

## New Mexico District Court Refuses to Block Energy Merger

The federal district court of New Mexico refused to grant the Federal Trade Commission's motion for a preliminary injunction to stop the proposed merger between Western Refining, Inc. and Giant Industries, Inc. *Federal Trade Commission v. Foster, et al.*, No. CIV 07-352 (D.N.M. May 29, 2007). This case represents the second time in two weeks that the FTC has failed in its attempt to block a proposed energy merger, and underscores the importance in merger cases of developing evidence of credible potential market entry and demonstrating how that entry can mitigate issues that otherwise might lead to a successful merger challenge.

Western Refining is an independent crude oil refiner and marketer of refined products, operating primarily in the southwest United States. Giant Industries also is a refiner and marketer of petroleum products, with substantial operations (including two oil refineries) in New Mexico. On November 13, 2006, Western Refining and Giant Industries announced an agreement under which Western would acquire all of the outstanding shares of Giant.

After a nearly five-month investigation, the FTC sought and received a temporary restraining order preventing consummation of the merger. The FTC then moved for a preliminary injunction that would enjoin the parties from completing the merger until after an administrative trial.

After a five-day hearing, United States District Judge James Browning denied the motion for the preliminary injunction and dissolved the TRO, holding that the FTC failed to show that the merger would eliminate competition in the bulk supply of gasoline to northern New Mexico. The key issue to the judge's decision was the potential for market entry or expansion by competitors.

The relevant product market was defined as bulk gasoline and the relevant geographic market, while disputed, was recognized to be northern New Mexico, including Albuquerque. However, the key factual dispute turned on which competitors could be considered part of the market. The court determined that refiners located on the Gulf Coast, bulk gasoline supply delivered by trucks, and other potential entrants should be included in the market. Based on its view of the totality of market participants, the court held that the combined Western/Giant entity would have a market share of under 6 percent (the FTC's expert calculated the market share to be 18.6 percent). The court, based on its view of market participants, characterized the Western/Giant transaction as a merger of 8 competitors to 7, and noted that the FTC had not challenged an 8 to 7 merger since at least 2001.

The court considered it unlikely that the combined entity would be able to sustain a unilateral price increase, and rejected the FTC economic expert's opinion that the merger would make it

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more likely that the combined entity would withhold supply from northern New Mexico. The court also noted that the FTC did not seriously contend that the merger would have anticompetitive effects because of likely coordination among rivals. The court concluded that the FTC's case was "weak" and therefore a preliminary injunction was not justified.

Given the current climate of high gasoline prices, and the resulting political fallout, it is clear that the FTC will continue to aggressively pursue merger transactions in the energy field, particularly transactions that impact petroleum and natural gas. Some recent developments involving petroleum transactions include:

- In January, the FTC entered into a consent decree requiring a private equity fund to convert its interest in the merged entity into a passive investment in the Kinder Morgan pipeline, in part because the fund held a private interest in the target's main competitor. *In the Matter of TC Group, L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P.*, File No. 061 0197, Docket No. C-4183 (Jan. 2007).
- In *Federal Trade Commission v. Aloha Petroleum, Ltd., and Trustreet Properties, Inc.*, FTC File No. 151 0131 (2005), the FTC challenged the purchase of import-capable terminal and retail gasoline assets on the island of Oahu. The challenge was abandoned after the combined entity agreed to a long-term contract providing access to its terminal to a competitor.
- In March, a bill was introduced in the Senate that would require the FTC and Department of Justice to amend the Horizontal Merger Guidelines to address specifically mergers in the oil and gas industry. Among other things, in mergers between oil and gas companies, the parties – not the government – would bear the burden of proof to demonstrate that the proposed merger will not substantially lessen competition. This burden-shifting change might have drastically altered the dynamics of the Western Refining case, and may very well have led to a different result.

We expect energy transactions, and particularly oil and gas transactions, to draw increased scrutiny for the immediate future.

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