Senator DeWine
Questions
Consolidation in the Oil and Gas Industry: Raising Prices?
March 14, 2006

QUESTIONS FOR ALIOTO, LAUTENSCHLAGER, BORENSTEIN, BOIES, GREEN:

– We heard from the oil companies that the recent mergers have been important to give them the scale they need to engage in increasingly expensive and risky development projects. In fact, United States oil companies have consolidated and grown at roughly the same rate as other global players around the world. In most cases, the FTC allowed oil company mergers only after imposing a number of limitations on these mergers to prevent them from decreasing competition. **FIRST**, what more should the FTC do to prevent oil industry mergers from lessening competition?

RESPONSE BY JOSEPH M. ALIOTO:

The FTC should forbid absolutely any mergers, joint ventures or other cooperative agreements between or among any major vertically integrated oil companies. The cooperation between and among them now has resulted in substantial increases in prices to the public in the face of lower costs, unused capacity and huge profits from joint crude oil enterprises. The "limitations" placed on these mergers by the FTC have been cosmetic at best and contributed in no way to any increase in competition or the lowering of prices.

QUESTION:

How should U.S. energy policy work to prevent consolidation that leads to higher prices while still addressing the risk that an aggressive merger policy could keep U.S. companies relatively small in a way puts them at a competitive disadvantage to other global players?

RESPONSE BY JOSEPH M. ALIOTO:

At no time in the last 100 years have any of the major integrated oil companies been at any disadvantage against any other companies with regard to the production, transportation, refining, marketing and retailing of petroleum products. The major oil companies have been dealing on a global basis since the turn of the century. Even Aramco – a pretended antagonist – must cooperate with the majors, who once owned the majority interest.

The policy of the United States with regard to the oil industry as with any other industry should be one that favors the free enterprise system and the known benefits achieved by real competition where supply and demand determine the price and not a long internecine cooperative relationship.

QUESTIONS FOR ALIOTO, LAUTENSCHLAGER, BORENSTEIN, BOIES, GREEN:

– If there was one change you could make to the antitrust laws to make oil and gasoline markets more competitive, what would that be?

RESPONSE BY JOSEPH M. ALIOTO:

The one change that would make oil and gasoline markets more competitive would be to ensure that private parties could bring antitrust cases if necessary, whether the private party is a direct *or indirect* purchaser. In particular, Section 4 of the Clayton Act, 15 U.S.C. §15(a), should be amended as follows:

"Except as provided in subsection (b), any person, who shall be injured in his business or property, *directly or indirectly*, by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 16 of the Clayton Act, 15 U.S.C. §26, should be amended as follows:

"Any person, firm, corporation, or association, shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage, *direct or indirect,* by a violation of the antitrust laws, including sections two, three, seven and eight of this Act [15 USCS §§ 13, 14, 18, and 19], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49, United States Code [49 USCS §§ 10101 et seq.]. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."

Moreover, it should be made plain, in legislative history or the statute itself, that these changes in Title 15 would in no way alter the prohibition against the use of the "passing on" defense, as proscribed by the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery, Inc.*, 392 U.S. 481 (1968).