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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

Chevron Corporation, a corporation, and
Texaco, Inc., a corporation

File No. 011 0011

COMMENTS OF THE NATIONAL ASSOCIATION OF TEXACO AND SHELL MARKETERS, INC.

Pursuant to the invitation and instruction contained at Section V of the "Analysis of Proposed Consent Order to Aid Public Comment," which was issued simultaneously with the "Agreement Containing Consent Orders" (hereinafter referred to as "Proposed Consent Order" or "PCO") by the Federal Trade Commission on September 7, 2001, the National Association of Texaco and Shell Marketers, Inc. hereby submits its comments with regard to the PCO. These comments are joined in and have been fully endorsed by the Petroleum Marketers Association of America ("PMAA"), which represents marketers of every brand affiliation, as well as unbranded marketers, nationwide.

To the extent that it is approved by the FTC, the agreement announced on October 9, 2001 between Shell and Chevron-Texaco regarding the valuation of Texaco's interests in Motiva and Equilon would alter the terms of the merger as set forth in the PCO and further discussed below. However, this agreement does not resolve the legitimate concerns of the marketer community about the negative effect that the merger will have upon competition in the sale of petroleum products. Therefore, NATSM respectfully requests that its comments continue to receive the full consideration of the Commission, despite the agreement announced by Shell and Chevron-Texaco.

A. Information About NATSM and Texaco-Branded Marketers

The National Association of Texaco and Shell Marketers, Inc. ("NATSM") is a nonprofit trade association that represents Texaco and Shell petroleum wholesale distributors, or marketers. The association's purpose is to promote the maintenance of a fair and competitive marketplace in which its members can distribute petroleum products to consumers. Through its Executive Committee and Board of Directors, NATSM represents the interests of approximately 1,100 Texaco and Shell petroleum marketers and convenience store operators. As a group, these marketers distribute petroleum products to approximately 22,000 service stations throughout the United States, approximately 50% of which they own and operate. The remainder are owned and operated by independent service station dealers. Collectively, Texaco and Shell marketers employ nearly 60,000 people. Texaco marketers have made a large investment in the retail facilities, bulk plants and transportation equipment through which they serve the American consumer, which, according to NATSM's analysis, amounts to a total investment of between six and eight billion dollars. Texaco marketers as a whole supply over 10,000 Texaco-branded retail facilities, and deliver approximately 65% of the Texaco-branded gasoline sold at retail in the United States. They also supply farm, municipal government, residential and commercial accounts with heating oil, lubricants, motor fuel and other petroleum products.

B. <u>Effect of the Merger Upon the Viability and Competitive Function of Marketers</u>

NATSM would like to take this opportunity to commend the FTC for the effort it has made to understand the manner in which the merger of Chevron and Texaco will affect the rights of American consumers to have the widest possible choice of petroleum products on the most convenient basis and at the lowest possible price. We at NATSM also appreciate the degree to which the PCO reflects an understanding of the vital role that the thousands of retail outlets operated and/or supplied by marketers play in maximizing competition in the marketing of petroleum products.

In submissions made to the FTC prior to the issuance of the PCO, NATSM emphasized that the ability of its members to benefit consumers was dependent upon: 1) their ability to exert pressure upon the prices and terms at which they were offered product by their present and future branded suppliers, and 2) their ability to survive the effect of the dwindling number of integrated petroleum refining and marketing companies.

NATSM has suggested that these two goals can best be served by imposing conditions upon the Chevron-Texaco merger that tend to maximize the number of realistic alternative brand choices and sources of supply for marketers who carry the

Texaco flag. If marketers appear to their suppliers as captive customers, then they have no means by which to induce suppliers to compete for their business, and, by so doing, to offer prices and terms that make it possible for marketers to offer petroleum products to their customers at the lowest possible prices. In order to maximize the positive competitive effect of Texaco marketers, NATSM first requested that the PCO include terms that would help preserve the Texaco brand. However, the PCO reflects the apparent belief on the part of the FTC that the future of the Texaco brand is something that either should or must be decided through the workings of the marketplace. Therefore, the preservation of the brand, as such, was not specifically addressed or undertaken in any discernible fashion in the PCO. However, as the Commission is well aware, Equilon and Motiva have no incentive to promote the Texaco brand in the absence of a long-term (*e.g.,* 15 to 20-year) licensing agreement, and, to NATSM's knowledge, no such agreement had been reached with Chevron-Texaco as of the filing of these comments. Chevron-Texaco, on the other hand, has been ominously silent about any plan it might have to aggressively promote the Texaco brand. Furthermore, even if it were to attempt to do so, the Texaco brand presence, and, therefore, the brand itself, will be greatly diminished as a result of the divestiture by Chevron-Texaco of the quondam Texaco direct-owned marketing assets (which represent approximately 35% of the volume of Texaco motor fuel sold in the United States) and the likely conversion of a substantial additional number of existing Texaco-branded outlets to Shell or other brands, pursuant to the mechanism provided in the PCO.

In view of the destructive effect upon the competitive function served by all marketers that will result when their choice of alternative brands is thus further diminished by the likely demise of the Texaco brand, marketers asked that the Commission take steps to maintain the viability of those who were once Texaco-branded marketers. Such relief is especially critical since the probable loss of the Texaco brand, coupled with the recent dramatic reduction in the number of major petroleum refining and marketing companies via the BP-Amoco-Arco and Exxon-Mobil mergers, will further diminish the branding options available to <u>all</u> marketers, and not simply those that were previously branded Texaco.

The most effective step, marketers suggested, was to require the waiver of all contractual obligations on the part of marketers under contracts with Equilon and Motiva through which they may have received payments on a per gallon basis over the course of several (usually 4) years as a partial form of reimbursement for, and an inducement to, make large investments in physical and other improvements to their individual retail locations. These per gallon reimbursement plans or loans (referred to in the PCO as "Facility Development Incentive Programs") carry with them strong penalties for decisions by marketers to switch to other brands before a specified term of operation has been completed after the incentive payments by Equilon and Motiva have been completed.

All such marketer investments in Texaco-branded retail outlets under these incentive programs were undertaken with the expectation and understanding on the part of marketers that the Texaco brand would be supported by Equilon or Motiva, as the case may have been, for the indefinite future, or, at the very least, for the full ten year term that is typical of these incentive agreements. The problem created by the merger, of course, is that the Texaco brand in which these investments were made has been dramatically weakened, and its future placed in serious doubt. However, the debt associated with these incentive programs makes it difficult from a practical standpoint for marketers to move to alternate suppliers.

C. Terms of Proposed Consent Order and Recent Shell-Chevron Agreement of Particular Relevance to Marketers

The following very briefly summarizes NATSM's understanding of the extent to which the PCO attempted to maintain the competitive function served by the marketers affected by the Chevron-Texaco merger. The provisions relating to marketers are set forth at Article IV of the PCO.

Although the PCO contains no provisions which attempt to preserve the Texaco brand, as such, it does propose to allow Motiva and Equilon to continue marketing under the Texaco brand on an exclusive basis through the end of the uniform term of their respective contracts with their Texaco-branded marketers, which, in the case of Motiva, ends on June 30, 2003, and in the case of Equilon, ends on June 30, 2002. If Motiva and Equilon agree to release marketers from liability for incentive payments that would otherwise be due if any marketer were to choose to switch to another supplier after the end of the contract period, the PCO orders Chevron-Texaco to offer Equilon the exclusive use of the Texaco brand for an additional year, up until June 30, 2003 (the end of the current Motiva contract term), and to offer both Equilon and Motiva the non-exclusive use of the brand through June 30, 2006 at those locations as to which agreements with marketers have been made prior to June 30, 2003 for their conversion to the Shell brand. In order to be thus relieved of liability, Texaco-branded marketers must continue to honor their contracts to purchase Texaco products through June 30, 2003.

If, on the other hand, Equilon and/or Motiva do not choose to provide such a blanket release to Texaco-branded marketers, the PCO offers marketers a degree of freedom from the onerous penalties and repayment provisions of their incentive agreements with Equilon and Motiva by requiring Chevron-Texaco to indemnify marketers for any amounts that become due under these agreements so long as:

a. The marketer continues to purchase product for the retail outlet in question from Equilon until June 30, 2002 or from Motiva until June 30, 2003; and

b. The marketer does not agree to convert the outlet to the Shell brand; and

c. Equilon or Motiva commence litigation or arbitration to compel payment; and

d. The marketer defends the litigation or affords Equilon the right to do so. To the extent compensation is provided to the marketer for amounts otherwise due in this circumstance, Chevron-Texaco's duty to indemnify would be commensurately reduced. The PCO does not clearly indicate to what point in the litigation process a marketer must "vigorously defend" any suit filed by Shell to compel repayment under incentive agreements (would it be, for example, to an initial final verdict, or through all available appeals?). However, it seems clear that marketers must bear the cost of any such litigation until this unspecified point is reached.

The final provision in the PCO of particular concern to NATSM members is that Chevron is permitted to supply existing Texaco marketers after the exclusive license to Equilon and Motiva comes to an end, and so long as such supply and branding relationships do not result in an increase in the overall market concentration in the relevant county or metropolitan area.

NATSM would like to express its appreciation to the FTC for the attention that it gave to the maintaining the important competitive role served by marketers in the sale of petroleum products to American consumers. NATSM would also like to state its general support for the provisions of particular relevance to marketers that it has attempted to summarize above. However, without any intention to detract from the support thus expressed, the members of NATSM strongly believe that several adjustments to the final consent order are urgently needed in order to give Texaco-branded marketers the opportunity to continue to function as viable competitors in the retail sale of motor fuel and other petroleum products. As stated above, NATSM does not believe that its concerns have been fully addressed, nor in any sense rendered moot by the October 9, 2001 agreement reached between Shell and Chevron-Texaco.

D. Specific Suggested Improvements to PCO

Three adjustments to the PCO are essential in order to maximize the viability and competitiveness of current Texaco-branded jobbers:

1. Equilon and Motiva should have the non-exclusive right to use the Texaco brand following the expiration of their exclusive license, and through at least June 30, 2006. However, this non-exclusive right should be granted regardless of whether Equilon and Motiva waive and release all claims under their incentive programs and deed restrictions, and regardless of whether they have entered into an agreement with the affected marketer to convert the retail location in question to the Shell brand.

Under the terms of the PCO, Equilon and Motiva would have little incentive to provide a release of their claims under incentive agreements, since only one more year of the exclusive right to the Texaco brand would be gained in the case of Equilon, and no additional time in the case of Motiva. It is NATSM's understanding that Equilon and Motiva do not believe that this benefit would compensate them for the losses they would incur if they renounce their rights under the many outstanding incentive agreements with Texaco-branded marketers, and, therefore, will not pursue this option.

If Equilon and Motiva respond in the expected manner, and, again, assuming the facts as they existed when the PCO was written and irrespective of the agreement between Shell and Chevron-Texaco on October 9, 2001, they will have no right to offer the Texaco brand beyond June 30, 2002 and June 30, 2003, respectively, and Chevron-Texaco has not indicated whether or not it intends to offer the brand itself during this non-exclusive period. In such an event, insufficient time will remain within which Shell and current Texaco-branded marketers with a mutual interest in switching to the Shell brand may reach agreement on new franchise terms and, especially in the case of Equilon, complete the physical task of rebranding the retail outlets involved by the above dates. Much worse, a substantial portion of current Texaco marketers will not even be offered the Shell brand, and will not have other immediate brand options.

If, pursuant to the terms of the agreement announced on October 9, 2001, Equilon and Motiva gain the right to the brand on an exclusive basis through June 2004, the degree of this problem may be reduced to some extent. However, it will not be eliminated. Although Shell's October 9, 2001 "News Release" describing the agreement with regard to its acquisition of Texaco's assets in Equilon and Motiva indicated that a non-exclusive right would be granted to Equilon and Motiva through June 2006, it did not indicate whether the parties had agreed to the same limitations on the nature of this non-exclusive right as those that were set forth in the PCO. Therefore, it is far from clear that the October 9 announcement of the parties addresses the serious concern that marketers have regarding this issue.

NATSM requests that any non-exclusive right to the Texaco brand should be granted to Equilon and Motiva with respect to all Texaco-branded retail locations, and not just those Equilon or Motiva and any particular marketer have agreed in writing by the "Brand License Date" (as defined in the PCO) to convert to the Shell brand. Pursuant to the PCO, if Equilon and Motiva choose not to provide releases, they will have no right to offer the Texaco brand beyond June 30, 2002 at locations supplied by Equilon, and beyond June 30, 2003 at locations supplied by Motiva. Equilon and Motiva would then be entitled under the PMPA to terminate by those dates the franchises of all Texaco-branded marketers that they did not wish to or could not feasibly convert to the Shell brand. They would be legally entitled to do this on the ground that they had lost the right to use the Texaco brand. However, if Equilon and Motiva are granted the non-exclusive right to use the brand regardless of whether an agreement has been reached with the marketer in question to convert to the Shell brand, then they cannot claim that they have no right to use the Texaco brand, and would be required under the PMPA to continue supplying Texaco product to those marketers who find themselves with no better alternative until the end of this non-exclusive period. The non-exclusive period runs through June of 2006 under both the PCO and the recent Shell/Chevron-Texaco agreement. In any case, however, the Commission needs to assure that the non-exclusive right to Equilon and Motiva extends to all Texaco-branded marketers, and not just those who have entered into contracts to switch to the Shell brand.

Those marketers who are going to be converted to Shell do not need to worry about having their motor fuel supply contracts terminated, since they have already agreed to switch to Shell. It is those who have not been offered or who feel that they cannot agree to accept the Shell brand that will have the most serious problem. If the non-exclusive right to the brand is limited to those who have agreed to be converted to the Shell brand (as the PCO provides), the other Texaco-branded marketers will be subject to termination.

It is very important that Equilon and Motiva's non-exclusive right to the Texaco brand extend to all Texaco-branded marketers, since not every Texaco marketer will find that he or she has viable options at the end of the current Motiva and Equilon license terms. Such marketers will need more time to fashion a response to the conditions created, through no fault of their own, by the Chevron-Texaco merger. If this safeguard is maintained, Texaco marketers would have the option to remain as Texaco-branded marketers under Motiva or Equilon for the duration of the non-exclusive term, even if they are not offered the chance to switch their locations to the Shell brand, if they do not choose to switch to the Shell brand, if Chevron-Texaco decides not to market the Texaco brand in the United States or if they have no viable alternative supplier in the near term.

NATSM's request for a non-exclusive right on Shell's part to use the brand is also based on the fact that Chevron-Texaco's plans for the Texaco brand are a mystery at the present time. If it later develops that Chevron-Texaco wishes to actively promote the brand, NATSM wishes to give it the option to do so as soon as possible and to compete with Shell for the business of current Texaco-branded marketers. If the brand were to go to Equilon/Motiva on an exclusive basis, it would be under the control for an additional three-year term of a competitor that had no long-term incentive to support or promote it, and would be greatly weakened as a result. The likelihood that Chevron-Texaco would consider an attempt to resurrect the Texaco brand at the end of this additional term would thus be severely diminished. Finally, there is a possibility that more locations will fly the Texaco "flag" if both Equilon/Motiva and Chevron-Texaco have the option to do so. Obviously, the more locations that carry the Texaco brand, the stronger the brand will be, to the benefit of all those who retain the brand, and as long as it survives.

NATSM has requested that a non-exclusive license be extended through at least June 30, 2006. However, we wish to emphasize that this is the minimum period that we would support, but that NATSM's members would support as long a non-exclusive license period as the Commission would choose to designate.

2. Marketers should have the option of switching to alternate suppliers as soon as 90 days after the Consent Order becomes final, and any resulting incentive payments and penalties that might be claimed by Equilon and Motiva should be borne by Chevron-Texaco.

Marketers should not have to wait until the Brand License Date to establish relationships with new suppliers, nor should they have to wait until the expiration of the exclusive license period (June 2004) agreed to by Shell and Chevron-Texaco in the agreement they announced on October 9. The merger came about through no fault of marketers, and will work to the sole benefit of Chevron, Texaco and their respective shareholders. Therefore, marketers should not be limited in their ability to respond to the challenge that has been thrust upon them. Both the brand license date, especially for Motiva marketers, and the June 2004 exclusive license period recently agreed to by Shell and Chevron-Texaco are sufficiently far in the future that a rule that requires them to wait until that time to enter into new supply contracts may very likely cause them to lose an opportunity that will not remain when the Brand License Date or June 2004 finally arrives.

The Texaco brand is going to be weakened as a result of the merger; indeed, it already has been. Texaco-branded marketers were not looking for new suppliers or a new brand before the announcement of the merger, but the damage to the brand, both that which will inevitably occur in the future, and that which has resulted simply from the announcement of the merger, has forced them to look at alternatives. Therefore, since the merger has forced Texaco-branded marketers to consider new suppliers and new brand options as a matter of survival, the final order in this proceeding should not limit the ability of these marketers to respond to the difficulties the merger has thrust upon them by prohibiting them from entering into new supply relationships until the Brand License Date specified in the PCO. Instead, marketers should be free to establish new supply and brand relationships as soon as 90 days after the issuance of the final consent order in this proceeding. As the instigator and beneficiary of the merger, Chevron-Texaco should be required to pay all costs and damages that result to Equilon and Motiva due to the departure of marketers who previously operated under the Texaco brand.

It may be argued that marketers will not suffer, and can enter now into agreements with alternative suppliers that will go into effect after the Brand License Dates or after June 2004, pursuant to the recent Shell/Chevron-Texaco agreement. However, considering the terms of the PCO, Texaco marketers may not be able, especially on the Motiva side (where the contract is not to expire until 2003), to get assurances from new suppliers about what they might be willing to do as far away as June 30, 2003. The problem becomes worse if they are required to wait until June 2004, pursuant to the terms of the proposed Shell/Chevron-Texaco agreement. Rather than postpone action until these dates, these potential suppliers may pursue relationships with other marketers. Furthermore, as a result of their inability to lock in future relationships with alternate suppliers, Texaco-branded marketers will not be able to make effective assurances to the independent dealers they supply, and this uncertainty will cause Texaco marketers to lose dealers to other potential suppliers.

The brand that Texaco marketers were representing before the merger is already a different brand. There is no current evidence that there will be support in the future for the Texaco brand from either Motiva/Equilon or Chevron-Texaco. Those marketers who can do so should be afforded the opportunity to find a supply situation that allows them to continue to serve a competitive function in the marketplace.

3) Texaco-branded jobbers should not have to defend lawsuits filed by Equilon or Motiva in order to receive indemnification from Chevron-Texaco. If a suit is filed, the marketer's only duty should be to <u>notify</u> Chevron-Texaco, which should immediately defend the suit and indemnify the marketer.

There is no equitable or other reason to saddle marketers with the possibly onerous expense of defending litigation initiated by Shell. This is properly part of the cost to Chevron-Texaco of the merger through which it was created, and it should assume the cost and responsibility for such litigation as soon as they arise.

Respectfully submitted

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