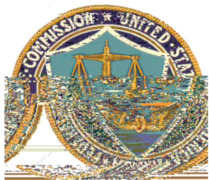

Office of Commissioner
Andrew N. Ferguson

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

Dissenting Statement of Commissioner Andrew N. Ferguson

In the Matter of Chevron Corporation and Hess Corporation
Commission File No. 241-0008

September 30, 2024

The Commission today authorizes the filing of an administrative complaint and proposed decision and order against Chevron Corporation and Hess Corporation. The Complaint alleges that Chevron's proposed $53 billion acquisition of Hess Corporation would violate Section 7 of the Clayton Act.[1] The Complaint does not plead a traditional Section 7 theory because the Commission has none. Chevron and Hess together have a two percent share of the relevant market.[2] No court has ever blocked a merger between comp(e r)-1 (el)aC0iw.00om th shh s melt 4hNamstr

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—Hess Corporation's

Chevron's twelve-member board of directors turns an unobjectionable merger into a

The Commission's Section 7 theory does not hold water. It rests on a series of implausible and unsupported assumptions that fall well short of pleading a violation of the Clayton Act. But it does satisfy a constituency important to the Commission majority—Democratic politicians who have repeatedly and publicly urged the Commission to block this merger in order to advance their climate agenda.[7] Bending Section 7 to political pressure is incompatible with the rule of law. I therefore dissent from the filing of the Complaint.

I

First, the majority necessarily assumes that Mr. Hess would continue his communications with OPEC representatives after joining Chevron's board. If that were not the case, then the transaction would be at worst competitively neutral or even pro-competitive insofar that Mr. Hess's previous communications were injurious to competition.[8] This assumption is utterly implausible.

director had any potentially unlawful discussions with OPEC officials. In fact, one private lawsuit against Hess Corporation specifically alleges that Chevron rejected OPEC's calls for constrained output in favor of increased production.[11] But for the proposed order, Mr. Hess would become a director of Chevron. He would then be subject to Chevron's direction, and Chevron's incentive to prevent its officers and directors from cavorting with OPEC officials would apply to Mr. Hess. The Commission's assumption that Mr. Hess's behavior as a Chevron board member would be identical to his behavior as Hess Corporation's CEO is not only implausible; the only plausible inference is precisely the opposite.

Second, the majority must also assume that Mr. Hess's post-merger behavior would have a sufficiently major effect on global oil markets "substantially to lessen competition or tend to create a monopoly."[12] [illegible]

Section 7 does not forbid disquieting conduct.[20] It forbids transactions "the effect" of which "may be substantially to lessen competition, or to tend to create a monopoly."[21] Nothing in the Commission's Complaint suggests that this transaction will have such an effect. The Commission should not twist Section 7 into knots to get at Mr. Hess's alleged conduct.

II

Neither judicial nor Commission precedent supports the Complaint's theory of Section 7. The only time we have ever posited this sort of theory before was in a recent unlitigated settlement complaint involving the merger of Exxon Corporation and Pioneer Natural Resources Company.[22] And we did so over my dissent.[23] I cannot imagine that the majority Commission would ever risk litigating a Section 7 claim involving two percent shares of the market simply because of one potential director's speeches and texts. I therefore doubt that the Commission will ever risk letting the courts review the interpretation of Section 7 embodied in today's Complaint.

It is not a coincidence that the Commission has trotted out this theory only in settlements. I have lamented repeatedly that the majority has a penchant for pressing far-fetched, novel theories in complaints it knows will not be litigated, and relying on those unadjudicated complaints as a form of precedent for subsequent Commission action.[24] No court should give this consent, or its equally lawless predecessor in Exxon-Pioneer, any precedential value.[25] Unadjudicated complaints tell us nothing about the law. This Complaint is an accusation leveled by three Commissioners, nothing more.[26]

One might wonder why I object to a complaint that the merging parties are voluntarily settling. The Complaint is the Commission's statement of what Section 7 means. I believe that statement to be woefully incorrect and therefore cannot join it. And the fact of settlement should lend no credibility to the majority's outlandish interpretation of Section 7.

hold up Chevron and Hess's $53 billion dollar merger even though the lack of a plausible Section 7 theory had long been obvious. And yes, the parties could have told the Commission to make their day and file a lawsuit. But that lawsuit would cause months of delay and cost countless millions of dollars in legal fees. The merging parties surely would have prevailed on this Section 7 claim, but the victory could very well have been Pyrrhic if market conditions changed in the intervening months. They therefore rationally took the quick and easy path opened to them by this consent agreement. For Hess Corporation's shareholders, the consent is all upside: with the merger cleared, they will soon get paid. And for Chevron's shareholders, the benefit is clear and the cost is minimal: a valuable asset in exchange for keeping one person off of the board of directors.

The Commission majority and the Democratic politicians who urged them on will hail today's Complaint and proposed order as a victory. Those politicians have loudly urged the Commission to block this merger, and today the Commission majority can pretend it delivered, even as it allows the merger to proceed.[29] Fawning press coverage will surely follow—a nice bonus for the Democrats as voters head to the polls to pick the next President. The American public rightly loathes OPEC and has little affection for its perceived friends. Few apart from seasoned antitrust practitioners will look under the hood of the Commission's antitrust theory. The Commission will tout this modest, coerced settlement as a "win" and add it to the list of "wins" it uses to calculate a supposed "90% win rate."[30]

But this settlement is not a victory for the rule of law. "A settlement extracted from an innocent party reveals much about the Commission's power, but nothing about the law."[31] The Commission's power under the Hart-Scott-Rodino Act is considerable and coercive. We do not approve or forbid mergers, but we may sue to block them. Lawsuits are expensive and time-consuming, and the mere risk of an enforcement action can make an otherwise valuable transaction too costly to pursue.[32] Our gatekeeping function therefore gives us the power to exact tolls on merging parties even if our legal theory is bunk.[33] The risk, time, and expense associated with convincing a judge that the Commission's theory is bunk is coercive enough that merging parties will pay for the Commission to go away. But such a settlement does not vindicate the rule of law. It is instead a sort of tax on mergers made possible by the fact that Congress has made the Commission a merger gatekeeper.

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Today, two merging companies pay a toll to pass through the Hart-Scott-Rodino gate. They do not pay the toll because Section 7 requires it. Nothing in Section 7 requires Mr. Hess to stay off

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[29] See *supra* note 7.
[30] See Douglas Farrar, X, (Sept. 13, 2024), https://x.com/DouglasLFarrar/status/1834727643171733651 ("FTC Chair Khan has won more than 90% of her lawsuits") (quoting remarks of Rep. Alexandria Ocasio-Cortez).
[31] *In re Asbury*, supra note 24, at 3.
[32] *Id.* at 4 ("That a firm may break this cycle by litigating is no answer to my objection. For most small businesses—and many large ones—a Commission investigation is costly. Lawyers are expensive, and investigations sometimes last for years. Litigation may take many years more. The mere risk of a Commission investigation is coercive and can be enough to force some businesses to yield.").
[33] See Joint Dissenting Statement of Melissa Holyoak, Comm'r, Fed. Trade Comm'n, and Andrew N. Ferguson, Comm'r, Fed. Trade Comm'n, *In re ExxonMobil Corp.*, FTC Matter No. 241 0004 (May 1, 2024).

the Chevron board. They pay the toll because the Commission has threatened to make their lives difficult if they do not, and they have concluded that it is easier to pay than to resist. The Commission collects the toll and proclaims victory. But reducing antitrust enforcement to a pay-for-peace racket inflicts serious injury on the rule of law—and on the Commission's credibility.