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Via Email (consentagreement@ftc.gov) and Mail

Office of the Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Conoco, Inc. and Phillips Petroleum Company

Dear Mr. Secretary:

This firm represents the Petroleum Marketers Association of America ("PMAA"). PMAA is a federation of 43 state and regional trade associations representing independent petroleum marketers. PMAA is filing these comments pursuant to the September 9, 2002 notice in the Federal Register (67 F.R., 174 at 57235). According to the most recent data, PMAA's federated associations represent approximately 8600 independent petroleum marketing companies. Throughout the U.S., these companies, in the aggregate, market over 50% of the motor gasoline, 81% of the distillate fuel oil and significant amounts of diesel fuel and lubricating oils, through over 70,000 retail outlets (almost 40,000 of which they own) as well as directly to government, farm, industrial and commercial customers.

I. Interest of PMAA

PMAA is, of course, interested in the Phillips-Conoco merger as it affects the over 1,700 independent marketer members of its federated associations who currently wholesale and/or retail Phillips and Conoco products. PMAA's interest in this matter is, however, far broader than the concerns of these Phillips or Conoco marketers. As the only national representative of the independent companies that collectively are the principal provider of petroleum products to the American public, PMAA is concerned with the impacts the current round of consolidation of its members' suppliers (refiners) will have on both their competitive viability and the retail marketplace for the vital products they distribute.

The speed and comprehensiveness of this most recent upstream consolidation can best be seen by noting that of the 15 refining companies that accounted for over 91% of U.S. gasoline consumption in 1995, all but one (Sun) will have participated in at least one major merger by the close of this year. This presumes that in the remaining months of 2002, no additional mergers are announced.

The mergers between Tosco and Circle K and then Tosco and 76 Products Company in 1996 and 1997; Conoco and Kerr McGee in 1995; Ultramar and Diamond Shamrock in 1996 and Total in 1997; the Ashland/Marathon merger and Shell/Texaco/Star "alliance", PDVSA's (Citgo) purchase of UNOCAL's interest in Uno-Ven, in 1997; BP and Amoco in 1998; Mobil and Exxon, BP Amoco and Arco in 1999; Tosco and Phillips, Valero and Ultramar Diamond Shamrock; and Chevron and Texaco in 2001, have drastically altered the American motor fuel marketplace. These mergers have impacted, in important ways, on the competitive posture of PMAA's membership in it and ultimately on the retail price to consumers.

II. Upstream Mergers Impact On Competition in Petroleum Marketing

Simply stated, PMAA's 8600 marketer members are the major oil companies' principal customers. While the majority of PMAA's members market under one or more major oil company brands, they are all independent companies that have traditionally been controlled only modestly through contractual arrangements with refiner suppliers. Their independence has allowed them to serve as a conduit, transmitting downstream competitive marketplace pressures up to their refiner-suppliers.

The mergers that have taken place and are being contemplated should result in a more cost efficient petroleum industry. The redundancies that the mergers will eliminate and the synergies they will create should strengthen the merged companies' exploration, production, refining and marketing efforts and better allow them to compete in what is truly a global industry.

Notwithstanding this, these mergers pose certain threats to downstream competition which must be safeguarded against. A consolidated industry offers fewer sources of supply for PMAA marketer members. Generally speaking, terminal racks with a greater number of suppliers offer more competitive pricing. A diminution in competitors, particularly when coupled with certain changes that refiner-suppliers have recently made in the way they interface with their marketers, could well combine to lessen competition in a given market.

There are two reasons that independent marketers have been able to focus their upstream suppliers' attention on downstream, competitive retail and wholesale market conditions. These are, the heretofore healthy competition amongst suppliers for marketer business and the relative freedom of marketers to move significant portions of that business from one supplier to another. Should a given supplier, for example, not maintain its competitive posture in price, products or services, its marketers could find a new supplier and change brands or go unbranded.

Thus, the current spate of mergers results in two opposite impacts on the market. The first appears to be salutary. The more efficient merged companies should be able to offer better products and services at lower prices. The second, unless adequately addressed by the FTC, is harmful. Generally, where there are fewer rack sellers, the average rack prices tend to be higher. When this latter impact is combined with the concomitant one of fewer suppliers, a reduced ability to change brands, Commission action to preserve the independence of independent marketers is indicated.

III. Preserving The Competitive Viability Of Independent Marketers

Governmental awareness that independent marketers play a significant role in the competitive marketplace is not new. When the United States was faced with its first energy crises, the Arab oil embargo of 1973, the Congress reacted by passing the Emergency Petroleum Allocation Act of 1973. The Act mandated the, preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the . . . distribution, marketing . . . sectors of such industry, and to preserve the competitive viability of . . . nonbranded independent marketers and branded independent marketers. (P. L. 93-159 section 4(b)(1)(D)).

This task was to be monitored by the Federal Trade Commission under section 7 of the Act.

The FTC's continuing recognition of the need to continue to preserve the competitive role played by independent marketers, as embodied in Section II and III of the proposed consent order and is more fully explained in Section V of the Analysis of Proposed Consent Order to Aid Public Comment, is therefore, most appropriate. PMAA however, suggests that the Commission consider taking additional steps to preserve their independence, and thus the competitive force, they bring to the wholesale and retail marketplace.

According to Department of Energy's data, major integrated oil companies, the so-called "FRS refiners" (those required to submit such data), continues to increased their reliance on PMAA's members as their principal channel of trade. PMAA heartily endorses this trend, believing that its members are the most competitive force in the marketplace. Unfortunately however, as refiners have turned more and more of the downstream market over to independent marketers, some have attempted to compensate for the loss of direct control of these markets through a series of contract and policy changes restricting the freedom of their marketers.

In previous decades, major oil company supply contracts were generally of three year duration. Incentive money payments and the amortization of them were of a like term. Recently however, some supply contracts and most incentive amortizations have been lengthened. Moreover, the amortizations of many incentive agreements have become much like "balloon" loans. A ten year incentive agreement, for example, will, in many cases, not begin to amortize until year five or in some cases year nine. Some contracts even contain liquidated damages clauses, specifying a fixed cents per gallon payment to the refiner for gallons not purchased due to early marketer termination. The result of all this is that it becomes much more expensive for an independent marketer to switch suppliers. This inevitably means that fewer independent marketers will do so and inherently diminishes the ability of independent marketers to transmit competitive market pressures upstream to their refiner-suppliers.

Additionally, and perhaps of greater competitive impact, is the reversal of what had been the traditional course of dealing between independent marketers and their refiner suppliers concerning contractual purchase obligations. Until recently, should a marketer of one brand switch to another supplier during the term of its original supplier's contract, the original supplier would not institute legal action against the marketer for breach of contract or seek lost profit damages for product not purchased.

In approximately 1994 however, this began to change. In that year, Arco sued an independent dealer who had, during the pendency of its Arco supply contract, switched to another supplier. Arco sought several cents a gallon for the contractual volumes the dealer had failed to purchase due to the brand change. (See *Arco v. Merritt Truax No. 2*, USDC Ore., 94-1494 St.). More recently, another supplier sought similar lost profit damages from its former Jacksonville, Florida jobber. That jobber changed brands to another while its original supplier's contract was still in effect. (See *BP v. Petro*, USDC MD. Fl., 97-478 Civ-J-10A). Other similar suits have been filed or threatened.

Trade press reports indicate that less than six months after the Commission approved the sale of marketing and refining assets ordered divested in *Chevron-Texaco* to Equilon and Motiva, the buyer has begun to "redline" areas where the purchase created dual distribution markets. According to these reports, as well as reports by PMAA members, Equilon has selected several dual distribution markets, including Denver, to be the exclusive domain of itself under the Shell brand. Likewise, Motiva redlined the Boston area. While, pursuant to the Petroleum Marketing Practices Act, Equilon and Motiva cannot terminate their existing jobbers, they have reportedly decided to refuse to allow the existing jobber to brand any new service stations. What this does, besides severely diminishing the economic value of that jobber company, is assure that the company will eventually go out of business. Marketing concerns, like all others, must grow or wither away. In this fashion, the ability of the existing jobbers in these areas to be competitive forces will be severely diminished or totally removed. In several of these redlining cases, the major oil company appears to have used their power to set their jobber's purchase prices, under the open price term in the contracts, as another means to enforce their redlining policies. They have done this by setting the jobber's purchase price higher than their selling price to their own directly-supplied dealers or even their pump prices at their directly-operated retail outlets. All of these recent major oil company actions serve to limit the flexibility of their independent marketers. They thus lessen the ability of independent marketers to focus their suppliers' attention on the competitive wholesale and retail markets. Given these realities, the Commission must consider strengthening the prophylactic measures fashioned in the consent order to preserve the freedom of independent marketers to grow or move to other brands.

IV. Specific PMAA Suggestions

PMAA suggestions here are directed to the consequences of the Proposed Decision and Order and its impact on competition, as well as on PMAA's members. The suggestions below are aimed at assisting the Commission in its efforts to assure a healthy competitive environment in the downstream petroleum marketplace.

A. Potential Competitive Harm Caused by FTC Divestiture Order

Under its Divestiture Order, the FTC and Phillips and Conoco have agreed to several asset divestitures. Among these are Phillips' Woods Cross, Utah and Conoco's Commerce City, CO refineries and all Phillips branded contracts in Colorado, Idaho, Montana, Utah and Wyoming. The independent small business marketers represented by PMAA, who comprise virtually all of the holders of such contracts, object strongly to being treated as chattel and in such a cavalier fashion. Simply stated, these marketers did not seek the merger nor did they seek the agreed upon (among the merging parties and the FTC) divestiture. They ask the Commission to borrow from Hippocratis' mandate to physicians, "First do no harm."

In order to assure that the divestitures do not harm either competition or the competitors who make up the class of independent marketers to be divested, PMAA offers two alternative prophylactics.

1. Allow marketers the greatest possible freedom to seek alternative supply-branding options by assuring that the petitioners waive any outstanding incentive funds owed to them by any marketers who changes brands within twelve (12) months of the final date of the consent order.

In *BP-Amoco*, the Commission recognized that independent marketers in the six divestiture areas should have an opportunity to bring new competitive force to the marketplace. Thus the consent order included a provision waiving all unamortized incentive funds owed by BP or Amoco to any marketers who switched brands within ninety (90) days of the final date of the consent order. In *Chevron-Texaco*, the Commission took the similar step but mandated that the waiver only apply to those Texaco branded marketers who changed brands after a date that now appears to be July 1, 2004.

Both of these steps were ineffective. The first, which is taken up by virtually no marketer, was rendered useless because there were not enough time for the marketers covered by the amnesty to locate a new supplier and finalize a supply deal. The second is causing great problems because it binds the currently branded Texaco marketers to Equilon and Motiva until a date some time far in the future.

Because of these problems, PMAA submits that in order for the Commission to effectuate the intents of these provisions in both *BP-Amoco* and *Chevron-Texaco* it add one effective immediately on the effective date of the Consent Order running for a twelve (12) month period.

2. Alternatively, if the Commission believes that the importance of assuring a branded marketing network to the purchasers of the respective refineries is too great to allow marketers to exercise unfettered rights to participate in the competitive marketplace in the divested areas, PMAA urges the Commission to order the type of Distributor Fund to those marketers who remain Phillips marketers that was provided as an incentive to Exxon and Mobil marketers to remain with the purchaser of the assets ordered divested in that merger preceding.

3. As marketers have seen over the years, all too frequently when a major brand with strong consumer acceptance is divested to the holder of another major brand, the competitive force of that brand is often lost. For example, when Chevron merged with Gulf in 1985, the Gulf brand was divested in part to Sohio, while Chevron sold a license to the brand to a non refiner (Cumberland Farms) in the northeast. Except for some residual value to the Gulf brand in the Cumberland Farms' area, the Gulf brand has all but disappeared from the marketplace in the US. Likewise, Motiva and Equilon, the purchasers of the Texaco brand, are strongly de-emphasizing its use. Texaco marketers fear great diminution in that brand's value when part of the right to it reverts to ChevronTexaco. PMAA, therefore, believes the Consent Order should contain a provision requiring ConocoPhillips to continue to support the Phillips brand in all of its current areas of market use, including the divested areas.

B. Refiner-Purchaser Issues

1. Because of the extreme shortage of unbranded supply in the Rocky Mountain region, PMAA believes the FTC must not approve any purchaser of the refinery assets without a requirement that the purchaser not diminish the percentage of unbranded product output these refineries currently supply.

2. Likewise, PMAA believes that it is imperative that any FTC approval of a refinery-purchaser include a requirement that there be no diversion of any of the products produced by the respective refinery, either through direct shipment or exchange, from the geographic areas which it currently supplies.

3. Finally, there is one other important measure to assure the competitive viability of the divested refining-marketing assets; the FTC must assure itself that the purchaser(s) have proven experience and commitment to branded marketing.

V. Conclusion

PMAA understands the evolving need of the industry to become more efficient through mergers. PMAA's only concern is that these mergers do not diminish the competitive force represented by its members. PMAA therefore endorses the approach taken by the Commission in its proposed consent order to assure competition by protecting the freedom of independent marketers. PMAA suggests that the Commission consider strengthening and broadening that approach along the lines of the recommendations it makes in these comments.

On behalf of PMAA, we thank you in advance for your consideration of these brief comments.

Respectfully Submitted,

BASSMAN, MITCHELL & ALFANO

Robert S. Bassman
General Counsel to PMAA

RSB:bdw
C:\PMAA\Fed Trade Commission\PMAA Comments (Conoco--Phillips)Final
cc: Dan Gilligan, President, PMAA (via fax)