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 has issued a consent order to resolve complaint allegations with regard to a number of markets in which Exxon and Mobil had overlapping operations.

Of the great many markets that are addressed in the complaint and consent order, 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 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 ExxonMobil divest or assign its retail gasoline stations located in these markets.

1. Wholesale and Retail Marketing of Gasoline

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. ¶¶ 17a, 18, 31, and 32 of the complaint. It also defines as relevant geographic markets five metropolitan areas in Texas, and "smaller areas" contained within those metropolitan areas. *Id*. ¶¶ 17b, 19, 33, and 34. The complaint further defines Arizona and "smaller areas" within Arizona as relevant geographic markets. *Id*. ¶¶ 17c, 21, 35, and 36.

In analyzing the competitive effects of a merger, it is critical to identify the proper geographic markets. As explained above, the Commission alleged that the proper geographic 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.'" United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.21 (1992).

Rather than very large geographic areas (e.g., entire states)[1] 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. 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).

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." 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 was 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 merger between Exxon and Mobil could 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* § 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 competitive harm, the Commission typically concludes that such a merger may substantially lessen competition.

In recent years, the Commission 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

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[1] 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[2] for the wholesaling and retailing of gasoline in the southeastern United States. *British Petroleum Co., plc.* [3]

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.[4] 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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[2] 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.

[3] 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.

[4] 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.

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 and mid-Atlantic United States, four markets in Texas, and one market in Arizona.[5] 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* § 1.51(b).

I still find the Commission's theory that major brands have coordinated their gasoline prices in these moderately concentrated markets[6] to be insufficiently 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 that 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. The better view of the evidence, however, is that such coordination was not occurring premerger and is not likely to occur following the merger. I consequently dissented from the complaint allegations with regard to the wholesale and retail gasoline markets in the northeastern and mid-Atlantic United States, Texas, and Arizona that would be moderately concentrated, and I would not have required the divestiture and assignment of retail gasoline stations located in those markets.[7]

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[5] The moderately concentrated markets are New Haven, CT; Lewiston, ME; Baltimore, MD; Boston, MA; Atlantic City, NJ; Middlesex, NJ; Newark, NJ; Vineland, NJ; New York, NY; 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.

[6] Of course, I recognize that when we decide 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.

[7] The majority states that the "effects of mergers in less concentrated markets should [not] be ignored" and that "there is considerable judicial precedent for finding violations in moderately concentrated markets." I agree with these statements. But I merely disagree with the conclusion that the facts show anticompetitive effects are likely in the moderately concentrated markets at issue in this case.

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.