UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Melissa Holyoak

Dissenting Statement of Commissioner Melissa Holyoak
Joined by Commissioner Andrew N. Ferguson

In the Matter of ExxonMobil/Pioneer Resources
Final Decision and Order
Commission File No. 2410004

January 17, 2025

In the Majority's Complaint challenging ExxonMobil Corporation's acquisition of Pioneer Natural Resources Company, the Majority fabricated one of the most ludicrous theories of harm in its merger-enforcement history.[1] As my dissent explained when the Commission issued the Complaint, the Complaint butchered both the economics and law of coordinated effects, provided absolutely no reason to believe the law has been violated, and ignored the public interest by using its Complaint to obtain a consent agreement ("Consent") that targeted an individual who was *not* party to the agreement.[2] To prove that the Exxon Complaint was not mere transient amnesia, the Majority regurgitated its theories of harm a few months later in a complaint that challenged Chevron Corporation's acquisition of Hess Corporation.[3]

Thanks to Commission rules that require a comment period for proposed consents,[4] the Commission had the opportunity to correct its missteps in the finalization of its Decision and Order. The comment period ended *six months* ago. But as a surprise to no one, the Majority has not used this mystifying delay as an opportunity to rectify its wrongs—even though Mr. Scott Sheffield, a former director and executive of Pioneer, submitted a comment that casts doubt on

[1] Joint Dissenting Statement of Comm'r Melissa Holyoak and Comm'r Andrew N. Ferguson, *In re ExxonMobil Corp.*, Comm'n File No. 241-0004 (May 2, 2024) [hereinafter Holyoak & Ferguson Exxon Dissent].
[2] *See* Agreement Containing Consent Order, *In re Exxon Mobil Corp.*, Comm'n File No. 241-0004 (May 1, 2024); Decision & Order, *In re Exxon Mobil Corp.*, Comm'n File No. 241-0004 (May 1, 2024) [hereinafter Exxon Order].
[3] Dissenting Statement of Commissioner Melissa Holyoak, *In re Chevron Corp. & Hess Corp*., Comm'n File No. 241-0008 (Sep. 30, 2024) [hereinafter Holyoak Chevron Dissent]. I also voted today to reject the finalization of the Decision and Order that resolves the merger of Chevron and Hess. I dissented from the issuance of the complaint and consent agreement for the reasons specified in my dissent at that time. *Id.* My views have not changed with respect to the flawed nature of the complaint and consent in Chevron/Hess—views that continue to apply to my decision to vote against today's finalization of the Decision and Order.
[4] 16 C.F.R. § 2.34(c) ("Promptly after its acceptance of the consent agreement, the Commission will place the order contained in the consent agreement, the complaint, and the consent agreement on the public record for a period of 30 days, or such other period as the Commission may specify, for the receipt of comments or views from any interested person. At the same time, the Commission will place on the public record an explanation of the provisions of the order and the relief to be obtained thereby and any other information that it believes may help interested persons understand the order. The Commission also will publish the explanation in the Federal Register.").

much of the Majority's Complaint.[5] Instead, the Majority has taken *six months* to rubber stamp its original failings—demonstrating the Commission's embarrassing mismanagement and the Majority's willingness to disregard the law in response to political pressure.[6] From my perspective, it appears the Majority has ended its delay only as part of its last-minute salvo to execute its agenda before the inauguration. I dissent.

Section 7 of the Clayton Act condemns acquisitions where "the effect of such acquisition may be substantially to lessen competition."[7] The Complaint rests upon a theory of anticompetitive coordinated effects to satisfy these statutory requirements.[8] But as I have explained previously, alleged past efforts by Mr. Sheffield to suggest (or even attempt) coordination are insufficient to plausibly allege anticompetitive effects from this acquisition for several reasons: (1) Exxon and Pioneer's combined share in the alleged global market—and market concentration metrics generally—falls way below any level of concentration that would be conducive to coordination;[9] (2) the merger does not eliminate a maverick;[10] (3) nothing in the Complaint suggests a post-merger change in incentives that would make the global market conducive to coordination;[11] and (4) one of twelve board members will likely be less able to orchestrate coordination than could that same individual when he was a chief executive officer (and never coordinated the market).[12] With these egregious failings, the Complaint does not provide even an "ephemeral possibilit[y]" of harm,[13] let alone a "reason to believe" the law has been violated.[14]

Of course, the Majority does not rely on this Complaint in a litigated case, nor would I ever ask staff to defend such allegations in court. But just because a consent agreement accompanies a Complaint it does not excuse our statutory requirement to only vote out complaints when we have reason to believe the law has been violated.[15] As I have said before: "Because so many of the Commission's cases settle without litigation, the Majority has the luxury of advancing unsound legal theories below the radar. However the Majority wants to move the law, it cannot do so by manufacturing change through some fictitious body of extracted settlements."[16]

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[5] Comment on Behalf of Scott Sheffield, *In re ExxonMobil Corp.*, Comm'n File No. 241-0004 (May 28, 2024) [hereinafter Sheffield Comment].
[6] Holyoak Chevron Dissent at 1-2 (discussing political pressure from U.S. Senate).
[7] 15 U.S.C. § 18.
[8] *See, e.g.*, Compl., *In re Exxon Mobil Corp.*, Comm'n File No. 241-004, ¶¶ 7-8 (May 1, 2024) [hereinafter Compl.]. The Complaint has nothing to do with allegations of collusion (or even invitations to collude) under the Sherman Act.
[9] Holyoak & Fergusson Exxon Dissent at 2.
[10] *See* Holyoak Chevron Dissent at 3. As with Hess, Sheffield was the alleged coordinator and not the maverick being removed by the acquisition.
[11] *Id.* at 2-3. As I have said, "Focusing merely on an individual's conduct—without allegations about the incentives of [the post-merger entity] and all the other firms in the industry—does not amount to a plausible pleading of coordinated effects." *Id.* at 3.
[12] *See Id.* at 3. To be clear, the Majority's complaint *never* suggested that Mr. Sheffield ever actually coordinated anything, even as the CEO of Pioneer.
[13] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).
[14] 15 U.S.C. § 45(b).
[15] *Id.*
[16] Holyoak Chevron Dissent at 4; *see also* Statement of Comm'r Andrew N. Ferguson, Concurring in Part and Dissenting in Part, *In the Matter of Grubhub, Inc.*, Comm'n File No. 2023157 at 6 (Dec. 17, 2024) ("This maneuver furthers the majority's regrettable practice of advancing its most aggressive and novel theories in cases no judge will decide, while retreating to the motte any time a judge will get a say.").

Mr. Sheffield's public comment somehow manages to make the Complaint—despite its many failings—even more embarrassing for the Commission than it appeared back in May of 2024. His comment alleges that the Majority relied upon a "false narrative"[17] to condemn the proposed transaction and Mr. Sheffield personally. *First*, Mr. Sheffield argued that the Complaint misunderstood the meaning of "capital discipline" as used by Mr. Sheffield and the oil industry.[18] Rather than some sort of nefarious output reduction, "capital discipline" refers to a strategy by Pioneer to attract and retain investors. "Pioneer reduced its operating and capital costs and changed its capital framework in 2019 so that it would return free cash flow to shareholders in the form of buybacks and dividends, which are themselves important differentiators in evaluating companies in capital markets, while still continuing to grow oil production."[19] Mr. Sheffield argues that this observation changes the context and the meaning of many of the communications cited in the Complaint.[20] One such example from the Complaint was a statement by Mr. Sheffield that "all the shareholders that I've talked to said that if anybody goes back to growth, they will punish those companies."[21] Based upon this corrected context, Mr. Sheffield contends that the statement does not suggest attempted collusion by rivals, but rather an observation by an executive about shareholder behavior.

Second, the comment explains that some of the Complaint's allegations were based upon lawful petitioning by Mr. Sheffield to the Texas Railroad Commission (TRRC).[22] Mr. Sheffield explains that because of the COVID pandemic and other market conditions in 2020, oil reached negative prices—causing many companies to declare bankruptcy.[23] In response, Pioneer retained counsel to petition the TRRC to take excess barrels of oil off the market.[24] The TRRC, in a vote of two-to-one by its Commissioners, denied Pioneer's request.[25] Despite the constitutional right to petition, the Commission emphasized Mr. Sheffield's involvement in the petition process as evidence to support its allegations that Mr. Sheffield attempted coordination.[26] I agree with Mr. Sheffield that "[i]t should be a matter of great public concern that the FTC would cite what is clearly protected government petitioning in support" of its allegations against Mr. Sheffield.[27] Again, this context further undermines the Complaint's allegations.

Third, Mr. Sheffield disputes the Complaint's allegations that he had "voluminous" contacts with OPEC officials.[28] He argues that his contacts were much more limited, reflecting sporadic contact at conferences, group dinners, and a few text messages, sometimes with multi-year gaps between contact with individuals.[29] Such contact is far less frequent than would be expected by a central figure allegedly coordinating with OPEC, the world's most well-known output-fixing cartel that has damaged oil customers for decades.

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[17] Sheffield Comment at 2.
[18] *Id.* at 9-15.
[19] *Id.* at 10.
[20] *Id.* at 13-15.
[21] Compl. ¶¶ 4, 27; *see* Sheffield Comment at 13.
[22] Sheffield Comment at 15-19.
[23] *Id.* at 15-16.
[24] *Id.* at 16.
[25] *Id.* at 18.
[26] *Id.* (quoting Compl. ¶ 31).
[27] *Id.*
[28] *Sheffield Comment* at 20-21.
[29] *Id.*

Fourth, Mr. Sheffield contends that Pioneer has "doubled its production and become the largest producer in the Permian Basin."[30] He also notes that "[t]he United States is now producing more oil than any country ever has."[31] The fact that Pioneer, the Permian Basin, and the United States have all dramatically increased output makes it unlikely that Mr. Sheffield, through Pioneer, orchestrated U.S.-based coordination in the alleged global market. At a minimum, increased production suggests that even if Mr. Sheffield had tried to coordinate, he was bad at it, making it extraordinarily difficult for me to find reason to believe that his appointment to Exxon's board would result in a substantial lessening of competition.

The factual failings alleged by Mr. Sheffield's comment—as substantively concerning as they are—are exacerbated by the process failings that the Majority embraced in this investigation. Mr. Sheffield explained that even though he testified under oath for four hours during an investigational hearing with staff, staff did not ask him "about the communications cited in the Complaint."[32] As made evident in Mr. Sheffield's comment, and explained above, additional context for some of the communications cited in the Complaint affect their meaning and, therefore, the legitimacy of the Complaint's allegations. Equally troubling, despite being singled out and maligned in the Complaint, Mr. Sheffield explains that "[t]he FTC did not engage with Mr. Sheffield's counsel on the substance of the allegations in the Complaint or give [them] an opportunity to provide feedback on the Complaint."[33] Whatever *ex ante* strategy decisions or extenuating circumstances may have driven staff actions during the investigation has no bearing at this juncture—because of the comment process required by our Rules the Commission can correct any oversights, though the Majority refuses to do so.

The Majority provided three responses to Mr. Sheffield's comment in a letter to his counsel.[34] *First*, the letter contends that the factual arguments made my Mr. Sheffield "are not always consistent with Mr. Sheffield's written communications" and that "context" of the communications support the allegations in the Complaint that Mr. Sheffield "worked to organize anticompetitive output reductions."[35] I do not share the Majority's dismissive interpretation of the concerns raised by Mr. Sheffield. And as I have explained, the factual interpretations and context of the Complaint, as written, did not provide reason to believe that the law had been violated. Any shade that Mr. Sheffield's comment casts on the Complaint—which I consider to be substantial—further undermines the Complaint.

Second, the letter *does not* dispute that Mr. Sheffield's petitioning to the TRRC was protected speech but argues that such speech can be used to "support the Commission's complaint."[36] I find the Majority's indifference toward First Amendment rights deeply troubling.

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[30] *Id.* at 3.
[31] *Id.*
[32] *Id.* at 22. Mr. Sheffield explains that "company counsel invited the FTC to ask Mr. Sheffield about these communications if the FTC was interested in them." *Id.*
[33] *Id.* As reflected in the Majority's letter responding to Mr. Sheffield's comment, there is some dispute about engagement on the Complaint.
[34] Letter from April J. Tabor, Secretary, Fed. Trade Comm'n, to David I. Gelfand et al., Counsel to Mr. Sheffield, *In re Exxon Mobil Corporation*, Doc. No. 2024-10731 (Jan. 2025) [hereinafter Letter to Sheffield].
[35] *Id.* at 3.
[36] *Id.*

Lawful petitioning of one government agency *should not* be the basis of presuming that Mr. Sheffield is—and will continue to be—a lawless colluder under the antitrust laws. I find such reasoning nonsensical. The Majority's letter also asserts that including Mr. Sheffield's communications in the complaint does not violate his First Amendment rights.[37] This is entirely beside the point. Again, the concern is that the Majority uses past lawful conduct to presume lawless conduct will occur in the future.

Third, the Majority's letter contends that Mr. Sheffield was not deprived of due process because he is not a party to the agreement, he had advance notice of the contents of the Complaint and chose not to engage, and the timing constraints were dictated by Exxon and Pioneer.[38] The Majority elevates form over substance. Mr. Sheffield's name appears *47 times* in an *eight-page* redacted Complaint.[39] The Majority repeatedly maligned him as the central figure in a cartel, and then performed a victory dance on his metaphorical grave in its press release, stating "it [is] crystal clear that [Mr. Sheffield] should be nowhere near Exxon's boardroom. American consumers shouldn't pay unfair prices at the pump simply to pad a corporate executive's pocketbook."[40] And then, of course, the central—and almost sole—purpose of the Consent was to make sure Mr. Sheffield would never serve on Exxon's board.[41] Despite all this, the Majority's letter now ineffectively hides behind the caption that names only Exxon.

I also find it ironic that the Majority—which so frequently decries the abuses that large parties impose upon small parties[42]—happily defers to Exxon's incentives while disregarding the

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[37] *Id.*
[38] *Id.* at 2-3.
[39] Compl. ¶¶ 1-46.
[40] Fed. Trade Comm'n, Press Release, FTC Order Bans Former Pioneer CEO from Exxon Board Seat in Exxon-Pioneer Deal (May 2, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/05/ftc-order-bans-former-pioneer-ceo-exxon-board-seat-exxon-pioneer-deal (mentioning Mr. Sheffield by name ten times).
[41] *See* Exxon Order at § II.
[42] *See, e.g.*, Statement of Comm'r Alvaro M. Bedoya, Joined by Chair Lina M. Khan and Comm'r Rebecca Kelly Slaughter, *In the Matter of Southern Glazer's Wine and Spirits, LLC*, Comm'n File No. 211-0155 (Dec. 12, 2024) ("The Commission is suing Southern so that small, family-run grocery and liquor stores can get the same prices as their billionaire competitors."); "Returning to Fairness," Prepared Remarks of Comm'r Alvaro M. Bedoya, Fed. Trade Comm'n, Midwest Forum on Fair Markets, https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf (Sep. 22, 2022) (discussing harm by large firms upon small and independent firms); Statement by Acting Chairwoman Rebecca Kelly Slaughter on Agency's Decision not to Petition Supreme Court for Review of Qualcomm Case (Mar. 29, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/statement-acting-chairwoman-rebecca-kelly-slaughter-agencys-decision-not-petition-supreme-court ("Now more than ever, the FTC and other law enforcement agencies need to boldly enforce the antitrust laws to guard against abusive behavior by dominant firms, including in high-technology markets and those that involve intellectual property."); Memorandum from Chair Lina M. Khan to Commission Staff and Commissioners, *Vision and Priorities for the FTC* (Sep. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf ("[W]e need to address rampant consolidation and the dominance that it has enabled across markets. This will require both finding ways to strengthen our merger enforcement work as well as generally focusing our resources on scrutinizing dominant firms, where lack of competition makes unlawful conduct more likely."); Brian Contreras, *FTC Chair Lina Khan Says Antitrust Regulations Help Small Businesses Too*, Inc. (Sep 20, 2024), https://www.inc.com/brian-contreras/ftc-chair-lina-khan-says-antitrust-regulations-help-small-businesses-too.html ("Dominant firms have been gaining power and been able to exercise that power in ways that [are] concretely and materially harming the American people." (quoting Chair Khan) (brackets in original)); Lina M. Khan, *The Ideological*

interests of an individual.[43] Exxon and its shareholders, rightfully so, had revealed incentives to close its $64.5 billion transaction. These incentives likely far outweighed Exxon's incentives to protect Mr. Sheffield, a mere potential Exxon board member from another *much* smaller company. In short, despite expressions otherwise, the Majority has revealed that they are willing to align with and support the interests of large companies—at the expense of individuals—when it allows them to coerce a consent that appeases political pressure.

As for the timing concerns, the Majority again relies upon Exxon as a scapegoat. No doubt, merger investigations move very quickly,[44] but the HSR Act dictates the speed at which merger investigations move and the Commission has been navigating statutory timelines for nearly 50 years for thousands of transactions per year.[45] Such timelines fail to excuse the Majority's Complaint in this case.

The Majority's Complaint was woefully inadequate. Mr. Sheffield's comment illuminates the failings of the Complaint. There is no reason to believe that Section 7 has been violated, which invalidates any justification for the order. Today's vote should vacate the order, but instead the Majority's pre-inauguration swan song disregards the public interest. As the new administration replaces the old, the public interest considerations will be more than lip service, and the continuing viability of this order should be scrutinized.[46]

Roots of America's Market Power Problem, 127 YALE L. J. F. 960, 961 (2018) ("Dominant firms' economic power allows them, in turn, to concentrate political power, which they then use to win favorable policies and further entrench their dominance").

[43] The Majority's letter makes much of the fact that Mr. Sheffield "voluntarily" relinquished his candidacy as a member of Exxon's board. Letter to Sheffield at 2. Based upon my understanding, Mr. Sheffield did not "voluntarily" relinquish his right. And if his comment letter did not make this clear, my understanding of the facts suggests that any indication of voluntarily relinquishment preceded a complaint, consent order, and press release that maligned Mr. Sheffield. I also question to what extent the Majority's posture and Mr. Sheffield's fiduciary duties impacted any "voluntary" behavior.

[44] The speed certainly requires Commission staff to make strategy decisions based upon imperfect or asymmetrical information.

[45] Except for 2009, more than one thousand transactions have been reported under the HSR Act in every single year since 1982. *See, e.g.*, FED. TRADE COMM'N & U.S. DEP'T OF JUST., THIRTEENTH ANNUAL REPORT TO CONGRESS PURSUANT TO SECTION 201 OF THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, at Appendix B (Fiscal Year 1990); FED. TRADE COMM'N & U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT, at 1, Figure 1 (Fiscal Year 2014); FED. TRADE COMM'N & U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT, at 1, Figure 1 (Fiscal Year 2023). There were 4,926 transactions reported in 2000, the highest number of filings in a fiscal year in the history of the HSR Act. FED. TRADE COMM'N & U.S. DEP'T OF JUST., ANNUAL REPORT TO CONGRESS FISCAL YEAR 2005, at 2 Figure 1 (2005).

[46] *See* 15 U.S.C. § 45(b) ("[T]he Commission may . . . reopen and alter, modify, or set aside, in whole or in part any report or order . . . , whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . .").