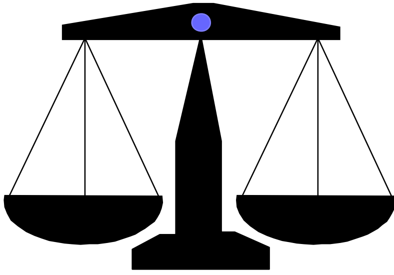

General Counsel Corner

By Peter H. Gunst, Esquire

FTC Requires Modifications to BP/Amoco Merger

To complete BP's forty-eight billion dollar stock acquisition of Amoco, the two giants required the antitrust approval of the Federal Trade Commission. Now, the FTC has arrived at a proposed agreement with BP and Amoco that places some conditions on the BP/Amoco merger. It is worth reviewing what occurred.

First The Rhetoric

FTC Chairman Robert Pitofsky groused that the merger involves "companies of enormous size" and reflects "a significant trend towards concentration in the petroleum industry." Similarly, in its official Analysis, the FTC warns of "what appears to be a significant trend towards consolidation in the petroleum industry."

This trend consists not only of the recent refining and marketing consolidations involving Texaco and Shell, Marathon and Ashland and Tosco and Unocal, but also the proposed Exxon/Mobil and Phillips/Ultramar Diamond Shamrock mergers.

Only time will tell what the FTC's rhetoric means for these pending or other not-yet-announced mergers and consolidations. We do know that the FTC appears to be aggressively investigating both the Exxon/Mobil and Phillips/Ultramar Diamond Shamrock deals. SSDA, along with other industry players, has been asked to provide input to the FTC.

Then The Pragmatism

The FTC's rhetoric gave way to pragmatism in the case of the BP/Amoco merger, however. The FTC analyzed the potential anti-competitive effects of the BP/Amoco merger by zeroing in on specific product and geographic markets. It then concluded that the two companies' operations were sufficiently diverse that, in Chairman Pitofsky's words, they "rarely overlap in a way that threatens competition."

What did concern the FTC was the potential for diminished competition in the terminalling of gasoline and other light petroleum products in nine specific Ohio, Tennessee, Florida, Mississippi, Alabama and South Carolina markets, and for diminished competition in the wholesale sale of gasoline to jobbers and dealers in 30 metropolitan markets located principally in mid-western and southern states.

Then the FTC sat down with BP and Amoco to address its concerns.

Finally The "Solution"

BP and Amoco agreed to address the FTC's terminalling concerns by divesting Amoco's terminals in each of the nine markets at issue to Williams Energy Ventures, or to another acquirer satisfactory to the FTC. The FTC's criterion for approving any terminal sell-off will be the

maintenance of "the competitive environment that existed prior to the acquisition."

The deal that the FTC, BP and Amoco worked out to address concerns about diminished competition in the 30 metropolitan wholesale gasoline markets is more complex. In those markets, Amoco and BP are to give its jobbers and open dealers the option of canceling their Amoco and BP franchise and supply agreements, in order to permit them to switch their stations to other brands.

Those jobbers and open dealers who avail themselves of this opportunity will be released from all debts, loans, obligations and other responsibilities under their Amoco and BP agreements, other than for fuel actually delivered and for some other specific debts, so long as they switch over to another brand having less than a twenty percent market share.

In addition, BP and Amoco agreed that — unless their market shares in the Youngstown and Toledo Ohio markets drop by mid-1999 — they will sell off a package of company-owned stations in those markets. Significantly, each of those two potential sales is to be made to a "single acquirer." Affected dealer lessees are provided with no right of first refusal to purchase their stations.

Apparently, the issue of whether impacted lessee dealers should have been given a shot at ownership, if BP and Amoco are compelled to sell off dealer lessee stations, was given no consideration by the FTC. If the situation arises, it will raise interesting questions concerning impacted dealers' PMPA rights.

What Effect on Future Mergers?

Basically, the FTC decided in the BP/Amoco case that the potential impact on competition was not so severe that the baby had to be thrown out with the bathwater.

The Exxon/Mobil deal should raise more difficult competitive issues because the overlay in competition will be substantially greater. The need exists to protect the interest of affected open and lessee dealers throughout the FTC's investigation of the Exxon/Mobil merger.

Finally, the proposed Consent Order resolving the FTC’s concerns about the BP/Amoco merger will not become effective until after a 60-day public comment period expires on March 8, 1999.