008.

Energy Industry Scrutiny



- Recent FTC Challenges to Proposed Acquisitions in the Energy Sector
 - Marathon Oil / CITGO Petroleum
 - Proposed acquisition of light petroleum products terminals in several Ohio cities and CITGO's Inland Pipeline (intrastate products pipeline).
 - Parties abandon transaction and FTC closes investigation on June 19, 2008.
- FTC received Hart-Scott-Rodino filings for 24 transactions involving oil and gas firms in 2008.
- Monitored Industry for non-reportable transactions

Energy Industry Scrutiny



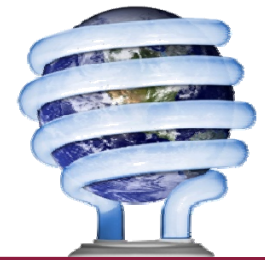
- Pricing Investigations in the Energy Sector
 - Bulk supply and demand conditions and markets for gasoline and diesel fuel throughout the Pacific Northwest region.
 - Commission authorized compulsory process in May 2007 to determine whether the observed prices resulted from unlawful anticompetitive activity, including collusion. FTC concluded investigation in August finding no evidence of illegal conduct.
 - Gasoline Pricing in New England Region focusing on reported differences in gasoline prices between Cape Cod and off-Cape locations.
 - Investigation in 2008 involved analysis of station-level data at various locations and firm-level rack prices for the primary terminal for the wholesale supply of gasoline to Cape Cod.

Energy Industry Scrutiny



- Pricing Investigations in the Energy Sector, Con't
 - Gasoline prices in North Adams and other localities in western Massachusetts.
 - FTC to determine whether wholesaler or retailer pricing was anticompetitive. Involves examining city average price data, station specific data, and rack price data. Expects to complete in 2009.
 - Gasoline Prices in Buffalo, New York area.
 - Investigate pricing anomalies upon Congressional request.
 - Gasoline prices in northern Vermont.
 - Respond to congressional inquiry regarding unusually high prices for gasoline.
 - Diesel & Jet Fuel Prices – FTC collected data on refinery capacity utilization, imports & exports, and refinery level profits in order to monitor pricing behavior. Letter reporting findings to Congress in September 2008 on price trends since 2004.

Energy Industry Scrutiny



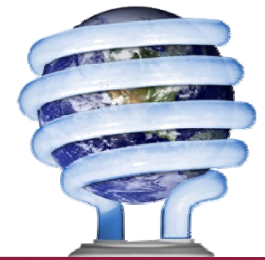
- FTC tasked with examining and identify market manipulation in the petroleum sector and taking action where necessary.
 - Pursuant to Section 811 of the Energy Independence and Security Act of 2007.
 - Targets “any manipulative or deceptive device or contrivance” “in connection with the purchase or sale or crude gasoline or petroleum distillates at wholesale.”
 - The latest revisions of the proposed market manipulation rule, which takes an anti-fraud approach, has been sent around for public comment with a May 20, 2009 deadline.

Energy Industry Scrutiny



- Gasoline and Diesel Price Monitoring Project
 - Project underway since 2002 to monitor the wholesale and retail prices of gasoline in order to help detect potential anticompetitive conduct and determine if investigation is warranted.
 - Tracks retail gasoline and diesel prices in approx. 360 cities and wholesale prices in 20 major urban areas.
 - FTC Bureau of Economics takes relevant information and determines whether prices each week are anomalous in context of historical data.
 - May trigger investigation.

Energy Industry Scrutiny



- Market Manipulation & Price Gouging
 - Issues report on Hurricane Katrina and its effect on gasoline prices. May 2006
 - Found no illegal market manipulation that led to higher prices during the relevant time, but found 15 examples of pricing at the refining, wholesale, or retail level that fit definition of evidence of “price gouging” as defined by legislation.
 - Report determines that given amount of gasoline production and pipeline capacity eliminated by Hurricanes Katrina and Rita and inelastic response of consumer demand to gasoline price changes, the post-hurricane gasoline price increases were as would be predicted.
 - Then Commissioner Leibowitz issues concurring statement: “petroleum industry pricing and gas price manipulation are enormously complicated matters – ones not subject to simple explanation, even absent the disruptive effects of a major natural disaster. Still, the behavior of many market participants, on balance, leaves much to be desired.”
 - Investigates effects on oil and gas prices from Hurricane Ike. September 2008
 - Establishes Hurricane Ike Task Force with mission to track gasoline pricing trends and supply information and respond to consumer complaints.
 - Coordinates with Department of Energy regarding complaints it receives on its Gasoline Price Hotline. Offers technical assistance to state attorneys general in hurricane-affected states in responding to consumer complaints.

Energy Industry Scrutiny



- Focus on Ethanol

- Energy Policy Act of 2005 requires FTC annually to perform analysis of competition in ethanol market so as “to avoid price-setting and other anticompetitive behavior.”
- 2008 Report on U.S. Ethanol Market Concentration concludes that the market, measured on basis of production or capacity, remains unconcentrated.

Energy Industry Scrutiny



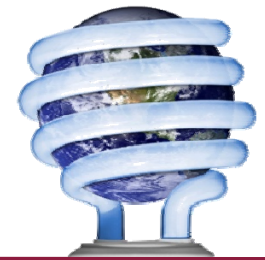
- Antitrust Division, Department of Justice
 - Transportation, Energy, and Agriculture Section
 - Investigates and enforces antitrust laws in the transportation, energy, and agriculture industries.
 - Energy Policy Act of 2005 established 5 member task force that included the DOJ.
 - Requires Task Force to study and analyze competition in the wholesale and retail markets for electrical energy. Submitted to Congress in April 2007.

Energy Industry Scrutiny - Summary



- The oil and gas industry has been closely scrutinized by the FTC.
- The change in administration will likely increase the scrutiny that the industry receives.
- Areas of interest include potential gasoline price manipulation.
- Electric power generation, as well as ethanol and other forms of alternative energy also may receive more attention.

Selected Bibliography



- Report of the Federal Trade Commission on Activities in the Oil and Natural Gas Industries (Jan-June 2008)
- Report of the Federal Trade Commission on Activities in the Oil and Natural Gas Industries (July –Dec. 2008)
- 2008 Report on the Ethanol Market Concentration
- Horizontal Merger Investigation Data Fiscal Years 1996-2007
- FTC Letter to Councilmember Mary M. Cheh (June 2007)
- Opening Remarks of Chairman Majoras – “Estimating the Price Effects of Mergers and Concentration in the Petroleum Industry: An Evaluation of Recent Learning.” (Jan. 14, 2005)