

IN THE MATTER OF
EXXON CORPORATION, ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.
5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8934. Complaint, July 18, 1973—Dismissal Order, Sept. 16, 1981

This order dismisses without prejudice the Commission's July 18, 1973 complaint charging eight major oil companies with maintaining and reinforcing a non-competitive market structure in the refining of crude oil into petroleum products. Upon agreement between complaint counsel and respondents that the matter cannot be resolved in the foreseeable future, the Commission concluded that pending proceedings were not in the public interest. The order also vacates the ALJ's January 5, 1977 Protective Order, as modified by the ALJ's Orders of April 23 and June 5, 1979; and bars the Commission from disclosing documents and information protected by these orders to any unauthorized party, or pursuant to an FOIA request. Upon dismissal of the complaint, the agency is additionally required to place respondents' documents, received pursuant to discovery in Docket 8934, in the physical possession of a designated custodian to be accorded the protections provided by Section 21 of the FTCA.

Appearances

For the Commission: *John A. Woodstock, Marc G. Schildkraut, Daniel P. Ducore, Arthur J. Nolan, Rhett R. Krulla, David C. Dickey, Gregory M. Fox, James M. Giffin, Oleta J. Harden, Eugene Higgins, Charles A. James, Jeff Jacobovitz, Patrick J. O'Brien, Mark L. Rosenberg, and Constance M. Salemi.*

For the respondents: *Robert E. Jordan III, Richard H. Porter and F. Michael Kail, Steptoe & Johnson, Washington, D.C., and Edward E. Vaill, in-house Litigation Counsel, Los Angeles, Calif., for Atlantic Richfield Co., William Simon and Robert G. Abrams, Howrey & Simon, Washington, D.C., and Charles W. Mathews, in-house counsel, Houston, Tex., and A.P. Lindemann, Jr., in-house counsel, New York City, for Exxon Corp., and John E. Bailey, Assistant General Counsel, and Morgan L. Copeland, in-house counsel, Houston, Tex., for Gulf Oil Corp., and Andrew J. Kilcarr and Vincent Tricarico, Donovan Leisure Newton & Irvine, Washington, D.C., and Charles F. Rice, in-house counsel, New York City, for Mobil Oil Corp., and William R. Jentes and Tefft W. Smith, Kirkland & Ellis, Chicago, Ill., and M.J. Keating, Paula J. Clayton, and Jeffrey R. Harder, in-house counsel, Chicago, Ill., for Standard Oil Co. (Indiana), and George A. Sears, Richard W. Odgers, and Roland W. Selman, Pillsbury, Madison & Sutro, San Francisco, Calif., for Standard Oil*

Complaint

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Co. of California, and *J. Wallace Adair* and *Frederick S. Frei*, *Howrey & Simon*, Washington, D.C., and *Chester D. Walz, Jr.*, in-house counsel, Houston, Tex., for Shell Oil Co., and *Milton Handler*, *Milton J. Schubin*, and *Barry Willner*, *Kaye, Scholer, Fierman, Hays & Handler*, New York City, and *Robert D. Wilson* and *Sharon S. Jacobs*, in-house counsel, White Plains, N.Y., for Texaco, Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint charging as follows:

I. RESPONDENTS

1. Respondent Exxon Corporation (Exxon) is a corporation organized, existing and doing business under the laws of the State of New Jersey with its principal office and place of business at 1251 Avenue of the Americas, New York, New York. Exxon is the nation's largest corporation with assets in 1972 exceeding \$21.5 billion. In 1972 its sales exceeded \$20 billion—second in the nation. Exxon is the nation's largest petroleum company.

2. Texaco Inc. (Texaco) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at 135 East 42nd St., New York, New York. Texaco is the nation's third largest corporation with assets in 1972 exceeding \$12 billion. In 1972 its sales exceeded \$8.6 billion—eighth in the nation. Texaco is the nation's second largest petroleum company.

3. Gulf Oil Corporation (Gulf) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at the Gulf Building, Pittsburgh, Pennsylvania. Gulf is the nation's sixth largest corporation with assets in 1972 exceeding \$9.3 billion. In 1972, its sales exceeded \$6.2 billion—eleventh in the nation. Gulf is the nation's third largest petroleum company.

4. Mobil Oil Corporation (Mobil) is a corporation organized, existing and doing business under the laws of the State of New York with its principal office and place of business at 150 East 42nd St., New York, New York. Mobil is the nation's seventh largest corporation with assets in 1972 exceeding \$9.2 billion. In 1972 its

sales exceeded \$9.1 billion—seventh in the nation. Mobil is the nation's fourth largest petroleum company.

5. Standard Oil Company of California (Standard of California) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at the Standard Oil Building, 225 Bush St., San Francisco, California. Standard of California is the nation's ninth largest corporation with assets in 1972 exceeding \$8 billion. In 1972 its sales exceeded \$5.8 billion—twelfth in the nation. Standard of California is the nation's fifth largest petroleum company.

6. Standard Oil Company (Indiana) (Standard of Indiana) is a corporation organized, existing and doing business under the laws of the State of Indiana with its principal office and place of business at 910 South Michigan Ave., Chicago, Illinois. Standard of Indiana is the nation's twelfth largest corporation with assets in 1972 exceeding \$6.1 billion. In 1972 its sales exceeded \$4.5 billion—fifteenth in the nation. Standard of Indiana is the nation's sixth largest petroleum company.

7. Shell Oil Corporation (Shell) is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at One Shell Plaza, Houston, Texas. Shell is the nation's fourteenth largest corporation with assets in 1972 exceeding \$5.1 billion. In 1972 its sales exceeded \$4 billion—seventeenth in the nation. Shell is the nation's seventh largest petroleum company.

8. Atlantic Richfield Company (Atlantic Richfield) is a corporation organized, existing and doing business under the laws of the State of Pennsylvania with its principal office and place of business at 717 Fifth Ave., New York, New York. Atlantic Richfield is the nation's sixteenth largest corporation with assets in 1972 exceeding \$4.6 billion. In 1972 its sales exceeded \$3.3 billion—twenty-fifth in the nation. Atlantic Richfield is the nation's eighth largest petroleum company.

9. Other petroleum companies, not named as respondents herein, have engaged in some of the acts and practices alleged herein and have contributed to the noncompetitive structure of the petroleum industry, as hereinafter alleged.

II. THE INDUSTRY

10. The petroleum industry is comprised of five basic levels of operation: the exploration and production of crude oil, the transportation of crude oil, the refining of crude oil, the transportation of

refined petroleum products and the marketing of refined petroleum products. All respondents are vertically integrated companies and operate at all of the above-mentioned levels.

III. RELEVANT MARKETS

11. For purposes of this complaint, the relevant market is the refining of crude oil into petroleum products and relevant submarkets thereof.

12. For purposes of this complaint, the relevant geographic market encompasses the Eastern and Gulf Coast states, together with parts of the Mid-Continent area of the United States, and relevant submarkets thereof, in which respondents' conduct in maintaining a noncompetitive market, as alleged herein, has operated to prevent free and open competition.

IV. JURISDICTION

13. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, each of the respondents is in substantial competition with each and all of the other respondents and with other petroleum refiners in the refining of crude oil into petroleum products.

14. In the course and conduct of their business, respondents cause and have caused crude oil and petroleum products to be shipped from their facilities in various States to locations in various other States of the United States, and at all times mentioned, maintain and have maintained, a substantial course of trade in crude oil and petroleum products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

V. ACTS AND PRACTICES

15. Since at least 1950, respondents, individually and with each other, have maintained and reinforced a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant market.

16. In maintaining and reinforcing the aforesaid noncompetitive market structure, respondents, individually and with each other, have been and are engaged in, among others, the following acts and practices, some of which, *inter alia*, control and limit the supply of crude oil to independent refiners and potential entrants into refining:

(a) Pursuing a common course of action to abuse and exploit the ownership and control of the means of gathering and transporting crude oil to refineries;

(b) Pursuing a common course of action in participating in restrictive or exclusionary transfers of ownership of crude oil among themselves and with other petroleum companies;

(c) Pursuing a common course of action of adhering to a system of posted prices leading to the maintenance of an artificial level for the price of crude oil;

(d) Entering into numerous processing arrangements with independent refiners thereby expanding their control over refining capacity and limiting the availability of refined petroleum products to independent marketers, and potential entrants into marketing;

(e) Pursuing a common course of action of accomodating the needs and goals of each other in the production, supply and transportation of crude oil to the exclusion or detriment of independent refiners and potential entrants into refining;

(f) Pursuing a common course of action of using their vertical integration to keep profits at the crude level artificially high and profits at the refining level artificially low thereby raising entry barriers to refining;

(g) Pursuing a common course of action to abuse and exploit the ownership and control of the means of transporting refined petroleum products from refineries;

(h) Pursuing a common course of action of accomodating the needs and goals of each other in the transportation and marketing of refined petroleum products to the exclusion or detriment of independent marketers and potential entrants into marketing.

17. Respondents have exercised monopoly power in the refining of petroleum products in the relevant markets by engaging in, among others, the following acts and practices:

(a) Pursuing a common course of action in refusing to sell gasoline and other refined petroleum products to independent marketers;

(b) Pursuing a common course of action in participating in restrictive or exclusionary exchanges and sales of gasoline and other refined petroleum products among themselves and with other petroleum companies;

(c) Pursuing a common course of action in their marketing practices thereby avoiding price competition in the marketing of refined petroleum products.

18. Respondents, individually and with each other, have followed and do follow common courses of action in accomodating the needs and goals of each other throughout the petroleum industry thereby increasing the interdependence of respondents and reducing respondents' incentive to behave competitively.

VI. EFFECTS

19. Respondents' acts and practices have had, among others, the following effects:

(a) Respondents have established and maintained artificial price levels for the goods and services rendered at each level of the petroleum industry.

(b) Barriers to entry into the refining of petroleum products have been raised, strengthened and otherwise increased.

(c) Actual and potential competition at all levels of the petroleum industry has been hindered, lessened, eliminated and foreclosed.

(d) The normal response of supply to demand for refined petroleum products has been distorted. Shortages of petroleum products have fallen with particular severity on sections of the country where independent refiners and marketers are primarily located.

(e) The burden of shortages of petroleum products has been forced to fall with particular severity on those sections of the United States, east of the Rockies, where independent refiners and marketers are concentrated, thereby eliminating the most significant source of price competition in the marketing of petroleum products and threatening the competitive viability and existence of the independent sector.

(f) Independent marketers have been forced to close retail outlets and significantly curtail retail operations because of their inability to obtain refined product.

(g) Respondents have obtained profits and returns on investments substantially in excess of those that they would have obtained in a competitively structured market.

(h) American consumers have been forced to pay substantially higher prices for petroleum and petroleum products than they would have had to pay in a competitively structured market.

VII. VIOLATIONS

20. The aforesaid acts and practices constitute a combination or agreement to monopolize refining of crude oil into petroleum

products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

21. Through the aforesaid acts and practices respondents have maintained monopoly power over the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

22. Respondents, individually and with each other, have restrained trade and maintained a noncompetitive market structure in the refining of crude oil into petroleum products in the relevant markets in violation of Section 5 of the Federal Trade Commission Act.

ORDER

I.

On April 24, 1981, the Commission issued an order requesting that the parties brief four specific issues relevant to the status of this case.¹ The order also stayed all proceedings in this matter pending further order by the Commission.

On June 23, 1981, complaint counsel and respondents simultaneously filed initial memoranda in response to the Commission's April 24, 1981, Order. Responsive pleadings were subsequently filed by complaint counsel on July 9, 1981, and by respondents on July 23, 1981.

II.

On July 18, 1973, the Commission issued the complaint in this matter pursuant to Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

On October 31, 1980, complaint counsel filed their "First Statement of Issues, Factual Contentions and Proof," pursuant to a March 12, 1980, Order by Administrative Law Judge James P. Timony. In the interim, the Commission denied motions by respondents to withdraw this matter from adjudication pending the filing of complaint counsel's pleading. See June 30, 1980, Order. After reviewing complaint counsel's statement, ALJ Timony concluded in a January 23, 1981, Order that "... no issues have been eliminated

¹ The parties were requested to: (1) provide a proposed schedule setting forth dates for the conclusion of all additional discovery, the filing of all pretrial motions, the filing of all pretrial briefs, and the commencement and conclusion of trial; (2) discuss any procedures by which these proceedings may be expedited and/or resolved, in whole or in part; (3) discuss the extent to which the allegations of liability can be further narrowed or consolidated, in whole or in part; and (4) discuss whether there are any other factors bearing on the public interest which the Commission should now address in connection with the status of these proceedings.

from the Pretrial Discovery Statement of February 22, 1974, and the Order Stating Issues of January 9, 1976." Thereafter, on February 2, 1981, respondent Texaco Inc. moved that the Commission dismiss this proceeding in light of ALJ Timony's January 23, 1981, Order.

The Commission's April 24, 1981, Order specifically raised its concern that the issues of fact and law in this case did not appear to have been sufficiently narrowed to accomplish a timely and meaningful resolution of this matter. None of the memoranda filed by the parties pursuant to this Order, however, has presented any evidence to assuage the Commission's initial concerns regarding the status of this matter. Complaint counsel's "best case" model contemplates the filing by each party of three additional Statements of Contentions and Proof over the next thirty-three months and a potential target of approximately three years before trial would commence. (Complaint Counsel's Response at 26-31.) Moreover, complaint counsel state that any further narrowing of the issues at this time would be "arbitrar[y]" and "irresponsible." (Complaint Counsel's Response at 39.) Finally, complaint counsel predict that ". . . it [is] unlikely that continuation of the *Exxon* case can accomplish 'a timely and meaningful resolution' of the violations described in Complaint Counsel's First Statement. Complaint counsel therefore recommend that this matter be dismissed, without prejudice" (Complaint Counsel's Response at 6.)

Respondents, while specifically declining to address the first three requests of the Commission's April 24, 1981, Order, assert that the proceeding is not in the public interest and therefore should be terminated. (Respondents' Joint Submission at 1-4.) Respondents state that ". . . only a fraction of the discovery that will be necessary to prepare this case for trial has been completed" (Respondents' Joint Submission at 40) and that a "realistic assessment suggests that the case is far closer to its beginning than to its end." (Respondents' Joint Submission at 39.) Respondents conclude that "Docket 8934 should be dismissed." (Respondents' Joint Submission at 49.)

Thus, both complaint counsel and respondents agree that completion of discovery is at least several years away, that this matter cannot be resolved in the foreseeable future and that the complaint should be dismissed. In addition, the parties have agreed that the ALJ's January 5, 1977, Protective Order, as modified by the ALJ's Orders of April 23 and June 5, 1979, be vacated. This order requires that the documents, obtained during discovery and designated as confidential, be returned at the conclusion of the proceeding.²

² In an Agreement Between the Parties, filed with the Commission on June 23, 1981, respondents waive the

III.

The Commission has considered the briefs of the parties, submitted in response to its April 24, 1981, Order, together with other filings in this proceeding, submitted or referred to by the parties, specifically including Complaint Counsel's First Statement of Issues, Factual Contentions and Proof, dated October 31, 1980, and the Counters-statements of Respondents, dated March 30, 1981, and has concluded that further proceedings in Docket No. 8934 are not in the public interest. While the length or complexity of litigation does not, in itself, constitute a basis for dismissal, the circumstances of this proceeding, including the limited progress of the litigation, call for this result. This case has been in pre-trial for eight years and unless the issues are substantially narrowed it may be well over three years before trial commences. While the Commission has the authority to remove this matter from adjudication and narrow the issues on its own initiative, such action would be impracticable under the circumstances. Therefore, without reaching the merits of this case, we believe the proper course for the Commission is to dismiss the pending proceedings and to preserve the option of addressing any anticompetitive problems in this industry in more focused proceedings. Accordingly, *it is ordered*, that this matter be dismissed, without prejudice.

It is further ordered, That the Agreement Between the Parties, filed with the Commission on June 23, 1981, is approved by the Commission and that pursuant thereto, the ALJ's Protective Order of January 5, 1977, as modified by the ALJ's Orders of April 23 and June 5, 1979, is vacated. The documents and information covered by these orders will be treated as follows:

1. Except as permitted or authorized by the Federal Trade Commission Act, as amended by the Federal Trade Commission Improvements Act of 1980 (Pub. Law No. 96-252), and the Commis-

ALJ's January 5, 1977 Protective Order, as modified, provided that the Commission dismisses the complaint and that the Commission's order of dismissal contains the following assurances of confidentiality: (1) except as permitted or authorized by the FTC Act, as amended, the Commission shall not disclose documents received from respondents, or information contained therein, to any person who is not an employee of the Commission; (2) the Commission shall not disclose the documents or information pursuant to any request under the Freedom of Information Act; and (3) upon dismissal of the complaint, the Commission shall designate a custodian who will maintain physical possession of the documents, all of which shall be treated as if they had been designated confidential by respondents at the time of submission and as if they had been duly subpoenaed subject to applicable provisions of the FTC Improvements Act, and the documents shall be protected as provided by Section 21 of the FTC Act and the Commission's implementing Rules of Practice. The agreement also states that respondents do waive "any restriction imposed by law on the Commission's use or disclosure of [the] . . . documents, information, . . . the right to seek the return of any or all of such documents, or the right to seek additional protection for . . . [the] documents, or information." The documents and information subject to the agreement are exempt from mandatory public disclosure under applicable statutes and case law. See 5 U.S.C. 552.

sion's implementing rules, the Commission shall not disclose documents in the possession of the Commission which were received from respondents, or information contained therein, to any person who is not an employee of the Commission. The Commission shall obtain suitable assurances from all employees afforded access to respondents' documents not to disclose such documents or the information contained therein, except as authorized.

2. The Commission shall not disclose the documents or information contained therein pursuant to any request under the Freedom of Information Act.

3. Upon dismissal of the complaint, the Commission shall designate a custodian pursuant to Section 21 of the Federal Trade Commission Act, as added by Section 13 of the Federal Trade Commission Improvements Act of 1980. The documents in the possession of the Commission which were received from respondents pursuant to discovery in Docket 8934 shall be placed in the physical possession of the custodian, and shall be treated as if they had been designated confidential by respondents at the time of submission and as if duly subpoenaed subject to provisions of the Improvements Act, and shall thereafter be protected as provided by Section 21 and pursuant to the regulations implementing the Act promulgated by the Commission.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I have voted to dismiss this case for one reason—as it now stands, it cannot serve a useful public interest. The number and complexity of issues raised by the complaint, the resources and zeal of teams of lawyers from eight major companies, and the need for massive discovery on all sides have made the case unmanageable and have slowed its progress to a crawl. This unfortunate state of affairs, and the Commission's resulting decision to abandon the case, do not necessarily mean that there have not been major problems in the competitive structure and performance of the oil industry. For example, particular areas of concern appear to include pipeline ownership and allocation, joint ventures, and the competitive advantages of small independent companies. In addition, there are indications that mergers of competing oil companies may occur frequently in the future.

There are such competitive problems, however, we are much

more likely to reach them by focusing on a narrower set of issues in any future proceeding. This case, begun in 1973 and spanning over four administrations, both Democratic and Republican, and five Chairmen, has represented far and away the major commitment of the Commission to this key industry. Conducting it has obligated many of our best lawyers and has prevented the Commission from considering other, narrower oil industry investigations and possible enforcement actions. I have reluctantly concluded that the Commission's enforcement discretion should be exercised by committing our resources to initiatives more likely to provide benefits to the public. Retaining the documents obtained over the history of the case and taking advantage of the expertise gained by our staff concerning every level and significant practice of this industry will help us do just that.

Complaint

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IN THE MATTER OF

TENNECO, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT
AND SEC. 7 OF THE CLAYTON ACT*Docket 9097. Complaint, March 15, 1977—Final Order, Sept. 23, 1981*

This order requires, among other things, a Houston, Texas, corporation to timely divest, in accordance with the terms of the order, all assets and properties constituting the Monroe Auto Equipment Company. The order also prohibits the company from acquiring, for a period of ten years, any enterprise engaged in the manufacture or sale of shock absorbers, without prior Commission approval; and bars any corporate officer or employee owning or controlling more than 1 per cent of Tenneco's assets from acquiring any of the divested stock or assets.

Appearances

For the Commission: *K. Keith Thurman, Layn R. Phillips, and Linda C. Martin.*

For the respondent: *John L. Jeffers, Alan Gover, and Henry Kollenberg, Baker & Botts, Houston, Texas, and David C. Murchison, John DeQ. Briggs III, and Bernard Cooney, Howrey & Simon, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents, Tenneco Inc. (hereinafter "Tenneco") and Monroe Auto Equipment Company (hereinafter "Monroe"), corporations subject to the jurisdiction of the Commission, through taking steps to combine Tenneco and Monroe, have violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); the proposed acquisition by Tenneco of the stock of Monroe, if consummated, would violate Section 7 of the Clayton Act, as amended (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest; the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)) and states its charges as follows: