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FEDERAL TRADE COMMISSION

[File No. 141 0171]

Par Petroleum Corporation and Mid Pac Petroleum, LLC; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order -- embodied in the consent agreement -- that would settle these allegations.

DATES: Comments must be received on or before April 17, 2015.

ADDRESSES: Interested parties may file a comment at https://ftcpublic.commentworks.com/ftc/parmidpacconsent online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Par Petroleum Corporation - Consent Agreement; File No. 141-0171" on your comment and file your comment online at https://ftcpublic.commentworks.com/ftc/parmidpacconsent by following the instructions on the web-based form. If you prefer to file your comment on paper, write "Par Petroleum Corporation - Consent Agreement; File No. 141-0171" on your comment and on the envelope, and mail your comment to the following address: Federal Trade

Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Anna Kertesz, Bureau of Competition, (202-326-2511), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR § 2.34, notice is hereby given that the above-captioned consent agreement containing consent orders to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for March 18, 2015), on the World Wide Web, at http://www.ftc.gov/os/actions.shtm.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 17, 2015. Write "Par Petroleum Corporation - Consent Agreement; File No. 141-0171" on your comment. Your comment - including your name and your state - will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any "[t]rade secret or any commercial or financial information which . . . is privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), and FTC Rule 4.10(a)(2), 16 CFR § 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR § 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at https://ftcpublic.commentworks.com/ftc/parmidpacconsent by following the instructions on the web-based form. If this Notice appears at http://www.regulations.gov/#!home, you also may file a comment through that website.

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR § 4.9(c).

If you file your comment on paper, write "Par Petroleum Corporation - Consent Agreement; File No. 141-0171" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Website at http://www.ftc.gov to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before April 17, 2015. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at http://www.ftc.gov/ftc/privacy.htm.

Analysis of Agreement Containing Consent Order to Aid Public Comment

INTRODUCTION

The Federal Trade Commission ("Commission") has accepted from Par Petroleum Corporation ("Par"), subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") designed to remedy the anticompetitive effects resulting from Par's proposed acquisition of 100% of the outstanding voting securities of Koko'oha Investments, Inc. ("Koko'oha"), which owns all of the membership interests of Mid Pac Petroleum, LLC ("Mid Pac"). Under the terms of the proposed Decision and Order ("Order") contained in the Consent Agreement, Par must terminate its acquired storage and throughput rights at Aloha Petroleum, Ltd.'s ("Aloha") Barbers Point Terminal ("Barbers Point Terminal").

The Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make the Order final.

THE PARTIES

Par, a publicly-traded diversified energy company based in Houston, Texas, engages in the refining, bulk supply, transportation, and marketing of petroleum products in Hawaii through its wholly-owned subsidiary, Hawaii Independent Energy, LLC ("HIE"). HIE owns and operates the 94,000 barrel-per-day Kapolei refinery on Oahu and refined product terminals in Hawaii. HIE markets gasoline through its Tesoro-branded retail locations and wholesale and retail sales to third parties.

Koko'oha, through its wholly-owned subsidiary Mid Pac, engages in the bulk supply, marketing, and distribution of petroleum products in Hawaii. Mid Pac owns and operates refined products terminals and is the exclusive licensee of the "76" gasoline brand in Hawaii. Mid Pac markets gasoline through its branded retail locations and wholesale and retail sales to third parties.

THE PROPOSED ACQUISITION

Pursuant to an Agreement and Plan of Merger dated June 2, 2014, Par proposes to acquire Koko'oha for $107 million (the "Acquisition"). The Commission's Complaint alleges that the Acquisition, 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, as amended, 15 U.S.C. § 45, by substantially lessening competition in the market for bulk supply of Hawaii-grade gasoline blendstock ("HIBOB") in the state of Hawaii.

THE RELEVANT MARKET

The relevant product market in which to analyze the competitive effects of the Acquisition is the bulk supply of HIBOB. Refineries produce HIBOB from crude oil. HIBOB is the only gasoline blendstock that, when combined with ethanol, yields gasoline that meets the standards and specifications of Hawaii law. No substitute exists for HIBOB for motor vehicles that must use Hawaii-grade gasoline.

Bulk supply means the provision of larger-than-truckload volumes of petroleum products, which can come from local refineries or via ocean-going vessels. Bulk suppliers need bulk volumes of gasoline blendstock (either through their own refinery operations or through imports) and terminal capacity. Bulk suppliers deliver bulk supply of HIBOB into gasoline terminals for storage and local distribution, or for further pipeline or marine shipment. No alternative exists to the bulk supply of HIBOB.

The relevant geographic market in which to assess the competitive effects of the Acquisition is Hawaii. Bulk suppliers refine HIBOB in, or import it into, Hawaii.

THE STRUCTURE OF THE MARKET

Bulk supply of HIBOB comes from either the two local refineries or imports from out of state via ocean-going vessels. Par and Chevron Corporation ("Chevron") are the only local refiners. Non-refiners Aloha and Mid Pac can supply bulk volumes to Hawaii, for distribution throughout the state, by receiving imported HIBOB cargoes through Barbers Point Terminal. This is the only terminal in Hawaii not owned by a local refiner that can receive full waterborne cargoes of HIBOB from out of state. By virtue of a long-term storage and throughput agreement, Mid Pac holds substantial storage and throughput rights at Barbers Point Terminal, which provides Mid Pac with sufficient terminal access to handle and distribute imported HIBOB cargoes.[2] The four bulk suppliers – Par, Mid Pac, Chevron, and Aloha – own or control access to all of the Hawaii gasoline terminals that handle bulk volumes of HIBOB.

EFFECTS OF THE ACQUISITION

The Acquisition is likely to substantially lessen competition and lead to higher prices for bulk supply of HIBOB in Hawaii. The potential for competitive harm from the Acquisition stems from the importance of imports in establishing HIBOB prices. Although Aloha and Mid Pac typically buy bulk supply of HIBOB from Par and Chevron, Aloha and Mid Pac use their import capabilities to obtain favorable HIBOB bulk supply prices from the local refiners. Aloha and Mid Pac's import capabilities serve to constrain local refiners' bulk supply prices of HIBOB.

The Acquisition would weaken the threat of imports and relax a competitive constraint on HIBOB bulk supply prices. Although the Acquisition reduces from four to three the number of bulk suppliers of HIBOB, the increase in concentration from the loss of Mid Pac does not give rise to competitive concerns. Mid Pac's ability to command import parity pricing makes it a bulk supply market participant, but the evidence did not show that Mid Pac's participation in bulk supply or downstream markets is competitively significant. However, Par's acquisition of Mid Pac's storage rights at Barbers Point Terminal would result in Par and Aloha sharing access to the terminal. Through these acquired rights, Par could limit Aloha's use of the terminal and hamper Aloha's ability to import bulk supply of HIBOB, thus weakening Aloha's ability to use its import capabilities to obtain better bulk supply prices. With Aloha as a weakened competitor, Par could unilaterally exercise market power post-merger or increase the likelihood and degree

[2] Aloha entered the storage and throughput agreement with Mid Pac in mid-2005, shortly after the Commission sought to enjoin Aloha's acquisition of Trustreet Properties LLP, Aloha's fifty-percent partner in the Barbers Point Terminal at the time. The Commission subsequently dismissed its complaint in that matter. *See* Press Release, Fed. Trade Comm'n, FTC Resolves Aloha Petroleum Litigation (Sept. 6, 2005), *available at* https://www.ftc.gov/news-events/press-releases/2005/09/ftc-resolves-aloha-petroleum-litigation.

of coordination between Par and Chevron. As a result, the Acquisition likely would increase the price of bulk supply of HIBOB, which would ultimately lead to higher gasoline prices for Hawaii consumers.

ENTRY CONDITIONS

Entry into the relevant line of commerce in the relevant section of the country would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. The prospect of new entry through construction of a refinery or import-capable terminal is extremely remote, given the financial, regulatory, and logistical challenges such entry would need to surmount. It is also unlikely that a new entrant would import HIBOB to counteract the competitive harm described above, as current bulk suppliers have no incentive to offer terminal access to create or support entry by a new bulk supply competitor.

THE DECISION AND ORDER

The Order resolves the competitive concerns raised by the Acquisition by preserving flexibility for HIBOB imports at Barbers Point Terminal. The Order requires Par to terminate its rights at Barbers Point Terminal within 5 days after the closing date of the Acquisition. The Order allows Par to retain only those rights necessary to load a limited number of tanker trucks at Barbers Point Terminal truck rack. These rights would not interfere with the storage and handling of full cargoes of imported HIBOB at Barbers Point Terminal. The Commission must approve any modification to Par's rights to load products at Barbers Point Terminal or any new agreement relating to storage or throughput rights at Barbers Point Terminal. Par may renew or extend the agreement that permits the loading of tanker trucks at Barbers Point Terminal truck rack, without prior Commission approval.

In addition, the Order obligates Par to provide the Commission prior written notice of an acquisition of any leasehold, ownership, or any other interest in any assets engaged in the bulk supply of HIBOB in Hawaii. In light of the post-acquisition structure of the HIBOB bulk supply market, Par's future acquisition of any interest enumerated above could raise competitive concerns that may warrant careful investigation by the Commission. However, Par may acquire, without prior written notice, rights or assets not used for bulk supply, which would not result in an increase in concentration in the relevant market. Specifically, the Order excludes from prior written notice the acquisitions of: (i) pipeline throughput rights, (ii) barges or other vessels engaged only in inter-island movement of HIBOB, or (iii) petroleum product terminals or other storage facilities that are unable to receive at least 150,000 barrels of petroleum products in a single delivery from out of state on ocean-going vessels. The acquisition of these rights or assets would not raise competitive concerns in the bulk supply of HIBOB in Hawaii.

To ensure Par's compliance with the Order, Par must submit periodic compliance reports and give the Commission prior notice of certain events that might affect its compliance obligations arising from the Order. Lastly, the Order terminates after 10 years.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Order or to modify its terms in any way.

By direction of the Commission, Commissioner Wright dissenting.

Donald S. Clark,
Secretary.

Statement of the Federal Trade Commission[1]
In the Matter of Par Petroleum Corporation and Mid Pac Petroleum, LLC

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[1] Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeny join in this statement.

The Commission has reason to believe the proposed acquisition of Koko'oha Investment Inc.'s wholly-owned subsidiary Mid Pac Petroleum, LLC by Par Petroleum Corporation is likely to substantially lessen competition in the bulk supply of Hawaii-grade gasoline blendstock, in violation of Section 7 of the Clayton Act. The transaction is likely to impede the ability of Aloha Petroleum, Ltd., the only remaining bulk supplier without a local refinery, to use imports to constrain the local refiners' bulk supply prices. Par has agreed to settle the Commission's charges. Our remedy counteracts the alleged potential anticompetitive effects of the proposed acquisition without eliminating any of the efficiencies from the combination of Par and Mid Pac.

As set forth in the complaint, the competitive concerns from this acquisition stem from the unique characteristics of the Hawaiian market for bulk supply of Hawaii-grade gasoline blendstock ("HIBOB"), which is blended with ethanol to make finished gasoline. Other than Par and Chevron, Aloha is the only owner of a commercial gasoline terminal in Hawaii that is capable of receiving economical shipments of imported HIBOB – the Barbers Point terminal. Pursuant to a long-term storage and throughput agreement, Mid Pac currently shares access to Barbers Point.[2] Par and Chevron can produce more gasoline (HIBOB and other gasoline blending components) than is consumed in Hawaii, rendering imports unnecessary. However, Aloha's ability to threaten credibly to import HIBOB constrains the prices charged by the local refiners and, ultimately, the price paid by Hawaii gasoline consumers. Aloha's ability to threaten to import at Barbers Point thus is key to negotiations with Par and Chevron.

The Commission's investigation uncovered evidence that Par's acquisition of Mid Pac's throughput and storage rights at Barbers Point would give Par the incentive and ability to reduce Aloha's capability to constrain prices through importing, thereby increasing the price Aloha pays

[2] Mid Pac acquired its rights to the Barbers Point terminal in 2005 after the Commission's challenge of Aloha's acquisition of Trustreet Properties LLP, which was Aloha's 50 percent partner in the terminal at the time.

for bulk supply. As an incumbent local refiner that seeks to supply Aloha, Par would have an incentive to use the Barbers Point rights strategically and differently than Mid Pac. By storing substantial amounts of gasoline for an extended period, Par could reduce the size of an import cargo that Aloha could receive at the terminal. This would force Aloha to spread substantial fixed freight costs over a smaller number of barrels of gasoline, which would significantly increase its cost-per-barrel of importing. Contrary to Commissioner Wright's assertion, the evidence shows that market participants, including Aloha itself, believe Par might profitably seek to adopt this strategy.

Our reason to believe that Par would take steps leading to this competitive harm also flows from evidence and analysis suggesting that the benefits to Par of such a strategy outweigh its likely costs. The costs to Par associated with storing the amount of product necessary to tie up Aloha's import capability at Barbers Point appear modest at best. At the same time, Par stands to benefit significantly, in its bulk supply and downstream businesses, from even a slight increase in bulk supply prices.

Moreover, even if the benefit to Par depends on Chevron following Par's strategy, evidence from the investigation suggests a substantial risk that Chevron would respond in that fashion. As the only other incumbent local refiner and potential local supplier to Aloha, Chevron also stands to benefit if Aloha's import costs are increased. Regardless of where in the supply chain it occurs, any increase in prices would harm Hawaii gasoline consumers.

The proposed consent order is narrowly tailored to address these specific competitive concerns by requiring the termination of Par's acquired storage and throughput rights at Aloha's

Barbers Point terminal.[3] There is no evidence that this particular remedy would eliminate any of the efficiencies arising from the acquisition. The prior approval and notice provisions in the proposed consent order provide additional safeguards to alert the Commission of any future agreements or acquisitions that might similarly harm competition, while imposing minimal reporting requirements on Par. Under these circumstances, we believe that the remedy furthers the public interest.

[3] Aloha and Par had entered into negotiations regarding the termination of Par's storage and throughput rights at the Barbers Point terminal before the Commission identified this as a competitive concern.

Dissenting Statement of Commissioner Joshua D. Wright

In the Matter of Par Petroleum Corporation/Koko'oha Investments, Inc.

(Mid Pac Petroleum, LLC)

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

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[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.

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, 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

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[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).

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.

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