Statement of Commissioner Mary L. Azcuenaga

Concurring in Part and Dissenting in Part

in Exxon Corporation, Docket No. 9281

Last year, the Commission issued a complaint against Exxon Corporation and, in accordance with its practice, a Notice of Contemplated Relief, the title of which is self-explanatory. The complaint alleged that Exxon had made certain deceptive claims concerning the need for its premium gasoline. Today the Commission approves a settlement and issues a final decision and order that provides less relief than the Commission contemplated when it issued the complaint and less relief than it ordered against other companies that previously have settled similar charges.[(1)] I agree that the core provision of the order barring the allegedly deceptive claims is appropriate,[(2)] but I cannot agree to the omission of a broader provision barring Exxon from making unsubstantiated claims concerning "the relative or absolute attributes of any gasoline with respect to engine performance, power [or] . . . acceleration."

An injunctive provision covering not just the specific claims challenged in the complaint, but also, future deceptive claims of a similar nature is a common feature in Commission advertising orders. It provides an important deterrent, because any future advertising claims that do not comport with it are punishable by substantial civil penalties. The Commission previously has challenged similar advertising claims by three other gasoline companies, all of which, unlike Exxon, agreed to settlements without litigation, and all of which consented to inclusion of the broader injunctive relief omitted from this order.

Exxon's advertisements seem likely to have contributed to consumer misperceptions about the attributes of and the need for premium gasoline as much as gasoline advertisements run by the other companies. The more lenient injunctive coverage in Exxon's order will be less effective in deterring future deception and may create perverse incentives. In the future, companies may believe it is in their interest to decline negotiated settlement until after litigation has commenced if they think that the Commission will reward greater intransigence.

Narrowing the injunction might be worthwhile if some other effective remedy were added, and the order adds a provision that requires Exxon to produce and disseminate a 15-second television commercial and distribute a certain number of copies of a brochure.[(3)] Given the apparently entrenched consumer misperceptions allegedly created by Exxon's challenged claims about the need for and attributes of premium gasoline, a consumer education remedy is justified. The goal of the consumer education campaign, to correct apparently widespread and assuredly costly consumer misperceptions about the benefits of high octane gasoline, is laudable. Unfortunately, I do not believe that this particular campaign is likely to be effective. The Commission has extensive experience with advertising techniques, and that experience should tell us that there is a good deal more to creating a successful advertisement than first meets the eye.[(4)] The commercial is uninspired at best, and we have no basis for concluding that it will be effective in conveying the desired message to consumers or in changing their misperceptions. The order does not provide a performance standard or other means of assuring that this goal will be met.[(5)]

Although it may be argued that we similarly have no assurance of the effectiveness of the broader injunction that was included in the Notice of Contemplated Relief, we have, at least, the assurance that further deceptive claims covered by the order may result in substantial civil penalties and, therefore, that the company may think twice before running advertisements that might mislead reasonable consumers about the attributes of particular gasoline products. In addition, the injunctive relief would remain in place for 20 years, far longer than the likely effects of the single short-lived advertising campaign provided in the order. On balance, I believe that the notice order is stronger. Perhaps the fact that Exxon was willing to agree to this order rather than the notice order should tell us something.

To the extent that the order is more narrow than the notice order, I respectfully dissent.

Endnotes:

1. See Sun Company, Inc., Docket C-3381 (consent order, May 6, 1992); Unocal Corporation, Inc., Docket C-3493 (consent order, April 24, 1994); Amoco Oil Company, Docket C-3655 (consent order, May 7, 1996).

2. Order ¶ I.

3. The text of the negotiated advertisement is:

> Hi, I'm Sherri Stuewer. I run Exxon's Baytown Refinery. We offer three octane grades. Which is right for you? Most cars will run properly on regular octane, so check your owner's manual...and stop by Exxon for this helpful pamphlet.

4. The advertisement required by the order has not been copytested.

5. The order could have specified survey methodology and required that the advertisement be revised as needed until the survey results showed that a minimum number or percentage of consumers actually took the intended educational message from the advertising spot. The Commission has taken this approach in the past. RJR Foods, Inc., 83 F.T.C. 7, 16-21 (consent order, July 13, 1973).