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FTC Defers to State Resolution of Competitive Concerns Arising Out of Acquisition of Natural Gas Assets

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On November 7, 2012, the Federal Trade Commission announced it had closed its investigation of Hilcorp Alaska LLC's proposed $375M acquisition of Marathon Oil Company's Cook Inlet, Alaska natural gas production, storage, and pipeline assets, despite identifying several competitive concerns with the transaction. The FTC explained in a ***written statement*** that this unusual move was based upon the "unique circumstances" of the case, specifically, that the effects of the proposed acquisition are confined solely to consumers in Alaska and that the State of Alaska has negotiated a consent decree that the State believes alleviates the competitive concerns arising from the transaction and mitigates the State's energy security concerns.

Natural gas produced in the Cook Inlet supplies south-central Alaska with the natural gas needed for electric power generation, space heating, and industrial use. Because Marathon and Hilcorp are two of the three primary competitors for sales of natural gas in south-central Alaska, which account for over 90 percent of the natural gas produced in Cook Inlet, both the FTC and the State of Alaska expressed concern that the proposed transaction would harm competition by diminishing the negotiating strength of the area's primary purchasers – local utilities and industrial users. The FTC also identified competitive concerns with the post-merger Hilcorp because it would control all of the proprietary gas storage capacity in south-central Alaska and the majority of pipeline infrastructure needed to deliver gas from the fields to customers, which potentially could hinder efforts by other companies in the area to increase natural gas production.

In its ***consent decree*** filed in Alaska Superior Court, the State of Alaska Attorney General noted that although the proposed transaction presented competitive concerns, it could also alleviate existing concerns regarding energy security and local energy supply shortages. Existing fields in Cook Inlet are declining in production, and local utility demand is expected to exceed annual production within a few years. Given the current state of the market and the expected shortages, the State has been actively working to incentivize and encourage new investment in exploration and production in the Cook Inlet.

The consent decree negotiated with Hilcorp requires that it abide by the following conditions: (1) price caps on natural gas sold to local utilities and industrial users for the next five years (with an escalator allowing a 4 percent annual increase); (2) a prohibition on selling Cook Inlet natural gas for LNG export for five years; and (3) it will not knowingly sell Cook Inlet natural gas to other companies who intend to resell the gas for LNG export. According to the Alaska Attorney General, the consent decree properly balances the need for pricing protection for consumers to address the competitive concerns against the importance of encouraging new investment in exploration and development of the Cook Inlet natural gas resources.

This transaction is noteworthy in several respects. It demonstrates that both the federal government and state attorneys general are taking an active role in reviewing acquisitions that may impact a state's energy resources. However, it is uncommon for a federal antitrust agency to defer to state resolution of a matter in which the federal agency identified real competitive concerns, as the FTC did in this case, even where the situation presents unusual circumstances. This is especially true where, as in this transaction, the resolution included a conduct remedy, as the FTC typically does not favor conduct remedies, preferring instead structural remedies (such as asset divestitures) to resolve competitive concerns. This case therefore shows a willingness by federal antitrust regulators to acknowledge, and even give priority to, state concerns in certain cases, at least where the competitive effects are limited to the state.