

ethanol has recently settled claims that it overcharged California energy customers with a payment of more than \$400 million and a restructuring of its supply contracts that may save customers another \$1 billion.¹⁶ Thus, all three major marketers of ethanol have recent histories of anticompetitive conduct and exploitation of consumers. The acquisition of MCP will increase concentration of control over distribution which will make both tacit collusion among these leading marketers more likely and increase the potential for unilateral anticompetitive conduct by ADM which remains the overwhelming dominant marketer in this business.

To determine the seriousness of these risks, it is important to have a good estimate of the volume needed to achieve minimum efficient scale for marketing ethanol. Assuming Murex with a 200 million gallon share is an efficient competitor,¹⁷ then additional entry into distribution may occur as the volume expands. Other middle-sized petroleum marketing organizations might exist that have substantial volumes of goods going to market through the same networks. Entry into ethanol marketing may not be difficult for such firms if they exist and can easily add ethanol sales to their existing marketing efforts. Key here is the minimum size needed to make effective use of dedicated facilities such as terminal tanks, railcars, etc., that must be used in an ethanol specific way. Thus, the question is what are the product specific economies of scale and scope.

Given the foregoing market information, it would be possible to determine whether ADM's control over the marketing of ethanol, including its own production, that of MCP, and that under contract to the resulting firm, together with the market shares of the other two major, integrated marketers, would have an adverse effect on entry or expansion by independents in the marketing arena. If it takes 200 million gallons of volume for product-specific economies, then the current set of 5 or 6 marketers may be all that can be accommodated given ADM's dominance. Even with substantial growth in the total volume,¹⁸ it may be difficult to make entry into marketing because the increments of new plants—circa 40 to 80 million gallons—will be insufficient to warrant entry into marketing unless the entrant can get additional clients. But from the perspective of the owner of a new plant, the question will be whether to select an established marketer or affiliate with a new entrant that needs additional volume to be efficient.

If economies of scale with ethanol marketing are significant, entry is difficult, and a few firms control the majority of product being marketed, it becomes possible to withhold some product as the new energy requirements kick in and drive up price

(compare Enron or El Paso in California electric markets). In addition, because both ADM and MCP use the wet process, it is possible to manipulate ethanol supplies by shifting plant output to other products, e.g., HFCS. This means that as the dominant firm, ADM may be able to have unilateral, anticompetitive effect in the marketing of ethanol by manipulating supply. On the other hand, ethanol is a uniform product with growing demand. Moreover, that demand is unlikely to be very price elastic (10% of a gallon of gas is not going to effect the price at the pump very much).¹⁹ So, assuming limits on effective entry in the marketing level, existing marketers may engage in interdependent price setting to the detriment of the competitive market. The history of ADM's conduct in comparable markets and the presence in ethanol of some of its co-conspirators from other cartelistic efforts, strongly reinforces the proposition that there is a risk of such conduct if it is economically feasible.

The Merger Guidelines speak to these risks. "Where products are relatively undifferentiated and capacity primarily distinguishes firms . . . the merger firm may find it profitable unilaterally to raise price and suppress output. . . . Where the merging firms have a combined market share of at least thirty-five percent, the merged firms may find it profitable to raise price and reduce joint output. . . ." Guidelines 2.21. While this statement creates no presumption, it identifies the unilateral effect that is a possible consequence of this acquisition in addition to the potential for collusive reductions in output based on control of the marketing-distribution process. Recent news reports, after the filing of the Competitive Impact Statement, indicate that traders believe that ADM has the capacity and incentive to withhold supplies and drive up prices.²⁰ This is exactly the anticompetitive risk that this market structure poses.

The Competitive Impact Statement filed by the government explaining its analysis of the ADM-MCP merger does not even advert to the fact of ADM's leading position in ethanol production and marketing or MCP's substantial market share. As a result, it is not possible to tell whether the government has examined both the marketing and production aspects of ethanol. While it is probable that the government lawyers have in fact investigated at least some of the ethanol aspects of this merger, there is no public record of what aspects they examined or what conclusions they reached. If the government had simply sued the merger, the ethanol issues would have been subsumed under the corn syrup and HFCS issues because of the unitary nature of the

production process. Once the government has elected to settle the case by allowing the acquisition, the impact of the acquisition in the related market where the parties have such large market shares becomes a very important aspect of a public interest analysis: "the court may consider . . . any other considerations bearing upon the adequacy of such judgment. . . ." Clayton Act, sec. 5(e); 15 U.S.C. sec. 16(e).

The government's failure to report the conclusions of its investigation of the ethanol market is, therefore, another serious flaw in this case. Given ADM's market position and its history, the government ought to have explained why it did not believe that there was any serious anticompetitive risk in these markets given its willingness to allow ADM to acquire the second largest producer of ethanol.

It can be argued that disclosure concerning the ethanol market is inconsistent with the confidentiality requirements imposed on merger filings. As the DOJ's comments to the DOT in the Hawaiian airlines case demonstrates, it is possible for the DOJ to report not only its conclusions about competitive effects but also explain in some detail its reasoning on the public record even when it has "confidential" information. See, PUBLIC COMMENTS OF THE DEPARTMENT OF JUSTICE, Joint Application of ALOHA AIRLINES, INC. and HAWAIIAN AIRLINES, INC., DOT Docket No. OST-2002-13002, filed Aug. 30, 2002. Indeed, the FTC has recently demonstrated exactly such a responsible approach in connection with the cruise line merger investigation. See, Statement of the Federal Trade Commission, Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc, FTC File No. 021 0041, October 4, 2002; Dissenting Statement of Commissioners Sheila F. Anthony and Mozelle W. Thompson, *id.*

The public information about the ethanol markets—both production and marketing—does not demonstrate the kind of obvious anticompetitive risks that are manifest in the case of HFCS and corn syrup. Nevertheless, this acquisition will work a very substantial change in those markets that will increase concentration and so will necessarily tend to reinforce any anticompetitive potentials that may exist. Thus, another serious deficiency in the present Competitive Impact Statement is that it totally ignores the impact of this acquisition on ethanol. If it were in fact that case the government has completely failed to consider the competitive implications of that aspect of this merger, then it would also be clear that the government had failed in the most basic obligations of its responsibility to analyze the competitive implications of the transaction. It seems more likely that the government has examined at least some of the ethanol related issues and satisfied itself that this acquisition will not result in a significant risk of a "substantial[] lessen[ing] of competition" of the sort prohibited by section 7 of the Clayton Act. But if that is so, it owes it to the court and the public to explain what markets it considered (did it review both the production and the marketing components of ethanol?) and what its conclusions were on the

¹⁶ See David Barboza, *A big Victory by California in Energy Case*, New York Times, Nov. 12, 2002, at C1.

¹⁷ Murex markets other petroleum products and so in terms of dealing with railroads, barges, terminals or pipeline has more relevant volume than just its ethanol.

¹⁸ 200 million gallons is 10% of current volume estimates but only 4% of the projected 5 billion gallon volume of the future.

¹⁹ The price of corn which is largely a function of broader demand considerations will influence the supply side of the market significantly as will the market price for animal feed products that ethanol production also yields.

²⁰ "Ethanol prices have risen 20 percent in the past six months. . . . Todd Kruggel, a broker . . . [said:] "ADM and the other big boys may be storing what they're making until California demand gears up some more." Bloomberg News Service, Price of gas additive ethanol keeps rising, Wisconsin State Journal (Madison, Wisconsin), Nov. 12, 2002 at C9.