SEPARATE STATEMENT OF COMMISSIONER ORSON SWINDLE
in Exxon Corporation, File No. 991-0077

In this matter, the Commission has investigated the proposed $80 billion merger between Exxon Corporation ("Exxon") and Mobil Corporation ("Mobil"). The proposed merger would create the largest privately owned oil company in the world, with both Exxon and Mobil having extensive operations in terms of exploration, production, refining, pipelines, terminal operations, wholesaling, and retailing. The Commission has accepted for public comment a consent agreement to resolve complaint allegations with regard to a number of markets in which Exxon and Mobil have overlapping operations.

Of the great many markets that are addressed in the complaint and proposed consent agreement, I dissent only from the provisions concerning the wholesaling and retailing of gasoline in markets that would be only moderately concentrated after the merger. The proposed merger between Exxon and Mobil is not likely to lead to consumer harm in the form of higher prices for gasoline in these markets because of the difficulties that oil companies face in coordinating their prices in these markets. Unlike my colleagues, I therefore would not require that Exxon and Mobil divest or assign their retail gasoline stations located in these markets.

A. Overview

The proposed merger would reunite two parts of the Standard Oil Trust. Exxon is the successor to Standard Oil of New Jersey, and Mobil is the successor to Standard Oil of New York. At the turn of the last century, the Standard Oil Trust controlled about 90% of all refining of oil and other petroleum products in the United States. *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). Since that time, however, all aspects of the oil industry - - exploration, production, refining, pipelines, terminals, wholesaling, and retailing - - in the United States and throughout the world have undergone tremendous changes. Simply stated, although the public may perceive that allowing the merger of Exxon and Mobil is an ominous sign that the government is allowing the Standard Oil Trust to be reassembled, the merger is not, as Yogi Berra once said, "deja vu all over again."

The Commission has conducted an extensive and thorough investigation of the economic effects of the proposed merger between Exxon and Mobil. The Commission has alleged that the proposed merger would raise competitive concerns in specific refinery, pipeline, terminal, wholesale, and retail gas station markets in which Exxon and Mobil have competing operations. The proposed relief that the Commission has obtained to address these competitive concerns is comprehensive and extensive.

The proposed consent order specifically would require the merged firm to divest up to about $2 billion (as estimated by the parties) out of its $80 billion in assets. However, even though $2 billion in divestitures is a substantial amount, the fact that the amount is a relatively small portion of the total assets involved underscores for me a vital point -- the proposed merger between Exxon and Mobil appears to be, in large part, a benefit (or at least not a detriment) to competition and consumers.[1]

In particular, the proposed merger may allow Exxon and Mobil to realize efficiencies in exploration and production without creating any competitive concerns. Following the merger, the combined firm will own only about 1% of the world's oil reserves and produce only about 3% of the world's oil. By contrast, the national oil companies (such as Saudi Arabia's Aramco, Venezuela's PdVSA, and Mexico's PEMEX) collectively own 90% of the world's oil reserves and produce about 70% of the world's oil. By merging, Exxon and Mobil thus may become a more effective competitor in oil exploration and production, thereby benefitting American consumers and the American economy.

I want to provide one caveat about Commission law enforcement in the oil industry. The oil industry is undergoing and may continue to undergo tremendous restructuring, including mergers between large oil companies. In analyzing the competitive effects of these mergers, the Commission, of course, applies the standards set forth in the *Horizontal Merger Guidelines*. United States Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 8, 1997). As concentration increases in some markets as a result of mergers, it becomes more likely that the Commission will challenge future mergers that affect those markets. This greater probability of challenge would not be the result of expansive antitrust enforcement -- rather, it would be the result of the consistent application of the *Horizontal Merger Guidelines* to the changing state of competition in the oil industry. In my view, the Commission can and should take into account these changes in determining whether law enforcement action concerning a particular merger is appropriate.

B. <u>Wholesale and Retail Marketing of Gasoline</u>

The complaint alleges that the merger between Exxon and Mobil may substantially lessen competition for the wholesaling and retailing of gasoline in many and various markets. Specifically, the complaint defines as a relevant geographic market each of the States from Virginia to Maine, "smaller areas" within those states including particular metropolitan areas, and even "smaller areas" within those metropolitan areas. ¶¶s 17a, 18, 31, and 32 of the Complaint. It also defines as relevant geographic markets five metropolitan areas in Texas (Austin, Bryan/College Station, Dallas, Houston, and San Antonio), and "smaller areas" contained within those metropolitan areas. ¶¶s 17b, 19, 33, and 34 of the Complaint. The complaint further defines Arizona and "smaller areas" within Arizona as relevant geographic markets. ¶¶s 17c, 21, 35, and 36 of the Complaint.

In analyzing the competitive effects of a merger, it is critical to identify the proper geographic markets. As explained above, the Commission has alleged that the proper geographic

[1] *See Horizontal Merger Guidelines* at § 0.1 ("While challenging competitively harmful mergers, the [Commission] seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral.").

markets here include everything from entire states to metropolitan areas within these states to "smaller areas" within these metropolitan areas, which presumably include counties, cities, towns, townships, price zones, etc. A geographic market is "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and non-transitory increase in price.'" *Horizontal Merger Guidelines* at 1.21.

Rather than very large geographic areas (e.g., entire states)[2] or very small geographic areas (e.g., price zones), I think that standard metropolitan statistical areas ("MSAs") are the most appropriate areas to use as geographic markets because they are consistent with the general boundaries of competition in the wholesaling and retailing of gasoline, and they are consistent with the size of the geographic markets that the Commission generally has used in analyzing past oil mergers. S*ee British Petroleum Co., plc.*, Dkt. No. C-3868 (1999) (¶19 of Complaint) ("cities and metropolitan areas"); *see also Shell Oil Co.*, Dkt. No. C-3803 (1998) (¶¶ 21 and 22 of Complaint) (San Diego County, California) (Oahu Island, Hawaii).[3]

The basic theory underlying the complaint is that so-called major brands (including Exxon, Mobil, Shell/Texaco, BP/Amoco, and Sunoco) currently price as an oligopoly. Major brands allegedly observe the gasoline prices that other major brands are charging at their retail locations in specific areas, known as "price zones." Armed with this information, major brands purportedly adjust their prices only in that particular price zone so that the resulting retail price for their brand of gasoline is in line with those of other major brands. Because major brands determine their gasoline prices based on the prices charged by other major brands and not exclusively on cost, major brands supposedly can and do find it profitable to increase their gasoline prices. Allowing Exxon and Mobil to merge, it is theorized, would reduce the number of major brands, thereby purportedly making it even easier to coordinate and maintain higher gasoline prices.

I have reason to believe that the proposed merger between Exxon and Mobil may substantially lessen competition in wholesale and retail gasoline in *highly* concentrated markets, i.e., highly concentrated MSAs. Mergers that significantly increase concentration in highly concentrated markets are presumed to be likely to cause competitive harm. *Horizontal Merger Guidelines* at § 1.51(c). In the absence of proof of entry that is timely, likely, and sufficient or in the absence of other countervailing considerations that would rebut the presumption of

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[2] The majority cites *Marathon Oil Co. v. Mobil Corp.*, 669 F. 2d 378 (6th Cir. 1981), as precedent for the proposition that geographic markets for the marketing of gasoline may include entire states. In that case, the Sixth Circuit did conclude that, in granting a preliminary injunction, the district court had not erred in using individual state markets rather than a national market for the marketing of gasoline. *Id.* at 380. However, simply because a court found that there were statewide markets for the marketing of gasoline in certain Midwestern states nearly twenty years ago does not persuade me that today there are statewide markets for the marketing of gasoline in the Northeastern United States, Texas, and Arizona.

[3] Using MSAs as geographic markets also promotes greater consistency in analysis because most oil industry data is reported by MSA.

competitive harm, the Commission typically concludes that such a merger may substantially lessen competition.

In the recent past, the Commission has challenged mergers that would significantly increase concentration in highly concentrated gasoline markets. In 1998, the Commission alleged that a joint venture may substantially lessen competition where it would have significantly increased concentration in the highly concentrated markets for wholesaling and retailing of gasoline in San Diego County, California, and on Oahu, Hawaii. *Shell Oil Co.* In 1999, the Commission similarly alleged that a merger between British Petroleum and Amoco may substantially lessen competition where it would have significantly increased concentration in twenty-five highly concentrated markets[4] for the wholesaling and retailing of gasoline in the Southeastern United States. *British Petroleum Co., plc.* [5]

In this case, the complaint alleges that the merger between Exxon and Mobil would significantly increase concentration in *twenty highly concentrated* wholesale and retail gasoline markets - - nineteen markets in the Northeastern United States and one in Texas.[6] The theory that major brands coordinate on price is more plausible in these highly concentrated markets given the limited number of firms that need to coordinate their actions concerning gasoline prices, a conclusion that is consistent with the presumption accorded under the *Horizontal Merger Guidelines*. New entry is not likely to defeat a coordinated price increase in these markets because of the difficulty of entering into the wholesale and retail gasoline business to a sufficient extent due to restrictive zoning laws, regulatory approvals, deed restrictions, the scarcity of sites for stations, and high costs. Sufficient jobber switching in response to a coordinated price increase is also not likely to occur because (unlike my assessment of the facts in the Southeastern United States markets in *British Petroleum Co.*) switching generally has not been prevalent in these markets and the cost of doing so has been increasing significantly. Consequently, I support the complaint allegations with regard to these highly concentrated markets and the corresponding order requirement that the retail gasoline stations in these markets be divested or assigned.

In addition to alleging that the proposed merger may substantially lessen competition in highly concentrated markets for the wholesaling and retailing of gasoline, the majority, however, has also alleged that it is likely to cause competitive harm in markets that would be only

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[4]The Commission also alleged that the merger may substantially lessen competition in five markets that were only moderately concentrated.

[5]I dissented in *British Petroleum Co.* because I concluded that the likelihood of entry and jobber switching in markets in the Southeastern United States warranted overcoming the presumption that the merger would have raised serious competitive concerns.

[6]The highly concentrated markets are Washington, D.C.; Hartford, CT; New London, CT; Dover, DE; Wilmington, DE; Bangor, ME; Portland, ME; Barnstable, MA; Bergen, NJ; Jersey City, NJ; Monmouth, NJ; Trenton, NJ; Albany, NY; Newburgh, PA; Allentown, PA; Altoona, PA; Johnstown, PA; State College, PA; Burlington, VT; and Bryan/College Station, TX.

moderately concentrated. I disagree.

Specifically, I do not support the complaint allegations that the proposed merger between Exxon and Mobil may substantially lessen competition in twenty-three wholesale and retail gasoline markets that would be only *moderately* concentrated after the merger - - eighteen markets in the Northeastern United States, four markets in Texas, and one market in Arizona.[7] Such mergers are not presumed to cause competitive harm, but instead "potentially raise significant competitive concerns depending on [factors such as potential adverse competitive effects and entry.]." *Horizontal Merger Guidelines* at § 1.51(b).

I do not find the Commission's theory that major brands have coordinated their gasoline prices in these moderately concentrated markets[8] to be sufficiently persuasive to support the complaint allegations. Coordinating gasoline prices tends to be more difficult in markets with moderate concentration levels than with high concentration levels because there generally are more firms whose prices have to be coordinated. Price coordination also may be complicated by variations in the boundaries of the price zones that major brands use and the difficulty in accounting for a variety of other factors that may affect gasoline prices, such as brand name strength, retail location, and credit card programs. Moreover, even if a coordinated price could be established, it likely would be difficult to maintain because, although retail gasoline prices may be publicly posted, cheating on the price could also occur through hard-to-monitor discounts on the wide variety of other goods and services that stations offer, especially the convenience store items which are becoming an increasingly large source of retail gasoline station revenue.

I do not think that it is unreasonable to conclude that gasoline prices *might be* coordinated in markets that would be moderately concentrated. However, I think that the better view of the evidence is that such coordination is not occurring and is not likely to occur following the merger. I consequently dissent from the complaint allegations with regard to the wholesale and retail gasoline markets in the Northeast, Texas, and Arizona that would be moderately concentrated, and I would not require the divestiture and assignment of retail gasoline stations located in those markets.

C. Refining, Pipelines, and Terminal Markets

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[7]The moderately concentrated markets are New Haven, CT; Lewiston, ME; Baltimore, MD; Boston, MA; Atlantic City, NJ; Middlesex, NJ; Newark, NJ; Vineland, NJ; Harrisburg, PA; Lancaster, PA; Philadelphia, PA; Reading, PA; Scranton, PA; York, PA; Providence, RI; Norfolk, VA; Richmond, VA; Austin, TX; Dallas, TX; Houston, TX, San Antonio, TX, and Arizona.

[8] In deciding to challenge a merger only with regard to its effects in markets that are highly concentrated, there is a risk of missing some markets in which its effects raise the same competitive concerns even though they have slightly lower concentration levels. *See Horizontal Merger Guidelines* § 1.5 ("other things being equal, cases falling just above and just below a threshold present comparable competitive issues."). Nevertheless, I think that using highly concentrated markets here as a cut-off is a reasonable approach, albeit a necessarily imperfect one.

With regard to the remaining complaint allegations relating to refining, pipeline, and terminal markets, I support the allegations with regard to each of these markets. However, a brief treatment of two of these markets is warranted. I am not persuaded that a full trial on the merits would demonstrate that the proposed merger may substantially lessen competition in the United States and Canadian market for refining paraffinic base oil, ¶¶s 51 and 52 of the Complaint, or in the West Coast market for refining CARB gasoline. ¶¶s 37 and 38 of the Complaint. The information that the Commission staff has compiled during their extensive and thorough investigation, however, persuades me that there is at least "reason to believe" that the proposed merger may substantially lessen competition in these two markets. Because this showing is enough to meet the applicable legal standard at the time of complaint issuance, I am willing to support the allegations relating to these two markets.

The proposed relief appears to be necessary and appropriate to address the complaint allegations in the refining, pipeline, and terminal markets. In my view, the Commission's staff and the merging parties have worked diligently and creatively to craft relief to remedy the competitive concerns in these markets. However, given the extraordinary complexity of the divestitures and other relief negotiated, I welcome public comments addressing whether the order would fulfill its remedial purpose without causing unintended adverse effects on competition or consumers. In particular, I would be interested in public comment on whether the merging parties should be <u>required</u> to divest the Exxon refinery in Benicia, California, and the Exxon retail gasoline stations in California to a single buyer. From a purely economic basis, there seems to be little logic in forcing the divestiture of the refinery and the retail stations to a single buyer.