October 8, 1999

The Honorable Robert Pitofsky
Chairman
Federal Trade Commission
Sixth Street and Pennsylvania Avenue, N.W.
Room 338
Washington, D.C. 20850

Re: Proposed Mergers in the Oil Industry

Dear Chairman Pitofsky:

By way of introduction, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before federal agencies and Congress. Recently, the Office of Advocacy has been contacted by members of the oil industry and Congress expressing concerns about the impact of recent mergers in the oil industry on small business. After reviewing the issue, the Office of Advocacy also has concerns about the potential long-term effect of the numerous oil mergers on the various small business sectors of the oil industry.

Currently, the Federal Trade Commission is considering two proposed mergers between major oil companies. One merger is between BP/Amoco Oil Company (BP) and ARCO Oil Company (ARCO), which will result in BP/Amoco/ARCO (BPAA). The other merger is between Exxon Oil Company and Mobil Oil Company, which will result in Exxon-Mobil (EM). Because of the potential post-merger landscape of the oil industry, the Office of Advocacy is deeply concerned that the mergers of these companies may create a competitive disadvantage for small businesses in various sectors of the oil industry and violate Section 7 of the Clayton Anti-Trust Act.

Sectors of the Industry

Although both mergers are among the major oil producers in the industry, the effect on small businesses will reach far beyond the oil producers. The oil industry is comprised of several sectors that reach beyond the small oil producers that compete with the large oil producers such as BP and Exxon. These sectors have small business players.

In addition to small oil producers, there are also small business refiners that are dependent upon reasonably priced crude. The refiners supply petroleum oil to independent/unbranded companies, jet fuel companies, gasoline stations, home heating oil companies, diesel fuel users like agricultural facilities and other marketers that require oil to produce their product, such as concrete manufacturers. The proposed mergers will effect small business players in all of the different sectors of the oil industry.

Effect of Mergers on Industry

The Office of Advocacy asserts that the impact of the mergers on the small business players in the oil industry must also be considered in making a determination as to the whether the mergers should be approved. Such consideration is necessary to assure that a level playing field that will enable small businesses to continue to compete is maintained.

Structure and Holdings of the Merged Entities

If the mergers are approved, both companies will be dominant players in the industry. EM will have 21.5 billion barrels of oil and gas reserve, making it the largest holder of oil and gas reserves in the world. [1] It will produce 4.3 million barrels of oil per day, making it the largest oil and gas producer in the world and second largest in the US market.[2] EM's refining capacity will be the largest in the world and second largest in the US.[3]

Similarly, BPAA will obtain major market power through the merger. BPAA will hold approximately 19 billion barrels of oil and gas reserves worldwide.[4] It will produce 4 million barrels of oil per day, making it the second largest oil and gas producer in the US.[5] Moreover, BPAA will dominate the Alaska region, which accounts for approximately 20% of the nation's oil product.[6]

In terms of refining, BPAA will have the largest refining capacity in the US. BP obtained significant refining capacity in its merger with Amoco, which was the leader in refining and marketing east of the Rocky Mountains. ARCO is the leader in refining in the West. With the combined refining capacities of the merged entity, it will dominate the country.[7]

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[1] Merrill Lynch, BP Amoco A Giant Step with Amoco…A Big One with ARCO: An Analysis of the Proposed Acquisition of ARCO by BP Amoco, page 15, April 1999.
[2] Id.
[3] Id.
[4] Id.
[5] Id.
[6] Id., at 17.
[7] Id., at22-23.

Impact on the Small Businesses

Both companies will have a formidable presence throughout the US and the world. These are fully integrated companies that will have the ability to impact all aspects of the industry-production, transportation of oil products (the large oil companies own the pipelines) refining, distribution, and retail. Needless to say, such a strong position will render a significant amount of control and market power that may be detrimental to small businesses in the different sectors of the industry. The oil reserves, production capacity, refining capacity, and marketing ability of the merged entities may allow them to significantly impact the price of crude oil and its products.

The ability to obtain and transport crude at a reasonable rate is particular important in areas like California, the Pacific Northwest, and Alaska where the small refiners are dependent on the crude oil that will be produced by EM and BPAA. With the market power in refining that will be obtained through the mergers, the newly formed entities have no true incentive to provide crude oil to small refiners at competitive prices.

If the small refiners are unable to obtain crude at a reasonable price, they may be unable to compete and subsequently forced out of the market. The end result, however, will affect not only the refiners but also ***their customers***. Once the small refiners leave, the large companies will have complete control over petroleum prices for the independent non-affiliated gasoline dealers, the home heating oil companies, the agricultural diesel users, the concrete manufacturers, etc. Without competition, the end result will be higher prices for small business gasoline suppliers and, ultimately, the consumer.

The Proposed Mergers May Violate the Clayton Act

In enacting the Clayton Act, Congress desired to outlaw substantial increases in concentration through acquisition by a dominant concern. FTC v. Coca-Cola, Co. 641 F.Supp. 1128, 11 (D.D.C. 1986), vacated as moot 829 F.2d 191 (D.C. Cir. 1987); FTC v. PPG Industries, Inc., 798 F.2d 1500,1501 (D.D.C. 1986). Section 7 of the Clayton Act provides that:

> "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly… ." 15 U.S.C. §18.

Section 7 concerns itself with the reasonable probability of the lessening of competition or tendency towards monopoly as a result of the particular merger being scrutinized. U.S. v. Atlantic Richfield Co., 297 F. Supp. 1061 (S.D.N.Y. 1969). The Supreme Court has stated that the dominant theme in Congress when it considered the 1950 amendments to Section 7 of the Clayton Act was the rising tide of economic concentration in the economy. Brown Shoe v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L.Ed. 2d 510 (1962). Clearly, the greater degree of concentration in a particular industry, the greater the likelihood that parallel policies of mutual advantage, not competition, will emerge. United States v. Aluminum Co. of America, 377 U.S. 271, 280, 84 S.Ct. 1283, 1289, 12 L.Ed. 314 (1964).

Accordingly, Section 7 the Clayton Act bars a merger if its effect may be to lessen competition substantially or create a monopoly in any section of the country. As noted above, the proposed mergers will give the respective companies significant market power throughout the country and particularly in the western parts of the country such as California, Washington, and Alaska. The power and control will lessen the competitive landscape for small businesses.

While the Office of Advocacy recognizes that it is not the intent of the Clayton Act to restrict all mergers, Advocacy asserts that the number of mergers that have occurred and are occurring in oil industry provide reason for concern. The numerous mergers, affiliations, and agreements between the large oil companies are creating an environment that increases the likelihood of parallel policies that will interfere with competition. Restrictions should be placed on such mergers that will assure that small players in the oil industry will be able to continue to compete. There needs to be some assurance that adequate supply of crude oil will remain available.

In reviewing the information that it has on the industry, the FTC should consider the impact that the proposed mergers may have on the small businesses at every level. Such a review will assure that the proposed mergers do not adversely impact small businesses in the oil industry. If the mergers are allowed to go forward, safeguards and protections for small businesses at every level need to be provided.

Thank you for allowing me to comment on this important topic. If you any questions, please feel free to contact Jennifer Smith or me at (202) 205-6533.

Sincerely,

Jere W. Glover
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Office of Advocacy

Jennifer A. Smith
Assistant Chief Counsel
for Economic Regulation

ENDNOTES

1. Merrill Lynch, BP Amoco A Giant Step with Amoco…A Big One with ARCO: An Analysis of the Proposed Acquisition of ARCO by BP Amoco, page 15, April 1999.
2. Id.
3. Id.
4. Id.
5. Id.
6. Id., at 17.
7. Id., at22-23.