

SEPARATE STATEMENT OF COMMISSIONER ORSON SWINDLE  
in Exxon Corporation, Dkt. No. C-3907

In this matter, the Commission investigated the \$80 billion merger between Exxon Corporation (“Exxon”) and Mobil Corporation (“Mobil”). The merger created the largest privately owned oil company in the world, having extensive operations in terms of exploration, production, refining, pipelines, terminal operations, wholesaling, and retailing. The Commission

Rather than very large geographic areas (e.g., entire states)<sup>1</sup> 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. MSAs are consistent with the general boundaries of competition in the wholesaling and retailing of gasoline. Using MSAs as geographic markets also promotes greater consistency in analysis because most oil industry data are reported by MSA. Finally, MSAs are consistent with the size of the geographic markets that the Commission generally has used in analyzing past oil mergers. *See 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).

The basic theory underlying the complaint was that so-called major brands (including Exxon, Mobil, Shell/Texaco, BPAmoco, and Sunoco) priced 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.

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<sup>1</sup> In its statement, 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 and mid-Atlantic United States, Texas, and Arizona.

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<sup>2</sup> for the wholesaling and retailing of gasoline in the southeastern United States. *British Petroleum Co., plc.*<sup>3</sup>

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.<sup>4</sup> 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 remain comfortable with 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.

However, in addition to alleging that the merger may substantially lessen competition in highly concentrated markets for the wholesaling and retailing of gasoline, the majority has alleged that the merger is likely to cause competitive harm in markets that would be only *moderately* concentrated. I disagree.

Specifically, nothing that has transpired since the Commission accepted the consent agreement would lead me to support the complaint allegations that the merger between Exxon

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<sup>2</sup> The Commission also alleged that the merger of BP and Amoco may substantially lessen competition in five markets that were only moderately concentrated. The majority cites this case as “precedent” for challenging oil mergers because of their effects in moderately concentrated markets. Commission consent orders lack precedential effect. Moreover, the most that *British Petroleum Co.* stands for is the proposition that some oil mergers cause competitive problems in some moderately concentrated markets, not that all oil mergers cause competitive problems in all moderately concentrated markets.

<sup>3</sup> 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.

<sup>4</sup> 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.

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<sup>5</sup> The moderately concentrated markets are New Haven, CT; Lewiston, ME; Baltimore, MD; Boston,

## 2. Refining, Pipelines, and Terminal Markets

Although I support the remaining complaint allegations relating to refining, pipeline, and terminal markets, a brief treatment of two of these markets is warranted. I am not persuaded that a full trial on the merits would have demonstrated that the merger may substantially lessen competition in the United States and Canadian market for refining paraffinic base oil (¶¶ 51 and 52 of the complaint) or in the West Coast market for refining CARB gasoline (*id.* ¶¶ 37 and 38). The information that the Commission staff compiled during its extensive and thorough investigation, however, persuaded me that there was at least “reason to believe” that the merger could substantially lessen competition in these two markets. Because this showing was enough to meet the applicable legal standard, I was willing to support the allegations relating to these two markets.