UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

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In the Matter of)

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Shell Oil Company,)

) Docket No. C-4059

a corporation,)

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and)

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Pennzoil-Quaker State Co.,)

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a corporation.)

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Comments of Citizens for Voluntary Trade to the Proposed Consent Order

Pursuant to the September 27, 2002, request for public comments on the proposed Consent Order with Shell Oil Company and Pennzoil-Quaker State Company, Citizens for Voluntary Trade submits the following comments.[1]

This case has nothing to do with protecting competition. This case has everything to do with perpetuating a history of failed FTC intervention in the oil industry. Rather than admit error, the FTC continues to insist on further regulation, prosecution, and divestiture as the solution to a "problem" that was largely caused by government interference in the first place. This consent agreement continues the cycle of regulatory failure by relying, once again, on divestiture, a remedy that has never been proven to improve competition in the oil industry. In fact, this current agreement requires Shell to divest assets acquired as a result of previous consent agreements the FTC coerced from other oil companies.

Briefly stated, Shell and Pennzoil have been targeted because they seek to maximize their profits. In the aftermath of recent corporate accounting scandals, the FTC should applaud Shell's commitment to their stockholders' interests. Instead we're now told they should be faulted for failing to consider *consumer* interests as paramount. The price for this failure is forfeiture of property. Even if the FTC could prove a tangible harm to the legal rights of consumers-which they can't-that would not excuse the FTC's naked violation of Shell and Pennzoil's right to enjoy and use their own property.

The proposed order requires Pennzoil to divest parts of its Group II base oil production business to a third-party. The reasoning behind this remedy is murky at best. The FTC claims it will remedy "anticompetitive effects" they found in Pennzoil's merger with Shell. But the FTC never proved any anticompetitive effects existed. Rather, the FTC made a series of allegations, offered a few irrelevant statistical measures, and declared the law was violated. The FTC's complaint contains no proof of illegal conduct by the respondents.

According to the FTC, the Shell-Pennzoil merger would give the combined company a 39% share of the Group II base oil market. It doesn't take a Nobel prize-winning economist to figure out that 39% is not a dominant share of the industry, or even a simple majority. The mere fact a company has a 39% market share does not conclusively demonstrate the existence of "monopoly power." Indeed, the very concept of monopoly requires the monopolist to not only dominate the field, but to enjoy the power to prevent other competitors from entering the marketplace. Shell-Pennzoil has no such power, and the FTC knows that.

That's not to say there aren't significant barriers for potential competitors. The FTC concedes that the major entry barriers to the Group II base oil market are the need for extensive capital and "regulatory constraints." 2 In other words, the government itself poses a barrier to entry, not the actions of Shell-Pennzoil. But since the FTC lacks the authority (or the inclination) to cast blame on its fellow bureaucrats, they assign total blame to Shell-Pennzoil.

Beyond the issue of marketplace entry, the FTC has also failed to demonstrate any harm to consumers resulting from the Shell-Pennzoil merger. The best the FTC can come up with is an alleged 5-10% increase in the price of base oil should the merger be left unchecked. We have no clue what the FTC is basing the 5-10% figure on, but assuming it would be true, the FTC still fails to demonstrate the relevancy. Pennzoil's 5W30 motor oil (a Group II product) retails for approximately $20 per 12-quart case. A 10% price increase, the FTC's maximum threshold, would raise that price to $22. What exactly is the great injustice here? Individuals will not cease using motor oil over an extra $2 per case, and is doubtful the majority of consumers will suffer financial hardship from the additional expense.

It appears the FTC isn't interested in protecting competition, but establishing price controls. That's the only rational explanation for the Commission's behavior. If a 5% price increase justifies federal prosecution, than clearly no business can be secure in raising their prices, for any reason. The fact that this price increase might take place following a merger does not, in our judgment, warrant government intervention. The FTC is using this merger as a pretext for restraining the price of Group II base oils.

In its defense, the FTC cites the Herfindahl-Hirschmann Index, a measure of market concentration, as a statistical justification for this action. The HHI sounds authoritative, but in reality provides no factual basis for government intervention in private commerce. HHI adds the squares of the market shares of the firms in a given market. For example, if an industry has five firms with equal (20%) market share, the HHI would be 2000. Antitrust regulators traditionally consider an HHI over 1800 suspicious. In this case, the FTC claims the Shell-Pennzoil merger will raise the HHI from approximately 1600 to 2300.

The HHI is, in our opinion, irrelevant to this action. The 1800 threshold is arbitrary and capricious. The FTC could state that any HHI level was too high, and any number they picked would be equally irrelevant to monopoly analysis. The only issue that the FTC should properly examine is whether Shell and Pennzoil gained their market share through fraudulent or coercive means. Absent any such showing, the combined companies' actual market share is irrelevant, since it was presumably earned through lawful competition. The FTC's use of HHI here, like in most cases, simply provides an excuse to go after a merger the Commission would otherwise prosecute. Had the HHI been below 1800, we have no doubt the FTC would still have attempted to block this merger on the same grounds it cites in the complaint.

Beyond the HHI, the FTC presents no statistical or factual evidence to support its fears of monopolization. The FTC's complaint contains nothing but lies, conjecture, and rampant speculation. At one point the Commission charges this merger will increase the "likelihood of collusion" among remaining industry competitors. This is typical FTC rhetorical gibberish. The FTC has no knowledge of Shell-Penzoil's future intentions, nor the intentions of their remaining competitors. The Commission simply assumes companies will act collusively or badly, because, well, corporations are inherently evil and will act to harm consumers in the absence of regulatory intervention. It's the business equivalent of original sin doctrine. What it's not is valid, objective law. The FTC, as usual, is simply on a witch hunt to punish companies without presenting evidence, or even specific, credible allegations of illegal conduct.

No public interest is served by this consent agreement. The public is not, as best we can tell, knocking on the FTC's door demanding price controls to preclude the possibility of modest increases in motor oil prices. Nor does the public have any right to demand such an action. Consumers have no legal right to any product at a below-market price, and for the FTC to claim otherwise under the guise of "protecting competition" is as offensive as it is unethical. This Commission has no right to defraud the public in an effort to control private industry. The settlement with Shell and Pennzoil should be immediately withdrawn, and this case dismissed with all deliberate speed. That would be the only possible outcome in the "public interest."

Respectfully Submitted,

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1 Citizens for Voluntary Trade is a nonprofit association organized under District of Columbia law.

2 Complaint, at paragraph 14.