ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of American Petroleum Company, Inc. , File No. 061 0229

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with American Petroleum Company, Inc. ("American Petroleum" or "Respondent"), an importer and seller of lubricants with its principal place of business located at Road 865 KM 0.2, Barrio Campanillas, Toa Baja, Puerto Rico 00951. The agreement settles charges that American Petroleum violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by agreeing with competitors to restrict the importation and sale of lubricants in Puerto Rico. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify their terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

American Petroleum has for many years been engaged in the business of importing lubricants into, and selling lubricants in, the Commonwealth of Puerto Rico.

Puerto Rico Law 278, enacted in 2004, was intended to create incentives for the safe disposal of used lubricants. The law required all persons in the chain of distribution, from the importer to the end-user, to pay an environmental deposit of fifty cents for each quart of lubricants purchased. The deposit could be recovered after the used lubricating oil was delivered to an authorized collection center. During 2005 and 2006, American Petroleum joined with numerous others in the Puerto Rico lubricants industry to lobby for the delay, modification, and/or repeal of Law 278. These efforts were partially successful. The Legislature postponed the starting date for the law until March 31, 2006.

In March 2006, with the effective date for Law 278 approaching, American Petroleum and several competing importers and sellers of lubricants adopted a new strategy to pressure the Government to repeal Law 278. The companies agreed to cease importing lubricants, beginning on March 31, 2006, and continuing for so long as Law 278 remained in effect. The conspirators

issued a public warning that as a result of this joint action, shortages of lubricants would arise throughout the island, and would continue until Law 278 was repealed.

In December 2006, the Puerto Rico Legislature repealed Law 278.

II. Legal Analysis

In several previous cases, the Commission has challenged under Section 5 of the FTC Act boycott activity where the victim was the government in its capacity as a consumer; that is, the conspiring sellers refused to deal in order to exact higher prices from the government.[1] Here, the lubricant importers are alleged to have used their economic might in order to pressure the government in its role as a regulator. As discussed below, the antitrust laws reach this conduct as well.

The conspiracy alleged in the complaint is per se unlawful. A horizontal agreement to restrict output is inherently likely to harm competition, and there is no legitimate efficiency justification for respondent's conduct. *SCTLA*, 493 U.S. 411; *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138 (1st Cir. 1993); *PolyGram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 15,453 (FTC 2003) (*available at* <http://ftc.gov/os/2003/07/polygramopinion.pdf>), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

Ordinarily, members of a cartel reduce output across the market in order to force consumers to bid up prices. Here the strategy was to impose pain on consumers in order to coerce the Government of Puerto Rico to accede to the industry's demand that Law 278 be repealed. This raises the possibility of viewing the alleged conspiracy as a form of petitioning activity that arguably is immune from antitrust sanctions. As the Supreme Court has held, it is not the purpose of the antitrust laws to regulate traditional petitioning activity aimed at securing anticompetitive governmental action. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

On the other hand, where competitors coordinate their commercial activity, conspiring in a manner that harms consumers directly, the fact that the conspirators intended thereby to motivate governmental action is not a defense to liability. *SCTLA*, 493 U.S. 411. An exception to this latter rule governs group boycotts that seek a purely political objective (that is, an objective that involves no special pecuniary benefit for the conspirators). A politically motivated boycott is protected by the First Amendment, and is not subject to antitrust liability. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982) (The First Amendment protects "a

[1] *E.g., Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *Peterson Drug* Co., 115 F.T.C. 492 (1992); *Michigan State Medical Society*, 110 F.T.C. 191 (1983).

nonviolent, politically motivated boycott designed to force governmental and economic change to effectuate rights guaranteed by the Constitution itself.").[2]

The conduct alleged in the complaint would not be immune from antitrust sanctions under these precedents. In *Noerr*, the alleged restraint of trade (legislation favoring the conspirators) was the consequence of governmental action, and for this reason was exempt from antitrust review. In the present investigation, the alleged restraint of trade (a constriction in the supply of lubricants) was the means by which the conspirators sought to obtain favorable legislation. It follows that the *Noerr* defense is not applicable.[3] The *Claiborne Hardware* defense is also inapplicable because the Puerto Rico conspiracy was an effort to escape regulation and advance the parochial economic interests of the importers. This was not a politically motivated boycott, as that term is used in the case law.

The present case is similar to *Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138. A group of insurance companies agreed to cease offering workers' compensation policies in Maine in order to coerce the legislature into authorizing higher rates. The Court of Appeals concluded that this concerted refusal to sell insurance was a per se violation of the Sherman Act, and that the legislative agenda of the insurance companies afforded them no defense to liability. The opinion explains: "[P]rivate actors who conduct an economic boycott violate the Sherman Act and may be held responsible for direct marketplace injury caused by the boycott, even if the boycotters' ultimate goal is to obtain favorable state action." 985 F.2d at 1142.

It is not a legitimate antitrust defense to claim that Law 278 is inefficient, and that the repeal thereof would enhance consumer welfare. The legality of an otherwise anticompetitive restraint cannot turn on the wisdom or efficiency of the governmental policy that is targeted by the conspirators.[4]

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[2] *See also Allied International, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981), *aff'd*, 456 U.S. 212 (1982); *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980).

[3] *See In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir. 1999) (The *Noerr* doctrine "does not authorize anticompetitive *action* in advance of government's adopting the industry's anticompetitive proposal. The doctrine applies when such action is the consequence of legislation or other governmental action, not when it is the means for obtaining such action . . .") (emphasis in original).

[4] An analogous defense was considered and rejected by the Commission in *Detroit Auto Dealers Ass'n*, 110 F.T.C. 417 (1989), *aff'd in part and rev'd in part*, 955 F.2d 457 (6th Cir. 1992). *DADA* involved an agreement among competing automobile dealers to limit the hours of operation of their dealerships. Respondents argued, *inter alia*, that the agreement to limit showroom hours was justified because it reduced the likelihood that their employees would join

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III. The Proposed Consent Order

American Petroleum has signed a consent agreement containing the proposed consent order. The proposed consent order enjoins American Petroleum from conspiring with competitors to restrict output.

More specifically, American Petroleum would be enjoined from agreeing or attempting to agree with any other seller of lubricants: (i) to restrain, restrict, limit or reduce the import or sale of lubricants; or (ii) to deal with, refuse to deal with, threaten to refuse to deal with, boycott, or threaten to boycott any buyer or potential buyer of lubricants.

The proposed order would not interfere with the company's Constitutional right to engage in legitimate petitioning activity. The proposed order includes a safe harbor provision expressly permitting American Petroleum to exercise rights under the First Amendment to petition any government body concerning legislation, rules, or procedures.

The proposed order will expire in 20 years.

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[4] (...continued)
unions. Unionization would potentially lead to higher wages, and hence higher prices for automobiles. The Commission could find "no merit" in the proposed efficiency defense. "Given the national policy favoring the association of employees to bargain in good faith with employers over wages, hours and working conditions, we do not believe that preventing unionization can be a legitimate justification for an otherwise unlawful restraint." *Id.* at 498 n. 22.

Just as collective bargaining is part of national labor policy, Law 278 represents the environmental policy of the Commonwealth of Puerto Rico. And just as escaping national labor policy is not a cognizable antitrust defense, altering Puerto Rico environmental legislation is not a cognizable antitrust defense.