ANALYSIS OF PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission" or "FTC") has issued a complaint ("Complaint") alleging that the proposed merger of Exxon Corp. ("Exxon") and Mobil Corp. ("Mobil") (collectively "Respondents") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and has entered into an agreement containing consent orders ("Agreement Containing Consent Orders") pursuant to which Respondents agree to have entered and be bound by a proposed consent order ("Proposed Order") and a hold separate order that requires Respondents to hold separate and maintain certain assets pending divestiture ("Order to Hold Separate"). The Proposed Order remedies the likely anticompetitive effects arising from Respondents' merger, as alleged in the Complaint. The Order to Hold Separate preserves competition in the markets for refining and marketing of gasoline, and in other markets, pending divestiture.

II. Description of the Parties and the Transaction

Exxon, which is headquartered in Irving, Texas, is one of the world's largest integrated oil companies. Among its other businesses, Exxon operates petroleum refineries that make various grades of gasoline and lubricant base stock, among other petroleum products, and sells these products to intermediaries, retailers and consumers. Exxon owns four refineries in the United States; those four refineries can process approximately 1.1 million barrels of crude oil and other feedstocks daily.[1] Exxon owns or leases approximately 2,049 gasoline stations nationally and sells gasoline to distributors or dealers that operate another 6,475 retail outlets throughout the United States. During fiscal year 1998, Exxon had worldwide revenues of approximately $115 billion and net income of approximately $6 billion.

Mobil, which is headquartered in Fairfax, Virginia, is another of the world's largest integrated oil companies. Among its other businesses, Mobil operates petroleum refineries in the United States, which make gasoline, lubricant base stock, and other petroleum products, and sells those products throughout the United States. Mobil operates four refineries in the United States, which can process approximately 800 thousand barrels of crude oil and other feedstocks per day. About 7,400 retail outlets sell Mobil-branded gasoline throughout the United States. During fiscal year 1998, Mobil had worldwide revenues of approximately $52 billion and net income of approximately $2 billion.

[1] A "barrel" is an oil industry measure equal to 42 gallons. "MBD" means thousands of barrels per day.

On or about December 1, 1998, Exxon and Mobil entered into an agreement to merge the two corporations into a corporation to be known as Exxon Mobil Corp. This merger is one of several consolidations in this industry in recent years, including the combination of British Petroleum Co. plc and Amoco Corp. into BP Amoco plc; the pending combination of BP Amoco plc and Atlantic Richfield Co. (which is the subject of pending investigation by the Commission); the combination of the refining and marketing businesses of Shell Oil Co., Texaco Inc., and Star Enterprises; the combination of the refining and marketing businesses of Marathon Oil Co. and Ashland Oil Co., and the acquisition of the refining and marketing businesses of Unocal Corp. by Tosco Corp.

Exxon's gasoline marketing in California; (5) the terminal operations of Mobil in Boston and in the Washington, D.C. area, and the ability to exclude a terminal competitor from using Mobil's wharf in Norfolk; (6) either Mobil's interest in the Colonial pipeline or Exxon's interest in the Plantation pipeline; (7) Mobil's interest in TAPS; (8) the terminal and retail operations of Exxon on Guam; (9) a quantity of paraffinic lubricant base oil equivalent to the amount of paraffinic lubricant base oil refined in North America that is controlled by Mobil; and (10) Exxon's jet turbine oil business. The terms of the divestitures and other provisions of the Proposed Order are discussed more fully in Section IV below.

The Commission's decision to issue the Complaint and enter into the Agreement Containing Consent Orders was made after an extensive investigation in which the Commission examined competition and the likely effects of the merger in the markets alleged in the Complaint and in several other markets, including the worldwide markets for exploration, development and production of crude oil; markets for crude oil exploration and production in the United States and in parts of the United States; markets for natural gas in the United States; markets for a variety of petrochemical products; and markets for pipeline transportation, terminaling or marketing of gasoline or other fuels in sections of the country other than those alleged in the Complaint. The Commission has not found reason to believe that the merger would result in likely anticompetitive effects in markets other than the markets alleged in the Complaint.

The Commission conducted the investigation leading to the Complaint in coordination with the Attorneys General of the States of Alaska, California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Texas, Vermont, Virginia and Washington. As a result of that joint effort, Respondents have entered into agreements with the States of Alaska, California, Delaware, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia and Washington, and the District of Columbia, settling charges that the merger would violate both state and federal antitrust laws.

The Complaint alleges in 12 counts that the merger would violate the antitrust laws in several different lines of business and sections of the country, each of which is discussed below. The analysis applied in each market generally follows the analysis set forth in the FTC and U.S. Department of Justice *Horizontal Merger Guidelines* (1997) ("*Merger Guidelines*"). The efficiency claims of the Respondents, to the extent they relate to the markets alleged in the Complaint, are small and speculative compared to the magnitude and likelihood of the potential harm, and would not restore the competition lost as a result of the merger even if the efficiencies were achieved.

A. Count I – Marketing of Gasoline in the Northeast and Mid-Atlantic

Exxon and Mobil today are two of the largest marketers of gasoline from Maine to Virginia, and would be the largest marketer of gasoline in this region after the merger, but for the remedy specified in the Proposed Order. The merging companies are direct and significant competitors in at least 39 metropolitan areas in the Northeast and Mid-Atlantic[2]; in each of these areas, and in each of the States in the Northeast and Mid-Atlantic, the merger would result in a market that is at least moderately concentrated and would significantly increase concentration in that market.[3] Nineteen of these 39 metropolitan areas would be highly concentrated as a result of this merger.[4] On average, the four top firms in each metropolitan area would have 73% of sales; the top four firms in the Northeast and Mid-Atlantic as a whole (Exxon Mobil, Motiva,[5] BP

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[2]Hartford, New Haven-Bridgeport-Stamford-Waterbury-Danbury, New London-Norwich, CT; Dover, Wilmington-Newark, DE; Washington, DC; Bangor, Lewiston-Auburn, Portland, ME; Baltimore, MD; Barnstable-Yarmouth, Boston-Worcester-Lawrence-Lowell-Brockton, MA; Atlantic-Cape May, Bergen-Passaic, Jersey City, Middlesex-Somerset-Hunterdon, Monmouth-Ocean, Newark, Trenton, Vineland-Millville-Bridgeton, NJ; Albany-Schenectady-Troy, Duchess, Nassau-Suffolk, New York, Newburgh, NY; Allentown-Bethlehem-Easton, Altoona, Harrisburg-Lebanon-Carlisle, Johnstown, Lancaster, Philadelphia, Reading, Scranton-Wilkes Barre-Hazelton, State College, York, PA; Providence-Warwick-Pawtucket, RI; Norfolk-Virginia Beach-Newport News, Richmond-Petersburg, VA; Burlington, VT. These areas are defined, variously, as "Metropolitan Statistical Areas" ("MSAs"), "Primary Metropolitan Statistical Areas" ("PMSAs"), and "New England County Metropolitan Areas" ("NECMAs") by the Census Bureau.

[3]The Commission measures market concentration using the Herfindahl-Hirschman Index ("HHI"), which is calculated as the sum of the squares of the shares of all firms in the market. *Merger Guidelines* § 1.5. Markets with HHIs between 1000 and 1800 are deemed "moderately concentrated," and markets with HHIs exceeding 1800 are deemed "highly concentrated." Where the HHI resulting from a merger exceeds 1000 and the merger increases the HHI by at least 100, the merger "potentially raise[s] significant competitive concerns depending on the factors set forth in Sections 2-5 of the Guidelines." *Merger Guidelines* § 1.51.

[4]Hartford, New London-Norwich, CT; Dover, Wilmington-Newark, DE; Washington, DC; Bangor, Portland, ME; Barnstable-Yarmouth, MA; Bergen-Passaic, Jersey City, Monmouth-Ocean, Trenton, NJ; Albany-Schenectady-Troy, Newburgh, NY; Allentown-Bethlehem-Easton, Altoona, Johnstown, State College, PA; Burlington, VT. In each of these MSAs, the increase in concentration exceeds 100 HHI points. "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in Sections 2-5 of the *Guidelines* make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares." *Merger Guidelines* § 1.51.

[5]Motiva LLC is the refining and marketing joint venture between Shell Oil Co., Texaco Inc. and Saudi Aramco, and sells gasoline under the "Shell" and "Texaco" names in the Eastern
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Amoco, and Sunoco) would on average have 66% of each of these metropolitan areas.

The Complaint alleges that the marketing of gasoline is a relevant product market, and that metropolitan areas and areas contained within them are relevant geographic markets. The Commission used metropolitan statistical areas ("MSAs") as a reasonable approximation of geographic markets for gasoline marketing in *Shell Oil Co.*, C-3803 (1998), and *British Petroleum Co.*, C-3868 (1999). As described below, the evidence in this investigation suggests that pricing and consumer search patterns may indicate smaller geographic markets than MSAs as defined by the Census Bureau. To that extent, using MSAs or counties to define geographic markets likely understates the relevant levels of concentration.[6]

The Commission has found reason to believe that t

[5](...continued)
United States. Equilon LLC, a refining and marketing joint venture between Shell and Texaco, sells gasoline under the "Shell" and "Texaco" names in the Western United States.

[6]Exxon and Mobil compete in at least 134 counties in 39 MSAs in the Northeast and Mid-Atlantic; 61 of those counties are highly concentrated with significant increases in concentration; 56 are moderately concentrated with significant increases in concentration; and in only five counties (if defined as geographic markets) would the merger not result in increases in concentration exceeding *Guidelines* thresholds. *See FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986) (use of data in broader market to calculate market concentration is acceptable where market of concern would be more concentrated).

stations. There might be 10 or more price zones established by an individual oil company in a metropolitan area.

Distributors or jobbers typically purchase branded gasoline from the branded company at a terminal (paying a terminal “rack” price), and deliver the gasoline themselves to jobber-supplied stations at prices or transfer prices set by the distributor.[7]

In much of the Northeast and Mid-Atlantic, Exxon, Mobil and their principal competitors (Motiva, BP Amoco, and Sunoco) use delivered pricing and price zones to set DTW prices based on the level of competition in the immediately surrounding area. These DTW prices generally are unrelated to the cost of hauling fuel from the terminal to the retail store. Gasoline is a homogeneous product, and retail prices are observable (wholesale prices and retail sales volumes are also frequently known to firms in the industry). By monitoring the retail prices (and volumes) of their competitors in the immediate area, branded companies can and do adjust their DTW prices in order to take advantage of higher prices in some neighborhoods, without having to raise price throughout a metropolitan area as a whole.

The use of price zones in the manner described above indicates that these competitors set their prices on the basis of their competitors’ prices, rather than on the basis of their own costs. This is an earmark of oligopolistic market behavior. Thus, Exxon, Mobil and their principal competitors have some ability to raise their prices profitably, and have a greater ability to do so when they face fewer and less price-competitive firms in highly local markets. The effects of oligopolistic market structures (where firms base their pricing decisions on their rivals’ prices, and recognize that their prices affect their sales volume) have been recognized in this industry. *See Petroleum Products Antitrust Litigation*, 906 F.2d 432, 443, 444 (9th Cir. 1990) (examining California gasoline market from 1968 to 1973), *cert. denied sub nom. Chevron Corp. v. Arizona*, 500 U.S. 959 (1991):

> . . . [A]s the number of firms in a market declines, the possibilities for interdependent pricing increase substantially. In determining whether to follow a unilateral price increase by a competitor, a firm in a relatively concentrated market will recognize that, because its pricing and output decisions have an effect on market conditions and will generally be watched by its competitors, there is less likelihood that any shading would go undetected or be ignored. . . . On the other hand, the firm may recognize that the higher price [charged by its competitor] is one that would produce higher profits. It may therefore decide to follow the price increase, knowing that the other firms will likely see

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[7]The Commission has found evidence in its investigations in this industry indicating that some branded companies have experimented with rebates and discounts to jobbers based on the location of particular stations, thereby replicating the effect of price zones in the jobber class of trade.

things the same way . . . .

> We recognize that such interdependent pricing may often produce economic consequences that are comparable to those of classic cartels.

Exxon and Mobil are each other's principal competitors in many of these markets, and the elimination of Mobil as an independent competitor is likely to result in higher prices.[8]

Market incumbents also use price zones to target entrants without having to lower price throughout a broader marketing area. With a large and dispersed network of stores, an incumbent can target an entrant by cutting price at a particular store, without cutting prices throughout a metropolitan area. By targeting price-cutting competitors, incumbents can (and have) deterred entrants from making significant investments in gasoline stations (which are specialized, sunk cost facilities) and thus from expanding to a scale at which the entrant could affect price throughout the broader metropolitan area.

While branded distributors historically have moderated the effects of zone pricing through arbitrage, distributors' ability to do so is increasingly limited in the Northeast and Mid-Atlantic by major branded companies' efforts to limit their distribution to direct channels, especially in major metropolitan areas. The merger would reduce interbrand competition through the elimination of one independent supplier; the Commission evaluated the effect of that reduction in interbrand competition in the context of the contemporaneous reduction in intrabrand competition that it found in these markets.

Entry appears unlikely to constrain noncompetitive behavior in the Northeast and Mid-Atlantic. New gas station sites are difficult to obtain in the Northeast and Mid-Atlantic, and the evidence in this investigation suggests that entry through the construction of new stations is unlikely to occur in a manner sufficient to constrain price increases by incumbents. As in *British Petroleum Co.*, C-3868, the Commission has not seen substantial evidence that jobbers or open dealers are likely to switch to new entrants in the event of a small price increase. Therefore, the Commission has found it unlikely that a new entrant might enter a market by converting such stations in a manner that would meaningfully constrain the behavior of incumbents.

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[8] In finding reason to believe that this merger likely would reduce competition, the Commission has not, in the context of this investigation, concluded that these practices of themselves violate the antitrust laws or constitute unfair methods of competition within the meaning of Section 5 of the FTC Act. Rather, evidence of market behavior provides the Commission with reason to believe that these moderately and highly concentrated markets are not fully competitive even prior to the merger, and therefore that the merger likely would reduce competition in these markets whether or not the post-merger market was highly concentrated.

The merger is likely to reduce competition in Northeastern and Mid-Atlantic gasoline markets and could result in a price increase of 1% or more. A 1% price increase on gasoline sold in the Northeast and Mid-Atlantic (and in the Texas and Arizona markets discussed below) would cost consumers approximately $240 million annually. As described below, the Proposed Order seeks to preserve competition by requiring Respondents to divest all branded stations of Exxon or Mobil throughout the Northeast and Mid-Atlantic: (1) all Exxon branded gas stations (company operated, lessee dealer, open dealer and jobber) in Maine, New Hampshire, Vermont, Rhode Island, Connecticut, and New York, and (2) all Mobil branded stations in New Jersey, Pennsylvania, Delaware, Maryland, Virginia and the District of Columbia.

B. <u>Count II – Marketing of Gasoline in Metropolitan Areas in Texas</u>

Exxon and Mobil compete in the marketing of gasoline in several metropolitan areas in Texas, and in five of those metropolitan areas (Austin, Bryan/College Station, Dallas, Houston and San Antonio) the merger would result in a moderately or highly concentrated market. The evidence collected in the investigation indicates that market conditions in these Texas markets resemble those found in the Northeast and Mid-Atlantic, particularly in the use of delivered pricing and zone pricing to coordinate prices and deter entry. The Proposed Order therefore requires Respondents to divest and assign Mobil's gasoline marketing business in these areas, as described below.

C. <u>Count III – Marketing of Gasoline in Arizona</u>

Mobil markets motor gasoline in Arizona. Exxon gasoline is marketed in Arizona by Tosco Corporation, which acquired Exxon's Arizona marketing assets and businesses and the right to sell Exxon branded gasoline in 1994. Gasoline marketing in Arizona is moderately concentrated.

Pursuant to the agreement under which Exxon sold its Arizona assets to Tosco, Exxon retains the option of repurchasing the retail gasoline stores sold to Tosco in the event Tosco were to convert the stations from the "Exxon" brand to another brand (including another brand owned by Tosco). The merger creates the risk that competition between the merged company and Tosco (selling Exxon branded gasoline) could be reduced by restricting Tosco's incentive and ability to compete against Mobil by converting the stores to a brand owned by Tosco. The Proposed Order terminates Exxon's option to repurchase these stations.

D. <u>Count IV – Refining and Marketing of CARB Gasoline</u>

Exxon and Mobil both refine motor gasoline for use in California, which requires that motor gasoline used in that State meet particularly stringent pollution specifications mandated by the California Air Resources Board ("CARB," hence "CARB gasoline"). More than 95% of the CARB gasoline sold in California is refined by seven firms (Chevron, Tosco, Equilon, ARCO, Exxon, Mobil and Ultramar Diamond Shamrock), all of which operate refineries in California. Those seven firms also control more than 90% of retail sales of gasoline in California through gas stations under their brands.

The Complaint alleges that the refining and marketing of CARB gasoline is a product market and line of commerce. Motorists of gasoline-fueled automobiles are unlikely to switch to other fuels in response to a small but significant and nontransitory increase in the price of CARB gasoline, and only CARB gasoline may be sold for use in California. As described below, the refining and marketing of gasoline in California is tightly integrated; refiners that lack marketing in California, and marketers that lack refineries on the West Coast, do not effectively constrain the price and output decisions of incumbent refiner-marketers.

California is a section of the country and geographic market for CARB gasoline refining and marketing because the refiner-marketers in California can profitably raise prices by a small but significant and nontransitory amount without losing significant sales to other refiners. The next closest refineries, located in the U.S. Virgin Islands and in Texas and Louisiana, do not supply CARB gasoline to California except during supply disruptions at California refineries, and are unlikely to supply CARB gasoline to California in response to a small but significant and nontransitory increase in price because of the price volatility risks associated with opportunistic shipments and the small number of independent retail outlets that might purchase from an out-of-market firm attempting to take advantage of a price increase by incumbent refiner-marketers.

To a much greater extent than in many other parts of the country, the seven refiner-marketers in California own their stations, and operate through company-operated stations, lessee dealers and open dealers, rather than through distributors.[9] The marketing practices described in the Northeast and Mid-Atlantic, *see* Section III.A above, are employed in California and are reinforced by the refiner-marketers' more complete control of the marketing channel. One effect of the close integration between refining and marketing in California is that refiners outside the West Coast cannot easily find outlets for imported cargoes of CARB gasoline, since nearly all the outlets are controlled by incumbent refiner-marketers. Likewise, the extensive integration of refining and marketing makes it more difficult for the few non-integrated marketers to turn to imports as a source of supply, since individual independents lack the scale to import cargoes economically and thus must rely on California refiners for their usual supply. The Commission's investigation indicated that vertical integration and the resulting lack of independent import customers, rather than the cost of imports, is the principal barrier to supply from outside the West Coast.

[9]Exxon is unique among these firms in operating primarily through jobbers in California. Exxon also differs from its competitors in that a substantial portion of its refinery output is not sold under the Exxon name, but is sold to non-integrated marketers and through other channels.

As measured by refinery capacity, the merger will increase the HHI for CARB gasoline refining capacity on the West Coast by 171 points to 1699, at the high end of the "moderately concentrated" range of the *Merger Guidelines.* The *Guidelines'* "numerical divisions [of HHI ranges] suggest greater precision than is possible with the available economic tools and information. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues." *Id.* § 1.5.

Count VI of the Complaint identifies two metropolitan areas that are relevant sections of

[10]The Commission has found reason to believe that terminal mergers would be anticompetitive on prior occasions. *E.g., British Petroleum Co.*, C-3868; *Shell Oil Co.*; *Texaco Inc.*, 104 F.T.C. 241 (1984); *Chevron Corp.*, 104 F.T.C. 597 (1984).

governance of both pipelines, and to receive confidential competitive information of each pipeline. Through its position as one of Plantation's two shareholders, Respondents could prevent Plantation from taking actions to compete with Colonial. As a result, the merger is likely substantially to lessen competition, including price and service competition, between the two pipelines. The Commission has twice previously recognized that control of overlapping interests in these two pipelines might substantially reduce competition in the market for transportation of light petroleum products to this section of the country. *Shell Oil Co.*, C-3803; *Chevron Corp.*, 104 F.T.C. 597, 601, 603. To prevent competitive harm from the merger, Section IX of the

The market is subject to coordination. There are three companies, and the merger would reduce their number to two. The product is homogeneous, and prices are readily observed. New entry is unlikely to defeat an anticompetitive price increase. An entrant would require sufficient terminal capacity and enough retail outlets to be able to buy gasoline at the tanker-load level, or 350,000 barrels. Terminal capacity of this scale is unavailable in Guam. In 1988 a firm attempted to enter Guam relying on publicly available terminaling; it exited within seven years, and sold its four stations to Mobil.

Section III of the Proposed Order restores competition by requiring Respondents to divest Exxon's terminal and retail assets on Guam.

L. Count XI – Paraffinic Base Oil in the United States and Canada

Paraffinic base oil is a refined petroleum product that forms the foundation of most of the world's finished lubricants. Base oil is mixed with chemical additives and forms finished lubricants, such as motor oil and automatic transmission fluid. Most base oil is used to make products that lubricate engines, but base oil can be mixed with additives to create a large variety of finished products like newspaper ink or hydraulic fluid.[11]

Currently Exxon produces 45.9 MBD of paraffinic base oil in North America. Mobil controls 23.8 MBD of base oil production. A combined Exxon-Mobil would control 35 percent of the base oil produced in North America. As the largest base oil producer in the United States and Canada, Exxon already dominates the base oil market. With the addition of Mobil's sizeable capacity, Exxon would have even greater control over base oil pricing.

Exxon is the price leader in base oil in the United States and Canada. Other base oil producers do not expand production to take advantage of Exxon price increases. Imports do not increase when United States prices increase because transportation costs are too great. Entry into the base oil market requires large capital investments and would be unlikely to have any effect within the next two years.

The Proposed Order remedies the likely effects of the likely merger by requiring Respondents to surrender control of a quantity of base oil production equivalent to Mobil's production in the United States.

[11]Other types of base oil, including naphthenic and synthetic base oils, are not substitutes for paraffinic base oil because the users of paraffinic base oil would not switch to other base oils in the event of a small but significant, nontransitory increase in price for paraffinic base oils.

M. Count XII – Jet Turbine Oil

Jet turbine oil (also known as ester-based turbine oil) is used to lubricate the internal parts of jet engines used to power aircraft. Exxon and Mobil dominate the sales of jet turbine oil, with approximately equal shares that, combined, account for 75% of the worldwide market (defined broadly), and approach 90% of worldwide sales to commercial airlines.

Entry into the development, production and sale of jet turbine oil is not likely to occur on a timely basis, in light of the time required to develop a jet turbine oil and to obtain the necessary approvals and qualifications from the appropriate military and civilian organizations. The merger would eliminate the direct competition between Exxon and Mobil, and create a virtual monopoly in sales to commercial airlines. The Proposed Order remedies the effect of the merger by requiring Respondents to divest Exxon's jet turbine oil business.

IV. Resolution of the Competitive Concerns

On November 30, 1999, the Commission provisionally entered into the Agreement Containing Consent Orders with Exxon and Mobil in settlement of a Complaint. The Agreement Containing Consent Orders contemplates that the Commission would issue the Complaint and enter the Proposed Order and the Order to Hold Separate.

A. General Terms

Each divestiture or other disposition required by the Proposed Order must be made to an acquirer that receives the prior approval of the Commission and in a manner approved by the Commission, and must be completed within nine months of executing the Agreement Containing Consent Orders (except that the divestiture of the Benicia Refinery and Exxon marketing in California must be completed within twelve months of executing the Agreement Containing Consent Orders).

Respondents are required to provide the Commission with a report of compliance with the Proposed Order every sixty (60) days until the divestitures are completed, and annually for a period of 20 years.

In the event Respondents fail to complete the required divestitures and other obligations in a timely manner, the Proposed Order authorizes the Commission to appoint a trustee or trustees to negotiate the divestiture of either the divestiture assets or of "crown jewels," alternative asset packages that are broader than the divestiture assets. The crown jewel for the Exxon Northeastern Marketing Assets is Mobil's marketing in the same area; for the Mobil Mid-Atlantic

Marketing Assets, Exxon's marketing in the same area[12]; for the Exxon California Refining and Marketing Assets, the Mobil California Refining and Marketing Assets; for the Mobil Texas Marketing Assets, the Exxon Texas Marketing Assets; for Mobil's interest in TAPS, Exxon's interest in TAPS; for the paraffinic base oil to be sold, Mobil's Beaumont Refinery; and for Exxon's Jet Turbine Oil Business, Mobil's Jet Turbine Oil Business. In each case, the crown jewel is a significantly larger asset package than the divestiture assets.

Respondents have also agreed to the entry of an Order to Hold Separate and Maintain Assets, and the Commission has entered that Order. Under the terms of that Order, until the divestitures of the Benicia Refinery, marketing assets, base oil production and jet turbine oil business have been completed, Respondents must maintain Mobil's Northeastern, Mid-Atlantic and Texas fuels marketing businesses, Mobil's California refining and marketing businesses, and Exxon's ester based turbine oil business as separate, competitively viable businesses, and not combine them with the operations of the merged company. Under the terms of the Proposed Order, Respondents must also maintain the assets to be divested in a manner that will preserve their viability, competitiveness and marketability, and must not cause their wasting or deterioration, and cannot sell, transfer, or otherwise impair the marketability or viability of the assets to be divested. The Proposed Order and the Hold Separate Order specify these obligations in greater detail.

To avoid conflicts between the Proposed Order and the State consent decrees, the Commission has agreed to extend the time for divesting particular assets if all of the following conditions are satisfied: (1) Respondents have fully complied with the Proposed Order; (2) Respondents submit a complete application in support of the divestiture of the assets and businesses to be divested; (3) the Commission has in fact approved a divestiture; but (4) Respondents have certified to the Commission within ten days after the Commission's approval of a divestiture that a State has not approved that divestiture. If these conditions are satisfied, the Commission will not appoint a trustee or impose penalties for an additional sixty days, in order to allow Respondents either to satisfy the State's concerns or to produce an acquirer acceptable to the Commission and the State.[13] If at the end of that additional period, the

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[12]The "crown jewel" divestiture would include the exclusive right to use the Exxon or Mobil name (as the case may be) in the pertinent States for at least 20 years. If Respondents fail to divest both the Exxon Northeast Marketing Assets and the Mobil Mid-Atlantic Marketing Assets, the Commission may direct the trustee to divest all of Exxon's marketing from Maine to Virginia.

[13]The consent decree between Respondents and the States of Connecticut, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Vermont and Virginia provides that a State that objects to a proposed acquirer must petition the court before which the decree is pending to (continued...)

State remains unsatisfied, the Commission may appoint a trustee and seek penalties for noncompliance.

B. Gasoline Marketing in the Northeast and Mid-Atlantic

Sections IV and V of the Proposed Order are intended to preserve competition in gasoline marketing in the Northeast and Mid-Atlantic by requiring Respondents to divest to an acquirer approved by the Commission all retail gasoline stations owned by Exxon (or leased by Exxon from another person) in Maine, Massachusetts, New Hampshire, Vermont, Rhode Island, Connecticut, and New York (Proposed Order ¶ IV.A), and to assign to the acquirer of those stations all dealer leases and franchise agreements and all supply contracts with branded jobbers (¶ IV.B). The Proposed Order defines "Existing Lessee Agreements" and "Existing Supply Agreements" broadly, to include the totality of the relationship between Respondents and the

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[13](...continued)
rule on the suitability of the proposed acquirer. In the event such a motion is made, Respondents' time to divest under the Proposed Order is tolled until the matter is resolved.

[14]The assigned relationship does not include business format franchises for the sale of ancillary products (*e.g.*, restaurant franchises) other than gasoline and diesel fuel.

Exxon and Mobil networks to their own brands.[15] The Proposed Order requires the respective Exxon and Mobil packages to be divested to a single acquirer (although both packages may be divested to the same acquirer). The divestiture and assignment of large packages of retail gasoline stations should allow the acquirer the ability to efficiently advertise a brand, develop credit card and other marketing programs, persuade distributors to market the acquirer's brand, and otherwise compete in the sale of branded gasoline.

The acquirer will nonetheless be allowed to continue to offer the Exxon or Mobil name, as the case may be, to dealers and jobbers in order to allow the acquirer to preserve the network to the greatest extent feasible and to comply with the requirements of the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA"). Thus, the acquirer will be able to continue to offer Exxon or Mobil branded fuel, as the case may be, to dealers and jobbers that are today selling Exxon or Mobil branded fuel and displaying those brands. Over time, the acquirer in its business judgment may choose to convert the business it acquires to its own brand name, subject to the requirements of law or with the consent of the dealers and jobbers in question.

To effectuate the divestiture and allow the acquirers an opportunity to convert dealers and jobbers to a new brand, the Proposed Order prohibits Respondents from using the pertinent brand in the sale of gasoline for at least five (5) and as much as twelve (12) years from the date of divestiture in the region in question (*i.e.*, Respondents will not be able to sell gasoline under the Exxon name in New York or New England, where they are divesting and assigning Exxon stations, dealers and jobbers). In addition, Respondents will be prohibited from offering to sell branded fuels for resale at divested or assigned sites for a period of seven (7) years. (¶¶ IV.G, V.G)

Respondents' obligations to preserve the assets to be divested and assigned includes the obligation to maintain the relationships with dealers and jobbers pending divestiture or assignment. Respondents have agreed to meet this obligation by, among other things, establishing a fund of $30 million to be paid to distributors who accept assignment of their supply agreements to the acquirer. The terms of that incentive program are set forth in Appendix A to the Proposed Order.

C. Marketing of Gasoline in Texas

To remedy the reduction in competition in the five metropolitan areas in Texas alleged in Count II of the Complaint, Paragraph VI of the Proposed Order requires Respondents to divest and assign Mobil's marketing businesses in those five metropolitan areas. Mobil's marketing

[15] For that reason, the agreement entered into between Respondents and the acquirer(s) may provide for an increasing fee for the use of the name after five years. The terms of that agreement will be subject to Commission approval.

assets in those metropolitan areas include interests of Mobil in partnerships with TETCO Inc. and Southland Corp. The Proposed Order requires that Respondents divest Mobil's interest in its partnership with TETCO to TETCO or to another acquirer approved by the Commission, in either event only in a manner approved by the Commission. The Proposed Order also requires Respondents to assign their Existing Supply Agreements to Assignees approved by the marketing businesses to an acquirer, the Commission will consider the acquirer's ability and incentive to invest and compete in the businesses in which Exxon was engaged in California. The Commission will consider, *inter alia*

J. Count X – Importation, Terminaling and Marketing of Light Petroleum Products in Guam

To remedy the reduction in competition in the importation, terminaling and marketing of light petroleum products in Guam, Paragraph III of the Proposed Order requires Respondents to divest Exxon's terminal and marketing in Guam. Essentially all of Exxon's gasoline marketing in Guam consists of approximately 11 company-operated retail gasoline stores, which can be divested without the right to use the "Exxon" brand. The Proposed Order therefore does not provide for the use of the "Exxon" brand in Guam. The Proposed Order does provide that the divestiture of the terminal include Exxon's rights in its joint terminaling arrangements with Shell and, at the acquirer's option, Exxon's liquefied propane gas ("LPG") storage facilities. The divestiture would thereby eliminate the effect of this merger in this market.

K. Count XI – Paraffinic Base Oil

The Proposed Order requires Respondents to relinquish control of an amount of base oil equivalent to the amount controlled by Mobil, in order to remedy the effect of combining Exxon's and Mobil's base oil production. *First,* Respondents must offer to change several terms in Mobil's contract with Valero, in order to relinquish control over Valero's base oil production. The terms Respondents must offer are confidential, and are contained in a confidential appendix to the order.

Second, Respondents must enter into a long-term supply agreement (or agreements) with not more than three firms to supply those firms with an aggregate of 12 MBD of base oil from the merged firm's three refineries in the Gulf Coast area. The purchaser(s) of this base oil would purchase this base oil for ten years, under a price formula agreed to by the parties (and approved by the Commission) that is not tied to a United States base oil price (*e.g.*, the formula might be tied to a benchmark price for crude oil). The purchaser(s) could use the base oil or resell it. Since the price term will be unrelated to any U.S. base oil price, Respondents would not be able to influence the price of this base oil. This sales agreement would put the purchasers(s) in the same position as competing base oil producers.

By changing Mobil's contract with Valero and entering into a Gulf off-take agreement, Mobil's share of the base oil market will effectively be given to Valero and some new entrant(s) in the base oil market or other suitable acquirers. The status quo in the base oil market will be maintained.

If Respondents do not offer the aforementioned terms to Valero within six months and do not enter into base oil supply contracts with suitable entities within nine months, they must divest

[16] A divestiture of Mobil's Beaumont refinery would give the acquirer six percent of North American base oil production and complete control of a low-cost base oil refinery. The buyer would be free to make any capital investments to expand capacity it chose to make. The Commission does not believe, on the facts of this investigation, that a divestiture of the refinery is strictly necessary to maintain competition in the paraffinic base oil market. The Commission might