Understanding
FTC v. Aloha Petroleum

Michael Bloom, Director of Litigation
Federal Trade Commission Bureau of Competition*
March 31, 2006

***Mr. Bloom's remarks are his own and do not necessarily reflect the views of the Federal Trade Commission or any Commissioner**

The Proposed Acquisition

- Aloha Petroleum, a co-owner of the Barbers Point gasoline terminal in Oahu and owner-operator of numerous Oahu retail service stations, proposed to acquire
  - Trustreet Properties' co-ownership rights in the gasoline terminal
  - Trustreet's 18 Oahu retail service stations

The Complaint

- Action for TRO and PI alleged likely anticompetitive effects in:
  - The marketing in Hawaii of gasoline by bulk suppliers, especially to non-integrated retailers
  - Oahu retail gasoline markets

The Resolution

- Aloha conveyed to MidPac, a competing gasoline retailer and potential bulk supplier, extensive, long-term terminal rights.

- With the effective restoration of the competitive *status quo ante*, the Commission withdrew its complaint

e terminal. the terminal. the termina

- The critical facts:
  - There are only two gasoline refiners—Chevron and Tesoro—in Hawaii, both on Oahu
  - These refiners ordinarily command bulk prices well above the import parity price of gasoline

e terminal. the terminal. the termina

- The critical facts (continued):
  - This pricing pattern breaks down where a prospective purchaser confronts a refiner with a credible threat of bulk importation
  - To credibly threaten bulk importation, a firm must have apparent assured access to an import capable marine terminal

e terminal. the terminal. the termina

- The critical facts (continued):
  - Only Aloha, Trustreet, and *perhaps* Shell have apparent assured access to an import capable marine terminal

e terminal. the terminal. the termina

- The critical facts (continued):
  - The locally branded retailers generally charge lower retail prices than, and constrain, Chevron, Shell, and Tesoro
  - Neither Chevron nor Shell will or are likely to sell gasoline to locally branded retailers that are not themselves import-capable

Therefore

- Aloha's acquisition of Trustreet's terminal interest will reduce:
  - The number of bulk sellers (*i.e.*, the local refiners and potential bulk importers) from five to four
  - The number of bulk sellers willing to sell to non-integrated retailers from three to two

“Routine” IO Analysis

- Market Definition
  - There are no alternatives to local refiners and importers for the supply of gasoline in Hawaii
  - A hypothetical monopolist of sales of gasoline by bulk suppliers could sustain a price increase

“Routine” IO Analysis

- Market Concentration:
  - Participants: Tesoro, Chevron, Shell, Aloha, and Trustreet
  - Pre-acquisition HHI=2,524;
    post-acquisition HHI=2,744
- Entry is impracticable, if not impossible

“Routine” IO Analysis

- Of the five bulk suppliers, only Tesoro, Aloha, and Trustreet are likely to compete for sales to non-integrated retailers
  - But Aloha and Trustreet have materially greater incentives to price aggressively than does Tesoro
    - Retail positioning
    - Share of bulk market

“Routine” IO Analysis

- The loss of Trustreet will significantly increase concentration in the relevant market
- Increased concentration will not be offset by entry or expansion
- Market wide price increases will result

Econometric Support

- A historical record of entry and exit in a relevant market may be informative as to the likely competitive effect of two incumbents combining

- The opening and subsequent changes in use of the Barbers Point terminal afforded a similar “natural experiment” regarding the competitive consequences of entry and exit in our relevant market

Econometric Support

- Dr. Hayes performed an econometric analysis of Hawaii gasoline prices relative to mainland prices over time

- His empirical analysis showed that the addition or loss of one bulk supplier was associated with substantial gasoline price reductions and increases, respectively

Econometric Support

- Dr. Hayes' empirical work enables one to predict that the loss of a second bulk seller at Barbers Point would result in substantial market wide price increases

Taken Together

- The confluence of commonsense reasoning from the critical facts, “routine” IO analysis, and empirical findings strongly urged condemnation of the acquisition as a violation of the Clayton and FTC Acts

Some Questions to Consider

- Have courts come to expect econometric proofs in antitrust cases, especially challenges to acquisitions?
  - Is the absence of econometric evidence itself potentially prejudicial to a plaintiff?

Some Questions to Consider

- Do courts need additional competencies to resolving conflicting econometric evidence within the competence of most courts?
  - FRE 706 countenances a court's appointment of an economic expert, either on motion or on its own initiative.
  - But raises further questions, such as nature and scope of assignment

Some Questions to Consider

- At least at times, should the critic of econometric evidence have some burden of coming forward beyond “pot-shotting”?
  - Especially significant where the critique is that the econometric work should have controlled for additional variables

Some Questions to Consider

- Has economic empiricism resulted in the substitution of a “scientific proof” standard for the legal standard of “predominance of the evidence”?
  - Can economists inform the court as to probabilities of events/outcomes despite a lack of statistical significance at the 95% level