Prepared Statement of the Federal Trade Commission

presented by

Robert Pitofsky, Chairman

desire to reduce overcapacity in more mature industries. The rapidly evolving world of electronic commerce has a substantial impact on the merger wave, because consolidations refinery in California; light petroleum terminals in Boston, Massachusetts, Manassas, Virginia, and Guam; a pipeline interest in the Southeast; Mobil's interest in the Trans-Alaska Pipeline; Exxon's jet turbine oil business; and a volume of paraffinic lubricant base oil equivalent to Mobil's production. The Commission coordinated its investigation with the Attorneys General of several states and with the European Commission (about 60% of the merged firm's assets are located outside the United States).

There are several particularly noteworthy aspects of the Exxon/Mobil settlement. First, the divestiture requirements eliminated *all* of the overlaps in areas in which the Commission had evidence of competitive concerns. Second, while several different purchasers may end up buying divested assets, each will purchase a major group of assets constituting a business unit. This is likely to replicate, as nearly as possible, the scale of operations and competitive incentives that were present for each of these asset groups prior to the merger. Third, these divestitures, while extensive, represent a small part of the overall transaction. The majority of the transaction did not involve significant competitive overlaps. In sum, we were able to resolve the competitive concerns presented by this massive merger without litigation.

The Commission also required divestitures in the merger between BP and Amoco,[(8)] and in a joint venture combining the refining and marketing businesses of Shell, Texaco and Star Enterprises to create at the time the largest refining and marketing company in the United States.[(9)]

The Commission challenged potentially anticompetitive mergers in other energy industries as well. Three recent matters served to protect emerging competition in electric power generation. Two of these cases were so-called "convergence mergers," where an electric power company proposed to acquire a key supplier of fuel used to generate electricity. One involved PacifiCorp's proposed acquisition of The Energy Group PLC and its subsidiary, Peabody Coal. PacifiCorp's control of certain Peabody coal mines allegedly would have enabled it to raise the fuel costs of its rival generating companies and raise the wholesale price of electricity during certain peak demand periods. The Commission secured a consent agreement to divest the coal mines, but the transaction was later abandoned by the parties.[(10)] In another case, Dominion Resources, an electric utility that accounted for more than 70% of the electric power generation capacity in the Commonwealth of Virginia, proposed to acquire Consolidated Natural Gas ("CNG"), the primary distributor of natural gas in southeastern Virginia and the only likely supplier to any new gas-fueled electricity generating plants in that region. Dominion allegedly could have raised the cost of entry and power generation for new electricity competitors. Working closely with Commonwealth officials, the Commission required the divestiture of Virginia Natural Gas, a subsidiary of CNGegedly could to its pipeline network, thus allowing new entry that should maintain a competitive market.

Another highlight from the past two years is the Commission's successful challenge to the proposed mergers of the nation's four largest drug wholesalers into two firms. McKesson Corp. proposed to acquire AmeriSource Health Corp., and Cardinal Health, Inc. proposed to acquire Bergen Brunswig Corp. The two surviving firms would have controlled over merger, because the parties abandoned the transaction before the staff made a final recommendation.

We have also challenged a number of other large mergers involving products and services that are highly important to consumers, including pharmaceutical products,[17] medical devices,[18] household products,[19] and insurance services.[20] In each of these cases, our goal has been to protect consumers from the potential exercise of market (m)-6(tny)-4(m)-6(t)(tny)-ik arruc

The issuance of a second request is not undertaken lightly, and the care we take in choosing when to issue them is illustrated by the fact that a large majority of those transactions that receive second requests result in some form of enforcement action. In addition, most second request investigations are resolved without major document have been made for clarifications and other changes to the Guidelines. The agencies are now considering those suggestions before issuing final Guidelines.

Retailing

Of course, even more traditional retailing practices can raise competitive concerns. Earlier this month the FTC and the Attorneys General from 56 U.S. states, territories, commonwealths, and possessions settled charges that Nine West, one of the country's largest suppliers of women's shoes, engaged in resale price maintenance, resulting in higher prices for many popular lines of shoes. To settle the charges with the states, Nine West agreed to pay $34 million, which will be used to fund women's health, vocational, educational, and safety programs.

Slotting allowances are another retailing-related topic of current interest at the Commission. The term "slotting allowance" typically refers to a lump-sum, up-front payment that a supplier, such as a food manufacturer, might pay to a retailer, such as a supermarket, for access to its shelves.[(30)] These allowances can amount to tens or hundreds of thousands of dollars. Slotting allowances can be either beneficial or harmful. They can be beneficial if they fairly reimburse retailers for the costs and risks of taking on an unproven new product, or when they result in lower prices to consumers. On the other hand, slotting allowances can be harmful if they permit one manufacturer to acquire a degree of exclusivity, across many retail outlets, sufficient to prevent other firms from becoming effective competitors. Still other situations fall in an intermediate grey area. To sharpen our understanding of the circumstances under which slotting allowances can be beneficial or harmful to competition and to consumers, the Commission will hold a two-day workshop on May 31 and June 1. This session will bring together people from manufacturing, retailing, economics, and other relevant disciplines to discuss the issues involved in this very complex subject.

The Commission recently examined charges of price discrimination in a related retailing context. By majority vote, the Commission charged McCormick & Company, the world's largest spice company and by far the leading supplier in the United States, with engaging in unlawful price discrimination in the sale of spice and seasoning products. Some retailers allegedly were charged substantially higher net prices than were others, and discounts to favored chains allegedly were conditioned on an agreement to devote all or a substantial portion of shelf space to McCormick products. McCormick agreed to settle the charges by accepting an order that would prohibit the selling of spices at different prices to different retailers, except when permitted by the Robinson-Patman Act.

Health Care

Health care is an increasing part of overall consumer expenditures, and the significant rise in health care costs is felt by all consumers. For many years, the Commission has been at the forefront in bringing enforcement actions to protect the competitive process in all types of health care markets, including services provided by hospitals and health care professionals as well as products provided by the pharmaceutical and medical equipment industries. In the past two years alone, the Commission has brought more than a dozen enforcement actions involving health care, pharmaceuticals, and medical devices.

In one of these cases the Commission, jointly with several states, sued Mylan Laboratories, one of the nation's largest generic pharmaceutical manufacturers, charging

Mylan and other companies with monopolization, attempted monopolization and conspiracy to eli equipment and technology employed in laser vision correction. Most of the approximately 140 million people in the United States with vision problems correct their vision with contact lenses or eyeglasses, but an increasing number are turning to laser techniques. Until recently, VISX and Summit were the only firms with FDA approval to market the laser equipment used for this surgery. The complaint charged that the two companies eliminated competition between themselves by placing their competing patents in a patent pool and agreeing to charge doctors a uniform $250-per-procedure fee every time a Summit or VISX laser was used. In essence, this was price-fixing u8m equi additional resources for this important mission.

Mr. Chairman and Members of the Subcommittee, we appreciate this opportunity to provide an overview of the Commission's efforts to maintain a competitive marketplace for American businesses and consumers. We would be pleased to respond to any questions you may have.

Endnotes:

*. This written statement represents the views of the Federal Trade Commission. My oral presentation and responses to questions are my own and do not necessarily reflect the views of the Commission or any other Commissioner.

1. Sandra Sugawara, *Merger Wave Accelerated in '98: Economy, Internet Driving Acquisition,* Wash. Post, Dec. 31, 1999 at E1.

2. *See* Attachment 1.

3. In addition, 19 merger filings were withdrawn before the Commission's investigation was completed.

4. Telecommunications, especially in the areas of cable and video programming, also has been, and continues to be, an area of substantial activity. See Prepared Statement of the Federal Trade Commission, Presented by Robert Pitofsky, Chairman, Before The Committee on Commerce, Science, and Transportation, United States Senate, November 8, 1999.

5. *Federal Trade Commission v. BP Amoco, p.l.c.,* Civ. No. C 000416 (SI) (N.D. Cal. Feb. 4, 2000) (complaint).

6. The complaint also alleges that the combination of BP's and ARCO's pipeline and oil storage facilities in and around Cushing, Oklahoma, a major crude oil trading center, would enable the combined firm to manipulate the market for crude oil futures contracts traded on the New York Mercantile Exchange. Those contracts involve crude oil designated for delivery in Cushing. The complaint alleges that the combination of BP's futures trading business and existing pipeline and terminal facilities with ARCO's pipelines, oil storage infrastructure, and in-line transfer business would increase BP's ability to manipulate crude oil futures trading by giving it access to information and control over pipelines and other essential facilities.

7. *Exxon Corp.,* FTC File No. 991 0077 (Nov. 30, 1999) (proposed consent order).

8. *British Petroleum Company p.l.c.* , C-3868 (April 19, 1999) (consent order). BP/Amoco involved very large companies but relatively few significant competitive overlaps. The Commission ordered divestitures and other relief to preserve competition in the wholesaling of gasoline in 30 cities or metropolitan areas in the eastern and southeastern United States, and in the terminaling of gasoline and other light petroleum products in nine geographic markets.

9. *Shell Oil Co.,* C-3803 (April 21, 1998) (consent order). The Shell/Texaco transaction raised competitive contn 30ies -10(9(s)3(2(.)-9(2TJ r5(s)2k)3(et) s)37(lita)-f)n ni na it cse asd

order was withdrawn when the parties abandoned the transaction.

11. *Dominion Resources, Inc.*, C-3901 (Dec. 9, 1999) (consent order).

12. *CMS Energy Corp.*, C-3877 (June 2, 1999) (consent order).

13. *FTC v. Cardinal Health, Inc.*, 12 F. Supp.2d 34 (D.D.C. 1998).

14. 1992 U.S. Dep't of Justice and Federal Trade Commission Horizontal Merger Guidelines, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (April 2, 1992; as amended, April 8, 1997).

15. *Albertson's, Inc.*, FTC File No. 981 0339 (consent agreement accepted for public comment, June 21, 1999). The Commission has also challenged a number of other supermarket mergers. *E.g.*, *Albertson's, Inc.*, C-3838 (Dec. 8, 1998) (consent order) (acquisition of Buttrey Food and Drug Store Co.); *Koninklijke Ahold N.V.*, C-3861 (April 14, 1999) (consent order) (acquisition of Giant Food, Inc.).

16. The merged firm might have been able to do so in a number of ways, including strategies short of an outright refusal to sell to the non-Barnes & Noble bookstores. For example, Barnes & Noble/Ingram could have chosen to (1) sell to non-Barnes & Noble bookstores at higher prices; (2) slow down book shipments to

38. The President's proposed budget also includes additional resources for the FTC's consumer protection mission.