



General Counsel Corner

By Peter H. Gunst, Esquire

Update on the Exxon/Mobil Merger

This month, center stage continues to be occupied by the huge proposed Exxon/Mobil merger. Congress has now heard testimony from the Federal Trade Commission, the governmental agency responsible for evaluating the proposed deal's competitive impact, as well as from interested industry representatives, including SSDA.

In testimony before Congress, FTC Director of the Bureau of Competition Bill Baer gave some indication that the FTC had real concerns with the proposed deal.

First, the FTC is concerned by the very size of the proposed merger. Baer emphasized that the Exxon/Mobil combination would be "the largest industrial merger ever" and would create "the largest private oil company worldwide and the largest U.S. company of any type."

Second, the FTC is concerned because the merger would impact competition at all levels of the petroleum industry, from the wellhead to the pump.

Upstream, according to Baer, the merger would have the effect of "creating the world's largest privately owned oil producer." Given the significant independent market power of major oil producing nations like Saudi Arabia, Iran and Venezuela, however, this is probably the least of the FTC's concerns.

Impact on competition at the refining level will be a subject of intensive FTC scrutiny. In his testimony, Baer stressed that the Commission had in the past required divestiture of refineries and pipeline interests as the price of merger approval. Examples include the required divestiture of a Louisiana refinery in the context of the Chevron/Gulf merger of 15 years ago and the FTC's very recent refusal to permit Shell and Texaco to combine refining capabilities in the Pacific Northwest.

At least as significant to the FTC will be the proposed merger's effect at the retail level. Baer emphasized in his testimony that Exxon/Mobil would become "the largest or one of the largest players" in the northeast, Gulf Coast and California market sectors.

We are already seeing fallout at the jobber and dealer levels from the BP/Amoco merger. And the geographic markets in which those companies compete is fairly limited. If the Exxon/Mobil merger is approved, it may be anticipated that far broader divestitures will be required.

With respect to company-owned stations, the FTC's approach with BP and Amoco was to require the sale of marketing facilities in a given market to a single purchaser that would, hypothetically, introduce some additional competition into the market. This approach can be attacked on at least two grounds.

First, what happens to the dealer's right of first refusal under the PMPA? It is not clear (at least to this writer) that the right of first refusal can so easily be ignored.

Second, do adequate "single purchasers" actually exist? And will they be strong enough to appeal to dealers who have spent years developing good will in a particular brand name?

Such concerns intensify in the context of a Exxon/Mobil merger. There, far more dealers will be impacted both because of the size of the combining players and the broad areas in which they compete with each other.

Finally, it is noteworthy that the FTC emphasized in its testimony that the Exxon/Mobil merger did "not occur in a vacuum," but appeared "to be part of an ongoing trend of consolidations and concentration in this industry." This overall market trend has raised the FTC's antennas, as well as those of the 21 state attorneys general who are also reviewing the transaction.

Where it will all end is far from clear. It does appear, however, that Exxon and Mobil's plan will receive heavy governmental scrutiny, and any approval will be subject to major conditions.

