UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

Chevron Corporation and Texaco Inc.

File No. 011 0011
Docket No. C-4023

COMMENTS OF EXXON MOBIL CORPORATION ON
PROPOSED CHEVRON-TEXACO CONSENT ORDER

On September 7, 2001, the Commission announced a proposed Decision and Order (the "Proposed Order") that would resolve its investigation of the pending merger of Chevron Corporation and Texaco Inc. Pursuant to 16 C.F.R. § 2.34(c), Exxon Mobil Corporation ("ExxonMobil") submits these comments on certain aspects of the Proposed Order.

I. Introduction

ExxonMobil takes no position on the Commission's conclusions as to the competitive effects of the proposed Chevron-Texaco merger, or the need for divestitures or other relief to remedy such effects. ExxonMobil's comments are instead focused on the need for consistency in the Commission's review of mergers in this industry.[1]

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[1] As a general principle of law, the Commission has an obligation to engage in "reasoned decision-making," and cannot simply change its mind or disregard its prior rulings without legitimate reason. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970). An agency thus may not "chang[e] its course" without "supply[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." Id. at 852. Where agencies have acted inconsistently or failed to treat similarly situated parties similarly, such actions have been invalidated as arbitrary and unjustified departures from precedent. E.g., Atchison, Topeka & Santa Fe R.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973); Boston Edison Co. v. FPC, 557 F.2d 845, 849 (D.C. Cir. 1977).

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In its review of recent mergers in the petroleum industry, including *Exxon-Mobil*, the Commission took a strict position that there could not be any increase in concentration among refiners of California CARB gasoline, and it similarly refused to permit any material increase[2] in concentration in markets for the wholesaling of branded gasoline in many regions of the United States. Here, in contrast, the Proposed Order expressly endorsees Shell's acquisition of Texaco refining interests in California and Texaco marketing interests throughout the United States. Proposed Decision & Order, ¶ II.A.

Such an acquisition clearly would not be permitted if Shell were not already a participant with Texaco in the Equilon and Motiva ventures, but the Commission apparently believes that Shell's present involvement in those ventures means that a Shell acquisition of Texaco's venture interests would not yield any change in the competitive status quo. ExxonMobil respectfully disagrees. Although ExxonMobil does not share the Commission's view that relief was required in its prior cases, ExxonMobil strongly believes that the Commission must apply the standards that arose from those investigations in a

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Here, the Commission has explicitly stated that it is not purporting to alter its enforcement standards. Its press release press release announcing the Proposed Order says that the proposed remedies are "consistent with the analyses and approaches taken by the Commission in prior major petroleum industry mergers." FTC Release, *FTC Consent Order Allows the Merger of Chevron Corp. and Texaco Inc., Preserves Market Competition,* Sept. 7, 2001. Likewise, when the Commission announced that it had closed its investigation of the Phillips-Tosco transaction, it took pains to explain that its enforcement standards in the petroleum industry have not changed. *Philips Petroleum Corp./Tosco Corp.*, FTC File No. 011-0095, Statement of the Commission (Sept. 19, 2001) ("[C]learance of this particular merger should not be viewed as a signal that the Commission's merger enforcement standards have changed. They have not.").

2 By "material," we refer to concentration increases at or above the thresholds spelled out in the *Horizontal Merger Guidelines* as warranting further scrutiny – i.e., 50 points in highly concentrated markets and 100 points in moderately concentrated markets. Guidelines, § 1.51.

consistent and even-handed manner. Here, by strengthening Shell's control over the Texaco refining and marketing activities contributed to the ventures, a Shell acquisition of Texaco's interests would affect the same markets in which the Commission demanded divestitures in *Exxon-Mobil* and other cases to prevent increases in concentration. Accordingly, the Proposed Order endorses a result that cannot be reconciled with the positions taken by the Commission in *Exxon-Mobil* and other recent cases. ExxonMobil submits that the Proposed Order should be modified to eliminate the provision permitting Shell to acquire Texaco's interests in the Equilon and Motiva ventures.

II. But for Shell's Involvement in the Equilon and Motiva Ventures, the Commission Plainly Would Not Allow Shell to Acquire All of Texaco's Refining and Marketing Interests

Under the enforcement standards developed and applied in *Exxon-Mobil* and other recent petroleum industry cases, the Commission would not permit Shell to acquire all of Texaco's refining and marketing interests if Shell were not already a participant in the Equilon and Motiva ventures. Such an acquisition would significantly increase concentration in at least two sets of markets in which the Commission has recently concluded (in *BP-Amoco* and *Exxon-Mobil*) that competition would be adversely affected by further concentration: (1) the market for the refining of California CARB gasoline and (2) markets for the wholesaling of branded gasoline in MSAs and counties that the Commission has regarded as moderately or highly concentrated, both along the East Coast and in other regions.

A. Refining of California CARB Gasoline on the West Coast

In *Exxon-Mobil* the Commission alleged that the proposed transaction would increase concentration in a market defined as the refining of California CARB gasoline on the West Coast. The Commission required that ExxonMobil divest Exxon's only West

Coast refinery – located in Benicia, California – together with all of Exxon's retail marketing assets in California. As the Commission explained, this divestiture was designed to "*eliminate* the refining overlap in the West Coast market."[3]

The Commission underscored its conclusion that there could be *zero* increase in concentration when it considered potential acquirers of Exxon's Benicia refinery. One proposal was a divestiture to Ultramar Diamond Shamrock ("UDS"), which operated one small refinery in Southern California that produced CARB gasoline. A divestiture of the Benicia refinery to UDS would have resulted in a net increase in concentration of less than 100 points, but Commission Staff nevertheless rejected UDS as an acceptable purchaser. This reflected the Commission's conclusion that *any* increase in concentration in the refining of CARB gasoline on the West Coast, and *any* reduction in the number of entities involved in such refining, would not be permitted.

A Shell acquisition of the West Coast refineries in which Texaco has an interest clearly runs afoul of the Commission's standard. The Equilon venture encompasses one large former-Shell refinery in California (at Martinez) and two former-Texaco refineries in California (at Wilmington and Bakersfield). Each of these refineries is a significant producer of CARB gasoline. ExxonMobil estimates that, together, their CARB production is approximately equal to what ExxonMobil would have had *if ExxonMobil had been permitted to retain its two California refineries.*[4] Giving Shell 100% interests in the Texaco

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[3] *In the Matter of Exxon Corp. and Mobil Corp.*, FTC Docket No. C-3907, Analysis to Aid Public Comment (Nov. 30, 1999), p. 10 (emphasis added).

[4] ExxonMobil estimates that the former-Texaco Wilmington and Bakersfield refineries have the capacity to produce approximately 95 kbd of gasoline, roughly equal to that of Mobil's Torrance refinery, and that the former-Shell Martinez refinery has approximately 95 kbd of gasoline capacity, roughly equal to that of the former-Exxon Benicia refinery.

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refineries would yield an increase in the HHI greater than that which the Commission alleged would have resulted from an unremedied Exxon-Mobil merger.[5]

B. Marketing of Branded Gasoline

A Shell acquisition of Texaco's interests in the Equilon and Motiva ventures, which together encompass all of Texaco's branded gasoline marketing activities in the United States, is equally inconsistent with standards previously applied by the Commission. In both *BP-Amoco* and *Exxon-Mobil* the Commission required the divestiture of *all* branded retail outlets of one of the merging parties where there was a material overlap in the branded sites of the merging parties in markets that the Commission regarded as moderately or highly concentrated, both in the Eastern United States and in other regions with similar market conditions.

Specifically, in *BP-Amoco*, the Commission determined that the merger would increase the HHI by over 100 points in over 30 moderately and highly concentrated markets for the sale of branded gasoline in Eastern Seaboard states and elsewhere.[6] In each of those markets, the Commission required the divestiture of *all* retail gasoline stations owned by either BP or Amoco. It also required that, with respect to the divested brand, BP-

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Equilon's CARB production capacity represents nearly 18% of total capacity on the West Coast; prior to the Benicia divestiture, Exxon and Mobil each had approximately 9% of West Coast CARB capacity.

5 Whereas the Commission alleged that the Exxon-Mobil transaction would have increased the HHI by 171 points to 1669, ExxonMobil estimates that a combination of the former-Shell and former-Texaco California refineries would increase the HHI by 186 points to 1615.

6 See *In the Matter of the British Petroleum Co. and Amoco Corp.*, FTC Docket No. C-3868, Analysis to Aid Public Comment (Dec. 30, 1998), ¶ III.

Amoco had to give its wholesale customers (jobbers and open dealers) the option of canceling their franchise and supply agreements with BP or Amoco.

Likewise, in *Exxon-Mobil*, the Commission concluded that it would be anticompetitive to allow material increases in concentration in numerous markets for the sale of branded gasoline on the East Coast and in Texas that were moderately or highly concentrated, and it required relief that eliminated any potential increase in concentration in these markets.[7]

Application of this standard would bar Shell's acquisition of Texaco's interest in branded gasoline marketing in numerous MSAs and counties in which both Texaco and Shell have a significant marketing presence. That conclusion is perhaps clearest in markets along the Eastern Seaboard, since both Shell and Texaco have a significant branded marketing presence in virtually *every* Eastern Seaboard state. In eight of the jurisdictions between Virginia and Maine – the region within which the Commission demanded the *complete* divestiture of Exxon or Mobil branded gasoline marketing assets and activities – Shell and Texaco together account for at least 15% of the state's branded retail sales and *each* accounts for at least 7% of sales.[8] In many metropolitan areas within

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[7] See *In the Matter of Exxon Corp. and Mobil Corp.,* FTC Docket No. C-3907, Analysis to Aid Public Comment (Nov. 30, 1999), pp. 8-9. The relief imposed by the Commission in *Exxon-Mobil* to remedy these alleged violations was in significant respects even more extensive than that in *BP-Amoco*. Unlike in *BP-Amoco*, the Commission demanded that ExxonMobil affirmatively sever its ties with *all* branded sites by assigning its franchise and supply agreements to the acquirer of the company-owned sites and, with respect to Eastern Seaboard markets, required that ExxonMobil's divestitures and assignments encompass the entire states – from Maine to Virginia – that included overlap markets.

[8] According to Lundberg data, those jurisdictions are Connecticut, Delaware, District of Columbia, Maryland, Massachusetts, New Jersey, Rhode Island and Virginia. Data

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these Eastern Seaboard states, a combination of Shell's and Texaco's branded gasoline sales would achieve significant increases in concentration.

The branded marketing activities of Shell and Texaco also overlap significantly in numerous markets outside the Eastern Seaboard states that were at issue in *Exxon-Mobil* and/or *BP-Amoco*. Recent retail survey data indicate that Shell and Texaco both have a significant marketing presence in the Southeast – e.g., Florida, North Carolina, Tennessee the Gulf region – e.g., Louisiana and Texas – and the West – e.g., California, Nevada, Oregon. The Commission has expressly found many of these markets to have "market conditions that resemble those found in the Northeast and Mid-Atlantic,"[9] such that the strict enforcement standard developed in recent cases is applicable.

III. The Commission Should Not Endorse Shell's Acquisition Simply Because It Is Already a Participant in the Equilon and Motiva Ventures

Despite the significant overlap between Shell and Texaco in markets for the gasoline refining and wholesaling markets, the Proposed Order expressly endorses the divestiture of Texaco's interests to Shell. Proposed Decision & Order, ¶ II.A. Because the Commission's settled standards would so clearly prohibit a Shell acquisition of Texaco's interests,[10] ExxonMobil believes that the Commission's decision to endorse a Shell

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compiled in Energy Information Agency reports indicate a similar overlap of Shell and Texaco branded retail outlets.

9 *In the Matter of Exxon Corp. and Mobil Corp.*, FTC Docket No. C-3901, Analysis to Aid Public Comment (Nov. 30, 1999), p. 8 (Texas); p. 9 (California); *In the Matter of the British Petroleum Co. and Amoco Corp.*, FTC Docket No. C-3868, Analysis to Aid Public Comment, ¶ III (Dec. 30, 1998), ¶ III (North Carolina, Tennessee, Florida).

10 The fact that the Commission has acted in this case to prevent *Chevron* from acquiring any of Texaco's refining and marketing interests in the United States further underscores that, absent Shell's involvement in the Equilon and Motiva ventures, the substantial competitive overlap between Shell and Texaco in those markets would disqualify

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acquisition must stem from the fact that Shell is already a part owner of the Equilon and Motiva ventures. ExxonMobil respectfully disagrees with the Commission's apparent conclusion that a Shell acquisition of Texaco's interests in these ventures would not affect the competitive status quo.

There are important differences between ventures owned and operated *jointly* by Shell and Texaco (Equilon) or Shell, Texaco and SRI (Motiva), on the one hand, and one in which Shell has 100% ownership (proposed for Equilon) or a clear majority position with one fewer co-owner (proposed for Motiva), on the other hand. It is well recognized that changes in the control of a joint venture can affect venture governance and thereby alter the competitive landscape.[11] The change that the Commission endorses here will solidify Shell's position in both the West Coast CARB refining market and numerous markets for the wholesaling of branded gasoline in which the Shell and Texaco sales overlap.

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Shell as a purchaser of Texaco's interests under the Commission's strict enforcement standards. The Commission's analysis in *Chevron-Texaco* confirms that the Commission continues to believe that there should be no material increase in concentration in the refining and wholesale markets in which the Commission has demanded relief in its other recent cases. The Commission's complaint alleges a violation of the Clayton Act in the market for the refining of CARB gasoline on the West Coast, and the Commission purports to address this violation by demanding that there be *zero* combination of Chevron's and Texaco's interests in CARB refining capacity. Complaint ¶¶ 40-41; Analysis to Aid Public Comment, ¶ III.C. The Commission's Complaint also alleges a violation of the Clayton Act in numerous markets for the wholesaling of branded gasoline where the retail assets and activities of Chevron overlap with Texaco's Equilon and Motiva ventures, and the Commission purports to address this violation by demanding that there be *zero* combination of Chevron's and Texaco's interests in branded gasoline marketing, except in specific markets where Chevron has little or no presence. Complaint, ¶¶ 36-39; Analysis to Aid Public Comment, ¶ III.A-B.

[11] See generally Daniel P. O'Brien & Steven C. Salop, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559, 585-89 (2000).

A Shell acquisition of Texaco's interests in Equilon and Motiva would result in Shell's achieving 100% ownership of Equilon, which operates three California refineries that produce CARB gasoline, as well as all Shell and Texaco gasoline marketing activities in the Western United States. As reflected in the Commission's Hart-Scott-Rodino rules, such an acquisition is tantamount to an outright purchase of the underlying refinery and retail assets.[12]

A Shell acquisition of Texaco's interest in Motiva, which operates the Shell and Texaco gasoline marketing activities in the Eastern United States, would transform Shell's 30% minority interest into a strong 65% majority position. Further, it is unclear how active a role Saudi Refining, Inc. ("SRI"), the only remaining minority owner of Motiva, would play in the management of venture activities. Even a Shell acquisition of the Motiva interest in conjunction with SRI would significantly strengthen Shell's ownership position and eliminate Texaco as a co-owner with its own independent competitive interests.

Through the acquisitions endorsed by the Commission's Proposed Order, Shell would achieve greater control over the assets and operations of both Equilon and Motiva and would extinguish the potentially conflicting competitive interests of Texaco. Texaco, as an owner with considerable influence over venture activities and potentially conflicting competitive interests (including its separate interests arising from its separate ownership of the Texaco brand used in a substantial portion of Equilon and Motiva's gasoline sales), would no longer act as a check on Shell's decision-making. In addition, a Shell acquisition of Texaco's interests would allow Shell to convert the Equilon and Motiva

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12 FTC Formal H-S-R Interpretation No. 15, as amended March 2001, 66 Fed. Reg. 16241 (Mar. 23, 2001) (Commission regards such an acquisition "as the acquisition of all the assets of the LLC").

ventures from alliances having a scope and duration delimited by the written agreements among the venturers into essentially permanent arrangements.

To the extent the Commission might have approved the formation of Equilon and Motiva on the assumption that the ventures were the equivalent of a complete merger of the affected Shell and Texaco businesses, the fact is that the ventures did not *actually* have that effect. Shell and Texaco have remained separate parties to those ventures, with separate and potentially divergent competitive interests. As a result, the Commission's prior decision in *Shell-Texaco* to approve the formation of those ventures under a less-stringent standard that tolerated additional concentration in the markets at issue does not avoid the Commission's obligation to evaluate and prevent, *under today's more-stringent standard*, the further effects on market structure that would result from a divestiture of Texaco's interests to Shell.

ExxonMobil therefore believes that a Shell acquisition of Texaco's venture interests is in direct conflict with the strict enforcement standards developed by the Commission in *Exxon-Mobil* and *BP-Amoco.* Through a series of steps – now including the Commission's proposed Order requiring divestiture of Texaco's "Alliance" interests and permitting Shell's acquisition of those interests – Shell will have achieved what the Commission has prohibited ExxonMobil and other oil industry participants from achieving: material effects on market structure in markets for the refining of California CARB gasoline and numerous markets for the wholesaling of branded gasoline that, under the Commission's view, are moderately or highly concentrated.

Conclusion

For the foregoing reasons, ExxonMobil requests that the Commission modify its Proposed Order to preclude Shell from acquiring Texaco's interests in California refining and branded gasoline marketing in the East Coast and other markets that the Commission has regarded as moderately or highly concentrated.

Respectfully submitted,

Timothy C. Hester
David L. Meyer
Andrew J. Heimert
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Exxon Mobil Corporation

Dated: October 5, 2001