

Preeminent Problem Market: The U.S. Petroleum Products Sector

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This Morning's Agenda

- What Makes Petroleum a “Problem Market”?
- Competition Agency Policy Responses
- Implications
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- Caveat: Personal Views Only
- Kovacic, *STANDARD OIL CO. v. UNITED STATES and its Influence on the Conception of Competition Policy*, 11 Competition L.J. 89 (2012)

Problem Markets: Some Defining Characteristics

- Consumer Goods or Services
- Relatively Inelastic (Short-Term) Demand
- Frequent Purchases (High “Visibility” to Users)
- Unrealistic Social Expectations
- Notable Past Episodes of Industry Misconduct
- Regulation: Complex/Internal Contradictions
- Intense Political Scrutiny

U.S. Consumers and Gasoline

- Heavy Reliance on Automobiles for Transport
 - Urban sprawl
 - Social culture
- Accustomed to *Relatively* Low Prices (cf. EU)
- Keen Awareness of Price Increases

Prevailing Consumer Expectations

- Gasoline/Energy Supplies Should be:
 - Abundant
 - Inexpensive
 - Safe
 - Reliable
 - Green
 - Sourced Out of Sight

Informing Narrative: A Checkered Past

- Tarbell, THE HISTORY OF STANDARD OIL (1904)
- *Standard Oil Co. v. United States* (1911)
- *United States v. Socony-Vacuum Oil Co.* (1940)
- FTC, THE INTERNATIONAL OIL CARTEL (1952)
- Sampson, THE SEVEN SISTERS (1975)
- McCloy, THE GREAT [GULF] OIL SPILL (1976)
- *Exxon-Valdez* Grounding and Spill (1989)
- *Compare: Enron Scandal* (2000-2001)

Regulatory Policy Archipelago

- National and State Competition Law
- National and State Consumer Protection Law
 - E.g., State bans on below-cost sales and price-gouging
- Environmental Protection
 - E.g., land use & air quality controls (“boutique” fuels)
- Sectoral Controls: Output/Pricing (1930s, 1970s)
- Labor: Shipping and the Jones Act
- Foreign Policy Constraints

Consequences of the Archipelago

- Antitrust and “Competition Policy”: Coexist with Many Other Policy Commands/Needs
- Inter-Agency Coordination Complexity
 - E.g., FTC, FERC, State of California: Enron 2000-01

FTC's Multi-Dimensional Mandate

- Antitrust Enforcement
 - §5: Ban on “unfair methods of competition”
- Consumer Protection Enforcement
 - §5: Ban on “unfair or deceptive acts or practices”
- Rulemaking: e.g., Octane Rule (1970s)
- Information Gathering, Market Studies, Research
- Advocacy: e.g., EPA Air Quality Standard Regions
- Political Expectation: Power to Solve Any Problem

Surrounding US Political Environment

- Crisis-Driven Demands for Action
 - 1973 Oil Embargo
 - Katrina/Rita Aftermath
- DOJ/FTC Action: Never Seen as Good Enough
- Increasingly Intense Political Overlay
 - 1990s oil mergers: Exxon/Mobil, BP/Amoco-Arco
 - Government Accountability Report (2004)

Interpretation of US Antitrust Enforcement Experience

- Genuine Accomplishments, But Often Heavily Discounted: Standard Oil Breakup (1911)
- Big Case Mirage: *Mother Hubbard* (1940)
- Hazard of Acting on Basis of Political Pressure
 - *In re Exxon* (1973-1981) and Bakersfield (2004)
- Regulatory Roots: Socony and Unocal
- Foreign Policy Issues: *International Cartel Case*

Interpretation of US Market Studies Experience

- Inform Litigation Judgments
 - E.g., FTC International Oil Cartel Report (1951)
- “Mapping” the Policy Archipelago
 - FTC energy hearings and report (2006-2008)
 - Value as a teaching device?
- Contributions to Sectoral Knowledge
- Legislative/regulatory “Safety Valve”
 - But see Market Manipulation Legislation (2007)

Especially If the Agency Fails to Find Misconduct

- Legislative Reaction to FTC Market Study on Effects of Hurricanes Katrina and Rita
 - “This is an outrage – a complete outrage”
 - “Whitewash, or worse”
 - “FTC means ‘Friend To Chevron’”
 - See FTC Chair Deborah Majoras Testimony before Senate Commerce Committee, May 23, 2006 (YouTube Clip): www.c-span.org/video/?192656-1/gasoline-price-gouging

Interpretation of the Advocacy Experience

- Modest Impact on Collateral Regulators
 - EPA, FERC
- Some Tempering Impact on Legislation
 - NOPEC, state divorcement proposals
 - Michael Sallinger's prescription
- Limited Ability to Educate Larger Public

Impact of the Energy Portfolio on FTC “Brand” and Effectiveness

- Inability to Fulfill Impossible Expectations
- Resource Costs
- Staff Morale

Implications for Future US Policy

- Competition Law/Policy as Limited Solution
 - And possible distraction
- Identification/Understanding of Larger Policy Interrelationships
- Defining and Redefining Role of Competition Agency