DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK CONCERNING SOCAL-GULF ACQUISITION, FILE NO. 841-0109 APRIL 26, 1984

I find the decision on this consent agreement to be a far closer question than the Texaco-Getty consent agreement or the failure of the Commission to pursue an adequate remedy in the Mobil-Marathon case, primarily because the staff has negotiated an agreement which gives some hope that the divested Gulf properties will emerge in an economically viable and competitive posture. For this, credit must be given to the skill and determination of key staff members as well as to the healthy expressions of concerns about past Commission actions by those outside the Commission. Yet I find myself compelled to vote against the agreement and in favor of seeking to enjoin the merger for a number of reasons.

First, it has become increasingly obvious that there are major weaknesses in our procedures for addressing the antitrust problems of huge mergers in a limited period of time and for negotiating massive and complex divestitures. Under the terms of the Hart-Scott-Rodino Act, we have as little as ten days before the Commission must decide whether to challenge a merger after requested information is received from the merging companies. In this case, the largest merger in history, the staff analysis of the consent agreement -- the principal document describing the consent agreement and its rationale -- was provided to the Commission at about 2:00 P.M yesterday, Bureau of Economic analyses on key points arrived at 6:00 P.M., and the Bureau Director's memo was furnished at 6:30 P.M. These memos deal with exceedingly complex issues of restructuring Gulf assets and attempting to solve major horizontal overlaps in a series of markets. I do not believe that a responsible evaluation of these issues can be done, including resolving the competing claims of various staff and interested private groups, in the few hours available.

Second, although the consent agreement represents a major improvement over our approach in Texaco-Getty, I am still concerned that the divestitures we have in mind risk the selling off and eventual demise of assets which have up till now been viable. A major advantage of this agreement is that it provides for holding Gulf separate until the divestitures are approved and, more importantly, for providing the Commission authority to order additional divestitures, including crude oil, to insure the divested assets are continued as "ongoing, viable enterprises." This provision, as well as the staff analysis, recognize the crucial importance of access to crude oil in maintaining viability for refiners and marketers. It is a principle we could have put to better use in the Texaco-Getty and Mobil-Marathon matters.

However, this hold separate agreement is not the ordinary hold separate procedure employed to preserve the Commission's opportunity to enjoin a merger entirely after a period of investigation or litigation. This hold separate provision is a lever to encourage Socal to divest properties as well as a way of facilitating sale of assets in viable "packages," but it is not a guarantee to the Commission that it can conclude later that the only way the assets can be viable is that the merger itself be rescinded.

The staff candidly admits that "despite the strong guarantees in the consent a refinery-marketing divestiture is not without risks." These risks arise because of the importance of regular access to crude and refined products as well as the powerful incentive Socal has to sell off or close down the least desirable properties it acquires from Gulf. In order to insure that the divested properties remain viable, the Commission will have to oversee complex negotiations between Socal and potential buyers, to make predictions about what the buyers intend to do with purchased assets, and to determine what additional assets, particularly crude supply contracts, are necessary for "viability." As far as I know, the Commission has never assumed responsibility for overseeing such a major restructuring of assets, and it remains to be seen how effective and vigorous it will be in carrying out this difficult job over the coming months.

At the very least, we can expect temporary supply contracts of one sort or another to be negotiated as a part of these sales. Are Socal temporary supply agreements sufficient to get a refinery or marketing assets permanently over some survival threshold, or will they be temporary lifelines only? Further, will such supply contracts in reality be agreed to by potential buyers because they are able to get crude oil at a bargain price, not because they actually intend to operate assets for the long term? Moreover, if this complex divestiture plan begins to fall apart some months from now, what are the Commission's options? As I interpret the agreement, we do have a fair amount of discretion in requiring Socal to put additional assets in the divestiture package, but we do not have the discretion to throw up our hands and say the only solution is preserving an independent Gulf. By accepting this agreement we are committed to a course in which most of Gulf is absorbed by Socal and some of its least desirable assets are parceled out. There will be no turning back from that basic decision.

I realize that there are limits to how certain we can be about the success of divestitures, but I do not believe the law requires us to take any significant risks once a merger has been recognized as a likely violation of the law. All the Commissioners agree that this merger is likely to harm competition and violate the antitrust laws; otherwise there would be no need for a consent agreement. The question is what degree of risk that our remedies are insufficient are we to assume. In answering that question, it is reasonable to ask: what are the social benefits of this merger? It is fairly clear that there are no significant "efficiencies" in any ordinary use of the word. While Socal argues that acquiring Gulf will give Socal access to Gulf's technology, few specifics are offered, and Socal's president conceded that Socal can acquire industry technology in other ways. In a survey of possible acquisitions, Socal could not identify synergies with Gulf's upstream assets. Socal's principal basis for any future cost savings appears to be closing down facilities. Based on this and other evidence, the staff concludes that "this acquisition does not present the efficiencies which might have flowed from several earlier mergers in this industry, notwithstanding Socal's statements that it does." In short, I believe the Commission is accepting substantial risks in relying on a complex, uncertain remedy in a case where a merger clearly appears to be unlawful, and offers few, if any, benefits other than to the private parties.

Other Provisions

I am also troubled by a number of other provisions and omissions in the agreement. For example, the agreement provides an option to Socal to divest one of Gulf's two refineries in the Gulf Coast area. Depending on which refinery Socal chooses, the Herfindahl index would still increase about 100 points in kerojet production (less in the case of a divestiture of Port Arthur, more if Alliance is sold). Second, the staff identified an overlap in the sale of aviation gasoline in the Gulf and East coast regions that would exceed the Justice guidelines in increasing the Herfindahl index, but did not address it in the agreement. Each of these issues alone would not justify rejecting the entire agreement but, taken together with the considerations mentioned above, they strengthen the argument against it.

Non-Antitrust Issues

However close the antitrust issues are here, and I believe they are closer than in some previous cases on which I disagreed with the majority, we should keep in mind that issues we cannot address under the antitrust laws remain of major, perhaps overriding, importance. This merger is driven by Socal's desire for crude oil. Despite protestations to the contrary by company officials, I find it very difficult to conclude that this merger will not diminish exploration for crude oil. One major company, which has needed additional crude reserves, has now disappeared. A second major competitor, which has had strong incentives to drill, has now won control of 2 billion barrels of crude oil reserves along with a huge debt burden. We may not understand precisely how much this acquisition will reduce exploration but to assume it will affect it little or none at all flies in the face of common sense.

Conclusion

Even though I believe staff has done a commendable job in negotiating this agreement under severe time constraints, in particular, by giving the Commission a greater ability to insure the divestitures achieve their stated purpose, I cannot help but conclude that there are too many unanswered questions and too many risks to endorse this agreement. The law does not require that we go out of our way to restructure acquisitions that violate the antitrust laws, particularly when there is a cloud of uncertainty as to whether our restructuring will or will not work and when the merger, which we are struggling so hard to preserve, offers no significant efficiencies. While the public comment period on this case can be particularly useful, because of the scope and significance of the acquisition and divestitures, I must vote against the agreement based on what has been presented to the Commission.