NEW ZEALAND

COMMERCE COMMISSION AUTHORISES JOINT MARKETING OF POHOKURA WITH CONDITIONS*

The Commerce Commission has released its final decision on the application by the Pohokura joint venturers (Shell, OMV and Todd) for authorisation to jointly market gas from the Pohokura field. As expected, the Commission has confirmed its draft determination and granted authorisation, although on slightly different conditions than originally proposed.

In its decision, the Commission confirmed the position taken in its draft determination that separate marketing of gas from joint venture fields is possible, and competitively preferable. It acknowledged that in this case joint marketing is likely to lead to earlier production of Pohokura gas than separate marketing, and found that earlier production carries a significant public benefit (particularly given the predicted shortage of gas following the depletion of the Maui field).

However, the Commission considered that the earlier production of jointly marketed gas from Pohokura is insufficiently certain for it to grant an unconditional authorisation. It has, therefore, made the authorisation contingent upon three conditions, including that the Pohokura field is in full production by June 2006.

The applicants argued that such a condition did not take into account uncontrollable delays to gas production and thus could jeopardise the development of the field if it is unexpectedly delayed. The Commission essentially rejected this argument, although it did reduce the threshold for what constitutes "full production" from 70 PJ a year to 60 PJ (the latter being the bottom end of expected volumes, thus supposedly giving the parties a "production margin", although not a big one).

The second condition the Commission attached is a requirement that any assignment of interest in the Pohokura field must be subject to a clearance from the Commission. This effectively amounts to a compulsory pre-merger notification and investigation by the Commission. It is a departure from the current practice whereby the clearance process is an entirely voluntary one – parties can choose to use it to protect themselves (if successful) from legal challenge to a merger or acquisition. The Commission acknowledged that this change was largely driven by administrative limitations in the voluntary regime – if parties choose not to apply for a clearance and the Commission wants to challenge the acquisition, it must take action through the courts (usually by applying for an injunction). This could be problematic, especially if it only finds out about the merger late in the process.

The last condition imposed by the Commission prevents the joint venture parties from restricting buyers of the gas from on-selling it. This condition (unlike the first two) was not one of the original conditions proposed by the Commission but was originally suggested by two potential gas purchasers. While the Commission refers to the ability of the joint venture to price discriminate in its discussion of this condition, it is not clear that this restriction really counteracts a specific detriment. It seems more likely that the Commission has used the opportunity created by conditions to address a practice that it views as anti-competitive. While the outcome may indeed promote competition (by enabling gas purchasers to compete with producers by reselling gas), this

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does raise the question of how far the Commission can go in imposing conditions to correct market deficiencies with only a tenuous connection to the practice for which authorisation is sought.

The joint venture parties initially reacted strongly to the decision, claiming that the Commission has imposed conditions "where none were required or appropriate". While clearly the immediate impact will be most strongly felt by the parties to the Pohokura joint venture, it will be interesting to see how the decision affects other industry participants.

As in the draft determination, the Commission explicitly rejected the possibility that the decision would have a negative impact on exploration, reiterating its comments in the draft determination that the decision is case-specific and dependent on the market power of the specific joint venture parties. It is not clear whether industry participants can take much comfort from this. The Commission does seem to have made an attempt to avoid a general requirement for authorisation of joint marketing by focusing more specifically on the size of the Pohokura field as a factor in increasing the detriments of a single seller. A further factor that might assist future producers is that the Commission found that joint marketing of Pohokura would "lessen competition" (sufficient to give it grounds for authorisation) without specifically finding that such a lessening is substantial. This suggests that the issue of whether joint marketing *substantially* lessens competition in breach of the Act (thus *requiring* authorisation) is still an open issue, especially for fields smaller than Pohokura.

The Commission reiterated its belief that even if future explorers/producers require authorisation for joint marketing, the costs imposed by the need for authorisation are likely to be small when weighed against the potential gains from field development. While this might be correct in some cases, it is another factor that makes life more uncertain and difficult for potential investors. New Zealand does not offer such clear cut investment opportunities that market risk can be so lightly written off.