Analysis of Proposed Consent Order To Aid Public Comment
In the Matter of Valero L.P., Valero Energy Corporation,
Kaneb Services LLC, and Kaneb Pipe Line Partners, L.P.
File No. 051 0022, Docket No. C-4141

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has issued a complaint ("Complaint") alleging that Valero L.P.'s proposed acquisition of Kaneb Services LLC and Kaneb Pipe Line Partners, L.P. (collectively "Kaneb") 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, and has entered into an agreement containing consent orders ("Agreement Containing Consent Orders") pursuant to which Valero L.P., Valero Energy, and Kaneb (collectively "Respondents") agree to be bound by a proposed consent order that requires divestiture of certain assets ("Proposed Consent Order") and a hold separate order that requires Respondents to hold separate and maintain certain assets pending divestiture ("Hold Separate Order"). The Proposed Consent Order remedies the likely anticompetitive effects arising from the proposed acquisition, as alleged in the Complaint. The Hold Separate Order preserves competition pending divestiture.

II. Description of the Parties and the Transaction

Valero L.P. is a publicly traded master limited partnership based in San Antonio, Texas. Valero L.P. shares its headquarters with Valero Energy, which owns 46% of Valero L.P.'s common units. Valero L.P. is engaged in the transportation and storage of crude oil and refined petroleum products and currently derives 98% of its total revenues from services provided to Valero Energy. The remaining 2% of revenue is generated from third parties who pay fees to use Valero L.P.'s pipelines and terminals. Valero L.P. reported 2004 net income of $78.4 million on total revenue of $221 million.

Respondent Valero Energy Corporation is an independent domestic refining company, headquartered in San Antonio, Texas. It is engaged in national refining, transportation, and marketing of petroleum products and related petrochemical products. Valero Energy reported 2004 net income of $1.8 billion on revenues of nearly $55 billion.

Kaneb is a single company represented by two publicly traded entities: Kaneb Pipe Line Partners, L.P. ("KPP") and Kaneb Services LLC ("KSL"). Kaneb owns and operates refined petroleum product pipelines and petroleum and specialty liquids storage and terminaling facilities. KPP is a master limited partnership that owns Kaneb's pipeline and terminaling assets. KSL owns the general partnership in KPP and five million of KPP's limited partnership units. KSL's wholly owned subsidiary, Kaneb Pipeline Company LLC, manages and operates KPP's pipeline and terminaling assets. KSL reported 2004 consolidated net income of $24 million on total revenue of approximately $1 billion.

Pursuant to the terms of the Agreements and Plans of Merger between Valero L.P. and the Kaneb entities, (1) Valero L.P. will pay $525 million in cash for the entirety of KSL's partnership units, and (2) Valero L.P. will exchange $1.7 billion in Valero L.P. partnership units for all outstanding KPP partnership units. As a result of the transactions, both KSL and KPP will be wholly owned subsidiaries of Valero L.P., and Valero Energy's equity ownership in Valero L.P. would be reduced to 23%.

III. The Investigation and the Complaint

The Complaint alleges that the merger of Valero L.P. and Kaneb 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 each of the following markets: (1) terminaling services for bulk suppliers of light petroleum products in the Greater Philadelphia Area; (2) pipeline transportation and terminaling services for bulk suppliers of light petroleum products in the Colorado Front Range; (3) terminaling services for bulk suppliers of refining components, blending components, and light petroleum products in Northern California; and (4) terminaling for bulk ethanol in Northern California.

To remedy the anticompetitive effects of the merger, the Proposed Consent Order requires Respondents to divest the following assets: (1) in the Greater Philadelphia Area, Kaneb's Paulsboro, New Jersey, Philadelphia North, and Philadelphia South terminals; (2) in the Colorado Front Range, Kaneb's West Pipeline system, which originates in Casper, Wyoming, and terminates in Rapid City, South Dakota, and Colorado Springs, Colorado, and includes Kaneb's terminals in Rapid City, South Dakota, Cheyenne, Wyoming, Denver, Colorado, and Colorado Springs, Colorado; and (3) in Northern California, Kaneb's Martinez and Richmond terminals. Finally, the Order also requires Valero L.P. not to discriminate in favor of or otherwise prefer Valero Energy in bulk ethanol terminaling services and to maintain customer information confidentiality at the Selby and Stockton terminals.

The Commission's decision to issue the Complaint and enter into the Agreement Containing Consent Orders was made after an extensive investigation in which the Commission examined competition and the likely effects of the merger in the markets alleged in the Complaint and in other markets.[1] The Commission has concluded that the merger is unlikely to reduce competition significantly in markets other than those alleged in the Complaint.

The Complaint alleges that the merger would violate the antitrust laws in four product and geographic markets, each of which is discussed below. The analysis applied in each market requiring structural relief follows the analysis set forth in the FTC and U.S. Department of

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[1] The Commission conducted the investigation leading to the Complaint in collaboration with the Attorney General of the State of California. As part of this joint effort, Respondents have entered into a State Decree with California settling charges that aspects of the transaction affecting California consumers would violate both state and federal antitrust laws.

Justice *Horizontal Merger Guidelines* (1997) ("*Merger Guidelines*"). The relief obtained in the bulk ethanol terminaling market is consistent with the Commission's past remedies in similarly-structured mergers.

In addition, the Commission focused on the identity and corporate control of the merging parties. Valero Energy owns the general partner of Valero L.P. The general partner is presumed to exercise all operational rights afforded by the partnership agreements and applicable state corporation law. In light of this relationship, and for purposes of competitive analysis, the Commission attributes Valero Energy's assets and incentives to Valero L.P. The Commission further determined that Valero Energy may have incentives to operate the Valero L.P. assets less competitively than would Kaneb, by maximizing product prices rather than terminal or pipeline revenues. Given the trend toward master limited partnerships holding midstream petroleum transportation and terminaling assets, Commission staff will continue to scrutinize the ownership and control of limited partnerships in its evaluation of midstream asset transactions. Where it appears an operator's interests may be more closely aligned with downstream output reductions than increased transportation and terminaling throughput, the Commission will apply the analysis conducted during this investigation.

Count I Terminaling Services for Bulk Suppliers of Light Petroleum Products in the Greater Philadelphia Area

The Complaint charges that the proposed merger would likely reduce competition in the market for terminaling services for bulk suppliers of light petroleum products in the Greater Philadelphia Area, thereby increasing the price for terminaling services and bulk supply of transportation fuels, by (1) eliminating direct competition between Valero L.P. and Kaneb; and (2) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in the Greater Philadelphia Area. The proposed merger reduces the number of suppliers of terminaling services for transportation fuels and eliminates Kaneb as a source of imported transportation fuel, thereby increasing the likelihood of coordination.

Valero L.P. and Kaneb compete in the supply of terminaling services for bulk suppliers of light petroleum products in the Greater Philadelphia Area, a relevant antitrust market. Terminaling customers such as refiner-marketers, independent marketers, and traders rely on terminals to supply transportation fuel to the area. There are no substitutes for terminals in supplying and distributing transportation fuels in the Greater Philadelphia Area.

The Greater Philadelphia Area includes the city of Philadelphia, the Philadelphia suburbs, and portions of southern New Jersey and northern Delaware. Terminals outside the Greater Philadelphia Area are not economic substitutes for terminals within the area because of additional costs of transporting product by truck from more distant terminals. Post-merger, the remaining terminal operators could profitably impose a small but significant and nontransitory price increase in terminaling services for transportation fuels because no additional terminals can serve the Greater Philadelphia Area without significantly raising the cost of distributing fuel.

be sufficient to reverse the merger's potential to raise the price of bulk supply and terminal services.

Count II Pipeline Transportation and Terminaling Services for Bulk Suppliers of Light Petroleum Products in the Colorado Front Range

The Complaint charges that the proposed acquisition would likely substantially reduce competition in pipeline transportation and terminaling services for bulk suppliers of light petroleum products in Denver and Colorado Springs by (1) eliminating direct competition between Valero L.P. and Kaneb, (2) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in the Denver area, and (3) eliminating all competition in Colorado Springs, making Valero L.P. a monopolist in pipeline transportation and terminaling services. While the relevant market is pipeline transportation and terminaling services, any purchaser of light petroleum products would have to pay for the product to get to the market through pipeline transportation and/or terminals. Therefore, a price increase in these relevant markets would also cause an increase in light petroleum products prices.

Valero L.P. and Kaneb compete in the pipeline transportation and terminaling services for bulk suppliers of light petroleum products in both Denver and Colorado Springs. While light petroleum products can be trucked to Denver and Colorado Springs, pipeline transportation is the only economic means to ship bulk supplies of light petroleum products to either Denver or Colorado Springs. There is no economically feasible substitute to pipeline transportation to reach these geographic areas.

Light petroleum products reach Denver and Colorado Springs through terminals that can receive product from either pipelines or refineries. Tank trucks pick up the light petroleum products from these local terminals and deliver them short haul distances to retail outlets and other customers. Terminals outside of Denver and Colorado Springs cannot economically supply those areas due to the costs of shipping light petroleum products by truck. Therefore, terminaling services provided by those terminals in the Denver and Colorado Springs areas is a relevant market.

Following the merger, the combined firm would control a significant share of bulk supply and terminaling services for light petroleum products in the Colorado Front Range. The proposed transaction would significantly increase market concentration, and post-merger the market would be highly concentrated. Moreover, the proposed transaction would result in the combined firm having a monopoly in the Colorado Springs area. The change in market concentration underestimates the likely competitive harm because it does not take into account how Valero L.P.'s incentives differ from Kaneb's current incentives in operating the Kaneb West Pipeline system.

Entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects arising from the proposed acquisition. Pipeline entry in Denver or Colorado Springs is very unlikely because of the high expense of constructing a new pipeline to these geographically isolated areas. It is highly improbable, if not impossible, that a new pipeline originating in a distant market could be both approved and constructed within the two-year period required by the *Merger Guidelines*.

Terminal entry in Denver or Colorado Springs is also very unlikely. Each refinery in and each pipeline to the Denver and Colorado Springs markets is accommodated by an existing terminal. Given the sufficient terminal capacity for the existing refinery and pipeline infrastructure, it is highly unlikely that a potential entrant could find a financial incentive to make a major investment, involving high sunk costs, in the construction of a new terminal.

The efficiency claims of the Respondents, to the extent they relate to these markets, are not cognizable under the *Merger Guidelines*, are small as compared to the magnitude of the potential harm, and would not be sufficient to reverse the merger's potential to raise the price of bulk supply and terminal services.

The proposed acquisition would create a highly concentrated market in Denver and Colorado Springs and create a presumption that the acquisition "will create or enhance market power or facilitate its exercise. . ." *Merger Guidelines* § 1.5(c). These anticompetitive effects could result from the coordinated interaction between Valero L.P. and the remaining firms with enough excess capacity to defeat a price increase in Denver, and from a unilateral reduction in supply or price increase instituted by Valero L.P. in Colorado Springs.

Count III Terminaling Services for Bulk Suppliers of Refining Components, Blending Components, and Light Petroleum Products in Northern California

The Complaint charges that the proposed acquisition would likely substantially reduce competition in terminaling services for bulk suppliers of refining components, blending components, and light petroleum products in Northern California by (1) eliminating direct competition between the firms in the provision of terminaling services for bulk suppliers of refining components, blending components, and light petroleum products, and (2) increasing the ability and likelihood of coordinated interaction between the combined company and its competitors in Northern California. Downstream effects will likely result in increased prices for light petroleum products.

Valero L.P. and Kaneb compete in providing terminaling services for bulk suppliers of refining components, blending components, and light petroleum products in Northern California. Refiner-marketers, independent marketers, and traders use Kaneb's three marine-accessible Northern California terminals to receive and store imported products and to distribute light petroleum products via pipeline to other Northern California terminals. In addition, refiners use the Kaneb terminals to store refining components, blending components, and light petroleum products that are needed to optimize production from their refineries. There are no substitutes for terminaling services for these products.

Northern California is a relevant geographic market. Due to trucking costs, firms need access to the Kinder Morgan intrastate pipeline to distribute bulk volumes of California gasoline and other light petroleum products throughout the state, and Southern California terminals are not connected to Kinder Morec8m0.00 0.s 72.0000 re

Count IV Terminaling for Bulk Ethanol in Northern California

The Complaint charges that the proposed acquisition would likely substantially reduce competition in terminaling services for bulk ethanol in Northern California by changing the owner of Kaneb's Selby and Stockton terminals. Ethanol is a necessary input in producing California-grade "CARB" gasoline. This is the Commission's first opportunity to examine a merger's competitive effects on ethanol since California adopted it as the preferred oxygenate.

In Northern California, Kaneb's Selby, Stockton, and Richmond terminals are the only terminals capable of receiving and storing bulk quantities of ethanol. From these terminals, ethanol is offloaded from large rail or marine shipments, placed into storage tanks, and loaded onto trucks for delivery to other nearby terminals. Once the ethanol reaches these other terminals, ethanol is blended at the truck rack to produce CARB gasoline.

Terminal services for bulk ethanol is the relevant product market. There are no substitutes for these services; large quantities of ethanol received from producers must be broken into smaller volumes for distribution to remote gasoline terminals. Because remote terminals must receive ethanol supplies by truck, the geographic market is limited to Northern California. It is simply not feasible to supply Northern California terminals with ethanol trucked from Southern California terminals. Similarly, customers currently using Kaneb's Stockton terminal would face additional trucking costs if forced to use either of Kaneb's Selby or Richmond terminals.

The proposed acquisition raises vertical issues relating to ethanol terminaling services with likely effects in finished gasoline sales. Valero Energy and the other Northern California refiners do not offer ethanol terminaling services that compete with Kaneb and would not likely be able to do so in the event of a price increase. Post-acquisition, Valero L.P.'s ownership of the Kaneb terminals would give it control over an input necessary to finish gasoline for portions of Northern California. Valero Energy refines and markets CARB gasoline. By virtue of the merger, Valero L.P. could use control over bulk ethanol terminaling to limit access to ethanol storage by refusing to renew storage agreements with terminaling customers, by canceling contracts at some terminals to force competitors to truck longer distances, or by simply raising prices or abusing confidential information for ethanol terminaling. Because a percentage of ethanol must be added to CARB gasoline where oxygenation is required, any of these actions could increase the price of finished gasoline in Northern California. Because Kaneb does not market CARB gasoline, Kaneb currently has no incentive to manipulate ethanol access in these ways.

New entry into the market for Northern California bulk ethanol terminaling services would not be likely or timely, for the same reasons that entry would not be timely or likely for terminaling services for refining components, blending components, and light petroleum products in Northern California.

IV. The Proposed Consent Order

The Commission has provisionally accepted the Agreement Containing Consent Orders executed by Valero L.P., Valero Energy, and Kaneb in the settlement of the Complaint. The Agreement Containing Consent Orders contemplates that the Commission would issue the originating near Casper, Wyoming, and terminating in Rapid City, South Dakota, and Colorado Springs, Colorado; (2) refined products terminals in Rapid City, South Dakota; Cheyenne, Wyoming; Dupont, Colorado; and Fountain, Colorado. The assets to be divested also include all assets located at, or used in connection, with these pipelines and terminals, including truck racks, local connector pipelines, storage tanks, real estate, inventory, customer contracts, and real estate.

This divestiture is designed to maintain the likelihood that the new owner of the Kaneb West Pipeline System will not restrict Montana and Wyoming refiners' ability to send product to Denver and Colorado Springs. The divestiture will eliminate the ability of the combined company to raise light petroleum product prices in Denver and Colorado Springs by restricting access to the West Pipeline System. It also ensures that the current competition for pipeline transportation to and terminaling services in Denver and Colorado Springs will be maintained, with the same number of competitors post-acquisition as pre-acquisition. The divestiture of the West Pipeline System will also complicate the ability of the terminal and pipeline owners in these markets to coordinate in raising their pipeline transportation or terminaling service fees. Finally, the divestiture prevents Valero L.P. from controlling light petroleum product pipeline transportation to and terminaling in Colorado Springs. It effectively maintains the pre-merger competition in this market.

These pipeline and terminal assets must be divested within six months of the date the merger is effectuated to a buyer that receives the prior approval of the Commission. In a separate Order to Hold Separate and Maintain Assets, Respondents are required to hold all assets to be divested separate and to maintain the viability and marketability of the assets until they are divested.

C. Kaneb's Martinez and Richmond Terminals

To remedy the lessening of competition in terminaling services for bulk suppliers of refining components, blending components, and light petroleum products in Northern California as alleged in Count III of the Complaint, Paragraph IV of the Proposed Order requires Respondents to divest Kaneb's Martinez and Richmond terminals to a Commission-approved buyer. The assets to be divested include both terminals, and all assets located at or used in connection with these terminals, including truck racks, local connector pipelines, storage tanks, real estate, inventory, customer contracts, and real estate.

The divestiture is ordered to maintain the likelihood that the new owner of these terminals does not restrict access to these terminals or otherwise limit imports into the Northern California market. The divestiture also complicates the ability of the remaining terminal owners in the market to coordinate to raise the prices of terminaling services. Although Valero L.P. will acquire Kaneb's Selby terminal, the presence of an independent operator of Martinez and Richmond will check Valero L.P.'s incentive and ability to restrict access at that terminal.

These terminal assets must be divested within six months of the date the Merger is effectuated to a buyer that receives the prior approval of the Commission. In a separate Order to Hold Separate and Maintain Assets, Respondents are required to hold all assets to be divested separate and to maintain the viability and marketability of the assets until they are divested.

In considering an application to divest any of these three asset packages, to one or more buyers, the Commission will consider factors such as the acquirer's ability and incentive to invest and compete in the businesses in which Kaneb was engaged in the relevant geographic markets alleged in the Complaint. The Commission will consider whether the acquirer has the business experience, technical judgment, and available capital to continue to invest in the terminals in order to maintain current levels of competition.

D. Terminaling Services for Bulk Ethanol in Northern California

To remedy the lessening of competition in terminaling services for bulk ethanol in Northern California alleged in Count IV of the Complaint, Paragraph VI of the Proposed Order requires Respondents to maintain an information firewall. The Paragraph also requires that the Respondents not discriminate in offering access to commingled terminaling of ethanol at its retained Northern California terminals in Stockton and Selby, and offer access to third parties on terms and conditions no less advantageous to those given to Valero Energy. This remedy is ordered to ensure that the Respondents do not use confidential business information or limit access to ethanol storage to maintain competition in the terminaling of ethanol and the sale of finished gasoline in Northern California.

E. Other Terms

Paragraph VII requires the Respondents to provide written notification prior to acquiring the Paulsboro, New Jersey, Philadelphia North, or Philadelphia South terminals, or any portion thereof. It further requires Respondents to provide reports to the Commission regarding compliance with the Proposed Order. Paragraph IX requires the Respondents to provide written notification prior to any proposed dissolution, acquisition, merger, or consolidation, or any other change that may affect compliance obligations arising out of the Proposed Order. Paragraph X requires the Respondents to provide the Commission with access to their facilities and employees for purposes of determining or securing compliance with the Proposed Order. Paragraph XI provides for an extension of time to complete divestitures required under the Proposed Order if the particular divestiture has been challenged by a State.

V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Proposed Order and the comments received and will decide whether it should withdraw from the Proposed Order or make