

FEDERAL TRADE COMMISSION DECISIONS

**FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2001 TO JUNE 30, 2001**

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**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD JANUARY 1, 2001 TO JUNE 30, 2001**

TIMOTHY J. MURIS, *Chairman*
Took oath of office June 4, 2001.

ROBERT PITOFSKY, *Chairman**
Took oath of office April 12, 1995.

SHEILA F. ANTHONY, *Commissioner*
Took oath of office September 30, 1997.

MOZELLE W. THOMPSON, *Commissioner*
Took oath of office December 17, 1997.

ORSON SWINDLE, *Commissioner*
Took oath of office December 18, 1997.

THOMAS B. LEARY, *Commissioner*
Took oath of office November 17, 1999.

DONALD S. CLARK, *Secretary*
Appointed August 28, 1998.

*Resigned, effective May 31, 2001.

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Complaint

IN THE MATTER OF

R.S. of HOUSTON WORKSHOP, ET AL.

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

Docket C-3994; File No. 0023024

Complaint, January 12, 2001--Decision, January 12, 2001

This consent order addresses representations by Respondent R.S. of Houston Workshop, a company, and Respondents Ronald J. Schoemmell and Valdimar Thorkelsson, owners and principals of the company, concerning the earnings and profit potential, and the extent of risk involved, in using the respondents' trading methods -- embodied in a training program they sell on the Internet -- for the daily buying and selling of stocks ("day trading"). The order, among other things, requires the respondents to have a reasonable basis substantiating any representation that users of their day trading program can reasonably expect to earn large profits, or as much as \$2,000 to \$5,000 per day on some days; to earn profits of \$500 to \$750 or more per day; to approach trading as a business and earn a consistent living from the markets; and to trade in volatile markets with low risk. The order also prohibits the respondents from misrepresenting that users of any trading program can reasonably expect to trade with little or no financial risk, and from misrepresenting the extent of risk to which users of any such program are exposed. In addition, the order requires the respondents to disclose, clearly and conspicuously, that "DAYTRADING involves HIGH RISKS and YOU can LOSE a lot of money.," in close proximity to any representation they make about the financial benefits of any trading program.

Participants

For the Commission: *Peter Lamberton, Stephen Gurwitz, and Eileen Harrington.*

For the Respondents: *Robert J. Becerra, Raskin & Raskin, P.A.*

COMPLAINT

The Federal Trade Commission, having reason to believe that R.S. of Houston Workshop, a company; Ronald J. Schoemmell, individually and as an owner and principal of the company; and Valdimar Thorkelsson, individually and as an owner and principal

Complaint

of the company ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent R.S. of Houston Workshop is an unincorporated entity, a d/b/a of Valdimar Thorkelsson, who filed a Certificate of Operation Under Assumed Name on November 17, 1997, in Harris County, TX ("company"), with its principal office or place of business at 1419 Diamond Brook Drive, Houston, TX 77062.
2. Respondent Ronald J. Schoemmell is a fifty percent owner and principal of the company respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of R.S. of Houston Workshop.
3. Respondent Valdimar Thorkelsson is a fifty percent owner and principal of the company respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of R.S. of Houston Workshop.
4. Respondents have advertised, offered for sale, sold, and distributed trading programs, trading methods and training to the public. Respondents advise their clients to buy and sell stocks on a daily basis. Respondents sell their program, method and training through their Internet Web site, www.rsofhouston.com.
5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
6. Respondents have disseminated or have caused to be disseminated Internet advertisements for their trading program or trading method and training, including but not necessarily limited

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to the attached Exhibit A, pages 1 through 4. These advertisements contain the following statements:

“CAN TRADING REALLY BE MADE SIMPLE AND PROFITABLE? You Bet! Stop making trading more difficult than it should be. Let us show you how 4 incredibly simple techniques unlock the profit of the markets. So simple you will be amazed. You will say, “How did I never see this before , so simple yet so profitable?”

“This is your BEST chance of succeeding at trading. Let us show you what will last you a lifetime of profitable and enjoyable trading.”

“Our method loves the volatility and we will show you how to trade these markets with LOW RISK.”

“Trade a few hours in the evening or early AM and profit nicely.”

“A more reasonable expectation is to average between \$500-\$750 pr. contract/day and look to make \$2,500-\$3,500 pr. contract/week. Of course you will have days when you make \$2,000, \$3,000 or even \$5,000 but you won’t be able to do that all the time. This is what the RS of Houston methodology is about, going for small consistent wins and hitting the occasional home run. This enables you to approach trading as a business and earn a consistent living from the markets.”

“The RS of Houston methodology for trading works especially well for daytrading the S&P 500 due to its high intraday volatility. The methodology is also quite effective on several other markets in a daily time frame.”

7. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that:

Complaint

- a. That users of respondents' trading program or trading method can reasonably expect to earn large profits, or as much as \$2,000 to \$5,000 per day on some days;
 - b. That users of respondents' trading program or trading method can reasonably expect to earn profits of \$500 to \$750 or more per day;
 - c. That users of respondents' trading program or training method can reasonably expect to approach trading as a business and earn a consistent living from the markets;
 - d. That users of respondents' trading program or trading method can reasonably expect to trade in volatile markets with low risk;
 - e. Testimonials appearing in the advertisements for respondents' trading program or trading method reflect the typical or ordinary experience of members of the public who use the program or method.
8. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.
9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.
10. Through the means described in Paragraph 6, respondents have represented, expressly or by implication that users of respondents' trading program or trading method can reasonably expect to trade with little financial risk.

Complaint

11. In truth and in fact, users of respondents' trading program or trading method cannot reasonably expect to trade with little financial risk. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twelfth day of January 2001, has issued this complaint against respondents.

EXHIBIT A

RS OF HOUSTON WORKSHOP

THE SIMPLE AND PROFITABLE WAY TO TRADE

SIMPLY REGISTER FOR YOUR 2 FREE REPORTS

LATEST UP TO DATE REAL LIFE TESTIMONIALS

CAN TRADING REALLY BE MADE SIMPLE AND PROFITABLE?

You Bet!! Stop making trading more difficult than it should be. Let us show you how 4 incredibly simple techniques unlock the profit of the markets. So simple you will be amazed. You will say, "How did I never see this before, so simple yet so profitable?"

Just imagine, NO MORE lagging indicators, diverging oscillators, cycles, waves, channels, Gann, ellipses, pitchforks, astrology etc. NOTHING - JUST THE PRICE CHART ITSELF .

These techniques have worked since the markets have been in existence. Why? Because it is the market ITSELF telling you where it's going (or wants to go).

This is your BEST chance of succeeding at trading. Let us show you what will last you a lifetime of profitable and enjoyable trading. 90% of traders use the same old tired indicators and 90% of traders lose money !! Maybe there is a correlation?

To profit in the markets you need to be doing something different. Get rid of all the curve-fitted, over-optimized garbage proliferated in current trading education programs and mechanical trading software. You know what we're referring to, the stuff that only works in hindsight and then falls apart when your money is on the line.

OUR APPROACH IS WHAT YOU HAVE BEEN SEARCHING FOR. IT'S ALL YOU NEED, INCLUDING COMPLETE RULES FOR MONEY AND TRADE MANAGEMENT.

Have you quit or shied away from trading the volatile markets we have seen lately? If you have, you are missing out on great opportunity for profits. Our method loves the volatility and we will show you how to trade these markets with LOW RISK. Let 1999 be your breakout year.

GOOD NEWS: YOU DON'T HAVE TO GIVE UP YOUR DAY JOB TO "DAYTRADE" !

The markets are now open round the clock. If you have a full time job and always wanted to daytrade, but couldn't , NOW IS YOUR CHANCE. Trade a few hours in the evening or early AM and profit nicely. You pick the time to match your schedule. We will show you how.

HOME STUDY COURSE or ON-SITE TRAINING the choice is yours.

COME LEARN AND WATCH US TRADE OUR MONEY FOR REAL!!

NOW'S THE TIME TO GO FOR IT IN 1999.

R. S. of Houston
Exhibit A, p. 1 of 4

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LONG BEACH, CALIFORNIA
HILTON LONG BEACH HOTEL
OCTOBER 1-3, 1999

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Trading!**

Learn the strategies and secrets of
over 30 superstar trading wizards!



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Smart Web Tips
www.smartwebtips.com

RS OF HOUSTON WORKSHOP

THE SIMPLE AND PROFITABLE WAY TO TRADE

Dear Trader,

We appreciate your interest in the RS of Houston Short-term and Daytrading Workshop. We are confident that you will benefit greatly from our workshop and it will improve your trading. We do not make outrageous unsubstantiated claims to appeal to your greed and give you false hopes, but do tell you what we believe is realistically possible. Furthermore, we pledge to work with you as long as it takes for you to master the methodology.

Anyone can trade a chart with 20/20 hindsight and make a ton of money on paper, but it's a whole different ball game when those price bars are coming at you from the hard-right edge of the screen and the patterns are unfolding in real-time. In our workshop you will learn the RS of Houston methodology and observe RS and his trading partner trading the S&P500 futures live and be able to follow their thought process as they analyze the market. Win, lose or draw, the results are there for everyone to see. This is a course for traders, developed by traders who put their money where their mouth is and practice what they preach.



We don't pretend to only pick winners. There will be losing trades and losing days, but that is all part of trading. Our philosophy is that you can't expect to consistently make \$1,000-\$1,500 pr. day in the markets (at least not on a one-lot), contrary to what some vendors would have you believe. A more reasonable expectation is to average between \$500-\$750 pr. contract/day and look to make \$2,500-\$3,500 pr. contract/week. Of course you will have days when you make \$2,000, \$3,000 or even \$5,000 but you won't be able to do that all the time. This is what the RS of Houston methodology is about, going for small consistent wins and hitting the occasional home run. This enables you to approach trading as a business and earn a consistent living from the markets.

The RS of Houston methodology for trading works especially well for daytrading the S&P 500 due to its high intraday volatility. The methodology is also quite effective on several other markets in a daily timeframe. This will all be explained in the workshop with suggestions for short-term traders who wish to trade the "dailies"

Please take the time to examine our web site carefully, if after reviewing the material you feel that the RS of Houston Workshop might be something for you, contact us as soon as possible to reserve your space in one of the upcoming workshops. Space is limited and we expect them to fill up quickly.

Sincerely,
Valdi Thorkelsson.

(The CFTC requires that we state: THERE IS A RISK OF LOSS IN FUTURES TRADING)

 
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R. S. of Houston
Exhibit A, p. 3 of 4



[E-mail us](#)

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Last revision 7/3/99
Site designed & developed by:
Smart Web Tips
www.smartwebtips.com

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the aforementioned executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent R.S. of Houston Workshop is an unincorporated entity, a d/b/a of Valdimar Thorkelsson, who filed a Certificate of Operation Under Assumed Name on November 17, 1997, in Harris County, TX (“company”), with its principal office or place of business at 1419 Diamond Brook Drive, Houston, TX 77062.
2. Respondent Ronald J. Schoemmell is a fifty percent owner and principal of the company respondent. Individually or in concert with

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others, he formulates, directs, or controls the policies, acts, or practices of the company. His principal office or place of business is the same as that of R.S. of Houston Workshop.

3. Respondent Valdimar Thorkelsson is a fifty percent owner and principal of the company respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the company. His principal office or place of business is the same as that of R.S. of Houston Workshop.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however*, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in

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print that contrasts with the background against which it appears.

- C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. In the case of advertisements disseminated by means of an interactive electronic medium such as the Internet or other online services, "in close proximity" shall mean on the same Web page and proximate to the triggering representation, and not on other portions of the Web site, accessed or displayed through hyperlinks or other means.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Trading program" or "trading method" shall mean any program, method, service, course, instruction, system, training, manual, computer software, or other materials involving the purchase or sale of stocks, currencies, commodity futures, options, or other financial instruments or investments.

5. Unless otherwise specified, "respondents" shall mean R.S. of Houston Workshop, a company, its successors and assigns and its officers, owners and principals; Ronald J. Schoemmell, individually and as a fifty percent owner and principal of the company; and Valdimar Thorkelsson, individually and as a fifty percent owner and principal of the company; and each of the above's agents, representatives, and employees.

Decision and Order

I.

IT IS ORDERED that respondents, directly or through any company, corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program or trading method, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That users of respondents' trading program or trading method can reasonably expect to earn large profits, or as much as \$2,000 to \$5,000 per day on some days;
- B. That users of respondents' trading program or trading method can reasonably expect to earn profits of \$500 to \$750 or more per day;
- C. That users of respondents' trading program or trading method can reasonably expect to approach trading as a business and earn a consistent living from the markets;
- D. That users of respondents' trading program or trading method can reasonably expect to trade in volatile markets with low risk;
- E. The amount of earnings, income, or profit that a prospective user could reasonably expect to attain; or
- F. Any financial benefit or other benefit of any kind from the purchase or use of such trading program or trading method;

unless respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made.

II.

IT IS FURTHER ORDERED that respondents, directly or through any company, corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion,

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offering for sale, sale, or distribution of any trading program or trading method, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication,

- A. That users of the program or method can reasonably expect to trade with little or no financial risk; or
- B. The extent of risk to which users of the program or method are exposed.

III.

IT IS FURTHER ORDERED that respondents, directly or through any company, corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program or trading method, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the financial benefits of such program, unless they disclose, clearly and conspicuously, and in close proximity to the representation,

"DAYTRADING involves high risks and YOU can LOSE a lot of money."

Provided, the disclosure required by this Part is in addition to, and not in lieu of, any other disclosure that respondents may be required to make, including but not limited to any disclosure required by state or federal law or by a self-regulatory organization. The requirements of this Part are not intended to, and shall not be interpreted to, exempt respondents from making any other disclosure.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any company, corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program or trading method, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented

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by any user, testimonial or endorsement of the trading program or trading method represents the typical or ordinary experience of members of the public who use the trading program or trading method unless:

- A. Respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made; or
- B. Respondents disclose, clearly and conspicuously, and in close proximity to the endorsement or testimonial, either:
 - 1. what the generally expected results would be for users of the trading program or trading method, or
 - 2. the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

V.

IT IS FURTHER ORDERED that respondent R.S. of Houston Workshop, and its successors and assigns; respondent Ronald J. Schoemmell; and respondent Valdimar Thorkelsson shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials (including packaging) containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon

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for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent R.S. of Houston Workshop, and its successors and assigns; respondent Ronald J. Schoemmel; and respondent Valdimar Thor kelsson shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Commission for inspection and copying each such signed and dated statement for a period of five (5) years after creation.

VII.

IT IS FURTHER ORDERED that respondent R.S. of Houston Workshop, and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the company that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the company name or address. *Provided, however,* that, with respect to any proposed change in the company about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Decision and Order

VIII.

IT IS FURTHER ORDERED that respondent Ronald J. Schoemmell, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

IX.

IT IS FURTHER ORDERED that respondent Valdimar Thorkelsson, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

X.

IT IS FURTHER ORDERED that respondents R.S. of Houston Workshop, and its successors and assigns; respondent Ronald J. Schoemmell; and respondent Valdimar Thorkelsson shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on January 12, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation

Decision and Order

of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not effect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XII.

All notices required to be sent to the Commission pursuant to this Order shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 Pennsylvania Avenue, N.W., Washington, D.C. 20580. ATTN: In the Matter of R.S. of Houston Workshop.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on October 6, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from R.S. of Houston Workshop, a company, and Ronald J. Schoemmell and Valdimar Thorkelsson, fifty percent owners and principals of the company, individually and as officers of the company (together, “respondents”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

Respondents sell a training program for a trading method on the Internet for the daily buying and selling of stocks (also known as “day trading”). They advertise on their Internet Web site, www.rsfofhouston.com. This matter concerns allegedly deceptive representations of the earnings and profit potential, as well as the extent of risk involved in using respondents’ trading programs and trading methods.

The Commission’s proposed complaint alleges that respondents made unsubstantiated claims that users of respondents’ trading programs and trading methods could reasonably expect to earn large profits, as much as six figures annually (*i.e.*, more than \$182,000); that users of respondents’ trading programs and trading methods could reasonably expect consistent investment returns of \$2,500 to \$3,500 per week; that users of respondents’ trading programs and trading methods could reasonably expect to succeed at day trading for a lifetime of profitable and enjoyable trading; and that testimonials appearing in the advertisements for respondents’ trading programs and trading methods reflected the typical or ordinary experience of members of the public who use the program. In addition, the complaint alleges that respondents misrepresented that users of

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respondents' trading programs and trading methods could trade in volatile markets with LOW RISK.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondents to have a reasonable basis substantiating any representation that users of respondents' day trading program can reasonably expect to earn large profits: (1) that users of respondents' trading program or trading method can reasonably expect to earn large profits, or as much as \$2,000 to \$5,000 per day on some days; (2) that users of respondents' trading program or trading method can reasonably expect to earn profits of \$500 to \$750 or more per day; (3) that users of respondents' trading program or trading method can reasonably expect to approach trading as a business and earn a consistent living from the markets; and (4) that users of respondents' trading program or trading method can reasonably expect to trade in volatile markets with low risk. Part I also requires respondents to possess a reasonable basis substantiating claims about the amount of earnings, income, or profit that a prospective user of any trading program or trading method could reasonably expect to attain, or about any financial benefit or other benefit from the purchase or use of any such trading program or trading method.

Part II of the proposed order prohibits respondents from misrepresenting that users of any trading program can reasonably expect to trade with little or no financial risk and from misrepresenting the extent of risk to which users of any such program are exposed.

Part III of the proposed order requires respondents to disclose, clearly and conspicuously, "DAYTRADING involves HIGH RISKS and YOU can LOSE a lot of money." in close proximity to any representation they make about the financial benefits of any trading program. This disclosure is in addition to, and not instead

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of, any other disclosure that respondents may be required to make.

Part IV of the proposed order prohibits respondents from representing without a reasonable basis that the experience represented by any user, testimonial or endorsement of any trading program represents the typical or ordinary experience of members of the public who use the program; or respondents must disclose either what the generally expected results would be for users of the trading program, or the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

Parts V and VI of the proposed order require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements and to provide copies of the order to certain personnel. Part VII requires R.S. of Houston Workshop to notify the Commission of any changes in the corporate structure that might affect compliance with the order. Parts VIII and IX require that individual respondents Ronald J. Schoemmell and Valdimar Thorkelsson, respectively, to notify the Commission of changes in their employment status for a period of seven years. Part X requires respondents to file compliance reports with the Commission. Part XI provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**WFS ENTERPRISES, INC. d/b/a
THE CASH NURSERY, ET AL.**

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

*Docket C-4129; File No. 0023025
Complaint, January 3, 2001--Decision, January 3, 2001*

This consent order addresses representations by Respondent W.F.S. Enterprises, Inc., doing business as The Cash Nursery, and Respondents Rabb Sabin and Arthur Smith, officers of the corporation, concerning the earnings and profit potential, and the extent of risk involved, in using the respondents' trading methods -- embodied in a training program they sell on the Internet -- for the daily buying and selling of stock and commodity options ("day trading"). The order, among other things, requires the respondents to possess a reasonable basis substantiating any representation (1) that users of their currency trading program can reasonably expect to earn large profits; and (2) that users of their commodity and stock option trading program can reasonably expect to earn large profits, or as much as six figures annually; to realize consistent investment returns of 100 percent to 500 percent on their trades; and to secure returns of 100 percent or better on 90 percent or more of their trades. The order also prohibits the respondents from misrepresenting that users of any trading program can reasonably expect to trade with little or no financial risk, and from misrepresenting the extent of risk to which users of any such program are exposed. In addition, the order requires the respondents to disclose, clearly and conspicuously, that "Stock, commodity futures, and stock or commodity options trading involve HIGH RISKS and YOU can LOSE a lot of money.," in close proximity to any representation they make about the financial benefits of any trading program.

Participants

For the Commission: *Karen Leonard, Stephen Gurwitz, and Eileen Harrington.*

For the Respondents: *Paul W. Thomas, Paul W. Thomas and Associates.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that WFS Enterprises, Inc., d/b/a The Cash Nursery, a corporation, and Rabb Sabin and Arthur Smith, individually and as officers of the corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent WFS Enterprises, Inc., d/b/a The Cash Nursery, is a Nevada corporation with its principal office or place of business at 2914 East Katella, Suite 212, Orange, California 92867.
2. Respondent Rabb Sabin is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of WFS Enterprises, Inc.
3. Respondent Arthur Smith is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of WFS Enterprises, Inc.
4. Respondents have advertised, offered for sale, sold, and distributed stock and commodity futures trading training and computer programs to the public. Respondents advise their clients to buy and sell specific commodities futures and/or stock and/or commodities options on a daily or weekly basis. Respondents sell their program and training through their Internet Web site, www.the-cash-nursery.com.
5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in

Complaint

Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

6. Respondents have disseminated or have caused to be disseminated Internet advertisements for their commodity and stock option trading programs and training, including but not necessarily limited to the attached Exhibit A, pages 1 through 14. These advertisements contain the following statements:

a. “90% WINNING TRADES” and “a proven strategy with a 90% success rate...really!”

b. “[O]ur extraordinary trading methodologies and strict money management principles produce an average of 80-90% winning trades.”

c. [Chart: as of April 1999]

MONTH	% SUCCESSFUL TRADES
January	88%
February	100%
March	79%
April	82%
May	86%
June	94%
July	91%
August	95.5%
September	96%
October	96.4%
November	95%
98 - Average	91.18%
January - 99	89%
February	90%
March	88%
April	94%
99 - Average	90.25

Complaint

d. “When we first developed TCN’s trading methods, we back-tested thousands of possible trades over a twelve-month period. The computers ran 24 hours a day for one full month. The outcome? Believe it our not, the system was 96.7% accurate in selecting successful trades.”

e. “Investment returns we enjoy on stock options average 150% - 500%, while returns on commodity options average 100% - 400%.”

f. “At the time of the interview, Rabb had just made \$100,000 plus in a Coffee Trade. He went on to turn that amount into over \$500k by the year’s end.”

g. [consumer testimonial] “Within my first week with TCN, I invested \$280 for a return of \$1020 and \$425 for a return of \$1200. That is an incredible 314% return on investment.”

h. [consumer testimonial] “I grossed \$12,953 in my first month with The Cash Nursery. I’m not talking about once in awhile big profits.”

i. [consumer testimonial] “First, I got a call in hogs and made \$832 profit in 9 days! Then I got a put in hogs and rode that sucker back down and made \$1,755 in 10 days. That combined with my other trades made me more money in 2 weeks than I make in 4 MONTHS at my current job! My favorite part of the entire methodology is that I am usually in and out of the trade with my profits in 10 days or less!”

j. [consumer testimonial] “I hit my sell stop in Swiss francs today at 105 points. Excellent! My Feb[ruary] Swiss France 68 put cost 34 points, and sold at 105 points. So ... $105 - 34 = 71$ points. $71 \times \$12.50 = \887.50 gross profit. That’s over 300% gross profit!”

k. “System Trades©, a proprietary program, shows you how to

Complaint

turn \$500 into \$52,700.”

7. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that:

- a. Users of respondents’ commodity and stock option trading program can reasonably expect to earn large profits, or as much as six figures annually.
- b. Users of respondents’ commodity and stock option trading program can reasonably expect consistent investment returns of 100% to 500% on their trades;
- c. Users of Respondents’ commodity and stock option trading program can reasonably expect 95% or more of their trades to yield returns of 100% or better;
- d. Testimonials appearing in the advertisements for respondents’ commodity and stock option trading program reflect the typical or ordinary experience of members of the public who use the program.

8. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made.

9. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 7, at the time the representations were made. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. Through the means described in Paragraph 6, respondents have represented, expressly or by implication, that users of

Complaint

respondents' commodity trading program can reasonably expect to trade with little financial risk.

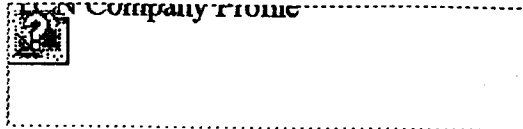
11. In truth and in fact, users of respondents' commodity and stock option trading program cannot reasonably expect to trade with little financial risk. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twelfth day of January, 2001, has issued this complaint against respondents.

EXHIBIT A

The Cash Nursery (TCN)



Online Slide Show

Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

Questions & Answers

TCN Promise

TCN's 90% Track Record

Tuition Options

98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

Contact Us

"My trading experiences since I just finished studying TCN's methods are unbelievable! First, I got a call in hogs and made \$832 profit in 9 days! Then I got a put in hogs and rode that sucker back down and made \$1,755 in 10 days!

That combined with my other trades made me more money in 2 weeks than I make in 4 MONTHS at my current job! My favorite part of the entire methodology is that I am usually in and out of a trade with my profits in 10 days or less!"

Bud Glass ~ Florida ~ December 17, 1998

Hello and welcome to our Garden!

Your visit here could very well change your life! We're a small group of traders and investors who believe in sharing our good fortune with people like you. Our Master Cash Gardener, Rabb Sabin, has been trading since 1993. Those of you who have had any contact with the Ken Roberts Company may know about him through a taped interview by Jim Roberts in 1994. Rabb's interview still appears on the "Conversations with Course Members" tape sent out to new prospective students. At the time of the interview, Rabb had just made \$100,000 plus in a Coffee trade. He went on to turn that amount into over \$550K by the year's end. At times, if you notice an apparent emphasis on commodities - well, it's hard to blame him.

~ 90% WINNING TRADES ~

TCN does trade in the stock market with options on a regular basis. And our extraordinary trading methodologies and strict money management

principles produce an average of 80-90% winning trades. No, we don't pretend to be "trading know-it-alls" by any stretch of the imagination, but we are very good at what we do.

When we first developed TCN's trading methods, we back-tested thousands of possible trades over a twelve-month period. The computers ran 24 hours a day for one full month. The outcome? Believe it or not, the system was 96.7% accurate in selecting successful trades.

~ LEARN CASH GARDENING HERE ~

Why do we call this place The Cash Nursery? Well, what do nurseries do? They grow things! And growing anything requires specific knowledge, to make sure that what you plant grows up strong and healthy. Here at TCN we plant our seeds, keep our gardens free of weeds, harvest the winners, and replant again! At the Cash Nursery we'll share those gardening methods with you. We'll show you what we're doing, how we're doing it, how and when we plant and harvest. You'll see the flowers as well as the weeds.

In commodities, you'll see straight option trades that provide maximum returns on your investment, as well as alternative methods that may allow you to take advantage of markets you might not otherwise be able to purchase if you are trading with a limited account. These techniques include spreads, straddles, strips, straps, and others - even trades that allow you to begin with a straight option and end up in a spread.

In the stock market, you'll learn our methods for trading options, as well as how to take advantage of stock splits, leaps, etc. Did you know that an option can actually end up being worth more than its underlying market?

We'll provide you with places on the internet where you can do trading research. We'll share our brokers with you and, if necessary, recommend others based

on their honesty and excellent service. We'll also share with you simple systems which maximize your returns in a short amount of time. You'll learn how to read and understand trading charts. We provide you with unlimited e-mail and live chat support as well as a TCN member's forum board. If you prefer, one-on-one live chat sessions or phone calls are always available during office hours for our members.

We believe using options as our trading vehicle is much safer than straight contracts or stocks because risk is much more manageable. Keeping investment drawdown to a minimum is paramount.

The Cash Nursery is designed in a very simple manner so that all can participate - no matter what your current knowledge of trading. We start with the basics, then advance through each trading concept, step-by-step, until all the pieces come together. TCN's trading curriculum is designed to:

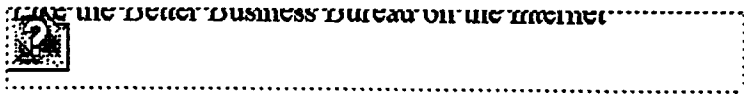
- Share both concepts and practical trading information you can apply right now
- Teach you how to grow your own cash garden
- Help you earn quick returns on their investments.

Later in the course, you'll be able to participate in paper trading. Then you'll advance to the Trades Section where you'll see the trades our staff members do on a daily basis. We feel this "what is happening in the markets right now" approach is of much greater benefit to our members rather than referring to old trades done last week, last month or last year. Lists of trades that made someone lots of money doesn't help you now.

On an average week, TCN will typically be involved in five to twenty trades in both the stock and commodity markets. **Investment returns we enjoy on stock options average 150% - 500%, while returns on commodity options average 100% - 400%.** Yes, that sounds a bit phenomenal, but it really is true.

Even the Investor General's Warning agrees:
Subscribing to the Cash Nursery has been found to
cause wealth...

If you'd like to learn more, we recommend you view
TCN's Online Slide Show.



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few months!

Manning Endrina ~ July 9, 1997

"I would like to gladly share my first week experience with you, members and non-member.

I always thought you needed an excess amount of money and personal knowledge in order to invest in the stock/commodity market until TCN came into the picture. My brother recommended that I join TCN to learn the correct way of trading and while in the process of learning....trade like an expert.

Within my first week with TCN, I invested \$280 for a return of \$1020 and \$425 for a return of \$1200. That is an incredible 314% ROI (Return of Investment for you beginners like me.) Needless to say it was enough money to cover my membership, original investments and to once again play the market (using profits only).

You go into a trade knowing what your profits or losses will be. TCN offers total money management and an easy, stress free trading opportunity. I can hardly wait to see what my first month with TCN will be like. (Incidentally - the trades were in commodities options.)

Tanya Endrina ~ Ewa Beach, Hawaii ~ July 10, 1997

"Just to update you, I moved up my stops this morning to protect profits. Wheat 34 P stopped at 16.5 Swiss franc 68 P closed at 64, with stop at 51.

I am eagerly looking forward to everything you have to teach me in 1998. I don't know how any people tell you this, but I am very grateful you are there and doing what you do. I am not sure I could do the same. I could understand the thrill of teaching others this skill, but if I was financially

independent due to options investing and I had to deal with 2 or 3 hammerheads in a row, criticizing me for something beyond my control when I am just trying to help them! Well, I think I would just start to get tired of it.

I understand that not all positions will make money. It is the knowledge to make these decisions myself that is so valuable. I guess I just want to say thanks and tell you I am grateful you are where you are doing what you do.

Here's what followed a few days later:

By the way, I hit my sell stop in Swiss francs today @ 105 points. Excellent! My Feb Swiss Franc 68 put cost 34 points, and sold at 105 points. So... $105 - 34 = 71$ points. $71 \times \$12.50 = \887.50 gross profit. That's over 300% gross profit!

About the only thing I'm gun-shy about now is trading futures contracts with KRC methods."

Tom Bobst ~ North Olmstead, OH ~ January 1998

"I'm in and out of sugar with a gross profit of \$313 (I sold @ 48 pts.) This in just 3 hours time. This is the fastest trade I have ever made! A good example of why you want to have your sells tops in place right away. Thanks!"

Name withheld by request

"I think the Sunday live chat sessions would be great for myself and other working stiffs. Good idea.

Rabb, you probably wouldn't approve, but I after watching all my paper trades make money, I couldn't stand it anymore and had to make a couple of real money trades. These two trades have more than paid for my tuition at TCN. They were hogs and

< 11 of 27 >

~ SECTION 2 ~

- Introduction to spreads, splits, and leaps as powerful trading tools
- System TradesSM - proprietary program shows you how to turn \$500 into \$52,700

Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

Questions & Answers

TCN Promise

TCN's 90% Track Record

98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

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- Access allowed only after graduation
- Ensures you are equipped to trade!
- View the same trades that TCN plays
- All trades posted night before - not after the fact, as many other so-called "experts" do out there.
- View trades BEFORE they are made
- Allows you time to research each trade
- Decide for yourself if you want to make the trade

Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

Questions & Answers

TCN Promise

TCN's 90% Track Record

98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

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- Commodity & Stock options only
- TCN selects 8 - 15 trades per week (average)
- Trade length: Hours to 10 days (average)
- Preferred trades made in-the-money or at-the-money, never out-of-the-money
- Option premium range: \$100 - \$800
- All trades posted are actually played by TCN
- TCN criteria must be met to post trades!

Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

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Questions & Answers

TCN Promise

TCN's 90% Track Record

98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

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Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

Questions & Answers

TCN Promise

TCN's 90% Track Record

98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

- Development of TCN's trading methods - back-tested thousands of possible trades over a twelve-month period
- Computers ran 24 hours a day for one full month to process data
- Outcome: 96.7% accurate in selecting successful trades

Month	% Successful Trades
January	88%
February	100%
March	79%
April	82%
May	86%
June	94%
July	91%
August	95.5%
September	96%
October	96.4%
November	95%
98-Average	91.18%
January-99	89%
February	90%
March	88%
April	94%
99-Average	90.25%

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Members

Online Slide Show

Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

Questions & Answers

TCN Promise

TCN's 90% Track Record

98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

Learn to trade commodity and stock options... and succeed! Discover a proven strategy with a 90% success rate...really!

TRADING IMPAIRED? YOU'VE FOUND THE RIGHT PLACE!

"I grossed \$12,953 in my first month with The Cash Nursery. I'm not talking about once in awhile big profits. I'm talking consistent profits, day to day.

TCN sneaks up on you...\$500 here...a \$1000 there...maybe \$2,000 there. And then you realize you're in the money! The risk management techniques make investing fun and stress free!"

Manning Endrina ~ July 9, 1997

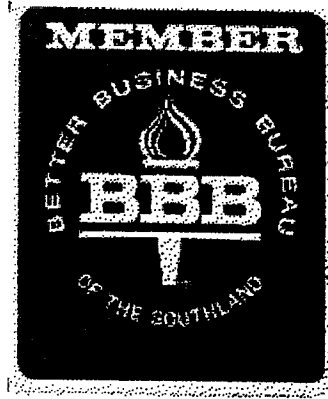
ACCEPTING ONLY ~ 30 ~ NEW MEMBERS THIS MONTH!

Show

Online Slide

Two empty rectangular boxes with dashed borders, likely for user input.

Submit



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eCOST.com ( **HEWLETT PACKARD**) **Brand Names**
(computers and software)
Computers 

LinkExchange

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000007

6/9/99 9:27 AM

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Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

Questions & Answers

TCN Promise

TCN's 90% Track Record

~ RABB SABIN ~
~ Founder & Dean of Admissions ~

- Starting trading in 1993
- Hit a big coffee trade in early 1994 with three options at \$1530 total invested
- Turned \$1530 into \$130,000 in 92 days, that 130K into \$550,000 by end of 1994
- Brought The Cash Nursery to the internet in September, 1996
- Passion is to help people achieve financial independence
- Master of Business Administration, San Diego State College, 1974
- Two tours in Vietnam, Special Forces Medic, 1968-1971
- Entrepreneur since graduating from college

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98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

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Ken Roberts?

TCN Profile

Student Testimonials

Curriculum: What You'll Learn

Questions & Answers

TCN Promise

TCN's 90% Track Record

98% Club: Are you a member?

Your Opinion Wanted

Trading Resources

**~ ART SMITH ~
~ Operations & Support Manager ~**

- College at UCR in accounting, engineering
- Started trading in 1994
- Traded commodities & studied trading methods 1994 - present
- Studied technical analysis of trading 1995 - 1997
- Joined TCN in 1997
- Friend of Rabb Sabin for ten years
- Fluent in Spanish, written and spoken
- Grew up in Mexico
- Broadcasting degree from CBS
- US Army Medic, Viet Nam Vet, 1966-68
- Turned \$1000 into \$200,000 in one year using TCN methods

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the aforementioned executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent WFS Enterprises, Inc. is a Nevada corporation, doing business as The Cash Nursery, with its principal office or place of business at 2914 East Katella, Suite 212, Orange, California 92867.
2. Respondent Rabb Sabin is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation.

Decision and Order

His principal office or place of business is the same as that of WFS Enterprises, Inc.

3. Respondent Arthur Smith is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation. His principal office or place of business is the same as that of WFS Enterprises, Inc.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. “Clearly and conspicuously” shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however*, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type

Decision and Order

size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

- C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. In the case of advertisements disseminated by means of an interactive electronic medium such as the Internet or other online services, “in close proximity” shall mean on the same Web page and proximate to the triggering representation, and not on other portions of the Web site, accessed or displayed through hyperlinks or other means.

3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. “Trading program” shall mean any program, service, course, instruction, system, training, manual, computer software, or other materials involving the purchase or sale of stocks, currencies, commodity futures, options, or other financial instruments or investments.

5. Unless otherwise specified, “Respondents” shall mean WFS Enterprises, Inc., a corporation d/b/a The Cash Nursery, its successors and assigns, and its officers; Rabb Sabin and Arthur Smith, individually and as officers of the corporation; and each of the above’s agents, representatives, and employees.

Decision and Order

I.

IT IS ORDERED that Respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That users of Respondents' commodity and stock option trading program can reasonably expect to earn large profits, or as much as six figures annually;
- B. That users of Respondents' commodity and stock option trading program can reasonably expect consistent investment returns of 100% to 500% on their trades;
- C. That users of Respondents' commodity and stock option trading program can reasonably expect 90% or more of their trades to yield returns of 100% or better;
- D. The amount of earnings, income, or profit that a prospective user could reasonably expect to attain; or
- E. Any financial benefit or other benefit of any kind from the purchase or use of such trading program;

unless Respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

Decision and Order

- A. That users of the program can reasonably expect to trade with little or no financial risk; or
- B. The extent of risk to which users of the program are exposed.

III.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the financial benefits of such program, unless they disclose, clearly and conspicuously, and in close proximity to the representation:

“Stock, commodity futures, and stock or commodity options trading involve HIGH RISKS and YOU can LOSE a lot of money.”

Provided, the disclosure required by this Part is in addition to, and not in lieu of, any other disclosure that Respondents may be required to make, including but not limited to any disclosure required by state or federal law or by a self-regulatory organization. The requirements of this Part are not intended to, and shall not be interpreted to, exempt Respondents from making any other disclosure.

IV.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user, testimonial or endorsement of the trading program represents the typical or ordinary experience of members of the public who use the trading program unless:

Decision and Order

- A. Respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made; or
- B. Respondents disclose, clearly and conspicuously, and in close proximity to the endorsement or testimonial, either:
 - 1. what the generally expected results would be for users of the trading program, or
 - 2. the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

For purposes of this Part, “endorsement” shall mean as defined in 16 C.F.R. § 255.0(b).

V.

IT IS FURTHER ORDERED that respondent WFS Enterprises, Inc., d/b/a The Cash Nursery, and its successors and assigns, and respondents Rabb Sabin and Arthur Smith shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements, instruction material, and promotional materials (including packaging) containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

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VI.

IT IS FURTHER ORDERED that respondent WFS Enterprises, Inc., d/b/a The Cash Nursery, and its successors and assigns, and respondents Rabb Sabin and Arthur Smith shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain, and upon request make available to the Commission for inspection and copying, each such signed and dated statement for a period of five (5) years after creation.

VII.

IT IS FURTHER ORDERED that respondent WFS Enterprises, Inc. d/b/a The Cash Nursery, and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

VIII.

IT IS FURTHER ORDERED that respondent Rabb Sabin, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or

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employment involving the advertising, promotion, offering for sale or sale of any business or business venture, franchise; or any business or employment related, directly or indirectly, to the purchase or sale of stocks, currencies, commodity futures, options, or other financial instruments or investments. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

IX.

IT IS FURTHER ORDERED that respondent Arthur Smith, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment involving the advertising, promotion, offering for sale or sale of any business or business venture, franchise; or any business or employment related, directly or indirectly, to the purchase or sale of stocks, currencies, commodity futures, options, or other financial instruments or investments. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

X.

IT IS FURTHER ORDERED that respondent WFS Enterprises, Inc. d/b/a The Cash Nursery, and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XI.

This order will terminate on January 12, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation

Decision and Order

of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not effect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XII.

All notices required to be sent to the Commission pursuant to this Order shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 Pennsylvania Avenue, N.W., Washington, D.C. 20580. ATTN: In the Matter of WFS Enterprises, Inc. d/b/a The Cash Nursery.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on October 6, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from W.F.S. Enterprises, Inc., a corporation, doing business as The Cash Nursery, and Rabb Sabin and Arthur Smith, individually and as officers of the corporation (together, “respondents”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

Respondents sell a training program on the Internet for the daily buying and selling of stock and commodity options (also known as “day trading”). They advertise on their Internet Web site, www.thecashnursery.com. This matter concerns allegedly deceptive representations of the earnings and profit potential, as well as the extent of risk involved in using respondents’ trading methods.

The Commission’s proposed complaint alleges that respondents made unsubstantiated claims that users of respondents’ options trading program could reasonably expect to earn large profits, as much as seven figures annually (*i.e.*, more than \$1,000,000); that users could reasonably expect consistent investment returns of 100% to 500% on their trades; and that testimonials appearing in the advertisements for respondents’ options trading program reflected the typical or ordinary experience of members of the public who use the program. In addition, the complaint alleges that respondents misrepresented that users of their options trading program could reasonably expect to trade with little financial risk.

Analysis

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondents to have a reasonable basis substantiating any representation that users of respondents' currency trading program can reasonably expect to earn large profits: (1) that users of Respondents' commodity and stock option trading program can reasonably expect to earn large profits, or as much as six figures annually; (2) that users of Respondents' commodity and stock option trading program can reasonably expect consistent investment returns of 100% to 500% on their trades; and (3) that users of Respondents' commodity and stock option trading program can reasonably expect 90% or more of their trades to yield returns of 100% or better. Part I also requires respondents to possess a reasonable basis substantiating claims about the amount of earnings, income, or profit that a prospective user of any trading program could reasonably expect to attain, or about any financial benefit or other benefit from any trading program offered by respondents.

Part II of the proposed order prohibits respondents from misrepresenting that users of any trading program can reasonably expect to trade with little or no financial risk and from misrepresenting the extent of risk to which users of any such program are exposed.

Part III of the proposed order requires respondents to disclose, clearly and conspicuously, "Stock, commodity futures, and stock or commodity options trading involve HIGH RISKS and YOU can LOSE a lot of money." in close proximity to any representation they make about the financial benefits of any trading program. This disclosure is in addition to, and not instead of, any other disclosure that respondents may be required to make.

Part IV of the proposed order prohibits respondents from representing without a reasonable basis that the experience represented by any user, testimonial or endorsement of any trading

Analysis

program represents the typical or ordinary experience of members of the public who use the program; or respondents must disclose either what the generally expected results would be for users of the trading program, or the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

Parts V and VI of the proposed order require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements and to provide copies of the order to certain personnel. Part VII requires W.F.S. Enterprises, Inc. to notify the Commission of any changes in the corporate structure that might affect compliance with the order. Parts VIII and IX require that individual respondents Rabb Sabin and Arthur Smith, respectively, to notify the Commission of changes in their employment status for a period of ten years. Part X requires W.F.S. Enterprises, Inc. to file compliance reports with the Commission. Part XI provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

GLAXO WELLCOME PLC, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3990; File No. 0010088**Complaint, December 15, 2000--Decision, January 26, 2001*

This consent order addresses the merger of Respondent Glaxo Wellcome plc ("Glaxo") and Respondent SmithKline Beecham plc ("SB"). The order, among other things, requires the respondents (1) to divest all of SB's worldwide rights and intellectual property relating to its antiemetic drug, Kytril, to F. Hoffman LaRoche; (2) to divest SB's intellectual property rights to manufacture and market ceftazidime (an injectable antibiotic used to treat serious hospital-borne infections) to Abbott Laboratories; (3) to divest SB's worldwide rights and intellectual property relating to its antiviral drugs, Famvir and Denavir, to Novartis Pharm AG and Novartis Pharmaceuticals Corporation; and (4) to return to Cantab Pharmaceuticals plc all rights to use Cantab's DISC technology for the development of a prophylactic herpes vaccine. The order also requires the respondents (5) to divest Glaxo's United States and Canadian Zantac trademark rights to Pfizer; (6) to assign or relinquish all of SB's relevant intellectual property rights and options to the drug renzapride (used to treat irritable bowel syndrome) to Alizyme plc; (7) to assign all of Glaxo's relevant intellectual property rights to GII47211C, a topoisomerase I inhibitor (used to treat certain types of cancer), to Gilead Sciences, Inc.; and (8) to assign all of SB's relevant intellectual property rights and relinquish all options to regain control over frovatriptan (used to treat migraine headaches) to Vernalis Ltd.

Participants

For the Commission: *Jaqueline K. Mendel, Michael R. Moiseyev, David L. Inglefield, David von Nirschl, Michael Barnett, Robert Pickett, Eric Coffman, Ann Malester, Elizabeth Piotrowski, David Reiffen, Leslie Farber, and Daniel O'Brien.*

For the Respondents: *Garrard Beeney, Thomas Leuba, and Daryl Libow, Sullivan & Cromwell.*

Complaint

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Respondent Glaxo Wellcome plc (“Glaxo”), a corporation subject to the jurisdiction of the Commission, has agreed to merge with Respondent SmithKline Beecham plc (“SB”), a corporation subject to the jurisdiction of the Commission, in violation of 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 to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. "Commission" means the Federal Trade Commission.
2. “FDA” means the United States Food and Drug Administration.
3. “Ceftazidime” means any product that contains any form or formulation of the compound ceftazidime, any of its constituent elements, active ingredients or intermediaries, and all rights relating to the research, development, manufacture and sale of any such Product. Ceftazidime is a semisynthetic, broad-spectrum antibacterial derived from cephaloridine and used especially for pseudomonas and other gram-negative infections in hospitalized patients.
4. “5HT-3 antiemetic drug” means any 5HT-3 receptor antagonist prescription pharmaceutical compound indicated for the prevention and treatment of nausea and vomiting associated with medical treatment, including chemotherapy, radiation therapy, or surgery.
5. “Second generation oral and intravenous antiviral drugs for the treatment of herpes” means oral and intravenous antiviral

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drugs, other than acyclovir, for use in the treatment of infections by the herpes simplex virus Type 1 ("HSV-1"), the herpes simplex virus Type 2 ("HSV-2"), and the herpes varicella zoster virus.

6. "Prophylactic herpes vaccines" means a vaccine used to prevent genital infection by HSV-1 and HSV-2.

7. "Topoisomerase I inhibitors" means prescription pharmaceuticals of the topoisomerase I inhibitor class being researched, developed, sold, or marketed for the treatment of cancer, including, but not limited to, ovarian, non-small cell lung cancer ("non-SCLC"), breast, colorectal, and other solid tumor cancers.

8. "Drugs for the treatment of IBS" means drugs for the treatment of irritable bowel syndrome, the symptoms of which may include abdominal cramping, pain, constipation and/or diarrhea..

9. "OTC H-2 blockers" means over-the-counter versions of histamine 2 blockers for acid relief.

10. "Triptan drugs for the treatment of migraine headaches" means drugs of the triptan chemical class being researched, developed, sold, and marketed for the treatment of migraine headaches.

11. "Topical prescription herpes antivirals" means prescription topical antiviral medications indicated for the treatment of recurrent herpes labialis, also called oral herpes and commonly known as cold sores.

II. RESPONDENTS

12. Respondent Glaxo is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Glaxo Wellcome House, Berkeley Avenue, Greenford, Middlesex,

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UB6 0NN, England. Glaxo is engaged in the research, development, manufacturing and sale of human pharmaceutical products, including 5HT-3 antiemetic drugs, Second generation oral and intravenous antiviral drugs for the treatment of herpes, Topical prescription herpes antivirals, Ceftazidime, Prophylactic herpes vaccines, OTC H-2 blockers, Topoisomerase I inhibitors, Drugs for the treatment of IBS, and Triptan drugs for the treatment of migraine headaches.

13. Respondent SB is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at New Horizons Court, Brentford, Middlesex, TW8 9EP, England. SB, among other things, is engaged in the research, development, manufacturing and sale of human pharmaceutical products, including 5HT-3 antiemetic drugs, Second generation oral and intravenous antiviral drugs for the treatment of herpes, Topical prescription herpes antivirals, Ceftazidime, Prophylactic herpes vaccines, OTC H-2 blockers, Topoisomerase I inhibitors, Drugs for the treatment of IBS, and Triptan drugs for the treatment of migraine headaches.

14. Respondents are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and are corporations whose business is in, or affects commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED MERGER

15. On January 17, 2000, the Boards of Glaxo and SB announced agreement to the terms of a merger to be effected by way of a scheme of arrangement of Glaxo and SB under section 425 of the Companies Act of 1985 (“Merger”). The value of the transaction is approximately \$182 billion. On completion of the transaction, the current Glaxo shareholders will own approximately 58.75% of the shares of Glaxo SmithKline and

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current SB shareholders will own approximately 41.25% of the shares of Glaxo SmithKline.

IV. THE RELEVANT MARKETS

16. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Merger are:

- a. the research, development, manufacture and sale of 5HT-3 antiemetic drugs;
- b. the research, development, manufacture and sale of Second generation oral and intravenous antiviral drugs for the treatment of herpes;
- c. the research, development, manufacture and sale of Topical prescription herpes antivirals;
- d. the research, development, manufacture and sale of Ceftazidime;
- e. the research, development, manufacture and sale of Prophylactic herpes vaccines;
- f. the research, development, manufacture and sale of OTC H-2 blockers;
- g. the research, development, manufacture and sale of Topoisomerase I inhibitors;
- h. the research, development, manufacture and sale of Drugs for the treatment of IBS; and
- i. the research, development, manufacture and sale of Triptan drugs for the treatment of migraine headaches.

Complaint

17. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Merger in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

18. The market for 5HT-3 antiemetic drugs is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). Glaxo and SB are the two leading suppliers of 5HT-3 antiemetic drugs in the United States. Glaxo and SB, respectively, have approximately 58% and 34% of the market, and the pre-merger HHI is 4584. As a result of the Merger, Glaxo SmithKline would have a 92% percent share of the market, and the post-merger HHI would be 8528, representing a 3944 point increase in the HHI.

19. The market for Second generation oral and intravenous antiviral drugs for the treatment of herpes is highly concentrated. Glaxo and SB are the only two suppliers of these drugs in the United States. No other company is presently manufacturing or selling drugs to compete with Glaxo and SB.

20. The market for Ceftazidime is highly concentrated as measured by the HHI. Glaxo and SB are the only two manufacturers of Ceftazidime in the United States, and two of the three firms with rights to market Ceftazidime in the United States. Glaxo and SB, respectively, have approximately 77% and 8% of the market, and the pre-merger HHI is 6218. As a result of the Merger, Glaxo SmithKline would have an 85% share of the market, and the post-merger HHI would be 7450, representing a 1232 point increase in the HHI.

21. The market for Topical prescription herpes antivirals is highly concentrated. Currently, SB’s Denavir is the only topical prescription preparation approved by the FDA for the treatment of oral herpes. Until April of 2000, Glaxo was in the final stages of seeking FDA approval of a creme formulation of Zovirex for the treatment of oral herpes, but after the announcement of the

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Merger, Glaxo withdrew the application for FDA approval, without prejudice to its refiling its NDA with the FDA. Glaxo's Zovirex creme could be on the market in less than one year. No other companies are working on a prescription topical treatments for oral herpes.

22. No company currently markets a prophylactic herpes vaccine. SB has the most advanced development effort toward a herpes vaccine. Glaxo has been developing a vaccine for HSV infection in conjunction with Cantab Pharmaceuticals plc. Glaxo had planned, with Cantab, to design Phase III clinical trials this year, exercising its option to do so pursuant to its contract with Cantab. Other firms that have undertaken efforts to develop a prophylactic herpes vaccine either have failed in their efforts or are far behind SB and Glaxo/Cantab, with vaccines that are only in pre-clinical stages of testing. Thus, Glaxo and SB are likely to be the first two competitors to reach the market with Prophylactic herpes vaccines.

23. The market for OTC H-2 blockers is highly concentrated as measured by the HHI. Glaxo and SB are two of the leading suppliers of OTC H-2 blockers in the United States. Glaxo and SB, respectively, have approximately 30% and 11% of the market, and the pre-merger HHI is 2990. As a result of the Merger, Glaxo SmithKline would have a 41% share of the market, and the post-merger HHI would be 3650, representing a 660 point increase in the HHI.

24. The market for Topoisomerase I inhibitors is highly concentrated. SB's drug Hycamptin is currently a leading second-line therapy for ovarian and non-small cell lung cancer ("non-SCLC") and SB is pursuing first-line indications for these cancers as well as second-line therapy for colorectal and other solid-tumor cancers. Glaxo presently maintains rights in a topoisomerase I inhibitor formulation being developed by Gilead Sciences, Inc. for ovarian, breast, non-SCLC and other solid tumor indications, including colorectal cancer. The only other topoisomerase I inhibitor on the market is Camptosar from Pharmacia, which is

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currently indicated as a second-line therapy for colorectal cancer. No other topoisomerase I inhibitors is in development.

25. Currently, there are no Drugs available for the treatment of irritable bowel syndrome. Though effective in treating IBS sufferers, Glaxo's Lotronex, the only FDA-approved treatment for IBS, was recently taken off the market by Glaxo because of concerns about serious side effects in some patients. However, Glaxo continues to conduct clinical trial for Lotronex. Alizyme plc, pursuant to a licensing agreement with SB, has been developing a drug called renzapride for the treatment of irritable bowel syndrome. If SB exercises the relevant options under its agreement with Alizyme, then SB and Alizyme would have one of only three drugs currently being developed to treat IBS.

26. The market for Triptan drugs for the treatment of migraine headaches is highly concentrated. Glaxo, with approximately 65% of sales, leads the market with its migraine medications Immitrex and Amerge. Only two other drugs in the triptan class are approved for the treatment of migraine headaches – Zomig from AstraZeneca and Maxalt from Merck & Co., Inc. SB presently maintains rights in SB209509, a compound in development that is in the same triptan class as these four drugs. SB209509 is being developed by Vernalis Ltd. for the treatment of migraine headaches.

VI. ENTRY CONDITIONS

27. Entry into each of the relevant markets identified in Paragraph 16 is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 28, because of, among other things, the time and expense necessary to develop and gain FDA approval for such human pharmaceutical products.

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VII. EFFECTS OF THE MERGER

28. The effects of the Merger, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by increasing the likelihood that the merged entity would increase prices and reduce innovation in the market for 5HT-3 antiemetic drugs, either unilaterally or through coordinated interaction;
- b. by increasing the likelihood that the merged entity would increase prices in the market for Cefazidime, either unilaterally or through coordinated interaction;
- c. by increasing the likelihood that the merged entity would unilaterally increase prices and reduce innovation in the market for Second generation oral and intravenous antiviral drugs for the treatment of herpes;
- d. by eliminating the only potential entrant in the market for Topical prescription herpes antivirals where SB is currently a monopolist;
- e. by increasing the likelihood that the merged entity would forego or delay the development efforts of one of the Prophylactic herpes vaccines or, alternatively, eliminate price competition between the two prophylactic herpes vaccines if both were introduced in the market;
- f. by increasing the likelihood that the merged entity would increase prices and reduce innovation in the market for OTC H-2 blockers, either unilaterally or through coordinated interaction;

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- g. by increasing the likelihood that the merged entity would increase prices and reduce innovation in the market for Topoisomerase I inhibitors for the treatment of ovarian, non-SCLC, colorectal, and other solid tumor cancers, either unilaterally or through coordinated interaction;
- h. by increasing the likelihood that the merged entity would increase prices and reduce innovation in the market for Drugs for the treatment of IBS; and
- i. by increasing the likelihood that the merged entity would increase prices and reduce innovation in the market for Triptan drugs for the treatment of migraine headaches, either unilaterally or through coordinated interaction.

VIII. VIOLATIONS CHARGED

29. The Merger Agreement described in Paragraph 15 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

30. The Merger described in Paragraph 15, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of December, 2000, issues its Complaint against said Respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent Glaxo Wellcome plc (“Glaxo”) and Respondent SmithKline Beecham plc (“SB”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Glaxo is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Glaxo Wellcome House, Berkeley Avenue, Greenford, Middlesex, UB6 0NN, England.

2. Respondent SB is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at New Horizons Court, Brentford, Middlesex, TW8 9EP, England.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Glaxo" means Glaxo Wellcome plc, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Glaxo Wellcome plc (including, but not limited to, Glaxo Wellcome Inc., Glaxo Wellcome OTC Inc., Glaxo Wellcome Inc. (Canada), and Glaxo Group Limited), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "SB" means SmithKline Beecham plc, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by SmithKline Beecham plc (including, but not limited to, SmithKline Beecham (Cork) Limited and SmithKline Beecham Corporation) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- C. "Respondents" means Glaxo and SB, individually and collectively.
- D. "Merger" means the proposed merger of Glaxo and SB by means of a scheme of arrangement pursuant to section 425 of the Companies Act 1985 (Eng.) announced on January 17, 2000, which was approved by the shareholders of SB and Glaxo at shareholders meetings held on July 31, 2000.
- E. "Commission" means the Federal Trade Commission.
- F. "Abbott Labs" means Abbott Laboratories, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 100 Abbott Park Road, Abbott Park, IL 60064-3500.
- G. "Alizyme" means Alizyme Therapeutics Limited, a company registered in England and Wales under company number 2762675 and having its registered office at 280 Cambridge Science Park, Milton Road, Cambridge, CB4 4WE, England.
- H. "Aventis" means Aventis S.A., a corporation organized, existing and doing business under and by virtue of the laws of France, with its offices and principal place of business located at 10236 Marion Park Drive, Kansas City, MO 64137.
- I. "Biochemie" means Biochemie GmbH, a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its offices and principal place of business located at A-6250, Kundl, Austria.
- J. "Cantab" means Cantab Pharmaceuticals plc, a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its offices and principal place of business located at 310 Cambridge Science Park, Milton Road, Cambridge, CB4 OWG, England.
- K. "Gilead Sciences" means Gilead Sciences, Inc. (incorporating Nexstar Pharmaceuticals Inc.), a corporation organized, existing and doing business under and by the laws of the State of Delaware, with its offices and principal place of business located at 333 Lakeside Drive, Foster City, CA 94404.
- L. "Lilly" means Eli Lilly and Company, a corporation organized, existing and doing business under and by the laws

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of the State of Indiana, with its offices and principal place of business located at Lilly Corporate Center, Indianapolis, Indiana 46285.

M. "Novartis" means Novartis Pharma AG, a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its offices and principal place of business located at Lichtstrasse 35, 4002 Basel, Switzerland, and Novartis Pharmaceuticals Corporation, a Delaware corporation, with its offices and principal place of business located at 59 Route 10, East Hanover, New Jersey 07936.

N. "Pfizer" means Pfizer, Inc., including, but not limited to, the former Warner-Lambert Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 235 East 42nd Street, New York, New York 10017.

O. "Roche" means F.Hoffman-La Roche Ltd, a corporation organized, existing and doing business under and by virtue of the laws of Switzerland, with its offices and principal place of business located at CH-4070 Basel, Switzerland.

P. "Takeda" means Takeda Chemical Industries, Ltd., a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its United States offices located at 600 Central Avenue, Suite 240, Highland Park, IL 60035.

Q. "Vernalis" means Vernalis Limited, formerly known as Vanguard Medica Ltd., a company organized under English law and having its registered office at Chancellor Court, Surrey Research Park, Guildford, Surrey, GU2 7SF, England.

R. "Agency(ies)" means any governmental regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s) or permit(s) for any aspect of the research, development, manufacture, marketing, distribution or sale of a Product. The term "Agency" includes, but is not limited to, the United States Food and Drug Administration ("FDA").

S. "Antiemetic Product" means any prescription pharmaceutical compound indicated for the prevention and treatment of nausea and vomiting associated with medical

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treatment, including chemotherapy, radiation therapy and surgery.

T. "Assigned Contracts" means all contracts relating to a Product.

U. "Business Day" means any day excluding Saturday, Sunday and any other United States Federal holiday.

V. "Ceftazidime" means any Product that contains any form or formulation of the compound ceftazidime, any of its constituent elements, active ingredients or intermediaries, and all rights relating to the research, development, manufacture or sale of any such Product.

W. "Closing Date" means the date on which Respondents and a Commission-approved Acquirer close on a transaction to divest or transfer relevant assets pursuant to this Order.

X. "Commission-approved Acquirer" means an entity approved by the Commission to acquire particular assets the Respondents are required to divest or transfer pursuant to this Order.

Y. "Confidential Business Information" means all information owned by Respondents that is not in the public domain relating to the research, development, manufacture, marketing, commercialization, distribution, importation, cost, pricing, supply, sales, sales support, or use of any of Respondents' Products or Products in development.

Z. "Contract Manufacture" means the manufacture of a Product supplied pursuant to a Divestiture Agreement by Respondents for sale to the Commission-approved Acquirer.

AA. "Denavir" means any Product containing the drug compound Penciclovir, any of its constituent elements, active ingredients or intermediaries, and all rights relating to the research, development, manufacture or sale of Denavir and Vectavir.

BB. "Designee" means any entity that will manufacture a Product for a Commission-approved Acquirer.

CC. "DISC-HSV Prophylactic Vaccine Assets" means all Product Intellectual Property relating to DISC Technology owned by Cantab or licensed by Cantab to Glaxo as of the Closing Date pursuant to the DISC-HSV Development and Licence Agreement, and all Product Intellectual Property

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relating to the Programme established by the DISC-HSV Development and Licence Agreement, that can be used to develop a vaccine for the Prophylaxis of human infections with herpes simplex virus. These assets include the exclusive right to seek and obtain regulatory approval from Agencies for an indication for the Prophylaxis of human infections with herpes simplex virus for any vaccine using DISC Technology or other vaccine arising out of the Programme and the exclusive right to use such an indication when regulatory approval from Agencies is obtained.

DD. “DISC-HSV Development and Licence Agreement” means the *Development and Licence Agreement* between Cantab and Glaxo dated 18 March 1997, which is contained in non-public Appendix IV attached to this Order.

EE. “DISC-HSV Amended Development and Licence Agreement” means the DISC HSV Development and Licence Agreement as amended in the *Amendments to the Development and Licence Agreement* entered into between Glaxo and Cantab on 30 August 2000, which is contained in non-public Appendix IV attached to this Order.

FF. “DISC Technology” means the technology relating to the manufacture, use or applications of genetically disabled mutant herpes virus having a genome that is functionally deleted in respect of a herpes viral gene that is essential for the production of infectious new virus particles.

GG. “Divestiture Agreement” means each of the following agreements individually, or any agreement signed by the Respondents and approved by the Commission to accomplish the requirements of this Order: the Famciclovir and Penciclovir Asset Sale Agreement, the Famciclovir and Penciclovir Supply Agreement, the DISC-HSV Amended Development and Licence Agreement, the Kytril Asset Sale Agreement, the Kytril Supply Agreement, the Kytril Transition Support Agreement, the Zantac Agreements, the Renzapride Asset Sale Agreements, the Frovatriptan Asset Sale Agreement, the GI147211C Asset Sale Agreements, the Tazicef Asset Sale Agreement and the Tazicef Final Finished Pharmaceuticals Supply Agreement.

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HH. "Domain Name" means the domain name(s) (universal resource locators), and registration(s) thereof, issued by NetworkSolution, Inc. or any other entity or authority who issues and maintains the domain name registration. "Domain Name" shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.

II. "Drug Master Files" means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 relating to any Product included in this Order.

JJ. "Famciclovir" means the chemical compound 2-[2-(2-amino-9H-purin-9-yl) ethyl] -1,3-propanediol diacetate, its salts and esters in any form or formulation.

KK. "Famciclovir and Penciclovir Assets" means all of Respondents' rights, title and interest, worldwide, in and to all assets and businesses relating to the Product Denavir and/or to the Product Famvir, separately (where "Product," as used in this paragraph and its subparts, means both Denavir and Famvir, separately), and to Penciclovir and to Famciclovir, separately, including the research, development, manufacture, distribution, marketing or sale of the Product Denavir, the Product Famvir, Penciclovir and/or Famciclovir, including, without limitation, the following:

1. all Product Intellectual Property (the Patents and Product Trademarks for Denavir and Famvir are listed in Appendix III);
2. the Product and Product Registrations;
3. lists of all current customers for the Products and the pricing of the Products for such customers;
4. all Famciclovir and Penciclovir Assigned Contracts, each at the option of the Commission-approved Acquirer;
5. Respondents' records and files pertaining to the following, including, but not limited to, all specified documents: the Product Registrations; rights of reference to Drug Master

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Files; correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including without limitation, all clinical data, sales force call activity, and physician prescription activity for the Products on a per-physician basis from January 1, 1997, through the Closing Date; and quality control histories pertaining to the Products owned by Respondents, in each case such as is in existence, in the possession or control of Respondents, as of the Closing Date;

6. rights of reference to all Drug Master Files, including but not limited to, the pharmacology and toxicology data contained in all NDAs, ANDAs, SNDAs and MAAs;
7. all Product Marketing Materials;
8. the NDC Numbers relating to the Products;
9. Scientific and Regulatory Material;
10. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders to be provided to the Commission-approved Acquirer within two business days after the Closing Date);
11. all books, records and files that relate to the following: Product Manufacturing Technology; Product manufacturing and manufacturing processes; and
12. all inventories on hand as of the Closing Date.

PROVIDED, HOWEVER, that the definition of “Famciclovir and Penciclovir Assets” does not include any rights, titles and interests in or to owned or leased real property or buildings, or to machinery, fixtures, equipment, or tools.

LL. “Famciclovir and Penciclovir Assigned Contracts” means all Assigned Contracts related to Famciclovir and/or Penciclovir (including, but not limited to, those related to

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Famvir and Denavir), including, but not limited to, all customer contracts, co-promotion agreements, co-distributorship agreements, supply agreements and intercompany license agreements relating to Penciclovir and/or Famciclovir.

MM. “Famciclovir and Penciclovir Asset Sale Agreement” means the *Asset Sale Agreement* entered into as of August 30, 2000, among SmithKline Beecham plc, Beecham Group plc, SmithKline Beecham Corporation, SmithKline Beecham (Cork) Limited, Novartis Pharma AG, and Novartis Pharmaceuticals Corporation, which is contained in non-public Appendix III attached to this Order.

NN. “Famciclovir and Penciclovir Supply Agreement” means the *Supply Agreement* dated as of the Closing Date, among SmithKline Beecham (Cork) Limited and Novartis Pharma AG, which is contained in non-public Appendix III attached to this Order.

OO. “Famciclovir and Penciclovir Key Employees” means the individuals identified in Schedule 6.16 of the Famciclovir and Penciclovir Asset Sale Agreement, who represent SB’s United States marketing, regulatory and clinical employees and SB’s worldwide manufacturing employees with responsibility for Denavir and/or Famvir, which include all key marketing executives and personnel and key administrative and sales personnel (including, without limitation, executives and personnel having any responsibilities in the areas of sales management, brand management, sales training, market research, managed care, contracting, hospital market and other specialty markets, but excluding secretaries), who directly participated (irrespective of the portion of working time involved) in the marketing, contracting or promotion of Denavir and/or Famvir in the United States or the manufacture of Denavir and/or Famvir worldwide within the eighteen (18) month period immediately prior to the Closing Date.

PP. “Famciclovir and Penciclovir Sales Employees” means all SB sales force personnel with responsibilities related to the sale of Denavir and/or Famvir worldwide, including, but not limited to, all sales representatives, sales managers, national account managers, and reimbursement managers.

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QQ. “Famvir” means any Product containing the drug compound Famciclovir, any of its constituent elements, active ingredients or intermediaries, and all rights relating to the research, development, manufacture or sale of Famvir.

RR. “Finished Goods” means (1) Famciclovir, Penciclovir and Kytril packaged and ready for distribution to the ultimate customer in their current presentations, (2) Famciclovir and Kytril in finished tablet form but not packaged and ready for distribution to the ultimate customer, or (3) Penciclovir in finished topical cream form but not packaged and ready for distribution to the ultimate customer.

SS. “Frovatriptan” means a drug compound in development for use in the treatment of migraine, also known as “SB209509.”

TT. “Frovatriptan Assets” means all Product Intellectual Property related to Frovatriptan owned or controlled by Vernalis, including without limitation all rights, title and interest in and to such Product Intellectual Property sold, transferred or otherwise conveyed by SB to Vernalis pursuant to the Development, License and Co-Promotion Agreement, dated October 21, 1994, between Vernalis (formerly Vanguard Medica LTD) and SB, as amended July 5, 2000, and November 27, 2000, for the development of a Product for the treatment and/or prevention of migraine.

UU. “Frovatriptan Asset Sale Agreement” means the *Development License and Co-Promotion Agreement*, dated October 21, 1994, between Vernalis (formerly Vanguard Medica LTD) and SB, as amended on July 5, 2000, and November 27, 2000, which is contained in non-public Appendix VIII attached to this Order.

VV. “GI147211C” means the chemical compound having the chemical structure 7- (4-methylpiperazinomethylene)-10,11 - ethylenediory - 20(s) - camptothecin hydrochloride, a topoisomerase I inhibitor Product currently being researched and developed by Gilead Sciences for use in treating cancer.

WW. “GI147211C Assets” means the Intellectual Property related to the Product GI147211C and the GI147211C technology as described in the GI147211C Asset Sale Agreements.

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XX. “GI147211C Asset Sale Agreements” mean the *Letter Agreement* entitled “Amendments to the Licence Agreement” dated May 2, 2000, between Glaxo and Gilead Sciences that amends the *Licence Agreement* between the parties dated 27 May 1998, and the *Patent Assignment Agreement* dated November 16, 2000, between Glaxo and Gilead Sciences, which are contained in non-public Appendix IX attached to this Order.

YY. “Granisetron” means the chemical compound endo-N-(9-methyl-9-azabicyclo [3.3.1] non-3-yl) - 1 methyl - 1H-indazole-3-carboxamide hydrochloride, its salts and esters in any form or formulation.

ZZ. “Intellectual Property” means all: (1) Patents; (2) mask works and copyrights in works of authorship of any type, including, but not limited to, computer software and industrial designs, registrations and applications for registration thereof; (3) trademarks, including the goodwill of the business symbolized thereby and associated therewith, as well as registrations and applications for registration thereof; (4) trade secrets, know-how and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof; (5) rights to obtain and file for Patents and registrations thereof; and (6) rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach thereof.

AAA. “Kytril” means any Product containing Granisetron, any of its constituent elements, active ingredients or intermediaries, and all rights relating to the research, development, manufacture or sale of any such Product.

BBB. “Kytril Asset Sale Agreement” means the *Asset Sale Agreement* entered into as of August 30, 2000, among SmithKline Beecham plc, Beecham Group plc, SmithKline Beecham Corporation, SB Pharmco Puerto Rico, Inc., Hoffmann-La Roche Inc., and F.Hoffmann-La Roche Ltd, and amended on November 22, 2000, which is contained in non-public Appendix II attached to this Order.

CCC. “Kytril Assets” means all of Respondents’ rights, title and interest, worldwide, in and to all assets and businesses

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relating to Kytril and to Granisetron, including the research, development, manufacture, distribution, marketing or sale of Kytril, including without limitation, the following:

1. all Product Intellectual Property (the Patents and Product Trademarks for Kytril are listed in Appendix II);
2. the Product and Product Registrations;
3. lists of all current customers for the Product and the pricing of the Product for such customers;
4. all Kytril Assigned Contracts, each at the option of the Commission-approved Acquirer;
5. Respondents' records and files pertaining to the following, including, but not limited to, all specified documents: Product Registrations, rights of reference to Drug Master Files, correspondence with the FDA and other Agencies, all validation documents and data, all market studies, all sales histories, including without limitation, all clinical data, sales force call activity and physician prescription activity for the Product on a per-physician basis from January 1, 1997 through the Closing Date, and quality control histories pertaining to the Product owned by Respondents, in each case such as is in existence, in the possession or control of Respondents, as of the Closing Date;
6. rights of reference to all Drug Master Files, including but not limited to, the pharmacology and toxicology data contained all NDAs, ANDAs, SNDAs and MAAs;
7. all Product Marketing Materials;
8. the NDC Numbers relating to the Product;
9. Scientific and Regulatory Material;

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- 10 all unfilled customer orders for finished goods as of the Closing Date (a list of such orders to be provided to the Commission-approved Acquirer within two business days after the Closing Date);
11. all books, records and files that relate to the following:
Product Manufacturing Technology; Product manufacturing and manufacturing processes;
12. all inventories on hand as of the Closing Date; and
13. all equipment currently owned by SB and used to manufacture sachets for the Product for the Japanese market.

PROVIDED, HOWEVER, that the definition of “Kytril Assets” does not include any rights, titles and interests in or to owned or leased real property or building(s).

PROVIDED FURTHER, HOWEVER, that except for the machinery used to manufacture sachets for the Product for the Japanese market, the definition of “Kytril Assets” does not include any rights, titles and interests in or to machinery, fixtures, equipment, or tools.

DDD. “Kytril Assigned Contracts” means all Assigned Contracts related to Kytril, including, but not limited to, contracts with managed care organizations and oncology distributors; hospital tenders/contracts for the United Kingdom; pricing agreements for Canada relating to Kytril; and the Kytril Loyalist Agreements.

EEE. “Kytril Core Employees” means the individuals identified in Schedule 6.10(a) of the Kytril Asset Sale Agreement, who represent SB’s worldwide manufacturing, marketing, regulatory and clinical employees with responsibility for Kytril, which include all key marketing executives and personnel and key administrative and sales personnel (including, without limitation, executives and personnel having any responsibilities in the areas of sales

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management, brand management, sales training, market research, managed care, contracting, hospital market and other specialty markets, but excluding secretaries), who directly participated (irrespective of the portion of working time involved) in the manufacturing, marketing, contracting or promotion of Kytril worldwide within the eighteen (18) month period immediately prior to the Closing Date.

FFF. “Kytril Sales Employees” means all SB worldwide oncology sales force personnel, including all sales representatives, sales managers, national account managers, reimbursement managers, oncology medical associates and oncology nurse educators.

GGG. “Kytril Supply Agreement” means the *Supply Agreement*, dated as of the Closing Date, attached as Exhibit D to the Kytril Asset Sale Agreement among SmithKline Beecham plc, SB Pharmco Puerto Rico, Inc., SmithKline Beecham (Cork) Limited, SmithKline Beecham Seiyaku K.K., F.Hoffmann-La Roche Ltd, and Hoffmann-La Roche Inc., and any modifications and amendments thereto that have been approved by the Commission, which is contained in non-public Appendix II attached to this Order.

HHH. “Kytril Transition Support Agreement” means the *Transition Support Agreement* entered into on August 30, 2000 by and between SmithKline Beecham plc and F.Hoffmann-La Roche Ltd and Hoffmann-La Roche Inc., and any modifications and amendments thereto that have been approved by the Commission, which is contained in non-public Appendix II attached to this Order.

III. “Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information relating to the manufacture, validation, packaging, release testing, stability and shelf life of the Product including the Product’s formulation, in existence and in the possession of Respondents as of the Closing Date.

JJJ. “New Drug Application” (“NDA”), “Abbreviated New Drug Application” (“ANDA”), “Supplemental New Drug Application” (“SNDA”), or “Marketing Authorization Application” (“MAA”) mean the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part

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314, or its foreign Agency equivalent, and all supplements, amendments, revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the FDA or other Agency relative thereto.

KKK. “NDC Numbers” means the National Drug Code number(s) assigned by the FDA to the Product(s).

LLL. “Ownership Interest” means any and all rights, present or contingent, of Respondents to hold any voting or nonvoting stock, share capital, equity or other interests or beneficial ownership in an entity.

MMM. “Patents” mean all patents, patents pending, patent applications and statutory invention registrations, including reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world, related to any product of or owned by Respondents as of the Closing Date.

NNN. “Penciclovir” means the chemical compound 9-[4-hydroxy-3-(hydroxy methol) butyl] quanine, its salts and esters in any form or formulation.

OOO. “Prescription Field of Use” means the market in which Products may be lawfully sold to consumers only by prescription.

PPP. “Product” means any finished pharmaceutical composition containing any formulation or dosage of a compound referenced as its pharmaceutically active ingredient.

QQQ. “Product Intellectual Property” means all worldwide (1) Product Patents, (2) Product Trademarks, (3) Manufacturing Technology, (4) the Website and the Domain Name, (5) Product Trade Dress, (6) all copyrights in and to the Product Marketing Materials, (7) all other Intellectual Property relating to a Product, and (8) all Confidential Business Information.

RRR. “Product Marketing Materials” means all marketing materials used anywhere in the world with respect to the Products as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, price

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lists, mailing lists, sales materials, marketing information (e.g., customer sales, IMS data and competitor data), promotional materials, artwork for the production of packaging components, television masters and other materials associated with the Products.

SSS. “Product Registrations” means all registrations, permits, licenses, consents, authorizations and other approvals, and pending applications and requests therefor, required by applicable Agencies relating to the research, development, manufacture, distribution, finishing, packaging, marketing or sale of the Product worldwide, including all INDs (“Investigational New Drug Applications”), NDAs, ANDAs, SNDAs and MAAs, in existence for the Product as of the Closing Date.

TTT. “Product Trade Dress” means the current trade dress of the Product, including, but not limited to, product packaging associated with the sale of the Product worldwide and the lettering of the Product’s trade name or brand name, but excluding the stripes, band and coloring used on the front panel of the packaging to the extent used on other of Respondents’ product packages.

UUU. “Product Trademarks” means all trademarks, trade names and brand names including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized by and associated therewith, for a Product.

VVV. “Programme” means the program of development for the purposes of developing a Product pursuant to the DISC-HSV Development and Licence Agreement.

WWW. “Prophylaxis” means the prevention of a disease or infection through the administration of a vaccine with preventive efficacy in persons who have not been established as having the disease or infection prior to the administration of the vaccination.

XXX. “Ranitidine” means a drug compound identified as N-[2-[[[5-(dimethylamino) methyl]-2-furanyl]methyl]thio]-ethyl]-N'-methyl-2-nitro-1,1-ethenediamine and its hydrochloride salt.

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YYY. “Renzapride” means a drug compound identified as (+)endo-4-amino-5-chloro-2-methoxy-N-(1'-azabicyclo[3.3.1]non-4'-yl)-benzamide, in development for use in the treatment of irritable bowel syndrome.

ZZZ. “Renzapride Assets” means all Product Intellectual Property related to Renzapride owned or controlled by Alizyme, including without limitation all rights, title and interest in and to such Product Intellectual Property sold, transferred or otherwise conveyed by SB to Alizyme pursuant to the Development Agreement, dated July 17, 1998, between Alizyme and SB, as amended on May 22, 2000, and amended further on November 10, 2000, that can be used to develop a Product for the treatment and/or prevention of irritable bowel syndrome. These assets include the exclusive right to seek and obtain regulatory approvals from Agencies for an indication for the treatment and/or prophylaxis of irritable bowel syndrome and the exclusive right to use such an indication when regulatory approval is obtained.

AAAA. “Renzapride Asset Sale Agreements” mean the agreement containing the *Sale of Renzapride IPR*, dated 22 May 2000, between SmithKline Beecham plc and Alizyme Therapeutics Limited relating to the sale and purchase of Renzapride technology and related intellectual property rights, and the Letter Agreement dated 10 November 2000, between SmithKline Beecham Pharmaceuticals and Alizyme Therapeutics Limited, which are contained in non-public Appendix VII attached to this Order.

BBBB. “Scientific and Regulatory Material” means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and clinical trial materials and information relating to the Product, and all rights thereto, in any and all jurisdictions.

CCCC. “Tazicef” means SB’s Product containing the drug compound ceftazidime.

DDDD. “Tazicef Asset Sale Agreement” means the *Asset Purchase Agreement* dated November 7, 2000, between SmithKline Beecham Corporation and Abbott Laboratories, which is contained in non-public Appendix VI attached to this Order.

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EEEE. “Tazicef Assets” means all of Respondents’ rights, title and interest in and to all assets and businesses relating to Tazicef for sales of Tazicef within and into the United States, including without limitation, all assets listed in subparagraphs 1-12 of this paragraph. These assets include, but are not limited to, all Product Intellectual Property necessary to enable the Commission-approved Acquirer or the Commission-approved Acquirer’s Designee to become qualified by the FDA to manufacture the finished Product Tazicef anywhere in the world for sale into the United States:

1. all Product Intellectual Property (the Patents and Product Trademarks for Tazicef are listed in Appendix VI);
2. the Product and Product Registrations;
3. lists of all current customers for the Product and the pricing of the Product for such customers;
4. all Tazicef Assigned Contracts, each at the option of the Commission-approved Acquirer;
5. Respondents’ records and files pertaining to the following, including, but not limited to, all specified documents: the Product Registrations, rights of reference to Drug Master Files, correspondence with the FDA and other Agencies, all validation documents and data, all market studies, all sales histories, including without limitation, all clinical data, sales force call activity and physician prescription activity for the Product on a per-physician basis from January 1, 1997, through the Closing Date, and quality control histories pertaining to the Product owned by Respondents, in each case such as is in existence, in the possession or control of Respondents, as of the Closing Date;
6. rights of reference to all Drug Master Files, including but not limited to, the pharmacology and toxicology data contained all NDAs, ANDAs, SNDAs and MAAs;

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7. all Product Marketing Materials;
8. the NDC Numbers relating to the Product;
9. Scientific and Regulatory Material;
- 10 all unfilled customer orders for finished goods as of the Closing Date (a list of such orders to be provided to the Commission-approved Acquirer within two business days after the Closing Date);
11. all books, records and files that relate to the following:
Product Manufacturing Technology; Product manufacturing and manufacturing processes; and
12. all inventories on hand as of the Closing Date.

PROVIDED, HOWEVER, that the definition of “Tazicef Assets” does not include any rights, titles and interests in or to owned or leased real property or buildings.

FFFF. “Tazicef Final Finished Pharmaceuticals Supply Agreement” means the *Final Finished Pharmaceuticals Supply Agreement* dated November 7, 2000, between SmithKline Beecham Corporation and Abbott Laboratories, which is contained in non-public Appendix VI attached to this Order.

GGGG. “Valtrex” means a Product that contains any form or formulation of the compound valacyclovir and any similar oral or topical prescription Product for the treatment of herpes.

HHHH. “Website” means the website(s) located at the Domain Names and all copyrights in such website(s), to the extent owned by Respondents. “Website” shall not include content owned by third parties and other Intellectual Property not owned by Respondents that are incorporated in such website(s), such as stock photographs used in the website(s) except to the extent that Respondents can transfer their rights, if any, therein.

IIII. “Zantac” means all Products containing Ranitidine marketed by Warner-Lambert and Glaxo that are the subject of

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the *Purchase Agreement* between Warner-Lambert Company and Glaxo Wellcome plc dated as of December 18, 1998, contained in non-public Appendix V to this Order, including but not limited to, those Products marketed under the trademarks Zantac and Zantac75.

JJJJ. “Zantac Assets” means:

- (1) the Product Trademarks relating to Ranitidine in the United States and Canada;
- (2) the Website relating to Ranitidine in the United States and Canada; and
- (3) all rights, title, and interest, in the United States, in and to the tablet shape, color, trade dress, logos, slogans and any unregistered marks, logos and slogans in commercial use by Glaxo or Warner-Lambert as of the Closing Date on any Ranitidine Product (other than Glaxo’s company name, corporate logos and other company indicia).

KKKK. “Zantac Agreements” mean the following agreements, contained in non-public Appendix V attached to this Order:

- (1) *Trademark Assignment and Trademark License Cancellation Agreement* between Glaxo Group Limited and Warner Lambert Company dated 26 October 2000;
- (2) *Assignment of U.S. Trademarks* between Glaxo Group Limited and Warner-Lambert Company dated 26 October 2000;
- (3) *Trademark License Agreement* between Warner-Lambert Company and Glaxo Group Limited dated 26 October 2000;
- (4) *Amendment to Patent and Know-How License Agreement* between Glaxo Group Limited, Glaxo Wellcome Inc. and Warner-Lambert Company dated 26 October 2000;

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(5) *Amendment to Purchase Agreement* between Warner-Lambert Company and Glaxo Wellcome plc dated October 26, 2000;

(6) *Amendment to Manufacturing and Supply Agreement* between Glaxo-Wellcome Inc. and Warner-Lambert Company dated 26 October 2000;

(7) *Amended and Restated Documentation Agreement* between Glaxo Wellcome Inc., Glaxo Wellcome OTC Inc., and Warner-Lambert Company dated October 26, 2000;

(8) *Canadian Trademark Assignment and Trademark License Cancellation Agreement* between Glaxo Group Limited and Warner-Lambert Canada Inc. dated 26 October 2000;

(9) *Assignment of Canadian Trademarks* between Glaxo Group Limited and Warner-Lambert Canada Inc. dated 26 October 2000;

(10) *Canadian Trademark License Agreement* between Warner-Lambert Canada Inc. and Glaxo Group Limited dated 26 October 2000;

(11) *Amendment to Patent and Know-How License Agreement* between Glaxo Group Limited, Glaxo Wellcome Inc. and Warner-Lambert Canada Inc. dated 26 October 2000;

(12) *Amendment to the Purchase Agreement* between Warner-Lambert Canada Inc. and Glaxo Wellcome Inc. dated October 26, 2000; and

(13) *Amendment to Manufacturing and Supply Agreement* between Glaxo Wellcome Inc. and Warner-Lambert Canada Inc. dated October 26, 2000.

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LLLL. “Zofran” means a Product containing the drug substance ondansetron hydrochloride, any of its constituent elements, active ingredients or intermediaries, and all rights relating to the research, development, manufacture or sale of Zofran, which is manufactured, marketed and distributed by Glaxo.

MMMM. “Zofran Assets” means all worldwide rights, title and interest of Respondents in and to the following assets relating to Zofran, regardless of where such assets are physically situated:

1. all Product Intellectual Property;
2. the Product and Product Registrations;
3. the existing lists of all current customers for the Product and the pricing of the Product for such customers;
4. all Assigned Contracts;
5. Respondents’ records and files pertaining to the following, including, but not limited to, all specified documents: the Product Registrations; rights of reference to Drug Master Files, including but not limited to, the pharmacology and toxicology data contained in all New Drug Applications, all Abbreviated New Drug Applications, and all supplemental NDAs; correspondence with the FDA and other Agencies; all validation documents and data; all market studies; all sales histories, including without limitation, clinical data, sales force call activity, and physician prescription activity (to the extent Respondents have the right to transfer such information), for the Product on a per-physician basis from January 1, 1997, through the Closing Date, and quality control histories pertaining to the Product owned by Respondents, in each case such as is in existence, in the possession or control of Respondents, as of the Closing Date;
6. all Product Marketing Materials;

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7. the NDC Numbers relating to the Product;
8. Scientific and Regulatory Material;
9. all unfilled customer orders for finished goods as of the Closing Date (a list of such orders to be provided to the Commission-approved Acquirer within two business days after the Closing Date);
10. all books, records and files that relate to the following: Product Manufacturing Technology; Product manufacturing and manufacturing processes; and
11. all inventories on hand as of the Closing Date.

PROVIDED, HOWEVER, that the definition of “Zofran Assets” may not include rights, titles and interests in or to owned or leased real property or buildings.

NNNN. “Zovirax” means a Product that contains any form or formulation of the compound acyclovir and any similar oral or topical prescription Product for the treatment of herpes.

II.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall divest the Kytril Assets as an ongoing business to Roche pursuant to and in accordance with the Kytril Asset Sale Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreement, if approved by the Commission as the Divestiture Agreement for the Kytril Assets, is incorporated by reference into this Order and made part hereof as non-public Appendix II. If Respondents do not divest the Kytril Assets to Roche within ten (10) Business Days after the Merger is consummated, the Commission may appoint a trustee to divest either the Kytril Assets or the Zofran

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Assets. Provided, however, that if Respondents have divested the Kytril Assets to Roche prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Roche is not an acceptable purchaser of the Kytril Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Roche and the Commission may appoint a trustee to divest either the Kytril Assets or the Zofran Assets to a Commission-approved Acquirer.

B. Failure to comply with all terms of the Kytril Asset Sale Agreement, Kytril Supply Agreement, or Kytril Transition Support Agreement, if approved by the Commission, shall constitute a failure to comply with this Order. Any Divestiture Agreement between Respondents (or a trustee appointed pursuant to Paragraph XI. of this Order) and an acquirer of the Kytril Assets that has been approved by the Commission shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in any Divestiture Agreement related to the Kytril Assets the following provisions, and Respondents shall commit to satisfy the following:

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer in a timely manner and under reasonable terms and conditions, a supply of Granisetron, and of Kytril (including, as necessary, Kytril as Finished Goods), for a period of years sufficient to allow the Commission-approved Acquirer to become certified by the FDA to manufacture Kytril independently of Respondents.
2. After Respondents commence delivery of Granisetron and of Kytril to the Commission-approved Acquirer pursuant to a Divestiture Agreement and for the term of the Contract Manufacture related to Granisetron and Kytril, Respondents will make inventory of Granisetron

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and of Kytril available for sale or resale only to the Commission-approved Acquirer.

3. Respondents shall make representations and warranties that the Granisetron and the Kytril supplied through Contract Manufacture pursuant to the Divestiture Agreement meets FDA-approved specifications. Respondents shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Granisetron or the Kytril supplied to the Commission-approved Acquirer pursuant the Divestiture Agreement by the Respondents to meet FDA specifications. This obligation shall be contingent upon the Commission-approved Acquirer's giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondents under this Order. This obligation shall not require Respondents to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by the Respondents to the Commission-approved Acquirer.
4. Respondents shall make representations and warranties that Respondents will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver Granisetron or Kytril in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents.

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5. During the term of the Contract Manufacture between Respondents and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or the Monitor Trustee, Respondents shall make available to the Monitor Trustee all records that relate to the manufacture of Granisetron and of Kytril.
 6. Upon reasonable notice and request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner: (a) assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary Agency approvals to manufacture and sell Kytril; (b) assistance to the Commission-approved Acquirer (or the Designee thereof) to manufacture Kytril in substantially the same manner and quality employed or achieved by SB; and (c) consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee thereof) receives certification from the FDA, sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Kytril. Such assistance shall include on-site inspections of Respondents' manufacturing facilities related to Kytril, at the Commission-approved Acquirer's request.
- D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information relating to Kytril. This provision shall not apply to any Confidential Business Information relating to Kytril that Glaxo can demonstrate it obtained without the assistance of SB prior to the consummation of the Merger.
- E. Respondents shall not use, directly or indirectly, any Confidential Business Information relating to the research, development, manufacturing or marketing of Kytril, and shall

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not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer. This provision shall not apply to any Confidential Business Information relating to Kytril that Glaxo can demonstrate it obtained without the assistance of SB prior to the consummation of the Merger. Notwithstanding the foregoing, Respondents shall be permitted to disclose any such Confidential Business Information to the extent legally required or necessary for obtaining appropriate regulatory licenses or approvals or responding to Agency inquiries, or to the extent necessary to permit Respondents to comply with obligations under the Divestiture Agreements and this Order.

F. Respondents shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Kytril Sales Employees and the Kytril Core Employees for a period of six (6) months from the Closing Date (“the Access Period”), provided that such contracts are contingent upon the Commission’s approval of the Divestiture Agreement. Notwithstanding the foregoing, the Access Period for the Kytril Core Employees who are identified as manufacturing employees shall continue until the Commission-approved Acquirer is fully validated, qualified, and approved by the FDA, and able to manufacture Granisetron.

G. Respondents shall provide the Commission-approved Acquirer an opportunity to inspect the personnel files and other documentation relating to the Kytril Sales Employees and the Kytril Core Employees, to the extent permissible under applicable laws, at the request of the Commission-approved Acquirer, at any time after execution of the Divestiture Agreement until the end of the Access Period.

H. During the Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of Kytril Sales Employees or Kytril Core Employees, and shall remove any impediments that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with

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Respondents that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to a Kytril Sales or Kytril Core Employee who receives a written offer of employment from the Commission-approved Acquirer. Provided, however, that if Roche is the Commission-approved Acquirer, the restrictions on making counteroffers shall end with respect to the Kytril Sales Employees in the United States on the date that the 20th Kytril Sales Employee has accepted employment with Roche. The restriction on making counteroffers shall end with respect to the Kytril Sales Employees in each country outside the United States on the date that 20% of Kytril Sales Employees in each such country have accepted employment with Roche.

I. Respondents shall provide all Kytril Core Employees and all Kytril Sales Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Kytril Assets has occurred, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondents shall provide to each Kytril Core Employee and each Kytril Sales Employee incentives to accept employment with the Commission-approved Acquirer at the time of the divestiture. Such incentives shall include a bonus for each such employee, equal to 10% of the employee's current annual salary and commissions (including any annual bonuses) as of the Closing Date, who accepts an offer of employment during the Access Period (as defined in Paragraph II.F.) from the Commission-approved Acquirer and remains employed by the Acquirer for a period of one (1) year, payable by Respondents one (1) year after the commencement of the employee's employment by the Commission-approved Acquirer.

J. For a period of one (1) year following the date the divestiture is accomplished, Respondents shall not, directly or indirectly, solicit or otherwise attempt to induce any employees of the Commission-approved Acquirer with any amount of responsibility relating to Kytril to terminate their

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employment relationship with the Commission-approved Acquirer; provided, however, a violation of this provision will not occur if: (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Respondents hire employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this paragraph. During the one-year period following the divestiture, Respondents shall not, directly or indirectly, hire or enter into any arrangement for the services of any employees employed by the Commission-approved Acquirer with any amount of responsibility relating to Kytril, unless the individual's employment has been terminated by the Commission-approved Acquirer.

K. Respondents shall secure, prior to divestiture, all consents and waivers from all private entities that are necessary for the divestiture of the Kytril Assets, or for the continued research, development, manufacture, sale, marketing or distribution of Kytril by the Commission-approved Acquirer.

L. For the periods as set forth in this Paragraph II. L. (collectively, the "Moratorium/Waiting Period," referred to in the Kytril Asset Sale Agreement as the "Non Competition Period"), Respondents will not market or promote Zofran or any other Antiemetic Product using the services of any employee who has directly participated in the marketing, contracting, promotion or sale of Kytril, regardless of the portion of work time expended on Kytril, within the eighteen (18) month period immediately prior to the Closing Date. The Moratorium/Waiting Period shall be as follows: (1) six (6) months from the Closing Date with respect to Kytril Sales Employees; and (2) twelve (12) months from the Closing Date for all Kytril Core Employees and all other employees who have directly participated in marketing, promotion or sales of Kytril, including participating in strategic decision-making, sales management, brand management, sales training, market research and contracting with managed care organizations, hospitals and other institutions. Without limiting the foregoing, employees covered by this Paragraph II. L. shall include those individuals listed by name and title in Schedule

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6.10(a) of the Kytril Asset Sale Agreement, as well as all other employees subject to this Paragraph.

M. Respondents shall require, as a condition of continued employment post-divestiture, that each Kytril Sales Employee and each Kytril Core Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Kytril Confidential Business Information (including, without limitation, all field experience) strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents. (A copy of this confidentiality agreement is contained in Schedule 6.10(e)(ii) of the Kytril Asset Sale Agreement).

N. Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information relating to Kytril by Respondents' personnel and of the restrictions on the sale of Zofran by certain SB personnel to all of the Respondents' employees involved in the manufacturing, distribution, sale or marketing of Kytril or Zofran, with such notification to be in substantially the form set forth in Schedule 6.10(e)(i) of the Kytril Asset Sale Agreement. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall also obtain from each employee covered by this Paragraph II. N. an agreement to abide by the applicable restrictions, with the agreement to be in substantially the form set forth in Schedule 6.10(e)(ii) of the Kytril Asset Sale Agreement. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certificate to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by their sales forces of all applicable restrictions, including the provision of written reminders to all such sales personnel at three (3) month intervals until the expiration of the time periods set forth in all

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Divestiture Agreements, including those in the Kytril Asset Sale Agreement, and take corrective actions for the failure of sales personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

O. At the time of divestiture, Respondents shall make available to the Commission-approved Acquirer such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Kytril Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer is fully validated, qualified, and approved by the FDA, and able to manufacture Kytril. At the time of divestiture, Respondents shall also divest any additional, incidental assets of Respondents and make any further arrangements for transitional services within the first twelve (12) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Kytril Assets.

P. Pending divestiture of the Kytril Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Kytril Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Kytril Assets except for ordinary wear and tear.

Q. Respondents shall maintain manufacturing facilities for Kytril production that are ready, validated, qualified and approved by the FDA, and fully capable of producing Granisetron at a capacity of at least 60 kilograms per year, until either (1) the Commission-approved Acquirer, upon approval by the Commission, terminates, or elects not to extend, any Contract Manufacture arrangement with Respondents to supply Granisetron or Kytril, or (2) the Commission-approved Acquirer is fully validated, qualified, and approved by the FDA and able to manufacture Granisetron or Kytril (hereinafter referred to as the "Kytril Supply Period").

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R. During the term of the Kytril Supply Period, Respondents shall manufacture at least 20 kilograms of Granisetron per year and shall not permit, at any time, the total amount of Granisetron available for Kytril production to fall below 30 kilograms. The total amount of Granisetron shall include the amount in both the Respondents' and the Commission-approved Acquirer's inventory.

S. During the term of the Kytril Supply Period, should the amount of Granisetron available for Kytril production fall below 30 kilograms, or should Respondents fail to maintain a facility that is validated, qualified and approved by the FDA to manufacture Granisetron, the Commission may, in its sole discretion, require Respondents to divest the Zofran Assets; provided, however, that Respondents shall be allowed to demonstrate that such failure was entirely beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents. If the Commission determines that the Zofran Assets are to be divested, the Commission may appoint a trustee to divest the Zofran Assets.

T. The purpose of the divestiture of the Kytril Assets is to ensure the continued use of the Kytril Assets in the same business in which the Kytril Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall divest the Famciclovir and Penciclovir Assets as ongoing businesses to Novartis pursuant to and in accordance with the Famciclovir and Penciclovir Asset Sale Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreement, if approved by the Commission as the Divestiture Agreement for the Famciclovir and Penciclovir Assets, is incorporated by reference into this

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Order and made part hereof as non-public Appendix III. If Respondents do not divest the Famciclovir and Penciclovir Assets to Novartis within ten (10) Business Days after the Merger is consummated, the Commission may appoint a trustee to divest the Famciclovir and Penciclovir Assets, together. Provided, however, that if Respondents have divested the Famciclovir and Penciclovir Assets to Novartis prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Novartis is not an acceptable purchaser of the Famciclovir and Penciclovir Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Novartis and the Commission may appoint a trustee to divest the Famciclovir and Penciclovir Assets, together, to a Commission-approved Acquirer.

B. Failure to comply with all terms of the Famciclovir and Penciclovir Asset Sale Agreement or the Famciclovir and Penciclovir Supply Agreement, if approved by the Commission, shall constitute a failure to comply with this Order. Any Divestiture Agreement between Respondents (or a trustee appointed pursuant to Paragraph XI. of this Order) and an acquirer of the Famciclovir and Penciclovir Assets that has been approved by the Commission shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in the Divestiture Agreement related to the Famciclovir and Penciclovir Assets the following provisions, and Respondents shall commit to satisfy the following:

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer in a timely manner and under reasonable terms and conditions, supplies of Famciclovir and Penciclovir as Finished Goods for a period of years sufficient to allow the Commission-approved Acquirer to become certified by the FDA to

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manufacture Famciclovir and Penciclovir as Finished Goods independently of Respondents.

2. After Respondents commence delivery of Famciclovir and Penciclovir as Finished Goods to the Commission-approved Acquirer pursuant to the Divestiture Agreement and for the term of the Contract Manufacturing arrangement related to Famciclovir and Penciclovir as Finished Goods, Respondents will make inventory of Famciclovir and Penciclovir as Finished Goods available for sale or resale only to the Commission-approved Acquirer.
3. Respondents shall make representations and warranties that the Famciclovir and Penciclovir as Finished Goods supplied through Contract Manufacture pursuant to the Divestiture Agreement meets FDA-approved specifications. Respondents shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Famciclovir and Penciclovir as Finished Goods supplied to the Commission-approved Acquirer pursuant the Divestiture Agreement by the Respondents to meet FDA specifications. This obligation shall be contingent upon the Commission-approved Acquirer's giving Respondents prompt, adequate notice of such claim, and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondents under this Order. This obligation shall not require Respondents to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by the Respondents to the Commission-approved Acquirer.

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4. Respondents shall make representations and warranties that Respondents will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver Famciclovir and Penciclovir as Finished Goods in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents.
5. During the term of the Contract Manufacture between Respondents and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or the Monitor Trustee, Respondents shall make available to the Monitor Trustee all records that relate to the manufacture of Famciclovir and of Penciclovir as Finished Goods.
6. Upon reasonable notice and request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner: (a) assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary Agency approvals to manufacture and sell Famciclovir and Penciclovir as Finished Goods; (b) assistance to the Commission-approved Acquirer (or the Designee thereof) to manufacture Famciclovir and Penciclovir as Finished Goods in substantially the same manner and quality employed or achieved by SB; and (c) consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee thereof) receives certification from the FDA, sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the

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manufacture of Famciclovir and Penciclovir as Finished Goods. Such assistance shall include on-site inspections of Respondents' manufacturing facilities related to Famciclovir and Penciclovir as Finished Goods, at the Commission-approved Acquirer's request.

D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information relating to Famciclovir, Penciclovir, Famciclovir Finished Goods and Penciclovir Finished Goods. This provision shall not apply to any Confidential Business Information relating to Famciclovir or Penciclovir that Glaxo can demonstrate it obtained without the assistance of SB prior to the consummation of the Merger.

E. Respondents shall not use, directly or indirectly, any Confidential Business Information relating to the research, development, manufacturing or marketing of Famciclovir, Penciclovir, Famciclovir Finished Goods or Penciclovir Finished Goods, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer. This provision shall not apply to any Confidential Business Information relating to Famciclovir or Penciclovir that Glaxo can demonstrate it obtained without the assistance of SB prior to the consummation of the Merger. Notwithstanding the foregoing, Respondents shall be permitted to disclose any such Confidential Business Information to the extent legally required or necessary for obtaining appropriate regulatory licenses or approvals or responding to Agency inquiries, or to the extent necessary to permit Respondents to comply with obligations under the Divestiture Agreements and this Order.

F. Respondents shall provide the Commission-approved Acquirer with the opportunity to enter into employment contracts with the Famciclovir and Penciclovir Key Employees and the Famciclovir and Penciclovir Sales Employees for a period of six (6) months from the Closing Date ("the Access Period"), provided that such contracts are contingent upon the Commission's approval of the Divestiture Agreement. Notwithstanding the foregoing, the Access Period for the

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Famciclovir and Penciclovir Key Employees who are identified as manufacturing employees shall continue until the Commission-approved Acquirer is fully validated, qualified, and approved by the FDA, and able to manufacture Famciclovir, Penciclovir, Famciclovir Finished Goods and Penciclovir Finished Goods.

G. Respondents shall provide the Commission-approved Acquirer an opportunity to inspect the personnel files and other documentation relating to the Famciclovir and Penciclovir Sales Employees and the Famciclovir and Penciclovir Key Employees, to the extent permissible under applicable laws, at the request of the Commission-approved Acquirer, at any time after execution of the Divestiture Agreement until the end of the Access Period.

H. During the Access Period, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of Famciclovir and Penciclovir Key Employees or Famciclovir and Penciclovir Sales Employees, and shall remove any impediments that may deter these employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to any Famciclovir and Penciclovir Sales Employee or any Famciclovir and Penciclovir Key Employee who receives a written offer of employment from the Commission-approved Acquirer.

I. Respondents shall provide all Famciclovir and Penciclovir Key Employees and all Famciclovir and Penciclovir Sales Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the Famciclovir and Penciclovir Assets has occurred, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondents shall provide to each Famciclovir and Penciclovir

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Key Employee and each Famciclovir and Penciclovir Sales Employee incentives to accept employment with the Commission-approved Acquirer at the time of the divestiture. Such incentives shall include a bonus for each such employee, equal to 10% of the employee's current annual salary and commissions (including any annual bonuses) as of the Closing Date, who accepts an offer of employment during the Access Period (as defined in Paragraph III.F.) from the Commission-approved Acquirer and remains employed by the Acquirer for a period of one (1) year, payable by Respondents one (1) year after the commencement of the employee's employment by the Commission-approved Acquirer.

J. For a period of one (1) year following the date the divestiture is accomplished, Respondents shall not, directly or indirectly, solicit or otherwise attempt to induce any employees of the Commission-approved Acquirer with any amount of responsibility relating to Famciclovir, Penciclovir, Famciclovir Finished Goods or Penciclovir Finished Goods to terminate their employment relationship with the Commission-approved Acquirer; provided, however, a violation of this provision will not occur if (i) Respondents advertise for employees in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Respondents hire employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this paragraph. During the one-year period following the divestiture, Respondents shall not, directly or indirectly, hire or enter into any arrangement for the services of any employees employed by the Commission-approved Acquirer with any amount of responsibility relating to Famciclovir, Penciclovir, Famciclovir Finished Goods or Penciclovir Finished Goods, unless the individual's employment has been terminated by the Commission-approved Acquirer.

K. Respondents shall secure, prior to divestiture, all consents and waivers from all private entities that are necessary for the divestiture of the Famciclovir and Penciclovir Assets, or for the continued research, development, manufacture, sale, marketing or distribution of Famciclovir, Penciclovir,

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Famciclovir Finished Goods or Penciclovir Finished Goods by the Commission-approved Acquirer.

L. For the periods set forth in this Paragraph III. L. (collectively, the “Moratorium/Waiting Period,” referred to in the Famciclovir and Penciclovir Asset Sale Agreement as the “Non-competition Periods”), Respondents will not market, sell or promote valacyclovir (Valtrex), acyclovir or any other oral, intravenous or topical prescription product for the treatment of herpes, cold sores, chicken pox or shingles, or assist in any way those involved in the marketing, promotion or sale of valacyclovir (Valtrex), acyclovir or any other oral, intravenous or topical prescription product for the treatment of herpes using the services of any employee who has directly participated in the marketing, contracting, promotion or sale of Famciclovir Finished Goods or Penciclovir Finished Goods within the eighteen (18) month period immediately prior to the Closing Date. The Moratorium/Waiting Period shall be as follows: (1) six (6) months from the Closing Date with respect to Famciclovir and Penciclovir Sales Employees; and (2) twelve (12) months from the Closing Date for all Famciclovir and Penciclovir Key Employees and all other employees who have had any decision-making responsibility relating to Famciclovir Finished Goods or Penciclovir Finished Goods, including, but not limited to, responsibilities for, or involvement in, strategic decision-making, sales management, brand management, sales training, market research and contracting with managed care organizations, hospitals and other institutions. Without limiting the foregoing, employees covered by this Paragraph III. L. shall include those individuals listed by name and title in Schedule 6.16 of the Famciclovir and Penciclovir Asset Sale Agreement, as well as all other employees subject to this Paragraph.

M. Respondents shall require, as a condition of continued employment post-divestiture, that each Famciclovir and Penciclovir Key Employee and each Famciclovir and Penciclovir Sales Employee sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Famciclovir and Penciclovir Confidential Business Information (including, without limitation, all field experience)

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strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents.

N. Respondents shall provide written notification of the restrictions on the use of the Famciclovir and Penciclovir Confidential Business Information by Respondents' personnel and of the restrictions on the sale of valacyclovir (Valtrex), acyclovir or any other oral, intravenous or topical prescription product for the treatment of herpes, cold sores, chicken pox or shingles, by certain SB personnel to all of the Respondents' employees involved in the manufacturing, distribution, sale or marketing of Famciclovir, Penciclovir, Famciclovir Finished Goods, Penciclovir Finished Goods, Valtrex or Zovirax. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall also obtain from each employee covered by this Paragraph III. N. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' corporate headquarters and shall provide an officer's certificate to the Commission, stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by their sales forces of all applicable restrictions, including the provision of written reminders to all such sales personnel at three (3) month intervals until the expiration of the time periods set forth in all Divestiture Agreements, including those in the Famciclovir and Penciclovir Asset Sale Agreement, and take corrective actions for the failure of sales personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

O. At the time of divestiture, Respondents shall make available to the Commission-approved Acquirer such

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personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Famciclovir and Penciclovir Assets, and shall continue providing such personnel, assistance and training, at Respondents' cost, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer is fully validated, qualified, and approved by the FDA, and able to manufacture Famciclovir, Famciclovir Finished Goods, Penciclovir and Penciclovir Finished Goods. At the time of divestiture, Respondents shall also divest any additional, incidental assets of Respondents and make any further arrangements for transitional services within the first twelve (12) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Famciclovir and Penciclovir Assets.

P. Pending divestiture of the Famciclovir and Penciclovir Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Famciclovir and Penciclovir Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Famciclovir and Penciclovir Assets except for ordinary wear and tear.

Q. Respondents shall maintain manufacturing facilities for Famciclovir, Penciclovir, Famciclovir Finished Goods, and Penciclovir Finished Goods that are ready, validated, qualified and approved by the FDA, and fully capable of producing Penciclovir, Famciclovir, Penciclovir Finished Goods and Famciclovir Finished Goods, and shall manufacture Famciclovir Finished Goods and Penciclovir Finished Goods pursuant to all Divestiture Agreements until either: (1) the Commission-approved Acquirer, upon approval by the Commission, terminates, or elects not to extend, any Contract Manufacture arrangement with Respondents to supply Famciclovir Finished Goods or Penciclovir Finished Goods, or (2) the Commission-approved Acquirer is fully validated, qualified, and approved by the FDA and able to manufacture Famciclovir Finished Product and Penciclovir Finished Product, whichever occurs earlier.

R. The purpose of the divestiture of the Famciclovir and Penciclovir Assets is to ensure the continued use of the

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Famciclovir and Penciclovir Assets in the same business in which the Famciclovir and Penciclovir Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall transfer and surrender, absolutely and in good faith, all of Glaxo's DISC-HSV Prophylactic Vaccine Assets to Cantab, pursuant to and in accordance with the DISC-HSV Amended Development and Licence Agreement, and such agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix IV. Failure by Respondents to comply with the requirements of the DISC-HSV Amended Development and Licence Agreement shall constitute a failure to comply with this Order.
- B. Upon reasonable notice and request from Cantab to Respondents, Respondents shall provide to Cantab, in a timely manner and at no cost to Cantab, any assistance or advice as may be necessary for Cantab to obtain FDA approvals to research and develop a vaccine for the Prophylaxis of human infections with herpes simplex virus in connection with the use of the DISC Technology.
- C. Respondents shall not, directly or indirectly: (i) exercise dominion or control over, or otherwise seek to influence, the management, direction or supervision of the business of Cantab; (ii) seek or obtain representation on the Board of Directors of Cantab; (iii) exercise any voting rights attached to any Ownership Interest in Cantab, except in accordance with directions given by the Board of Cantab; (iv) seek or obtain access to any confidential or proprietary information of Cantab relating to the research or development of a vaccine for the Prophylaxis of human infections with herpes simplex virus and not otherwise necessary to comply with this Order; or (v) take

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any action or omit to take any action in a manner that would be incompatible with the status of Respondents as passive investors in Cantab. The requirements of this Paragraph shall continue and remain in effect so long as Respondents retain any Ownership Interest in Cantab.

D. Pending the completion of the transfer of the DISC-HSV Prophylactic Vaccine Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the DISC-HSV Prophylactic Vaccine Assets, and to prevent the destruction, deterioration, or impairment of any of the DISC-HSV Prophylactic Vaccine Assets.

E. The purpose of Paragraph IV of this Order is to ensure the continued use of the DISC-HSV Prophylactic Vaccine Assets in the same business in which the DISC-HSV Prophylactic Vaccine Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

F. For a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any additional or greater Ownership Interest in Cantab than that which exists as of the Closing Date, or any other interest(s), in whole or in part, in any of the DISC-HSV Prophylactic Vaccine Assets. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction

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(hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall divest and transfer the Zantac Assets to Pfizer, pursuant to and in accordance with the Zantac Agreements, and such agreements are incorporated by reference into this Order and made a part hereof as non-public Appendix V. Provided, however, Respondents may obtain a license from Pfizer to use the Product Trademarks relating to Zantac within the Prescription Field of Use.
- B. Failure to comply with all terms of the Zantac Agreements shall constitute a failure to comply with this Order.
- C. Pending the completion of the divestiture and transfer of the Zantac Assets to Pfizer, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Zantac Assets, and to prevent the destruction, deterioration, or impairment of any of the Zantac Assets.
- D. The purpose of Paragraph V of this Order is to ensure the continued use of the Zantac Assets in the same business in which the Zantac Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of

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competition resulting from the Merger as alleged in the Commission's complaint.

VI.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall divest the Tazicef Assets as an ongoing business to Abbott Labs pursuant to and in accordance with the Tazicef Asset Sale Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreement, if approved by the Commission as the Divestiture Agreement for the Tazicef Assets, is incorporated by reference into this Order and made part hereof as non-public Appendix VI. If Respondents fail to divest the Tazicef Assets within ten (10) Business Days after the Merger is consummated, the Commission may appoint a trustee to divest the Tazicef Assets. Provided, however, that if Respondents have divested the Tazicef Assets to Abbott Labs prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Abbott Labs is not an acceptable purchaser of the Tazicef Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Abbott Labs and the Commission may appoint a trustee to divest the Tazicef Assets to a Commission-approved Acquirer.

B. Failure to comply with all terms of the Tazicef Asset Sale Agreement or the Tazicef Final Finished Pharmaceuticals Supply Agreement, if approved by the Commission, shall constitute a failure to comply with this Order. Any Divestiture Agreement between Respondents (or a trustee appointed pursuant to Paragraph XI. of this Order) and an acquirer of the Tazicef Assets that has been approved by the Commission shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of such

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Divestiture Agreement shall constitute a failure to comply with this Order.

C. Respondents shall include in any Divestiture Agreement related to the Tazicef Assets the following provisions, and Respondents shall commit to satisfy the following:

1. Respondents shall Contract Manufacture and deliver to the Commission-approved Acquirer in a timely manner and under reasonable terms and conditions, a supply of Ceftazidime, for a period of years sufficient to allow the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to become certified by the FDA to manufacture Ceftazidime independently of Respondents.
2. Respondents shall make representations and warranties that the Ceftazidime supplied through Contract Manufacture pursuant to the Divestiture Agreement meets FDA-approved specifications. Respondents shall agree to indemnify, defend and hold the Commission-approved Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Ceftazidime supplied to the Commission-approved Acquirer pursuant the Divestiture Agreement by the Respondents to meet FDA specifications. This obligation shall be contingent upon the Commission-approved Acquirer's giving Respondents prompt, adequate notice of such claim and cooperating fully in the defense of such claim. The Divestiture Agreement shall be consistent with the obligations assumed by Respondents under this Order. This obligation shall not require Respondents to be liable for any negligent act or omission of the Commission-approved Acquirer or for any representations and warranties, express or implied, made by the Commission-approved Acquirer that exceed the representations and warranties made by the Respondents to the Commission-approved Acquirer.

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3. Respondents shall make representations and warranties that Respondents will hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver Ceftazidime in a timely manner as required by the Divestiture Agreement unless Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents.
4. During the term of the Contract Manufacturing between Respondents and the Commission-approved Acquirer, upon request of the Commission-approved Acquirer or the Monitor Trustee, Respondents shall make available to the Monitor Trustee all records that relate to the manufacture of Ceftazidime.
5. Upon reasonable notice and request from the Commission-approved Acquirer to the Respondents, Respondents shall provide in a timely manner: (a) assistance and advice to enable the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) to obtain all necessary Agency approvals to manufacture and sell Tazicef; (b) assistance to the Commission-approved Acquirer (or the Designee thereof) to manufacture Tazicef in substantially the same manner and quality employed or achieved by SB; and (c) consultation with knowledgeable employees of Respondents and training, at the request of the Commission-approved Acquirer and at a facility chosen by the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee thereof) receives certification from the FDA, sufficient to satisfy management of the Commission-approved Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Tazicef. Such assistance shall include on-site inspections of Respondents' manufacturing facilities related to Ceftazidime and/or Tazicef, at the Commission-approved Acquirer's request.

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D. Respondents shall submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information relating to Tazicef. This provision shall not apply to any Confidential Business Information relating to Tazicef that was obtained by Glaxo without the assistance of SB prior to the consummation of the Merger.

E. Respondents shall not use, directly or indirectly, any Confidential Business Information relating to the research, development, manufacturing or marketing of Tazicef, and shall not disclose or convey such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer. This provision shall not apply to any Confidential Business Information relating to Tazicef that was obtained by Glaxo without the assistance of SB prior to the consummation of the Merger. Notwithstanding the foregoing, Respondents shall be permitted to use or disclose any such Confidential Business Information to the extent legally required or necessary for obtaining appropriate regulatory licenses or approvals or responding to Agency inquiries, or to the extent necessary to permit Respondents to comply with obligations under the Divestiture Agreements and this Order.

F. Respondents shall secure, prior to divestiture, all consents and waivers from all private entities that are necessary for the divestiture of the Tazicef Assets or are necessary for the continued research, development, manufacture, sale, marketing or distribution of Tazicef by the Commission-approved Acquirer, including, but not limited to, all necessary consents and waivers from Lilly and Takeda.

G. At the time of divestiture, Respondents shall make available to the Commission-approved Acquirer such personnel, assistance and training as the Commission-approved Acquirer might reasonably need to transfer the Tazicef Assets, and shall continue providing such personnel, assistance and training, at the request of the Commission-approved Acquirer, until the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) is fully validated, qualified, and approved by the FDA, and able to manufacture Ceftazidime. At the time of divestiture, Respondents shall also

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divest any additional, incidental assets of Respondents and make any further arrangements for transitional services within the first twelve (12) months after divestiture that may be reasonably necessary to assure the viability and competitiveness of the Tazicef Assets.

H. Pending divestiture of the Tazicef Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Tazicef Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Tazicef Assets except for ordinary wear and tear.

I. During the term of the Tazicef Final Finished Pharmaceuticals Supply Agreement, Respondents shall ensure that no interruption in the supply of Tazicef to the Commission-approved Acquirer occurs. Provided, however, that if any interruption (expected or unexpected) in the supply of Tazicef to the Commission-approved Acquirer does occur, or if Respondents' supply of Tazicef is depleted, Respondents shall immediately provide a substitute Ceftazidime Product to the Commission-approved Acquirer. Provided further, that to ensure an immediate supply of a substitute Ceftazidime Product is available for the Commission-approved Acquirer in the event of an interruption or depletion in the supply of Tazicef, Respondents shall take all actions necessary to obtain all FDA approvals required to qualify another Ceftazidime Product as a substitute for Tazicef, and Respondents shall give priority to the Commission-approved Acquirer in supplying a substitute Ceftazidime Product during any such interruption or depletion in the supply of Tazicef, including before Respondents satisfy their own requirements for any Ceftazidime Product.

J. Respondents shall reimburse the Commission-approved Acquirer for any annual minimum royalty(ies) due to any owner of U.S. Patent 5,710,146 (including, but not limited to Lilly), that are paid by the Commission-approved Acquirer under existing license agreements, to the extent those amounts are not offset by the royalties earned from the Commission-approved Acquirer. Such reimbursement by Respondents shall continue through the expiration of U.S. Patent 5,710,146.

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K. Respondents shall be responsible for all costs involved in ensuring that (1) the FDA approves the manufacturing facility of the Commission-approved Acquirer (or the Designee of the Commission-approved Acquirer) in which the Commission-approved Acquirer's Cefprozil Product will be manufactured; and (2) such facility satisfies the Commission-approved Acquirer's requirements for third-party vendors. Respondents shall pay for the cost of a third-party consultant hired by the Commission-approved Acquirer to supervise such efforts as well as any costs incurred by the Commission-approved Acquirer as a result of the inability of the Designee of the Commission-approved Acquirer to supply Tazicef to the Commission-approved Acquirer that is not otherwise assumed by the Designee.

L. The purpose of the divestiture of the Tazicef Assets is to ensure the continued use of the Tazicef Assets in the same business in which the Tazicef Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

VII.

IT IS FURTHER ORDERED that:

A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall transfer and surrender, absolutely and in good faith, all Renzapride Assets, pursuant to and in accordance with the Renzapride Asset Sale Agreements, to Alizyme, and such agreements are incorporated by reference into this Order and made a part hereof as non-public Appendix VII. Failure by Respondents to comply with all terms of the Renzapride Asset Sale Agreements shall constitute a failure to comply with this Order.

B. Pending the completion of the transfer of the Renzapride Assets to Alizyme, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Renzapride Assets, and to prevent the destruction, deterioration, or impairment of any of the Renzapride Assets.

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C. The purpose of Paragraph VII of this Order is to ensure the continued use of the Renzapride Assets in the same business in which the Renzapride Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

D. For a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any additional or greater Ownership Interest in Alizyme than that which exists as of the Closing Date, or any other interest(s), in whole or in part, in any of the Renzapride Assets. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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VIII.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall transfer and surrender, absolutely and in good faith, all Frovatriptan Assets, pursuant to and in accordance with the Frovatriptan Asset Sale Agreement, to Vernalis, and such agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix VIII. Failure by Respondents to comply with all terms of the Frovatriptan Asset Sale Agreement shall constitute a failure to comply with this Order.
- B. Pending the completion of the transfer of the Frovatriptan Assets to Vernalis, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Frovatriptan Assets, and to prevent the destruction, deterioration, or impairment of any of the Frovatriptan Assets.
- C. The purpose of Paragraph VIII of this Order is to ensure the continued use of the Frovatriptan Assets in the same business in which the Frovatriptan Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.
- D. For a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership or other interest, in whole or in part, in any of the Frovatriptan Assets. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department

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of Justice, and notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IX.**IT IS FURTHER ORDERED** that:

A. Not later than ten (10) Business Days after the Merger is consummated, Respondents shall transfer and surrender, absolutely and in good faith, all GI147211C Assets, pursuant to and in accordance with the GI147211C Asset Sale Agreements, to Gilead Sciences, and such agreements are incorporated by reference into this Order and made a part hereof as non-public Appendix IX. Failure by Respondents to comply with all terms of the GI147211C Asset Sale Agreements shall constitute a failure to comply with this Order.

B. Pending the completion of the transfer of the GI147211C Assets to Gilead Sciences, Respondents shall take such actions as are necessary to maintain the viability and marketability of the GI147211C Assets, and to prevent the destruction, deterioration, or impairment of any of the GI147211C Assets.

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C. The purpose of Paragraph IX of this Order is to ensure the continued use of the GI147211C Assets in the same business in which the GI147211C Assets were engaged at the time of the announcement of the Merger, and to remedy the lessening of competition resulting from the Merger as alleged in the Commission's complaint.

D. For a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership or other interest, in whole or in part, in any of the GI147211C Assets. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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X.**IT IS FURTHER ORDERED** that:

A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor Trustee to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Divestiture Agreements. The Commission may appoint one or more Monitor Trustees to assure Respondents' compliance with the requirements of Paragraph II, III, IV, V, VI, VII, VIII and IX, respectively, of this Order, and the related Divestiture Agreements.

B. If one or more Monitor Trustees is appointed pursuant to Paragraph X.A. of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Monitor Trustee:

1. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed Monitor Trustee.
2. The Monitor Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this Order and with the relevant Divestiture Agreement(s) made a part of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.
3. Within ten (10) days after appointment of the Monitor Trustee, Respondents shall execute a trust agreement that,

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subject to the prior approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order and with the relevant Divestiture Agreement(s) in a manner consistent with the purposes of this Order.

4. The Monitor Trustee shall serve until the last obligation under each of the Divestiture Agreements has been fully performed and each of the Commission-approved Acquirers pursuant to Paragraphs II., III., and VI. of this Order (or as otherwise specified by the Commission) has received all necessary FDA approvals to manufacture and sell the Product(s) acquired pursuant to a Divestiture Agreement; provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order.
5. The Monitor Trustee shall have full and complete access to Respondents' personnel, books, records, documents, facilities and technical information relating to the research, development and manufacture of the relevant Product, or to any other relevant information, as the Monitor Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the manufacture of the relevant Product and all materials and information relating to FDA and other Agency approvals. Respondents shall cooperate with any reasonable request of the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondents' compliance with this Order and the relevant Divestiture Agreement(s).
6. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Commission may, among other things, require the Monitor Trustee to sign an appropriate confidentiality

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agreement relating to Commission materials and information received in connection with the performance of the Monitor Trustee's duties. The Monitor Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.
8. If the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee in the same manner as provided in Paragraph X.A. of this Order.
9. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the relevant Divestiture Agreement(s).
10. Respondents shall report to the Monitor Trustee in accordance with the requirements of Paragraph XII. of this Order and/or as otherwise provided in any trust agreement approved by the Commission. The Monitor Trustee shall evaluate the reports submitted to it by the Respondents,

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and any reports submitted by the relevant Commission-approved Acquirer(s), with respect to the performance of Respondents' obligations under the relevant Divestiture Agreement(s). Within one (1) month from the date the Monitor Trustee receives these reports, the Monitor Trustee shall report in writing to the Commission concerning compliance by Respondents with the provisions of this Order and the relevant Divestiture Agreement(s). These responsibilities of the Monitor Trustee shall continue until the last obligation under the relevant Divestiture Agreement(s) has been fully performed, unless otherwise directed by the Commission.

XI.

IT IS FURTHER ORDERED that:

A. If Respondents have not fully complied with the obligations specified in Paragraphs II through IX of this Order, the Commission may appoint a trustee or trustees to divest or transfer the assets required to be divested or transferred pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph, as applicable ("Divestiture Trustee(s)"). The Commission may appoint a different Divestiture Trustee to accomplish each of the divestitures described in Paragraphs II, III, IV, V, VI, VII, VIII, and IX, respectively. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced

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by the Commission, for any failure by the Respondents to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph XI.A. of this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest or transfer the relevant assets that are required by this Order to be divested or transferred.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture(s) or transfer(s) required by the Order.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph XI.B.3. to accomplish

Decision and Order

the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; provided, however, the Commission may extend the divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the relevant assets that are required to be divested by this Order or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture(s). Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
6. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made in the manner and to an acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those

Decision and Order

approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

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9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph XI.B. of this Order.
10. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.
11. In the event that the Divestiture Trustee determines that he or she is unable to divest the assets required to be divested pursuant to each of the relevant Paragraphs in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the research, design, development, manufacture, distribution, marketing or sale of the relevant Product or Products, the Divestiture Trustee may divest such additional assets related to the relevant Product or Products of the Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
13. The Divestiture Trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).

XII.

IT IS FURTHER ORDERED that:

- A. Respondents shall submit to the Commission (with simultaneous copies to the Monitor Trustee(s) and the

Decision and Order

Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. These reports are due as follows: the initial report is due thirty (30) days after the date this Order becomes final; the second report is due sixty (60) days after the initial report; and all subsequent reports are due every ninety (90) days thereafter until Respondents have fully complied with Paragraphs II., III., IV.A., V.A., VI., VII.A., VIII.A., and IX.A. of this Order. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through IX. of the Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

B. One (1) year from the date this Order becomes final, annually for the next five (5) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

XIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

Decision and Order

XIV.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XV.

IT IS FURTHER ORDERED that this Order shall terminate on January 26, 2021.

By the Commission.

CONFIDENTIAL APPENDIX I

[Redacted Public Record Version]

Decision and Order

CONFIDENTIAL APPENDICES II-IX

[Redacted From Public Record Version]

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger between Respondent Glaxo Wellcome plc (“Glaxo”) and Respondent SmithKline Beecham plc (“SB”), hereinafter referred to as “Respondents,” and the Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing the proposed Decision and Order, an admission by the Respondents of all of the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Glaxo is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business

Order

located at Glaxo Wellcome House, Berkeley Avenue,
Greenford, Middlesex, UB6 ONN, England.

2. Respondent SB is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 3 New Horizons Court, Brentford, Middlesex, TW8 9EP, England.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Respondents shall take such actions as are reasonably necessary to maintain the viability, marketability, and competitiveness of the Kytril Assets, Zofran Assets, Famciclovir Assets and Penciclovir Assets, Tazicef Assets, Zantac Assets, DISC-HSV Prophylactic Vaccine Assets, Renzapride Assets, GI147211C Assets, and Frovatriptan Assets, hereinafter collectively referred to as "Assets," and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

Order

- B. Respondents shall adhere to and abide by the Divestiture Agreements incorporated by reference into this Order to Maintain Assets and made a part hereof.

III.

IT IS FURTHER ORDERED that:

- A. At any time after the Commission issues this Order to Maintain Assets, the Commission may appoint one or more Monitor Trustee(s) to assure that Respondents expeditiously comply with their obligations relating to the Assets pursuant to this Order to Maintain Assets, and to the Consent Agreement, the Decision and Order and the related Divestiture Agreements.
- B. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of any Monitor Trustee appointed pursuant to Paragraph III.A.:
1. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. The Monitor Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this Order to Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.
 3. Within ten (10) days after appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to

Order

permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order to Maintain Assets and, as applicable, the Consent Agreement and the Decision and Order.

4. The Monitor Trustee shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order to Maintain Assets.
5. The Monitor Trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to Respondents' personnel, books, records, documents, facilities and technical information relating to any of the Assets or to any other relevant information, as the Monitor Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Assets. Respondents shall cooperate with any reasonable request of the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondents's compliance with this Order to Maintain Assets and, as applicable, the Consent Agreement and the Decision and Order.
6. The Monitor Trustee shall serve, without bond or other security, at the expense of the Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities.
7. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for,

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or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses damages, claims, or expenses result from misfeasance, gross negligence, wilful or wanton acts, or bad faith by the Monitor Trustee.

8. If the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph III.A. of this Order to Maintain Assets.
 9. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets and, as applicable, the Consent Agreement and the Decision and Order.
 10. The Monitor Trustee shall report in writing to the Commission concerning compliance by Respondents with the provisions of this Order to Maintain Assets and, as applicable, the Consent Agreement and the Decision and Order, within twenty (20) days from the date of appointment and every thirty (30) days until the Respondents have completed all the divestitures required by the Decision and Order.
- C. The Monitor Trustee(s) appointed pursuant to Paragraph III.A. of this Order to Maintain Assets may be the same person(s) appointed as Monitor Trustee(s) pursuant to Paragraph X.A. of the Decision and Order in this matter, and/or as Divestiture Trustee(s) pursuant to Paragraph XI.A. of the Decision and Order in this matter.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution,

Order

assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

Order

B. The day after all of the divestitures or transfers of the Assets, as described in and required by the Decision and Order, are completed.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 15, 2001

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an agreement containing a proposed Consent Order from Glaxo Wellcome plc (“Glaxo”) and SmithKline Beecham plc (“SB”) which is designed to remedy the anticompetitive effects of the merger of Glaxo and SB. Under the terms of the agreement, the companies would be required to: (1) divest all of SB’s worldwide rights and intellectual property relating to its antiemetic drug, Kytril, to F. Hoffman LaRoche; (2) divest SB’s intellectual property rights to manufacture and market ceftazidime to Abbott Laboratories; (3) divest SB’s worldwide rights and intellectual property relating to its antiviral drugs, Famvir and Denavir, including the rights to the base active ingredients, penciclovir and famciclovir, to Novartis Pharm AG and Novartis Pharmaceuticals Corporation; (4) return to Cantab Pharmaceuticals plc all rights to use Cantab’s DISC technology for the development of a prophylactic herpes vaccine; (5) divest Glaxo’s U.S. and Canadian Zantac trademark rights to Pfizer (formerly Warner-Lambert) and thereby remove restrictions on the ability of Pfizer’s Zantac 75 to compete in the over-the-counter (“OTC”) H-2 blocker acid relief market; (6) assign all of SB’s relevant intellectual property rights and relinquish all options to the drug renzapride, a drug to treat irritable bowel syndrome, to Alizyme plc; (7) assign all of Glaxo’s relevant intellectual property rights and relinquish all of Glaxo’s reversionary rights to GI147211C, a topoisomerase I inhibitor to treat certain types of cancer, to Gilead Sciences, Inc.; and (8) assign all of SB’s relevant intellectual property rights and relinquish all options to regain control over frovatriptan, a drug to treat migraine headaches, to Vernalis Ltd.

The proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will

Analysis

decide whether it should withdraw from the agreement or make final the agreement's proposed Consent Order.

Pursuant to a scheme of arrangement announced on January 17, 2000, Glaxo and SB propose to combine their two companies in a transaction valued at approximately \$182 billion. Thereafter, the merged entity will be renamed Glaxo SmithKline plc. The proposed Complaint alleges that the proposed merger, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the markets for the research, development, manufacture and sale of: (1) 5HT-3 antiemetic drugs; (2) ceftazidime; (3) second generation oral and intravenous antiviral drugs for the treatment of herpes virus infections; (4) prescription topical antiviral cremes for herpes labialis or oral herpes, commonly referred to as cold sores; (5) prophylactic herpes vaccines; (6) OTC H-2 blockers; (7) topoisomerase I inhibitors marketed or in development for the treatment of ovarian, non-small cell lung, colorectal and other solid tumor cancers; (8) drugs for the treatment of irritable bowel syndrome ("IBS"); and (9) triptan drugs for the treatment of migraine headaches. The proposed Consent Order would remedy the alleged violations by replacing the lost competition that would result from the merger in each of these markets.

5HT-3 Antiemetic Drugs

Antiemetic drugs are administered to cancer patients undergoing chemotherapy and radiation therapy to prevent or lessen the nausea and vomiting associated with those medical procedures. 5HT-3 antiemetic products have revolutionized the treatment of patients with cancer because they are more effective than any of the older antiemetic products. Today, oncologists can pursue more aggressive chemotherapy and radiation regimens because patients are much less likely to experience debilitating nausea and vomiting, side effects that can curtail aggressive cancer treatment.

Analysis

The United States market for 5HT-3 antiemetic drugs is highly concentrated. In the \$778 million dollar 5HT-3 antiemetic market, Glaxo markets Zofran and SB markets Kytril, which together represent approximately 90% of the market. Only one other firm, Aventis, markets a 5HT-3 antiemetic product, called Anzemet.

Entry into the manufacture and sale of prescription pharmaceutical drugs is difficult, expensive, and time-consuming. *De novo* entry for pharmaceutical products has been estimated to take between 12 to 24 years and cost upwards of \$359 million. No other pharmaceutical company is expected to enter the United States market with a 5HT-3 antiemetic product in the foreseeable future.

The merger of SB and Glaxo would reduce the number of 5HT-3 antiemetic competitors from three to two; create a dominant firm with a greater than 90% share of the overall market; and leave Anzemet as the only remaining competitor against the combined Glaxo SmithKline. Currently, health care provider customers benefit enormously by competing Zofran and Kytril against one another to achieve favorable pricing.

The Consent Agreement effectively remedies the anticompetitive effects in the market for 5HT-3 antiemetic drugs by requiring that: (1) SB divest all of its worldwide rights and intellectual property relating to Kytril (granisetron) to F. Hoffman-La Roche Ltd. ("Roche"); (2) SB submit all confidential information and know-how regarding Kytril to Roche; (3) the former SB sales force and management who participated in the marketing of Kytril maintain the confidentiality of this information; and (4) the former SB sales and marketing personnel be prohibited from selling products that compete with Kytril, *i.e.*, Zofran, for a period of six to twelve months (depending on the status of the employee).

The Consent Agreement also requires SB to contract manufacture Kytril for Roche until Roche obtains approval from

Analysis

the U.S. Food and Drug Administration (“FDA”) to manufacture Kytril for itself.

Second Generation Oral and Intravenous Antiviral Drugs for the Treatment of Herpes

SB manufactures and markets Famvir, and Glaxo manufactures and markets Valtrex, the only two second generation oral and intravenous antiviral prescription drugs for the treatment of herpes infections. Due to their greater bioavailability, superior efficacy, and requirements for less frequent dosing, Famvir and Valtrex have a significant advantage in treating herpes simplex virus Type 1 (“HSV-1”), herpes simplex virus Type 2 (“HSV-2”) and the herpes varicella zoster virus (“herpes zoster”) over the first-generation drug acyclovir.

New entry into the manufacture and sale of second generation antiviral drugs for the treatment of HSV-1, HSV-2 and herpes zoster infection is difficult, time-consuming, and expensive. SB and Glaxo are the only firms that have introduced second generation products to the market, and no other companies are developing drugs for these indications. Thus, given the amount of time it would take for a new product to obtain regulatory approval, entry cannot occur in a timely fashion to counter the anticipated anticompetitive effects of the proposed merger.

The proposed merger of SB and Glaxo would eliminate the only competition that exists in the \$500 million market for second generation prescription oral and intravenous antiviral drugs for the treatment of HSV-1, HSV-2, and herpes zoster. As a result of the proposed merger, American consumers are likely to pay higher prices for Valtrex and Famvir, and because SB and Glaxo offer the only second generation drugs available to treat HSV-1, HSV-2, and herpes zoster infections, the merger will result in a monopoly for an extended period, as there are no other drugs in research or development for these indications.

Analysis

The proposed divestiture to Novartis remedies the anticompetitive effects of the merger in both the oral and intravenous antiviral herpes infection treatment market as well as those in the topical oral herpes prescription creme market, which is discussed below. In the oral and intravenous herpes antiviral market, the divestiture resolves the anticompetitive effects of the proposed merger by requiring that: (1) SB divest all of its worldwide rights and intellectual property relating to Famvir, including rights to the base active ingredient famciclovir, to Novartis; (2) SB submit all confidential information and know-how regarding Famvir to Novartis; (3) the former SB sales force and management who participated in the marketing of Famvir maintain the confidentiality of this information; and (4) the former SB sales and marketing personnel be prohibited from selling products that compete with Famvir, *i.e.*, Valtrex, for a period of six to twelve months (depending on the status of the employee).

The Consent Agreement also requires SB to contract manufacture Famvir for Novartis until Novartis obtains FDA approval to manufacture Famvir for itself.

Prescription Topical Antiviral Creams for Oral Herpes

SB's Denavir is currently the only prescription topical antiviral medication approved by the FDA for the treatment of oral herpes infections, commonly called cold sores. Meanwhile, Glaxo's Zovirex creme is the dominant prescription cold sore product in much of Europe. Glaxo was in the final stages of seeking FDA approval to market its creme formulation of Zovirex for the treatment of oral cold sores in the United States. But, in April of 2000, after the announcement of its proposed merger with SB, Glaxo withdrew the Zovirex creme application then pending at the FDA, but without prejudice to refiling. At the time, Glaxo was a little more than six months from bringing its Zovirex cream to the U.S. market to compete against Denavir.

De novo entry into prescription topical antiviral creams for the treatment of oral herpes is difficult, time-consuming, and

Analysis

expensive. No other companies are currently developing prescription topical medications for the treatment of cold sores.

The proposed merger eliminates the only potential entrant into the market for prescription topical antiviral medications for the treatment of cold sores – the Zovirex creme which Glaxo was close to bringing to market. If SB and Glaxo merge, it is highly unlikely that the merged firm would bring the Zovirex cream to market to compete against Denavir.

As noted above, the proposed divestiture to Novartis remedies the anticompetitive effects of the merger in both the oral and intravenous antiviral herpes infection treatment market as well as those in the prescription topical oral herpes antiviral market. In the prescription topical oral herpes antiviral market, the divestiture resolves the anticompetitive effects of the proposed merger by requiring that: (1) SB divest all of its worldwide rights and intellectual property relating to Denavir, including rights to the base active ingredient penciclovir, to Novartis; (2) SB submit all confidential information and know-how regarding Denavir to Novartis; (3) the former SB sales force and management who participated in the marketing of Denavir maintain the confidentiality of this information; and (4) the former SB sales and marketing personnel be prohibited from selling products that compete with Denavir, *i.e.*, topical Zovirex cream, for a period of six to twelve months (depending on the status of the employee).

The Consent Agreement also requires SB to contract manufacture Denavir for Novartis until Novartis obtains FDA approval to manufacture Denavir for itself.

Ceftazidime

Ceftazidime is an injectable antibiotic administered to hospitalized patients who are critically ill and at risk of contracting, and possibly dying from, pseudomonas infection, a serious hospital-borne infection. Ceftazidime is considered the “gold standard” for treating patients who are either at risk of

Analysis

contracting pseudomonas or who have such infections. Ceftazidime is a third-generation of a class of antibiotics called cephalosporins and is considered a “broad spectrum” antibiotic effective at treating a broad range of hospital-borne infection. Nearly all hospitals in the U.S. have ceftazidime on their formularies for use in combating pseudomonas infections.

Last year, sales of all ceftazidime products were approximately \$82 million dollars in the U.S. Currently, only two firms, SB and Glaxo, manufacture ceftazidime. Three firms market ceftazidime products: Glaxo manufactures and markets Fortaz and Ceptaz; Lilly markets Tazidime, which is manufactured by SB; and Abbott Labs markets SB’s Tazicef brand in the U.S. In 1999, sales of Glaxo’s Fortaz and Ceptaz and of SB’s Tazicef amounted to 85% of the market.

There are significant barriers to entry into the manufacture and sale of ceftazidime. The production of ceftazidime requires an aseptic facility for both the manufacture and sterile filling processes, greatly increasing the costs and complexities of manufacturing the product. Building and obtaining FDA approval for this type of facility takes much longer than two years, and patents covering the manufacture of ceftazidime that do not expire for a number of years prevent generic production of ceftazidime at this time.

The proposed merger of Glaxo and SB would create a monopoly in the manufacture of ceftazidime and would reduce the number of firms marketing ceftazidime from three to two. Glaxo SmithKline would not likely continue its relationship with Abbott as a marketer, removing a competing marketer of branded ceftazidime. Lilly, the only other competitor to Glaxo SmithKline, would be dependent on Glaxo SmithKline for its supply. The presence of three ceftazidime competitors in the market allows customers to negotiate more favorable pricing than would be possible with only two firms. Consequently, after the merger, customers’ ability to negotiate lower prices for ceftazidime would diminish, likely resulting in higher prices.

Analysis

The Consent Agreement effectively remedies the anticompetitive effects in the market for ceftazidime by requiring: (1) SB to provide all necessary intellectual property rights to manufacture and market ceftazidime to Abbott Laboratories, and (2) the creation of a new stream of supply for ceftazidime to Abbott that is independent of SB. Thereby, the Consent Agreement replaces SB's manufacturing and marketing rights and capabilities in the United States ceftazidime market.

Prophylactic Herpes Vaccines

The evidence shows that the development of prophylactic vaccines to prevent infection by HSV-1 and HSV-2 is a relevant product market. Currently, no vaccines exist for the prevention of HSV-1 and HSV-2 infection, but SB and Glaxo are two of very few firms developing prophylactic vaccines to prevent herpes infections.

SB is one of the world's three leading vaccine suppliers, and currently, SB has the most advanced development effort toward a prophylactic herpes vaccine. Glaxo is relatively new in the vaccine area, but has a significant effort underway to develop vaccines against genital herpes. Glaxo has been developing a vaccine for genital HSV infection using the Disabled Infectious Single Cycle ("DISC") technology developed by Cantab Pharmaceuticals. With Cantab, Glaxo is currently pursuing a therapeutic indication, and had planned to begin work with Cantab designing Phase III clinical trials on a prophylactic indication this year, exercising its option to do so pursuant to its contract with Cantab.

New entry into the research, development, manufacture and sale of vaccines to prevent HSV-1 and HSV-2 infection is extremely difficult, time-consuming, and expensive. Development of vaccines for other diseases have generally taken more than a decade and the time frames for vaccine development tend to be longer than those for prescription drugs. Other firms

Analysis

that have undertaken efforts to develop a prophylactic herpes vaccine either have failed in their efforts or are far behind SB and Glaxo/Cantab.

The merger is likely to chill certain innovations in a very complex area as a combined Glaxo SmithKline would potentially forego the development efforts of one of the firms. Even if both products were developed, the merger would eliminate future price competition between the two prophylactic vaccines.

The Consent Agreement effectively remedies the anticompetitive effects in the market for prophylactic vaccines for the prevention of infection by HSV-1 and HSV-2 by requiring Glaxo to return to Cantab all rights and information and results from clinical trials that are necessary for Cantab to develop a prophylactic herpes vaccine. This will permit Cantab to pursue a prophylactic indication for the vaccine developed by the joint venture, and, should that effort be unsuccessful, to develop a different prophylactic herpes vaccine using its DISC technology.

OTC H-2 Blockers

Histamine-2 blockers, more commonly known as “H-2 blockers,” are a class of drugs available over-the-counter (“OTC”) for acid relief. H-2 blocker products originated as prescription products and were later approved by the FDA for OTC sale. As their name implies, H-2 blockers work by blocking histamine (acid) production, acting in essence like corks to prevent the release of stomach acid.

Today, the \$502 million OTC H-2 blocker market is comprised of four branded products - SB’s Tagamet, Glaxo’s Zantac 75 (marketed by Pfizer, formerly Warner-Lambert), Johnson & Johnson’s Pepcid AC and Whitehall-Robin’s Axid, along with private label equivalents of Tagamet, Zantac 75, and Pepcid AC. SB’s Tagamet and Glaxo’s Zantac 75 have a combined market share of approximately 41%.

Analysis

Entry into the OTC H-2 blocker acid relief market is time-consuming, difficult, and expensive. New products take several years to develop; each must be approved by the FDA for OTC sale, or alternatively, approved to switch from prescription to OTC status; and furthermore, expensive advertising and promotion is required to establish a brand name in the OTC market. Currently, no additional H-2 blockers are expected to enter the OTC market.

The merger of SB and Glaxo is likely to lessen the competitiveness of Zantac 75 in the OTC market where it is marketed by Pfizer. Currently, the trademark license under which Pfizer sells Zantac 75 requires the approval of Glaxo for any product or trademark changes or improvements. Prior to the merger, as licensor to Pfizer, Glaxo had the incentive to approve changes or improvements that would enhance the competitiveness of Zantac 75 in the OTC H-2 blocker market. But after the merger, it is likely that Glaxo SmithKline will be less inclined to approve changes to enhance the competitiveness of Zantac 75, an OTC H-2 rival to its Tagamet. Furthermore, Pfizer would be in the difficult position of having to ask its close rival for permission to make product improvements, thereby exposing its future competitive strategy, which the rival might preemptively counter. Such a situation could prevent or discourage Pfizer from pursuing such competitive product improvements, as Glaxo SmithKline would be provided with direct access to competitive intelligence on a product that competes directly against its own.

The Consent Agreement effectively remedies the anticompetitive effects in the market for OTC H-2 blockers by: (1) requiring Glaxo to divest all of its U.S. and Canadian trademark rights to Zantac to Pfizer; (2) removing all requirements on Pfizer to seek prior approval from Glaxo for any product line extensions; (3) removing all restrictions on Pfizer's ability to seek FDA approval of higher OTC dosage strengths for Zantac; (4) reducing the cost to Pfizer if a higher dosage strength is approved by the FDA for the OTC market to a payment not to exceed \$3 million; and (5) allowing Pfizer to use any FDA

Analysis

approved form of the base active, ranitidine, in Zantac products. In the United States and Canada, Glaxo only retains the exclusive use of the Zantac name for prescription products that contain ranitidine. This gives Pfizer the unrestricted ability to market the OTC Zantac products, improve those products, and use the Zantac trademarks unfettered, which will allow Pfizer to compete vigorously and effectively in the OTC H-2 blocker market.

Topoisomerase I Inhibitors for the Treatment of Ovarian, non-SCLC, Colorectal, and other Solid Tumor Cancers

SB's drug Hycamptin is currently a leading therapy for ovarian and non-small cell lung cancer ("non-SCLC"), and SB is pursuing indications for these cancers as well as a second-line indication for treating colorectal and other solid-tumor cancers. Gilead Sciences, in conjunction with Glaxo, is developing a topoisomerase I inhibitor, GI14722C, that is being developed for ovarian, breast, non-SCLC, and other solid tumor indications, including colorectal cancer. The only other topoisomerase I inhibitor on the market is Pharmacia's Camptosar, which is indicated as a second-line treatment for colorectal cancer, and is being tested for non-SCLC.

The proposed merger is likely to create anticompetitive effects in the topoisomerase I inhibitor market by potentially eliminating one of the few research and development efforts in this area. As a result of the merger, the combined entity could unilaterally delay, terminate or otherwise fail to develop the GI147211C topoisomerase I inhibitor, resulting in less product innovation, fewer choices, and higher prices for consumers.

The Consent Agreement effectively remedies the anticompetitive effects in the market for topoisomerase I inhibitors for the treatment of certain cancers by requiring Glaxo to assign all relevant GI147211C intellectual property to Gilead and to relinquish its reversionary rights to Gilead's drug. Thus, the Consent Agreement eliminates Glaxo's ability to regain

Analysis

control over GI147211C, a drug likely to compete against SB's Hycamptin in combating ovarian, non-SCLC, colorectal, and other solid tumor cancers.

Drugs for the Treatment of Irritable Bowel Syndrome

Irritable bowel syndrome ("IBS") is not well understood and often has been labeled as several different conditions, including irritable colon and spastic colon. People with IBS experience varying symptoms, with some sufferers experiencing symptoms of diarrhea, others constipation, and still others a mix of both. The symptoms of IBS may include cramping, abdominal pain and other forms of abdominal discomfort. Seventy percent of IBS sufferers are women. IBS is estimated to affect up to 15% of the U.S. population.

Glaxo currently owns a drug called Lotronex for the treatment of IBS. Though effective in treating IBS sufferers, Lotronex was recently taken off the market by Glaxo because of concerns about serious side effects in some patients, but Glaxo continues to conduct clinical trials for Lotronex. Lotronex is the only FDA-approved drug for the treatment of IBS. SB currently does not have a drug in this market, but has an option to acquire and market renzapride, a drug being developed by Alizyme Therapeutics plc for the treatment of IBS. Alizyme's renzapride drug is about 2-3 years from being on the market. In addition to the Alizyme/SB renzapride development effort, only two other drugs for IBS are in clinical development; thus, timely entry will not occur to deter or counteract the likely anticompetitive effects of the proposed merger.

The proposed merger likely would eliminate one of the few research and development efforts on drugs to treat IBS. As a result of the merger, Glaxo SmithKline would likely delay, terminate or otherwise fail to develop renzapride which would compete against Lotronex, resulting in less product innovation, and consequently, fewer product choices, and higher prices for consumers.

Analysis

The Consent Agreement effectively remedies the anticompetitive effects in the market for drugs to treat IBS by requiring SB to assign all relevant intellectual property rights to Alizyme and to relinquish all options in renzapride, thus removing any possible influence over Alizyme's development of an IBS drug that is likely to compete directly against Glaxo's Lotronex.

Triptan Drugs for the Treatment of Migraine Headaches

Glaxo is the leading seller of triptan drugs for the treatment of migraine headaches with its two triptan migraine drugs – Immitrex (sumatriptan succinate) and Amerge (naratriptan hydrochloride). SB has a reversionary interest in another triptan drug for migraines – SB209509 (frovatriptan) – which is being developed by Vernalis Ltd. The only other approved migraine drugs in the triptan class are Maxalt (rizatriptan benzoate) from Merck and Zomig (zolmitriptan) from Astra Zeneca. Vernalis expects to submit final data to the FDA by the end of 2000, and hopes to launch its frovatriptan drug in the second half of 2001.

In addition to the SB/Vernalis frovatriptan effort, only two other triptan drugs for migraine are in clinical development and are well behind the SB/Vernalis efforts. Thus, timely entry will not occur to deter or counteract the likely anticompetitive effects of the proposed merger.

The proposed merger likely would eliminate one of the few research and development efforts on triptan drugs to treat migraines. As a result of the merger, Glaxo SmithKline would likely delay, terminate or otherwise fail to develop frovatriptan which would compete against Glaxo's Immitrex and Amerge, resulting in less product innovation, and consequently, fewer product choices and higher prices for consumers.

To resolve the merger's anticompetitive effects in this market, SB renegotiated its agreement with Vernalis, assigning all relevant intellectual property to Vernalis and relinquishing its options in

Analysis

frovatriptan, which likely will compete directly against Glaxo's Immitrex and Amerge.

The Consent Agreement also allows the Commission to appoint a Monitor Trustee to ensure Glaxo SmithKline's compliance with all of the requirements of the Order. In addition, the Commission may appoint a Divestiture Trustee in the event that Glaxo SmithKline fails to divest all of the assets required to be divested. Finally, the Consent Agreement imposes reporting requirements on Glaxo SmithKline until such time as it has fully complied with all of the provisions of the Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Order, and it is not intended to constitute an official interpretation of the proposed Consent Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

COMPUTER SCIENCES CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-3991; File No. 0010181

Complaint, December 20, 2000--Decision, January 26, 2001

This consent order addresses the acquisition by Respondent Computer Sciences Corporation ("CSC") -- a large computer-services provider that sells vertical software applications in the financial services industries, and also provides consulting and support services to insurance companies, banking, consumer finance companies, and investment companies -- of Respondent Mynd Corporation, which develops and sells a claims assessment system known as Claims Outcome Advisor ("COA") to the insurance and other financial services industries. The order, among other things, requires Respondent CSC to divest Respondent Mynd's claims assessment systems business -- including customer lists, contracts, intellectual property, and other intangible assets -- to Insurance Services Office, Incorporated. The order also requires the respondents to dismiss with prejudice all CSC intellectual-property litigation claims against Neuronworks, the original developer of COA, and prohibits the respondents from taking any action to restrict the ability of Neuronworks to do business with the acquirer of Mynd's claims assessment system. An accompanying Order to Maintain Assets requires the respondents to preserve the assets they are required to divest as a viable, competitive, and ongoing operation until the divestiture is achieved.

Participants

For the Commission: *Daniel J. Silver, Jeanine K. Balbach, Angelike Andrinopoulos, William Diaz, Steven Dahm, Rhett R. Krulla, Richard Liebeskind, Rendell A. Davis, Jr., Daniel P. Ducore, Kenneth Kelly, Leslie Farber, and Daniel O'Brien.*

For the Respondents: *Hayward D. Fisk, Computer Sciences Corporation, Raymond Jacobsen, Charles Work, Ronald Bloch, and Joel Grosberg, McDermott, Will & Emery, Stephen G. Morrison, Mynd Corporation, and John F. Collins, Dewey Ballantine LLP.*

Complaint

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Computer Sciences Corporation (“CSC”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the outstanding common stock of Mynd Corporation (“Mynd”), a corporation subject to the jurisdiction of the Commission, in violation of 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 to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Claims Assessment Systems” means computer software and other intellectual property used by insurance companies and others to evaluate appropriate payments for claims for bodily injury or to evaluate return-to-work plans in workers compensation claims, including, but not limited to, the software packages known as Claims Outcome Advisor and Colossus.
2. “Acquisition Agreement” means the agreement between CSC and Mynd for CSC’s proposed acquisition of the outstanding common stock of Mynd pursuant to the Agreement and Plan of Merger dated June 20, 2000.
3. "Respondents" means CSC and Mynd.

II. RESPONDENTS

4. Respondent CSC is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its executive offices located at 2100 E. Grand Avenue, El Segundo, California 90245. CSC, among other things, is engaged in the sale of Claims Assessment Systems.

Complaint

5. Pursuant to the Acquisition Agreement, CSC will purchase the outstanding common stock of Mynd.

6. Respondent Mynd is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its executive offices located at One Mynd Center, Blythewood, South Carolina 29016. Mynd is engaged, among other things, in the sale of Claims Assessment Systems.

7. Respondents CSC and Mynd are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose business is in, or affects, commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

8. On June 20, 2000, CSC and Mynd entered into an Acquisition Agreement under which CSC is to acquire the outstanding common stock of Mynd for an amount valued, at the time of entering into the Acquisition Agreement, at approximately \$568 million (“Acquisition”).

IV. THE RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the provision of Claims Assessment Systems.

10. The United States is one relevant geographic area within which to analyze the likely effect of the proposed acquisition on competition in the Claims Assessment Systems market.

V. THE STRUCTURE OF THE MARKETS

11. The market for Claims Assessment Systems in the relevant geographic area is highly concentrated. CSC and Mynd are the

Complaint

only significant competitors in the provision of Claims Assessment Systems.

VI. BARRIERS TO ENTRY

12. Entry into the market for providing Claims Assessment Systems would not be likely or sufficient, and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 13, because of, among other things, the time and expense necessary to develop the systems.

VII. EFFECTS OF THE ACQUISITION

13. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by increasing concentration substantially in a highly concentrated market;
- b. by eliminating actual, direct and substantial competition between CSC and Mynd in the relevant market;
- c. by creating a monopoly or near monopoly;
- d. by facilitating the unilateral exercise of market power by the merged firm;
- e. by likely increasing prices for Claims Assessment Systems; and
- f. by likely reducing innovation as a result of delayed or reduced product development.

Complaint

VIII. VIOLATIONS CHARGED

14. The Acquisition Agreement described in Paragraph 8 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

15. The Acquisition described in Paragraph 8, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twentieth day of December, 2000, issues its Complaint against said Respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Computer Sciences Corporation of all the voting securities of Mynd Corporation; and

Computer Sciences Corporation and Mynd Corporation (collectively, “respondents”) having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of 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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

Decision and Order

1. Computer Sciences Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its office and principal place of business located at 2100 East Grand Avenue, El Segundo, California 90245.
2. Mynd Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of South Carolina, with its office and principal place of business located at One Mynd Center, Blythewood, South Carolina 29016. Mynd Corporation was formerly known as Policy Management Systems Corporation.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “CSC” means Computer Sciences Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Computer Sciences Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Mynd” means Mynd Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Mynd Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Decision and Order

- C. "Respondents" means CSC and Mynd.
- D. "ISO" means Insurance Services Office, Incorporated, a Delaware corporation with principal place of business at 7 World Trade Center, New York, New York.
- E. "Neuronworks" means
1. Neuronworks Pty., Ltd., an Australian Company Limited By Shares (ACN No. 078 304 088) with principal place of business at Suite 1, Level 2, 10 Cross Street, Hurstville, New South Wales, Australia 2220, and
 2. Paul Beinat, Nicholas Townsend, Barry Hornery, and Graham Bartholomew.
- F. "Acquirer" means ISO or any other Person that acquires the Assets To Be Divested pursuant to this Order.
- G. "Acquisition Date" means the date, if any, on which CSC first acquires any voting securities or assets of Mynd.
- H. "Assets To Be Divested" means all of Mynd's rights, titles, and interests in assets, tangible and intangible, relating to the Mynd Claims Assessment Systems Business, regardless of whether such assets relate exclusively to such business and regardless of where such business or assets are located worldwide, including, but not limited to:
1. Specified Tangible Assets and other tangible assets;
 2. all intellectual property, inventions, technology, trademarks, trade names, brand names, formulations, specifications, contractual rights, patents, patent applications, trade secrets, copyrights, know-how, research materials, technical information, marketing and distribution information, customer lists, prospect lists, vendor lists, catalogs, sales promotion literature, advertising materials, information stored in management

Decision and Order

information systems (and specifications sufficient for the Acquirer to use such information), software, designs, drawings, processes, production information, manufacturing information, integration information, testing and quality control data;

3. all rights, titles and interests in and to contracts (subject to Paragraph II.C.9.);
4. all rights under warranties and guarantees, express or implied; and
5. all books, records and files (subject to Paragraph II.C.10.).

Provided that the definition of “Assets To Be Divested” shall not include (i) Specified Tangible Assets that do not relate exclusively to the Mynd Claims Assessment Systems Business, (ii) the “Mynd” names and/or trademarks, (iii) the “Policy Management Systems Corporation” names and/or trademarks, (iv) the “Mynd Asia Pacific” names and/or trademarks, and (v) catalogs, sales promotion literature, advertising materials, and marketing and distribution information relating exclusively to software packages known as “RiskMaster” and as “Litigation Advisor.”

- I. “Claims Assessment Systems” means computer software and other intellectual property used by insurance companies and others to evaluate appropriate payments for claims for bodily injury or to evaluate return-to-work plans in workers compensation claims, including, but not limited to, the software packages known as Claims Outcome Advisor and Colossus.
- J. “Commission” means the Federal Trade Commission.
- K. “Confidential Information” means trade secrets and other proprietary information to be conveyed to the Acquirer pursuant to this Order.

Decision and Order

- L. “CSC Claims Assessment Systems Business” means the research, development, manufacture, marketing, distribution, sale, license, customer support, and maintenance of Claims Assessment Systems by CSC.
- M. "Divestiture Agreement" means the ISO Divestiture Agreement or any other agreement or agreements pursuant to which Respondents, or a trustee, divest the Assets to Be Divested pursuant to this Order.
- N. “Divestiture Date” means the date that the Respondents divest the Assets to be divested to the Acquirer.
- O. “ISO Divestiture Agreement” means the following agreements (including all exhibits and other documents referenced in those agreements, or attached thereto):
1. Asset Purchase Agreement dated December 1, 2000, between Mynd and ISO,
 2. Patent Covenant Not to Sue Agreement dated December 1, 2000, among Respondents, ISO, and Neuronworks,
 3. Release and Settlement Agreement dated December 1, 2000, between Respondents and Neuronworks,
 4. Limited License Agreement dated December 1, 2000, between Mynd and ISO,
 5. Limited Services Agreement (including Work Order No. 1) dated December 1, 2000, between Mynd and ISO,
 6. Bill of Sale, Assignment and Assumption Agreement dated December 1, 2000, between Mynd and ISO, and
 7. Amendment to the above agreements dated December 1, 2000, between Respondents and ISO.

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- P. “Key Employees” means Linda Neely, Carol Garren, Lee Everett Fogle, Andrew M. Blume, Marvin E. Jones, Anthony Mattioli, Eva Turner, Terry Tuttle, Earl Knaus, Pete Askins, Donna L. Crapps, Kellie Lynette Gobble, Deborah L. Rivers, Michael T. Rivers, Nancy G. Roddy, Clarence Leroy Royson, Ronald Everett Summer, Douglas J. Zellner, Mary Kathryn Evans, Sandra R. Harrington, Harriet Louise Hobbs, Jacqueline Suzann Parker, Patty Ann Yingling, Kelly Gardner, Sharleen Craig, Angela Martin, David Smart, Tracy Shadbolt, Michael Dixon, Justin Goodwin, Philip Tench, Simon Bradshaw, Bryan Harries, Simon Powell, and Mark Strang.
- Q. “Mynd Claims Assessment Systems Business” means the research, development, manufacture, marketing, distribution, sale, license, customer support, and maintenance of Claims Assessment Systems by Mynd, but does not include assets relating exclusively to software packages known as “RiskMaster” and as “Litigation Advisor.”
- R. "Person" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.
- S. “Persons with Access to Confidential Information” means all natural persons who provided services to Mynd at any time since January 1, 1998, whether as employees, consultants, contractors, or in any other capacity, and who had access to any Confidential Information.
- T. “Specified Tangible Assets” means buildings, plants, manufacturing operations, machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools, inventory, and owned or leased real property (including any improvements, appurtenances, licenses and permits relating to such real property), but does not mean any intangible assets, such as computer software and other intellectual property, imbedded in such tangible assets.

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II.

IT IS FURTHER ORDERED that:

- A. No later than ten (10) days after the Acquisition Date, Respondents shall divest to ISO, absolutely, and in good faith, at no minimum price, the Assets To Be Divested as an on-going business. The ISO Divestiture Agreement shall be incorporated into this Order and made a part hereof as Confidential Appendix B, and shall not be construed to vary from or contradict the terms of this Order. Any failure to comply with the terms of the ISO Divestiture Agreement shall constitute a violation of this Order. Provided, however, if, at the time the Commission makes the Order final, the Commission determines that ISO is not an acceptable acquirer or that the ISO Divestiture Agreement is not an acceptable manner of divestiture, Respondents shall, within three (3) months of the date Respondents receive notice of such determination from the Commission, divest the Assets To Be Divested absolutely and in good faith, at no minimum price, as an on-going business, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- B. If Respondents have divested the Assets To Be Divested to ISO prior to the date this Order becomes final, and if the Commission notifies Respondents that ISO is not an acceptable acquirer or that the ISO Divestiture Agreement is not an acceptable manner of divestiture, then Respondents shall, within three (3) business days, rescind the transaction with ISO, and shall divest the Assets To Be Divested in accordance with the proviso to Paragraph II.A. of this Order.
- C. Respondents shall divest the Assets To Be Divested on the following terms, in addition to others that may be required by this Order and by the Divestiture Agreement, and shall agree with the Acquirer to do the following:

Decision and Order

1. Respondents shall place no restrictions on the use by the Acquirer of any of the assets of the Assets To Be Divested.
2. Respondents shall take no action to restrict the ability of Neuronworks to do business with the Acquirer or the ability of the Acquirer to do business with Neuronworks. Respondents shall agree to the dismissal with prejudice of all of CSC's litigation against Neuronworks, and shall not make any other claim against Neuronworks for its acts prior to the Divestiture Date.
Provided, however, that, if any Person other than Respondents makes a claim against Respondents and such claim arises out of a misappropriation, misuse, or other improper use by Neuronworks of that Person's intellectual property, Respondents may seek indemnification from Neuronworks for any liability resulting from such claim.
3. Respondents shall release, hold harmless, and indemnify the Acquirer from liability for any past, current, or future claims arising out of Mynd's or Neuronworks' acts prior to the Divestiture Date related to Claims Outcome Advisor.
4. Respondents shall not assign Persons with Access to Confidential Information to the CSC Claims Assessment Systems Business until at least two (2) years after the Divestiture Date. Respondents shall require that, as a condition of continued employment with Respondents after the Divestiture Date, any Persons with Access to Confidential Information shall immediately enter into agreements with the Acquirer not to disclose any Confidential Information to Respondents or to any third party. To permit the Acquirer to protect the confidentiality of intellectual property conveyed to it, Respondents shall assign to the Acquirer (to the extent assignable) such rights under contracts between Mynd and Persons with Access to Confidential Information as

Decision and Order

require such persons to preserve the confidentiality of Confidential Information. To the extent that such agreements are not assignable, Respondents shall enforce such confidentiality provisions at the request and expense, and with the assistance of, the Acquirer.

5. Respondents shall not accept, nor seek to obtain, any Confidential Information from any Persons with Access to Confidential Information.
6. Respondents shall allow the Acquirer to inspect the personnel files and other documentation relating to each Key Employee, to the extent permissible under applicable laws, no later than twenty (20) days before the Divestiture Date. Respondents shall take reasonable steps from the date Respondents execute the Agreement Containing Consent Orders to cause the Key Employees to accept offers of employment from the Acquirer. For a period of at least two (2) years following the Divestiture Date, Respondents shall not hire or solicit Key Employees who accept such offers unless the employees have been terminated by the Acquirer. Respondents shall not offer incentives, other than those contained in existing benefit programs, to Key Employees to stay with Respondents. Respondents shall not enforce any covenants not to compete preexisting the Divestiture Date against any Key Employees who accept employment with the Acquirer, except to the extent that competition from such employees is entirely unrelated to their employment with the Acquirer.
7. Respondents shall not enforce any covenants not to compete preexisting the Divestiture Date against any current or former employees of Mynd, or against any consultants, contractors, or other Persons who provided services to the Mynd Claims Assessment Systems Business, in a manner that would prevent those employees or Persons from providing services to the Acquirer in the field of Claims Assessment Systems.

Decision and Order

8. Respondents shall not enforce against current or former employees of Mynd, or against any consultants, contractors, or other Persons who provided services to the Mynd Claims Assessment Systems Business, any contractual requirements that would prevent those employees or Persons from disclosing to the Acquirer any information to be conveyed to the Acquirer pursuant to this Order.
9. Notwithstanding any other provision of this Paragraph II, should the transfer of any contract listed in Confidential Appendix A not be possible, despite best efforts by Respondents, due to a person other than Respondents withholding its consent to the transfer, Respondents shall enter into an agreement with the Acquirer the purpose of which agreement is to realize the same effect as such transfer. The terms of such agreement with the Acquirer shall be at least as favorable to the Acquirer as the contract to be transferred is favorable to Respondents.
10. Notwithstanding any other provision of this Paragraph II, Respondents may redact from books, records, and files conveyed to the Acquirer information that does not pertain to the Mynd Claims Assessment Systems Business. Respondents may retain copies of the books, records, and files conveyed to the Acquirer if they also pertain to businesses other than the Mynd Claims Assessment Systems Business, provided that Respondents redact from the retained copies all information pertaining solely to the Mynd Claims Assessment Systems Business. Provided further that counsel for Respondents may retain, for the limited purpose of preparing reports to the Securities and Exchange Commission and other government agencies, unredacted copies of books, records, and files to be conveyed to the Acquirer, but only if such counsel maintains the confidentiality of any information pertaining to the Mynd Claims Assessment Systems

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Business (except to the extent that such information must be reported to government agencies).

- D. The purpose of Paragraph II of this Order is to ensure the continuation of the Assets To Be Divested as, or as part of, ongoing viable enterprises engaged in the same business in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time and in the manner required by Paragraph II of this Order, the Commission may appoint a trustee to divest those assets. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

Decision and Order

1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect each divestiture required by this Order.
4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph III.B.3. to accomplish the divestitures. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods of twelve (12) months each.
5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information, as the trustee may request. Respondents

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shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestitures shall be made only in a manner that receives the prior approval of the Commission, and only to an acquirer that receives the prior approval of the Commission. Provided, however, if the trustee receives bona fide offers for an asset to be divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such asset to the acquiring entity or entities selected by CSC from among those approved by the Commission; provided further, however, that CSC shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the

Decision and Order

case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish divestitures required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
12. The trustee shall report in writing to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures required by this Order.

Decision and Order

IV.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until they have fully complied with its obligations under Paragraphs II.A., II.B. and III of this Order, each Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II and III of this Order and with the Order to Maintain Assets. Respondents shall include in such compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II and III of the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.
- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order is entered, and at such other times as the Commission may require, each Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any

Decision and Order

other change in the corporation that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, relating to any matters contained in this Order.

VII.

IT IS FURTHER ORDERED that this Order will terminate on January 26, 2011.

By the Commission.

CONFIDENTIAL APPENDICES A AND B

[Redacted from Public Record Version]

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Computer Sciences Corporation of all the voting securities of Mynd Corporation; and

Computer Sciences Corporation and Mynd Corporation (collectively, “respondents”) having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of 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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Computer Sciences Corporation is a corporation organized, existing, and doing business under and by virtue of the laws

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of Nevada, with its office and principal place of business located at 2100 East Grand Avenue, El Segundo, California 90245.

2. Mynd Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of South Carolina, with its office and principal place of business located at One Mynd Center, Blythewood, South Carolina 29016. Mynd Corporation was formerly known as Policy Management Systems Corporation.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "CSC" means Computer Sciences Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Computer Sciences Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Mynd" means Mynd Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Mynd Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Respondents" means CSC and Mynd.

Order

- D. “Acquirer” means any Person that acquires the Assets To Be Divested pursuant to the Decision and Order.
- E. “Acquisition Date” means the date, if any, on which CSC first acquires any voting securities or assets of Mynd.
- F. “Assets To Be Divested” means all of Mynd’s rights, titles, and interests in assets, tangible and intangible, relating to the Mynd Claims Assessment Systems Business, regardless of whether such assets relate exclusively to such business and regardless of where such business or assets are located worldwide, including, but not limited to:
1. Specified Tangible Assets and other tangible assets;
 2. all intellectual property, inventions, technology, trademarks, trade names, brand names, formulations, specifications, contractual rights, patents, patent applications, trade secrets, copyrights, know-how, research materials, technical information, marketing and distribution information, customer lists, prospect lists, vendor lists, catalogs, sales promotion literature, advertising materials, information stored in management information systems (and specifications sufficient for the Acquirer to use such information), software, designs, drawings, processes, production information, manufacturing information, integration information, testing and quality control data.
 3. all rights, titles and interests in and to contracts;
 4. all rights under warranties and guarantees, express or implied; and
 5. all books, records and files.

Provided that the definition of “Assets To Be Divested” shall not include (i) Specified Tangible Assets that do not relate exclusively to the Mynd Claims Assessment Systems

Order

Business, (ii) the “Mynd” names and/or trademarks, (iii) the “Policy Management Systems Corporation” names and/or trademarks, (iv) the “Mynd Asia Pacific” names and/or trademarks, (v) catalogs, sales promotion literature, advertising materials, and marketing and distribution information relating exclusively to software packages known as “RiskMaster” and as “Litigation Advisor,” (vi) information in books, records, and files that does not pertain to the Mynd Claims Assessment Systems Business, and (vii) duplicate copies of books, records, and files from which all information pertaining to the Mynd Claims Assessment Systems Business has been redacted.

- G. “Claims Assessment Systems” means computer software and other intellectual property used by insurance companies and others to evaluate appropriate payments for claims for bodily injury or to evaluate return-to-work plans in workers compensation claims, including, but not limited to, the software packages known as Claims Outcome Advisor and Colossus.
- H. “Commission” means the Federal Trade Commission.
- I. “Confidential Information” means trade secrets and other proprietary information to be conveyed to the Acquirer pursuant to the Decision and Order.
- J. “CSC Claims Assessment Systems Business” means the research, development, manufacture, marketing, distribution, sale, license, customer support, and maintenance of Claims Assessment Systems by CSC.
- K. “Divestiture Date” means the date that the Respondents divest the Assets to be divested to the Acquirer.
- L. “Key Employees” means Linda Neely, Carol Garren, Lee Everett Fogle, Andrew M. Blume, Marvin E. Jones, Anthony Mattioli, Eva Turner, Terry Tuttle, Earl Knaus, Pete Askins, Donna L. Crapps, Kellie Lynette Gobble, Deborah L. Rivers,

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Michael T. Rivers, Nancy G. Roddy, Clarence Leroy Royson, Ronald Everett Summer, Douglas J. Zellner, Mary Kathryn Evans, Sandra R. Harrington, Harriet Louise Hobbs, Jacqueline Suzann Parker, Patty Ann Yingling, Kelly Gardner, Sharleen Craig, Angela Martin, David Smart, Tracy Shadbolt, Michael Dixon, Justin Goodwin, Philip Tench, Simon Bradshaw, Bryan Harries, Simon Powell, and Mark Strang.

- M. "Mynd Claims Assessment Systems Business" means the research, development, manufacture, marketing, distribution, sale, license, customer support, and maintenance of Claims Assessment Systems by Mynd, but does not include assets relating exclusively to software packages known as "RiskMaster" and as "Litigation Advisor."
- N. "Person" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.
- O. "Persons with Access to Confidential Information" means all natural persons who provided services to Mynd at any time since January 1, 1998, whether as employees, consultants, contractors, or in any other capacity, and who had access to any Confidential Information.
- P. "Specified Tangible Assets" means buildings, plants, manufacturing operations, machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools, inventory, and owned or leased real property (including any improvements, appurtenances, licenses and permits relating to such real property), but does not mean any intangible assets, such as computer software and other intellectual property, imbedded in such tangible assets.

Order

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice.
- B. From the date Respondents sign the Consent Agreement until the Divestiture Date, Respondents shall:
 1. Maintain the Assets To Be Divested in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement and take such action that is consistent with the past practices of Respondents in connection with the Assets To Be Divested and is taken in the ordinary course of the normal day-to-day operations of Respondents;
 2. Keep available the services of the current officers, employees, and agents of the Mynd Claims Assessment Systems Business; and maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with the Mynd Claims Assessment Systems Business; and

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3. Preserve the Assets To Be Divested intact as an ongoing business and not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Assets To Be Divested would be diminished.
- C. From the date Respondents sign the Consent Agreement until the date this Order to Maintain Assets terminates pursuant to Paragraph V:
1. Respondents shall not assign Persons with Access to Confidential Information to the CSC Claims Assessment Systems Business.
 2. Respondents shall take reasonable steps to cause the Key Employees to accept offers of employment from the Acquirer. Respondents shall not hire or solicit Key Employees who accept such offers unless the employees have been terminated by the Acquirer. Respondents shall not offer incentives, other than those contained in the existing benefit programs, to Key Employees to stay with Respondents.
 3. CSC shall not accept, nor seek to obtain, any Confidential Information from any Persons with Access to Confidential Information.
- D. From the Acquisition Date until the date this Order to Maintain Assets terminates pursuant to Paragraph V:
1. Respondents shall require that, as a condition of continued employment with Respondents after the Divestiture Date, any Persons with Access to Confidential Information shall immediately enter into agreements with the Acquirer not to disclose any Confidential Information to Respondents or to any third party.
 2. To permit the Acquirer to protect the confidentiality of intellectual property conveyed to it, Respondents shall

Order

assign to the Acquirer (to the extent assignable) such rights under contracts between Mynd and Persons with Access to Confidential Information as require such persons to preserve the confidentiality of Confidential Information. To the extent that such agreements are not assignable, Respondents shall enforce such confidentiality provisions at the request and expense, and with the assistance of, the Acquirer.

3. Respondents shall not enforce any covenants not to compete preexisting the Divestiture Date against any Key Employees who accept employment with the Acquirer, except to the extent that competition from such employees is entirely unrelated to their employment with the Acquirer.
4. Respondents shall not enforce any covenants not to compete preexisting the Divestiture Date against any current or former employees of Mynd, or against any consultants, contractors, or other Persons who provided services to the Mynd Claims Assessment Systems Business, in a manner that would prevent those employees or Persons from providing services to the Acquirer in the field of Claims Assessment Systems. Respondents shall not enforce against current or former employees of Mynd, or against any consultants, contractors, or other Persons who provided services to the Mynd Claims Assessment Systems Business, any contractual requirements that would prevent those employees or Persons from disclosing to the Acquirer any information to be conveyed to the Acquirer pursuant to the Decision and Order.
5. Mynd shall not accept, nor seek to obtain, any Confidential Information from any Persons with Access to Confidential Information.

Order

III.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Decision and Order or this Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

V.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

Order

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. such time as all Assets To Be Divested have been divested pursuant to the terms of the Consent Agreement.

By the Commission.

Analysis

Analysis of the Complaint and Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 20, 2000

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Computer Sciences Corporation ("CSC") and Mynd Corporation ("Mynd") (collectively "respondents"). The Consent Agreement is intended to resolve anticompetitive effects stemming from CSC's proposed acquisition of the outstanding shares of Mynd. The Consent Agreement includes a proposed Decision and Order (the "Order") that would require CSC to divest Mynd's claims assessment systems business to Insurance Services Office, Incorporated ("ISO"). Mynd develops and sells a claims assessment system known as Claims Outcome Advisor ("COA"). The Consent Agreement also includes an Order to Maintain Assets that requires respondents to preserve the assets they are required to divest as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Order, if finally issued by the Commission, would settle charges that CSC's proposed acquisition of Mynd may have substantially lessened competition in the United States market for claims assessment systems. The Commission has reason to believe that CSC's proposed acquisition of Mynd would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The proposed complaint, described below, relates the basis for this belief.

II. Description of the Parties and the Proposed Merger

CSC, headquartered in El Segundo, California, is a large computer-services provider, which also sells vertical software applications in the financial services industries. CSC's Financial Services Group ("FSG"), headquartered in Austin, Texas, provides consulting and support services along with application

Analysis

software to insurance companies, banking, consumer finance companies, and investment companies.

Mynd, headquartered in Columbia, South Carolina, provides consulting and services and packaged software solutions to the insurance and other financial services industries.

Pursuant to an agreement, CSC will make a \$16 per share cash tender offer for outstanding Mynd shares. Mynd will then become a wholly-owned subsidiary of CSC.

III. The Proposed Complaint

According to the Commission's proposed complaint, the relevant line of commerce in which to analyze the effects of CSC's proposed acquisition of Mynd is the provision of claims assessment systems, and the relevant geographic market is the United States. Claims assessment systems are computer software and other intellectual property used by insurance companies and others to evaluate appropriate payments for claims for bodily injury or to evaluate return-to-work plans in workers compensation claims. Claims assessment systems are designed to aid claims adjusters by providing a consistent methodology for analyzing information that an adjuster would take into account in assessing the appropriate settlement values for claims. Mynd sells the claims assessment system known as COA, and CSC sells the claims assessment system known as Colossus. The proposed complaint alleges that the market for claims assessment systems in the United States is highly concentrated and that CSC and Mynd are the only significant competitors in the provision of claims assessment systems. The proposed complaint alleges that the proposed acquisition of Mynd by CSC would create a monopoly or near monopoly in the market for claims assessment systems.

The proposed complaint also alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or offset adverse effects of the acquisition on competition. Entry is difficult in this market because the time and expense necessary to develop

Analysis

software systems such as these are great. Claims assessment systems involve the use of expert-system technology, which is a set of computerized methods for exploiting information drawn from relevant knowledge domains through rules or algorithms so as to assist in the solution of real-world problems, such as claims assessment. Entry is difficult in this market because of the time and expense necessary for finding and choosing the appropriate domain information, choosing or developing the appropriate rules or algorithms, and integrating the expert-system technology into a computing platform that is sufficiently robust, scalable, and stable while incorporating a domain-appropriate user interface.

The proposed complaint alleges that CSC's proposed acquisition of Mynd would eliminate actual, direct, and substantial competition between CSC and Mynd. Elimination of this competition would likely result in increased prices for claims assessment systems and reduced innovation as a result of delayed or reduced product development.

IV. Terms of the Agreement Containing Consent Order

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the United States market for claims assessment systems, as alleged in the complaint, by requiring the divestiture to ISO of Mynd's claims assessment business. The Order would also require respondents to dismiss with prejudice all of CSC's intellectual-property litigation claims against Neuronworks, the original developers of COA, so as to enable Neuronworks to perform COA-related consulting or other work in conjunction with ISO or another acquirer. Further, the Order would require respondents to release, hold harmless, and indemnify ISO or other acquirer from liability for any past, current, or future claims arising out of Mynd's and Neuronworks's acts prior to the divestiture date related to COA. The purpose of these provisions is to allow the acquirer to compete in the market by selling COA free from claims by CSC of intellectual property infringement. The proposed Order would also require respondents to divest other assets related to Mynd's claims assessment systems

Analysis

business, including customer lists, contracts, intellectual property, and other intangible assets so as to put ISO or another acquirer into a position to compete as soon as possible following the divestiture.

ISO, based in New York City, is a leading vendor of statistical, actuarial, and underwriting information for and about the property and casualty insurance industry. ISO uses these statistics to develop advisory prospective loss costs – projections of average future claim payments and loss adjustment expenses, for various lines of insurance and classifications of policy holders. Insurance companies use these loss costs to develop their own independent rates for their insurance policies. ISO also provides aggregate insurance statistics to state regulators.

If the Commission, at the time that it accepts the proposed Order for public comment, notifies respondents that it does not approve of the proposed divestiture to ISO, or the manner of the divestiture, the proposed Order provides that respondents would have three months to divest Mynd's claims assessment business to a different Commission-approved acquirer. If respondents did not complete the divestiture in that period, a trustee would be appointed who, upon Commission approval, would have the authority to divest Mynd's claims assessment business to a Commission-approved acquirer.

The proposed Order to Maintain Assets that is also included in the Consent Agreement requires that respondents preserve the Mynd assets they are required to divest as a viable and competitive operation and conduct the Mynd claims assessment business in the ordinary course of business until those Mynd assets are transferred to the Commission-approved acquirer.

The Consent Agreement requires respondents to provide the Commission with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order further requires respondents to provide the Commission with a report of

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compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the terms of the Order.

V. Opportunity for Public Comment

The proposed Order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Order and the comments received and will decide whether it should withdraw from the proposed Order or make it final. By accepting the proposed Order subject to final approval, the Commission anticipates that the competitive problems alleged in the proposed complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Order, including the proposed divestiture, to aid the Commission in its determination of whether to make the proposed Order final. This analysis is not intended to constitute an official interpretation of the proposed Order, nor is it intended to modify the terms of the proposed Order in any way.

Complaint

IN THE MATTER OF

THE VALSPAR CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-3995; File No. 0010197**Complaint, January 26, 2001--Decision, January 26, 2001*

This consent order addresses the acquisition by Respondent Valspar Corporation -- a leading supplier of silver, tin and copper solutions ("mirror solutions") and mirror backing paint in the United States -- of Lilly Industries, Inc., another leading supplier of those solutions and paint. The order, among other things, requires Respondent Valspar to divest its mirror coatings business -- which is comprised of silver, tin and copper solutions, mirror backing paint, and any other coating researched, developed, manufactured or sold by Valspar that is used in the production of a mirror -- to Spraylat Corporation. The order also requires the respondent to provide incentives to accept employment from, and remain employed by, the acquiring firm. In addition, the order prohibits the respondent, for one year, from inducing key customers to terminate their contracts with the acquiring firm, and prohibits employees of the respondent involved with its mirror coatings business from disclosing any confidential information to employees involved with the Lilly business.

Participants

For the Commission: *Christina R. Perez, Tamara L. Bond, Ann Malester, Joseph Eckhaus, Elizabeth A. Piotrowski, Morris E. Morkre, Michael Vita and Daniel O'Brien.*

For the Respondent: *Robert M. Huber, Bryan Cave LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, The Valspar Corporation. ("Valspar"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Lilly Industries, Inc. ("Lilly"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as

Complaint

amended, 15.U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. DEFINITIONS

1. “Acquisition Agreement” means the Agreement and Plan of Merger By and Among Lilly Industries, Inc., The Valspar Corporation and VAL Acquisition Corp., dated June 23, 2000.
2. “Silver Solution” means any solution used to produce a reflective surface on a mirror.
3. “Tin Solution” means any solution used to adhere a silver solution to the surface of a piece of glass to make a mirror.
4. “Copper Solution” means any solution used to create a protective barrier between the silver solution and the mirror backing paint.
5. “Mirror Backing Paint” means any paint that is applied to the back of a mirror to provide a hard shell coating.
6. “Respondent” means The Valspar Corporation.

II. THE PARTIES

7. Respondent Valspar, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware with its office and principal place of business located at 1101 Third Street South, Minneapolis, Minnesota 55440.
8. Lilly Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Indiana, with its principal executive offices located at 200 W. 103 Street, Indianapolis, Indiana.

Complaint

9. Pursuant to the Acquisition Agreement, Valspar will acquire 100 percent of the outstanding voting securities of Lilly Industries, Inc.
10. Respondent and Lilly are, and at all times relevant herein have been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in, or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

11. On June 23, 2000, Respondent and Lilly entered into an Agreement and Plan of Merger, under which Valspar is to acquire 100 percent of the voting securities of Lilly in a transaction valued at approximately \$762 million (“Acquisition”).

IV. THE RELEVANT MARKETS

12. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:
 - a. the research, development, manufacture and sale of Silver Solutions;
 - b. the research, development, manufacture and sale of Tin Solutions;
 - c. the research, development, manufacture and sale of Copper Solutions; and
 - d. the research, development, manufacture and sale of Mirror Backing Paints.

Complaint

13. For the purposes of this Complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

V. THE STRUCTURE OF THE MARKETS

14. The market for the research, development, manufacture and sale of Silver Solutions in the United States is highly concentrated. Valspar and Lilly account for over 90% of the Silver Solution market in the United States.
15. The market for the research, development, manufacture and sale of Tin Solutions in the United States is highly concentrated. Valspar and Lilly account for over 90% of the Tin Solution market in the United States.
16. The market for the research, development, manufacture and sale of Copper Solutions in the United States is highly concentrated. Valspar and Lilly account for over 90% of the Copper Solution market in the United States.
17. The market for the research, development, manufacture and sale of Mirror Backing Paint in the United States is highly concentrated. Valspar and Lilly account for over 60% of the Mirror Backing Paint market in the United States.

VI. BARRIERS TO ENTRY

18. Entry into the relevant markets set forth in paragraphs 12 and 13 would not occur in a timely manner to deter or counteract the adverse competitive effects described in paragraph 19 because of, among other things, the difficulty in developing formulas, establishing a nationwide sales and service network, and gaining brand name recognition and customer acceptance in the markets. In addition, entry into the relevant markets would be relatively costly in light of the size of the markets and is not likely to occur because

Complaint

sales opportunities would likely be too small to justify the costs and risks associated with new entry.

VII. EFFECTS OF THE ACQUISITION

19. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets set forth above in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC act, as amended, 15 U.S.C. § 45, in the following ways, among others:
 - a. by eliminating actual, direct and substantial competition between Respondent and Lilly in the relevant markets;
 - b. by increasing the likelihood that the combined Valspar and Lilly would increase prices of Silver Solutions, Tin Solutions, Copper Solutions and Mirror Backing Paints unilaterally; and
 - c. by reducing innovation in the relevant markets.

VIII. VIOLATIONS CHARGED

20. The Acquisition agreement described in Paragraph 11 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.
21. The Acquisition described in Paragraph 11, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-sixth day of January, 2001, issues its Complaint against said Respondent.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent The Valspar Corporation (“Valspar”) of Lilly Industries, Inc. (“Lilly”), and Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of 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

Respondent, its attorneys and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondent has violated the said Acts and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Valspar is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware with its office and principal place of business located at 1101 Third Street South, Minneapolis, Minnesota 55415.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Valspar" means The Valspar Corporation, its directors, officers, employees, agents and representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The Valspar Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Lilly" means Lilly Industries, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the state of Indiana with its office and principal place of business located at 200 W. 103 Street, Indianapolis, Indiana 42690.
- C. "Respondent" means Valspar.
- D. "Spraylat" means Spraylat Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the state of New York with its office and principal place of business located at 716 S. Columbus Ave., Mount Vernon, New York 10550. Spraylat also includes all of the joint ventures, subsidiaries, divisions, groups and affiliates controlled by Spraylat Corporation.

Decision and Order

- E. “Commission” means Federal Trade Commission.
- F. “Acquirer” means Spraylat, or the entity approved by the Commission to acquire the Assets To Be Divested pursuant to Paragraph II. of this Order.
- G. “Acquisition” means the proposed acquisition by Valspar of Lilly pursuant to the Agreement and Plan of Merger By and Among Lilly Industries, Inc., The Valspar Corporation and VAL Acquisition Corp., dated June 23, 2000.
- H. “Assets To Be Divested” means all of Valspar’s business, assets, properties, and goodwill, tangible and intangible, as of the date the Consent Agreement is signed by the Respondent, relating to the research, development, manufacture, quality assurance, customer support, marketing or sale of Mirror Coatings, including, but not limited to, the following:
1. a lease for the Greensboro Facility together with appurtenances and improvements;
 2. all fixtures, equipment, furniture, tools and other tangible personal property, together with all licenses and permits located at the Greensboro Facility;
 3. all fixtures, equipment, furniture, tools and other tangible personal property, together with all licenses and permits relating to the research and development of any Mirror Coating located at the High Point Facility;
 4. trade names, trademarks, brand names, formulations, contractual rights, Patents, trade secrets, technology, know-how, inventions, specifications, designs, drawings, processes, production information, manufacturing information, testing and quality control data, research materials, technical information, marketing and distribution information, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, information

Decision and Order

stored on management information systems (and specifications sufficient for the Acquirer to use such information) and all data, contractual rights, materials and information regarding Regulatory Approvals relating to Mirror Coatings;

5. all rights, titles and interest in and to the contracts entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors and lessees, licensors, licensees, consignors and consignees;
 6. inventory and storage capacity;
 7. all rights under warranties and guarantees, express or implied;
 8. all books, records, and files; and
 9. all items of prepaid expense.
- I. “Cost” means direct cash cost of raw materials and labor.
- J. “Divestiture Agreement” means the agreement(s) by and between Respondent and the Acquirer and all exhibits thereof, incorporated by reference into this Order and made a part hereof as Confidential Appendix I, that has been approved by the Commission.
- K. “Greensboro Facility” means the facility located at 3125 Spring Garden St., Greensboro, North Carolina
- L. “High Point Facility” means the facility located at 1647 English Road, High Point, North Carolina.
- M. “Key Employees” means the employees listed in Confidential Appendix II.

Decision and Order

- N. "Mirror Coatings" means any silver solution, tin solution, copper solution, reducer, mirror backing paint or any other coating researched, developed, manufactured or sold by Valspar that is used in the production of a mirror or an ornament.
- O. "Non-Public Acquirer Information" means any information not in the public domain obtained by Respondent, directly or indirectly, from the Acquirer relating to Mirror Coatings or any information obtained by Respondent, directly or indirectly, while providing assistance to the Acquirer as required by Paragraph III. of this Order. Non-Public Acquirer Information shall not include information already in the public domain or information that subsequently falls within the public domain through no violation of this Order by Respondent.
- P. "Patents" means all patents and patent rights, patent applications, patents of addition, re-examinations, reissues, extensions, granted supplementary protection certificates, substitutions, confirmations, registrations, revalidations, revisions, additions and the like, of or to said patent and patent rights and any and all continuations and continuations-in part and divisionals relating to Mirror Coatings.
- Q. "Regulatory Approvals" means approval by any governmental entity or regulatory approvals held by Valspar for the research, development, manufacture, quality control, marketing or sale of Mirror Coatings as of the date of the Acquisition.
- R. "Sole Source Customer" means any person or company that has a contract, as of the date of the Acquisition, to purchase 100% of its Mirror Coatings from Respondent.
- S. "Sole Source Customer Contract" means any agreement between any Sole Source Customer and Respondent relating to Mirror Coatings existing as of the date the Consent Agreement is signed by the Respondent.

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- T. “Third-Party Consents” means all consents, waivers and approvals from any person, private or public, that are necessary to effect the complete transfer to the Acquirer of the Assets To Be Divested pursuant to this Order.
- U. “Transitional Services” means any services or assistance provided by Respondent to enable or facilitate the transfer of the Assets To Be Divested to the Acquirer, including, but not limited to, all services identified in the Transition Services Agreement.
- V. “Transition Services Agreement” means the Transition Services Agreement entered into by and between Valspar and Acquirer attached as Exhibit C to the Divestiture Agreement.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent shall divest the Assets To Be Divested to Spraylat pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary from or contradict or be construed to vary from or contradict the terms of this Order). The divestiture shall be made no later than ten (10) days after Respondent consummates the Acquisition. Provided, however, that if Respondent has divested the Assets To Be Divested to Spraylat prior to the date the Order becomes final, and if, at the time the Commission determines to make the Order final, the Commission notifies Respondent that Spraylat is not an acceptable purchaser or that the manner of divestiture or the proposed transaction is not acceptable, then Respondent shall immediately rescind the transaction with Spraylat and shall divest the Assets To Be Divested, absolutely and in good faith, within six (6) months of the date the Order becomes final. Respondent shall divest the Assets To Be Divested only to an Acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

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- B. Respondent shall obtain all Third-Party Consents prior to the closing of the divestiture pursuant to the Divestiture Agreement required by Paragraph II.A. of this Order.
- C. Respondent shall comply with all of the terms of the Divestiture Agreement approved by the Commission pursuant to which the Assets To Be Divested are divested to the Acquirer (either Spraylat or the entity approved by the Commission to acquire the Assets To Be Divested pursuant to this Order). The Divestiture Agreement with the Acquirer shall be deemed incorporated by reference into this Order and any failure by Respondent to comply with the terms of the Divestiture Agreement shall constitute a failure to comply with this Order.
- D. The purpose of the divestiture pursuant to this Order is to ensure the continued use of the Assets To Be Divested in the same businesses in which they were engaged at the time of the announcement of the proposed Acquisition and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. No later than ten (10) days prior to the divestiture, Respondent shall provide the Acquirer with a complete list of all non-clerical employees of Respondent who are engaged, or have been engaged, in the research, development, manufacture, quality assurance, customer support, marketing or sale of Mirror Coatings at any time during the period from June 23, 2000, until the date of the divestiture. The list shall state each individual's name, position or positions held from June 23, 2000, until the date of the divestiture, address, telephone number, and a description of the duties and work performed by the individual in connection with Mirror Coatings. Respondent shall provide the Acquirer the opportunity to enter into employment contracts with such individuals, provided that

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such contracts are contingent upon the Commission's approval of the divestiture.

- B. Respondent shall provide the Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified pursuant to Paragraph III.A. of this Order to the extent permissible under applicable laws, at the request of the Acquirer any time after the execution of the Divestiture Agreement between the Acquirer and Respondent.
- C. Respondent shall not enforce any confidentiality or non-compete restrictions relating to the Assets To Be Divested that apply to any employee identified pursuant to Paragraph III.A. who accepts employment with the Acquirer that would interfere with the Acquirer's ability to interview or hire such employee.
- D. Respondent shall provide all employees identified pursuant to Paragraph III.A. with reasonable financial incentives to continue in their positions until the date the divestiture is accomplished. Such incentives shall include a continuation of all employee benefits offered by Respondent until the date the divestiture of the Assets to Be Divested is accomplished, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Respondent shall provide all Key Employees incentives to accept employment with the Acquirer at the time of the divestiture. Such incentives shall include a bonus for each Key Employee, equal to 10% of the employee's current annual salary and commissions (including any annual bonuses) as of the date this Order is accepted by the Commission for public comment, who accepts an offer of employment on or prior to the date the Order becomes final from the Acquirer and remains employed by the Acquirer for a period of three (3) years, payable by the Acquirer three (3) years after the commencement of the employee's employment by the Acquirer.

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- E. For a period of one (1) year following the date the divestiture is accomplished, Respondent shall not, directly or indirectly, solicit or otherwise attempt to induce any employees to terminate their employment relationship with the Acquirer; provided, however, it shall not be deemed to be a violation of this provision if: (i) Respondent advertises for employees in newspapers, trade publications or other media not targeted specifically at the employees, or (ii) Respondent hires employees who apply for employment with Valspar, as long as such employees were not solicited by Valspar in violation of this Paragraph III.E. During the one-year period following the divestiture, Respondent shall not, directly or indirectly, hire or enter into any arrangement for the services of any employees employed by the Acquirer, unless the individual's employment has been terminated by the Acquirer.
- F. Respondent shall not transfer, without the consent of the Acquirer, any of the individuals identified in Paragraph III.A. of this Order to any other position until the divestiture is accomplished.
- G. For the period beginning on the date the Divestiture Agreement is signed and ending one (1) year following the divestiture ("Extended Restricted Period"), Respondent shall not:
1. solicit, induce or attempt to induce any Sole Source Customer to terminate or modify any Sole Source Customer Contract or, in the case of any Sole Source Customer Contract which by its terms expires or terminates within one (1) year of the date this order is signed by Respondent, solicit the Sole Source Customer which is a party to such Sole Source Customer Contract to not renew such Sole Source Customer Contract; or

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2. solicit, induce, or attempt to induce any Sole Source Customer to transfer to Respondent any business that is subject to any Sole Source Customer Contract during the term of such Sole Source Customer Contract.

Nothing in this paragraph shall prevent Respondent from responding to an unsolicited invitation to bid on a contract from any Sole Source Customer during the Extended Restricted Period.

- H. Respondent shall, at the request of the Acquirer, at Cost to the Acquirer, provide: (a) for a period not to exceed one (1) year after the divestiture is accomplished, such Transitional Services as are necessary to enable the Acquirer to manufacture and distribute Mirror Coatings in substantially the same manner and quality employed or achieved by Respondent; and (b) for a period not to exceed one (1) year after the divestiture is accomplished, such assistance, personnel and training as are reasonably necessary to enable the Acquirer to obtain any necessary Regulatory Approvals to manufacture and sell Mirror Coatings.
- I. Respondent shall not provide, disclose or otherwise make available to any of its employees not involved in providing Transitional Services any Non-Public Acquirer Information, nor shall Respondent use any Non-Public Acquirer Information obtained or derived by Respondent in its capacity as provider of Transitional Services pursuant to Paragraph III.H. of this Order except for the sole purpose of providing Transitional Services pursuant to Paragraph III.H. of this Order. Respondent shall cause each individual involved in providing Transitional Services pursuant to Paragraph III.H. of this Order and having access to Non-Public Acquirer Information to sign an agreement that the individual will maintain the confidentiality of any Non-Public Acquirer Information as required by the terms and conditions of this Paragraph.

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Such individuals shall not be involved in any way in the management, sales, marketing, or financial operations of the competing products of Respondent.

- J. Pending divestiture of the Assets To Be Divested, Respondent shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Assets To Be Divested, and to prevent the destruction, removal, wasting, deterioration or impairment of the Assets To Be Divested except for ordinary wear and tear.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested within the time required by Paragraph II. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested in a manner that satisfies the requirements of Paragraphs II. and III. of this Order.
- B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

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- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Assets To Be Divested.
 3. Within ten (10) days after appointment of the trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.
 4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.

Decision and Order

5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the Assets To Be Divested or to any other relevant information as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission; provided, however, if the trustee receives bona fide offers for the Assets To Be Divested from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such assets to the acquiring entity or entities selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties

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and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Assets To Be Divested.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claims, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. In the event that the trustee determines that he or she is unable to divest the Assets To Be Divested, in a manner consistent with the Commission's purpose as described in Paragraph II.D., the trustee may divest additional ancillary assets and businesses of Respondent and effect such arrangements as are necessary to satisfy the requirements of this Order.

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12. The trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
13. The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondent has fully complied with the provisions of Paragraphs II. through IV. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with Paragraphs II. through IV. of this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through IV. of the Order, including a description of all substantive contacts or negotiations relating to the divestiture and the approvals and consents. Respondent shall include in its compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures and approvals. The final compliance report required by this Paragraph V. shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor

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corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to compliance with this Order; and
- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

By the Commission.

Decision and Order

CONFIDENTIAL APPENDIX I

[Redacted From Public Record Version]

Decision and Order

CONFIDENTIAL APPENDIX II

[Redacted From Public Record Version]

Analysis

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

Issued when the Commission tentatively approved a proposed consent order on December 15, 2001

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Valspar Corporation (“Valspar”), which is designed to remedy the anticompetitive effects resulting from Valspar’s acquisition of Lilly Industries, Inc. (“Lilly”). Under the terms of the agreement, within ten days of the date the Consent Agreement is placed on the public record, Valspar will be required to divest its mirror coatings business, which is comprised of silver, tin and copper solutions, mirror backing paint, and any other coating researched, developed, manufactured or sold by Valspar that is used in the production of a mirror, to Spraylat Corporation. Should Valspar fail to do so, the Commission may appoint a trustee to divest the mirror coatings business.

The proposed Consent Agreement has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make final the Decision & Order.

Pursuant to an Asset Purchase Agreement dated June 23, 2000, Valspar has agreed to acquire Lilly for approximately \$762 million. The Commission's Complaint alleges that the acquisition, 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, in the markets for silver solutions, tin solutions, copper solutions and mirror backing paint.

Valspar and Lilly are the two leading suppliers of silver, tin and copper solutions (“mirror solutions”) in the United States and two of three suppliers of mirror backing paint in the United States.

Analysis

Five basic inputs are needed to make a mirror: glass, a tin solution, a silver solution, a copper solution, and mirror backing paint. Most mirrors are made by placing clean pieces of glass flat on a conveyor belt, which moves the glass through the various stations where the solutions and paint are applied to the back of each piece of glass. The first layer applied to the glass is a tin solution, which is an adhesion promoter so that the silver will bond to the glass. After the tin solution, a silver solution is applied, which creates a metal film on the glass surface, giving the mirror its reflective surface. The third step is to apply a copper solution, which helps keep the silver from oxidizing and creates a surface to which the mirror backing paint will adhere. Finally, the mirror backing paint is applied. This adds a hard coating that protects the solutions from becoming scratched or damaged and further protects the silver solution from corrosion.

Both Lilly and Valspar produce all of the components, other than glass, necessary to make a mirror. The United States mirror solutions and mirror backing paint markets are highly concentrated, and the proposed acquisition would produce a firm controlling over 90% of the mirror solutions markets and over 60% of the mirror backing paint market. Both companies have frequently competed against each other for customers. By eliminating competition between the two most significant competitors in these highly concentrated markets, the proposed acquisition would allow the combined firm to exercise market power unilaterally, thereby increasing the likelihood that purchasers of mirror solutions as well as mirror backing paint would be forced to pay higher prices and that innovation and service levels in these markets would decrease.

Significant impediments to new entry exist in the mirror solutions and mirror backing paint markets. A new entrant into any of these markets would need to undertake the difficult, expensive and time-consuming process of developing a competitive product, establishing reliable U.S. distribution and technical support, and developing a reputation among mirror manufacturers for consistently producing a high-quality product.

Analysis

Because of the difficulty of accomplishing these tasks, new entry into either the mirror solutions markets or the mirror backing paint market could not be accomplished in a timely manner. Additionally, new entry into any one of these markets is made more unlikely because of the limited sales opportunities available to new entrants.

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the United States mirror solutions and mirror backing paint markets by requiring Valspar to divest its mirror coatings business. Pursuant to the Consent Agreement, Valspar is required to divest its mirror coatings business to Spraylat Corporation within ten days of the date the Commission places the Order on the public record. Should Valspar fail to do so, the Commission may appoint a trustee to divest the business.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. The Commission is satisfied that Spraylat is a well-qualified acquirer of the divested assets. Based in Mount Vernon, New York, Spraylat is a family owned company that manufactures and sells specialty paints and coatings for industrial uses. Spraylat possesses the necessary industry expertise to replace the competition that existed prior to the proposed acquisition. Furthermore, Spraylat poses no separate competitive issues as the acquirer of the divested assets.

The Consent Agreement includes a number of provisions that are designed to ensure that the transfer of Valspar's mirror coatings business to the acquirer is successful. The Consent Agreement requires Valspar to provide incentives to certain key employees to accept employment, and remain employed, by the acquirer. Valspar is also prohibited from inducing key customers from terminating their contracts with the acquirer for a period of one year. Finally, Valspar employees involved with its mirror

Analysis

coatings business are prohibited from disclosing any confidential information to employees involved with the Lilly business.

In order to ensure that the Commission remains informed about the status of the Valspar mirror coatings business pending divestiture, and about efforts being made to accomplish the divestiture, the Consent Agreement requires Valspar to report to the Commission within 30 days, and every thirty days thereafter until the divestiture is accomplished. In addition, Valspar is required to report to the Commission every 60 days regarding its obligations to provide transitional services and facilities management.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify in any way its terms.

Complaint

IN THE MATTER OF

EXXON CORPORATION AND MOBIL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3907; File No. 9910077

Complaint, November 30, 1999--Decision, January 26, 2001

This consent order addresses the merger of Respondent Exxon Corp. -- one of the world's largest integrated oil companies, whose businesses operate petroleum refineries, own or lease gasoline stations nationally; and sell gasoline to distributors or dealers that operate another 6,475 retail outlets throughout the United States -- and Respondent Mobil Corp., another of the world's largest integrated oil companies, whose businesses operate petroleum refineries; and retail outlets that sell Mobil-branded gasoline throughout the United States. The order, among other things, requires the respondents to divest or otherwise surrender control of: (1) all of Mobil's gasoline marketing in the Mid-Atlantic (New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and the District of Columbia), and all of Exxon's gasoline marketing in the Northeast (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York); (2) Mobil's gasoline marketing in the Austin, Bryan/College Station, Dallas, Houston and San Antonio, Texas, metropolitan areas; (3) Exxon's option to repurchase retail gasoline stores from Tosco Corp. in Arizona; (4) Exxon's refinery located in Benicia, California ("Exxon Benicia Refinery"), and all of Exxon's gasoline marketing in California; (5) the terminal operations of Mobil in Boston and in the Washington, D.C. area, and the ability to exclude a terminal competitor from using Mobil's wharf in Norfolk; (6) either Mobil's interest in the Colonial pipeline or Exxon's interest in the Plantation pipeline; (7) Mobil's interest in the Trans Alaska Pipeline System; (8) the terminal and retail operations of Exxon on Guam; (9) a quantity of paraffinic lubricant base oil equivalent to the amount of paraffinic lubricant base oil refined in North America that is controlled by Mobil; and (10) Exxon's jet turbine oil business. An accompanying Order to Hold Separate and Maintain Assets requires the respondents to maintain all the assets to be divested as separate, competitively viable businesses, in a manner that will preserve their viability, competitiveness and marketability pending their divestiture.

Participants

For the Commission: *Dennis F. Johnson, Renee S. Henning,
Peter Richman, Philip Eisenstat, Constance M. Salemi, Marc*

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Schneider, Thomas Dahdouh, Gwendolyn Fanger, Marc Jarsulic, Crystal Jones, Anthony Joseph, Jonathan Kanter, Stewart Lawler, Frank Lipson, Thomas Respess, Stephen Riddell, W. Stephen Sockwell, Norris Washington, John Weber, Barbara Shapiro, Nathan J. Muyskens, Jennifer Duckenfield, Mary Rose Emig, William R. Vigdor, Richard Liebeskind, Phillip L. Broyles, Naomi Licker, Rendell A. Davis, Jr., Elizabeth Piotrowski, Daniel P. Ducore, Leslie Farber, Gregory S. Vistnes, and Jeremy I. Bulow.

For the Respondent: *Charles F. Rule, Deborah Garza, and David Meyer, Covington & Burling, and Janet McDavid and Edward Duckers, Hogan & Hartson.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said acts, the Federal Trade Commission (“Commission”), having reason to believe that respondent Exxon Corporation (“Exxon”), a corporation, and respondent Mobil Corporation (“Mobil”), a corporation, both subject to the jurisdiction of the Commission, have entered into an agreement and plan of merger, in violation of 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Exxon Corporation

1. Respondent Exxon is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal place of business at 5959 Las Colinas Boulevard, Irving, Texas 75039.
2. Respondent Exxon is, and at all times relevant herein has been, engaged in the business of refining, transporting, distributing, and marketing crude oil and refined petroleum products,

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including gasoline, jet fuel, other light petroleum products, paraffinic base oil, and jet turbine oil, in the United States.

3. Respondent Exxon is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Mobil Corporation

4. Respondent Mobil is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 3225 Gallows Road, Fairfax, Virginia 22037.
5. Respondent Mobil is, and at all times relevant herein has been, engaged in the business of refining, transporting, distributing, and marketing crude oil and refined petroleum products, including gasoline, jet fuel, other light petroleum products, paraffinic base oil, and jet turbine oil, in the United States.
6. Respondent Mobil is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

The Proposed Merger

7. Pursuant to an Agreement and Plan of Merger dated December 1, 1998, Exxon and Mobil agreed to a merger between Mobil and a wholly owned subsidiary of Exxon. As a result of this agreement, Exxon will acquire 100 percent of the issued and outstanding voting securities of Mobil, and will merge the two companies into a new corporation to be known as Exxon Mobil

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Corporation. Based on the value of the securities at the time of the agreement, the transaction is valued at approximately \$80 billion.

Trade and Commerce

8. Relevant lines of commerce (*i.e.*, product markets) in which to analyze the effects of the proposed merger are:
 - a. the marketing of motor gasoline;
 - b. the refining and marketing of gasoline that meets the specifications of the California Air Resources Board (“CARB” gasoline);
 - c. the bidding for and refining of jet fuel for the U.S. Navy;
 - d. the terminaling of gasoline and other light petroleum products;
 - e. the pipeline transportation of light petroleum products;
 - f. the pipeline transportation of crude oil;
 - g. the refining and marketing of paraffinic base oil; and
 - h. the production and sale of jet turbine oil.
9. Motor gasoline is a fuel used in automobiles and other vehicles. It is manufactured from crude oil at refineries in the United States and throughout the world. There is no substitute for motor gasoline as a fuel for automobiles and other vehicles that are designed to use motor gasoline.
10. CARB gasoline is a special low-pollution formulation of motor gasoline mandated by the California Air Resources Board pursuant to California state law. No other formulation of motor gasoline may be sold for use in California. There is

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no substitute for CARB gasoline as a fuel for automobiles and other vehicles that use gasoline in California.

11. Navy jet fuel (sometimes referred to as “JP-5”) is a specialized fuel used by the U.S. Navy for its jet airplanes. Navy jet fuel requires more stringent specifications than other types of jet fuel because of the dangers associated with storing fuel, and aircraft that contain fuel, aboard ships. There is no substitute for Navy jet fuel for use in U.S. Navy jet airplanes.
12. Terminals are specialized facilities with large storage tanks used for the receipt and local distribution by tank truck of large quantities of gasoline and other light petroleum products. There are no substitutes for terminals for the storage and local distribution of gasoline and other light petroleum products.
13. Refined product pipelines are specialized pipelines for the transportation of refined light petroleum products, including gasoline, diesel fuel, jet fuel, and home heating oil. Colonial Pipeline Co. (“Colonial”) and Plantation Pipe Line Co. (“Plantation”) own and operate the pipelines that are the most economical means of supplying light petroleum products to the inland portions of the States of Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia and Tennessee (*i.e.*, the portions of those states more than 50 miles from ports such as Savannah, Charleston, Wilmington and Norfolk) (hereinafter the “inland Southeast”). Exxon owns approximately 49 percent of Plantation, and has equal control of the board of directors of Plantation with Plantation’s other owner. Mobil owns approximately 11 percent of Colonial, and designates a member of Colonial’s board of directors. There are no substitutes for Colonial and Plantation for the transportation of light petroleum products to the inland Southeast.

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14. Crude oil pipelines are specialized pipelines for the transportation of crude oil from production fields to refineries or locations where the crude oil can be transported to refineries by other means. The Trans-Alaska Pipeline System (“TAPS”) is an 800-mile pipeline used to transport crude oil from the Alaskan North Slope to port facilities at Valdez, Alaska, from which the crude oil can be transported to refineries on the West Coast of the United States. TAPS is owned primarily by seven major refiners. Exxon owns approximately 20% of TAPS, and Mobil owns approximately 3%. The only way that crude oil can be transported from the Alaskan North Slope to port facilities at Valdez is through TAPS.
15. Paraffinic base oil is a refined petroleum product that is used as the principal component, or “base stock,” of most finished lubricant products, including passenger car motor oil, heavy duty engine oil, and automatic transmission fluid. There is no economic substitute for paraffinic base oil as the base stock for those products.
16. Jet turbine oil is a specialized ester-based lubricant used to lubricate jet aircraft engines. There are no substitutes for jet turbine oil in lubricating jet aircraft engines.
17. Relevant sections of the country (*i.e.*, geographic markets) in which to analyze the proposed merger are the following:
 - a. The northeastern United States, consisting of the District of Columbia and the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia, and smaller areas contained therein, including but not limited to the following metropolitan areas: Hartford, New Haven-Bridgeport-Stamford-Waterbury-Danbury, and New London-Norwich, CT; Dover and Wilmington-Newark, DE; Washington, DC; Bangor, Lewiston-Auburn, and Portland, ME; Baltimore, MD; Barnstable-Yarmouth

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and Boston-Worcester-Lawrence-Lowell-Brockton, MA; Atlantic-Cape May, Bergen-Passaic, Jersey City, Middlesex-Somerset-Hunterdon, Monmouth-Ocean, Newark, Trenton, and Vineland-Millville-Bridgeton, NJ; Albany-Schenectady-Troy, Dutchess, Nassau-Suffolk, New York, and Newburgh, NY; Allentown-Bethlehem-Easton, Altoona, Harrisburg-Lebanon-Carlisle, Johnstown, Lancaster, Philadelphia, Reading, Scranton-Wilkes Barre-Hazelton, State College, and York, PA; Providence-Warwick-Pawtucket, RI; Norfolk-Virginia Beach-Newport News and Richmond-Petersburg, VA; Burlington, VT; and smaller areas contained therein, where the merger would reduce competition in the marketing of motor gasoline, as alleged below;

- b. The following metropolitan areas in the State of Texas: Austin, Bryan/College Station, Dallas, Houston, and San Antonio, and smaller areas contained therein, where the merger would reduce competition in the marketing of motor gasoline, as alleged below;
- c. The State of Arizona and smaller areas contained therein, where the merger would reduce competition in the marketing of motor gasoline, as alleged below;
- d. The State of California and smaller areas contained therein, where the merger would reduce competition in the refining and marketing of CARB gasoline, as alleged below;
- e. The West Coast of the United States, where the merger would reduce competition in the bidding for and refining of jet fuel for the U.S. Navy, as alleged below;
- f. The metropolitan areas of Boston, MA, Washington, DC, and Norfolk, VA, where the merger would reduce competition in the terminaling of gasoline and other light petroleum products, as alleged below;

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- g. The inland Southeast and smaller areas contained therein, where the merger would reduce competition in the transportation of refined light petroleum products, as alleged below;
- h. Locations at which crude oil from the Alaskan North Slope is refined, including the States of Alaska, California, and Washington, where the merger would reduce competition in the transportation of crude oil produced on the Alaskan North Slope to port facilities at Valdez and intermediate points, as alleged below;
- i. The Territory of Guam, where the merger would reduce competition in the importation, terminaling and marketing of motor gasoline and other light petroleum products, as alleged below;
- j. The United States and Canada, and smaller areas contained therein, where the merger would reduce competition in the refining and marketing of paraffinic base oil, as alleged below;
- k. The world, where the merger would reduce competition in the manufacture and sale of jet turbine oil, as alleged below.

Market Structure

- 18. The marketing of motor gasoline in the northeastern United States, including the District of Columbia and the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia, and smaller areas contained therein, including but not limited to the metropolitan areas of Hartford, New Haven-Bridgeport-Stamford-Waterbury-Danbury, and New London-Norwich, CT; Dover and Wilmington-Newark, DE; Washington, DC; Bangor, Lewiston-Auburn, and Portland, ME; Baltimore, MD; Barnstable-Yarmouth and Boston-Worcester-

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Lawrence-Lowell-Brockton, MA; Atlantic-Cape May, Bergen-Passaic, Jersey City, Middlesex-Somerset-Hunterdon, Monmouth-Ocean, Newark, Trenton, and Vineland-Millville-Bridgeton, NJ; Albany-Schenectady-Troy, Dutchess, Nassau-Suffolk, New York, and Newburgh, NY; Allentown-Bethlehem-Easton, Altoona, Harrisburg-Lebanon-Carlisle, Johnstown, Lancaster, Philadelphia, Reading, Scranton-Wilkes Barre-Hazleton, State College, and York, PA; Providence-Warwick-Pawtucket, RI; Norfolk-Virginia Beach-Newport News and Richmond-Petersburg, VA; Burlington, VT, would be either moderately or highly concentrated as a result of the merger. The proposed merger would significantly increase concentration in each of these markets.

19. The marketing of motor gasoline in the metropolitan areas of Austin, Bryan/College Station, Dallas, Houston, and San Antonio, TX, and smaller areas contained therein, would be either moderately or highly concentrated as a result of the merger. The proposed merger would significantly increase concentration in each of these markets.
20. The refining and marketing of CARB gasoline for sale in the State of California, and smaller areas contained therein, would be moderately concentrated as a result of the merger. The proposed merger would significantly increase concentration in each of these markets.
21. The marketing of motor gasoline in the State of Arizona and smaller areas contained therein would be moderately concentrated as a result of the merger. Exxon has contractual rights to reacquire stations owned by a competitor. The proposed merger would provide the merged firm with an incentive to reduce the ability of that competitor to compete.
22. The bidding for and refining of jet fuel for the U.S. Navy on the West Coast of the United States is highly concentrated.

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The proposed merger would significantly increase concentration in this market.

23. The terminaling of gasoline and other light petroleum products is highly concentrated in the metropolitan areas of Boston, MA and Washington, DC. The proposed merger would significantly increase concentration in both of these markets.
24. The terminaling of gasoline and other light petroleum products is highly concentrated in the Norfolk, VA metropolitan area. Mobil controls a wharf that is the only means by which a competing terminal can receive gasoline and other light petroleum products from marine vessels. The proposed merger would provide the merged firm with an incentive and ability to restrict the competitive viability of that competitor.
25. The market for the transportation of refined light petroleum products to the inland Southeast is highly concentrated. The proposed merger would significantly increase the risk of coordinated behavior between Colonial and Plantation.
26. The market for transporting crude oil produced on the Alaskan North Slope through TAPS to Valdez and intermediate points is highly concentrated. The proposed merger would significantly increase concentration in this market.
27. The importation, terminaling and marketing of gasoline and other light petroleum products in the Territory of Guam is highly concentrated. The proposed merger would significantly increase concentration in this market.
28. The refining and marketing of paraffinic base oil in the United States and Canada would be moderately concentrated as result of the merger. Exxon is the leading firm in this market. The proposed merger would

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significantly increase concentration in this market and enhance Exxon's position as the leading firm.

29. The worldwide production and sale of jet turbine oil is highly concentrated. The proposed merger would significantly increase concentration in this market and leave Exxon as the dominant firm.

Entry Conditions

30. Entry into the relevant markets in the relevant sections of the country is difficult and would not be timely, likely or sufficient to prevent the anticompetitive effects that are likely to result from the proposed merger.

First Violation Charged

31. Exxon and Mobil are actual and potential competitors in the marketing of motor gasoline in the northeastern United States, consisting of the District of Columbia and the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and Virginia, and smaller areas contained therein, including but not limited to the metropolitan areas of Hartford, New Haven-Bridgeport-Stamford-Waterbury-Danbury, and New London-Norwich, CT; Dover and Wilmington-Newark, DE; Washington, DC; Bangor, Lewiston-Auburn, and Portland, ME; Baltimore, MD; Barnstable-Yarmouth and Boston-Worcester-Lawrence-Lowell-Brockton, MA; Atlantic-Cape May, Bergen-Passaic, Jersey City, Middlesex-Somerset-Hunterdon, Monmouth-Ocean, Newark, Trenton, and Vineland-Millville-Bridgeton, NJ; Albany-Schenectady-Troy, Dutchess, Nassau-Suffolk, New York, and Newburgh, NY; Allentown-Bethlehem-Easton, Altoona, Harrisburg-Lebanon-Carlisle, Johnstown, Lancaster, Philadelphia, Reading, Scranton-Wilkes Barre-Hazleton, State College, and York, PA; Providence-Warwick-Pawtucket, RI;

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Norfolk-Virginia Beach-Newport News and Richmond-Petersburg, VA; and Burlington, VT.

32. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the marketing of motor gasoline in the northeastern United States, and in smaller markets contained therein, in violation of 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, in the following ways, among others:
- a. by eliminating direct competition in the marketing of motor gasoline between Exxon and Mobil;
 - b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in the northeastern United States;

each of which increases the likelihood that the price of motor gasoline will increase in the northeastern United States and smaller areas contained therein.

Second Violation Charged

33. Exxon and Mobil are actual and potential competitors in the marketing of motor gasoline in the following metropolitan areas in the State of Texas: Austin, Bryan/College Station, Dallas, Houston, and San Antonio, and smaller areas contained therein.
34. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the marketing of motor gasoline in the relevant metropolitan areas in the State of Texas, and smaller areas contained therein, in

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violation of 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, in the following ways, among others:

- a. by eliminating direct competition in the marketing of motor gasoline between Exxon and Mobil;
- b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power; and
- c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in the relevant metropolitan areas in Texas;

each of which increases the likelihood that the price of motor gasoline will increase in the relevant metropolitan areas in Texas.

Third Violation Charged

35. Exxon and Mobil are potential competitors in the marketing of motor gasoline in the State of Arizona. Exxon sells motor gasoline in Arizona through a distributor to which Exxon sold its owned retail gasoline stores, and does not retain any significant control over that distributor's price or output. Pursuant to that sale, Exxon has a contractual right to reacquire those stores in the event the distributor re-brands the stores to any name other than Exxon. The merger would provide the merged company with the ability and incentive to reduce competition in the State of Arizona by exercising or threatening to exercise this right.
36. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the marketing of motor gasoline in the State of Arizona and smaller areas contained therein, in violation of Section 7 of the Clayton

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Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating potential competition in the marketing of motor gasoline between Exxon and Mobil; and
- b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in Arizona;

each of which increases the likelihood that the price of motor gasoline will increase in the State of Arizona.

Fourth Violation Charged

37. Exxon and Mobil are actual and potential competitors in the refining and marketing of CARB gasoline in the State of California, and smaller areas contained therein.
38. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and marketing of CARB gasoline in the State of California, and smaller areas contained therein, in violation of 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, in the following ways, among others:
 - a. by eliminating direct competition in the refining and marketing of CARB gasoline between Exxon and Mobil;
 - b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power;
 - c. by increasing the degree of vertical integration between the refining and marketing of CARB gasoline; and

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- d. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in California;

each of which increases the likelihood that the price of CARB gasoline will increase.

Fifth Violation Charged

39. Exxon and Mobil are potential competitors in the bidding for and refining of jet fuel for the U.S. Navy on the West Coast.
40. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining of jet fuel for the U.S. Navy on the West Coast in violation of 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, in the following ways, among others:
 - a. by eliminating direct competition in the refining of jet fuel for the U.S. Navy between Exxon and Mobil;
 - b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in the bidding for and refining of jet fuel for the U.S. Navy on the West Coast;

each of which increases the likelihood that the price of jet fuel for the U.S. Navy will increase.

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Sixth Violation Charged

41. Exxon and Mobil are actual and potential competitors in the terminaling of gasoline and other light petroleum products in the Boston, MA and Washington, DC metropolitan areas.
42. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the terminaling of gasoline and other light petroleum products in the Boston, MA and Washington, DC metropolitan areas in violation of 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, in the following ways, among others:
 - a. by eliminating direct competition in the terminaling of gasoline and other light petroleum products between Exxon and Mobil;
 - b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in the terminaling of gasoline and other light petroleum products in the Boston, MA and Washington, DC metropolitan areas;

each of which increases the likelihood that the price for terminaling of gasoline and other light petroleum products will increase in the Boston, MA and Washington, DC metropolitan areas.

Seventh Violation Charged

43. Exxon and Mobil are potential competitors in the terminaling of gasoline in the Norfolk, VA metropolitan

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area. Mobil controls a wharf that is the only means by which a competing terminal can receive gasoline by marine vessel.

44. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the terminaling of gasoline in the Norfolk, VA metropolitan area in violation of 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, in the following ways, among others:
- a. by increasing the likelihood that the combined Exxon and Mobil will deny access to the Mobil wharf to their competitor, thereby raising the cost to that competitor of receiving gasoline;
 - b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in the terminaling of gasoline in the Norfolk, VA metropolitan area;

each of which increases the likelihood that the price for terminaling of gasoline will increase in the Norfolk, VA metropolitan area.

Eighth Violation Charged

45. Exxon and Mobil, through their ownership of and board representation on, Colonial and Plantation, are actual and potential competitors in the transportation of refined light petroleum products to the inland Southeast.
46. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the transportation of refined light petroleum products to the inland Southeast in

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violation of 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, in the following ways, among others:

- a. by eliminating direct competition between Colonial and Plantation in the transportation of refined light petroleum products to the inland Southeast;
- b. by providing the combined Exxon and Mobil with access to sensitive competitive information of both Colonial and Plantation; and
- c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between Colonial and Plantation, or between the owners of each;

each of which increases the likelihood that the price of transporting refined light petroleum products to the inland Southeast will increase.

Ninth Violation Charged

47. Exxon and Mobil are actual and potential competitors in the transportation of crude oil through TAPS from the Alaskan North Slope to Valdez and intermediate points.
48. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the transportation of crude oil from the Alaskan North Slope through TAPS in violation of 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, in the following ways, among others:
 - a. by eliminating direct competition between Exxon and Mobil in the transportation of crude oil from the Alaskan North Slope through TAPS;

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- b. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in the transportation of crude oil from the Alaskan North Slope through TAPS;

each of which increases the likelihood that the price of transporting crude oil from the Alaskan North Slope through TAPS will increase.

Tenth Violation Charged

- 49. Exxon and Mobil are actual and potential competitors in the importation, terminaling and marketing of gasoline and other light petroleum products in the Territory of Guam.
- 50. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the importation, terminaling and marketing of gasoline and other light petroleum products in the Territory of Guam in violation of 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, in the following ways, among others:
 - a. by eliminating direct competition between Exxon and Mobil in the importation, terminaling and marketing of gasoline and other light petroleum products;
 - b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their other competitor in Guam;

each of which increases the likelihood that the price of gasoline and other light petroleum products will increase in the Territory of Guam.

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Eleventh Violation Charged

51. Exxon and Mobil are actual and potential competitors in the refining and marketing of paraffinic base oil in the United States and Canada.
52. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the refining and marketing of paraffinic base oil in the United States and Canada in violation of 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, in the following ways, among others:
 - a. by eliminating direct competition between Exxon and Mobil in the refining and marketing of paraffinic base oil;
 - b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction between the combination of Exxon and Mobil and their competitors in the refining and marketing of paraffinic base oil;

each of which increases the likelihood that the price of paraffinic base oil will increase in the United States and Canada.

Twelfth Violation Charged

53. Exxon and Mobil are actual and potential competitors in the production and sale of jet turbine oil in the United States and throughout the world.
54. The effect of the proposed merger, if consummated, may be substantially to lessen competition in the production and sale of jet turbine oil in the United States and throughout the

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world in violation of 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, in the following ways, among others:

- a. by eliminating direct competition between Exxon and Mobil in the production and sale of jet turbine oil; and
- b. by increasing the likelihood that the combination of Exxon and Mobil will unilaterally exercise market power;

each of which increases the likelihood that the price of jet turbine oil will increase in the United States and throughout the world.

Statutes Violated

55. The proposed merger between Exxon and Mobil violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirtieth day of November, 1999, issues its complaint against said respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed merger involving Respondents, Exxon Corporation and Mobil Corporation, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and accepted the executed Consent Agreement and placed such Agreement on the public record for a period of sixty (60) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to Rule 2.34 of its Rules (16 C.F.R. § 2.34), now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

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1. Respondent Exxon Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 5959 Las Colinas Boulevard, Irving, Texas 75039.
2. Respondent Mobil Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3225 Gallows Road, Fairfax, Virginia 22037.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Exxon” means Exxon Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Exxon, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Mobil” means Mobil Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Mobil, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Exxon Mobil” means Exxon Mobil Corporation, or any other entity resulting from the merger involving Exxon and

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Mobil, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Exxon Mobil, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- D. "Respondents" means Exxon and Mobil, individually and collectively, and the successor corporation.
- E. "ANS" means the North Slope of Alaska.
- F. "Base Oil" means paraffinic-based lubricant stock of all types, grades, viscosities, and qualities suitable for blending into finished oils (*e.g.*, passenger car motor oil, heavy duty diesel oil, hydraulic fluids, or gear oils), but does not mean naphthenic or synthetic oils.
- G. "Branded Distributors" means Exxon Branded Sellers or Mobil Branded Sellers that purchase Branded Fuels at a terminal and transport such Branded Fuels to Retail Sites for resale.
- H. "Branded Fuels" means motor gasoline or diesel fuel sold at a Retail Site under a brand name owned by Respondents.
- I. "Branded Products" means any product other than Branded Fuels that is sold at a Retail Site under a brand name owned by Respondents.
- J. "Business Format Franchise" shall have the meaning of "franchise" set forth in 16 C.F.R. § 436.2, excluding franchises granted by Respondents to sell Branded Fuels.
- K. "California-North MSAs" means the following primary metropolitan statistical areas in California as defined by the Census Bureau as of September 30, 1999: Oakland, San Francisco, San Jose, and Santa Rosa.

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- L. “Colonial” means Colonial Pipeline Company.
- M. “Commission” means the Federal Trade Commission.
- N. “Designated Base Oil Refineries” means Mobil’s refinery located at Beaumont, Texas; Exxon’s refinery located at Baytown, Texas; and Exxon’s refinery located at Baton Rouge, Louisiana.
- O. “Effective Date of Divestiture” means the date on which the applicable divestiture is consummated.
- P. “Existing Lessee Agreements” means all agreements between Respondents and Exxon Lessee Dealers or Mobil Lessee Dealers relating to such Person’s right or obligation to sell or resell Branded Fuels using Exxon’s brand name or Mobil’s brand name at a Retail Site, including, but not limited to, each Branded Fuels dealer lease agreement and dealer sales agreement. “Existing Lessee Agreements” does not include Business Format Franchises.
- Q. “Existing Supply Agreements” means all agreements between Respondents and Exxon Branded Sellers or Mobil Branded Sellers relating to such Person’s right or obligation to sell or resell Branded Fuels using Exxon’s brand name or Mobil’s brand name at a Retail Site, including, but not limited to, each Branded Fuels supply contract, distributor agreement, dealer agreement, image agreement, amortization agreement, and jobber outlet incentive program contract. “Existing Supply Agreements” does not include Business Format Franchises.
- R. “Exxon Benicia Refinery Assets” means Exxon’s refinery located at Benicia, California and all of Exxon’s interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Exxon in the operation of the refinery; at the acquirer’s

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option, all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output; at the acquirer's option, all agreements under which Exxon receives crude oil or other inputs at or for the refinery; and, at the acquirer's option, all exchange agreements involving the refinery. "Exxon Benicia Refinery Assets" also includes all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Benicia refinery. "Exxon Benicia Refinery Assets" also includes, but is not limited to, all of Exxon's interest in the 20" crude pipeline between the Equilon pigging station and the refinery, the 6" pipeline between Bullshead Point and the refinery, the dock on the Carquinez Strait associated with the refinery, all pipelines running between the dock and the refinery, the refined products terminal adjacent to the refinery, and the coke silo leased from Benicia Industries and used by the refinery. "Exxon Benicia Refinery Assets" does not include Exxon's proprietary trade names and trademarks. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the refinery to perform the same function at the same or less cost.

- S. "Exxon Branded Seller" means any Person (other than Exxon or Mobil) that has, by virtue of contract or agreement with Exxon in effect at the time Respondents execute the Agreement Containing Consent Orders, the right to sell

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gasoline using Exxon's brand name at Retail Sites, or to resell gasoline to any such person. "Exxon Branded Seller" includes distributors, jobbers, contract dealers, and open dealers, but does not include Lessee Dealers.

- T. "Exxon California-North Marketing Assets" means all Retail Assets in California-North MSAs that are owned by Exxon or leased by Exxon from another Person as of the date Respondents execute the Agreement Containing Consent Orders.
- U. "Exxon California-South Marketing Assets" means all Retail Assets in California other than in California-North MSAs, that are owned by Exxon or leased by Exxon from another Person as of the date Respondents execute the Agreement Containing Consent Orders.
- V. "Exxon California Refining and Marketing Assets" means the (1) Exxon Benicia Refinery Assets; (2) Exxon California-North Marketing Assets; and (3) Exxon California-South Marketing Assets.
- W. "Exxon Guam Assets" means the Exxon Guam Marketing Assets and the Exxon Guam Terminal.
- X. "Exxon Guam Marketing Assets" means all Retail Assets in Guam that are owned by Exxon or leased by Exxon from another Person as of the date Respondents execute the Agreement Containing Consent Orders.
- Y. "Exxon Guam Terminal" means all of Exxon's assets relating to its petroleum storage and distribution terminal in the Territory of Guam, including all assets, tangible and intangible, that are used to operate the terminal for the storage and distribution of petroleum products, including, but not limited to, all real estate, storage tanks, loading and unloading facilities, licenses, permits and contracts pertaining to the terminal facilities, offices, buildings, warehouses, equipment, machinery, fixtures, tools, spare

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parts, and all other property used in Terminaling; the non-exclusive right to use all patents, know-how, and other intellectual property used by Exxon in the operation of the terminal; and the rights of Exxon in any agreement with Shell Guam, Inc., relating to terminaling in Guam; provided, however, that “Exxon Guam Terminal” shall include, at the option of the acquirer, those assets used by Exxon to operate its LPG business. “Exxon Guam Terminal” does not include Exxon’s proprietary trade names and trademarks or, except as provided above, patents, know-how, and other intellectual property. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer’s efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the terminal to perform the same function at the same or less cost.

- Z. “Exxon Jet Turbine Oil Business” means all of Exxon’s rights, titles, and interests in the following businesses and assets, tangible and intangible, used in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Jet Turbine Oils, regardless of where the businesses or assets are located worldwide:
1. a sole and exclusive worldwide perpetual royalty-free license to practice in the Field of Jet Turbine Oils the patents set out in Appendix B (Confidential) and the supplemental patents selected pursuant to subparagraph XII.B.13., whether such patents have been issued or applied for, without reservation to Respondents of any rights to practice such patents in the Field of Jet Turbine Oils, and including the right to enforce such license in the Field of Jet Turbine Oils and the right to transfer such

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- license exclusively or nonexclusively to others through sublicense or any other means;
2. a grant by Respondents to the acquirer (including the acquirer's subsidiaries and affiliates, and any purchaser of acquirer's jet turbine oil business) of immunity from suit in the Field of Jet Turbine Oils under all other patents held, or applied for, by Exxon as of the date of the Merger, or for which the Held Separate Exxon Jet Turbine Oil Business (as specified in subparagraph I.K.5. of the Order to Hold Separate and Maintain Assets) has filed an application between the date of the Merger and the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business;
 3. a royalty-free sublicense of all rights in the Field of Jet Turbine Oils under any patent license held by Exxon as of the date of the Merger, including the right to transfer such sublicense exclusively or nonexclusively to others through any means, and without reservation to Respondents of any such rights in the Field of Jet Turbine Oils;
 4. the sole and exclusive right to all Jet Turbine Oil Formulations, including all records containing Jet Turbine Oil Formulations;
 5. the following rights:
 - a. the sole and exclusive right to
 - (1) all product names;
 - (2) all trademarks, brand names, service marks, copyrights, slogans, symbols, designs, and icons, used at any time since January 1, 1995, on cans or other packaging of Jet Turbine Oil by Exxon or by the Held Separate Exxon Jet Turbine Oil Business; and

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- (3) all other trademarks, brand names, service marks, copyrights, slogans, symbols, designs, and icons
 - (a) used exclusively in the Field of Jet Turbine Oils by Exxon or by the Held Separate Exxon Jet Turbine Oil Business, and
 - (b) not used by Respondents outside the Field of Jet Turbine Oils prior to November 30, 1999; and
- b. the right to exclude (for a period of five (5) years from the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business) any entity, including Respondents, from using in the marketing, customer support, or sale of Jet Turbine Oils any other trademarks, brand names, service marks, copyrights, slogans, symbols, designs, and icons used both inside and outside the Field of Jet Turbine Oils by Exxon or the Held Separate Exxon Jet Turbine Oil Business, but not including the right to use such other trademarks, brand names, service marks, copyrights, slogans, symbols, designs, and icons;
6. a sole and exclusive worldwide perpetual royalty-free license in the Field of Jet Turbine Oils, without reservation to Respondents of any rights in the Field of Jet Turbine Oils, to all trade secrets, know-how, inventions, software, and other intellectual property, regardless of whether used exclusively in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Jet Turbine Oils (except as provided by subparagraphs I.Z.5.b. and XII.B.9.), provided, however, that such license
 - a. shall not include (i) patents and patented inventions, (ii) software used in Exxon's general corporate processes, such as accounting software, messaging

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software, and word processing software, and (iii) accounting and auditing processes, and

- b. shall include, but not be exclusive with respect to, Exxon's general business processes and practices, including, without limitation, operations and controls integrity management systems, general scientific analytical techniques, and health, safety and environmental processes;
7. military, customer, and original equipment manufacturer approvals for products (to the extent transferable);
8. contracts for supply and distribution (to the extent transferable);
9. procurement information for products and services used in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Jet Turbine Oils;
10. the research and test equipment described in Appendix C;
11. warehousing services at competitive third-party rates until the acquirer is able to make other arrangements; and
12. Exxon's manufacturing facility located in Bayway, New Jersey and all physical assets located at that facility.

AA. "Exxon Jet Turbine Oil Employees" means the following Exxon employees:

1. all sales, research, and manufacturing personnel employed in the Exxon Jet Turbine Oil Business at any time since January 1, 1999;

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2. all personnel employed at any time during the Hold Separate Period in that portion of the Held Separate Business defined in subparagraph I.K.5. of the Order to Hold Separate and Maintain Assets; and
 3. Karen Brown, Walt Goldeski, Mike Verrault, Martha Arduin, Pat Wysocki, Lee Chen, John Bryant, Joycelyn Failla, John McKechnie, Dave Duckert, Sue Scheuerman, Rich Skillman, Cyril Hutley, Klaus Rudolph, Bernard Pafford, and Paul Berlowitz.
- BB. “Exxon Maine to Virginia Assets” means all Retail Assets in the District of Columbia and the States of Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine that are owned by Exxon or leased by Exxon from another Person as of the date Respondents execute the Agreement Containing Consent Orders.
- CC. “Exxon Mid-Atlantic Marketing Assets” means all Retail Assets in the District of Columbia, and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, that are owned by Exxon or leased by Exxon from another Person as of the date Respondents execute the Agreement Containing Consent Orders.
- DD. “Exxon Northeast Marketing Assets” means all Retail Assets in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York, that are owned by Exxon or leased by Exxon from another Person as of the date Respondents execute the Agreement Containing Consent Orders.
- EE. “Exxon Texas Marketing Assets” means all Retail Assets in the Texas MSAs that are owned by Exxon or leased by Exxon from another Person as of the date Respondents execute the Agreement Containing Consent Orders.

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- FF. “Field of Jet Turbine Oils” means the research, development, manufacture, quality assurance, marketing, customer support, and sale of Jet Turbine Oils, including, but not limited to, the research, development, manufacture, and quality assurance of ingredients for use in Jet Turbine Oils (but not including the research, development, manufacture, and quality assurance of such ingredients for use in products other than Jet Turbine Oils).
- GG. “Jet Turbine Oil Formulations” means (a) product formulae for Jet Turbine Oils, and (b) other proprietary technical information relating exclusively to the manufacture or development of, or research into, Jet Turbine Oils.
- HH. “Jet Turbine Oils” means any lubricants that contain polyol esters and additives and that are used in jet turbine engines, regardless of the application in which the jet turbine engines are employed, which applications include, without limitation, commercial aviation, private aviation, military aviation, marine applications, and stationary applications.
- II. “Key Exxon Jet Turbine Oil Employees” means Pat Godici, Dan Murphy, Jai Bansal, Kim Fyfe, David Hertsgaard, and Nick Cleary.
- JJ. “Key Mobil Jet Turbine Oil Employees” means researchers, research technicians, sales representatives, and manufacturing facility managers employed in the Mobil Jet Turbine Oil Business between January 1, 1999, and the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business.
- KK. “Lessee Dealer” means a dealer who operates a Retail Site leased from Respondents under a lease in effect at the time Respondents execute the Agreement Containing Consent Orders.

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LL. “MBD” means thousands of barrels per day.

MM. “Merger” means the proposed merger involving Exxon and Mobil.

NN. “Mobil Beaumont Refinery Assets” means Mobil’s refinery located at Beaumont, Texas, and all of Mobil’s interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Mobil in the operation of the refinery; at the acquirer’s option, all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery’s petroleum product output; at the acquirer’s option, all agreements under which Mobil receives crude oil or other inputs at or for the refinery; and, at the acquirer’s option, all exchange agreements involving the refinery. “Mobil Beaumont Refinery Assets” also includes all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Beaumont refinery. “Mobil Beaumont Refinery Assets” also includes, but is not limited to, all of Mobil’s interest in the product pipeline from the refinery to Hebert, Texas, and pumping stations, tankage and other facilities at Hebert Station, including those used to feed Colonial’s pump and line to Colonial’s Hebert Station. “Mobil Beaumont Refinery Assets” does not include Mobil’s storage facility at Hull, Texas; provided, however, that Respondents shall provide acquirer with the right to use the facility and access the facility via Mobil’s pipelines between the refinery complex and Hull for amounts of petroleum products consistent with the refinery’s historical patterns of usage, on terms subject to the approval of the Commission. “Mobil Beaumont Refinery Assets” does

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not include Mobil's proprietary trade names and trademarks. "Mobil Beaumont Refinery Assets" also does not include Mobil's petrochemical facilities in the vicinity of the Beaumont refinery. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the refinery to perform the same function at the same or less cost.

- OO. "Mobil Boston Terminal" means all of Mobil's assets relating to its petroleum storage and distribution terminal in Boston, Massachusetts, including all assets, tangible and intangible, that are used to operate the terminal for the storage and distribution of petroleum products, including, but not limited to, all real estate, storage tanks, loading and unloading facilities, licenses, permits and contracts pertaining to the terminal facilities, offices, buildings, warehouses, equipment, machinery, fixtures, tools, spare parts, and all other property used in Terminaling; and the non-exclusive right to use all patents, know-how, and other intellectual property used by Mobil in the operation of the terminal. "Mobil Boston Terminal" does not include Mobil's proprietary trade names and trademarks or, except as provided above, patents, know-how, and other intellectual property. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including

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patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the terminal to perform the same function at the same or less cost.

- PP. “Mobil Branded Seller” means any Person (other than Exxon or Mobil) that has, by virtue of contract or agreement with Mobil in effect at the time Respondents execute the Agreement Containing Consent Orders, the right to sell gasoline using Mobil’s brand name at Retail Sites or to resell gasoline to any such person. “Mobil Branded Seller” includes distributors, jobbers, contract dealers, and open dealers, but excludes Lessee Dealers.
- QQ. “Mobil California Marketing Assets” means all Retail Assets in California that are owned by Mobil or leased by Mobil from another Person as of the date Respondents execute the Agreement Containing Consent Orders.
- RR. “Mobil California Refining and Marketing Assets” means the (1) Mobil Torrance Refinery Assets and (2) Mobil California Marketing Assets.
- SS. “Mobil Jet Turbine Oil Business” means all of Mobil’s rights, titles, and interests in the following businesses and assets, tangible and intangible, used in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Jet Turbine Oils, regardless of where the businesses or assets are located worldwide:
1. a sole and exclusive worldwide perpetual royalty-free license to practice in the Field of Jet Turbine Oils all patents, whether issued or applied for, held by Respondents as of the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business,
 - a. not including patents held by Exxon prior to the Merger, and not including patents for which the Held Separate Exxon Jet Turbine Oil Business (as specified

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in subparagraph I.K.5. of the Order to Hold Separate and Maintain Assets) has filed an application after the date of the Merger and prior to the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business,

- b. including the right to transfer such license exclusively or nonexclusively to others through sublicense or any other means,
 - c. including the right to enforce those rights in the Field of Jet Turbine Oils and
 - d. without reservation to Respondents of any right to those patents in the Field of Jet Turbine Oils;
2. a royalty-free sublicense of all rights in the Field of Jet Turbine Oils under any patent license held by Exxon Mobil as of the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, (a) not including licenses held by Exxon prior to the Merger, and not including licenses acquired by the Held Separate Exxon Jet Turbine Oil Business (as specified in subparagraph I.K.5. of the Order to Hold Separate and Maintain Assets) after the date of the Merger and prior to the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, (b) including the right to transfer such sublicense exclusively or nonexclusively to others through any means, and (c) without reservation to Respondents of any such rights in the Field of Jet Turbine Oils;
 3. the sole and exclusive right to all Jet Turbine Oil Formulations, including all records containing Jet Turbine Oil Formulations;
 4. the sole and exclusive right to all trademarks, service marks, product names, and copyrights (except as provided by subparagraph XII.C.9.);

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5. a sole and exclusive worldwide perpetual royalty-free license in the Field of Jet Turbine Oils, without reservation to Respondents of any rights in the Field of Jet Turbine Oils, to all trade secrets, know-how, inventions, software, and other intellectual property, regardless of whether used exclusively in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Jet Turbine Oils (except as provided by subparagraph XII.C.9.), provided, however, that such license
 - a. shall not include (i) patents and patented inventions, (ii) software used in Mobil's general corporate processes, such as accounting software, messaging software, and word processing software, and (iii) accounting and auditing processes, and
 - b. shall include, but not be exclusive with respect to, Mobil's general business processes and practices, including, without limitation, operations and controls integrity management systems, general scientific analytical techniques, and health, safety and environmental processes;
6. military, customer, and original equipment manufacturer approvals for products (to the extent transferable);
7. contracts for supply and distribution (to the extent transferable);
8. procurement information for products and services used in the research, development, manufacture, quality assurance, marketing, customer support, or sale of Jet Turbine Oils;
9. manufacturing, research, and test equipment ;

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10. warehousing services at competitive third-party rates until the acquirer is able to make other arrangements; and
 11. all of Mobil's facilities for the manufacture of Jet Turbine Oils and for the manufacture of ingredients (including esters and additives) used in manufacturing Jet Turbine Oils.
- TT. "Mobil Manassas Terminal" means all of Mobil's assets relating to its petroleum storage and distribution terminal in Manassas, Virginia, including all assets, tangible and intangible, that are used to operate the terminal for the storage and distribution of petroleum products, including, but not limited to, all real estate, storage tanks, loading and unloading facilities, permits, licenses, and contracts pertaining to the terminal facilities, offices, buildings, warehouses, equipment, machinery, fixtures, tools, spare parts, and all other property used in Terminaling; and the non-exclusive right to use all patents, know-how, and other intellectual property used by Mobil in the operation of the terminal. "Mobil Manassas Terminal" does not include Mobil's proprietary trade names and trademarks or, except as provided above, patents, know-how, and other intellectual property. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the terminal to perform the same function at the same or less cost.
- UU. "Mobil Mid-Atlantic Marketing Assets" means all Retail Assets in the District of Columbia and the States of New

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Jersey, Pennsylvania, Delaware, Maryland, and Virginia that are owned by Mobil or leased by Mobil from another Person as of the date Respondents execute the Agreement Containing Consent Orders.

VV. “Mobil Northeast Marketing Assets” means all Retail Assets in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York that are owned by Mobil or leased by Mobil from another Person as of the date Respondents execute the Agreement Containing Consent Orders.

WW. “Mobil Texas Marketing Assets” means all Retail Assets owned by Mobil or leased by Mobil in the State of Texas as of the date Respondents execute the Agreement Containing Consent Orders (“Mobil Texas Marketing Assets” does not include any interest of Respondents in Retail Assets owned by TETCO or Petro Stopping Centers Holdings, L.P.)

XX. “Mobil Torrance Refinery Assets” means Mobil’s refinery located at Torrance, California, and all of Mobil’s interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Mobil in the operation of the refinery; at the acquirer’s option, all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery’s petroleum product output; at the acquirer’s option, all agreements under which Mobil receives crude oil or other inputs at or for the refinery; and, at the acquirer’s option, all exchange agreements involving the refinery. “Mobil Torrance Refinery Assets” also includes all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property, relating to such plans) related to the operation of, and improvements,

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modifications, or upgrades to, the Torrance refinery. “Mobil Torrance Refinery Assets” also includes, but is not limited to, all of Mobil’s interest in the SJV crude pipeline system between Lost Hills, California, and the refinery (M-70); the Southwest Terminal in Los Angeles Harbor (including the dock, tanks, and other facilities located at the terminal); all crude (M-146) and products pipelines running between the Southwest Terminal dock and the refinery; and the products pipeline between the refinery and Kinder Morgan’s Watson Terminal; the Mobil Pacific Pipe Line Company products pipeline between the GATX terminal and the refinery; the jet fuel pipeline between the refinery and Los Angeles International Airport; and Mobil Pacific Pipeline’s interest in the THUMS Wilmington Crude Gathering System between the Wilmington Field and the refinery (M-131, M-132, M-142); and the Torrance crude system (M-134, M-135). “Mobil Torrance Refinery Assets” does not include Mobil’s proprietary trade names and trademarks. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer’s efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (including patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the refinery to perform the same function at the same or less cost.

YY. “Mobil-Valero Paulsboro Agreement” means the Purchase and Sales Agreement for Lubricant Base Oils between Valero and Mobil Oil Corporation dated September 16, 1998, as amended.

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- ZZ. “Mobil’s Norfolk Wharf” means Mobil’s wharf and the loading/discharge facilities located at Mobil’s Norfolk, Virginia, petroleum products terminal.
- AAA. “Mobil’s TETCO Interest” means all of Mobil’s ownership and/or partnership interest in TETCO as of the date Respondents execute the Agreement Containing Consent Orders.
- BBB. “Mobil’s TETCO Partners/Members” means TETCO, Inc., TETCO Stores-I, LLC, and Tetco-Nevada, Inc.
- CCC. “Paulsboro Refinery” means Valero’s refinery located at Paulsboro, New Jersey.
- DDD. “Person” means any individual, partnership, association, company or corporation.
- EEE. “Plantation” means Plantation Pipe Line Company.
- FFF. “Pre-Existing Base Oil Supply Contracts” means contracts for the supply of Base Oil by Exxon or Mobil that were entered into before January 1, 1999.
- GGG. “Retail Assets” means, for each Retail Site, all fee and leasehold interests of Respondents in the Retail Site, and all of Respondents’ interest in all assets, tangible or intangible, that are used at that Retail Site, including, but not limited to, all permits, licenses, consents, contracts, and agreements used in the operation of the Retail Site, and the non-exclusive right to use all patents, know-how, and other intellectual property used by Respondents in the operation of the Retail Sites. “Retail Assets” also includes all fee and leasehold interests of Respondents in real property that, as of October 1, 1999, was intended for use by Respondents as a Retail Site and all permits, licenses, consents, contracts, and agreements intended for use or used with respect to

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that real property. “Retail Assets” also includes all of Respondents’ interest in all assets relating to all ancillary businesses (including, but not limited to, automobile mechanical service, convenience store, restaurant or car wash) located at each Retail Site, including all permits, licenses, consents, contracts, and agreements used in the operation of the ancillary businesses, and the non-exclusive right to use all know-how, patents, and other intellectual property used in the operation of the ancillary businesses. “Retail Assets” also includes, at the acquirer’s option, all tank trucks and all contracts with all other Persons for supplying Branded Fuels to the Retail Sites. “Retail Assets” does not include Respondents’ proprietary trademarks, trade names, logos, trade dress, identification signs, additized product inventory, petroleum franchise agreements, Business Format Franchise agreements, petroleum product supply agreements, credit card agreements, satellite-based or centralized credit card processing equipment not incorporated in gasoline dispensers, or system-wide software and databases, or, except as provided above, know-how, patents, and other intellectual property. In the event that Respondents are unable to satisfy all conditions necessary to divest any intangible asset, Respondents shall: (1) with respect to permits, licenses or other rights granted by governmental authorities (other than patents), provide such assistance as the acquirer may reasonably request in the acquirer’s efforts to obtain comparable permits, licenses or rights, and (2) with respect to other intangible assets (other than patents), substitute equivalent assets, subject to Commission approval. A substituted asset will not be deemed to be equivalent unless it enables the Retail Site to perform the same function at the same or less cost. With respect to Turnpike Retail Assets, Respondents shall make good faith, diligent efforts, including, but not limited to, offering to compensate and compensating any

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pecuniary loss under applicable law to the States, to assign or otherwise convey their rights to the acquirer or to terminate Respondents' rights, but Respondents' failure to assign or terminate such rights due to a State's refusal to accede to such an assignment or termination, Respondents having made such good faith, diligent efforts, shall not constitute non-compliance with this Order. Turnpike Retail Assets that Respondents fail to assign or terminate shall be included among the Retail Sites from which the percentages in Paragraph XV are calculated.

- HHH. "Retail Site" means a business establishment from which gasoline is sold to the general public.
- III. "TAPS" means the Trans Alaska Pipeline System as described in the Trans Alaska Pipeline System Agreement, as amended, entered into on August 27, 1970.
- JJJ. "Terminaling" means the services performed by a facility that provides temporary storage of gasoline received from a pipeline or marine vessel, and the redelivery of gasoline from storage tanks into tank trucks or transport trailers.
- KKK. "TETCO" means TETCO Stores LP and/or TETCO Stores-I LLC.
- LLL. "Texas MSAs" means the Austin, Bryan/College Station, and San Antonio MSAs, and the Dallas and Houston PMSAs, as defined by the Census Bureau as of September 30, 1999.
- MMM. "Turnpike Locations" means the nine (9) Mobil stations located on the Garden State Parkway in New Jersey and the one (1) Mobil station on I-95 in Delaware at which Mobil leases Retail Assets from a State or turnpike authority enabled by a State.

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- NNN. “Turnpike Retail Assets” means Retail Assets at Turnpike Locations.
- OOO. “Valero” means Valero Energy Corporation.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the Exxon California Refining and Marketing Assets to a single acquirer, absolutely and in good faith and at no minimum price, within twelve (12) months from the date Respondents execute the Agreement Containing Consent Orders.
- B. Respondents shall, upon the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, assign to the acquirer of the Exxon California Refining and Marketing Assets (1) all Existing Lessee Agreements with respect to the Exxon California-South Marketing Assets in effect as of the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, subject to any applicable right of first refusal under California law exercisable by Exxon’s Lessee Dealers that operate Retail Sites being divested, and (2) all Existing Supply Agreements between Exxon and Exxon Branded Sellers in effect as of the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets with respect to Retail Sites in California other than the California-North MSAs.
- C. Respondents shall, upon the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, enter into an agreement with the acquirer of the Exxon California Refining and Marketing Assets, the terms of which and subsequent amendments to which shall be subject to the prior approval of the Commission, which shall be effective upon the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, pursuant to

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which the acquirer of the Exxon California Refining and Marketing Assets will receive, for a period of ten (10) years from the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets: (1) the exclusive right to sell Branded Fuels under the Exxon brand in California other than in the California-North MSAs, except as permitted by subparagraphs II.J. and II.K., and (2) the exclusive right to use Exxon's brand name in connection with the sale of Branded Fuels under the Exxon brand in California other than in the California-North MSAs, including the exclusive rights to use Exxon's identification signs, trademarks, and other trade indicia, and the non-exclusive right to accept and process Exxon credit cards in connection with such sales of Exxon Branded Fuels. Such agreement shall provide for the provision of credit card services, additive, and such brand support as the acquirer may choose to purchase and may provide for payments covering Respondents' costs in connection with the provision of credit card services, additive, and such brand support as the acquirer may choose to purchase. The agreement shall not provide for any payment by the acquirer to Respondents for the use of the brand name for the first five years of the agreement, but may provide for additional payments, beginning five (5) years after the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets and escalating each year until the end of the ten (10) year term, by the acquirer to Respondents for the use of Exxon's identification signs, trademarks, and other trade indicia. Acquirer's payments for credit card services, additive and the use of Exxon's brand, but not including such other brand support as acquirer may choose to purchase, shall not exceed 2.5 cents per gallon, except that the agreement may provide for an annual minimum payment to which Respondents and the acquirer agree, subject to approval of the Commission. At the end of the ninth year after the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, Respondents shall offer to meet with the acquirer to discuss a renewal of the agreement.

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- D. Respondents shall, upon the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, at the acquirer's option, also enter into an agreement with the acquirer of the Exxon California Refining and Marketing Assets, the terms of which and subsequent amendments to which shall be subject to the prior approval of the Commission, which shall be effective upon the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, that requires Respondents to supply the acquirer ANS crude oil in ratable quantities of up to 100 MBD for up to ten (10) years.
- E. Respondents shall offer the acquirer of the Exxon California Refining and Marketing Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Benicia refinery and the Retail Sites that are divested or assigned pursuant to this Paragraph.
- F. Respondents shall divest the Exxon California Refining and Marketing Assets, assign the Existing Lessee Agreements and Existing Supply Agreements, and enter into the agreements as required by subparagraphs II.A., II.B., II.C., II.D., and II.E. only to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such

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assets or agreements. The Exxon California-North Marketing Assets shall be divested only to a person that commits to offer each of Exxon's Lessee Dealers that operate a Retail Site being divested a non-discriminatory franchise within the meaning of the Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*

- G. No later than the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, Respondents shall cancel all Existing Lessee Agreements and Existing Supply Agreements between Exxon and Exxon Lessee Dealers and Exxon Branded Sellers with respect to Retail Sites in the California-North MSAs in effect as of the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets.
- H. Notwithstanding subparagraphs II.A. and II.F, the divestiture of the Exxon California-South Marketing Assets shall be subject to any applicable right of first refusal under California law exercisable by Exxon's Lessee Dealers that operate assets being divested. Respondents shall not attempt in any way to persuade or encourage Exxon Lessee Dealers to exercise such right. Respondents shall not, for a period of seven (7) years from the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, sell Branded Fuels to any Lessee Dealer that exercises such right.
- I. Upon the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, Respondents shall allow the acquirer of the Exxon California Refining and Marketing Assets the non-exclusive right to sell other Exxon Branded Products (*e.g.*, motor oil) at the acquirer's Exxon branded Retail Sites in California. The acquirer's access to all such other products or services acquired from Respondents for resale at such Retail Sites shall be on commercial, arm's length terms no less favorable than those given by Respondents to other wholesale purchasers. Upon the Effective Date of Divestiture of the Exxon California

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Refining and Marketing Assets, Respondents shall allow an Exxon Branded Seller or Exxon Lessee Dealer that was Exxon's franchisee with respect to a Business Format Franchise as of the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets to continue as Respondents' franchisee with respect to such Business Format Franchise. Respondents shall not object to an assumption by the acquirer of Respondents' obligations as Business Format Franchisee, subject to any applicable approvals required of the Business Format Franchisor.

- J. Respondents shall not (1) sell or attempt to sell, for twelve (12) years from the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, Branded Fuels under the Exxon brand for sale or resale at Retail Sites in California; provided, however, that Respondents may sell to the acquirer of the Exxon California Refining and Marketing Assets quantities of Branded Fuels equal to quantities of unadditized gasoline sold to Respondents by the acquirer for purposes of adding Exxon's proprietary additive and making the gasoline salable by acquirer as Exxon Branded Fuels; or (2) sell or attempt to sell, for seven (7) years from the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, Branded Fuels under the Mobil brand to any Exxon Branded Seller or Exxon Lessee Dealer for resale at any Retail Site in California that sold Exxon Branded Fuels as of the date Respondents execute the Agreement Containing Consent Orders. This subparagraph shall not prohibit sales, solicitations, discussions or negotiations involving brands other than the Exxon brand with respect to Retail Sites that were not Exxon branded Retail Sites as of the date Respondents execute the Agreement Containing Consent Orders.
- K. Notwithstanding the provisions of subparagraphs II.C. and II.J., in the event that the acquirer of the Exxon California Refining and Marketing Assets ceases using the Exxon brand in California pursuant to the agreement conveying the

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right to use the brand described in subparagraph II.C., Respondents shall have the right to use the brand in California beginning two (2) years after the acquirer of the Exxon California Refining and Marketing Assets ceases to use the brand in California, but in no event prior to five (5) years after the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets.

- L. Until the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Exxon California Refining and Marketing Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining all proprietary trademarks, trade names, logos, trade dress, identification signs, Business Format Franchise agreements, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture of the Exxon California Refining and Marketing Assets. Until the assignments of Existing Supply Agreements provided by subparagraph II.B. occur, Respondents shall not attempt in any way to encourage any Exxon Branded Seller to terminate, nor shall Respondents terminate (except for reasons set out in § 2802(c) of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802(c)), an Existing Supply Agreement with respect to a Retail Site in California, and Respondents shall continue in effect all programs and other business practices aimed at maintaining existing relationships with Exxon Branded Sellers with respect to Retail Sites in California other than in the California-North MSAs and shall otherwise seek to preserve such relationships as diligently as was done prior to the time Respondents executed the Agreement Containing Consent Orders. Respondents shall offer to all Exxon Branded Distributors in California other than in the California-North MSAs the program set forth in Appendix A.

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M. The purpose of the divestiture of the Exxon California Refining and Marketing Assets and the assignment of the Existing Supply Agreements between Exxon and Exxon Branded Sellers in California, and of the other provisions of this Paragraph, is to ensure the continued use of the assets comprising Exxon's California refining and marketing businesses as viable, on-going businesses, in the same businesses in which they were engaged at the time of the announcement of the Merger, including the refining and marketing of CARB gasoline and other petroleum products, by a firm that has a sufficient ability and an equivalent incentive to invest and compete in the assets and businesses as Exxon had before the Merger, and to remedy the lessening of competition in the refining and marketing of CARB gasoline and other petroleum products resulting from the proposed Merger as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the Exxon Guam Assets to a single acquirer, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders.
- B. Respondents shall offer the acquirer of the Exxon Guam Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Exxon Guam Assets, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Retail Sites that are divested or assigned pursuant to this Paragraph.

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- C. Respondents shall divest the Exxon Guam Assets and enter into the agreement as required by subparagraphs III.A. and III.B., only to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.
- D. No later than the Effective Date of Divestiture of the Exxon Guam Assets, Respondents shall cancel all Existing Lessee Agreements and Existing Supply Agreements between Exxon and Exxon Lessee Dealers and Exxon Branded Sellers with respect to Retail Sites in Guam. Respondents shall not sell Branded Fuels to such Lessee Dealers or Branded Sellers for a period of seven (7) years from the Effective Date of Divestiture of the Exxon Guam Assets. For a period of ten (10) years from the Effective Date of Divestiture of the Exxon Guam Assets, Respondents shall be prohibited from using the Exxon brand for the sale of Branded Fuels at Retail Sites in Guam.
- E. Until the Effective Date of Divestiture of the Exxon Guam Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Exxon Guam Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, including but not limited to renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture of the Exxon Guam Assets.

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- F. The purpose of the divestiture of the Exxon Guam Assets is to ensure the continued use of the Exxon Guam Assets in the same businesses in which they were engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in the importation, terminaling, and wholesale and retail sale of gasoline in Guam resulting from the proposed Merger, as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the Exxon Northeast Marketing Assets to a single acquirer, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders.
- B. Respondents shall, upon the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, assign to the acquirer of the Exxon Northeast Marketing Assets (1) all Existing Lessee Agreements with respect to the Exxon Northeast Marketing Assets in effect as of the Effective Date of Divestiture of Exxon Northeast Marketing Assets and (2) all Existing Supply Agreements between Exxon and Exxon Branded Sellers in effect as of the Effective Date of Divestiture of Exxon Northeast Marketing Assets with respect to Retail Sites in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine.
- C. Respondents shall enter into an agreement with the acquirer of the Exxon Northeast Marketing Assets, the terms of which and subsequent amendments to which shall be subject to the prior approval of the Commission and which shall be effective upon the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, pursuant to which the acquirer of the Exxon Northeast Marketing Assets will

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receive, for a period of ten (10) years from the Effective Date of Divestiture of the Exxon Northeast Marketing Assets: (1) the exclusive right to sell Branded Fuels under the Exxon brand in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, except as permitted by subparagraphs IV.G. and IV.H., and (2) the exclusive right to use Exxon's brand name in connection with the sale of Branded Fuels under the Exxon brand in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, including the exclusive rights to use Exxon's identification signs, trademarks, and other trade indicia, and the non-exclusive right to accept and process Exxon credit cards, in connection with such sales of Exxon Branded Fuels. Such agreement shall provide for the provision of credit card services, additive, and such brand support as the acquirer may choose to purchase and may provide for payments covering Respondents' costs for provision of credit card services, additive, and such brand support as the acquirer may choose to purchase. The agreement shall not provide for any payment by the acquirer to Respondents for the use of the brand name for the first five years of the agreement, but may provide for additional payments, beginning five (5) years after the Effective Date of Divestiture of the Exxon Northeast Marketing Assets and escalating each year until the end of the ten (10) year term, by the acquirer to Respondents for the use of Exxon's identification signs, trademarks, and other trade indicia. Acquirer's payments for credit card services, additive and the use of Exxon's brand, but not including such other brand support as acquirer may choose to purchase, shall not exceed 2.5 cents per gallon, except that the agreement may provide for an annual minimum payment to which Respondents and the acquirer agree, subject to approval of the Commission. At the end of the ninth year after the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, Respondents shall offer to meet with the acquirer to discuss a renewal of the agreement.

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- D. Respondents shall offer the acquirer of the Exxon Northeast Marketing Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Retail Sites that are divested or assigned pursuant to this Paragraph.
- E. Respondents shall divest the Exxon Northeast Marketing Assets, assign the Existing Lessee Agreements and Existing Supply Agreements, and enter into the agreements as required by subparagraphs IV.A., IV.B., IV.C., and IV.D. to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.
- F. Upon the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, Respondents shall allow the acquirer of the Exxon Northeast Marketing Assets the non-exclusive right to sell other Exxon Branded Products (e.g., motor oil) at the acquirer's Exxon branded Retail Sites in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine. The acquirer's access to all such other products or services acquired from Respondents for resale at such Retail Sites shall be on commercial, arm's length terms no less favorable than those given by Respondents to other

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wholesale purchasers. Upon the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, Respondents shall allow an Exxon Branded Seller or Exxon Lessee Dealer that was Exxon's franchisee with respect to a Business Format Franchise as of the Effective Date of Divestiture of the Exxon Northeast Marketing Assets to continue as Respondents' franchisee with respect to such Business Format Franchise. Respondents shall not object to an assumption by the acquirer of Respondents' obligations as Business Format Franchisee, subject to any applicable approvals required of the Business Format Franchisor.

- G. Respondents shall not, except as requested by the acquirer of the Exxon Northeast Marketing Assets, (1) sell or attempt to sell, for twelve (12) years from the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, Branded Fuels under the Exxon brand for sale or resale at Retail Sites in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine; provided, however, that Respondents may sell to the acquirer of the Exxon Northeast Marketing Assets quantities of Branded Fuels equal to quantities of unadditized gasoline sold to Respondents by the acquirer for purposes of adding Exxon's proprietary additive and making the gasoline salable by acquirer as Exxon Branded Fuels; or (2) sell or attempt to sell, for seven (7) years from the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, Branded Fuels under the Mobil brand to any Exxon Branded Seller or Exxon Lessee Dealer for resale at any Retail Site in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine that sold Exxon Branded Fuels as of the date Respondents executed the Agreement Containing Consent Orders. This subparagraph shall not prohibit sales, solicitations, discussions or negotiations involving brands other than the Exxon brand with respect to Retail Sites that were not Exxon branded Retail Sites as of the date Respondents execute the Agreement Containing Consent Orders.

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- H. Notwithstanding the provisions of subparagraphs IV.C. and IV.G., in the event that the acquirer of the Exxon Northeast Marketing Assets ceases to use the Exxon brand in any of the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, or Maine, pursuant to the agreement conveying the right to use the brand described in subparagraph IV.C., Respondents shall have the right to use the brand in such state beginning two (2) years after the acquirer of the Exxon Northeast Marketing Assets ceases to use the brand in such state, but in no event prior to five (5) years after the Effective Date of Divestiture of the Exxon Northeast Marketing Assets.
- I. Until the Effective Date of Divestiture of the Exxon Northeast Marketing Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining all proprietary trademarks, trade names, logos, trade dress, identification signs, Business Format Franchise agreements, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture of the Exxon Northeast Marketing Assets. Until the assignments of Existing Supply Agreements provided by subparagraph IV.B. occur, Respondents shall not attempt in any way to encourage any Exxon Branded Seller to terminate, nor shall Respondents terminate (except for reasons set out in § 2802(c) of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802(c)), an Existing Supply Agreement with respect to a Retail Site in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, or Maine, and Respondents shall continue in effect all programs and other business practices aimed at maintaining existing relationships with Exxon Branded Sellers with respect to Retail Sites in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, or Maine and shall otherwise seek to

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preserve such relationships as diligently as was done prior to the time Respondents executed the Agreement Containing Consent Orders. Respondents shall offer to all Exxon Branded Distributors in States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, or Maine the program set forth in Appendix A.

- J. The purpose of the divestiture of the Exxon Northeast Marketing Assets, the assignment of the Existing Supply Agreements, and of the other provisions of this paragraph is to ensure the continued use of the assets comprising Exxon's marketing business in these states as a viable, ongoing business, in the same business in which they were engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in the wholesale and retail sale of gasoline in the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, or Maine, resulting from the proposed Merger, as alleged in the Commission's Complaint.

V.**IT IS FURTHER ORDERED** that

- A. Respondents shall divest the Mobil Mid-Atlantic Marketing Assets to a single acquirer, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders.
- B. Respondents shall, upon the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, assign to the acquirer of the Mobil Mid-Atlantic Marketing Assets (1) all Existing Lessee Agreements with respect to the Mobil Mid-Atlantic Marketing Assets in effect as of the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets and (2) all Existing Supply Agreements between Mobil and Mobil Branded Sellers in effect as of the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets

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with respect to Retail Sites in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia.

- C. Respondents shall enter into an agreement with the acquirer of the Mobil Mid-Atlantic Marketing Assets, the terms of which and subsequent amendments to which shall be subject to the prior approval of the Commission, which shall be effective upon the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, pursuant to which the acquirer of the Mobil Mid-Atlantic Marketing Assets will receive, for a period of ten (10) years from the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets: (1) the exclusive right (except with respect to Retail Sites at Turnpike Locations to the extent that Respondents have failed to assign or terminate their rights in connection therewith) to sell Branded Fuels under the Mobil brand in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, except as permitted by subparagraphs V.G. and V.H., and (2) the exclusive right (except with respect to Turnpike Locations to the extent that Respondents have failed to assign or terminate their rights in connection therewith) to use Mobil's brand name in connection with the sale of Branded Fuels under the Mobil brand in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, including the exclusive rights to use Mobil's identification signs, trademarks, and other trade indicia, and the non-exclusive right to accept and process Mobil credit cards in connection with such sales of Mobil Branded Fuels. Such agreement shall provide for the provision of credit card services, additive, and such brand support as the acquirer may choose to purchase and may provide for payments covering Respondents' costs for provision of credit card services, additive, and such brand support as the acquirer may choose to purchase. The agreement shall not provide for any payment by the acquirer to Respondents for the use of the brand name for the first five years of the agreement, but may provide for additional

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payments, beginning five (5) years after the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets and escalating each year until the end of the ten (10) year term, by the acquirer to Respondents for the use of Mobil's identification signs, trademarks, and other trade indicia. Acquirer's payments for credit card services, additive and the use of Mobil's brand, but not including such other brand support as acquirer may choose to purchase, shall not exceed 2.5 cents per gallon, except that the agreement may provide for an annual minimum payment to which Respondents and the acquirer agree, subject to approval of the Commission. At the end of the ninth year after the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, Respondents shall offer to meet with the acquirer to discuss a renewal of the agreement.

- D. Respondents shall offer the acquirer of the Mobil Mid-Atlantic Marketing Assets an indemnity, subject to the prior approval of the Commission and to be effective upon the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, which indemnity shall allocate among Respondents and the acquirer, on such terms as the Respondents and the acquirer agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Retail Sites that are divested or assigned pursuant to this Paragraph.
- E. Respondents shall divest the Mobil Mid-Atlantic Marketing Assets, assign the Existing Lessee Agreements and Existing Supply Agreements, and enter into the agreements as required by subparagraphs V.A., V.B., V.C., and V.D. only to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter

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into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

- F. Upon the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, Respondents shall allow the acquirer of the Mobil Mid-Atlantic Marketing Assets the non-exclusive right to sell other Mobil Branded Products (e.g., motor oil) at the acquirer's Mobil branded Retail Sites in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia. The acquirer's access to all such other products or services acquired from Respondents for resale at such Retail Sites shall be on commercial, arm's length terms no less favorable than those given by Respondents to other wholesale purchasers. Upon the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, Respondents shall allow a Mobil Branded Seller or Mobil Lessee Dealer that was Mobil's franchisee with respect to a Business Format Franchise as of the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets to continue as Respondents' franchisee with respect to such Business Format Franchise. Respondents shall not object to an assumption by the acquirer of Respondents' obligations as Business Format Franchisee, subject to any applicable approvals required of the Business Format Franchisor.
- G. Respondents shall not, except as requested by the acquirer of the Mobil Mid-Atlantic Marketing Assets (and except at Retail Sites at Turnpike Locations to the extent that Respondents have failed to assign or terminate their rights in connection therewith), (1) sell or attempt to sell, for twelve (12) years from the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, Branded Fuels under the Mobil brand for sale or resale at Retail Sites in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia; provided, however, that Respondents may sell to the acquirer of the

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Mobil Mid-Atlantic Marketing Assets quantities of Branded Fuels equal to quantities of unadditized gasoline sold to Respondents by the acquirer for purposes of adding Mobil's proprietary additive and making the gasoline salable by acquirer as Mobil Branded Fuels, or (2) sell or attempt to sell, for seven (7) years from the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, Branded Fuels under the Exxon brand to any Mobil Branded Seller or Mobil Lessee Dealer for resale at any Retail Site in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia that sold Mobil Branded Fuels as of the date Respondents executed the Agreement Containing Consent Orders. This subparagraph shall not prohibit sales, solicitations, discussions or negotiations involving brands other than the Mobil brand with respect to Retail Sites that were not Mobil branded Retail Sites as of the date Respondents execute the Agreement Containing Consent Orders.

- H. Notwithstanding the provisions of subparagraph V.C. and V.G., in the event that the acquirer of the Mobil Mid-Atlantic Marketing Assets ceases to use the Mobil brand in the District of Columbia or in any of the States of New Jersey, Pennsylvania, Delaware, Maryland, or Virginia pursuant to the agreement conveying the right to use the brand described in V.C., Respondents shall have the right to use the brand in such District or State beginning two (2) years after the acquirer of the Mobil Mid-Atlantic Marketing Assets ceases to use the brand in such District or State, but in no event prior to five (5) years after the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets.
- I. Until the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, including, but not

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limited to, continuing in effect and maintaining all proprietary trademarks, trade names, logos, trade dress, identification signs, Business Format Franchise agreements, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture of the Mobil Mid-Atlantic Marketing Assets. Until the assignments of Existing Supply Agreements provided by subparagraph V.B. occur, Respondents shall not attempt in any way to encourage any Mobil Branded Seller to terminate, nor shall Respondents terminate (except for reasons set out in § 2802(c) of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802(c)), an Existing Supply Agreement with respect to a Retail Site in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia, and Respondents shall continue in effect all programs and other business practices aimed at maintaining existing relationships with Mobil Branded Sellers with respect to Retail Sites in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia and shall otherwise seek to preserve such relationships as diligently as was done prior to the time Respondents executed the Agreement Containing Consent Orders. Respondents shall offer to all Mobil Branded Distributors in District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia the program set forth in Appendix A.

- J. The purpose of the divestiture of the Mobil Mid-Atlantic Marketing Assets, the assignment of the Existing Supply Agreements, and of the other provisions of this Paragraph is to ensure the continued use of the assets comprising Mobil's marketing business in these states as a viable, on-going business, in the same business in which they were engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in the wholesale and retail sale of gasoline in the District of Columbia and the States of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia resulting from the proposed Merger, as alleged in the Commission's Complaint.

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VI.**IT IS FURTHER ORDERED** that:

A. Respondents shall divest the Mobil Texas Marketing Assets to a single acquirer, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders.

B. Respondents shall divest the Mobil Texas Marketing Assets only to:

- (1) 7-Eleven, Inc., formerly known as Southland Corporation, or
- (2) an acquirer that receives the prior approval of the Commission,

and, as to either acquirer, only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

C. Respondents shall divest Mobil's TETCO Interest to an acquirer absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders.

D. Respondents shall divest Mobil's TETCO Interest only to:

- (1) Mobil's TETCO Partners/Members or
- (2) an acquirer that receives the prior approval of the Commission,

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and, as to either acquirer, only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

- E. Respondents shall, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders, assign to a single person in each of the Texas MSAs (each of whom shall be a "Mobil Texas Assignee") that receives the prior approval of the Commission, all Existing Supply Agreements between Mobil and Mobil Branded Sellers in effect as of the date of the assignment with respect to Retail Sites in the applicable Texas MSA.

- F. Respondents shall enter into agreements with each Mobil Texas Assignee, the terms of which and subsequent amendments to which shall be subject to the prior approval of the Commission, which shall be effective upon the effective date of the assignments pursuant to subparagraph VI.E., pursuant to which each Mobil Texas Assignee will receive, for a period of ten (10) years from the effective date of the assignment to the Mobil Texas Assignee(s), in the pertinent Texas MSA or MSAs: (1) the exclusive right to sell Branded Fuels under the Mobil brand, except as permitted by subparagraphs VI.I. and VI.J., and (2) the exclusive right to use Mobil's brand name, including the exclusive right to use Mobil's identification signs, trademarks, and other trade indicia, and the non-exclusive right to accept and process Mobil credit cards in connection with such sales of Branded Fuels under the Mobil brand. Such agreement shall provide for provision of credit card services, additive, and such brand support as the assignee may choose to purchase and may provide for payments covering Respondents' costs for the provision of credit card

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services, additive, and such brand support as the assignee may choose to purchase. The agreement shall not provide for any payment by the assignee to Respondents for the use of the brand name for the first five years of the agreement, but may provide for additional payments, beginning five (5) years after the effective date of the assignment to the Mobil Texas Assignee(s) and escalating each year until the end of the ten (10) year term, by the assignee to Respondents for the use of Mobil's identification signs, trademarks, and other trade indicia. Assignee's payments for credit card services, additive and the use of Mobil's brand, but not including such other brand support as the assignee may choose to purchase, shall not exceed 2.5 cents per gallon, except that the agreement may provide for an annual minimum payment to which Respondents and the assignee agree, subject to approval of the Commission. At the end of the ninth year after the effective date of the assignment to the Mobil Texas Assignee(s), Respondents shall offer to meet with the assignee to discuss a renewal of the agreement.

- G. Upon the effective date of the assignment to the Mobil Texas Assignee(s), Respondents shall allow the assignee the non-exclusive right to sell other Mobil Branded Products (e.g., motor oil) at the acquirer's Mobil branded Retail Sites in the pertinent Mobil Texas MSA (or MSAs). The assignee's access to all such other products or services acquired from Respondents for resale at such Retail Sites shall be on commercial, arm's length terms no less favorable than those given by Respondents to other wholesale purchasers. Upon the effective date of the assignment to the Mobil Texas Assignee(s), Respondents shall allow a Mobil Branded Seller or Mobil Lessee Dealer that was Mobil's franchisee with respect to a Business Format Franchise as of the effective date of the assignment to the Mobil Texas Assignee(s) to continue as Respondents' franchisee with respect to such Business Format Franchise. Respondents shall not object to an assumption by the acquirer of Respondents' obligations as Business Format

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Franchisee, subject to any applicable approvals required of the Business Format Franchisor.

- H. Respondents shall offer each Mobil Texas Assignee an indemnity, subject to the prior approval of the Commission and to be effective upon the effective date of the pertinent assignment, which indemnity shall allocate among Respondents and the assignee, on such terms as the Respondents and the assignee agree, responsibility with respect to potential claims and liabilities arising out of failure to comply with local, state, and federal environmental obligations in connection with the Retail Sites that are assigned to the assignee pursuant to subparagraph VI.E.
- I. Respondents shall not, except as requested by the Mobil Texas Assignee(s) in a Texas MSA, (1) sell or attempt to sell, for twelve (12) years from the effective date of the assignment to the Mobil Texas Assignee(s) in that MSA, Branded Fuels under the Mobil brand for sale or resale at Retail Sites in the Texas MSAs; provided, however, that Respondents may sell to each Mobil Texas Assignee quantities of Branded Fuels equal to quantities of unadditized gasoline sold to Respondents by the assignee for purposes of adding Mobil's proprietary additive and making the gasoline salable by assignee as Mobil Branded Fuels, or (2) sell or attempt to sell, for seven (7) years from the effective date of the assignment to the Mobil Texas Assignee(s), Branded Fuels under the Exxon brand to any Mobil Branded Seller or Lessee Dealer for resale at Retail Sites in the Texas MSAs that sold Mobil Branded Fuels as of the date Respondents executed the Agreement Containing Consent Orders. This subparagraph shall not prohibit sales, solicitations, discussions or negotiations involving brands other than the Mobil brand with respect to Retail Sites in a Texas MSA that were not Mobil branded Retail Sites as of the date Respondents execute the Agreement Containing Consent Orders.

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- J. Notwithstanding the provisions of subparagraph VI.F. and VI.I., in the event that the Mobil Texas Assignee(s) ceases to use the Mobil brand in any of the Texas MSAs pursuant to the agreement conveying the right to use the brand described in subparagraph VI.F, Respondents shall have the right to use the brand in that MSA beginning two (2) years after the Mobil Texas Assignee(s) ceases to use the brand in that MSA, but in no event prior to five (5) years after the effective date of the assignment.
- K. Until the Effective Date of Divestitures of the Mobil Texas Marketing Assets and Mobil's TETCO Interest, Respondents shall take such actions as are necessary to maintain the viability and marketability of the respective assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the respective assets, except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining all proprietary trademarks, trade names, logos, trade dress, identification signs, Business Format Franchise agreements, and renewing or extending any base leases or ground leases that expire or terminate prior to the Effective Date of Divestiture of the Mobil Texas Marketing Assets. Until the assignments of Existing Supply Agreements provided by subparagraph VI.E. occur, Respondents shall not attempt in any way to encourage any Mobil Branded Seller to terminate, nor shall Respondents terminate (except for reasons set out in § 2802(c) of the Petroleum Marketing Practices Act, 15 U.S.C. § 2802(c)), an Existing Supply Agreement with respect to a Retail Site in the Texas MSAs, and Respondents shall continue in effect all programs and other business practices aimed at maintaining existing relationships with Mobil Branded Sellers with respect to Retail Sites in the Texas MSAs and shall otherwise seek to preserve such relationships as diligently as was done prior to the time Respondents executed the Agreement Containing Consent Orders. Respondents shall offer to all Mobil Branded Distributors in the Texas MSAs the program set forth in Appendix A.

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- L. The purpose of the divestiture of the Mobil Texas Marketing Assets, Mobil's TETCO Interest, the assignment of the Existing Supply Agreements, and of the other provisions of this Paragraph is to ensure the continued use of the assets comprising Mobil's marketing business in the Texas MSAs as viable, on-going businesses, in the same businesses in which they were engaged at the time of the announcement of the proposed Merger, and to remedy the lessening of competition in the wholesale and retail sale of gasoline in the Texas MSAs resulting from the proposed Merger, as alleged in the Commission's Complaint.

VII.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the Mobil Boston Terminal, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders.
- B. Respondents shall divest the Mobil Boston Terminal to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.
- C. Until the Effective Date of Divestiture of the Mobil Boston Terminal, Respondents shall take such actions as are necessary to maintain the viability and marketability of the assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

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- D. The purpose of this Paragraph is to ensure the continuation of the Mobil Boston Terminal as an ongoing, viable enterprise engaged in the Terminaling of gasoline and other petroleum products, and to remedy the lessening of competition resulting from the Merger in Terminaling markets as alleged in the Commission's complaint.

VIII.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the Mobil Manassas Terminal, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders.
- B. Respondents shall divest the Mobil Manassas Terminal to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission;
- C. Until the Effective Date of Divestiture of the Mobil Manassas Terminal, Respondents shall take such actions as are necessary to maintain the viability and marketability of the assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.
- D. The purpose of this Paragraph is to ensure the continuation of the Mobil Manassas Terminal as an ongoing, viable enterprise engaged in the Terminaling of gasoline and other petroleum products, and to remedy the lessening of competition resulting from the Merger in Terminaling markets as alleged in the Commission's complaint

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IX.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders, either all of Mobil's interest in Colonial or all of Exxon's interest in Plantation.
- B. Respondents shall divest the Colonial or Plantation interest identified in subparagraph A. above only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- C. Pending divestiture of either Mobil's interest in Colonial or Exxon's interest in Plantation, Respondents shall not serve on Colonial's board of directors or any committee thereof, attend meetings of Colonial's board of directors or any committee thereof, vote any of Mobil's stock in Colonial (provided, however, that Respondents shall vote its stock in Colonial to create unanimity only when unanimous action by all owners of Colonial is required and Respondents' vote is necessary to create unanimity), or receive any information from Colonial not made available to all shippers or to the public at large, except that a representative of Respondents may observe meetings of the Colonial Board of Directors and may receive and use nonpublic information of Colonial solely for the purpose of effectuating the divestiture of Mobil's interest in Colonial pursuant to this Order. Said representative of Respondents shall be identified to the Commission, shall not divulge any nonpublic Colonial information to Respondents (other than employees of Respondents whose sole responsibility is to effectuate the divestiture, and agents of Respondents specifically retained for the purpose of effectuating the divestiture), and shall acknowledge these obligations in writing to the Commission.

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- D. The purpose of the divestiture of either the Colonial or Plantation pipeline interest is to prevent an overlap of ownership in both of these pipeline systems and to remedy the lessening of competition resulting from the proposed Merger as alleged in the Commission's Complaint.

X.**IT IS FURTHER ORDERED** that

- A. Respondents shall divest, absolutely and in good faith and at no minimum price, within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders, all of Mobil's interest in TAPS; provided, however, that divestiture of (1) Mobil's interest in the Prince William Sound Oil Spill Response Corporation and (2) Mobil's interest in the terminal tankage governed by Section 3.2 of the Trans Alaska Pipeline System Agreement in excess of a 3% interest in such tankage, shall be at the acquirer's option.
- B. Respondents shall divest Mobil's interest in TAPS only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission; provided, however, that, with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the acquirer's option, Respondents need not divest such assets or enter into such agreements only if the acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.
- C. Until the Effective Date of Divestiture of Mobil's interest in TAPS, Respondents shall take such actions as are necessary to maintain the viability and marketability of the assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear.

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- D. The purpose of the divestiture of Mobil's interest in TAPS is to prevent the combination of Mobil's and Exxon's interest in TAPS and to remedy the lessening of competition resulting from the proposed Merger as alleged in the Commission's Complaint.
- E. For a period of ten (10) years from the Effective Date of Divestiture of Mobil's interest in TAPS, Respondents shall not (1) reacquire Mobil's interest in TAPS or (2) enter into any joint venture (except one in which the owners of at least 75% of TAPS participate) in which all or substantially all of Mobil's interest in TAPS is managed, operated or controlled by such joint venture without providing the Commission with advance notification. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least sixty (60) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required

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to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

XI.

IT IS FURTHER ORDERED that, within ten (10) days from the date this Order becomes final, Exxon will surrender its contractual right to reacquire the Retail Sites in Arizona that Exxon sold to Tosco Corporation pursuant to the “Agreement of Purchase and Sale (Arizona Assets Sale)” dated November 10, 1994 between Exxon Corporation and Tosco Corporation, as amended.

XII.

IT IS FURTHER ORDERED that:

- A. Within nine (9) months from the date Respondents execute the Agreement Containing Consent Orders, Respondents shall divest the Exxon Jet Turbine Oil Business to a single acquirer, as set forth in subparagraph XII.B., absolutely and in good faith and at no minimum price. Respondents shall divest the Exxon Jet Turbine Oil Business only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- B. Respondents shall carry out the divestiture of the Exxon Jet Turbine Oil Business on the following terms:
 1. Respondents shall assign to the acquirer all contracts for the supply of Jet Turbine Oils by Exxon, where permissible under applicable law and/or the terms of the contracts. With respect to existing non-assignable approvals, permits or contracts with customers for the purchase of Jet Turbine Oils, Respondents shall use best efforts to assist in the transfer to the acquirer of such contracts. Best efforts shall include a written reasoned recommendation, the provision to the acquirer of all

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information and records available to Exxon relating to such customers, the provision to the acquirer of available customer contact data and information on the customer decision maker(s) and, if the acquirer so requests in accordance with reasonable commercial practice, the organization of joint visits with the acquirer to such customers.

2. For a two (2) year period from the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business and subject to terms and conditions to be mutually agreed upon between the acquirer and Respondents, Respondents shall not solicit for the purpose of selling Jet Turbine Oils any commercial aviation customers to which Exxon has sold any Jet Turbine Oils between January 1, 1999, and the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business. Respondents may approach such customers for the purpose of selling products other than Jet Turbine Oils. To the extent that Mobil sold Jet Turbine Oils to any customers of the Exxon Jet Turbine Oil Business after January 1, 1999, and before October 1, 1999, nothing herein shall be construed to prevent Respondents from continuing to sell Mobil Jet Turbine Oils to such customers.
3. Respondents shall assign to the acquirer all of Exxon's contracts for the purchase of esters and additives used by Exxon in manufacturing Jet Turbine Oils, where permissible under applicable law and/or the terms of the contracts. With respect to existing non-assignable contracts for the purchase of esters and additives used by Exxon in manufacturing Jet Turbine Oils, Respondents shall use their best efforts to assist in the transfer to the acquirer of such contracts.
4. At the time Respondents apply to the Commission for approval of the divestiture, Respondents shall provide the Commission with copies of the approval by the leaseholder of Exxon's manufacturing facility located in

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- Bayway, New Jersey to the divestiture of that facility. With respect to permits, licenses or other rights granted by governmental authorities (other than patents), Respondents shall provide such assistance as the acquirer may reasonably request in the acquirer's efforts to obtain comparable permits, licenses or rights.
5. Respondents shall take reasonable steps from the date Respondents execute the Agreement Containing Consent Orders, including appropriate incentive schemes (such as payment of all current and accrued benefits, e.g., bonuses and pensions, etc., to which the employees are entitled), to cause the Exxon Jet Turbine Oil Employees to accept offers of employment from the acquirer. For a period of at least two (2) years following the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall not hire or solicit Exxon Jet Turbine Oil Employees who accept such offers unless the employees have been terminated by the acquirer. Respondents shall not offer incentives to Exxon Jet Turbine Oil Employees to stay with Respondents, and shall not assign Exxon Jet Turbine Employees to Respondents' Jet Turbine Oils business for a period of at least two (2) years following the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business.
 6. Respondents shall require that, as a condition of continued employment with Respondents after the divestiture of the Exxon Jet Turbine Oil Business, any of Respondents' employees with knowledge of Jet Turbine Oil Formulations, trade secrets, know-how, and other intellectual property conveyed to the acquirer pursuant to this Paragraph XII enter into agreements with the acquirer not to disclose to Respondents or to any third party any such intellectual property, except that such agreements may permit such employees to disclose to Respondents intellectual property other than Jet Turbine Oil Formulations for uses outside the Field of Jet Turbine Oils. To permit the acquirer to protect the confidentiality

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of intellectual property conveyed to it, Respondents shall assign to the acquirer (to the extent assignable) such rights under contracts between Exxon and its former employees as require such employees to preserve the confidentiality of such intellectual property. To the extent that such agreements with Exxon's former employees are not assignable, Respondents shall enforce such confidentiality provisions at the request and expense, and with the assistance of, the acquirer. Respondents shall not accept, nor seek to obtain, from any current or former employee of Exxon,

- a. for any use, Jet Turbine Oil Formulations, or
- b. for use within the Field of Jet Turbine Oils, other intellectual property conveyed to the acquirer pursuant to this Paragraph XII,

except (x) with the consent of the acquirer, or (y) as required to comply with this Order or prosecute, defend, or enforce patents, patent applications and claims relating to the Exxon Jet Turbine Oil Business where (i) those who receive such information enter into confidentiality agreements with the acquirer not to disclose or use, other than for the purposes listed in provision (y), any intellectual property conveyed to the acquirer, and (ii) Respondents use their best efforts to obtain a protective order to protect the confidentiality of such intellectual property during any adjudication.

7. Respondents shall provide Key Exxon Jet Turbine Oil Employees with the following financial incentives to continue in their employment positions pending divestiture and to accept employment with the acquirer at the time of the divestiture or at any time within two (2) years thereafter:

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- a. Vesting of all pension benefits current and accrued as of the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business;
- b. A bonus equal to thirty (30) percent of the employee's annual salary (including any other bonuses) as of the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business for any individual who agrees to employment with the acquirer, payable upon the beginning of employment by the acquirer. For Pat Godici, the bonus shall be one hundred (100) percent of his annual salary.

With respect to Key Exxon Jet Turbine Oil Employees, compliance with such incentives shall constitute the “reasonable steps” required by subparagraph XII.B.5. For a period of at least three (3) years following the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall not hire or solicit Key Exxon Jet Turbine Oil Employees who accept offers of employment from the acquirer unless the employees have been terminated by the acquirer. Respondents shall not offer incentives to Key Exxon Jet Turbine Oil Employees to stay with Respondents, and shall not assign Key Exxon Jet Turbine Employees to Respondents’ Jet Turbine Oils business for a period of at least three (3) years following the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business. If Pat Godici continues to be employed by Respondents after the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall, at the acquirer’s option, assign him as a consultant to the acquirer for up to full-time for two years, with the acquirer paying (a) a prorated share of his salary and employee benefits and (b) reasonable travel expenses (including meals and lodging).

8. Respondents shall place no restrictions on the use by the acquirer of any of the business or assets of the Exxon Jet Turbine Oil Business, other than the field of use

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restrictions set forth in this Paragraph XII and in the definition of “Exxon Jet Turbine Oil Business.”

9. Notwithstanding any other provisions of this Paragraph XII and notwithstanding subparagraph I.Z.5., Respondents shall not be required to convey to the acquirer any rights to the Excluded Jet Turbine Oil Assets or to the mark and slogan “Fly with the Tiger”, except that Respondents shall allow the acquirer to identify itself (for a period of one (1) year from the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business) as the acquirer of the “Exxon” or “Esso” Jet Turbine Oil Business. For a period of two (2) years after the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall not use the Excluded Jet Turbine Oil Assets in the marketing, customer support, or sale of Jet Turbine Oils, except that Respondents may use the word “Exxon” as part of the “Exxon Mobil” (or “ExxonMobil”) name or mark. For a period of five (5) years after the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall not use the mark and slogan “Fly with the Tiger” in the marketing, customer support, or sale of Jet Turbine Oils. Respondents shall not be required to allow the acquirer to use the names “ETO” and “Exxon Turbo Oil,” except that Respondents shall allow the acquirer to use the term “turbo oil” and shall allow the acquirer to identify its products (for a period of one (1) year from the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business) as formerly known as “ETO” or “Exxon Turbo Oil.” Respondents shall not use the names “ETO” and “Exxon Turbo Oil” in the Field of Jet Turbine Oils. However, Respondents shall be allowed to use the phrase “turbo oil” in the Field of Jet Turbine Oils if that phrase is not preceded immediately by the word “Exxon”. In particular, Respondents shall be allowed to use the phrase “turbo oil” in the Field of Jet Turbine Oils if that phrase is immediately preceded by the words “Exxon Mobil” or “ExxonMobil”. Respondents shall

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agree with the acquirer to comply with the requirements of this subparagraph XII.B.9. For purposes of this subparagraph XII.B.9., “Excluded Jet Turbine Oil Assets” means the following names, marks, copyrights, slogans, symbols, designs, or icons: Exxon; Esso; Humble; Live Running Tiger; Crossed X (Interlocking X Device); Oil Drop Character Design; Happy Motoring; Whimsical Tiger; Run with the Tiger; and Rely on the Tiger.

10. Respondents shall convey to the acquirer all copies of records containing Jet Turbine Oil Formulations of the Exxon Jet Turbine Oil Business. Respondents shall provide the acquirer with all records containing any other intellectual property to be conveyed to the acquirer to the extent that such records are located at the facilities used by the Exxon Jet Turbine Oil Business in Bayway (New Jersey), Florham Park (New Jersey), Sarnia (Ontario), and Houston (Texas), or were moved from such locations after November 1, 1999. Respondents may redact from the records conveyed to the acquirer information that pertains neither to the Exxon Jet Turbine Oil Business nor the Field of Jet Turbine Oils. Respondents may retain copies of the records conveyed to the acquirer if they pertain to businesses other than the Exxon Jet Turbine Oil Business, provided that Respondents redact therefrom all information pertaining solely to the Exxon Jet Turbine Oil Business. Provided further, however, that counsel for Respondents may retain unredacted copies of all records provided to the acquirer in order to comply with this Order and prosecute, defend, and enforce patents, patent applications, and claims relating to the Exxon Jet Turbine Oil Business if (i) those who view such unredacted records enter into confidentiality agreements with the acquirer not to disclose or use other than for such purposes any intellectual property conveyed to the acquirer, and (ii) Respondents use

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their best efforts to obtain a protective order to protect the confidentiality of such intellectual property during any adjudication.

11. Following the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall not manufacture or sell any Jet Turbine Oils that have the same formulation or product name as any Jet Turbine Oils manufactured or sold by the Exxon Jet Turbine Oil Business at any time prior to the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business.
12. With respect to Exxon's contracts for the distribution of Jet Turbine Oils, Respondents shall, at the acquirer's option, use their best efforts to assist the acquirer in securing contractual rights with distributors of Exxon Jet Turbine Oils comparable to the rights in Exxon's distributor contracts used by Exxon to distribute Jet Turbine Oils.
13. Within one (1) year of the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall supplement Appendix B (Confidential), subject to the prior approval of the Commission, with any and all additional patents selected by the acquirer, provided that:
 - a. each such patent was (i) issued to, or applied for by, Exxon as of the date of the Merger, or (ii) was the subject of a patent application filed by the Held Separate Exxon Jet Turbine Oil Business (as specified in subparagraph I.K.5. of the Order to Hold Separate and Maintain Assets) between the date of the Merger and the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, and
 - b. with respect to each such patent, prior to the Merger and within the Field of Jet Turbine Oils, Exxon (i)

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practiced an invention claimed in the patent, or (ii) engaged in research on, or development of, an invention (or an application of an invention) claimed in the patent.

14. For one (1) year following the Effective Date of Divestiture of the Exxon Jet Turbine Oil Business, Respondents shall promptly upon the acquirer's request offer to the acquirer technical assistance in transferring and gaining approvals and certifications.

C. If the trustee divests the Mobil Jet Turbine Oil Business pursuant to subparagraph XV.A. of this Order, the divestiture of the Mobil Jet Turbine Oil Business shall be carried out on the following terms:

1. Respondents shall assign to the acquirer all contracts for the supply of Jet Turbine Oils by Mobil, where permissible under applicable law and/or the terms of the contracts. With respect to existing non-assignable approvals, permits or contracts with customers for the purchase of Jet Turbine Oils, Respondents shall use best efforts to assist in the transfer to the acquirer of such contracts. Best efforts shall include a written reasoned recommendation, the provision to the acquirer of all information and records available to Mobil relating to such customers, the provision to the acquirer of available customer contact data and information on the customer decision maker(s) and, if the acquirer so requests in accordance with reasonable commercial practice, the organization of joint visits with the acquirer to such customers.
2. For a two (2) year period from the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business and subject to terms and conditions to be mutually agreed upon between the acquirer and Respondents, Respondents shall not solicit for the purpose of selling Jet Turbine Oils any commercial aviation customers to

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which Mobil has sold any Jet Turbine Oils between January 1, 1999, and the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business. Respondents may approach such customers for the purpose of selling products other than Jet Turbine Oils. To the extent that Exxon sold Jet Turbine Oils to any customers of the Mobil Jet Turbine Oil Business after January 1, 1999, and the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, nothing herein shall be construed to prevent Respondents from continuing to sell Exxon Jet Turbine Oils to such customers.

3. Respondents shall assign to the acquirer all of Mobil's contracts for the purchase of esters and additives used by Mobil in manufacturing Jet Turbine Oils, where permissible under applicable law and/or the terms of the contracts. With respect to existing non-assignable contracts for the purchase of esters and additives used by Mobil in manufacturing Jet Turbine Oils, Respondents shall use their best efforts to assist in the transfer to the acquirer of such contracts.
4. Respondents shall assist the Divestiture Trustee in obtaining all third-party approvals necessary to accomplish the divestiture of the manufacturing facilities of the Mobil Jet Turbine Oil Business.
5. Respondents shall take reasonable steps from the date Respondents execute the Agreement Containing Consent Orders, including appropriate incentive schemes (such as payment of all current and accrued benefits, e.g., bonuses and pensions, etc., to which the employees are entitled) to cause the sales, research, manufacturing, and supervisory personnel associated with the Mobil Jet Turbine Oil Business to accept offers of employment from the acquirer. For a period of at least two (2) years following the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, Respondents shall not hire or solicit Mobil Jet Turbine Oil Employees who accept such

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offers unless the employees have been terminated by the acquirer. Respondents shall not offer incentives to Mobil Jet Turbine Oil Employees to stay with Respondents, and shall not assign Mobil Jet Turbine Employees to Respondents' Jet Turbine Oils business for a period of at least two (2) years following the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business.

6. Respondents shall require that, as a condition of continued employment with Respondents after the divestiture of the Mobil Jet Turbine Oil Business, any of Respondents' employees with knowledge of Jet Turbine Oil Formulations, trade secrets, know-how, and other intellectual property conveyed to the acquirer pursuant to this Paragraph XII enter into agreements with the acquirer not to disclose to Respondents or to any third party any such intellectual property, except that such agreements may permit such employees to disclose to Respondents intellectual property other than Jet Turbine Oil Formulations for uses outside the Field of Jet Turbine Oils. To permit the acquirer to protect the confidentiality of intellectual property conveyed to it, Respondents shall assign to the acquirer (to the extent assignable) such rights under contracts between Mobil and its former employees as require such employees to preserve the confidentiality of such intellectual property. To the extent that such agreements with Mobil's former employees are not assignable, Respondents shall enforce such confidentiality provisions at the request and expense, and with the assistance of, the acquirer. Respondents shall not accept, nor seek to obtain, from any current or former employee of Mobil,
 - a. for any use, Jet Turbine Oil Formulations, or
 - b. for use within the Field of Jet Turbine Oils, other intellectual property conveyed to the acquirer pursuant to this Paragraph XII,

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except (x) with the consent of the acquirer, or (y) as required to comply with this Order or prosecute, defend, or enforce patents, patent applications and claims relating to the Mobil Jet Turbine Oil Business where (i) those who receive such information enter into confidentiality agreements with the acquirer not to disclose or use, other than for the purposes listed in provision (y), any intellectual property conveyed to the acquirer, and (ii) Respondents use their best efforts to obtain a protective order to protect the confidentiality of such intellectual property during any adjudication.

7. Respondents shall provide Key Mobil Jet Turbine Oil Employees with the following financial incentives to continue in their employment positions pending divestiture and to accept employment with the acquirer at the time of the divestiture or at any time within two (2) years thereafter:
 - a. Vesting of all pension benefits current and accrued as of the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business;
 - b. A bonus equal to thirty (30) percent of the employee's annual salary (including any other bonuses) as of the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business for any individual who agrees to employment with the acquirer, payable upon the beginning of employment by the acquirer.

With respect to Key Mobil Jet Turbine Oil Employees, compliance with such incentives shall constitute the “reasonable steps” required by subparagraph XII.C.5. For a period of at least three (3) years following the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, Respondents shall not hire or solicit Key Mobil Jet Turbine Oil Employees who accept offers of employment from the acquirer unless the employees have been terminated by the acquirer. Respondents shall not offer

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incentives to Key Mobil Jet Turbine Oil Employees to stay with Respondents, and shall not assign Key Mobil Jet Turbine Employees to Respondents' Jet Turbine Oils business for a period of at least three (3) years following the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business. If any researchers associated with the Mobil Jet Turbine Oil Business continue to be employed by Respondents after the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, Respondents shall, at the acquirer's option, assign each of them as consultants to the acquirer for up to full-time for two years, with the acquirer paying (a) a prorated share of each such employee's salary and employee benefits and (b) reasonable travel expenses (including meals and lodging).

8. Respondents shall place no restrictions on the use by the acquirer of any of the business or assets of the Mobil Jet Turbine Oil Business, other than the field of use restrictions set forth in this Paragraph XII and in the definition of "Mobil Jet Turbine Oil Business."
9. Notwithstanding any other provisions of this Paragraph XII, Respondents shall not be required to allow the acquirer to use the "Mobil" name and/or trademark (or the Red O, Pegasus Character, Airplane Character, or AVREX trademarks), except that Respondents shall allow the acquirer to identify itself (for a period of one (1) year from the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business) as the acquirer of the Mobil Jet Turbine Oil Business. For a period of two (2) years after the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, Respondents shall not use the "Mobil" name and/or trademark (or the Red O, Pegasus Character, Airplane Character, or AVREX trademarks) in connection with the marketing or sale of Jet Turbine Oils, except that Respondents may use the word "Mobil" as part of the "Exxon Mobil" name and/or trademark.

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10. Respondents shall convey to the acquirer all copies of records containing Jet Turbine Oil Formulations of the Mobil Jet Turbine Oil Business. Respondents shall provide the acquirer with all records containing any other intellectual property to be conveyed to the acquirer to the extent that such records are located at the facilities used by the Mobil Jet Turbine Oil Business, or were moved from such locations after November 1, 1999. Respondents may redact from the records conveyed to the acquirer information that pertains neither to the Mobil Jet Turbine Oil Business nor the Field of Jet Turbine Oils. Respondents may retain copies of the records conveyed to the acquirer if they pertain to businesses other than the Mobil Jet Turbine Oil Business, provided that Respondents redact therefrom all information pertaining solely to the Mobil Jet Turbine Oil Business. Provided further, however, that counsel for Respondents may retain unredacted copies of all records provided to the acquirer in order to comply with this Order and prosecute, defend, and enforce patents, patent applications, and claims relating to the Mobil Jet Turbine Oil Business if (i) those who view such unredacted records enter into confidentiality agreements with the acquirer not to disclose or use other than for such purposes any intellectual property conveyed to the acquirer, and (ii) Respondents use their best efforts to obtain a protective order to protect the confidentiality of such intellectual property during any adjudication.

11. Following the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, Respondents shall not manufacture or sell any Jet Turbine Oils that have the same formulation or product name as any Jet Turbine Oils manufactured or sold by the Mobil Jet Turbine Oil Business at any time prior to the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business.

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12. With respect to Mobil's contracts for the distribution of Jet Turbine Oils, Respondents shall, at the acquirer's option, use their best efforts to assist the acquirer in securing contractual rights with distributors of Mobil Jet Turbine Oils comparable to the rights in Mobil's distributor contracts used by Mobil to distribute Jet Turbine Oils.
 13. The trustee shall have the power to divest to the acquirer any other assets of Mobil if and to the extent necessary to permit the Mobil Jet Turbine Oil Business to remain viable after divestiture. Such assets may include, but shall not be limited to, intellectual property relating to products (other than, and in addition to, Jet Turbine Oils) produced by the manufacturing facilities of the Mobil Jet Turbine Oil Business.
 14. For one (1) year following the Effective Date of Divestiture of the Mobil Jet Turbine Oil Business, Respondents shall promptly upon the acquirer's request offer to the acquirer technical assistance in transferring and gaining approvals and certifications.
- D. The purpose of the divestiture of the Exxon Jet Turbine Oil Business or the Mobil Jet Turbine Oil Business is to ensure that either the Exxon Jet Turbine Oil Business or the Mobil Jet Turbine Oil Business is independent of, and is a viable and vigorous competitor to, the Jet Turbine Oil business retained by Respondents, and to remedy the lessening of competition resulting from the proposed Merger in markets for Jet Turbine Oils as alleged in the Commission's Complaint.

XIII.

IT IS FURTHER ORDERED that for so long as Mobil's Norfolk Wharf is owned by Respondents, Respondents shall not provide the "prior written notice of termination" set forth in

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Section III of the Wharf Agreement dated October 1, 1992, as amended, between Mobil Oil Corporation and Louis Dreyfus Energy Corporation, predecessor of TransMontaigne, Inc., respecting TransMontaigne, Inc.'s access to Mobil's Norfolk Wharf.

XIV.

IT IS FURTHER ORDERED that:

- B. Within six (6) months of the date Respondents execute the Agreement Containing Consent Orders, Respondents shall offer, in good faith, to amend the Mobil-Valero Paulsboro Agreement in compliance with this Paragraph and in the manner set forth in Appendix D (Confidential). Respondents shall offer only such terms as have received the prior approval of the Commission. At the time Respondents submit their proposed terms to the Commission for its approval, they shall also provide a copy to Valero. The amendment subsequently offered to Valero shall consist only of the terms approved by the Commission, and shall not be conditioned on Valero's acceptance of any other terms. The offer shall be held open for one (1) year after the Commission approves Respondents' proposed terms. If Valero accepts the offer, Respondents shall comply with the Mobil-Valero Paulsboro Agreement as amended, and any failure by Respondents to comply with any provision of the amendments offered to and accepted by Valero shall constitute a failure to comply with this Order; provided, however, that such failure shall not be a basis for the appointment of a trustee pursuant to Paragraph XV or for the alternative remedy set forth in Paragraph XV.
- C. Within nine (9) months of the date the Merger is consummated, Respondents shall enter into Base Oil supply contract(s) that receive the prior approval of the Commission with at least one, but not more than three, acquirer(s) that receive the prior approval of the Commission, to supply to acquirer(s) a cumulative total of

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twelve (12) MBD of Base Oil. Each such contract with each acquirer shall contain the following terms:

1. Respondents will supply Base Oil for a term of ten (10) years.
2. The Base Oil may be supplied from any or all of the Designated Base Oil Refineries, to be determined by mutual agreement between Respondents and each acquirer.
3. The agreement shall require the acquirer (a) to take delivery of the Base Oil to be supplied and shall not provide for any waiver of acquirer's obligation to take delivery; and (b) to provide Respondents with advance notice of the quantities and qualities to be purchased under the contract.
4. Respondents must initially make available to the acquirer Base Oil in proportionate grades, viscosities, qualities, and amounts that correspond to the 1999 production of Mobil's Beaumont, Texas, refinery. Beginning January 1, 2001, and on an annual basis thereafter, Respondents shall be obligated to provide the acquirer the option of purchasing Base Oil in the proportionate grades, viscosities, qualities, and amounts that correspond to Respondents' planned production at all of the Designated Base Oil Refineries.
5. The agreement will specify formula price terms for each grade, viscosity, and other quality of Base Oil to be supplied initially. The formula price terms for each grade, viscosity, and other quality of Base Oil not supplied initially shall reflect adjustments to existing price formulae that are established by mutual agreement, or by binding arbitration if the parties fail to agree. The formula price terms shall be subject to renegotiation no more frequently than every three years, with binding arbitration if the parties fail to agree on price terms,

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provided, however, that neither the renegotiated nor arbitrated price terms may be a function of United States or Canadian Base Oil prices. The formula price term of any Base Oil to be supplied shall not be calculated as a function of any United States or Canadian price of Base Oil, but may be calculated as a function of any widely-traded commodity (e.g., any petroleum product traded on the NYMEX).

Respondents shall comply with such Base Oil supply contract(s), and any failure by Respondents to comply with any provision of any such Base Oil contract shall constitute a failure to comply with this Order; provided, however, that such failure shall not be a basis for the appointment of a trustee pursuant to Paragraph XV or for the alternative remedy set forth in Paragraph XV.

- D. The purpose of this Paragraph is to provide a supply of Base Oil to independent or integrated compounder blenders of Base Oil into finished products and to remedy the lessening of competition in the refining and marketing of Base Oil resulting from the proposed Merger as alleged in the Commission's Complaint.

XV.

IT IS FURTHER ORDERED that:

- A. If Respondents have not, within the time periods required, complied with the requirements to divest, assign, enter into agreements, or make an offer of amendment, as applicable, of Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XII, or XIV absolutely and in good faith and with the Commission's prior approval and in the manner approved by the Commission, the Commission may appoint a person or persons as trustee or trustees (as used herein "trustee" shall mean "trustee or trustees") to effectuate the divestiture, assign all agreements, and effectuate all other provisions of the applicable paragraph or paragraphs; provided, however,

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that the trustee may, subject to the approval of the Commission, substitute the following assets for the assets described in the applicable paragraph or paragraphs: (1) in connection with Paragraph II., the Mobil California Refining and Marketing Assets, and the applicable brand name; (2) in connection with Paragraph IV, the Mobil Northeast Marketing Assets, and the applicable brand name (provided, however, that if Respondents fail to divest pursuant to both Paragraphs IV and V, the trustee may substitute the Exxon Maine-Virginia Assets, and the applicable brand name, for the assets to be divested pursuant to Paragraphs IV and V); (3) in connection with Paragraph V, the Exxon Mid-Atlantic Marketing Assets, and the applicable brand name (provided, however, that if Respondents fail to divest pursuant to both Paragraphs IV and V, the trustee may substitute the Exxon Maine-Virginia Assets, and the applicable brand name, for the assets to be divested pursuant to Paragraphs IV and V); (4) in connection with Paragraph VI, the Exxon Texas Marketing Assets, and the applicable brand name; (5) in connection with Paragraph X, Exxon's Interest in TAPS; (6) in connection with Paragraph XII, Mobil's Jet Turbine Oil Business; and (7) in connection with Paragraph XIV, the Mobil Beaumont Refinery Assets. Provided, however, that with respect to Paragraphs IV and V, the trustee may enter into an agreement with the acquirer, granting the acquirer rights to the Exxon or Mobil brand, as the case may be, on a royalty-free basis for up to twenty years, with the right to renew indefinitely thereafter on an annual basis, at the acquirer's option, on further terms to which the Respondents and the acquirer agree or, in the absence of agreement, on commercially reasonable terms as determined by binding arbitration (instead of the ten-year period as specified in subparagraphs IV.C. and V.C.).

Provided, further, however, that if within the applicable time period Respondents have divested and assigned rights with respect to at least 95% of the Retail Sites as to which divestiture or assignment is required in (a) for Paragraph II,

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California; (2) for Paragraph IV, the States of New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, or Maine; (3) for Paragraph V, the District of Columbia or the States of Virginia, Maryland, Delaware, Pennsylvania, or New Jersey; and (4) for Paragraph VI, the Texas MSAs, as the case may be, and Respondents have been enjoined by any court from divesting or assigning, or have been prevented from divesting or assigning despite attempting in good faith to complete such divestitures or assignments, the remaining 5% of the Retail Sites required to be divested and assigned, Respondents shall have an additional six (6) months to complete the required divestitures and assignments and Respondents' failure to have completed the divestitures and assignments with respect to the remaining Retail Sites shall not constitute non-compliance for purposes of this Order until the expiration of the additional six (6) month period. If Respondents have not divested the remaining assets or assigned the applicable Existing Lessee Agreements or Existing Supply Agreements by the end of the extended period, the Commission may appoint a person or persons to act as trustee (or trustees) pursuant to this paragraph to divest those remaining assets but not the substitute assets described above in this subparagraph.

- B. In the event that the Commission or the United States Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the United States Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph XV.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee or trustees, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the assets to be divested, assign the agreements required to be assigned, and enter into the required agreements, thereby binding Respondents, all on such terms and conditions as are necessary to comply with the requirements of the applicable paragraph, to comply with all applicable laws, and to effectuate the remedial purposes of this Order. Subject to the prior approval of the Commission, the trustee shall have the sole authority to divest the assets described in subparagraphs XV.A.(2) and (3), in smaller packages as the trustee deems necessary to effectuate divestiture of the assets and to effectuate the remedial purposes of this Order, provided, however, that no package of assets shall comprise less than all the Retail Assets, Existing Lessee Agreements, and Existing Supply Agreements in an individual state or District. Provided, however, that with respect to Paragraphs IV and V, the trustee may enter into an agreement with the acquirer, granting the acquirer rights to the Exxon or Mobil brand, as the case

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may be, on a royalty-free basis for up to twenty years, with the right to renew indefinitely thereafter on an annual basis, at the acquirer's option, on further terms to which the Respondents and the acquirer agree or, in the absence of agreement, on commercially reasonable terms as determined by binding arbitration (instead of the ten-year period as specified in subparagraphs IV.C. and V.C.).

3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph XV.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the assets to be divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as

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determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as approved by the Commission, as applicable; provided, however, if the trustee receives bona fide offers from more than one acquiring entity for any package of assets, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission, provided further, however, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement

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contingent on the trustee's divesting the assets to be divested.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph XV.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.
12. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures.

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XVI.**IT IS FURTHER ORDERED** that:

- A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II., III., IV., V., VI., VII, VIII, IX, X, XI, XII, XIII, XIV, and XV of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with these Paragraphs. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with these Paragraphs, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.
- B. One (1) year from the date this Order becomes final, annually for the next nineteen (19) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with each provision of this Order.

XVII.**IT IS FURTHER ORDERED** that:

- A. Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale

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resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.

- B. Upon consummation of the Merger, Respondents shall cause Exxon Mobil to be bound by the terms of this Order.

XVIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of each Respondent relating to any matters contained in this Order; and
- B. Upon five days' notice to each Respondent and without restraint or interference from it, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

XIX.

IT IS FURTHER ORDERED that, if Respondents fail to complete any of the divestitures required by this Order within the time period required, the Commission may appoint a trustee pursuant to Paragraph XV of this Order to divest the applicable package of assets as described in Paragraph XV (subject to the extension as set forth in Paragraph XV); provided, however, that if Respondents submit an application for approval to divest a package of assets to an acceptable acquirer no later than 65 days before the date by which the Order requires completion of that

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required divestiture and the Commission subsequently approves the application for approval to divest that package of assets, but Respondents are unable to complete that required divestiture because the Commission has not acted on Respondents' application before the date by which the order requires that Respondents must divest that package of assets, then the time by which Respondents must divest that package of assets shall be extended for one month from the time the Commission approves the application relating to that package of assets.

XX.

IT IS FURTHER ORDERED that if (1) within the time period required for divestiture or other relief pursuant to Paragraphs II, IV, V, VI, X and XII of this Order, Respondents have submitted a complete application in support of the divestiture or other relief (including the acquirer, manner of divestiture and all other matters subject to Commission approval) as required by such paragraphs; and (2) the Commission has approved the divestiture or other relief and has not withdrawn its acceptance; but (3) Respondents have certified to the Commission prior to the expiration of the applicable time period that (a) notwithstanding timely and complete application for approval by Respondents to the State or District under an applicable consent decree to which the State (or District) and Respondents are parties, the State or District has failed to approve the divestiture or other relief that is also required under this Order, or (b) a State or District has filed a timely motion in court seeking to enjoin the proposed divestiture or other relief under an applicable consent decree to which the State (or District) and Respondents are parties, then, (4) with respect to the particular divestiture or other relief that remains unconsummated, the time in which the divestiture or other relief is required under this Order to be complete shall be extended (a) for ninety (90) days or (b) until the disposition of the motion filed by the State or District pertaining to the proposed divestiture or other relief, whichever is later. During such period of extension, Respondents shall exercise utmost good faith and best efforts to resolve the concerns of the particular State.

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XXI.

IT IS FURTHER ORDERED that this Order will terminate on January 26, 2021.

By the Commission, Commissioner Leary recused.

Decision and Order

APPENDIX A**Branded Distributor Retention Program**

1. Within thirty (30) days of the date Respondents execute the Agreement Containing Consent Orders, Respondents shall establish a fund (the “Fund”) in the amount of \$30,000,000.00 to be distributed within thirty (30) days of the later of (a) twelve (12) months after the date on which Respondents execute the Agreement Containing Consent Orders and (b) ninety (90) days after the last Effective Date of Divestiture pursuant to Paragraphs II., IV., V., and VI. of this Order (hereinafter the “Distribution Date”) in the manner described in subparagraph 3 to eligible Branded Distributors as to which Existing Supply Agreements are to be assigned pursuant to Paragraphs II., IV., V., and VI. of this Order.
2. Branded Distributors as to which Existing Supply Agreements are to be assigned pursuant to Paragraphs II., IV., V. and VI. of this Order shall be eligible for a distribution from the Fund only if:
 - (a.) The assignment of the Branded Distributor’s Existing Supply Agreement with Exxon or Mobil, as applicable, becomes effective within the periods required by subparagraphs II.A., IV.A., V.A., or VI.E. of the Order;
 - (b.) The Branded Distributor has been a Branded Distributor of Branded Fuels under the Exxon or Mobil brand, as applicable, for Respondents or the acquirer or assignee, as applicable, continuously from the date Respondents execute the Agreement Containing Consent Orders to the Distribution Date; and
 - (c.) The aggregate volume of Exxon or Mobil branded gasoline, as applicable, purchased by the Branded Distributor for resale under the Exxon or Mobil brand, as applicable, pursuant to Existing Supply Agreements assigned pursuant to this Order during the twelve (12)

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calendar months preceding the Distribution Date is at least 95% of the aggregate volume during the twelve (12) calendar months preceding the date Respondents execute the Agreement Containing Consent Orders.

3. Each eligible Branded Distributor shall receive a share of the Fund the numerator of which shall be equal to the Branded Distributor's purchases of gasoline during the twelve (12) calendar months preceding the Distribution Date from Exxon or Mobil, as applicable, and the acquirer or assignee, as applicable, for resale under the Exxon or Mobil brand, as applicable, at Retail Sites subject to divestiture or assignment under this Order, and the denominator of which shall be equal to the volume of gasoline purchased during the twelve (12) calendar months preceding the Distribution Date by all eligible Branded Distributors from Exxon or Mobil, as applicable, and the acquirer and assignee, as applicable, for resale under the Exxon or Mobil brand, as applicable, at Retail Sites subject to divestiture or assignment under this Order.

Decision and Order

APPENDIX B (Confidential)

[Redacted from Public Record Version]

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APPENDIX C

**Research and Test Equipment of Exxon Jet Turbine Oil
Business**

Inclined Panel Deposit Test

Pratt & Whitney Pressure Cylinder Test

U.S. Navy Vapor Phase Coker Test

Rolls Royce Dynamic Coking Test

High Press. Differential Scanning Calorimetry (HPDSC)

Hydrolytic Stability Test

Coker Mister Test

Navy Ball Corrosion Test

Falex Four Ball Extreme Pressure Wear Test

Rolls Royce Volatility and Thermal Stability Tests

Rolls Royce Corrosion Tests

Rolls Royce Confined Heat Stability Test

Mod (DERD) Rolls-Royce Elastomers Compatibility

Four Ball Initial Seizure Test

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APPENDIX D (Confidential)

[Redacted from Public Record Version]

Order

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission having initiated an investigation of the proposed merger of Respondents Exxon Corporation and Mobil Corporation, and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Consent Agreement on the public record for a period of sixty (60) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Hold Separate and Maintain Assets (“Hold Separate”):

1. Respondent Exxon Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 5959 Las Colinas Boulevard, Irving, Texas 75039-2298.

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2. Respondent Mobil Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3225 Gallows Road, Fairfax, Virginia 22037-0001.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate, the following definitions and provisions shall apply:

- A. “Exxon” means Exxon Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Exxon, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Mobil” means Mobil Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Mobil, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Exxon Mobil” means Exxon Mobil Corporation, or any other entity resulting from the merger involving Exxon and Mobil, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Exxon Mobil, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order

- D. “Respondents” means Exxon and Mobil, individually and collectively, and the successor corporation.
- E. "Commission" means the Federal Trade Commission.
- F. “Assets to be Divested” means all the assets required to be divested, the rights required to be assigned, and all other obligations pursuant to Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XII, XIV, and XV if applicable, of the Decision & Order contained in the Consent Agreement.
- G. “Branded Fuels” means motor gasoline or diesel fuel sold at a Retail Site under a brand name owned by Respondents.
- H. “Computer Networks and Systems” means Respondents’ computer systems, applications and shared knowledge networks used to operate and/or manage Respondents’ businesses and which contain Material Confidential Information of the Held Separate Business or provide access to Material Confidential Information of the Held Separate Business, including, but not limited to, SAP SALADIN, React, TMS, MIMS/Petrosoft/Optimizer, Business Warehouse, Burster, Filenet, Intelligent Agent, Acxiom, Process Industry Modeling System, PROMIS, Khalix, Dataflex, Bestnet, Exchange Reconciliation, Express and associated tax programs.
- I. “Existing Business Units” means the personnel employed in, and all tangible and intangible property and other assets, used by the units identified in subparagraph I.J.6.a. as of October 1, 1999, except as provided in subparagraph II.B.3.
- J. “Held Separate Business” means:
 - 1. The following Mobil “Natural Business Units” (“NBUs”) and “Integrated Business Unit” (“IBU”):

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- a. New England Fuels Marketing NBU, consisting of: (i) all of Mobil's interest in all Mobil branded operating service station facilities as of October 1, 1999, in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut (the "New England States"), either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil; (ii) all light petroleum products storage and distribution terminals owned or leased by Mobil located in the New England States and all Terminal Assets used in the operation of those terminals; (iii) except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation of the service stations described in clause (i) which are operated by Mobil or in the management of Mobil's business relationship with the service stations described in clause (i) which are not operated by Mobil, and the terminals described in clause (ii), including, but not limited to, all field marketing personnel, field office support staff and persons covered by the contractual rights and obligations described in clause (iv); and (iv) all contractual rights and obligations associated with the assets described in clauses (i) and (ii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements;
- b. New York Fuels Marketing NBU, consisting of: (i) all of Mobil's interest in all Mobil branded operating service station facilities as of October 1, 1999, in the State of New York, either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil; (ii) all light petroleum products storage and distribution terminals owned or leased by Mobil located in the State of New

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York and all Terminal Assets used in the operation of those terminals; (iii) except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation of the service stations described in clause (i) which are operated by Mobil or in the management of Mobil's business relationship with the service stations described in clause (i) which are not operated by Mobil, and the terminals described in clause (ii), including, but not limited to, all field marketing personnel and field office support staff and persons covered by the contractual rights and obligations described in clause (iv); and (iv) all contractual rights and obligations associated with the assets described in clauses (i) and (ii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements;

- c. Pennsylvania and New Jersey Fuels Marketing NBU, consisting of: (i) all of Mobil's interest in all Mobil branded operating service station facilities as of October 1, 1999, in the States of Pennsylvania and New Jersey, either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil; (ii) all light petroleum products storage and distribution terminals owned or leased by Mobil located in the States of Pennsylvania and New Jersey and all Terminal Assets used in the operation of those terminals; (iii) except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation of the service stations described in clause (i) which are operated by Mobil or in the management of Mobil's business relationship with the service stations described in clause (i) which are not operated by Mobil, and the terminals described in clause (ii), including, but not limited to, all field marketing personnel and field

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office support staff and persons covered by the contractual rights and obligations described in clause (iv); and (iv) all contractual rights and obligations associated with the assets described in clauses (i) and (ii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements;

- d. Mid-Atlantic Fuels Marketing NBU, consisting of: (i) all of Mobil's interest in all Mobil branded operating service station facilities as of October 1, 1999, in the District of Columbia and the States of Delaware, Maryland, Virginia and North Carolina (the "Mid-Atlantic States"), either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil; (ii) all petroleum storage and distribution terminals owned or leased by Mobil located in the District of Columbia and the Mid-Atlantic States and all Terminal Assets used in the operation of those terminals; (iii) except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation of the service stations described in clause (i) which are operated by Mobil or in the management of Mobil's business relationship with the service stations described in clause (i) which are not operated by Mobil, and the terminals described in clause (ii), including, but not limited to, all field marketing personnel and field office support staff and persons covered by the contractual rights and obligations described in clause (iv); and (iv) all contractual rights and obligations associated with the assets described in clauses (i) and (ii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements;

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- e. Florida Fuels Marketing NBU, consisting of: (i) all of Mobil's interest in all Mobil branded operating service station facilities as of October 1, 1999, in the States of Florida and Georgia, either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil; (ii) all light petroleum products storage and distribution terminals owned or leased by Mobil located in the States of Florida and Georgia and all Terminal Assets used in the operation of those terminals; (iii) except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation or management of the service stations described in clause (i) and the terminals described in clause (ii), including, but not limited to, all field marketing personnel and field office support staff and persons covered by the contractual rights and obligations described in clause (iv); and (iv) all contractual rights and obligations associated with the assets described in clauses (i) and (ii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements;

- f. Texas Fuels Marketing NBU, consisting of: (i) all of Mobil's interest in all Mobil branded operating service station facilities as of October 1, 1999, in the States of Texas and Louisiana, either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil; (ii) all light petroleum products storage and distribution terminals owned or leased by Mobil located in the States of Texas and Louisiana and all Terminal Assets used in the operation of those terminals, except for the truck rack and associated light petroleum products storage facilities at Mobil's

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Chalmette refinery, which shall remain outside of the Held Separate Business; provided, however, that the Held Separate Business shall have the right to lift light petroleum products from that truck rack; (iii) except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation of the service stations described in clause (i) which are operated by Mobil or in the management of Mobil's business relationship with the service stations described in clause (i) which are not operated by Mobil, and the terminals described in clause (ii), including, but not limited to, all field marketing personnel and field office support staff and persons covered by the contractual rights and obligations described in clause (iv); and (iv) all contractual rights and obligations associated with the assets described in clauses (i) and (ii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements; and

- g. Team Mobil West, an IBU, consisting of: (i) all of Mobil's interest in all Mobil branded operating service station facilities as of October 1, 1999, in the States of California, Arizona and Nevada, either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil; (ii) all light petroleum products storage and distribution terminals owned or leased by Mobil located in the States of California, Arizona and Nevada and all Terminal Assets used in the operation of those terminals; (iii) the Mobil Torrance Refinery Assets as defined in the Consent Agreement; (iv) except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation of the service stations described in clause (i) which are operated by Mobil or in the management of Mobil's

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business relationship with the service stations described in clause (i) which are not operated by Mobil, the terminals described in clause (ii), the Mobil Torrance Refinery Assets described in clause (iii), and all persons covered by the contractual rights and obligations described in clause (v); and (v) all contractual rights and obligations associated with the assets described in clauses (i), (ii) and (iii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements.

2. Mobil Alaska Pipeline Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware;
3. Mobil's interest in the Colonial Pipeline Company;
4. Mobil's Guam Fuels Marketing Business, including Mobil Oil Guam, Inc. ("MOGI"), a corporation organized, existing, and doing business under and by virtue of the laws of the Territory of Guam, and the assets located on or used in connection with Mobil's fuels marketing businesses for the Commonwealth of the Northern Mariana Islands and the Federated States of Micronesia (collectively, with the Territory of Guam, the "Guam Area"), all of which more specifically consist of:
 - (i) all Mobil branded operating service station facilities as of October 1, 1999, in the Guam Area, either owned by Mobil, leased by Mobil or supplied by Mobil or its distributors, together with all Retail Assets used in the operation of those facilities owned or leased by Mobil;
 - (ii) all docks, pipelines, petroleum storage and distribution terminals owned or leased by Mobil located in the Guam Area, including Mobil's interest in the terminals, storage and loading facilities, and other assets and structures located on Cabras Island, and all Terminal Assets used in the operation of those terminals;
 - (iii)

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except as provided in subparagraph II.B.3, all persons employed as of October 1, 1999, in the operation of the service stations described in clause (i) which are operated by Mobil or in the management of Mobil's business relationship with the service stations described in clause (i) which are not operated by Mobil, and the docks, pipelines and terminal assets described in clause (ii), including, but not limited to, all field marketing personnel and field office support staff and persons covered by the contractual rights and obligations described in clause (iv); and (iv) all contractual rights and obligations associated with the assets described in clauses (i) and (ii) above, including, without limitation, real estate and facility leases, franchise agreements, service contracts (both third party and shared service agreements) and exchange agreements;

5. The Exxon Jet Turbine Oil Business as defined in the Decision & Order contained in the Consent Agreement, and including: (1) the Business Support Coordinator named in Paragraph II. of Appendix A and (2) all other employees listed in the organizational chart attached as Appendix C; provided, however, that the Manager may select, within sixty (60) days of the date this Hold Separate becomes final, any of Exxon's employees, who, within the last two years, have had responsibilities or duties relating to the sales, research, or manufacture of Jet Turbine Oil, as replacements for or in addition to any of the employees listed on the organizational chart.
6. The Existing Business Units, current personnel, Newly-constituted Support Service Units, and newly-created positions, which assist the Manager in managing the Held Separate Business and provide support services (described in Appendix A) within the Held Separate Business, described below:
 - a. The following Existing Business Units of Mobil's North America Marketing & Refining Division:

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- (1) Mobil's existing East/Southwest Inventory - Gasolines Unit;
 - (2) Mobil's existing Fuels Customer Support and Delivery Operations Control Center Units;
 - (3) Mobil's existing Fuels Pricing Unit;
 - (4) Mobil's existing Retail Operations & Information Services Unit;
 - (5) Mobil's existing Point of Sale ("POS") Support Unit;
- b. The following current personnel, Newly-constituted Support Service Units, and newly-created positions within the Held Separate Business:
- (1) Personnel from Mobil's existing Business & Performance Analysis Unit as identified in Appendix A;
 - (2) Personnel from Mobil's existing Global Manufacturing Development Unit as identified in Appendix A;
 - (3) A chief financial officer, as identified in Appendix A, to manage the funds described in Paragraph II.B.10., and staffed with the personnel identified in Appendix A;
 - (4) A Marketing Manager as identified in Appendix A;
 - (5) A Distillate Manager as identified in Appendix A;
 - (6) Personnel, as identified in Appendix A, who will provide or arrange for the provision of the following services to the Held Separate Business:
 - (a) Implementation of marketing programs and policies, management of relationships with dealers and jobbers, and development and implementation of local and regional promotional activities based on local market factors;
 - (b) Employee relations services;
 - (c) Legal services;
 - (d) Public relations services;
 - (e) Information systems management;

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- (f) Refined product trading, to the extent not acquired from Respondents or third parties;
 - (g) Authorize and direct maintenance and construction services provided to Retail Sites and terminals within the NBUs;
 - (h) Maintenance and engineering provided in the normal course of business within the Torrance Refinery; and
 - (i) Support of environmental health and personnel safety services at the Torrance Refinery, Retail Sites, and Terminals within the NBUs.
7. Offices located in the Willow Oaks Building, Willow Oaks Corporate Drive, Fairfax, Virginia 22031, consisting of space in that building that, during the Hold Separate Period, will be maintained under separate keyed access for the sole and exclusive use of the Held Separate Business.

Provided, however, that the Held Separate Business need not include those service station facilities that were Mobil branded operating service station facilities as of October 1, 1999, and would otherwise be included within the Held Separate Business as defined in subparagraphs I.J.1.a.–g. and I.J.4., but that, as of the date Respondents execute the Agreement Containing Consent Orders, have been or are in the process of being terminated by Respondents pursuant to mutual agreement or otherwise in compliance with the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*, with such termination effective on or before December 31, 1999; provided, further, that the Held Separate Business shall include all operating service station facilities that have been approved as Mobil branded operating service stations since October 1, 1999, in the geographic areas described in subparagraphs I.J.1.a. – g. and I.J.4.

- K. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin no later than ten (10) days after the date the Hold Separate becomes final and terminate pursuant to Paragraph V hereof.

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- L. "Material Confidential Information" means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.
- M. "Merger" means the proposed merger involving Exxon and Mobil.
- N. "Mobil Torrance Refinery Assets" means Mobil's refinery located at Torrance, California, and all of Mobil's interest in all tangible assets used in the operation of the refinery; all licenses, agreements, contracts, and permits used in the operation of the refinery; the non-exclusive right to use all patents, know-how, and other intellectual property used by Mobil in the operation of the refinery; at the acquirer's option, all contracts, agreements or understandings relating to the transportation, terminaling, storage or sale of the refinery's petroleum product output; at the acquirer's option, all agreements under which Mobil receives crude oil or other inputs at or for the refinery; and, at the acquirer's option, all exchange agreements involving the refinery. "Mobil Torrance Refinery Assets" also includes all plans (including proposed and tentative plans, whether or not adopted), specifications, drawings, and other assets (including the non-exclusive right to use patents, know-how, and other intellectual property, relating to such plans) related to the operation of, and improvements, modifications, or upgrades to, the Torrance refinery. "Mobil Torrance Refinery Assets" also includes, but is not limited to, all of Mobil's interest in the SJV crude pipeline system between Lost Hills, California, and the refinery (—70); the Southwest Terminal in Los Angeles Harbor (including the dock, tanks, and other facilities located at the terminal); all crude (—146) and products pipelines running between the Southwest Terminal dock and the refinery; and the products pipeline between the refinery and Kinder Morgan's Watson Terminal; the Mobil Pacific Pipe Line Company products

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pipeline between the GATX terminal and the refinery; the jet fuel pipeline between the refinery and Los Angeles International Airport; and Mobil Pacific Pipeline's interest in the THUMS Wilmington Crude Gathering System between the Wilmington Field and the refinery (—131, —132, —142); and the Torrance crude system (—134, —135).

- O. “Newly-constituted Support Services Unit” means a business function, staffed with personnel identified in Appendix A and charged with providing or arranging for the provision of support services to the Held Separate Business.
- P. “Retail Assets” means, for each Retail Site, all fee and leasehold interests of Respondents in the Retail Site, and all of Respondents’ interest in all assets, tangible or intangible, that are used at that Retail Site, including, but not limited to, all permits, licenses, consents, contracts, and agreements used in the operation of the Retail Site, and the non-exclusive right to use all patents, know-how, and other intellectual property used by Respondents in the operation of the Retail Sites. “Retail Assets” also includes all fee and leasehold interests of Respondents in real property that, as of October 1, 1999, was intended for use as a Retail Site and all permits, licenses, consents, contracts, and agreements intended for use or used with respect to that real property. “Retail Assets” also includes all of Respondents’ interest in all assets relating to all ancillary businesses (including, but not limited to, automobile mechanical service, convenience store, restaurant or car wash) located at each Retail Site, including all permits, licenses, consents, contracts, and agreements used in the operation of the ancillary businesses, and the non-exclusive right to use all know-how, patents, and other intellectual property used in the operation of the ancillary businesses. “Retail Assets” also includes all tank trucks and all contracts with all other persons for supplying Branded Fuels to the Retail Sites.

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- Q. “Retail Site” means a business establishment within the Held Separate Business from which gasoline is sold to the general public.
- R. “Terminal Assets” means all of Mobil’s assets relating to its petroleum storage and distribution terminals, including all assets, tangible and intangible, that are used to operate the terminal for the storage and distribution of petroleum products, including, but not limited to, all real estate, storage tanks, loading and unloading facilities, licenses, permits and contracts pertaining to the terminal facilities, offices, buildings, warehouses, equipment, machinery, fixtures, tools, spare parts, and all other property used in Terminaling; and the non-exclusive right to use all patents, know-how, and other intellectual property used by Mobil in the operation of the terminal.
- S. “Terminaling” means the services performed by a facility that provides temporary storage of gasoline received from a pipeline or marine vessel, and the redelivery of gasoline from storage tanks into tank trucks or transport trailers.

II.

IT IS FURTHER ORDERED that:

- A. During the Hold Separate Period, Respondents shall hold the Held Separate Business separate, apart, and independent as required by this Hold Separate, except to the extent that Respondents must exercise direction and control over the Held Separate Business to assure compliance with this Hold Separate, or with the Decision & Order contained in the Consent Agreement, and except as otherwise provided in this Hold Separate, and shall vest the Held Separate Business with all rights, powers, and authorities necessary to conduct their business. The purpose of this Hold Separate is to: (i) preserve the Held Separate Business, including the Assets to be Divested, as viable, competitive, and ongoing businesses independent of Respondents until the relevant

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divestitures are achieved; (ii) assure that no Material Confidential Information is exchanged between Respondents and the Held Separate Business, except in accordance with the provisions of this Hold Separate; (iii) prevent interim harm to competition pending the relevant divestitures and other relief; and (iv) help remedy any anticompetitive effects of the proposed Merger.

B. Respondent shall hold the Held Separate Business separate, apart, and independent on the following terms and conditions:

1. The Commission may appoint a Hold Separate Trustee subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the Hold Separate Trustee within five (5) days after notice by the staff of the Commission to Respondents of the identity of any Hold Separate Trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 - a. No later than five (5) days after the appointment of the Hold Separate Trustee, Respondents shall enter into an agreement with the Hold Separate Trustee that will, subject to the approval of the Commission, transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Order to Hold Separate and Maintain Assets and consistent with the purposes of the Decision & Order contained in the Consent Agreement. The trustee agreement shall require that thirty (30) days after the Order to Hold Separate and Maintain Assets becomes final, and every thirty (30) days thereafter until the Hold Separate terminates, the Hold Separate Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate. Included within that report shall be the Hold Separate Trustee's assessment of the extent to which the businesses

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comprising the Held Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.

- b. No later than five (5) days after the Commission's approval of the agreement between the Hold Separate Trustee and the Respondents, Respondents shall transfer to the Hold Separate Trustee all rights, powers, and authorities necessary to permit the Hold Separate Trustee to perform his/her duties and responsibilities, pursuant to this Order to Hold Separate and Maintain Assets and consistent with the purposes of the Decision & Order contained in the Consent Agreement.
- c. The Hold Separate Trustee shall have the responsibility, consistent with the terms of this Hold Separate and the Decision & Order contained in the Consent Agreement, for monitoring the organization of the Held Separate Business; for managing the Held Separate Business through the Manager; for maintaining the independence of the Held Separate Business; and for assuring Respondents' compliance with their obligations pursuant to this Hold Separate and the Decision & Order contained in the Consent Agreement.
- d. The Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Held Separate Business or to any other relevant information as the Hold Separate Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Held Separate Business. Respondents shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee.

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Respondents shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondents' compliance with this Hold Separate and the Consent Agreement or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate.

- e. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
- f. The Commission may require the Hold Separate Trustee to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with performance of the Hold Separate Trustee's duties.
- g. Respondents may require the Hold Separate Trustee to sign a confidentiality agreement prohibiting the disclosure of any Material Confidential Information gained as a result of his or her role as Hold Separate Trustee to anyone other than the Commission.
- h. If the Hold Separate Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Hold Separate Trustee in the same manner as provided in Paragraph II. of this Hold Separate. In the event a substitute Hold Separate Trustee is appointed, Respondents shall be notified of the name of the substitute Hold Separate Trustee. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Hold Separate Trustee within ten (10) business days after notice by the Commission to Respondents of the identity of any proposed Hold

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Separate Trustee, Respondents shall be deemed to have consented to the selection of the proposed Hold Separate Trustee.

2. No later than one (1) day after this Order to Hold Separate and Maintain Assets becomes final, Respondents shall enter into a management agreement with, and transfer all rights, powers, and authorities necessary to manage and maintain the Held Separate Business to, Brian R. Baker, President of Mobil's North America Marketing & Refining Division, the individual Respondents have selected to act as Manager.
 - a. In the event that Brian Baker ceases to act as Manager, then Respondents shall select a substitute Manager, subject to the approval of the Hold Separate Trustee, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Order to Hold Separate and Maintain Assets.
 - b. The Manager shall report directly and exclusively to the Hold Separate Trustee and shall manage the Held Separate Business independently of the management of Respondents. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondents during the term of this Hold Separate.
 - c. The Manager shall have no financial interests affected by Respondents' revenues, profits or profit margins, except that the Manager's compensation for managing the Held Separate Business may include economic incentives dependent on the financial performance of the Held Separate Business if there are also sufficient incentives for the Manager to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of production and sales) and to achieve the objectives

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of this Hold Separate. For a period of two (2) years beginning after the end of the Hold Separate Period, Respondents shall not retain the services of such former Manager.

- d. The Manager shall make no material changes in the present operation of the Held Separate Business except with the approval of the Hold Separate Trustee.
- e. The Manager shall have the authority, with the approval of the Hold Separate Trustee, to remove persons identified in Appendix A and replace them with others of similar experience or skills. If any person identified in Appendix A ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Manager, in consultation with the Hold Separate Trustee, may request Respondents to, and Respondents shall, appoint a substitute person, which person the Manager shall have the right to approve.
- f. In addition to those employees within the Held Separate Business, the Manager shall employ such employees as are reasonably necessary to assist the Manager in managing the Held Separate Business, including, without limitation, pricing services personnel, employee relations personnel, legal services personnel, public relations personnel, supply personnel, earnings consolidation and analysis personnel, business performance personnel (balanced scorecard, expense, volume, shared services reporting) customer relations personnel and marketing administration personnel.
- g. The Hold Separate Trustee shall be permitted to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondents shall appoint a replacement Manager, subject to the approval of the Hold Separate Trustee, on the same

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terms and conditions as provided in subparagraph II.B.2 of this Hold Separate.

3. The Held Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Held Separate Business. Employees of the Held Separate Business shall include (i) all personnel described in subparagraph I.J.; and (ii) any persons hired from other sources. To the extent that any employees of the Held Separate Business leave or have left the Held Separate Business prior to the divestiture of the Assets to be Divested, the Manager, with the approval of the Hold Separate Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.
4. In connection with support services not included within the Held Separate Business:
 - a. Respondents shall offer and the Held Separate Business shall obtain the following services and products only from Respondents:
 - (1) National brand advertising and promotion programs;
 - (2) Federal and state regulatory policy development and compliance;
 - (3) Human resources administrative services;
 - (4) Environmental health and safety services, which develops corporate policies and insures compliance with federal and state regulations and corporate policies;
 - (5) Preparation of tax returns; and
 - (6) Audit services.
 - b. Respondents shall offer to the Held Separate Business any services and products that Respondents provide to their other businesses directly or through third party

Order

contracts, or that they have provided directly or through third party contracts to the businesses constituting the Held Separate Business at any time since October 1, 1999. The Held Separate Business may, at the option of the Manager with the approval of the Hold Separate Trustee, obtain such services and products from Respondents. The services and products that Respondents shall offer the Held Separate Business shall include, but shall not be limited to the following:

- (1) Refined fuels product trading and acquisition;
- (2) Wholesale engineering services, including engineering, design, and maintenance of terminals;
- (3) Convenience store category management;
- (4) Development of new POS systems;
- (5) Credit card processing;
- (6) Information systems, which constructs, maintains, and supports all SAP and other computer systems;
- (7) Medical services, including drug testing;
- (8) Public affairs, which provides media and community relations services;
- (9) Processing of accounts payable;
- (10) Security services;
- (11) Technical support;
- (12) Financial accounting services;
- (13) Aviation services;
- (14) Procurement of refinery supplies for the Mobil Torrance Refinery (*e.g.* catalysts, chemicals, repair services, maintenance);
- (15) Procurement of goods and services utilized in the ordinary course of business by the Held Separate Business;
- (16) Legal services;
- (17) Service station design, maintenance, and construction;
- (18) New product development services from Mobil Technical Center;

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- (19) Real estate services, including the identification and development of new sites (to be provided by Trammel Crow under existing contracts); and
 - (20) Any and all services and products relating to and including the distribution and sale of Jet Turbine Oils.
- c. In connection with services and products other than those listed in II.B.4.a., and including but not limited to those listed in II.B. 4.b., the Held Separate Business shall have, at the option of the Manager with the approval of the Hold Separate Trustee, the ability to acquire services and products from third parties unaffiliated with Respondents.
 - d. Except as otherwise provided in this Hold Separate, for such services and products provided pursuant to this subparagraph II.B.4., Respondents may charge the Held Separate Business the same amount, if any, charged by Respondents to their other businesses.
 - e. Respondents' personnel supplying services or products to the Held Separate Business pursuant to this subparagraph must retain and maintain any and all Material Confidential Information of the Held Separate Business on a confidential basis. Except as permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating or otherwise furnishing Material Confidential Information of the Held Separate Business to or with any person whose employment involves any of Respondents' businesses. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Material Confidential Information of the Held Separate Business.
5. Respondents shall cause the Hold Separate Trustee, the Manager, and each employee of the Held Separate

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Business having access to Material Confidential Information to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Material Confidential Information relating to the Held Separate Business on a confidential basis and, except as is permitted by this Hold Separate, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any of Respondents' businesses other than the Held Separate Business. These persons shall not be involved in any way in the management, production, distribution, sales, marketing, and financial operations of the competing products of Respondents.

6. No later than five (5) days after the date this Order to Hold Separate and Maintain Assets becomes final, Respondents shall establish written procedures, subject to the approval of the Hold Separate Trustee, covering the management, maintenance, and independence of the Held Separate Business consistent with the provisions of this Hold Separate.
7. No later than ten (10) days after the date this Order to Hold Separate and Maintain Assets becomes final, Respondents shall circulate to employees of the Held Separate Business and to Respondents' employees who are responsible for the sale or distribution of motor fuels in the United States, a notice of this Hold Separate and Consent Agreement, in the form attached as Attachment A.
8. The Hold Separate Trustee and the Manager shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.

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9. Respondents shall indemnify the Hold Separate Trustee and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Hold Separate Trustee's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Hold Separate Trustee or the Manager.
10. Respondents shall provide the Held Separate Business with sufficient financial resources:
 - a. as are appropriate in the judgment of the Hold Separate Trustee to operate the Held Separate Business at no less than current rates of operation (including, but not limited to, current rates of refinery production and product sales) and at no less than the rates of operation projected in the business plans of Respondents as of October 1, 1999 (including, but not limited to, the rates of refinery production and product sales projected in such business plans); provided that failure to achieve production or sales goals projected in Respondents' business plans shall not be deemed to be a violation of this Hold Separate,
 - b. to perform all maintenance to, and replacements of, the assets of the Held Separate Business,
 - c. to carry on capital projects and business plans (as reflected in plans dated no later than October 1, 1999) at their scheduled pace, and
 - d. to maintain the viability, competitive vigor, and marketability of the Held Separate Business.

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- e. Such financial resources to be provided to the Held Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; provided, however, that, consistent with the purposes of the Decision & Order contained in the Consent Agreement, the Hold Separate Trustee may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.
11. Except as provided in this Order to Hold Separate, Respondents shall not, during the Hold Separate Period, offer employees of the Held Separate Business positions with Exxon Mobil. Each Commission-approved acquirer of Assets to be Divested that are contained within the Held Separate Business shall have the option of offering employment to any employees of those Assets to be Divested, as described by subparagraphs I.J.1.a.- d., I.J.1.f.-g., and I.J.2. - 5, to the extent applicable. Respondents shall not interfere with the employment, by any Commission-approved acquirer of Assets to be Divested, of employees of those Assets to be Divested; shall not offer any incentive to such employees of any Assets to be Divested to decline employment with any Commission-approved acquirer of Assets to be Divested or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with any Commission-approved acquirer of Assets to be Divested including, but not limited to, any noncompete or confidentiality provisions of employment relating to the Assets to be Divested or other contracts that would affect the ability of such employees to be employed by any acquirer of Assets to be Divested, and the payment, or the transfer for the account of the employee, of all

Order

current and accrued bonuses, pensions and other current and accrued benefits to which such employees would otherwise have been entitled had they remained in the employment of the Respondents.

12. For a period of one (1) year commencing on the date each package of Assets to be Divested are divested and assigned, as appropriate, Respondents shall not employ or make offers of employment to employees of the Held Separate Business who have accepted offers of employment with any acquirer unless the individual has been terminated by the acquirer.
13. Notwithstanding the requirements of subparagraph 11, Respondents may offer a bonus or severance to employees included in the Held Separate Business that continue their employment with the Held Separate Business until termination of the Hold Separate Period (in addition to any other bonus or severance to which the employees would otherwise be entitled).
14. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Held Separate Business, the Hold Separate Trustee, the Manager, or any of its operations; provided, however, that Respondents shall exercise such direction and control over the Held Separate Business as is necessary to assure compliance with this Hold Separate, the Consent Agreement, and with all applicable laws, including, in consultation with the Hold Separate Trustee, continued oversight of the Held Separate Business' compliance with policies and standards concerning the safety, health, and environmental aspects of their operations and the integrity of their financial controls; and Respondents shall have the right to defend any legal claims, investigations or enforcement actions threatened or brought against any Held Separate Business.

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15. Except for the Manager, employees of the Held Separate Business, and support services employees involved in providing services to the Held Separate Business pursuant to subparagraph II.B.4 and except to the extent provided in subparagraph II.B.14, Respondents shall not permit any other of its employees, officers, or directors to be involved in the operations of the Held Separate Business.
16. Respondents shall maintain the viability, competitiveness, and marketability of the Held Separate Business; shall not sell, transfer, or encumber said assets (other than in the normal course of business or as required to comply with Respondents' obligations under the Consent Agreement); and shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Held Separate Business.
17. Respondents shall assure that employees of the Held Separate Business receive, during the Hold Separate Period, their salaries, all current and accrued bonuses, pensions and other current and accrued benefits to which those employees would otherwise have been entitled.
18. Except as required by law, and except to the extent that necessary information is exchanged in the course of consummating the Merger, negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence; complying with this Hold Separate or the Consent Agreement; overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Held Separate Business and the integrity of the Held Separate Business' financial controls; defending legal claims, investigations or enforcement actions threatened or

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brought against the Held Separate Business; or obtaining legal advice, Respondents' employees (excluding support services employees involved in providing support to the Held Separate Business pursuant to subparagraph II.B.4.) shall not receive, or have access to, or use or continue to use any Material Confidential Information, not in the public domain, of the Held Separate Business. Nor shall the Manager or employees of the Held Separate Business receive or have access to, or use or continue to use, any Material Confidential Information not in the public domain about Respondents and relating to Respondents' businesses, except such information as is necessary to maintain and operate the Held Separate Business. Respondents may receive aggregate financial information relating to the Held Separate Business to the extent necessary to allow Respondents to prepare United States consolidated financial reports, tax returns, reports required by securities laws, and personnel reports. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

19. Respondents and the Held Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the Hold Separate Trustee, of access and data controls for the Computer Networks and Systems to prevent unauthorized access to or dissemination of Material Confidential Information of the Held Separate Business, including, but not limited to, the opportunity by the Hold Separate Trustee, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate.

Order

III.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Hold Separate.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Hold Separate; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

Order

V.

IT IS FURTHER ORDERED that this Held Separate shall terminate at the earlier of:

- A. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. the day after the last of the divestitures required by the Consent Agreement is completed; provided, however, that certain assets controlled by the Held Separate Business shall be released upon the occurrence of the following events:
 1. When an Asset to be Divested that is included within the Held Separate Business is divested pursuant to the Consent Agreement, that asset shall cease to be held by the Held Separate Business;
 2. When the Exxon Northeast Marketing Assets are divested and Respondents have complied with subparagraphs IV.A., IV.B., IV.C., IV.D., IV.E., and IV.F. of the Decision & Order contained in the Consent Agreement, the Mobil Mid-Atlantic Marketing Assets are divested and Respondents have complied with subparagraphs V.A., V.B., V.C., V.D., V.E., and V.F. of the Decision & Order contained in the Consent Agreement, and the Mobil Texas Marketing assets have been divested and Respondents have complied with subparagraphs VI.A., VI.B., VI.C., VI.D., VI.E., VI.F., VI.G., and VI.H. of the Decision & Order contained in the Consent Agreement (or if Paragraph XV of the Consent Agreement is invoked, when Respondents have divested the Mobil Northeast Marketing Assets, the Exxon Mid-Atlantic Marketing Assets, or the Exxon Maine-Virginia Assets, as the case may be, and Respondents have complied with the applicable subparagraphs), then the Held Separate Business shall transfer the following assets to Exxon Mobil (to the

Order

- extent they have not been divested): Assets in the Mobil Texas Fuels Marketing NBU not required to be divested; assets in the Mid-Atlantic Fuels Marketing NBU not required to be divested; the Mobil New England, New York and Florida Fuels Marketing NBUs; and the Existing Business Units, Newly-constituted Support Service Units, and personnel identified in subparagraph I.J.6., except to the extent deemed necessary by the Hold Separate Trustee in accordance with the terms of this Hold Separate to support assets of the Held Separate Business, if any, which have not been divested;
3. When Mobil's interest in the Trans Alaska Pipeline System and either Mobil's interest in Colonial Pipeline or Exxon's interest in the Plantation Pipeline have been divested pursuant to Paragraphs IX and X of the Consent Agreement, then the Held Separate Business shall transfer the following assets to Exxon Mobil: Mobil Alaska Pipeline Company and Mobil's interest in the Colonial Pipeline Company if it has not been divested;
 4. When the Exxon California Refining and Marketing Assets have been divested and Respondents have complied with subparagraphs II.A., II.B., II.C., II.D., II.E., II.F., II.G., II.H., and II.I. of the Decision & Order contained in the Consent Agreement, then the Held Separate Business shall transfer the following assets to Exxon Mobil: Mobil's Team Mobil West; and
 5. When the Exxon Guam Assets have been divested pursuant to Paragraph III of the Consent Agreement, then the Held Separate Business shall transfer the following assets to Exxon Mobil: Mobil Guam Fuels Marketing Business.

By the Commission, Commissioner Leary not participating.

APPENDIX A

- I. The included support services required by Paragraph I.J.6 of this Hold Separate shall be provided to the Held Separate Business by support services units and personnel who have been selected or approved by the Manager, including those described and identified below:
- A. Mobil's East/Southwest Inventory - Gasolines Unit, which will (1) schedule and monitor fuels product deliveries to terminals within the NBUs and notify traders of any product acquisition needs beyond existing supply and exchange agreements (Respondents will use existing price formulas set forth in Appendix B (Confidential) to charge the Held Separate Business for any product deliveries the Held Separate Business may in its discretion request from Respondents), and (2) monitor and implement existing fuels product exchange agreements and enter into any new exchange agreements required by the Held Separate Business;
 - B. Mobil's existing Fuels Customer Support and Fuels Delivery Operations Control Center Units, which are located at the Malvern Corporate and Administrative Center, which will receive and process customer orders for Branded Fuels products, schedule trucks and deliveries to Retail Sites within the NBUs, and provide customer billing, collections and other customer services to the NBUs; it also will supply such services under contract to the Mobil's Midwest NBU (which is not part of the Held Separate Business);
 - C. Mobil's existing Fuels Pricing Unit, which will collect pricing data and recommend prices to the NBUs, subject to review by the Manager, with the exception of the personnel who are responsible for pricing fuels products for Mobil's Midwest NBU;
 - D. Mobil's existing Retail Operations & Information Services Unit, which will handle administration and retail accounting for company operated Retail Sites within the NBUs; it also will supply such services under contract to Mobil's Midwest NBU (which is not part of the Held Separate Business);
 - E. Mobil's existing Point of Sale ("POS") Support Unit, which will provide technology support services maintenance of POS and Speedpass systems; it will also supply such services under contract to the Mobil's Midwest NBU (which is not part of the Held Separate Business);
 - F. The following personnel from Mobil's existing Business & Performance Analysis Unit, who will provide competitive and financial performance analysis, support, and strategic planning for the Held Separate Business (e.g., balanced scorecards, volume, and shared services reporting) and to monitor the funds as described in Paragraph II.B.10 of the Hold Separate:

- Manager Business Performance/Analysis/CFO
 - Earnings Consolidation
 - Analysis/Planning
 - Capital/Cash Management
 - Expense Analysis
 - Volume Analysis
 - Balanced Scorecard
 - Shared Service Monitoring
 - Industry Analysis

K. Campbell
 J. O'Neill
 J. Cashion
 D. Monaghan
 W. Fine
 D. Hightower
 R. Long
 P. Greco
 J. Wadley;

G. The following person from Mobil's existing Global Manufacturing Development unit, who will conduct periodic review and analysis of Torrance Refinery operations data to optimize output:

- Manufacturing Manager

A. Johnson;

H. • Marketing Manager

A. Spiess

The Marketing Manager of the Held Separate Business will monitor the performance of outsourced contractors providing: (1) Operations Management for Convenience Stores, a service which is provided by a third party (Strasburger) under existing contracts; (2) Supplies and Inventory Management for convenience stores, which will be provided by a third party (McLane) under an existing contract; and (3) credit card processing, which is provided by a third party (First Data) under existing contracts; these third-party service providers will also be permitted to continue supplying similar services to Mobil's Midwest NBU (which is not part of the Held Separate Business) under the separate direction of Respondents' personnel. In addition, the Marketing Manager will provide guidance and direction to the following personnel in the Held Separate Business, who will provide or arrange for the provision of services to those businesses in connection with the implementation of marketing programs and policies, management of relationships with dealers and jobbers, and development and implementation of local and regional promotional activities based on local market factors:

- Customer Relations
- Retail Dealer Coordination
- Distributor Coordination
- Advertising/Programs
- Fuels Customer Support
- Real Estate Coordination
- Salary Field Operations

O. Williams
 R. Gavlick
 S. Lucas
 C. Colvett
 J. Bernard
 D. Diccico
 K. Kane
 (Strasburger Employee)

- I. • Distillate Manager K. Weir

The Distillate Manager will provide guidance and support directly and through other personnel for the sales and distribution of Mobil's branded and unbranded distillate products within the geographic areas covered by the Held Separate Business.

- J. The Held Separate Business will also include the following personnel who will provide or arrange for the provision of the following services to those businesses:

Employee relations services:

- Employee/Industrial Relations Manager R. Amrhein

Legal services:

- Managing Counsel D. Rogers

Public relations services:

- Public Affairs Manager B. Eaton

Information systems management:

- Systems Liaison P. President

Refined product trading, to the extent not acquired from Respondents or third parties:

- Product Trader C. Das

Authorize and direct maintenance and construction services provided to Retail Sites and terminals within the NBUs:

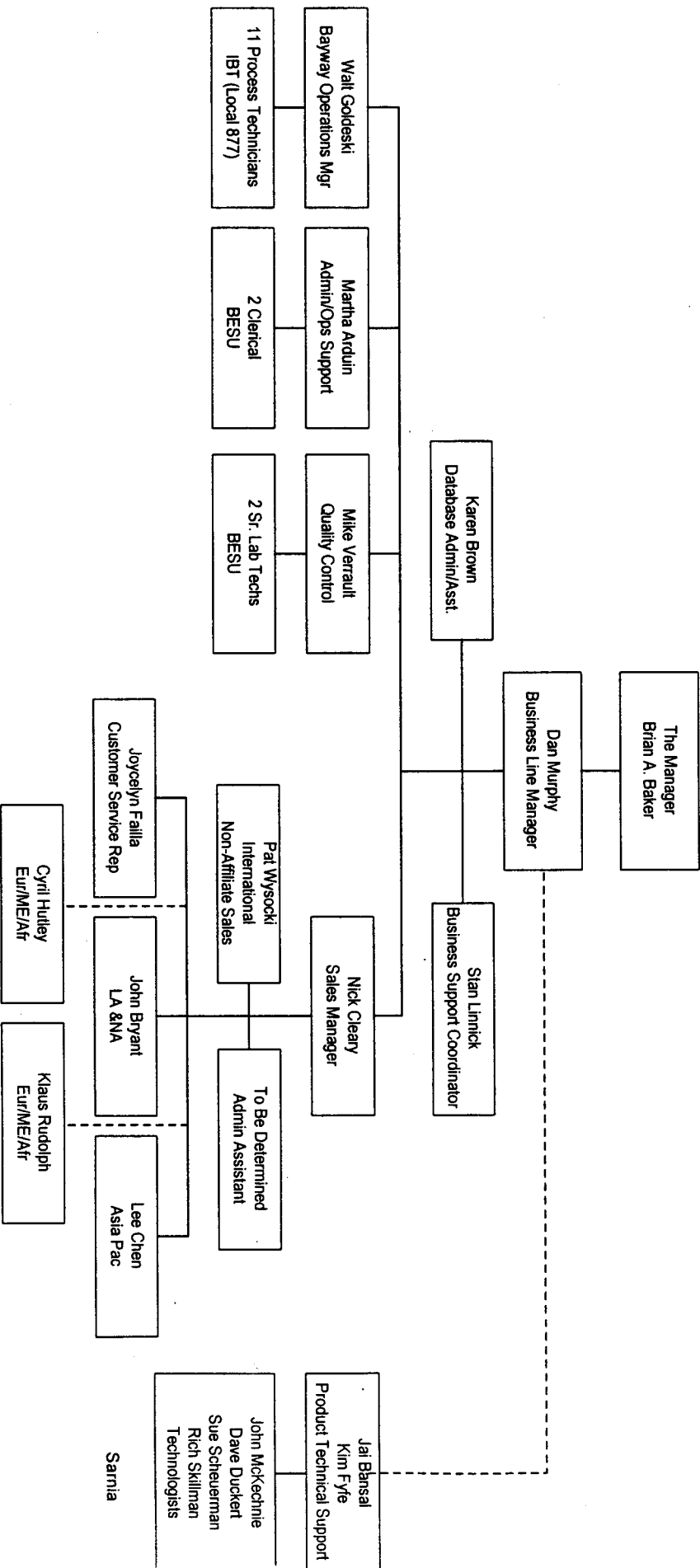
- Engineering/Maintenance Coordination L. Wyte

- II The Business Support Coordinator for the Exxon Jet Turbine Oil Business to be held separate described in subparagraph I.B.5. will be Stan Linnick.

APPENDIX B

[Redacted from Public Record Version]

Exxon Synthetic Aviation Turbine Oil Hold-Separate Organization



Key

IBT - International Brotherhood of Teamsters

BESU - Bayway Employee Salary Union

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

Exxon Corporation ("Exxon") and Mobil Corporation ("Mobil"), hereinafter referred to as Respondents (which includes the entity resulting from the merger of Exxon and Mobil), have entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission relating to the divestiture of certain assets and other relief.

As used herein, the term "Held Separate Business" means the businesses and personnel as defined in Paragraph I.J. of the Order to Hold Separate and Maintain Assets contained in the Consent Agreement. Under the terms of the Decision & Order contained in the Consent Agreement, Exxon and Mobil must divest certain packages of assets, some of which are included within the Held Separate Business, within nine to 12 months of the date Exxon and Mobil executed the Consent Agreement.

During the Hold Separate Period (which begins after the Order to Hold Separate and Maintain Assets becomes final and ends after Respondents have completed the required divestitures), the Held Separate Business shall be held separate, apart, and independent of Respondents' businesses. The Held Separate Business must be managed and maintained as a separate, ongoing business, independent of all other businesses of Respondents until Respondents have completed the required divestitures. All competitive information relating to the Held Separate Business must be retained and maintained by the persons involved in the operation of the Held Separate Business on a confidential basis. Such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other of Respondents' businesses, except as advised by legal counsel of the Held Separate Business. These persons involved in the operation of the Held Separate Business shall not be involved in any way in the management, production, distribution, sales, marketing, or financial operations of Respondents relating to competing products. Similarly, persons involved in similar activities in Respondents' businesses shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any similar information to or with any other person whose employment involves the Held Separate Business.

Any violation of the Consent Agreement may subject Respondents to civil penalties and other relief as provided by law.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on November 30, 1999.

I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) has issued a complaint (“Complaint”) alleging that the proposed merger of Exxon Corp. (“Exxon”) and Mobil Corp. (“Mobil”) (collectively “Respondents”) would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and has entered into an agreement containing consent orders (“Agreement Containing Consent Orders”) pursuant to which Respondents agree to have entered and be bound by a proposed consent order (“Proposed Order”) and a hold separate order that requires Respondents to hold separate and maintain certain assets pending divestiture (“Order to Hold Separate”). The Proposed Order remedies the likely anticompetitive effects arising from Respondents’ merger, as alleged in the Complaint. The Order to Hold Separate preserves competition in the markets for refining and marketing of gasoline, and in other markets, pending divestiture.

II. Description of the Parties and the Transaction

Exxon, which is headquartered in Irving, Texas, is one of the world’s largest integrated oil companies. Among its other businesses, Exxon operates petroleum refineries that make various grades of gasoline and lubricant base stock, among other petroleum products, and sells these products to intermediaries, retailers and consumers. Exxon owns four refineries in the United States; those four refineries can process approximately 1.1 million barrels of crude oil and other feedstocks daily.¹ Exxon owns or leases approximately 2,049 gasoline stations nationally and sells gasoline to distributors or dealers that operate another 6,475 retail outlets throughout the United States. During fiscal year 1998,

¹ A “barrel” is an oil industry measure equal to 42 gallons. “MBD” means thousands of barrels per day.

Analysis

Exxon had worldwide revenues of approximately \$115 billion and net income of approximately \$6 billion.

Mobil, which is headquartered in Fairfax, Virginia, is another of the world's largest integrated oil companies. Among its other businesses, Mobil operates petroleum refineries in the United States, which make gasoline, lubricant base stock, and other petroleum products, and sells those products throughout the United States. Mobil operates four refineries in the United States, which can process approximately 800 thousand barrels of crude oil and other feedstocks per day. About 7,400 retail outlets sell Mobil-branded gasoline throughout the United States. During fiscal year 1998, Mobil had worldwide revenues of approximately \$52 billion and net income of approximately \$2 billion.

On or about December 1, 1998, Exxon and Mobil entered into an agreement to merge the two corporations into a corporation to be known as Exxon Mobil Corp. This merger is one of several consolidations in this industry in recent years, including the combination of British Petroleum Co. plc and Amoco Corp. into BP Amoco plc; the pending combination of BP Amoco plc and Atlantic Richfield Co. (which is the subject of pending investigation by the Commission); the combination of the refining and marketing businesses of Shell Oil Co., Texaco Inc., and Star Enterprises; the combination of the refining and marketing businesses of Marathon Oil Co. and Ashland Oil Co., and the acquisition of the refining and marketing businesses of Unocal Corp. by Tosco Corp.

III. The Investigation and the Complaint

The Complaint alleges that consummation of the merger 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. The Complaint alleges that the merger will lessen competition in each of the following markets: (1) the marketing of gasoline in the Northeastern and Mid-Atlantic United States (including the States of Maine, New Hampshire, Vermont,

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Massachusetts, Rhode Island, Connecticut, and New York (collectively “the Northeast”), and the States of New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and the District of Columbia (collectively the “Mid-Atlantic”), and smaller areas contained therein); (2) the marketing of gasoline in five metropolitan areas in the State of Texas; (3) the marketing of gasoline in Arizona; (4) the refining and marketing of “CARB” gasoline (specially formulated gasoline required in California) in the State of California; (5) the bidding for and refining of jet fuel for the U.S. Navy on the West Coast; (6) the terminaling of light petroleum products in the Boston, Massachusetts, and Washington, D.C., metropolitan areas; (7) the terminaling of light petroleum products in the Norfolk, Virginia metropolitan area; (8) the transportation of refined light petroleum products to the inland portions of the States of Mississippi, Alabama, Georgia, South Carolina, North Carolina, Virginia, and Tennessee (*i.e.*, the portions more than 50 miles from ports such as Savannah, Charleston, Wilmington and Norfolk) (“inland Southeast”); (9) the transportation of crude oil from the north slope of the State of Alaska via the Trans Alaska Pipeline System (“TAPS”); (10) the importation, terminaling and marketing of gasoline and diesel fuel in the Territory of Guam; (11) the refining and marketing of paraffinic lubricant base oils in the United States and Canada; and (12) the worldwide manufacture and sale of jet turbine lubricants. To remedy the alleged anticompetitive effects of the merger, the Proposed Order requires Respondents to divest or otherwise surrender control of: (1) all of Mobil’s gasoline marketing in the Mid-Atlantic (New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and the District of Columbia), and all of Exxon’s gasoline marketing in the Northeast (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, and New York); (2) Mobil’s gasoline marketing in the Austin, Bryan/College Station, Dallas, Houston and San Antonio, Texas, metropolitan areas; (3) Exxon’s option to repurchase retail gasoline stores from Tosco Corp. in Arizona; (4) Exxon’s refinery located in Benicia, California (“Exxon Benicia Refinery”), and all of Exxon’s gasoline marketing in California; (5) the terminal operations of Mobil in Boston and in the Washington, D.C. area,

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and the ability to exclude a terminal competitor from using Mobil's wharf in Norfolk; (6) either Mobil's interest in the Colonial pipeline or Exxon's interest in the Plantation pipeline; (7) Mobil's interest in TAPS; (8) the terminal and retail operations of Exxon on Guam; (9) a quantity of paraffinic lubricant base oil equivalent to the amount of paraffinic lubricant base oil refined in North America that is controlled by Mobil; and (10) Exxon's jet turbine oil business. The terms of the divestitures and other provisions of the Proposed Order are discussed more fully in Section IV below.

The Commission's decision to issue the Complaint and enter into the Agreement Containing Consent Orders was made after an extensive investigation in which the Commission examined competition and the likely effects of the merger in the markets alleged in the Complaint and in several other markets, including the worldwide markets for exploration, development and production of crude oil; markets for crude oil exploration and production in the United States and in parts of the United States; markets for natural gas in the United States; markets for a variety of petrochemical products; and markets for pipeline transportation, terminaling or marketing of gasoline or other fuels in sections of the country other than those alleged in the Complaint. The Commission has not found reason to believe that the merger would result in likely anticompetitive effects in markets other than the markets alleged in the Complaint.

The Commission conducted the investigation leading to the Complaint in coordination with the Attorneys General of the States of Alaska, California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Texas, Vermont, Virginia and Washington. As a result of that joint effort, Respondents have entered into agreements with the States of Alaska, California, Delaware, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Virginia and Washington, and the District

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of Columbia, settling charges that the merger would violate both state and federal antitrust laws. The Complaint alleges in 12 counts that the merger would violate the antitrust laws in several different lines of business and sections of the country, each of which is discussed below. The analysis applied in each market generally follows the analysis set forth in the FTC and U.S. Department of Justice *Horizontal Merger Guidelines* (1997) (“*Merger Guidelines*”). The efficiency claims of the Respondents, to the extent they relate to the markets alleged in the Complaint, are small and speculative compared to the magnitude and likelihood of the potential harm, and would not restore the competition lost as a result of the merger even if the efficiencies were achieved.

A. Count I – Marketing of Gasoline in the Northeast and Mid-Atlantic

Exxon and Mobil today are two of the largest marketers of gasoline from Maine to Virginia, and would be the largest marketer of gasoline in this region after the merger, but for the remedy specified in the Proposed Order. The merging companies are direct and significant competitors in at least 39 metropolitan areas in the Northeast and Mid-Atlantic;² in each of these areas,

² Hartford, New Haven-Bridgeport-Stamford-Waterbury-Danbury, New London-Norwich, CT; Dover, Wilmington-Newark, DE; Washington, DC; Bangor, Lewiston-Auburn, Portland, ME; Baltimore, MD; Barnstable-Yarmouth, Boston-Worcester-Lawrence-Lowell-Brockton, MA; Atlantic-Cape May, Bergen-Passaic, Jersey City, Middlesex-Somerset-Hunterdon, Monmouth-Ocean, Newark, Trenton, Vineland-Millville-Bridgeton, NJ; Albany-Schenectady-Troy, Dutchess, Nassau-Suffolk, New York, Newburgh, NY; Allentown-Bethlehem-Easton, Altoona, Harrisburg-Lebanon-Carlisle, Johnstown, Lancaster, Philadelphia, Reading, Scranton-Wilkes Barre-Hazleton, State College, York, PA; Providence-Warwick-Pawtucket, RI; Norfolk-Virginia Beach-Newport News,

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and in each of the States in the Northeast and Mid-Atlantic, the merger would result in a market that is at least moderately concentrated and would significantly increase concentration in that market.³ Nineteen of these 39 metropolitan areas would be

Richmond-Petersburg, VA; Burlington, VT. These areas are defined, variously, as “Metropolitan Statistical Areas” (“MSAs”), “Primary Metropolitan Statistical Areas” (“PMSAs”), and “New England County Metropolitan Areas” (“NECMAs”) by the Census Bureau.

³ The Commission measures market concentration using the Herfindahl-Hirschman Index (“HHI”), which is calculated as the sum of the squares of the shares of all firms in the market. *Merger Guidelines* § 1.5. Markets with HHIs between 1000 and 1800 are deemed “moderately concentrated,” and markets with HHIs exceeding 1800 are deemed “highly concentrated.” Where the HHI resulting from a merger exceeds 1000 and the merger increases the HHI by at least 100, the merger “potentially raise[s] significant competitive concerns depending on the factors set forth in Sections 2-5 of the Guidelines.” *Merger Guidelines* § 1.51.

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highly concentrated as a result of this merger.⁴ On average, the four top firms in each metropolitan area would have 73% of sales; the top four firms in the Northeast and Mid-Atlantic as a whole (Exxon Mobil, Motiva,⁵ BP Amoco, and Sunoco) would on average have 66% of each of these metropolitan areas.

The Complaint alleges that the marketing of gasoline is a relevant product market, and that metropolitan areas and areas contained within them are relevant geographic markets. The Commission used metropolitan statistical areas (“MSAs”) as a reasonable approximation of geographic markets for gasoline marketing in *Shell Oil Co.*, C-3803 (1998), and *British Petroleum Co.*, C-3868 (1999). As described below, the evidence in this investigation suggests that pricing and consumer search patterns

⁴ Hartford, New London-Norwich, CT; Dover, Wilmington-Newark, DE; Washington, DC; Bangor, Portland, ME; Barnstable-Yarmouth, MA; Bergen-Passaic, Jersey City, Monmouth- Ocean, Trenton, NJ; Albany-Schenectady-Troy, Newburgh, NY; Allentown-Bethlehem-Easton, Altoona, Johnstown, State College, PA; Burlington, VT. In each of these MSAs, the increase in concentration exceeds 100 HHI points. “Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise. The presumption may be overcome by a showing that factors set forth in Sections 2-5 of the *Guidelines* make it unlikely that the merger will create or enhance market power or facilitate its exercise, in light of market concentration and market shares.” *Merger Guidelines* § 1.51.

⁵ Motiva LLC is the refining and marketing joint venture between Shell Oil Co., Texaco Inc. and Saudi Aramco, and sells gasoline under the “Shell” and “Texaco” names in the Eastern United States. Equilon LLC, a refining and marketing joint venture between Shell and Texaco, sells gasoline under the “Shell” and “Texaco” names in the Western United States.

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may indicate smaller geographic markets than MSAs as defined by the Census Bureau. To that extent, using MSAs or counties to define geographic markets likely understates the relevant levels of concentration.⁶

The Commission has found reason to believe that the merger would significantly reduce competition in the moderately and highly concentrated markets that would result from this merger. A general understanding of the channels of trade in gasoline marketing is necessary to understand the Commission's analysis of the competitive issues and of the Proposed Order. Gasoline is sold to the general public through retail gas stations of four types: (1) *company operated* stores, where the branded oil company owns the site and operates it using its own employees; (2) *lessee dealer* stores, where the branded company owns the site but leases it to a franchised dealer; (3) *open dealers*, who own their own stations but purchase gasoline at a DTW price from the branded company; and (4) "*jobber*" or *distributor* stores, which are supplied by a distributor.

Branded oil companies set the retail prices of gasoline at the stores they operate, and sometimes set those prices on a station-by-station basis. Lessee dealers and open dealers generally purchase from the branded company at a delivered price ("dealer tank wagon" or "DTW") that the branded supplier likewise might set on a station-by-station basis. In the

⁶ Exxon and Mobil compete in at least 134 counties in 39 MSAs in the Northeast and Mid-Atlantic; 61 of those counties are highly concentrated with significant increases in concentration; 56 are moderately concentrated with significant increases in concentration; and in only five counties (if defined as geographic markets) would the merger not result in increases in concentration exceeding *Guidelines* thresholds. *See FTC v. PPG Industries, Inc.*, 798 F.2d 1500, 1505 (D.C. Cir. 1986) (use of data in broader market to calculate market concentration is acceptable where market of concern would be more concentrated).

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Northeast and Mid-Atlantic, DTW prices charged by Exxon, Mobil and their major competitors are typically set using “price zones” established by the supplier. Price zones, and the prices used within them, take account of the competitive conditions faced by particular stations or groups of stations. There might be 10 or more price zones established by an individual oil company in a metropolitan area.

Distributors or jobbers typically purchase branded gasoline from the branded company at a terminal (paying a terminal “rack” price), and deliver the gasoline themselves to jobber-supplied stations at prices or transfer prices set by the distributor.⁷

In much of the Northeast and Mid-Atlantic, Exxon, Mobil and their principal competitors (Motiva, BP Amoco, and Sunoco) use delivered pricing and price zones to set DTW prices based on the level of competition in the immediately surrounding area. These DTW prices generally are unrelated to the cost of hauling fuel from the terminal to the retail store. Gasoline is a homogeneous product, and retail prices are observable (wholesale prices and retail sales volumes are also frequently known to firms in the industry). By monitoring the retail prices (and volumes) of their competitors in the immediate area, branded companies can and do adjust their DTW prices in order to take advantage of higher prices in some neighborhoods, without having to raise price throughout a metropolitan area as a whole.

The use of price zones in the manner described above indicates that these competitors set their prices on the basis of their competitors’ prices, rather than on the basis of their own costs. This is an earmark of oligopolistic market behavior. Thus, Exxon,

⁷ The Commission has found evidence in its investigations in this industry indicating that some branded companies have experimented with rebates and discounts to jobbers based on the location of particular stations, thereby replicating the effect of price zones in the jobber class of trade.

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Mobil and their principal competitors have some ability to raise their prices profitably, and have a greater ability to do so when they face fewer and less price-competitive firms in highly local markets. The effects of oligopolistic market structures (where firms base their pricing decisions on their rivals' prices, and recognize that their prices affect their sales volume) have been recognized in this industry. See *Petroleum Products Antitrust Litigation*, 906 F.2d 432, 443, 444 (9th Cir. 1990) (examining California gasoline market from 1968 to 1973), *cert. denied sub nom. Chevron Corp. v. Arizona*, 500 U.S. 959 (1991):

. . . [A]s the number of firms in a market declines, the possibilities for interdependent pricing increase substantially. In determining whether to follow a unilateral price increase by a competitor, a firm in a relatively concentrated market will recognize that, because its pricing and output decisions have an effect on market conditions and will generally be watched by its competitors, there is less likelihood that any shading would go undetected or be ignored. . . . On the other hand, the firm may recognize that the higher price [charged by its competitor] is one that would produce higher profits. It may therefore decide to follow the price increase, knowing that the other firms will likely see things the same way

We recognize that such interdependent pricing may often produce economic consequences that are comparable to those of classic cartels.

Exxon and Mobil are each other's principal competitors in many of these markets, and the elimination of Mobil as an independent competitor is likely to result in higher prices.⁸

⁸ In finding reason to believe that this merger likely would reduce competition, the Commission has not, in the context of this investigation, concluded that these practices of themselves violate the antitrust laws or constitute unfair methods of competition

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Market incumbents also use price zones to target entrants without having to lower price throughout a broader marketing area. With a large and dispersed network of stores, an incumbent can target an entrant by cutting price at a particular store, without cutting prices throughout a metropolitan area. By targeting price-cutting competitors, incumbents can (and have) deterred entrants from making significant investments in gasoline stations (which are specialized, sunk cost facilities) and thus from expanding to a scale at which the entrant could affect price throughout the broader metropolitan area.

While branded distributors historically have moderated the effects of zone pricing through arbitrage, distributors' ability to do so is increasingly limited in the Northeast and Mid-Atlantic by major branded companies' efforts to limit their distribution to direct channels, especially in major metropolitan areas. The merger would reduce interbrand competition through the elimination of one independent supplier; the Commission evaluated the effect of that reduction in interbrand competition in the context of the contemporaneous reduction in intrabrand competition that it found in these markets.

Entry appears unlikely to constrain noncompetitive behavior in the Northeast and Mid-Atlantic. New gas station sites are difficult to obtain in the Northeast and Mid-Atlantic, and the evidence in this investigation suggests that entry through the construction of new stations is unlikely to occur in a manner sufficient to constrain price increases by incumbents. As in *British Petroleum Co.*, C-3868, the Commission has not seen substantial evidence that jobbers or open dealers are likely to switch to new entrants in

within the meaning of Section 5 of the FTC Act. Rather, evidence of market behavior provides the Commission with reason to believe that these moderately and highly concentrated markets are not fully competitive even prior to the merger, and therefore that the merger likely would reduce competition in these markets whether or not the post-merger market was highly concentrated.

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the event of a small price increase. Therefore, the Commission has found it unlikely that a new entrant might enter a market by converting such stations in a manner that would meaningfully constrain the behavior of incumbents.

The merger is likely to reduce competition in Northeastern and Mid-Atlantic gasoline markets and could result in a price increase of 1% or more. A 1% price increase on gasoline sold in the Northeast and Mid-Atlantic (and in the Texas and Arizona markets discussed below) would cost consumers approximately \$240 million annually. As described below, the Proposed Order seeks to preserve competition by requiring Respondents to divest all branded stations of Exxon or Mobil throughout the Northeast and Mid-Atlantic: (1) all Exxon branded gas stations (company operated, lessee dealer, open dealer and jobber) in Maine, New Hampshire, Vermont, Rhode Island, Connecticut, and New York, and (2) all Mobil branded stations in New Jersey, Pennsylvania, Delaware, Maryland, Virginia and the District of Columbia.

B. Count II – Marketing of Gasoline in Metropolitan Areas in Texas

Exxon and Mobil compete in the marketing of gasoline in several metropolitan areas in Texas, and in five of those metropolitan areas (Austin, Bryan/College Station, Dallas, Houston and San Antonio) the merger would result in a moderately or highly concentrated market. The evidence collected in the investigation indicates that market conditions in these Texas markets resemble those found in the Northeast and Mid-Atlantic, particularly in the use of delivered pricing and zone pricing to coordinate prices and deter entry. The Proposed Order therefore requires Respondents to divest and assign Mobil's gasoline marketing business in these areas, as described below.

C. Count III – Marketing of Gasoline in Arizona

Mobil markets motor gasoline in Arizona. Exxon gasoline is marketed in Arizona by Tosco Corporation, which acquired

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Exxon's Arizona marketing assets and businesses and the right to sell Exxon branded gasoline in 1994. Gasoline marketing in Arizona is moderately concentrated.

Pursuant to the agreement under which Exxon sold its Arizona assets to Tosco, Exxon retains the option of repurchasing the retail gasoline stores sold to Tosco in the event Tosco were to convert the stations from the "Exxon" brand to another brand (including another brand owned by Tosco). The merger creates the risk that competition between the merged company and Tosco (selling Exxon branded gasoline) could be reduced by restricting Tosco's incentive and ability to compete against Mobil by converting the stores to a brand owned by Tosco. The Proposed Order terminates Exxon's option to repurchase these stations.

D. Count IV – Refining and Marketing of CARB Gasoline

Exxon and Mobil both refine motor gasoline for use in California, which requires that motor gasoline used in that State meet particularly stringent pollution specifications mandated by the California Air Resources Board ("CARB," hence "CARB gasoline"). More than 95% of the CARB gasoline sold in California is refined by seven firms (Chevron, Tosco, Equilon, ARCO, Exxon, Mobil and Ultramar Diamond Shamrock), all of which operate refineries in California. Those seven firms also control more than 90% of retail sales of gasoline in California through gas stations under their brands.

The Complaint alleges that the refining and marketing of CARB gasoline is a product market and line of commerce. Motorists of gasoline-fueled automobiles are unlikely to switch to other fuels in response to a small but significant and nontransitory increase in the price of CARB gasoline, and only CARB gasoline may be sold for use in California. As described below, the refining and marketing of gasoline in California is tightly integrated; refiners that lack marketing in California, and marketers that lack refineries on the West Coast, do not effectively constrain the price and output decisions of incumbent refiner-marketers.

Analysis

California is a section of the country and geographic market for CARB gasoline refining and marketing because the refiner-marketers in California can profitably raise prices by a small but significant and nontransitory amount without losing significant sales to other refiners. The next closest refineries, located in the U.S. Virgin Islands and in Texas and Louisiana, do not supply CARB gasoline to California except during supply disruptions at California refineries, and are unlikely to supply CARB gasoline to California in response to a small but significant and nontransitory increase in price because of the price volatility risks associated with opportunistic shipments and the small number of independent retail outlets that might purchase from an out-of-market firm attempting to take advantage of a price increase by incumbent refiner-marketers.

To a much greater extent than in many other parts of the country, the seven refiner marketers in California own their stations, and operate through company-operated stations, lessee dealers and open dealers, rather than through distributors.⁹ The marketing practices described in the Northeast and Mid-Atlantic, *see* Section III.A above, are employed in California and are reinforced by the refiner-marketers' more complete control of the marketing channel. One effect of the close integration between refining and marketing in California is that refiners outside the West Coast cannot easily find outlets for imported cargoes of CARB gasoline, since nearly all the outlets are controlled by incumbent refiner-marketers. Likewise, the extensive integration of refining and marketing makes it more difficult for the few non-integrated marketers to turn to imports as a source of supply, since individual independents lack the scale to import cargoes

⁹ Exxon is unique among these firms in operating primarily through jobbers in California. Exxon also differs from its competitors in that a substantial portion of its refinery output is not sold under the Exxon name, but is sold to non-integrated marketers and through other channels.

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economically and thus must rely on California refiners for their usual supply. The Commission's investigation indicated that vertical integration and the resulting lack of independent import customers, rather than the cost of imports, is the principal barrier to supply from outside the West Coast.

As measured by refinery capacity, the merger will increase the HHI for CARB gasoline refining capacity on the West Coast by 171 points to 1699, at the high end of the "moderately concentrated" range of the *Merger Guidelines*. The *Guidelines*' "numerical divisions [of HHI ranges] suggest greater precision than is possible with the available economic tools and information. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues." *Id.* § 1.5.

CARB gasoline is a homogeneous product, and (as in the Northeast and Mid-Atlantic) wholesale and retail prices are publicly available and widely reported to the industry. Integrated refiner-marketers carefully monitor the prices charged by their competitors' retail outlets, and therefore readily can identify firms that deviate from a coordinated or collusive price.

Entry by a refiner or marketer is unlikely to be timely, likely, and sufficient to defeat an anticompetitive price increase because new refining capacity requires substantial sunk costs. Retail entry is likewise difficult and costly, particularly at a scale that would support supply from an out-of-market refinery.

The merger could raise the costs of CARB gasoline substantially; a 1% price increase would cost California consumers more than \$100 million annually. To remedy the harm, the Proposed Order requires the Respondents to divest Exxon's Benecia refinery, which refines CARB gasoline, and Exxon's marketing in California, as described more fully below. This divestiture will eliminate the refining overlap in the West Coast market otherwise presented by the merger.

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E. Count V – Navy Jet Fuel on the West Coast

The U.S. Navy requires a specific formulation of jet fuel that differs from commercial jet fuel and jet fuel used in other military applications. Three refiners, including Exxon and Mobil, have bid to supply the Navy on the West Coast in recent years. The merger will eliminate one of these firms as an independent bidder, raising the likelihood that the incumbents could raise prices by at least a small amount, since other bidders are unlikely to enter the market. The divestiture of Exxon's Benicia refinery, described below, resolves this concern.

F. Count VI – Terminaling of Light Petroleum Products in Metropolitan Boston and Washington

Petroleum terminals are facilities that provide temporary storage of gasoline and other petroleum products received from a pipeline or marine vessel, and then redeliver these products from the terminal's storage tanks into trucks or transport trailers for ultimate delivery to retail gasoline stations or other buyers. Terminals provide an important link in the distribution chain for gasoline between refineries and retail service stations. There are no substitutes for petroleum terminals for providing terminaling services.

Count VI of the Complaint identifies two metropolitan areas that are relevant sections of the country (*i.e.*, geographic markets) in which to analyze the effects of the merger on terminaling: metropolitan Boston, Massachusetts and Washington, D.C. Exxon and Mobil both operate terminals that supply both of these metropolitan areas with gasoline and other light petroleum products.

The Complaint charges that the terminaling of gasoline and other light petroleum products in each of these metropolitan areas is highly concentrated, and would become significantly more concentrated as a result of the merger. Entry into the terminaling of gasoline and other light petroleum products in each of these

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metropolitan areas is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects that may result from the merger.¹⁰ Paragraphs VII and VIII of the Proposed Order therefore require Respondents to divest Mobil's Boston and Manassas, Virginia, terminals.

G. Count VII – Terminaling of Gasoline in Norfolk, Virginia

The Complaint charges that terminaling of gasoline and other light petroleum products is highly concentrated in the Norfolk, Virginia area. Exxon currently terminals gasoline in Norfolk, although Mobil does not. Mobil does terminal other light petroleum products there, and another terminaling firm, TransMontaigne, on occasion uses Mobil's wharf to receive gasoline shipments. Since TransMontaigne terminals gasoline in competition with Exxon, the merger would create or enhance Mobil's incentive to deny TransMontaigne access to Mobil's dock or increase the cost of such access, thereby limiting TransMontaigne's ability to compete against Exxon in the terminaling of gasoline. The Proposed Order remedies this effect of the merger.

H. Count VIII – Transportation of Refined Light Petroleum Products to the Inland Southeast

The inland Southeast receives essentially all of its refined light petroleum products (including gasoline, diesel fuel and jet fuel) from either the Colonial pipeline or the Plantation pipeline. These two pipelines largely run parallel to each other from Louisiana to Washington, D.C., and directly compete to provide petroleum product transportation services to the inland Southeast. Mobil owns approximately 11 percent of Colonial and has representation

¹⁰ The Commission has found reason to believe that terminal mergers would be anticompetitive on prior occasions. *E.g.*, *British Petroleum Co.*, C-3868; *Shell Oil Co.*; *Texaco Inc.*, 104 F.T.C. 241 (1984); *Chevron Corp.*, 104 F.T.C. 597 (1984).

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on the Colonial Board of Directors. Exxon owns approximately 49 percent of Plantation, is one of Plantation's two shareholders, and has representation on Plantation's Board.

The proposed transaction would put the merged entity in a position to participate in the governance of both pipelines, and to receive confidential competitive information of each pipeline. Through its position as one of Plantation's two shareholders, Respondents could prevent Plantation from taking actions to compete with Colonial. As a result, the merger is likely substantially to lessen competition, including price and service competition, between the two pipelines. The Commission has twice previously recognized that control of overlapping interests in these two pipelines might substantially reduce competition in the market for transportation of light petroleum products to this section of the country. *Shell Oil Co.*, C-3803; *Chevron Corp.*, 104 F.T.C. 597, 601, 603. To prevent competitive harm from the merger, Section IX of the Proposed Order requires Respondents to divest to a third party or parties the Exxon or Mobil pipeline interest.

I. Count IX – Transportation of Alaska North Slope Crude Oil

Exxon and Mobil are two of the seven owners of the Trans Alaska Pipeline System ("TAPS"), which is the only means of transporting crude oil from the Alaska North Slope ("ANS") to port in Valdez, Alaska. ANS crude is shipped primarily (but not exclusively) to refineries in California and Washington State. A relatively small amount of ANS crude is used within Alaska, and some ANS is sold to refineries in Asia. Exxon owns 20% of TAPS, while Mobil owns 3%. The owners of TAPS are entitled to capacity on the pipeline (which they can resell) in proportion to their ownership interests. Some TAPS owners – Mobil, in particular – have discounted their tariffs in an effort to attract additional shippers.

Exxon and Mobil both have available capacity on TAPS, *i.e.*, capacity not needed to carry their own production. Based on

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available capacity, the merger would increase the HHI by 268, to 5103. The merger would eliminate Mobil, a significant discounter on TAPS, as an independent firm, and reduce Exxon's incentives to discount TAPS tariffs. Entry is unlikely to defeat this price increase, since a second crude oil pipeline is highly unlikely to be built. In the absence of the Proposed Order, the merger could raise costs to purchasers of ANS crude oil by \$3.5 million annually. The Proposed Order eliminates this risk by requiring the Respondents to divest Mobil's interest in TAPS.

J. Count X – Terminaling and Marketing of Gasoline and other Light Petroleum Products in Guam

Gasoline and diesel fuel are supplied into Guam, primarily from Singapore, into terminals on Guam owned by Mobil, Exxon and Shell, who are the principal marketers of gasoline on Guam. Terminal capacity is essential to light petroleum products marketing on Guam. Consumers of gasoline have no alternative but to buy gasoline on Guam. Accordingly, the relevant market to analyze the transaction is the importation, terminaling and marketing of gasoline on Guam. Mobil and Exxon are the two largest marketers on Guam. The market is highly concentrated. The merger will raise the HHI by more than 2800 points to 7400, measured by station count; Exxon Mobil would have 36 of Guam's 43 stations, or 84% of stations.

The market is subject to coordination. There are three companies, and the merger would reduce their number to two. The product is homogeneous, and prices are readily observed. New entry is unlikely to defeat an anticompetitive price increase. An entrant would require sufficient terminal capacity and enough retail outlets to be able to buy gasoline at the tanker-load level, or 350,000 barrels. Terminal capacity of this scale is unavailable in Guam. In 1988 a firm attempted to enter Guam relying on publicly available terminaling; it exited within seven years, and sold its four stations to Mobil.

Analysis

Section III of the Proposed Order restores competition by requiring Respondents to divest Exxon's terminal and retail assets on Guam.

L. Count XI – Paraffinic Base Oil in the United States and Canada

Paraffinic base oil is a refined petroleum product that forms the foundation of most of the world's finished lubricants. Base oil is mixed with chemical additives and forms finished lubricants, such as motor oil and automatic transmission fluid. Most base oil is used to make products that lubricate engines, but base oil can be mixed with additives to create a large variety of finished products like newspaper ink or hydraulic fluid.¹¹

Currently Exxon produces 45.9 MBD of paraffinic base oil in North America. Mobil controls 23.8 MBD of base oil production. A combined Exxon-Mobil would control 35 percent of the base oil produced in North America. As the largest base oil producer in the United States and Canada, Exxon already dominates the base oil market. With the addition of Mobil's sizeable capacity, Exxon would have even greater control over base oil pricing.

Exxon is the price leader in base oil in the United States and Canada. Other base oil producers do not expand production to take advantage of Exxon price increases. Imports do not increase when United States prices increase because transportation costs are too great. Entry into the base oil market requires large capital investments and would be unlikely to have any effect within the next two years.

¹¹ Other types of base oil, including naphthenic and synthetic base oils, are not substitutes for paraffinic base oil because the users of paraffinic base oil would not switch to other base oils in the event of a small but significant, nontransitory increase in price for paraffinic base oils.

Analysis

The Proposed Order remedies the likely effects of the likely merger by requiring Respondents to surrender control of a quantity of base oil production equivalent to Mobil's production in the United States.

M. Count XII – Jet Turbine Oil

Jet turbine oil (also known as ester-based turbine oil) is used to lubricate the internal parts of jet engines used to power aircraft. Exxon and Mobil dominate the sales of jet turbine oil, with approximately equal shares that, combined, account for 75% of the worldwide market (defined broadly), and approach 90% of worldwide sales to commercial airlines.

Entry into the development, production and sale of jet turbine oil is not likely to occur on a timely basis, in light of the time required to develop a jet turbine oil and to obtain the necessary approvals and qualifications from the appropriate military and civilian organizations. The merger would eliminate the direct competition between Exxon and Mobil, and create a virtual monopoly in sales to commercial airlines. The Proposed Order remedies the effect of the merger by requiring Respondents to divest Exxon's jet turbine oil business.

IV. Resolution of the Competitive Concerns

On November 30, 1999, the Commission provisionally entered into the Agreement Containing Consent Orders with Exxon and Mobil in settlement of a Complaint. The Agreement Containing Consent Orders contemplates that the Commission would issue the Complaint and enter the Proposed Order and the Order to Hold Separate.

A. General Terms

Each divestiture or other disposition required by the Proposed Order must be made to an acquirer that receives the prior approval of the Commission and in a manner approved by the Commission,

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and must be completed within nine months of executing the Agreement Containing Consent Orders (except that the divestiture of the Benicia Refinery and Exxon marketing in California must be completed within twelve months of executing the Agreement Containing Consent Orders).

Respondents are required to provide the Commission with a report of compliance with the Proposed Order every sixty (60) days until the divestitures are completed, and annually for a period of 20 years.

In the event Respondents fail to complete the required divestitures and other obligations in a timely manner, the Proposed Order authorizes the Commission to appoint a trustee or trustees to negotiate the divestiture of either the divestiture assets or of “crown jewels,” alternative asset packages that are broader than the divestiture assets. The crown jewel for the Exxon Northeastern Marketing Assets is Mobil’s marketing in the same area; for the Mobil Mid-Atlantic Marketing Assets, Exxon’s marketing in the same area¹²; for the Exxon California Refining and Marketing Assets, the Mobil California Refining and Marketing Assets; for the Mobil Texas Marketing Assets, the Exxon Texas Marketing Assets; for Mobil’s interest in TAPS, Exxon’s interest in TAPS; for the paraffinic base oil to be sold, Mobil’s Beaumont Refinery; and for Exxon’s Jet Turbine Oil Business, Mobil’s Jet Turbine Oil Business. In each case, the crown jewel is a significantly larger asset package than the divestiture assets.

¹² The “crown jewel” divestiture would include the exclusive right to use the Exxon or Mobil name (as the case may be) in the pertinent States for at least 20 years. If Respondents fail to divest both the Exxon Northeast Marketing Assets and the Mobil Mid-Atlantic Marketing Assets, the Commission may direct the trustee to divest all of Exxon’s marketing from Maine to Virginia.

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Respondents have also agreed to the entry of an Order to Hold Separate and Maintain Assets, and the Commission has entered that Order. Under the terms of that Order, until the divestitures of the Benicia Refinery, marketing assets, base oil production and jet turbine oil business have been completed, Respondents must maintain Mobil's Northeastern, Mid-Atlantic and Texas fuels marketing businesses, Mobil's California refining and marketing businesses, and Exxon's ester based turbine oil business as separate, competitively viable businesses, and not combine them with the operations of the merged company. Under the terms of the Proposed Order, Respondents must also maintain the assets to be divested in a manner that will preserve their viability, competitiveness and marketability, and must not cause their wasting or deterioration, and cannot sell, transfer, or otherwise impair the marketability or viability of the assets to be divested. The Proposed Order and the Hold Separate Order specify these obligations in greater detail.

To avoid conflicts between the Proposed Order and the State consent decrees, the Commission has agreed to extend the time for divesting particular assets if all of the following conditions are satisfied: (1) Respondents have fully complied with the Proposed Order; (2) Respondents submit a complete application in support of the divestiture of the assets and businesses to be divested; (3) the Commission has in fact approved a divestiture; but (4) Respondents have certified to the Commission within ten days after the Commission's approval of a divestiture that a State has not approved that divestiture. If these conditions are satisfied, the Commission will not appoint a trustee or impose penalties for an additional sixty days, in order to allow Respondents either to satisfy the State's concerns or to produce an acquirer acceptable to the Commission and the State.¹³ If at the end of that additional

¹³ The consent decree between Respondents and the States of Connecticut, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Vermont and Virginia provides that a State that objects to a proposed acquirer must petition the court before

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period, the State remains unsatisfied, the Commission may appoint a trustee and seek penalties for noncompliance.

B. Gasoline Marketing in the Northeast and Mid-Atlantic

Sections IV and V of the Proposed Order are intended to preserve competition in gasoline marketing in the Northeast and Mid-Atlantic by requiring Respondents to divest to an acquirer approved by the Commission all retail gasoline stations owned by Exxon (or leased by Exxon from another person) in Maine, Massachusetts, New Hampshire, Vermont, Rhode Island, Connecticut, and New York (Proposed Order ¶ IV.A), and to assign to the acquirer of those stations all dealer leases and franchise agreements and all supply contracts with branded jobbers (¶ IV.B). The Proposed Order defines “Existing Lessee Agreements” and “Existing Supply Agreements” broadly, to include the totality of the relationship between Respondents and the dealers and distributors to be assigned.¹⁴ Respondents will divest and assign similar interests in all Mobil stations in New Jersey, Pennsylvania, Delaware, Maryland, Virginia and the District of Columbia (¶¶ V.A-B). The assignment of dealer leases and franchise agreements is intended not to effect a material change in the rights and obligations of the parties to those leases and franchise agreements. Exxon and Mobil will divest approximately 676 owned or leased stores and assign supply agreements for 1,064 additional stores in the Northeast and Mid-Atlantic.

which the decree is pending to rule on the suitability of the proposed acquirer. In the event such a motion is made, Respondents’ time to divest under the Proposed Order is tolled until the matter is resolved.

¹⁴ The assigned relationship does not include business format franchises for the sale of ancillary products (*e.g.*, restaurant franchises) other than gasoline and diesel fuel.

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To effectuate the divestiture of stations and assignment of franchise agreements, Respondents shall enter into an agreement with the acquirer under which Respondents shall allow the acquirer to use the Exxon or Mobil name, as the case may be, for up to 10 years (with the possibility of further use of the name by mutual agreement thereafter) (¶¶ IV.C, V.C). Pursuant to that agreement, the acquirer will have the exclusive right to use the Exxon or Mobil name, as the case may be, in connection with the sale of branded gasoline and diesel fuel in these states, and will have the right to accept Exxon or Mobil credit cards and to sell other Exxon or Mobil branded products (*e.g.*, motor oil) at gas stations in these states. The acquirer will have the right to expand the Exxon or Mobil network in these states, as the case may be, by opening new stores or converting stores to the Exxon or Mobil brand. (¶¶ IV.C, IV.F, V.C, V.F)

It is the Commission's contemplation that the acquirers will seek to transition the existing Exxon and Mobil networks to their own brands.¹⁵ The Proposed Order requires the respective Exxon and Mobil packages to be divested to a single acquirer (although both packages may be divested to the same acquirer). The divestiture and assignment of large packages of retail gasoline stations should allow the acquirer the ability to efficiently advertise a brand, develop credit card and other marketing programs, persuade distributors to market the acquirer's brand, and otherwise compete in the sale of branded gasoline.

The acquirer will nonetheless be allowed to continue to offer the Exxon or Mobil name, as the case may be, to dealers and jobbers in order to allow the acquirer to preserve the network to the greatest extent feasible and to comply with the requirements of the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* ("PMPA"). Thus, the acquirer will be able to continue to offer

¹⁵ For that reason, the agreement entered into between Respondents and the acquirer(s) may provide for an increasing fee for the use of the name after five years. The terms of that agreement will be subject to Commission approval.

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Exxon or Mobil branded fuel, as the case may be, to dealers and jobbers that are today selling Exxon or Mobil branded fuel and displaying those brands. Over time, the acquirer in its business judgment may choose to convert the business it acquires to its own brand name, subject to the requirements of law or with the consent of the dealers and jobbers in question.

To effectuate the divestiture and allow the acquirers an opportunity to convert dealers and jobbers to a new brand, the Proposed Order prohibits Respondents from using the pertinent brand in the sale of gasoline for at least five (5) and as much as twelve (12) years from the date of divestiture in the region in question (*i.e.*, Respondents will not be able to sell gasoline under the Exxon name in New York or New England, where they are divesting and assigning Exxon stations, dealers and jobbers). In addition, Respondents will be prohibited from offering to sell branded fuels for resale at divested or assigned sites for a period of seven (7) years. (¶¶ IV.G, V.G)

Respondents' obligations to preserve the assets to be divested and assigned includes the obligation to maintain the relationships with dealers and jobbers pending divestiture or assignment. Respondents have agreed to meet this obligation by, among other things, establishing a fund of \$30 million to be paid to distributors who accept assignment of their supply agreements to the acquirer. The terms of that incentive program are set forth in Appendix A to the Proposed Order.

C. Marketing of Gasoline in Texas

To remedy the reduction in competition in the five metropolitan areas in Texas alleged in Count II of the Complaint, Paragraph VI of the Proposed Order requires Respondents to divest and assign Mobil's marketing businesses in those five metropolitan areas. Mobil's marketing assets in those metropolitan areas include interests of Mobil in partnerships with TETCO Inc. and Southland Corp. The Proposed Order requires that Respondents divest Mobil's interest in its partnership with

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TETCO to TETCO or to another acquirer approved by the Commission, in either event only in a manner approved by the Commission. The Proposed Order also requires Respondents to assign their Existing Supply Agreements to Assignees approved by the Commission, on the same terms as discussed with regard to Northeastern and Mid-Atlantic marketing, Part IV.B above. Respondents will divest approximately 10 owned or leased Mobil stores and assign supply agreements for Mobil's distributor-supplied stores in Texas.

D. Marketing of Gasoline in Arizona

To remedy the reduction in competition in the marketing of gasoline in Arizona alleged in Count III of the Complaint, Paragraph XI of the Proposed Order requires Exxon to surrender its right to reacquire stores sold to Tosco.

E. Refining and Marketing of CARB Gasoline for California and Navy Jet Fuel for the West Coast

To remedy the reduction in competition in the refining and marketing of CARB gasoline and navy jet fuel alleged in Counts IV and V of the Complaint, Paragraph II of the Proposed Order requires Respondents to divest Exxon's Benicia refinery and Exxon's owned gas stations in California, and to assign Exxon's lessee contracts and jobber supply contracts in California to an acquirer approved by the Commission. (¶¶ II.A, II.B) The divestiture of Exxon's Benicia refinery, with Exxon's California marketing, will not significantly reduce the amount of gasoline available to non-integrated marketers, since the refinery likely will continue to produce that gasoline and need outlets for its sale. Respondents will divest approximately 85 owned or leased Exxon stores and assign supply agreements for approximately 275 additional stores in California.

As part of its divestiture of the refinery, Respondents shall (at the acquirer's option) enter into a supply contract with the acquirer for a ratable quantity of Alaska North Slope ("ANS")

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crude oil up to 100 thousand barrels per day (an amount equivalent to the refinery's historic usage). Exxon is one of the three principal producers of ANS crude oil (the other two are BP Amoco and ARCO).

The divestiture and assignment of the Exxon stations is generally under the same terms as described regarding the Northeast and Mid-Atlantic, *see* Section IV.B above, except that in four PMSAs (San Francisco, Oakland, San Jose and Santa Rosa) Respondents will terminate their dealers' contracts and divest the real estate to the acquirer without authorizing the acquirer to use the Exxon name. Because Mobil does not market branded gasoline in these PMSAs, Exxon can effectuate a "market withdrawal" in these MSAs under the PMPA, 15 U.S.C. § 2801 *et seq.*

In considering an application to divest and assign Exxon's California refining and marketing businesses to an acquirer, the Commission will consider the acquirer's ability and incentive to invest and compete in the businesses in which Exxon was engaged in California. The Commission will consider, *inter alia*, whether the acquirer has the business experience, technical judgment and available capital to continue to invest in the refinery in order to maintain CARB gasoline production even in the event of changing environmental regulation.

F. Count VI – Terminaling of Light Petroleum Products in Metropolitan Boston and Washington

To remedy the reduction of competition in terminaling of light petroleum products in metropolitan Boston and Washington, Paragraphs VII and VIII require Respondents to divest Mobil's East Boston, Massachusetts, and Manassas, Virginia, light petroleum products terminals, thereby eliminating the effect of the merger in these markets.

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G. Count VII – Terminaling of Light Petroleum Products in the Norfolk, Virginia Area

To remedy the reduction of competition in terminaling of light petroleum products in metropolitan Norfolk, Virginia, Paragraph IX requires Respondents to continue to offer TransMontaigne access to Mobil's wharf on the same terms as have been offered historically, for as long as Respondents own the wharf.

H. Count VIII – Transportation of Light Petroleum Products to the Inland Southeast

To remedy the reduction of competition in transportation of light petroleum products to the inland Southeast, the Proposed Order requires Respondents to divest either Exxon's interest in Plantation or Mobil's interest in Colonial, and, pending divestiture, not to exercise their voting rights in connection with ownership or board representation on Colonial, thereby eliminating the effect of this merger in this market.

I. Count IX – Transportation of Crude Oil from the Alaska North Slope

To remedy the reduction of competition in transportation of crude oil from the Alaska North Slope to Valdez, Alaska, and intermediate points, Paragraph X of the Proposed Order requires Respondents to divest Mobil's interest in TAPS (including Mobil's interest in terminal storage at Valdez and, at the acquirer's option, Mobil's interest in the Prince William Sound Oil Spill Response Corporation), thereby eliminating the effect of this merger in this market.

J. Count X – Importation, Terminaling and Marketing of Light Petroleum Products in Guam

To remedy the reduction in competition in the importation, terminaling and marketing of light petroleum products in Guam, Paragraph III of the Proposed Order requires Respondents to

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divest Exxon's terminal and marketing in Guam. Essentially all of Exxon's gasoline marketing in Guam consists of approximately 11 company-operated retail gasoline stores, which can be divested without the right to use the "Exxon" brand. The Proposed Order therefore does not provide for the use of the "Exxon" brand in Guam. The Proposed Order does provide that the divestiture of the terminal include Exxon's rights in its joint terminaling arrangements with Shell and, at the acquirer's option, Exxon's liquefied propane gas ("LPG") storage facilities. The divestiture would thereby eliminate the effect of this merger in this market.

K. Count XI – Paraffinic Base Oil

The Proposed Order requires Respondents to relinquish control of an amount of base oil equivalent to the amount controlled by Mobil, in order to remedy the effect of combining Exxon's and Mobil's base oil production. *First*, Respondents must offer to change several terms in Mobil's contract with Valero, in order to relinquish control over Valero's base oil production. The terms Respondents must offer are confidential, and are contained in a confidential appendix to the order.

Second, Respondents must enter into a long-term supply agreement (or agreements) with not more than three firms to supply those firms with an aggregate of 12 MBD of base oil from the merged firm's three refineries in the Gulf Coast area. The purchaser(s) of this base oil would purchase this base oil for ten years, under a price formula agreed to by the parties (and approved by the Commission) that is not tied to a United States base oil price (*e.g.*, the formula might be tied to a benchmark price for crude oil). The purchaser(s) could use the base oil or resell it. Since the price term will be unrelated to any U.S. base oil price, Respondents would not be able to influence the price of this base oil. This sales agreement would put the purchasers(s) in the same position as competing base oil producers.

By changing Mobil's contract with Valero and entering into a Gulf off-take agreement, Mobil's share of the base oil market will

Analysis

effectively be given to Valero and some new entrant(s) in the base oil market or other suitable acquirers. The status quo in the base oil market will be maintained.

If Respondents do not offer the aforementioned terms to Valero within six months and do not enter into base oil supply contracts with suitable entities within nine months, they must divest Mobil's Beaumont, Texas refinery.¹⁶

L. Count XII – Jet Turbine Oil

To remedy the effects of the merger in the market for jet turbine oil, the Proposed Order requires Respondents to divest Exxon's jet turbine oil business. The Proposed Order defines Exxon's jet turbine oil business, which must be divested, to include, among other things, an exclusive, perpetual license to use identified Exxon patents in the field of jet turbine oil, other intellectual property, research and testing equipment, and Exxon's jet turbine oil manufacturing facility at Bayway, New Jersey.

¹⁶ A divestiture of Mobil's Beaumont refinery would give the acquirer six percent of North American base oil production and complete control of a low-cost base oil refinery. The buyer would be free to make any capital investments to expand capacity it chose to make. The Commission does not believe, on the facts of this investigation, that a divestiture of the refinery is strictly necessary to maintain competition in the paraffinic base oil market. The Commission might normally believe that divestiture of a refinery was necessary in order to allow the acquirer to have the ability to expand production and develop new products. However, the current trend toward producing higher grade base oils for use in finished products that need to be replaced less often (*i.e.*, new products that significantly reduce drain intervals), suggests that the demand for base oil is likely to contract, making the need for expansion less significant on the particular facts here.

Analysis

V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. The Commission, pursuant to a change in its Rules of Practice, has also issued its Complaint in this matter, as well as the Order to Hold Separate. Comments received during this sixty day comment period will become part of the public record. After sixty days, the Commission will again review the Proposed Order and the comments received and will decide whether it should withdraw from the Proposed Order or make final the agreement's Proposed Order.

By accepting the Proposed Order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Order, including the proposed divestitures, to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

Statement

**Statement of Chairman Robert Pitofsky and Commissioners
Sheila F. Anthony and Mozelle W. Thompson**

The Federal Trade Commission has issued a consent order to settle charges that the Exxon Corporation's acquisition of the Mobil Corporation would violate the antitrust laws. We write to explain the reasons for our decision to approve a settlement that allows the merger to occur, and to ensure that the Commission's action in this matter is fully understood.

The merger between Exxon and Mobil involves the second- and fourth-largest vertically integrated oil companies in the world and the two largest headquartered in the United States, with the acquired assets valued at about \$80 billion. We emphasize, however, that Commission approval in this matter does not indicate that continuing trends toward undue and unjustified concentration will be countenanced by this agency in the oil industry or elsewhere in the United States economy.

The merger has significant competitive effects in seven different product markets. Because these were markets where competition was likely to be affected adversely, the Commission has required extensive restructuring. The details of the divestitures and other remedial provisions designed to address those competitive problems were summarized in the Analysis to Aid Public Comment. We touch here only on the most significant reasons why a merger between such large companies that have been direct competitors in some markets is allowed to occur at all.

1. About 60 percent of the assets of the merged firms were located outside the United States. Competitive effects in foreign countries have been reviewed by antitrust authorities abroad and the merger has been approved by those reviewing authorities with some restructurings.
2. In the United States, the most important overlaps involved gasoline marketing in states along the Atlantic Coast, California, Texas and Guam, gasoline refining in California,

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and the production and sale of paraffinic base oil, an ingredient in motor oil, throughout the United States. These overlaps amounted to only about 3 percent of the merged assets.

3. Where there were significant competitive overlaps, the companies consented to substantial restructuring of the deal, including the largest divestiture ever ordered by the Federal Trade Commission. In those areas of principal concern, the restructuring consisted of the following:

Retail Gas Stations: In all of the United States, a total of over 2,400 stations have been sold or contracts assigned. In the Northeast and Mid-Atlantic states, sale of 676 owned stations and assignment of supply contracts with 1,064 stations formerly branded Exxon and Mobil was required. In California, 360 stations were required to be sold or assigned.

Refining: Exxon's Benicia, California refinery was sold.

Terminaling: The consent required Exxon-Mobil to divest Mobil's terminals in Boston, Massachusetts and Manassas, Virginia, as well as Exxon's terminal in Guam.

Basic Paraffinic Motor Oil Ingredient: The consent required the sale of an amount of output equivalent to the amount formerly controlled by Mobil in North America.

4. While there has been a significant trend toward concentration in the oil industry, in the world and in the United States, and that trend will continue to receive our attention, it remains true that in the United States there are still at least a dozen remaining oil companies, though some are much smaller than others, and some are more regional than national. After the Exxon-Mobil merger, the top four firms in the United States accounted for about 42% of refining capacity and gasoline sales, a level of concentration that is not ordinarily a subject of concern in antitrust enforcement. In regional and local markets, likely anticompetitive effects were more pronounced, but those have been addressed by the consent order.

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5. The Commission assured itself not only that restructuring would occur, but that there were companies ready, willing and able to acquire divested assets and to be effective competitors. In approving or disapproving buyers, the Commission has treated as a major concern the effect of divestitures on the welfare of station owners and employees. Also, the Commission has insisted that the buyers of divested assets are sensitive to the role of independent station owners and lessees in continuing to play an important role in preserving competition in the retail sector of the gasoline market.

Increasing concentration in the oil industry may simply reflect the needs of firms competing in a global market. With the recent mergers in the industry however, concentration has significantly increased. Accordingly the Commission has been demanding in its requirements for restructuring this transaction, and will review any future proposed mergers in this industry with special concern.

We intend to ensure that competition, and the welfare of consumers, is protected. As with our recent enforcement actions, the Commission will assess the effectiveness of the remedies in this case in determining whether settlement, instead of litigation, would be appropriate in future transactions within this industry.

Finally, we offer a brief response to the concurring statement of our colleague, Commissioner Orson Swindle.

1. Relevant geographic market in which anticompetitive effects might be measured was pleaded in the complaint as ranging from states to metropolitan areas to smaller areas within metropolitan areas. Commissioner Swindle would have preferred to limit the pleading to metropolitan areas. As the Analysis to Aid Public Comment indicated, there was some evidence of coordinated action in parts of metropolitan areas (usually termed “price zones”), and there is precedent in this industry for pleading

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geographic markets as statewide.¹ At the pleading stage, we believe pleading in the alternative is traditional and justified.

2. Commissioner Swindle would have limited any finding of anticompetitive effects to highly concentrated markets. It is true that in such markets, mergers of significant size may be presumed to lead to anticompetitive effects. But that does not mean the effect of mergers in less concentrated markets should be ignored. On the contrary, there is considerable judicial precedent for finding violations in moderately concentrated markets.² Also, the Department of Justice - FTC Guidelines state that in moderately concentrated markets, significant competitive concerns depend on a review of additional factors. Many of the factors cited in the Guidelines are present in oil industry distribution and marketing: key price and other competitively significant information is easily available in the marketplace; gasoline is a homogeneous product (despite aggressive advertising efforts to introduce product differentiation) so that coordinated action is easier to achieve; there are high though not insurmountable barriers to entry into terminaling and distribution; and there is some history of successful collusion among companies in this market.³ For all those reasons, a remedy that reaches competitive effects in moderately concentrated markets - following the example that the Commission set in settling its case against British Petroleum's acquisition of Amoco - is justified.

¹ See, e.g., Marathon Oil Co. v. Mobil Corp., 669 F.2d 378, 380 (6th Cir. 1981).

² See Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

³ See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation, 906 F.2d 432 (9th Cir.1990).

Statement

Separate Statement of Commissioner Orson Swindle

In this matter, the Commission investigated the \$80 billion merger between Exxon Corporation (“Exxon”) and Mobil Corporation (“Mobil”). The merger created the largest privately owned oil company in the world, having extensive operations in terms of exploration, production, refining, pipelines, terminal operations, wholesaling, and retailing. The Commission has issued a consent order to resolve complaint allegations with regard to a number of markets in which Exxon and Mobil had overlapping operations.

Of the great many markets that are addressed in the complaint and consent order, I dissent only from the provisions concerning the wholesaling and retailing of gasoline in markets that would be only moderately concentrated after the merger. The merger between Exxon and Mobil is not likely to lead to consumer harm in the form of higher prices for gasoline in these markets because of the difficulties that oil companies face in coordinating their prices in these markets. Unlike my colleagues, I therefore would not require that ExxonMobil divest or assign its retail gasoline stations located in these markets.

1. Wholesale and Retail Marketing of Gasoline

The complaint alleges that the merger between Exxon and Mobil may substantially lessen competition for the wholesaling and retailing of gasoline in many and various markets. Specifically, the complaint defines as a relevant geographic market each of the states from Virginia to Maine, “smaller areas” within those states including particular metropolitan areas, and even “smaller areas” within those metropolitan areas. ¶¶ 17a, 18, 31, and 32 of the complaint. It also defines as relevant geographic markets five metropolitan areas in Texas, and “smaller areas” contained within those metropolitan areas. *Id.* ¶¶ 17b, 19, 33, and 34. The complaint further defines Arizona and “smaller areas” within Arizona as relevant geographic markets. *Id.* ¶¶ 17c, 21, 35, and 36.

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In analyzing the competitive effects of a merger, it is critical to identify the proper geographic markets. As explained above, the Commission alleged that the proper geographic markets here include everything from entire states to metropolitan areas within these states to “smaller areas” within these metropolitan areas, which presumably include counties, cities, towns, townships, price zones, etc. A geographic market is “a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a ‘small but significant and non-transitory increase in price.’” United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 1.21 (1992).

Rather than very large geographic areas (e.g., entire states)¹ or very small geographic areas (e.g., price zones), I think that standard metropolitan statistical areas (“MSAs”) are the most appropriate areas to use as geographic markets. MSAs are consistent with the general boundaries of competition in the wholesaling and retailing of gasoline. Using MSAs as geographic markets also promotes greater consistency in analysis because most oil industry data are reported by MSA. Finally, MSAs are consistent with the size of the geographic markets that the Commission generally has used in analyzing past oil mergers. See *British Petroleum Co., plc.*, Dkt. No. C-3868 (1999) (¶19 of

¹ In its statement, the majority cites *Marathon Oil Co. v. Mobil Corp.*, 669 F. 2d 378 (6th Cir. 1981), as precedent for the proposition that geographic markets for the marketing of gasoline may include entire states. In that case, the Sixth Circuit did conclude that, in granting a preliminary injunction, the district court had not erred in using individual state markets rather than a national market for the marketing of gasoline. *Id.* at 380. However, simply because a court found that there were statewide markets for the marketing of gasoline in certain midwestern states nearly twenty years ago does not persuade me that today there are statewide markets for the marketing of gasoline in the northeastern and mid-Atlantic United States, Texas, and Arizona.

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complaint) (“cities and metropolitan areas”); *see also Shell Oil Co.*, Dkt. No. C-3803 (1998) (¶¶ 21 and 22 of complaint) (San Diego County, California; Oahu Island, Hawaii).

The basic theory underlying the complaint was that so-called major brands (including Exxon, Mobil, Shell/Texaco, BPAmoco, and Sunoco) priced as an oligopoly. Major brands allegedly observe the gasoline prices that other major brands are charging at their retail locations in specific areas, known as “price zones.” Armed with this information, major brands purportedly adjust their prices only in that particular price zone so that the resulting retail price for their brand of gasoline is in line with those of other major brands. Because major brands determine their gasoline prices based on the prices charged by other major brands and not exclusively on cost, major brands supposedly can and do find it profitable to increase their gasoline prices. Allowing Exxon and Mobil to merge, it was theorized, would reduce the number of major brands, thereby purportedly making it even easier to coordinate and maintain higher gasoline prices.

I have reason to believe that the merger between Exxon and Mobil could substantially lessen competition in wholesale and retail gasoline in *highly* concentrated markets, i.e., highly concentrated MSAs. Mergers that significantly increase concentration in highly concentrated markets are *presumed* to be likely to cause competitive harm. *Horizontal Merger Guidelines* § 1.51(c). In the absence of proof of entry that is timely, likely, and sufficient or in the absence of other countervailing considerations that would rebut the presumption of competitive harm, the Commission typically concludes that such a merger may substantially lessen competition.

In recent years, the Commission challenged mergers that would significantly increase concentration in highly concentrated gasoline markets. In 1998, the Commission alleged that a joint venture may substantially lessen competition where it would have significantly increased concentration in the highly concentrated markets for wholesaling and retailing of gasoline in San Diego County, California, and on Oahu, Hawaii. *Shell Oil Co.* In 1999,

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the Commission similarly alleged that a merger between British Petroleum and Amoco may substantially lessen competition where it would have significantly increased concentration in twenty-five highly concentrated markets² for the wholesaling and retailing of gasoline in the southeastern United States. *British Petroleum Co., plc.*³

In this case, the complaint alleges that the merger between Exxon and Mobil would significantly increase concentration in twenty highly concentrated wholesale and retail gasoline markets -- nineteen markets in the northeastern United States and one in Texas.⁴ The theory that major brands coordinate on price is more plausible in these highly concentrated markets given the limited number of firms that need to coordinate their actions concerning gasoline prices, a conclusion that is consistent with the

² The Commission also alleged that the merger of BP and Amoco may substantially lessen competition in five markets that were only moderately concentrated. The majority cites this case as “precedent” for challenging oil mergers because of their effects in moderately concentrated markets. Commission consent orders lack precedential effect. Moreover, the most that *British Petroleum Co.* stands for is the proposition that some oil mergers cause competitive problems in some moderately concentrated markets, not that all oil mergers cause competitive problems in all moderately concentrated markets.

³ I dissented in *British Petroleum Co.* because I concluded that the likelihood of entry and jobber switching in markets in the southeastern United States warranted overcoming the presumption that the merger would have raised serious competitive concerns.

⁴ The highly concentrated markets are Washington, D.C.; Hartford, CT; New London, CT; Dover, DE; Wilmington, DE; Bangor, ME; Portland, ME; Barnstable, MA; Bergen, NJ; Jersey City, NJ; Monmouth, NJ; Trenton, NJ; Albany, NY; Newburgh, PA; Allentown, PA; Altoona, PA; Johnstown, PA; State College, PA; Burlington, VT; and Bryan/College Station, TX.

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presumption accorded under the *Horizontal Merger Guidelines*. New entry is not likely to defeat a coordinated price increase in these markets because of the difficulty of entering into the wholesale and retail gasoline business to a sufficient extent due to restrictive zoning laws, regulatory approvals, deed restrictions, the scarcity of sites for stations, and high costs. Sufficient jobber switching in response to a coordinated price increase is also not likely to occur because (unlike my assessment of the facts in the southeastern United States markets in *British Petroleum Co.*) switching generally has not been prevalent in these markets and the cost of doing so has been increasing significantly. Consequently, I remain comfortable with the complaint allegations with regard to these highly concentrated markets and the corresponding order requirement that the retail gasoline stations in these markets be divested or assigned.

However, in addition to alleging that the merger may substantially lessen competition in highly concentrated markets for the wholesaling and retailing of gasoline, the majority has alleged that the merger is likely to cause competitive harm in markets that would be only *moderately* concentrated. I disagree.

Specifically, nothing that has transpired since the Commission accepted the consent agreement would lead me to support the complaint allegations that the merger between Exxon and Mobil may substantially lessen competition in twenty-three wholesale and retail gasoline markets that would be only *moderately* concentrated after the merger -- eighteen markets in the northeastern and mid-Atlantic United States, four markets in Texas, and one market in Arizona.⁵ Such mergers are not

⁵ The moderately concentrated markets are New Haven, CT; Lewiston, ME; Baltimore, MD; Boston, MA; Atlantic City, NJ; Middlesex, NJ; Newark, NJ; Vineland, NJ; New York, NY; Harrisburg, PA; Lancaster, PA; Philadelphia, PA; Reading, PA; Scranton, PA; York, PA; Providence, RI; Norfolk, VA; Richmond, VA; Austin, TX; Dallas, TX; Houston, TX, San Antonio, TX, and Arizona.

Statement

presumed to cause competitive harm, but instead “potentially raise significant competitive concerns depending on [factors such as potential adverse competitive effects and entry.]” *Horizontal Merger Guidelines* § 1.51(b).

I still find the Commission’s theory that major brands have coordinated their gasoline prices in these moderately concentrated markets⁶ to be insufficiently persuasive to support the complaint allegations. Coordinating gasoline prices tends to be more difficult in markets with moderate concentration levels than with high concentration levels because there generally are more firms whose prices have to be coordinated. Price coordination also may be complicated by variations in the boundaries of the price zones that major brands use and the difficulty in accounting for a variety of other factors that may affect gasoline prices, such as brand name strength, retail location, and credit card programs. Moreover, even if a coordinated price could be established, it likely would be difficult to maintain because, although retail gasoline prices may be publicly posted, cheating on the price could also occur through hard-to-monitor discounts on the wide variety of other goods and services that stations offer, especially the convenience store items that are becoming an increasingly large source of retail gasoline station revenue.

I do not think that it is unreasonable to conclude that gasoline prices *might be* coordinated in markets that would be moderately concentrated. The better view of the evidence, however, is that

⁶ Of course, I recognize that when we decide to challenge a merger only with regard to its effects in markets that are highly concentrated, there is a risk of missing some markets in which its effects raise the same competitive concerns even though they have slightly lower concentration levels. *See Horizontal Merger Guidelines* § 1.5 (“other things being equal, cases falling just above and just below a threshold present comparable competitive issues”). Nevertheless, I think that using highly concentrated markets here as a cut-off is a reasonable approach, albeit a necessarily imperfect one.

Statement

such coordination was not occurring premerger and is not likely to occur following the merger. I consequently dissented from the complaint allegations with regard to the wholesale and retail gasoline markets in the northeastern and mid-Atlantic United States, Texas, and Arizona that would be moderately concentrated, and I would not have required the divestiture and assignment of retail gasoline stations located in those markets.⁷

2. Refining, Pipelines, and Terminal Markets

Although I support the remaining complaint allegations relating to refining, pipeline, and terminal markets, a brief treatment of two of these markets is warranted. I am not persuaded that a full trial on the merits would have demonstrated that the merger may substantially lessen competition in the United States and Canadian market for refining paraffinic base oil (¶¶ 51 and 52 of the complaint) or in the West Coast market for refining CARB gasoline (*id.* ¶¶ 37 and 38). The information that the Commission staff compiled during its extensive and thorough investigation, however, persuaded me that there was at least “reason to believe” that the merger could substantially lessen competition in these two markets. Because this showing was enough to meet the applicable legal standard, I was willing to support the allegations relating to these two markets.

⁷ The majority states that the “effects of mergers in less concentrated markets should [not] be ignored” and that “there is considerable judicial precedent for finding violations in moderately concentrated markets.” I agree with these statements. But I merely disagree with the conclusion that the facts show anticompetitive effects are likely in the moderately concentrated markets at issue in this case.

Complaint

IN THE MATTER OF

EL PASO ENERGY CORPORATION, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-3997; File No. 0010121**Complaint, January 30, 2001--Decision, January 30, 2001*

This consent order addresses the acquisition by Respondent El Paso Energy Corporation -- a firm engaged in the transportation, gathering, processing, and storage of natural gas; the marketing of natural gas, power, and other energy-related commodities; power generation; the development and operation of energy infrastructure facilities worldwide; and the domestic exploration and production of natural gas and oil -- of PG&E Gas Transmission Teco, Inc., and PG&E Gas Transmission Texas Corporation from Respondent PG&E Corporation, a California holding company that provides energy services throughout North America. The order, among other things, requires the respondents to divest all of El Paso's interest in the Oasis Pipe Line Company to Aquila Gas Pipeline Corporation, Dow Hydrocarbons and Resources, Inc., and the Oasis Pipe Line Company, and all of PG&E's pipeline assets in Matagorda to Panther Pipeline. The order also requires the respondents to divest (1) a fifty percent interest in the Trans Texas pipeline segment from Waha to New Braunfels, Texas; (2) all of PG&E's interest in the Trans Texas pipeline segment running from New Braunfels to Dewville, Texas; and (3) all of PG&E's interest in the Trans Texas pipeline segment running from Dewville to Katy, Texas, to acquirers approved by the Commission. In addition, the order, for ten years, prohibits Respondent El Paso from acquiring, directly or indirectly, any of the assets to be divested, or altering the governance provisions of the Teco pipeline, without obtaining prior Commission approval.

Participants

For the Commission: *Nathan J. Muyskens, W. Stephen Sockwell, Jr., Patricia V. Galvan, Alison M. Chin, Kenton A. James, Evelyn J. Boynton, William R. Vigdor, Phillip L. Broyles, Joseph Eckhaus, Daniel P. Ducore, John D. Simpson, Jeffrey H. Fischer and Daniel P. O'Brien.*

For the Respondent: *Bernard Nigro, Eric Queen and James Rhilinger, Fried, Frank, Shriver and Jacobson, and Michael Fremuth and Kenneth Minesinger, Andrews and Kurth.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Respondent El Paso Energy Corporation ("El Paso"), a corporation, and PG&E Corporation ("PG&E"), a corporation, have entered into a stock purchase agreement whereby El Paso proposes to acquire all voting securities of PG&E Gas Transmission Teco, Inc. and PG&E Gas Transmission Texas Corp., that such agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such agreement, 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 to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

El Paso

1. Respondent El Paso is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 1001 Louisiana Street, El Paso Energy Building, Houston, Texas 77002.
2. Respondent El Paso is, and at all times relevant herein has been, engaged in, among other things, the exploration, production, transportation and sales of natural gas in the State of Texas and elsewhere.
3. Respondent El Paso had total revenues of \$10.6 billion in 1999.

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PG&E

4. Respondent PG&E is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at One Market Square, Spear Tower, Suite 2400, San Francisco, California 94105.
5. Respondent PG&E is, and at all times relevant herein has been, engaged in, among other things, the exploration, production, transportation and sales of natural gas in the State of Texas and elsewhere.
6. Respondent PG&E had total revenues of \$20.8 billion in 1999.
7. Respondents El Paso and PG&E are, and at all times relevant herein have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

8. Respondent El Paso entered into a stock purchase agreement whereby El Paso proposes to acquire all the voting securities of PG&E Gas Transmission Teco, Inc., and PG&E Gas Transmission Texas Corp., dated January 27, 2000, for \$840 million, including the assumption of \$561 million of debt (the "Acquisition").

III. TRADE AND COMMERCE

9. A relevant line of commerce in which to analyze the effects of the Acquisition is the pipeline transportation of natural gas. The only way to economically ship natural gas over significant distances is through large diameter high pressure pipelines. Buyers of natural gas must use these pipelines to transport gas

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from producing to consuming areas. No other economic way exists to transport commercial quantities of natural gas.

Permian Basin

10. A section of the country in which to analyze the effects of the Acquisition is the prolific natural gas production area located in southwestern Texas and southeastern New Mexico known as the Permian Basin.

11. Consumption of natural gas in the Permian Basin is well below natural gas production levels. Most production is transported to consuming areas in eastern Texas and California on natural gas pipelines.

12. Permian Basin natural gas producers either contract directly with natural gas consumers or sell the gas to marketers who resell the natural gas. Neither the producers nor marketers of Permian Basin gas have an economic alternative to using the natural gas pipelines located in the Permian Basin to deliver gas to users. The producing area of the Permian Basin is therefore a relevant section of the country.

13. El Paso, through its subsidiaries, owns two pipeline systems that transport natural gas out of the Permian Basin. One pipeline transports natural gas to California and other western states. The other, the Oasis pipeline, is a pipeline transporting natural gas from the Permian Basin through the central part of Texas to the Houston area. El Paso controls significant aspects of the Oasis pipeline business.

14. PG&E, through its subsidiaries, owns an interest in two pipeline systems that transport natural gas from the Permian Basin. One pipeline system transports natural gas across Texas to the Dallas area. Another pipeline system transports gas to the Houston area.

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15. Together Respondents own or control a significant share of all the pipeline capacity from the Permian Basin. Respondents own or control most of the pipeline capacity to the areas in and around San Antonio and Austin, Texas.

16. El Paso and PG&E are actual and direct competitors in the Permian Basin. Competition between the El Paso and PG&E pipeline systems has resulted in significant competition in the transportation of natural gas from the Permian Basin area.

17. There are substantial barriers to entering this market. Building additional pipelines out of the Permian Basin would be expensive, would take more than two years, and would not prevent Respondents from being able to maintain a price increase over pre-Acquisition levels.

Central Texas

18. A section of the country in which to analyze the effects of the Acquisition is the natural gas consuming area in or around the metropolitan areas of San Antonio and Austin, Texas (“Central Texas”).

19. The major buyers of natural gas in Central Texas include local gas and electric public utilities and merchant power producers. These entities consume large quantities of natural gas to resell or use as fuel to generate electricity.

20. Natural gas consumption in Central Texas is well above natural gas production levels. Almost all natural gas consumed in Central Texas must be delivered by natural gas pipelines.

21. Natural gas consumers can only receive natural gas from those pipelines that travel through Central Texas. Natural gas buyers in Central Texas have no effective alternative to natural gas pipeline transportation within that area. A relevant line of commerce in which to analyze the effects of the Acquisition is

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therefore the pipeline transportation of natural gas into Central Texas.

22. El Paso's Oasis pipeline transports natural gas into Central Texas. The Oasis Pipeline is one of the major suppliers of natural gas to Central Texas.

23. PG&E owns a pipeline system that transports natural gas into Central Texas. PG&E's system is also a major supplier of natural gas to Central Texas.

24. Together Respondents own or control a significant share of all the pipeline capacity into Central Texas. For some natural gas buyers, Respondent's pipeline systems are the only two alternatives.

25. El Paso and PG&E are actual and direct competitors in Central Texas. Competition between the El Paso and PG&E pipeline systems has resulted in significant competition to transport natural gas to Central Texas.

26. There are substantial barriers to entering this market. Building additional pipelines to natural gas production areas or pipelines outside the geographic market would be expensive, would take more than two years, and would not prevent Respondents from being able to maintain a price increase over pre-Acquisition levels.

Matagorda Offshore Production Area

27. A section of the country in which to analyze the effects of the Acquisition is the natural gas production area located in Texas waters in the Gulf of Mexico known as Matagorda Offshore Production Area ("Matagorda"). This section includes, but is not limited to, Blocks 487, 518, and 519 as designated by the United States Mineral Management Service.

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28. Consumption of natural gas in Matagorda is well below natural gas production levels. Most production is transported to consuming areas on shore.
29. Matagorda natural gas producers either contract directly with natural gas consumers or sell the natural gas to marketers who resell it. Neither producers nor marketers of Matagorda gas have an economic alternative to using natural gas pipelines located in Matagorda to deliver gas to users. The producing area of Matagorda is therefore a relevant section of the country.
30. Respondents own the only two pipelines transporting natural gas from Matagorda.
31. El Paso and PG&E are actual and direct competitors in Matagorda. Competition between the El Paso and PG&E pipeline systems has resulted in significant competition to transport natural gas from Matagorda.
32. There are substantial barriers to entering this market. Building additional pipelines out of Matagorda would be cost prohibitive, and would not prevent Respondents from being able to maintain a price increase over pre-Acquisition levels.

COUNT I:**LOSS OF COMPETITION IN THE PERMIAN BASIN**

33. Paragraphs 1 - 32 are incorporated by reference as if fully set forth herein.
34. The relevant product market in which it is appropriate to assess the effect of the Acquisition is natural gas transportation.
35. The relevant geographic market in which it is appropriate to assess the effect of the Acquisition is the Permian Basin.

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36. The relevant market is highly concentrated and the Acquisition, if consummated, will substantially increase that concentration.
37. Entry into the relevant market would not be timely, likely, or sufficient to prevent anticompetitive effects.
38. The Acquisition will eliminate actual and direct competition between Respondents, with the likely results of raising rates and reducing output of transportation in the relevant market, and diminishing production of natural gas the Permian Basin.

**COUNT II:
LOSS OF COMPETITION IN CENTRAL TEXAS**

39. Paragraphs 1 - 32 are incorporated by reference as if fully set forth herein.
40. The relevant product market in which it is appropriate to assess the effect of the Acquisition is natural gas transportation.
41. The relevant geographic market in which it is appropriate to assess the effect of the Acquisition is Central Texas.
42. The relevant market is highly concentrated and the Acquisition, if consummated, will substantially increase that concentration.
43. Entry into the relevant market would not be timely, likely, or sufficient to prevent anticompetitive effects.
44. The Acquisition will eliminate actual and direct competition between Respondents, with the likely results of raising rates and reducing output of natural gas transportation, and thereby increasing the cost of electricity.

Complaint

**COUNT III:
LOSS OF COMPETITION IN MATAGORDA**

45. Paragraphs 1 - 32 are incorporated by reference as if fully set forth herein.
46. The relevant product market in which it is appropriate to assess the effect of the Acquisition is natural gas transportation.
47. The relevant geographic market in which it is appropriate to assess the effect of the Acquisition is Matagorda.
48. The relevant market is highly concentrated and the Acquisition, if consummated, will substantially increase that concentration.
49. Entry into the relevant market would not be timely, likely, or sufficient to prevent anticompetitive effects.
50. The Acquisition will eliminate actual and direct competition between Respondents with the likely results of raising rates and reducing output of transportation in the relevant market, and diminishing production of natural gas in Matagorda.

IV. VIOLATIONS CHARGED

51. The stock purchase agreement entered into by Respondents El Paso and PG&E constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.
52. The Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its

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official seal affixed, at Washington, D.C., this thirtieth day of
January, 2001, issues its Complaint against Respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent El Paso Energy Corporation (“El Paso”) of all of the outstanding voting shares of PG&E Gas Transmission Teco, Inc., and PG&E Gas Transmission Texas Corp., owned by Respondent PG&E Corporation (“PG&E”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated such Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

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1. Respondent El Paso is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1001 Louisiana Street, El Paso Energy Building, Houston, Texas 77002.
2. Respondent PG&E is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business at One Market Square, Spear Tower, Suite 2400, San Francisco, California 94105.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "El Paso" means El Paso Energy Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, business units, groups and affiliates controlled by El Paso, including PG&E Gas Transmission Teco, Inc., and PG&E Gas Transmission Texas Corp. after the Acquisition, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.
- B. "PG&E" means PG&E Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, business units, groups and affiliates controlled by PG&E, and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.
- C. "Commission" means the Federal Trade Commission.

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- D. “Aquila” means Aquila Gas Pipeline Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Loop 410, Suite 1000, San Antonio, Texas 78216.
- E. “Acquirer” or “Acquirers” means the El Paso Oasis Buyer, the PG&E Teco Buyer, or the PG&E Matagorda Buyer or any other entity or entities that are approved by the Commission to acquire the Assets To Be Divested pursuant to Paragraphs II.B, II.D., and II.F. of this Order.
- F. “Acquisition” means the transaction described in the Stock Purchase Agreement between El Paso and PG&E, dated January 27, 2000, pursuant to which Respondent El Paso agreed to acquire all of the outstanding voting shares of PG&E Gas Transmission Teco, Inc., and PG&E Gas Transmission Texas Corp., owned by Respondent PG&E.
- G. “Assets To Be Divested” means El Paso Oasis, PG&E Teco, and PG&E Matagorda.
- H. “Divestiture Agreements” means each and all of the following:
1. PG&E Teco Stock Purchase Agreement between El Paso and Duke, dated October 24, 2000, including, but not limited to, all the schedules, exhibits, and attachments to that agreement and the New Operating Agreement attached as Exhibit A thereto;
 2. PG&E Matagorda Pipeline System Asset Purchase Agreement between El Paso and Panther Pipeline, dated October 24, 2000, including, but not limited to, all the schedules, exhibits, and attachments to that agreement.
 3. El Paso Oasis Purchase Agreement between and among El Paso and Oasis Pipe Line Company, Aquila and Dow dated October 3, 2000, as amended by the First Amendment to Oasis Purchase Agreement, dated October

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23, 2000, including, but not limited to, all the schedules, exhibits, and attachments to that agreement.

- I. “Dow” means Dow Hydrocarbons and Resources, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at P.O. Box 3387, Houston, Texas 77253-3387.
- J. “Duke” means Duke Energy Field Services, LLC, a limited liability company organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 370 17th Street, Suite 900, Denver, Colorado 80202.
- K. “El Paso Oasis” means all of El Paso’s direct or indirect interest in the Oasis Pipe Line Company.
- L. “El Paso Oasis Buyer” means an entity or entities proposing to acquire El Paso Oasis that receive(s) the prior approval of the Commission to acquire El Paso Oasis.
- M. “Firm Transportation” means the provision of natural gas pipeline transportation that is not subject to a prior claim by another pipeline customer or another class of transportation service and cannot be interrupted except in a situation of force majeure.
- N. “New Divestiture Agreements” means any agreement for the sale of any Assets To Be Divested, other than the Divestiture Agreements, and includes, but is not limited to any divestiture agreement between El Paso and PG&E Teco Buyer, El Paso and PG&E Matagorda Buyer, and El Paso and El Paso Oasis Buyer, which has received the prior approval of the Commission, and any agreement entered into by a trustee pursuant to Paragraph IV. of this Order.
- O. “Oasis Pipe Line Company” means Oasis Pipe Line Company a corporation organized and doing business under and by virtue of the laws of the State of Delaware,

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with its principal place of business located at 12012 Wickchester Lane, Suite 540, Houston, Texas 77079 and its joint ventures, subsidiaries, divisions, business units, groups and affiliates, successors and assigns, including, but not limited, to Oasis Pipe Line Company Texas L.P., Oasis Pipe Line Management Company, and Oasis pipeline (the thirty-six (36) inch pipeline that transports natural gas from Waha, Texas, to Katy, Texas). Oasis Pipe Line Company is currently co-owned by Dow, Aquila and El Paso Field Services Company (formerly known as Channel Gas Marketing Company).

- P. “Ownership Interest” means the interest of either El Paso, Duke or PG&E Teco Buyer as defined in New Operating Agreement.
- Q. “Panther Pipeline” means Panther Pipeline, Ltd., a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at 100 Glenborough Drive, Suite 960, Houston, Texas 77067.
- R. “PG&E Matagorda” means the assets listed on the schedules to the PG&E Matagorda Pipeline System Asset Purchase Agreement between El Paso and Panther Pipeline, dated October 24, 2000.
- S. “PG&E Matagorda Buyer” means an entity or entities proposing to acquire PG&E Matagorda that receive(s) the prior approval of the Commission to acquire PG&E Matagorda.
- T. “PG&E Teco” means the assets listed on the schedules to the PG&E Teco Stock Purchase Agreement between El Paso and Duke, dated October 24, 2000.
- U. “PG&E Teco Buyer” means an entity or entities proposing to acquire PG&E Teco that receive(s) the prior approval of the Commission to acquire PG&E Teco.

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- V. “Public Record Date” means the date that the Commission places the Consent Agreement on the public record pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34
- W. “New Operating Agreement” means any agreement between El Paso and Duke or the PG&E Teco Buyer that determines the governance, operation, and expansion of and the receipt, delivery and transport of natural gas on the pipeline segment of PG&E Teco running from Waha to New Braunfels.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Public Record Date or the closing of the Acquisition, whichever is later, Respondents shall divest to Duke absolutely and in good faith, PG&E Teco pursuant to and in accordance with PG&E Teco Stock Purchase Agreement between El Paso and Duke, dated October 24, 2000, which Agreement shall not be read to vary or contradict the terms of this Order, and which Agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix 1.
- B. If Respondents have divested PG&E Teco to Duke and have entered into the New Operating Agreement prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Duke is not an acceptable purchaser of PG&E Teco, that the manner in which the divestiture was accomplished is not acceptable, or that the New Operating Agreement is not acceptable, then Respondents shall immediately rescind the PG&E Teco Stock Purchase Agreement between El Paso and Duke, dated October 24, 2000, and shall divest to PG&E Teco Buyer absolutely and in good faith, at no minimum price, PG&E Teco in a manner that receives prior approval of the Commission within one hundred twenty (120) days of the

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date that the Order becomes final. Provided, however, that Respondents shall not be required to divest any fixture, equipment, natural gas inventory, or any asset that PG&E Teco Buyer does not want to acquire, if the Commission approves the manner of the divestiture without those assets.

- C. Not later than ten (10) days after the Public Record Date or the closing of the Acquisition, whichever is later, Respondents shall divest to Oasis Pipe Line Company, Aquila and Dow absolutely and in good faith, El Paso Oasis pursuant to and in accordance with the El Paso Oasis Purchase Agreement between and among El Paso and Oasis Pipe Line Company, Aquila and Dow dated October 3, 2000, as amended by First Amendment to Oasis Purchase Agreement dated October 23, 2000, which Agreement shall not be read to vary or contradict the terms of this Order, and which Agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix 2.
- D. If Respondents have divested El Paso Oasis to Oasis Pipe Line Company, Aquila and Dow prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that any of Oasis Pipe Line Company, Aquila or Dow is not an acceptable purchaser of El Paso Oasis or that the manner in which the divestiture was accomplished is not acceptable then Respondents shall immediately rescind the El Paso Oasis Purchase Agreement between and among El Paso and Oasis Pipe Line Company, Aquila and Dow dated October 3, 2000, as amended by First Amendment to Oasis Purchase Agreement dated October 23, 2000, and shall divest to El Paso Oasis Buyer absolutely and in good faith, at no minimum price, El Paso Oasis in a manner that receives prior approval of the Commission within one hundred fifty (150) days of the date that the Order becomes final. Provided, however, that Respondents shall not be required to divest any fixture, equipment, natural gas inventory, or any asset that El Paso Oasis Buyer

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does not want to acquire, if the Commission approves the manner of the divestiture without those assets.

- E. Not later than ten (10) days after the Public Record Date or the closing of the Acquisition, whichever is later, Respondents shall divest to Panther Pipeline absolutely and in good faith, PG&E Matagorda pursuant to and in accordance with the PG&E Matagorda Pipeline System Asset Purchase Agreement between El Paso and Panther Pipeline, dated October 24, 2000, which Agreement shall not be read to vary or contradict the terms of this Order, and which Agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix 3.
- F. If Respondents have divested PG&E Matagorda to Panther Pipeline prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Panther Pipeline is not an acceptable purchaser of PG&E Matagorda or that the manner in which the divestiture was accomplished is not acceptable then Respondents shall immediately rescind the PG&E Matagorda Pipeline System Asset Purchase Agreement between and among El Paso and Panther Pipeline dated October 24, 2000, and shall divest to PG&E Matagorda Buyer absolutely and in good faith, at no minimum price, PG&E Matagorda in a manner that receives prior approval of the Commission within one hundred twenty (120) days of the date that the Order becomes final. Provided, however, that Respondents shall not be required to divest any fixture, equipment, natural gas inventory, or any asset that PG&E Matagorda Buyer does not want to acquire, if the Commission approves the manner of the divestiture without those assets.
- G. Respondents shall comply with the terms of the Divestiture Agreements and the New Operating Agreement, which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondents to

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comply with the Divestiture Agreements or the New Operating Agreement shall constitute a failure to comply with this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements or the New Operating Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreements (excluding the New Operating Agreement, modifications to which shall be restricted only by the prior approval requirements of Paragraph III.A. of the Order) without the prior approval of the Commission, shall constitute a failure to comply with this Order. Provided, however, that no decision by the arbitrator or any arbitration panel under any the Divestiture Agreement or the New Operating Agreement shall constitute an interpretation of or determine the obligations of Respondents under the Order.

- H. The purpose of Paragraphs II. and III. of this Order is to ensure that the Assets To Be Divested continue to be used in the same businesses in which the Assets To Be Divested are engaged at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.

- A. Respondent El Paso shall not, without the prior approval of the Commission, directly or indirectly, make or agree to any modification or amendment of the voting rights as defined in Section 3.2 of New Operating Agreement, or the Ownership Interests as defined in Section 5.1 of New Operating Agreement.
- B. Respondent El Paso shall not, without the prior approval of the Commission, directly or indirectly:
- (1) acquire any stock, share capital, equity, or other interest in the whole or any part of the Oasis Pipe Line Company or Assets To Be Divested; or

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- (2) acquire the whole or any part of the Oasis Pipe Line Company or Assets To Be Divested.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondents fail to complete one or more of the divestitures required by Paragraph II. of this Order within the time periods specified therein, the Commission may appoint one or more Divestiture Trustees to divest those Assets To Be Divested that have not been divested to an Acquirer or Acquirers in a manner acceptable to the Commission. The Divestiture Trustee will have the authority and responsibility to divest the Assets To Be Divested absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, to divest any of the assets under this Paragraph IV. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV. of this Order to divest the Assets To Be Divested to an Acquirer or Acquirers, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustees powers, duties, authority, and responsibilities:
 1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within

Decision and Order

ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Assets To Be Divested to an Acquirer or Acquirers pursuant to the terms of this Order and to enter into a purchase and sale agreement(s) and, as applicable, an operating agreement with the Acquirer or Acquirers pursuant to the terms of this Order, which purchase and sale agreement(s) and, as applicable, operating agreement, shall be subject to the prior approval of the Commission.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Assets To Be Divested to an Acquirer or Acquirers and to enter into a purchase and sale agreement(s) and, as applicable, an operating agreement, with the Acquirer or Acquirers.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. of this Order to divest the Assets To Be Divested to Acquirer or Acquirers in a manner acceptable to the Commission. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however,

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the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondents related to the Assets To Be Divested, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.
6. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestitures shall be made only to Acquirer or Acquirers and the divestitures shall be accomplished only in a manner that receives the prior approval of the Commission; provided however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving written notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and

Decision and Order

other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating an Acquirer or Acquirers and assuring compliance with this Order.

8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph IV. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this Order.

Decision and Order

11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
 12. The Divestiture Trustee shall report in writing to the Commission every two (2) months concerning his or her efforts to divest the Assets To Be Divested and Respondents' compliance with the terms of this Order.
- C. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents or the Divestiture Trustee have divested the Assets To Be Divested pursuant to the terms of this Order. Respondents shall conduct the business of the Assets To Be Divested in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationship with suppliers, customers, employees, and others having business relationships with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operations of any Assets To Be Divested. Respondents shall use their best efforts to keep the organization and properties of each Assets To Be Divested intact, including current business operations, physical facilities and working conditions, and a work force of equivalent size, training, and expertise associated with the Assets To Be Divested.

Decision and Order

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation, that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondents.

VII.

IT IS FURTHER ORDERED that one (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order is entered, and at such other times as the Commission may require, El Paso shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order. Each report shall describe any agreement whereby Respondents obtain Firm Transportation on any of the Assets to Be Divested.

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VIII.

IT IS FURTHER ORDERED that this Order shall terminate:

- A. With respect to Respondent El Paso, ten (10) years after the date the Order becomes final.
- B. With respect to Respondent PG&E, when the Acquisition has been completed.

By the Commission.

Analysis

Analysis of Proposed Consent Order To Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on January 29, 2001

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment from the El Paso Energy Corporation (“El Paso”) and PG&E Corporation (“PG&E”) (collectively the “Proposed Respondents”) an Agreement Containing Consent Order (“the Proposed Consent Order”). The Proposed Consent Order remedies the likely anticompetitive effects in the natural gas transportation markets in the Permian Basin production area, the San Antonio – Austin area, and the Matagorda offshore production area. El Paso has also reviewed a proposed draft of complaint (the “Proposed Complaint”) that the Commission contemplates issuing. The Proposed Consent Order is designed to remedy the likely competitive effects arising from the El Paso acquisition of all of the outstanding voting shares of PG&E Gas Transmission Teco, Inc., and PG&E Gas Transmission Texas Corporation, from PG&E (the “Acquisition”).

II. Description of the Parties and the Proposed Acquisition

El Paso Energy Corporation is an integrated energy company producing, transporting, gathering, processing, and treating natural gas. With over \$21 billion in assets, El Paso Energy Corporation is one of the largest integrated natural gas-to-power companies in the world. El Paso Energy not only owns North America's largest natural gas pipeline system, but also has growing operations in merchant energy services, power generation, international project development, gas gathering and processing, and gas and oil production.

El Paso has an interest in five pipeline systems in Texas: the Oasis pipeline, running from west Texas, through the San Antonio and Austin areas, to the Katy natural gas trading area (near Houston, Texas); the Channel Pipeline, extending from south Texas to the Houston Ship Channel; the Shoreline and Tomcat gathering systems, carrying gas from the Texas Gulf Coast to

Analysis

other larger transmission pipelines, and the Gulf States Pipeline, which runs from the Texas border to Ruston, Louisiana. In addition, El Paso owns the El Paso Natural Gas Pipeline that carries large volumes of gas from the Permian Basin gas gathering area to New Mexico, Arizona and Southern California.

PG&E is a California holding company that provides energy services throughout North America. During 1999, PG&E's annual revenues were \$20.8 billion. One of PG&E's divisions, PG&E Gas Transmission, provides natural gas transmission and distribution through three subsidiaries. PG&E Gas Transmission operates natural gas transportation in the northwestern United States through its wholly-owned subsidiary PG&E Gas Transmission Northwest and in Texas through two wholly-owned subsidiaries PG&E Gas Transmission Texas Corporation ("PG&E GTT") and PG&E Gas Transmission Teco, Inc. ("PG&E Teco").

Together PG&E GTT and PG&E Teco own 8,000 miles of intrastate pipelines in Texas. PG&E's Texas pipeline capacity is about 3 billion cubic feet of gas per day ("Bcf/d."). One PG&E pipeline system connects a prolific gas supply area of western Texas and southeastern New Mexico (the Permian Basin) to the cities of San Antonio and Austin and a major market trading area near Houston, called Katy. This is the Trans Texas pipeline. The Tufco pipeline, a second PG&E system, jointly owned with TXU Corporation connects the Permian Basin to another trading area near Dallas. A third PG&E system connects producing areas in southern Texas to the trading area of Agua Dulce.

El Paso proposes to acquire all of the outstanding stock of PG&E Teco and PG&E GTT, owned by PG&E, for \$840 million.

III. The Investigation and the Proposed Complaint

The Proposed Complaint alleges that consummation of the Acquisition would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Proposed

Analysis

Complaint alleges that the Acquisition will lessen competition in each of the following markets: (1) the transportation of natural gas out of the Permian Basin; (2) the transportation of natural gas into the gas consuming area of Central Texas, which includes San Antonio, Austin, and the surrounding metropolitan area; and (3) the transportation of natural gas out of the Matagorda Island Offshore production area (“Matagorda”), located in waters off of the Texas coast near Galveston.

To remedy the alleged anticompetitive effects of the Acquisition, the Proposed Consent Order requires Proposed Respondents to divest: (1) all of El Paso’s share of the Oasis Pipe Line Company; (2) a 50 percent interest in the pipeline segment from Waha to New Braunfels; (3) all of PG&E’s interest in the pipeline segment running from New Braunfels to Dewville, Texas; (4) all of PG&E’s interest in the pipeline segment running from Dewville to Katy; and (5) all of PG&E’s assets in Matagorda.

The Commission accepted for public comment the Agreement Containing Consent Order after an extensive investigation in which the Commission examined competition and the likely effects of the acquisition in the markets alleged in the Proposed Complaint and in several other areas. The Commission conducted the investigation in coordination with the Attorney General of the State of Texas. Proposed Respondents have entered into an agreement with the State of Texas settling charges that the Acquisition would violate state antitrust law.

The analysis applied in each market follows the analysis of the Federal Trade Commission and Department of Justice *Horizontal Merger Guidelines* (1997) (“*Merger Guidelines*”). The Proposed Complaint alleges in three counts that the Acquisition would violate the Federal antitrust laws in natural gas transportation in three separate geographic markets in Texas. The proposed Acquisition, if consummated would result in highly concentrated markets and allow Proposed Respondents to raise prices unilaterally. The Proposed Complaint also alleges that entry into

Analysis

any of the three markets would not be timely, likely, or sufficient to prevent a price increase. The efficiency claims of the Proposed Respondents, to the extent they relate to the markets alleged in the Proposed Complaint, are small compared to the magnitude and likely harm, and would not restore competition lost as a result of the acquisition even if the Proposed Respondents achieved the claimed efficiencies.

A. Count I – Loss of Competition in the Permian Basin

The Permian Basin is a natural gas producing area in western Texas and southeastern New Mexico. As alleged in the Proposed Complaint, producers and marketers of Permian Basin gas have no alternative but to transport their gas to consuming areas on natural gas pipelines located in the Permian Basin. El Paso and PG&E today are two of the largest holders of natural gas pipeline capacity out of the Permian Basin, and El Paso would be the largest holder of capacity in this region if the Acquisition were completed.

As alleged in the Proposed Complaint, the market for natural gas transportation from the Permian Basin would be highly concentrated after the Acquisition. For most times of the year, Permian Basin natural gas producers prefer to sell their gas to the San Antonio and Austin area (“Central Texas”). At other times, California is a desirable destination. The Proposed Complaint alleges that Proposed Respondents own or control most of the capacity from the Permian Basin to Central Texas. Proposed Respondents own almost all the capacity from the Permian Basin to California. The Acquisition is likely to eliminate actual and direct competition in this market between Proposed Respondents with the likely effects of increased rates and reduced output of transportation in the market, and diminished production of natural gas in the Permian Basin.

B. Count II – Loss of Competition in Central Texas

Central Texas, which includes the metropolitan areas of San Antonio and Austin, is an important natural gas consuming area.

Analysis

Buyers of natural gas, gas and electric utilities and merchant power plants, have no alternative to using pipelines located near metropolitan San Antonio and Austin. These Central Texas customers also do not have economic alternatives to using natural gas to fuel all or a significant number of their power plants. El Paso's Oasis pipeline and PG&E's Trans Texas pipeline account for almost all of the natural gas pipeline capacity into Central Texas.

Today, the market is highly concentrated and would become more so if the Acquisition were to occur, absent the proposed divestitures. Certain Central Texas transportation customers must use either Oasis or Trans Texas for all or a significant portion of their transportation needs. Other pipelines in the area have insufficient capabilities to offset the anticompetitive effects of the Acquisition. Absent relief, the Acquisition would enable El Paso unilaterally to raise prices to these customers, which would also raise the price of electricity to Central Texas consumers.

C. Count III – Loss of Competition in Matagorda

El Paso and PG&E own the only two pipeline systems that transport gas from the Matagorda off-shore production areas to on-shore processing facilities. The Proposed Complaint alleges that the Acquisition will eliminate actual and direct competition between Proposed Respondents, with the likely effects of increased rates and reduced output of transportation in the market, and diminished production of natural gas in the Matagorda area.

IV. The Proposed Consent Order

The Commission accepted for public comment an Agreement Containing Consent Order with Proposed Respondents, which would settle allegations contained in the Proposed Complaint. The Agreement Containing Consent Order contemplates that the Commission would issue the Proposed Complaint and enter the Proposed Order.

Analysis

The Proposed Consent Order requires the Proposed Respondents to divest all of El Paso's interest in Oasis Pipe Line Company to Aquila Gas Pipeline Corporation ("Aquila," a subsidiary of Utilicorp United Ltd.), Dow Hydrocarbons and Resources, Inc. ("Dow," a subsidiary of Dow Chemical Company) and the Oasis Pipe Line Company (the corporate owner of the Oasis pipeline). Aquila, Dow and El Paso currently own Oasis Pipe Line Company. The Proposed Consent Order also requires the Proposed Respondents to divest: (1) a 50 percent interest in the Trans Texas pipeline segment from Waha to New Braunfels; (2) all of PG&E's interest in the Trans Texas pipeline segment running from New Braunfels to Dewville, Texas; *and* (3) all of PG&E's interest in the Trans Texas pipeline segment running from Dewville to Katy. Prior to PG&E's Acquisition in 1997, these three pipeline segments were known as the Teco Pipeline. The Proposed Respondents must divest the Teco Pipeline to Duke Energy Field Services, LLC ("Duke," a subsidiary of the Duke Corporation). The Proposed Consent Order also requires Proposed Respondents to divest all of PG&E's pipeline assets in Matagorda to Panther Pipeline. The Proposed Respondents must divest these assets to these approved buyers not later than 10 days after the Commission places the Agreement Containing Consent Order on the public record or the closing of the Acquisition, whichever is later.

Under the terms of the Proposed Consent Order, in the event that El Paso does not divest the assets required to be divested under the terms and time constraints of the Proposed Consent Order, the Commission may appoint a trustee to divest those assets, expeditiously, and at no minimum price.

For a period of ten (10) years from the date the Proposed Consent Order becomes final, the Proposed Consent Order prohibits El Paso from acquiring, directly or indirectly, any of the assets that are to be divested or altering the governance provisions of the Teco pipeline without obtaining the prior approval of the Commission. PG&E's obligations under the Proposed Consent Order terminate after completing the Acquisition.

Analysis

The Proposed Consent Order also requires the Proposed Respondents to provide the Commission with a report of compliance with the terms of the Proposed Consent Order within thirty (30) days after the Order becomes final. Proposed Respondents must also file annual compliance reports detailing their compliance with the notice provisions under the Proposed Consent Order.

A. Resolution of the Competitive Concerns

The Proposed Consent Order, if finally issued by the Commission, would settle all of the charges alleged in the Commission's Proposed Complaint.

1. The Proposed Order Resolves Competitive Concerns in the Permian Basin and Central Texas

Under the terms of the Proposed Consent Order, Respondent El Paso will divest all of its interest in the Oasis Pipe Line Company to Aquila, Dow, and the Oasis Pipe Line Company. Proposed Respondents also have agreed to divest to Duke all of the Teco Pipeline.

El Paso will sell its Oasis Pipe Line Company stock to Dow, Aquila and the Oasis Pipe Line Company. Oasis Pipe Line Company will retire its El Paso stock. Oasis currently operates as a single pipeline with three owners, Aquila, Dow and El Paso. After the proposed divestitures are completed, El Paso will no longer have any interest in the Oasis Pipe Line Company, and current owners will continue to own and operate Oasis. The divestiture therefore enables Oasis to compete with El Paso and Duke to serve Permian Basin producers and marketers of natural gas.

The Teco Pipeline is being divested to Duke, a firm that is not presently in the market. Under the Proposed Consent Order, Duke will be able to sell gas on or expand the Teco Pipeline without obtaining the approval of El Paso. These protections will afford

Analysis

Duke the opportunity to compete with El Paso to serve the Permian Basin. In 1999, Duke had annual revenues of \$21.7 billion. Duke currently owns and operates natural gas and other pipelines throughout the United States.

The proposed divestitures resolve competitive concerns in the Permian Basin by giving Permian producers two new options for transportation. The proposed divestitures lower Permian Basin concentration levels below pre-Acquisition concentration levels. The proposed divestitures also give Permian producers new options for shipping natural gas to the most desirable destination. Before the Acquisition, Permian producers had two companies competing to deliver gas to Central Texas, PG&E and Oasis (owned by El Paso). After the divestitures, they will have three alternatives, Duke, Oasis (independent of El Paso) and El Paso.

In Central Texas, the divestiture creates a market less concentrated than before the proposed Acquisition. Presently, firms that need natural gas transportation have two primary options, Oasis and PG&E. After the divestiture these firm will have a third option in Duke.

2. The Proposed Order Resolves Competitive Concerns in the Matagorda Area

Under the terms of the Proposed Consent Order, Proposed Respondents will divest PG&E's Matagorda area pipeline assets to Panther Pipeline Company. Panther has substantial experience operating pipeline and gathering systems. By divesting all of the PG&E assets, Matagorda producers will continue to have two pipelines with which they may contract for natural gas transportation.

B. Opportunity for Public Comment

The Proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part

Analysis

of the public record. After thirty (30) days, the Commission will again review the Proposed Consent Order and the comments received and will decide whether it should withdraw from the Proposed Consent Order or make it final.

By accepting the Proposed Consent Order subject to final approval, the Commission anticipates that the competitive problems alleged in the Proposed Complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Order, including the proposed divestitures, to aid the Commission in its determination of whether it should make final the Proposed Consent Order. This analysis is not intended to constitute an official interpretation of the Proposed Consent Order, nor is it intended to modify the terms of the Proposed Consent Order in any way.

Complaint

IN THE MATTER OF

THE BLACK & DECKER CORPORATION, ET AL.

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

Docket C-4000; File No. 0023194

Complaint, February 8, 2001--Decision, February 8, 2001

This consent order addresses claims on certain packaging and labeling for lockset products, including locksets, deadbolts, knobs, and handles marketed by Respondent Kwikset Corporation -- a wholly-owned subsidiary of Respondent The Black & Decker Corporation -- that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondents from misrepresenting the extent to which any Kwikset lockset is made in the United States, while permitting the respondents to represent that such products are made in the United States as long as all, or virtually all, of the components of the products are of United States origin, and all, or virtually all, of the labor in manufacturing them is performed in the United States. The order also prohibits the respondents from representing that their products are "All American Made" or "All American Made and Proud of it" or otherwise entirely made in the United States, unless such products are in fact one hundred percent made in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Elaine D. Kolish, and Keith B. Anderson.*

For the Respondents: *Mary L. Azcuenaga and Joan Heim, Heller Ehrman.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Black & Decker Corporation and Kwikset Corporation ("respondents") have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent The Black & Decker Corporation is a Maryland corporation with its principal office or place of business at 701 East Joppa Road, Towson, Maryland 21286.
2. Respondent Kwikset Corporation is a California corporation with its principal office or place of business at 1 Park Place, Suite No. 1000, Irvine, California 92714. Kwikset Corporation is a wholly owned subsidiary of The Black & Decker Corporation.
3. Respondents have manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including residential locks and lock systems.
4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
5. Respondents have disseminated or have caused to be disseminated advertising and packaging for certain of its Kwikset products, including but not necessarily limited to the attached Exhibits A through H. The advertising and packaging contain the following statements or depictions:

Advertising**A. Kwikset Web site, Exhibit A**

“Headquartered in Irvine, California, Kwikset produces all of its products in the United States at four manufacturing facilities, employing more than 2,700 people.”

B. Kwikset brochure, Exhibit B

“Kwikset Quality . . . *Made in the U.S.A.”

C. Kwikset Titan brochure, Exhibit C

Complaint

“TITAN products are the most durable Grade 2 locksets made in America.” and

“TITAN Quality . . . *Made in the U.S.A.”

D. Kwikset Plus brochure, Exhibit D

“Kwikset PLUS Quality . . . *Made in the U.S.A.”

E. Kwikset Product Selector Guide, Exhibit E

“Made in U.S.A.”

Packaging

F. Kwikset Tylo Unkeyed Knobs (“Lockset”), Exhibit F

“All American Made” with star and stripes shield (on top, front, and side panel);

“ALL AMERICAN MADE AND PROUD OF IT” inside star and stripes shield (on inside flap); and

“Made and Printed in U.S.A.” (on bottom panel); and

In small print on side panel, the words “ASSEMBLED IN MEXICO.”

G. Kwikset Decorative Colonial Handle, Exhibit G

“Made in USA” on back of package.

H. Kwikset Sliding Door Lock, Exhibit H

“Made in USA” on back of package.

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that certain of its locks

Complaint

and lock systems are made in the United States, *i.e.*, that all, or virtually all, of the component parts of such locks and lock systems are made in the United States, and that all, or virtually all, of the labor in manufacturing such locks and lock systems is performed in the United States.

7. In truth and in fact, a significant portion of the components of certain of respondents' locks and lock systems is, or has been, of foreign origin. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

8. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this eighth day of February, 2001, has issued this complaint against respondents.

Kwikset[®]

C O R P O R A T I O N

a **BLACK & DECKER** company



Home
Consumer
Links

New
Products

F.A.Q.

Product
Support

Job
Opportunities

Company
Information

Knobs

Levers

Deadbolts

Handlesets

FOR IMMEDIATE RELEASE

Company background: Kwikset Corporation

As the largest manufacturer of residential locksets in the United States, Kwikset Corporation has been an industry leader since its founding in 1945.

Kwikset's long, successful track record of significant contributions to the industry has earned the company an unparalleled reputation for manufacturing products that offer customers superior quality and outstanding value. Ever since the company's founders, Adolf Schoepe and Karl Rhinehart, revolutionized the residential lockset industry when they invented the tubular design to replace the old-fashioned mortise lock, Kwikset has never looked back, maintaining a position of leadership within the industry. Since 1957, Kwikset has been the number one manufacturer of residential locksets.

A Black & Decker company since 1989, Kwikset markets products under the KWIKSET, TITAN and BLACK & DECKER brands. Its full line of residential door hardware includes: handlesets, knobsets, deadbolt locks, and leversets. Additionally, the company manufactures key-in-levers for the light commercial market.

Kwikset has long been a supporter of law enforcement and crime prevention groups. For many years, the company has distributed security demonstration kits free of charge for use in community education programs. Kwikset is also a supporter of the California Police Athletic Federation, which promotes better health and physical fitness among law enforcement personnel through amateur athletic competition.

The addition of the AccessOne Remote Lighting Module to TITAN's AccessOne line allows homeowners to get the most use out of their TITAN AccessOne remote control. The AccessOne Remote Lighting Module allows remote control activation of house lights and maximizes the capability of the AccessOne remote control. All AccessOne home security products utilize rolling code technology which prevents code-grabbers from gaining electronic access to the home. With more than four billion possible combinations, this technology provides the highest level of home security available.

The Society Brass Collection of handlesets, interior knobs and levers features elegant touches

and finishes which create a dramatic first impression for any door.

Headquartered in Irvine, California, Kwikset produces all of its products in the United States at four manufacturing facilities, employing more than 2,700 people.

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Kwikset

Kwikset, America's lockset leader, proudly presents its opening price-point line of security hardware, represented in the Kwikset product line. Here you'll find everything from knobs in a range of styles and finishes to quality, solid-forged entry handlesets. The line includes single- and double-cylinder deadbolts, one-sided deadbolts for residential and light commercial applications, plus three knob designs, and three newly redesigned solid-forged handlesets.

In the Kwikset product line you'll discover our commitment for over half a century of providing stylish function and quality products at an affordable price. All are easy to install in three simple steps and reversible to install on left- or right-handed doors.

Kwikset Knobs Exceptional Value

- Quality Products at Great Prices
- Traditional and Contemporary Styles
- Wide Selection of Finishes
- Versatile—Carrying a Matching Theme Throughout the Home

Kwikset Deadbolt Security

- Tough Protection at an Affordable Price
- Full 1" Throw Deadbolt
- Tapered Cylinder Guard Resists Wrenching
- Large Interior Turnpiece

Kwikset Quality

- 10 Year Mechanical Warranty
- 5 Year Finish Warranty
- Toll-Free Installation Hotline (1-800-327-LOCK)

~~Manufactured in the U.S.A.~~

Kwikset Convenience

- Full Range of Functions
- Fits Most Doors, Standard Door Preparation
- Reversible for Left- or Right-Handed Doors
- Easy 3-Step Installation

To help our customers gain an edge over the competition and increase profits, Kwikset offers knobsets, deadbolts and handlesets designed to protect and enhance any residential application. The 660 deadbolt is Kwikset's most popular deadbolt-quality product at a great price. Offering exceptional value is what has made Kwikset number one year after year.

The Kwikset line of products displays design variety complimented by an array of durable, beautiful finishes. With a premium on quality, not price, the opening price point locksets demonstrate how they mesh perfectly with any builders market.

We stand behind our products with a 10 year mechanical warranty and a 5 year finish warranty.

The Best Value Today



Over Fifty Years of Quality in Every Lock For over half a century, Kwikset Corporation has manufactured quality home security products that have earned it over five decades of industry leadership. It all began with entrepreneurs Adolf Schoepe and Karl Rhinehart.

1946 Schoepe and Rhinehart revolutionized residential lock design by pioneering a tubular lock—named "Kwikset" to underscore its speedy installation.

1948 A state-of-the-art manufacturing facility is constructed to meet post-war housing boom needs for a fast, dependable, and easily installed lockset.

1957 Kwikset merges with American Hardware Corporation (AHC) of New Britain, Conn. AHC leads the commercial and industrial lockset industry, while Kwikset continues to forge ahead with the residential market. Kwikset becomes the number one manufacturer of residential locksets, a title it has held ever since.



Builders and consumers nationwide choose Kwikset's best hardware, represented in the TITAN product line. Designed for the discriminating customer, ~~TITAN products are the most durable Grade 2 locksets made in America.~~ The line includes single- and double-cylinder, unbeatable-security deadbolts, plus six knob designs, five lever styles, and eight solid-forged handlesets.

All are keyed 6-pin for over 30,000 more keying combinations than standard 5-pin systems . . . which means greater security. The TITAN product line has been constructed with features that have come to represent greater durability and security than standard residential locksets.

TITAN Durability

- 200% more durable than Grade 3
- Nickel-Plated Bolt
- Steel Latch Face and Strike
- Steel Rack and Pinion
- Solid-Forged Construction
- Split Lock Washers
- Interior Torque Spring

TITAN Security

- Steel Anti-Pry Shield
- 6-Pin Cylinder
(Six times the security combinations)
- Professional Grade 2
(200% stronger than residential locksets)
- Heavy-Duty 1" Throw Steel Deadbolt
- Four 3" Hardened Steel Screws

TITAN Quality

- Lifetime Mechanical Warranty
- Lifetime Finish Warranty-
A Patented Lifetime Finish process option for entry locksets.
- Standard 10 Year Finish Warranty
- Toll-Free Installation Hotline
(1-800-327-LOCK)
- Made in the U.S.A.

TITAN Convenience

- Fits Most Doors
- Universal Keying
- Easy 3-Step Installation

Nothing comes close to TITAN strength, durability, convenience or styling. This line of hardware has passed the most stringent tests imposed by the American National Standards Institute (ANSI). TITAN achieves a Grade 2 rating—the highest performance rating in residential hardware.

TITAN quality begins with highly advanced engineering and design. Built with heavy-duty metal components and solid, tight-fitting construction, these products are the most durable you'll find. They're the easiest to install, too, with screw guides and factory preset screws. And they come equipped with front removable cylinders, so they're easy to rekey. TITAN has set a new standard of style, with designs to enhance a vast array of home decor.

We stand behind the TITAN line with a Lifetime mechanical warranty and a 10 year finish warranty. The optional Lifetime finish, achieved by a patented manufacturing process, ensures life-long performance and beauty.

The Gold Standard in Security



Over Fifty Years of Quality in Every Lock For over half a century, Kwikset Corporation has manufactured quality home security products that have earned it over five decades of industry leadership. It all began with entrepreneurs Adolf Schoepe and Karl Rhinehart.

1946 Schoepe and Rhinehart revolutionized residential lock design by pioneering a tubular lock—named "Kwikset" to underscore its speedy installation.

1948 A state-of-the-art manufacturing facility is constructed to meet post-war housing boom needs for a fast, dependable, and easily installed lockset.

1957 Kwikset merges with American Hardware Corporation (AHC) of New Britain, Conn. AHC leads the residential and industrial lockset industry, while Kwikset



Kwikset, America's lockset leader, proudly presents the Kwikset PLUS line of security hardware, with exciting new styles and features you've been wanting. Here you'll find everything from knobs in a range of styles and finishes to quality, solid-forged entry handlesets. The line includes single- and double-cylinder deadbolts, plus three knob designs, five lever designs including the three with keyed entry functions, and four solid-forged handlesets.

In the Kwikset PLUS product line you'll discover our commitment for over half a century of providing stylish function and quality products at an affordable price. Grade 3 keyed levers and Lifetime Finish option introduce convenience and durability features at an exceptional value.

Kwikset PLUS knobs, levers, and handlesets

- Quality Products at Great Prices
- Heavy-Duty Dual Torque Springs for Extra Durability
- Wide Selection of Finishes
- Levers with the Fit, Feel, and Improved Durability of Premium Levers

Kwikset PLUS Deadbolt Security

- Tough Protection at an Affordable Price
- Heavy-Duty Adjustable Bolt
- Full 1" Throw Deadbolt
- Large Interior Turnpiece Meets ADA Requirements

Kwikset PLUS Quality

- 25 Year Mechanical Warranty
- 5 Year Finish Warranty
- Optional Lifetime Finish Warranty
- Toll-Free Installation Hotline (1-800-327-LOCK)
- Made in the U.S.A.

Kwikset PLUS Convenience

- Full Range of Functions
- Fits Most Doors, Standard Door Preparation
- Easy 3-Step Installation

To help our customers gain an edge over the competition and increase profits, Kwikset PLUS offers knobsets, lever-sets, deadbolts, and handlesets designed to protect and enhance any residential application. The upgrade features in the lever series and durability components incorporated across the product line provide step-up options. Offering exceptional value is what has made Kwikset number one year after year.

The Kwikset PLUS line of products display design variety complimented by an array of durable, beautiful finishes. We stand behind our products with a 25 year mechanical warranty, 5 year finish warranty, and an optional Lifetime Finish warranty on selected styles.

A Better Value Lockset



Over Fifty Years of Quality in Every Lock For over half a century, Kwikset Corporation has manufactured quality home security products that have earned it over five decades of industry leadership. It all began with entrepreneurs Adolf Schoepe and Karl Rhinehart.

1946 Schoepe and Rhinehart revolutionized residential lock design by pioneering a tubular lock—named “Kwikset” to underscore its speedy installation.

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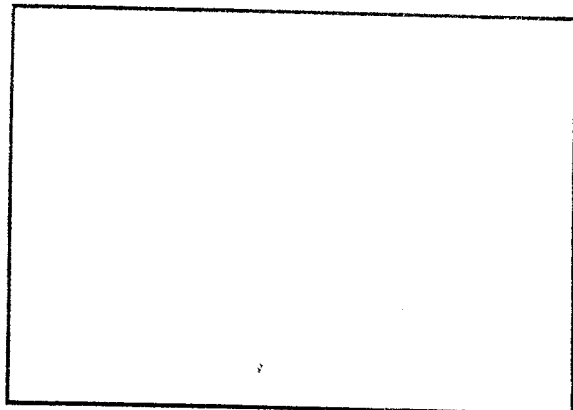
Toll Free Installation Hotline: Call 800-327-2006

Kwikset

C O R P O R A T I O N

▶ BLACK & DECKER COMPANY

Customer Service
516 East Santa Ana Street
Anaheim, CA 92803-4280



Made in U.S.A.

Kwikset

**PRODUCT
SELECTOR
GUIDE**



Kwikset

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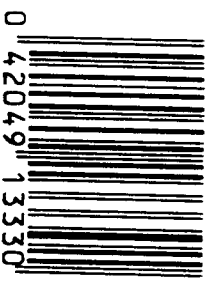


Kwikset Lockset

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ASSEMBLED IN MEXICO
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America's
Largest Selling
Residential
Locksets

BLACK & DECKER

Kwikset
Lockset

BD84

Kwikset

A
BLACK & DECKER
COMPANY

KWIKSET CORPORATION
Anderson, California, U.S.A.

America's
Largest Selling
Residential
Locksets



kwikset

Lockset

▶ BLACK DECKER



America's
Largest Selling
Residential
Locksets

kwikset
Lockset

▶ BLACK DECKER



FOR MORE FASHIONABLE DOORWAYS USE KWIKSET DECORATIVE HANDLES

Decorate your doorways by highlighting the beauty of the lockset design with Kwikset Decorative Handles. They are custom-crafted from the finest materials and their lustrous finishes are protected with Kwikset's durable coating to assure lasting beauty.

The use of this inexpensive styling feature will add a touch of elegance to entryways and give your home that distinctive difference. See the easy installation instructions below.

TO REMOVE YOUR EXISTING LOCKSET

Kwikset, Kwikset Plus, TITAN or Tubular Locksets

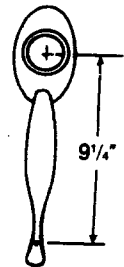
1. Remove interior screws.
2. Remove exterior and interior lockset assemblies.

Other types of cylindrical Locksets

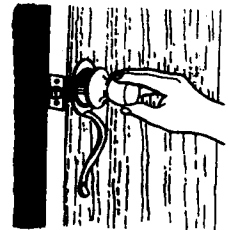
1. Depress slot or button in neck of interior knob and pull knob from spindle.
2. Snap off rose cover with screwdriver inserted in slot in rose.
3. Remove screws from mounting plate or liner and disengage lockset mechanism from latch by pulling straight out from door.

DECORATIVE HANDLE INSTALLATION INSTRUCTIONS

1. Remove Decorative Handle from card by tearing off protective film.
2. Measure from center hole where lockset was removed $9\frac{1}{4}"$ (235 mm) down door face and mark with pencil or other sharp instrument for drilling.
3. Drill $\frac{3}{16}"$ (8 mm) diameter hole through door.
4. Reassemble, insert lockset mechanism through center hole in decorative handle. Insert lockset stems through holes in installed latch. Press lockset and decorative handle flush against door.
5. Insert sex nut through bottom of handle and door, and secure with interior washer and screw provided.
6. Install interior knob assembly of lockset.



DECORATIVE HANDLE



Made in USA

Kwikset



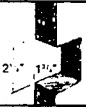
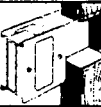
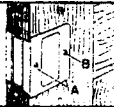
SLIDING/POCKET DOOR LOCKS

Kwikset sliding door locks are distinctively styled from the finest material and can be installed onto pocket type sliding interior doors with a single cut in door edge. Both privacy Model No. 333 with locking turn button and non-locking passage Model No. 332 fit doors 1 $\frac{3}{8}$ " thick.

Passage Lock Model No. 332

- For passage doors where locking is not required - plain front both sides
- Equipped with edge pull

INSTALLATION INSTRUCTIONS

		
1. Cut one simple notch in door	2. Slide lock into position as shown	3. A) Fasten machine screw which tightens and automatically aligns lock B) Insert wood screw and tighten

18595-001

Kwikset

A • BLACKS BECKER COMPANY

KWIKSET CORPORATION
Anaheim, California U.S.A

1-800-327-LOCK

Made in USA



© 1997 KWIKSET CORPORATION

Exhibit H

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Black & Decker Corporation is a Maryland corporation with its principal office or place of business at 701 East Joppa Road, Towson, Maryland 21286.

2. Respondent Kwikset Corporation is a California corporation with its principal office or place of business at 1 Park Place, Suite No. 1000, Irvine, California 92714. Kwikset Corporation is a wholly owned subsidiary of The Black & Decker Corporation.

Decision and Order

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that respondents The Black & Decker Corporation and Kwikset Corporation, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Kwikset "lockset" product in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States. For purposes of this order, Kwikset lockset product means any product that is manufactured or sold by Kwikset Corporation that is used to secure doors, including, but not limited to locksets, deadbolts, knobs and handles.

PROVIDED, however, that a representation that any such product is made in the United States will not be in violation of this order so long as all, or virtually all, of the component parts of such product are made in the United States and all, or virtually all, of the labor in manufacturing such product is performed in the United States.

PROVIDED FURTHER, that nothing in the order shall prohibit Kwikset Corporation from depleting the inventory of Kwikset lockset products bearing a marking or labeling otherwise prohibited by this order and existing on the date this order is signed, in the normal course of business, provided that no such existing inventory is shipped later than November 1, 2000.

Decision and Order

II.

IT IS FURTHER ORDERED that respondents The Black & Decker Corporation and Kwikset Corporation shall not in any labeling, packaging, advertisement, or promotional material for any Kwikset lockset product use the legend “All American Made,” “All American Made and Proud of it” or otherwise represent that a product is entirely made in the United States unless such product is in fact 100% made in the United States.

III.

IT IS FURTHER ORDERED that respondents The Black & Decker Corporation and Kwikset Corporation and their successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All labeling, packaging, advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

IT IS FURTHER ORDERED that respondent Kwikset Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future officers and directors, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and

Decision and Order

shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent Kwikset Corporation shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondents The Black & Decker Corporation and Kwikset Corporation, and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondents The Black & Decker Corporation and Kwikset Corporation, and their successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Decision and Order

VII.

This order will terminate on February 8, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 20, 2000

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondents The Black & Decker Corporation and its wholly-owned subsidiary, Kwikset Corporation.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns advertising, packaging, labeling, and promotional practices related to the sale of Kwikset Corporation's lockset products, including locksets, deadbolts, knobs, and handles. The Commission's complaint charges that respondents misrepresented on packaging and in advertising that certain Kwikset Corporation products are all or virtually all made in the United States. In truth and in fact, these products are actually made with significant foreign content and/or processing.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondents from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Kwikset Corporation from misrepresenting the extent to which any Kwikset lockset is made in the United States. The order defines Kwikset lockset products as any product that is manufactured or sold by Kwikset Corporation that is used to secure doors, including but not limited to locksets, deadbolts, knobs, and handles. The proposed order would allow Kwikset Corporation to represent that such products are made in the United States as long as all, or virtually all, of the components of the products are of U.S. origin, and all, or virtually

Analysis

all, of the labor in manufacturing them is performed in the United States.

The proposed order also prohibits Kwikset Corporation from representing that its products are “All American Made” or “All American Made and Proud of it” or otherwise entirely made in the United States, unless such products are in fact 100% made in the United States.

Part II of the proposed order requires respondents to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires Kwikset Corporation to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondents to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondents to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

WINN-DIXIE STORES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-4001; File No. 0110022**Complaint, February 14, 2001--Decision, February 14, 2001*

This consent order addresses the acquisition by Respondent Winn-Dixie Stores, Inc., which operates more than 1,000 supermarkets in fourteen southeastern states and the Bahamas, of supermarkets and other assets of Jitney-Jungle Stores of America, Inc., an operator -- before effecting a Chapter 11 bankruptcy filing -- of supermarkets, gas stations, and liquor stores in six southern states. The order, among other things, prohibits the respondent, for ten years, from acquiring any interest in four identified Jitney-Jungle supermarkets without the prior approval of the Commission. The order also requires the respondent, for ten years, to provide written notice to the Commission prior to acquiring any interest in a supermarket owner or operator, or any facility that has operated as a supermarket within the previous six months, located in any of the relevant geographic markets at issue. In addition, the order prohibits the respondent, for ten years, from entering into or enforcing any agreement that restricts the ability of any acquirer -- of any supermarket, leasehold interest in a supermarket, or interest in any retail location used as a supermarket within certain areas -- to operate a supermarket at that site, if such supermarket was formerly owned or operated by the respondent.

Participants

For the Commission: *Michael Joel Bloom, Dara J. Diomande, Barbara Anthony, James A. Fishkin, Phillip L. Broyles, Kenneth A. Libby, and Daniel P. Ducore.*

For the Respondent: *Christopher J. MacAvoy, Howrey, Simon, Arnold & White.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"),

Complaint

having reason to believe that respondent Winn-Dixie Stores, Inc. ("Winn-Dixie") has entered into an agreement to acquire certain assets from Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), an entity controlled by Bruckmann, Rosser, Sherrill & Co., L.P., all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such acquisition, 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definitions

1. For the purposes of this complaint:
 - (a) "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
 - (b) "Jitney-Jungle" means Jitney-Jungle Stores of America, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi 39202, and includes its subsidiaries, divisions, groups, and affiliates controlled by Jitney-Jungle, including Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S

Complaint

Operations, Inc., Supermarket Cigarette Sales, Inc.,
Delchamps, Inc., and Southern Jitney Jungle Company,
Inc.

Winn-Dixie Stores, Inc.

2. Respondent Winn-Dixie is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 5050 Edgewood Court, Jacksonville, Florida 32254.

3. Respondent Winn-Dixie is, and at all times relevant herein has been, engaged in the operation of supermarkets in 14 states and the Bahama Islands. Winn-Dixie operates 1,079 supermarkets under the Winn-Dixie trade names. Winn-Dixie had approximately \$13.7 billion in total sales for the fiscal year that ended on June 30, 2000.

4. Respondent Winn-Dixie is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Acquisition

5. On or about October 29, 2000, Winn-Dixie entered into an "Agreement for Purchase and Sale of Retail Grocery Stores By and Between Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. and Winn-Dixie Stores, Inc." pursuant to which Winn-Dixie will acquire 72 supermarkets, 32 gas stations and two liquor stores from the Jitney-Jungle entities. The supermarkets, gas stations and liquor stores are located in Alabama, Florida, Louisiana, and Mississippi. The

Complaint

total value of the proposed acquisition is approximately \$85 million plus the value of inventory.

6. Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. each filed a voluntary petition for reorganization relief pursuant to Chapter 11 of the United States Code, 11 U.S.C. § 101 et seq. as amended (“The Bankruptcy Code”) on October 12, 1999. The proposed transaction is subject to approval by the United States Bankruptcy Court for the Eastern District of Louisiana, Docket No. 99-17191.

Trade and Commerce

7. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

8. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

9. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices on the prices primarily of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food

Complaint

and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

10. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets. These stores operate significantly different retail formats. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

11. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein include, among others, the areas in and near the following cities and towns:

- a. Niceville, Florida;
- b. Gulf Breeze, Florida;
- c. Destin, Florida; and
- d. the Gulfport-Biloxi area of Mississippi, which consists of the parts of Hancock, Harrison, and Jackson counties that include Waveland, Bay Saint Louis, Pass Christian, Long Beach, Gulfport, Biloxi, D'Iberville, and Ocean Springs, and narrower markets contained therein, including Gulfport and Biloxi.

Market Structure

12. The post-merger relevant markets are all highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by the four-firm concentration ratio. The acquisition would substantially increase concentration in each market. The post-acquisition HHIs in the geographic markets range from approximately 2,400 to 10,000.

Complaint

Entry Conditions

13. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

Actual Competition

14. Winn-Dixie and Jitney-Jungle are actual and direct competitors in the relevant line of commerce and the relevant sections of the country.

Effects

15. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of 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, in the following ways, among others:

- a. by eliminating direct competition between supermarkets owned or controlled by Winn-Dixie and supermarkets owned or controlled by Jitney-Jungle;
- b. by increasing the likelihood that Winn-Dixie will unilaterally exercise market power; and
- c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

Complaint

Violations Charged

16. The October 29, 2000, "Agreement for Purchase and Sale of Retail Grocery Stores By and Between Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. and Winn-Dixie Stores, Inc." violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of February, 2001, issues its complaint against said respondent.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Winn-Dixie Stores, Inc. ("Winn-Dixie") of certain assets from Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"), an entity controlled by Bruckmann, Rosser, Sherrill & Co., L.P., and Respondent having been furnished with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, containing a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order:

Decision and Order

- a. Respondent Winn-Dixie is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 5050 Edgewood Court, Jacksonville, Florida 32254.
- b. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Winn-Dixie" or "Respondent" means Winn-Dixie Stores, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Winn-Dixie, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Winn-Dixie, after consummation of the Acquisition, includes the assets that it is acquiring from Jitney-Jungle.

B. "Jitney-Jungle" means Jitney-Jungle Stores of America, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 1770 Ellis Avenue, Suite 200, Jackson, Mississippi 39202, and includes its subsidiaries, divisions, groups, and affiliates controlled by Jitney-Jungle, including Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S Operations, Inc., Supermarket Cigarette Sales, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc.

C. "Acquisition" means the October 29, 2000, "Agreement for Purchase and Sale of Retail Grocery Stores By and Between Interstate Jitney Jungle Stores, Inc., Pump and Save, Inc., P&S

Decision and Order

Operations, Inc., Supermarket Cigarette Sales, Inc., Jitney-Jungle Stores of America, Inc., Delchamps, Inc., and Southern Jitney Jungle Company, Inc. and Winn-Dixie Stores, Inc.” pursuant to which Winn-Dixie will acquire certain assets from Jitney-Jungle and will merge them into Winn-Dixie.

D. "Commission" means the Federal Trade Commission.

E. "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

II.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years commencing on the date this Order becomes final, Respondent shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise, acquire any stock, share capital, equity, or other interest in any supermarket or leasehold interest in any supermarket located at:

1. 65 Poinciana Boulevard, Destin, Florida 32541 (Walton County);
2. 1104 John Sims Parkway, Niceville, Florida 32578 (Okaloosa County);
3. 334 Gulf Breeze Parkway, Gulf Breeze, Florida 32561 (Santa Rosa County); and

4. 171 Porter Avenue, Biloxi, Mississippi 39530 (Harrison County),

including any facility that has operated as a supermarket at such location within six (6) months of the date of the proposed acquisition.

B. The purpose of this prohibition is to ensure the continuation of these assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition in Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent or the

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acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent's offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final:

A. Respondent shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 2000, in Okaloosa, Santa Rosa or Walton counties

Decision and Order

in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Respondent.

B. Respondent shall not remove any fixtures or equipment from a property owned or leased by Respondent in Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama, that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Respondent; or (3) otherwise with the prior approval of the Commission.

V.

IT IS FURTHER ORDERED that, one (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change the corporation that may affect compliance obligations arising out of the Order.

Decision and Order

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request with reasonable notice to Respondent, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and

B. Without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding any such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 14, 2011.

By the Commission.

Analysis

**Analysis of the Complaint and Proposed Consent Order to
Aid Public Comment**

Issued when the Commission tentatively approved a proposed consent order on January 8, 2001

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from Winn-Dixie Stores, Inc. ("Winn-Dixie" or "the Proposed Respondent") an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondent has also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to furnish the Commission with prospective relief in the markets affected by the proposed acquisition by Winn-Dixie of supermarkets and other assets of Jitney-Jungle Stores of America, Inc. ("Jitney-Jungle"). A plan of sale pertaining to the supermarkets involved in this case has been confirmed by the United States Bankruptcy Court for the Eastern District of Louisiana in *In re Jitney-Jungle Stores of America*, Case No. 99-17191, on December 15, 2000.

II. Description of the Parties and the Proposed Acquisition

Jitney-Jungle, owned principally by Bruckmann, Rosser, Sherill & Co., an investment company, runs most of its stores under the names "Jitney-Jungle" and "Delchamps." Prior to its filing under Chapter 11 of the Bankruptcy Act on October 12, 1999, Jitney-Jungle operated nearly 200 supermarkets, and a lesser number of nearby gas stations and liquor stores, in Mississippi, Alabama, Louisiana, Florida, Arkansas, and Tennessee. Following that filing, Jitney-Jungle has closed more than 45 supermarkets and sold off at least ten (10) others. Following the solicitation of buyers for any and all of its stores, Jitney-Jungle proposed to sell 72 supermarkets to Winn-Dixie for a total purchase price of \$85 million. Following an auction held under the auspices of the bankruptcy court, and as limited by the proposed consent order, Winn-Dixie plans instead to acquire 68 of the Jitney-Jungle stores for a reduced consideration.

Analysis

Winn-Dixie is a Florida corporation headquartered in Jacksonville, Florida. It operates more than 1,000 supermarkets in fourteen southeastern states and the Bahamas. Winn-Dixie reported sales of \$14.1 billion for fiscal 1999.

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. They carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")), as well as a deep inventory of those SKUs in a variety of brand names and sizes. To accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space. So called "supercenters" operated by mass merchants such as Wal-Mart, which have full-line supermarkets attached to general merchandise stores, are included in the product market.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices on the prices primarily of food and grocery products sold at nearby supermarkets. They do not regularly price-check food and grocery products sold at other types of stores such as club stores or limited assortment stores, and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, and mass

Analysis

merchants, do not effectively constrain most prices at supermarkets. These other stores operate significantly different retail formats and sell far more limited assortments of items. None of these formats would constrain a price increase taken by supermarkets.

The draft complaint alleges that the relevant sections of the country in which to analyze the acquisition include, among others, the areas in and near the following cities and towns: Niceville, Florida; Gulf Breeze, Florida; Destin, Florida; and the Gulfport-Biloxi area of Mississippi, which consists of the parts of Hancock, Harrison, and Jackson counties that include Waveland, Bay Saint Louis, Pass Christian, Long Beach, Gulfport, Biloxi, D'Iberville, and Ocean Springs, and narrower markets contained therein, including Gulfport and Biloxi (the "Relevant Geographic Markets").

Jitney-Jungle and Winn-Dixie are actual and direct competitors in all of the above listed markets. The acquisition will eliminate that competition. The draft complaint alleges that each of the post-merger markets would be highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by four-firm concentration ratios.¹ The acquisition would substantially increase concentration in each market. Jitney-Jungle and Winn-Dixie would have a combined market share that ranges from slightly less than 34% to 100% in the Relevant Geographic Markets. The post-acquisition HHIs in the Relevant Geographic Markets range from just over 2,400 points to 10,000 points.

The draft complaint further alleges that entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the Relevant Geographic Markets.

¹ The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Analysis

Notwithstanding all of this, Winn-Dixie's acquisition of Jitney-Jungle assets is not likely to create or enhance market power, or facilitate its exercise, to the extent that the imminent failure of Jitney-Jungle would cause those assets, or some of them, to exit the market. To that extent, post-acquisition performance in the relevant market is not likely to be worse than performance had the acquisition been blocked and the assets exited.

As previously indicated, Jitney-Jungle has sought protection from its creditors pursuant to Chapter 11 of the Bankruptcy Act. A review of that proceeding indicates that Jitney-Jungle will not be able to reorganize successfully under Chapter 11, and that but for the auction sale conducted under the auspices of the bankruptcy court Jitney-Jungle would be thrown into liquidation proceedings under Chapter 7 of the Bankruptcy Act. The key question, therefore, is whether Jitney-Jungle has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the Jitney-Jungle assets. Through a variety of means, including the retention of appropriate professionals to elicit offers for its assets and culminating in the previously mentioned auction sale under the auspices of the bankruptcy court, Jitney-Jungle has sought to elicit reasonable alternative bids. In the four Relevant Geographic Markets, Jitney-Jungle has been able to elicit bids that are timely, above the liquidation value of the assets, and otherwise acceptable to creditors. Therefore, the Commission concluded that in the Relevant Geographic Markets the proposed acquisition would be anticompetitive because it would eliminate substantial, direct, and ongoing competition. In all other areas where Winn-Dixie directly competes against Jitney-Jungle, Jitney-Jungle has been unable to elicit bids that are timely, likely, above liquidation value of the assets, and otherwise acceptable to creditors. Therefore, the other areas where Winn-Dixie and Jitney-Jungle directly compete are not being challenged.

The draft complaint alleges that Winn-Dixie's proposed acquisition of various supermarket assets of Jitney-Jungle, if consummated, may substantially lessen competition in the four

Analysis

Relevant Geographic Markets in violation of 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, by eliminating direct competition between supermarkets presently owned or controlled by Jitney-Jungle and supermarkets owned or controlled by Winn-Dixie; by increasing the likelihood that Winn-Dixie will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects raises the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the Relevant Geographic Markets alleged in the proposed complaint.

IV. Terms of the Agreement Containing Consent Order

The proposed consent order will furnish prospective relief in the markets affected by the proposed acquisition.² Under the terms of the proposed consent order, the Proposed Respondent must not, for a period of ten (10) years from the date the proposed consent order becomes final, acquire any interest in four identified Jitney-Jungle supermarkets without the prior approval of the Commission.

Also for a period of ten (10) years, the Proposed Respondent must provide written notice to the Commission prior to acquiring any interest in a supermarket owner or operator, or any facility that has operated as a supermarket within the previous six (6) months, located in any of the Relevant Geographic Markets. Following notice, Proposed Respondent may not complete such an acquisition until after it has provided any information requested

² Acceptance of the proposed consent order for public comment terminates the Hart-Scott-Rodino waiting period and enables Winn-Dixie immediately to acquire the Jitney-Jungle assets.

Analysis

by the Commission during a specified waiting period. This provision does not restrict the Proposed Respondent's construction of new supermarket facilities on its own; nor does it restrict the Proposed Respondent from leasing facilities not operated as supermarkets within the previous six (6) months.

The proposed consent order also prohibits the Proposed Respondent, for ten (10) years, from entering into or enforcing any agreement that restricts the ability of any acquirer of any supermarket, leasehold interest in a supermarket, or interest in any retail location used as a supermarket within Okaloosa, Santa Rosa or Walton counties in Florida; Hancock, Harrison, Jackson or Lauderdale counties in Mississippi; St. Tammany Parish, Louisiana; or Mobile County, Alabama on or after January 1, 2000, to operate a supermarket at that site if such supermarket was formerly owned or operated by the Proposed Respondent. In addition, the Proposed Respondent may not remove fixtures or equipment from a store or property owned or leased in these counties that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy, (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Proposed Respondent, or (3) otherwise with the prior approval of the Commission.

The Proposed Respondent is required to provide to the Commission a report of compliance with the consent order beginning one (1) year from the date the proposed consent order becomes final and annually for each of the following nine (9) years.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will

Analysis

decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF

PHILIP MORRIS COMPANIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket C-3987; File No. 0010215

Complaint, December 7, 2000--Decision, February 22, 2001

This consent order addresses the acquisition by Respondent Philip Morris Companies, Inc. -- which, through its Kraft Foods Inc. subsidiary, is the nation's largest food and beverage company -- of Respondent Nabisco Holdings Corp., the nation's seventh largest food and beverage company. The order, among other things, requires the respondents to divest the Nabisco dry-mix desserts and baking powder businesses -- including the Royal brand of dry-mix gelatin dessert products; the Royal and My-T-Fine brands of dry-mix pudding dessert products; and the Royal brand of no-bake dessert products; and the Davis and Fleischmann's brands of baking power products -- to The Jel Sert Company. The order also requires the respondents to divest the Nabisco intense mints business, together with related Ice Breakers gum and Breath Savers mint businesses, to Hershey Foods Corporation. An accompanying Order to Maintain Assets requires the respondents to preserve and maintain the competitive viability of all the assets required to be divested, in order to insure that their competitive value will be maintained until the assets are actually divested.

Participants

For the Commission: *Joseph Brownman, Erika Brown-Lee, Anthony Saunders, Nathan J. Muyskens, Karen Harris, Phillip L. Broyles, Kenneth A. Libby, Elizabeth A. Piotrowski, Abraham L. Wickelgren, David Balan, Charissa P. Wellford, and Daniel P. O'Brien.*

For the Respondent: *Deborah L. Feinstein, Arnold & Porter, and Joel M Cohen, Davis Polk & Wardwell.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it

Complaint

by said Acts, the Federal Trade Commission, having reason to believe that Philip Morris Companies, Inc. ("Philip Morris") and Nabisco Holdings Corp. ("Nabisco") have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be implemented, would result in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent Philip Morris

1. Respondent Philip Morris is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017-5592.
2. Respondent Philip Morris is, and at all times relevant herein has been, among other things, engaged in the production, sales, and distribution of food products to customers located throughout the United States.
3. Respondent Philip Morris, in 1999, had total worldwide sales of all products of approximately \$79 billion, and United States sales of all products of approximately \$48 billion.
4. Respondent Philip Morris is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Complaint

II. Respondent Nabisco

5. Respondent Nabisco is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054-0311.
6. Respondent Nabisco is, and at all times relevant herein has been, engaged in the manufacture, sale, and distribution of food products to customers located throughout the United States.
7. Respondent Nabisco, in 1999, had total worldwide sales of all products of approximately \$8.3 billion, and United States sales of all products of approximately \$5.9 billion.
8. Respondent Nabisco is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. The Proposed Acquisition

9. On or about June 25, 2000, Respondents Philip Morris and Nabisco executed an agreement for Philip Morris to acquire Nabisco. The value of the proposed acquisition is approximately \$19.4 billion.

IV. Trade and Commerce

A. Dry-Mix Gelatin

10. Dry-mix gelatin is a sugar-based or sugar-free, flavored, powdered gelatin product that, when combined with water, produces a flavored gelatin dessert.

Complaint

11. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells Jell-O brand dry-mix gelatin desserts.
12. Nabisco sells Royal and My-T-Fine brands of dry-mix gelatin desserts. The Royal and My-T-Fine dry-mix gelatin desserts are produced in Sheboygan, Wisconsin, for Nabisco by Enzo Pac, Inc., pursuant to a co-packing agreement.
13. Philip Morris and Nabisco are the only two significant sellers of branded dry-mix gelatin desserts in the United States.
14. Total United States sales (at wholesale) of all dry-mix gelatin desserts are about \$212 million.

B. Dry-Mix Pudding

15. Dry-mix pudding is a sugar-based or sugar-free powder, typically made with flour, sweetener, and flavoring, that when combined with milk or water, produces a soft, thickened, dessert.
16. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells Jell-O brand dry-mix pudding.
17. Nabisco sells Royal and My-T-Fine brands of dry mix pudding. The Royal and My-T-Fine dry-mix puddings are produced in Sheboygan, Wisconsin, for Nabisco by Enzo Pac, Inc., pursuant to a co-packing agreement.
18. Philip Morris and Nabisco are the only two significant sellers of branded dry-mix pudding in the United States.
19. Total United States sales (at wholesale) of all dry-mix pudding desserts are about \$202 million.

Complaint

C. No-Bake Desserts

20. No-bake desserts are three-stage dessert mixes (for a crust, filling, and topping) that, when combined with milk or water and butter or margarine, produce a cheesecake or other dessert.
21. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells Jell-O brand no-bake desserts.
22. Nabisco sells the Royal brand of no-bake desserts. The Royal no-bake desserts are produced in Sheboygan, Wisconsin, for Nabisco by Enzo-Pac, Inc., pursuant to a co-packing agreement.
23. Philip Morris and Nabisco are the only two significant sellers of no-bake desserts.
24. Total United States sales (at wholesale) of all no-bake desserts are about \$56 million.

D. Baking Powder

25. Baking powder is a leavening agent in making baked goods that consists of a carbonate, an acid substance, and starch or flour.
26. Philip Morris, through its Kraft Foods Inc. subsidiary, produces and sells the Calumet brand of baking powder.
27. Nabisco sells the Davis and Fleischmann's brands of baking powder. Nabisco produces its baking powders in Exeter, Canada.
28. Philip Morris and Nabisco are two of only three significant sellers of baking powder in the United States.

Complaint

29. Total United States revenues of all baking powder are about \$29 million.

E. Intense Mints

30. Intense mints are strong mint-flavored candies such as Altoids, Ice Breakers, and Cool Blasts, but not including traditional mint candies such as Life Savers.
31. Philip Morris produces and sells the Altoids brand of intense mints. Altoids are produced in the United Kingdom by Callard & Bowser - Suchard Inc., a division of Kraft Foods Inc., which is a subsidiary of Philip Morris.
32. Nabisco sells the Ice Breakers and Cool Blast brands of intense mints. The mix for Ice Breakers intense mints is pre-blended for Nabisco by Beacon Specialty, Grand Haven, Michigan. The mints are then pressed in Nabisco's Holland, Michigan, plant, and packaged for Nabisco by Packaging Coordinators, Philadelphia, Pennsylvania. Cool Blast intense mints are manufactured and packaged for Nabisco in Saltillo, Coahuila, Mexico, by Pissa, pursuant to a co-packing agreement.
33. Philip Morris and Nabisco are two of only three significant sellers of intense mints in the United States.
34. Total United States sales (at wholesale) of all intense mints are about \$250 million.

V. The Relevant Product Markets

35. The relevant product markets in which it is appropriate to assess the effects of the proposed acquisition are as follows:
- (a) the distribution and sale of dry-mix gelatin;
 - (b) the distribution and sale of dry-mix pudding;

Complaint

- (c) the distribution and sale of no-bake desserts;
- (d) the distribution and sale of baking powder; and
- (e) the distribution and sale of intense mints.

VI. The Relevant Geographic Markets

36. The relevant geographic markets in which it is appropriate to assess the effects of the proposed acquisition, in each relevant market, are:
- (a) the United States; and
 - (b) smaller areas within the United States.

VII. Concentration

37. The relevant markets are highly concentrated and the proposed acquisition, if consummated, will substantially increase that concentration, as follows:
- (a) In the dry-mix gelatin market, Philip Morris has approximately an 86% share of the market and Nabisco has approximately a 6% share. After the acquisition, the Philip Morris share will increase to approximately 92% and it will control virtually all sales of branded product. The acquisition will increase the Herfindahl-Hirschman Index (“HHI”) by more than 1000 points and result in market concentration of more than 8400 points.
 - (b) In the dry-mix pudding market, Philip Morris has approximately an 82% share and Nabisco has approximately a 9% share. After the acquisition, the Philip Morris share will increase to approximately 91% and it will control virtually all sales of branded product. The acquisition will increase the HHI by more than 1400 points and result in market concentration of more than 8300 points.

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- (c) In the no-bake desserts market, Philip Morris has approximately a 90% share and Nabisco has approximately a 6% share. After the acquisition, the Philip Morris share will increase to approximately 96%. The acquisition will increase the HHI by more than 1000 points and result in market concentration of more than 9200 points.
- (d) In the baking powder market, Philip Morris has approximately a 27% share and Nabisco has approximately a 17% share. After the acquisition, the Philip Morris share will increase to approximately 44% and it will have only one other significant competitor of branded products. The acquisition will increase the HHI by more than 900 points and result in market concentration of more than 4800 points.
- (e) In the intense mints markets, Philip Morris has approximately a 60% share and Nabisco has approximately a 15% share. After the acquisition, the Philip Morris share will increase to approximately 75% and it will have only one other significant competitor. The acquisition will increase the HHI by approximately 1800 points and result in market concentration of more than 5800 points.

VIII. Conditions of Entry

38. Entry into each relevant market would not be timely, likely, or sufficient to prevent the anticompetitive effects set forth in Paragraph 39, below.

IX. Effects

39. The proposed acquisition will eliminate competition between Philip Morris and Nabisco, and will enhance, increase, and facilitate the continued exercise by Philip Morris of its market power, as follows:
- (a) By creating or increasing the likelihood that it will exercise unilateral market power; and

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(b)By creating or increasing the likelihood that it will engage in coordinated interaction with its remaining competitors;

each of which increases the likelihood that prices will increase, or not decrease as rapidly or as much as they otherwise would, or that the various services and promotional activities associated with these products will decrease (or not increase as much as they otherwise would) but for the merger.

X. Violations Charged

40. The agreement entered into between Respondents Philip Morris and Nabisco for Philip Morris to acquire Nabisco constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Further, the agreement, if consummated, would be a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of December, 2000, issues its Complaint against Respondents Philip Morris and Nabisco.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the acquisition by Respondent Philip Morris Companies, Inc. of Respondent Nabisco Holdings Corp., and Respondents having been furnished thereafter with draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated Section 5 of the Federal Trade Commission Act and that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments thereafter filed by interested persons pursuant to Rule 2.34 of the Commission’s Rules of Practice (16 C.F.R. § 2.34),

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now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional finding and issues the following Decision and Order (“Order”):

1. Respondent Philip Morris Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017.
2. Respondent Nabisco Holdings Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Philip Morris” means Philip Morris Companies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Philip Morris Companies, Inc. (including, but not limited to, Kraft Foods, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- B. “Nabisco” means Nabisco Holdings Corp., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nabisco Holdings Corp. (including, but not limited to, Nabisco, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Philip Morris and Nabisco, individually and collectively.
- D. “Commission” means Federal Trade Commission.
- E. “Hershey” means Hershey Foods Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal place of business at 100 Crystal A Drive, Hershey, Pennsylvania 17033, and any of its subsidiaries, successors and assigns.
- F. “Jel Sert” means The Jel Sert Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal place of business at Highway 59 and Conde Street, West Chicago, Illinois 60186, and any of its subsidiaries, successors and assigns.
- G. “Acquisition” means the proposed acquisition by Philip Morris of Nabisco as described in the June 25, 2000, Agreement and Plan of Merger between Philip Morris and Nabisco.
- H. “Dry-Mix Desserts” means, individually and collectively, dry-mix gelatin, dry-mix pudding, and no-bake desserts.

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- I. “Dry-mix gelatin” means sugar-based or sugar-free, flavored, powdered gelatin products that, when combined with water, produce a flavored gelatin dessert.
- J. “Dry-mix pudding” means a sugar-based or sugar-free powder, typically made with flour, sweetener, and flavoring, that when combined with milk or water, produces a soft, thickened, dessert.
- K. “No-bake desserts” means three-stage dessert mixes (for a crust, filling, and topping) that, when combined with milk or water and butter or margarine, produce a cheesecake or other dessert.
- L. “Baking Powder” means a powder used as a leavening agent in making baked goods that consists of a carbonate, an acid substance, and starch or flour.
- M. “Intense Mints” means strong mint-flavored candies such as Altoids, Ice Breakers or Cool Blast, but not including traditional mint candies such as Life Savers.
- N. “Nabisco Dry-Mix Desserts Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Dry-Mix Desserts in or into the United States, including without limitation, the following:
 - 1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including, but not limited to all rights of Nabisco to the Royal, Royalito, and My-T-Fine trade names and trademarks in the United States for any product;

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2. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
3. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, including, without limitation, all contracts with any third party for the supply of Dry-Mix Desserts;
4. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
5. all commitments and orders for the purchase of goods that have not been shipped;
6. all rights under warranties and guarantees, express or implied; and
7. all studies, reports, books, records and files, and all items of prepaid expense.

PROVIDED, HOWEVER, that the “Nabisco,” Red Triangle, and Colophon trademarks, trade names and trade designations are excluded from the definition of Nabisco Dry-Mix Desserts Assets.

- O. “Nabisco Baking Powder Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Baking Powder in or into the United States, including without limitation, the following:

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1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including but not limited to all rights of Nabisco to the Davis and Fleischmann's trade names and trademarks in the United States for any product;
2. all assets utilized in the manufacture and packaging of Baking Powder, including the production equipment located in the Nabisco plant located in Exeter, Ontario, Canada, but not including the plant or any equipment at the plant that is not used in the production of Baking Powder;
3. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
4. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, including, without limitation, all contracts with any third party for the supply of Baking Powder;
5. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
6. all commitments and orders for the purchase of goods that have not been shipped;
7. all rights under warranties and guarantees, express or implied; and

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8. all studies, reports, books, records and files, and all items of prepaid expense.

PROVIDED, HOWEVER, that the “Nabisco,” Red Triangle, and Colophon trademarks, trade names and trade designations are excluded from the definition of Nabisco Baking Powder Assets.

- P. “Nabisco Intense Mints Assets” means all assets, businesses and goodwill, tangible and intangible, of Nabisco that are related to the manufacture, marketing or sale of Intense Mints in or into the United States, including without limitation, the following:
 1. all intellectual property, inventions, technology, trademarks, trade names, trade secrets, know-how, trade dress, service marks, copyrights, patents, formulations, specifications and manufacturing know-how and processes, and quality control data, including but not limited to all rights of Nabisco to the Ice Breakers, Breath Savers, Breath Savers Cool Blast, and Neutrazin trade names and trademarks in the United States for any product (including but not limited to Ice Breakers gum);
 2. all assets utilized in the manufacture and packaging of Intense Mints, including the production equipment located in the Nabisco plant located in Holland, Michigan, but not including the plant or any equipment at the plant that is not used in the production of Intense Mints;
 3. all customer lists, vendor lists, catalogs, sales promotion literature and advertising materials, and product literature;
 4. all rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds),

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suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, including, without limitation, all contracts with any third party for the supply of Intense Mints;

5. all inventory, including raw materials, packaging materials, work-in-process and finished goods;
6. all commitments and orders for the purchase of goods that have not been shipped;
7. all rights under warranties and guarantees, express or implied; and
8. all studies, reports, books, records and files, and all items of prepaid expense.

PROVIDED, HOWEVER, that the “Nabisco,” Red Triangle, and Colophon trademarks, trade names and trade designations are excluded from the definition of Nabisco Intense Mints Assets.

- Q. “Hershey Agreement” means the Asset and Stock Sale Agreement among Nabisco, Inc., Kraft Foods, Inc., Hershey Foods Corporation and Hershey Chocolate & Confectionery Corporation dated as of November 5, 2000.
- R. “Jel Sert Agreement” means the Asset Sale Agreement between Nabisco, Inc. and The Jel Sert Company dated as of November 5, 2000.
- S. “Acquirer-Dry-Mix Desserts” means Jel Sert, or the entity that acquires the Nabisco Dry-Mix Desserts Assets pursuant to Paragraphs II or V of this Order, as applicable.

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- T. “Dry-Mix Desserts Divestiture Agreement” means all agreements between Respondents and any Acquirer-Dry-Mix Desserts, and all amendments, exhibits, attachments, related agreements (including, but not limited to, any supply agreements) and schedules thereto, including, but not limited to, the Jel Sert Agreement.
- U. “Acquirer-Baking Powder” means Jel Sert, or the entity that acquires the Nabisco Baking Powder Assets pursuant to Paragraphs III or V of this Order, as applicable.
- V. “Baking Powder Divestiture Agreement” means all agreements between Respondents and any Acquirer-Baking Powder, and all amendments, exhibits, attachments, related agreements (including, but not limited to, any supply agreements) and schedules thereto, including, but not limited to, the Jel Sert Agreement.
- W. “Acquirer-Intense Mints” means Hershey, or the entity that acquires the Nabisco Intense Mints Assets pursuant to Paragraphs IV or V of this Order, as applicable.
- X. “Intense Mints Divestiture Agreement” means all agreements between Respondents and any Acquirer-Intense Mints, and all amendments, exhibits, attachments, related agreements (including, but not limited to, any supply agreements) and schedules thereto, including, but not limited to, the Hershey Agreement.
- Y. “Cost” means cost of manufacturing an item, as determined by GAAP, including the actual cost of raw materials, direct labor, reasonably allocated factory overhead and reasonable, actual contracted services. The cost of raw materials and direct labor is the actual cost of materials and labor consumed to manufacture the item.

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II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Dry-Mix Desserts Assets as ongoing businesses.
- B. 1. The divestiture shall be made to Jel Sert no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Jel Sert Agreement.
2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Dry-Mix Desserts Assets to Jel Sert prior to the date this Order becomes final, Respondents will include and enforce a provision in the Jel Sert Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Jel Sert is not an acceptable purchaser of the Nabisco Dry-Mix Desserts Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED FURTHER, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with Jel Sert and shall divest the Nabisco Dry-Mix Desserts Assets within 120 days of rescission to an Acquirer-Dry-Mix Desserts that receives the prior approval of the Commission pursuant to a Dry-Mix Desserts Divestiture Agreement that receives the prior approval of the Commission.
3. PROVIDED FURTHER, that if the Acquirer-Dry-Mix Desserts expresses a preference not to acquire any portion of the Nabisco Dry-Mix Desserts Assets, and if the

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Commission approves such acquirer and the Dry-Mix Desserts Divestiture Agreement excluding such portion of the Nabisco Dry-Mix Dessert Assets, then Respondents shall not be required to divest that portion of the Nabisco Dry-Mix Desserts Assets.

- C. Respondents shall comply with all the terms of the Dry-Mix Desserts Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Dry-Mix Desserts Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Dry-Mix Desserts Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Dry-Mix Desserts Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Dry-Mix Desserts Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.
- E. The purpose of the divestiture of the Nabisco Dry-Mix Desserts Assets is to ensure the continued use of the Nabisco Dry-Mix Desserts Assets in the same businesses in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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III.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Baking Powder Assets as an ongoing business.
- B. 1. The divestiture shall be made to Jel Sert no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Jel Sert Agreement.
2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Baking Powder Assets to Jel Sert prior to the date this Order becomes final, Respondents will include and enforce a provision in the Jel Sert Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Jel Sert is not an acceptable purchaser of the Nabisco Baking Powder Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED FURTHER, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with Jel Sert and shall divest the Nabisco Baking Powder Assets within 120 days of rescission to an Acquirer-Baking Powder that receives the prior approval of the Commission pursuant to a Baking Powder Divestiture Agreement that receives the prior approval of the Commission.
3. PROVIDED FURTHER, that if the Acquirer-Baking Powder expresses a preference not to acquire any portion of the Nabisco Baking Powder Assets, and if the Commission

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approves such acquirer and the Baking Powder Divestiture Agreement excluding such portion of the Nabisco Baking Powder Assets, then Respondents shall not be required to divest that portion of the Nabisco Baking Powder Assets.

- C. Respondents shall comply with all the terms of the Baking Powder Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Baking Powder Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Baking Powder Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Baking Powder Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Baking Powder Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.
- E. At the request of the Acquirer-Baking Powder, Respondents shall supply to the Acquirer-Baking Powder, for such period as the Acquirer-Baking Powder may request, up to one (1) year from the date the Nabisco Baking Powder Assets are divested, on reasonable commercial terms and provisions, at Respondents' Cost or at such lower price as Respondents and the Acquirer-Baking Powder may otherwise agree, for distribution and sale by the Acquirer-Baking Powder, such quantities and types of Baking Powder as may be requested by the Acquirer-Baking Powder from among those manufactured or sold by Nabisco prior to the Acquisition or as may be introduced, developed or modified by the Acquirer-Baking Powder to the extent they can be made by the current Nabisco personnel on the current Nabisco equipment relating to Baking

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Powder with commercially reasonable efforts. Such supply agreement must be approved by the Commission as part of the Baking Powder Divestiture Agreement.

- F. The purpose of the divestiture of the Nabisco Baking Powder Assets is to ensure the continued use of the Nabisco Baking Powder Assets in the same business in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest or cause to be divested, absolutely and in good faith, at no minimum price, the Nabisco Intense Mint Assets as an ongoing business.
- B. 1. The divestiture shall be made to Hershey no later than ten (10) business days after Respondent Philip Morris consummates the Acquisition, and shall be pursuant to and in accordance with the Hershey Agreement.
2. PROVIDED, HOWEVER, that if Respondents divest the Nabisco Intense Mints Assets to Hershey prior to the date this Order becomes final, Respondents will include and enforce a provision in the Hershey Agreement requiring that the transaction be rescinded if the Commission determines not to make the Order final or if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Hershey is not an acceptable purchaser of the Nabisco Intense Mints Assets or that the manner in which the divestiture was accomplished is not an acceptable manner of divestiture. PROVIDED

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FURTHER, that if the Commission so notifies Respondents, Respondents shall immediately rescind the transaction with Hershey and shall divest the Nabisco Intense Mints Assets within 120 days of rescission to an Acquirer-Intense Mints that receives the prior approval of the Commission pursuant to an Intense Mints Divestiture Agreement that receives the prior approval of the Commission.

3. PROVIDED FURTHER, that if the Acquirer-Intense Mints expresses a preference not to acquire any portion of the Nabisco Intense Mints Assets, and if the Commission approves such acquirer and the Intense Mints Divestiture Agreement excluding such portion of the Nabisco Intense Mints Assets, then Respondents shall not be required to divest that portion of the Nabisco Intense Mints Assets.
- C. Respondents shall comply with all the terms of the Intense Mints Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order or the Order to Maintain Assets), and such agreement shall be deemed incorporated by reference into this Order. Failure to comply with the Intense Mints Divestiture Agreement shall constitute a failure to comply with this Order.
- D. Pending divestiture of the Nabisco Intense Mints Assets, Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Intense Mints Assets and to prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of any of the Nabisco Intense Mints Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.
- E. At the request of the Acquirer-Intense Mints, Respondents shall supply to the Acquirer-Intense Mints, for such period as the Acquirer-Intense Mints may request, up to one (1) year

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from the date the Nabisco Intense Mint Assets are divested, on reasonable commercial terms and provisions, at Respondents' Cost or at such lower price as Respondents and the Acquirer-Intense Mints may otherwise agree, for distribution and sale by the Acquirer-Intense Mints, such quantities and types of Intense Mints as may be requested by the Acquirer-Intense Mints from among those manufactured or sold by Nabisco prior to the Acquisition or as may be introduced, developed or modified by the Acquirer-Intense Mints to the extent they can be made by the current Nabisco personnel on the current Nabisco equipment relating to Intense Mints with commercially reasonable efforts. Such supply agreement must be approved by the Commission as part of the Intense Mints Divestiture Agreement.

- F. The purpose of the divestiture of the Nabisco Intense Mints Assets is to ensure the continued use of the Nabisco Intense Mints Assets in the same business in which they were engaged at the time of the announcement of the proposed Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested, absolutely and in good faith, the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets within the time periods required by Paragraphs II, III and IV of this Order, respectively, the Commission may appoint a trustee to divest such of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets that have not been divested, in a manner that satisfies the requirements of Paragraphs II, III, and/or IV, as applicable.

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- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph V.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee. The trustee may be the same person or entity as any trustee appointed pursuant to the Order to Maintain Assets.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets.

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3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph V. C. 3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time or that consents can be obtained in a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to the personnel, books, records and facilities related to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

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6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestitures shall be made only to an acquirer that receives the prior approval of the Commission, and the divestitures and consents shall be accomplished only in a manner that receives the prior approval of the Commission; provided however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving written notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Nabisco Dry-Mix Desserts Assets, the Nabisco

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Baking Powder Assets, and/or the Nabisco Intense Mints Assets.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph V.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.
11. The trustee shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the marketability, viability and competitiveness of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets, as applicable.
12. The trustee shall have no obligation or authority to operate or maintain the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and/or the Nabisco Intense Mints Assets.

Decision and Order

13. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestitures and to obtain the necessary consents.

VI.

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any ownership, leasehold, or other interest, in whole or in part, in any of the assets required to be divested pursuant to Paragraphs II, III or IV of this Order.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the

Decision and Order

Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VII.

IT IS FURTHER ORDERED that, within thirty (30) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the provisions of Paragraphs II through V of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II through V of this Order and with the Order to Maintain Assets. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II through V of the Order, including a description of all substantive contacts or negotiations relating to the divestitures and the approvals. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestitures and approvals. The final compliance report required by this Paragraph VII shall include a statement that the divestitures have been accomplished in the manner approved by the Commission and shall include the dates the divestitures were accomplished.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any

Decision and Order

other change in the corporation that may affect compliance obligations arising out of the Order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on February 22, 2011.

By the Commission.

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Philip Morris Companies, Inc. of Respondent Nabisco Holdings Corp. and Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing the proposed Decision and Order, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated Section 5 of the Federal Trade Commission Act, and that the Acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement containing the Decision and Order on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

Order

1. Respondent Philip Morris Companies, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its office and principal place of business located at 120 Park Avenue, New York, New York 10017.
2. Respondent Nabisco Holdings Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply:

- D. "Philip Morris" means Philip Morris Companies, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Philip Morris Companies, Inc. (including, but not limited to, Kraft Foods, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- E. "Nabisco" means Nabisco Holdings Corp., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nabisco Holdings Corp. (including, but not limited to, Nabisco, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order

- F. “Respondents” means Philip Morris and Nabisco, individually and collectively.
- G. “Commission” means the Federal Trade Commission.
- H. “Acquisition” means the proposed acquisition by Philip Morris of Nabisco as described in the June 25, 2000, Agreement and Plan of Merger between Philip Morris and Nabisco.
- F. “Dry-Mix Desserts” means, individually and collectively, dry-mix gelatin, dry-mix pudding, and no-bake desserts.
- G. “Baking Powder” means a powder used as a leavening agent in making baked goods that consists of a carbonate, an acid substance, and starch or flour.
- H. “Intense Mints” means strong mint-flavored candies such as Altoids, Ice Breakers or Cool Blast, but not including traditional mint candies such as Life Savers.
- I. “Nabisco Dry-Mix Desserts Assets” shall have the same meaning as in the Decision and Order.
- J. “Dry-mix gelatin” means sugar-based or sugar-free, flavored, powdered gelatin products that, when combined with water, produce a flavored gelatin dessert.
- K. “Dry-mix pudding” means a sugar-based or sugar-free powder, typically made with flour, sweetener, and flavoring, that when combined with milk or water, produces a soft, thickened, dessert.
- L. “No-bake desserts” means three-stage dessert mixes (for a crust, filling, and topping) that, when combined with milk or water and butter or margarine, produce a cheesecake or other dessert.

Order

- M. “Nabisco Baking Powder Assets” shall have the same meaning as in the Decision and Order.
- N. “Nabisco Intense Mints Assets” shall have the same meaning as in the Decision and Order.
- O. “Asset Maintenance Trustee” means any trustee appointed pursuant to Paragraph III of this Order to Maintain Assets.
- P. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph V of the Decision and Order.
- Q. “Asset Maintenance Period” means the period of time which shall begin on the date Respondents sign the Agreement Containing Consent Orders and shall terminate as provided in Paragraph VI of this Order to Maintain Assets.
- R. “Material Confidential Information” means competitively sensitive or proprietary information not independently known to an entity from sources other than the entity to which the information pertains, and includes, but is not limited to, all customer lists, price lists, marketing methods, patents, technologies, processes, know-how, or other trade secrets.

PROVIDED, HOWEVER, any term used in this Order to Maintain Assets that is not otherwise defined in this Paragraph I has the same meaning as defined in the Consent Agreement and the Decision and Order.

II.

IT IS FURTHER ORDERED that, from the date this Order to Maintain Assets becomes final:

- A. Respondents shall take such actions as are reasonably necessary to maintain the viability and marketability of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets, and to prevent

Order

the destruction, removal, wasting, deterioration, sale, disposition, transfer or impairment of any of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets, except for ordinary wear and tear and as would otherwise occur in the ordinary course of business.

- B. Except to the extent necessary to assure compliance with this Order to Maintain Assets, the Consent Agreement, and the Decision and Order, Respondents shall not allow any person not involved in the management or operations of the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, or the Nabisco Intense Mints Assets to have access to any Material Confidential Information concerning the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, or the Nabisco Intense Mints Assets.

III.

IT IS FURTHER ORDERED that:

- A. At any time after the Commission issues this Order to Maintain Assets, the Commission may appoint an Asset Maintenance Trustee to ensure that Respondents comply with their obligations relating to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets under the terms of Paragraph II of this Order to Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.
- B. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities and responsibilities of the Asset Maintenance Trustee appointed pursuant to Paragraph III.A.:
 - 1. The Commission shall select the Asset Maintenance Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the

Order

reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The Asset Maintenance Trustee shall have the power and authority to monitor Respondents' compliance with the terms of Paragraph II of this Order to Maintain Assets and of any corresponding terms in the Consent Agreement and the Decision and Order.
3. Within ten (10) days after appointment of the Asset Maintenance Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Asset Maintenance Trustee all the rights and powers necessary to permit the Asset Maintenance Trustee to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Consent Agreement, and the Decision and Order.
4. The Asset Maintenance Trustee shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of Paragraph II of this Order.
5. The Asset Maintenance Trustee shall have full and complete access, subject to any legally recognized privilege of Respondents, to Respondents' personnel, books, records, documents, facilities and technical information relating to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets, or to any other relevant information, as the Asset Maintenance Trustee may reasonably request, including, but not limited to, all documents and records kept in the normal course of business that relate to the Nabisco Dry-Mix Desserts Assets, the Nabisco Baking Powder Assets, and the Nabisco Intense Mints Assets. Respondents shall cooperate with any reasonable request of the Asset Maintenance Trustee. Respondents shall take no action to interfere with or impede

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the Asset Maintenance Trustee's ability to monitor Respondents' compliance with this Order to Maintain Assets, the Consent Agreement, and the Decision and Order.

6. The Asset Maintenance Trustee shall serve, without bond or other security, at the expense of the Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Asset Maintenance Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Asset Maintenance Trustee's duties and responsibilities.
7. Respondents shall indemnify the Asset Maintenance Trustee and hold the Asset Maintenance Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Asset Maintenance Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, wilful or wanton acts, or bad faith by the Asset Maintenance Trustee.
8. If the Commission determines that the Asset Maintenance Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph III.A. of this Order to Maintain Assets.
9. The Commission may on its own initiative or at the request of the Asset Maintenance Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets, the Consent Agreement and the Decision and Order.

Order

10. The Asset Maintenance Trustee shall report in writing to the Commission concerning compliance by Respondents with the provisions of Paragraph II of this Order to Maintain Assets, the Consent Agreement and the Decision and Order, within twenty (20) days from the date of appointment and every thirty (30) days until the Respondents have completed all the divestitures required by the Decision and Order.

C. The Asset Maintenance Trustee may be the same person appointed as the Divestiture Trustee pursuant to Paragraph V.A. of the Decision and Order in this matter.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and

Order

- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. For the Nabisco Dry-Mix Desserts Assets, three (3) business days after the divestiture of the Nabisco Dry-Mix Desserts Assets pursuant to Paragraph II or Paragraph V of the Decision and Order; for the Nabisco Baking Powder Assets, three (3) business days after the divestiture of the Nabisco Baking Powder Assets pursuant to Paragraph III or Paragraph V of the Decision and Order; and for the Nabisco Intense Mints Assets, three (3) business days after the divestiture of the Nabisco Intense Mints Assets pursuant to Paragraph IV or Paragraph V of the Decision and Order.

By the Commission.

Analysis

**Analysis to Aid Public Comment on the Provisionally
Accepted Consent Order**

Issued when the Commission tentatively approved a proposed consent order on December 7, 2000

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment from Philip Morris Companies, Inc. (“Philip Morris”) and Nabisco Holdings Corp. (“Nabisco”) an *Agreement Containing Consent Orders* (“Proposed Consent Order”). Philip Morris and Nabisco (“Proposed Respondents”) have also reviewed a Draft Complaint that the Commission contemplates issuing. The Commission and the Proposed Respondents have also agreed to an Order to Maintain Assets that requires the Proposed Respondents to maintain the competitive viability of certain assets pending divestiture. The Proposed Consent Order will remedy the likely anticompetitive effects in five relevant product markets arising from the proposed acquisition by Philip Morris of Nabisco.

II. Parties and Transaction

Proposed Respondent Philip Morris is a Virginia corporation with its headquarters and principal place of business at 120 Park Avenue, New York, New York 10017-5592. In 1999, Philip Morris had total worldwide sales of approximately \$79 billion, and total United States sales of approximately \$48 billion. Philip Morris, through its Kraft Foods Inc. subsidiary, is the nation’s largest food and beverage company.

Proposed Respondent Nabisco is a Delaware corporation with its headquarters and principal place of business located at 7 Campus Drive, Parsippany, New Jersey 07054-0311. In 1999, Nabisco had total worldwide sales of approximately \$8.3 billion, and total United States sales of approximately \$5.9 billion. Nabisco is the nation’s seventh largest food and beverage company.

Analysis

On June 25, 2000, Philip Morris and Nabisco entered into an agreement for Philip Morris to acquire Nabisco. The value of the transaction is approximately \$19.4 billion.

III. Proposed Complaint

According to the Draft Complaint that the Commission intends to issue, Philip Morris, through its Kraft Foods subsidiary, and Nabisco compete in the United States to sell and distribute (a) dry-mix gelatin, (b) dry-mix pudding, (c) no-bake desserts, (d) baking powder, and (e) intense mints.

The Commission is concerned that the proposed acquisition would eliminate substantial competition between Philip Morris and Nabisco, and increase concentration substantially, in each relevant market, and result in higher prices. The Commission stated it has reason to believe that the proposed acquisition would have anticompetitive effects and violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

IV. Competitive Concerns

A. Dry-Mix Gelatin Market

Total United States sales of all dry-mix gelatin dessert products are about \$212 million. In this market, Philip Morris, through its Jell-O brand, is the largest competitor with about an 86% share, and Nabisco, through its Royal brand, has about a 6% share. After the acquisition, Philip Morris will control approximately 92% of all dry-mix gelatin sales. The proposed acquisition will increase the Herfindahl-Hirschman Index ("HHI"), the customary measure of industry concentration, in the dry-mix gelatin market by more than 1000 points, and result in a market concentration of over 8400 points.

Analysis

B. Dry-Mix Pudding Market

Total United States sales of all dry-mix pudding dessert products are about \$202 million. In this market, Philip Morris, through its Jell-O brand, is the largest competitor with about an 82% share, and Nabisco, through its Royal and My-T-Fine brands, has about a 9% share. After the acquisition, Philip Morris will control approximately 91% of all dry-mix pudding sales. The proposed acquisition will increase the HHI by more than 1400 points and result in a market concentration of over 8300 points.

C. No-Bake Desserts Market

Total United States sales of all no-bake dessert products are about \$56 million. In this market, Philip Morris, through its Jell-O brand, is the largest competitor with about a 90% share, and Nabisco, through its Royal brand, has about a 6% share. After the acquisition, Philip Morris will control approximately 96% of all no-bake dessert sales. The proposed acquisition will increase the HHI by more than 1000 points, and result in a market concentration of over 9200 points.

D. Baking Powder Market

Total United States sales of all baking powder products are about \$29 million. In this market, Philip Morris, through its Calumet brand, has about a 27% share, and Nabisco, with its Davis and Fleischmann's brands, has about a 17% share. After the acquisition, Philip Morris will control approximately 44% of all United States baking powder sales. The proposed acquisition will increase the HHI by more than 900 points and result in market concentration of more than 4800 points.

E. Intense Mints Market

Total United States sales of all intense mints products are about \$250 million. In this market, Philip Morris, through its Altoids brand, has about a 60% share, and Nabisco, with its Ice Breakers

Analysis

and Cool Blast brands, has about a 15% share. After the acquisition, Philip Morris will control approximately 75% of all United States intense mints sales. The proposed acquisition would increase the HHI by approximately 1800 points and result in market concentration of more than 5800 points.

V. The Consent Order

The Proposed Consent Order, if finally issued by the Commission, would settle all of the charges alleged in the Commission's Draft Complaint. Under the terms of the Proposed Consent Order, Philip Morris and Nabisco will be required to divest the Nabisco dry-mix desserts and baking powder businesses to The Jel Sert Company and the intense mints business, together with related Ice Breakers gum and Breath Savers mint businesses, to Hershey Foods Corporation.

Philip Morris and Nabisco will be required to complete the required divestitures within ten (10) business days from the date they consummate their proposed acquisition. In the event Philip Morris and Nabisco do not complete the required divestitures in the time allowed, procedures for the appointment of a trustee to sell the assets have been agreed to and will be triggered. The Proposed Consent Order empowers the trustee to sell such additional ancillary assets as may be necessary to assure the marketability, viability, and competitiveness of the businesses that are required to be divested.

Accompanying the Proposed Consent Order is an *Order to Maintain Assets*. This order requires Philip Morris and Nabisco to preserve and maintain the competitive viability of all of the assets required to be divested in order to insure that the competitive value of these assets will be maintained after the merger but before the assets are actually divested.

VI. Opportunity for Public Comment

This Proposed Consent Order has been placed on the public record for thirty (30) days for receipt of comments from interested

Analysis

persons. Comments received during this period will become part of the public record. After the thirty (30) days, the Commission will again review the Proposed Consent Order and the comments received, and will decide whether it should withdraw from the agreement or make final the Consent Order in the agreement.

By accepting the Proposed Consent Order subject to final approval, the Commission anticipates that the competitive problems alleged in the Draft Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order. It is not intended to constitute an official interpretation of the Proposed Consent Order, nor is it intended to modify the terms of the orders in any way.

Complaint

IN THE MATTER OF

INDIGO INVESTMENT SYSTEMS, INC., ET AL.

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

*Docket C-4003; File No. 0023015
Complaint, March 7, 2001--Decision, March 7, 2001*

This consent order addresses an advertising campaign designed to sell Indigo, a stock trading program, conducted by Respondent Indigo Investment Systems, Inc. -- and Respondent Frank Alfonso, its chief executive officer -- through ads in various media, including investment magazines, Internet banner ads, and three websites. The order, among other things, requires the respondents -- with regard to the sale of any trading program -- to possess a reasonable basis for future representations about the amount of earnings, income, or profit, or the rate of return, that a user of such trading program could reasonably expect to attain; the usual or typical earnings, income, profit, or rate of return, achieved by users of such trading program or any part thereof; or any financial benefit or other benefit of any kind from the purchase or use of such trading program. The order also prohibits respondents, in connection with the sale of any trading program, from misrepresenting that hypothetical or simulated earnings data represent actual trading results; that users of such trading program can reasonably expect to trade with little risk; or the extent of risk to which users of the trading program are exposed. In addition, the order requires future benefits claims to be accompanied by the statement that the type of trading promoted involves high risks, and that traders can lose a significant amount of money.

Participants

For the Commission: *Janet M. Evans, C. Lee Peeler, and Russell Porter.*

For the Respondents: *Glenn Mitchell, Stein, Mitchell & Mezines.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Indigo Investment Systems, Inc., a corporation, and Frank Alfonso, individually and as an officer of the corporation ("respondents"), have violated the provisions of the Federal Trade

Complaint

Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Indigo Investment Systems, Inc. ("IISI") is a Florida corporation with its principal office or place of business at 8302 S. Tamiami Trail, Sarasota, Florida 34238. IISI was formerly known as MicroStar Research and Trading, Inc.
2. Respondent Frank Alfonso is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of IISI.
3. Respondents have advertised, offered for sale, sold, and distributed investment trading programs and training to the public. Investment trading programs sold by respondents include the "Indigo" program for trading stocks. The Indigo program issues, on a daily basis, signals advising its users to buy, sell, or hold specific stocks. These signals are based upon data generated by software programs that look at historical data to determine what trading patterns would, in the past, have been profitable. Respondents have advertised Indigo on their Web sites, www.microstar-research.com, www.msindigo.com, and www.indigoinvestor.com, as well as through Internet banners and newspaper advertisements.
4. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
5. Respondents have disseminated or have caused to be disseminated advertisements for their investment trading programs and training, including but not necessarily limited to the attached Exhibits A through H. These advertisements contain the following statements:

Complaint

A. ***“INDIGO CAPTURES HUGE PROFITS
INVESTING IN HOT STOCKS!!!***

9/22/99 Indigo's MSX1_M05 - Stock Model Performance

Year	Annual RoR MSX	Annual RoR Market	Total Annual Buy/Hold	# of trades	Maximum Risk
1990	52.43%	-8.22%	-30.86%	285	10.35%
1991	107.22%	27.84%	63.15%	215	16.16%
1992	42.86%	4.42%	50.90%	175	10.62%
1993	27.06%	7.16%	12.61%	160	20.95%
1994	67.24%	-1.36%	9.80%	145	2.89%
1995	27.51%	35.30%	48.00%	110	5.58%
1996	85.83%	19.33%	36.85%	165	6.78%
1997	147.41%	31.76%	16.34%	265	6.79%
1998	141.59%	26.14%	7.45%	275	15.74%
1999	24.58%	8.98%	-51.99%	225	10.38%

**PAST PERFORMANCE DOES NOT
GUARANTEE FUTURE RESULTS**

(Amounts listed assume an initial investment size of \$10,000)

* * * *

[Consumer endorser:] ‘I have been actually investing and making money with the Indigo program. I recently made a trade with the msx405.por, making \$4,000 in one trade.’ Mr. Suprenant, NY”

Exhibit A (Web page, www.microstar-research.com/home/index2.htm)

Complaint

B. “Indigo Stock Test

Here are some of Indigo’s recent positions:

Recent MSX Trades

ENTRY DATE	EXIT DATE	SYMBOL	POSITION	ENTRY PRICE	CURRENT PRICE	PROFIT
8/26/1999	08/30/99*	AMZN	SHORT	128.562	119.250	\$687
8/26/1999	08/30/99*	AOL	SHORT	100.438	93.250	\$682
8/27/1999	08/30/99*	BBY	SHORT	72.500	70.313	\$270
8/26/1999	08/30/99*	CMGI	SHORT	87.313	81.813	\$597
8/27/1999	08/30/99*	EBAY	SHORT	127.250	119.438	\$579
8/27/1999	08/30/99*	EXDS	SHORT	82.750	76.125	\$765
8/26/1999	08/30/99*	LU	SHORT	66.375	64.313	\$279
8/26/1999	08/30/99*	MSPG	SHORT	31.563	28.939	\$800
8/26/1999	08/30/99*	YHOO	SHORT	152.688	143.812	\$547

*CLOSED POSITIONS

\$10,000 INITIAL PURCHASE EACH OF 9 STOCKS

(AMZN, AOL, BBY, CMGI, EBAY, EXDS, LU, MSPG, YHOO)

1999 ANNUALIZED – PAST PERFORMANCE DOES NOT GUARANTEE

FUTURE RESULTS

Enter your stock symbol below to learn how Indigo will maximize your profits and reduce your risk!”

Exhibit B (Web page, www.microstar-research.com/home/stocktest/msxquote.shtml)

C. “Click, Click, You’re Rich?”

It costs more than chump change, but Indigo - Blue Chip Investment Strategies, the investment management software program (actual cost: \$2,720) developed by Sarasota’s MicroStar Research & Trading, Inc., has done “phenomenally well” since it was introduced in 1995, says sales manager Greg Roper.

“With this program, you don’t shoot yourself in the foot by second-guessing,” he says. “It’s not emotional; it’s not greedy.” Click on its signal update, and Indigo instructs on which securities to buy and/or sell at what prices. “Those instructions are based on the internal research and analysis that the program does every day,” Roper says. “It gives the individual investor the same edge in terms of technical research

Complaint

and trading pattern analysis that the big brokers and large institutional traders have,” Roper says.

* * * *

MicroStar’s clients have seen their conservative portfolios jump “40 percent annually over the past three years, while most aggressive portfolios with hot internet stocks have gone up several hundred percent,” Roper says.”

Exhibit C (Web page, www.microstar-research.com/home/reviews/maddux.htm)

D. “Real People . . . Real Results !!!

Indigo . . . A powerful easy to use computer trading program designed for individual investors. Fully researched and ready-to-trade, the program provides you with 100% objective signals that consistently beat the market!

* * * *

Listen to what some of our customers have to say.

* * * *

[Consumer endorser:] “I began trading with about \$30,000. I have made approximately \$210,000 using the program in the past 5 months. Since 1/19/1999, I have made a 200% profit in about 80 days!!!! On occasion, I try to improve on the program by buying a stock earlier or later than the program would signal - this is almost always a bad decision. If you can just follow what the program tells you to do, you will make money.”

D. Heacock, VA

* * * *

Complaint

Indigo will quickly update your stock and mutual fund data, automatically analyze the markets with scientifically tested investment methods, and get you into winning stocks and mutual funds. . .all in less than 10 minutes a day!

[Consumer endorser:] “I made \$2,100 with Indigo in the last 5 weeks. The technical support is excellent. Easy portfolio management. Research and testing is easy and complete. The staff is helpful and friendly, especially for beginners to Indigo.”
C. Brennman, FL”

Exhibit D (Web page, www.microstar-research.com/home/testimony/testimony.htm)

- E. **“INDIGO ONLINE (*Which is representative of Indigo Investment Software*) IS NOW UP 193% ANNUALIZED IN 1999 !!!!! THAT IS BEATING THE S&P 500 INDEX WHICH IS UP ONLY 26% ANNUALIZED IN 1999 !!!!!”**

Exhibit E (Web page, www.microstar-research.com/cgi-local/marketrpt.pl)

- F. “\$10,000 to over \$10,000,000
with . . .
Indigo’s RSX Model

Imagine earning over **10 million dollars in profits** since 1990 on only a \$10,000 original investment. That’s what Indigo’s 10-Stock Relative Strength Model RSX could have produced for you . . . **an average annual return of over 115% per year!**

* * * *

HIGH
ANNUAL
RETURNS
LOW RISK”

Complaint

Exhibit F (newspaper ad, Investor's Business Daily)

G. ***"If you were using INDIGO's RSX - TECH 5 PORTFOLIO you could now have \$539,329 IN PROFITS!!!"***

* * * *

**Indigo
Investment Software**

Imagine your **\$10,000** account growing to over **\$539,329!** That's what Indigo produced since 1994 trading 3 High Tech Industry stocks . . ."

Exhibit G (newspaper ad, Investor's Business Daily)

H. **"Stock Performance Test**

Put Us To The Test!

This stock performance test will show you the past results trading with Indigo Investment Software. Please enter the stock of your choice

Here are a few dynamic performances from Indigo for 1999:

77.19% trading AOL (America Online)

71.99% trading BGEN (Biogen)

62.48% trading HD (Home Depot)"

[Stock test entry form follows, requiring entry of stock symbol, name, country, telephone number and e-mail address. Upon entering the stock symbol "LU," completing the form and pushing the submit button, the consumer receives the following automated response:]

Complaint

**“Stock Performance Test Results for Lucent Technology -
LU**

The results shown below are based upon an initial investment size of \$10,000. The trading period is indicated by the dates below in the blue bar. The net profit includes interest and compounded equity.

Performance Summary**April 01, 1996 - December 31, 1999**

Total Net Profit: \$82,235
 Total Trades: 19
 % Winning Trades: 78.95%
 Annual % Return: 80.83%
 Maximum Risk: 7.68%

Yearly Performance

Year	Indigo Annual % Return	Market Annual % Return	Number of Trades	Percentage of Wins	Maximum Risk
1996	62.72%	13.27%	4	100.00%	.00%
1997	59.60%	31.01%	3	66.67%	5.64%
1998	202.75%	25.57%	5	80.00%	4.27%
1999	17.16%	19.37%	7	71.43%	6.66%

To find out how you can start making PROFITS like this. . . .

CALL INDIGO INVESTMENT SYSTEMS NOW!!!

* * * *

Performance results listed above and in all marketing materials represent simulated computer results over past historical data, and not the results of an actual account. Hypothetical or simulated performance results have certain limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under-or-over compensated for the

Complaint

impact, if any, of certain market factors, such as lack of liquidity. Simulated programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to those shown. Testimonial or actual account results presented to not necessarily reflect the results of all users of the program. Past performance does not guarantee future results. Trading some indigo models represents a high risk speculative investment. Please read customer disclosure document before purchasing."

Exhibit H (Web pages, www.msindigo.com/index.cfm?fuseAction=showStockTestForm, and www.msindigo.com/index.cfm?fuseAction=requestStockTest)

6. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that:
 - a. The Indigo earnings data described in the ads represent trades that were actually made and that resulted in the profits stated in the advertisements;
 - b. The annual returns for the years 1990 through 1999, as enumerated in the advertisements, were actually achieved by users of respondents' Indigo trading program; and
 - c. Users of respondents' Indigo investment trading program can reasonably expect to trade with little financial risk.

7. In truth and in fact:
 - a. The Indigo earnings data described on the site do not represent trades that were actually made and that resulted in the profits stated in the advertisements. The data represent results of hypothetical trading and are

Complaint

prepared with the benefit of hindsight using historical data.

- b. The annual returns for the years 1990 through 1999, as enumerated in the advertisements, were not actually achieved by users of respondents' Indigo trading program. The annual returns are based upon hypothetical trades using historical data. Indeed, respondents' Indigo trading program did not exist until 1995.
- c. Users of respondents' Indigo trading program cannot reasonably expect to trade with little financial risk. Consumers who trade in stocks risk a substantial loss of capital, and trading some Indigo models represents a high risk speculative investment.

Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

8. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that:

- a. Most users of respondents' Indigo trading program who have invested in conservative portfolios have achieved an annual return of 40% over the past three years.
- b. Most users of respondents' Indigo trading program who have invested in aggressive portfolios with hot Internet stocks have achieved returns of several hundred percent.
- c. Testimonials appearing in the advertisements for respondents' Indigo trading program reflect the typical or ordinary experience of members of the public who use the program.

Complaint

- d. Users of respondents' Indigo trading program can reasonably expect to achieve substantial profits on a consistent basis, whether pursuing a conservative or aggressive trading strategy.

9. Through the means described in Paragraph 5, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

10. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this seventh day of March, 2001, has issued this complaint against respondents.

Complaint Exhibit A

SEE WHAT OUR USERS HAVE TO SAY ABOUT INDIGO

Indigo Online

Advanced Investment Research

HOME

CONTACT US

PRODUCTS

DOWNLOADS

OUR COMPANY

FREE STOCK TEST

NEWS & REVIEWS

SUPPORT

TESTIMONIALS

LINKS



Research & Trading
 8302 S. Tamiami Trail
 Sarasota, FL 34238

We'll change the way you invest forever!

**Important Message to all
 Indigo customers!!**

E-Trade Investors Click Here!**Notice Regarding 24 Hour Trading**

**INDIGO CAPTURES HUGE PROFITS
 INVESTING IN HOT STOCKS!!!**

9/22/99	Indigo's MSX1 M05 - Stock Model Performance				
Year	Annual RoR MSX	Annual RoR Market	Annual Buy/Hold	Total # of trades	Maximum Risk
1990	52.43%	-8.22%	-30.86%	285	10.35%
1991	107.22%	27.84%	63.15%	215	16.16%
1992	42.86%	4.42%	50.90%	175	10.62%
1993	27.06%	7.16%	12.61%	160	20.95%
1994	67.24%	-1.36%	9.81%	145	2.89%
1995	27.51%	35.30%	48.00%	110	5.58%
1996	85.83%	19.33%	36.85%	165	6.78%
1997	147.41%	31.76%	16.34%	265	6.79%
1998	141.59%	26.14%	7.45%	275	15.74%
1999	24.58%	8.98%	-51.99%	225	10.38%

**PAST PERFORMANCE DOES NOT
 GUARANTEE FUTURE RESULTS**
 (Amounts listed assume an initial investment size of \$10,000.)
 msx1 m05.mod - ADV,ARV,IFSIA,OCR,SFA

MicroStar Training Seminars

We are now taking seminar reservations for
October 22nd & 23rd 1999
November 12th & 13th, 1999
 December - no seminar

Want to see a live presentation of MicroStar
 products at a location near you? Then go
On the Road with Microstar!

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 All rights reserved

Indigo
 Data & Position
 Information

Indigo is an "all-in-one"
 investment package. It
 crunches the numbers,
 analyzes the data and
 tells me what to buy and
 sell. It blows the
 subjective programs and
 charting software away.
 Mr. Brett Anderson, TX

I have been actually
 investing and making
 money with the Indigo
 program. I recently made
 a trade with the
 max405 por, making
 \$4,000 in one trade.
 Mr. Suprenant, NY

What I really like about
 Indigo is that when I
 started using it from day
 one, the interface was
 easy to use and the
 program provides
 researched, ready-to-
 trade models and
 portfolios.
 G. Wilson, OH

Indigo Stock Test

Here are some of Indigo's recent positions:

Recent MSX Trades						
ENTRY DATE	EXIT DATE	SYMBOL	POSITION	ENTRY PRICE	CURRENT PRICE	PROFIT
08/26/99	08/30/99*	AMZN	SHORT	128.582	119.250	\$ 687
08/26/99	08/30/99*	AOL	SHORT	100.438	93.250	\$ 682
08/27/99	08/30/99*	BBY	SHORT	72.500	70.313	\$ 270
08/26/99	08/30/99*	CMGI	SHORT	87.313	81.813	\$ 597
08/27/99	08/30/99*	EBAY	SHORT	127.250	119.438	\$ 579
08/27/99	08/30/99*	EXDS	SHORT	82.750	76.125	\$ 765
08/26/99	08/30/99*	LU	SHORT	66.375	64.313	\$ 279
08/26/99	08/30/99*	MSPG	SHORT	31.583	28.938	\$ 800
08/26/99	08/30/99*	YHOO	SHORT	152.688	143.812	\$ 547
*CLOSED POSITIONS						
\$10,000 INITIAL PURCHASE EACH OF 9 STOCKS (AMZN, AOL, BBY, CMGI, EBAY, EXDS, LU, MSPG, YHOO) 1999 ANNUALIZED - PAST PERFORMANCE DOES NOT GUARANTEE FUTURE RESULTS						

Enter your stock symbol below to learn how Indigo will maximize your profits and reduce your risk! We'll send you detailed market statistics, yearly performance and recent trade listings.

(All fields marked with a * must be completed to process your stock test.)

*Stock Symbol:	TEST
	Mr. <input checked="" type="radio"/> Mrs. <input type="radio"/> Ms. <input type="radio"/>
*First Name:	Greg
Middle Initial:	B
*Last Name:	Nash
*Telephone:	(941)918-8268
Organization:	MicroStar
*Address:	8302 S. Tamiami Trail
*City:	Sarasota

US Residents - Please leave Province blank.

Tampa Bay's
Maddux Report
August 1996
Business, Finance and Development

Click, Click, You're Rich?

It costs more than chump change, but Indigo - Blue Chip Investment Strategies, the investment management software program (actual cost: \$2,720) developed by Sarasota's MicroStar Research & Trading, Inc., has done "phenomenally well" since it was introduced in 1995, says sales manager Greg Roper.

"With this program, you don't shoot yourself in the foot by second-guessing," he says. "It's not emotional; it's not greedy." Click on its signal update, and Indigo instructs on which securities to buy and/or sell at what prices. "Those instructions are based on the internal research and analysis that the program does every day," Roper says. "It gives the individual investor the same edge in terms of technical research and trading pattern analysis that the big brokers and large institutional traders have," Roper says.

Indigo isn't a trading program, however. Investors have to use a broker or online trading service to buy and sell.

Now in its fourth, more user-friendly version, Indigo evolved from the earlier career of MicroStar president and chief analyst Frank J. Alfonso, a CPA who developed models while trading soybean futures on the Chicago Board of Trade 25 years ago. MicroStar has other products that provide market trading programs for futures, bonds, and the Standards & Poor Index.

The program continues to evolve. "We update at least once a year, changing names, adding portfolios. We put all new information on our Web site (<http://www.microstar-research.com>), and Indigo owners can download the latest models free." Roper said that by September, Indigo should be available online as a subscription service.

MicroStar's clients have seen their conservative portfolios jump "40 percent annually over the past three years, while most aggressive portfolios with hot internet stocks have gone up several hundred percent," Roper says.

The company itself is jumping. "We're about 28 people now, and we've just about quadrupled our office space since we opened in Sarasota in 1995," says Roper. "What our programs teach you to do is diversify.

With this program, you don't put all your money on 17 black and hope it turns again."

- by D.J. Wilson

Real People ... Real Results !!!

FREE STOCK TEST Dare to Compare !

Go ahead, enter your stock and how long you have been trading it. We'll run it through the Indigo program and you'll be surprised how much money you should have made!

**Call Now:
800 315-5635**

Indigo ... A powerful easy to use computer trading program designed for individual investors. Fully researched and ready-to-trade, the program provides you with 100% objective signals that consistently beat the market!

Don't wait! For immediate results: Call Now: 800 315-5635

Listen to what some of our customers have to say.

"I started with \$2,500 in a margin account Sept. 8, 1998 with the Growth4. On Dec. 15 1998, added another \$2,500 to my account and started using Internet3. Because of my concern with the internet stocks being overvalued, I transferred to Growth7. The following are my transactions to date (Jan. 20, 1999). Total equity after 4 1/2 months is \$12,575 on a \$5,000 investment. Great Program!"

P. Lowry, KS



"I began trading with about \$30,000. I have made about \$210,000 using the program in the past 5 months. Since 1/19/1999, I have made a 200% profit in about 80 days!!!! On occasion, I try to improve on the program by buying a stock earlier or later than the program would signal - this is almost always a bad decision. If you can just follow what the program tells you to do, you will make money."

D. Heacock, VA

"As an investor for ten years, I wish Indigo was around when I started. The Model and Portfolio test functions are easy to use and helped me pick 4 winning portfolio's in no time. It is an excellent program and paid for itself in a short time."

I think it's underpriced!"

J. Petitti, NY



Indigo will quickly update your stock and mutual fund data, automatically analyze the markets with scientifically tested investment methods, and get you into winning stocks and mutual funds... all in less than 10 minutes a day!



"I began using the program in October 98, and as of the end of January 99, I am \$3,000 short of my SECOND DOUBLE (Making 300% return on initial investment). Your program (Indigo) has paid for itself over "twenty" times in three months, and it couldn't be easier to use. It is uncanny how it "knows" when to get in and out."

J. Spann, CA

"I made \$2,100 with Indigo in the last 5 weeks. The Technical support is excellent. Easy portfolio management. Research and testing is easy and complete. The staff is helpful and friendly, especially for beginners to Indigo."

G. Brennan, FL



C. Brennan, F.E.



"I have several other programs. I still have to decide which stock to trade among many signals. Indigo is more powerful and accurate. The ease of use and fast operation gives me the confidence to hold stocks longer than I might ordinarily do. I recently did my first trade from the Internet. I purchased 135 shares of Excite. Initial investment size \$6,428.94 on 12/29/98. Sold on 1/11/99 at \$10.019.85. A profit of \$3,590.91 in 13 days!"
J. Contant, NY

Don't wait! Be on the right side of the market tomorrow!

Call Now: 800 315-5635

Indigo
Investment Software

"We'll change the way you invest forever."



Download a free demo: www.microstar-research.com

Headquarters: 8302 South Tamiami Trail, Sarasota Florida 34238
phone: 941 918-8268 fax: 941 918-8168

PAST PERFORMANCE DOES NOT GUARANTEE FUTURE RESULTS.



MicroStar Market Report

Volume 5 Issue 37

July 7, 1999

INDIGO ONLINE (Which is representative of Indigo Investment Software) IS NOW UP 193% ANNUALIZED IN 1999 !!!!! THAT IS BEATING THE S&P 500 INDEX WHICH IS UP ONLY 26% ANNUALIZED IN 1999 !!!!!

**** io_athm_msx1.mod (Excite@Home) 724% Average Annual Return since 1997 !!! 624% Annual Return in 1998 !!! 362% Annualized Return in 1999 vs. "only" 86% for buy/hold !!! LONG on 6/28/99 @ 52.750 TAKES PROFIT @ 56.938 on 7/06/99 and goes SHORT !!!!!

**** io_lcos_msx1.mod (Lycos) 461% Average Annual Return since 1996 !!! 232% Annual Return in 1998 !!! 1,354% Annualized Return in 1999 vs. "only" 181% for B/H !!! LONG @ 92.500 on 6/28/99... now 103.812 !!!!!

Afraid to Trade Internets ??? Indigo's MSX method makes money in VOLATILE MARKETS in other sectors too...

**** io_dg_oe2.mod (Dollar General) 90% Average Annual Return since 1990 !!! 81 Trades... 77% WINNING TRADES !!! Uses the "Over-Extended" method... for investors seeking High Returns with less trades than the active MSX method. 114% Annualized Return in 1999... 4 trades... all winners !!! LONG @ 26.000 on 6/01/99... now 30.813 !!!!!

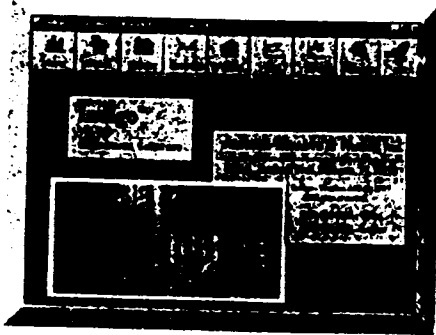
**** msx_bby4.mod (Best Buy) 162% Average Annual Return since 1990 !!! 278% Annual Return in 1998 !!! 640% Annualized Return in 1999 vs. "only" 281% for Buy/Hold ! SHORT on 6/24 @ 64.00...takes PROFIT @ on 6/28/99 and goes LONG @ 62.688... now 77.250 !!!!!

THE MARKET IS ON A "BULL RUN" RIGHT NOW... WHEN EVERYONE WAS WORRIED ABOUT THE MARKET 3 WEEKS AGO... INDIGO WAS PRODUCING PROFITABLE BUY SIGNALS !!!!!

DON'T MISS THIS MOVE... GET INDIGO TODAY !!!!!

PAST PERFORMANCE DOES NOT GUARANTEE FUTURE RESULTS

\$10,000 to over \$10,000,000 with... Indigo's RSX Model



Indigo

Investment Software

Imagine earning over 10 million dollars in profits since 1990 on only a \$10,000 original investment. That's what Indigo's 10-Stock Relative Strength Model RSX could have produced for you... an average annual return of over 115% per year!

Indigo... an easy-to-use, fully researched computer trading program designed to provide individual investors profitable 100% objective trading signals each day.

Indigo's easy-to-use software will quickly update your stock/fund data, automatically analyze the markets with the scientifically tested trading models provided, and get you into winning stocks and funds... right now!

THE INDIGO ADVANTAGE

10-Stock RSX Model Performance
\$10,000 INITIAL INVESTMENT 1/2/90

YEAR	ANNUAL RATE OF RETURN		YEARS TO RECOVER		TOTAL RETURNS	
	TOTAL	NET PROFIT	ANNUAL	CUMULATIVE	TOTAL	NET PROFIT
1990	\$2,001	20.07%	-0.22%	5	60.00%	11.93%
1991	\$17,575	133.52%	27.84%	4	50.00%	2.79%
1992	\$8,038	25.86%	4.42%	6	83.33%	26.46%
1993	\$43,835	105.84%	7.16%	5	80.00%	30.81%
1994	\$31,947	38.20%	-1.36%	5	80.00%	6.43%
1995	\$298,873	258.84%	35.36%	4	100.00%	0.00%
1996	\$305,910	73.73%	19.13%	5	60.00%	12.61%
1997	\$1,090,125	168.62%	31.76%	5	80.00%	0.00%
1998	\$5,725,757	319.79%	26.14%	3	66.67%	4.18%
1999	\$3,099,625	271.16%	24.16%	1	100.00%	0.00%

RECENT RSX TRADES

DATE	BUY DATE	SYMBOL	TYPE	BUY PRICE	SELL PRICE	PROFIT
97/05/07	97/07/14	VLSI	Long	22.375	25.700	\$1,488
97/07/14	97/10/31	XCIT	Long	8.063	16.625	\$5,829
97/10/31	98/01/15	WMB	Long	25.531	27.063	\$579
98/01/15	98/05/08	YHOO	Long	32.625	57.375	\$7,558
98/05/22	98/08/03	VLSI	Long	16.875	16.125	(\$474)
98/08/03	99/02/05	YHOO	Long	45.000	172.063	\$28,200

rs_divcrse21.mod *Open Position
 STOCKS: VLSI Technology Inc, Verano Semiconductor, WorldCom, Inc., Western Union, Williams Cos, Wal-Mart Stores, Exide Inc, Exxon Corp., Sunco Corp, Yahoo Inc.

**HIGH
ANNUAL
RETURNS**
LOW RISK

CALL NOW:
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www.microstar-research.com



PAST PERFORMANCE DOES NOT GUARANTEE FUTURE RESULTS

If you were using INDIGO'S RSX - TECH5 PORTFOLIO you could now have \$539,329 IN PROFITS!!!

A powerful, but easy to use financial software program, Indigo
will tell you exactly when to buy and when to sell ...
in less than 10 minutes a day!

Indigo
Investment Software

Imagine your \$10,000 account growing
to over \$539,329! That's what Indigo
produced since 1994 trading 3 High
Tech/tech stocks... Cisco Systems,
Dell Computer and Microsoft Corp.

YEAR	ANNUAL RATE OF RETURN		TECH5POR	
	INDIGO	S&P500	MAX	RISK
1994	84.48%	1.36%	3.97%	
1995	84.18%	35.30%	3.60%	
1996	124.40%	19.33%	0.00%	
1997	153.25%	31.76%	0.00%	
1998	146.44%	26.14%	4.99%	
*1999	67.13%	32.23%	0.00%	

What our customers have to say...
"I have used the program since my purchase on October 9
1994. The results have been nothing short of phenomenal. My
account where I use High Growth 4 is up about 65%. Internal 3 is
up about 55% and Tech 5 is up about 45%. I have had complete
confidence in the signals generated by the program, which are
paying the road to..."
S. J. Maryland

*An individual with very limited computer
skills will be up and running from day one.
The software is applicable to all major operating systems
in the service to invest time efficiently.
S.E. Virginia

1-800-315-5635

www.microstar-research.com

- EASY TO USE
- HIGH RETURNS
- LOWER RISK



PAST PERFORMANCE DOES NOT GUARANTEE FUTURE RESULTS.

UP 67% ANNUALIZED IN 1999...
INVESTING IN HOT HIGH TECH STOCKS
WITH ONLY 5% MAXIMUM RISK!!!
to Tech5

ENTRY DATE	EXIT DATE	SYMBOL	PRICE	ENTRY PRICE	EXIT PRICE	PROFIT
94/01/03	94/03/25	CSCO	7.194	7.880	\$	932
94/03/25	94/07/08	DELL	0.867	0.840	\$	(375)
94/07/08	94/07/27	MSFT	12.625	12.584	\$	(596)
94/07/27	95/02/16	CSCO	4.361	7.694	\$	8,498
95/02/16	95/04/04	DELL	1.422	1.352	\$	(946)
95/04/04	95/06/30	MSFT	17.500	22.406	\$	4,890
95/06/30	96/04/01	CSCO	11.333	20.722	\$	18,369
96/04/01	96/07/05	DELL	2.133	2.992	\$	16,505
96/07/05	96/08/27	MSFT	30.031	30.781	\$	1,407
96/08/27	96/11/01	DELL	3.969	5.094	\$	15,673
96/11/01	96/12/17	CSCO	27.778	28.000	\$	575
96/12/17	97/04/25	DELL	6.703	9.953	\$	36,302
97/04/25	97/09/11	CSCO	21.278	31.388	\$	53,709
97/09/11	97/10/27	DELL	21.969	22.906	\$	7,088
97/10/27	98/01/29	CSCO	35.111	41.333	\$	30,782
98/01/29	98/04/14	DELL	24.188	33.563	\$	79,294
98/04/14	98/05/06	MSFT	88.688	87.500	\$	(3,832)
98/05/06	98/06/19	DELL	44.531	42.750	\$	(11,235)
98/06/19	98/09/21	CSCO	55.083	59.825	\$	22,139
98/09/21	98/11/09	DELL	55.734	65.938	\$	53,246
98/11/09	99/02/17	CSCO	67.750	96.888	\$	147,015
99/02/17	99/03/15	DELL	39.125	43.750	\$	58,050



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Stock Test

Stock Performance Test

Put Us To The Test!

This stock performance test will show you the past results trading with Indigo Investment Software. Please enter the stock of your choice or call Indigo Investment Systems at 1-800-315-5635.

Here are a few dynamic performances from Indigo for 1999:

- 77.19% trading AOL (America Online)
- 71.99% trading BGEN (Biogen)
- 62.48% trading HD (Home Depot)

(All fields are required.)

Stock Symbol:

Mr. Mrs. Ms.

First Name:

Last Name:

Country: ▼

Telephone:

Email:

SUBMIT STOCK TEST

Indigo Investment Systems' Privacy Policy: We will not release, sell or divulge in any manner, any personal information you submit to this site. The information you submit is for internal use only and by submitting this form you are providing your consent to be contacted by an Indigo Investment Systems representative via telephone or email.



Indigo Investment Systems, Inc. formerly known as MicroStar Research & Trading, Inc.
© 2000 All rights reserved [disclaimer](#) | [privacy statement](#)
8320 S. Tamiami Trail, Sarasota, FL 34238; call toll-free: 1-800-315-5635



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Stock Test

Stock Performance Test Results for Lucent Technology - LU

The results shown below are based upon an initial investment size of \$10,000. The trading period is indicated by the dates below in the blue bar. The net profit includes interest and compounded equity.

Performance Summary

April 01, 1996 - December 31, 1999	
Total Net Profit:	\$82,235
Total Trades:	19
% Winning Trades:	78.95%
Annual % Return:	80.83%
Maximum Risk:	7.68%

Yearly Performance

Year	Indigo Annual Return	Market Annual Return	Number of Trades	Percentage Wins	Maximum Risk
1996	62.72 %	13.27 %	4	100.00 %	.00 %
1997	59.60 %	31.01 %	3	66.67 %	5.64 %
1998	202.75 %	26.67 %	5	80.00 %	4.27 %
1999	17.16 %	19.37 %	7	71.43 %	6.66 %

To find out how you can start making PROFITS like this...

CALL INDIGO INVESTMENT SYSTEMS NOW!!!
1 - 800 - 315 - 5635

Performance results listed above and in all marketing materials represent simulated computer results over past historical data, and not the results of an actual account. Hypothetical or simulated performance results have certain limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under-or-over compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to those shown. Testimonial or actual account results presented do not necessarily reflect the results of all users of the program. Past performance does not guarantee future results. Trading some indigo models represents a high risk speculative investment. Please read customer disclosure document before purchasing.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34,, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Indigo Investment Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida. The mailing address and principal

Decision and Order

place of business of Indigo Investment Systems, Inc. is 8302 S. Tamiami Trail, Sarasota, Florida 34238.

2. Proposed respondent Frank Alfonso is an officer or director of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporate respondent, including the acts or practices alleged in the complaint. His principal office or place of business is the same as that of Indigo Investment Systems, Inc.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. *Provided, however,* that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a

Decision and Order

duration, sufficient for an ordinary consumer to read and comprehend it.

- B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
- C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. In the case of advertisements disseminated by means of an interactive electronic medium such as the Internet or online services, "in close proximity" shall mean on the same Web page, online service page, or other electronic page, and proximate to the triggering representation, and shall not include disclosures accessed or displayed through hyperlinks, pop-ups, interstitials or other means.

3. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

4. "Trading program" shall mean any program, service, course, instruction, system, training, manual, computer software, or other materials involving the purchase or sale of stocks, mutual funds, currencies, commodity futures, options, or other financial instruments or investments.

Decision and Order

5. Unless otherwise specified, "respondents" shall mean Indigo Investment Systems, Inc.; a corporation, its successors and assigns and its officers; Frank Alfonso, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. The amount of earnings, income, or profit, or the rate of return, that a user of such trading program could reasonably expect to attain;
- B. The usual or typical earnings, income, profit, or rate of return, achieved by users of such trading program or any part thereof; or
- C. Any financial benefit or other benefit of any kind from the purchase or use of such trading program;

unless respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication,

Decision and Order

- A. That hypothetical or simulated earnings data represent actual trading results;
- B. That users of such trading program can reasonably expect to trade with little risk; or
- C. The extent of risk to which users of the trading program are exposed.

III.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Indigo Investment Software or any other trading program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the financial benefits of such program, unless they disclose, clearly and conspicuously, and in close proximity to the representation,

“STOCK [or CURRENCY, OPTIONS, ETC., as applicable] TRADING involves high risks and YOU can LOSE a significant amount of money”

Provided, the disclosure required by this Part is in addition to, and not in lieu of, any other disclosure that respondents may be required to make, including but not limited to any disclosure required by state or federal law or by a self-regulatory organization. The requirements of this Part are not intended to, and shall not be interpreted to, exempt respondents from making from any other disclosure.

IV.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division, trade name, or other

Decision and Order

device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any trading program, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user, testimonial or endorsement of the trading program represents the typical or ordinary experience of members of the public who use the trading program unless:

- A. Respondents possess and rely upon a reasonable basis substantiating the representation at the time it is made; or
- B. Respondents disclose, clearly and conspicuously, and in close proximity to the endorsement or testimonial, either:
 1. what the generally expected results would be for users of the trading program, or
 2. the limited applicability of the endorser's experience to what users may generally expect to achieve, that is, that users should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 C.F.R. § 255.0(b).

V.

IT IS FURTHER ORDERED that respondent Indigo Investment Services, Inc., and its successors and assigns, and respondent Frank Alfonso shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials (including packaging) containing the representation;

Decision and Order

- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent Indigo Investment Services, Inc, and its successors and assigns, and respondent Frank Alfonso shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondents shall maintain and upon request make available to the Commission for inspection and copying each such signed and dated statement for a period of three (3) years after creation.

VII.

IT IS FURTHER ORDERED that respondent Indigo Investment Services, Inc, and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution of a subsidiary, parent or affiliate that engages in any acts or practices

Decision and Order

subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

VIII.

IT IS FURTHER ORDERED that respondent Frank Alfonso, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment that involves investment trading programs or training. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities.

IX.

IT IS FURTHER ORDERED that respondent Indigo Investment Services, Inc., and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

X.

This order will terminate on March 7, 2021 or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any

Decision and Order

violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not effect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XI.

All notices required to be sent to the Commission pursuant to this Order shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 601 Pennsylvania Avenue, N.W., Washington, D.C. 20580. ATTN: In the Matter of Indigo Investment Services, Inc.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on January 9, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Indigo Investment Systems, Inc., a corporation, and Frank Alfonso, its CEO (together, “respondents”) settling charges that they engaged in a deceptive advertising campaign for Indigo, a stock trading program.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Respondents sold Indigo through ads in various media, including investment magazines, Internet banner ads, and three websites: www.microstar-research.com, www.msindigo.com, and www.indigoinvestor.com. According to the FTC complaint, respondents' advertising falsely represented that Indigo earnings data described in the ads represent trades that were actually made and that resulted in the profits stated in the advertisements; that the annual returns for the years 1990 through 1999 enumerated in the advertisements were actually achieved by users of respondents' Indigo trading program; and that users of respondents' Indigo investment trading program can reasonably expect to trade with little financial risk. According to the complaint, the Indigo earnings data described on the site do not represent trades that were actually made and that resulted in the profits stated in the advertisements; instead, the data represent results of hypothetical trading and are prepared with the benefit of hindsight using historical data. The annual returns for the years 1990 through 1999 enumerated in the advertisements were not actually achieved by users of respondents' Indigo trading program; instead, the annual returns are based upon hypothetical trades using historical data. Indeed, respondents' Indigo trading

Analysis

program did not exist until 1995. Additionally, the complaint alleges, users of respondents' Indigo trading program cannot reasonably expect to trade with little financial risk; indeed, consumers who trade in stocks risk a substantial loss of capital, and trading some Indigo models represents a high risk speculative investment.

The complaint further alleges that respondents made several unsubstantiated claims. It alleges that respondents' advertising represented that most users of respondents' Indigo trading program who have invested in conservative portfolios have achieved an annual return of 40% over the past three years; that most users of respondents' Indigo trading program who have invested in aggressive portfolios with "hot" Internet stocks have achieved returns of several hundred percent; that testimonials appearing in the advertisements for respondents' Indigo trading program reflect the typical or ordinary experience of members of the public who use the program; and that users of respondents' Indigo trading program can reasonably expect to achieve substantial profits on a consistent basis, whether pursuing a conservative or aggressive trading strategy. Respondents, however, lacked a reasonable basis to substantiate these claims, according to the complaint.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I of the order would require, with regard to the sale of any trading program, that respondents possess a reasonable basis for future representations about the amount of earnings, income, or profit, or the rate of return, that a user of such trading program could reasonably expect to attain; the usual or typical earnings, income, profit, or rate of return, achieved by users of such trading program or any part thereof; or any financial benefit or other benefit of any kind from the purchase or use of such trading program.

Part II of the order prohibits respondents, in connection with sale of any trading program, from misrepresenting that

Analysis

hypothetical or simulated earnings data represent actual trading results; that users of such trading program can reasonably expect to trade with little risk; or the extent of risk to which users of the trading program are exposed.

Part III requires that future benefits claims be accompanied by the statement that **“STOCK [or CURRENCY, OPTIONS, ETC., as applicable] TRADING involves high risks and YOU can LOSE a significant amount of money.”** Part IV prohibits respondents from representing that the experience represented by any user, testimonial or endorsement of the trading program represents the typical or ordinary experience of members of the public who use the trading program unless respondents can substantiate the typicality representation or they disclose either what the generally expected results would be for users of the trading program, or the limited applicability of the endorser's experience to what users may generally expect to achieve.

The remaining parts of the order contain standard record keeping, order distribution, reporting, compliance, and sunseting provisions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

SHARP ELECTRONICS CORP.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4002; File No. 9923263
Complaint, March 7, 2001--Decision, March 7, 2001*

This consent order addresses advertising by Respondent Sharp Electronics Corporation for its Mobilon line of hand-held personal computers, including in particular representations that the products' operating system could be upgraded at a later date. The order, among other things, prohibits the respondent from misrepresenting the availability of any upgrade product. The order also requires the respondent to offer the promised upgrade to consumers who purchased a Mobilon 4100, 4500, or 4600 handheld PC.

Participants

For the Commission: *Kerry O'Brien, Matthew Gold, Erika Wodinsky, Jeffrey Klurfeld, Jesse B. Leary, Gerard R. Butters, Paul A. Pautler and Jeremy I. Bulow.*

For the Respondent: *Denis T. Rich and Patricia Medina, Howard, Rice, Nemerovski, Canady, Falk & Rabkin.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Sharp Electronics Corp., a corporation, ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Sharp Electronics Corp. is a New York corporation with its principal office or place of business at Sharp Plaza, Mahwah, New Jersey 07430-2135.
2. Respondent has advertised, labeled, offered for sale, sold, and distributed consumer electronics products to the public, including

Complaint

the “Mobilon” line of hand-held personal computers (“HPCs”). Sharp’s Mobilon HPCs, as well as similar devices from several other manufacturers, use the Microsoft Windows CE operating system. This operating system and several applications, including a word processor, a spreadsheet, and a database, are installed on these devices’ ROM board. HPCs are designed to be upgradeable to newer versions of the operating system and/or applications through the purchase and installation of a new ROM board.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for Mobilon hand-held personal computers, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements and depictions:

A. “HC-4100 Specifications

...

ROM	Upgradeable
-----	-------------

(Exhibit A, brochure for Model HC-4100)

B. “HC-4600 Specifications

...

ROM	Upgradeable
-----	-------------

(Exhibit B, brochure for Model HC-4600)

Complaint

C. "Comparison Chart

Specifications:	<u>HC-4100</u>	<u>HC-4500</u>	<u>HC-4600</u>
-----------------	----------------	----------------	----------------

...

ROM	Upgradeable"
-----	--------------

(Exhibit C, World Wide Web ad)

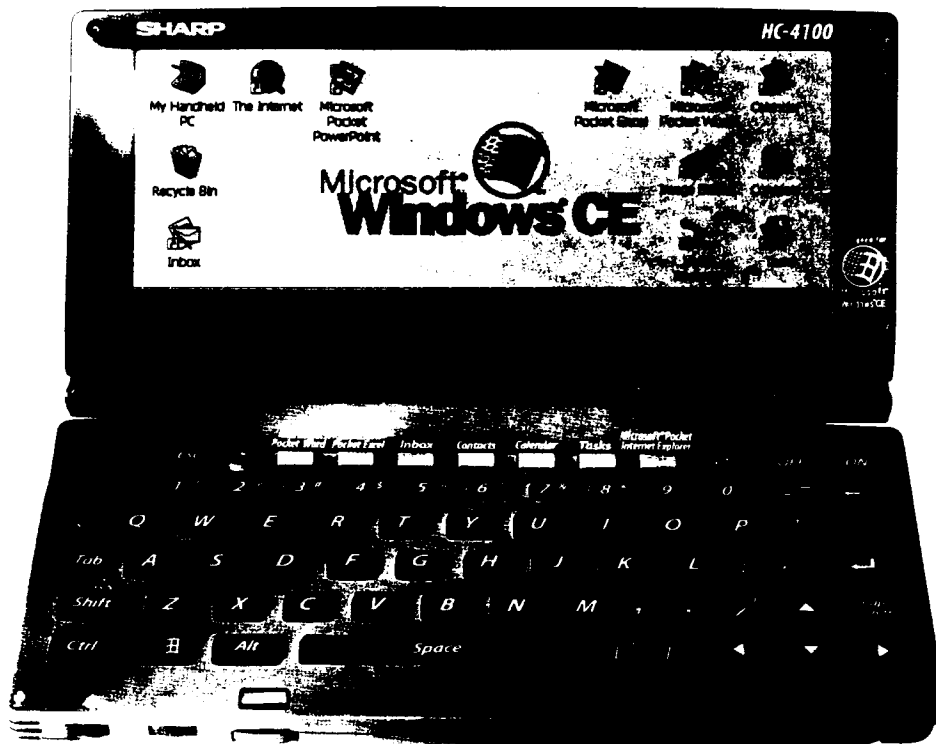
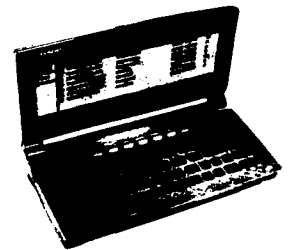
5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it would offer to its Mobilon customers an upgrade to a later version of the Microsoft Windows CE operating system when such a later version became available.

6. In truth and in fact, respondent never offered to its Mobilon customers an upgrade to a later version of the Microsoft Windows CE operating system when such a later version became available. Further, respondent continued to represent that its Mobilon HPCs were upgradeable for several months after deciding not to offer an upgrade. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this seventh day of March, 2001, has issued this complaint against respondents.

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mobilon.

- ▶ High-Contrast LCD Display
- ▶ Easy Type™ Keyboard
- ▶ Built-in 33.6 Kbps Modem
- ▶ One-Touch™ Application Keys
- ▶ Voice Recorder
- ▶ Internet Access
- ▶ Microsoft® Windows® CE 2.0
- ▶ Image Editor
- ▶ IntelliMigrate™ (data transfer)
- ▶ Color Digital Camera Card (optional)

SHARP

EXHIBIT A

HC-4100 Specifications

PROCESSOR	MIPS RISC Processor	
MEMORY	12MB	
ROM	Upgradeable	
DISPLAY	6.5" High-Contrast LCD Touch Screen with Backlight (viewable area measured diagonally) <ul style="list-style-type: none"> • Colors: 16 Grayscale • Resolution: 640 x 240 • Type: DFSTN • Contrast control: Keyboard 	
KEYBOARD	64 Keys + 7 One Touch Application Keys	
PC CARD SLOT	1 Type II	
DATA FAX MODEM	Low power consumption: 33.6Kbps (data), 9.6Kbps (fax)	
AUDIO	WAV file compatible with microphone, speaker, and external record button	
EXPANSION PORTS	<ul style="list-style-type: none"> • Serial Port • PC Link • Printing 	<ul style="list-style-type: none"> • IR Port - IrDA 1.1 (115.2Kbps) compliant • PC Link • Printing • Unit-to-Unit Data Transfer (to H/PCs and Sharp Zaurus)
INDICATORS	Notification LED <ul style="list-style-type: none"> • Calendar and Task Reminders • World Clock Daily Alarms • Charging Battery (when using NiMH Rechargeable Battery Pack and AC Adaptor) • Modem Active • Recording Voice memos 	
SOFTWARE (for HPC)	<ul style="list-style-type: none"> • Microsoft Windows CE 2.0 • Microsoft Handheld PC Applications • Microsoft Pocket Word • Microsoft Pocket Excel • Microsoft Pocket Outlook (Calendar, Contacts, Tasks, Inbox) • Microsoft Pocket PowerPoint • Microsoft Pocket Internet Explorer • Accessories (Calculator, World Clock, Terminal, Solitaire) • Voice Recorder • Image Editor • Sharp Zaurus Unit-to-Unit IR Data Transfer • bFax Express 	
SOFTWARE (for PC)	<ul style="list-style-type: none"> • Microsoft Windows CE Services (Microsoft Office 95 and 97 Data Transfer and Synchronization) • IntelliMigrate (transfers data from Sharp Zaurus/Wizard/Electronic Organizers to Mobilon - ZR, OZ, YO-600 series, and ZQ-5000/5200 models) • Microsoft Schedule+ 7.0a 	
ACCESSORIES (included)	<ul style="list-style-type: none"> • 2 x AA Alkaline Batteries • 1 x CR2032 Lithium Battery • PC Link cable (9-pin) 	<ul style="list-style-type: none"> • RJ-11 Modular Phone Cable • Stylus
BATTERY	<ul style="list-style-type: none"> • Operating: 2 x AA Alkaline (included) • Memory Backup: 1 x CR2032 Lithium (included) 	
BATTERY LIFE	25 hours (typical use; 4 hours with continuous modem use)	
SIZE	7.3" x 3.7" x 1.0" (186mm x 93.6mm x 26.4mm)	
WEIGHT	14.5 oz (410g)	
OPTIONAL ACCESSORIES	<ul style="list-style-type: none"> • HC-DS01 Docking Station Kit (Docking Station, NiMH Rechargeable Battery Pack, AC Adaptor) • HC-BN01 NiMH Rechargeable Battery Pack • CE-AG04 Color Digital Camera Card <ul style="list-style-type: none"> • Resolution: 640 x 480 • Colors: 16.7 million • Zoom: 4x (2x Optical, 2x Digital) 	
WARRANTY	1 year parts and labor limited warranty	

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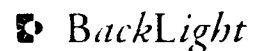
Design, specifications and options are subject to change without notice. All trademarks and registered trademarks are property of their respective holders.



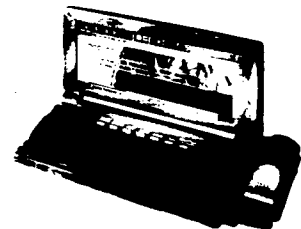
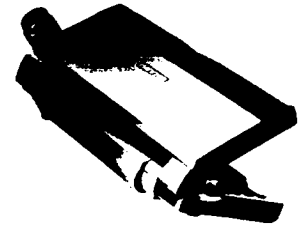
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COME SHARP PRODUCTS™

SHARP ELECTRONICS CORPORATION
Sharp Plaza, Mahwah, NJ 07430-2135

For more information: Call 1-800-BE-SHARP Fast Fax 1-201-529-9113
or visit us on the World Wide Web at <http://www.sharp-usa.com>
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Unit Shown with Optional Color Digital Camera Card

mobilon

- ▶ High-Contrast Color LCD Display
- ▶ Built-in 33.6 Kbps Modem
- ▶ PC File Viewer Software
- ▶ One-Touch™ Application Keys
- ▶ Voice Recorder
- ▶ Internet Access
- ▶ Image Editor
- ▶ PhotoLink
- ▶ bFax™ Pro Software
- ▶ IntelliMigrate™ (data transfer)
- ▶ Citrix® ICA® Thin Client
- ▶ Microsoft® Windows® CE 2.0
- ▶ Color Digital Camera Card (optional)

SHARP

HC-4600 Specifications

PROCESSOR	MIPS RISC Processor								
MEMORY	16MB EDO RAM Internally Expandable to 32MB								
RAM	Upgradeable								
DISPLAY	<ul style="list-style-type: none"> 5" High-Contrast LCD Touch Screen with Backlight (viewable area measured diagonally) Colors: 256 Resolution: 640 x 240 Type: Color STN Contrast Control: Keyboard 								
KEYBOARD	64 Keys + 7 One Touch Application Keys								
PC CARD SLOT	1 Type II								
DATA FAX MODEM	Low power consumption: 33.6 Kbps (data), 9.6 Kbps (fax)								
AUDIO	WAV file compatible with microphone, speaker, and external record button								
EXPANSION PORTS	<table border="0"> <tr> <td>Serial Port</td> <td>IR Port - IrDA 1.1 (115.2 Kbps) compliant</td> </tr> <tr> <td>• PC Link</td> <td>• PC Link</td> </tr> <tr> <td>• Printing</td> <td>• Printing</td> </tr> <tr> <td></td> <td>• Unit-to-Unit Data Transfer (to H/PCs and Sharp Zaurus)</td> </tr> </table>	Serial Port	IR Port - IrDA 1.1 (115.2 Kbps) compliant	• PC Link	• PC Link	• Printing	• Printing		• Unit-to-Unit Data Transfer (to H/PCs and Sharp Zaurus)
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• Charging Battery									
SOFTWARE (for PC)	<ul style="list-style-type: none"> • Microsoft Windows CE 2.0 • Microsoft Handheld PC Applications • Microsoft Pocket Word • Microsoft Pocket Excel • Microsoft Pocket Outlook™ (Calendar, Contacts, Tasks, Inbox) • Microsoft Pocket PowerPoint • Microsoft Pocket Internet Explorer • Accessories (Calculator, World Clock, Terminal, Solitaire) • Voice Recorder • PC File Viewer - views common PC files on Mobilon. Types include: MS Word, WordPerfect, MS Excel, Lotus 1-2-3, Quattro Pro, MS Access, dBase, BMP, GIF, JPG, TIFF, and EPS • PhotoLink - integrates CE-AG04 Color Digital Camera Card and images from other sources with Contacts • Image Editor <ul style="list-style-type: none"> • Automatic image correction • Create MPEG movies • Annotation, drawing, and image manipulation tools • Slide Show • Citrix ICA client - thin-client for Citrix WinFrame™ and Microsoft Windows Terminal Server (with Citrix MetaFrame™) users • Sharp Zaurus Unit-to-Unit IR Data Transfer • bFax™ Pro - send and receive faxes, fax from applications that support printing 								
SOFTWARE (for PC)	<ul style="list-style-type: none"> • Microsoft Windows CE Services 2.1 (Microsoft Office 95 and 97 Data Transfer and Synchronization, including Outlook™ 98) • IntelliMigrate™ (transfers data from Sharp Zaurus/Wizard/Electronic Organizers to Mobilon, ZR, OZ, YO-600 series, and ZQ-5000/5200 models supported) • Microsoft Schedule+ 7.0a 								
ACCESSORIES INCLUDED	<table border="0"> <tr> <td>• NiMH Rechargeable Battery Pack</td> <td>• RJ-11 Modular Phone Cable</td> </tr> <tr> <td>• Stylus</td> <td>• AC Adapter</td> </tr> <tr> <td>• 1 x CR2032 Lithium Battery</td> <td>• PC Link cable (9-pin)</td> </tr> </table>	• NiMH Rechargeable Battery Pack	• RJ-11 Modular Phone Cable	• Stylus	• AC Adapter	• 1 x CR2032 Lithium Battery	• PC Link cable (9-pin)		
• NiMH Rechargeable Battery Pack	• RJ-11 Modular Phone Cable								
• Stylus	• AC Adapter								
• 1 x CR2032 Lithium Battery	• PC Link cable (9-pin)								
BATTERY	<ul style="list-style-type: none"> • Operating: NiMH Rechargeable Battery Pack (included) • Memory Backup: 1 x CR2032 Lithium (included) 								
BATTERY LIFE	<ul style="list-style-type: none"> • Up to 5 hrs. (approx.) • Using Modem: 2.5 hr. with continuous fax sending, 1 hr. with continuous data downloading (approx.) 								
DIMENSIONS (w x d x h)	7.3" x 3.8" x 1.2" (186mm x 96.5mm x 29.6mm)								
WEIGHT	17.5 oz (495g)								
OPTIONS	<ul style="list-style-type: none"> • HC-DS01 Docking Station Kit (Docking Station, NiMH Rechargeable Battery Pack, AC Adapter) • HC-BN01 NiMH Rechargeable Battery Pack • CE-AG04 Color Digital Camera Card • HC-SM02 16MB EDO Memory Upgrade Module 								
WARRANTY	1 year parts and labor limited warranty								

Information. Mobility. Power.

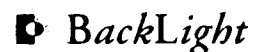
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SHARP.
FROM SHARP MINDS
COME SHARP PRODUCTS™

SHARP ELECTRONICS CORPORATION
Sharp Plaza, Mahwah, NJ 07430-2135

Visit us on the World Wide Web at www.sharp-usa.com
or for more information: Call 1-800-BE-SHARP

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mobilon

Product Information

Windows® CE

Color Digital Camera Card Demo

News & Reviews

Software & Support

Corporate Sales

Dealer Locator

SHARP
FROM SHARP MINDS
COME SHARP PRODUCTS™



Specifications:	<u>HC-4100</u>	<u>HC-4500</u>	<u>HC-4600</u>
Memory	12MB	16MB	16MB Upgradeable to 32MB
ROM	Upgradeable		
Display (measured diagonally)	6.5" High Contrast 16 Grayscale LCD Touch Screen with Backlight	6.5" High Contrast Color LCD Touch Screen with Backlight	6.5" High Contrast Color LCD Touch Screen with Backlight
Keyboard	64 Keys + One-Touch™ Application Key		64 Keys + 7 One-Touch™ Application Keys
Modem	33.6/9.6Kbps Data/Fax Modem Low power consumption		
Voice Recorder	Microphone, speaker and external record button		
Shortcut Keys	One Touch Access to 7 Applications		
PC Card Slot	1 Type II slot		
Camera Card Support	Supports Color Digital Camera Card (optional)		

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Western Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Sharp Electronics Corporation (“Sharp”), is a New York corporation with its principal office or place of business at Sharp Plaza, Mahwah, New Jersey 07430-2135.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

ORDER

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “Respondent” shall mean Sharp Electronics Corporation, its successors and assigns and its officers, agents, representatives and employees.
2. “Eligible Person” shall mean each consumer who purchased a Mobilon 4100, 4500, or 4600 handheld PC in the United States or in a territory of the United States.
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the “Mobilon HPC,” any other hand-held personal computer, notebook computer, personal digital assistant, portable personal computer, desktop personal computer, or any component of any such product, in or affecting commerce, shall not misrepresent the availability of any upgrade product.

II.

- A. Within five (5) business days of the date of service on respondent of this order, and for seventy-five (75) days from the date of service of this order, respondent shall publish notice of this redress provision on the main page of respondent’s Web site and the main page of respondent’s Mobilon Web site. This notice shall be in the form set out in Appendix A. On its Web site, respondent shall provide a

Decision and Order

means by which eligible persons can submit electronically the information that the form requests. Respondent may publish the notice required by this Part through the use of a hyperlink. Any such hyperlink must be labeled: "Important Mobilon Upgrade Offer. Click Here."

- B. Within ten (10) days of the date of service on respondent of this order, respondent shall compile a mailing list containing the name and last known address of each Eligible Person. Respondent shall compile the list from all customer service records under its control, including, but not limited to, registration cards, telephone logs, electronic mail logs, and written correspondence. In addition, respondent shall retain a National Change of Address System ("NCOA") licensee to update this list by processing the list through the NCOA database.
- C. Within fifteen (15) days of the date of service of this order, respondent shall send via first-class mail, postage prepaid, a notice in the form set forth in Appendix B to this order, to each Eligible Person whose name appears on the list required by Part II.B. Respondent shall send the items set forth in Appendix B via electronic mail to any purchaser for whom respondent has only an electronic mail address. No information other than that contained in Appendix B shall be included. No additional materials, other than a postage pre-paid envelope for return of the offer form, shall be transmitted therewith.
- D. The envelope containing the items set forth in Appendix B shall be in the form set forth in Appendix C to this order. In the case of a mailing returned by the U.S. Postal Service as undeliverable for which respondent thereafter obtains a corrected address, respondent shall, within fifteen (15) business days after receiving the corrected address, send the items set forth in Appendix B to the corrected address.
- E. For a period of seventy-five (75) days from the date of service of this order, respondent shall comply with the

Decision and Order

procedures set out in Part II.C of this order with regard to each Eligible Person who contacts respondent or the Commission in any manner. Each mailing shall be made within fifteen (15) days after respondent receives such person's name and address.

- F. Any Eligible Person who, within seventy-five (75) days of the date of service of this order, returns to respondent both: 1) the form contained in Appendix A or Appendix B; and 2) payment in the amount of ten (10) dollars, will be eligible to receive a Callisto Handheld PC upgrade (“Upgrade”), more specifically described on Appendix A. Respondent will not be required to honor any request that is postmarked or emailed after the seventy-fifth day.
- G. Within ninety (90) days of the date of service of this order, respondent shall acquire a sufficient inventory of the Upgrade to meet reasonably expected demand.
- H. Respondent shall send by common carrier, delivery charges prepaid, the Upgrade and instructions for installation to each Eligible Person who complies with Part II.F, as soon as possible, but in the event of lack of inventory, within ninety (90) days of receipt of the request pursuant to Part II.F.
- I. For a period of one hundred twenty (120) days from the date of service of this order, respondent shall provide, and adequately staff during ordinary business hours, a toll-free telephone number to answer questions and provide information relating to this Upgrade offer.
- J. Within two hundred forty (240) days of the date of service of this order, respondent shall furnish to Commission staff the following:
 - 1. A list of the names and addresses of all purchasers who obtain an Upgrade pursuant to this order; a copy of the records used to identify these purchasers; and the mailing date of every Upgrade sent. Respondent shall provide

Decision and Order

this information and material to Commission staff in computer readable form and in computer print out form, if available;

2. Copies of all notices returned to respondent as undeliverable (previously described in Parts II.D of this order); and
3. All other documents and records evidencing efforts made and actions taken by respondent to identify, locate, contact and provide Upgrades to consumers.

III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for a period of three (3) years from the date of service of this order, deliver a copy of this order to all current and future principals, officers, directors, and managers,

Decision and Order

and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Decision and Order

VII.

This order will terminate on March 7, 2021 or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Decision and Order

APPENDIX A

[Web Site Notice]

**NOTICE TO PURCHASERS OF MOBILON 4100, 4500,
AND 4600 HANDHELD PCS:**

IF YOU PURCHASED A SHARP MOBILON 4100, 4500, OR 4600 HANDHELD PC, YOU ARE ENTITLED TO RECEIVE A CALLISTO HANDHELD PC UPGRADE THAT INCORPORATES THE MICROSOFT WINDOWS CE 2.11 OPERATING SYSTEM WITH THE PAYMENT OF A \$10.00 SHIPPING AND HANDLING FEE.

When we marketed the Mobilon handheld PC, we advertised in the specifications of the Mobilon that the product was “upgradeable.” When Sharp later developed the production and support cost applicable to upgrades, it found that the cost to the consumer of such upgrades would be too great to warrant completion of an actual upgrade. We believe in good faith that the cost would make the demand by our Mobilon customers for such an upgrade inconsequential. While Sharp believes that this determination was appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC under which purchasers of the Mobilon who would like to improve the performance of their handheld device have an opportunity to secure a handheld PC upgrade incorporating a newer version of Microsoft’s Windows CE operating system. This is actually more than an upgrade, in the sense that it is an entirely different and more advanced system.

For a limited time, Sharp is offering its Mobilon customers a Callisto handheld PC upgrade that incorporates Microsoft’s Windows CE operating system, Version 2.11. This upgrade kit includes several key software features and is easy to install.

To take advantage of this offer, please fill out the information on the form below and return it in an envelope addressed to Sharp Electronics Corporation [address]. If you wish to pay with a

Decision and Order

credit card, you may submit the completed form electronically through our Web site at www.sharp-usa.com. You may wish to make a copy of the form for your records. Upon receipt of payment and a properly completed form, Sharp will ship the new Callisto Upgrade to you as soon as possible, but no later than 90 days after your request is received. You need only pay a \$10.00 handling and shipment charge.

Please note that this offer is being made for a limited time only and that to receive an upgrade kit at this price, customers must respond with payment and a properly completed form by no later than May 29, 2001. Because of the limited availability of upgrade kits, we will not be able to extend this deadline, and we will not be offering this upgrade opportunity in the future. You should also note that this upgrade opportunity is only available to customers who purchased Mobilon 4100, 4500 and 4600 handheld PC.

Should you have any questions regarding this upgrade offer, please call 1-800- ___ - ____

SHARP ELECTRONICS CORPORATION

[Form to be Attached to Web Site Notice]

RETURN THIS FORM WITH YOUR PAYMENT:

I am the purchaser of a Sharp Mobilon _____ (fill in the correct model number 4100, 4500, or 4600) handheld PC. I understand that to participate in this offer I must have purchased my handheld PC and that I must include the serial number of my handheld PC with my order. I would like a Callisto Upgrade. Please deliver my Upgrade to the following address:

NAME:

STREET ADDRESS:

Decision and Order

CITY AND STATE: _____ ZIP
CODE: _____

_____ My check for \$10.00 is enclosed (make checks payable to
Sharp Place.com)

Mail check and completed form to the following address:
[Address]

_____ Please charge my _____ Visa _____ MasterCard _____
American Express

_____ _____
Credit Card Number Expiration Date (Month/Year)

CREDIT CARD HOLDER: PLEASE PROVIDE THE
FOLLOWING INFORMATION:

NAME:

BILLING
ADDRESS _____

ZIP CODE: _____
DAYTIME TELEPHONE NUMBER: _____

I hereby certify that I bought a Sharp Mobilon _____ (fill
in the correct model number 4100, 4500, or 4600) . The serial
number of my Mobilon is _____ .

DATED: _____, 20__ .

Signature

Decision and Order

APPENDIX B

[Sharp Electronics Corporation Letterhead]

[Date]

Re: Mobilon Upgrade Offer

Dear [Customer Name]:

Our records show that during 1998, 1999 or 2000, you purchased a Sharp Mobilon handheld PC.

When we marketed the Mobilon handheld PC, we advertised in the specifications of the Mobilon that the product was “upgradeable.” When Sharp later developed the production and support cost applicable to upgrades, it found that the cost to the consumer of such upgrades would be too great to warrant completion of an actual upgrade. We believe in good faith that the cost would make the demand by our Mobilon customers for such an upgrade inconsequential. While Sharp believes that this determination was appropriate, customer satisfaction is our highest priority and, to this end, we have reached a settlement with the FTC under which purchasers of the Mobilon who would like to improve the performance of their handheld device have an opportunity to secure a handheld PC upgrade incorporating a newer version of Microsoft’s Windows CE operating system. This is actually more than an upgrade, in the sense that it is an entirely different and more advanced system.

For a limited time, Sharp is offering its Mobilon customers a Callisto handheld PC upgrade that incorporates Microsoft’s Windows CE operating system, Version 2.11. This upgrade kit includes several key software features and is easy to install.

To take advantage of this offer, please fill out the information on the enclosed form and return it in an envelope addressed to

Decision and Order

Sharp Electronics Corporation [address]. If you wish to pay with a credit card, you may submit the form electronically through our Web site at www.sharp-usa.com. You may wish to make a copy of the form for your records. Upon receipt of payment and a properly completed form, Sharp will ship the new Callisto Upgrade to you as soon as possible, but no later than 90 days after your request is received. You need only pay a \$10.00 handling and shipment charge.

Please note that this offer is being made for a limited time only and that to receive an upgrade kit at this price, customers must respond with payment and a properly completed form by no later than May 29, 2001. Because of the limited availability of upgrade kits, we will not be able to extend this deadline, and we will not be offering this upgrade opportunity in the future. You should also note that this upgrade opportunity is only available to customers who purchased Mobilon 4100, 4500 and 4600 handheld PC.

If you have any questions regarding this upgrade offer, please call our information line at 1(800)-_____. As always, we at Sharp Electronics view the satisfaction of our customers as our most important product or service. We appreciate your choosing Sharp and look forward to serving you again in the future.

Sincerely,

[Name]

[Form to be Enclosed with Above Letter]

RETURN THIS FORM WITH PAYMENT

I am the purchaser of a Sharp Mobilon _____ (fill in the correct model number 4100, 4500, or 4600) handheld PC. I understand that to participate in this offer I must have purchased

Decision and Order

my handheld PC and that I must include the serial number of my handheld PC with my order. I would like a Callisto Upgrade. Please deliver my Upgrade to the following address:

NAME: _____

STREET ADDRESS: _____

CITY AND STATE: _____

ZIP CODE: _____

My check for \$10.00 is enclosed (make checks payable to Sharp Place.com)

Please charge my Visa Master Card American Express

Credit Card Number_____
Expiration Date
(Month/Year)

CREDIT CARD HOLDER: PLEASE PROVIDE THE FOLLOWING INFORMATION:

NAME:

BILLING

ADDRESS: _____

ZIP CODE: _____

DAYTIME TELEPHONE NUMBER: _____

Decision and Order

I am the purchaser of a Sharp Mobilon _____ (fill in the correct model number 4100, 4500, or 4600). The serial number of my Mobilon is _____ .

DATED: _____, 20__.

Signature

Decision and Order

Appendix C

Sharp Electronics Corporation
[address]

FORWARDING AND RETURN POSTAGE GUARANTEED

[ADDRESS]

**ATTENTION: IMPORTANT UPGRADE OFFER
FOR YOUR SHARP MOBILON HANDHELD PC**

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on January 25, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Sharp Electronics Corporation (“Sharp”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Sharp advertises and sells the “Mobilon” line of hand-held personal computers (“HPCs”). Sharp’s Mobilon HPCs, as well as similar devices from several other manufacturers, use the Microsoft Windows CE operating system. This operating system and several applications, including a word processor, a spreadsheet, and a database, are installed on these devices’ ROM board. HPCs are designed to be upgradeable to newer versions of the operating system and/or applications through the purchase and installation of a new ROM board.

This matter concerns allegedly false and deceptive advertising of Sharp’s Mobilon HPCs. The Commission's proposed complaint alleges that Sharp claimed that it would offer to its Mobilon customers an upgrade to a later version of the Microsoft Windows CE operating system when such a later version became available. In fact, Sharp never offered to its Mobilon customers an upgrade to a later version of the Microsoft Windows CE operating system when such a later version became available. Further, the company continued to represent that its Mobilon HPCs were upgradeable for several months after deciding not to offer an upgrade.

The proposed consent order contains provisions designed to prevent Sharp from engaging in similar acts and practices in the

Analysis

future. Part I of the proposed order prohibits the company from misrepresenting the availability of any upgrade product. Part II of the proposed order requires Sharp to offer the promised upgrade to consumers who purchased a Mobilon 4100, 4500, or 4600 handheld PC. Under this provision, Mobilon owners may obtain the upgrade for the payment of a shipping and handling charge of \$10. Parts III through VI of the proposed order are reporting and compliance provisions. Part VII is a provision "sunsetting" the order after twenty years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

JORE CORPORATION

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

*Docket C-4004; File No. 0023237
Complaint, March 15, 2001--Decision, March 15, 2001*

This consent order addresses claims on certain packaging and labeling for products marketed by Respondent Jore Corporation -- including power tool accessories -- that such products are all or virtually all made in the United States. The order, among other things, prohibits the respondent from misrepresenting the extent to which any product is made in the United States, while permitting the respondent to represent that such products are made in the United States as long as all, or virtually all, of the components of the products are of United States origin, and all, or virtually all, of the labor in manufacturing them is performed in the United States.

Participants

For the Commission: *Laura D. Koss, Walter C. Gross, Elaine D. Kolish, and Keith B. Anderson.*

For the Respondent: *William Outman, Baker & McKenzie.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Jore Corporation ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Jore Corporation is a Montana corporation with its principal office or place of business at 45000 Highway 93 South, Ronan, Montana 59864.
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products to the public, including power tool accessories.

Complaint

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or has caused to be disseminated packaging for certain of its products, including but not necessarily limited to the attached Exhibits A through C. The packaging contains the following statements or depictions:
 - A. **Craftsman Speed-Lok, 7/16" Hex Shank Wood Boring Bit (½"), Exhibit A**

“Made in USA”
 - B. **Craftsman Speed-Lok, 7/16" Hex Shank Wood Boring Bit (1"), Exhibit B**

“Made in USA”
 - C. **Stanley/JoreTech Fast Change Power Drilling and Driving Set, Exhibit C**

“Made in USA” in immediate conjunction with American flag (on front and two side panels)

In small print on back of package, “Made in USA with Domestic and Global Components”
5. Through the means described in Paragraph 4, notwithstanding the inconspicuous statement “Made in USA with Domestic and Global Components,” respondent has represented, expressly or by implication, that certain of its power tool accessories are made in the United States, *i.e.*, that all, or virtually all, of the component parts of such power tool accessories are made in the United States, and that all, or virtually all, of the labor in manufacturing such power tool accessories is performed in the United States.

Complaint

6. In truth and in fact, a significant portion of the components of certain of respondent's power tool accessories is, or has been, of foreign origin. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. Respondent has disseminated or has caused to be disseminated packaging for certain of its products, including but not necessarily limited to the attached Exhibits D and E. The packaging contain the following statements:

A. Stanley/JoreTech 1/4" Hex Shank Wood Boring Bit (5/8"), Exhibit D

"Made in USA with Domestic and Global Components"

B. Stanley/JoreTech 1/4" Hex Shank Wood Boring Bit (7/8"), Exhibit E

"Made in USA with Domestic and Global Components"

8. Through the means described in Paragraph 7, respondent has represented, expressly or by implication, that certain of its power tool accessories are made in the United States with domestic and imported components.

9. In truth and in fact, these products do not contain domestic components. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fifteenth day of March, 2001, has issued this complaint against respondent.

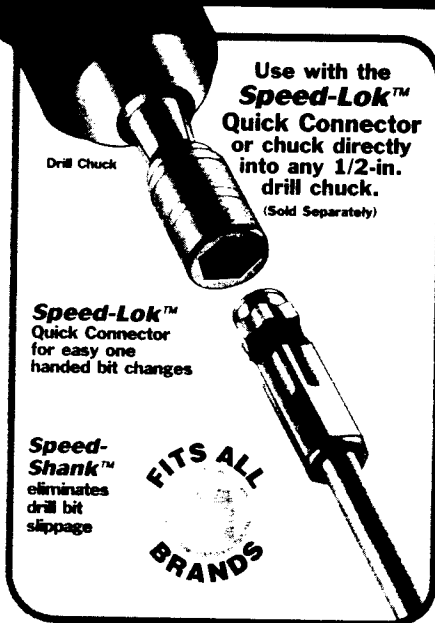
CRAFTSMAN

926254

Speed-Lok™

7/16-in.
Speed-Shank™

1/2-in Wood Boring Bit



WARNING:

Always wear eye protection which complies with current ANSI Standard Z87.1

Always disconnect power source before using tool on electrical boxes, fittings or any workplace which may conduct electricity.

Do not use on any power impact wrench. Bits could break, throwing fragments in all directions.

Before using on a power tool, read and understand machine owners manual, observing all instructions. **FAILURE TO HEED ALL INSTRUCTIONS CAN RESULT IN SERIOUS BODILY INJURY OR DEATH.**

Speed-Lok™ and Speed-Shank™

ARE TRADEMARKS OWNED BY JORE CORPORATION

MADE IN U.S.A. Sold by Sears, Roebuck and Co., Hoffman Estates, IL 60179 1/2000



D9M26254

60550669

926254

CRAFTSMAN

Aggressive Angled Cutting Edge

Hardened Steel

Quick Connector

7/16-in. Speed-Shank™

Speed-Shank™

CRAFTSMAN

926258

Speed-Lok™

7/16-in.
Speed-Shank™

1-in Wood Boring Bit



WARNING:

Always wear eye protection which complies with current ANSI Standard Z87.1

Always disconnect power source before using tool on electrical boxes, fittings or any workplace which may conduct electricity.

Do not use on any power impact wrench. Bits could break, throwing fragments in all directions.

Before using on a power tool, read and understand machine owners manual, observing all instructions. **FAILURE TO HEED ALL INSTRUCTIONS CAN RESULT IN SERIOUS BODILY INJURY OR DEATH.**

Speed-Lok™ and Speed-Shank™

ARE TRADEMARKS OWNED BY JORE CORPORATION

MADE IN U.S.A. Sold by Sears, Roebuck and Co., Hoffman Estates, IL 60179 1/2000



D 9 M 2 6 2 5 8

60550673

926258

CRAFTSMAN

Aggressive Angled Cutting Edge

Hardened Steel

Quick Connector

7/16-in. Speed-Shank™

Speed-Shank™

STANLEY

Job Done Right

Fast Change Power Drilling and Driving Set

Juego de cambio rápido para taladro o destornillador eléctrico
Ensemble de perçage et de vissage motorisé avec connecteur à remplacement rapide

FAST IN

FAST OUT

FAST SHANK



Contractor Grade

Fast Change Power Drilling and Driving Set

Juego de cambio rápido para taladro o destornillador eléctrico
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STC-1744

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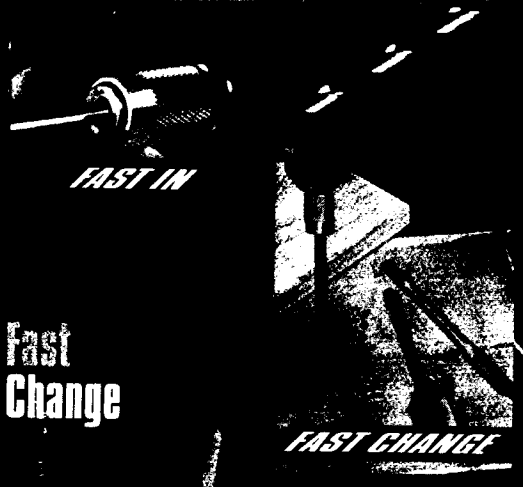


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15.8 MM

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FAST SHANK

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**Fast
Change**

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Work safely. Use proper technique. Read and follow all safety instructions.



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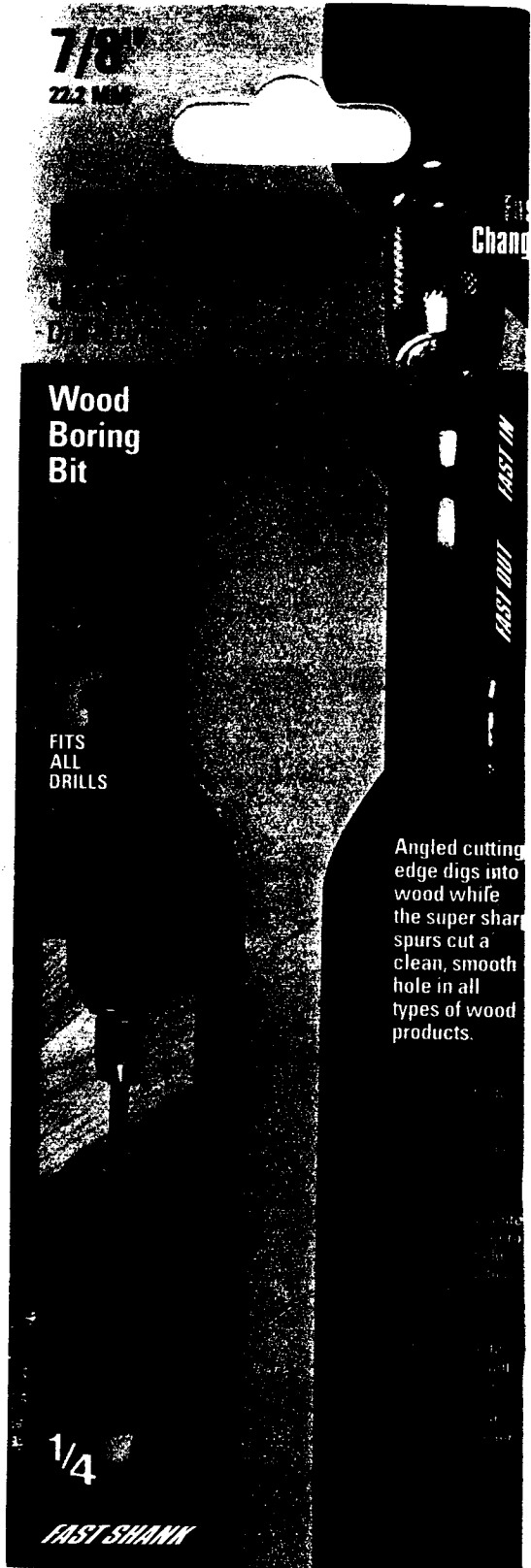
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The Jore Company, Helena, Montana

7/8
22.2 MM



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DRILLS

Angled cutting edge digs into wood while the super sharp spurs cut a clean, smooth hole in all types of wood products.

1/4

FAST SHANK

8F-1200

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jore Corporation is a Montana corporation with its principal office or place of business at 45000 Highway 93 South, Ronan, Montana 59864.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

ORDER

I.

IT IS ORDERED that respondent, Jore Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, in or affecting commerce, as "commerce" is defined in section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall not misrepresent, in any manner, directly or by implication, the extent to which any such product is made in the United States.

PROVIDED, however, that a representation that any such product is made in the United States will not be in violation of this Order so long as all, or virtually all, of the component parts of the product are made in the United States and all, or virtually all, of the labor in manufacturing the product is performed in the United States.

PROVIDED FURTHER, that nothing in the order shall prohibit respondent from depleting the inventory of any product bearing a marking or labeling otherwise prohibited by this order and existing on the date this order is signed, in the normal course of business, provided that no such existing inventory is shipped later than January 31, 2001.

II.

IT IS FURTHER ORDERED that respondent Jore Corporation, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All labeling, packaging, advertisements and promotional materials containing the representation;

Decision and Order

- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

III.

IT IS FURTHER ORDERED that respondent Jore Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future officers, directors, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent Jore Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part

Decision and Order

shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent Jore Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

This order will terminate on March 15, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of this order if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By direction of the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on January 22, 2001

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent Jore Corporation.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns U.S. origin claims contained on packaging for certain Jore Corporation products, including power tool accessories. The Commission's complaint charges that respondents misrepresented on this packaging that the products were all or virtually all made in the United States. In truth and in fact, these products were actually made with significant foreign content and/or processing.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Jore Corporation from misrepresenting the extent to which any product is made in the United States. The proposed order would allow Jore Corporation to represent that such products are made in the United States as long as all, or virtually all, of the components of the products are of U.S. origin, and all, or virtually all, of the labor in manufacturing them is performed in the United States.

Part II of the proposed order requires respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires Jore Corporation to distribute copies of the order to certain company

Analysis

officials and employees. Part IV of the proposed order requires Jore Corporation to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires Jore Corporation to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**DOW CHEMICAL COMPANY AND
UNION CARBIDE CORP.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-3999; File No. 9910301
Complaint, February 5, 2001--Decision, March 15, 2001*

This consent order addresses the merger of Respondent The Dow Chemical Company -- a large, worldwide chemical company, with a particular focus on polyethylene, the world's most widely used plastic, and technologies relating to its manufacture -- and Respondent Union Carbide Corporation, also a large, worldwide chemical company and a leading developer and licensor of polyethylene process technology. The order, among other things, requires the respondents to divest and license certain intellectual property and other assets relating to polyethylene to BP Amoco plc ("BP"). The order also requires the respondents to divest Respondent Dow's worldwide businesses in ethyleneamines and ethanolamines -- families of chemicals used in products such as surfactants, personal care products, pulp and paper products, and herbicides and/or fungicides -- respectively to Huntsman International LLC and Ineos Group plc. In addition, the order requires the respondents to divest Dow's business in methyldiethanolamine ("MDEA") -- a powerful solvent used to remove unwanted compounds from gas streams, in oil refineries, natural gas plants, ammonia plants, and other facilities that handle hydrocarbon gases -- to Ineos Group plc. An accompanying Order to Maintain Assets requires the respondents to preserve the businesses they are required to divest as a viable, competitive, and ongoing operation until the divestiture is achieved.

Participants

For the Commission: *Wallace Easterling, Phillip M. Eisenstat, John Warden, Eric Elmore, Crystal Jones, Kristina Martin, April Tabor, Kavita Puri, Scott Reiter, Ronald Curtis, Linda Cunningham, Jeanine Balbach, Rhett R. Krulla, Richard Liebeskind, Arthur Strong, David von Nirschl, Jeffrey Dahnke, Roberta S. Baruch, Gorav Jindal, Jeremy Beck, J. Elizabeth Callison, David Meyer, and Jane Ruseski.*

Complaint

For the Respondents: *George Cary, Cleary, Gottlieb, Steen & Hamilton*, and *Nathan Eimer, Eimer Stahl Klevorn & Solberg*.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondents The Dow Chemical Company (“Dow”), a corporation, and Union Carbide Corporation (“Carbide”), a corporation, both subject to the jurisdiction of the Commission, have agreed to merge, in violation of 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 to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Dow is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 2030 Dow Center, Midland, Michigan, 48674-2030. Dow is a global science and technology company that develops and manufactures a portfolio of plastic, chemical, and agricultural products and services and distributes its products to customers throughout the world.

2. Respondent Carbide is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 39 Old Ridgebury Road, Danbury Connecticut, 06817-0001. Carbide is a worldwide chemical and plastics producer.

Complaint

II. JURISDICTION

3. Dow and Carbide are, and at all times relevant herein have been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED MERGER

4. Dow and Carbide announced on August 4, 1999, that their boards of directors approved a merger agreement, pursuant to which Carbide shareholders would receive shares of Dow stock. Dow and Carbide shareholders have subsequently approved the merger.

IV. VIOLATIONS CHARGED

COUNT ONE – LINEAR LOW DENSITY POLYETHYLENE AND RELATED TECHNOLOGY

5. Paragraphs 1-4 are incorporated by reference as if fully set forth herein.

6. Polyethylene is the world’s most widely used plastic. Linear low density polyethylene (“LLDPE”) is the fastest growing type of polyethylene, and is particularly well suited for making plastic films that are both flexible and strong (but not transparent). One of the largest uses of LLDPE is in making trash bags. LLDPE sales in the United States and Canada exceeded \$3 billion in 1999.

7. LLDPE resins have distinct performance characteristics and superior physical properties, including superior strength and toughness as compared to other thermoplastics. LLDPE is used where its properties are important in applications, such as trash bags, stretch wrap, construction liners, and heavy duty sacks.

Complaint

Where LLDPE is used, it is the most cost effective resin per pound, and due to its superior properties, provides a substantial cost advantage on a volume basis.

8. LLDPE is a differentiated product with a high level of product customization. There are many distinct grades and formulations of LLDPE resins, and Dow and Carbide are leading producers of LLDPE formulations with performance characteristics that are superior to “commodity” LLDPE. These high performance resins (sold by Dow, Carbide and others, including Exxon Mobil Corporation (“Exxon”)) account for a substantial portion of the LLDPE sold each year. Dow has historically led the industry in production and sale of LLDPE polymers tailored to deliver performance characteristics demanded by many LLDPE users, and has been able to sell such “premium” LLDPE polymers at premium prices.

9. Polyethylene is produced in specialized industrial reactors, in a polymerization reaction in the presence of a catalyst. Reactor process technology, catalyst technology, LLDPE polymers themselves and applications for LLDPE polymers are all areas in which firms (including Respondents) compete by, among other things, innovating and developing technology (including patents, trade secrets and know-how) for their own use and, in some cases, for license to other LLDPE producers.

10. Dow is a leader in the polyethylene industry, both in product sales and technology. Dow produces and sells polyethylene in North America, and was the largest seller of polyethylene in the United States and Canada in 1999. Its focus is on high performance products, and it has developed a proprietary solution process and metallocene catalysts for the production of polyethylene. Carbide is also a leading producer of polyethylene and a leading developer of polyethylene technology.

11. Carbide, Dow and BP are leading developers of polyethylene reactor process technology. Carbide’s “Unipol” reactor process, in which ethylene is in gaseous state during

Complaint

polymerization (“gas phase”), is the most widely licensed and widely used polyethylene process in the world. BP’s “Innovene” process, also a gas-phase process, is the only other widely licensed process for LLDPE. Dow does not license its polyethylene reactor technology, in which ethylene is polymerized in solution. Gas phase LLDPE production is generally lower cost than solution production.

12. Polyethylene catalysts, including metallocenes, initiate the polymerization of ethylene to produce polyethylene, and these catalysts control important characteristics of the resulting polymer. Metallocene catalysts are an advanced form of catalyst which allow polyethylene producers to make polymers that have distinct advantages over polymers made with conventional catalysts, such as higher strength and enhanced processability. The technology to make and use metallocene catalysts in manufacturing LLDPE is claimed by U.S. and foreign patents owned by Dow and Exxon.

13. If metallocene catalysts were generally available to LLDPE producers, those producers likely would be able to erode Respondents’ position as leading producers of premium LLDPE polymers.

14. Carbide owns a 50% interest in Univation Technologies, LLC, a joint venture with Exxon. Univation develops and licenses metallocene catalyst technology for use in Carbide’s Unipol gas phase polyethylene process. Post-merger, Dow will become Exxon’s partner in Univation.

15. Dow uses its metallocene catalyst technology to produce LLDPE and other polymers in its proprietary solution process. In addition, prior to entering into the agreement to merge with Carbide, Dow was working with BP Amoco plc (“BP”) pursuant to a Joint Development Agreement (“JDA”) to combine Dow’s metallocene catalysts with BP’s Innovene gas phase process for producing polyethylene. Through the JDA, Dow and BP developed technology allowing the use of Dow’s metallocene

Complaint

catalysts in gas phase process reactors, and developed several metallocene-based advanced polyethylene polymers.

16. In 1999, at or about the time it agreed to merge with Carbide, Dow terminated the JDA rather than enter into a joint licensing venture to market the jointly developed technology. Dow declined to license its own metallocene catalyst technology to BP for sublicense to others. As a result of Dow's decision not to proceed with a licensing venture with BP, BP is not able to offer metallocene catalysts or the jointly developed technology to BP's process technology licensees or prospective licensees.

17. There are no economic substitutes for LLDPE in the vast majority of applications in which it is used. LLDPE constitutes a relevant product market and "line of commerce" within the meaning of the antitrust laws.

18. Metallocene catalysts are distinct from conventional polyethylene catalysts and produce polymers that have distinct advantages over polymers produced with conventional catalysts. There is no economic substitute today for metallocene catalyst technology as part of a complete LLDPE technology package. In addition, metallocene catalyst technology and metallocene-based polymers have the potential to constitute substantial competition in high performance LLDPE polymers. Metallocene catalyst technology for use in LLDPE manufacture constitutes a relevant product market and "line of commerce" within the meaning of the antitrust laws.

19. Dow and Exxon are the only firms in the world that have succeeded in developing a commercially viable metallocene catalyst technology for LLDPE, and Dow (working with BP) and Carbide (working with Exxon in Univation) are the only firms that have succeeded in developing a viable implementation of metallocene catalyst technology in gas phase polyethylene processes. Dow and Univation have the largest metallocene patent estates, and have exchanged patent immunities giving each of them freedom to operate in this area. Other firms attempting to

Complaint

develop metallocenes have not succeeded in commercializing those catalysts or in using, licensing or selling them without threat of patent infringement actions brought by Dow, Univation or Exxon. Unlike Dow and Univation, other firms seeking to develop metallocenes have not demonstrated success in persuading LLDPE producers to license their metallocene technology.

20. Even if firms that are attempting to commercialize metallocene catalyst technology succeeded in doing so, they would not be significant constraints on Dow or Univation unless and until they further developed metallocenes for use in gas phase reactors. The substantial majority of LLDPE production capacity not controlled by Respondents is gas phase, and it would take substantial time and expense for other firms to adapt metallocene catalysts for use in gas phase reactors, particularly in light of the need to invent around patents controlled by Dow or Univation.

21. Innovation through competition in research and development in LLDPE reactor process technology leads to reductions in cost, improved product properties, performance, and expansion of uses for polyethylene resin. LLDPE reactor process technology constitutes a relevant product market and “line of commerce” within the meaning of the antitrust laws.

22. The relevant geographic market and section of the country within which to analyze the likely effects of the proposed transaction in the production and sale of LLDPE is the United States and Canada. The relevant geographic market and section of the country within which to analyze the likely effects of the proposed transaction in the market for metallocene catalyst technology for use in LLDPE manufacture and in the market for LLDPE reactor process technology is the world.

23. The relevant markets would be highly concentrated as a result of the merger. Two firms (Respondents and Exxon) likely would control more than 50% of LLDPE polymer sales in North America, essentially all metallocene technology for LLDPE that

Complaint

has been commercialized to date, and a substantial share of LLDPE reactor process technology. By illustration, Respondents' technology is used in approximately 75% of the installed LLDPE capacity in the United States and Canada.

24. Entry into the relevant markets would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the merger.

25. The effects of the merger, if consummated, may be substantially to lessen competition and tend to create a monopoly in each of the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the merger would:

- a. eliminate actual, direct and substantial competition between Dow and Carbide and between Dow and Univation in the relevant markets;
- b. substantially reduce competition in the market for LLDPE polymers by giving Respondents an effective monopoly of metallocene catalysts for LLDPE, thereby impeding the ability of Respondents' polymer competitors to compete with Respondents;
- c. substantially reduce competition in the market for LLDPE polymers by giving Respondents control of the most widely licensed LLDPE reactor process technology, and by impairing the competitive viability of their leading competitor, thereby allowing Respondents to impede the development of LLDPE reactor process technology for the benefit of Respondents' LLDPE business;
- d. eliminate potential competition between Dow and Carbide in the market for metallocene catalyst technology for use in LLDPE manufacture;

Complaint

- e. increase barriers to entry into the relevant markets, including enhancing patent barriers in the relevant markets resulting in increased cost of LLDPE production and increased prices for LLDPE polymers;
- f. reduce innovation competition among developers of the relevant products, including the delay of, or redirection of, research and development projects in metallocene catalyst technology, LLDPE reactor process technology, LLDPE and LLDPE applications;
- g. substantially increase the level of concentration in the relevant markets and enhance the probability of coordination;
- h. permit Dow to further impair the ability of BP to compete in gas phase licensing and develop new technology and products based on its work with Dow under the JDA;
- i. increase Respondents' ability to exercise market power unilaterally in the relevant markets;
- j. allow Dow to impair Univation's ability to compete in the licensing of metallocene catalyst technology and LLDPE reactor process technology through Dow's post-merger ownership and governance interest in Univation; and
- k. eliminate BP as an actual and potential competitor in the development and licensing of metallocene catalyst technology for LLDPE manufacture.

26. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

27. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as

Complaint

amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

COUNT TWO – ETHYLENEAMINES

28. Paragraphs 1-27 are incorporated by reference as if fully set forth herein.

29. One relevant line of commerce in which to assess the effects of the acquisition is ethyleneamines. Ethyleneamines are a family of homologues containing nitrogen, hydrogen and carbon, formulated so that each nitrogen atom is separated from every other nitrogen atom by two carbon atoms.

30. Ethyleneamines are produced by the chemical reaction of ammonia with ethylene dichloride or by the reductive amination method. Ethyleneamines are used as chemical intermediates, used to make other chemical products, which are used in many diverse applications. There are no economic substitutes for ethyleneamines.

31. One relevant geographic area and section of the country in which to analyze the effects of the proposed acquisition in the market for ethyleneamines is the world.

32. Another relevant geographic area and section of the country in which to analyze the effects of the proposed acquisition in the market for ethyleneamines is the United States and Canada. There are no producers of ethyleneamines outside the United States and Canada to which customers located in the United States and Canada can turn for a supply of ethyleneamines which can economically supply customers in the United States and Canada.

33. Both geographic markets for ethyleneamines are highly concentrated. There are two producers of ethyleneamines in the United States and Canada, Dow and Carbide. There are six producers of ethyleneamines in the world, including both Dow and Carbide. As measured by either current sales to customers, or

Complaint

capacity available for the production of ethyleneamines, the relevant markets are highly concentrated.

34. Entry into production and marketing of ethyleneamines requires more than two years and would not be likely, timely, or sufficient to prevent anticompetitive effects in the relevant markets.

35. Dow and Carbide are actual competitors in the relevant markets.

36. The effect of the acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Dow and Carbide in the relevant markets for ethyleneamines;
- b. create a monopoly in the market for ethyleneamines in the United States and Canada;
- c. increase the likelihood that Respondents will unilaterally exercise market power in the markets for ethyleneamines;
- d. substantially increase the level of concentration in the world and increase the likelihood of coordinated pricing behavior among worldwide producers of ethyleneamines;
- e. increase barriers to entry; and
- f. increase the likelihood that customers of ethyleneamines would be forced to pay higher prices.

Complaint

37. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

38. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

COUNT THREE – ETHANOLAMINES

39. Paragraphs 1-38 are incorporated by reference as if fully set forth herein.

40. One relevant line of commerce in which to assess the effects of the acquisition is ethanolamines. Ethanolamines are a family of homologues produced by the reaction of ammonia and ethylene oxide, including monoethanolamine, diethanolamine, and triethanolamine. Ethanolamines are used as chemical intermediates to make other chemical products, which are used in many diverse applications. There are no economic substitutes for ethanolamines as chemical intermediates.

41. One relevant geographic area in which to analyze the effects of the proposed acquisition in the market for ethanolamines is the United States and Canada.

42. The market for ethanolamines in the United States and Canada is highly concentrated. There are three principal producers of ethanolamines, including Dow and Carbide, and two additional small producers who have very limited capacity. As measured by either current sales or capacity available for the production of ethanolamines, the relevant market is highly concentrated.

43. Entry into production and marketing of ethanolamines requires more than two years and would not be likely, timely, or sufficient to prevent anticompetitive effects in the relevant market.

Complaint

44. Dow and Carbide are actual competitors in the relevant market.

45. The effect of the merger, if consummated, may be substantially to lessen competition and tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Dow and Carbide in the market for ethanolamines in the United States and Canada;
- b. substantially increase the level of concentration and increase the likelihood of coordinated pricing behavior among producers of ethanolamines;
- c. increase the likelihood that Respondents will unilaterally exercise market power in the market for ethanolamines;
- d. increase barriers to entry; and
- e. increase the likelihood that customers of ethanolamines in the United States and Canada would be forced to pay higher prices.

46. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

47. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

Complaint

**COUNT FOUR – MDEA BASED GAS TREATING
PRODUCTS**

48. Paragraphs 1-47 are incorporated by reference as if fully set forth herein.

49. One relevant line of commerce in which to assess the effects of the acquisition is methyldiethanolamine (“MDEA”) based gas treating products.

50. MDEA, either alone or blended with other chemicals, is used in a wide variety of settings to remove impurities such as sulphur and carbon dioxide from hydrocarbon gas streams. When used to remove impurities from hydrocarbon gas streams, the sale of MDEA is branded and combined with engineering services that can include the design of the equipment used to treat the gas stream, monitoring the effectiveness of the gas treatment over time, and maintaining the optimum blend of MDEA and other chemicals. There are no economic substitutes for MDEA based gas treating products in the treatment of hydrocarbon gas streams.

51. Because of the high economic cost of failure of a hydrocarbon gas treating product, consumers of MDEA based gas treating products cannot economically substitute commodity MDEA for use in treatment of hydrocarbon gas streams.

52. One relevant geographic area in which to analyze the effects of the proposed acquisition in the market for MDEA based gas treating products is the United States and Canada.

53. The market for MDEA based gas treating products in the United States and Canada is highly concentrated, as measured by current sales. There are only two developers and producers of MDEA based gas treating products in the United States and Canada who offer a wide array of products to treat gas with different levels of impurities.

Complaint

54. Entry into development and marketing of MDEA based products for the treating of hydrocarbon gasses requires more than two years and would not be likely, timely, or sufficient to prevent anticompetitive effects in the relevant market. Because of the high economic cost of failure of a hydrocarbon gas treating product, consumers of MDEA based gas treating products would be reluctant to accept a supplier that does not have an established reputation and a recognized brand MDEA based product for the treating of hydrocarbon gas streams.

55. Dow and Carbide are actual competitors in the relevant market.

56. The effect of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Dow and Carbide in the United States and Canada market for MDEA based gas treating products;
- b. increase the likelihood of coordinated pricing behavior among United States and Canada producers of MDEA based gas treating products;
- c. increase the likelihood that Respondents will unilaterally exercise market power in the United States and Canada market for MDEA based gas treating products; and
- d. increase the likelihood that United States and Canada customers of MDEA based gas treating products would be forced to pay higher prices.

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57. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

58. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifth day of February, 2001, issues its Complaint against said Respondents.

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DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the proposed acquisition by The Dow Chemical Company ("Dow") of Union Carbide Corporation ("Union Carbide"), collectively hereinafter sometimes referred to as "Respondents," including Union Carbide's interest in Univation Technologies LLC, and Respondents having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration and which, if issued by the Commission, would charge Dow and Union Carbide with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents Dow and Union Carbide and their attorneys, and counsel for the Commission having thereafter executed an agreement containing consent order, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets (Appendix A), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

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1. Respondent The Dow Chemical Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 2030 Dow Center, Midland, Michigan 48674.

2. Respondent Union Carbide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut 06817.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. The following terms shall mean the following entities:

1. "Dow" means The Dow Chemical Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by The Dow Chemical Company, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each. Dow does not include Union Carbide Corporation or Univation.

2. "Union Carbide" means Union Carbide Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by Union Carbide Corporation, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

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Union Carbide does not include Dow. Union Carbide does not include Univation.

3. “Univation” means Univation Technologies, LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 555 San Felipe Road, Suite 1950, Houston, Texas 77056.

4. “Respondents” means Dow and Union Carbide individually and collectively.

5. “Commission” means the Federal Trade Commission.

6. “Asahi” means Asahi Chemical Industry Co., Ltd., a foreign corporation, existing and doing business under and by virtue of the laws of Japan, with its offices and principal place of business located at 1-2, Yuraku-cho, 1-chome, Chiyoda-ku, Tokyo 100, Japan, its subsidiaries, divisions, groups and affiliates.

7. “BP” means BP Amoco p.l.c., a foreign corporation, existing and doing business under and by virtue of the laws of England and Wales, with its offices and principal executive offices located at Britannic House, 1 Finsbury Circus, London EC2M, England, its subsidiaries, divisions, groups and affiliates. BP’s principal U.S. office is located at 200 East Randolph Drive, Chicago, Illinois 60601-7125.

8. “Exxon” or “Exxon Mobil” means Exxon Mobil Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its offices and principal place of business located at 5959 Las Colinas Boulevard, Irving, Texas 75039-2298, its subsidiaries, divisions, groups and affiliates. Exxon does not include Univation.

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9. “Huntsman” means Huntsman International LLC, a limited liability company, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 500 Huntsman Way, Salt Lake City, Utah 84108, and its subsidiaries, divisions, groups, and affiliates.

10. “Ineos” means Ineos Group plc and its subsidiaries, divisions, groups and affiliates, including Ineos L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its offices and principal place of business located at 701 Poydras Street, Suite 5000, New Orleans, Louisiana 70139.

11. “Mitsui” means Mitsui Chemicals, Inc., a foreign corporation, existing and doing business under and by virtue of the laws of Japan, with offices and principal place of business located at 2-5 Kasumigaseki, 3-chome, Chiyoda-ku, Tokyo, Japan, its subsidiaries, divisions, groups and affiliates. Mitsui’s principal U.S. office is located at Mitsui Petrochemicals (America), First Interstate Bank Plaza, 1000 Louisiana, Suite 5696, Houston, Texas 77002.

12. “Albemarle” means Albemarle Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its offices and principal place of business located at 330 South Fourth St., Richmond, Virginia 23210.

13. “Boulder Scientific” means Boulder Scientific Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its offices and principal place of business located at 598 Third St., Mead, Colorado 80542.

B. “Acquirer” means any person or business that purchases the Dow Global Ethyleneamines Business, the Dow Global

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Ethanolamines Business, the Dow Gas Spec MDEA Business, or the Dow Gas Phase Metallocene PE Assets pursuant to this Order. Acquirer includes BP, Huntsman and/or Ineos.

C. “Acquisition” means the acquisition by Dow of assets or voting shares of Union Carbide that is reportable under the Hart-Scott-Rodino Antitrust Improvements Act.

D. “AEEA” means aminoethylethanolamines.

E. “AEEA Plant” means Dow’s AEEA production facility located at the Freeport Site.

F. “Asahi Agreement Patent Rights” means all rights conveyed to Dow, pursuant to the Joint Development Agreement, dated July 21, 1995, as amended, and the Technology Commercial Agreement, dated February 26, 1998, as amended, both between Asahi Chemical Industry Co., Ltd. and Dow, to make, use, and sell, and to sublicense any person to make, use and sell, Ethylene Polymers in a Gas Phase PE Process.

G. “BisCP Metallocene Catalyst” means Metallocene Catalyst containing in its preactivated state two Cyclic Moieties wherein for each of the Cyclic Moieties three or more adjacent atoms comprising a portion of a ring of the Cyclic Moiety are π -bonded to the same metal atom and the three or more adjacent atoms are within normal bonding distance of the metal atom and wherein the Cyclic Moieties may be the same or different, symmetric or asymmetric, unbridged or bridged to each other.

H. “BP Confidential Information” means (1) information regarding the Dow Gas Phase Metallocene PE Assets, (2) information regarding BP’s Innovene Gas Phase PE Process, and (3) information subject to any confidentiality or secrecy obligation, received by Dow from or on behalf of BP regarding Metallocene Technology, Gas Phase PE Process technology, or Ethylene Polymers, *provided, however*, that BP Confidential

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Information shall not include information, other than Dow Gas Phase PE Technology, that is:

1. public knowledge at the date of receipt by Dow, or that prior to Dow's use of such information, becomes public knowledge through no act or failure to act on the part of Dow;
2. already known, without obligation of confidentiality, to Dow at the date of its receipt;
3. subsequently lawfully acquired from third parties or affiliates to the extent that Dow has the right to use or disclose it without obligations of confidentiality; or
4. required to be disclosed due to operation of law or an order of a court or other governmental authority, *provided* that Dow shall first notify BP of such requirement and use reasonable efforts to preserve the confidentiality of the information required to be disclosed and to limit disclosure of such information to that legally required.

I. "BP Divestiture and License Agreement" means the Divestiture and License Agreement between Dow and BP dated as of January 19, 2001, providing, *inter alia*, for the sale of the Dow Gas Phase Metallocene PE Assets to BP, and the grant of the Enhanced Gas-Phase Metallocene Licenses & Immunities to BP.

J. "BP-Dow-Chevron Agreement" means the Single Site Metallocene Catalyst Co-Operation and Exploitation Agreement dated September 8, 1998, by and between BP, Dow and Chevron Chemical Company LLC, as amended.

K. "BP-Dow JDA" means the Joint Development Agreement dated January 30, 1995, by and between BP and Dow, as amended.

L. "BP-Dow Joint Development Program" means all research and development activity taken by Dow or BP, individually or

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jointly, pursuant to, in furtherance of, or in performance of the BP-Dow JDA.

M. “Businesses and Assets To Be Divested” means

1. the Dow Global Ethyleneamines Business;
2. the Dow Global Ethanolamines Business;
3. the Dow Gas Phase Metallocene PE Assets; and
4. the Dow Gas Spec MDEA Business.

N. “Castmate” means CASTMATE and MORMATE ceramic processing additives produced by blending ethyleneamines, latex, and water, and any other products comprising ethyleneamines and, optionally, latex and water, sold for use in the manufacture of ceramic articles as a processing additive and managed by the same persons in Freeport, Texas who manage the Dow Global Ethyleneamines Business.

O. “Catalyst Technology” means technology relating to PE Catalyst or to the production, preparation and use of PE Catalysts, PE Catalyst Support or PE Catalyst Systems.

P. “Combined Technology” means technology (including without limitation Patents and Know-How) developed in the course of the BP-Dow Joint Development Program, whether or not patentable, including all technical data and information generated individually or jointly by Dow or BP in the course of the BP-Dow Joint Development Program; all Ethylene Polymers produced in the course of the BP-Dow Joint Development Program; any individual or joint invention, improvement or discovery, whether or not patentable, which was made or conceived in the course of the BP-Dow Joint Development Program and technology developed in the course of the BP-Dow Joint Development Program for use and/or manufacture of any Combined Technology Catalyst; and all laboratory records,

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reports, technical data and information generated in the course of the BP-Dow Joint Development Program; excluding, however, ownership of technology developed by Dow prior to, or not in the course of, the BP-Dow Joint Development Program.

Q. “Combined Technology Catalyst” means any Metallocene Catalyst System (including activators, supports or scavenging agents) made or conceived in the course of the BP-Dow Joint Development Program, including any improvements upon Introduced Dow Metallocene Catalyst Systems, which improvements were made or conceived in the course of the BP-Dow Joint Development Program, but excluding the Introduced Dow Metallocene Catalyst Systems.

R. “Combined Technology Patents” means all Patents claiming inventions that are Combined Technology that are owned by Dow or BP, including the patents listed in Confidential Appendix B hereto.

S. “Cyclic Moiety” means a cyclopentadienyl (C_5H_5) moiety and/or any other type of cyclic compound including, for example, but not limited to, a cyclohexadienyl moiety, a pyrolyl moiety, a phospholyl moiety, a boratabenzene moiety, etc.; wherein each of these moieties and/or compounds may be unsubstituted or substituted with anything and in any manner (including, but not limited to, ring or multi-ring structures such as indenyl, fluorenyl, or other ring structures).

T. “Dedicated Gas Phase Metallocene PE Assets” means:

1. the two agitated dry phase reactors that are owned by Dow, that have been used by Dow for testing of Metallocene Catalyst Systems in a Gas-Phase PE Process for making Ethylene Polymers, and that have been located at Freeport, Texas and Midland, Michigan; and
2. all of Dow’s rights, title and interest in the BP-Dow-Chevron Agreement, and all Dow’s rights, title and interest in

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all sole or joint inventions, improvements or discoveries, whether or not patentable, that were made or conceived in the course of the BP-Dow-Chevron Agreement program, including any Know-How and any Patents claiming the same, and including any improvements upon Introduced Dow Metallocene Catalyst Systems, which improvements were made or conceived in the course of the BP-Dow -Chevron Agreement program, but excluding the Introduced Dow Metallocene Catalyst Systems.

U. “Density” means density in grams per cubic centimeter as measured by the most recent version of ASTM D-1505 (as of the Effective Date of Divestiture, ASTM D-1505-98) using specimens prepared by the procedure described in ASTM D-1928, Procedure C.

V. “Divestiture Agreements” means the Huntsman Agreement, the Ineos Agreement, the BP Divestiture and License Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, and any New Gas Spec MDEA Divestiture Agreement.

W. “Dow Appendix C Employees” means Dow Employees listed on Confidential Appendix C of this Order and such other Dow employees who, during any twelve-month period since January 1, 1995, devoted 50 work days to Combined Technology or to the BP-Dow Joint Development Program or to any combination thereof.

X. “Dow Gas Phase Metallocene PE Assets” means:

1. all Dow’s rights, title and interest in the BP-Dow JDA, and all Dow’s rights, title and interest in all Combined Technology, and Combined Technology Patents;
2. the Dedicated Gas Phase Metallocene PE Assets;
3. the Dow Gas Phase PE Patents;

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4. all research materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes and quality control data of Dow related solely to Metallocene Technology for use in a Gas-Phase PE Process or to Dow Gas Phase PE Technology that are recorded in written or electronic form as of the date the Commission accepts this Order for public comment;

5. all interest in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, licensors, licensees, consignors and consignees, and rights under warranties and guarantees, express or implied of Dow related solely to Metallocene Technology for use in a Gas-Phase PE Process or to Dow Gas Phase PE Technology, except the Univation Settlement Agreement; and

6. all documents, books, records, and files, written or electronic, of Dow related solely to Metallocene Technology for use in a Gas-Phase PE Process or Dow Gas Phase PE Technology, except the Univation Settlement Agreement and information provided to Dow by or on behalf of Univation, Union Carbide, and Exxon Mobil either prior to or after the effective date of such Univation Settlement Agreement.

Y. "Dow Gas Phase PE Patents" means all Patents owned by Dow having a priority date or filing date on or before the date on which the Commission accepts this Order for public comment, all claims of which are limited to (i) Metallocene Technology that can only be used in a Gas Phase PE Process for Ethylene Polymers; (ii) Metallocene Catalyst Systems or components of Metallocene Catalyst Systems that can only be used in Gas Phase PE Processes for Ethylene Polymers; (iii) a process for using such Metallocene Catalyst Systems or components in a Gas Phase PE Process to make Ethylene Polymers; or (iv) Ethylene Polymers made only by such a Gas Phase PE Process, including the patents listed in Confidential Appendix D hereto.

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Z. “Dow Gas Phase PE Technology” means all Know-How owned by Dow and developed before the date on which the Commission accepts this Order for public comment, that is limited to (i) Metallocene Technology that can only be used in a Gas Phase Process for Ethylene Polymers; (ii) Metallocene Catalyst Systems or components of Metallocene Catalyst Systems that can only be used in Gas Phase PE Processes for Ethylene Polymers; (iii) a process for using such Metallocene Catalyst Systems or components in a Gas Phase PE Process to make Ethylene Polymers; or (iv) Ethylene Polymers made only by such a Gas Phase PE Process.

AA. The “Dow Gas Spec MDEA Business” means all of Dow’s right, title, and interest in all assets and businesses relating to the research, development, sale, and distribution of Gas Spec MDEA in the United States and Canada, including, without limitation, the following:

1. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;
2. at Acquirer’s option, and with the concurrence of the Commission, a Supply Contract pursuant to which Dow will provide to an Acquirer MDEA on commercially reasonable terms that achieve the purposes of this Order;
3. all intellectual property rights, including but not limited to Patents, Patent rights, licenses, formulas, mixes, molds, inventions, copyrights, trade secrets, know-how, trademarks, and trade names;
4. all raw material and finished product inventories and goods in process;

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5. all right, title, and interest in and to the contracts (together with associated bid and performance bonds) entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
6. all rights under warranties and guarantees, express or implied;
7. all separately maintained, and all relevant portions of not separately maintained, books, records and files;
8. all applicable federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, to the extent permitted by law; and
9. all items of prepaid expense arising on or after August 1, 2000.

Provided, however, that the Dow Gas Spec MDEA Business does not include the following:

10. any plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other property (other than the laboratory and software used by the Dow Gas Spec MDEA Business) that relate to the manufacture of MDEA and MMEA, including Dow's MDEA and MMEA manufacturing facilities;
11. intellectual property used solely for the manufacture of MDEA and MMEA;
12. real property at the Freeport Site, Plaquemine Site or any other Dow location;
13. customer lists, files, information and records for customers located outside of the United States and Canada; and

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14. the assets listed in Confidential Appendix E of this Order.

Provided, however, that if Dow divests the Dow Gas Spec MDEA Business to Ineos pursuant to Paragraph IV of this Order, the definition of the Dow Gas Spec MDEA Business includes, but shall not be limited by, the assets conveyed by the Ineos Agreement.

AB. The “Dow Global Ethanolamines Business” means all of Dow’s right, title, and interest in all assets and businesses in the world relating to the research, development, manufacture, sale, and distribution of Ethanolamines, including, without limitation, the following:

1. all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property related to Ethanolamines and located at a facility owned and operated by Dow at Block 55 of the Plaquemine Site, as well as any easements necessary to operate these facilities as an Ethanolamines business;
2. at Acquirer’s option, and with the concurrence of the Commission, a Supply Contract for EO;
3. at Acquirer’s option, and with the concurrence of the Commission, a contract or contracts pursuant to which Dow will provide to an Acquirer certain services related to Ethanolamines, including one or more of the following: maintenance, environmental, liquid waste disposal, computer, safety, security, transportation, or other services related to Ethanolamines;
4. at Acquirer’s option, and with the concurrence of the Commission, a contract or contracts pursuant to which Dow will provide to an Acquirer certain utilities related to

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Ethanolamines, including one or more of the following: water, electricity, sewer, or other utilities related to Ethanolamines;

5. a lease, license, or other rights in real property at the Plaquemine Site sufficient for the operation of the Dow Global Ethanolamines Business in the manner in which such business has been operated in the past and as such business may be operated in the future in a manner consistent with the purposes of this Order;

6. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

7. all intellectual property rights, including but not limited to Patents, Patent rights, licenses, formulas, mixes, inventions, copyrights, trade secrets, know-how, trademarks, and trade names;

8. all raw material and finished product inventories and goods in process;

9. all right, title, and interest in and to the contracts (together with associated bid and performance bonds) entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

10. all rights under warranties and guarantees, express or implied;

11. all separately maintained, and all relevant portions of not separately maintained, books, records and files;

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12. rights to operate under all applicable federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, to the extent permitted by law; and

13. all items of prepaid expense arising on or after August 1, 2000.

Provided, however, that the Dow Global Ethanolamines Business does not include the following:

14. assets or businesses solely for the production or sale of products other than Ethanolamines including any downstream products into which Ethanolamines are an input;

15. production facilities used to manufacture EO;

16. a fee simple interest in any real property, including the real property underlying the Ethanolamines manufacturing facility at the Plaquemine Site; and

17. the assets listed in Confidential Appendix E of this Order.

Provided, however, that if Dow divests the Dow Global Ethanolamines Business to Ineos pursuant to Paragraph III of this Order, the definition of the Dow Global Ethanolamines Business includes, but shall not be limited by, the assets conveyed by the Ineos Agreement.

AC. The “Dow Global Ethyleneamines Business” means all of Dow’s right, title, and interest in all assets and businesses in the world relating to the research, development, manufacture, sale, and distribution of Ethyleneamines, AEEA, and Castmate, including, without limitation, the following:

1. all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools,

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supplies, stores, spare parts, and other tangible personal property related to Ethyleneamines and located at a facility owned and operated by Dow at Block A-3800 of the Freeport Site, as well as any easements necessary to operate these facilities as an Ethyleneamines business;

2. all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property related to and located at the AEEA Plant at the Freeport Site, as well as any easements necessary to operate the facilities as an AEEA business;

3. a lease, license, or other rights in real property at the Freeport Site sufficient for the operation of the Dow Global Ethyleneamines Business in the manner in which such business has been operated in the past and as such business may be operated in the future in a manner consistent with the purposes of this Order;

4. at Acquirer's option, and with the concurrence of the Commission, a Supply Contract for ethylene dichloride and caustic;

5. at Acquirer's option, and with the concurrence of the Commission, a contract or contracts pursuant to which Dow will provide to an Acquirer certain services related to Ethyleneamines, including one or more of the following: maintenance, environmental, liquid waste disposal, computer, safety, security, transportation, and other services related to Ethyleneamines;

6. at Acquirer's option, and with the concurrence of the Commission, a contract or contracts pursuant to which Dow will provide to an Acquirer certain utilities related to Ethyleneamines, including one or more of the following: water, electricity, sewer, and other utilities related to Ethyleneamines;

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7. an option to purchase, at cost, including capital charges consistent with those charged to other Dow businesses, up to thirty (30) million pounds of Ethyleneamines annually from the Terneuzen Plant;

8. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;

9. all intellectual property rights, including but not limited to Patents, Patent rights, licenses, formulas, mixes, inventions, copyrights, trade secrets, know-how, trademarks, and trade names;

10. all raw material and finished product inventories and goods in process;

11. all right, title, and interest in and to the contracts (together with associated bid and performance bonds) entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;

12. all rights under warranties and guarantees, express or implied;

13. all separately maintained, and all relevant portions of not separately maintained, books, records and files;

14. rights to operate under all applicable federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto to the extent permitted by law; and

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15. the confidentiality agreements entered into by or on behalf of Dow in connection with the sale of the Dow Global Ethyleneamines Business, related to any third party bid to purchase the assets of the Dow Global Ethyleneamines Business in connection with the sale of the Dow Global Ethyleneamines Business, to the extent that assignment or disclosure of such confidentiality agreements to Acquirer would not constitute a breach thereof.

Provided, however, that the Dow Global Ethyleneamines Business does not include the following:

16. assets or businesses solely for the production or sale of (i) any downstream products into which Ethyleneamines are an input, except Castmate; or (ii) any other products other than Ethyleneamines.

17. production facilities used to manufacture ethylene dichloride, ethylene, chlorine, or caustic;

18. the Terneuzen Plant;

19. production facilities used to manufacture Castmate;

20. a fee simple interest in any real property, including the real property underlying the Ethyleneamines, the AEEA, and the Castmate manufacturing facilities at the Freeport Site; and

21. the assets listed in Confidential Appendix F of this Order.

Provided, however, that if Dow divests the Dow Global Ethyleneamines Business to Huntsman pursuant to Paragraph II of this Order, the definition of the Dow Global Ethyleneamines Business includes, but shall not be limited by, the assets conveyed by the Huntsman Agreement.

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AD. “Dow Metallocene Background Patents” means any claims in Patents owned by Dow having a priority date or filing date on or before two years after the date on which the Order becomes final which claims are directed to inventions conceived prior to the date of the Acquisition, which cover: (i) Metallocene Technology for use in a Gas Phase PE Process to make Ethylene Polymers; (ii) Metallocene Catalyst Systems or components of Metallocene Catalyst Systems for use in a Gas Phase PE Process to make Ethylene Polymers, including without limitation Introduced Dow Metallocene Catalyst Systems; (iii) a process for using Metallocene Catalyst Systems or components thereof in a Gas Phase PE Process to make Ethylene Polymers; (iv) Ethylene Polymers made by a Gas Phase PE Process; or (v) the application of Ethylene Polymers made by a Gas Phase PE Process, including without limitation the patents listed in Confidential Appendix G hereto, *provided, however*, that Dow Metallocene Background Patents do not include patent claims to chemical modifications of Ethylene Polymers, and *further provided* that Dow Metallocene Background Patents do not include Dow Metallocene Background Patents Requiring Third Party Consent or Patents acquired by Dow on or after the date of the Acquisition.

AE. “Dow Metallocene Background Patents Requiring Third Party Consent” means any claims in Patents owned by Dow that Dow cannot license to BP without securing the consent of or paying compensation to a third party (other than Univation, Exxon Mobil, or Union Carbide), having a priority date or filing date on or before two years after the date on which the Order becomes final which claims are directed to inventions conceived prior to the date of the Acquisition, which cover: (i) Metallocene Technology for use in a Gas Phase PE Process to make Ethylene Polymers; (ii) Metallocene Catalyst Systems or components of Metallocene Catalyst Systems for use in a Gas Phase PE Process to make Ethylene Polymers, including without limitation Introduced Dow Metallocene Catalyst Systems; (iii) a process for using Metallocene Catalyst Systems or components thereof in a Gas Phase PE Process to make Ethylene Polymers; (iv) Ethylene Polymers made by a Gas Phase PE Process; or (v) the application

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of Ethylene Polymers made by a Gas Phase PE Process, including without limitation the patents listed in Confidential Appendix H hereto, *provided, however*, that Dow Metallocene Background Patents Requiring Third Party Consent do not include patent claims to chemical modifications of Ethylene Polymers or Patents acquired by Dow on or after the date of the Acquisition.

AF. “Effective Date of Divestiture” means the date upon which Respondents close a transaction to divest or transfer relevant assets pursuant to this Order.

AG. “Enhanced Gas Phase Metallocene Licenses & Immunities” means

1. the Gas Phase Metallocene Licenses & Immunities;
2. a paid up, worldwide, irrevocable, nonexclusive license, providing immunity from suit and right to sublicense, under the Univation Settlement Patent Rights and the Supplemental Univation Patent Rights to make, use, sell, offer for sale and import MPE Resins made by polymerization in a Gas Phase PE Process; *provided, however* that as a condition of the grants under the Univation Settlement Patent Rights, BP may agree to abide by the terms and conditions of the BP Divestiture and License Agreement, including without limitation Section 2.1.3, Section 3.1.2, and Section 3.1.3;
3. a paid up, worldwide, irrevocable, nonexclusive license, providing immunity from suit and right to sublicense, under the Mitsui License Agreement Patent Rights, *provided, however*, that as a condition of the grants under the Mitsui License Agreement Patent Rights, BP may agree to abide by the terms and conditions of the Patent License Agreement between Dow and Mitsui Chemicals, Inc. signed July 29, 1999, including any amendments or supplemental agreements; and

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4. a paid up, worldwide, irrevocable, nonexclusive license, providing immunity from suit and right to sublicense, under the Asahi Agreement Patent Rights.

AH. "EO" means ethylene oxide.

AI. "Ethanalamines" means each and every homologue produced by the reaction of ammonia and ethylene oxide, including monoethanolamine, diethanolamine, triethanolamine, and higher molecular weight amines.

AJ. "Ethyleneamines" means each and every homologue containing nitrogen, hydrogen and carbon, formulated so that each nitrogen atom is separated from every other nitrogen atom by two carbon atoms. These compounds are produced by the chemical reaction of ammonia with ethylene dichloride or by the reductive amination method. Ethyleneamines include, without limitation, AEEA.

AK. "Ethylene Polymers" or PE mean homopolymers of ethylene and copolymers and interpolymers composed of at least thirty mol percent (30 mol %) ethylene, with the remaining monomers consisting of one or more monounsaturated, acyclic, alpha-olefin hydrocarbon comonomers, but including no more than twenty-five mol percent (25 mol %) propylene.

AL. "Foreign Counterpart Patents" means (i) a patent or patent application that has a common claim of priority with or claims priority from another specific patent, and (ii) commonly owned applications and patents filed in other countries claiming substantially the same subject matter as the specific patent but without a claim of priority to any prior application in another country.

AM. "Freeport Site" means Dow's manufacturing facilities in Freeport, Texas.

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AN. “Gas Phase PE Process” means a low-pressure polymerization process using any Catalyst Technology which results in Ethylene Polymer formation in the form of solid polymer particles suspended in a medium that is substantially gaseous under the conditions of the polymerization.

AO. “Gas Phase Metallocene Licenses & Immunities” means a paid up, world-wide, irrevocable, non-exclusive patent license, providing immunity from suit, for use with the Dow Gas Phase Metallocene PE Assets or other BP-owned Metallocene Technology,

1. to develop, make or have made, use, license and sell Metallocene Technology and Metallocene Catalyst Systems, or any component thereof, for use in a Gas Phase PE Process under the Dow Metallocene Background Patents;

2. to make, use, sell, offer for sale and import Ethylene Polymers made by polymerization in a Gas Phase PE Process under the Dow Metallocene Background Patents, *provided, however,* that Dow Metallocene Background Patents do not include Patent claims to chemical modifications of Ethylene Polymers;

3. to sublicense the foregoing rights to any person, without notice to or approval by Respondents; and

4. to develop or have developed, by practice of the Dow Metallocene Background Patents, technology for making Ethylene Polymers made by polymerization in a Gas Phase PE Process, including but not limited to the right to develop or have developed Combined Technology and Dow Gas Phase PE Patents.

AP. “Gas Spec MDEA” means methyldiethanolamine sold for use in treating gas streams to remove impurities, whether sold alone or blended with other chemicals.

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AQ. “Huntsman Agreement” means the Amended and Restated Asset Purchase Agreement between Huntsman and Dow entered into as of August 1, 2000, calling for the sale of the Dow Global Ethyleneamines Business to Huntsman, including:

1. the Payment and Performance Guaranty Agreement;
2. the Amended and Restated Site Service Agreement;
3. the Amended and Restated Computerized Process Control Software Agreement;
4. the Amended and Restated Environmental Systems Separation and Services Agreement;
5. the Labor Services Agreement;
6. the Amended and Restated Freeport Ground Lease and License Agreement;
7. the Contract Manufacturing Agreement;
8. the Know-How License Agreement;
9. the Supply Agreement;
10. the Raw Material Supply Agreement;
11. the Exchange Agreement;
12. the Reductive Amination Technology License Agreement; and
13. the Novation Agreement.

AR. “Ineos Agreement” means the Asset Purchase Agreement between Ineos and Dow entered into on or about July 31, 2000, as amended, calling for the sale of the Dow Global Ethanolamines

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Business and the Dow Gas Spec MDEA Business to Ineos including:

1. Payment and Performance Guaranty;
2. the Site Service Agreement;
3. the Plaquemine Servitude Agreement;
4. the Operating Services Agreement;
5. the EO Supply Agreement;
6. the Computerized Process Control Software Agreement;
7. the GAS/SPEC Supply Agreement; and
8. the Consent Agreement, Dow and Dow Diamond.

AS. “Introduced Dow Metallocene Catalyst Systems” means Dow Metallocene Catalyst Systems provided by Dow to BP for evaluation in the BP-Dow Joint Development Program or provided by Dow to Chevron or BP for evaluation in accordance with the BP-Dow-Chevron Agreement.

AT. “Know-How” means all technological, technical, scientific, chemical, biological, regulatory and marketing materials and information used to develop, make, use, sell, offer for sale, import or seek regulatory approval in any country to market, make, use, sell, offer for sale, or import a product, including without limitation all: formulae; trade secrets; inventions; techniques; intellectual property whether or not patentable; discoveries; compounds; and compositions of matter; research data; technical data and information; testing data; regulatory files; statistical analyses; analytical data; specifications; designs; drawings; processes; testing and quality assurance/quality control data; manufacturing data and information; regulatory

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submissions; and any other information and experience, whether recorded on paper or electronically.

AU. “MDEA” means methyldiethanolamine.

AV. “Metallocene Catalyst” means an organometallic compound containing at least one Cyclic Moiety wherein three or more adjacent atoms comprising a portion of a ring of the Cyclic Moiety are π -bonded to a metal atom and the three or more adjacent atoms are within normal bonding distance of the metal atom.

AW. “Metallocene Catalyst System” means any Metallocene Catalyst or any combination of any Metallocene Catalyst and any activator, scavenging agent or PE Catalyst Support.

AX. “Metallocene Catalyst Technology” means all Patents and Know-How pertaining to the manufacture, use or sale of Metallocene Catalyst Systems useful in the manufacture of Ethylene Polymers, including, but not limited to, recipes, manufacturing procedures, synthesis techniques and supports.

AY. “Metallocene Process Technology” means all Patents and Know-How pertaining to the manufacture of Ethylene Polymers (specifically excluding solution and slurry process technology) including, but not limited to, feed specifications; operating conditions; control procedures; start-up, shutdown, and transitioning procedures; and any equipment requirements applicable where a Metallocene Catalyst is used.

AZ. “Metallocene Product Technology” means all Patents and Know-How pertaining to Ethylene Polymers, including, but not limited to, structure-property relationships, use of product additives, processing (such as extrusion, molding and film fabrication techniques) to convert Ethylene Polymers into end use form, and end-use applications.

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BA. “Metallocene Technology” means Metallocene Catalyst Technology, Metallocene Process Technology and Metallocene Product Technology.

BB. “Mitsui License Agreement Patent Rights” means all rights under all Patent claims and Patents of Mitsui conveyed to Dow, or any rights that would have been available to a Licensing Entity to be established by Dow and BP, for sublicensing of Ethylene Polymers made with Metallocene Catalyst Systems in a Gas Phase PE Process pursuant to the Patent License Agreement between Dow and Mitsui Chemicals, Inc., signed July 29, 1999, including any amendments or supplemental agreements.

BC. “MonoCP Metallocene Catalyst” means Metallocene Catalyst containing in its preactivated state one, but not more than one, Cyclic Moiety wherein three or more adjacent atoms comprising a portion of a ring of the Cyclic Moiety are π -bonded to the metal atom and the three or more adjacent atoms are within normal bonding distance of the metal atom and wherein the Cyclic Moiety can be either unbridged or bridged to the metal atom through at least one substituent; provided however, that a MonoCP Metallocene Catalyst may contain in its preactivated state other Cyclic Moieties which do not meet the requirement of having three or more adjacent atoms comprising a portion of a ring of the other Cyclic Moiety π -bonded to the same metal atom (i.e., the same specific atom in the complex, as opposed to a second metal atom, for example, in a dimer structure) as the first Cyclic Moiety and the three or more adjacent atoms are within normal bonding distance of the metal atom.

BD. “MPE Resin” means homopolymers of ethylene and copolymers of at least seventy-five percent (75%) by weight ethylene with a remaining amount of monomer consisting of one or more monounsaturated, acyclic, alpha-olefin hydrocarbon comonomers, said polymers having a Density of 0.910 g/cc or more or such lower Density as in the future may be brought within the scope of the field of the Univation venture, as expanded from

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time to time, and are manufactured with one or more Metallocene Catalyst Systems.

BE. “New Ethanolamines Divestiture Agreement” means all agreements for the sale of the Dow Global Ethanolamines Business other than the Ineos Agreement and includes any divestiture agreement entered into by a trustee pursuant to Paragraph X of this Order.

BF. “New Ethyleneamines Divestiture Agreement” means all agreements for the sale of the Dow Global Ethyleneamines Business other than the Huntsman Agreement and includes any divestiture agreement entered into by a trustee pursuant to Paragraph X of this Order.

BG. “New Gas Spec MDEA Divestiture Agreement” means all agreements for the sale of the Dow Gas Spec MDEA Business other than the Ineos Agreement and includes any divestiture agreement entered into by a trustee pursuant to Paragraph X of this Order.

BH. “Non-Public Confidential Information” means any non-public information either relating to the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business prior to their divestiture pursuant to Paragraphs II, III, IV, or X of this Order and/or relating to the operation of the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business by any Acquirer after such business is divested pursuant to Paragraphs II, III, IV, or X of this Order. Non-Public Confidential Information shall not include:

(1) information that is public knowledge at the date of receipt by Dow, or that prior to Dow’s use of such information, becomes public knowledge through no act or failure to act on the part of Dow; (2) information which Respondents develop independently and without using, directly or indirectly, any information obtained from any current or former agents or employees of Dow whose

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duties related directly to the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business; (3) information which subsequently becomes known to Respondents from a third party not in breach of a confidentiality obligation; (4) information that has uses or applications in Respondents' other businesses and is not competitively significant to the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business; and (5) information that is conveyed or licensed to Respondents under the Huntsman Agreement, the Ineos Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, or any New Gas Spec MDEA Divestiture Agreement.

BI. "Patents" mean all patents, patents pending, patent applications and statutory invention registrations, including reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions, claimed or which may later be claimed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto in the world.

BJ. "PE Catalyst" means supported and unsupported catalyst components for use in production of Ethylene Polymers.

BK. "PE Catalyst Support" means preformed support components or support carriers for use with PE Catalysts.

BL. "PE Catalyst Systems" means combinations of PE Catalyst and PE Catalyst Support or activator component designed, developed, used, or suitable for use for the production of Ethylene Polymers.

BM. "PE Technology" means technology relating to Ethylene Polymers, to the production and use thereof, and to the preparation and use of Catalyst Systems.

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BN. “Plaquemine Site” means Dow’s manufacturing facilities in Plaquemine, Louisiana.

BO. “Respondents’ Ethanolamines Business” means the worldwide ethanolamines business conducted by Respondents after the Dow Global Ethanolamines Business is divested pursuant to Paragraph III or Paragraph X of this Order, including all employees, officers, directors, and agents of Respondents whose duties relate to Respondents’ Ethanolamines Business.

BP. “Respondents’ Ethyleneamines Business” means the worldwide ethyleneamines business conducted by Respondents after the Dow Global Ethyleneamines Business is divested pursuant to Paragraph II or Paragraph X of this Order, including all employees, officers, directors, and agents of Respondents whose duties relate to Respondents’ Ethyleneamines Business.

BQ. “Respondents’ MDEA Business” means the worldwide MDEA business conducted by Respondents after the Dow Gas Spec MDEA Business is divested pursuant to Paragraph IV or Paragraph X of this Order, including all employees, officers, directors, and agents of Respondents whose duties relate to Respondents’ MDEA Business.

BR. “Respondents’ Support Contact” means Respondents’ designee under Paragraph V of this Order.

BS. “Respondents’ Support Personnel” means Respondents’ employees who are: (i) responsible for providing services and inputs to the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business after such businesses are divested pursuant to paragraphs II, III, IV, or X of this Order, and (ii) exposed to competitively sensitive information relating to the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business, including, but not limited to information about cost, price, quantity, customers, product

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specifications, terms of sale, production planning/forecasting and communications with the Acquirers of such businesses.

BT. “Supplemental Univation Patent Rights” means the following rights:

1. a royalty free, nonexclusive, irrevocable, worldwide (except for Korea and Japan, which restriction expires on December 31, 2004) license within the Univation Field, with the right to sublicense, under U.S. Patent Nos. 5,405,922 and 5,462,999 (including all U.S. divisionals, continuations, continuations-in-part, reissues or reexaminations that are pending on or after January 1, 2001), European Patent No. 89691 and any Foreign Counterpart Patents to make, have made, offer for sale, sell, import, or use MonoCP Metallocene Catalysts; *provided, however*, that no rights are granted under U.S. Patent Nos. 5,405,922 and 5,462,999 and European Patent No. 89691 and their Foreign Counterpart patents to make, have made, offer for sale, sell, import or use BisCP Metallocene Catalysts and no rights are granted for any mixed PE Catalyst Systems that contain BisCP Metallocene Catalysts;

2. a royalty free, nonexclusive, irrevocable, worldwide license within the Univation Field to practice under any claim in any Exxon or Univation Patent that would be licensed to Dow or Dow Affiliates under the Univation Settlement Agreement but for the inclusion in the claim of “Catalyst Support Technology,” as “Dow Affiliates” and “Catalyst Support Technology” are used in the Univation Settlement Agreement;

3. a royalty free, nonexclusive, irrevocable, worldwide license within the Univation Field, with a right to sublicense to resin producers of MPE Resins made with MonoCP Metallocene Catalysts licensed by BP to use MonoCP Metallocene Catalysts (i) under every patent claim that Univation was, is or will be empowered to grant at any time from December 4, 2000 until the date of the Acquisition, and

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(ii) under every patent claim that Univation would have been empowered to grant if such patent claim existed as of the date of the Acquisition but only for any patent claim that is included in a patent application filed on or before June 15, 2001, or that claims priority in whole or part from a patent application filed on or before June 15, 2001, for each such patent claim covering either:

- (a) a polymer composition or article where a MPE Resin satisfies all the limitations of one or more claimed components of the composition or article recited in the patent claim;
- (b) an end use for a MPE Resin; or
- (c) an application for a MPE Resin;

where such patent claim is in a patent or patent application (including reissues or reexaminations of such patents) owned or controlled by Univation (which includes Union Carbide and Exxon Mobil patents). Any use rights granted by BP pursuant to this subsection to a resin producer shall be extendible by such resin producer to its customers for use with these MPE Resins. The rights to be granted to BP pursuant to this subsection shall only apply where each of the following conditions are met: (i) one or more MonoCP Metallocene Catalysts (but in no event any BisCP Metallocene Catalysts) are used in a Gas Phase Process to make those MPE Resins present in the polymer composition, article, end use or application; and (ii) the presence of such MPE Resins made with MonoCP Metallocene Catalyst or MonoCP Metallocene Catalysts in such polymer, composition, end use, article or application satisfies at least one limitation in the patent claim directed to a polymer composition or article or a material element of the patent claims to an end use or application. Nothing in this subsection shall be construed to grant rights or a license to a composition, end use, article or application where MPE Resins are present merely to present a defense to patent

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infringement. The rights to be granted in accordance with this subsection are limited to patent claims expressly requiring Ethylene Polymers in the field of the Univation venture (as provided in the Univation Reorganization Agreement), polymer compositions or end uses, regardless of whether or not the patent claim recites a limitation to Metallocene Catalysts. No additional rights are granted to or to be implied in any patented processes, operations or equipment for producing an Ethylene Polymer, or for components of catalysts; and

4. a royalty free, nonexclusive, irrevocable, worldwide license with a right to sublicense, under Univation LCB Patents to make, have made, offer for sale, sell, import and use MPE Resins within the Univation Field made with MonoCP Metallocene Catalysts; *provided, however*, that no rights are granted to make, have made, offer for sale, sell, import or use MPE Resins made using BisCP Metallocene Catalysts and no rights are granted for any mixed PE Catalyst Systems that contain BisCP Metallocene Catalysts.

BU. “Supply Contract” means a contract by which Dow sells, swaps, toll manufactures, converts, transfers, or otherwise provides an Acquirer with inputs, products, or other materials at the Freeport Site or the Plaquemine Site in connection with the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business.

BV. “Support Personnel for the Dow Gas Phase Metallocene PE Assets” means employees of Dow who (1) are responsible for providing services to BP under a research service agreement negotiated pursuant to the BP Divestiture and License Agreement and (2) are exposed to competitively sensitive information relating to the Dow Gas Phase Metallocene PE Assets.

BW. “Terneuzen Plant” means Dow’s existing Ethyleneamines plant, including any terminals Dow uses as

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storage facilities or for raw materials, in Terneuzen, The Netherlands.

BX. “Unipol Process Technology for Ethylene Polymers” and “Unipol Gas Phase PE Process” mean all Patents and Know-How owned or controlled by Union Carbide within the field of the Univation venture (as provided in the Univation Reorganization Agreement) in a Gas-Phase PE Process pertaining to the production of Ethylene Polymers.

BY. “Unipol Gas Phase PE Technology Business” means: (i) the Union Carbide business for the licensing and sale of Unipol Process Technology for Ethylene Polymers within the field of the Univation venture (as provided in the Univation Reorganization Agreement), including the right to sublicense others, and all administrative, management, and research and development responsibilities relating thereto; *provided, however*, that to the extent agreed by Respondents and Exxon Mobil in the Univation Reorganization Agreement, “Unipol Gas Phase PE Process Technology Business” does not include the right to receive lump sum, running royalties, fees, or other licensing income under license and technology purchase agreements signed before August 8, 1996, and (ii) the Union Carbide business for the sale to third parties of PE Catalyst Systems for Ethylene Polymers within the field of the Univation venture (as provided in the Univation Reorganization Agreement) by Union Carbide that is not part of Univation as of the date on which the Commission accepts for public comment the Agreement Containing Consent Order, including the exclusive right to sell and sub-license such PE Catalyst Systems to third parties, and all administrative, management, and research and development responsibilities for such PE Catalyst Systems; *provided, however*, that to the extent agreed by Respondents and Exxon Mobil in the Univation Reorganization Agreement, the “Unipol Gas Phase PE Technology Business” does not include (a) the manufacturing assets owned by Union Carbide that produce PE Catalysts and PE Catalyst Systems; or (b) the right to receive lump sum, running royalty, fees, purchase price, lease price, or other income for the

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sale of conventional PE Catalyst Systems to Univation pursuant to the Univation Reorganization Agreement or to licensees who will continue to pay lump sum, running royalty fees, or other licensing income to Union Carbide rather than Univation under license and technology purchase agreements signed before August 8, 1996.

BZ. “Univation Field” means, for purposes of this Order, (1) development, manufacture, marketing and sale of Metallocene Catalyst Systems to make MPE Resins in a Gas Phase PE Process, and (2) development of Metallocene Technology and technology pertaining to Metallocene Catalyst Systems and licensing thereof to any person for manufacture of MPE Resins in a Gas Phase PE Process for the sale and use by such person, but the Univation Field specifically excludes the development and licensing of technology relating to: (i) power transfer fluids, lubricants and/or lubricant additive systems (except for use as a processing aid and/or additive in polyolefins); (ii) fuel additive systems; and (iii) additive, compounding or other post-reactor technology related to wire and cable applications.

CA. “Univation LCB Patents” means the independent claims and claims dependent thereon of all patents (which for this definition shall include utility model and other forms of petty patents) and patent applications throughout the world owned or controlled by Univation, where such patents and applications are based in whole or part upon patent applications filed prior to June 15, 2001, including:

- (i) reissues or reexaminations of such patents, and
- (ii) patents issuing from applications claiming benefit of priority in whole or in part from applications for these patents regardless of when filed;

but only including the independent and dependent claims of such patents, patent applications, reexamined patents and reissued patents satisfying the additional requirement of the independent claim being limited (either expressly or inherently) to require a

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polymer which has long chain branches (“LCB”) greater than or equal to 0.01 per 1000 carbon atoms (but does not include LCBs formed by a free radical polymerization process). Notwithstanding the foregoing, where there is a dependent claim that is expressly or inherently limited to require LCB polymers as specified above in this definition, but the claim(s) antecedent to such dependent claim are not so limited, the defined term “Univation LCB Patents” shall include such dependent claim(s) if the antecedent claims are determined to be invalid or not patentable or unenforceable upon a final, non-appealable, non-reviewable order. Subject to the next sentence, the defined term “Univation LCB Patents” includes the rights under any patents and patent applications meeting the other criteria of this definition owned or controlled by Univation as of June 15, 1999 or within two years of June 15, 1999, regardless as to whether Univation subsequently assigns or transfers such patents or patent applications to any third party. The defined term “Univation LCB Patents” does not include patents which Univation did not have the right to grant to BP without the agreement of or accounting to a third party (not including Exxon Mobil or Union Carbide) as of June 15, 1999, and does not obtain the right to grant to BP within two years of June 15, 1999. To the extent Univation must obtain the agreement of or account to a third party, Univation shall use good faith efforts (Univation need not offer value to the third party unless BP reaches agreement with Univation on reimbursement) to obtain the relevant rights for BP from the third party.

CB. “Univation Reorganization Agreement” means the Univation Reorganization Agreement dated December 4, 2000, by and among Exxon Mobil, Dow, Union Carbide, and Univation, as amended.

CC. “Univation Settlement Agreement” means the Settlement Agreement between Dow and Univation dated June 15, 1999, as amended.

CD. “Univation Settlement Patent Rights” means all rights under all patent claims of Univation conveyed to Dow to make

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MPE Resins in a Gas-Phase PE Process, and to use, and sell such MPE Resins, and right to sub-license, pursuant to the Univation Settlement Agreement, as amended by the Univation Reorganization Agreement to provide sub-licensing rights to BP.

II.

IT IS FURTHER ORDERED that:

A. Dow shall divest, absolutely and in good faith, at no minimum price, the Dow Global Ethyleneamines Business as an ongoing business.

B. The divestiture shall be made to Huntsman no later than ten (10) days after the date on which this Order becomes final, in accordance with the Huntsman Agreement (which agreement shall not vary or contradict the terms of this Order or the Order to Maintain Assets). *Provided, however,* that if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Huntsman is not an acceptable acquirer, or the Huntsman Agreement is not an acceptable manner of divestiture, then Dow shall immediately rescind the transaction with Huntsman and shall divest the Dow Global Ethyleneamines Business, within six (6) months after the date on which the Order becomes final, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Dow Global Ethyleneamines Business is to ensure the continued operation of the Dow Global Ethyleneamines Business in the same businesses in which the assets and businesses of the Dow Global Ethyleneamines Business are engaged at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

D. Pending divestiture of the Dow Global Ethyleneamines Business, Dow shall take such actions as are necessary to maintain

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the viability and marketability of the Dow Global Ethyleneamines Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Dow Global Ethyleneamines Business, except for ordinary wear and tear.

E. Dow shall comply with all terms of the Order to Maintain Assets, attached to this Order and made a part hereof as Appendix A. The Order to Maintain Assets shall continue in effect until such time as Dow has divested each of the Businesses and Assets to be Divested as required by this Order.

F. Respondents shall use Non-Public Confidential Information relating to the Dow Global Ethyleneamines Business only (i) in the performance of Respondents' obligations under this Order or the Huntsman Agreement or any New Ethyleneamines Divestiture Agreement; or (ii) for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety, and environmental obligations.

G. Respondents shall not, absent the prior written consent of an Acquirer of the Dow Global Ethyleneamines Business, provide, disclose or otherwise make available any Non-Public Confidential Information relating to the Dow Global Ethyleneamines Business to persons who are not Respondents' Support Personnel for the Dow Global Ethyleneamines Business, except for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety and environmental obligations.

H. Respondents shall comply with the terms of the Huntsman Agreement (if Respondents divest pursuant to the Huntsman Agreement) or the New Ethyleneamines Divestiture Agreement (if Respondents, or a trustee, divest pursuant to Paragraph II or Paragraph X of this Order to an Acquirer other than Huntsman), which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondents to comply with the Huntsman Agreement or the New Ethyleneamines Divestiture Agreement shall constitute a failure to comply with this Order.

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III.

IT IS FURTHER ORDERED that:

A. Dow shall divest, absolutely and in good faith, at no minimum price, the Dow Global Ethanolamines Business as an ongoing business.

B. The divestiture shall be made to Ineos no later than ten (10) days after the date on which this Order becomes final, in accordance with the Ineos Agreement (which agreement shall not vary or contradict the terms of this Order or the Order to Maintain Assets). *Provided, however*, that if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Ineos is not an acceptable acquirer, or the Ineos Agreement is not an acceptable manner of divestiture, then Dow shall immediately rescind the transaction with Ineos and shall divest the Dow Global Ethanolamines Business, within six (6) months after the date on which the Order becomes final, to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Dow Global Ethanolamines Business is to ensure the continued operation of the Dow Global Ethanolamines Business in the same businesses in which the assets and businesses of the Dow Global Ethanolamines Business are engaged at the time of the Acquisition, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

D. Pending divestiture of the Dow Global Ethanolamines Business, Dow shall take such actions as are necessary to maintain the viability and marketability of the Dow Global Ethanolamines Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Dow Global Ethanolamines Business, except for ordinary wear and tear.

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E. Dow shall comply with all terms of the Order to Maintain Assets, attached to this Order and made a part hereof as Appendix A. The Order to Maintain Assets shall continue in effect until such time as Dow has divested each of the Businesses and Assets to be Divested as required by this Order.

F. Respondents shall use Non-Public Confidential Information relating to the Dow Global Ethanolamines Business only (i) in the performance of Respondents' obligations under this Order or the Ineos Agreement or any New Ethanolamines Divestiture Agreement; or (ii) for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety, and environmental obligations.

G. Respondents shall not, absent the prior written consent of an Acquirer of the Dow Global Ethanolamines Business provide, disclose or otherwise make available any Non-Public Confidential Information relating to the Dow Global Ethanolamines Business to persons who are not Respondents' Support Personnel for the Dow Global Ethanolamines Business, except for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety and environmental obligations.

H. Respondents shall comply with the terms of the Ineos Agreement (if Respondents divest pursuant to the Ineos Agreement) or the New Ethanolamines Divestiture Agreement (if Respondents, or a trustee, divest pursuant to Paragraph III or Paragraph X of this Order to an Acquirer other than Ineos), which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondents to comply with the Ineos Agreement or the New Ethanolamines Divestiture Agreement shall constitute a failure to comply with this Order.

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IV.

IT IS FURTHER ORDERED that:

A. Dow shall divest, absolutely and in good faith, at no minimum price, the Dow Gas Spec MDEA Business as an ongoing business.

B. The divestiture shall be made to Ineos no later than ten (10) days after the date on which this Order becomes final, in accordance with the Ineos Agreement (which agreement shall not vary or contradict the terms of this Order or the Order to Maintain Assets). *Provided, however*, that if, at the time the Commission determines to make the Order final, the Commission notifies Respondents that Ineos is not an acceptable acquirer, or the Ineos Agreement is not an acceptable manner of divestiture, then Dow shall immediately rescind the transaction with Ineos and shall divest the Dow Gas Spec MDEA Business, within six (6) months after the date on which the Order becomes final, to an acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission.

C. The purpose of the divestiture of the Dow Gas Spec MDEA Business is to ensure the continued operation of the Dow Gas Spec MDEA Business, and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

D. Pending divestiture of the Dow Gas Spec MDEA Business, Dow shall take such actions as are necessary to maintain the viability and marketability of the Dow Gas Spec MDEA Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Dow Gas Spec MDEA Business except for ordinary wear and tear.

E. Respondents shall use Non-Public Confidential Information relating to the Dow Gas Spec MDEA Business only (i) in the

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performance of Respondents' obligations under this Order or the Ineos Agreement or any New Gas Spec MDEA Divestiture Agreement; or (ii) for the purpose of complying with Respondents' financial, tax reporting, health, safety, and environmental obligations.

F. Respondents shall not, absent the prior written consent of an Acquirer of the Dow Gas Spec MDEA Business, provide, disclose or otherwise make available any Non-Public Confidential Information relating to the Dow Gas Spec MDEA Business to persons who are not Respondents' Support Personnel for the Dow Gas Spec MDEA Business, except for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety and environmental obligations.

G. Dow shall comply with all terms of the Order to Maintain Assets, attached to this Order and made a part hereof as Appendix A. The Order to Maintain Assets shall continue in effect until such time as Dow has divested each of the Businesses and Assets to be Divested as required by this Order.

H. Respondents shall comply with the terms of the Ineos Agreement (if Respondents divest pursuant to the Ineos Agreement) or the New Gas Spec MDEA Divestiture Agreement (if Respondents, or a trustee, divest pursuant to Paragraph IV or Paragraph X of this Order to an Acquirer other than Ineos), which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondents to comply with the Ineos Agreement or the New Gas Spec MDEA Divestiture Agreement shall constitute a failure to comply with this Order.

V.

IT IS FURTHER ORDERED that within thirty (30) days from the date on which the Respondents sign the Consent Agreement:

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A. Respondents shall take steps to ensure that all of Respondents' Support Personnel comply with Paragraphs II, III, and IV of this Order. Such steps shall include, without limitation:

1. distribution of this Order to Respondents' Support Personnel, and to the agents and employees of Respondents' Ethyleneamines Business, Respondents' Ethanolamines Business, and Respondents' MDEA Business;
2. development of procedures, policies, and practices relating to the receipt, identification, custody, use, and disposal of any Non-Public Confidential Information;
3. dissemination of such procedures, policies, and practices;
4. periodic in-person training of initial and future Respondents' Support Personnel;
5. periodic in-person training of agents and employees of Respondents' Ethyleneamines Business, Respondents' Ethanolamines Business, and Respondents' MDEA Business;
6. development of new procedures, or incorporation of procedures into existing measures, to be used in the event Respondents' Support Personnel fail to comply with Respondents' obligations under this Order, such procedures sufficient to create reasonable incentives for such personnel to perform Respondents' obligations in good faith and to deter such personnel from failing to perform Respondents' obligations; and
7. development of new procedures, or incorporation of procedures into existing measures, to deter agents and employees of Respondents' Ethyleneamines Business, Respondents' Ethanolamines Business, and Respondents' MDEA Business from receiving, retaining, or using any Non-Public Confidential Information.

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B. Respondents shall designate a person, whose duties both at the time of such person's initial designation and for the duration of this Order, do not include responsibility for or participation in Respondents' Ethyleneamines Business, Respondents' Ethanolamines Business, and Respondents' MDEA Business, to serve as Respondents' Support Contact. The duties of Respondents' Support Contact shall include:

1. monitoring Respondents' performance of the Huntsman Agreement, the Ineos Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, or any New Gas Spec MDEA Divestiture Agreement;
2. maintaining a complete and accurate master list of the names of all of Respondents' Support Personnel;
3. providing such assistance as requested by the Monitor Trustee to obtain information and documents, or arrange interviews with Respondents' Support Personnel, relating to Respondents' performance of its obligations under this Order or the Huntsman Agreement, Ineos Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, or any New Gas Spec MDEA Divestiture Agreement; and
4. preparing or supervising the preparation of such reports or data compilations relating to Respondents' performance of its obligations under this Order or the Huntsman Agreement, Ineos Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, or any New Gas Spec MDEA Divestiture Agreement as requested by the Monitor Trustee.

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VI.

IT IS FURTHER ORDERED that:

A. Respondents shall divest the Dow Gas Phase Metallocene PE Assets, to BP, absolutely and in good faith and at no minimum price, in accordance with the BP Divestiture and License Agreement (which agreement shall not vary or contradict the terms of this Order).

B. Respondents shall:

1. Grant to BP the Enhanced Gas Phase Metallocene Licenses & Immunities, in accordance with the BP Divestiture and License Agreement (which agreement shall not vary or contradict the terms of this Order), and

2. With respect to each Dow Metallocene Background Patent Requiring Third Party Consent, (a) use best efforts to obtain any third party consent needed to grant to BP a license and immunity to such Dow Metallocene Background Patent Requiring Third Party Consent at least as broad as that granted to Gas Phase Metallocene Licenses & Immunities that do not require such consent; and (b) promptly (i) identify to BP each party whose consent is required; (ii) disclose to BP all rights and obligations of Dow and the third party with respect to the Patent; (iii) with respect to BP and its licensees, waive its claims of confidentiality or secrecy and all of its contract rights (exclusivity, noncompetition or other) limiting BP's use of the Patent; and (iv) cooperate and assist BP in securing the license and immunity; *provided, however*, that Dow may limit any waiver with respect to disclosure of confidential information to information relevant to Metallocene Technology for production of Ethylene Polymers through a Gas Phase PE Process, and *provided further*, that Dow may pass on to BP the obligation to pay a royalty or fee to the third party.

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C. The divestiture of the Dow Gas Phase Metallocene PE Assets, and the grant of the Enhanced Gas Phase Metallocene Licenses & Immunities, shall be made to BP within three (3) days after the Commission accepts the Order for public comment, as to all intellectual property rights, and within thirty (30) days after the Commission accepts the Order for public comment, as to all tangible assets, in accordance with the BP Divestiture and License Agreement (which agreement shall not vary or contradict the terms of this Order or the Order to Maintain Assets), *provided, however,* that as consideration for the grant of the Enhanced Gas Phase Metallocene Licenses & Immunities, BP may agree to grant to Univation certain licenses with sublicensing rights in accordance with the BP Divestiture and License Agreement and the Univation Reorganization Agreement, including without limitation licenses with sublicensing rights under Dow's Metallocene Background Patents and Dow's Gas Phase PE Patents.

D. Respondents shall use BP Confidential Information relating to the Dow Gas Phase Metallocene PE Assets only (a) in the performance of Respondents' obligations under this Order or the BP Divestiture and License Agreement, (b) for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety, and environmental obligations, or (c) as permitted by license or other written agreement with, or written consent from, BP. Respondents shall not, absent the prior written consent of BP, provide, disclose or otherwise make available any BP Confidential Information to persons who are not Support Personnel for the Dow Gas Phase Metallocene PE Assets, except as permitted in the preceding sentence.

E. Respondents shall comply with the terms of the BP Divestiture and License Agreement, which terms are incorporated by reference into this Order, and made a part hereof. Any failure by Respondents to comply with the BP Divestiture and License Agreement shall constitute a failure to comply with this Order.

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F. Dow shall, to the extent requested by BP, upon the divestiture of the Dow Gas Phase Metallocene PE Assets: (i) disclose and provide to BP on a nonexclusive basis, all research materials, technical information, management information systems, software, inventions, specifications, designs, drawings, processes and quality control data of Dow related to Metallocene Technology for use in a Gas-Phase PE Process or to Dow Gas Phase PE Technology to the extent that any of the foregoing are recorded in research notebooks, written memoranda, or electronic form as of the date the Commission accepts this Order for public comment, (ii) disclose and provide to BP on a nonexclusive basis, all documents, books, records, and files of Dow related to Metallocene Technology for use in a Gas-Phase PE Process or to Dow Gas Phase PE Technology to the extent that any of the foregoing are recorded in research notebooks, written memoranda, or electronic form as of the date the Commission accepts this Order for public comment, except the Univation Settlement Agreement and information provided to Dow by or on behalf of Univation, Exxon Mobil, or Union Carbide either prior to or after the effective date of such Univation Settlement Agreement; and (iii) make available to BP on a nonexclusive basis rights under contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, licensors, licensees, consignors and consignees, and rights under warranties and guarantees, express or implied of Dow related to Metallocene Technology for use in a Gas-Phase PE Process.

G. Upon execution of the BP Divestiture and License Agreement, Dow shall make available for inspection by BP, to the extent permissible under applicable laws, the personnel files and other documentation relating to Dow Appendix C Employees, as requested by BP within one year after execution of the BP Divestiture and License Agreement.

H. Dow shall provide BP with the opportunity to hire or enter into employment contracts with Dow Appendix C Employees; Dow shall not interfere with the hiring or employing by BP of

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Dow Appendix C Employees; Dow shall not offer any incentive to such employees to decline employment with BP or to accept other employment with Respondents; Dow shall not make any counteroffer to any such employee who receives a written offer of employment from BP; and Dow shall remove any impediments that may deter such employees from accepting employment with BP, including, but not limited to, waiver of any non-compete or confidentiality provisions of employment contracts that would affect the ability or incentive of any such individual to be employed by BP; *provided, however*, that Dow may limit any waiver with respect to disclosure of confidential information to information relevant to Metallocene Technology for production of MPE Resin through a Gas-Phase PE Process and to information that does not waive obligations of Dow to third parties other than Exxon Mobil and Univation.

I. Dow shall provide all Dow Appendix C Employees with reasonable financial incentives to continue in their positions until completion of the divestiture of the Dow Gas Phase Metallocene PE Assets. Such incentives shall include a continuation of all employee benefits offered by Dow until the divestiture has been completed, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, Dow shall provide to each such employee to whom BP extends a written offer of employment incentives to accept employment with BP within ninety days following the completion of the divestiture. Such incentives shall include payment by Dow for the benefit of the employees of all accrued bonuses, pensions and other accrued benefits to which such employees are entitled as of the date of the divestiture. Dow shall not impose any loss of pension benefits on employees hired by BP to which such employees are entitled, at the time of consummation of the Acquisition, under Respondents' pension plans as administered under ERISA.

J. During the one-year period following the divestiture, Respondents shall not, directly or indirectly, hire, attempt to hire, or enter into any arrangement for the services of any former Dow

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employees hired or employed by BP that have any amount of responsibility relating to the Dow Gas Phase Metallocene PE Assets, unless the individual's employment has been terminated by BP.

K. Respondents shall not use, nor assist Univation or Exxon in using, any BP Confidential Information for the purpose of filing, prosecuting, encouraging, supporting, or inducing any patent infringement action against BP or its licensees by any person, including Respondents.

L. Respondents shall not disclose to any third party, Univation or Exxon, any BP Confidential Information without the prior consent of BP, except for the purpose of complying with Respondents' financial, tax reporting, legal, health, safety and environmental obligations.

M. Respondents shall not permit:

1. Any Dow employee listed in Category 1 of Confidential Appendix I to participate or direct any research or other activity by Dow, Union Carbide or Univation for the purpose of development, improvement or discovery of MPE Resins in a Unipol Gas Phase PE Process for one year from the date on which the Commission accepts this Order for public comment; and

2. Any Dow employee listed in Category 2 of Confidential Appendix I to participate or direct any research or other activity by Dow, Union Carbide or Univation for the purpose of development, improvement or discovery of MPE Resins (i) in a Unipol Gas Phase PE Process for two years from the date on which the Commission accepts this Order for public comment; or (ii) in a slurry loop process for one year from the date on which the Commission accepts this Order for public comment.

N. Dow shall, upon the divestiture of the Dow Gas Phase Metallocene PE Assets, (i) identify to BP every supplier to Dow

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of Introduced Dow Metallocene Catalyst Systems, Combined Technology Catalyst, and components thereof, (ii) expressly authorize each such supplier (including without limitation Albemarle and Boulder Scientific) notwithstanding any confidentiality, non-compete, or exclusivity agreement with Dow, to develop, manufacture, and supply Metallocene Catalyst Systems and components thereof to BP for use in a Gas Phase PE Process, as requested by BP, and to enter into confidentiality agreements with BP regarding such development, manufacture, or supply; and (iii) as required by BP, assist and facilitate BP in securing supplies of Metallocene Catalyst Systems for BP and its licensees for use in a Gas Phase PE Process.

O. The purpose of the divestiture of the Dow Gas Phase Metallocene PE Assets, and of the further remedies provided for in this Paragraph VI, is to ensure the continued operation of the Dow Gas Phase Metallocene PE Assets in the same businesses in which the Dow Gas Phase Metallocene PE Assets are engaged at the time of the Acquisition; to ensure that BP (or such other Acquirer as the Commission may approve) is a viable and competitive participant in the markets for licensing PE Technology and Metallocene Catalyst Systems, and for the development of PE Technology and Metallocene Catalyst Systems; and to remedy the lessening of competition resulting from the Acquisition, as alleged in the Commission's complaint.

VII.**IT IS FURTHER ORDERED** that:

A. At the time of consummation of the Acquisition, Respondents shall contribute the Unipol Gas Phase PE Technology Business to Univation.

B. At the time of consummation of the Acquisition, Respondents shall grant to Univation, with the right to sublicense others, the Unipol Process Technology for Ethylene Polymers, and shall provide that upon termination or dissolution of Univation, at

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any time and for any reason or no reason, or transfer of control or any equity interest in Univation from Exxon Mobil to Respondents, Exxon (or Exxon's successor in interest other than Respondents) shall retain nonexclusive rights to the Unipol Process Technology for Ethylene Polymers and to all technology owned or controlled by Univation, including the right to sublicense to others, and to develop, use or license Unipol Process Technology for Ethylene Polymers with any PE Catalyst Systems, any agreement between Respondents and Exxon to the contrary notwithstanding.

C. Respondents shall not require Exxon to make royalty payments to Univation for Metallocene Catalyst Technology in an amount exceeding Respondents' royalty payments to Univation for Metallocene Catalyst Technology, calculated on a calendar year basis.

D. Dow, when it becomes part owner of Univation, shall support and use its best efforts (including without limitation by vote of its management, directors or shares) (i) to assure that Univation takes no action inconsistent with Respondents' obligations under this Order, and (ii) in support of any proposal by Exxon Mobil to expand the Univation Field to include Density down to 0.900 grams per cubic centimeter.

VIII.

IT IS FURTHER ORDERED that Respondents shall comply with all terms of the Order to Maintain Assets, attached to this Order and made a part hereof as Appendix A, which Order shall continue in effect until such time as Respondents have divested each of the Businesses and Assets To Be Divested as required by this Order.

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IX.**IT IS FURTHER ORDERED** that:

A. At any time after Respondents sign the Consent Agreement, the Commission may appoint one or more Persons to serve as Monitor Trustee to monitor Respondents' compliance with the terms of this Order and the Divestiture Agreement(s) made a part of this Order.

B. If one or more Monitor Trustees are appointed pursuant to Paragraph IX.A. of this Order, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Monitor Trustee:

1. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) business days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The Monitor Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this Order and the Divestiture Agreement(s) and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order and in consultation with the Commission.

3. Within ten (10) days after appointment of the Monitor Trustee, Respondents shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order and the relevant Divestiture Agreement(s)

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in a manner consistent with the purposes of this Order. Respondents may require the Monitor Trustee to sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.

4. The Monitor Trustee shall serve until the earlier of: (i) the expiration of this Order pursuant to Paragraph XIV; or (ii) the expiration of all the terms that comprise the Divestiture Agreement(s).

5. The Monitor Trustee shall have full and complete access to Respondents' books, records, documents, personnel, facilities and technical information relating to compliance with this Order and the Divestiture Agreement(s), or to any other relevant information, as the Monitor Trustee may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondents' compliance with this Order and the Divestiture Agreement(s).

6. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

7. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties

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(including the duties of the Monitor Trustee's employees), including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.

8. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee in the same manner as provided in this Paragraph IX.

9. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and the Divestiture Agreement(s).

10. The Monitor Trustee shall report in writing to the Commission concerning Respondents' compliance with this Order and the Divestiture Agreement(s) every ninety days for a period of two years from the date Respondents sign the Consent Agreement and annually thereafter on the anniversary of the date this Order becomes final during the remainder of the Monitor Trustee's period of appointment, and at such other times as representatives of the Commission may request.

X.**IT IS FURTHER ORDERED** that:

A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, each of the Businesses and Assets to Be Divested within the time periods required by this Order, the Commission may appoint a trustee to divest any of the Businesses and Assets to Be Divested that have

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not been divested (“the Remaining Businesses and Assets to Be Divested”). In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action to divest the Remaining Businesses and Assets to Be Divested. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

B. If a trustee is appointed by the Commission or a court pursuant to Paragraph X.A of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

C. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.

D. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Remaining Businesses and Assets to Be Divested.

E. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights

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and powers necessary to permit the trustee to effect the divestitures required by this Order.

F. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph X.E to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend this period only two (2) times.

G. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Remaining Businesses and Assets to Be Divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

H. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in Paragraphs II, III, IV, and VI of this Order; *provided, however*, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall

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select such entity within five (5) days after receiving notification of the Commission's approval.

I. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Remaining Businesses and Assets to Be Divested.

J. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

K. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph X.A of this Order.

L. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee

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issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

M. In the event that the trustee determines that he or she is unable to divest the Remaining Businesses and Assets to Be Divested in a manner consistent with the Commission's purpose as described in Paragraphs II, III, IV, and VI, the trustee may divest such additional ancillary assets related to the Businesses and Assets to Be Divested and effect such arrangements as are necessary to satisfy the requirements of this Order.

N. The trustee shall have no obligation or authority to operate or maintain the Remaining Businesses and Assets to Be Divested.

O. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture, until the Businesses and Assets to be Divested have been divested.

XI.**IT IS FURTHER ORDERED** that:

A. Within thirty (30) days after Respondents sign the Consent Agreement and every thirty (30) days thereafter until thirty (30) days after Respondents have divested the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, the Dow Gas Spec MDEA Business, and the Dow Gas Phase Metallocene PE Assets, as required by the provisions of Paragraphs II, III, IV, VI, and VII of this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II, III, IV, VI, and VII of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II, III, IV, VI, and VII of the Order, including a description of all substantive contacts or negotiations for the

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divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture; and

B. Within thirty (30) days after the Respondents sign the Agreement Containing Consent Order and every six (6) months thereafter until the earlier of: (i) the third anniversary of the date of this Order; or (ii) expiration of all the terms of all the contracts that comprise the Huntsman Agreement, the Ineos Agreement, the BP Divestiture and License Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, or any New Gas Spec MDEA Divestiture Agreement, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Huntsman Agreement, the Ineos Agreement, the BP Divestiture and License Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, any New Gas Spec MDEA Divestiture Agreement. Respondents shall submit such compliance reports on an annual basis beginning on the fourth anniversary of the date of this Order until the earlier of: (i) the tenth anniversary of the date of this Order; or (ii) expiration of all the terms of the all the contracts that comprise the Huntsman Agreement, the Ineos Agreement, the BP Divestiture and License Agreement, any New Ethyleneamines Divestiture Agreement, any New Ethanolamines Divestiture Agreement, or any New Gas Spec MDEA Divestiture Agreement. All compliance reports submitted by Respondents shall identify and describe in reasonable detail all disputes (including, but not limited to, any allegation or claim that any person is in breach of its obligations under this Order, including but not limited to any contracts incorporated into this Order) with either the Interim Trustee or Acquirer.

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XII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

XIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

B. Upon five days' notice to Respondents and without restraint or interference from them, to interview in the presence of counsel, officers, directors, employees, agents or independent contractors of Respondents.

XIV.

IT IS FURTHER ORDERED that this Order shall terminate on March 15, 2011.

By the Commission.

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APPENDIX A: ORDER TO MAINTAIN ASSETS

CONFIDENTIAL APPENDICES B-D
[Redacted from Public Record Version]

CONFIDENTIAL APPENDICES G-I
[Redacted from Public Record Version]

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CONFIDENTIAL APPENDIX E
Public VersionAssets Excluded from the Definitions of the
Dow Global Ethanolamines Business and the
Dow Gas Spec MDEA Business

1. All current assets, including without limitation, all cash, cash equivalents and other short-term investments, prepaid rent, prepaid supplies, advances and other prepaid expenses and deposits and accounts or notes receivable, of the Dow Global Ethanolamines Business and the Dow Gas Spec MDEA Business, excluding inventory (“Current Assets”), that were in existence prior to August 1, 2000 or that result from collections, disposals or realizations of Current Assets that were in existence prior to August 1, 2000;
2. all assets sold or otherwise disposed of in the ordinary course of business and not in violation of any provisions of the Ineos Agreement, any New Ethanolamines Divestiture Agreement or any New Gas Spec MDEA Divestiture Agreement during the period from the date of such agreements until the divestiture of the Dow Global Ethanolamines Business and the Dow Gas Spec MDEA Business;
3. intellectual property that is not unique to the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business and has general uses or applications in Respondents’ other businesses, provided however, that, to the extent such intellectual property is used in the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business, Dow shall grant Acquirer a nonexclusive, worldwide license to use such intellectual property in the operation of the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business, as the case may be;
4. any insurance policies or insurance coverage (or assumed coverage);

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5. any rights pursuant to any agreement or contract between Dow and any of its affiliates;
6. employment agreements between Dow and any employees of the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business;
7. all buildings and equipment (other than laboratory equipment and software relating to the Gas Spec laboratory) relating to the manufacture of MDEA and MMEA (including Gas Spec products), including the MDEA and MMEA production facilities located at the Freeport Site;
8. all rights, including the right to use, in or to any the trade name and trademark whether or not registered in any country in the world which includes the term "DOW" or the DOW DIAMOND design;
9. the services of employees of the Dow Global Ethanolamines Business who are not transferring to the Acquirer;
10. the services of employees of the Dow Gas Spec MDEA Business who are not transferring to the Acquirer;
11. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Dow prior to August 1, 2000;
12. all tax returns of Dow;
13. any books and records that Dow is required by law to retain so long as Dow delivers at least one copy thereof to Acquirer;
14. any rights of Dow under the Ineos Agreement, any New Ethanolamines Divestiture Agreement or any New Dow Gas Spec MDEA Divestiture Agreement;

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15. the real property underlying Block 55 of the Plaquemine Site and any other real property;
16. all correspondence and documents, including the confidentiality agreements entered into by Dow in connection with the sale of the Dow Global Ethanolamines Business and Dow Gas Spec MDEA Business, related to any third party bid to purchase the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business;
17. any permit used, required or necessary for aspects of the businesses of Dow other than the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business regardless of whether such permit also covers the operations of these businesses;
18. assets, properties or rights of Union Carbide or rights of Dow vis-à-vis Union Carbide (it being understood and agreed that Dow and Union Carbide may conduct ethanolamines and gas-treating businesses after consummation of the Acquisition);
19. all terminals owned by Dow, and all terminals used by Dow in any business other than the Dow Global Ethanolamines Business;
20. all terminals owned by Dow, and all terminals used by Dow in any business other than the Dow Gas Spec MDEA Business;
21. [redacted - confidential information]
22. [redacted - confidential information]
23. agreements, contracts, licenses, leases of personal property, indentures, mortgages, instruments, security interests, purchase and sale orders and other similar arrangements, commitments or understandings that are related to

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businesses other than the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business;

24. [redacted - confidential information]
25. the identity of any customers of Dow's gas-treating business other than the customers of the Dow Gas Spec MDEA Business;
26. all tangible property that is not used in the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business;
27. any intellectual property that is licensed to the Acquirer as part of the divestiture of the Dow Global Ethanolamines Business or the Dow Gas Spec MDEA Business;
28. [redacted - confidential information]
29. any patents, patent applications, inventions, trade secrets, know-how, formulae or other intellectual property owned by Dow relating to the manufacture, formulation, sale or use of MDEA or MMEA otherwise than for use or sale in gas-processing either or both (a) under the trademarks GAS/SPEC CS Plus Solvent or GAS/SPEC SS (with or without additional symbols) or (b) using the GAS/SPEC formulations;
30. [redacted - confidential information]
31. any collective bargaining agreements;
32. [redacted - confidential information]; and
33. [redacted - confidential information]

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CONFIDENTIAL APPENDIX F
Public VersionAssets Excluded from the Definition of the
Dow Global Ethyleneamines Business

1. Assets, properties and rights of Dow related to the operation of the Terneuzen Plant and any terminals Dow uses as storage facilities in The Netherlands, including raw materials located at the Terneuzen Plant, but not including: (i) assets relating to the sale or marketing (as opposed to production) of Ethyleneamines at the Terneuzen Plant; (ii) intellectual property used to manufacture Ethyleneamines; (iii) all certifications, registrations and similar rights held by Dow that are necessary to enable Acquirer to fulfill its obligations under contracts involving the delivery of Ethyleneamines produced at the Terneuzen Plant; and (iv) all customer lists relating to sales of Ethyleneamines produced at the Terneuzen Plant and associated customer files, and all contracts with customers and distributors of the Terneuzen Plant;
2. all current assets (other than inventory), including without limitation, all cash, cash equivalents, and other short-term investments, prepaid rent, prepaid supplies, advances and other prepaid expenses and deposits and accounts or notes receivable;
3. raw materials inventory located at the Terneuzen Plant;
4. the following assets of Dow's Castmate business:
 - a. all tangible assets (other than books and records), including personal property such as machinery, mobile and immobile equipment, furniture, furnishings, vehicles, tools, tooling, dies, stores, parts, supplies and other tangible personal property, used to manufacture Castmate (but not Ethyleneamines or AEEA);

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- b. Dow's inventory of latex and any contracts for the supply of latex, in each case used to manufacture Castmate; and
 - c. engineering spare parts and lab equipment (other than lab equipment dedicated to Castmate or related to Castmate and Ethyleneamines, taken together) used to manufacture Castmate;
5. all assets sold or otherwise disposed of to unaffiliated third parties or, prior to the Acquisition, Union Carbide in the ordinary course of business and not in violation of any provisions of the Huntsman Agreement or any New Ethyleneamines Agreement during the period from the date of such agreements until the closing date of the divestiture of the Dow Global Ethyleneamines Business;
 6. intellectual property that is not unique to the Dow Global Ethyleneamines Business and has general uses or applications in Respondents' other businesses, provided however, that, to the extent such intellectual property is used in the Dow Global Ethyleneamines Business, Dow shall grant Acquirer a nonexclusive, worldwide license to use such intellectual property in the operation of the Dow Global Ethyleneamines Business;
 7. any insurance policies or insurance coverage (or assumed coverage);
 8. any rights pursuant to any agreement or contract between Dow and any of its affiliates;
 9. all receivables and payables with Dow;
 10. all rights, including the right to use, in or to any trade name and trademark whether or not registered in any country in the world which includes the term "DOW" or the DOW DIAMOND design;

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11. services of employees of the Dow Global Ethyleneamines Business who are not transferring to the Acquirer;
12. all refunds, rebates or similar payments of taxes to the extent such taxes were paid by or on behalf of Dow;
13. all tax returns of Dow;
14. any books and records that Dow is required by law to retain, so long as Dow delivers at least one copy thereof to the Acquirer of the Dow Global Ethyleneamines Business;
15. any rights of Dow under the Huntsman Agreement or any New Ethyleneamines Agreement;
16. the real property underlying the A-3800 Block and the A-3400 Block of the Freeport Site;
17. all correspondence and documents, including the confidentiality agreements entered into by Dow in connection with the sale of the Dow Global Ethyleneamines Business related to any third party bid to purchase the Dow Global Ethyleneamines Business; provided however that:
(i) Dow shall take all actions necessary to enforce such confidentiality agreements on behalf of Acquirer; and (ii) to the extent the assignment or disclosure of such confidentiality agreements to Acquirer would not constitute a breach, Dow shall assign or transfer such confidentiality agreements to Acquirer, as provided in the Order;
18. [redacted - confidential information]
19. any permit, authorization or approval used, required or necessary for aspects of businesses of Dow other than the Dow Global Ethyleneamines Business regardless of whether such permit, authorization or approval also covers operations of the Dow Global Ethyleneamines Business;

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20. assets, properties or rights of Union Carbide or rights of Dow vis-à-vis Union Carbide (it being understood and agreed that Dow or Union Carbide may conduct an ethyleneamines and AEEA business after consummation of the Acquisition);
21. [redacted - confidential information]
22. [redacted - confidential information]
23. [redacted - confidential information]
24. all collective bargaining agreements; and
25. [redacted - confidential information]

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent The Dow Chemical Company (“Dow”) of Respondent Union Carbide Corporation (“Union Carbide”), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent The Dow Chemical Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, having its principal offices at 2030 Dow Center, Midland, Michigan 48674.

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2. Respondent Union Carbide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal executive offices located at 39 Old Ridgebury Road, Danbury, Connecticut 06817.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the attached Decision and Order shall apply, and that, for purposes of this Order to Maintain Assets, the following definitions shall also apply:

- A. “Persons with Access to Non-Public Confidential Information” means (1) Respondents’ Support Personnel, (2) employees of Respondents who were employees of the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, or the Dow Gas Spec MDEA Business during any time since January 1, 1998, as well as (3) any other employees of Respondents who had access to Non-Public Confidential Information during any time since January 1, 1998.
- B “Decision and Order” means the Decision and Order, incorporated into and made a part of the Consent Agreement.

II.

IT IS FURTHER ORDERED that:

- A. From the date Respondents sign the Consent Agreement until the Effective Date of Divestiture, Respondents shall:
 - 1. Maintain the Businesses and Assets to Be Divested in substantially the same condition (except for normal wear

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- and tear) existing at the time Respondents sign the Consent Agreement and take such action that is consistent with the past practices of Respondents in connection with the Businesses and Assets to Be Divested and is taken in the ordinary course of the normal day-to-day operations of Respondents;
2. Keep available the services of the current officers, employees, and agents of the Businesses and Assets to Be Divested; and maintain the relations and good will with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with the Businesses and Assets to Be Divested; and
 3. Preserve the Businesses and Assets to Be Divested intact as an ongoing business and not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Businesses and Assets to Be Divested would be diminished.
- B. Respondents shall adhere to and abide by the Divestiture Agreements incorporated by reference into this Order to Maintain Assets and made a part hereof.
- C. From the date Respondents sign the Consent Agreement until the date this Order to Maintain Assets terminates pursuant to Paragraph VII:
1. Respondents shall not assign Persons with Access to Non-Public Confidential Information to any employment positions or duties relating to Respondents' Ethyleneamines Business, Respondents' Ethanolamines Business, or Respondents' MDEA Business.
 2. Respondents' Ethyleneamines Business, Respondents' Ethanolamines Business, or Respondents' MDEA Business shall not retain, request, receive, solicit, accept,

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nor seek to obtain, any Non-Public Confidential Information.

III.

IT IS FURTHER ORDERED that:

1. At any time after Respondents sign the Consent Agreement, the Commission may appoint one or more Persons to serve as Monitor Trustee to monitor Respondents' compliance with the terms of this Order to Maintain Assets, Decision and Order, and the Divestiture Agreement(s) made a part of this Order.
2. If one or more Monitor Trustees are appointed pursuant to Paragraph III of this Order to Maintain Assets, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Monitor Trustee:
 1. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. The Monitor Trustee shall have the power and authority to monitor Respondents' compliance with the terms of the Order to Maintain Assets, Decision and Order and the Divestiture Agreement(s) and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of the Order to Maintain Assets and in consultation with the Commission.

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3. Within ten (10) days after appointment of the Monitor Trustee, Respondents shall execute an agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of the Order to Maintain Assets, Decision and Order and the Divestiture Agreement(s), in a manner consistent with the purposes of such orders and agreements. Respondents may require the Monitor Trustee to sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.
4. The Monitor Trustee shall serve for such time as is necessary to monitor Respondents' compliance with the provisions of this Order to Maintain Assets.
5. The Monitor Trustee shall have full and complete access to Respondents' books, records, documents, personnel, facilities and technical information relating to compliance with the Order to Maintain Assets, Decision and Order and the Divestiture Agreement(s), or to any other relevant information, as the Monitor Trustee may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondents' compliance with this Order to Maintain Assets, Decision and Order and the Divestiture Agreement(s).
6. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other

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- representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
7. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties (including the duties of the Monitor Trustee's employees), including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.
 8. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee in the same manner as provided in this Paragraph III.
 9. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Maintain Assets, Decision and Order and the Divestiture Agreement(s).
 10. The Monitor Trustee shall report to the Commission in writing concerning compliance by Respondents with the provisions of this Order to Maintain Assets, Decision and Order and Divestiture Agreement(s), within twenty (20) days from the date of appointment and every thirty (30) days thereafter during the

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remainder of the Monitor Trustee's period of appointment, and at such other time as representatives of the Commission may request.

3. The Monitor Trustee(s) appointed pursuant to Paragraph III.A. of this Order to Maintain Assets may be the same person(s) appointed as Monitor Trustee(s) pursuant to Paragraph IX.A. of the Decision and Order, and/or as divestiture trustee(s) pursuant to Paragraph X.A. of the Decision and Order in this matter.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Decision and Order or this Order to Maintain Assets.

V.

IT IS FURTHER ORDERED that within thirty (30) days after Respondents sign the Consent Agreement and every thirty (30) days thereafter until thirty (30) days after Respondents have divested the Dow Global Ethyleneamines Business, the Dow Global Ethanolamines Business, the Dow Gas Spec MDEA Business, and the Dow Gas Phase Metallocene PE Assets, as required by the provisions of Paragraphs II, III, IV, VI, and VII of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the Decision and Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II, III, IV, VI, and VII of the Decision and Order, including a

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description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order to Maintain Assets, upon written request, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order to Maintain Assets; and

B. Upon five days' notice to Respondents and without restraint or interference from them, to interview in the presence of counsel, officers, directors, employees, agents or independent contractors of Respondents.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate at the earlier of:

1. three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
2. such time as all Businesses and Assets to Be Divested have been divested pursuant to the terms of the Consent Agreement.

By the Commission.

Analysis

**Analysis of the Complaint and Proposed Consent Order to
Aid Public Comment**

Issued when the Commission tentatively approved a proposed consent order on February 5, 2001

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment a Decision and Order (“Order”), pursuant to an Agreement Containing Consent Orders (“Consent Agreement”), against The Dow Chemical Company (“Dow”) and Union Carbide Corporation (“Carbide”) (collectively “Respondents”). The Order is intended to resolve anticompetitive effects stemming from the proposed merger of Dow and Carbide (the “Merger”). As described below, the Order seeks to remedy anticompetitive effects of the merger in polyethylene, ethyleneamines, ethanolamines and methyldiethanolamine (“MDEA”). The Order remedies those anticompetitive effects by requiring Respondents to divest and license certain intellectual property and other assets relating to polyethylene to BP Amoco plc (“BP”); to divest Dow’s worldwide businesses in ethyleneamines to Huntsman International LLC (“Huntsman”); and to divest Dow’s worldwide ethanolamines business and its MDEA business in the United States and Canada to Ineos Group plc (“Ineos”). The Commission has also issued an Order to Maintain Assets that requires Respondents to preserve the businesses they are required to divest as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Order, if finally issued by the Commission, would settle charges that the Merger may have substantially lessened competition in the markets for polyethylene and polyethylene technology, ethyleneamines, ethanolamines and MDEA. The Commission has reason to believe that the Merger would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The proposed complaint, described below, relates the basis for this belief.

Analysis

II. Description of the Parties and the Proposed Merger

Dow, headquartered in Midland, Michigan, is a large, worldwide chemical company, with particular strength in polyethylene, the world's most widely used plastic, and in key technologies relating to the manufacture of polyethylene. Carbide, headquartered in Danbury, Connecticut, is also a large, worldwide chemical company, and a leading developer and licensor of polyethylene process technology.

Pursuant to a merger agreement dated August 8, 1999, Dow and Carbide propose to merge in a transaction pursuant to which Carbide shareholders would exchange their shares for shares of Dow.

III. The Proposed Complaint

According to the Commission's proposed complaint, the merger would substantially reduce competition in four lines of commerce: linear low density polyethylene ("LLDPE") in the United States and Canada, and related technology (both metallocene catalysts and reactor processes) worldwide; the worldwide market for metallocene catalysts for use in producing LLDPE; the worldwide market for LLDPE reactor process technology; the worldwide market for ethyleneamines; the worldwide market for ethanolamines; and the market for branded MDEA in the United States and Canada.

A. Count One: Polyethylene

The proposed complaint alleges that the merger would substantially reduce competition in polyethylene. Three interrelated polyethylene markets are affected by the merger: (1) LLDPE in the United States and Canada; (2) metallocene catalysts for LLDPE production worldwide; and (3) LLDPE reactor process technology worldwide. As alleged in the proposed complaint and described below, the reduction or elimination of competition in metallocene catalyst technology, resulting from the merger, in turn

Analysis

reduces competition in LLDPE itself and in LLDPE reactor process technology. The reduction in competition in LLDPE process technology in turn further reduces competition in LLDPE.

Polyethylene is the world's most widely used plastic, and LLDPE is the fastest growing type of polyethylene. LLDPE is particularly well suited for applications that require both flexibility and strength. One of the most significant uses of LLDPE is in making trash bags, and LLDPE is used to make bags out of plastic films that are strong, thin and puncture resistant. Dow and Carbide are leading producers of LLDPE in the United States and Canada, and throughout the world.

The proposed complaint alleges that LLDPE is a differentiated product, and that Dow and Carbide are among the LLDPE producers that have succeeded in developing specialty, high performance polymers demanded by significant users of LLDPE (notably makers of branded trash bags and cast stretch film).¹ Dow has historically led the industry in production and sale of premium LLDPE polymers tailored to deliver performance characteristics demanded by many LLDPE users, and has been able to sell premium LLDPE at premium prices.

Polyethylene is made in polymerization reactions in the presence of a catalyst. Both the reactor technology and the catalyst technology are patented, and both Dow and Carbide are leading developers of reactor technology. Carbide's reactor technology, called "Unipol," is the world's most widely licensed

¹ In a differentiated product market, the merger of firms whose products are closer substitutes is more likely to result in a significant lessening of competition, because sales that (pre-merger) one of the merging parties would have lost to the other, in the event of a price increase, would now be retained by the merged firm. U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines* § 2.21; *FTC v. Swedish Match*, slip op. 33-34 (D.D.C. Dec. 14, 2000) (Civ. No. 00-1501 TFH).

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polyethylene process technology. The other significant licensed LLDPE technology is “Innovene,” owned by BP. Both Unipol and Innovene make polyethylene in a process in which ethylene is in a gaseous form during polymerization (“gas phase”). Dow’s reactor technology, which Dow does not license, polymerizes ethylene in solution. The large majority of LLDPE reactor capacity is gas phase rather than solution.

Dow and Exxon Mobil Corp. (“Exxon”) have succeeded in developing and commercializing “metallocene” catalysts, which represent a significant advance over conventional LLDPE catalysts. The proposed complaint alleges that, if metallocene catalysts were generally available to LLDPE producers, those producers likely would be able to erode Dow’s position as the world’s leading producer of premium LLDPE polymers.

Both Dow and Exxon entered into joint ventures with the leading gas technology firms (BP and Carbide, respectively) to develop and commercialize metallocene catalysts for use in gas reactors. Both the Dow/BP joint development program and the Exxon/Carbide joint venture, Univation Technologies LLC (“Univation”), succeeded in adapting metallocene catalysts for use in gas reactors; both sought to license that technology to other gas-process LLDPE producers; and both indeed sold licenses to metallocene catalysts for gas reactors.

In 1999, however, Dow entered into an agreement to merge with Carbide, which would result in Dow becoming a partner with Exxon in Univation. As alleged in the proposed complaint, at or about the time Dow entered into the merger agreement with Carbide, Dow determined that it would not continue its joint development program with BP, and that it would not license its metallocene catalyst to BP (with rights to sublicense), thereby effectively terminating any ability by BP to license metallocene catalysts in competition with Univation (in which Dow would, as a result of the merger, succeed to Carbide’s interest).

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The proposed complaint alleges that each of the polyethylene markets would be highly concentrated as a result of the merger. The proposed complaint further alleges that Dow and Carbide are direct and significant actual competitors in the market for LLDPE in the United States and Canada; that Dow and Carbide (through Univation) are direct and significant actual competitors in the market for metallocene catalyst technology worldwide; and that Dow and Carbide are actual and potential competitors in the market for LLDPE process technology worldwide. The proposed complaint further alleges that, as part of its course of dealing in connection with the merger, Dow's actions terminating the Dow/BP joint development program and refusing to license metallocene catalysts to BP significantly reduced competition in LLDPE process technology by impairing BP's ability to compete in that market.² The proposed complaint also alleges that entry into the relevant markets would not be timely, likely, or sufficient to deter or offset adverse effects of the acquisition on competition.

The proposed complaint alleges that Respondents' merger would eliminate actual or potential, direct, and substantial competition between Respondents in the relevant markets. Elimination of this competition would likely result in increased prices for LLDPE polymers, metallocene technology licenses and LLDPE process technology licenses; and lessened innovation in each of these markets. Specifically, by eliminating BP as an

² The Commission can, under Section 5 of the FTC Act, 15 U.S.C. § 45, infer that facially independent actions or agreements nonetheless constitute intertwined events that should be considered together for the purpose of evaluating whether their effect constitutes a violation of the Act. *SKF Industries, Inc.*, 94 F.T.C. 6, 95 (1979). The proposed complaint alleges that Dow's decision to enter into the merger agreement with Carbide, and its decisions (1) to allow the Dow/BP joint development agreement to expire by its terms and (2) not to license its metallocene technology to BP, are sufficiently related to consider together in examining the effects of the merger.

Analysis

alternative source of metallocene catalysts for Dow's competitors (the majority of which use gas phase LLDPE reactor technology), and by acquiring Carbide's interest in Univation, Dow would be in a position to impede the development, licensing and use of metallocene catalysts and thereby benefit Dow's own polyethylene business. The merger (and the related termination of the BP/Dow joint development agreement) would also lessen BP's ability to compete with Univation in polyethylene process technology, and thereby further impair competition in polyethylene.

B. Count Two: Ethyleneamines

Ethyleneamines are a family of chemicals containing at least one ethylene and one amine molecule and are used in a broad variety of applications, including lubricating oil additives, chelating agents, wet-strength resins, epoxy curing agents, surfactants, personal care products, pulp and paper products, and fungicides. Dow and Carbide are the only producers of ethyleneamines in the United States and Canada, and together sold approximately \$170 million worth of ethyleneamines in 1999. There are no cost-effective substitutes for ethyleneamines in the end-uses for which they are used.

Dow and Carbide compete in the United States and Canada in the production and sale of ethyleneamines, and also compete outside the United States and Canada. The proposed complaint alleges that the United States and Canada constitute a properly defined geographic market, and that the world also constitutes a properly defined geographic market. Whether the market is defined as the United States and Canada (in which Dow and Carbide are the only producers) or the world (in which the market is highly concentrated, and Dow and Carbide combined would have more than 50% of worldwide capacity), the merger would result in a highly concentrated market, and concentration would increase substantially. The proposed complaint alleges that entry would not be timely, likely or sufficient to constrain an anticompetitive price increase or reduction in output.

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C. Count Three: Ethanolamines

Ethanolamines are a family of chemicals, comprising monoethanolamine (“MEA”), diethanolamine (“DEA”), and triethanolamine (“TEA”), made by reacting ethylene oxide and ammonia. Ethanolamines are used in a broad variety of applications, including the production of ethyleneamines, and in surfactants, personal care products, herbicides, oil and gas refining applications, pharmaceuticals and fabric softeners. The proposed complaint alleges that there are no cost-effective substitutes for ethanolamines in the end-uses for which they are used, and that the proper geographic market to analyze the effect of the merger on the sale of ethanolamines is the United States and Canada.

Carbide and Dow are the largest and third largest producers, respectively, of ethanolamines in the United States and Canada. As a result of the merger, proposed Respondents would have more than 60% of sales in the relevant market, and two firms would have more than 90%. The proposed complaint alleges that entry would be unlikely to remedy the likely anticompetitive effects of the merger.

D. Count Four: MDEA-Based Gas Treating Products

Methyldiethanolamine (“MDEA”) is a powerful solvent used in gas treating to remove unwanted compounds from gas streams. MDEA is used in oil refineries, natural gas plants, ammonia plants and other facilities that handle hydrocarbon gases. While some MDEA is sold alone, a substantial portion of the MDEA sold in the United States and Canada is sold blended with additives and other chemicals, including ethanolamines, and is sold on a branded basis. Branded MDEA is often sold bundled with engineering services relating to gas treating.

The proposed complaint alleges that MDEA-based gas treating products constitute a relevant product market and that the United States and Canada constitute a relevant geographic market. As alleged in the proposed complaint, because of the high cost

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associated with failure of gas treating products, customers that purchase MDEA-based gas treating products would be unlikely to substitute commodity MDEA in the event of a small but significant, nontransitory price increase of MDEA-based gas treating products. Dow and Carbide are the two largest sellers of MDEA-based gas treating products. As a result of the merger, Respondents would have approximately 60% of the relevant market, and three firms would have approximately 90% of that market. The proposed complaint alleges that entry is unlikely to counteract the competition lost by the merger.

IV. Terms of the Agreement Containing Consent Order

The proposed Order is designed to remedy the anticompetitive effects of the merger in the markets alleged in the proposed complaint, as described below.

A. Polyethylene

The proposed Order would remedy the anticompetitive effects of the merger by (1) allowing BP to develop and license metallocene catalysts to the majority of LLDPE producers worldwide, *i.e.*, those that make LLDPE in gas phase reactors, without being subject to patent claims by Dow, Univation or Exxon; and (2) enabling Exxon to develop and license metallocene catalysts and Unipol reactor process technology independently of Dow, should Dow's participation in Univation frustrate Exxon's interest in developing and licensing that technology.

Section VI of the proposed Order would enable BP to develop and license metallocene catalysts by (1) divesting to BP Dow's interest in the intellectual property developed jointly by Dow and BP, to which BP's rights were uncertain as a result of Dow's decision to terminate the joint development effort without resolving the ownership of those rights; (2) divesting Dow's remaining intellectual property (and related assets) specific to the gas phase process; (3) licensing Dow's metallocene catalyst

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technology to BP, with the right to sublicense that technology; and (4) licensing to BP, with rights to sublicense, Exxon patents controlled by Univation that otherwise would expose BP's efforts to develop, commercialize and license metallocene catalysts to infringement suit brought by Exxon or Univation. The divestiture and license would be made pursuant to a Divestiture and License Agreement executed by Dow and BP, which agreement is incorporated in and made part of the proposed Order.³

The purpose of the divestiture and license of intellectual property and related assets to BP is to enable BP to compete with Univation in developing, commercializing and licensing metallocene technology, remedying the anticompetitive effect in the market for metallocene catalyst technology. Moreover, by allowing BP to offer metallocene catalysts in connection with licenses of its Innovene gas phase reactor technology, the proposed Order is intended to preserve the viability of that technology as an alternative to Carbide's Unipol technology (which, through Univation, can offer metallocene technology). By preserving competition in both metallocene catalyst technology and LLDPE reactor process technology, the proposed order would allow BP licensees (or future licensees) in the United States and Canada to obtain metallocene catalysts from a source not controlled by Dow, thereby preserving metallocenes as a threat to Dow's premium polymer business, and providing a reactor process technology solution (including metallocenes) independent of Respondents.

Section VII of the proposed Order enables Exxon to retain rights, including the right to sublicense, in all Univation technology and in Carbide's Unipol process should the Univation venture be dissolved or should Dow come to control the Univation venture. The grant of this right to Exxon provides additional

³ That Divestiture and License Agreement is confidential and is not being placed on the public record. However, that Agreement may not contradict the terms of the proposed Order.

Analysis

remedy to the anticompetitive effects alleged in the proposed complaint by allowing Exxon to develop and license the Unipol process independently of Dow, should Dow seek to impede Univation's licensing business for the benefit of Dow's polyethylene business.

B. Ethyleneamines

The provisions of Section II of the proposed Order would remedy the anticompetitive effects in the markets for ethyleneamines, as alleged in Count Two of the proposed complaint, by requiring proposed Respondents to divest Dow's global ethyleneamines business to Huntsman, a worldwide producer of chemicals and plastics, including ethylene derivatives. Huntsman does not today produce ethyleneamines.

If the Commission, at the time that it makes the proposed Order final, notifies Respondents that it does not approve of the proposed divestiture to Huntsman, or the manner of the divestiture, the proposed Order provides that Respondents would rescind the sale to Huntsman and divest Dow's global ethyleneamines business within six months to an acquirer approved by the Commission and in a manner approved by the Commission. If Respondents did not complete the divestiture in that period, a trustee would be appointed who, upon Commission approval, would have the authority to divest Dow's global ethyleneamines business to a Commission-approved acquirer.

C. Ethanolamines

The provisions of Section III of the proposed Order would remedy the anticompetitive effects in the markets for ethanolamines, as alleged in Count Three of the proposed complaint, by requiring proposed Respondents to divest Dow's global ethanolamines business to Ineos, a producer of ethylene derivatives and other chemicals, which does not today produce ethanolamines.

If the Commission, at the time that it makes the proposed Order final, notifies Respondents that it does not approve of the

Analysis

proposed divestiture to Ineos, or the manner of the divestiture, the proposed Order provides that Respondents would rescind the sale to Ineos and divest Dow's global ethanolamines business within six months to an acquirer approved by the Commission and in a manner approved by the Commission. If Respondents did not complete the divestiture in that period, a trustee would be appointed who, upon Commission approval, would have the authority to divest Dow's global ethanolamines business to a Commission-approved acquirer.

D. MDEA-Based Gas Treating Products

The provisions of Section IV of the proposed Order would remedy the anticompetitive effects in the markets for MDEA-based gas treating products, as alleged in Count Four of the proposed complaint, by requiring proposed Respondents to divest Dow's "Gas Spec" MDEA business to Ineos.

If the Commission, at the time that it makes the proposed Order final, notifies Respondents that it does not approve of the proposed divestiture to Ineos, or the manner of the divestiture, the proposed Order provides that Respondents would rescind the sale to Ineos and divest Dow's Gas Spec MDEA business within six months to an acquirer approved by the Commission and in a manner approved by the Commission. If Respondents did not complete the divestiture in that period, a trustee would be appointed who, upon Commission approval, would have the authority to divest Dow's Gas Spec MDEA business to a Commission-approved acquirer.

E. Other Provisions of the Proposed Order

The proposed Order requires Respondents to provide the Commission with an initial report setting forth in detail the manner in which Respondents will comply with the provisions relating to the divestiture of assets. The proposed Order further requires Respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the

Analysis

date the Order becomes final and every thirty (30) days thereafter until they have complied with the terms of the Order.

F. The Order To Maintain Assets

Respondents have also agreed to the entry of an Order to Maintain Assets, which has been entered by the Commission and is effective immediately. The Order to Maintain Assets requires Respondents to preserve the ethyleneamine, ethanolamine and MDEA businesses that they are required to divest as viable and competitive businesses and conduct the businesses in the ordinary course of business until those businesses are divested to the Commission-approved acquirer. The Order to Maintain Assets also requires Respondents to preserve and maintain the polyethylene assets to be divested and licensed to BP.

V. Opportunity for Public Comment

The proposed Order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Order and the comments received and will decide whether it should withdraw from the proposed Order or make it final. By accepting the proposed Order subject to final approval, the Commission anticipates that the competitive problems alleged in the proposed complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Order, including the proposed divestiture, to aid the Commission in its determination of whether to make the proposed Order final. This analysis is not intended to constitute an official interpretation of the proposed Order, nor is it intended to modify the terms of the proposed Order in any way.

Complaint

IN THE MATTER OF

EL PASO ENERGY CORPORATION, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3996; File No. 0010086
Complaint, January 29, 2001--Decision, March 19, 2001*

This consent order addresses the acquisition by Respondent El Paso Energy Corporation -- a firm engaged in the transportation, gathering, processing, and storage of natural gas; the marketing of natural gas, power, and other energy-related commodities; power generation; the development and operation of energy infrastructure facilities worldwide; and the domestic exploration and production of natural gas and oil -- of Respondent The Coastal Corporation, a diversified energy and petroleum products company that explores for, produces, gathers, processes, transports, stores, markets and sells natural gas throughout the United States, and is also engaged in refining, marketing, and distributing petroleum products; coal mining; and marketing power. The order, among other things, requires the respondents to divest their interests in (1) the Gulfstream Natural Gas System to Duke Energy and Williams Gas Pipeline; (2) the Empire Pipeline to Westcoast Energy; (3) the Green Canyon and Tarpon Pipelines to Williams Field Services; (4) the Manta Ray, Nautilus, and Nemo Pipelines to Enterprise Products; and (5) the Stingray Pipeline to Shell Gas Transmission and Enterprise Products. The order also requires the respondents to divest their interests in the Midwestern Gas Transmission Pipeline, the UTOS Pipelines, and the Iroquois Pipeline to acquirers approved by the Commission. In addition, the order requires Respondent Dominion Resources -- which already owns sixteen percent of the Iroquois Pipeline -- to provide the Commission with advance notice before increasing its interest in that pipeline.

Participants

For the Commission: *John C. Weber, Art Nolan, Mark Menna, Stephen Y. Wu, Robert E. Friedman, Kenton A. James, Alison M Chin, Evelyn Boynton, William R. Vigdor, Phillip L. Broyles, Daniel P. Ducore, Jeff Dahnke, Geary A. Gessler, Jeffrey H. Fischer and Daniel O'Brien.*

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For the Respondents: *Linda R. Blumkin, and Eric H. Queen, Fried, Frank, Harris, Shriver & Jacobson, Clifford H. Aronson, John Lyons, and Ian G. John, Skadden, Arps, Slate, Meagher & Flom LLP, and Stephen Paul Mahinka, Morgan, Lewis & Bockius LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that respondent El Paso Energy Corporation has entered into an agreement to acquire all of the securities of The Coastal Corporation, all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such acquisition, 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 that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows.

I. RESPONDENTS

El Paso

1. Respondent El Paso Energy Corporation (“El Paso”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 1001 Louisiana Street, El Paso Energy Building, Houston, Texas 77002.
2. Respondent El Paso is, and at all times relevant herein has been, engaged in, among other things, the exploration, production, gathering, processing, transportation, storage, marketing and sales of natural gas in the United States.

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3. Respondent El Paso had total revenues of \$10.6 billion in 1999.

Coastal

4. Respondent The Coastal Corporation (“Coastal”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at Coastal Tower, Nine Greenway Plaza, Houston, TX 77046.
5. Respondent Coastal is, and at all times relevant herein has been, engaged in, among other things, the exploration, production, gathering, processing, transportation, storage, marketing and sales of natural gas in the United States.
6. Respondent Coastal had total revenues of \$ 8.2 billion in 1999.

II. THE ACQUISITION

7. Respondent El Paso entered into a merger agreement, dated January 17, 2000, in which El Paso would acquire all of the Coastal common stock and the former Coastal shareholders will, as a result, own approximately 53% of El Paso’s voting securities (the “Acquisition”). The total dollar value of the Acquisition, which includes about \$6 billion in debt and preferred securities, is estimated to be \$16 billion.

III. TRADE AND COMMERCE

8. A relevant line of commerce in which to analyze the effects of the Acquisition is transportation of natural gas. The only way economically to transport commercial quantities of natural gas over significant distances is through large diameter, high pressure pipelines.
9. A second relevant line of commerce in which to analyze the effects of the Acquisition is long term firm transportation of

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natural gas. Long term firm transportation is a natural gas transportation service requiring the pipeline company to guarantee for one year or more that it will transport a specified daily quantity of natural gas from one destination to another, without interruption. Many users of natural gas cannot bear the risk of interruption and must purchase long term firm transportation in areas where pipelines are periodically capacity constrained. For these customers, other pipeline services and periodic resales of transportation by holders of long term transportation rights are not reasonably interchangeable.

10. A third relevant line of commerce in which to analyze the effects of the Acquisition is the provision of tailored services. Tailored services allow users of natural gas, such as local natural gas distribution companies, to balance their changes in natural gas demand with their supply of natural gas and transportation. Tailored services include limited and no notice services and are typically sold in conjunction with natural gas storage services. Users of this service, such as local natural gas distribution companies, face severe variations in their natural gas demand and cannot substitute alternative pipeline services and periodic resales of transportation by long-term transportation holders for tailored services.

Central Florida

11. A section of the country in which to analyze effect of the Acquisition is the natural gas consuming area consisting of the Florida counties of Brevard, Charlotte, Citrus, De Soto, Glades, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Lake, Lee, Manatee, Martin, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Sarasota, Sumter and St. Lucie (“Central Florida”).
12. The major buyers of natural gas in Central Florida include local natural gas distribution companies, electric power generating utilities and industrial customers. These entities

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buy large quantities of natural gas to resell, to use as fuel to generate electricity or for industrial processes.

13. Consumption of natural gas in Central Florida is substantially higher than production, with the result that most natural gas consumed in Central Florida must be transported by natural gas pipelines.
14. Natural gas users in Central Florida can only receive natural gas from those pipelines that travel to Central Florida. Natural gas users in Central Florida have no effective alternative to natural gas pipeline transportation within that area and cannot economically access natural gas pipelines outside of Central Florida.
15. El Paso owns a 50% interest in the Florida Gas Transmission (“FGT”) pipeline which transports natural gas to Central Florida. FGT is the only interstate natural gas pipeline currently transporting natural gas to Central Florida.
16. Coastal has proposed building the Gulfstream Natural Gas System (“Gulfstream”) to transport natural gas into Central Florida. Gulfstream has precedent agreements with ten Florida utilities and power-generation facilities representing long-term commitments for the majority of its 1.1 billion cubic feet of natural gas per day capacity. Coastal plans to have Gulfstream begin service in June of 2002.
17. Together Respondents will own or control all the pipeline capacity into Central Florida. For natural gas buyers in Central Florida, Respondents’ pipeline systems are or will be the only two alternatives.
18. El Paso and Coastal are ongoing competitors, actual potential competitors, and perceived potential competitors in Central Florida.

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19. There are substantial barriers to entering Central Florida. Building additional pipelines to natural gas production areas or pipelines out of Central Florida would be unlikely, take over two years, and not prevent Respondents from maintaining prices at pre-Acquisition levels.

Buffalo-Niagara Falls, Rochester, Syracuse,
and Albany-Schenectady-Troy MSAs

20. Sections of the country in which to analyze effect of the Acquisition are the natural gas consuming areas in or around the Buffalo-Niagara Falls, Rochester, Syracuse, and Albany-Schenectady-Troy, New York, Metropolitan Statistical Areas (“MSAs”).
21. The major buyers of natural gas in each of the Buffalo-Niagara Falls, Rochester, Syracuse, and Albany-Schenectady-Troy MSAs include local natural gas distribution companies, electric power generating utilities, and industrial customers. These entities buy large quantities of natural gas to resell, to use as fuel to generate electricity or for industrial processes.
22. Consumption of natural gas in each of the New York State MSAs is substantially higher than production, with the result that most natural gas consumed in each of the MSAs must be transported by natural gas pipelines.
23. Natural gas users in each of the Buffalo-Niagara Falls, Rochester, Syracuse, and Albany-Schenectady-Troy MSAs can only receive natural gas from those pipelines that travel through that MSA. Natural gas users in each MSA have no effective alternative to natural gas pipeline transportation within that MSA and cannot economically access natural gas pipelines outside of that MSA.
24. El Paso’s Tennessee Gas Pipeline is one of the major suppliers of natural gas transportation into each of the

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Buffalo-Niagara Falls, Rochester, Syracuse, and Albany-Schenectady-Troy MSAs.

25. Coastal operates and owns a 50% interest in the Empire State Pipeline. The Empire State Pipeline is a major supplier of natural gas to each of the Buffalo-Niagara Falls, Rochester, and Syracuse MSAs.
26. Coastal also owns a 16% interest in the Iroquois Gas Transmission Company, which owns the Iroquois Pipeline (“Iroquois”). Iroquois is a major supplier of natural gas to the Albany-Schenectady-Troy MSA.
27. Together Respondents own or control a significant share of all pipeline capacity into the Buffalo-Niagara Falls, Rochester, Syracuse and Albany-Schenectady-Troy MSAs. For some natural gas buyers, Respondents’ pipelines are two of the only three transportation options. For some natural gas buyers, Respondents’ pipelines are the only two transportation options for transporting low cost Canadian natural gas into these areas.
28. El Paso and Coastal are ongoing competitors in the Buffalo-Niagara Falls, Rochester, Syracuse and Albany-Schenectady-Troy MSAs. Competition between the El Paso and Coastal pipeline systems has resulted in significant competition to transport natural gas to the Buffalo-Niagara Falls, Rochester, Syracuse and Albany-Schenectady-Troy MSAs.
29. There are substantial barriers to entering any Buffalo-Niagara Falls, Rochester, Syracuse and Albany-Schenectady-Troy MSA. Building additional pipelines to natural gas production areas or pipelines out of any of those MSAs would be unlikely, take over two years, and not prevent Respondents from raising prices above pre-Acquisition levels.

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Milwaukee-Waukesha PMSA

30. A section of the country in which to analyze effect of the Acquisition is the natural gas consuming area in or around the Milwaukee-Waukesha, Wisconsin, Primary Metropolitan Statistical Area (“Milwaukee-Waukesha PMSA”).
31. The major buyers of natural gas in the Milwaukee-Waukesha PMSA include local natural gas distribution companies. These entities buy large quantities of natural gas to resell.
32. Consumption of natural gas in this section of the country is substantially higher than production, with the result that most natural gas consumed in the Milwaukee-Waukesha PMSA must be transported by natural gas pipelines.
33. Natural gas users in the Milwaukee-Waukesha PMSA only can receive natural gas from those pipelines that travel through the Milwaukee-Waukesha PMSA. Natural gas users in the Milwaukee-Waukesha PMSA have no effective alternative to natural gas pipeline transportation within that PMSA and cannot economically access natural gas pipelines outside of the Milwaukee-Waukesha PMSA.
34. Coastal’s ANR pipeline is the only supplier of natural gas transportation to the Milwaukee-Waukesha PMSA. The ANR pipeline is the only pipeline that currently allows Wisconsin users of natural gas to access storage fields in Michigan and is the only current supplier of tailored services to the Milwaukee-Waukesha PMSA.
35. Guardian Pipeline L.L.C. has proposed building the Guardian pipeline to compete with ANR in the Milwaukee-Waukesha PMSA in the provision of natural gas pipeline transportation and tailored services. Guardian expects to enter service in the fall of 2002.

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36. El Paso's Midwestern Gas Transmission ("MGT") pipeline likely will offer tailored services to customers within the Milwaukee-Waukesha PMSA by acting as an upstream supplier to the Guardian pipeline once it enters service. MGT terminates near the origin of the Guardian pipeline. MGT is the only supplier of tailored services that would allow Guardian to access low-cost natural gas storage fields in Michigan.
37. Together Respondents will own or control a significant share of all the pipeline capacity capable of offering tailored services to the Milwaukee-Waukesha PMSA that accesses gas storage fields in Michigan. For tailored services buyers in the Milwaukee-Waukesha PMSA, Respondents' pipeline systems in combination with the Guardian pipeline will form the only two routes to associated natural gas storage facilities.
38. Respondents' pipelines are significant actual potential and perceived potential competitors in the provision of tailored services in the Milwaukee-Waukesha PMSA. Specifically, the merged entity will be in a position to deny the rival Guardian pipeline timely and reliable access to tailored services or competitive prices for tailored services. El Paso's MGT pipeline forms the only link to alternate sources of storage needed to provide tailored services that will compete directly with ANR in the Milwaukee-Waukesha PMSA, once Guardian is in service. Together Respondents will control both MGT and ANR, preventing Guardian from competing effectively.
39. There are substantial barriers to entering the Milwaukee-Waukesha PMSA. Offering tailored services requires a pipeline with appropriate tariff services as well as access to low-cost natural gas storage fields in Michigan. Building additional pipelines to natural gas production areas and natural gas storage fields or pipelines outside the

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geographic market would be unlikely, take over two years and not prevent Respondents from maintaining prices at pre-Acquisition levels and denying Guardian access to tailored services.

Evansville Area

40. A section of the country in which to analyze the effect of the Acquisition is the natural gas consuming area in or around the Indiana counties of Posey, Vanderburgh and Warrick counties in Indiana (“Evansville Area”).
41. The major buyers of natural gas in the Evansville Area include local natural gas distribution companies, electric power generating utilities, and industrial customers. These entities buy large quantities of natural gas to resell, to use as fuel to generate electricity, or for industrial processes.
42. Consumption of natural gas in the Evansville Area is substantially higher than production, with the result that most natural gas consumed in the Evansville Area must be transported by natural gas pipelines.
43. Natural gas users in the Evansville Area can only receive natural gas from those pipelines that travel through the Evansville Area. Natural gas users in the Evansville Area have no effective alternative to natural gas pipeline transportation within the Evansville Area and cannot economically access natural gas pipelines outside of the Evansville Area.
44. El Paso’s MGT pipeline transports natural gas into the Evansville Area. MGT is one of the major suppliers of natural gas transportation in the Evansville Area.
45. Coastal’s ANR pipeline transports natural gas into the Evansville Area. ANR is one of the major suppliers of natural gas transportation to the Evansville Area.

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46. Together Respondents own or control a significant share of all pipeline capacity into the Evansville Area. For some natural gas buyers, Respondents' pipelines are the only alternatives. For some natural gas buyers, Respondents' pipelines are two of the only three transportation options.
47. El Paso and Coastal are ongoing competitors, actual potential competitors and perceived potential competitors in the Evansville Area. Competition between the El Paso and Coastal pipeline systems has resulted in significant competition to transport natural gas to the Evansville Area.
48. There are substantial barriers to entering the Evansville Area. Building additional pipelines to natural gas production areas or pipelines out of the Evansville Area would be unlikely, take over two years and not prevent Respondents from raising prices above pre-Acquisition levels.

Central Gulf of Mexico

49. Sections of the country in which to analyze the effect of the Acquisition are the following offshore natural gas producing areas in the Central Gulf of Mexico (collectively and individually referred to as "Central Gulf Sections"):
 - a. eastern Eugene Island South Addition (the area bounded by the following blocks: Eugene Island 282, Eugene Island 279, Ewing Bank 982, Ewing Bank, 979);
 - b. northwestern Eugene Island South Addition (the area bounded by the following blocks: Eugene Island 334, Eugene Island 267, Eugene Island 274, Eugene Island 327);
 - c. southwestern Eugene Island South Addition (the area bounded by the following blocks: Eugene Island 395, Eugene Island 335, Eugene Island 341, Ewing Bank 978);

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- d. southern Vermilion South Addition (the area bounded by the following blocks: Vermilion 410, Vermilion 327, Vermilion 333, Vermilion 413);
- e. central and southern Ship Shoal South Addition (the area bounded by the following blocks: Ship Shoal 290, Ship Shoal 288, Ewing Bank 989, Ewing Bank 983, Ship Shoal 364, Ship Shoal 319, Ship Shoal 314);
- f. northwestern Ship Shoal South Addition (the area bounded by the following blocks: Ship Shoal 296, Ship Shoal 247, Ship Shoal 243, Ship Shoal 300);
- g. the area around the western part of the Bluewater Header (the area bounded by the following blocks: South Marsh Island 57, South Marsh Island 63, South Marsh Island 95, South Marsh Island 105, South Marsh Island 89, South Marsh Island 86);
- h. the area around the central part of the Bluewater Header (the area bounded by the following blocks: Eugene Island 267, Eugene Island 201, Eugene Island 211, Eugene Island 257);
- i. the area around the eastern part of the Bluewater Header (the area bounded by the following blocks: Ship Shoal 127, Ship Shoal 128, Ship Shoal 207, Ship Shoal 231, Ship Shoal 224); and
- j. the central Gulf deepwater (the area bounded by the following blocks: Garden Banks 26, Garden Banks 35, Garden Banks 79, Garden Banks 80, Garden Banks 85, Green Canyon 49, Green Canyon 5, Green Canyon 35, Green Canyon 1003, Green Canyon 969, Garden Banks 994).

The central part of the Gulf of Mexico is off the coast of Louisiana in or around portions of the areas known by the

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Department of Interior assigned names of Ewing Bank, Ship Shoal, Ship Shoal South Addition, Eugene Island, Eugene Island South Addition, South Marsh Island, South Marsh Island South Addition, Vermilion, Vermilion South Addition, Garden Banks and Green Canyon.

50. Consumption of natural gas in each Central Gulf Section is well below natural gas production levels. Most production is transported to areas in the Midwestern and Eastern United States.
51. Central Gulf of Mexico producers either contract directly with natural gas consumers or sell the natural gas to marketers who resell the natural gas. Neither the producers nor the marketers of Central Gulf of Mexico natural gas have an alternative to using the natural gas pipelines located in each Central Gulf Section to transport natural gas out that Section.
52. El Paso, through its subsidiaries, owns all or part of the Bluewater, TTT, Green Canyon, Tarpon, Manta Ray and Nautilus pipelines and related facilities. El Paso is one of the major transporters of natural gas out of each Central Gulf Section.
53. Coastal, through its subsidiaries, owns the ANR (Patterson) pipeline and related facilities. Coastal is one of the major transporters of natural gas out of each Central Gulf Section.
54. Together Respondents own or control a significant share of all pipeline capacity out of each Central Gulf Section. For some natural gas producers, Respondents' pipelines are the only alternatives.
55. El Paso and Coastal are ongoing, actual potential and perceived potential competitors in each Central Gulf Section. Competition between the El Paso and Coastal

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pipeline systems has resulted in significant competition to transport natural gas from each Central Gulf Section.

56. There are substantial barriers to entering any Central Gulf Section. Building additional pipelines to transport natural gas out of each Central Gulf Section would be unlikely, take over two years and not prevent Respondents from raising prices above pre-Acquisition levels.

West Central Gulf of Mexico

57. Sections of the country in which to analyze the effect of the Acquisition are the following offshore natural gas producing areas in the West Central Gulf of Mexico (collectively and individually referred to as “West Central Gulf Sections”):
 - a. northern West Cameron (the area bounded by the following blocks: West Cameron 148; West Cameron 144, West Cameron 248, West Cameron 244);
 - b. northwestern West Cameron and Northern West Cameron West Addition (the area bounded by the following blocks: West Cameron 53, West Cameron 56, West Cameron 168, West Cameron 185, West Cameron West Addition 288, West Cameron West Addition 161); and
 - c. West Cameron 167 (the area consisting of block West Cameron 167).

The west central part of the Gulf of Mexico is off the coast of Louisiana in or around portions of the areas known by the Department of Interior assigned names of West Cameron, West Cameron West Addition, West Cameron South Addition, East Cameron, East Cameron South Addition, Vermilion South Addition, High Island South Addition, High Island East Addition South Extension, East Breaks, Alaminos Canyon, Keathley Canyon and Garden Banks.

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58. Consumption of natural gas in each West Central Gulf Section is well below natural gas production levels. Most production is transported to areas in the Midwestern and Eastern United States.
59. West Central Gulf of Mexico producers either contract directly with natural gas consumers or sell the natural gas to marketers who resell the natural gas. Neither the producers nor the marketers of West Central Gulf of Mexico natural gas have an alternative to using the natural gas pipelines located in each West Central Gulf Section to transport natural gas out that Section.
60. El Paso, through its subsidiaries or 50% ownership of Deepwater Holdings L.L.C. (50% owned by Coastal), owns all or part of the Bluewater (southwest leg), High Island Offshore System, U-T Offshore System, Stingray and East Breaks Gathering System pipelines and related facilities. El Paso is one of the major transporters of natural gas out of each West Central Gulf Section.
61. Coastal, through its subsidiaries or 50% ownership of Deepwater Holdings L.L.C., owns all or part of the ANR (Grand Chenier), High Island Offshore System, U-T Offshore System, Stingray and the East Breaks Gathering System pipelines and related facilities. Coastal is one of the major transporters of natural gas out of each West Central Gulf Section.
62. Together Respondents own or control a significant share of all pipeline capacity out of each West Central Gulf Section. For some natural gas producers, Respondents' pipelines are the only alternatives.
63. El Paso and Coastal are ongoing, actual potential, and perceived potential competitors in each West Central Gulf Section. Competition between the El Paso and Coastal

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pipeline systems has resulted in significant competition to transport natural gas from each West Central Gulf Section.

64. There are substantial barriers to entering any West Central Gulf Section. Building additional pipelines to transport natural gas out of each West Central Gulf Section would be unlikely, take over two years and not prevent Respondents from raising prices above pre-Acquisition levels.

**COUNT I:
LOSS OF COMPETITION IN CENTRAL FLORIDA**

65. Paragraphs 1 - 64 are incorporated by reference as if fully set forth herein.
66. One relevant product market in which to assess the effect of the Acquisition is long term firm transportation of natural gas.
67. One relevant geographic market in which to assess the effect of the Acquisition is Central Florida.
68. Central Florida is a highly concentrated market and the Acquisition, if consummated, will substantially increase that concentration.
69. Entry into the Central Florida market would not be timely, likely or sufficient to prevent likely anticompetitive effects arising from the Acquisition.
70. The Acquisition will eliminate ongoing competition, actual potential competition and perceived potential competition between Respondents with the likely result of maintaining prices and reducing output of natural gas transportation in Central Florida, and thereby increasing the cost of natural gas service, electricity and industrial products.

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**COUNT II:
LOSS OF COMPETITION IN THE
BUFFALO-NIAGARA FALLS, ROCHESTER, SYRACUSE,
AND ALBANY-SCHENECTADY-TROY MSAs**

71. Paragraphs 1 - 64 are incorporated by reference as if fully set forth herein.
72. One relevant product market in which to assess the effect of the Acquisition is long term firm transportation of natural gas.
73. Relevant geographic markets in which to assess the effect of the Acquisition are the Buffalo-Niagara Falls, Rochester, Syracuse and Albany-Schenectady-Troy MSAs.
74. These relevant markets are highly concentrated and the Acquisition, if consummated, will substantially increase that concentration.
75. Entry into any of the Buffalo-Niagara Falls, Rochester, Syracuse and Albany-Schenectady-Troy MSA markets would not be timely, likely or sufficient to prevent likely anticompetitive effects arising from the Acquisition.
76. The Acquisition will eliminate ongoing competition in each relevant market between Respondents with the likely result of raising rates and reducing output of natural gas transportation in each relevant market, and thereby increasing the cost of natural gas service, electricity and industrial products.

**COUNT III:
LOSS OF COMPETITION IN THE
MILWAUKEE-WAUKESHA PMSA**

77. Paragraphs 1 - 64 are incorporated by reference as if fully set forth herein.

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78. One relevant product market in which to assess the effect of the Acquisition is the provision of tailored services.
79. One relevant geographic market in which to assess the effect of the Acquisition is the Milwaukee-Waukesha PMSA.
80. The Milwaukee-Waukesha PMSA market is highly concentrated and the Acquisition, if consummated, will substantially increase that concentration.
81. Entry into the Milwaukee-Waukesha PMSA market would not be timely, likely or sufficient to prevent likely anticompetitive effects arising from the Acquisition.
82. The Acquisition will threaten ongoing competition, actual potential competition and perceived potential competition by permitting the Respondents to deny the rival Guardian pipeline and any potential rivals of Coastal's ANR pipeline timely access to tailored services or competitive prices for tailored services across El Paso's MGT pipeline with the likely result of maintaining rates and reducing output of tailored services in the relevant market, and thereby increasing the cost of natural gas service.

COUNT IV:

LOSS OF COMPETITION IN THE EVANSVILLE AREA

83. Paragraphs 1 - 64 are incorporated by reference as if fully set forth herein.
84. One relevant product market in which to assess the effect of the Acquisition is long term firm transportation of natural gas.
85. One relevant geographic market in which to assess the effect of the Acquisition is the Evansville Area.

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86. The Evansville Area market is highly concentrated and the Acquisition, if consummated, will substantially increase that concentration.
87. Entry into the Evansville Area market would not be timely, likely or sufficient to prevent likely anticompetitive effects arising from the Acquisition.
88. The Acquisition will eliminate ongoing competition between Respondents with the likely result of raising rates and reducing output of natural gas transportation in the Evansville Area market and thereby increasing the cost of natural gas service, electricity and industrial products.

**COUNT V:
LOSS OF COMPETITION IN THE CENTRAL GULF OF
MEXICO**

89. Paragraphs 1 - 64 are incorporated by reference as if fully set forth herein.
90. One relevant product market in which to assess the effect of the Acquisition is transportation of natural gas.
91. Relevant geographic markets in which to assess the effect of the Acquisition are the Central Gulf Sections identified in Paragraph 49.
92. The Central Gulf Sections are highly concentrated markets and the Acquisition, if consummated, will substantially increase that concentration.
93. Entry into any Central Gulf Section would not be timely, likely or sufficient to prevent likely anticompetitive effects arising from the Acquisition.
94. The Acquisition will eliminate ongoing, actual potential and perceived potential competition between Respondents with

Complaint

the likely result of raising rates and reducing output of natural gas transportation in each Central Gulf Section, and diminishing production of natural gas in each Central Gulf Section.

**COUNT VI:
LOSS OF COMPETITION IN THE WEST CENTRAL
GULF OF MEXICO**

95. Paragraphs 1 - 64 are incorporated by reference as if fully set forth herein.
96. One relevant product market in which to assess the effect of the Acquisition is transportation of natural gas.
97. Relevant geographic markets in which to assess the effect of the Acquisition are the West Central Gulf Sections identified in Paragraph 57.
98. Each West Central Gulf Section is a highly concentrated market and the Acquisition, if consummated, will substantially increase that concentration.
99. Entry into any West Central Gulf Section would not be timely, likely or sufficient to prevent likely anticompetitive effects arising from the Acquisition.
100. The Acquisition will eliminate ongoing and potential competition between Respondents with the likely result of raising rates and reducing output of natural gas transportation in each West Central Gulf Section, and diminishing production of natural gas in each West Central Gulf Section.

Complaint

IV. VIOLATIONS CHARGED

101. The merger agreement entered into by Respondents El Paso and Coastal constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.
102. The Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

IN WITNESS WHEREOF, the Federal Trade Commission, having caused this Complaint to be signed by the Secretary and its official seal affixed, at Washington, D.C., this twenty-ninth day of January, 2001, issues its complaint against respondent.

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The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent El Paso Energy Corporation of certain voting securities of Respondent The Coastal Corporation and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of 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

Respondents and Dominion Resources, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Maintain Assets and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

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1. Respondent El Paso Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
2. Respondent The Coastal Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Nine Greenway Plaza, Houston, Texas 77046.
3. Dominion Resources is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia with its office and principal place of business located at 120 Tredegar Street, Richmond, Virginia 23219.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “El Paso” means El Paso Energy Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by El Paso, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Coastal” means The Coastal Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Coastal, and the respective directors, officers,

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employees, agents, representatives, successors, and assigns of each.

- C. “Dominion Resources” means Dominion Resources, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Dominion Resources, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Acquisition” means the transaction described in the Agreement and Plan of Merger between El Paso and Coastal, dated January 17, 2000, pursuant to which El Paso agreed to acquire certain voting securities of Coastal.
- E. “Commission” means the Federal Trade Commission.
- F. “Development Area” means South Marsh Island Blocks 57 through 70, South Marsh Island South Addition Blocks 71 through 81 and 92 through 97, Eugene Island Blocks 201 through 266, Eugene Island South Addition Blocks 267 through 311, 315 through 330, 338 through 353, 361 through 374, and 384 through 389, Ewing Bank Blocks 937 through 940 and 978 through 985, Green Canyon Blocks 8 through 15 and 54 through 59, Ship Shoal Blocks 149 through 154, 172 through 179, and 196 through 203, and Ship Shoal South Addition Blocks 248, 249, 270 through 273, 294 through 297, 318 through 321, 341 through 346, and 362 through 365.
- G. “Duke Energy” means Duke Energy Gas Transmission Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 5400 East Heimer Court, Houston, Texas 77056.
- H. “East Breaks Gathering Company” means East Breaks Gathering Company, L.L.C., a limited liability company organized, existing and doing business under and by virtue

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of the laws of Delaware, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.

- I. “Eligible Facility” means any natural gas pipeline or facility directly connected to such pipeline that (i) serves producers in the Development Area, (ii) originates at any pipeline owned by the Green Canyon/Tarpon Acquirer, or any subsidiary or affiliate of the Green Canyon/Tarpon Acquirer, and (iii) extends to a point more than two miles from any pipeline owned by the Green Canyon/Tarpon Acquirer, or any subsidiary or affiliate of the Green Canyon/Tarpon Acquirer, immediately after it acquires the Green Canyon/ Tarpon Assets.
- J. “Empire Acquirer” means the Person that acquires the Empire Assets.
- K. “Empire Assets” means all of Coastal’s rights, title, and interest in the Empire State Pipeline and Empire State Pipeline Company.
- L. “Empire State Pipeline” means the natural gas pipeline known as the Empire State Pipeline that originates near Niagara, New York, and extends approximately 157 miles to its interconnection with the facilities of Niagara Mohawk Power Corporation, 15 miles northwest of Syracuse, New York.
- M. “Empire State Pipeline Company” means the Empire State Pipeline Company, Inc., a corporation organized, existing and doing business under and by virtue of the laws of New York, with its office and principal place of business located at 500 Renaissance Center, Detroit, Michigan 48243.
- N. “Empire Purchase Agreement” means the Stock Purchase and Sale Agreement between American Natural Resources Company and Westcoast Energy Enterprises (U.S.), Inc., dated November 6, 2000, including all related amendments, agreements, schedules, exhibits, and appendices.

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- O. “Enterprise Products” means Enterprise Products Operating L.P., a limited partnership organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 2727 North Loop West, Suite 700, Houston, Texas 77008.
- P. “Green Canyon Gathering System” means the natural gas gathering system located in the central Gulf of Mexico consisting of approximately 68 miles of 10-inch to 20-inch diameter pipeline that transports natural gas from South Marsh Island, Eugene Island, Garden Banks, and Green Canyon areas to Transcontinental Gas Pipeline’s South Lateral in South Marsh Island Block 106, and related facilities.
- Q. “Green Canyon/Tarpon Acquirer” means the Person that acquires the Green Canyon/ Tarpon Assets.
- R. “Green Canyon/Tarpon Assets” means (1) the assets listed on Exhibit A to the Green Canyon/Tarpon Purchase Agreement, and (2) all of El Paso’s rights, title, and interest in the Green Canyon Gathering System, Tarpon Pipeline, and Tarpon Transmission Company.
- S. “Green Canyon/Tarpon Purchase Agreement” means the Purchase and Sale Agreement by and among El Paso Energy Partners, L.P., Green Canyon Pipeline Company, L.P. and Williams Field Services - Gulf Coast Company, L.P., dated December 8, 2000, including all related amendments, agreements, schedules, exhibits, and appendices.
- T. “Guardian Pipeline” means the natural gas pipeline (with a planned initial capacity of approximately 750 million cubic feet per day) to be constructed at a point near Joliet, Illinois, and extending to a point near Ixonia, Wisconsin, as described in the Application of Guardian Pipeline, L.L.C. for Certificates of Public Convenience and Necessity, FERC Docket Nos. CP00-36-000, CP00-37-000, and CP00-38-000.

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- U. “Guardian Interconnection” means a pipeline interconnection between MGT Pipeline and Guardian Pipeline at or near Joliet, Illinois, with capacity of at least 450 million cubic feet per day of natural gas, to be constructed on commercially reasonable terms agreed to between the MGT Acquirer and the owner or representative of the Guardian Pipeline.
- V. “Gulfstream Acquirer” means the Person that acquires the Gulfstream Assets.
- W. “Gulfstream Assets” means all of Coastal’s rights, title, and interests in the Gulfstream Pipeline and Gulfstream Natural Gas System.
- X. “Gulfstream Confidential Information” means any information relating to the Gulfstream Assets obtained by Respondent El Paso in the course of evaluating the Acquisition or obtained from any Coastal employee, agent, or representative who remains or becomes employed by Respondents, provided, however, that Gulfstream Confidential Information shall not include information already within the public domain.
- Y. “Gulfstream Natural Gas System” means Gulfstream Natural Gas System, L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at Nine Greenway Plaza, Houston, Texas 77046.
- Z. “Gulfstream Pipeline” means the natural gas pipeline (with a planned initial capacity of approximately 1.1 billion cubic feet per day) to be constructed at a point near Mobile Bay, Alabama, and extending across the Gulf of Mexico to a point south of Tampa, Florida, and extending on land in an easterly direction branching out to serve markets across central and

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southern Florida, as described in the Application of Gulfstream Natural Gas System, L.L.C. for Certificate of Public Convenience and Necessity, FERC Docket Nos. CP00-6-000, CP00-7-000, and CP00-8-000.

- AA. “Gulfstream Purchase Agreement” means the Amended and Restated Acquisition Agreement by and among Duke Energy Gas Transmission Corporation, Williams Gas Pipeline Company, ANR Gulfstream, L.L.C. and Coastal Southern Pipeline Company, dated December 8, 2000, including all related amendments, agreements, schedules, exhibits, and appendices.
- BB. “Iroquois Assets” means all of Coastal’s rights, title, and interest in the Iroquois Gas Transmission System.
- CC. “Iroquois Gas Transmission System” means Iroquois Gas Transmission System, L.P., a limited partnership organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at One Corporate Drive, Suite 600, Shelton, Connecticut 06484.
- DD. “Iroquois Pipeline” means the natural gas pipeline that originates near the United States/Canadian border at Waddington, New York, and extends approximately 375 miles to Long Island, New York.
- EE. “Johnson Bayou Plant” means the production handling facility that provides liquids separation and gas dehydration services for UTOS Pipeline System that is located at the onshore terminus of UTOS Pipeline System in Cameron Parish, Louisiana.
- FF. “Long Term Firm Transportation” means the provision of natural gas pipeline transportation for a period greater than one year that is not subject to a prior claim by another pipeline customer or another class of transportation service

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and cannot be interrupted except in a situation of force majeure.

- GG. “Manta Ray Acquirer” means the Person that acquires the Manta Ray Assets.
- HH. “Manta Ray Assets” means all of El Paso’s rights, title, and interest in the Manta Ray Pipeline System, Nautilus Pipeline, Nemo Pipeline System, Sailfish Pipeline Company, and Moray Pipeline Company.
- II. “Moray Pipeline Company” means Moray Pipeline Company, L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
- JJ. “Manta Ray Pipeline System” means the natural gas pipeline system known as Manta Ray Pipeline System located in the east central Gulf of Mexico, including but not limited to, approximately 237 miles of 12-inch to 24-inch diameter pipeline that transports natural gas within the areas of Green Canyon, Ewing Bank, Ship Shoal, Grand Isle, and South Timbalier areas to ANR Pipeline Company and Nautilus Pipeline Company in Ship Shoal Block 207 and CMS Trunkline in South Timbalier Block 280 and Transcontinental Gas Pipeline’s Southeast Louisiana lateral in Ship Shoal Block 332.
- KK. “Manta Ray Purchase Agreement” means the Purchase and Sale Agreement by and among El Paso Energy Partners, L.P. and El Paso Energy Partners Company and Enterprise Products Operating L.P., dated December 8, 2000, including all related amendments, agreements, schedules, exhibits, and appendices.
- LL. “MGT Acquirer” means the Person that acquires the MGT Assets.

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- MM. “MGT Assets” means all of El Paso’s rights, title, and interest in the MGT Pipeline, Midwestern Gas Transmission Company, and Midwestern Gas Marketing Company.
- NN. “MGT Pipeline” means the natural gas pipeline known as the Midwestern Gas Transmission pipeline that originates near Portland, Tennessee, and extends approximately 350 miles to a point near Joliet, Illinois.
- OO. “Midwestern Gas Transmission Company” means Midwestern Gas Transmission Company, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
- PP. “Midwestern Gas Marketing Company” means Midwestern Gas Marketing Company, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
- QQ. “Monitor Trustee” means the Monitor Trustee appointed pursuant to Paragraph XI of this Order.
- RR. “Nautilus Pipeline System” means the natural gas pipeline system known as Nautilus Pipeline System located in the east central Gulf of Mexico, including but not limited to, approximately 101 miles of 30-inch diameter pipeline that transports natural gas from the Manta Ray junction platform in Ship Shoal Block 207 to delivery point interconnections downstream of the outlet of the Garden City Gas Processing Plant in St. Mary Parish, Louisiana and delivery point interconnects downstream at the outlet of the Neptune Gas Processing Plant.

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- SS. “Nemo Pipeline” means the natural gas gathering system known as Nemo Pipeline under construction in the east central Gulf of Mexico, including but not limited to, approximately 24 miles of 20-inch diameter pipeline that will transport natural gas from the Brutus and Glider deepwater development properties to Manta Ray Pipeline System.
- TT. “Newco” means Starfish Pipeline Company, L.L.C., a limited liability company to be owned by Enterprise Products and Shell Gas Transmission and organized and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1301 McKinney, Suite 700, Houston, Texas 77010.
- UU. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- VV. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- WW. “Pipeline Assets” means the assets to be divested pursuant to Paragraphs II and III of this Order.
- XX. “Respondents” means El Paso and Coastal, individually and collectively.
- YY. “Restricted Development Area” means those portions of the Development Area to the south or southwest of Tarpon, including areas to the south or southwest of Tarpon in the following blocks: Ewing Bank Blocks 937 through 940, and 978 through 985, Green Canyon Blocks 8 through 15, and 54 through 59, Ship Shoal South Addition Blocks 273, 294 through 297, 318 through 321, 341 through 346, and 362 through 365, and Eugene Island South Addition Blocks

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323, 324, 343 through 345, 346 through 350, 361 through 374, and 384 through 389.

- ZZ. “Sailfish Pipeline Company” means Sailfish Pipeline Company, L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
- AAA. “Shell Gas Transmission” means Shell Gas Transmission, L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1301 McKinney, Suite 700, Houston, Texas 77010.
- BBB. “Stingray Acquirer” means the Person that acquires the Stingray Assets.
- CCC. “Stingray Assets” means all of El Paso’s rights, title, and interest in the Stingray Pipeline System, West Cameron Dehydration Facility, Stingray Pipeline Company, West Cameron Dehydration Company, and East Breaks Gathering Company.
- DDD. “Stingray Pipeline Company” means Stingray Pipeline Company, L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
- EEE. “Stingray Pipeline System” means the natural gas pipeline system known as Stingray Pipeline located in the central Gulf of Mexico, including but not limited to, approximately 325 miles of 6-inch to 36-inch diameter pipeline that transports natural gas from the High Island, West Cameron, East Cameron, Vermilion, and Garden Banks areas to

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onshore transmission systems at Holly Beach and Cameron Parish, Louisiana, and eighteen former NGPL laterals connected to the Stingray Pipeline and located in the East Cameron, Vermilion, and West Cameron areas.

- FFF. “Stingray Purchase Agreement” means the Purchase and Sale Agreement by and among Deepwater Holdings, L.L.C., and Enterprise Products Operating L.P., Shell Gas Transmission, L.L.C., and Newco, L.L.C., dated December 8, 2000, including all related amendments, agreements, schedules, exhibits, and appendices.
- GGG. “Tarpon Pipeline” means the natural gas gathering system known as Tarpon located in the central Gulf of Mexico, including but not limited to, approximately 40 miles of 16-inch diameter pipeline that extends from Trunkline at Ship Shoal Block 274 to the Eugene Island area of the Gulf.
- HHH. “Tarpon Transmission Company” means the Tarpon Transmission Company, a corporation organized, existing and doing business under and by virtue of the laws of Texas, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
- III. “Transitional Pipelines” means the Empire State Pipeline, MGT Pipeline, Stingray Pipeline System, and UTOS Pipeline, individually and collectively.
- JJJ. “UTOS Acquirer” means the Person that acquires the UTOS Assets.
- KKK. “UTOS Assets” means all of El Paso’s rights, title, and interest in the UTOS Pipeline, Johnson Bayou Plant, and U-T Offshore System.
- LLL. “U-T Offshore System” means U-T Offshore System, L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of Delaware,

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with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.

- MMM. “UTOS Pipeline” means the system known as the U-T Offshore System located in the Gulf of Mexico, including but not limited to, approximately 30 miles of 42-inch diameter pipeline that transports natural gas from an interconnection with the HIOS system at West Cameron Block 167 to the Johnson Bayou Plant.
- NNN. “West Cameron Dehydration Facility” means the dehydration facility located at Holly Beach, Cameron Parish, Louisiana, and connected to the onshore terminus of Stingray Pipeline System at Holly Beach, and related facilities.
- OOO. “West Cameron Dehydration Company” means West Cameron Dehydration Company, L.L.C., a limited liability company organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
- PPP. “Westcoast Energy” means Westcoast Energy, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 1333 West Georgia Street, Vancouver, British Columbia, Canada V8E 3K0.
- QQQ. “Williams Field Services” means Williams Field Services - Gulf Coast Company LP, a Delaware limited partnership organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1800 South Baltimore, Tulsa, OK 74119.
- RRR. “Williams Gas Pipeline” means Williams Gas Pipeline Company, a corporation organized, existing and doing

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business under and by virtue of the laws of Delaware, with its office and principal place of business located at 2800 Post Oak Boulevard, Houston, Texas 77056.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest, absolutely and in good faith:
1. The Gulfstream Assets to Williams Gas Pipeline and Duke Energy, in accordance with the Gulfstream Purchase Agreement (which agreement shall not be construed to vary from or contradict the terms of this Order), no later than twenty days from the date the Commission accepts the Consent Agreement for public comment;
 2. The Empire Assets to Westcoast Energy, in accordance with the Empire Purchase Agreement (which agreement shall not be construed to vary from or contradict the terms of this Order). If, at the time the Commission determines to make this Order final, the Commission determines that Westcoast Energy is not acceptable as the Empire Acquirer or that the Empire Purchase Agreement is not an acceptable manner of divestiture, and so notifies Respondents, Respondents shall immediately terminate the Empire Purchase Agreement and divest the Empire Assets, at no minimum price, to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. Respondents shall divest to Westcoast or such Person no earlier than the date this Order becomes final and no later than ten days after the later of (1) the date this Order becomes final or (2) the date Respondents receive approval from the New York Public Service Commission, and in any event, no later than 150 days from the date this Order becomes final;

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3. The Green Canyon/Tarpon Assets to Williams Field Services, in accordance with the Green Canyon/Tarpon Purchase Agreement (which agreement shall not be construed to vary from or contradict the terms of this Order), no later than twenty days from the date the Commission accepts the Consent Agreement for public comment;
4. The Manta Ray Assets to Enterprise Products, in accordance with the Manta Ray Purchase Agreement (which agreement shall not be construed to vary from or contradict the terms of this Order), no later than twenty days from the date the Commission accepts the Consent Agreement for public comment;
5. The Stingray Assets to Enterprise Products, Shell Gas Transmission, and Newco, in accordance with the Stingray Purchase Agreement (which agreement shall be construed to vary from or contradict the terms of this Order), no later than twenty days from the date the Commission accepts the Consent Agreement for public comment; and
6. Each of the assets described in Paragraph II.A. of this Order shall be divested pursuant to and in accordance with the corresponding purchase agreement, which agreement shall be incorporated by reference into this Order and made a part hereof. Any failure by Respondents to comply with any term of any such purchase agreement shall constitute a failure to comply with this Order;

Provided, however, that if Respondents have divested any of the assets described in Paragraphs II.A.1., II.A.3., II.A.4., and II.A.5. prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission determines that any acquirer identified in Paragraphs II.A.1., II.A.3., II.A.4., and II.A.5. is not acceptable as the acquirer of the corresponding assets or that the corresponding purchase agreement is not an acceptable manner

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of divestiture, and so notifies Respondents, Respondents shall immediately rescind the applicable purchase agreement and divest the assets, at no minimum price, to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, no later than 120 days from the date this Order becomes final.

- B. The purpose of the divestiture of the assets described in Paragraph II.A. of this Order is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

III.**IT IS FURTHER ORDERED** that:

- A. 1. Respondents shall divest at no minimum price, absolutely and in good faith the Iroquois Assets only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, no later than ninety days from the date the Commission accepts the Consent Agreement for public comment; provided, however, that Respondents shall not divest more than an 8.72% partnership interest in Iroquois Gas Transmission System to Dominion Resources;
2. If Dominion Resources acquires a partnership interest in Iroquois Gas Transmission System pursuant to this Order, Dominion Resources shall not, for a period of ten years following such acquisition, acquire any additional interest, in whole or in part, in Iroquois Gas Transmission System, without providing advance written notification to the Commission.
- B. Respondents shall divest at no minimum price, absolutely and in good faith the MGT Assets only to an acquirer that receives

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the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, no later than 120 days from the date the Commission accepts the Consent Agreement for public comment; provided, however, that Respondents shall include and enforce a provision in the purchase agreement between Respondents and the MGT Acquirer requiring the MGT Acquirer to complete the Guardian Interconnection no later than the in-service date of the Guardian Pipeline.

- C. Respondents shall divest at no minimum price, absolutely and in good faith the UTOS Assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, no later than April 1, 2001.
- D. The purpose of the divestiture of the assets described in Paragraph III of this Order is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that between the date Respondents sign the Consent Agreement and the date the Pipeline Assets are completely divested pursuant to Paragraphs II and III of this Order, Respondents shall:

- A. Maintain the Pipeline Assets in substantially the same condition (except for normal wear and tear) existing on the date Respondents sign the Consent Agreement and shall continue to take such action that is consistent with the past practices of Respondents and is taken in the ordinary course of the normal day-to-day operations of Respondents.

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- B. Use their best efforts to keep available the services of the current officers, employees, and agents relating to the Pipeline Assets; and maintain the relations and goodwill with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with the Pipeline Assets.
- C. Preserve the Pipeline Assets intact as ongoing businesses and not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Pipeline Assets would be diminished.

V.**IT IS FURTHER ORDERED** that:

- A. In connection with the divestitures required by Paragraphs II.A.2, II.A.5., III.B. and III.C. of this Order, Respondents shall provide services at the request of the applicable acquirer sufficient to operate the Transitional Pipelines pursuant to the following terms and conditions:
 - 1. Respondents shall operate the Transitional Pipelines and provide related services on behalf of each pipeline's respective acquirer in a manner consistent with Respondents' past practices for a period up to nine months for each pipeline from the date Respondents divest such pipeline;
 - 2. Respondents shall use their best efforts to transfer the operation of the Transitional Pipelines from Respondents to each applicable acquirer no later than nine months from the date Respondents divest each pipeline;

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3. From the date they divest each of the Transitional Pipelines, Respondents shall have no role in negotiating or setting rates, terms or conditions of service, making expansion or interconnection decisions, or marketing any services relating to the transportation of natural gas (or related products) through each of the Transitional Pipelines; provided, however, that Respondents, in providing transitional services may assist in submitting any necessary regulatory filings and facilitating expansions or interconnections;
 4. Respondents shall (i) use all information obtained in the course of operating the Transitional Pipelines solely to fulfill Respondents' obligations under this Paragraph V.A., and (ii) make available such information only to those persons employed by Respondents having a need to know and who agree in writing to maintain the confidentiality of such information; and
 5. Respondents shall provide the services required by this Paragraph V.A. to any applicable acquirer for a fee agreed to by Respondents and acquirer and included in the applicable purchase agreement.
- B. In connection with the divestitures required by Paragraphs II and III of this Order, Respondents shall provide each acquirer of the Pipeline Assets an opportunity to transfer employment relationships from Respondents to the acquirer, pursuant to the following terms and conditions:
1. Respondents shall provide each acquirer an opportunity to enter into an employment contract with each individual identified in the purchase agreement between Respondents and the acquirer (hereinafter "Key Employee");
 2. Respondents shall allow the acquirer to inspect the personnel files and other documentation relating to each Key Employee, to the extent permissible under applicable

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laws, no later than ten days before the date the applicable assets are divested;

3. Respondents shall take steps to cause each Key Employee to accept an offer of employment from the acquirer (such as payment of all current and accrued benefits and pensions, to which the employees are entitled). To incentivize each Key Employee to accept such an offer, Respondents shall pay a bonus to each Key Employee who accepts an offer of employment on or prior to the date of divestiture of the applicable assets and remains employed by the applicable acquirer for a period of twelve months (eighteen months if employed by the Gulfstream Acquirer), equal to 25% of the Key Employee's current annual salary and commissions (including any annual bonuses) as of November 1, 2000;
 4. Respondents shall not interfere with the employment by the acquirer of any Key Employee; not offer any incentive to any Key Employee to decline employment with the acquirer; and shall remove any contractual impediments with Respondents that may deter any Key Employee from accepting employment with the acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Key Employee to be employed by the acquirer; and
 5. For a period of one year from the date this Order becomes final, Respondents shall not, without the consent of the acquirer, directly or indirectly, hire or enter into any arrangement for the services of any Key Employee employed by the acquirer, unless the Key Employee's employment has been terminated by the acquirer without the Key Employee's consent.
- C. 1. Respondents shall provide consulting services at the request of the Gulfstream Acquirer, for a fee not to exceed Respondents' costs of direct material and labor, for a period

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beginning from the date Respondents sign the Consent Agreement to the in-service date of the Gulfstream Pipeline, relating to any aspect of the Gulfstream Pipeline and furnished by any one or more individuals identified in the Gulfstream Purchase Agreement;

2. Unless otherwise compelled by law, Respondents shall not provide, disclose or otherwise make available any Gulfstream Confidential Information to any Person (including any of Respondents' employees, agents, or representatives) and shall not use any Gulfstream Confidential Information for any reason or purpose (except in the course of providing consulting services to the Gulfstream Acquirer), and shall enforce the terms of this Paragraph V.C.2. as to any Person and take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph V.C.2., including all actions that Respondents would take to protect their own trade secrets and confidential information; and
 3. Respondents shall not enter into any agreement to acquire any rights to Long Term Firm Transportation on the Gulfstream Pipeline except that nothing in this Paragraph V.C.3. shall preclude Respondents from acquiring Long Term Firm Transportation to serve the peak day needs of any planned or existing power plant of Respondent El Paso, or any other Long Term Firm Transportation where Respondent El Paso is the end user of the natural gas, and Respondent El Paso may release capacity so obtained so long as the term of the release is less than one year.
- D. In connection with the divestiture required by Paragraph II.A.3. of this Order, Respondents shall pay to the Commission the sum of \$40 million, no later than ten days from the date Respondents divest the Green Canyon/Tarpon Assets, pursuant to the following terms and conditions:

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1. The funds paid to the Commission shall be deposited into an interest-bearing account (“Development Fund”) administered by the Commission (which may designate an agent to administer the Development Fund) to be used in a manner consistent with this Paragraph V.D.;
2. Funds from the Development Fund (including earnings, but excluding costs of administration which shall be paid from the Development Fund) shall be made available to reimburse the Green Canyon/Tarpon Acquirer only for the total direct costs of constructing any Eligible Facility; provided, however, that no more than \$15 million shall be made available for construction in the Restricted Development Area;
3. For each construction project for which the Green Canyon/Tarpon Acquirer may seek reimbursement from the Development Fund, the Green Canyon/Tarpon Acquirer shall (i) maintain records relating to the design and cost of the project and sufficient to identify all project expenditures and recipients of expenditures, and (ii) make available such records upon request to the Monitor Trustee or to representatives of the Commission;
4. To obtain reimbursement from the Development Fund, the Green Canyon/ Tarpon Acquirer shall make a written request to the Monitor Trustee, state the amount of reimbursement requested, provide a description of how the expenditures for which reimbursement is sought were made, and include an attestation that the reimbursement will not be inconsistent with the use of the Development Fund permitted by this Paragraph;
5. The Monitor Trustee shall have full authority to review the written request submitted by the Green Canyon/Tarpon Acquirer, request any additional information that may be necessary to determine whether the conditions imposed by this Paragraph V.D. for reimbursement has been met (to

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which the Green Canyon/Tarpon Acquirer shall promptly respond), and report to the Commission, provided, however, that no funds from the Development Fund shall be paid without approval by a duly authorized representative of the Commission;

6. The Monitor Trustee shall (i) not disclose any information received from the Green Canyon/Tarpon Acquirer to Respondents, (ii) maintain records of all information submitted by the Green Canyon/Tarpon Acquirer, and (iii) make available such records upon request to representatives of the Commission;
7. The Green Canyon/Tarpon Acquirer may seek reimbursement from the Development Fund for a period of twenty years from the date the Development Fund is created, including reimbursement for any Eligible Facility that is constructed after the twenty year period if the Green Canyon/Tarpon Acquirer committed to such construction prior to the end of the twenty year period and such construction is completed within two years after the twenty year period has ended. After all appropriate reimbursements have been paid to the Green Canyon/Tarpon Acquirer, all funds remaining in the Development Fund shall be paid to Respondent El Paso; and
8. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with this Paragraph.

For purposes of this Paragraph V., “direct costs” means costs of direct material and labor, and variable overhead incurred in construction, but excluding administrative and general costs allocable to the Green Canyon/Tarpon Acquirer.

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- E. In connection with any of the divestitures required by Paragraphs II.A.1., II.A.2., and III.B. of this Order, from the date Respondents sign the Consent Agreement until Respondents have divested the applicable pipeline, Respondents shall not enter into any agreement to acquire any rights to Long Term Firm Transportation on the Gulfstream Pipeline, Empire State Pipeline, or MGT Pipeline.

VI.

IT IS FURTHER ORDERED that between the date Respondents sign the Consent Agreement and the date the Iroquois Assets are divested, Respondents shall not serve on any committee of Iroquois Gas Transmission System, attend any meeting of any such committee, exercise any vote as a partner in Iroquois Gas Transmission System or receive any information from Iroquois Gas Transmission System not made available to all shippers or to the public at large; provided, however, that Respondents shall vote (i) in favor of any expansion of the Iroquois Pipeline, (ii) in favor of the divestiture of the Iroquois Assets, and (iii) to create unanimity when unanimous action by all partners of a block within Iroquois Gas Transmission System is required and Respondents' vote is necessary to create unanimity; provided, further, that a representative of Respondents may observe meetings of any management committee and may receive and use nonpublic information of Iroquois Gas Transmission System solely for the purpose of effectuating the divestiture of the Iroquois Assets pursuant to this Order. Said representative shall be identified to the Commission, shall not divulge any nonpublic Iroquois Gas Transmission System information to Respondents (other than employees of Respondents whose sole responsibility is to effectuate the divestiture, and agents of Respondents specifically retained for the purpose of effectuating the divestiture), and shall acknowledge these obligations in writing to the Commission.

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VII.

IT IS FURTHER ORDERED that for a period of ten years from the date this Order becomes final, Respondents shall not, without providing advance written notification to the Commission:

- A. Acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any of the Pipeline Assets.
- B. Enter into any agreement that would result in Respondents holding any rights to Long Term Firm Transportation greater than 100,000 dekatherms per day on the Empire Pipeline or 100,000 dekatherms per day on the MGT Pipeline, except that any amount acquired to serve the peak day needs of any planned or existing power plant of Respondent El Paso, or any other Long Term Firm Transportation where Respondent El Paso is the end user of the natural gas shall not be included in calculating the 100,000 dekatherms per day limitation.

VIII.

IT IS FURTHER ORDERED that:

- A. The prior notification required by Paragraphs III.A.2. and VII.A. of this Order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not

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be made to the United States Department of Justice, and notification is required only of the acquiring party and not of any other party to the transaction. The acquiring party shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), the acquiring party shall not consummate the transaction until twenty days (or such other duration that may hereinafter be determined by amendment to Section 7A of the Clayton Act, 15 U.S.C. 18a, as the second waiting period) after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

- B. The prior notification required by Paragraph VII.B. of this Order shall be provided in writing to the Commission at least twenty days prior to consummating the transaction and shall set forth the principal terms of the agreement, including the name of the pipeline on which the Long Term Firm Transportation rights are being acquired, identity of the seller, the volume to be acquired, the length of the contract, the date of expected execution, the receipt and delivery points, and the price.

IX.

IT IS FURTHER ORDERED that Respondents shall not:

- A. Engage in any unfair or deceptive act or practice that would prevent, hinder, or delay the construction or approval of the Guardian Pipeline;

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- B. Take any affirmative action, directly or indirectly, or fail to take any action the result of which would prevent, hinder, or delay completion of the Guardian Interconnection; or
- C. Fail to publicly disclose to the Federal Energy Regulatory Commission and the Public Service Commission of Wisconsin funding by Respondents of third-party efforts to oppose the Guardian Pipeline.

X.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order (i) to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through XIV of this Order, no later than ten days after Respondents sign the Consent Agreement, and (ii) subsequent to the date the Commission accepts the Consent Agreement for public comment, to any Person who Respondents propose to acquire any of the assets to be divested pursuant to Paragraph III of this Order, prior to executing a purchase agreement with such proposed acquirer.

XI.

IT IS FURTHER ORDERED that:

- D. At any time after Respondents sign the Consent Agreement, the Commission may appoint one or more Persons to serve as Monitor Trustee to ensure that Respondents expeditiously perform their obligations as required by this Order and the Order to Maintain Assets.
- E. If a Monitor Trustee is appointed pursuant to this Paragraph XI, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee:

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1. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed in writing, including the reasons for opposing, the selection of any proposed trustee within ten business days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. The Monitor Trustee shall have the power and authority (i) to monitor Respondents' compliance with the terms of this Order and the Order to Maintain Assets and (ii) to perform the responsibilities required by Paragraph V.D. of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order and the Order to Maintain Assets and in consultation with the Commission.
3. Within ten business days after appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the approval of the Commission, confers on the Monitor Trustee all the rights and powers necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order and the Order to Maintain Assets in a manner consistent with the purposes of these orders. Respondents may require the Monitor Trustee to sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee.
4. The Monitor Trustee shall serve until Respondents have completed all obligations under this Order and the Order to Maintain Assets.
5. The Monitor Trustee shall have full and complete access to Respondents' books, records, documents, personnel,

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facilities and technical information relating to compliance with this Order and Order to Maintain Assets, or to any other relevant information, as the Monitor Trustee may reasonably request. Respondents shall cooperate with any reasonable request of the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondents' compliance with this Order and Order to Maintain Assets.

6. The Monitor Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Monitor Trustee shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
7. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties (including the duties of the Monitor Trustee's employees), including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.
8. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor Trustee in the same manner as provided in this Paragraph XI.

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9. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and Order to Maintain Assets.
10. The Monitor Trustee shall report in writing to the Commission concerning Respondents' compliance with this Order and Order to Maintain Assets every sixty days for a period of six months from the date Respondents sign the Consent Agreement and annually thereafter on the anniversary of the date this Order becomes final during the remainder of the Monitor Trustee's period of appointment, and at such other time as representatives of the Commission may request.

XII.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith any of the Pipeline Assets within the time and manner required by Paragraphs II and III of this Order, the Commission may at any time appoint one or more persons as trustee to divest such assets.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph XII shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any

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other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- C. If a trustee is appointed by the Commission or a court pursuant to this Paragraph XII, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of the Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures and may be the same person as the Monitor Trustee appointed pursuant to Paragraph XI of this Order. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten business days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to effect the divestiture for which he or she has been appointed.
 3. Within ten business days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture for which he or she has been appointed.
 4. The trustee shall have twelve months from the date the Commission approves the trust agreement described in Paragraph XII.C. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period the trustee has submitted a plan of divestiture or believes that

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divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court appointed trustee, by the court; provided, however, the Commission may extend this period only two times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the assets to be divested, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, but shall divest expeditiously at no minimum price. The divestiture shall be made only to an acquirer that receives the prior approval of the Commission, and the divestiture shall be accomplished only in a manner that receives the prior approval of the Commission; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; provided, further, that Respondents shall select such entity within five business days of receiving written notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and

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customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets.

8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties (including the duties of the trustee's employees), including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in this Paragraph XII.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestitures required by this Order.

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11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.
12. The trustee shall report in writing to the Commission every sixty days concerning the trustee's efforts to accomplish the divestiture.

XIII.

IT IS FURTHER ORDERED that no later than sixty days from the date this Order becomes final and annually thereafter, on the anniversary of the date this Order becomes final, until the Order terminates, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order; provided, however, that if, at the time this Order becomes final, Respondents are required to file one or more written reports pursuant to the Order to Maintain Assets, Respondents shall file the first report required by this Paragraph no later than sixty days from the date Respondents file their final report pursuant to the Order to Maintain Assets.

XIV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty days prior to any proposed change in the corporate Respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

XV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order, and subject

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to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to its principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order; and
- B. Upon five days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

XVI.

IT IS FURTHER ORDERED that this Order shall terminate on March 19, 2021.

By the Commission.

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent El Paso Energy Corporation of certain voting securities of Respondent The Coastal Corporation and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge Respondents with violations of 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

Respondents and Dominion Resources, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent El Paso Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal

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place of business located at 1001 Louisiana Street, Houston, Texas 77002.

2. Respondent The Coastal Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Nine Greenway Plaza, Houston, Texas 77046.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply:

- A. “El Paso” means El Paso Energy Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by El Paso, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Coastal” means The Coastal Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Coastal, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.
- D. “Decision and Order” means the Decision and Order incorporated into and made a part of the Consent Agreement.

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- E. “Empire State Pipeline” means the natural gas pipeline known as the Empire State Pipeline that originates near Niagara, New York, and extends approximately 157 miles to its interconnection with the facilities of Niagara Mohawk Power Corporation, 15 miles northwest of Syracuse, New York.
- F. “Guardian Pipeline” means the natural gas pipeline (with a planned initial capacity of approximately 750 million cubic feet per day) to be constructed at a point near Joliet, Illinois, and extending to a point near Ixonia, Wisconsin, as described in the Application of Guardian Pipeline, L.L.C. for Certificates of Public Convenience and Necessity, FERC Docket Nos. CP00-36-000, CP00-37-000, and CP00-38-000.
- G. “Guardian Interconnection” means a pipeline interconnection between MGT Pipeline and Guardian Pipeline at or near Joliet, Illinois, with capacity of at least 450 million cubic feet per day of natural gas, to be constructed on commercially reasonable terms agreed to between the MGT Acquirer and the owner or representative of the Guardian Pipeline.
- H. “Gulfstream Acquirer” means the Person that acquires the Gulfstream Assets.
- I. “Gulfstream Confidential Information” means any information relating to the Gulfstream Assets obtained by Respondent El Paso in the course of evaluating the Acquisition or obtained from any Coastal employee, agent, or representative who remains or becomes employed by Respondents, provided, however, that Gulfstream Confidential Information shall not include information already within the public domain.
- J. “Gulfstream Pipeline” means the natural gas pipeline (with a planned initial capacity of approximately 1.1 billion cubic feet per day) to be constructed at a point near Mobile Bay, Alabama, and extending across the Gulf of Mexico to a point south of Tampa, Florida, and extending on land in an easterly

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direction branching out to serve markets across central and southern Florida, as described in the Application of Gulfstream Natural Gas System, L.L.C. for Certificate of Public Convenience and Necessity, FERC Docket Nos. CP00-6-000, CP00-7-000, and CP00-8-000.

- K. “Gulfstream Purchase Agreement” means the Amended and Restated Acquisition Agreement by and among Duke Energy Gas Transmission Corporation, Williams Gas Pipeline Company, ANR Gulfstream, L.L.C. and Coastal Southern Pipeline Company, dated December 8, 2000, including all related amendments, agreements, schedules, exhibits, and appendices.
- L. “Iroquois Assets” means all of Coastal’s rights, title, and interest in the Iroquois Gas Transmission System.
- M. “Iroquois Gas Transmission System” means Iroquois Gas Transmission System, L.P., a limited partnership organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at One Corporate Drive, Suite 600, Shelton, Connecticut 06484.
- N. “Iroquois Pipeline” means the natural gas pipeline that originates near the United States/Canadian border at Waddington, New York, and extends approximately 375 miles to Long Island, New York.
- O. “MGT Pipeline” means the natural gas pipeline known as the Midwestern Gas Transmission pipeline that originates near Portland, Tennessee, and extends approximately 350 miles to a point near Joliet, Illinois.
- P. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- Q. “Pipeline Assets” means the assets to be divested pursuant to Paragraphs II and III of the Decision and Order.

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R. "Respondents" means El Paso and Coastal, individually and collectively.

II.

IT IS FURTHER ORDERED that:

- A. Between the date Respondents sign the Consent Agreement and the date the Pipeline Assets are completely divested pursuant to Paragraphs II and III of the Decision and Order, Respondents shall:
1. Maintain the Pipeline Assets in substantially the same condition (except for normal wear and tear) existing on the date Respondents sign the Consent Agreement and shall continue to take such action that is consistent with the past practices of Respondents and is taken in the ordinary course of the normal day-to-day operations of Respondents;
 2. Use their best efforts to keep available the services of the current officers, employees, and agents relating to the Pipeline Assets; and maintain the relations and goodwill with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with the Pipeline Assets; and
 3. Preserve the Pipeline Assets intact as ongoing businesses and not take any affirmative action, or fail to take any action within their control, as a result of which the viability, competitiveness, and marketability of the Pipeline Assets would be diminished.
- B. The purpose of this Order to Maintain Assets is to: (i) preserve the Pipeline Assets as viable, competitive, and ongoing businesses and (ii) prevent interim harm to competition.

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III.

IT IS FURTHER ORDERED that:

- A. In connection with the divestitures required by Paragraphs II and III of the Decision and Order, Respondents shall provide each acquirer of the Pipeline Assets an opportunity to transfer employment relationships from Respondents to the acquirer, pursuant to the following terms and conditions:
1. Respondents shall provide each acquirer an opportunity to enter into an employment contract with each individual identified in the purchase agreement between Respondents and the acquirer (hereinafter “Key Employee”);
 2. Respondents shall allow the acquirer to inspect the personnel files and other documentation relating to each Key Employee, to the extent permissible under applicable laws, no later than ten days before the date the applicable assets are divested;
 3. Respondents shall take steps to cause each Key Employee to accept an offer of employment from the acquirer (such as payment of all current and accrued benefits and pensions, to which the employees are entitled). To incentivize each Key Employee to accept such an offer, Respondents shall pay a bonus to each Key Employee who accepts an offer of employment on or prior to the date of divestiture of the applicable assets and remains employed by the applicable acquirer for a period of twelve months (eighteen months if employed by the Gulfstream Acquirer), equal to 25% of the Key Employee’s current annual salary and commissions (including any annual bonuses) as of November 1, 2000;
 4. Respondents shall not interfere with the employment by the acquirer of any Key Employee; not offer any incentive to any Key Employee to decline employment with the acquirer; and shall remove any contractual impediments with Respondents that may deter any Key Employee from

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accepting employment with the acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Key Employee to be employed by the acquirer; and

5. For a period of one year from the date this Order becomes final, Respondents shall not, without the consent of the acquirer, directly or indirectly, hire or enter into any arrangement for the services of any Key Employee employed by the acquirer, unless the Key Employee's employment has been terminated by the acquirer without the Key Employee's consent.
- B. 1. Respondents shall provide consulting services at the request of the Gulfstream Acquirer, for a fee not to exceed Respondents' costs of direct material and labor, for a period beginning from the date Respondents sign the Consent Agreement to the in-service date of the Gulfstream Pipeline, relating to any aspect of the Gulfstream Pipeline and furnished by any one or more individuals identified in the Gulfstream Purchase Agreement;
2. Unless otherwise compelled by law, Respondents shall not provide, disclose or otherwise make available any Gulfstream Confidential Information to any Person (including any of Respondents' employees, agents, or representatives) and shall not use any Gulfstream Confidential Information for any reason or purpose (except in the course of providing consulting services to the Gulfstream Acquirer), and shall enforce the terms of this Paragraph III.B.2. as to any Person and take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph III.B.2., including all actions that Respondents would take to protect their own trade secrets and confidential information; and
 3. Respondents shall not enter into any agreement to acquire any rights to Long Term Firm Transportation on the

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Gulfstream Pipeline except that nothing in this Paragraph III.B.3. shall preclude Respondents from acquiring Long Term Firm Transportation to serve the peak day needs of any planned or existing power plant of Respondent El Paso, or any other Long Term Firm Transportation where Respondent El Paso is the end user of the natural gas, and Respondent El Paso may release capacity so obtained so long as the term of the release is less than one year.

- C. In connection with any of the divestitures required by Paragraphs II.A.1., II.A.2., and III.B. of the Decision and Order, from the date Respondents sign the Consent Agreement until Respondents have divested the applicable pipeline, Respondents shall not enter into any agreement to acquire any rights to Long Term Firm Transportation on the Gulfstream Pipeline, Empire State Pipeline, or MGT Pipeline.

IV.

IT IS FURTHER ORDERED that between the date Respondents sign the Consent Agreement and the date the Iroquois Assets are divested, Respondents shall not serve on any committee of Iroquois Gas Transmission System, attend any meeting of any such committee, exercise any vote as a partner in Iroquois Gas Transmission System or receive any information from Iroquois Gas Transmission System not made available to all shippers or to the public at large; provided, however, that Respondents shall vote (i) in favor of any expansion of the Iroquois Pipeline, (ii) in favor of the divestiture of the Iroquois Assets, and (iii) to create unanimity when unanimous action by all partners of a block within Iroquois Gas Transmission System is required and Respondents' vote is necessary to create unanimity; provided, further, that a representative of Respondents may observe meetings of any management committee and may receive and use nonpublic information of Iroquois Gas Transmission System solely for the purpose of effectuating the divestiture of the Iroquois Assets pursuant to this Order. Said representative shall be identified to the Commission, shall not divulge any nonpublic Iroquois Gas Transmission System information to Respondents

Order

(other than employees of Respondents whose sole responsibility is to effectuate the divestiture, and agents of Respondents specifically retained for the purpose of effectuating the divestiture), and shall acknowledge these obligations in writing to the Commission.

V.

IT IS FURTHER ORDERED that Respondents shall not:

- A. Engage in any unfair or deceptive act or practice that would prevent, hinder, or delay the construction or approval of the Guardian Pipeline;
- B. Take any affirmative action, directly or indirectly, or fail to take any action the result of which would prevent, hinder, or delay completion of the Guardian Interconnection; or
- C. Fail to publicly disclose to the Federal Energy Regulatory Commission and the Public Service Commission of Wisconsin funding by Respondents of third-party efforts to oppose the Guardian Pipeline.

VI.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to Maintain Assets (i) to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through VIII of this Order to Maintain Assets, no later than ten days after Respondents sign the Consent Agreement, and (ii) subsequent to the date the Commission accepts the Consent Agreement for public comment, to any Person who Respondents propose to acquire any of the assets to be divested pursuant to Paragraph III of the Decision and Order, prior to executing a purchase agreement with such proposed acquirer.

Order

VII.

IT IS FURTHER ORDERED that no later than thirty (30) days from the date this Order to Maintain Assets becomes final and every thirty (30) days thereafter until this Order to Maintain Assets terminates, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the Decision and Order and this Order to Maintain Assets. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Decision and Order and this Order to Maintain Assets, including a description of all substantive contacts or negotiations relating to the divestitures required by Paragraphs II and III of the Decision and Order. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties and all reports and recommendations concerning the divestitures. The final compliance report required by this Paragraph shall include a statement that the divestitures have been accomplished in the manner approved by the Commission and shall include the dates the divestitures were accomplished.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

IX.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon

Order

written request with reasonable notice to Respondents made to its principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. Three business days after the divestiture of the assets required by Paragraphs II and III of the Decision and Order.

By the Commission.

Analysis

Analysis of the Complaint and Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 21, 2000

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment an Agreement Containing Consent Orders and a proposed Decision and Order (“proposed Order”) with El Paso Energy Corporation (“El Paso”), The Coastal Corporation (“Coastal”), and Dominion Resources, Inc. (“Dominion”). The proposed Order seeks to remedy the anticompetitive effects of El Paso’s acquisition of Coastal by requiring El Paso and Coastal (“Respondents”) to divest their interests in ten pipelines and one pipeline yet to be constructed. The divestitures are in locations where the Respondents already own additional pipelines and their ownership of the pipelines to be divested would likely injure competition. Additionally, the proposed Order seeks to remedy competition by establishing a development fund to be made available to the purchaser of the Green Canyon and Tarpon pipelines for the purpose of paying to construct pipelines into a defined area of competitive concern.

II. Description of the Parties and the Proposed Acquisition

El Paso, a Delaware corporation, is engaged in the transportation, gathering, processing, and storage of natural gas; the marketing of natural gas, power, and other energy-related commodities; power generation; the development and operation of energy infrastructure facilities worldwide; and the domestic exploration and production of natural gas and oil. El Paso owns or has interests in more than 38,000 miles of interstate and intrastate natural gas pipelines connecting the nation’s principal natural gas supply to consuming regions. In 1999, El Paso had revenues of \$10.6 billion and earnings of \$191 million, before interest and taxes.

Coastal, a Delaware corporation, is a diversified energy and petroleum products company. Coastal explores for, produces,

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gathers, processes, transports, stores, markets and sells natural gas throughout the United States. It is also engaged in refining, marketing, and distributing petroleum products; coal mining; and marketing power. Coastal owns or has interest in more than 18,000 miles of natural gas pipelines that serve the Rocky Mountain area, the Midwest, the south central United States, New York State, and other areas of the northeastern United States. In 1999, Coastal reported revenues of \$8.2 billion, and earnings of \$996.1 million before interest and taxes.

El Paso will acquire all of Coastal's common stock and the former Coastal shareholders will, as a result, own approximately 53% of El Paso's voting securities ("proposed Acquisition"). The total dollar value of the transaction (which includes about \$6 billion in debt and preferred securities) is estimated to be \$16 billion. The Respondents will have an asset base of approximately \$31.5 billion.

III. The Complaint

The Complaint alleges that the relevant line of commerce (*i.e.*, the product market) in which to analyze the proposed Acquisition is the transportation of natural gas via pipeline. For many end users, there are no substitutes for natural gas, and there is no practical alternative to pipeline transportation. The relevant market can be further delineated by focusing on long term firm transportation, which is a type of natural gas transportation service requiring the pipeline company to guarantee for one year or more that it will transport a specified daily quantity of natural gas from one destination to another, without interruption. Many natural gas users cannot bear the risk of interruption and, in areas where pipeline capacity is constrained periodically, these users must purchase long term firm transportation. For these customers, other pipeline services and periodic resales of transportation by holders of long term transportation rights are not reasonably interchangeable. Another relevant market in which to analyze the effects of the proposed Acquisition is the provision of tailored services. Tailored services allow users of natural gas to balance

Analysis

their changes in natural gas demand with their supply of natural gas and transportation. Tailored services include limited notice and no notice service, and are typically sold in conjunction with natural gas storage services.

The Complaint further alleges that the proposed Acquisition, if consummated, will eliminate actual and direct competition between the two companies in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, in the following 20 sections of the country (*i.e.*, the geographic markets): (a) Central Florida, (b) metropolitan areas of Buffalo, Rochester, Syracuse, and Albany, New York; (c) the metropolitan area of Milwaukee, Wisconsin; (d) the metropolitan area of Evansville, Indiana; and (e) 13 areas in the Gulf of Mexico. The Complaint alleges that each of these markets is highly concentrated, and the acquisition would substantially increase that concentration. In each of the relevant markets, pipelines owned by El Paso and Coastal are two of the most significant competitors. In some instances, El Paso and Coastal are the only two options available to customers, and in other instances, they represent two of three options. The merger not only eliminates existing competition between El Paso and Coastal pipelines but also threatens to forestall potential new competition as well. After the proposed acquisition, with the elimination of competition between El Paso and Coastal, it is likely that prices of transportation will increase and output of transportation will be reduced in the relevant markets, thereby increasing the cost of electricity and natural gas service.

The Complaint further alleges that new entry into the relevant geographic markets would not be likely, timely, or sufficient to prevent or counteract these anticompetitive effects and to prevent the Respondents from maintaining a price increase above pre-acquisition levels. There are substantial barriers to entering these markets, as building additional pipelines to natural gas production areas, to natural gas consuming areas, to natural gas storage fields, or outside the geographic market is expensive and would take more than two years. Major pipeline projects require approval

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from the Federal Energy Regulatory Commission, which is likely to take three or four years. In addition, it requires considerable time for a new entrant to secure rights of way, overcome landowner and environmental hurdles, secure sufficient advance commitments from customers, and obtain regulatory approvals in the face of opposition from competition.

IV. Terms of the Proposed Order

The proposed Order is designed to remedy the alleged anticompetitive effects of the proposed Acquisition. Under the terms of the proposed Order, the Respondents must, within twenty days from the date upon which the Commission places the proposed Order on the public record, divest their interests in: Gulfstream Natural Gas System to Duke Energy and Williams Gas Pipeline; the Empire pipeline to Westcoast Energy; the Green Canyon and Tarpon pipelines to Williams Field Services; the Manta Ray, Nautilus, and Nemo pipelines to Enterprise Products; and the Stingray pipeline to Shell Gas Transmission and Enterprise Products. The Respondents must also divest their interests in the Midwestern Gas Transmission pipeline (“MGT”) within 120 days of the date upon which the Commission places the proposed Order on the public record, UTOS by April 1, 2001, and the Iroquois pipeline within 90 days of the date upon which the Commission places the proposed Order on the public record.

The Commission is satisfied that the acquirers identified in the proposed Order are well-qualified acquirers and will compete vigorously with the Respondents. The Commission will evaluate additional proposed acquirers for assets to be divested under the proposed Order to make certain that such acquirers will not present competitive problems.

In connection with the divestiture of their interests in the Empire, MGT, Stingray, and UTOS pipelines, the proposed Order requires the Respondents to provide transitional services to the purchaser of these pipelines, at a reasonable fee, sufficient to operate the assets. The Respondents must provide these services

Analysis

for a period of up to nine months. Also, in connection with the divestiture of these assets, the Order requires the Respondents to give the acquirers an opportunity to transfer applicable employment relationships from either Coastal or El Paso to each acquirer. These provisions of the proposed Order help assure that there will be a successful and reasonably short transition of the pipelines to the new owners.

The proposed Order also contains additional provisions with respect to the divestiture of Gulfstream Natural Gas System. Gulfstream Natural Gas System is beginning to construct a 140-mile natural gas pipeline that will originate near Mobile Bay, Alabama; extend across the Gulf of Mexico to the west coast of Florida near Tampa; and extend inland to various destinations in the Florida peninsula. To ensure that the pipeline meets its scheduled in-service date of June 1, 2002, the proposed Order requires Respondents to provide consulting services, at a reasonable fee, to the buyer of Gulfstream until June 2002. The proposed Order prohibits the Respondents from acquiring any long term firm capacity on Gulfstream (except for their own end use) and from disclosing or making available any Gulfstream confidential information to any person. The Respondents are further prohibited from using any Gulfstream confidential information, except to provide consulting services to the buyer of Gulfstream.

In connection with the divestiture of the MGT pipeline, the proposed Order requires the Respondents to include and enforce a provision in the MGT purchase and sale agreement that requires the MGT acquirer to connect MGT to the Guardian pipeline ("Guardian Interconnection"). The Respondents are prohibited by the proposed Order from engaging in any action, or failing to take any action, the result of which would prevent, hinder, or delay completion of the Guardian Interconnection. Furthermore, the proposed Order prohibits the Respondents from engaging in any unfair or deceptive practice that would prevent, hinder, or delay construction of the Guardian pipeline; and requires Respondents to notify publicly the Federal Energy Regulatory Commission and

Analysis

the Public Service Commission of Wisconsin if Respondents fund any third-party effort to oppose the Guardian pipeline. These provisions are designed to ensure the effectiveness of the Commission's remedy. With regard to the MGT divestiture, the Respondents must divest MGT to a buyer approved by the Commission within 120 days from the date upon which the Commission places the proposed Order on the public record.

In connection with the divestiture of its interests in the Iroquois pipeline, the proposed Order prohibits Respondents from divesting more than 8.72% of their partnership interest in Iroquois pipeline to Dominion Resources. This limitation prevents Dominion Resources from acquiring additional control or influence over the Iroquois pipeline that could be used to thwart competition. The proposed Order also prohibits Respondents from serving on any committee of the Iroquois pipeline, attending any meeting of any such committee, or receiving any information from the Iroquois pipeline not made available to all shippers or to the public at large. Furthermore, until the Respondents are removed from the Iroquois Management Committee, the proposed Order requires that the Respondents' vote be cast in favor of expansion, if such a vote should arise. The Respondents are also deemed, by the proposed Order, to vote to create unanimity when unanimous action is required within a voting bloc in order to cast that bloc's vote. These provisions prevent the Respondents from gaining access to competitively sensitive information that could be used to prevent competition between Respondents and the Iroquois pipeline, and keep the Respondents from limiting the ability of the Iroquois pipeline to expand in the Albany market.

The proposed Order also requires that the Respondents to create a fund to encourage expansions of the Tarpon and Green Canyon pipelines by providing \$40 million, within ten days from the date of the divestiture of the Tarpon and Green Canyon pipelines, to be deposited in an interest-bearing account. The Tarpon and Green Canyon pipelines will be permitted to use the fund to pay the direct costs of constructing a natural gas pipeline or related facility that originates at any pipeline owned by the

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Green Canyon and Tarpon acquirer, and which extends to a location within a specified area. The fund will ensure that competition is maintained by allowing the Tarpon and Green Canyon acquirer to extend its pipelines into an area of competitive concern and to compete against the Respondents in that area. Without this fund competition would be reduced and the Tarpon and Green Canyon acquirer would be at a competitive disadvantage due to the longer distance between the acquiring firm's pipelines and the areas of concern. Any money remaining in the fund after twenty years will be paid to Respondent El Paso.

The proposed Order further requires that the Respondents assist the acquirers of the Gulfstream, Empire, Iroquois, MGT, Green Canyon, Tarpon, Nautilus, Manta Ray, Nemo, Stingray, and UTOS pipelines in obtaining any approval, consent, ratification, waiver, or other authorization (including governmental) that is or will become necessary to complete the divestitures required by the proposed Order.

Additionally, for a period of 10 years after the proposed Order becomes final, the Respondents must provide written notice to the Commission prior to acquiring any interest in any of the assets which are required to be divested by the proposed Order. The proposed Order also prohibits the Respondents from entering into any agreement to acquire any rights to long term firm transportation on the Gulfstream, Empire, or MGT pipelines from the date Respondents sign the Agreement Containing Consent Orders until Respondents have divested the applicable pipeline. After that date, and for a period of ten years, Respondents must provide advance written notification before entering into an agreement to purchase long term firm transportation greater than 100,000 dekatherms per day on either the Empire or MGT pipeline. There is an exception to these restrictions where the purchase of the transportation is for the Respondents' own end use. Furthermore, the Respondents must provide the Commission with a report of compliance with the proposed Order within 60 days after the proposed Order becomes final, annually thereafter

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until the order terminates, and at other times as the Commission may require.

The parties will also be subject to an “Order to Maintain Assets,” to be issued by the Commission. Under the Order to Maintain Assets, between the date the Respondents sign the Agreement Containing Consent Orders and the date of divestiture of the applicable asset, the Respondents must maintain the assets to be divested in substantially the same condition as existing on the date the Respondents signed the Agreement Containing Consent Orders; use their best efforts to keep available the services of current personnel relating to the assets to be divested and to maintain the relations and good will of those entities which have business relationships with the assets to be divested; and preserve the assets to be divested intact as an ongoing business. Under the Order to Maintain Assets, the Respondents must also provide the acquirers of the assets to be divested an opportunity to transfer employment relationships from the Respondents to the acquirers. In addition, the Order to Maintain Assets imposes several obligations on the Respondents which are also imposed by the proposed Order and which are mentioned earlier in this notice.

Further, Dominion Resources, which already owns 16% of the Iroquois pipeline, has been made a party to the proposed Order for the purposes of requiring it to provide the Commission with advance written notification before increasing its interest in the Iroquois pipeline.

Finally, under the terms of the proposed Order, in the event that El Paso does not divest the assets required to be divested under the terms and time constraints of the proposed Order, the Commission may appoint a trustee to divest those assets, expeditiously, and at no minimum price. The proposed Order also authorizes the Commission to appoint a Monitor Trustee to oversee the Development Fund by ensuring that those funds are used in a manner consistent with the terms of the proposed Order.

V. Opportunity for Public Comment

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The proposed Order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Order and the comments received and will decide whether it should withdraw from the proposed Order or make it final. By accepting the proposed Order subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Order, including the proposed divestitures, to aid the Commission in its determination of whether to make the proposed Order final. This analysis is not intended to constitute an official interpretation of the proposed Order, nor is it intended to modify the terms of the proposed Order in any way.

Complaint

IN THE MATTER OF**RHI AG****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT**

*Docket C-4005; File No. 9910281
Complaint, March 21, 2001--Decision, March 21, 2001*

This consent order addresses the acquisition by Respondent RHI AG of Global Industrial Technologies, Inc. The order, among other things, requires the respondent to divest two North American plants that manufacture refractories -- brick- and cement-like products made from certain natural minerals and materials that are used to line and protect furnaces in industries that require heating or containing solids, liquids, or gases at high temperatures -- and certain assets relating to refractory products currently produced at a third North American manufacturing plant to Resco Products, Inc., another refractories producer. The order also requires the respondent to enter into a one year high purity magnesite supply contract -- renewable for two additional one year terms at Resco's option and with most favored nation pricing -- to give Resco time to assimilate the relevant products into its own line of refractory products, to perfect the production processes, and to test other sources of high purity magnesite without jeopardizing customer contracts in the meantime.

Participants

For the Commission: *Gregg H. Vicinanza, Kristin Malmberg, John R. Hoagland, Morris A. Bloom, Arthur M. Strong, Daniel P. Ducore, Fred Martin, and Daniel O'Brien.*

For the Respondent: *Tom D. Smith and Peter Laun, Jones, Day, Reavis & Pogue.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that RHI AG has agreed to acquire Global Industrial Technologies, Inc., both corporations subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15

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U.S.C. § 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent RHI AG (“RHI”) is a corporation organized, existing and doing business under and by virtue of the laws of Austria with its principal executive offices located at Mommsengasse 35, A-1040 Vienna, Austria.
2. Respondent is engaged in, among other things, the research, development, manufacture, sale, and distribution of refractory bricks used in structures and equipment related to the production of steel.
3. For purposes of this proceeding, Respondent is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

4. Global Industrial Technologies, Inc. (“Global”) is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its office and principal place of business located at 2121 San Jacinto Street, Suite 2500 Dallas, Texas, 75201.
5. Global is engaged in, among other things, the research, development, manufacture, sale, and distribution of refractory bricks used in structures and equipment related to the production of steel.
6. For purposes of this proceeding, Global is, and at all times relevant herein has been, engaged in commerce as “commerce” is

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defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE ACQUISITION

7. Pursuant to an Agreement and Plan of Merger dated July 12, 1999, RHI will acquire, by a cash tender offer, all of the outstanding shares of Global at a price of \$13 per share, valued at approximately \$300 million.

IV. REFRACTORY BRICKS FOR STEEL PRODUCTION

8. Refractory bricks for steel production include, among other things, basic refractory bricks and high-alumina refractory bricks. Basic refractory bricks for steel production include magnesia-carbon (“mag-carbon”) refractory bricks for basic oxygen furnaces (“BOFs”), mag-carbon refractory bricks for electric arc furnaces (“EAFs”), mag-carbon refractory bricks for BOF steel ladles, and magnesia-chrome (“mag-chrome”) refractory bricks for steel degassers. High-alumina refractory bricks used in steel production include high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars.

9. Mag-carbon refractory bricks for BOFs are non-metallic insulating bricks and shapes composed predominantly of magnesia and containing at least 8% carbon. Mag-carbon refractory bricks for BOFs are designed and manufactured to withstand the extreme temperature and mechanical and chemical pressures that exist in BOFs during the steel-making process. Specifically, in addition to its heat-resistant qualities, magnesia is resistant to slag—a non-acidic (“basic”) substance formed by chemical action during the high-temperature steel-making process—and has low vulnerability to chemical attack by iron oxide and alkalis, all by-products of the steel-making process. Carbon prevents slag from entering the pores of the brick, further improving the ability of the mag-carbon refractory brick to

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withstand chemical attack from the slag. Mag-carbon bricks for BOFs are manufactured into specific sizes and shapes unique to BOFs, further strengthening the refractory and improving its ability to withstand heat as well as chemical and mechanical attack, and ultimately enabling the steel-making process to take place by protecting the BOF from these extreme pressures.

10. Mag-carbon refractory bricks for EAFs are non-metallic insulating bricks and shapes composed predominantly of magnesia and containing at least 8% carbon. Mag-carbon refractory bricks for EAFs are designed and manufactured to withstand the extreme temperature and mechanical and chemical pressures that exist in EAFs during the steel-making process, and possess the same chemical properties as mag-carbon bricks for BOFs that make them especially suited to resist the slag and other by-products of the steel-making process. Mag-carbon bricks for EAFs are manufactured into specific sizes and shapes unique to EAFs, further strengthening the refractory and improving its ability to withstand heat as well as chemical and mechanical attack, and ultimately enabling the steel-making process to take place by protecting the EAF from these extreme pressures.

11. BOF steel ladles are used to collect and transport molten steel from the BOF to the area of the steel plant where the molten steel is poured into molds. Slag is less dense than steel, and collects in a BOF steel ladle above the molten steel (the “slag line”). For the same reasons mag-carbon bricks are used to line BOFs and EAFs, mag-carbon bricks are used to line the area of a BOF steel ladle above the slag line in order to protect the ladle itself from the corrosiveness of the slag. Mag-carbon refractory bricks for BOF steel ladles are manufactured into specific sizes and shapes unique to BOF steel ladles.

12. Steel degassers are refractory-lined chambers used to rid molten steel of oxygen and hydrogen that is absorbed during the steel-making process. The steel degassing process causes violent turbulence in the chamber. This turbulence requires the utilization of refractories with high resistance to mechanical wear, and,

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because of the presence of slag, high resistance to the corrosiveness of the slag. Mag-chrome refractory bricks for steel degassers are specifically designed to withstand the pressures that exist within the degasser chamber. Mag-chrome refractory bricks for steel degassers are manufactured into specific sizes and shapes unique to steel degassers.

13. High-alumina refractory bricks are designed to protect the BOF steel ladle below the slag line from the corrosive forces of molten steel, which is chemically acidic in nature. High-alumina refractory bricks for BOF steel ladles are manufactured into specific sizes and shapes unique to BOF steel ladles.

14. Torpedo cars are used to transport molten iron from a blast furnace to a BOF to further the steel-making process. Molten iron is chemically acidic in nature, with little basic slag. High-alumina refractory bricks are designed to protect the torpedo cars from the corrosive forces of molten iron. High-alumina refractory bricks for torpedo cars are manufactured into specific sizes and shapes unique to torpedo cars.

V. THE RELEVANT MARKETS

15. One relevant line of commerce within which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of mag-carbon refractory bricks for BOFs. There are no economic substitutes for mag-carbon bricks for BOFs to which customers would switch in response to a small but significant price increase in mag-carbon bricks for BOFs.

16. Another relevant line of commerce within which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of mag-carbon bricks for EAFs. There are no economic substitutes for mag-carbon bricks for EAFs to which customers would switch in response to a small but significant price increase in mag-carbon bricks for EAFs.

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17. Another relevant line of commerce within which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of mag-carbon refractory bricks for BOF steel ladles. There are no economic substitutes for mag-carbon bricks for BOF steel ladles to which customers would switch in response to a small but significant price increase in mag-carbon bricks for BOF steel ladles.

18. Another relevant line of commerce within which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of mag-chrome refractory bricks for steel degassers. There are no economic substitutes for mag-chrome refractory bricks for steel degassers to which customers would switch in response to a small but significant price increase in mag-chrome refractory bricks for steel degassers.

19. Another relevant line of commerce within which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of high-alumina refractory bricks for BOF steel ladles. There are no economic substitutes for high-alumina refractory bricks for BOF steel ladles to which customers would switch in response to a small but significant price increase in high-alumina refractory bricks for BOF steel ladles.

20. Another relevant line of commerce within which to analyze the likely effects of the proposed Acquisition is the research, development, manufacture and sale of high-alumina refractory bricks for torpedo cars. There are no economic substitutes for high-alumina refractory bricks for torpedo cars to which customers would switch in response to a small but significant price increase in high-alumina refractory bricks for torpedo cars.

21. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the proposed Acquisition

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on competition in mag-carbon refractory bricks for BOFs, mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for BOF steel ladles, mag-chrome refractory bricks for steel degassers, high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars, is North America. These kinds of refractory bricks produced outside North America are not economic substitutes because of customers' need for local sales and technical service support, because the delays and uncertainties inherent in long-distance shipping are unacceptable to customers in an industry that requires just-in-time delivery, because of the high shipping costs associated with a relatively low-value, heavy product, and because of the storage and warehousing costs that would have to be borne by customers of product purchased from foreign sources.

VI. MARKET STRUCTURE

22. The North American market for mag-carbon refractory bricks for BOFs is highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or other measures of concentration. RHI and Global are the two largest sellers of mag-carbon refractory bricks for BOFs, controlling approximately 95 percent of North American sales. The proposed Acquisition thus represents a virtual merger to monopoly in mag-carbon bricks for BOFs.

23. The North American market for mag-carbon refractory bricks for EAFs is highly concentrated, whether measured by the HHI or other measures of concentration. RHI and Global are the two largest sellers of mag-carbon refractory bricks for EAFs, controlling approximately 65 percent of North American sales. The proposed Acquisition would increase concentration as measured by the HHI by 2,000 points to over 5,100 points.

24. The North American market for mag-carbon refractory bricks for BOF steel ladles is highly concentrated, whether measured by the HHI or other measures of concentration. RHI and Global are two of the largest sellers of mag-carbon refractory

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bricks for BOF steel ladles, controlling approximately 40 percent of North American sales. The proposed Acquisition would increase concentration as measured by the HHI by 750 points to more than 2,500 points.

25. The North American market for mag-chrome refractory bricks for steel degassers is highly concentrated, whether measured by the HHI or other measures of concentration. RHI and Global are two of the largest sellers of mag-chrome refractory bricks for steel degassers, controlling approximately 46 percent of North American sales. The proposed Acquisition would increase concentration as measured by the HHI by 896 points to more than 3,900 points.

26. The North American market for high-alumina refractory bricks for BOF steel ladles is highly concentrated, whether measured by the HHI or other measures of concentration. RHI and Global are the two largest sellers of high-alumina refractory bricks for steel ladles, controlling approximately 70 percent of North American sales. The proposed Acquisition would increase concentration as measured by the HHI by 2,250 points to more than 5,200 points.

27. The North American market for high-alumina refractory bricks for torpedo cars is highly concentrated, whether measured by the HHI or other measures of concentration. RHI and Global are the two largest sellers of high-alumina refractory bricks for torpedo cars, controlling approximately 52 percent of North American sales. The proposed Acquisition would increase concentration as measured by the HHI by 960 points to more than 3,600 points.

28. Entry into the relevant markets requires significant sunk costs and would not be timely, likely and sufficient to deter or offset reductions in competition resulting from the proposed Acquisition. Development of the specialized refractories described above, including determination of the proper chemical composition, as well as manufacturing techniques to ensure,

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among other things, the proper porosity, is time consuming and costly and requires an extremely high level of expertise. Because there is a trend in the steel industry to customers' seeking single sources of supply for their refractory needs, a new entrant would need to have the expertise and financial capability to be able to develop and supply a full line of refractories for BOFs, EAFs and ladles. Furthermore, because the refractory bricks at issue are used to control processes and substances at extremely high temperatures, the failure of the products can be catastrophic, sometimes causing the loss of human life. Consequently, customers are extremely resistant to change, and any new entrant would have to undergo months of laboratory testing, followed by field testing that may take years in the case of some products, prior to acceptance of product for use in BOF and EAF steel-making applications.

VII. EFFECTS OF THE ACQUISITION

29. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. It will eliminate actual, direct and substantial competition between RHI and Global in the relevant markets for mag-carbon refractory bricks for BOFs, mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for BOF steel ladles, mag-chrome refractory bricks for steel degassers, high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars;
- b. It will substantially increase the level of concentration in the relevant markets for mag-carbon refractory bricks for BOFs, mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for BOF steel ladles, mag-chrome refractory bricks for steel degassers, high-

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- alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars;
- c. It will increase the likelihood that the firm created by the merger of RHI and Global will unilaterally exercise market power in the relevant markets for mag-carbon refractory bricks for BOFs, mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for BOF steel ladles, mag-chrome refractory bricks for steel degassers, high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars;
 - d. It will increase the likelihood that purchasers of mag-carbon refractory bricks for BOFs, mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for BOF steel ladles, mag-chrome refractory bricks for steel degassers, high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars, in the relevant geographic market, will be forced to pay higher prices;
 - e. It will increase the likelihood that technical and sales services provided to purchasers of mag-carbon refractory bricks for BOFs, mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for BOF steel ladles, mag-chrome refractory bricks for steel degassers, high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars, in the relevant geographic market, will be reduced;
 - f. It will increase the likelihood that innovation in the development of mag-carbon refractory bricks for BOFs, mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for BOF steel ladles, mag-chrome refractory bricks for steel degassers, high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars will be reduced;

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- g. It will significantly enhance the likelihood of coordinated interaction in the relevant geographic market among the competitors in the production and sale of mag-carbon refractory bricks for EAFs, mag-carbon refractory bricks for steel ladles, mag-chrome refractory bricks for steel degassers, high-alumina refractory bricks for BOF steel ladles, and high-alumina refractory bricks for torpedo cars; and
- h. It will increase barriers to entry in the relevant markets.

30. All of the above increase the likelihood that the Acquisition would result in increased prices or reduced services in the near future and in the long term in the relevant markets.

VIII. VIOLATIONS CHARGED

31. The acquisition agreement between RHI and Global described in paragraph 7 violates Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

32. The proposed Acquisition of Global by RHI, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

33. The proposed Acquisition of Global by RHI, if consummated, would allow RHI to monopolize the United States market for mag-carbon bricks for BOFs in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-first day of March, 2001, issues its Complaint against said Respondent.

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The Federal Trade Commission having initiated an investigation of the proposed acquisition by RHI AG of 100 percent of the voting securities of Global Industrial Technologies, Inc., and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Agreement Containing Consent Order is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts and that a Complaint should issue stating its charges in that respect, and having accepted the executed Agreement Containing Consent Order and placed such Agreement Containing Consent Order on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, and makes the following jurisdictional findings and issues the following Order:

1. Respondent RHI AG is a corporation organized, existing and doing business under and by virtue of the laws of Austria,

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with its office and principal place of business at Mommsengasse 35, A-1040 Vienna, Austria.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "RHI" means RHI AG, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by RHI (including, but not limited to, North American Refractories Company), and the respective directors, officers, employees, agents, and representatives, successors, and assigns of each.
- B. "Global" means Global Industrial Technologies, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business at 2121 San Jacinto Street, Suite 2500, Dallas, Texas 75201.
- C. "Respondent" means RHI.
- D. "Commission" means the Federal Trade Commission.
- E. "Acquisition" means the acquisition by RHI, described in the Agreement and Plan of Merger Among RHI AG, Heat Acquisition Corporation, and Global Industrial Technologies, Inc., dated July 12, 1999, pursuant to which Respondent agreed to acquire one hundred (100) percent of the shares of common stock of Global.

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- F. “Basic Refractory Bricks For Steel Production” means magnesia-carbon bricks for basic oxygen furnaces, magnesia-carbon bricks for electric arc furnaces, magnesia-carbon bricks for steel ladles, and magnesia-chrome bricks for steel degassers, and includes, but is not limited to:
1. Those products listed on pages one through four of a document entitled, “UNBURNED BASIC (Hammond),” attached as part of Schedule 1.2(a)(vii) of the Divestiture Agreement; and,
 2. Those products listed on pages one through three of a document entitled, “BURNED BASIC (MgO) & MagChrome (Marelan),” attached as part of Schedule 1.2(a)(vii) of the Divestiture Agreement.
- G. “High Alumina Refractory Bricks For Steel Production” means high alumina bricks for steel ladles and high alumina bricks for torpedo cars, and includes, but is not limited to, those products listed on page 1 of a document entitled, “BURNED BAUXITE (Farber)” attached as part of Schedule 1.2(a)(vii) of the Divestiture Agreement.
- H. “Divested Products” means Basic Refractory Bricks For Steel Production and High Alumina Refractory Bricks For Steel Production.
- I. “Divested Assets” means:
1. all of Respondent’s rights, title, and interest acquired from Global pursuant to the Acquisition, in all assets and businesses relating to the research, development, manufacture, sale, and distribution of Basic Refractory Bricks For Steel Production in North America, including, without limitation, the following:
 - a. all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property located at or relating to a

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- facility owned and operated by Global at 5501 Kennedy Avenue, Hammond, IN 46323-1168;
- b. all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property located at or relating to a facility owned and operated by Global at 78, route 148, Grenville, Quebec JOV1JO, Canada;
 - c. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data, wherever located;
 - d. all United States and Canadian intellectual property rights, including but not limited to patents, patent rights, patent applications, formulas, mixes, molds, inventions, copyrights, trade secrets, know-how, trademarks, and trade names;
 - e. raw material and finished product inventories and goods in process, wherever located;
 - f. all right, title and interest in and to owned or leased real property, together with appurtenances, licenses, and permits, wherever located;
 - g. all right, title, interest, and contractual rights in and to sources of raw material for Basic Refractory Bricks For Steel Production, wherever located;
 - h. all right, title, and interest in and to the contracts (together with associated bids) entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, wherever located;
 - i. all rights under warranties and guarantees, express or implied, wherever located;

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- j. all separately maintained, as well as relevant portions of not separately maintained, books, records and files, wherever located;
 - k. all federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located; and
 - l. all items of prepaid expense; and,
2. all of Respondent's rights, title, and interest in all assets and businesses related to the research, development, manufacture, distribution, and sale of High Alumina Refractory Bricks For Steel Production in North America, including, without limitation, the following:
- a. all plant facilities, machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property located at or relating to a facility owned and operated by Respondent at 300 Locust St., Farber, Missouri 63345;
 - b. all customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data, wherever located;
 - c. all United States and Canadian intellectual property rights, including but not limited to patents, patent rights, patent applications, formulas, mixes, molds, inventions, copyrights, trade secrets, know-how, trademarks, and trade names;
 - d. raw material and finished product inventories and goods in process, wherever located;
 - e. all right, title and interest in and to owned or leased real property, together with appurtenances, licenses, and permits, wherever located;

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- f. all right, title, interest, and contractual rights in and to sources of raw material for High Alumina Refractory Bricks For Steel Production, wherever located;
- g. all right, title, and interest in and to the contracts (together with associated bids) entered into in the ordinary course of business with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, wherever located;
- h. all rights under warranties and guarantees, express or implied, wherever located;
- i. all separately maintained, as well as relevant portions of not separately maintained, books, records and files, wherever located;
- j. all federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located; and
- k. all items of prepaid expense, wherever located.

Provided, however, that if Respondent divests to Resco pursuant to Paragraph II.A. of this Order, Divested Assets are limited to the assets conveyed by the Divestiture Agreement, and Divested Assets do not include the following assets:

- (1) the fixtures, structures, and real property owned and operated by Respondent in Farber, Missouri (“RHI Farber Plant”);
- (2) the assets and contracts listed on Schedules 1.2(b)(ix) and 1.3(b)(iv) to the Asset Purchase Agreement (dated November 11, 1999) among North American Refractories Company and Resco Products, Inc.;
- (3) any trademark rights for any brand to the left of which the word “no” has been typed in the column bearing the heading, “TM Rights*,” for:
 - (i) those brands listed on pages one through four of a document entitled, “UNBURNED BASIC (Hammond),” attached as part of Schedule 1.2(a)(vii) of the Divestiture Agreement; and,

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- (ii) those brands listed on pages one through three of a document entitled, “BURNED BASIC (MgO) & MagChrome (Marelan),” attached as part of Schedule 1.2(a)(vii) of the Divestiture Agreement;
- (4) any trademark rights for any brand to the left of which the word “no” has been typed in the column bearing the heading, “TM Rights*,” for those products listed on page 1 of a document entitled, “BURNED BAUXITE (Farber)” in Schedule 1.2(a)(vii) of the Divestiture Agreement;
- (5) the assets not transferred to Resco pursuant to Section 1.2(b) of the Divestiture Agreement, as and to the extent modified or amended by the Settlement Agreement;
- (6) the licenses described in Confidential Attachment A to this Consent Order;
- (7) fixtures, equipment, and raw materials used for the tar impregnation of Basic Refractory Brick For Steel Production;
- (8) any real property, buildings, fixtures, equipment, inventory, documents, or other tangible assets located outside of the United States and Canada in which any of the following RHI direct or indirect subsidiaries (the “Mexican Subsidiaries”) has a legal or equitable interest: Refmex, S. de R.L. de C.V. Refractorios Green, S. de R.L. de C.V. Indresco de Mexico, S.A. de C.V. Harbison-Walker Refractories, S.A. de C.V. Intool de Mexico, S.A. de C.V. Corrosion Technologies de Mexico, S.A. de C.V. A. P. Green de Mexico, S.A. de C.V. Veitsch-Radex-Didier Mexico S.A. de C.V. ;
- (9) all patents, trade secrets, and other intellectual property in which any of the Mexican Subsidiaries has a legal or equitable interest, except for patents, trade secrets, and other intellectual property that such Mexican Subsidiaries acquired from Global that is used solely for the research, development, manufacture or sale of Basic Refractory Bricks For Steel Production; and,
- (10) documents and records not required to be transferred to Resco pursuant to the terms of Paragraph 8 of the Settlement Agreement.

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- J. “Resco” means Resco Products, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business at Conshohocken Road, PO Box 108, Norristown, Pennsylvania 19404.
- K. “Acquirer” means either Resco, if Respondent divests pursuant to Paragraph II.A. of this Order, or such other entity to whom Respondent divests the Divested Assets pursuant to any other provision of this Order.
- L. “Divestiture Agreement” means each and all of the following:
1. Asset Purchase Agreement (dated November 11, 1999) among North American Refractories Company and Resco Products, Inc., as amended by Amendment No. 1 to Asset Purchase Agreement (November 19, 1999), Amendment No. 2 to Asset Purchase Agreement (November 30, 1999), Amendment No. 3 to Asset Purchase Agreement (December 3, 1999), Amendment No. 4 to Asset Purchase Agreement (December 10, 1999), Amendment No. 5 to Asset Purchase Agreement (December 10, 1999), and Amendment No. 6 to Asset Purchase Agreement (December 15, 1999);
 2. Transition Services Agreement between North American Refractories Company and Resco Products, Inc. (March 3, 2000);
 3. Magnesite Supply Agreement among North American Refractories Company and Resco Products, Inc., ((March 3, 2000); and,
 4. Settlement Agreement, including, but not limited to, the provisions of the Settlement Agreement that modify the Divestiture Agreement.
- M. “Settlement Agreement” means the Settlement Agreement between North American Refractories Company and Resco Products, Inc. (October 27, 2000).

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N. "New Divestiture Agreement" means all agreements for the sale of the Divested Assets other than the Divestiture Agreement, and includes any divestiture agreement entered into by a trustee pursuant to Paragraph III of this Order.

II.

IT IS FURTHER ORDERED that:

- A. Respondent shall divest to Resco, absolutely and in good faith, at no minimum price, the Divested Assets pursuant to the Divestiture Agreement on or before March 3, 2000.
- B. *Provided, however,* that if the Commission determines to make the Order final, but notifies the Respondent either that Resco is not an acceptable acquirer, or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondent shall rescind the Divestiture Agreement and rescind any divestiture to Resco, and Respondent shall divest the Divested Assets, absolutely and in good faith, and at no minimum price, pursuant to a New Divestiture Agreement within ninety (90) days of the date the Order becomes final to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- C. Any New Divestiture Agreement shall require Respondent to:
 1. Indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses arising from the performance of any service or the manufacture or sale of any raw material or product supplied to the Acquirer by Respondent pursuant to the New Divestiture Agreement; *provided, however,* that the obligations of this Paragraph II.C.1. may be contingent upon the Acquirer's giving Respondent prompt, adequate notice of such claim, cooperating fully in the defense of such claim, and permitting Respondent

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to assume the sole control of all phases of the defense and/or settlement of such claim, including the selection of counsel; *and provided further* that the obligations of this Paragraph II.C.1. need not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondent to the Acquirer;

2. Make available to the Acquirer, upon reasonable notice and request by the Acquirer, for a period not to exceed eighteen (18) months from the date Respondent first provides assistance, personnel, or training to the Acquirer pursuant to the New Divestiture Agreement, all records kept in the normal course of business that relate to the Cost of providing such assistance, personnel, or training to the Acquirer.

D. If Respondent or a trustee divests pursuant to Paragraph II.B. or Paragraph IV. of this Order, Respondent shall, at the option of the Acquirer, enter into a contract:

1. To supply and deliver to the Acquirer in a timely manner and under reasonable terms and conditions, any raw materials reasonably necessary for the Acquirer to use the Divested Assets in the same businesses in which the Divested Assets are engaged at the time of the Acquisition;
2. To assign or otherwise convey to the Acquirer all of Respondent's right, title, and interest in any contract with any person relating to research, development, manufacture, marketing, sale, brokerage, or distribution of the Divested Products; *provided that* if such assignment or conveyance may not be made or be made effective without the consent of any person, Respondent shall use its best efforts to obtain all necessary consents from such person and, failing such consent, shall enter

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into an agreement with the Acquirer to provide to the Acquirer all the benefits flowing to Respondent pursuant to such contract; and,

3. To provide to the Acquirer, at cost, for a period not to exceed six (6) months from the date of consummation of the New Divestiture Agreement, such assistance, personnel and training as requested by the Acquirer (including its agents and contractors) relating to:
 - a. the research, development, manufacture, sale, and distribution of the Divested Products; and,
 - b. any Environmental Protection Agency applications, registrations, procedures, proceedings, or approvals related to the research, manufacture, sale and distribution of Divested Products;

Provided, however, that with respect to the assets that are to be divested and the contracts that are to be entered into pursuant to this Paragraph II.D. at the option of the Acquirer or Acquirers, Respondent need not divest such assets or enter into such contracts only if the Acquirer or Acquirers choose not to acquire such assets or enter such contracts and the Commission approves the divestiture without such assets or contracts.

- E. Respondent shall not use any patents, trade secrets, or other intellectual property licensed from Resco pursuant to the Settlement Agreement (including but not limited to the patent license agreement attached as Exhibit C to the Settlement Agreement) for the research, development, manufacture, distribution, or sale of Divested Products in North America.
- F. Respondent shall comply with the terms of the Divestiture Agreement (if Respondent divests pursuant to Paragraph II.A. of this Order) or the New Divestiture Agreement (if Respondent, or a trustee, divests pursuant to Paragraph II.B. or Paragraph III. of this Order), which terms are

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incorporated by reference into this Order, and made a part hereof. Any failure by Respondent to comply with the Divestiture Agreement or the New Divestiture Agreement shall constitute a failure to comply with this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement (if Respondent divests pursuant to Paragraph II.A. of the Order) or the New Divestiture Agreement (if Respondent, or a trustee, divests pursuant to Paragraph II.B. or Paragraph III. of this Order), any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement (if Respondent divests pursuant to Paragraph II.A. of the Order) or the New Divestiture Agreement (if Respondent, or a trustee, divests pursuant to Paragraph II.B. or Paragraph III. of this Order), without the prior approval of the Commission, shall constitute a failure to comply with this Order.

- G. Notwithstanding any provision of the Divestiture Agreement or this Order, Respondent's failure to act or to perform an obligation required by the Divestiture Agreement or this Order ("Required Act") by the date specified in the Divestiture Agreement or this Order ("Performance Date") shall not constitute a failure to comply with this Order if the Performance Date was on or before the date this Order becomes final, so long as Respondent performs such Required Act by the later of: (i) five (5) business days after the date this Order becomes final; and, (ii) the Performance Date, except that for any Performance Date created by paragraphs 4-9, 11-20, and 22-33 of the Settlement Agreement, and occurring after the date this Order becomes final, Respondent shall perform such Required Act within twenty (20) business days after the Performance Date.
- H. The purpose of the divestiture of the Divested Assets is to ensure the continued use of the Divested Assets in the same businesses in which the Divested Assets are engaged at the time of the Acquisition, and to remedy any lessening of

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competition resulting from the Acquisition as alleged in the Commission's complaint.

- I. Pending divestiture of the Divested Assets, Respondent shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets.

III.

IT IS FURTHER ORDERED that at any time after Respondent signs the Agreement Containing Consent Order in this matter, the Commission may appoint an Interim Trustee to ensure that Respondent fully performs its responsibilities in a timely manner as required by this Order and the Divestiture Agreement approved by the Commission. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Trustee appointed pursuant to this Paragraph III:

- A. The Commission shall select the Interim Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
- B. The Interim Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and with the terms of the Divestiture Agreement.
- C. Within ten (10) days after appointment of the Interim Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Interim Trustee all the rights and powers necessary to permit the Interim Trustee to monitor Respondent's

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compliance with the terms of this Order and with the Divestiture Agreement. The Interim Trustee shall sign a confidentiality agreement prohibiting the use, or disclosure to anyone other than the Commission, of any competitively sensitive or proprietary information gained as a result of his or her role as Interim Trustee.

- D. The Interim Trustee shall serve until the expiration of the terms of all of the contracts that comprise the Divestiture Agreement, or in the event that there is a New Acquirer pursuant to the provisions of Paragraph II.B. of this Order, the Interim Trustee shall serve until the expiration of the terms of all of the contracts that comprise the New Divestiture Agreement.
- E. The Interim Trustee shall have full and complete access to Respondent's personnel, books, records, documents, facilities and technical information relating to the research, development, manufacture, sale, and distribution of the Divested Products, or to any other relevant information, as the Interim Trustee may reasonably request. Respondent shall cooperate with any reasonable request of the Interim Trustee. Respondent shall take no action to interfere with or impede the Interim Trustee's ability to monitor Respondent's compliance with this Order and with the Divestiture Agreement or New Divestiture Agreement.
- F. The Interim Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Interim Trustee shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Trustee's duties and responsibilities. The Interim Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

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- G. Respondent shall indemnify the Interim Trustee and hold the Interim Trustee harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the Interim Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparations for, or defense of, any claim whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Trustee.
- H. If the Commission determines that the Interim Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph III.A. of this Order.
- I. The Commission may on its own initiative or at the request of the Interim Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order and with the Divestiture Agreement.
- J. The Interim Trustee shall report to the Commission in writing concerning compliance by Respondent with the provisions of Paragraphs II. and III. of this Order at least once every ninety (90) days. Such reports shall include at least the following:
1. whether Respondent has supplied any magnesite or other raw materials to the Acquirer in conformity with the requirements of this Order and the Divestiture Agreement or New Divestiture Agreement;
 2. whether Respondent has provided any technical assistance, services, or refractory products to the Acquirer in conformity with the requirements of this Order and the Divestiture Agreement or New Divestiture Agreement;

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3. whether Respondent has paid the Acquirer for any products or services sold or otherwise provided to Respondent by the Acquirer in conformity with the requirements of this Order and the Divestiture Agreement or New Divestiture Agreement;
4. whether Respondent has given the Interim Trustee access to records in conformity with this Order; and,
5. whether Respondents have maintained the Divested Assets as required in this Order.

IV.**IT IS FURTHER ORDERED** that:

- A. If Respondent fails to complete the divestitures required by Paragraph II. of this Order within the time periods specified therein, then the Commission may appoint a Divestiture Trustee to divest the Divested Assets to an Acquirer and to execute a New Divestiture Agreement that satisfies the requirements of Paragraph II of this Order. The Divestiture Trustee may be the same person as the Interim Trustee and will have the authority and responsibility to divest the Divested Assets absolutely and in good faith, and with the Commission's prior approval. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, to divest any of the assets under this Paragraph IV.A. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this Order to divest the Divested Assets to an Acquirer, Respondent shall consent to

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the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Divested Assets to an Acquirer pursuant to the terms of this Order and to enter into a Divestiture Agreement with the Acquirer pursuant to the terms of this Order, which Divestiture Agreement shall be subject to the prior approval of the Commission.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a (or amend the existing) trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Divested Assets to an Acquirer and to enter into a Divestiture Agreement with the Acquirer.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. of this Order to divest the Divested Assets and to enter into a Divestiture Agreement with an Acquirer that satisfies the requirements of Paragraph II. of this Order. If, however, at the end of the applicable twelve-month period, the

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Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend such divestiture period only two (2) times.

5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to the manufacture, distribution, or sale of the Divested Assets, or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of his or her responsibilities.
6. The Divestiture Trustee shall use reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest at no minimum price and the Divestiture Trustee's obligation to expeditiously accomplish the remedial purpose of this Order; to assure that Respondent enters into a Divestiture Agreement that complies with the provisions of Paragraph II. of this Order; to assure that Respondent complies with the remaining provisions of Paragraphs II, III and IV. of this Order; and to assure that the Acquirer obtains the assets required to research, develop, manufacture, sell and distribute the Divested Products. The divestiture shall be made to, and the Divestiture Agreement executed with, an Acquirer in the manner set forth in Paragraph II.B. of this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve

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more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondent. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's locating a New Acquirer and assuring compliance with this Order.
8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

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9. If the Commission determines that the Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in Paragraph IV. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to comply with the terms of this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divested Assets.
12. The Divestiture Trustee shall report in writing to Respondent and to the Commission every two (2) months concerning his or her efforts to divest the Divested Assets and Respondent's compliance with the terms of this Order.

V.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books,

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ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and

- B. Upon five (5) days' notice to Respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondent.

By the Commission.

Analysis

Analysis of Proposed Consent Order To Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 30, 1999

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Agreement") from RHI AG ("RHI" or "respondent") to resolve competitive concerns relating to the refractories industry arising out of RHI's proposed acquisition of Global Industrial Technologies, Inc. ("Global"). Under the Agreement, RHI would divest two refractories manufacturing plants located in North America and certain assets relating to refractory products currently produced at a third North American manufacturing plant. The proposed Order requires that the assets be divested to another refractories producer, Resco Products, Inc. ("Resco"), a company that produces refractories but does not compete in the affected markets at the present time, or to another buyer approved by the Commission.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Agreement and comments received and decide whether to withdraw its acceptance of the Agreement or make final the Agreement's proposed Order.

Refractories are brick- and cement-like products made from certain natural minerals and materials that are used to line and protect furnaces in many industries--including the steel, aluminum, cement and glass industries--that involve the heating or containment of solids, liquids, or gases at high temperatures. Refractories are consumable products, and wear down as a result of being subjected to intense temperatures as well as chemical and mechanical pressures.

The proposed complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, as amended, in the

Analysis

following markets: (1) the North American market for magnesia-carbon bricks for basic oxygen furnaces ("BOFs"); (2) the North American market for magnesia-carbon bricks for electric arc furnaces ("EAFs"); (3) the North American market for magnesia-carbon bricks for steel ladles used with BOFs; (4) the North American market for magnesia-chrome bricks for steel degassers; (5) the North American market for high-alumina bricks for steel ladles used with BOFs; and (6) the North American market for high-alumina bricks for torpedo cars used in steel making.

The proposed complaint alleges that each of the relevant markets is highly concentrated. Specifically, the proposed complaint alleges that RHI and Global control approximately 95 percent of the \$30 million North American market for magnesia-carbon refractory bricks for BOFs. The proposed acquisition thus represents a virtual merger to monopoly in magnesia-carbon bricks for BOFs.

The proposed complaint also alleges that RHI and Global control approximately 65 percent of the \$58 million North American market for magnesia-carbon refractory bricks for EAFs; approximately 40 percent of the \$100 million North American market for magnesia-carbon bricks for steel ladles used with BOFs; approximately 46 percent of the \$5 million North American market for magnesia-chrome bricks for steel degassers; approximately 70 percent of the \$50 million North American market for high-alumina bricks for steel ladles used with BOFs; and approximately 52 percent of the \$23.5 million North American market for high-alumina bricks for torpedo cars.

The proposed complaint further alleges that the effect of the acquisition may be to substantially lessen competition and to tend to create a monopoly by, among other things, eliminating actual, direct and substantial competition between RHI and Global in each of the relevant markets identified above. The proposed complaint further alleges that the effect of the acquisition may be to substantially lessen competition and to tend to create a monopoly by increasing the level of concentration in each of these

Analysis

relevant markets and by increasing the likelihood that the firm created by the merger of RHI and Global will unilaterally exercise market power in each of these relevant markets, that purchasers of these products will be forced to pay higher prices, that technical and sales service will decline, and that innovation in the development of these products will decline.

The proposed complaint further alleges that entry into the relevant markets requires significant sunk costs and would not be timely, likely and sufficient to deter or offset reductions in competition resulting from the proposed acquisition. Development of the specialized refractories described above, including determination of the proper chemical composition and manufacturing techniques, is time consuming and requires an extremely high level of expertise. In addition, customers in the steel industry increasingly require that their suppliers of refractories be able to supply the full line of refractories for particular applications, such as BOFs, EAFs and steel ladles. Thus, a new entrant would have to be able to assume the costs and expertise necessary to develop and supply both magnesia-carbon and high-alumina bricks.

Furthermore, because the refractory bricks at issue are used to control processes and substances at extremely high temperatures, the failure of the products can be catastrophic, sometimes causing the loss of human life. Consequently, customers are extremely resistant to change, and any new entrant would have to undergo months of laboratory testing, followed by extended periods (sometimes taking several years) of field testing, prior to acceptance of product for use in BOF and EAF steel making applications.

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the relevant markets, as alleged in the complaint, by requiring the divestiture to Resco of: (a) Global's Hammond, Indiana refractories plant, which produces magnesia-carbon bricks for BOFs, EAFs and steel ladles, and related equipment, machinery and intellectual property (including

Analysis

formulas, mixes, presses and molds) and customer lists and contracts; (b) Global's Marelán, Quebec plant, which produces magnesia-chrome bricks for steel degassers, and related equipment, machinery and intellectual property (including formulas, mixes, presses and molds) and customer lists and contracts; and (c) all rights, title and interest in and to specific assets relating to the production of high-alumina bricks for BOF steel ladles and torpedo cars, which are currently produced by RHI at its Farber, Missouri plant, including intellectual property, customer lists and contracts, formulas, mixes and molds. The proposed Order requires the divestiture to take place no later than forty-five (45) days after the date the Commission accepts the Agreement for public comment.

The proposed Order also provides for a magnesite supply contract between Resco and respondent. Currently, Global is one of only two U.S. producers of high purity magnesite, a necessary ingredient of magnesia-carbon and magnesia-chrome bricks, and currently supplies other refractory producers with the material for the production of refractories. In order to ensure that Resco has a continuing supply of high purity magnesite with which it can make the relevant products, and to prevent the possibility that customers might require re-qualification in the event that the acquirer is forced to obtain an alternate source of supply of this raw material, the proposed Order provides that respondent enter into a one year high purity magnesite supply contract, renewable for two additional one year terms at Resco's option, with most favored nation pricing. The arrangement is intended to be of sufficient duration to give Resco time to assimilate the relevant products into its own line of refractory products, to perfect the production processes, and to test other sources of high purity magnesite without jeopardizing customer contracts in the meantime.

Thus, the proposed Order is designed to promote the viability and competitiveness of the divested businesses by placing the businesses in the hands of a company with extensive expertise in the refractories industry, expertise in related refractories

Analysis

applications, and additional economies resulting from shared research and development, overhead and production. The proposed Order is structured to help assure the success of Resco in operating the divested businesses by providing Resco with the assets required for it to successfully compete in the relevant markets: magnesia-carbon, magnesia-chrome and high-alumina formulas that are well-known, well-respected and already proven in the marketplace; supply contracts with customers; technical assistance and training; production assets; and raw materials supply contracts to ensure the continued and consistent ability to produce the products.

If the Commission determines that Resco is not an acceptable buyer, or that the agreement between Resco and respondent is not an acceptable form of divestiture, the proposed Order provides that respondent shall rescind the Resco agreement and any divestiture to Resco, and divest the identified assets, including RHI's Farber, Missouri plant and fixtures, at the purchaser's option, to an acquirer that receives the prior approval of the Commission. In such an event, the proposed Order also contains provisions designed to ensure that such an acquirer has the benefit, at its option, of all of the raw materials, contracts and technical assistance relating to the businesses to be divested. The proposed Order also provides that if respondent fails to divest the assets to be divested as required by the proposed Order, the Commission may appoint a Divestiture Trustee to divest the business along with any assets related to the business that are necessary to effect the purposes of the proposed Order.

The proposed Order also provides for the appointment of an Interim Trustee to ensure that respondent expeditiously performs its responsibilities under the proposed Order. The Interim Trustee will oversee the divestiture to ensure the adequacy of the transfer, to ensure that disputes between the parties will be identified and resolved quickly, clearly, and impartially, and to identify possible violations of the proposed Order.

Analysis

The Agreement requires respondent to provide the Commission, within thirty (30) days of the date the Agreement was signed, with an initial report setting forth in detail the manner in which respondent will comply with the provisions relating to the divestiture of assets.

The purpose of this analysis is to facilitate public comment on the proposed Order. This analysis is not intended to constitute an official interpretation of the Agreement or the proposed Order or in any way to modify the terms of the Agreement or the proposed Order.

Complaint

IN THE MATTER OF

ENERJET CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4006; File No. 9923192
Complaint, April 16, 2001--Decision, April 16, 2001*

This consent order addresses Respondent Enerjet's compliance with the Energy Policy and Conservation Act and the Appliance Labeling Rule. The order, among other things, requires the respondent to pay a \$10,000 civil penalty for violating the Appliance Labeling Rule. The order also prohibits the respondent from making any representation about the energy use or efficiency of any product it manufactures that is subject to the Appliance Labeling Rule -- or the cost of energy consumed by such product -- unless the product has been tested in accordance with a test procedure prescribed by the Secretary of Energy and the representation fairly discloses the results of such testing.

Participants

For the Commission: *John Rothchild, James Mills, Elaine D. Kolish, and [Bureau of Economics].*

For the Respondent: *David I. Wilson, Silverberg Goldman & Bikoff, L.L.P.*

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Enerjet Corporation ("respondent"), a corporation, has violated the provisions of the Energy Policy and Conservation Act ("EPCA"), the Federal Trade Commission Act ("FTC Act"), and the Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Under the Energy Policy and Conservation Act ("Appliance Labeling Rule" or "Rule"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent Enerjet Corporation is a New York corporation with its principal office or place of business at 45 Drexel Drive, Bay Shore, New York 11706.
2. Respondent manufactures, advertises, offers for sale, and sells oil- and gas-fired boilers that are used for residential hot-water or steam space heating. Respondent sells its boilers to distributors, who resell them to installers or residential customers.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act.
4. The EPCA, 42 U.S.C. § 6291 et seq., directs the Commission to prescribe rules requiring manufacturers to affix energy-consumption labels to certain specified appliances, to make certain other disclosures, and to file certain reports. 42 U.S.C. § 6294.

Relevant Provisions of the EPCA and the Appliance Labeling Rule

5. Pursuant to its authority under the EPCA, 42 U.S.C. § 6294, the Commission promulgated the Appliance Labeling Rule. 16 C.F.R. Part 305. Among other things, the Rule prohibits a manufacturer from: (a) knowingly distributing any new covered product in commerce unless the product is labeled in accordance with the Rule, 16 C.F.R. § 305.4(a)(1); (b) knowingly distributing certain covered products, including furnaces, in commerce unless the manufacturer furnishes a fact sheet concerning the product to distributors and retailers that purchase the product (or, alternatively, supplies such information in an approved industry directory), 16 C.F.R. §§ 305.4(a)(1), 305.11(b), (c); and (c) refusing to submit certain prescribed annual reports to the Commission, 16 C.F.R. §§ 305.4(b)(2), 305.8.
6. The EPCA also prohibits a manufacturer from making any representation with respect to the energy use or efficiency of a

Complaint

covered product, or the cost of energy consumed by such product, unless the product has been tested in accordance with a prescribed test procedure and the representation fairly discloses the results of such testing. 42 U.S.C. § 6293(c). A representation that violates § 6293(c) is deemed to be an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), except to the extent that such representation is a violation of the Appliance Labeling Rule. 42 U.S.C. § 6303(c).

Status of Respondent and Its Products

7. Respondent is a “manufacturer” as defined in the Rule. 16 C.F.R. § 305.2(c). The boilers that respondent manufactures and distributes are “new covered products” and “furnaces” as defined in the Rule. 16 C.F.R. §§ 305.4(l), 305.3(g).

Respondent’s Violations of the Appliance Labeling Rule

8. Respondent has knowingly distributed in commerce oil-fired boilers, with model numbers belonging to the “OA” series (“OA oil boilers”), that are not marked with labels displaying the information that the Rule requires. In particular, the labels respondent has used do not display the name of the manufacturer, the annual fuel utilization efficiency rating, the range of annual fuel utilization efficiency ratings for comparable products, an indication of where the labeled product falls within this range, and certain prescribed generic statements, all as required by the Rule, 16 C.F.R. § 305.11(a)(5)(ii). Respondent has thereby violated 16 C.F.R. § 305.4(a)(1).

9. During 1997, respondent knowingly distributed OA oil boilers in commerce without furnishing a fact sheet concerning the boilers to distributors that purchase its products, and without supplying the required information in an approved industry directory, as required by the Rule, 16 C.F.R. § 305.11(b), (c). Respondent has thereby violated 16 C.F.R. § 305.4(a)(1).

Complaint

10. Respondent has failed to submit an annual report for the year 1997 to the Commission concerning its OA oil boilers, as required by the Rule, 16 C.F.R. § 305.8. Respondent has thereby violated 16 C.F.R. § 305.4(b)(2).

11. The EPCA, as amended by the Debt Collection Improvement Act of 1996, authorizes the Commission to assess a civil penalty of not more than \$110 for each violation of the Appliance Labeling Rule. 42 U.S.C. § 6303(a); FTC Rules of Practice, 16 C.F.R. §§ 1.97, 1.98. Each shipment of a covered product that is not labeled as required by the Rule, each covered product that is shipped without provision of a conforming fact sheet, and each day of a manufacturer's failure to submit an annual report constitutes a violation. 42 U.S.C. § 6303(a).

Respondent's Violations of the EPCA

12. Respondent has made representations with respect to the energy efficiency of its OA oil boilers that do not fairly disclose the results of testing of the boilers in accordance with the test procedure prescribed by the Secretary of the Department of Energy under the authority of 42 U.S.C. § 6293. In particular, respondent has produced and distributed brochures describing its OA oil boilers in which it assigns specific annual fuel utilization efficiency ("AFUE") ratings to various of its boilers. The stated AFUE ratings do not accurately disclose the actual ratings of the boilers according to the prescribed test procedures, but rather overstate the energy efficiency of the boilers.

13. The representations described in paragraph 12 violate the EPCA, 42 U.S.C. § 6293(c), and do not violate the Rule. Accordingly, those representations are deemed to be unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this sixteenth day of April, 2001, has issued this complaint against respondent.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Enerjet Corporation is a New York corporation with its principal office or place of business at 45 Drexel Drive, Bay Shore, New York 11706.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Covered product" shall mean any product that is defined in 16 C.F.R. § 305.3, and as to which a test procedure is applicable under 42 U.S.C. § 6293(a) & (b).
2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, and its successors and assigns, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, promotion, offering for sale, sale, or distribution of boilers or other covered products, in or affecting commerce, shall not make any representation with respect to the energy use or efficiency of such covered product, or the cost of energy consumed by such product, unless the product has been tested in accordance with a test procedure prescribed by the Secretary of Energy pursuant to 42 U.S.C. § 6293(a) & (b), and the representation fairly discloses the results of such testing.

II.

IT IS FURTHER ORDERED that, within 5 days from the date of issuance of this order, respondent shall pay, pursuant to 42 U.S.C. § 6303(a), a civil penalty in the amount of \$10,000. Respondent shall make this payment by electronic fund transfer to the Treasurer of the United States, pursuant to a procedure to be specified by FTC staff in writing. In the event of default, respondent shall be liable for interest calculated in accordance with 28 U.S.C. § 1961.

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III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation with respect to the energy use or efficiency of any covered product, or the cost of energy consumed by such product, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials, including test results, that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in its corporate structure that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporate structure about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director for Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue N.W., Washington, DC 20580.

VI.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate on April 16, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

Decision and Order

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on March 5, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement for entry of a consent order from Enerjet Corporation (“Enerjet”). The agreement would settle a complaint by the Federal Trade Commission that Enerjet violated (1) the Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Under the Energy Policy and Conservation Act (“Appliance Labeling Rule” or “Rule”), 16 C.F.R. Part 305, and (2) the Energy Policy and Conservation Act (“EPCA”), 42 U.S.C. § 6201 et seq.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter concerns Enerjet’s compliance with regulatory requirements relating to certain boilers that it manufactures. The administrative complaint alleges that Enerjet violated the Appliance Labeling Rule in several respects. First, the complaint alleges that Enerjet knowingly distributed certain oil-fired boilers that were not marked with labels displaying the information that the Rule requires. In particular, the complaint alleges, the labels Enerjet used did not display the name of the manufacturer, the annual fuel utilization efficiency rating of the boiler, the range of annual fuel utilization efficiency ratings for comparable products, an indication of where the labeled product falls within this range, and certain prescribed generic statements. Second, the complaint alleges that during 1997 Enerjet knowingly distributed boilers without furnishing a fact sheet concerning the boilers, and without supplying the required information in an approved industry directory. Third, the complaint alleges that Enerjet failed to submit a 1997 annual report concerning its boilers.

Analysis

The complaint also alleges that Enerjet violated the EPCA by distributing brochures that do not accurately disclose the annual fuel utilization efficiency ratings of its boilers in accordance with the test procedure prescribed by the Secretary of the Department of Energy, but rather overstate the energy efficiency of the boilers.

The proposed consent order requires Enerjet to pay a \$10,000 civil penalty for violating the Rule. It also prohibits Enerjet from making any representation about the energy use or efficiency of any product it manufactures that is subject to the Rule, or the cost of energy consumed by such product, unless the product has been tested in accordance with a test procedure prescribed by the Secretary of Energy and the representation fairly discloses the results of such testing.

The remainder of the proposed consent order contains provisions regarding recordkeeping, distribution of the order, notification of changes in corporate status, filing of a compliance report, and termination of the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement or the proposed order or to modify their terms in any way.

Complaint

IN THE MATTER OF

AMERICA ONLINE, INC. AND TIME WARNER INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

*Docket C-3989; File No. 0010105
Complaint, December 14, 2000--Decision, April 17, 2001*

This consent order addresses the merger of Respondent America Online, Inc. ("AOL") -- the world's leading internet service provider ("ISP"), with more than 27 million members -- and Respondent Time Warner Inc. (Time Warner"), the nation's second largest cable television distributor; a leading cable television network provider; the owner of a number of leading cable television networks, such as Home Box Office and CNN; and the Cartoon Network; and the owner of a wide variety of entertainment and media businesses, including leading magazine franchises and established record labels. The order, among other things, requires the respondents -- before they can make AOL's broadband ISP service available in certain Identified Cable Divisions representing over 70 percent of Time Warner's cable customers -- first to make available cable broadband service offered by Earthlink, Inc., pursuant to an agreement (approved by the Commission) between Time Warner and Earthlink. The order also prohibits the respondents from beginning to advertise or promote AOL's broadband ISP service to subscribers in a cable division until Earthlink's competing ISP service is available to subscribers in that cable division -- or Earthlink advertises or promotes its service in that cable division -- whichever occurs first. In addition, the order requires the respondents -- within 90 days after making AOL's broadband ISP service available to subscribers -- to enter into agreements (approved by the Commission) (1) to carry at least two other non-affiliated broadband ISPs to provide cable broadband ISP services in the Identified Cable Divisions, and (2) to carry at least three other non-affiliated ISPs to provide cable broadband ISP services in its other cable divisions. The order also requires the respondents to negotiate and enter into arms' length, commercial agreements with any other non-affiliated ISP that seeks to provide cable broadband ISP service on Time Warner's cable system. An accompanying Order to Hold Separate requires the respondents to hold AOL and Road Runner separate in each Identified Cable Division until they have made an affiliated ISP available to broadband customers in that Identified Cable Division.

Complaint

Participants

For the Commission: *Jill M. Frumin, Anthony Joseph, Kent Cox, Patricia Stephenson, Michele Arington, Barbara Shapiro, Valicia Spriggs, Katherine Siefert, Michaelynn Ware, Nidhi Kumar, Katie Siefert, Catharine M. Moscatelli, Phillip L. Broyles, Naomi Licker, Daniel P. Ducore, Debra Holt, and Malcolm Coate.*

For the Respondents: *Paul Cappuccio, Randy Boe, and Laura E. Jehl, America Online, Joe Sims, Jones, Day, Reavis & Pogue, Ronald A. Klain, O'Melveny & Myers, Christopher Bogart, Time Warner Inc., Robert D. Joffe and Katherine Forrest, Cravath, Swaine & Moore, George Cary, Cleary, Gottlieb, Hamilton & Steen, and Marc Apfelbaum and Edward Weiss, Time Warner Cable.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that respondents America Online, Inc. ("AOL"), a corporation, and Time Warner Inc. ("Time Warner"), a corporation, both subject to the jurisdiction of the Commission, have agreed to merge, in violation of 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 to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent America Online, Inc.

1. Respondent AOL is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 22000 AOL Way, Dulles, Virginia. AOL operates two internet service providers ("ISPs"): AOL, the nation's

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leading ISP, and CompuServe. In addition, AOL operates such internet brands as Digital City, Inc.; ICQ; the Netscape Netcenter and AOL.com internet portals; the Netscape Communicator client software, including the Netscape Navigator browser; AOL MovieFone, the nation's top movie listing guide and ticketing service; and Nullsoft, Inc., developer of the Spinner, Winamp, and SHOUTcast brands.

2. Respondent AOL is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. Respondent Time Warner Inc.

3. Respondent Time Warner is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York. Time Warner operates a variety of businesses, including cable television systems; cable television networks, such as HBO, Cinemax, CNN, TNT, and TBS Superstation; magazine franchises, including Time, People, and Sports Illustrated; copyrighted music that is produced and distributed by record labels such as Warner Bros. Records, Atlantic Records, Elektra Entertainment, and Warner Music International; and film, television, and animation libraries owned or managed by Warner Bros. and New Line Cinema. Some of Time Warner's cable systems, HBO, Cinemax, and Warner Bros.' filmed entertainment business belong to Time Warner Entertainment Company, L.P. ("TWE"), a limited partnership. Time Warner owns general and limited partnership interests in TWE consisting of 74.49% of the pro rata priority capital and residual equity capital and 100% of the junior priority capital.
4. Respondent Time Warner is, and at all times relevant herein has been, engaged in commerce, or in activities affecting

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commerce, within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. The Merger

5. On or about January 10, 2000, Respondents AOL and Time Warner entered into an Agreement and Plan of Merger regarding the proposed transaction. Under the proposed transaction, common stockholders of Time Warner will receive 1.5 shares of AOL Time Warner Inc. ("AOL/Time Warner") common stock for each share of Time Warner common stock they hold, and common stockholders of AOL will receive one share of common stock of AOL/Time Warner for each share of AOL common stock they hold.

IV. Trade and Commerce*A. Broadband Internet Access Service:*

6. Internet access is an important service demanded by an increasing number of Americans. The vast majority of residential users currently access the internet via dial-up modems: their computers use standard telephone lines to connect to an ISP, which in turn connects the user to the internet. This service is referred to as "narrowband" access.
7. A rapidly growing number of residential users access the internet through "broadband" networks and transmission facilities. Broadband internet access allows users to send and receive data at rates substantially faster than is possible using narrowband access.
8. Time Warner provides broadband internet access service to customers in areas served by its cable television systems through a controlling interest in its partially-owned Road Runner subsidiary. Road Runner is the only ISP available on Time Warner's cable systems, and is a significant competitor in

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each of those areas. AOL provides broadband internet access service over non-cable broadband transmission facilities, including areas served by Time Warner's cable television systems. AOL is the leading provider of narrowband internet access, with a share of approximately 50 percent of narrowband subscribers. AOL is positioned and likely to become the leading provider of broadband internet access as well.

B. Broadband Internet Transport Service:

9. In order to provide broadband internet access service, an ISP must have access to broadband transmission facilities that can carry data at high speeds between the ISP's facilities and the homes of individual subscribers. The two principal types of transmission facilities that provide broadband access to residential users today are (a) cable television systems; and (b) local telephone company networks.
10. Cable television companies originally designed their systems to transmit information (i.e., video programming) one way to customers' homes. Many cable companies have upgraded their cable systems to provide a larger number of video programming networks. The expanded cable capacity enables the cable system to provide the two-way data transmission necessary for residential broadband service. Cable subscribers can access the internet over computers connected to a cable modem. Time Warner operates cable systems that provide broadband internet transport services.
11. Telephone companies are upgrading their residential telephone lines and central offices to use digital subscriber line ("DSL") technology to connect a user to the internet. DSL service requires a DSL modem connecting the telephone lines to the personal computer. Local telephone companies, or other firms that contract with the local telephone company for the use of its telephone lines, may provide DSL service. DSL service is available only to a

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portion of residences that have local telephone service, primarily because of technical constraints.

12. Satellite and fixed wireless technologies also can provide broadband transmission to residential users. However, these technologies have a much smaller share of the broadband internet transport market than cable modems or DSL, and consumers are unlikely to perceive them as adequate substitutes for cable modems or DSL in the next few years.
13. Most residential broadband subscribers access the internet over cable. DSL services are the second most frequently used. Though the number of DSL users is growing rapidly, DSL still lags substantially behind cable modem service in market penetration and acceptance.
14. AOL's principal means of providing broadband internet services is through DSL. AOL broadband subscribers on DSL frequently represent lost revenue opportunities for cable broadband transport services. AOL will have less incentive to promote DSL as a transport medium in TW cable areas after the merger.

C. Interactive Television Service:

15. Because of the rapid growth in the number of residential broadband subscribers and the expectation that there will soon be very large numbers of such subscribers, many firms are developing content that may be particularly attractive to residential broadband consumers. Residential broadband transmission capacity allows customers to access content that contains larger quantities of data, such as high-quality streaming video and various forms of interactive entertainment, including enhanced programming that enables the viewer to interact with the programming. Narrowband connections cannot take advantage of much of this broadband content because it takes much longer to receive the requested content and the slower speeds of

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narrowband adversely affect the quality of the received pictures and video.

16. Interactive Television (“ITV”) combines television programming and internet functionality, and requires special hardware and software to blend data with video signals for display on a television screen. The first-generation technology, which is now on the market, uses a separate set-top box that sits between the cable set-top box and the television and contains a modem for connection to the internet by telephone.
17. AOL recently launched AOL-TV, a first-generation ITV product, and is well positioned to become a leading provider of ITV services.
18. The next generation of ITV likely will have a broadband internet connection. Cable has distinct advantages over alternative ITV transport and connection methods. The television signal is already transmitted over cable, which makes synchronizing viewer interaction with the programming easier. Neither satellite nor DSL connections can integrate the cable video programming and the interactive functionality as smoothly as cable. Local cable companies will play the key role in enabling the delivery of ITV services.
19. As a cable operator, Time Warner can control the interactive signals, triggers, and content that can be delivered over its cable systems.

V. Anticompetitive Effects

**COUNT I: LOSS OF COMPETITION IN
BROADBAND INTERNET ACCESS SERVICE**

20. Paragraphs 1-19 are incorporated by reference as if fully set forth herein.

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A. Relevant Product Market

21. The relevant product market in which to assess the effects of the proposed merger is the provision of residential broadband internet access service.

B. Relevant Geographic Markets

22. The relevant geographic markets in which to assess the effects of the proposed merger are Time Warner cable service areas and the United States.

C. Concentration

23. The relevant markets are, or are likely to become, highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.

D. Conditions of Entry

24. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects of the merger.

E. Effects

25. The merger will eliminate existing and potential competition between AOL and Time Warner nationally and in Time Warner cable service areas, and will increase AOL/Time Warner's ability to exercise unilateral market power.

**COUNT II: LOSS OF COMPETITION
IN BROADBAND INTERNET TRANSPORT SERVICE**

26. Paragraphs 1-19 are incorporated by reference as if fully set forth herein.

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A. Relevant Product Market

27. The relevant product market in which to assess the effects of the proposed merger is the provision of broadband internet transport service.

B. Relevant Geographic Markets

28. The relevant geographic markets in which to assess the effects of the proposed merger are Time Warner cable service areas and the United States.

C. Concentration

29. The relevant markets are, or are likely to become, highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.

D. Conditions of Entry

30. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects of the merger.

E. Effects

31. The merger will substantially lessen or reduce competition between cable television broadband transport service and DSL broadband transport service nationally and in Time Warner cable service areas, and increase AOL/Time Warner's ability to exercise unilateral market power.

**COUNT III: LOSS OF COMPETITION IN THE
PROVISION OF ITV SERVICE**

32. Paragraphs 1-19 are incorporated by reference as if fully set forth herein.

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A. Relevant Product Market

33. The relevant product market in which it is appropriate to assess the effects of the proposed merger is the provision of ITV service.

B. Relevant Geographic Markets

34. The relevant geographic markets in which it is appropriate to assess the effects of the proposed merger are the Time Warner cable service areas and the United States.

C. Concentration

35. The relevant markets are, or are likely to become, highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.

D. Conditions of Entry

36. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects of the merger.

E. Effects

37. The merger will increase barriers to entry and increase AOL/Time Warner's ability to exercise unilateral market power nationally and in Time Warner cable service areas.

VI. Violations Charged

38. The agreement entered into between Respondents AOL and Time Warner for their merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Further, the agreement, if consummated, would be a violation of Section 5 of the

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Federal Trade Commission Act, as amended, 15 U.S.C.
§ 45, and Section 7 of the Clayton Act, as amended, 15
U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal
Trade Commission on this fourteenth day of December, 2000,
issues its complaint against said Respondents.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent America Online, Inc. (“AOL”) and Respondent Time Warner Inc. (“Time Warner”), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect and having thereupon issued its Complaint and its Order to Hold Separate, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to Rule 2.34 of its Rules (16 C.F.R. § 2.34), and having modified the Decision and Order (“Order”) in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order:

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1. Respondent AOL is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 22000 AOL Way, Dulles, Virginia 20166.
2. Respondent Time Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York 10019.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "AOL" means America Online, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by America Online, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Time Warner" means Time Warner Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions (including, but not limited to, Time Warner Entertainment Company, L.P.), groups and affiliates controlled by Time Warner Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Access" means the provision of a connection point at the connection points within each Cable Division where Respondents are providing connections for Respondents' ISPs and where Respondents have provided all of the

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technology required to enable Non-affiliated ISPs to reach Subscribers over Respondents' Cable Holdings.

- D. "Adelphia" means Adelphia Communications Corporation, incorporated in Delaware, with its principal place of business located at One North Main Street, Coudersport, PA 16915-1141, and its subsidiaries, divisions, groups and affiliates controlled by Adelphia, and the successors and assigns of each.
- E. "Affiliated Cable Broadband ISP Service" means a Cable Broadband ISP Service Affiliated with Respondent, excluding Road Runner.
- F. "Affiliated" means having an attributable interest as defined in 47 C.F.R. § 76.501 (and accompanying notes), as that rule read on July 1, 1996.
- G. "Alternative Cable Broadband ISP Service Agreement" means an agreement between Respondents and a Non-affiliated ISP to provide Cable Broadband ISP Service on Respondents' Cable Holdings.
- H. "AT&T" means AT&T Corp., incorporated in New York, with its principal place of business located at 32 Avenue of the Americas, New York, New York 10013-2412 and its subsidiaries, divisions, groups and affiliates controlled by AT&T, and the successors and assigns of each.
- I. "Available" means ready for immediate use at the request of a Subscriber.
- J. "Bandwidth" means the measure, in bits per second, of the speed of data transmission.
- K. "Broadband" means Bandwidth designed to operate at rates greater than 128 kilobits per second.

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- L. "Cable Broadband ISP Service" means any ISP Service provided via Broadband over cable.
- M. "Cable Division" means each collection of localized communication networks, comprising one or more cable systems, that transmits multi-channel video, as well as other Content and services, by means of coaxial cables and/or fiber optics, that is located in the United States and is Controlled by Respondents.
- N. "Cablevision" means Cablevision Systems Corporation, incorporated in Delaware, with its principal place of business located at 1111 Stewart Avenue, Bethpage, NY 11714, and its subsidiaries, divisions, groups and affiliates controlled by Cablevision, and the successors and assigns of each.
- O. "Charter" means Charter Communications Holdings, LLC, incorporated in Delaware, with its principal place of business located at 12444 Powerscourt Drive, Suite 100, St. Louis, Missouri 63131, and its subsidiaries, divisions, groups and affiliates controlled by Charter, and the successors and assigns of each.
- P. "Comcast" means Comcast Cable Communications, Inc., incorporated in Delaware, with its principal place of business located at 1201 Market Street, Suite 2201, Wilmington, Delaware 19801 and its subsidiaries, divisions, groups and affiliates controlled by Comcast, and the successors and assigns of each.
- Q. "Commission" means the Federal Trade Commission.
- R. "Content" means data packets carrying information including, but not limited to, links, video, audio, text, e-mail, message, interactive signals, and interactive triggers.
- S. "Control" means (1) either (i) holding 50% or more of the outstanding voting securities of a Person or (ii) in the case

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of a Person that has no outstanding voting securities, having the right to 50% or more of the profits of the Person, or having the right in the event of dissolution to 50% or more of the assets of the Person or (2) having the contractual power presently to designate 50% or more of the directors of a Person that is a corporation, or in the case of unincorporated Persons, of individuals exercising similar functions.

- T. "Costs" means the prices charged (1) by a provider of DSL Services for access to a data line, including for any local data traffic aggregation, from a central office or remote terminal to a Subscriber's home, (2) by a provider of DSL Services or a third party for installation of DSL Services at a Subscriber's home, and (3) by a provider of DSL Services or a third party for customer premise equipment (such as a DSL modem) required to use such DSL Services by a Subscriber.
- U. "Cox" means Cox Communications, Inc., incorporated in Delaware, with its principal place of business located at 1400 Lake Hearn Drive, Atlanta, Georgia 30319 and its subsidiaries, divisions, groups and affiliates controlled by Cox, and the successors and assigns of each.
- V. "DSL" means a digital subscriber line or a modem technology that provides Broadband transport over telephone lines.
- W. "DSL Services" means Broadband ISP Services delivered via DSL.
- X. "Earthlink" means Earthlink, Inc., incorporated in Delaware, with its principal place of business located at 1430 West Peachtree Street, Suite 400, Atlanta, Georgia 30309 and its subsidiaries, divisions, groups and affiliates controlled by Earthlink, and the successors and assigns of each.

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- Y. "Earthlink Agreement" means the High-Speed Service Agreement effective as of November 18, 2000, between Earthlink, Inc., and Time Warner Entertainment Company, L.P.
- Z. "Identified Cable Division" means each of the Cable Divisions identified in Appendix A, as well as any other Cable Division with 300,000 Subscribers or more, that, after the date Respondents execute the Consent Agreement, is, through acquisition or otherwise, Controlled by Respondents.
- AA. "ILEC" means incumbent local exchange carrier, and has the same meaning specified in 47 U.S.C. § 251(h).
- BB. "ISP" means a provider of ISP Service.
- CC. "ISP Service" means the provision of connectivity to and services that enable the use of the Internet by an end-user.
- DD. "ITV" means interactive television.
- EE. "Merger" means the transaction contemplated by the Second Amended and Restated Agreement and Plan of Merger, dated as of January 10, 2000, among AOL Time Warner Inc., America Online, Inc., Time Warner Inc., America Online Merger Sub Inc., and Time Warner Merger Sub Inc.
- FF. "MSO" means a multiple system operator, which is a major cable television organization that has franchises in multiple locations.
- GG. "MSO Agreement" means an agreement between Respondents and any one of Adelphia, AT&T, Cablevision, Charter, Comcast, or Cox, pursuant to which Respondents provide Cable Broadband ISP Service over any of such MSO's cable systems.

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- HH. “Monitor Trustee” means any Person appointed by the Commission pursuant to Paragraph V. of this Order to monitor Respondents’ compliance with their obligations pursuant to this Order and, if the Commission so determines, to monitor compliance with Respondents’ obligations pursuant to the Order to Hold Separate issued in this matter.
- II. “Non-affiliated Cable Broadband ISP Service” means any Cable Broadband ISP Service that is not Affiliated with or Controlled by Respondents.
- JJ. “Non-affiliated ISP” means any ISP that is not Affiliated with or Controlled by Respondents.
- KK. “Offer” means in any way proffering, including, but not limited to, advertising, promoting, or announcing the current or future availability of service or its price.
- LL. “Person” means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- MM. Definition deleted.
- NN. Definition deleted.
- OO. “Respondents” means AOL and Time Warner.
- PP. “Respondents’ Cable Holdings” means each and every Cable Division.
- QQ. “Respondents’ ISP” means any ISP Controlled by or Affiliated with Respondents.
- RR. “Road Runner” means Road Runner LLC, organized in Delaware, with its principal place of business located at 13241 Woodland Park Road, Herndon, Virginia 20171, and any successor thereto.

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SS. "Subscriber" means the end-user that has entered into an agreement for the provision of a service.

II.

IT IS FURTHER ORDERED that:

A. In each Identified Cable Division:

1. Respondents shall not make Available to any Subscriber any Affiliated Cable Broadband ISP Service until such time as Non-affiliated Cable Broadband ISP Service provided by Earthlink pursuant to the Earthlink Agreement (which agreement shall not vary from or contradict or be construed to vary from or contradict the terms of this Order) is Available to Subscribers in that Identified Cable Division. Respondents shall not Offer to any Subscriber in that Identified Cable Division any Affiliated Cable Broadband ISP Service until: (x) the Non-Affiliated Cable Broadband ISP Service provided by Earthlink is Available in that Identified Cable Division or (y) Earthlink Offers its Non-affiliated Cable Broadband ISP Service to Subscribers in that Identified Cable Division, whichever occurs earlier. For purposes of this Paragraph II.A.1., the terms "make Available" and "Offer" shall not include tests that (i) involve a limited number of Subscribers, (ii) are for a limited period of time, and (iii) are not for commercial purposes but are conducted only for technological and operational implementation purposes; *provided, however*, that Respondents shall engage in no promotional activity in connection with such tests.
2. Within ninety (90) days after the date that Respondents make Available to any Subscriber an Affiliated Cable Broadband ISP Service, Respondents shall enter into Alternative Cable Broadband ISP Service Agreements that have received the prior approval of the Commission

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with at least two (2) Non-affiliated ISPs (other than the Non-affiliated ISP that is party to the Alternative Cable Broadband ISP Service Agreement approved by the Commission pursuant to Paragraph II.A.1. of this Order in that Identified Cable Division) that have received the prior approval of the Commission to make Available additional Non-affiliated Cable Broadband ISP Services to Subscribers in that Identified Cable Division.

3. If Respondents fail to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.A.2 of this Order within the time required, then the Commission may appoint a trustee pursuant to Paragraph VI of this Order who, for an additional ninety-day (90-day) period, shall have the authority to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.A.2. of this Order. Such agreements shall be subject to the prior approval of the Commission and entered into with Non-affiliated ISPs that receive the prior approval of the Commission. With respect to a specific Identified Cable Division, these agreements shall be (a) on terms that, taken as a whole, are comparable to either (i) the Earthlink Agreement or (ii) any MSO Agreement; and (b) in any event, on terms with respect to technological and operational implementation for the provision of service that could not reasonably be expected to adversely affect in any significant respect the Cable Broadband ISP Services or any other services provided by such Identified Cable Division. The trustee shall consult with Respondents during the course of negotiations relating to any Alternative Cable Broadband ISP Agreement and shall consider in good faith any business, technological or operational considerations expressed by Respondents relating to such negotiations.

- B. In each of Respondents' Cable Divisions, excluding the Identified Cable Divisions:

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1. Within ninety (90) days after the date that Respondents make Available to any Subscriber an Affiliated Cable Broadband ISP Service in that Cable Division, Respondents shall enter into Alternative Cable Broadband ISP Service Agreements that have received the prior approval of the Commission with at least three (3) Non-affiliated ISPs that have received the prior approval of the Commission to make Available Non-affiliated Cable Broadband ISP Services to Subscribers throughout that Cable Division. For purposes of this Paragraph II.B.1., the term "make Available" shall not include tests that (i) involve a limited number of Subscribers, (ii) are for a limited period of time, and (iii) are not for commercial purposes but are conducted only for technological and operational implementation purposes; *provided, however*, that Respondents shall engage in no promotional activity in connection with such tests. For purposes of this Paragraph II.B.1., the Earthlink Agreement is an Alternative Cable Broadband ISP Service Agreement that has received the prior approval of the Commission, and Earthlink is a Non-affiliated ISP that has received the prior approval of the Commission.

2. If Respondents fail to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.B.1. of this Order within the time required, then the Commission may appoint a trustee pursuant to Paragraph VI of this Order who, for an additional ninety-day (90-day) period, shall have the authority to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.B.1. Such agreements shall be subject to the prior approval of the Commission and entered into with Non-affiliated ISPs that receive the prior approval of the Commission. These agreements shall be (a) on terms that, taken as a whole, are comparable to either (i) any other Alternative Cable Broadband ISP Service Agreement between Respondents and a Non-affiliated ISP to provide Cable

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Broadband ISP Service in any of Respondents' Cable Holdings, or (ii) any MSO Agreement; and (b) in any event, on terms with respect to technological and operational implementation for the provision of service that could not reasonably be expected to adversely affect in any significant respect the Cable Broadband ISP Services or any other services provided by such Cable Division. The trustee shall consult with Respondents during the course of negotiations relating to any Alternative Cable Broadband ISP Agreement and shall consider in good faith any business, technological or operational considerations expressed by Respondents relating to such negotiations.

- C. Respondents shall include in all Alternative Cable Broadband ISP Service Agreements submitted to the Commission for the Commission's approval pursuant to Paragraphs II.A. and II.B.:
1. a "most favored nation clause" requiring that, in the event that Respondents execute an MSO Agreement, Respondents shall: (1) within five (5) business days of execution of the MSO Agreement, notify the Monitor Trustee of the execution of the MSO Agreement and, at the same time, provide the Monitor Trustee with a copy of the MSO Agreement, (2) within five (5) business days of execution of the MSO Agreement, notify each Non-affiliated ISP that is party to an Alternative Cable Broadband ISP Service Agreement to provide Non-affiliated Cable Broadband ISP Service to Subscribers on any of Respondents' Cable Holdings that was approved by the Commission pursuant to this Order of the execution of the MSO Agreement, and (3) give such Non-affiliated ISPs, for a minimum of thirty (30) days from the day the Non-affiliated ISP is notified of the execution of the MSO Agreement, the ability to convert to all of the rates and terms in the MSO Agreement.

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2. a requirement that, if Respondents make available different levels of service (including, but not limited to, quality of service guarantees, maximum and minimum throughput capacity, and byte consumption per Subscriber) to Respondents' ISPs, Respondents shall make those levels of service available to Non-affiliated ISPs;
 3. a requirement that, if Respondents make any network flow monitoring data (regarding data transport between the ISP's connection point to the cable network and the Subscriber's location) or usage accounting available to any of Respondents' ISPs, then Respondents shall make that same data or accounting available to Non-affiliated ISPs; and
 4. at the option of the Non-affiliated ISP, a requirement that disputes in connection with compliance with any of the rates, terms, and conditions in the Alternative Cable Broadband ISP Service Agreement shall be submitted to binding arbitration; *provided, however*, that the arbitrator shall have no responsibility or authority to resolve issues concerning Respondents' compliance with this Order; and *provided, further, however*, that any non-monetary remedies granted by the arbitrator shall be subject to judicial review, and monetary remedies (including, but not limited to, the establishment of price terms for different levels of service and percentage splits) shall not be subject to judicial review.
- D. In the event that any one of the Alternative Cable Broadband ISP Service Agreements approved by the Commission pursuant to Paragraphs II.A. or II.B,
1. is for a term that terminates prior to expiration of this Order, then Respondents shall enter into an additional Alternative Cable Broadband ISP Service Agreement approved by the Commission, with a Non-affiliated ISP approved by the Commission, to provide Non-affiliated

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- Cable Broadband ISP Service, as required by Paragraph II.A. or II.B. of this Order, as applicable, no later than ninety (90) days prior to termination of the original agreement, the term of which, if approved by the Commission, shall take effect immediately upon expiration of the original agreement; *provided, however*, that with respect to any such Alternative Cable Broadband ISP Service Agreement that is for a term that terminates prior to the expiration of this Order but is for a term of at least three (3) years, Respondents shall offer the Non-affiliated ISP that is party to such Alternative Cable Broadband ISP Service Agreement an option to renew such Alternative Cable Broadband ISP Service Agreement for at least two (2) years;
2. is terminated by Respondents prior to expiration of this Order, Respondents shall enter into an additional Alternative Cable Broadband ISP Service Agreement approved by the Commission, with a Non-affiliated ISP approved by the Commission, to provide Non-affiliated Cable Broadband ISP Service, as required by Paragraph II.A. or II.B. of this Order, as applicable, no later than ninety (90) days prior to termination of the original agreement, the term of which, if approved by the Commission, shall take effect immediately upon expiration of the original agreement; and
 3. is terminated by the approved Non-affiliated ISP or the approved Non-affiliated ISP ceases to make its Non-affiliated Cable Broadband ISP Service Available to Subscribers in a particular Identified Cable Division, then Respondents shall enter into an additional Alternative Cable Broadband ISP Service Agreement, approved by the Commission, with a Non-affiliated ISP, approved by the Commission, as required by Paragraph II.A. or II.B. of this Order, as applicable, within ninety (90) days after the Non-affiliated Cable Broadband ISP Service is no longer Available to Subscribers in that Identified Cable Division.

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- E. Throughout Respondents' Cable Holdings, Respondents shall negotiate and enter into arms' length, commercial agreements with any Non-affiliated ISP (in addition to Non-affiliated ISPs approved by the Commission pursuant to Paragraphs II.A and II.B. of this Order) that seeks to provide Cable Broadband ISP Service; ***provided, however,*** that Respondents may (1) decline to negotiate or decline to enter into such agreements based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations or (2) impose rates, terms, or conditions based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations but, as to either subparagraph E.(1) or E.(2), only so long as such determinations are made without discrimination on the basis of affiliation with respect to all ISPs that enter into or seek to enter into or negotiate agreements with Respondents to provide Cable Broadband ISP Service to Subscribers on Respondents' Cable Holdings and are not based, in whole or in part, on the impact or potential impact on Respondents' ISPs (including but not limited to a decrease or potential decrease in Subscribers on Respondents' ISPs).
- F. The purpose of this Order is to ensure the provision and availability of a full range of Content and services by Non-affiliated ISPs; to prevent discrimination by Respondents as to Non-affiliated ISPs on the basis of affiliation, which would interfere with the ability of the Non-affiliated ISPs to provide a full range of Content and services; and to remedy the lessening of competition in the market for broadband ISP Service as alleged in the Commission's Complaint.

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III.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not interfere in any way, directly or indirectly, with Content passed in either direction along the Bandwidth contracted for and being used by any Non-affiliated ISP in compliance with the Non-affiliated ISP's agreement with Respondents.
- B. For any Non-affiliated ISP offering Cable Broadband ISP Service to Subscribers on any of Respondents' Cable Divisions, Respondents shall, upon the request of the Non-affiliated ISP, provide Access.
- C. As to any of Respondents' Cable Holdings, Respondents shall not interfere with the ability of a Subscriber to use, in conjunction with ITV services provided by a Person that is not Affiliated with Respondent, interactive signals, triggers, or other Content that Respondents have agreed to carry.
- D. Respondents shall not discriminate on the basis of affiliation in the transmission or modification of Content that Respondents have contracted to deliver to Subscribers over their cable systems.
- E. Respondents shall not enter into any agreement with any MSO that would interfere with the ability of such MSO to enter into agreements with any other ISP or provider of ITV services.

IV.**IT IS FURTHER ORDERED** that within each separate geographic area served by an ILEC:

- A. Respondents shall offer DSL Services to Subscribers in those geographic areas in which any of Respondents' Cable Holdings are located and Affiliated Cable Broadband ISP

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Service or Road Runner is Available at retail pricing, terms, and conditions that are the same as or comparable to those at which Respondents offer DSL Services to Subscribers in those geographic areas in which neither Affiliated Cable Broadband ISP Service nor Road Runner is Available; *provided, however*, that Respondents' pricing may reflect any actual differences in Costs to Respondents charged by the provider of DSL Services. To the extent that Respondents' pricing reflects differences in Costs, Respondents shall include a description of these Cost differences in the reports they are required to submit to the Commission (and the Monitor Trustee) pursuant to Paragraph VII. of this Order.

- B. Respondents shall market and promote DSL Services to Subscribers in those geographic areas in which any of Respondents' Cable Holdings are located and Affiliated Cable Broadband ISP Service or Road Runner is Available at the same or comparable level and in the same or comparable manner as Respondents market and promote DSL Services to Subscribers in those areas in which neither Affiliated Cable Broadband ISP Service nor Road Runner is Available.

V.

IT IS FURTHER ORDERED that, any time after Respondents execute the Consent Agreement, the Commission may appoint a Monitor Trustee to monitor Respondents' compliance with their obligations under this Order, which Monitor Trustee shall have the necessary rights, duties, and responsibilities as described below:

- A. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the

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identity of any proposed Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed Monitor Trustee. Within ten (10) days after the appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Monitor Trustee all the power and authority necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order.

- B. The Monitor Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order in consultation with the Commission.
- C. The Monitor Trustee shall have full and complete access to all personnel, books, records, documents and facilities of Respondents related to compliance with this Order or to any other relevant information, as the Monitor Trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Order. Respondents shall develop such financial or other information as such Monitor Trustee may reasonably request and shall cooperate with the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor Respondents' compliance with the Order.
- D. Respondents may require the Monitor Trustee or any of the Persons referred to in Paragraph V.E. to sign a confidentiality agreement prohibiting the disclosure of any information gained as a result of his or her role as Monitor Trustee to anyone other than the Commission.

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- E. The Monitor Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
- F. The Monitor Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the Monitor Trustee's experience and responsibilities. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.
- G. The Monitor Trustee shall have no responsibility or obligation for the operation of Respondents' businesses.
- H. The Monitor Trustee shall serve for the duration of this Order.
- I. If the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee who shall have all the rights, duties, powers, authorities, and responsibilities described in this paragraph. The Commission shall select the substitute Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing,

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including the reasons for opposing, the selection of any proposed substitute Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor Trustee. Within ten (10) days after the appointment of the substitute Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor Trustee all the power and authority necessary to permit the substitute Monitor Trustee to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order.

- J. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- K. The Monitor Trustee shall report in writing to the Commission concerning Respondents' compliance with this Order thirty days after execution of the trust agreement and every ninety days thereafter until the Order terminates.

VI.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not entered into the Alternative Cable Broadband ISP Service Agreements as required by Paragraphs II.A.2. and II.B.1 of this Order in any Cable Division, the Commission may appoint a trustee (who may be the same individual named in Paragraph V of this Order), to enter into the Alternative Cable Broadband ISP Service Agreements as described in Paragraphs II.A.3. or II.B.2., as applicable to that Cable Division. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15

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U.S.C. § 45(*I*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*I*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph VI.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to enter into the Alternative Cable Broadband ISP Service Agreements described by Paragraph II.A.3. and II.B.2 of this Order for the applicable Cable Division.
 3. Subject to the prior approval of the Commission, the trustee shall have the sole power and authority to enter into the Alternative Cable Broadband ISP Service Agreements as required by Paragraph II.A.2 and II.B.1.

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and as described in Paragraph II.A.3 and II.B.2 of this Order for the applicable Cable Division.

4. The trustee shall have an additional ninety days after the period allowed by Paragraphs II.A.2 or II.B.1. has expired in the applicable Cable Division to enter into the Alternative Cable Broadband ISP Services Agreements, required by Paragraphs II.A.2 or II.B.1, applicable to that Cable Division; the Non-affiliated ISP and the Alternative Cable Broadband ISP Services Agreement shall be subject to the applicable requirements of Paragraph II.A. and II.B., and shall be subject to the prior approval of the Commission.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Cable Broadband ISP Services Agreements required by Paragraph II. of this Order or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's ability to perform his or her responsibilities under this Order. Any delays caused by Respondents shall extend the time for entering into the Cable Broadband ISP Services Agreements as required by Paragraph II. of this Order in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred, including fees for

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his or her services, subject to approval of the Commission.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
8. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph VI.A. and VI.B.1. of this Order.
9. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the requirements of Paragraph II. of this Order.
10. The trustee shall report in writing to Respondents and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the requirements of Paragraph II.

VII.

IT IS FURTHER ORDERED that

- A. Within thirty (30) days after the date Respondents execute the Consent Agreement, every thirty (30) days thereafter until Respondents have complied with their obligations pursuant to Paragraphs II.A. and II.B. of this Order, and every ninety (90) days thereafter until termination of this

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Order, Respondents shall submit to the Commission (with a copy to the Monitor Trustee) a verified written report setting forth in detail, the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their compliance reports a full description of the efforts being made to comply with this Order, including, but not limited to:

- (1) a list by Cable Division of (i) all ISPs with whom Respondents have entered into a Cable Broadband ISP Service Agreement, including name of ISP and the telephone number of contact person, (ii) the date of execution of the agreement with the ISP, (iii) the date service is made Available to Subscribers by ISP, (iv) the date Respondents Offer Affiliated Cable Broadband ISP Service to Subscribers, (v) the identity of all ISPs with whom Respondents are negotiating Cable Broadband ISP Service Agreements, all who have expressed interest in negotiating Cable Broadband ISP Service Agreements with Respondents but with whom Respondents have refused to negotiate, including the reasons why Respondents have refused to negotiate, and all whom Respondents have contacted but have expressed no interest in negotiating or entering into a Cable Broadband ISP Service Agreement, (vi) the identity of all ISPs with whom Respondents have declined to negotiate or to enter into an agreement to provide Cable Broadband ISP Service, including the reasons why Respondents declined to do so;
- (2) a description of the negotiations with each ISP, including submission of the latest draft of any Cable Broadband ISP Service Agreement; and
- (3) copies of all agreements with ISPs to provide Cable Broadband ISP Service on Respondents' Cable Holdings (other than Cable Broadband ISP Service Agreements approved by the Commission pursuant to Paragraphs II.A. and II.B.).

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B. One (1) year from the date this Order becomes final, annually for the next succeeding four (4) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall either include in the report submitted pursuant to Paragraph VII.A. above or submit to the Commission (with a copy to the Monitor Trustee) an additional verified written report setting forth in detail a description of all complaints from any Non-affiliated Broadband ISP or television programmer made in writing to the General Counsel of Respondents relating to the failure of Respondents to make available content, or to carry interactive signals, triggers or content, including a copy of all such written complaints, the identification of the Non-affiliated Broadband ISP or television programmer, the name of a contact person from the Non-affiliated Broadband ISP or television programmer, a description of the original request if not contained in the written complaint, and Respondents' response to the original request.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

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- A. Access, during office hours upon reasonable notice and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and
- B. Upon five (5) business days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that:

- A. This Order shall terminate on April 17, 2006; *provided, however,* that if Respondents abandon their plans to consummate the proposed Merger and so notify the Commission, this Order shall terminate on the day after the date Respondents withdraw their respective Notification and Report Forms filed pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a, and the regulations promulgated thereunder, 16 C.F.R. §§ 800 *et seq.* in connection with the proposed Merger.
- B. Obligations in this Order applicable to any Cable Division shall terminate upon the disposition of Respondents' Control over such Cable Division.

By the Commission.

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Appendix A

IDENTIFIED CABLE DIVISIONS

1. New York City
2. Tampa Bay
3. Central Florida
4. Houston
5. Raleigh/Fayetteville
6. Western Ohio
7. Northeast Ohio
8. Charlotte
9. Los Angeles
10. Milwaukee
11. Greensboro
12. Hawaii
13. Cincinnati
14. San Antonio
15. Syracuse
16. Kansas City
17. South Carolina
18. Columbus
19. Rochester
20. Albany

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ORDER TO HOLD SEPARATE

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent America Online, Inc. (“AOL”) and Respondent Time Warner Inc. (“Time Warner”), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement and the draft of Complaint on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, and hereby makes the following jurisdictional findings and issues this Order to Hold Separate:

1. Respondent AOL is a corporation organized, existing and doing business under and by virtue of the laws of the State

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of Delaware, with its office and principal place of business located at 22000 AOL Way, Dulles, Virginia 20166.

2. Respondent Time Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York 10019.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

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II.

IT IS ORDERED that, as used in this Order to Hold Separate, the following definitions shall apply:

- A. "AOL" means America Online, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by America Online, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Time Warner" means Time Warner Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions (including, but not limited to, Time Warner Entertainment Company, L.P.), groups and affiliates controlled by Time Warner Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Affiliated Cable Broadband ISP Service" means a Cable Broadband ISP Service Affiliated with Respondent, excluding Road Runner.

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- D. "Affiliated" means having an attributable interest as defined in 47 C.F.R. § 76.501 (and accompanying notes), as that rule read on July 1, 1996.
- E. "Alternative Cable Broadband ISP Service Agreement" means an agreement between Respondents and a Non-affiliated ISP to provide Cable Broadband ISP Service on Respondents' Cable Holdings.
- F. "Available" means ready for immediate use at the request of a Subscriber.
- G. "Bandwidth" means the measure, in bits per second, of the speed of data transmission.
- H. "Broadband" means Bandwidth designed to operate at rates greater than 128 kilobits per second.
- I. "Cable Broadband ISP Service" means any ISP Service provided via Broadband over cable.
- J. "Cable Division" means each collection of localized communication networks, comprising one or more cable systems, that transmits multi-channel video, as well as other Content and services, by means of coaxial cables and/or fiber optics, that is located in the United States and is Controlled by Respondents.
- K. "Commission" means the Federal Trade Commission.
- L. "Consent Agreement" means the Agreement Containing Consent Orders executed by the Respondents in this matter.
- M. "Content" means data packets carrying information including, but not limited to, links, video, audio, text, e-mail, message, interactive signals, and interactive triggers.
- N. "Control" means (1) either (i) holding 50% or more of the outstanding voting securities of a Person or (ii) in the case

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of a Person that has no outstanding voting securities, having the right to 50% or more of the profits of the Person, or having the right in the event of dissolution to 50% or more of the assets of the Person or (2) having the contractual power presently to designate 50% or more of the directors of a Person that is a corporation, or in the case of unincorporated Persons, of individuals exercising similar functions.

- O. "Decision and Order" means the Decision and Order issued pursuant to the Consent Agreement, and all terms contained therein.
- P. "Earthlink" means Earthlink, Inc., incorporated in Delaware, with its principal place of business located at 1430 West Peachtree Street, Suite 400, Atlanta, Georgia 30309 and its subsidiaries, divisions, groups and affiliates controlled by Earthlink, and the successors and assigns of each.
- Q. "Earthlink Agreement" means the High-Speed Service Agreement effective as of November 18, 2000, between Earthlink, Inc., and Time Warner Entertainment Company, L.P.
- R. "Identified Cable Division" means each of the Cable Divisions identified in Appendix A of the Decision and Order, as well as any other Cable Division with 300,000 Subscribers or more, that, after the date Respondents execute the Consent Agreement, is, through acquisition or otherwise, Controlled by Respondents. Any Identified Cable Division shall cease to be an Identified Cable Division for purposes of this Order to Hold Separate upon disposition by Respondents of Respondents' Control over such Identified Cable Division.
- S. "ISP" means a provider of ISP Service.

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- T. "ISP Service" means the provision of connectivity to and services that enable the use of the Internet by an end-user.
- U. "Merger" means the transaction contemplated by the Second Amended and Restated Agreement and Plan of Merger, dated as of January 10, 2000, among AOL Time Warner Inc., America Online, Inc., Time Warner Inc., America Online Merger Sub Inc., and Time Warner Merger Sub Inc.
- V. "Monitor Trustee" means any Person appointed by the Commission pursuant to Paragraph V. of the Decision and Order in this matter.
- W. "Non-affiliated Cable Broadband ISP Service" means any Cable Broadband ISP Service that is not Affiliated with or Controlled by Respondents.
- X. "Non-affiliated ISP" means any ISP that is not Affiliated with or Controlled by Respondents.
- Y. "Offer" or "Offering" means in any way proffering, including, but not limited to, advertising, promoting, or announcing the current or future availability of service or its price.
- Z. "Person" means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- AA. "Respondents" means Time Warner and AOL.
- BB. "Respondents' Cable Holdings" means each and every Cable Division.
- CC. "Road Runner" means Road Runner LLC, organized in Delaware, with its principal place of business located at 13241 Woodland Park Road, Herndon, Virginia 20171, and any successor thereto.

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III.

IT IS FURTHER ORDERED that:

- A. Until such time as Respondents have made Available an Affiliated Cable Broadband ISP Service in each Identified Cable Division, and regardless of whether Respondents have consummated the proposed Merger, Respondents shall:
1. hold Road Runner and all of its businesses separate and apart from AOL and all of its businesses;
 2. operate the businesses of Road Runner independently of the businesses of AOL; and
 3. operate the businesses of AOL independently of the businesses of Road Runner.
- B. In holding Road Runner separate and apart from AOL and in operating the businesses of each separately from the other, Respondents shall take no steps to use, and shall not, in any way directly or indirectly, use Road Runner and its businesses to increase or otherwise advantage AOL and its businesses (as each of Road Runner and AOL is constituted at the time Respondents execute the Consent Agreement), or to use AOL and its businesses to increase or otherwise advantage Road Runner and its businesses; among other things, Respondents shall:
1. comply with the requirements of Paragraph II.A.1. of the Decision and Order; and
 2. refrain from:
 - a. engaging in cross-promotional or marketing activities between AOL's services and Road Runner's services;

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- b. Offering or making Available cross links to AOL's services from Road Runner's services or to Road Runner's services from AOL's services;
- c. engaging in joint or cooperative advertising of AOL's services and Road Runner's services;
- d. Offering or making Available AOL's services on Road Runner's services or Offering or making Available Road Runner's services on AOL's services;
- e. making references to or about AOL or AOL's services on Road Runner's services or making references to or about Road Runner or its services on AOL's services;
- f. using lists of Road Runner subscribers or potential subscribers as a means to Offer, promote, advertise, market, or otherwise make references to or about AOL or AOL's services;
- g. using lists of AOL subscribers or potential subscribers as a means to Offer, promote, advertise, market, or otherwise make references to or about Road Runner or Road Runner's services;
- h. Offering or making Available formats, designs, and products for use on or with AOL's services that are similar to those of Road Runner;
- i. Offering or making Available formats, designs, and products for use on or with Road Runner's services that are similar to those of AOL;
- j. Offering or making Available a look or feel similar to AOL or its services for use on Road Runner's services;
- k. Offering or making Available a look or feel similar to Road Runner or its services for use on AOL's services;

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- l. taking any steps to transform or transforming Road Runner business into AOL business;
- m. causing or permitting Road Runner to hire AOL employees; and
- n. causing or permitting AOL to hire Road Runner employees.

IV.

IT IS FURTHER ORDERED that, any time after Respondents execute the Consent Agreement, the Commission may appoint a Monitor Trustee to monitor Respondents' compliance with their obligations under this Order to Hold Separate, which Monitor Trustee shall have the necessary rights, duties, and responsibilities as described below:

- A. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed Monitor Trustee. Within ten (10) days after the appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Monitor Trustee all the power and authority necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order to Hold Separate in a manner consistent with the purposes of this Order to Hold Separate.
- B. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order to Hold Separate and shall exercise such power and

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authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order to Hold Separate in consultation with the Commission.

- C. The Monitor Trustee shall have full and complete access to all personnel, books, records, documents and facilities of Respondents related to compliance with this Order to Hold Separate or to any other relevant information, as the Monitor Trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Order to Hold Separate. Respondents shall develop such financial or other information as such Monitor Trustee may reasonably request and shall cooperate with the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor Respondents' compliance with this Order to Hold Separate.
- D. Respondents may require the Monitor Trustee or any of the Persons referred to in Paragraph IV.E. to sign a confidentiality agreement prohibiting the disclosure of any information gained as a result of his or her role as Monitor Trustee to anyone other than the Commission.
- E. The Monitor Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
- F. The Monitor Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the Monitor Trustee's experience and responsibilities.

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Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.

- G. The Monitor Trustee shall have no responsibility or obligation for the operation of Respondents' businesses.
- H. The Monitor Trustee shall serve until such time as Respondents have complied with their obligations pursuant to this Order to Hold Separate.
- I. If the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee who shall have all the rights, duties, powers, authorities, and responsibilities described in this paragraph. The Commission shall select the substitute Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor Trustee. Within ten (10) days after the appointment of the substitute Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor Trustee all the power and authority necessary to permit the substitute Monitor Trustee to monitor Respondents' compliance with

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the terms of this Order to Hold Separate in a manner consistent with the purposes of this Order to Hold Separate.

- J. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Hold Separate.
- K. The Monitor Trustee shall report in writing to the Commission concerning Respondents' compliance with this Order to Hold Separate thirty days after execution of the trust agreement and every ninety days thereafter until this Order to Hold Separate terminates.

V.

IT IS FURTHER ORDERED that Respondents shall, within ten (10) days of the date this Order to Hold Separate is final, circulate to all of Respondents' employees a copy of this Order to Hold Separate and shall post a notice accessible to all employees informing employees of Respondents' obligations pursuant to this Order to Hold Separate.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation or company, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Hold Separate.

VII.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Hold Separate, and subject to any legally recognized privilege, and

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upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents upon reasonable notice and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order to Hold Separate; and
- B. Upon five (5) business days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order to Hold Separate shall terminate on the earlier of:

- A. The day after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. §§ 2.34;
- B. The day after Respondents, in accordance with the requirements of Paragraph II. of the Decision and Order, have made Available Affiliated Cable Broadband ISP Service throughout all of the Identified Cable Divisions; *provided, however,* that Respondents' obligations pursuant to Paragraph II. of this Order to Hold Separate in a particular Cable Division shall terminate on the day after Respondents have made Available Affiliated Cable Broadband ISP Service throughout that Cable Division so long as the termination of Respondents' obligations pursuant to Paragraph II. of this Order to Hold Separate in that Cable Division does not affect, in any way, directly or indirectly, Respondents' compliance with Paragraph II of

Order

this Order to Hold Separate throughout the remainder of Respondents' Cable Holdings;

C. In the event that Respondents abandon their plans to consummate the proposed Merger and so notify the Commission, on the day after the date they withdraw their respective Notification and Report Forms filed pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a, and the regulations promulgated thereunder, 16 C.F.R. §§ 800 *et seq.* in connection with the proposed Merger; or

D. On the date the Decision and Order terminates.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 14, 2000

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment from America Online, Inc. (“AOL”) and Time Warner Inc. (Time Warner”) (collectively “Proposed Respondents”) an Agreement Containing Consent Orders (“Proposed Consent Agreement”), including the Decision and Order (“Proposed Order”). The Proposed Respondents have also reviewed a draft complaint. The Commission has now issued the complaint and an Order to Hold Separate (“Hold Separate Order”). The Proposed Consent Agreement intends to remedy the likely anticompetitive effects arising from the merger of AOL and Time Warner.

II. The Parties and the Transaction

AOL is the world's leading internet service provider (“ISP”), providing access to the internet for consumers and businesses. AOL operates two ISPs: America Online, with more than 25 million members; and CompuServe, with more than 2.8 million members. AOL also owns several leading Internet products including AOL Instant Messenger, ICQ, Digital City, MapQuest, and MoviePhone; the AOL.com and Netscape.com portals; the Netscape 6, Netscape Navigator and Communicator browsers; and Spinner.com and NullSoft’s Winamp, leaders in Internet music.

Time Warner is the nation’s second largest cable television distributor, and one of the leading cable television network providers. Time Warner’s cable systems pass approximately 20.9 million homes and serve approximately 12.6 million cable television subscribers, or approximately 20% of U.S. cable television households. Time Warner, or its principally owned subsidiaries, owns leading cable television networks, such as HBO, Cinemax, CNN, TNT, TBS Superstation, Turner Classic Movies and Cartoon Network.

Analysis

Time Warner also owns, directly or through affiliated businesses, a wide conglomeration of entertainment or media businesses. Time Warner's holdings include leading magazine franchises, such as Time, People and Sports Illustrated; copyrighted music from many of the world's leading recording artists that it produces and distributes through a family of established record labels, such as Warner Bros. Records, Atlantic Records, Elektra Entertainment and Warner Music International; the unique and extensive film and animation libraries owned or managed by Warner Bros. and New Line Cinema; and trademarks, such as the Looney Tunes characters, Batman and The Flintstones; the WB Network, a national broadcasting network; and Internet websites, such as CNN.com. Time Warner is the majority owner of Road Runner (the trade name of ServiceCo, LLC), the second largest provider of cable broadband ISP service in the U.S., serving more than 1.1 million subscribers. Road Runner has an exclusive contract to provide cable broadband ISP service via Time Warner's cable systems through December 2001.

On January 10, 2000, AOL and Time Warner entered into an Agreement and Plan of Merger (the "merger"), pursuant to which Time Warner common stockholders will receive 1.5 shares of the combined AOL Time Warner ("combined company," or "AOL Time Warner") for each share of Time Warner common stock they hold. AOL common stockholders will receive one share of common stock of AOL Time Warner for each share of AOL common stock they hold.

III. The Proposed Complaint

According to the complaint the Commission intends to issue, AOL's merger with Time Warner will have anticompetitive effects in three relevant product markets: (1) the market for broadband Internet access; (2) the market for residential broadband Internet transport services, or last mile access; and (3) the market for interactive television ("ITV") services.

Analysis

AOL is the dominant narrowband ISP. Its narrowband customer base positions AOL to become a significant broadband ISP competitor as well. Time Warner provides broadband Internet access through Road Runner, a partially owned subsidiary in which it has a controlling interest. AOL and Road Runner are two of the most significant broadband ISP competitors in Time Warner cable areas. According to the Commission's draft complaint, the relevant broadband ISP markets are or are likely to become highly concentrated as a result of the merger, and the merger will increase the ability of the combined firm to unilaterally exercise market power in Time Warner cable areas and throughout the United States. Moreover, new entry is not likely to be timely or sufficient to prevent the combined firm from exercising market power.

In the market for broadband Internet transport services, the Commission's complaint alleges that cable television lines and digital subscriber lines ("DSL") are the two principal means of providing last mile access for broadband ISPs to the customers. Satellite and fixed wireless technologies also provide last mile access, but consumers do not view them as viable alternatives for DSL or cable broadband access. Currently, AOL's principal means of providing broadband access to its subscribers is through DSL, and every broadband subscriber it signs represents a lost revenue opportunity for cable broadband providers. AOL's merger with Time Warner will reduce its incentives to promote and market broadband access through DSL in Time Warner cable areas, adversely affecting DSL rollout in those areas and nationally, and will increase AOL Time Warner's ability to exercise unilateral market power in those areas.

According to the Commission's complaint, ITV combines television programming with Internet functionality. Cable television lines have distinct competitive advantages over DSL in providing ITV services to broadband customers. AOL recently launched AOL TV, a first generation ITV service, and is well positioned to become the leading ITV provider. Local cable companies will play the key role in enabling the delivery of ITV

Analysis

services. After the merger, AOL Time Warner will have incentives to prevent or deter rival ITV providers from competing with AOL's ITV service. Thus, the merger could enable AOL to exercise unilateral market power in the market for ITV services in Time Warner cable areas, which also affects the ability of ITV providers to compete nationally.

IV. Terms of the Proposed Order

The Proposed Order is effective for a term of five years and resolves the Commission's antitrust concerns with the merger as discussed below.

A. Broadband Internet Access Services

Under the terms of the Proposed Order, before Time Warner can make AOL's broadband ISP service available in certain identified cable divisions representing over 70 percent of Time Warner's cable customers ("Identified Cable Divisions"),¹ Time Warner must first make available cable broadband service offered by Earthlink, Inc. pursuant to an agreement between Time Warner and Earthlink that the Commission has evaluated and approved.

In addition, Respondents cannot begin to advertise or promote AOL's broadband ISP service to subscribers in a cable division until Earthlink's competing ISP service is available to subscribers in that cable division or Earthlink advertises or promotes its service in that cable division, whichever occurs first. These provisions ensure that a competing ISP service, which is not

¹ The identified cable divisions to which this provision applies are: New York City, Tampa Bay, Central Florida, Houston, Raleigh/Fayetteville, Western Ohio, Northern Ohio, Charlotte, Los Angeles, Milwaukee, Greensboro, Hawaii, Cincinnati, San Antonio, Syracuse, Kansas City, South Carolina, Columbus, Rochester, Albany, and any other cable division with 300,000 subscribers or more that is controlled by Respondents.

Analysis

affiliated with AOL Time Warner, is available to subscribers in most Time Warner cable areas at the same time that AOL introduces its cable broadband ISP service. It does not prevent Time Warner from conducting tests involving a limited number of subscribers that are purely for technological and operational implementation purposes, rather than for commercial purposes.

Within 90 days of making AOL's broadband ISP service available to subscribers, Time Warner must enter into agreements to carry at least two other non-affiliated broadband ISPs to provide cable broadband ISP services in the Identified Cable Divisions. The non-affiliated ISPs, and Time Warner's agreements with them, must receive the prior approval of the Commission. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint a trustee who will have the authority to enter into such agreements on Time Warner's behalf. These agreements must also receive the prior approval of the Commission. These agreements must be on terms comparable to either the Earthlink agreement, or any agreement between AOL and another cable system to provide AOL's cable broadband ISP service over that cable system.²

In Time Warner's other cable divisions, Time Warner must enter into cable broadband ISP service agreements that have received the prior approval of the Commission with at least three other non-affiliated ISPs that have received the prior approval of the Commission within 90 days of making AOL's cable broadband ISP service available in each such division. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint a trustee who will have the authority to enter into such agreements, which will be subject to the prior approval of the Commission. These agreements must be on terms comparable to either another alternative cable broadband ISP service agreement between a broadband ISP and the Proposed

² This provision applies to the following cable systems: Adelphia, AT&T, Cablevision, Charter, Comcast, and Cox.

Analysis

Respondents approved by the Commission, or any agreement between AOL and another cable system to provide AOL's cable broadband ISP service over that cable company's system.

The Proposed Order requires Time Warner to include several provisions in the agreements it negotiates with the non-affiliated ISPs. Specifically:

- Time Warner must include a most favored nation ("MFN") clause in all alternative cable broadband ISP service agreements submitted to the Commission for approval. The MFN must provide that if AOL executes a cable broadband ISP service agreement with another cable system operator, Respondents must provide a copy of the agreement with that cable system operator to a Monitor Trustee appointed by the Commission; give notice of the execution of the agreement to each non-affiliated ISPs that is a party to an alternative cable broadband ISP service agreement approved by the Commission; and give the non-affiliated ISPs the ability to convert to all of the rates and terms in the cable system operator's agreement;
- Time Warner must also include in all alternative cable broadband ISP service agreements submitted to the Commission for approval a requirement that if Proposed Respondents makes available different levels of service to their affiliated ISPs, they must make those levels of service available to non-affiliated ISPs;
- Time Warner must also include in all alternative cable broadband ISP service agreements submitted to the Commission for approval a requirement that if Proposed Respondents make available any network flow monitoring data or usage accounting to any of their affiliated ISPs, they must make that same data or accounting available to non-affiliated ISPs;

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- Time Warner must also include in all alternative cable broadband ISP service agreements, at the option of the non-affiliated ISP, a requirement that disputes concerning compliance with the rates, terms, and conditions of that agreement shall be submitted to binding arbitration; and
- If requested by a non-affiliated ISP, Time Warner must provide the non-affiliated ISPs with the same point of connection within Time Warner's cable divisions that Time Warner provides to affiliated ISPs. This provision is intended to ensure that Time Warner may not discriminate against non-affiliated ISPs by providing them with a less-advantageous connection point to its network than it provides to AOL.

If any of the alternative cable broadband ISP service agreements approved by the Commission is for a term that terminates prior to expiration of the Proposed Order (*i.e.*, five years from the date the Proposed Order becomes final), the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, that must take effect immediately upon the expiration of the original agreement. If the original alternative cable broadband ISP service agreement is for a term of at least three years, Time Warner must offer the non-affiliated ISP that is a party to that agreement an option to renew the agreement for at least two years.

If Time Warner terminates any of the alternative cable broadband ISP service agreements approved by the Commission before the expiration of the Proposed Order, the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, which must take effect immediately upon the expiration of the original agreement.

Analysis

If any non-affiliated ISP terminates its alternative cable broadband ISP service agreement approved by the Commission before the expiration of the Proposed Order, or if the non-affiliated ISP ceases to make its ISP service available to subscribers in a particular identified cable division, Time Warner must enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, within 90 days after the original non-affiliated cable broadband ISP service is no longer available to subscribers.

In addition to the broadband ISP service agreements described above, the Proposed Order also requires Time Warner to negotiate and enter into arms' length, commercial agreements with any other non-affiliated ISP that seeks to provide cable broadband ISP service on Time Warner's cable system. Time Warner may decline to enter into such negotiations or agreements or impose rates, terms, or conditions based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations, but only so long as it makes such determinations without discrimination on the basis of affiliation and not on the basis of the impact on Proposed Respondents' ISPs (including, but not limited to a decrease in subscribers of Proposed Respondents' ISPs).

The purpose of these provisions is to ensure that a full range of content and services from non-affiliated ISPs is available to subscribers; prevent discrimination by Proposed Respondents as to non-affiliated ISPs on the basis of affiliation, which would interfere with the ability of the non-affiliated ISP to provide a full range of content and services; and remedy the lessening of competition in the market for broadband ISP service as alleged in the Commission's complaint.

A. Interactive Television and Other Internet Services

Section III of the Proposed Order prohibits Time Warner from interfering in any way with content passed along the bandwidth

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contracted for and being used by non-affiliated ISPs in compliance with their agreements with Proposed Respondents. The Proposed Order also prohibits Time Warner from discriminating on the basis of affiliation in the transmission or modification of content that Time Warner has contracted to deliver to subscribers over its cable systems. The Proposed Order specifically prohibits Time Warner from interfering with the ability of a subscriber to use, in conjunction with ITV services provided by a non-affiliated entity, interactive signals, triggers, or other content that the Proposed Respondents have agreed to carry. If Time Warner has agreed to transmit ITV signals or interactive triggers that AOL subscribers can use, it cannot block transmission of such ITV signals or triggers to subscribers using a competing ITV service. In addition, the Proposed Order prohibits the Proposed Respondents from entering into any agreement with any other cable system that would interfere with the ability of the other cable system to enter into agreements with non-affiliated ISPs or ITV providers.

The Proposed Order also requires the Proposed Respondents to provide the Commission with all complaints from any non-affiliated broadband ISP relating to the failure of the Proposed Respondents to make content available. The Proposed Order also requires the Proposed Respondents to notify the Commission whenever a television programmer complains that the Proposed Respondents have failed to carry interactive triggers, signals or content through its cable systems.

B. Broadband Transport Services

Section IV of the Proposed Order requires AOL to charge the same or comparable price for its DSL service to subscribers in Time Warner cable areas where AOL cable broadband ISP service or Road Runner is available as AOL charges for its DSL service in areas in which neither AOL cable broadband ISP service nor Road Runner is available. However, AOL may charge different prices for its DSL service to the extent such pricing differences reflect any actual cost differences for DSL transmission services. The Proposed Respondents must include a description of these cost

Analysis

differences in the reports they are required to submit to the Commission.

The Proposed Order also requires AOL to market and promote its DSL services to subscribers in Time Warner cable areas where AOL cable broadband ISP service or Road Runner is available at the same or comparable level and in the same or comparable manner as it markets and promotes DSL services to subscribers in areas in which neither AOL cable broadband ISP service nor Road Runner is available.

C. Monitor Trustee Provisions

The Proposed Consent Order authorizes the Commission to appoint a Monitor Trustee to monitor compliance with the Order at any time after the Proposed Respondents sign the Consent Agreement. The Proposed Consent Order provides the Monitor Trustee with the power and authority to monitor the Proposed Respondents' compliance with the terms of the Proposed Consent Order, and full and complete access to personnel, books, records, documents, and facilities of the Proposed Respondents to fulfill that responsibility. In addition, the Monitor Trustee may request any other relevant information that relate to the Proposed Respondents' obligations under the Proposed Consent Order. The Proposed Consent Order precludes Proposed Respondents from taking any action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor compliance with the Proposed Consent Order.

The Monitor Trustee may hire such consultants, accountants, attorneys, and other assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Proposed Consent Order requires the Proposed Respondents to bear the cost and expense of hiring these assistants.

D. Trustee Provisions

Analysis

The Proposed Consent Order provides that the Commission may appoint a trustee to enter into broadband agreements with non-affiliated ISPs in two instances. First, if the Proposed Respondents have failed to enter into agreements with two additional ISPs in the Identified Cable Divisions within 90 days of making an affiliated ISP available to subscribers, the Commission may appoint a trustee to enter into an agreements, subject to the prior approval of the Commission. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) the Earthlink agreement; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least two non-affiliated ISPs are available on the Time Warner system in these divisions in addition to Earthlink.

The Commission may also appoint a trustee to enter into agreements in other Time Warner cable divisions if the Proposed Respondents fail to enter into agreements with at least three non-affiliated ISPs that the Commission approves within 90 days of making any affiliated ISP available. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) any other broadband agreement with a non-affiliated ISP for carriage on any Time Warner cable system; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least three non-affiliated ISPs are available on the Time Warner cable systems in these divisions.

E. Order to Hold Separate

In addition to the Proposed Order, the Commission also issued an Order to Hold Separate ("Hold Separate Order"). The purpose of the Hold Separate Order is to prevent interim harm to competition and to prevent AOL from gaining a competitive first mover advantage through a relationship with Road Runner.

Analysis

The Hold Separate Order requires the Proposed Respondents to hold AOL and Road Runner separate in each Identified Cable Division until they have made an affiliated ISP available to broadband customers in that Identified Cable Division. The Hold Separate Order expressly prohibits AOL and Road Runner from, among other things, cross or joint promotional activities, joint or cooperative advertising, and any steps to benefit, directly or indirectly, from each other's business activities.

The Commission may appoint a trustee to monitor compliance with the terms of the Hold Separate Order.

X. Opportunity for Public Comment

The Proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Proposed Consent Agreement and the comments received and will decide whether or not to make the Proposed Order final.

By accepting the Proposed Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Agreement, to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

Statement

**Concurring Statement of Commissioner
Mozelle W. Thompson**

The Commission has determined to issue, with certain modifications, a final consent order in connection with the merger of America Online, Inc. and Time Warner Inc. This merger marks the first, and potentially most significant convergence of an Internet giant with a media, entertainment and cable conglomerate. Because it will form a broadband Internet powerhouse spanning the three market tiers of content, consumer interface, and broadband conduit, it may also shape the very contours of the market for high speed Internet. In reviewing the merger, I have been concerned that without relief, the transaction would have threatened the significant open market environment that high technology and Internet companies, innovators, and consumers enjoy. I voted to accept the settlement, however, because the consent will not only provide a means to address these concerns, but will also send an important message to the market that high speed Internet should continue to provide consumers with choice of service and diversity of content.

It is important to note that our remedy does give me pause for several reasons. First, the remedy – as some might observe – appears to be an unusually regulatory solution for a merger order. I generally prefer the divestiture of an ongoing business – *i.e.*, structural relief – to restore lost competition, a policy that the Commission has increasingly favored when settling merger cases.¹ Moreover, it is difficult to determine whether the order's five-year duration is too limited to accomplish the full goal of the relief.

Second, I am concerned that the Commission's open access relief might not preclude the possibility of harm from the merged

¹ In matters such as this one, where the parties repeatedly failed to articulate how the merger would benefit consumers, I tend to believe that structural relief – or outright challenge of the merger – is even more warranted to preserve the public interest.

Statement

entity's control of AOL and Time Warner content along with the Time Warner cable systems. The settlement nonetheless marks an important first step for future open competition on cable for Internet service providers and content providers. The relief provides that the Commission will supervise AOL Time Warner's conduct for five years; however, it tells the market to continue to demand openness and competition in this important area. I note also that the negotiated relief was improved from the companies' earliest proposals.

That being said, I also hope that the public does not over-interpret today's decision; despite the fact that this merger has been allowed to proceed without challenge, I expect that the Commission will scrutinize future Internet mergers as it does any merger – on a case-by-case basis. Moreover, the Commission will continue to exercise its antitrust responsibilities by taking appropriate action against anti-competitive behavior. Finally, though many interested parties will, no doubt, scrutinize the terms of the ordered ISP access agreements, these should not necessarily be seen as a template for future Internet access, but should instead be regarded as examples of how the public should share the benefits provided by the principles of Internet openness and diversity.

For those reasons, I concur with issuing the consent order, as modified.

Complaint

IN THE MATTER OF

ALASKA HEALTHCARE NETWORK, INC.

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

*Docket C-4007; File No. 9910103
Complaint, April 25, 2001--Decision, April 25, 2001*

This consent order addresses practices used by Respondent Alaska Healthcare Network, Inc. -- a non-profit corporation composed of more than 60 percent of the physicians with active medical staff privileges at Fairbanks Memorial Hospital in Alaska -- with respect to the prices and other terms of trade on which its members deal with payors. The order, among other things, prohibits the respondent from entering into or facilitating any agreement (1) to negotiate on behalf of any physicians with any payor or provider; (2) to deal or refuse to deal with any payor or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payor or provider; or (4) to restrict the ability of any physician to deal with any payor or provider on an individual basis or through any other arrangement. The order also prohibits the respondent from exchanging or facilitating the exchange of information among Fairbanks area physicians concerning (1) negotiation with any payor or provider regarding reimbursement terms; or (2) any physician's intentions or decisions with respect to any dealings with any payor or provider. In addition, the order prohibits the respondent from encouraging, advising, or pressuring any person, other than the government, to engage in any action prohibited by the order. The order also provides that, for five years, if the respondent offers the services of its physicians through any other arrangement, its participating physicians must constitute no more than 50 percent of Fairbanks physicians in any of those specialties.

Participants

For the Commission: *Paul J. Nolan, Judith A. Moreland, Shane Woods, David R. Pender, Richard A. Feinstein, Joseph Eckhaus, Roberta S. Baruch, Jane E. Ruseski, Louis Silvia, and Gregory Vistnes.*

For the Respondent: *Douglas Ross, Davis Wright Tremaine, LLP.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Alaska Healthcare Network, Inc. (“Respondent AHN” or “AHN”) has violated and is violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent AHN is a non-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Alaska, with its office and principal place of business located at 1867 Airport Way, Suite 115-A, Fairbanks, Alaska 99701.

PARAGRAPH TWO: Fairbanks is the second largest city in Alaska, with a population of over 31,000. The greater Fairbanks area has a population of over 80,000. Fairbanks is isolated in the interior of Alaska. The nearest city to Fairbanks that has a population over 2,000 is Anchorage, which is approximately 360 miles southwest of Fairbanks. Fairbanks Memorial Hospital is the only private acute care hospital in Fairbanks.

PARAGRAPH THREE: At all times relevant to this Complaint, all members of Respondent AHN were physicians (medical doctors and doctors of osteopathic medicine) engaged in the business of providing health care services for a fee, and practiced in Fairbanks and its immediate environs. Except to the extent that competition has been restrained as alleged herein, some or all of the physician members of Respondent AHN have been, and are now, in competition with each other for the provision of physician services.

PARAGRAPH FOUR: At all times relevant to this Complaint, of the physicians in full-time, year-round private practice in

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Fairbanks who have active medical privileges at Fairbanks Memorial Hospital, Respondent AHN's members included approximately 63% of all such physicians, 48% of the family and general practitioners, 72% of the internists, 100% of the pediatricians, 80% of the obstetrician-gynecologists, and 86% of the general surgeons.

PARAGRAPH FIVE: The general business practices of Respondent AHN and its members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

PARAGRAPH SIX: Respondent AHN engages in substantial activities for the pecuniary benefit of its members. At all times relevant to this Complaint, Respondent AHN is and has been organized in substantial part for the profit of its members, and is therefore a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

PARAGRAPH SEVEN: Physicians often contract with health insurance firms and other third-party payors, including health maintenance organizations ("HMOs") and preferred provider organizations ("PPOs"). Such contracts typically establish the terms and conditions, including price terms, under which the physicians will render services to the subscribers of the third-party payors. In many cases, physicians entering into such contracts agree to reductions in their compensation in order to obtain access to additional patients. These contracts may permit third-party payors to lower their costs and thus reduce the cost of medical care for their subscribers.

PARAGRAPH EIGHT: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payors, competing physicians decide individually whether to enter into contracts with third-party

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payors to provide services to their subscribers or enrollees, and what prices they will accept pursuant to such contracts.

PARAGRAPH NINE: Respondent AHN, acting as a combination of its members, and in conspiracy with at least some of its members and others, has acted to restrain competition by, among other things, facilitating, entering into, and implementing agreements among its members, express or implied, to fix price and other competitively significant terms of dealing with payors, and to refuse to deal with payors except on collectively agreed-upon terms.

PARAGRAPH TEN: Respondent AHN was formed in 1996 to promote the collective economic interests of AHN's physician members. When AHN was formed, no HMO and only one PPO operated in the Fairbanks area; however, a wide range of third-party payors of physician services, including PPOs, HMOs, and government health care purchasing cooperatives, were then seeking to contract with Fairbanks physicians. AHN's founding members sought to organize Fairbanks physicians into a group that would have the power to maintain physicians' collective control over price and other terms of dealing with third-party payors.

PARAGRAPH ELEVEN: AHN described itself to members as a vehicle permitting them to bargain collectively with payors from a position of strength. It emphasized to its members that AHN, as a result of its size and its members' agreement to allow AHN to bargain on their behalf, was in a position to avert the competition that might otherwise be introduced into the Fairbanks area by managed care plans.

PARAGRAPH TWELVE: From early 1997 through 1998, AHN bargained collectively, on behalf of its physician members, about price and other terms of dealing with at least seven third-party payors. In early 1997, Respondent AHN collected fee information from its member physicians in order to develop a fee schedule that was used in contract negotiations with third-party payors. AHN

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told its members that its fee schedule represented members' usual fees, and that the fee schedule would be used to obtain a favorable level of reimbursement for area physicians. AHN's Board and Contracting Committee also adopted a "model contract" that required payors to use AHN's fee schedule and to delegate their credentialing, utilization review, and formulary management to AHN rather than operating their own programs.

PARAGRAPH THIRTEEN: AHN members authorized AHN's Executive Director to bargain on their behalf over the terms and conditions under which individual physicians would deal with third-party payors for contracts, including whether AHN members would share substantial financial risk for services delivered. With respect to PPO and other contracts where its members did not assume financial risk, AHN purported to operate as a "messenger model." Under a messenger model, an agent conveys payors' contract offers to individual physicians, who each make an independent decision whether to accept or reject each contract. In fact, AHN did not negotiate any contracts under which its physicians shared substantial financial risk, and it did not adhere to the messenger model. Instead, its Executive Director and Contracting Committee bargained with payors over payment and other terms of fee-for-service contracts. If a payor refused to agree to AHN's price and non-price terms, AHN would not transmit these payors' contract offers to AHN's physician members.

PARAGRAPH FOURTEEN: In 1998, AHN reached agreement on a contract with NYLCare, and referred it to individual members for their approval. AHN's Executive Director told the members that the Contracting Committee had revised the NYLCare contract proposal in a way that was responsive to the common economic interest of all AHN providers. Thereafter, Respondent AHN demanded that six other third-party payors use AHN's fee schedule, which represented fees actually charged by most AHN members. In addition, AHN demanded that those third-party payors use its model contract that required payors to delegate credentialing, quality assurance, and utilization review to

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AHN physicians. However, AHN had not implemented any utilization review, quality assurance, or credentialing systems, and it lacked the capacity to implement some or all of those services. AHN engaged payors in protracted negotiations over price and non-price terms that often extended for more than a year, with no resolution. AHN did not refer contract offers from any of these payors to its members.

PARAGRAPH FIFTEEN: Respondent AHN functioned de facto as the exclusive representative of its members. Through statements in its newsletters, documents, and other media, AHN encouraged its members to deal with payors only through AHN in order to obtain better price and other terms. Some payors who were seeking to enter the Fairbanks area attempted unsuccessfully to contract with individual physicians instead of AHN; physicians told the payors that AHN handled contracting for them and for other Fairbanks physicians. Payors believed that they could not go around AHN to contract individually with physicians in Fairbanks, and thus that they had no alternative but to reach agreement with AHN or to give up their planned entry into Fairbanks.

PARAGRAPH SIXTEEN: As a result of Respondent AHN's conduct, a wide range of third-party payors of physician services, including PPOs, HMOs, and employer health care purchasing cooperatives, were unable to secure contracts with physicians and thus were unable to do business in the Fairbanks area.

PARAGRAPH SEVENTEEN: The physician members of Respondent AHN have not integrated their practices to create efficiencies sufficient to justify their acts and practices described in Paragraphs 9 through 16.

PARAGRAPH EIGHTEEN: The purpose, effects, tendency, or capacity of the conduct described in Paragraphs 9 through 16 are and have been to restrain trade unreasonably and hinder competition in the provision of physician services in the Fairbanks area in the following ways, among others:

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- A. Price and other forms of competition among Respondent AHN's member physicians were unreasonably restrained;
- B. Prices for physician services were increased;
- C. The development of alternative health care financing and delivery systems was hindered;
- D. Health plans, employers, and individual consumers were deprived of the benefits of competition in the purchase of physician services; and
- E. Employers and individual consumers were deprived of the benefits of competition among health plans.

PARAGRAPH NINETEEN: The combination, conspiracy, acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts and practices, or the effects thereof, are continuing and will continue or recur in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fifth day of April, 2001, issues its Complaint against AHN.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Alaska Healthcare Network, Inc. (“AHN”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, and having determined to modify Attachment A of the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Order:

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1. Respondent is a nonprofit corporation organized, existing, and doing business under and by virtue of the laws of the State of Alaska, with its office and principal place of business at 1867 Airport Way, Suite 115-A, Fairbanks, Alaska 99701.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this order, the following definitions shall apply:

A. "Respondent" or "AHN" means Alaska Healthcare Network, Inc., its officers, directors, employees, agents and representatives, successors, and assigns, its subsidiaries, divisions, groups and affiliates controlled by AHN, and the respective officers, directors, employees, agents and representatives, successors, and assigns of each.

B. "Payor" means any person that purchases, reimburses for, otherwise pays for, or arranges for the payment of, all or any part of any health care services for itself or for any other person. Payor includes, but is not limited to, any health insurance company; preferred provider organization; prepaid hospital, medical, or other health service plan; health maintenance organization; government health benefits program; employer or other person providing or administering self-insured health benefits programs; and patients who purchase health care for themselves.

C. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

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D. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).

E. “Participating physician” means any physician (1) who is a stockholder, owner, or member of AHN; (2) who has agreed to provide services through AHN; or (3) whose services have been offered to any payor through AHN.

F. “Pre-existing practice group” means an individual physician practice or a physician practice group existing as of the date of signing of the Consent Agreement. A pre-existing practice group may add any physician to the practice group after that date, without losing the status of “pre-existing” under this definition, so long as each additional physician added to the practice group is not a Fairbanks area physician at the time of the addition to the practice group.

G. “Provider” means any person that supplies health care services to any other person, including, but not limited to, hospitals, clinics, and physicians (except members or prospective members of AHN).

H. “Qualified risk-sharing joint arrangement” means an arrangement to provide physician services in which (1) all participating physicians share substantial financial risk from their participation in the arrangement and thereby create incentives for the participating physicians to jointly control costs and improve quality by managing the provision of physician services, such as risk-sharing involving: (a) the provision of physician services to payors or providers at a capitated rate, (b) the provision of physician services for a predetermined percentage of premium or revenue from payors or providers, (c) the use of significant financial incentives (e.g., substantial withholds) for its participating physicians, as a group, to achieve specified cost-containment goals, or (d) the provision of a complex or extended course of treatment that requires the substantial coordination of care by physicians in different specialties offering a complementary mix of services, for a fixed, predetermined payment, where the costs of that course of treatment for any

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individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; (2) any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payors or providers on an individual basis or through any other arrangement.

I. "Qualified clinically-integrated joint arrangement" means an arrangement to provide physician services in which (1) all participating physicians participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the physicians participating in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; (2) any agreement concerning reimbursement or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies through the joint arrangement; and (3) the arrangement does not restrict the ability, or facilitate the refusal, of physicians participating in the arrangement to deal with payors or providers on an individual basis or through any other arrangement.

J. "Fairbanks area physician" means any physician who has active staff privileges at Fairbanks Memorial Hospital.

K. "Relevant physician market" means each of the following types of Fairbanks area physicians who are board-certified, board eligible, or actually practicing in: (1) family practice and general internal medicine; (2) obstetrics and/or gynecology; (3) pediatrics; (4) general surgery; and (5) orthopedic surgery.

L. "Reimbursement" means any payment, whether cash or non-cash, or other benefit received for the provision of physician services.

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II.

IT IS FURTHER ORDERED that AHN, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, do forthwith cease and desist from:

- A. Entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding among any Fairbanks area physicians:
 - 1. To negotiate on behalf of any physician with any payor or provider;
 - 2. To deal, refuse to deal, or threaten to refuse to deal, with any payor or provider;
 - 3. Regarding any terms, conditions, or requirements upon which any physician deals, or is willing to deal, with any payor or provider, including, but not limited to, terms of reimbursement; or
 - 4. To restrict the ability of any physician to deal with any payor or provider individually or through any arrangement outside AHN.

- B. Exchanging, transferring, or facilitating in any manner the exchange or transfer of information (including, but not limited to, any views, intentions, positions, terms, proposals, or decisions) among any Fairbanks area physicians who are not in the same practice group concerning:
 - 1. Negotiation of actual or proposed terms of reimbursement with any payor or provider; or

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2. Any physician's actual or contemplated intention or decision with respect to:
 - a. Entering into, refusing to enter into, threatening to refuse to enter into, withdrawing from, or threatening to withdraw from any actual or proposed agreement with any payor or provider; or
 - b. Agreeing to, refusing to agree to, or willingness to agree to any actual or proposed term, condition, or requirement of dealing with any payor or provider.
- C. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited if the person were subject to this order.

PROVIDED THAT nothing in this Order shall prohibit conduct that is approved and supervised by the State of Alaska insofar as that conduct is protected from liability under the federal antitrust laws pursuant to the state action doctrine.

PROVIDED FURTHER that nothing in this Paragraph shall prohibit any agreement involving, or conduct by, Respondent that is reasonably necessary to form, participate in, or take any other action in furtherance of a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, so long as the formation or operation of the arrangement is consistent with Paragraph III below, and the notification provisions contained in Paragraph VI of this Order have been satisfied.

III.

IT IS FURTHER ORDERED that within five (5) days after the date the Consent Agreement in this matter is signed by Respondent, and for a period of five (5) years after the date this Order becomes final, AHN shall cease and desist from offering the services of its physicians to any payor or provider:

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- A. Through a qualified risk-sharing joint arrangement or a qualified clinically- integrated joint arrangement, unless AHN's participating physicians constitute no more than thirty (30) percent of physicians in any relevant physician market, or
- B. Through any other arrangement, unless AHN's participating physicians constitute no more than fifty (50) percent of physicians in any relevant physician market.

PROVIDED THAT nothing in this Paragraph shall be construed to prohibit AHN from including as a participating physician in any arrangement, for each relevant physician market, any single physician, or any one pre-existing practice group.

PROVIDED FURTHER that AHN may at any time exceed the 30 percent or 50 percent limitations as a result of (a) any physician's exiting any relevant physician market or (b) the addition by new entry of a non-Fairbanks area physician to a pre-existing practice group; however, AHN may not exceed the 30 percent or 50 percent limitations by any greater degree than is directly caused by such exit or entry.

IV.

IT IS FURTHER ORDERED that AHN shall:

- A. Within thirty (30) days after the date on which this Order becomes final, distribute by first-class mail a copy of this Order and the Complaint to each participating physician, officer, director, manager, and employee of AHN, and to each payor enumerated in Attachment A to this order; and
- B. For a period of five (5) years after the date this Order becomes final:
 - 1. Distribute by first-class mail a copy of this Order and the Complaint to each new participating physician, officer, director, manager, and employee of AHN within thirty

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- (30) days of his or her admission, election, appointment, or employment;
2. Annually publish in an official annual report or newsletter sent to all participating AHN physicians, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles.

V.

IT IS FURTHER ORDERED that AHN shall file verified written reports within sixty (60) days after the date this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which it has complied and is complying with the Order. In addition to any other information that may be necessary to demonstrate compliance, AHN shall include in such reports: (1) information identifying each payor that has contacted AHN for the purpose of contracting for physician services; (2) information sufficient to describe the manner in which participating physicians share financial risk in each qualified risk-sharing joint arrangement in which they participate; and (3) copies of the minutes of AHN's annual meetings.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years after the date this Order is entered:

- A. Respondent shall notify the Commission in writing at least forty-five (45) days prior to forming, participating in, or taking any action, other than planning, in furtherance of any:
 1. Qualified risk-sharing joint arrangement or qualified clinically-integrated joint arrangement involving two (2)

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or more Fairbanks area physicians who are not in the same physician practice group; or

2. Other arrangement that, in dealing or negotiating with any payor or provider, is using, or intends to use, AHN or an agent that represents two (2) or more Fairbanks area physicians who are not in the same physician practice group.

- B. If a representative of the Commission makes a written request for information within thirty (30) days after receipt of a notice pursuant to Paragraph VI.A of this Order, Respondent shall not form, participate in, or take any action, other than planning, in furtherance of the arrangement until thirty (30) days after substantially complying with such request for information or such shorter waiting period as may be granted by letter from the Bureau of Competition.

VII.

IT IS FURTHER ORDERED that AHN shall notify the Commission at least thirty (30) days prior to any proposed change in AHN such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in AHN that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, AHN shall permit any duly authorized representative of the Commission:

- B. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession or under its control relating to any matter contained in this Order; and

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- C. Upon five (5) days' notice to AHN, and without restraint or interference from it, to interview officers, directors, or employees of AHN.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on April 25, 2021.

By the Commission, with the five Commissioners voting in the affirmative, but with Commissioner Swindle and Commissioner Leary dissenting as to a structural component of the relief prescribed by the Decision and Order.

Decision and Order

ATTACHMENT A

Admar Corporation
Aetna U.S. Healthcare
Premera Blue Cross
First Health
Government Employees Hospital Association, Inc. (“GEHA”)
Private Health Care Systems
TRICARE

Analysis

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

Issued when the Commission tentatively approved a proposed consent order on September 6, 2000

The Federal Trade Commission has accepted, subject to final approval, an agreement with the Alaska Healthcare Network, Inc. ("AHN") containing a proposed consent order. The agreement settles charges that AHN violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by facilitating or implementing agreements among its members to fix prices and other terms of dealing with payors, and to refuse to deal with payors except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify in any way their terms. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by AHN that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint

The allegations in the Commission's proposed complaint are summarized below.

Respondent AHN is a non-profit corporation composed of more than 60 percent of the physicians with active medical staff privileges at Fairbanks Memorial Hospital (the only private general acute care hospital in the Fairbanks area). AHN's members include almost half of the family and general practitioners, and from 70 to 100 percent of the internists,

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pediatricians, obstetrician-gynecologists, and general surgeons in full-time, year-round private practice in Fairbanks.

AHN has served as a vehicle for its physician members to negotiate collectively with health plans. When AHN was formed, a wide range of health plans, including PPOs, HMOs, and government health care purchasing cooperatives, were seeking to contract with Fairbanks physicians. AHN members authorized AHN's Executive Director to bargain on their behalf over the terms and conditions under which individual physicians would deal with third-party payors. AHN emphasized to its members that – as a result of its size and its members' agreement to allow AHN to bargain on their behalf – AHN would be able to bargain from a position of strength and thus avert the competition among physicians that might otherwise be introduced into the Fairbanks area by managed care plans.

From early 1997 through 1998, AHN negotiated price and other contract terms on behalf of its physician members with at least seven third-party payors. It used fee information collected from its member physicians to develop a fee schedule to use in contract negotiations. AHN told its members that its fee schedule represented members' usual fees, and that the fee schedule would be used to obtain a favorable level of reimbursement for area physicians. AHN's Board of Directors and Contracting Committee also adopted a model contract that required payors to use AHN's fee schedule and to delegate their credentialing, utilization review, and formulary management to AHN rather than operating their own programs.

AHN purported to operate as a "messenger model," under which an agent conveys payors' contract offers to individual physicians, who each make an independent decision whether to accept or reject each contract. In practice, however, AHN's Executive Director and Contracting Committee bargained with payors over payment and other terms, and refused to transmit contract offers to AHN members unless the payors agreed to AHN's terms.

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AHN functioned de facto as the exclusive representative of its members. Through statements in its newsletters, documents, and other media, AHN repeatedly advised members to deal with payors only through AHN in order to obtain better prices and other terms. Some payors who were seeking to enter the Fairbanks area attempted unsuccessfully to contract with individual physicians instead of dealing with AHN: physicians told the payors that AHN handled contracting for them and for other Fairbanks physicians. Payors believed that they could not go around AHN to contract individually with physicians in Fairbanks, and thus that they had no alternative but to reach agreement with AHN or give up their planned entry into Fairbanks. In several instances, payors approached individual physicians in mass mailings, requests for proposals, or phone calls, and received no responses. This was completely unprecedented and contradicted by payors' favorable responses to RFPs in other markets, including Anchorage, Alaska, and demonstrated the unwillingness of AHN and its members to deal with an entire category of payors.

AHN reached agreement with one payor – NYLCare – in 1998, and transmitted a contract to individual AHN members for their approval. AHN's Executive Director told the members that the Contracting Committee had revised the NYLCare contract proposal in a way that was responsive to the common economic interest of all AHN members. AHN engaged six other third-party payors in protracted negotiations over price and non-price terms that often extended for more than a year with no resolution. AHN demanded that the payors use AHN's fee schedule and its model contract that required payors to delegate credentialing, quality assurance, and utilization review to AHN physicians. However, AHN had not implemented any utilization review, quality assurance, or credentialing systems, and it lacked the capacity to implement some or all of those services. AHN did not refer contract offers from any of these payors to its members. As a result of AHN's conduct, a wide range of third-party payors of physician services, including PPOs, HMOs, and employer health care purchasing cooperatives, were unable to secure physician

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contracts and thus were unable to do business in the Fairbanks area.

AHN did not engage in any activity that might justify collective agreements on the prices its members would accept for their services. Its actions have restrained price and other competition among physicians in the Fairbanks area and thereby harmed consumers (including third-party payors, subscribers, and their employers) by increasing the prices for physician services, delaying the development of alternative health care financing and delivery systems, and limiting competition among health plans.

The Proposed Consent Order

The proposed order is designed to prevent recurrence of the illegal concerted actions alleged in the complaint, while allowing AHN and its members to engage in legitimate joint conduct. The core prohibitions of the proposed order are contained in Paragraph II. Paragraph II.A prohibits AHN from entering into or facilitating any agreement: (1) to negotiate on behalf of any physicians with any payor or provider; (2) to deal or refuse to deal with any payor or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payor or provider; or (4) to restrict the ability of any physician to deal with any payor or provider on an individual basis or through any other arrangement.

Paragraph II.B prohibits AHN from exchanging or facilitating the exchange of information among Fairbanks area physicians concerning: (1) negotiation with any payor or provider regarding reimbursement terms; or (2) any physician's intentions or decisions with respect to any dealings with any payor or provider. Paragraph II.C prohibits AHN from encouraging, advising, or pressuring any person, other than the government, to engage in any action that would be prohibited if the person were subject to the order.

Paragraph II contains two provisos. The first proviso permits respondent to engage in conduct that is approved and supervised

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by the State of Alaska, so long as that conduct is exempt from liability under the federal antitrust laws under the state action doctrine. That doctrine protects private conduct that is both: (1) in accordance with a clearly articulated and affirmatively expressed state policy to supplant competition; and (2) actively supervised by the state itself. *See, e.g., FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The second proviso in Paragraph II allows AHN to engage in conduct (including collectively determining reimbursement and other terms of contracts) that is reasonably necessary to operate any "qualified risk-sharing joint arrangement" or "qualified clinically-integrated joint arrangement," provided respondent complies with the prior notification requirements set forth in Paragraph VI of the order. The prior notification mechanism will allow the Commission to evaluate a specific proposed arrangement and assess its likely competitive impact.

As defined in the order, a "qualified risk-sharing joint arrangement" must satisfy three conditions. First, all physician participants must share substantial financial risk through the arrangement. The definition of financial risk-sharing tracks the discussion of that term contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. Second, any agreement on prices or terms of reimbursement must be reasonably necessary to obtain significant efficiencies through the joint arrangement. Third, the arrangement must be non-exclusive – that is, it must not restrict the ability, or facilitate the refusal, of participating physicians to deal with payors individually or through any other network or venture.

A "qualified clinically-integrated joint arrangement" is one in which the physicians undertake cooperative activities to achieve efficiencies in the delivery of clinical services, without necessarily sharing substantial financial risk. This definition also reflects the analysis contained in the 1996 FTC/DOJ Statements of Antitrust Enforcement Policy in Health Care. Participating physicians must

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establish a high degree of interdependence and cooperation through their use of programs to evaluate and modify their clinical practice patterns, in order to control costs and assure the quality of physician services provided. In addition, the arrangement must be non-exclusive, and any agreement on prices or terms of reimbursement must be reasonably necessary to obtaining significant efficiencies through the arrangement.

The proposed order also imposes a structural remedy for a period of five years. Although the Commission has not routinely imposed structural relief on physician groups in previous cases, such relief is not unprecedented. *See, e.g., Home Oxygen and Medical Equipment Co.*, 118 F.T.C. 661 (1994) (pulmonologists prohibited for ten years from acquiring ownership interest in any entity that provides home oxygen delivery services if more than 25 percent of the pulmonologists in the area would be affiliated with the entity), and *Physicians Group, Inc.*, 120 F.T.C. 567 (1995) (physician organization ordered to dissolve). The Commission will continue to consider the option of structural remedies in these cases when necessary to achieve effective relief.

Paragraph III.A requires that if AHN operates a qualified risk-sharing or clinically-integrated joint arrangement, its participating physicians must constitute no more than 30 percent of Fairbanks physicians in any of the key medical specialties of family practice and general internal medicine, obstetrics and/or gynecology, pediatrics, general surgery, and orthopedic surgery. Paragraph III.B of the proposed order further requires that, when offering the services of its physicians through any other arrangement, AHN's participating physicians constitute no more than 50 percent of Fairbanks physicians in any of those specialties. Paragraph III.B permits participation by a greater percentage of physicians because it is intended to apply to arrangements in which there is no agreement among AHN participating physicians on price or other competitively significant terms, including messenger model arrangements.

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Paragraph III contains two provisos. The first proviso permits AHN to include as a participating physician any single physician or any one pre-existing physician practice group, without regard to the percentage limitations. The single physician exception allows AHN to exceed the percentage limitations in instances where there may be only a few physicians in a designated medical speciality; and the one pre-existing practice group exception allows AHN to exceed the percentage limitations where the alternative would be to require an integrated practice group to downsize. The second proviso permits AHN to exceed the percentage limitations to the extent that the excess arises from certain changes in the marketplace. As a result of these provisos, once AHN is operating in conformity with percentage limitations contained in the order, it will not be required to reduce its physician membership because of (1) the addition of a physician (who was not already in practice in Fairbanks) to a member practice group, or (2) a reduction in the total number of physicians in a particular specialty (and thus in the denominator used in calculating the percentage of physicians in a specialty who can be AHN members) as a result of physician exit from the market.

The structural relief in this case is necessary to prevent continuing tacit collusion among AHN members. Fairbanks is an isolated community with a relatively small number of physicians, a high proportion of whom are AHN members. According to the allegations of the complaint, these doctors have demonstrated an unwillingness to participate in health plans independently of AHN. In these circumstances, there is a significant risk of continuing tacit collusion among AHN members that cannot adequately be addressed by an order limited to prohibiting certain specified conduct (i.e., AHN members might be able to coordinate their refusals to deal with payors without engaging in overt acts of collusion). Moreover, since AHN purported to operate as a messenger model, but in fact actively negotiated price and nonprice terms on behalf of its physician members, an order limited to conduct remedies would have required detailed provisions governing AHN's future operation as a messenger. The structural relief, by contrast, will permit AHN, subject to the

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five-year size limits, to carry on its activities as it finds most effective without detailed oversight by the Commission, so long as the core prohibitions of Paragraph II are respected.

The structural relief contained in the order responds to the particular facts of this case, and is intended to interrupt the chain of effects flowing from the conduct alleged in the complaint and to permit time for new market structures and relationships to develop among Fairbanks physicians and between the physicians and health plans. The presence of this provision in the proposed order does not suggest that other physician networks whose membership exceeds the percentage limitations are likely to have anticompetitive effects. The provision is limited to five years in order to give AHN the greatest possible freedom to respond to changing market conditions thereafter, once the effects of the challenged conduct have dissipated.

The remaining provisions of the proposed order impose obligations on AHN with respect to distributing the order and complaint to its members and other specified persons and reporting information to the Commission. The order terminates twenty years after the date it issues.

Statement

**Statement of Chairman Robert Pitofsky and Commissioners
Sheila F. Anthony and Mozelle W. Thompson**

The Commission today issued a final consent order settling charges that a group of approximately 90 physicians in Fairbanks, Alaska, acting through an organization known as the Alaska Healthcare Network (AHN), unlawfully fixed prices and refused to deal with health plans except on collectively-determined terms. Commissioners Swindle and Leary have voted to issue the complaint and accept the consent order, but they dissent from the part of the order that limits AHN's membership if it engages in contracting activities with health plans. Commissioners Swindle and Leary recognize that structural relief can, in certain markets for physician services, "be appropriate fencing-in relief for the type of conduct involved in this case." We issue this statement to discuss why we believe that this order's modest structural provisions – which will last for a period of only five years, and which are subject to certain exceptions – are appropriate under the factual circumstances in this case.

The structural relief is based on our conclusion that, in this particular market, consumers would not be adequately protected by an order that only barred similar unlawful conduct in the future, without seeking to prevent continued anticompetitive harm from tacit collusion among AHN members. Part III of the order limits membership in AHN to 50 percent of the physicians in each of the five medical specialties if AHN acts as a "messenger" to facilitate health plan contracting with physicians. Membership is limited to 30 percent of physicians in these specialties in the event that AHN elects to form an integrated joint venture that would actually negotiate contracts on behalf of its physicians. We believe that this approach, rather than the more drastic remedy of dissolution, represents an appropriate supplement to the conduct remedy.¹

¹ In some prior cases involving physician collective bargaining with health plans, the Commission has ordered that the organization be entirely disbanded. *See Physicians Group, Inc.*,

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Commissioners Swindle and Leary raise specific concerns about the effectiveness of a structural remedy in a market the size of the Fairbanks, Alaska market, the order's "grandfather" provision (which allows AHN to have a single pre-existing group practice in the organization even when that group's members cause AHN to exceed the cap), and the "entry" exception (which allows doctors new to the market to join existing practices without regard to the limits). Our view of the evidence differs. We believe that the structural relief will be effective at preventing future anticompetitive conduct, while the specific exceptions will preserve efficiencies.

The structural remedy will operate to reduce significantly AHN's "market share" in the various physician specialties, and thus its likely market power. Notably, the order will ensure that if AHN undertakes contracting activities, at least one of the two existing multi-specialty physician practice groups that previously have participated in AHN will henceforth remain outside of AHN, and thus will be available to serve as the nucleus for an alternative physician network. The order recognizes that while the present level of consolidation in particular specialties may confer market power on certain Fairbanks practice groups, that market power exists apart from, and has not been caused by, AHN's prior conduct.

We are also unpersuaded by our colleagues' suggestion that the structural remedy might discourage efficiency-enhancing mergers of physician practice groups in the specialties subject to the percentage limits. It is theoretically possible that physicians could so value AHN membership that they would refrain from a procompetitive merger because the merger would require forfeiting AHN membership. However, neither the Commission's investigation nor the public comments provide any evidence to support such a theory. To date, AHN appears to have had little function other than to facilitate the anticompetitive agreements

120 F.T.C. 567 (1995) (consent order); *Southbank IPA*, 114 F.T.C. 783 (1991) (consent order).

Statement

challenged in this case. If AHN undertakes significant procompetitive activities in the future, the opportunities for establishing networks outside of AHN, along with the temporary nature of the structural remedy, make it highly unlikely that any competitive advantages of AHN membership would deter efficient consolidation of physician practices.

The evidence that we have seen persuades us that the structural remedy included in the order – limited in scope as well as duration – is necessary to prevent the perpetuation of AHN’s unlawful conduct and its effects. Moreover, the risk that procompetitive integration will be deterred seems speculative at most. We therefore believe that limited structural relief is appropriate under the circumstances of this case.

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**Statement of Commissioners Orson Swindle and
Thomas B. Leary, Dissenting in Part**

Although we have voted to issue the consent order in this matter because we believe the conduct remedy is justified, we dissent from one component of the relief prescribed by the proposed order -- namely, the inclusion of a form of "structural" remedy to help cure the effects of the respondent AHN's allegedly unlawful conduct. For five years, the structural provision of the order (Paragraph III) imposes a 30 percent or a 50 percent "cap" on the number of Fairbanks physicians in each of five "relevant physician markets" who may participate in AHN, depending on whether AHN elects to function as a negotiator or merely as a "messenger."

When the Commission accepted this consent for public comment last year, we issued a separate statement inviting comments on (1) whether structural measures are generally appropriate in "conduct" cases and (2) whether such measures make sense in a thinly populated market like Fairbanks. We said, "Although we believe that limits on a physician group's 'market shares' in particular specialties can be appropriate fencing-in relief for the type of conduct involved in this case, we are not persuaded that this provision will operate in a rational and predictable way in a market as small as Fairbanks." We particularly noted the first proviso to Paragraph III, which allows respondent to "grandfather" in "any one pre-existing practice group" -- no matter how large -- and thus to perpetuate a structure inconsistent with the goals of that paragraph.

We also explained how the imposition of such structural relief in a setting like Fairbanks results in anomalies that would not arise in a larger urban area. For example (and assuming that things have not changed dramatically since the Commission accepted the consent agreement), one of the five "relevant physician markets" affected by the order (pediatrics) has only seven practitioners, and five are in a grandfathered group; another "market" (ob/gyn) has only ten practitioners, six of whom are in a grandfathered group. We can certainly understand the desire to

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refrain from forcing the breakup of a presumably efficient practice group, but this proviso makes the percentage caps ineffective for these specialties. On the other hand, the order itself potentially inhibits the formation of similarly efficient practice groups in the specialties where the caps are effective.

The public comments received indicate considerable concern about the structural portion of the remedy. Although some of those concerns may stem from a misunderstanding about the structural portions of the decree or about the overall operation of the order, the public comments at least indicate that there is a lively controversy and confusion over the impact of the structural relief in a market like Fairbanks. We continue to believe that the structural provision is unlikely to have the intended impact because of the grandfather exception mentioned above as well as a provision in Paragraph III that allows AHN to exceed the 30 percent or 50 percent limitation when it results from the entry of a physician from outside the Fairbanks area to a pre-existing practice group. The “entry” exception does address concerns over the possibility that the order will chill the ability of Fairbanks to attract new doctors, but it also undercuts the basic rationale for structural relief.

In these circumstances, we dissent from the structural relief in the order. We are uncomfortable with its impact in the present situation and with the likelihood that it will be cited hereafter as precedent for structural relief in other minuscule markets. As we said before, some form of structural relief might well be warranted in future cases in which the efficacy of a purely “conduct” (*i.e.*, “cease-and-desist”) order is in doubt. A formerly collusive group’s compliance with a conduct order (through the cessation of overtly conspiratorial behavior) does not necessarily spell the end of tacit coordination in the future. In a market with different characteristics from those involved here, some type of percentage cap on network membership could bolster competition through the creation of one or more competing networks. We simply do not see how this model can be applied rationally to Fairbanks.

Complaint

IN THE MATTER OF

HOECHST MARION ROUSSEL, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9293; File No. 9810368**Complaint, March 16, 2000--Decision, May 8, 2001*

This consent order settles an administrative complaint addressing an agreement among Respondent Hoechst Marion Roussel, Inc. ("HMR"), Respondent Carderm Capital, L.P., and Respondent Andrx Corporation concerning competition between Cardizem CD – a prescription drug manufactured and sold by HMR that is used to treat hypertension (high blood pressure) and angina pectoris (chest pain) – and a generic version developed by Andrx. The order, among other things, prohibits the respondents (except in certain licensing arrangements) from entering into agreements (1) in which the first company to file an Abbreviated New Drug Application agrees with the New Drug Application Holder not to relinquish its right to a 180-day exclusivity period (as interpreted by the courts at the time of the agreement), or (2) in which the Abbreviated New Drug Application First Filer agrees not to develop or market a generic drug product that is not the subject of a claim of patent infringement. The order also prohibits certain interim settlements of patent litigation by a respondent – involving payments to the generic company, and in which the generic company temporarily refrains from bringing its generic product to market – unless they are approved by the court, and the respondent gives notice to the Commission to allow it time to present its views to the court. In addition, the order requires the respondents to give the Commission written notice 30 days before entering into such agreements in other contexts.

Participants

For the Commission: *Markus H. Meier, Bradley S. Albert, Seth C. Silber, Daniel A. Kotchen, Robin Moore, Elizabeth R. Hilder, Suzanne Michel, Jon M. Steiger, Patricia Allen, David R. Pender, Richard A. Feinstein, Kenneth M. Davidson, Daniel P. Ducore, Elizabeth A. Schneirov, Leslie Farber, and Daniel P. O'Brien.*

For the Respondents: *James M. Spears and Michael Koon, Shook, Hardy & Bacon LLP, Peter O. Safir and Stacy L. Ehrlich,*

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Kleinfeld, Kaplan & Becker, and Louis M. Solomon, Solomon, Zauderer, Ellenhorn, Frischer & Sharp.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that respondents Hoechst Marion Roussel, Inc., Carderm Capital L.P., and Andrx Corporation have engaged in conduct, as described herein, that violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

The Respondents

1. Respondent Hoechst Marion Roussel, Inc. (“Hoechst MRI”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 10236 Marion Park Drive, Kansas City, Missouri. Hoechst MRI is, directly or indirectly, a wholly-owned subsidiary of Aventis, S.A., which is incorporated under the laws of the Republic of France with its office and principal place of business at 25 Quai Paul Doumier, 92408 Courbevoie Cedex, France. Hoechst MRI is engaged in the development, manufacture, distribution, and sale of pharmaceutical and health care products in the United States. Among other products, Hoechst MRI manufactures and sells Cardizem CD, a cardiovascular drug used to treat hypertension and angina.

2. At all relevant times herein, Hoechst MRI has been, and is now, a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

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3. Respondent Carderm Capital L.P. (“Carderm”) is a Delaware limited partnership having its office and principal place of business at Richmond House, 12 Par-la-Ville Road, Hamilton, Bermuda. Carderm is directly or indirectly owned or controlled by Hoechst MRI. Carderm holds the rights to three patents relating to Cardizem CD.

4. At all relevant times herein, Carderm has been, and is now, a partnership as “partnership” is used in Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

5. Respondent Andrx Corporation (“Andrx”) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 4001 S.W. 47th Avenue, Fort Lauderdale, Florida, 33314. Andrx develops, manufactures, and markets controlled-release pharmaceutical products. Andrx developed a generic or bioequivalent version of Cardizem CD, which has been approved by the FDA for sale in the United States.

6. At all relevant times herein, Andrx has been, and is now, a corporation as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

7. Respondents’ acts and practices, including the acts and practices alleged herein, are in or affect commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

Federal Regulation of Pharmaceutical Products

8. Under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq., approval by the United States Food & Drug Administration (“FDA”) is required before a company may market or sell a pharmaceutical product in the United States. Approval for a new or brand name drug is sought by filing a New Drug Application (“NDA”) with the FDA.

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9. A generic drug is a product that the FDA has found to be bioequivalent to a brand name drug. Generic drugs are chemically identical to their branded counterparts, but typically are sold at substantial discounts from the branded price. Approval may be sought for a generic version of a brand name drug by filing an Abbreviated New Drug Application (“ANDA”) with the FDA.

10. The FDA maintains a book of Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the “FDA Orange Book”), which lists all patents that the brand name manufacturer asserts relate to each brand name drug. If an applicant intends to market a generic product prior to the expiration of one or more patents relating to a brand name drug, the applicant must certify to the FDA, when appropriate, that the patent or patents listed in the FDA Orange Book are either invalid or not infringed by the generic version of the product (a “Paragraph IV Certification”), and must notify the holder of the approved NDA and the owner of the patent or patents of the filing of the ANDA. If neither the patent holder nor the NDA holder files a patent infringement suit against the ANDA filer within 45 days of receipt of notification of a Paragraph IV Certification, the FDA review and approval process may proceed and, upon FDA approval of the ANDA, the generic product may be marketed. If a patent infringement suit is filed against the ANDA filer within the 45-day period, however, FDA approval of the ANDA is automatically stayed until the earliest of: (i) patent expiration; (ii) a final judicial determination of non-infringement or invalidity in a lawsuit; or (iii) the expiration of a 30-month period from the time the patent holder receives Paragraph IV Certification.

11. The Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585, 21 U.S.C. § 355 (the “Hatch-Waxman Act”), as currently implemented by the FDA, provides that the first applicant to submit an ANDA with a Paragraph IV Certification for a generic version of a brand name drug (“ANDA First Filer”) is entitled to a 180-day period of marketing exclusivity (“180-day Exclusivity Period”) before the FDA may grant final approval of any other generic manufacturer’s ANDA

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regarding the same brand name drug. This period does not begin to run until either the generic is commercially marketed or a court enters final judgment that the patents subject to the Paragraph IV Certification are invalid or not infringed. No other generic manufacturer may obtain FDA approval to market its product until the ANDA First Filer's 180-day Exclusivity Period has expired.

Relevant Product And Geographic Market

12. A relevant product market for assessing respondents' anticompetitive conduct is once-a-day diltiazem. Diltiazem belongs to a group of drugs known as "calcium channel blockers," and is used principally to treat high blood pressure (hypertension) and to decrease the occurrence of chronic chest pain ("angina"). Once-a-day diltiazem is a time-release version of diltiazem, in capsule form, that is designed to be taken once every 24 hours. Other calcium channel blockers are not acceptable substitutes for diltiazem for several reasons, including, *inter alia*, the differences in efficacy and side effects, and the risks associated with switching patients from one calcium channel blocker to another. In addition, narrower relevant product markets may be contained within the market for once-a-day diltiazem products. Total U.S. sales of once-a-day diltiazem products amount to roughly \$1 billion per year, with Hoechst MRI's U.S. sales of Cardizem CD, one of the brand name once-a-day diltiazem products, accounting for over \$700 million per year.

13. The relevant geographic market is the United States.

Monopoly Power

14. At all relevant times herein, Hoechst MRI had monopoly power in the U.S. market for once-a-day diltiazem ("the relevant market"), and in narrower markets contained therein. Hoechst MRI distributes the leading once-a-day diltiazem drug, Cardizem CD, which, at all relevant times, accounted for over 70% of total sales in the relevant market.

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15. At all relevant times herein, entry into the relevant market was restricted and unlikely to diminish Hoechst MRI's monopoly power. Before entry could occur, potential entrants were required to, *inter alia*, file an NDA or an ANDA with the FDA, and obtain FDA final approval. At all relevant times, the FDA did not have an NDA accepted for filing for a new once-a-day diltiazem drug. If a new NDA were to be filed with the FDA, final approval would likely take a minimum of 12-18 months. Furthermore, any new once-a-day diltiazem drug introduced pursuant to an NDA would be unlikely to have a significant impact on the market, unless the new drug were bioequivalent to Cardizem CD.

16. At all relevant times herein, FDA final approval of an ANDA for a generic version of Cardizem CD for anyone other than Andrx was blocked. Pursuant to the Hatch- Waxman Act, as interpreted by the FDA, Andrx held the right to a 180-day Exclusivity Period for the sale of a generic version of Cardizem CD. As a result, no company could obtain FDA final approval of an ANDA to market or sell a generic version of Cardizem CD until 180 days after Andrx first sold its product, or until Andrx relinquished or otherwise lost its exclusivity right. Other than Andrx, only two companies had submitted ANDAs for a generic version of Cardizem CD to the FDA: Purepac Pharmaceutical Co. ("Purepac"), a subsidiary of Faulding Inc., and Biovail Corporation International ("Biovail"). Purepac and Biovail did not receive final FDA approval until Andrx's 180-day Exclusivity Period expired in December 1999.

Factual Background

17. In or around September 1995, Andrx filed the first ANDA with the FDA for the manufacture and sale of a generic version of Cardizem CD. In December 1995, Andrx certified to the NDA holder of Cardizem CD that the product covered by its ANDA did not infringe any of the patents covering Cardizem CD. Pursuant to the Hatch-Waxman Act, as currently interpreted, this filing entitled Andrx to a 180-day period during which it would hold the

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exclusive right to market and sell a generic version of Cardizem CD.

18. On January 31, 1996, Hoechst MRI and Carderm filed a lawsuit against Andrx in the U.S. District Court for the Southern District of Florida, alleging infringement of a patent claiming Cardizem CD. Pursuant to the Hatch-Waxman Act, unless the lawsuit was resolved at an earlier date, this lawsuit triggered a 30-month stay of final FDA approval of Andrx's ANDA, until July 1998.

19. In January 1997, Purepac filed an ANDA with the FDA for the manufacture and sale of a generic version of Cardizem CD. On January 31, 1997, Hoechst MRI filed a lawsuit against Purepac in the U.S. District Court for the District of New Jersey, alleging patent infringement. Pursuant to the Hatch-Waxman Act, unless the lawsuit was resolved at an earlier date, this lawsuit triggered a 30-month stay of final FDA approval of Purepac's ANDA, until July 1999.

20. On or about June 19, 1997, Biovail filed an ANDA with the FDA for the manufacture and sale of a generic version of Cardizem CD. Hoechst AG, Hoechst MRI, and Biovail had previously entered into a General Release and Covenant Not to Sue with respect to any claim of patent infringement relating to formulations for a once-daily medicine containing diltiazem.

Anticompetitive Conduct

21. Despite the terms of the General Release and Covenant Not to Sue, representatives of Hoechst MRI met with Biovail in early August 1997, ostensibly to discuss resolution of a potential claim of Hoechst MRI against Biovail for patent infringement relating to Biovail's generic version of Cardizem CD, as well as to discuss development of a new indication or use for the drug Probuco, a product for which Hoechst MRI held an approved NDA but which was not then being marketed or sold. During the course of these meetings, Hoechst MRI offered to pay Biovail a

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substantial amount of money to complete testing and the FDA approval process for a new ProbucoL indication. This offer was contingent on Biovail's agreeing to refrain from entering the market with a bioequivalent or generic version of Cardizem CD until at least July 1999. Biovail rejected Hoechst MRI's proposal. Hoechst MRI did not sue Biovail for patent infringement with respect to Biovail's generic or bioequivalent Cardizem CD product.

22. Beginning in late July 1997, representatives of Hoechst MRI and Andrx engaged in discussions of a possible agreement in connection with Hoechst MRI's pending patent infringement lawsuit against Andrx, pursuant to which Andrx would agree to refrain from bringing a generic version of Cardizem CD to market for a specific period of time.

23. On September 24, 1997, Hoechst MRI, Carderm, and Andrx entered into a Stipulation and Agreement. The Stipulation and Agreement did not settle the lawsuit -- indeed, it specifically contemplated that the parties would continue the litigation to final judicial resolution. Instead, Hoechst MRI, Carderm, and Andrx agreed among themselves that Andrx would not enter the market with the generic version of Cardizem CD covered by its ANDA until the earliest of (1) the entry of final judgment in the patent lawsuit, (2) Andrx's obtaining a license from Hoechst MRI under the terms and conditions specified in the Stipulation and Agreement, or (3) Hoechst MRI's providing notice that it intended to license a third party or sell its own bioequivalent or generic version of Cardizem CD. In the Stipulation and Agreement, Andrx also agreed -- at Hoechst MRI's insistence -- to refrain from selling any other bioequivalent or generic version of Cardizem CD, regardless of whether such product would infringe Hoechst MRI's or Carderm's patents. In addition, Andrx agreed not to withdraw its pending ANDA or to relinquish or otherwise compromise any right accruing under its ANDA, including its right to a 180-day Exclusivity Period, until the entry of final judgment in the patent lawsuit.

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24. In exchange for Andrx's various agreements, Hoechst MRI agreed to pay Andrx \$10 million per quarter, beginning upon final FDA approval of Andrx's ANDA (*i.e.*, once Andrx could otherwise have marketed) and continuing until the occurrence of either (1), (2) or (3) described above in Paragraph 23. The Stipulation and Agreement also provided that, should Hoechst MRI lose the patent infringement suit, Hoechst MRI would pay Andrx an additional \$60 million per year for that same time period.

25. The Stipulation and Agreement further provided that, beginning January 9, 2000 or upon the earlier occurrence of any of certain specified events, Andrx would have an option to acquire a license to Hoechst MRI's intellectual property in Cardizem CD. The amount of the royalties to be paid by Andrx to Hoechst MRI would depend on the ultimate outcome of the patent litigation – *i.e.*, Andrx would pay a higher royalty if Andrx ultimately lost the patent infringement litigation.

26. In the event Andrx breached any of its obligations under the Stipulation and Agreement, it would be required to repay all amounts received. For example, if Andrx breached one of its obligations one year after receiving final FDA approval, it would be required to repay \$40 million to Hoechst MRI. In addition, by its terms, the Stipulation and Agreement would terminate in the event of a breach by Andrx, thus extinguishing any right of Andrx to receive an additional payment should it prevail in the patent lawsuit, or to exercise a license should it lose the lawsuit.

27. On July 9, 1998, the FDA granted final approval for Andrx's ANDA for a generic version of Cardizem CD. This approval permitted Andrx to begin the marketing and sale of its generic version of Cardizem CD immediately. In accordance with the terms of the Stipulation and Agreement, Andrx did not begin commercial sale of its generic product. As a result, pursuant to the terms of the Stipulation and Agreement, Hoechst MRI began making quarterly payments of \$10 million to Andrx.

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28. On September 11, 1998, Andrx submitted a Supplemental ANDA to the FDA reflecting a modified formulation of its generic Cardizem CD product. Andrx filed a Paragraph IV Certification, stating its belief that Hoechst MRI had no legitimate basis to claim patent infringement by the product reflected in the Supplemental ANDA. Andrx's Supplemental ANDA received FDA approval on June 8, 1999. On or around that same day, Andrx and HMRI entered into a second agreement, essentially abrogating the Stipulation and Agreement and clearing the way for Andrx to go to market. Andrx began marketing a generic version of Cardizem CD on or around June 23, 1999.

The Effects of Respondents' Conduct

29. The acts and practices of the respondents as herein alleged have had the purpose or effect, or the tendency or capacity, to restrain competition unreasonably and to injure competition and consumers by preventing or discouraging the entry of competition in the form of generic versions of Cardizem CD into the relevant market.

30. Earlier entry of a generic version of Cardizem CD would have had a significant procompetitive impact in the relevant market. Pharmacists generally are permitted, and in some instances required, to substitute FDA-recognized generic drugs for their branded counterparts, without obtaining the prescribing physician's approval. In addition, there is a ready market for generic products because certain third-party payers of prescription drugs (*e.g.*, managed care plans and Medicaid programs) encourage or insist on the use of generic drugs wherever possible. A generic product can quickly and efficiently enter the marketplace at substantial discounts, generally leading to a significant erosion of the branded drug's sales within the first year. For example, respondents' forecasts projected that a generic version of Cardizem CD, sold at 70% of the brand price, would capture roughly 40% of Cardizem CD sales within the first year.

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31. The purpose and intended effect of the \$10 million quarterly payments from Hoechst MRI to Andrx during the term of the Stipulation and Agreement was to provide an incentive for Andrx to refrain both from entering the relevant market, and from taking any steps, including relinquishing its right to a 180-day Exclusivity Period, to permit or facilitate the entry of any other generic manufacturer.

32. By prohibiting Andrx from commencing the commercial sale not only of the product subject to the patent infringement suit, but also of any bioequivalent or generic version of Cardizem CD during the term of the agreement, the Stipulation and Agreement had the purpose and intended effect of deterring Andrx from selling any non-infringing or potentially non-infringing version of its generic Cardizem CD product. As a result, the Stipulation and Agreement was intended to have the effect of delaying substantially Andrx's entry into the relevant market with a generic version of Cardizem CD.

33. By prohibiting Andrx from withdrawing its pending ANDA or relinquishing or otherwise compromising any right accruing under its ANDA, including its right to a 180-day Exclusivity Period, until the entry of final judgment in the patent lawsuit, the Stipulation and Agreement had the purpose or effect of deterring Andrx from relinquishing its eligibility for a 180-day Exclusivity Period under the Hatch-Waxman Act. As a result, the Stipulation and Agreement was intended to have the effect of delaying substantially the entry into the relevant market of generic versions of Cardizem CD produced by other manufacturers.

34. The Stipulation and Agreement is not justified by any countervailing efficiencies.

35. Although the Stipulation and Agreement provided Andrx with the option of selling a generic version of Cardizem CD pursuant to a license from Hoechst MRI at a future date, this did not offset the anticompetitive effects set forth above. Entry by Andrx pursuant to the license was likely to occur, if at all, at a

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later date than would entry by Andrx or another generic manufacturer in the absence of the Stipulation and Agreement. In addition, the license required payment of substantial license fees, subject to the possibility of repayment if Andrx ultimately prevailed in the patent infringement suit. The requirement to pay substantial license fees may have reduced Andrx's incentive to exercise the licensing option. Moreover, entry by Andrx subject to the payment of substantial license fees, even if they may ultimately have been reimbursable, was likely to be competitively less significant than entry without the requirement to pay such fees.

Violations Alleged

36. The Stipulation and Agreement among Hoechst MRI, Carderm and Andrx as a whole, and in particular the specific provisions described in Paragraphs 32 and 33 above, constitute unreasonable restraints of trade in violation of Section 5 of the Federal Trade Commission Act, as amended.

37. Hoechst MRI had the specific intent to preserve its monopoly in the relevant market and narrower markets contained therein, and its actions – including proposing, negotiating and entering into the Stipulation and Agreement among Hoechst MRI, Carderm, and Andrx, and proposing a similar agreement with Biovail – created a dangerous probability that it would accomplish its monopolistic objectives, in violation of Section 5 of the Federal Trade Commission Act, as amended.

38. Hoechst MRI, Carderm, and Andrx acted with the specific intent that Hoechst MRI monopolize the relevant market, and engaged in overt acts described in Paragraphs 21-28 above in furtherance of a conspiracy to monopolize the relevant markets, in violation of Section 5 of the Federal Trade Commission Act, as amended.

39. The acts and practices described above are anticompetitive in nature and tendency and constitute unfair methods of

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competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

NOTICE

Proceedings on the charges asserted against you in this complaint will be held before an Administrative Law Judge (ALJ) of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3. A copy of Part 3 of the Rules is enclosed with this complaint.

You may file an answer to this complaint. Any such answer must be filed within 20 days after service of the complaint on you. If you contest the complaint's allegations of fact, your answer must concisely state the facts constituting each ground of defense, and must specifically admit, deny, explain, or disclaim knowledge of each fact alleged in the complaint. You will be deemed to have admitted any allegations of the complaint that you do not so answer.

If you elect not to contest the allegations of fact set forth in the complaint, your answer shall state that you admit all of the material allegations to be true. Such an answer will constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the ALJ will file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Such an answer may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice.

If you do not answer within the specified time, you waive your right to appear and contest the allegations of the complaint. The ALJ is then authorized, without further notice to you, to find that the facts are as alleged in the complaint and to enter an initial decision and a cease and desist order.

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The ALJ will schedule an initial prehearing scheduling conference to be held not later than 7 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

A hearing on the complaint will begin on November 14, 2000 at 10:00 A.M. in Room 532, or such other date as determined by the ALJ. At the hearing, you will have the right to contest the allegations of the complaint and to show cause why a cease and desist order should not be entered against you.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in an adjudicative proceeding in this matter that the respondents are in violation of Section 5 of the Federal Trade Commission Act, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate including, but not limited to, an order that requires the following:

1. Each Respondent shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which one party is an NDA holder for a Drug Product(s), any other party is the ANDA First Filer for the Drug Product(s), and:
 - A. the ANDA First Filer is prohibited by such Agreement from relinquishing, or is subject to a penalty, forfeiture, or

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loss of benefit if it relinquishes, its right to the 180-Day Exclusivity Period; or

- B. the ANDA First Filer agrees to refrain from researching, developing, manufacturing, marketing, or selling any Drug Product that could be approved for sale by the FDA pursuant to the ANDA and that is not the subject of a court action alleging patent infringement.

Provided, however, that nothing in this Section shall prohibit Agreements involving the complete transfer of rights in a Drug Product.

2. In any instance where any Respondent is a party to a patent infringement action in which it is either the NDA Holder or the alleged infringer, it shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which the parties do not agree to dismiss the litigation, and in which the NDA Holder provides anything of value to the alleged infringer and the alleged infringer agrees to refrain during part or all of the course of the litigation from selling the Drug Product at issue, or any Drug Product containing the same chemical entity(ies) at issue. *Notwithstanding the above, however,* such an Agreement is permissible when entered into in conjunction with a joint stipulation between the parties that the court may enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, if: (1) together with the stipulation for a preliminary injunction, the Respondent provides the court with the proposed Agreement, as well as a copy of the Commission’s complaint, order, and Analysis to Aid Public Comment in this matter; (2) the Respondent has provided Notification, as described in Paragraph 4 below, to the Commission at least thirty (30) days prior to submitting the stipulation for a preliminary injunction; (3) the Respondent does not oppose any effort by the Commission to participate, in

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any capacity permitted by the court, in the court's consideration of any such action for preliminary relief; and (4) the court issues an order which incorporates the terms of the Agreement. Nothing in this Paragraph shall be interpreted to prohibit or restrict the right of any Respondent to unilaterally seek relief from the court, without notice to the Commission, including, but not limited to, applying for preliminary injunctive relief or seeking to extend the 30 month stay pursuant to 21 U.S.C. § 355(j)(4)(B)(iii).

3. Each Respondent shall provide Notification as described in paragraph 4 below to the Commission at least thirty (30) days before becoming a party to any Agreement whereby an ANDA First Filer agrees with an NDA holder to refrain from selling any Drug Product under its ANDA for any period of time.
4. The Prior Notification required by Paragraphs 2 and 3 shall be filed with the Secretary of the Commission and shall include the following information, to the extent known, and not subject to any legally recognized privilege: (1) identification of the parties involved in the Agreement; (2) identification of all Drug Products involved in the Agreement; (3) identification of all persons who have filed an ANDA with the FDA (including the status of such application) for any Drug Product containing the same chemical entity(ies) as the Drug Product(s) involved in the Agreement; (4) a copy of the proposed Agreement; (5) identification of the court, and a copy of the docket sheet, for any legal action which involves either party to the Agreement and relates to any Drug Product(s) containing the same chemical entity(ies) involved in the Agreement; and (6) all documents which were prepared by or for any officer(s) or director(s) of any Respondent for the purpose of evaluating or analyzing the Agreement.
5. Each Respondent shall mail a copy of the Commission's complaint and order in this matter, along with a letter from such Respondent's chief executive officer stating that it will abide by the terms of this order, to each of its employees who

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has the authority to enter into agreements concerning the research, development, manufacture, marketing, or sale of a Drug Product.

6. Each Respondent shall take such other measures as are appropriate to correct or remedy, or prevent the recurrence of, the anticompetitive practices engaged in by Respondents.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this sixteenth day of March, 2000, issues its complaint against said Respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging that it had reason to believe that certain acts and practices of Hoechst Marion Roussel, Inc. (“Respondent Hoechst”), Carderm Capital L.P., (“Respondent Carderm”), and Andrx Corporation (“Respondent Andrx”) may have violated Section 5 of the Federal Trade Commission Act, and Respondents having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondents having filed answers denying said charges;

Respondents and counsel for the Commission having thereafter executed an Agreement Containing Consent Order, on the basis of which the matter is being settled; an admission by each Respondent only of the jurisdictional facts set forth in the complaint relating to it (except as modified in the Agreement Containing Consent Order), denying all other allegations; a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such complaint or that any allegation of the complaint is true, other than the jurisdictional facts relating to it set forth in paragraphs 1-4 immediately below (as more fully stated in the Agreement Containing Consent Order); and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

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1. Andrx is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4001 S.W. 47th Avenue, Fort Lauderdale, Florida, 33314.

2. Hoechst is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 339 Interpace Parkway, P.O. Box 663, Parsippany, New Jersey 07054. Hoechst is, directly or indirectly, a wholly-owned subsidiary of its parent Aventis, S.A., which is incorporated under the laws of the Republic of France with its office and principal place of business at 25 Quai Paul Doumier, 92408 Courbevoie Cedex, France.

3. Carderm is a Delaware limited partnership having its office and principal place of business at Richmond House, 12 Par-la-Ville Road, Hamilton, Bermuda. Carderm is directly or indirectly owned or controlled by Hoechst.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the Commission has determined that this proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that for the purposes of this order, the following definitions shall apply:

A. "Respondent Andrx" means Andrx Corporation, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Andrx, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

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B. “Respondent Hoechst” means Hoechst Marion Roussel, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its parent subsidiaries, divisions, groups, and affiliates controlled by Hoechst or its parent, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

C. “Respondent Carderm” means Carderm Capital, L.P., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Carderm, and the respective directors, officers, employees, agents and representatives, successors, and assigns of each.

D. “Commission” means the Federal Trade Commission.

E. “180-day Exclusivity Period” means the period of time established by section 505(j)(5)(B)(iv) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 355(j) *et seq.*), as interpreted by the appellate courts at the time of the Agreement.

F. “Agreement” means anything that would constitute an agreement under Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act.

G. “ANDA” means an Abbreviated New Drug Application, as defined under 21 U.S.C. § 355(j) *et seq.* as to which the applicant is the ANDA First Filer.

H. “ANDA First Filer” means the party whom the FDA determines is and remains entitled to, or eligible for, a 180-day Exclusivity Period which has not yet commenced running or expired, so long as that status, in the exercise of reasonable diligence at the time of the Agreement, is or would be known to or is believed by the Respondent entering into such Agreement.

I. “Drug Product” means a finished dosage form (*e.g.*, tablet, capsule, or solution) that contains a drug substance, generally, but

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not necessarily, in association with one or more other ingredients, as defined in 21 C.F.R. § 314.3(b).

J. “Effective Date” means the later of (1) the date of entering into the Agreement; or (2) the last date of receipt of each judicial or regulatory approval of the Agreement in the event that such approval is a pre-condition to the Agreement taking effect.

K. “Expiration Date” means the date 180 days (or such other period as is embraced by the definition of 180-day Exclusivity Period) after the date that the ANDA First Filer commences commercial marketing of the Drug Product pursuant to the ANDA, the Reference Drug Product, a Follow-on Drug Product, or any other generic version of the Reference Drug Product or Follow-on Drug Product.

L. “FDA” means the United States Food and Drug Administration.

M. “Follow-on Drug Product” means any Drug Product that (1) is manufactured or licensed by, or for, the same NDA Holder as the Reference Drug Product; (2) involves the same active chemical ingredient or is prescribed for one or more of the same indications as the Reference Drug Product (disregarding for these purposes any new indications of the Follow-on Drug Product); and (3) after the ANDA First Filer has submitted to the FDA its original or initial ANDA (a) receives final FDA approval, (b) is first commercially marketed in the United States, or (c) involves the NDA Holder withdrawing substantial or equivalent marketing or sales efforts from the Reference Drug Product or devoting substantial or additional marketing or sales efforts to the other Drug Product.

N. “NDA” means a New Drug Application, as defined under 21 U.S.C. § 355(b) *et seq.*

O. “NDA Holder” means: (1) the party that received FDA approval to market a Drug Product pursuant to an NDA, (2) a party owning or controlling enforcement of the patent(s) listed in

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the Approved Drug Products With Therapeutic Equivalence Evaluations (commonly known as the “FDA Orange Book”) in connection with the NDA, or (3) the predecessors, subsidiaries, divisions, groups and affiliates controlled by, controlling, or under common control with any of the entities described in subparagraphs (1) and (2) above (such control to be presumed by direct or indirect share ownership of 5% or greater), as well as the licensees, licensors, successors and assigns of each of the foregoing.

P. “Patent Infringement” means infringement of any patent or of any filed patent application, extension, reissue, renewal, division, continuation, continuation in part, reexamination, patent term restoration, patents of addition and extensions thereof.

Q. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

R. “Reference Drug Product” means the Drug Product identified by the ANDA applicant as the Drug Product upon which the ANDA First Filer bases its ANDA.

S. “Relinquishing” means abandoning, waiving, or relinquishing.

II.

IT IS FURTHER ORDERED that Respondents cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, with respect to which Respondent is either an NDA Holder or the ANDA First Filer for such Drug Product(s) from being a party to any Agreement in which one party is an NDA holder, and the other party is the ANDA First Filer, and in which:

A. the ANDA First Filer is prohibited by such Agreement from relinquishing, or is subject to a penalty, forfeiture, or loss of

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benefit if it relinquishes, its right to the 180-Day Exclusivity Period; or

- B. the ANDA First Filer agrees to refrain from researching, developing, manufacturing, marketing, or selling any Drug Product that could be approved for sale by the FDA pursuant to the ANDA as to which it is the ANDA First Filer and that is neither the subject of any written claim of Patent Infringement nor supported by a good faith opinion of counsel (the privileged nature of which shall be respected and remain protected), that the Drug Product would be the subject of such a claim if disclosed to the NDA Holder.

Provided, however, that nothing in Paragraph II shall prohibit Agreements where:

- (1) within 20 days of the Effective Date of the Agreement, the ANDA First Filer offers for sale, and as promptly as practicable thereafter, commences commercial marketing of the Drug Product subject to the ANDA, the Reference Drug Product, a Follow-on Drug Product, or any other generic version of the Reference Drug Product or Follow-on Drug Product;
- (2) one of the following two conditions has been satisfied: (a) the 180-day Exclusivity Period, if any, has been triggered and begun to run with respect to the Drug Product subject to the ANDA; or (b) within 10 days of the commercial marketing of a Drug Product other than the one subject to the ANDA, the ANDA First Filer has notified the FDA, in writing, that it will relinquish any and all eligibility for, and entitlement to, a 180-day Exclusivity Period, if any, for the Drug Product subject to the ANDA beyond the Expiration Date. *However,* subparagraphs (1) and (2) shall not apply (or shall be deemed satisfied) if Respondent is a party to an Agreement pursuant to which it engages in conduct described by Paragraphs II.A and/or II.B, but such conduct is pursuant to, or in accordance with, a federal statute, federal appellate court decision, FDA rule, FDA regulation

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or authoritative pronouncement or interpretation of the FDA made or promulgated after the date of this Order; and

- (3) Respondent has provided Notification, as described in Paragraph V below, to the Commission at least thirty (30) days prior to the Effective Date of the Agreement (except that a fewer number of days' notice, but in no event fewer than ten (10), may be given if the ANDA First Filer reasonably believes that such reduced notice will permit it to commence marketing more quickly).

Provided further that nothing anywhere in Paragraph II shall prohibit Agreements involving the complete transfer of rights in a Drug Product or the withdrawal of an ANDA.

III.

IT IS FURTHER ORDERED that, in any instance where a Respondent is a party to a Patent Infringement action in which it is either the NDA Holder or the alleged infringer, it shall cease and desist, either directly or indirectly, in connection with the sale of Drug Products in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, from being a party to any Agreement in which (a) the parties do not agree to dismiss the litigation, (b) the NDA Holder provides anything of value to the alleged infringer, and (c) the alleged infringer agrees to refrain during part or all of the course of the litigation from selling the Drug Product at issue, or any Drug Product containing the same active chemical ingredient as the Drug Product. *Notwithstanding the above, however*, such an Agreement is permissible when entered into in conjunction with a joint stipulation between the parties that the court may enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure, if: (1) together with the stipulation for a preliminary injunction that Respondent provides the court with the proposed Agreement, as well as a copy of the Commission's complaint, order, and Analysis to Aid Public Comment in this matter (which provision may be made to the court in camera or pursuant to any confidentiality order in place in the case); (2) such

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Respondent has provided Notification, as described in Paragraph V below, to the Commission at least thirty (30) days prior to submitting the stipulation for a preliminary injunction; (3) such Respondent does not oppose any effort by the Commission to participate, in any capacity permitted by the court, in the court's consideration of any such action for preliminary relief (with the Commission giving consideration to participating in such proceeding in the event the Commission determines that such participation will expedite the court's consideration of said preliminary injunction motion); and (4) the court issues an order and the parties' agreement conforms to said order or the Commission determines, at the request of such Respondent, that entering into the stipulation during the pendency of the Patent Infringement action would not raise issues under Section 5 of the Federal Trade Commission Act. Nothing in this paragraph shall be interpreted to prohibit or restrict the right of any Respondent from seeking relief from the court, without notice to the Commission, including, but not limited to, applying for preliminary injunctive relief or seeking to extend, or reduce, the 30-month stay pursuant to 21 U.S.C. § 355(j)(5)(B)(iii).

IV.

IT IS FURTHER ORDERED that a Respondent shall provide Notification as described in Paragraph V below to the Commission at least thirty (30) days before the Effective Date of any Agreement made after the date the Agreement Containing Consent Order is signed and effective whereby such Respondent is a party and is either an ANDA First Filer or an NDA Holder, and an ANDA First Filer agrees with an NDA Holder to refrain from selling any Drug Product under its ANDA for any period of time, provided that, in the event of litigation between the NDA Holder and the ANDA First Filer, such Respondent is not required to provide Notification for any such Agreement filed with or by the court unless the Agreement results in the dismissal of all or part of said litigation. Such Respondent shall use its best efforts to provide the required Notification in conformity with the 30-day period set forth above.

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V.

The Prior Notification required by Paragraphs III and IV shall be filed with the Secretary of the Commission and shall include the following information, to the extent known and not subject to any legally recognized privilege or immunity: (1) identification of the parties involved in the Agreement; (2) identification of all Drug Products involved in the Agreement; (3) identification of all persons who have filed an ANDA with the FDA (including the status of such application) for any Drug Product containing the same chemical entity(ies) as the Drug Product(s) involved in the Agreement; (4) a copy of the proposed Agreement; (5) identification of the court, and copy of the docket sheet, for any legal action which involves either party to the Agreement and relates to any Drug Product(s) containing the same chemical entity(ies) involved in the Agreement; and (6) all documents which were prepared by or for any officer(s) or director(s) of a Respondent for the purpose of evaluating or analyzing the Agreement.

VI.

IT IS FURTHER ORDERED that each Respondent shall file a verified written report within sixty (60) days after the date this order is issued, annually thereafter for five (5) years on the anniversary of the date this order is issued, and at such other times as the Commission may by written notice require, setting forth in detail the manner and form in which each Respondent intends to comply, is complying, and has complied with this order. Each Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this order.

VII.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation

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or dissolution of subsidiaries or any other change in Respondent that may affect compliance obligations arising out of this order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order and subject to any legally recognized privilege or immunity, and upon written request with reasonable notice to each Respondent, each Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities, and to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in its possession or under its control relating to compliance with this order; and
- B. To interview officers, directors, employees, agents, and other representatives of each Respondent, who may have counsel present, regarding such compliance issues.

IX.

IT IS FURTHER ORDERED that this order shall terminate on May 8, 2011.

By the Commission.

Analysis

Analysis to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on March 30, 2001

The Federal Trade Commission has accepted for public comment an agreement and proposed consent order with Hoechst Marion Roussel, Inc. (“HMR”), Carderm Capital, L.P. (“Carderm”), and Andrx Corporation (“Andrx”) to resolve the matters alleged in an administrative complaint issued by the Commission on March 16, 2000. The proposed consent order has been placed on the public record for 30 days to receive comments from interested members of the public. The proposed consent order has been entered into for settlement purposes only and does not constitute an admission by HMR, Carderm, or Andrx (collectively “the Respondents”) that they violated the law or that the facts alleged in the complaint, other than the jurisdictional facts, are true. Respondents deny all other allegations of the complaint.

The Complaint

On March 16, 2000, the Commission issued a complaint alleging that the above respondents entered into an agreement that had the tendency or capacity to restrain competition unreasonably by discouraging generic competition to Cardizem CD. Cardizem CD is a prescription drug manufactured and sold by HMR and is used to treat two chronic conditions that affect millions of Americans: hypertension (high blood pressure) and angina pectoris (chest pain). Andrx is a generic drug manufacturer that developed a generic version of Cardizem CD.

Generic drugs typically are sold at substantial discounts from the price of branded drugs. Generic drugs can have a swift marketplace impact, the complaint states, because pharmacists generally are permitted, and in some instances are required, to substitute lower-priced generic drugs for their branded counterparts, unless the prescribing physician directs otherwise. In addition, there is a ready market for generic products because certain third-party payers of prescription drugs (*e.g.*, state

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Medicaid programs and many private health plans) encourage or insist on the use of generic drugs wherever possible.

Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984, commonly referred to as “the Hatch-Waxman Act,” to facilitate the entry of lower priced generic drugs while maintaining incentives to invest in new drug development. A company seeking approval from the Food and Drug Administration (“FDA”) to market a new drug must file a New Drug Application (“NDA”) demonstrating the safety and efficacy of its product. In order to receive FDA approval to market a generic version of a brand name drug a company must file an Abbreviated New Drug Application (“ANDA”) demonstrating that its product is bioequivalent to its brand-name counterpart.

The Hatch-Waxman Act establishes certain rights and procedures in situations where a company seeks FDA approval to market a generic drug prior to the expiration of a patent or patents relating to the brand name drug upon which the generic is based. In such cases, the applicant must: (1) certify to the FDA that the patent in question is invalid or is not infringed by the generic product (known as a “paragraph IV certification”); and (2) notify the patent holder of the filing of the certification. If the holder of the patent rights files a patent infringement suit within 45 days, FDA approval to market the generic drug is automatically stayed for 30 months, under certain circumstances, unless before that time the patent expires or the patent is judicially determined to be invalid or not infringed. This automatic 30-month stay allows the patent holder time to seek judicial protection of its patent rights before a generic competitor is permitted to market its product.

In addition, the Hatch-Waxman Act provides an incentive for generic drug companies to bear the cost of patent litigation that may arise when they challenge invalid patents or design around valid ones. Under current FDA regulations, the Act grants the first company to file an ANDA with a paragraph IV certification a 180-day period during which it has the exclusive right to market a generic version of the brand name drug. No other generic

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manufacturer may obtain FDA approval to market its product until the first filer's 180-day exclusivity period has expired. At the time the Respondents entered into the challenged agreement in 1997, the governing FDA regulations required that an ANDA applicant successfully defend the patent holder's patent suit in order to be entitled to this exclusivity.

Andrx was the first company to file an ANDA for a generic version of Cardizem CD. It filed a paragraph IV certification with the FDA stating its belief that the product did not infringe any valid patent covering Cardizem CD. In January 1996, HMR sued Andrx for patent infringement. The lawsuit triggered a 30-month stay of final FDA approval of Andrx's generic product, until July 1998.

According to the complaint, HMR and Andrx entered into an agreement in September 1997, in the midst of this patent lawsuit. At the time of the agreement, approximately nine months before the 30-month stay of FDA approval of Andrx's application would expire, the patent lawsuit had already been pending for twenty-one months and both sides had filed numerous dispositive motions with the trial court that had not been acted on. Also by that time, two other companies, Purepac Pharmaceutical Co. and Biovail Corporation International, had filed for FDA approval of a generic Cardizem CD product, neither of which had yet obtained tentative approval from the FDA.

HMR's forecasts, the complaint states, projected that a generic once-a-day diltiazem product would capture roughly 40 percent of Cardizem CD sales within the first year following its launch. Cardizem CD was HMR's largest selling product at the time. Accordingly, the complaint charges, HMR sought to delay Andrx – and all other potential generic competition to Cardizem CD – from entering the market because of the threat they represented to the high profits it was making from Cardizem CD.

The complaint alleges that on September 24, 1997, HMR, Carderm, and Andrx entered into a "Stipulation and Agreement."

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The Stipulation and Agreement did not settle the lawsuit. Instead, under this agreement, the complaint alleges that Andrx agreed not to enter the market with its generic Cardizem CD product until the earliest of: (1) final resolution of the patent infringement litigation; (2) Andrx's exercise of an option to obtain a license from HMR in the future; or (3) notice by HMR that it would allow entry of another generic Cardizem CD product or market its own generic version of Cardizem CD. According to the complaint, Andrx also agreed to refrain from selling during the patent infringement suit any other bioequivalent or generic version of Cardizem CD. In addition, the complaint alleges that Andrx agreed not to withdraw its pending ANDA or to relinquish or otherwise compromise any right accruing under its ANDA, including its 180-day exclusivity right. In return, the complaint alleges, HMR agreed to pay Andrx \$10 million per quarter during the litigation beginning when Andrx received final FDA approval of its ANDA, unless the litigation was resolved prior to that time. Under the agreement, if HMR lost the patent infringement suit it would pay Andrx an additional \$60 million per year for that same time period. On September 25, 1997, the parties made public disclosures of the existence of the agreement. The Commission's complaint alleges that this agreement, at the time it was entered into, had the potential to affect Andrx's incentive to compete once it received final FDA approval.

In July 1998, upon expiration of the 30-month stay under Hatch-Waxman, Andrx received final FDA approval to market its original formulation of generic Cardizem CD that was subject to the still on-going lawsuit with HMR. Pursuant to the terms of the Stipulation and Agreement, HMR began making quarterly payments of \$10 million to Andrx.

Andrx filed a supplement to its ANDA reflecting a reformulation of its generic Cardizem CD product in September 1998. This reformulation altered the dissolution profile of the Andrx product, which was the basis of the patent dispute between Andrx and HMR. The FDA required Andrx to file a new certification and give notice to HMR of the reformulated product

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under the Hatch-Waxman procedures described above. Following its analysis of the reformulated product, HMR agreed that it would not assert a patent claim against the reformulated product. By June 1999, Andrx had solved the difficulties it had encountered since the summer of 1997 in consistently manufacturing commercial scale quantities of its formulations of its product in conformity with FDA regulations. Andrx received FDA approval in June 1999 to market its reformulated version of Cardizem CD. On or about the day Andrx received FDA approval of its reformulated product, the Respondents entered into a stipulation dismissing the litigation, with an agreement by Andrx not to sell its original formulation and an agreement by HMR not to sue Andrx for patent infringement on Andrx's reformulated product. The challenged agreement terminated.

On or about June 23, 1999, the federal district court dismissed the patent suit, and Andrx commenced marketing its reformulated generic Cardizem CD product, triggering its 180-day exclusivity period. At that time, Biovail Corporation International had not received tentative FDA approval for its product, and Purepac Pharmaceutical Co. had entered into a licensing arrangement with HMR for manufacture of generic Cardizem CD. Andrx's 180-day exclusivity period expired on December 19, 1999. Purepac launched its generic Cardizem CD product the next day pursuant to a license from HMR. Biovail obtained final FDA approval on December 23, 1999, and launched its product shortly thereafter.

Based on the FTC's investigation, it does not appear that there was any delay in the entry into the market of a generic version of Cardizem CD by Andrx or any other potential manufacturer, or that the conduct or agreement at issue delayed consumer access to a generic version of Cardizem CD. The agreement terminated in June 1999. It was at that time that Andrx received FDA approval to market, and commenced marketing, a reformulated generic version of Cardizem CD that HMR stipulated did not infringe any HMR patent.

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The complaint alleges that the challenged agreement was not justified by countervailing efficiencies. In its complaint, the Commission alleged that the presence in the agreement of a licensing provision (permitting Andrx to obtain a license from HMR to market generic Cardizem CD in January 2000, in the event Andrx lost the patent litigation, or if another generic company obtained final FDA approval) did not justify the agreement. The complaint alleges that entry by Andrx under a license, had it occurred, likely would have been later than entry by Andrx or another generic manufacturer absent the agreement.

Finally, the complaint charges that HMR had a monopoly in the market for once-a-day diltiazem, and, that by entering into the agreement with Andrx, HMR sought to preserve its dominance by delaying the entry of Andrx and other generic companies into the market. At the time of the challenged agreement, HMR accounted for 70% of the sales of once-a-day diltiazem in the United States. Other drugs, the complaint alleges, are not effective substitutes for once-a-day diltiazem because they are different in efficacy and side effects, and because of risks associated with switching patients from one treatment to another. In addition, the complaint alleges that HMR and Andrx conspired to monopolize the market for once-a-day diltiazem products. The complaint alleges that HMR and Andrx acted with specific intent that HMR monopolize the market for once-a-day diltiazem, and entered into a conspiracy to achieve that goal. Finally, the complaint charges that the Respondents' agreement otherwise amounts to an unfair method of competition in violation of Section 5 of the FTC Act.

The Proposed Order

In a statement issued at the time of the filing of the complaint in this matter, the members of the Commission stated that cases like this one “must be examined with respect to [their] particular facts,” and that the “development of a full factual record in the administrative proceeding . . . will help to shape further the appropriate parameters of permissible conduct in this area, and

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guide other companies and their legal advisors.”¹ Although the particular agreement challenged in the complaint has been terminated, the Commission believes prospective relief is necessary to prevent a recurrence of the types of agreements covered by the proposed order. Private agreements in which the brand name drug company (the “NDA Holder”) pays the first generic to seek FDA approval (the “ANDA First Filer”), and the ANDA First Filer agrees not to enter the market, have the potential to delay generic competition and raise serious antitrust issues. Moreover, the FDA has observed that the incentives for companies to enter into such arrangements are becoming greater, as the returns to a brand name company from extending its monopoly increasingly exceed the potential economic gains to the generic applicant from its 180 days of market exclusivity.²

The proposed order strikes an appropriate balance, on a prospective basis, between the legitimate interests of the Respondents and the Commission’s concerns with the possible competitive effects of agreements between NDA Holders and ANDA First Filers. By not imposing any broad prohibitions on the Respondents’ ability to compete, the order maintains HMR’s incentive to develop and sell new drug products and Andrx’s incentive to develop and sell generic products that do not infringe valid intellectual property rights held by others. In addition, the order preserves Andrx’s ability to decide for itself whether to market a product in the face of a claim of patent infringement, so long as such decision is otherwise lawful.

¹ Statement of Chairman Pitofsky, Commissioner Anthony, Commissioner Thompson, Commissioner Swindle, and Commissioner Leary concerning Abbott Laboratories and Geneva Pharmaceuticals, Inc., File No. 981-0395 (March 16, 2000).

²FDA Proposed Rule Regarding 180-Day Generic Drug Exclusivity for Abbreviated New Drug Applications, 64 Fed. Reg. 42873, 42882-83 (August 6, 1999).

Analysis

As described more fully below, the proposed order:

- bars (except in certain licensing arrangements) two particular types of agreements between brand name drug companies and potential generic competitors – restrictions on giving up Hatch-Waxman 180-day exclusivity rights and on entering the market with a non-infringing product;
- requires that interim settlements of patent litigation involving payments to the generic company in which the generic company temporarily refrains from bringing its generic product to market, be approved by the court, with notice to the Commission to allow it time to present its views to the court; and
- requires the Respondents to give the Commission written notice 30 days before entering into such agreements in other contexts.

Paragraph II prohibits two kinds of agreements between an NDA Holder and the ANDA First Filer (that is, the party possessing an unexpired right to Hatch-Waxman 180-day exclusivity). Paragraph II.A. bars agreements in which the first company to file an ANDA agrees with the NDA Holder not to relinquish its right to the 180-day exclusivity period (as interpreted by the courts at the time of the agreement). Paragraph II.B. prohibits the ANDA First Filer from agreeing not to develop or market a generic drug product that is not the subject of a claim of patent infringement. The order recognizes, however, that even these types of agreements, in the context of certain licensing arrangements, might not raise competitive concerns. Accordingly, conduct otherwise falling within the conduct described in Paragraph II would not be prohibited where the ANDA First Filer agrees to license and introduce a competitive product to the market, its 180-day exclusivity right is not extended, and the Commission is provided notice.

Paragraph II's focus on agreements between an NDA Holder and the ANDA First Filer does not mean that the Commission

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believes that there is no risk of competitive harm in other types of agreements. In particular substantial competitive concerns could arise from an agreement in which a generic company (other than the ANDA First Filer) agrees with the NDA Holder to refrain from marketing a non-infringing product. Given the variety of circumstances in which the restraints may arise, however, and the possibility that some legitimate justifications might exist for such arrangements, the Commission believes that it is appropriate at this time to limit the bans in Paragraph II to the described agreements between NDA Holders and ANDA First Filers.

Paragraph III covers certain private agreements involving payments from the NDA Holder to the ANDA First Filer during patent infringement litigation. Generally, the Respondents can enter into such arrangements only if (a) the agreement is presented to the court and embodied in a court-ordered preliminary injunction, and (b) the following other conditions are met: (i) along with any stipulation for preliminary injunction, Respondents provide the court with a copy of the Commission's complaint, order, and the Analysis to Aid Public Comment in this matter, as well as the proposed agreement; (ii) at least 30 days before submitting the stipulation to the court, they provide written notice (as set forth in Paragraph V of the order) to the Commission; and (iii) they do not oppose Commission participation in the court's consideration of the request for preliminary relief.

This part of the proposed order is designed to enhance the court's ability to assess the competitive implications of such agreements. This remedy, in addition to facilitating the court's access to information about the Commission's views, may also make the process more public and thereby may prompt other generic drug manufacturers (or other interested parties) to participate.

Paragraph IV addresses private agreements in which an ANDA First Filer agrees with the NDA Holder not to enter the market. Such situations would include agreements that are part of a final settlement of the litigation, and situations in which no litigation

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has been brought. In these circumstances, there may be no judicial role in ordering relief agreed to by the Respondents. Thus, the order requires that the Respondents notify the Commission at least 30 days before entering into such agreements. Such notice will assist the Commission because of the potential for competitive harm that these agreements may create. Absent the order, there may be no effective mechanism for the Commission to find out about such agreements.

The form of notice that the Respondents must provide to the Commission under Paragraphs II, III and IV of the order is set forth in Paragraph V. In addition to supplying a copy of the proposed agreement, the Respondents are required to provide certain other information to assist the Commission in assessing the potential competitive impact of the agreement. Accordingly, the order requires the Respondents to identify, among other things, all others who have filed an ANDA for a product containing the same chemical entities as the product at issue, and the court that is hearing any relevant legal proceedings involving either party. In addition, the Respondents must provide the Commission with all documents that evaluate the proposed agreement.

The proposed order also contains certain reporting and other provisions that are designed to assist the Commission in monitoring compliance with the order and are standard provisions in Commission orders.

The order will expire in 10 years.

Opportunity for Public Comment

The proposed order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed order and the comments received and will decide

Analysis

whether it should withdraw from the proposed order or make the proposed order final.

By accepting the proposed order subject to final approval, the Commission anticipates that the competitive issues alleged in the complaint will be addressed. The purpose of this analysis is to facilitate public comment on the agreement. It is not intended to constitute an official interpretation of the agreement, the complaint, or the proposed consent order, or to modify their terms in any way.

Complaint

IN THE MATTER OF

DTE ENERGY COMPANY, ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-4008; File No. 0010067
Complaint, May 15, 2001--Decision, May 15, 2001*

This consent order addresses the merger of a subsidiary of Respondent DTE Energy Company -- a diversified energy holding company whose principal operating subsidiary, The Detroit Edison Company ("Edison"), is a public utility engaged in the generation, transmission, distribution, and sale of electricity in southeastern Michigan, including the Detroit metropolitan area -- and Respondent MCN Energy Group Inc., another diversified energy holding company and the parent of Michigan Consolidated Gas Company ("MichCon"), a natural gas utility serving areas throughout the State of Michigan, including southeastern Michigan. The order, among other things, requires the respondents to divest certain assets -- including an easement over MichCon's local natural gas distribution system permitting the distribution of natural gas in the city of Detroit and all or parts of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties (the Overlap Area) -- to Exelon Energy Company or to another acquirer approved by the Commission. The order also requires the respondents to appoint an independent third-party auditor with knowledge of the natural gas industry to oversee the easement agreement; to repair and replace all components of the distribution system necessary for the proper operation thereof; and to comply promptly with any request from any customer in the Overlap Area to terminate its transportation or distribution contracts with MCN, without cost or penalty to such customer, to enable such customer to purchase gas distribution or transportation services from Exelon.

Participants

For the Commission: *Dennis F. Johnson, Marc W. Schneider, Constance M. Salemi, Andrew Lee, Mary Rose Emig, Evelyn Boynton, Phillip L. Broyles, Arthur Strong, Elizabeth A. Piotrowski, Roger Boner, John C. Hilke, J. Elizabeth Callison and Daniel O'Brien.*

For the Respondents: *William F. Young, Hunton & Williams, Mary Azcuenaga, Heller Ehrman White & McAuliffe, Ilene*

Complaint

*Knable Gotts and Joseph Larson, Wachtell, Lipton, Rosen & Katz,
and Paul Fabien, Honnigman Miller Schwartz and Cohn.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that respondents DTE Energy Company ("DTE"), a corporation, and MCN Energy Group, Inc. ("MCN"), a corporation, have entered into an agreement and plan of merger whereby MCN will merge with a subsidiary of DTE and become a wholly owned subsidiary of DTE, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that such agreement and merger, 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 to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS

A. DTE Energy Company

1. Respondent DTE is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 2000 2nd Avenue, Detroit, Michigan 48226.

2. Respondent DTE is, and at all times relevant herein has been, the parent holding company of The Detroit Edison Company ("Edison"), a public utility engaged in the generation, purchase, transmission, distribution and sale of electricity in Southeastern Michigan, including the city of Detroit, Michigan.

Complaint

3. Respondent DTE is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

B. MCN Energy Group Inc.

4. Respondent MCN is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 500 Griswold Street, Detroit, Michigan 48226.

5. Respondent MCN is, and at all times relevant herein has been, an integrated energy company primarily involved in the production, gathering, processing, transmission, storage and distribution of natural gas. MCN is the parent of Michigan Consolidated Gas Company (“MichCon”), a natural gas utility serving communities throughout the State of Michigan, including Southeastern Michigan and the city of Detroit, Michigan.

6. Respondent MCN is, and at all times relevant herein has been, engaged in commerce as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED MERGER

7. Pursuant to an agreement and plan of merger dated October 4, 1999, and amended November 12, 1999, by and among DTE, MCN and DTE Enterprises, Inc., a wholly-owned subsidiary of DTE, MCN will merge into DTE Enterprises, Inc.. Each share of MCN common stock will be converted into the right to receive either \$28.50 in cash or .775 shares of DTE common stock,

Complaint

subject to proration procedures. Including the assumption of debt, the transaction is valued at approximately \$4.6 billion.

III. TRADE AND COMMERCE

A. Self-Generation of Electricity

8. Edison distributes electricity to customers located in Southeastern Michigan. MichCon distributes natural gas to customers throughout various areas in Michigan, including part of the area in Southeastern Michigan served by Edison. The area in which the two firms overlap (*i.e.*, the area in which both Edison distributes electricity and MichCon distributes natural gas) consists of the City of Detroit and all (or parts) of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties, Michigan (the “Overlap Area”).

9. Natural gas is the fuel of choice for new electricity generation in the Overlap Area. Other fuels are not likely to be used for new generation because of a variety of disadvantages relative to natural gas. Coal and fuel oil, for example, present environmental problems that do not exist with natural gas. Virtually all new electricity generation in the Overlap Area is likely to rely on natural gas as its source of fuel.

10. Customers in the Overlap Area who need electricity have limited options. They can have electricity delivered by Edison, or they can self-generate electricity using natural gas delivered by MichCon. Self-generation includes cogeneration, generation by municipalities, and emerging forms of distributed generation, such as microturbines and fuel cells, that use natural gas. MichCon has aggressively sought to encourage customers to install gas-powered cogeneration equipment that would allow them to minimize or eliminate the purchase of electricity from Edison.

Complaint

B. The City of Detroit

11. The City of Detroit operates a municipal utility (the Public Lighting Department, or “PLD”) that distributes electricity to industrial, business, and public sector customers in Detroit. The PLD competes directly with Edison for new non-residential customers in Detroit.

12. The PLD has two sources of electricity. It purchases some power at wholesale, which is delivered over Edison’s power lines, and it generates the rest of its requirements using natural gas delivered by MichCon. The PLD has no viable option for natural gas delivery other than MichCon, and after the merger will have to rely on its only direct electricity competitor for delivery of natural gas.

C. Competing Applications

13. Electricity and natural gas compete directly for certain commercial and industrial applications. Some customers can choose either natural gas or electricity for specific energy needs, such as powering air compressors, commercial cooking, and various process applications. Customers within the Overlap Area who choose natural gas for these applications must use natural gas delivered by MichCon, and customers who choose electricity must use power delivered by the local electric utility, usually Edison. MichCon has aggressively sought to convert customers using electricity for such applications to natural gas, typically by attempting to convince customers of the relative economic benefits of natural gas compared to electricity.

IV. THE RELEVANT MARKETS

14. Relevant lines of commerce in which to analyze the effects of this merger are the local distribution of electricity and the local distribution of natural gas.

Complaint

15. A relevant section of the country in which to analyze the effects of this merger is the Overlap Area, *i.e.*, the City of Detroit and the areas of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties, Michigan, where both Edison distributes electricity and MichCon distributes natural gas.

V. MARKET STRUCTURE

16. The relevant markets are highly concentrated. MichCon is the only distributor of natural gas within the Overlap Area. Except for the cities of Detroit and Wyandotte, Michigan, which operate municipal utilities, Edison is the only distributor of electricity within the Overlap Area. The municipal utilities operated by the cities of Detroit and Wyandotte must use power lines operated and controlled by Edison to receive electricity that is not self-generated by the municipalities. Following the merger, Edison would effectively control the sources of distribution for both electricity and natural gas in the Overlap Area.

VI. ENTRY CONDITIONS

17. Entry into the distribution of electricity and the distribution of natural gas within the Overlap Area is effectively blocked by regulatory constraints and sunk costs, and would not be timely, likely, or sufficient to prevent anticompetitive effects that may result from this merger.

VII. VIOLATIONS CHARGED

First Violation

18. Respondents DTE and MCN are competitors in the Overlap Area because Edison distributes electricity and MichCon distributes natural gas used for the self-generation of electricity.

19. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in the Overlap

Complaint

Area in violation of 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, in the following ways, among others:

- a. By eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas used for the self-generation of electricity in the Overlap Area;
- b. By increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas used for the self-generation of electricity;

each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas in the relevant market.

Second Violation

20. Respondent DTE competes with the PLD in the distribution of electricity in the City of Detroit.

21. The PLD has no viable option for natural gas delivery other than MichCon, and after the merger will have to rely on its only direct electricity competitor for delivery of natural gas.

22. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the distribution of electricity in the City of Detroit in violation of 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, in the following ways, among others:

- a. By decreasing or eliminating competition in the distribution of electricity, and the distribution of natural gas used to produce electricity, in the City of Detroit;

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- b. By facilitating DTE's ability to raise the costs of the Detroit PLD;

each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas used to generate electricity in the City of Detroit.

Third Violation

23. Respondents DTE and MCN are competitors in the Overlap Area because Edison distributes electricity and MichCon distributes natural gas used to displace electricity in various commercial and industrial applications.

24. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in the Overlap Area in violation of 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, in the following ways, among others:

- a. By eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas in the Overlap Area;
- b. By increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas;

each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas in the relevant market.

Complaint

VIII. STATUTES VIOLATED

25. The agreement and plan of merger between DTE and MCN constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

26. The proposed merger, if consummated, would constitute a violation of 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of May, 2001, issues its complaint against said respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger between DTE Energy Company (“DTE”) and MCN Energy Group Inc. (“MCN”) (collectively “Respondents”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”) containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent DTE Energy Company is a corporation organized, existing and doing business under and by virtue of the

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laws of the State of Michigan, with its office and principal place of business at 2000 2nd Avenue, Detroit, Michigan 48226.

2. Respondent MCN Energy Group Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 500 Griswold Street, Detroit, Michigan 48226.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "DTE" means DTE Energy Company, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by DTE (including, but not limited to, The Detroit Edison Company), and the respective directors, officers, employees, agents and representatives, predecessors, successors, and assigns of each.

B. "MCN" means MCN Energy Group Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by MCN (including, but not limited to, Michigan Consolidated Gas Company), and the respective directors, officers, employees, agents and representatives, predecessors, successors, and assigns of each.

C. "Respondents" means DTE and MCN, individually and collectively.

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D. "Commission" means the Federal Trade Commission.

E. "Acquirer" means either Exelon or such other entity approved by the Commission to which Respondents or a trustee divest the Divested Assets pursuant to the requirements of this Order.

F. "Auditor Agreement" means the Amended and Restated Auditor Agreement made as of the 8th day of February, 2001, between Michigan Consolidated Gas Company, Exelon Energy Company, and Navigant Consulting, Inc., which is contained in Confidential Appendix B to this Order.

G. "Divested Assets" means all rights, title, and interest acquired by DTE from MCN pursuant to the Merger in all assets and businesses relating to the transportation, distribution and storage of natural gas, and the marketing and sale of natural gas distribution services, for Electric Displacement Load in the Overlap Area, including, without limitation, the following:

1. transportation and distribution capacity, storage capacity, and all other rights and assets used for, associated with, or necessary for the transportation and distribution of natural gas to any and all Electric Displacement Load customers in the Overlap Area;
2. all customer lists, customer data, vendor lists, sales promotion literature, advertising materials, marketing studies, engineering studies, research materials, technical information, dedicated management information systems, information contained in management information systems, rights to software, technology, know-how, ongoing research and development, specifications, designs, drawings, processes and quality control data;
3. all rights, title and interest in and to owned or leased real property, together with easements, rights-of-way, appurtenances, licenses, and permits;

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4. all rights, title, and interest in and to contracts (together with associated bids) entered into with customers, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
5. all rights under warranties and guarantees, express or implied;
6. all separately maintained, as well as relevant portions of not separately maintained, books, records and files;
7. all federal, state, and local regulatory agency registrations, permits, licenses, easements, authorizations, franchises, and applications, and all documents related thereto; and
8. all items of prepaid expense;

Provided, however, if Respondents divest to Exelon under the terms set forth in the Divestiture Agreement pursuant to Paragraph II.A. of this Order, “Divested Assets” means the easement and all rights and other assets conveyed by the Divestiture Agreement.

H. “Divestiture Agreement” means both of the following agreements, if approved by the Commission: (1) the Easement Agreement, and (2) the Auditor Agreement.

I. “Easement Agreement” means the Amended and Restated Easement Agreement made and entered into as of the 8th day of February, 2001, between Michigan Consolidated Gas Company and Exelon, which is contained in Appendix A to this Order.

J. “Electric Displacement Equipment” means any natural gas powered equipment that displaces or that can be used in lieu of electric equipment, including, but not limited to, chillers, air compressors, and commercial dishwashers and fryers; *provided, however,* that Electric Displacement Equipment does not include

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equipment used for direct-fired space heating and hot water applications.

K. “Electric Displacement Load” or “EDL” means natural gas consumption for:

1. On-Site Power Generation,
2. Electric Displacement Equipment, or
3. General Generation.

L. “Exelon” means Exelon Energy Company, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 2315 Enterprise Drive, Westchester, Illinois 60154, and its successors and assigns.

M. “General Generation” means up to 8,750,000 kWh of non-On-Site Power Generation per year per each unit of Generation Equipment served by the Acquirer of the Divested Assets in the Overlap Area; *provided, however*, that General Generation may not exceed 8,750,000 kWh at any Contiguous Customer Location, where a “Contiguous Customer Location” shall consist of the buildings or parts of buildings situated upon the same parcel or contiguous parcels of land and occupied and used by the customer as a unitary enterprise at one location and under one management.

N. “Generation Equipment” means power generation equipment, including, but not limited to, engines, turbines, or fuel cells.

O. “MCN Distribution System” means the natural gas distribution system operated by MCN in the Overlap Area, including, but not limited to, the gas pipelines and all related equipment, systems, components, rights and other assets used for, associated with, or necessary for the transportation, distribution or storage of natural gas within the Overlap Area.

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P. “Merger” means the merger of DTE and MCN described in the Agreement and Plan of Merger Among DTE Energy Company, MCN Energy Group Inc., and DTE Enterprises, Inc., dated October 4, 1999, as amended November 12, 1999, and February 28, 2001.

Q. “New Divestiture Agreement” means any agreement, other than the Divestiture Agreement between the Respondents and Exelon, for the sale of the Divested Assets that has been approved by the Commission to accomplish the requirements of this Order, including any agreement(s) entered into by a trustee pursuant to Paragraph III of this Order.

R. “Non-EDL” means natural gas consumption for applications or uses that are not Electric Displacement Load.

S. “Non-Utility Entity” means an entity that has no obligation under state or local law to provide utility service (*i.e.*, the local distribution of electricity or natural gas) to the public in the Overlap Area.

T. “On-Site Power Generation” means electrical generation from Generation Equipment to the extent that the electrical conductors between the Generation Equipment and facility consuming output from the Generation Equipment: (1) are owned or operated either by a Non-Utility Entity that owns or operates the Generation Equipment, or by the entity that owns or operates the facility consuming output from the Generation Equipment, or both such entities, or (2) are owned or operated by a municipal entity, including a city, village, township or county.

U. “Overlap Area” means the geographic areas in Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties, Michigan, in which both DTE distributes electricity and MCN distributes natural gas.

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V.

IT IS FURTHER ORDERED that:

- W. Respondents shall divest the Divested Assets:
1. to Exelon pursuant to and in accordance with the Divestiture Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), no later than five (5) days after the date on which the Merger is consummated.
 2. *Provided, however,* that if the Commission determines to make the Order final, but notifies the Respondents either that Exelon is not an acceptable acquirer of the Divested Assets, or that the Divestiture Agreement is not an acceptable manner of divestiture, then Respondents shall divest the Divested Assets, absolutely and in good faith, and at no minimum price, pursuant to a New Divestiture Agreement within ninety (90) days of the date on which this Order becomes final to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- X. Respondents shall:
1. Maintain, repair, and replace all components and other aspects of the MCN Distribution System:
 - a. necessary for the proper or safe operation of that system;
and
 - b. in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.

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2. Operate the MCN Distribution System in a reasonable and non-discriminatory manner, and in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.
3. Appoint an independent Auditor, subject to the approval of the Commission, that will perform such services as are necessary to effectuate the Divestiture Agreement, including, but not limited to, arbitration of disputes between Respondents and the Acquirer and all other duties and responsibilities set forth in the Divestiture Agreement. The Auditor shall have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Divestiture Agreement, including the right to propose changes to the Divestiture Agreement necessary to ensure the competitive viability of the Acquirer under the Divestiture Agreement, and shall have free access to all of Respondents' books, records, information, systems, and facilities as deemed reasonably necessary by the Auditor to monitor Respondents' performance under the Divestiture Agreement; *provided, however,* that the Auditor shall have no authority to modify any agreement between Respondents and the Acquirer, or otherwise to modify any obligations of the Respondents under this Order.
4. No later than five (5) days after the date on which the Merger is consummated, provide Acquirer with a list of all customers to which MCN transports natural gas in the Overlap Area, including the name, address, and rate classification for each such customer, and a statement indicating whether each such customer utilizes natural gas for Electric Displacement Load. Respondents shall provide this list and information in Microsoft Access format (if respondents divest the Divested Assets to Exelon), or in such other standard computer format as may be requested by

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another Acquirer (if respondents divest the Divested Assets to an Acquirer other than Exelon).

5. No later than five (5) days after the date on which the Merger is consummated, provide to the Auditor all information and results of the study conducted by the MCN Marketing Department of EDL opportunities in the Overlap Area referred to as the Data Collection and Analysis Team (“DCAT”) study. At the same time, Respondents shall send a letter to each customer in the DCAT study advising the customer that gas distribution services may be purchased from Acquirer and asking if the customer wishes the Auditor to provide the customer’s DCAT information to the Acquirer. Respondents shall instruct the Auditor that, upon the receipt of a request from any customer, the Auditor shall provide Acquirer with the customer-specific information, and that the Auditor shall not inform Respondents which customers did or did not authorize the transfer of their information to Acquirer.
6. For two (2) years after the date on which the Merger is consummated, promptly comply with any request of any customer in the Overlap Area to terminate its transportation or distribution contracts with MCN, without cost or penalty to such customer, to enable such customer to purchase gas distribution or transportation services provided by the Acquirer.

Y. If Respondents or a trustee, as appropriate, divest the Divested Assets pursuant to Paragraph II.A.2. or Paragraph III. of this Order, as applicable, Respondents shall execute a New Divestiture Agreement with the Acquirer (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order). Such New Divestiture Agreement shall divest the Divested Assets to the Acquirer pursuant to terms and conditions that receive the prior approval of the Commission, and shall require Respondents to:

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1. Grant the Acquirer such natural gas transportation and distribution capacity, storage capacity, and other rights in and to the MCN Distribution System that, in the sole discretion of the Commission, are necessary to insure that the Acquirer will be:
 - a. economically viable; and
 - b. able to transport and distribute natural gas for Electric Displacement Load competitively with Respondents and in a manner that achieves the purposes of this Order.
2. Operate and expand the MCN Distribution System in a manner that:
 - a. is reasonable and non-discriminatory and complies fully with all rules and regulations adopted by any federal, state or political subdivision, or any agency of any federal, state or political subdivision, having jurisdiction over any aspect of the MCN Distribution System;
 - b. enables the Acquirer to fulfill the purposes of this Order; and
 - c. reasonably allocates, consistent with the purposes of this Order, the cost of any expansion between Respondents and the Acquirer.
3. Appoint an independent Auditor, subject to the approval of the Commission, to mediate and arbitrate any dispute between Respondents and the Acquirer arising under the New Divestiture Agreement in good faith and in an expeditious manner consistent with the purposes of this Order.
4. Accept for transportation through the MCN Distribution System at all receipt points that exist at the time of the divestiture of the Divested Assets, or which shall be created

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during any period that the Divestiture Agreement is in effect, any natural gas nominated by the Acquirer, *provided, however,* that Respondents may condition acceptance of such natural gas on terms and conditions:

- a. required by rules and regulations adopted by any federal, state or political subdivision, or any agency of any federal, state or political subdivision, having jurisdiction over any aspect of the MCN Distribution System; or
 - b. required for the efficient, non-discriminatory operation of the MCN Distribution System.
5. Provide that the New Divestiture Agreement shall not be modified or assigned without the prior approval of the Commission.
6. Require the Acquirer to agree to the exercise of powers by the independent Auditor as provided in Paragraph II.B.3. of this Order.
7. Permit the Acquirer to sell, lease, or otherwise convey to other persons a portion of any capacity to transport or store natural gas in or through the MCN Distribution System acquired by the Acquirer pursuant to the New Divestiture Agreement; *provided, however,*
- a. Respondents shall prohibit the Acquirer from assigning all of its rights under or interest in the New Divestiture Agreement to any person without the prior approval of the Commission; and
 - b. Respondents may prohibit the Acquirer from assigning any portion or all of the Acquirer's obligations under the New Divestiture Agreement, but may permit such assignment with the prior approval of the Commission.

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8. Indemnify and hold the Acquirer harmless from suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons in connection with the MCN Distribution System.
9. Convey to the Acquirer all of the rights, title, and interest in any customer contracts, customer information, marketing studies, or other assets surrendered back, assigned, sold, or otherwise conveyed by Exelon to Respondents if the New Divestiture Agreement is executed following the termination of the Divestiture Agreement.
10. Undertake such additional contractual obligations as, in the sole discretion of the Commission, are necessary to effectuate the purposes of this Order.

Provided, however, that with respect to the assets that are to be divested and the contracts that are to be entered into pursuant to this Paragraph II.C, Respondents need not divest such assets or enter into such contracts if: (a) the Acquirer chooses not to acquire such assets or enter into such contracts; and (b) the Commission approves the New Divestiture Agreement without such assets or contracts.

Z. Respondents shall comply with the terms of the Divestiture Agreement or the New Divestiture Agreement, as applicable, which agreement, if approved by the Commission, is incorporated by reference into this Order and made a part hereof. Any failure by Respondents to comply with the terms of the Divestiture Agreement or the New Divestiture Agreement, as applicable, shall constitute a failure to comply with this Order. Further, nothing in the Divestiture Agreement or New Divestiture Agreement shall preclude, or be deemed to preclude, the Commission from bringing any action as may be appropriate under the Federal Trade Commission Act or any other statute enforced by the Commission for any failure by Respondents to comply with this Order. Notwithstanding any paragraph, section, or other provision of the

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Divestiture Agreement or the New Divestiture Agreement, as applicable, any failure to comply with any condition precedent to closing (whether or not waived), or any modification or assignment of the Divestiture Agreement or the New Divestiture Agreement, as applicable, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

AA. Pending divestiture of the Divested Assets pursuant to the Divestiture Agreement or the New Divestiture Agreement, as applicable, Respondents shall take such actions as are necessary to maintain the viability, marketability and competitiveness of the Divested Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divested Assets.

BB. The purpose of the divestiture of the Divested Assets is to ensure the continuation of a viable and competitive alternative supplier of natural gas transportation and distribution services to EDL customers in the Overlap Area after the Merger, and to remedy any lessening of competition resulting from the Merger as alleged in the Commission's complaint.

II.

IT IS FURTHER ORDERED that:

A. The Commission may appoint a trustee to divest the Divested Assets ("Divestiture Trustee") to an Acquirer and to execute a New Divestiture Agreement that satisfies the requirements of Paragraph II of this Order if:

1. Respondents fail to complete the divestitures required by Paragraph II. of this Order within the time periods specified therein;
2. Exelon terminates the Divestiture Agreement; or
3. The Divestiture Agreement is otherwise terminated.

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B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the decision of the Commission to appoint a Divestiture Trustee nor the decision of the Commission not to appoint a Divestiture Trustee shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph III. of this Order to divest the Divested Assets to an Acquirer, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Divested Assets to an Acquirer pursuant to the terms of this Order and to enter into a New Divestiture Agreement with the Acquirer pursuant to the terms of this Order, which New Divestiture Agreement shall be subject to the prior approval of the Commission.

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3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to divest the Divested Assets to an Acquirer and to enter into a New Divestiture Agreement with the Acquirer.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III. of this Order to divest the Divested Assets and to enter into a New Divestiture Agreement with an Acquirer in a manner that satisfies the requirements of Paragraph II. of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture or believes that divestiture can be achieved within a reasonable time, such divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; *provided, however*, the Commission may extend such divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondents related to the Divested Assets, or to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture or other responsibilities. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by

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the Commission or, for a court-appointed trustee, by the court.

6. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made to an Acquirer and pursuant to a New Divestiture Agreement in the manner as set forth in Paragraph II. of this Order; *provided, however*, that if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission, *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondents, such consultants, accountants, engineers, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents. The Divestiture Trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the Divestiture Trustee's divesting the Divested Assets to an

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Acquirer and entering into a New Divestiture Agreement in a manner that satisfies the requirements of Paragraph II. of this Order.

8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph III. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divested Assets.
12. The Divestiture Trustee shall report in writing to Respondents and to the Commission every two (2) months concerning his or her efforts to divest the Divested Assets.

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III.**IT IS FURTHER ORDERED** that:

A. Within sixty (60) days after the date this Order becomes final and every sixty (60) days thereafter until Respondents have fully complied with the divestiture provisions of Paragraphs II or III of this Order, as applicable, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II or III of this Order, as applicable. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II or III of the Order, as applicable, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One year (1) from the date this Order becomes final, annually for the next nineteen (19) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

IV.

IT IS FURTHER ORDERED that each Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

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VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, subject to any legally recognized privilege and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, employees, agents or independent contractors of Respondents, who may have counsel present, regarding any such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on May 15, 2021.

By the Commission.

AMENDED AND RESTATED

EASEMENT AGREEMENT

THIS EASEMENT AGREEMENT (this “Agreement”) is made and entered into as of the 8th day of February 2001, between MICHIGAN CONSOLIDATED GAS COMPANY, a Michigan corporation, with its principal address at 500 Griswold Street, Detroit, Michigan 48226 (“Grantor”), and EXELON ENERGY COMPANY, a Delaware corporation, with its principal address at 2315 Enterprise Drive, Westchester, Illinois 60154 (“Grantee”). Capitalized terms and phrases used and not otherwise defined herein shall for all purposes of this Agreement have the respective meanings specified therefor in Exhibit D attached hereto.

RECITALS:

This Agreement is based on the following recitals:

- A. Grantor is a regulated utility engaged in the distribution and sale of natural gas and owns and operates a natural gas distribution system consisting of gas lines and related equipment and systems constructed within easements granted pursuant to various franchise agreements and easement agreements (“Grantor's Distribution System”).
- B. Grantor is selling transportation and storage capacity on Grantor’s Distribution System to promote the growth of viable and competitive on-site Electric Displacement Load (“EDL”) (as hereinafter defined) within the geographic area of Grantor’s service territory that is also served by The Detroit Edison Company, as more fully described on the map attached as Exhibit A (the “Overlap Area”).
- C. Grantee desires to purchase capacity to serve EDL in the Overlap Area and Grantor has agreed, among other things, that Grantee will have the use of portions of Grantor’s Distribution System in order to develop EDL in competition with Grantor.
- D. Grantee desires that an easement be granted over portions of the Grantor’s Distribution System for purposes of firm transportation and storage of gas in accordance with the terms of this Agreement.

- E. Due to the unique nature of EDL and Grantee's capacity needs, Grantor is agreeable to providing said easement to Grantee.
- F. Subject to the provisions of this Agreement and the Auditor Agreement between Grantor, Grantee and the Auditor of even date herewith, Grantor shall retain full operational control over the transportation and storage of gas on Grantor's distribution System and have ultimate control over the operation of Grantor's Distribution System.

NOW, THEREFORE, in consideration of the foregoing recitals, for ONE DOLLAR (\$1.00), the sufficiency and receipt of which is hereby acknowledged, Grantor and Grantee hereby agree as follows:

1. **GRANT:** Grantor hereby grants to Grantee a perpetual, non-exclusive easement in, across and through the portions of the Grantor's Distribution System situated in Wayne, Washtenaw, Monroe, Oakland and Macomb Counties, Michigan, as more particularly described on Exhibit B upon the terms and conditions hereinafter set forth (the "Easement").
2. **PERMITTED USE:** The Easement is granted solely for the purpose of transportation and storage of gas in accordance with the terms and conditions of this Agreement.
3. **CAPACITY RIGHTS:**
 - (a) **Initial Capacity.** Grantee shall have use of 5 Bcf of annual transportation capacity ("Initial Capacity"), to serve any end use customers located within the Overlap Area that have been designated by Grantee as being customers of Grantee for the purposes of this Agreement, during the period of any such designation ("Grantee's Customers"). Payment for the Initial Capacity shall be at the rate set forth in Section 6.
 - (b) **Supplemental Capacity.** At Grantee's option, Grantee may exercise its right to purchase up to an additional 15 Bcf of annual transportation capacity ("Supplemental Capacity") for use in serving Grantee's Customers within the Overlap Area. Such Supplemental Capacity shall be sold to Grantee in increments of 1 Bcf. Each increment of Supplemental Capacity purchased by Grantee will be charged an annual capacity payment as provided in Section 6.
 - i) Supplemental Capacity must serve a minimum of 50% Electric Displacement Load ("EDL Target"). Grantee shall be deemed to have met the EDL Target if Grantee has demonstrated to the satisfaction of the Auditor that the total EDL consumption by all of Grantee's Customers combined equals or exceeds 50% of the Supplemental Capacity already sold by Grantee. Grantee may acquire one or more additional increments of Supplemental Capacity at any time, provided that (x) the total Supplemental Capacity may not exceed 15 Bcf, and either: (y) Grantee has met the EDL Target for the Supplemental Capacity already sold by Grantee; or (z) the Auditor has determined that the additional Supplemental Capacity requested by Grantee would be used to serve EDL

Load. No demonstration of compliance with conditions (y) or (z) shall be required prior to Grantee purchasing the first increment of Supplemental Capacity.

- (c) **Growth Capacity.** If the Auditor certifies that Grantee has purchased and met the EDL Target for all 15 Bcf of Supplemental Capacity, at Grantee's option, Grantee may exercise its right to purchase additional transportation capacity ("Growth Capacity") for use in serving the On-site Generation Load within the Overlap Area. Such additional capacity shall be sold to Grantee in any increments equal to the annual volumetric requirements of each of Grantee's incremental Growth Capacity customers as specified by the Grantee at the time the capacity is acquired. Growth Capacity purchased by Grantee will be charged a monthly capacity payment as provided in Section 6.
- (d) **Non-EDL Transportation.** At Grantee's election, Grantor will transport gas to Grantee's Customers at Tariff rates. Any capacity or volumes utilized for such transportation shall not be included in the calculation of Keep-Whole Payments or Grantee's ACQ or MDQ or overruns or Excess Quantities under this Agreement. Grantee shall pay for any metering necessary to separately measure the EDL.
- (e) **Overruns.** Grantor shall notify Grantee within thirty (30) days after the end of any Contract Year in which deliveries to Grantee's Customers overrun the current ACQ ("ACQ Overrun"). Grantee shall have thirty (30) days from the date of the notice to elect to (x) acquire an additional increment of capacity or (y) pay Grantor for ACQ Overrun as follows: (1) for ACQ Overrun up to 5% of ACQ, Grantee shall pay 80 cents per Mcf; and (2) for ACQ Overrun in excess of 5% of ACQ, Grantee shall pay the Sales Rate in effect for the Contract Year in which such ACQ Overrun occurred. For purposes of the foregoing calculation Committed ACQs and related actual volumes associated with Expansion Load shall be excluded.
- (f) **Expansion Load Overruns.** For each Expansion Load to the extent actual volumes related to such Expansion Load exceed Committed ACQ ("Committed ACQ Overrun"), Grantee shall pay Grantor for each Committed ACQ Overrun as follows: (x) for Committed ACQ Overrun up to 5% of Committed ACQ, Grantee shall pay 80 cents per Mcf; and (y) for Committed ACQ Overrun in excess of 5% of Committed ACQ, Grantee shall pay the Sales Rate in effect for the Contract Year in which such Committed ACQ Overrun occurred.
- (g) **Keep-Whole.** Within 30 days after the end of the Contract Year in which Grantee first purchases Supplemental Capacity, and each Contract Year thereafter, Grantee shall submit to the Auditor all information reasonably requested by the Auditor to determine whether Grantee has met the requirements for service to Electric Displacement Load and On-site Generation Load applicable to the capacity acquired by Grantee. If the Auditor finds that Grantee's Customers (in aggregate) failed to utilize the required amount of Electric Displacement Load or

On-site Generation Load, then Grantee shall keep Grantor whole by paying Grantor the Keep-Whole Rate, defined below, that would have been paid by those of Grantee's Customers whose non-EDL consumption caused Grantee to fall short of its EDL Target ("Keep-Whole Payment"). No Keep-Whole Payments shall be required by either party if Grantee exceeds its EDL Target. In order to calculate the Keep-Whole Payment the Auditor shall make the following findings:

- i) Keep-Whole Volumes (in Mcf) for Supplemental Capacity where Grantee has used 20 Bcf or less of capacity:

$$\text{Keep-Whole Volumes} = \frac{3}{4} (\text{non-EDL consumption} - 5.5 \text{ Bcf} - \text{EDL consumption})$$

- ii) Keep-Whole Volumes (in Mcf) for Supplemental Capacity and Growth Capacity where Grantee has used more than 20 Bcf of capacity shall be the sum of Keep-Whole Volumes_{EDL} and Keep-Whole Volumes_{OGL}:

$$\text{Keep-Whole Volumes}_{\text{OGL}} = (\text{Total consumption} - 20 \text{ Bcf}) - \text{OGL consumption}$$

$$\text{Keep-Whole Volumes}_{\text{EDL}} = \frac{3}{4} (\text{non-EDL consumption} - 5.5 \text{ Bcf} - \text{EDL consumption})$$

For purposes of calculating Keep-Whole Volumes_{EDL} in Section 3(g)(ii), non-EDL consumption shall never be greater than 20 Bcf.

For the purpose of determining Keep-Whole Volumes, consumption is determined by actual metered volumes or if EDL and OGL are not separately metered, a reasonable allocation of metered volumes as approved by the Auditor. Negative Keep-Whole Volumes, Negative Keep-Whole Volumes_{OGL}, and Negative Keep-Whole Volumes_{EDL} shall be deemed to be equal to zero.

- iii) Grantee's Customers to whom Keep-Whole Volumes were delivered. For purposes of this calculation, the Auditor shall assume that Keep-Whole Volumes were delivered under the last agreement(s) executed with Grantee for deliveries using capacity acquired under this Agreement;
- iv) The lowest cost-based MPSC approved rates (both distribution and customer service charge) that each of Grantee's Customers with Keep-Whole Volumes would have paid Grantor under its then current Tariff ("Keep-Whole Rate"). Grantor's current Tariff rates are attached as Exhibit C.

The Keep-Whole Payment shall be the Keep-Whole Volumes times the Keep-Whole Rate for each applicable Grantee's Customer; provided however, that no Keep-Whole Payment shall be required to the extent that Grantee's failure to meet the EDL Targets was a result of the termination of contracts with one or more EDL customers.

- (h) Nothing in this Agreement shall be construed to prevent Grantee from marketing gas to EDL, OGL or other end use customers in the Overlap Area or other areas of

Grantor's service territory under programs that do not involve the use of the capacity made available to Grantee under this Agreement.

- (i) Notwithstanding Section 20, Grantee may transfer the right to use transportation capacity with or without any associated storage rights it purchases under this Agreement to a third party for re-sale to end-users in the Overlap Area (“Brokered Capacity”). Grantee shall remain responsible to Grantor for all Capacity Payments and any Excess Quantity or Deficient Quantity Charges associated with Brokered Capacity. For purposes of calculating Keep-Whole Volumes, the Auditor shall determine EDL and/or OGL consumption based on how Brokered Capacity is consumed by the ultimate end-user utilizing information received from the acquiror of any Brokered Capacity, relevant end-users, Grantee or Grantor.

4. **GRANTEE TRANSPORTATION RIGHTS:** Grantee shall cause to be delivered to Grantor at the Receipt Point(s), and Grantor shall transport from the Receipt Point(s) through the Grantor’s Distribution System to the Delivery Points within the Overlap Area, Equivalent Quantities of natural gas. Grantor shall aggregate and treat as one, all Grantee’s Customers for the purposes of nominations, storage utilization, balancing and any fees or penalties (if applicable). If Grantor utilizes daily balancing or MMBtu instead of Mcf for all customers in its ST and LT tariff classes, then Grantor retains the right to require Grantee to balance Receipt Point(s), Delivery Point(s) and storage on a daily basis and/or to utilize MMBtu measurement.

- (a) Grantee shall cause gas to be delivered to the Receipt Point(s) up to the following parameters:

MDQ:	Winter (November – March)	$\frac{ACQ - ACQ_{OGL}}{110} + \frac{ACQ_{OGL}}{170}$
	Summer (April – August)	$\frac{ACQ - ACQ_{OGL}}{260} + \frac{ACQ_{OGL}}{110}$
	Fall (September – October)	$\frac{ACQ - ACQ_{OGL}}{260} + \frac{ACQ_{OGL}}{200}$

Grantee shall have no minimum delivery requirements as to its MDQ.

- (b) At no time shall Grantee’s daily nomination(s) to Receipt Point(s) exceed the then authorized MDQ unless agreed upon by Grantor in advance. Deliveries to Receipt Point(s) that exceed the authorized MDQ will be excess quantities (“Excess Quantities”). Deliveries to Grantee’s Customers that exceed the MDQ will be deficient quantities (“Deficient Quantities”). Grantee shall accept or pay an Excess Quantity Charge or Deficient Quantity Charge as applicable, as provided in Section 6, for all such volumes.
- (c) Grantee will also be responsible for (x) all upstream or third party transportation agreements and charges incurred in transporting the gas to the Receipt Point(s) and

(y) all charges or penalties caused by any agent acting on Grantee's behalf, including, but not limited to, unauthorized gas and storage penalties.

5. **STORAGE RIGHTS:** Transportation services under this Agreement include Grantee's access to a storage quantity equal to Grantee's Storage Capacity, which will be utilized by Grantee for balancing when Grantee's delivered volumes from the Receipt Point(s) do not match the consumption of Grantee's Customers at the Delivery Points.

- (a) During the months of September and October, net injections into storage will be limited to no more than 14.3% of Grantee's Storage Capacity unless otherwise mutually agreed to by the parties. If net injections during the September and October period exceed the 14.3% tolerance level, Grantee will accept the Excess Quantity Charge, as provided in Section 6, for volumes in excess of 14.3%.
- (b) If the volume of gas held by Grantor in storage for Grantee's account exceeds the Storage Capacity limits, Grantor shall treat the excess volumes as Excess Quantities. Grantor shall purchase the Excess Quantities from Grantee by paying Grantee the Excess Quantity Charge for all such volumes.
- (c) During the months of November through March, net withdrawals from Grantee's storage account will be limited each month to 40% of Grantee's Storage Capacity.
- (d) If (x) Grantee allows the storage balance to go below zero, or (y) during the months of November through March, net withdrawals exceed 40% of Grantee's Storage Capacity, then Grantee will be deemed to have purchased gas from Grantor and Grantee will pay Grantor the Deficient Quantity Charge for any volumes delivered from storage on behalf of Grantee when its storage balance is below zero.

6. **CHARGES**

- (a) Initial Capacity Annual Payment: \$ 3,750,000
- Supplemental Capacity Annual Payment: \$ 700,000 per 1 Bcf

Growth Capacity Monthly Payment is equal to the sum of:

One-twelfth (1/12) the annual volume of Residential Growth Capacity times 85% of the Grantor's Average Residential Distribution Charge

and

One-twelfth (1/12) the annual volume of Non-Residential Growth Capacity times the Grantor's Transportation Rate Schedule Minimum.

Provided however, that in no case shall the Growth Capacity Monthly Payment be less than one-twelfth (1/12) the total annual volume of elected Growth Capacity times 80% of the Grantor's Average Transportation Rate.

- (b) Grantee shall pay, on the twenty-fifth (25th) day of each month, one-twelfth (1/12) of the Initial and Supplemental Capacity Annual Payments in effect on the first day of the preceding month, and the Growth Capacity Monthly Payment; provided, however, that (x) no payments will be due for the first three (3) months immediately following the close of the proposed merger between DTE Energy Company and MCN Energy Group, Inc.; and (y) the payments for the fourth through twelfth months immediately following the close of said merger shall be equal to one half the otherwise applicable Initial and Supplemental Capacity monthly Payments.
- (c) (i) Capacity payments for Supplemental Capacity will start upon Grantee's election to purchase the additional capacity and continue as long as the capacity election remains in effect. Provided that Grantee has (x) not purchased Growth Capacity or (y) first turned back all Growth Capacity as provided below, Grantee shall have the right, upon 10 days prior notice, to reduce its election of Supplemental Capacity in the event that one or more of Grantee's Customers cease taking service from Grantee for EDL load. The amount of such reduction shall be in increments of 1 Bcf with 50% EDL and 50% non-EDL load. Any such reduction shall become effective on the first April 1 following Grantee's election.
- Grantee shall have the right, upon 10 days prior notice, to reduce its election of Growth Capacity. Any such reduction shall become effective on the first April 1 following Grantee's election.
- (ii) Beginning on the earlier of (x) Grantee's request or (y) with the April payment for the twenty-first (21st) Contract Year, all Initial and Supplemental Capacity Annual Payments shall be adjusted for increases or decreases in Grantor's average per Mcf volumetric cost of service as established by the MPSC, from time to time, as described below ("Adjustment Mechanism"). Once the capacity payment has been adjusted, then it shall continue to be adjusted for any change to the MPSC Rate, defined below. At no time will any annual capacity payment, on an Mcf basis, exceed 75% of Grantor's then

effective Sales Rate. The Growth Capacity Monthly Payment shall be increased or decreased coincident with any changes in Grantor's MPSC approved residential and transportation Tariff rates.

The Adjustment Mechanism shall be applied as follows: the Initial and Supplemental Capacity Annual Payments will be adjusted for increases or decreases in Grantor's current weighted average per Mcf cost of end-user service as established by the MPSC from time to time ("MPSC Rate"). For purposes of illustration, Grantor's current MPSC Rate is \$1.6012 as established by the MPSC in Case No. U-10150 and more fully set forth in Exhibit E. The Adjustment Mechanism shall be calculated using the following formula and shall be applied individually to both the Initial and Supplemental Capacity Annual Payments:

$$\text{New Capacity Payment} = \frac{\text{New MPSC Rate}}{\text{Immediately Preceding MPSC Rate}} \times \text{Immediately Preceding Capacity Payment}$$

"New MPSC Rate" means the MPSC Rate established by the MPSC after the date of this Agreement and from time to time thereafter.

- (d) A fuel use charge of 1% gas-in-kind for all volumes delivered to Grantor at the Receipt Point(s) for transportation to Grantee's Customers.
- (e) The Excess Quantity Charge is equal to 95% of the lowest price reported in *Gas Daily*, in the Daily Price Survey, for the following locations for the month in which the breach occurred or the month following such breach: Dawn, Ontario; ANR ML7 (entire zone); Chicago-LDC, large euts; Michigan - Consumers Energy, large euts; Michigan - MichCon, large euts. Grantor shall purchase Excess Quantities from Grantee by paying Grantee the Excess Quantity Charge.
- (f) The Deficient Quantity Charge is equal to 105% of the highest price reported in *Gas Daily*, in the Daily Price Survey, for the following locations for the month in which the breach occurred or the month following such breach: Dawn, Ontario; ANR ML7 (entire zone); Chicago-LDC, large euts; Michigan - Consumers Energy, large euts; Michigan - MichCon, large euts. If at any time during the term of this Agreement, *Gas Daily* ceases publication, the parties will mutually agree, subject to approval by the Auditor, on a replacement trade publication that reports regional daily gas prices. Grantee shall purchase Deficient Quantities from Grantor by paying Grantor the Deficient Quantity Charge.

7. **REPAIR AND REPLACEMENTS:** Grantor shall repair and replace all components of Grantor's Distribution System necessary for the proper operation thereof. If Grantor fails to repair or replace such components, the Auditor may, at Grantor's expense, make any repairs and or replacements necessary for the proper operation of Grantor's Distribution System. In order to facilitate the Auditor's repair or replacement or such components,

Grantee may guarantee the cost of such repairs and or replacements, and Grantor shall promptly reimburse any payments paid pursuant to such guarantee.

8. **RELOCATION:** Grantor reserves the right, from time to time, to relocate any portions of the Grantor's Distribution System. Such relocation shall in no way impact Grantee's rights, under this Agreement, to store and transport gas in the Overlap Area. If any portion of the Grantor's Distribution System required for performance of Grantor's obligations under this Agreement is relocated, Grantor will grant to Grantee a new easement and Grantee will release the existing Easement for the relocated portion of Grantor's system. Furthermore, in the event Grantee, its successors and assigns shall no longer require the use of all or any part of the Easement, the part no longer required shall automatically revert to Grantor thereof and Grantee shall release such part of the Easement which Grantee shall no longer require.
9. **EASEMENTS OR RESTRICTIONS:** The granting of the Easement is subject to any easements or restrictions of record including the lien created by Michigan Consolidated Gas Company's Indenture of Mortgage and Deed of Trust dated as of March 1, 1944, as supplemented and amended, to the terms of the underlying franchises or easement agreements. Grantor is not assigning or transferring any of its rights under any of the underlying franchises or easement agreements.
10. **CONFORMITY WITH LAW:** Grantor and Grantee shall use the Easement in conformity with safe practices and shall at all times comply with all local, State, and Federal laws, statutes, rules, and regulations pertaining thereto.
11. **INSURANCE:** Neither Grantor nor Grantee shall do or permit to be done any act or thing in connection with the use of the Easement that will invalidate or be in conflict with any insurance policies covering the Grantor's Distribution System.
12. **PROTECTION FROM LIENS:** Grantee shall keep the Easement and the Grantor's Distribution System and every part thereof free and clear of any and all liens and encumbrances for work performed by Grantee, or on Grantee's behalf, on the Easement.

13. **CONDITIONS:** This Agreement is subject to the following conditions:
- (a) Prior approval by the MPSC. Grantor will file with the MPSC for approval of this Agreement. Both parties shall openly support this Agreement and seek MPSC approval of it.
 - (b) The closing of the proposed merger between DTE Energy Company and MCN Energy Group Inc.
 - (c) Approval of this Agreement by the FTC through the issuance of a final decision and order.
14. **TERM:** Subject to Sections 13 and 17, this Agreement is effective as of the closing date of the proposed merger between DTE Energy Company and MCN Energy Group Inc.
- (a) This Agreement may be terminated by Grantee at the end of the twentieth Contract Year or the end of any succeeding Contract Year by giving Grantor and the Auditor written notice one year prior to the proposed termination date.
 - (b) This Agreement may be terminated by Grantor only if the proposed merger between DTE Energy Company and MCN Energy Group Inc. does not close within 12 months after MPSC approval of this Agreement.
 - (c) Upon termination of this Agreement, the Easement shall be deemed to have been abandoned and will cease and terminate, which termination may be evidenced by Grantor's recordation of an affidavit to that effect.
 - (d) Grantee, in its sole discretion, may terminate this Agreement at any time if the Securities and Exchange Commission ("SEC") or any successor agency asserts jurisdiction over Grantee or Exelon Corporation, or any successor, affiliate or subsidiary of either, under the Public Utility Holding Company Act of 1935 by reason of entering into this Agreement or relating to this Agreement or exercising any rights under this Agreement. Grantee may also terminate this Agreement if by reason of entering into this Agreement or relating to this Agreement or exercising any rights under this Agreement, the Federal Energy Regulatory Commission ("FERC") or the Michigan Public Service Commission ("MPSC") or any successor agencies, (i) subjects Grantee or Exelon Corporation, or any successor, affiliate or subsidiary of either, to regulation to which a gas marketer in the State of Michigan or any successor, affiliate or subsidiary thereof would not be subject and (ii) such regulation has, in Grantee's reasonable judgment, a material adverse impact upon this Agreement for Grantee or upon Grantee or Exelon Corporation or any successor, affiliate or subsidiary of either.
15. **GOVERNING LAW:** This Agreement shall be governed and construed in accordance with the laws of the State of Michigan.
16. **FURTHER ASSURANCES:** Grantor agrees to execute, acknowledge and deliver to Grantee all such further, other and additional easements, instruments, notices and other

documents and to do all such other and further acts and things as may be necessary or useful to more fully and effectively grant, convey and assign to Grantee the easements and rights in Grantor's Distribution system throughout Wayne, Washtenaw, Monroe, Oakland and Macomb Counties, Michigan being conveyed hereby or intended to be so conveyed, provided, however, that no documents executed, acknowledged or delivered pursuant to this Paragraph may modify the Easement Agreement.

17. **TERMINATION OR MODIFICATION.** This Agreement shall not be terminated, modified, altered, or amended by the parties except as provided herein or except in writing as agreed to by the parties hereto and after notice to and approval by the FTC.
18. **NOTICES:** All notices or other communications provided for under this Agreement shall be in writing, signed by the party giving the same, and shall be deemed properly given and received (i) when actually delivered and received, if personally delivered; or (ii) three (3) business days after being mailed, if sent by registered or certified mail, postage prepaid, return receipt requested; or (iii) one (1) business day after being sent by overnight delivery service; or (iv) upon receipt, if sent by facsimile, all to the following addresses:

If to Grantor: Michigan Consolidated Gas Company
500 Griswold Street
Detroit, Michigan 48226
Fax No: (313) 965-0009
Attn: Office of the General Counsel

If to Grantee: Exelon Energy Company
2315 Enterprise Drive
Westchester, Illinois 60154
Fax No: (708) 236-7901
Attn: Vice President and General Manager

Each party shall have the right to designate other or additional addresses or addressees for the delivery of notices, by giving notice of the same in the manner as previously set forth herein.

19. **SUCCESSORS AND ASSIGNS:** This Easement runs with the land and binds and benefits Grantor's and Grantee's successors and permitted assigns.
20. **ASSIGNMENT:** Neither party may assign this Agreement or any of its rights or obligations arising under this Agreement without prior approval of the FTC and without the prior written consent of the other party, which shall not be unreasonably withheld,

provided, however, either party may assign this Agreement to an affiliate so long as the assignor guarantees the continuing performance of the assignee. Furthermore, Grantee may assign this Agreement to any institution providing financing to it. In no event, however, will Grantor be required to consent to a partial assignment of any rights or obligations arising under this Agreement.

- 21. **FTC ACTION:** Nothing in this Agreement shall be deemed to preclude the FTC from bringing any action as may be appropriate under the Federal Trade Commission Act.
- 22. **GENERAL TERMS AND CONDITIONS:** All transportation services provided under this Agreement shall be in accordance with the General Terms and Conditions attached as Exhibit D.
- 23. **PRIOR AGREEMENTS:** This Agreement, together with Exhibits A, B, C, D and E, and the Auditor Agreement, dated of even date as this Agreement, terminate and supercede the Easement Agreement and Auditor Agreement executed by the parties on August 21, 2000.

IN WITNESS WHEREOF, the Grantor has signed and sealed this instrument this ____ day of _____, 2001, and the Grantee has signed and sealed this instrument the ____ day of _____, 2001.

In the presence of:

MICHIGAN CONSOLIDATED GAS COMPANY
a Michigan corporation

WITNESSES:

Donna E. Clark

Jeannette M. Renaud

By: _____
Steven E. Kurmas
Its: Sr. Vice President

WITNESSES:

EXELON ENERGY COMPANY
a Delaware corporation

David J. Dulick

Zina Gavin

By: _____
Gerald N. Rhodes
Its: President

EXHIBIT A

MAP OF OVERLAP AREA TO BE SERVED BY GRANTEE

EXHIBIT B

PORTIONS OF GRANTOR'S DISTRIBUTION SYSTEM SUBJECT TO EASEMENT

All distribution pipelines, associated rights of way and appurtenant facilities located in Wayne County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 24280, Pages 93 through 305, Wayne County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Wayne County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Washtenaw County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 2336, Pages 494 through 706, Washtenaw County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Washtenaw County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Milford Township, Oakland County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 11005, Pages 835 through 1047, Oakland County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Oakland County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Monroe County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 1087, Pages 22 through 234, Monroe County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Monroe County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

All distribution pipelines, associated rights of way and appurtenant facilities located in Macomb County, Michigan described in the Indenture of Mortgage and Deed of Trust dated as of March 1, 1944 and its 29 Supplemental Indentures from Michigan Consolidated Gas Company to Citibank, N.A., recorded at Liber 4695, Pages 1 through 213, Macomb County Records, and all other and after-acquired distribution pipelines, associated rights-of-way and appurtenant facilities located in Macomb County, Michigan, regardless of whether any of such other or after-acquired distribution pipelines, associated rights of way and/or appurtenant facilities are described in the instruments recited herein or in any other instruments of record.

EXHIBIT C
GRANTOR RATE SCHEDULES

Grantor's rate schedules are those found on Michigan Consolidated Gas Company's web site at:

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http://www.michcon.com/tariffs/tariffs_frameset.html

The web site will be updated to reflect any changes to Grantor's rates.

EXHIBIT D

GENERAL TERMS AND CONDITIONS

D-1. DEFINITIONS

- a) “Annual Contract Quantity” or “ACQ” refers to the total volume of firm transportation Initial Capacity, Supplemental Capacity and Growth Capacity purchased by Grantee and available for Grantee’s use in the Overlap Area in any Contract Year.
- b) “ACQ_{OGL}” refers to the volume of firm transportation Growth Capacity purchased by Grantee to serve On-site Generation Load.
- c) “Average Rate/Mcf” means, in dollars/Mcf, the Supplemental Capacity Annual Payment divided by 1,000,000.
- d) “Committed ACQ” means the anticipated ACQ of an Expansion Load (Mcf).
- e) “Committed Years” means the number of Contract Years, following the in-service of the expansion, Grantee commits to use the Committed ACQ for newly added incremental load for which the expansion was designed.
- f) “Contract Year” means the period from April 1st to March 31st.
- g) “Construct” means to design, engineer, procure, obtain regulatory approvals, permit, install, modify, upgrade, improve, build, inspect, test, or place in service.
- h) “Day” means a period of 24 consecutive hours commencing at 12:00 noon Eastern Time, or such other time as mutually agreed upon by the parties.
- i) “Delivery Point” is the interconnection(s) of the facilities of Grantor and those of each Grantee’s Customer and/or any Grantee downstream extension.
- j) “Electric Displacement Load” or “EDL” means natural gas consumption for On-Site Generation, General Generation or Electric Displacement Equipment:
 - 1) “On-Site Generation” means electrical generation from power generation equipment, including but not limited to, engines, turbines or fuel cells (“Generation Equipment”) to the extent that the electrical conductors between the Generation Equipment and the facility consuming output from the Generation Equipment (i) are owned or operated either by a non-utility entity that owns or operates the Generation Equipment, or by the entity that owns or operates the facility consuming output from the Generation Equipment, or both such entities, or (ii) are owned or operated by a municipal entity, including a city, village,

township or county. A “non-utility entity” is an entity that has no obligation under state or local law to provide utility service to the public in the Overlap Area.

- 2) “General Generation” means up to 8,750,000 kWh of non-On-Site Generation, per year per each unit of Generation Equipment served by Grantee in the Overlap Area; provided, however, that General Generation may not exceed 8,750,000 kWh at any “contiguous customer location”. A “contiguous customer location” means the buildings or parts of buildings situated upon the same parcel or contiguous parcels of land and occupied and used by the customer as a unitary enterprise at one location and under one management.
- 3) “Electric Displacement Equipment” means equipment that displaces electric equipment such as chillers, air compressors, commercial dishwashers and fryers, or other applications for which the Auditor determines that a practical and economic electric alternative exists. Electric displacement equipment shall not include direct-fired space heating and hot water applications.
- k) “Equivalent Quantities” means the quantity of gas, in MCF received from Grantee, for the account of Grantee, at the Receipt Point(s), less 1% gas-in-kind withheld by Grantor for loss and use.
- l) “Expansion Load” means new incremental Grantee Customer load added pursuant to Section D-5 of Exhibit D.
- m) “FERC” means the Federal Energy Regulatory Commission or its successor.
- n) “FTC” means the Federal Trade Commission or its successor.
- o) “Grantee’s Storage Capacity” equals 10% of Grantee's Initial Capacity and Supplemental Capacity in effect on May 31 of each Contract Year and is the maximum quantity of natural gas that Grantor will hold in firm storage on Grantee’s account under the terms of this Agreement.
- p) “Grantor's Average Residential Distribution Charge” equals the weighted average of the volumetric distribution charges of the MPSC approved residential service rates as in effect from time to time. Such distribution charges shall be exclusive of any customer charges. As of the effective date of this Agreement, the MPSC approved residential service rates include Rate Schedule Numbers 2, 2A, 3 and 3A, as identified in Exhibit C. In calculating the weighted average, the residential service rates shall be weighted by the total volume of service utilized by the MPSC in the most recent rate order to set rates for the respective residential rate classes. The Grantor's Average Residential Distribution Charge as of the effective date of this Agreement is \$1.4443/Mcf.
- q) “Grantor's Average Transportation Rate” equals the weighted average of the ST-1 and LT-1 MPSC approved fixed cost transportation rates (or any successor rate) in effect

from time to time, exclusive of any customer charges. As of the effective date of this Agreement, Rate Schedule Numbers ST-1 and LT-1 are identified in Exhibit C. In calculating the weighted average, the ST-1 and LT-1 transportation charges shall be weighted by the total volume of service for the ST-1 and LT-1 rate classes utilized by the MPSC in the most recent rate order to set rates. The "Grantor's Average Transportation Rate" as of the effective date of this Agreement is \$0.5762/Mcf.

- r) "Grantor's Transportation Rate Schedule Minimum" shall be the lowest MPSC approved non-residential Transportation Rate as listed in Exhibit C as in effect from time to time, exclusive of any customer charges. As of the effective date of this Agreement, Grantor's Transportation Rate Schedule Minimum is equal to \$0.2300/Mcf, the minimum transportation charge listed under Rate Schedule LT-2.
- s) "Maximum Daily Quantity" or "MDQ" is the maximum quantity of natural gas that may be transported from the Receipt Point(s) and/or Grantee's storage account to the Delivery Point(s) on any one Day.
- t) "MPSC" means the Michigan Public Service Commission or its successor.
- u) "Non-Residential Growth Capacity" is the volume of all Growth Capacity other than Residential Growth Capacity.
- v) "Residential Growth Capacity" is the volume of Growth Capacity that meets the definitions of residential usage as detailed in Grantor's MPSC approved rate schedules, (Exhibit C).
- w) "On-site Generation Load" or "OGL" means natural gas consumption for On-Site Generation and General Generation, as defined in Sections D-1(j)(1) and (j) (2) above.
- x) "Primary Receipt Point" refers to a Receipt Point where firm deliveries will be received.
- y) "Receipt Point(s)" are those interconnection(s) between the facilities of Grantor and third parties that deliver gas to Grantor, for the account of Grantee, identified in Section D-3.
- z) "Sales Rate" means the volumetric distribution charge for deliveries to MichCon commercial customers, as approved from time to time by the MPSC. As of the date of this Agreement, the Sales Rate, Rate 1 in the Tariff, is \$1.8179/Mcf.
- aa) "Secondary Receipt Point" refers to a Receipt Point where interruptible deliveries will be received.
- bb) "Tariff" means Grantor's Rules, Regulations and Rate Schedules for Gas Service as approved from time to time by the MPSC.

D-2. NOMINATIONS

All nominations must be made in accordance with Grantor’s nomination practices in effect at the time of nomination. Grantor’s current nomination practices are set out in Attachment D-I. Prior to making any change to its nomination procedure, Grantor shall submit the proposed changes to the Auditor and Grantee. Grantee and Auditor shall have a period of 45 days to review and comment on any proposed change. At the direction of the Auditor, Grantor shall implement any change to its nomination procedures that the Auditor deems consistent with good utility practice and necessary to prevent an unreasonable or discriminatory impact on Grantee. Grantor shall not impose any Excess Quantity Charges or Deficient Quantity Charges on Grantee to the extent either such charge is occasioned by a force majeure event on Grantor's Distribution System. Grantee shall promptly refer any complaints with respect to Grantor’s nomination procedures to the Auditor. The Auditor shall impose monetary damages, as provided in Section D-18, if the Auditor determines that Grantor’s treatment of Grantee’s nominations was unreasonable or discriminatory.

D-3. RECEIPT POINTS

Grantee may deliver gas to any Receipt Point located in the Overlap Area or that serves the Overlap Area, including but not limited to the Receipt Points identified below. Grantee shall have the flexibility to deliver up to its full MDQ at any primary Receipt Point. Further, Grantee may request Receipt Points in addition to those below, and Grantor shall grant such requests on a non-discriminatory basis to the extent operationally feasible. Grantor shall give written notice to the Auditor within one business day of refusing any Receipt Point request made by Grantee, and within two business days thereafter, Grantor shall provide the Auditor with a written explanation of the reasons for refusing Grantee's Receipt Point. The Auditor shall impose monetary damages, as provided in Section D-18, if the Auditor determines that Grantor’s refusal of a receipt point requested by Grantee was unreasonable or discriminatory.

Receipt Point	Summer*	Winter *
Willow/ANR Pipeline	Secondary	Primary
Northville/ Consumers Energy	Secondary	Primary
Belle River/ Great Lakes	Primary	Secondary
MichCon/ St. Clair Pipeline Co.	Primary	Secondary
Rouge/ Panhandle Eastern	Secondary	Primary
Woolfolk/ ANR Pipeline	Primary	Secondary

Kalkaska	Primary	Secondary
Belle River/ Vector Pipeline	Primary	Secondary
Milford/ Vector Pipeline	Secondary	Primary

* *Total volumes delivered at all Receipt Points may not exceed contract MDQ.*

D-4. DELIVERY POINT REQUIREMENTS

- a) For each Delivery Point, Grantee will provide customer enrollment and cancellation information to Grantor via a pre-formatted electronic file (“Enrollment/Cancellation File”). Files will be submitted through Grantor’s ConQuest™ Electronic Bulletin Board (EBB), or such other means as mutually agreed to by the parties. The Enrollment/Cancellation File will include the following information for each Delivery Point:
 - i) Name and address;
 - ii) Account number;
 - iii) Pressure requirements and maximum cubic feet/hour; and
 - iv) Any other pertinent information as necessary to process the transaction.

- b) Grantee may submit one Enrollment/Cancellation File to Grantor each business day. Grantor will perform a verification check to ensure that Grantee’s file contains accurate and complete Delivery Point information. Within ten business days after the Enrollment/Cancellation File has been received, Grantor will post a confirmation file on its EBB. The confirmation file will provide the status (i.e., accepted or rejected) of each transaction including notification whether accepted Enrollment Files will require new or incremental facilities. Rejected transactions will be accompanied with an explanation code briefly describing why the transaction could not be processed. Transactions may be rejected for the following reasons: 1) incorrect data, 2) incomplete data, or 3) inactive account. If Grantor deems an Enrollment File unacceptable for any reason other than specified above, Grantor must receive prior approval from the Auditor to reject the Enrollment File. Grantor shall provide the Auditor full electronic access to all Grantee transactions on Grantor’s EBB.

- c) Accepted enrollments and cancellations will become effective upon the earlier of (x) the next business day after all Grantor meters at the Delivery Point have been read or estimated by Grantor, or (y) 35 days after receipt of Grantee's Enrollment/Cancellation File. If the Delivery Point requires new or incremental facilities, such facilities will be installed as provided in Sections D-5, and Grantor will commence deliveries on behalf of Grantee when such facilities are placed in service.
- d) Any information or notices pertaining to Grantee's Customers ("Customer Information"), including information pertaining to any third party purchasing Brokered Capacity pursuant to Paragraph 3(i), will be maintained by Grantor's operations department in strictest confidence subject to the following:
 - i) Disclosure of Customer Information will be limited to that necessary and appropriate for ensuring compliance with the Michigan Gas Safety Code and the curtailment rules of Grantor's Tariff, which will be applied to Grantee's Customers in the same manner as applied to Grantor's customers.
 - ii) Disclosure of Customer Information will be limited to persons with responsibilities in connection with the operation and construction of Grantor facilities, and billing, if Grantee elects to have Grantor bill Grantee's Customers, and under no circumstances may Grantor disclose Customer Information or any other operational data pertaining to Grantee to employees of Grantor or any affiliate of Grantor who are engaged in the marketing of the transportation or sale of electricity or gas.
 - iii) Customer Information may be used only for the purpose of providing the transportation and storage services contemplated in this Agreement.
- e) At Grantee's election, Grantor will retain responsibility for the cost of installing, operating, maintaining (including replacing in-kind) and reading Grantee's Customer meters. Grantor will forward meter reads for Grantee's Customers to Grantee twice a month on or about the eighteenth day of the month in which meters are read and on or about the third day of the month following the month in which meters are read. Upon 30 days prior notice to the Auditor and Grantor, Grantee may assume responsibility for installing, operating, maintaining (including replacing in-kind) and reading Grantee's Customer meters. If Grantor provides billing services to Grantee, payments received from Grantee's Customers will be remitted on the same schedule as meter reads. Grantor or Grantee may install remote meter reading devices on the facilities of Grantee's Customers to get daily reads. The party requesting the installation of the remote meter reading devices shall bear all costs thereof.
- f) Subject to billing practices rules, as approved from time to time by the MPSC, Grantee may bill its customers directly or contract with Grantor for customer billing services at cost plus 10%. Grantee will bear all uncollectible risk with respect to

Grantee's Customers and Grantor shall not undertake any collection efforts on behalf of Grantee.

- g) If Grantee elects to terminate its transportation agreement with any of Grantee's Customers, Grantee must give Grantor written notice as provided in this Section D-4. Any customer terminated by Grantee may apply for service from Grantor as a "new customer" under the terms of Grantor's Tariff. Transportation service customers who are no longer served under this Agreement shall be returned to Grantor's transportation service tariff.
- h) Grantee shall have the right to transfer gas between its storage account under this Agreement and the storage accounts of Grantor's ST-1 and/or LT-1 end use transportation customers in the Overlap Area; provided that such customers also purchase their natural gas requirements from Grantee or one of its affiliates. Grantee shall notify Grantor of storage account transfers when submitting an Enrollment/Cancellation File and provide Grantor such information as reasonably requested to verify end use customer storage volumes to be transferred and gas supplier.

D-5. SYSTEM REQUIREMENTS

- a) **Operation**. Grantor shall be responsible for operation of its Distribution System and all infrastructure maintenance and system-wide upgrades.
- b) **System Expansions**. At Grantee's request, any upstream or downstream facilities necessary to interconnect with, or to meet the current or anticipated future service needs of, Grantee's Customers, including but not limited to service line extensions, upstream expansions, mains, transfer mains and gate stations shall be constructed.
 - i) System expansion requirements will be analyzed by the Stoner and Associates, Inc., SynerGEE model ("Stoner Model") as more fully described in Attachment D-II, or such other engineering modeling software generally accepted in the natural gas industry as may be agreed upon by Grantee and Grantor.
 - ii) Within five business days of receipt of all information necessary to run a Stoner Model of required facilities, Grantor will provide to Grantee, for Grantee review and approval, all of the details of the proposed facilities, including project design, lump sum cost estimate ("Construction Costs"), Expansion Allowance, as defined below, and the results, including all assumptions and variables, of its Stoner Model or such other mutually agreed upon engineering modeling software, generally accepted in the natural gas industry.
- c) **Costs**. To the extent that Grantee's level of purchased capacity is 20 Bcf or less, an

Expansion Allowance, as defined below, is available. The “Expansion Allowance” is equal to

$$\text{Average Rate/Mcf} \times \text{Committed Years} \times \text{Committed ACQ} \times 0.8$$

Grantee shall not be required to make a contribution towards the cost of any constructed upstream or downstream facilities related to Initial Capacity or Supplemental Capacity unless the actual cost of the requested expansion is greater than \$100,000.00. For expansions related to Initial Capacity or Supplemental Capacity that exceed \$100,000.00, the Grantee shall pay only those costs that exceed the Grantee's Expansion Allowance.

- i) Grantor shall submit such estimated Expansion Allowance, along with back-up data, to Grantee. The Expansion Allowance shall only be for construction or upgrades of facilities required to serve the specific Grantee Customer. Grantee shall either accept such Expansion Allowance or shall submit its dispute of the Expansion Allowance to the Auditor, under the arbitration procedures described in Section D-18, with the burden of proof on the Grantor.
 - ii) If Grantor elects to over-size the expansion, Grantor will absorb the cost associated with such over-sizing.
- d) To the extent that Grantee’s level of purchased capacity exceeds 20 Bcf, Grantee shall be entitled to the same expansion allowance that Grantee’s Customers would receive if Grantee’s Customers were taking service from Grantor and paying the rate paid by Grantee for such incremental customer.
- e) **Grantor Construction.** Grantor will use commercially reasonable and non-discriminatory efforts to construct facilities requested by Grantee within the timeframe requested by Grantee. To the extent any delay to the in-service date of a facility needed to serve Grantee’s Customer(s) is caused by Grantor, the Auditor may, after hearing, impose monetary damages on Grantor to compensate Grantee for unreasonable or discriminatory delays, as provided in Section D-18.
- f) **Grantee Construction.** Grantee may construct any required expansions, provided the facilities meet all Michigan Gas Safety Code requirements and applicable metering standards of the American Gas Association. Facilities constructed by Grantee will be placed in service no later than seven days following notice to Grantor that construction is completed. Within such seven-day notice period, Grantor may inspect and test the facilities.
- i) At Grantee’s request, made within 60 days of the in-service date of extensions constructed by Grantee or third parties contracted by Grantee, Grantor shall purchase the facilities from Grantee for the Construction Costs quoted by Grantor but not to exceed the Expansion Allowance.

- g) **Interconnects.** Grantor shall interconnect with any downstream system extensions constructed by Grantee, provided such extensions meet all existing gas safety codes as established from time to time by the MPSC, Department of Transportation, or other governmental agencies with jurisdiction over natural gas pipelines. Subject to the expansion allowance provisions of this Agreement, Grantee shall be responsible for costs of such interconnection, including any upstream expansions required on Grantor's system to accommodate the downstream extension.
- h) **Disputes.** Any disputes regarding the design, cost or timing of construction of facilities shall be resolved by the Auditor, under the procedures described in Section D-18, with the burden of proof on the Grantor. The Auditor may implement additional procedures applicable to system expansions and upgrades at any time.
- i) Nothing in this section is intended to change Grantee's capacity rights under Section 3 of this Agreement.
- j) Nothing in the foregoing shall be interpreted to limit either party's ability to compete with the other party to serve any end user, including offering prices and terms to induce the end user to not purchase gas transportation services from the other party.
- k) Grantor shall take no actions before the SEC, MPSC, FERC, or any other government agency in opposition to any attempt by Grantee to serve end users in the Overlap Area without utilizing Grantor's Distribution System.

D-6. OPERATIONAL NOTICES OR CHANGES

Grantor shall provide 45-days advance notice to Grantee and the Auditor of the following operational events:

- a) Any planned new receipt points;
- b) Any proposed modifications or changes to Grantor's nomination process;
- c) Any proposed modifications or changes to Grantor's gas measurement practices;
- d) Any proposed modifications or changes to Grantor's Gas Quality Specifications;
- e) Any scheduled maintenance or any other outage known to Grantor that would impact a Receipt Point or Delivery Point being used by Grantee;
- f) Any scheduled maintenance or other outage of facilities on Grantor's Distribution System, or any change in operating standards, practices or procedures that would degrade or interrupt service to any Grantee Customer; and
- g) Any other scheduled event likely to impact Grantee or Grantee's ability to serve

Grantee's Customers.

The Auditor may revise or modify any of the foregoing in accordance with good utility practice, if such revision or modification is necessary to prevent an unreasonable or discriminatory impact on Grantee.

D-7. MEASUREMENT

- a) All quantities of gas received at the Receipt Point(s) by Grantor for the account of Grantee shall be measured at the Receipt Point(s) by Grantor or its designee in accordance with, and shall comply with the measurement practices adopted by the American Gas Association ("AGA"), as amended from time to time (all collectively referred to as "Gas Measurement Reports"). The gas measurement practices currently adopted by the AGA and followed by Grantor are more fully set out in Attachment D-III. If at any time during the term of this Agreement the AGA ceases to publish gas measurement practices, the parties will mutually agree on replacement gas measurement practices that are generally accepted in the industry.
- b) All quantities of gas delivered by Grantor to Grantee's Customers will be measured at the Delivery Point(s) by Grantor, or its designee in accordance with applicable Gas Measurement Reports.

D-8. QUALITY

- a) All gas delivered by Grantee at the Receipt Point(s) or redelivered by Grantor at the Delivery Point(s) shall conform with the same gas quality standards to which Grantor holds itself and other shippers ("Gas Quality Specifications"). Grantor's current gas quality specifications are set forth in Attachment D-IV.
- b) If the gas delivered by Grantee at any Receipt Points or by Grantor at any Delivery Points fails at any time to conform to the Gas Quality Specifications, then Grantor or Grantee, as the case may be, shall notify the other of such deficiency and thereupon may, at its option, refuse to accept delivery pending correction. Upon demonstration acceptable to Grantor or Grantee, as the case may be, that the gas being tendered for delivery conforms to the Gas Quality Specifications, Grantor or Grantee, as the case may be, shall resume taking delivery of gas.

D-9. POSSESSION AND LIABILITY

- a) As between Grantor and Grantee, Grantee shall be deemed in exclusive control and possession of the gas transported hereunder and responsible for any damage or injury caused thereby until it is delivered to Grantor at the Receipt Point(s) and after it is delivered by Grantor at the Delivery Point(s). Grantor shall be deemed in exclusive control and possession of said gas and responsible for any damage or injury caused thereby after it is delivered by Grantee, or for Grantee's account, at the Receipt Point(s) and before it is delivered by Grantor at the Delivery Point(s).

- b) Neither party shall be liable to the other party for any punitive or exemplary damages in connection with this Agreement.
- c) Upon termination of this Agreement pursuant to Section 14, neither party shall have any further obligations to the other party, except such obligations as have accrued as of the termination date, and Grantor shall dispose of any Grantee storage inventories as directed by Grantee.

D-10. WARRANTY

- a) Grantee warrants that at the time of delivery it will have the right to deliver the gas in connection with Grantee's use of the capacity made available to Grantee under this Agreement.
- b) Grantee further warrants that either independently or through the services of a gas marketer or broker, Grantee will put in place contracts for the purchase and transportation of natural gas such that sufficient quantities of gas will be delivered to the Receipt Point(s) to meet Grantee's full requirements for natural gas, less any storage balance ("Sufficient Quantities"). Failure to deliver Sufficient Quantities while continuing to accept receipt of natural gas may affect Grantor's ability to operate Grantor's Distribution System. If Grantee fails to deliver Sufficient Quantities in any particular month, Grantor will notify Grantee of the shortage in deliveries and attempt to reach the designated person for notices by telephone as an additional notice.

D-11. INDEMNIFICATION

- a) Grantee will indemnify Grantor and hold it harmless from suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons in connection with gas provided in connection with Grantee's use of the capacity made available to Grantee under this Agreement and royalties, taxes, license fees or charges related to such gas.
- b) Grantor will indemnify Grantee and hold it harmless from suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons in connection with Grantor's Distribution System.

D-12. TAXES and FRANCHISE FEES

Grantee shall pay any taxes, tariffs, and duties however designated, levied, or charged resulting from Grantee's use of capacity rights provided under this Agreement, including, without limitation, all state and local privilege or excise taxes and any amount in lieu of such taxes, tariffs and duties paid or payable by Grantor, exclusive however of taxes based on the net income of Grantor, property taxes, and Grantor's single business taxes.

Grantee shall reimburse Grantor for any such taxes, tariffs and duties that are collected and remitted or paid on Grantee's behalf by Grantor because of Grantee's failure to pay. Grantor shall, however, reimburse Grantee for 80% of any franchise fees paid by it, provided that the reimbursement in any Contract Year shall not exceed 10% of the initial Annual Capacity Payment.

D-13. BILLING AND PAYMENT

- a) On or about the fifth day of each calendar month, Grantor shall render a statement to Grantee for the Capacity Payment and any other charge, if applicable. Grantee will pay Grantor the amount billed in that statement on or before the twenty-fifth day of the month. All such payments shall be made in the form of immediately available funds directed to a bank account designated by Grantor on its invoice.
- b) The statements rendered pursuant to this Agreement will be denominated in U.S. Dollars (\$U.S.). All payments must be made in \$U.S.
- c) Grantee shall have the right at all reasonable times to examine the books, records and charts of Grantor to the extent necessary to verify the accuracy of any statement, charge or computation made under or pursuant to any provisions of this Agreement.
- d) Should Grantee fail to pay any undisputed amount of any statement rendered by Grantor as herein provided when such amount is due, such undisputed and unpaid amount shall accrue interest at the prime lending rate as published in the Wall Street Journal on the first day of each month.
- e) If Grantee finds at any time within twelve (12) months after the date of any statement rendered by Grantor that it has been overcharged in the amount billed in such statement, and if the overcharge has been paid, and Grantee makes a claim therefor within 60 days from the date of discovery thereof, the overcharge, if verified, must be refunded within 30 days. If Grantor finds at any time within twelve months after the date of any statement rendered by it that there has been an undercharge in the amount billed in such statement, it may submit a statement for the undercharge, and Grantee, upon verifying the same, shall pay such amount within 30 days.

D-14. CREDITWORTHINESS

- a) If at any time during the term of this Agreement, the long-term debt rating of Grantee, or Grantee's ultimate parent if Grantee does not have a separate long-term debt rating, becomes less than "BBB" as reported by Standard and Poor's Corporation or an equivalent rating by Moody's Investors Services, Inc. ("Investment Grade"), Grantor shall request that the Auditor calculate the capitalized value of all Capacity Payments due for the remainder of the term of the

Agreement utilizing the 10-year treasury rate (“Settlement Payment”) and Grantee shall do any one of the following:

- i) Pay to Grantor the Settlement Payment; or
- ii) Provide Grantor with an irrevocable stand-by letter of credit in an amount equal to the Settlement Payment.

If Grantee elects to provide a letter of credit, such instrument must remain in place until the earlier of (x) Grantee demonstrates to Grantor’s reasonable satisfaction that it has an Investment Grade long term debt rating or (y) this Agreement is terminated as provided in Section 14.

D-15. FORCE MAJEURE

- a) Neither Grantee nor Grantor shall be liable in damages, or in any other remedy, legal or equitable, to the other for any act, omission or circumstances occasioned by or in consequence of any acts of God, strikes, lockouts, acts of the public enemy, wars, sabotage, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests, and restraints of rules and peoples, civil disturbances, failure of electronic data, explosions, breakage or accident to machinery or lines of pipe, the necessity to curtail receipts and/or deliveries on Grantor’s Distribution System to maintain system integrity, or the necessity to make repairs, tests, or alteration to machinery or lines of pipe, line freezups, the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to prevent or overcome. A failure to settle or prevent any strike or other controversy with employees or with anyone purporting or seeking to represent employees shall not be considered to be a matter within control of the party claiming suspension. To the extent Grantor curtails service and Grantee’s Customers’ service is curtailed due to a Force Majeure event, it shall be done on a non-discriminatory basis compared to all other firm customers on Grantor’s Distribution System.
- b) Such causes or contingencies affecting the performance of this Agreement by either party, however, shall not relieve it of liability in the event of its concurring negligence or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies affecting the performance of this Agreement relieve either party from its obligation to make payments of amounts then due thereunder, nor shall such causes or contingencies relieve either party of liability

unless such party shall give notice and full particulars of the same in writing or by telegraph to the other party as soon as possible after the occurrence relied on.

D-16. REGULATION

- a) This Agreement and the respective obligations of the parties hereunder are subject to all laws, orders, rules and regulations of duly constituted authorities having jurisdiction. This Agreement is also subject to all applicable federal, state and local taxes or surcharges.
- b) In the event there is a change in law or regulation that renders this Agreement, or any part of this Agreement, unenforceable and/or illegal, the Parties shall attempt to renegotiate this Agreement on mutually acceptable terms. Neither Grantor nor Grantee shall refuse to accept changes to the Agreement that would (i) render the Agreement enforceable and legal and (ii) would not materially adversely affect the Party refusing to accept the proposed change. Any disagreements as to what constitutes a material adverse affect shall be submitted to arbitration under the procedures described in Section D-18. Any changes to this Agreement are subject to FTC approval. In the event (i) the parties cannot reach a mutually agreeable resolution or (ii) the Auditor has not determined that a proposal is acceptable, Grantor commits not to oppose any efforts by Grantee to obtain franchises and any other regulatory approvals to serve end users in the Overlap Area.

D-17. INDEPENDENT AUDITOR

- a) Grantor and Grantee shall appoint an independent, third party auditor with knowledge of the natural gas industry. Appointment of the Auditor is subject to approval of the FTC.
- b) Because this is a perpetual Easement, the parties acknowledge that during the term of this Agreement, publications, models or standards agreed to by the parties may cease to exist and need to be replaced by a new publication, model or standard to be agreed upon by the parties. Before such replacement is implemented the Auditor shall approve any such change. If the parties fail to determine a mutually agreeable substitute, the Auditor as provided in Section D-18 below shall determine the appropriate publication, model or standard for implementation of this Agreement.
- c) The Auditor shall perform the duties contemplated by this Agreement as more fully set forth in an Independent Auditor Agreement that will be effective upon the effective date of this Agreement.

D-18. DISPUTES

- a) Any dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof, not settled by the management of the parties within 30 days, shall be submitted to the Auditor for adjudication in accordance with this Section D-18 and the Commercial Arbitration Rules of the American Arbitration Association as in

effect from time to time; provided, however, Grantee, in its sole discretion, may terminate management discussions at any time and submit the matter to the Auditor for adjudication.

- b) The arbitration shall be held at the office of the American Arbitration Association in Detroit, Michigan on ten days notice to the parties.
- c) All decisions shall be promptly communicated to the parties within two business days after conclusion of the arbitration proceeding with a written decision to follow within 30 days.
- d) Any monetary award rendered by the Auditor against Grantor shall be limited to direct and indirect damages, including lost profits, resulting from the breach of this Agreement. Monetary damages may be awarded if the Auditor finds that Grantor unreasonably or discriminatorily took action or failed to take action which resulted in placing Grantee at a competitive disadvantage in exercising its rights under this Agreement. Grantor shall have the burden of proving that it operated the gas distribution system in the Overlap Area in a reasonable and non-discriminatory manner.
- e) The award rendered by the Auditor shall be final and binding on all parties to the proceeding unless overturned or modified by a court of competent jurisdiction because the Auditor has made a clear error of law. The Auditor's findings of fact will not be subject to judicial review. Judgment upon any award rendered by the Auditor may be entered in any court having jurisdiction and each party hereto consents and submits to the jurisdiction of such court for purposes of such action.

D-19. NON-WAIVER OF FUTURE DEFAULTS

No waiver by either party of any one or more defaults by the other in the performance of any provisions of this Agreement will operate or be construed as a waiver of any future default or defaults, whether of a like or of a different character.

D-20. TREATMENT OF CONFIDENTIAL INFORMATION

Grantor and Grantee each shall use any Confidential Information received or derived from the Auditor, from one another, or from performing this Agreement or the Auditor Agreement, as each may be modified from time to time, solely (1) in the performance of Grantor's or Grantee's obligations under this Agreement or the Auditor Agreement; (2) the performance of Grantor's obligations under any order issued by the Federal Trade Commission; (3) the performance of Grantor's or Grantee's obligations under any order, rule, regulation or statute issued or administered by the MPSC; or (4) for the purpose of complying with financial, tax reporting, legal, health, safety, and environmental obligations of Grantor or Grantee. For purposes of this paragraph, Confidential Information means:

1. Any information designated as Confidential Information by either Grantor or Grantee that is treated as confidential by the party which designates the information as Confidential Information;
2. Any information designated as Confidential Information by the Auditor; and
3. Any information that is designated as confidential by any order, rule, regulation or statute issued or administered by the MPSC.

ATTACHMENT D-I

GAS NOMINATIONS OVERVIEW

Michigan Consolidated Gas Company (MichCon) accepts transportation and end user (eut) nominations via its electronic bulletin board, ConQuest. Nominations are due to MichCon via ConQuest no later than 2:00 PM EST, the day prior to the gas day. There is no charge to establish or maintain a ConQuest account with MichCon. The deadline for nominations is the same throughout the month, i.e. October 1 noms are due at 2:00PM on September 30. MichCon accepts standing nominations for an entire calendar month.

Shippers connect to ConQuest via a modem line and nominate individual packages of gas, tracked by individual delivery points and contract numbers. MichCon accepts gas at over 60 “citygate” points located throughout the state. All gas transactions within MichCon are done on an “Mcf” basis. Interconnect gas (ANR, GLGT, PEPL) that enters the MCGC system in Mmbtu at 14.73 psi is converted to Mcf’s at 14.65 psi upon completion of the nomination process. MichCon posts the effective BTU factors to be used prior to the beginning of the month. These BTU factors may change on the first day of each month. ConQuest verifies the amount of gas and receipt points that a shipper nominates to an end user on an ongoing basis. If the shipper tries to exceed the end user’s allowable MDQ, or deliver gas from a point not specified within the end user’s contract, the nomination record is not allowed to be saved, and an error message is generated to the shipper.

MichCon also offers an intraday “window” for the current gas day. This allows shippers to match up volumes that may have changed on the interconnecting pipelines to their noms on the MichCon side of the pipe, or to reallocate gas quantities among eut or other delivery points. This “window” opens at 9:00AM EST and closes at 7:00PM EST for the current gas day only.

MichCon is not subject to FERC jurisdiction and therefore is not required to comply with GISB standards. MichCon’s gas day is currently recognized as running from noon to noon, for measurement purposes. Interconnecting pipelines’ “gas days” start at 9:00 AM CST.

MichCon reconciles the nominations on a daily basis and communicates with shippers any discrepancies that have occurred before the gas day begins. This provides the shipper with an opportunity to correct any problems with intraday nomination changes.

MichCon finalizes monthly volumes, including eut deliveries during the first seven workdays following month end. After this process is complete, the shippers are notified and they are able to retrieve their monthly source and disposition and end user delivery reports from ConQuest.

MichCon posts on ConQuest the consumption amounts as obtained by our meter readers on a monthly basis. End users can allow a shipper to view this consumption information through the use of an agency authorization. This information is posted on the 4th workday of each month,

and allows the shipper, or its agent, to calculate storage positions very early into the new month. Currently, the end customer receives its invoice around the 11th workday of the following month.

Primary contacts within the Nominations Group are Tom Budzyn at (313) 256-5955 and David Reed at (313) 256-5262.

ATTACHMENT D-II
STONER MODEL EXPLANATION AND INPUTS

INPUTS:

- Existing system loads
- Existing system pressure ratings
- Existing pipeline diameters
- Existing pipeline lengths
- Existing valve and regulator configurations
- Expansion customer load
- Expansion customer pressure requirements

VARIABLES:

- Expansion pipeline diameter and lengths
- Expansion valve and regulator configuration

OUTPUTS:

- Actual customer delivery pressure (to be compared to proposed customer requirements)

ATTACHMENT D-III

GAS MEASUREMENT REPORTS

- ANSI B109.3 for Rotary-type Gas Displacement Meters (Standard for safe operation, durable construction and acceptable performance of rotary-type gas displacement meters.)
- Orifice Metering of Natural Gas – AGA Report No. 3 (Basic equations and uncertainty statements for computing the flow through orifice meters; specifications for construction and installation of orifice plates, meter tubes and associated fittings; guidelines for measurement of natural gas)
- Fuel Gas Energy Metering – AGA Report No. 5 (conversion of units of gas volume or mass-to-energy equivalents through the use of data associated with volume-metering practices)
- Compressibility and Super-Compressibility for Natural Gas and Other Hydrocarbon Gases – AGA Report No. 8 (Information for computation of gas phase densities, and compressibility and supercompressibility factors for natural gas and other related hydrocarbon gases)
- Measurement of Gas by Multipath Ultrasonic Meters, AGA Report No. 9 (Standards for multipath ultrasonic transit-time flow meters)

ATTACHMENT D-IV
GAS QUALITY SPECIFICATIONS

All gas received and delivered under the terms of this Agreement must conform to the following specifications:

- (a) The gas must be commercially free from dust, gum, gum-forming constituents, and all other solid and liquid matters, which may interfere with its merchantability or cause injury to or interfere with proper operation of the pipelines, regulators, meters or other appliances through which it flows;
- (b) The carbon dioxide content of the gas may not exceed a partial pressure of 5 pounds per square inch;
- (c) The water content of the gas may not exceed 7 pounds per million cubic feet; however, every reasonable effort must be made to keep the water content at or below 5 pounds per million cubic feet;
- (d) The gas may not contain oxygen. Grantee is responsible for insuring that its operator maintains its equipment to insure the gas is free of oxygen;
- (e) The gas may not contain more than 1/4 grain of hydrogen sulfide per 100 cubic feet;
- (f) The gas may not contain more than 1/2 grain of mercaptan sulfur per 100 cubic feet;
- (g) The gas may not contain more than 5 grains of total sulfur per 100 cubic feet, including the sulfur in any hydrogen sulfide, mercaptan, sulfides and residual sulfur.

EXHIBIT E

BASELINE RATE

**MICHIGAN CONSOLIDATED GAS COMPANY
CASE NO U-10150
Average Rate Per Mcf**

	Proposed Revenue	Projected Volume	Average Rate
	-----	-----	-----
	(000's)	(000's)	
Rate 1	\$ 98,062	46,453	\$ 2.1110
Rate 2	\$ 268,094	128,725	\$ 2.0827
Rate 2A	\$ 14,030	8,830	\$ 1.5889
Rate 3	\$ 12,929	6,508	\$ 1.9866
Rate 3A	\$ 14,672	8,534	\$ 1.7192
Rate 6	\$ 4,528	2,715	\$ 1.6677
Rate 8	\$ 99	89	\$ 1.1112
Rate 10	\$ 2,991	1,797	\$ 1.6644
Rate ST	\$ 31,014	31,881	\$ 0.9728
Rate LT	\$ 40,999	68,880	\$ 0.5952
	-----	-----	-----
Total	<u>\$ 487,418</u>	304,412	\$ 1.6012
	=====	=====	=====

Decision and Order

AMENDED AND RESTATED

AUDITOR AGREEMENT

THIS AGREEMENT, made as of the day of _____, 2001, is by and between **MICHIGAN CONSOLIDATED GAS COMPANY**, a Michigan corporation with offices at 500 Griswold Street, Detroit, Michigan 48226 ("MichCon") and **EXELON ENERGY, COMPANY**, a Delaware corporation with its principal address at 2315 Enterprise Drive, Westchester, Illinois 60154 ("Exelon") and **NAVIGANT CONSULTING, INC.** with an office at 200 Wheeler Road, Suite 400, Burlington, Massachusetts 01803 (the "Auditor").

RECITALS

Whereas, MichCon and Exelon are parties to an Amended and Restated Easement Agreement dated _____ ("Easement Agreement"), which grants to Exelon certain capacity rights for the transportation and storage of natural gas; and

Whereas, the Easement Agreement contemplates the appointment of an independent auditor, subject to approval of the Federal Trade Commission; and

Whereas, the Auditor is willing to provide the services contemplated in this Agreement;

Therefore, in consideration of the mutual promises contained herein and the mutual benefit to be obtained, the parties agree as follows:

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AGREEMENT**1. AUDITOR SERVICES**

- a) Subject to and in accordance with this Agreement and the Decision and Order of the Federal Trade Commission (the "Commission") in Docket No. _____ ("Commission Order"), the Auditor accepts the duties and obligations imposed by this Agreement and agrees to perform those professional services specified in the attached Schedule A (the "Services").
- b) The Auditor may engage in such other activities as the Auditor deems appropriate which are not in conflict with the interests of MichCon and Exelon and their respective subsidiaries and affiliates provided that the Services provided by the Auditor shall constitute an incidental business endeavor and the Auditor shall devote such time and skill as is necessary to fulfill all duties under this Agreement.

2. GENERAL POWERS AND OBLIGATIONS

- a) The Auditor shall perform all duties contemplated herein in a manner consistent with the terms and purposes of the Commission Order. The Auditor shall consult with the Commission Staff when the Auditor concludes such consultations are appropriate or upon the request of the Commission Staff. The Auditor shall have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Easement Agreement, including, without limitation, the right to assess consequential damages, including lost profits, against MichCon if found to operate its system in such a manner as to prejudice Exelon in the exercise of its rights under the Easement Agreement, and the right to propose changes to the Easement Agreement necessary to ensure the competitive viability of Exelon's efforts under the Easement Agreement.

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- b) The Auditor shall have free access to all MichCon books, records, information systems and facilities as deemed reasonably necessary by the Auditor to monitor MichCon's performance under the Easement Agreement. Exelon and MichCon shall comply with Auditor's requests to conduct interviews, meetings, or discussions with their employees or agents on any matters related to Auditor Agreement, the Easement Agreement, or the Commission Order, within such deadlines as the Auditor may establish. If the Auditor reasonably believes such material is necessary for the discharge of Auditor's duties under the Auditor Agreement, the Easement Agreement, or the Commission Order, MichCon and Exelon shall provide the Auditor with documents requested by the Auditor or compiled at the Auditor's request, within such deadlines as the Auditor may establish. The Auditor may share such information with Exelon if necessary to effectuate the terms of the Easement Agreement, subject to appropriate provisions for the protection of Confidential Information.
- c) The Auditor may consult with attorneys, accountants, engineers, appraisers or other parties deemed by the Auditor to have qualifications necessary to assist in the performance of the Services. The Auditor may select and employ such persons without Commission, MichCon or Exelon review or approval.
- d) Within 30 days after (i) the end of each full six-month calendar period during the term of this Agreement and (ii) termination of this Agreement or the Auditor's resignation, the Auditor shall provide to the Commission, MichCon and Exelon a written report and accounting, in reasonable detail, outlining: (i) the Services provided during the six-month period just ended; (ii) any operational notices provided pursuant to Section D-6 of the Easement Agreement; and (iii) any issues submitted to the Auditor for arbitration and the decision rendered. The Auditor shall also include in its reports to the Commission, or in such additional written or oral reports as the Commission or the Commission Staff may

Decision and Order

at any time request or as may otherwise be appropriate, in accordance with applicable confidentiality restrictions: (i) an opinion whether the parties have performed under the Easement Agreement in conformity with the Commission Order, including, as appropriate, supporting materials, documents and other information; and (ii) any other matters reasonably requested by the Commission or the Commission Staff. Unless otherwise directed by the Commission or the Commission Staff, the Auditor shall submit all written reports to be provided to the Commission pursuant to this paragraph, with all Confidential Information and other confidential portions of such reports clearly designated as “Confidential” and segregated from non-confidential portions of such reports, to: Secretary, Federal Trade Commission, Washington D.C. 20580 and Assistant Director, Compliance, Bureau of Competition, Federal Trade Commission, Washington D.C. 20580.

- e) If Exelon exercises its right to terminate the Easement Agreement or for any reason ceases to be the grantee thereunder, the Auditor shall immediately, upon receipt of Exelon’s notice of termination, utilize best efforts to attempt to find a replacement buyer for the capacity held by Exelon, such that the Easement Agreement will be assigned to the replacement buyer prior to its termination. Exelon and MichCon shall take all actions reasonably requested to assist the Auditor in finding a replacement buyer, including execution of all documents reasonably necessary to assign the Easement Agreement to a replacement buyer. Any potential replacement buyer and the manner by which it acquires Exelon’s capacity or otherwise accedes to Exelon rights shall be subject to prior approval by the Commission.
- f) Upon request by the Commission or the Commission Staff, Auditor shall provide the Commission or the Commission Staff any data, documents, reports, or other material relating to Auditor Agreement, the Easement Agreement, or the Commission Order.

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3. RESIGNATION OR REMOVAL OF THE AUDITOR AND APPOINTMENT OF SUCCESSOR

- a) The Auditor may resign its duties under this Agreement by written notice filed with the Commission and served upon MichCon and Exelon, at least 30 days prior to the proposed effective date of such resignation; provided, however, that the Auditor shall continue to serve in such capacity after the filing of the resignation until its proposed effective date unless the Commission shall direct otherwise, or the Auditor consents to an earlier effective date, which shall be the date that appointment of a successor Auditor becomes effective. Nothing in this Section 3(a) shall restrict the right to remove the Auditor as provided in Section 3(b).
- b) The Auditor may be removed by MichCon and Exelon acting jointly, or by either MichCon or Exelon acting at the direction of the Commission, for any reason and without cause upon written notice served upon the Auditor and filed with the Commission at least 30 days prior to the proposed effective date of such removal; provided, however, that the Auditor shall continue to serve in such capacity after the filing of the written notice of proposed removal until its proposed effective date unless the Commission shall direct otherwise, or the Auditor consents to an earlier effective date, which shall be the date that appointment of a successor Auditor becomes effective.
- c) If at any time there is a vacancy or anticipated vacancy in the position of Auditor, MichCon and Exelon shall select a successor Auditor subject to approval by the Commission. Any Auditor appointed as a successor Auditor under the terms of this Agreement shall be a person whose experience, background and capabilities are appropriate for the responsibilities of an Auditor under the terms of this Agreement. Every successor Auditor shall execute, acknowledge and deliver to the Commission, MichCon and Exelon an instrument accepting such appointment subject the terms of this Agreement.

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- d) If MichCon and Exelon cannot agree upon a successor Auditor within 10 days, a panel of five proposed Auditors shall be selected by the American Arbitration Association and the successor Auditor shall be selected, subject to the approval of the Commission, by MichCon and Exelon by the striking method. For the purposes of this paragraph, if the Commission does not object in writing within ten business days of being notified of the identity of the successor Auditor, then the proposed Auditor shall serve as an interim Auditor until such time as the Commission approves or disapproves the interim Auditor or a successor Auditor is selected by MichCon and Exelon and approved by the Commission.

4. COMPENSATION

- a) As compensation for Services provided under this Agreement, the Auditor shall receive compensation in accordance with the terms set forth in Schedule B. All reasonable and necessary third party out-of-pocket expenses incurred by the Auditor in connection with the performance of Services will be promptly reimbursed to the Auditor.
- b) The Auditor shall submit monthly, itemized invoices to MichCon and Exelon for the Services actually completed. Payments on all undisputed amounts shall be made within 30 days of receipt of such invoices.
- c) Prior to commencing any new activities for MichCon, Exelon, or any of their affiliates or successors, the Auditor shall provide the Commission Staff with a description of such activities and estimates of the compensation the Auditor expects to receive in connection with such activities.

5. INDEMNIFICATION

- a) The Auditor, acting in any capacity contemplated by this Agreement or the Commission Order, shall not be personally liable to any person except for such Auditor's acts or omissions that constitute fraud, willful misconduct, bad faith

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or gross negligence. Except in those situations in which the Auditor is not exonerated of personal liability as provided above, MichCon and Exelon shall indemnify the Auditor and hold the Auditor harmless from any losses, claims, damages, liabilities, or expenses arising out of, or in connection with the performance of the Auditor's duties and Services under this Agreement, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability except to the extent that such losses, claims, damages, liabilities or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Auditor.

6. STANDARD OF CARE

- a) The Auditor shall perform the Services in an efficient, prompt, economical, skillful and careful manner in accordance with current industry standards and practices. In performing the Services, the Auditor shall observe and obey all applicable laws, regulations, rules and standards imposed by any government or any other duly constituted authority having jurisdiction with respect to the Services or the parties to this Agreement.

7. TERM OF AGREEMENT

- a) This Agreement is effective upon the effective date of the Easement Agreement. The initial term of this Agreement expires twenty (20) years after the effective date. Thereafter, the term of this Agreement is automatically renewed for successive periods of five (5) years unless and until terminated pursuant to the terms of this Agreement. All requirements to file reports and notices with or obtain approvals from the Commission pursuant to the Auditor Agreement, the Easement Agreement or the Commission Order shall continue as provided in those Agreements and the Commission Order until the Commission Order (or relevant provisions therein) terminates.

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- b) This Agreement shall terminate immediately upon written notice to the Auditor, if either of the following occur:
- i) The Easement Agreement is terminated; or
 - ii) The Commission directs MichCon and/or Exelon or their respective parent corporations to terminate this Agreement.

8. NOTICES

- a) Any notice required to be given under this Agreement shall be in writing and sent by registered mail, overnight mail or facsimile transmission, and will be effective upon receipt thereof.

Auditor: Navigant Consulting, Inc.
200 Wheeler Road, Suite 400,
Burlington, Massachusetts 01803
Attn: _____
Fax No: _____

MichCon: Michigan Consolidated Gas Company
500 Griswold Street
Detroit, Michigan 48226
Attn: Office of General Counsel
Fax No: (313) 965-0009

Exelon: Exelon Energy, Company
2315 Enterprise Drive
Westchester, Illinois 60154
Fax No: (708) 236-7901
Attn: Vice President and General Manager

Commission: Assistant Director, Compliance
Bureau of Competition
Federal Trade Commission
Washington D.C. 20580
Fax No. (202) 326-3396 or (202) 326-2655

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Any person may change the address at which it is to receive notices under this Agreement by furnishing written notice of such change to the other parties.

9. CONFIDENTIALITY

- a) As used herein, "Confidential Information" shall include any and all oral and written information provided to the Auditor by MichCon or Exelon, provided, however, that Confidential Information shall not include any information which (i) is, or hereafter becomes (but not in violation of this Agreement), generally known to the public, (ii) was available to the Auditor on a non-confidential basis prior to the time it was disclosed by MichCon or Exelon, or (iii) is disclosed by an independent third party with a right to make such disclosure. Unless required by law, the Auditor shall not disclose the Confidential Information to any person or entity except to its directors, employees or outside consultants retained by it in connection with Auditor Agreement, the Easement Agreement, or the Commission Order.
- b) The Auditor agrees that the Confidential Information will not be used for any purpose other than in connection with the performance of its duties and obligations under this Auditor Agreement. The Auditor shall use best efforts to prevent access by unauthorized persons to the Confidential Information, such efforts to reflect at least the same general degree of security that the Auditor accords its own Confidential Information. The Auditor shall require that any outside consultant retained by the Auditor shall not disclose Confidential Information to anyone other than the FTC or the MPSC.
- c) In the event that the Auditor is requested or required under compulsion of legal process to disclose the Confidential Information, the Auditor will not, unless required by law, disclose the Confidential Information until MichCon and Exelon have each first (i) received prompt written notice of such request or requirement to disclose, and (ii) had an

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adequate opportunity to obtain a protective order or other reliable assurance that confidential treatment will be accorded to the Confidential Information. The Auditor shall not oppose actions by MichCon and Exelon to assure such confidential treatment.

- d) This paragraph 9 shall not restrict the Auditor's obligations to provide any information requested by the Commission or Commission Staff.

10. MISCELLANEOUS

- a) With the approval of the Commission, the parties may enter into an amendment of this Agreement for the purpose of adding any provision, changing it in any manner, or eliminating any of the provisions of this Agreement.
- b) The Commission's retained jurisdiction shall be as set forth in the Commission Order.
- c) This Agreement is governed by the law of the State of Michigan.
- d) This Agreement includes the following schedules (and all documents referenced therein) which are incorporated herein by reference:

SCHEDULE A - Scope of Services

SCHEDULE B - Price Schedule

This Agreement represents the entire understanding between the parties making all other representations null and void.

- e) This Agreement, together with Schedules A and B and the Easement Agreement shall be binding upon, and inure to the benefit of, the parties and their successors and assigns.

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- f) No modification, amendment, or assignment of this Auditor Agreement may become effective without the prior written approval of the Commission.
- g) Nothing in this Agreement shall be deemed to preclude the FTC from bringing any action as may be appropriate under the Federal Trade Commission Act.

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This Agreement is executed by duly authorized officers of the parties as of the day and year first above written.

MICHIGAN CONSOLIDATED GAS COMPANY

By: _____

Its: _____

EXELON ENERGY COMPANY

By: _____

Its: _____

NAVIGANT CONSULTING, INC.

By: _____

Its: _____

Decision and Order

SCHEDULE A

SCOPE OF SERVICES

The Auditor shall perform such services as necessary to effectuate the intent of the Easement Agreement, including but not limited to:

1. Arbitration of disputes in accordance with the procedures set forth in Section D-18 of Exhibit D to the Easement Agreement.
2. Calculation of the Keep-Whole Payment, as defined in the Easement Agreement.
3. Assessment of money damages against MichCon if found to be the cause of undue delays in the in-service date of any expansions or upgrades required to serve a customer of Exelon, or to have unreasonably denied nominations or receipt points, or otherwise to have interfered in Exelon's rights under the Easement Agreement.
4. Determination of the operational feasibility of granting Exelon's request for additional receipt points under the Easement Agreement.
5. From time to time, at Auditor's discretion, establish or modify such procedures as reasonably deemed necessary for MichCon's handling of Exelon's requests for system expansion and upgrades or for implementing any other procedures or provisions under the Easement Agreement in a non-discriminatory manner.
6. Any other duties or responsibilities as set forth in the Easement Agreement.

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SCHEDULE B**COMPENSATION SCHEDULE**

\$ _____ per month plus \$ _____ per hour and reasonable costs and third party fees incurred by Auditor for the performance of Services. Any expenses incurred by Auditor in its performance of this Agreement will be passed through at _____.

MichCon and Exelon shall each bear one-half of the Auditor's fees and expenses.

The following table details the type of activities expected and the manner in which fees would be charged:

Type of Activity	Detailed Activities	Frequency	Billing Method
Specify data requirements, collection, reporting, and frequency	Definition of all algorithms and data forms/sources/timing as specified in the Easement Agreement	Once at inception, and from time to time as needed	-----
Complete monthly analyses and reports necessary to perform as Auditor	Sales/load by customer segment, capacity utilization, storage utilization, system expansion, operational performance	Monthly	-----
Calculate Keep-Whole payment	As defined in the Easement Agreement	Annually	-----
Dispute arbitration		As required	-----
Respond to Commission requests as required by Section 2.f) of the Auditor Agreement		As requested	-----
Other activities as may be required from time to time		As required	-----
Develop reports required by Section 2.d) of the Auditor Agreement	As described in the Auditor Agreement	Semi-annually and as may be required by Section 2.d)	-----

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____. The Auditor's fees do not include sales, use, excise, gross revenue, or similar taxes. Such taxes, if applicable to all or any portion of this assignment, will be charged in addition to fees and expenses.

With respect to dispute resolution, each party shall bear its own expenses (including without limitation the fees and expenses of legal counsel and accountants) in connection with such arbitration and MichCon and Exelon shall each bear one-half of the Auditor's fees and expenses, provided that the Auditor's award shall allocate such fees and expenses of counsel, accountants, other advisors and the Auditor according to the relative success of the contesting parties in the arbitration, as determined by the Auditor. The Auditor shall award an amount equal to the actual direct and indirect damages, including lost profits, suffered by each contesting party, which may include interest costs incurred by such party, but the Auditor shall not have the authority to award punitive damages.

Analysis

**Analysis of the Proposed Consent Order and Draft Complaint
to Aid Public Comment**

Issued when the Commission tentatively approved a proposed consent order on March 20, 2001

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from DTE Energy Company ("DTE") and MCN Energy Group Inc. ("MCN") (collectively the "proposed Respondents") an Agreement Containing Consent Order (the "proposed consent order"). The proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy the anticompetitive effects that are described in the Commission's draft complaint and that are likely to arise from the merger of DTE and MCN.

II. Description of the Parties and the Proposed Acquisition

DTE, headquartered in Detroit, Michigan, is a holding company with subsidiaries engaged in various energy-related businesses. DTE's principal operating subsidiary, The Detroit Edison Company ("Edison"), is a public utility engaged in the generation, transmission, distribution, and sale of electricity in southeastern Michigan, including the Detroit metropolitan area.

MCN, also headquartered in Detroit, Michigan, is a diversified energy holding company, with its primary operations involved in the production, gathering, processing, transmission, storage, and distribution of natural gas. MCN is the parent of Michigan Consolidated Gas Company ("MichCon"), a natural gas utility serving areas throughout the State of Michigan, including southeastern Michigan. MichCon distributes natural gas, and Edison distributes electricity, in a portion of southeastern Michigan consisting of the city of Detroit and all or parts of Macomb, Monroe, Oakland, Washtenaw, and Wayne Counties (the "Overlap Area").

Analysis

Pursuant to an Agreement and Plan of Merger dated October 4, 1999, and amended November 12, 1999, MCN plans to merge with a subsidiary of DTE. Each share of MCN common stock will be converted into the right to receive either \$28.50 in cash or 0.775 shares of DTE common stock, subject to proration. The transaction is valued at approximately \$2.6 billion in cash and stock, plus the assumption of approximately \$2 billion in debt.

The Commission has carefully examined all areas in which the proposed merger of DTE and MCN might be anticompetitive. The Commission found that the transaction raises competitive concerns in the Overlap Area, as described in the draft complaint, and the Commission proposes to take action to remedy these potential anticompetitive effects.

III. The Draft Complaint

The draft complaint alleges that the merger of DTE and MCN would lessen competition in the local distribution of electricity and the local distribution of natural gas in the Overlap Area. According to the complaint, MichCon is the only distributor of natural gas within the Overlap Area. Similarly, except for the cities of Detroit and Wyandotte, which operate their own municipal electric utilities, Edison is the only distributor of electricity within the Overlap Area. Following the merger, Edison would effectively control the distribution of both electricity and natural gas within the Overlap Area.

According to the complaint, entry into the distribution of electricity and the distribution of natural gas within the Overlap Area is effectively blocked by regulatory constraints, and would not be timely, likely or sufficient to prevent anticompetitive effects that may result from the merger.

The draft complaint describes three ways in which the proposed merger would lessen competition. Each of these three ways is described below.

Analysis

A. Self-Generation of Electricity

According to the complaint, natural gas is the fuel of choice for new electricity generation in the Overlap Area. Other fuels are not likely to be used for new electricity generation because of various disadvantages relative to natural gas. Coal and fuel oil, for example, have environmental problems that do not exist with natural gas. As a result, virtually all new electricity generation in the Overlap Area is likely to rely on natural gas as its source of fuel.

The complaint alleges that customers in the Overlap Area who need electricity have limited options. They can have electricity delivered by Edison, or they can self-generate electricity using natural gas delivered by MichCon. Self-generation can take several forms, including cogeneration, generation by municipalities (such as the city of Wyandotte), and emerging forms of distributed generation, such as microturbines and fuel cells, that are fueled by natural gas. According to the complaint, MichCon has aggressively sought to encourage customers to install gas-powered self-generation equipment that would allow customers to minimize or eliminate the purchase of electricity from Edison.

The complaint charges that DTE and MCN are competitors in the Overlap Area because Edison distributes electricity and MichCon distributes natural gas used for the self-generation of electricity. The complaint further charges that the proposed merger may substantially lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in the Overlap Area in certain ways, including: (1) by eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas used for the self-generation of electricity in the Overlap Area, and (2) by increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas used for the self-generation of electricity, each of which increases the likelihood of

Analysis

anticompetitive prices and reduced competition in the distribution of electricity and the distribution of natural gas in the relevant market.

B. The City of Detroit

The city of Detroit operates a municipal utility (the Public Lighting Department, or “PLD”) that distributes electricity to industrial, business and public sector customers in Detroit. The PLD competes directly with Edison for new non-residential customers in Detroit.

According to the complaint, the PLD has two sources of electricity. It purchases some power at wholesale, which is delivered over Edison’s power lines, and it generates the rest of its requirements using natural gas delivered by MichCon. The PLD has no viable option for natural gas delivery other than MichCon, and after the merger will have to rely on its only direct electricity competitor for delivery of natural gas.

The complaint charges that the proposed merger, if consummated, may substantially lessen competition or tend to create a monopoly in the distribution of electricity in the city of Detroit in certain ways, including: (1) by decreasing or eliminating competition in the city of Detroit in the distribution of electricity and the distribution of natural gas used to produce electricity, and (2) by facilitating DTE’s ability to raise the costs of the Detroit PLD, each of which increases the likelihood of anticompetitive prices and reduced competition in the distribution of electricity and the distribution of natural gas used to generate electricity in the city of Detroit.

C. Competing Applications

Electricity and natural gas compete directly for certain commercial and industrial applications. According to the complaint, some customers can choose either natural gas or electricity for specific energy needs, such as powering air

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compressors, commercial cooking, and various process applications. Customers who choose natural gas for these applications must use natural gas delivered by MichCon, and customers who choose electricity must use power delivered by the local electric utility, usually Edison. MichCon has aggressively sought to convert customers using electricity for such applications to natural gas, typically by attempting to convince customers of the relative economic benefits of natural gas compared to electricity.

The complaint charges that the proposed merger, if consummated, would substantially lessen competition or tend to create a monopoly in the distribution of electricity and natural gas in certain ways, including: (1) by eliminating competition between DTE and MCN in the distribution of electricity and the distribution of natural gas in the Overlap Area, and (2) by increasing the likelihood that market power will be exercised in the Overlap Area in connection with the distribution of electricity and the distribution of natural gas, each of which increases the likelihood of anticompetitive prices and reduced competition for the distribution of electricity and the distribution of natural gas in the relevant market.

IV. Terms of the Proposed Consent Order

The proposed consent order is designed to remedy the Commission's competitive concerns about the proposed merger. Under Paragraph II of the proposed consent order, the proposed Respondents must divest certain assets (the "Divested Assets") to Exelon Energy Company ("Exelon") pursuant to and in accordance with the terms of a Divestiture Agreement between MichCon and Exelon, no later than five (5) days after the proposed merger is consummated.¹ The Divestiture Agreement

¹ However, if the Commission determines to make the Order final, but notifies the proposed Respondents either that Exelon is
(continued...)

Analysis

consists of two separate agreements: (1) an “Easement Agreement” entered into between MichCon and Exelon, and (2) an “Auditor Agreement” entered into between MichCon, Exelon, and a third party that serves an oversight function with respect to the Easement Agreement between MichCon and Exelon.

The Easement Agreement has been approved by the Michigan Public Service Commission as a special contract between MichCon and Exelon. *See* Order Approving Special Contract, In the Matter of the Joint Application of Michigan Consolidated Gas Company and Exelon Energy Company for Ex Parte Approval of a Special Contract for Certain Transportation and Storage Rights, Case No. U-12825, February 14, 2001.

The Easement Agreement conveys to Exelon an easement over MichCon’s local natural gas distribution system that will allow Exelon to engage in the distribution and storage of natural gas in the Overlap Area. Pursuant to the Easement Agreement, Exelon is entitled to the use of five billion cubic feet (“Bcf”) of annual transportation capacity (“Initial Capacity”) to serve any end use customers within the Overlap Area. Exelon is then entitled to an additional 15 Bcf of annual transportation capacity (“Supplemental Capacity”), in increments of 1 Bcf, that must serve at least 50% Electric Displacement Load. (Electric Displacement Load, or “EDL,” includes on-site electric power generation such as cogeneration, municipal generation, emerging forms of distributed generation (such as fuel cells and microturbines), and other gas-fired electric displacement equipment.) If Exelon uses all of the Initial Capacity and

¹(...continued)

not an acceptable acquirer, or that the Divestiture Agreement is not an acceptable manner of divestiture, then proposed Respondents are to divest the Divested Assets, at no minimum price, within 90 days of the date the Order becomes final, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

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Supplemental Capacity (a total of 20 Bcf, of which 7.5 Bcf must be used for EDL), then Exelon is entitled to additional transportation capacity (“Growth Capacity”) for use in serving on-site generation customers within the Overlap Area. Exelon also is entitled to storage capacity equal to 10% of its Initial Capacity and Supplemental Capacity. Charges for the Initial Capacity, Supplemental Capacity, and Growth Capacity are set at levels designed to allow Exelon to compete with MichCon in the Overlap Area, and to provide Exelon with incentives to distribute natural gas for EDL applications.

The Easement Agreement contains a number of provisions designed to ensure Exelon’s ability to be a viable competitor. In particular, the agreement requires the parties to appoint an independent third-party auditor with knowledge of the natural gas industry to oversee the Easement Agreement and to perform such services as are necessary to effectuate the agreement, including arbitration of disputes and other duties and responsibilities designed to ensure that MichCon cannot unreasonably discriminate against Exelon. (Easement Agreement ¶ D-17.) In addition, the Easement Agreement requires MichCon to repair and replace all components of the distribution system necessary for the proper operation thereof, and allows the Auditor to make repairs or replacements, at MichCon’s cost, if MichCon fails to do so. (Easement Agreement ¶ 7.) Further, the agreement allows Exelon to expand the system if necessary, either at MichCon’s expense or with the assistance of an expansion allowance paid for by MichCon. (Easement Agreement ¶ D-5.) Moreover, the Agreement requires that MichCon give Exelon and the Auditor advance notice of important operational events that may impact the distribution system, such as scheduled maintenance, outages, changes in operating standards, planned new receipt points, proposed modifications to nomination or measurement practices or quality specifications, and any other events that may affect Exelon or Exelon’s ability to service its customers, and empowers the Auditor to revise or modify any such events if necessary to prevent an adverse impact on Exelon. (Easement Agreement ¶ D-6.)

Analysis

The proposed consent order also contains other provisions designed to ensure the continuation of a viable and competitive alternative supplier of natural gas distribution services to Electric Displacement Load customers in the Overlap Area. For example, Paragraph II.B.1 of the proposed consent order requires that proposed Respondents maintain, repair, and replace all components and other aspects of the MCN Distribution System (1) necessary for the proper or safe operation of that system; and (2) in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System. Paragraph II.B.2 of the proposed consent order requires that proposed Respondents operate the MCN Distribution System in a reasonable and non-discriminatory manner, and in full compliance with all rules and regulations of any federal or state agency, or any other governmental entity, having jurisdiction over any aspect of the MCN Distribution System.

Paragraph II.B.3 deals with the Auditor, and provides that the Auditor shall have the power to take all actions as in the Auditor's judgment are necessary and appropriate to effectuate the purposes of the Divestiture Agreement, including the right to propose changes to the Divestiture Agreement necessary to ensure the competitive viability of the Acquirer, and shall have free access to all of proposed Respondents' books, records, information, systems, and facilities as deemed reasonably necessary by the Auditor to monitor proposed Respondents' performance under the Divestiture Agreement. In obtaining and utilizing proprietary information, the Auditor is required to observe confidentiality restrictions designed to prevent the unauthorized disclosure of such information.

Pursuant to Paragraph II.B.4, Respondents are required to provide Exelon with a list of all customers to which MCN transports natural gas in the Overlap Area, including the name, address, and rate classification for each such customer, and a statement indicating whether each such customer utilizes natural gas for Electric Displacement Load. In addition, under Paragraph

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II.B.5, Respondents must provide to the Auditor the results of a study conducted by MCN of Electric Displacement Load opportunities in the Overlap Area. Respondents must send a letter to each customer in the study advising the customer that gas distribution services may be purchased from Exelon and asking if the customer wishes the Auditor to provide the customer's study information to Exelon.

Paragraph II.B.6 provides that, for two years after the date the Order becomes final, Respondents shall promptly comply with any request of any customer in the Overlap Area to terminate its transportation or distribution contracts with MCN, without cost or penalty to such customer, to enable such customer to purchase gas distribution or transportation services provided by Exelon.

The proposed consent order also contains provisions dealing with the appointment of an alternative acquirer if Exelon terminates the Divestiture Agreement, as well as trustee provisions dealing with the responsibilities of any trustee appointed to accomplish any divestiture required by the order.

The proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within sixty days following the date on which the order becomes final, every sixty days thereafter until the divestitures are completed, and annually for a period of twenty years.

The Auditor Agreement, executed by MichCon, Exelon and the Auditor, defines the duties, powers and obligations of the Independent Auditor required by Paragraph II.B.3 and Paragraph D-17 of the Easement Agreement. The Auditor has the ability to take all actions necessary and appropriate to effectuate the purposes of the Easement Agreement, including the right to assess consequential damages against MichCon if MichCon operates the distribution system in a manner that is prejudicial to Exelon. (Auditor Agreement ¶ 2.) The Auditor also is responsible for arbitrating disputes between the parties, as well as for performing other necessary duties and responsibilities under the Easement

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Agreement, such as verification of Exelon's Electric Displacement Load volume, system repair and maintenance if MichCon fails to do so, designation of applications that qualify as Electric Displacement Loads, resolution of complaints by Exelon, modification of operational changes that may adversely impact Exelon, and related duties and responsibilities. (Auditor Agreement Sch. A; Easement Agreement ¶¶ 3, 7, D-1(j), D-2, D-4, D-6.)

The proposed buyer of the Divested Assets, Exelon Energy, is one of the largest unregulated suppliers of electricity and natural gas in the nation. It is a unit of Exelon Corporation, which was formed from the merger of Unicom Corporation and PECO Energy Company. The parent company has operations engaged in the generation, transmission, distribution and sale of electricity, the supply of natural gas and natural gas transportation services, the sale of distributed generation products, and related businesses. The company is extremely knowledgeable about the utility business and the distribution of electricity and natural gas. It currently markets natural gas to buyers in Michigan (as well as in other states), and has an affiliate that is engaged in the distribution of microturbines and distributed generation equipment.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer must not itself present competitive problems. Exelon is a major energy company with substantial experience in natural gas, electricity, and the operation of utilities. The Commission believes that Exelon is well qualified to operate the divested assets and that divestiture to Exelon will not be anticompetitive.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again

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review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of assets to Exelon, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order, nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF

SIEMENS AG, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

*Docket C-4011; File No. 0010212
Complaint, May 15, 2001--Decision, May 15, 2001*

The consent order addresses the acquisition by Respondent Siemens AG -- the leading supplier worldwide of highly integrated postal automation systems, which public postal services use (for letter and other flat mail) to cancel stamps or meter marks; to read addresses using optical character recognition technology; and to translate addresses into destination barcodes that can be used to sort the mail by country, state, city and/or street -- of the postal automation system subsidiary (Atecs Mannesmann AG) of Respondent Vodafone Group plc. The order, among other things, requires the respondents to divest Vodafone's Mannesmann Dematic Postal Automation ("MDPA") business to Northrop Grumman Corp., or to another acquirer approved by the Commission. The order also requires the respondents to provide incentives to certain MDPA employees to continue in their positions until the divestiture is accomplished. In addition, for different prescribed periods, the order prohibits the respondents from soliciting or inducing any employees or agents of the MDPA business to terminate their employment with MDPA; from hiring any employees or agents of MDPA; or from soliciting MDPA customers. The order also prohibits Respondent Siemens from disclosing to any person or from using any information it obtains relating to the MDPA business.

Participants

For the Commission: *Yolanda R. Gruendel, Steven K. Bernstein, Jeffrey Dahnke, Daniel P. Ducore, Hajime Hadeishi and Charissa P. Wellford.*

For the Respondents: *Steven A. Newborn, Clifford Chance Rogers & Wells, and Tom D. Smith, Jones, Day, Reavis & Pogue.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent Siemens AG ("Siemens"), a

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corporation subject to the jurisdiction of the Commission, has agreed to acquire certain voting securities of Atecs Mannesmann AG (“Atecs”), a subsidiary of Respondent Vodafone Group Plc (“Vodafone”), in violation of 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 to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Siemens is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Wittelsbacherplatz 2, D-80333 Munich, Germany. Siemens’s principal subsidiary in the United States is located at 153 East 53rd Street, New York, NY 10022.
2. Respondent Vodafone is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at The Courtyard, 2-4 London Road, Newbury, Berkshire, RG14 IJX, England. Vodafone’s Atecs subsidiary is comprised of Mannesmann Rexroth AG (“Rexroth”), Mannesmann Dematic AG (“Dematic”), Mannesmann Demag Krauss-Maffei Kunststofftechnik GmbH (“Demag Krauss-Maffei”), Mannesmann VDO AG (“VDO”) and Mannesmann Sachs AG (“Sachs”). Vodafone’s principal subsidiary in the United States is located at 2999 Oak Road, Walnut Creek, CA 94596.
3. Respondent Siemens and Respondent Vodafone, through its Dematic subsidiary, are engaged in, among other things, the research, development, manufacture, integration, sale and service of postal automation systems.
4. Respondents are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of

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the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

5. Pursuant to an April 14, 2000 Share Purchase Agreement and related amendments, Siemens agreed to acquire over 50% of the voting securities of Atecs from Vodafone, and Siemens agreed to subsequently purchase the remainder of the Atecs voting securities through the exercise of an option ("Acquisition"). The total value of the transaction is expected to exceed \$9 billion. Under the terms of the agreement, Siemens will operate and retain ownership of four Atecs subsidiaries, Dematic, VDO, Demag Krauss-Maffei and Sachs. Robert Bosch GmbH will lease from Siemens the right to operate the fifth Atecs subsidiary, Rexroth.

III. THE RELEVANT MARKET

6. For purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the research, development, manufacture, integration, sale and service of postal automation systems. Postal automation systems are used by public postal offices throughout the world to automate the handling of letter mail and flat mail, which includes over-sized letters, catalogs, magazines, circulars and newspapers. These highly integrated and sophisticated systems are able to cancel stamps or meter marks, read addresses using optical character recognition technology, translate addresses into destination barcodes, and use these barcodes to sort the mail by country, state, city and/or street.

7. For purposes of this Complaint, the world is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant line of commerce.

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IV. STRUCTURE OF THE MARKET

8. The market for the research, development, manufacture, integration, sale and service of Postal Automation Systems is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). Siemens and Vodafone’s Dematic subsidiary are the leading suppliers of postal automation systems in the world. Post-acquisition, the HHI would be 2,808 points, 1,024 points higher than the pre-acquisition HHI.

9. Siemens and Vodafone are actual competitors in the relevant market for the research, development, manufacture, integration, sale and service of postal automation systems.

V. BARRIERS TO ENTRY

10. Entry into the research, development, manufacture, integration, sale and service of postal automation systems is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 11 because of, among other things, the time, expense and difficulty associated with developing a new system, gaining a track record for reliability and participating in lengthy public postal competitions.

VI. EFFECTS OF THE ACQUISITION

11. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- (a) by eliminating actual, direct, and substantial competition between Siemens and Vodafone in the relevant market;

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- (b) by increasing the likelihood that Siemens will unilaterally exercise market power in the relevant market;
- (c) by increasing the likelihood of coordinated interaction in the relevant market;
- (d) by increasing the likelihood that customers of postal automation systems would be forced to pay higher prices; and
- (e) by increasing the likelihood that innovation and service levels would be reduced in the relevant market.

VII. VIOLATIONS CHARGED

12. The Acquisition agreement described in Paragraph 5 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

13. The Acquisition described in Paragraph 5, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fifteenth day of May, 2001, issues its Complaint against said Respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Siemens AG of certain voting securities of Atecs Mannesmann AG, a subsidiary of Respondent Vodafone Group Plc, and Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of 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

Respondents, their attorneys and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Siemens is a corporation organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Wittelsbacherplatz 2, D-80333 Munich, Germany. Siemens's principal subsidiary in the United States is located at 153 East 53rd Street, New York, NY 10022.
2. Respondent Vodafone is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at The Courtyard, 2-4 London Road, Newbury, Berkshire, RG14 IJX, England. Vodafone's principal subsidiary in the United States is located at 2999 Oak Road, Walnut Creek, CA 94596.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. "Siemens" means Siemens AG, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Siemens AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Vodafone" means Vodafone Group plc, its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Vodafone Group plc, and the respective directors, officers,

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employees, agents, representatives, successors, and assigns of each.

- C. “Acquisition” means the proposed acquisition of over 50% of the voting securities of Atecs by Siemens pursuant to a Share Purchase Agreement executed by Siemens, Robert Bosch GmbH, Mannesmann AG and Mannesmann Investment GmbH on April 14, 2000, and amended on January 23, 2001.
- D. “AFF” means the advanced flat feeder developed by MDPA and licensed to Rapistan pursuant to an agreement dated January 8, 2001, for the purpose of supplying 362 AFF units to Lockheed Martin Corp. for integration into the FSM 1000 Sorting Machine.
- E. “AFF Services Agreement” means the agreement between Respondents and the MDPA Acquirer described in Paragraph II.E.
- F. “Atecs” means Atecs Mannesmann AG, a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Mannesmannufer 2, 40213 Duesseldorf, Germany.
- G. “ATHS Intellectual Property” means intellectual property relating to the automated tray handling system that was developed for MDPA’s FSM TOP 2000 Sorting Machine by Offenbach pursuant to an agreement dated August 21, 2000, between Offenbach and MDPA.
- H. “ATHS Services Agreement” means the agreement between Respondents and the MDPA Acquirer described in Paragraph II.D.

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- I. “Automated Tray Handling System” or “ATHS” means the automated tray handling system developed by Offenbach for MDPA’s FSM TOP 2000 Sorting Machine.
- J. “Commission” means the Federal Trade Commission.
- K. “Existing NGFSM Contracts” means the August 14, 1998 contract (No. 102590-98-B-3187) and July 14, 2000 modification to the contract, between the United States Postal Service and Rapistan, to produce and deliver Next Generation Flat Sorting Machines, which are excluded from the definition of MDPA Assets below. Existing NGFSM Contracts does not include any amendments or modifications entered into by the USPS and Vodafone or Siemens after July 14, 2000; provided, however, that the USPS may exercise the options it has under contract No. 102590-98-B-3187 to purchase additional NGFSM units.
- L. “Existing WAND Contract” means the contract between Rapistan and the British Royal Mail dated November 14, 2000, for the development and installation of a worldwide advanced network distribution system.
- M. “FSM 1000 Sorting Machine” means the flat sorting system that MDPA developed and which is operational in USPS facilities. The FSM 1000 Sorting Machine is the predecessor of the NGFSM.
- N. “FSM TOP 2000 Sorting Machine” means the latest generation flat sorting system that MDPA is developing. MDPA plans to start deploying the FSM TOP 2000 Sorting Machine on the market by the end of the year 2001.
- O. “Key Employees” means all persons identified in Confidential Appendix I of this Order.
- P. “MDPA” means Mannesmann Dematic Postal Automation, a company organized, existing, and doing business under

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and by virtue of the laws of France, with its office and principal place of business located at 14, Avenue Raspail, 94250 Gentilly, France.

- Q. “MDPA Acquirer” means Northrop or any other Person that acquires the MDPA Assets pursuant to this Order.
- R. “MDPA Assets” means all assets, interests and rights owned or held by Vodafone relating to the operation of the MDPA Business, including, but not limited to:
1. all buildings, plants, manufacturing operations, machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
 2. all rights, titles and interests in and to all owned or leased real property and improvements, together with appurtenances, licenses and permits;
 3. all intellectual property, inventions, technology, trademarks, trade names, brand names, formulations, specifications, contractual rights, patents, trade secrets, copyrights, know-how, research materials, technical information, marketing and distribution information, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, information stored in management information systems (and specifications sufficient for the MDPA Acquirer to use such information), software, designs, drawings, processes, production information, manufacturing information, tooling information, integration information, testing and quality control data;
 4. inventory and storage capacity;
 5. all rights, titles and interests in and to contracts relating to the MDPA Business;

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6. all rights, titles and interests in and to contracts held by Rapistan relating to the MDPA Business, including, but not limited to, contracts relating to the AFF;
7. all assets owned or held by Offenbach that relate to the development and integration of the Automated Tray Handling System;
8. all rights under warranties and guarantees, express or implied;
9. all books, records and files;
10. all items of prepaid expense; and
11. any other assets and rights transferred to the MDPA Acquirer pursuant to the MDPA Divestiture Agreement.

Provided, however, that “MDPA Assets” does not include Existing NGFSM Contracts and Existing WAND Contract.

- S. “MDPA Business” means the research, development, engineering, manufacture, integration, distribution, or sale of any Vodafone product or service to automate the handling and processing of tangible letter mail and flat mail, including large envelopes, catalogs, and magazines, in any area of the world, including, but not limited to, the activities engaged in by Vodafone’s MDPA business unit.
- T. “MDPA Divestiture Agreement” means any agreement to acquire the MDPA Assets entered into by Respondents and any MDPA Acquirer including, but not limited to, the Northrop Purchase Agreement, and any related agreements, schedules, exhibits and appendices.

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- U. “Next Generation Flat Sorting Machines” or “NGFSMs” means the latest generation of machines used by United States Postal Service (“USPS”) facilities to sort flat mail that were developed by MDPA and supplied to the USPS under USPS Contract No. 102590-98-B-3187. The term employed by MDPA to refer to NGFSMs is Advanced Flat Mail Sorters Model 100.
- V. “NGFSM Intellectual Property” means the intellectual property developed and owned by MDPA and licensed to Rapistan (under the Patent and Know-How License, Agreement No. 4101003325 between Rapistan and Alcatel Postal Automation Systems) for production of Next Generation Flat Sorting Machines for the USPS.
- W. “Non-Public Vodafone Information” means any information relating to the MDPA Business or MDPA Assets obtained by Respondent Siemens. Non-Public Vodafone Information shall not include information already in the public domain and information that subsequently falls within the public domain through no violation of this Order by Siemens.
- X. “Northrop” means Northrop Grumman Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1840 Century Park East, Los Angeles, CA 90067.
- Y. “Northrop Purchase Agreement” means the agreement dated February 27, 2001, by and between Respondents and Northrop, incorporated by reference into this Order and made a part hereof as Confidential Appendix II.
- Z. “Offenbach” means Mannesmann Dematic AG, a company organized, existing, and doing business under and by virtue of the laws of Germany, with its office and principal place

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of business located at Ruhrstrasse 28, 58300 Wetter, Germany.

- AA. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity.
- BB. “Rapistan” means Mannesmann Dematic Rapistan Corp., a corporation organized, existing, and doing business under and by virtue of the laws of New York, with its office and principal place of business located at 507 Plymouth Avenue, NE, Grand Rapids, Michigan 49505.
- CC. “Respondents” means Siemens and Vodafone, individually and collectively.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall divest the MDPA Assets, as an on-going business, absolutely and in good faith, to Northrop pursuant to, and in accordance with, the Northrop Purchase Agreement, no later than ten (10) days from the date Respondents consummate the Acquisition; provided, however, that if at the time the Commission determines to make the Order final, the Commission notifies Respondents that Northrop is not approved as the MDPA Acquirer or that the Northrop Purchase Agreement is not an acceptable manner of divestiture, Respondents shall immediately terminate or rescind the Northrop Purchase Agreement and divest the MDPA Assets to another Person that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission, within three (3) months from the date this Order becomes final; provided further, however, that Siemens may receive (1) a non-exclusive, non-transferable license to use the NGFSM Intellectual Property for the purpose of supplying any

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machines under the Existing NGFSM Contracts and (2) a non-exclusive, non-transferable license to use the ATHS Intellectual Property for the purpose of completing the ATHS Services Agreement.

- B. Between the date Respondents sign the Consent Agreement and the date the MDPA Assets are completely divested, Respondents shall:
1. Maintain the MDPA Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondents sign the Consent Agreement and take such action that is consistent with the past practices of Respondent Vodafone in connection with the MDPA Assets and is taken in the ordinary course of the normal day-to-day operations of Respondent Vodafone;
 2. Use their best efforts to keep available the services of the current officers and employees of the MDPA Business; and maintain the relations and goodwill with suppliers, customers, landlords, creditors, employees, and others having business relationships with the MDPA Business; and
 3. Preserve the MDPA Assets intact as an ongoing business and not take any affirmative action, or fail to take any action within its control, as a result of which the viability, competitiveness, and marketability of the MDPA Assets would be diminished.
- C. For a period of ten (10) years from the date this Order becomes final, Respondent Siemens shall (1) not provide, disclose or otherwise make available any Non-Public Vodafone Information to any Person (including, but not limited to, any of its employees, agents, or representatives, or any third-party), (2) not use any Non-Public Vodafone Information for any reason or purpose, and (3) enforce the terms of this Paragraph II.C. as to any Person and take such

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action to the extent necessary to cause each such Person to comply with the terms of this Paragraph II.C., including all actions that Respondent Siemens would take to protect its own trade secrets and confidential information; provided, however, that:

1. Respondents (i) may use Non-Public Vodafone Information obtained in the course of providing the services under the ATHS Services Agreement (hereinafter “Confidential ATHS Information”) solely to fulfill Respondents’ obligations under the ATHS Services Agreement, (ii) shall make available Confidential ATHS Information only to those Persons working for Respondents and having a need to know and who agree in writing to maintain the confidentiality of such information, and (iii) shall enforce the terms of this Paragraph II.C.1. as to any Person and take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph II.C.1., including all actions that Respondents would take to protect their own trade secrets and confidential information.
2. Respondents (i) may use Non-Public Vodafone Information obtained in the course of performing their obligations under the Existing NGFSM Contracts (hereinafter “Confidential NGFSM Information”) solely to fulfill Respondents’ obligations under the Existing NGFSM Contracts, (ii) shall make available Confidential NGFSM Information only to those Persons working for Respondents and having a need to know and who agree in writing to maintain the confidentiality of such information, and (iii) shall enforce the terms of this Paragraph II.C.2. as to any Person and take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph II.C.2., including all actions that Respondents would take to protect their own trade secrets and confidential information.

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3. Respondents (i) may use Non-Public Vodafone Information obtained in the course of providing the services under the AFF Services Agreement (hereinafter “Confidential AFF Information”) solely to fulfill Respondents’ obligations under the AFF Services Agreement, (ii) shall make available Confidential AFF Information only to those Persons working for Respondents and having a need to know and who agree in writing to maintain the confidentiality of such information, and (iii) shall enforce the terms of this Paragraph II.C.3. as to any Person and take such action to the extent necessary to cause each such Person to comply with the terms of this Paragraph II.C.3., including all actions that Respondents would take to protect their own trade secrets and confidential information.
- D. For a period up to nine (9) months from the date Respondents divest the MDPA Assets pursuant to Paragraph II.A., Respondents shall provide to the MDPA Acquirer technical and other services for the purpose of developing and producing the ATHS for use with the FSM TOP 2000 Sorting Machine:
1. Respondents shall provide the services required by this Paragraph II.D. on terms agreed to by Respondents and the MDPA Acquirer (hereinafter “ATHS Services Agreement”) and made part of the MDPA Divestiture Agreement.
 2. Respondents shall provide the services required by this Paragraph II.D. in a manner that substantially maintains the type and level of service provided by Offenbach pursuant to the Automated Tray Handling System Agreement between Offenbach and MDPA, dated August 21, 2000.
 3. At the request of the MDPA Acquirer, Respondents shall provide to the MDPA Acquirer technical assistance and

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- training, including access to Respondent Siemens's production facilities, sufficient to enable the MDPA Acquirer to manufacture the AHS and integrate it into the FSM TOP 2000 Sorting Machine, such assistance and training to be completed no later than thirty (30) days after the date of the MDPA Acquirer's request.
4. Respondents shall transfer to the MDPA Acquirer all rights, title and interest in all intellectual property (including, but not limited to, all technical data, technical data package, and all other technical information) relating to the AHS developed by Respondents after the date Respondents divest the MDPA Assets, at the time such intellectual property is developed.
 5. At the request of the MDPA Acquirer, Respondents shall transfer to the MDPA Acquirer all rights, title and interest in all tooling relating to the AHS developed or acquired by Respondents after the date Respondents divest the MDPA Assets, no later than twenty (20) days after the request of the MDPA Acquirer, and in any event no later than the date the AHS Services Agreement terminates.
 6. Respondents shall not terminate the AHS Services Agreement for any reason; provided, however, that Respondents may terminate the AHS Services Agreement for an alleged material breach by the MDPA Acquirer, but only if Respondents have (i) provided the MDPA Acquirer with thirty (30) days' notice to cure the breach and (ii) submitted their claim to arbitration and the arbitrator has fully resolved the claim in Respondents' favor.
- E. From the date Respondents divest the MDPA Assets pursuant to Paragraph II.A. of this Order until the MDPA Acquirer successfully manufactures and installs the first AFF unit, Respondents shall provide to the MDPA Acquirer

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technical and other services for the purpose of producing and installing the AFF:

1. Respondents shall provide the services required by this Paragraph II.E. on terms agreed to by Respondents and the MDPA Acquirer (hereinafter "AFF Services Agreement") and made part of the MDPA Divestiture Agreement.
 2. Respondents shall provide the services required by this Paragraph II.E. in a manner that enables the MDPA Acquirer to substantially maintain the type and level of service provided by Rapistan under its contract with Lockheed Martin Corp., dated February 7, 2001.
 3. At the request of the MDPA Acquirer, Respondents shall provide to the MDPA Acquirer technical assistance, including access to Respondent Siemens's engineering personnel and production facilities, sufficient to enable the MDPA Acquirer to manufacture the AFF and install it into the FSM 1000 Sorting Machine, such assistance to be completed no later than ten (10) days after the date of the MDPA Acquirer's request.
 4. Respondents shall not terminate the AFF Services Agreement for any reason; provided, however, that Respondents may terminate the AFF Services Agreement for an alleged material breach by the MDPA Acquirer, but only if Respondents have (i) provided the MDPA Acquirer with thirty (30) days' notice to cure the breach and (ii) submitted their claim to arbitration and the arbitrator has fully resolved the claim in Respondents' favor.
- F. The MDPA Divestiture Agreement shall be incorporated into this Order and made a part hereof, and shall not be construed to vary or contradict the terms of this Order. Any failure to comply with the terms of the MDPA Divestiture

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Agreement shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the MDPA Divestiture Agreement, any modification of the MDPA Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

- G. The purpose of the divestiture of the MDPA Assets is to ensure the continued use of the MDPA Assets in the same business in which such assets are engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. At the time of the execution of the MDPA Divestiture Agreement, Respondents shall provide the MDPA Acquirer with a complete list of all non-clerical, salaried employees and agents of Vodafone who are involved, or have been involved, in the MDPA Business at any time during the period from April 14, 2000, until the date of the divestiture. The list shall state each individual's name, position or positions held from April 14, 2000, until the date of the divestiture, address, telephone number, and a description of the duties and work performed by the individual in connection with the MDPA Business. Respondents shall provide the MDPA Acquirer the opportunity to enter into employment contracts with such individuals, provided that such contracts are contingent upon the Commission's approval of the divestiture.
- B. Respondents shall provide the MDPA Acquirer with an opportunity to inspect the personnel files and other documentation relating to the individuals identified pursuant to Paragraph III.A. of this Order to the extent permissible

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under applicable laws, at the request of the MDPA Acquirer any time after the execution of the MDPA Divestiture Agreement between the MDPA Acquirer and Respondents.

- C. Respondents shall not enforce any confidentiality or non-compete restrictions relating to the MDPA Assets that apply to any employee identified pursuant to Paragraph III.A. who accepts employment with the MDPA Acquirer that would interfere with the MDPA Acquirer's ability to interview or hire any employee identified pursuant to Paragraph III.A.
- D. Respondents shall provide all employees identified pursuant to Paragraph III.A. with financial incentives to continue in their positions until the date the divestiture is accomplished. Such incentives shall include a continuation of all employee benefits offered by Vodafone until the date the divestiture of the MDPA Assets is accomplished, including regularly scheduled raises and bonuses, and a vesting of all pension benefits (as permitted by law). In addition, in the event the MDPA Acquirer is a person other than Northrop, Siemens shall provide incentives to all Key Employees to accept employment with the MDPA Acquirer at the time of the divestiture. Such incentives shall include a bonus for each Key Employee, equal to 10% of the employee's current annual salary and commissions (including any annual bonuses) as of the date this Order is accepted by the Commission for public comment, who accepts an offer of employment from the MDPA Acquirer within three (3) months of the date the divestiture is accomplished and remains employed by the MDPA Acquirer for a period of one (1) year, payable by Siemens one (1) year after the commencement of the employee's employment by the MDPA Acquirer.
- E. For a period of one (1) year following the date the divestiture is accomplished, Respondents shall not, directly or indirectly, solicit or otherwise attempt to induce any employees or agents to terminate their employment relationship with the MDPA Acquirer; provided, however, it

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shall not be deemed to be a violation of this provision if (1) Respondents advertise for employment opportunities in newspapers, trade publications or other media not targeted specifically at the employees, or (2) Respondents hire employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph III.E.; provided further, however, that during the four (4) month period following the date the divestiture is accomplished, Respondents shall not, directly or indirectly, hire or enter into any arrangement for the services of any employees or agents employed by the MDPA Acquirer or any Persons identified in Paragraph III.A.

- F. Respondents shall not transfer, without the consent of the MDPA Acquirer, any of the individuals identified in Paragraph III.A. of this Order to any other position until the divestiture to the MDPA Acquirer is accomplished.
- G. For the period beginning on the date the MDPA Divestiture Agreement is signed by Respondents and ending two (2) years following the divestiture required by Paragraph II. of this Order (“Extended Restricted Period”), Respondents shall not solicit, induce or attempt to induce any MDPA Business customer to terminate or modify any contract with the MDPA Business; provided, however, that nothing in this Paragraph III.G. shall prevent Respondents from responding to an unsolicited invitation to bid on a contract from any customer during the Extended Restricted Period.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested the MDPA Assets, absolutely and in good faith, within the time and in the manner required by Paragraph II.A. of this Order, the

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Commission may appoint at any time a trustee to divest such assets.

- B. In the event that the Commission brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- C. If a trustee is appointed by the Commission or a court pursuant to Paragraph IV. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of notice from the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the MDPA Assets.

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3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.
4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph IV.C.3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.
5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the MDPA Assets or to any other relevant information as the trustee may request. Respondents shall develop such financial or other information as the trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to

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divest expeditiously at no minimum price. The divestiture shall be made in a manner that receives the prior approval of the Commission and to an Acquirer that receives the prior approval of the Commission; provided, however, if the trustee receives bona fide offers for the MDPA Assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest such assets to the acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the MDPA Assets.
8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses

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incurred in connection with the preparation for or defense of any claims whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph IV. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. In the event that the trustee determines that he or she is unable to divest the MDPA Assets in a manner consistent with the Commission's purpose as described in Paragraph II.G. of this Order, the trustee may divest such additional assets related to the MDPA Assets of Respondents as necessary to achieve the remedial purposes of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the MDPA Assets.
13. The trustee shall report in writing to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture required by this Order.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter for a period of nine (9) months, and annually thereafter on the anniversary of the date this Order becomes final until

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Respondents have fully complied with this Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. through IV. of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. through IV. of the Order, including a description of all substantive contacts or negotiations relating to the divestiture and approval, and the identities of all parties contacted. Respondents shall include in their compliance reports copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approval. The final compliance report required by this Paragraph V. shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representative of the Commission:

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- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matter contained in this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate with respect to Respondent Vodafone when the Acquisition has been completed.

By the Commission.

CONFIDENTIAL APPENDIX I

CONFIDENTIAL APPENDIX II

Analysis

**Analysis of Agreement Containing Consent Order to Aid
Public Comment**

Issued when the Commission tentatively approved a proposed consent order on April 6, 2001

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Siemens AG (“Siemens”) and Vodafone Group Plc (“Vodafone”), which is designed to remedy the anticompetitive effects resulting from Siemens’s acquisition of certain voting securities of Atecs Mannesmann AG (“Atecs”), a subsidiary of Vodafone. Atecs is comprised of Mannesmann Rexroth AG (“Rexroth”), Mannesmann Dematic AG (“Dematic”), Mannesmann Demag Krauss-Maffei Kunststofftechnik GmbH (“Demag Krauss-Maffei”), Mannesmann VDO AG (“VDO”) and Mannesmann Sachs AG (“Sachs”). Under the terms of the Consent Agreement, Siemens and Vodafone will be required to divest Vodafone’s Mannesmann Dematic Postal Automation business (“MDPA business”) to Northrop Grumman Corp. (“Northrop”) no later than ten (10) days from the date Siemens consummates its acquisition.¹

The proposed Consent Agreement has been placed on the public record for thirty (30) days for the reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make final the Decision and Order.

Pursuant to an April 14, 2000 Share Purchase Agreement and related amendments, Siemens agreed to acquire just over 50% of the voting securities of Atecs from Vodafone, and subsequently to

¹ Because Vodafone will no longer have control over the assets to be divested following the acquisition, its obligations under the Consent Agreement terminate at the time the acquisition is consummated.

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purchase the remainder of the Atecs voting securities through the exercise of a “Put-Call-Option.” The total value of the transaction is expected to exceed \$9 billion. Under the terms of the agreement, Siemens will operate and retain ownership of four Atecs subsidiaries, Dematic, VDO, Demag Krauss-Maffei and Sachs. Robert Bosch GmbH will lease from Siemens the right to operate the fifth Atecs subsidiary, Rexroth. The Commission’s complaint alleges that the acquisition, 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, 15 U.S.C. § 45, in the market for the research, development, manufacture, integration, sale and service of postal automation systems.

Siemens and Vodafone, through its Atecs Dematic subsidiary, are the two leading suppliers of postal automation systems in the world. Public postal services throughout the world purchase these systems to process letter mail and flat mail, which includes oversized envelopes, catalogs, and magazines. These highly integrated systems are able to cancel stamps or meter marks, read addresses using optical character recognition technology, translate addresses into destination barcodes, and use these barcodes to sort mail by country, state, city and/or street. Postal automation systems reduce the amount of labor needed to reliably handle the millions of pieces of mail received daily by public postal services.

The world market for postal automation systems is highly concentrated, and the proposed acquisition would allow Siemens, the largest supplier of these systems, to purchase its closest competitor. Siemens and Dematic regularly bid against each other for significant public postal contracts, and they supply postal automation systems to virtually all of the major public postal services in the world, including the United States Postal Service. By eliminating competition between these two leading suppliers, the proposed acquisition would allow Siemens to exercise market power unilaterally, thereby increasing the likelihood that purchasers of postal automation systems would be forced to pay higher prices and that innovation and service levels in the market would decrease. Siemens’s proposed acquisition of Vodafone

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would also increase the likelihood that the remaining suppliers of postal automation systems could collude to the detriment of customers in the market for postal automation systems.

Significant impediments to new entry exist in the postal automation systems market. Customers require highly sophisticated and reliable systems in order to process the large volume of mail they handle daily. Consequently, customers do not consider new suppliers of postal automation systems unless they first establish a track record of successfully delivering smaller component parts. A supplier must then develop a competitive system and have the resources to participate in the very lengthy competitions typical in this market. These steps are difficult, expensive and time-consuming. For this reason, new entry into the market for postal automation systems would not be accomplished in a timely manner or be likely to occur at all even if prices increased substantially after the proposed acquisition.

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the postal automation systems market by requiring Siemens and Vodafone to divest the MDPA business. Pursuant to the Consent Agreement, Siemens and Vodafone are required to divest the MDPA business to Northrop no later than ten (10) days from the date Siemens consummates its acquisition of certain voting securities of Vodafone. If the Commission determines that Northrop is not an acceptable buyer or that the manner of divestiture is not acceptable, Siemens and Vodafone must divest the MDPA business to a Commission-approved buyer within three (3) months from the date the Order becomes final. Should they fail to do so, the Commission may appoint a trustee to divest the MDPA business.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. The Commission is satisfied that Northrop is a well-qualified acquirer of the divested assets. Northrop is a publicly-traded corporation

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and a leading systems integrator. It has the necessary industry expertise to replace the competition that existed prior to the proposed acquisition. Furthermore, Northrop poses no separate competitive issues as the acquirer of the divested assets.

The Consent Agreement contains several provisions designed to ensure that the divestiture of the MDPA business is successful. The Consent Agreement requires Siemens and Vodafone to provide incentives to certain employees to continue in their positions until the divestiture is accomplished. Under certain circumstances, Siemens is also required to provide additional incentives to key employees to accept employment, and remain employed, by the acquirer. For a period of one (1) year from the date the divestiture of the MDPA business is accomplished, Siemens and Vodafone are prohibited from soliciting or inducing any employees or agents of the MDPA business to terminate their employment with MDPA. Furthermore, for a period of four (4) months following the date the divestiture is accomplished, Siemens and Vodafone are prohibited from hiring any employees or agents of MDPA. Siemens and Vodafone are also prohibited from soliciting MDPA customers for a period of two (2) years from the date Siemens signs its divestiture agreement with the acquirer of the MDPA business. Finally, Siemens is not permitted to disclose to any person or use any information it obtains relating to the MDPA business.

In order to ensure that the Commission remains informed about the status of the MDPA business pending divestiture, and about the efforts being made to accomplish the divestiture, the Consent Agreement requires Siemens and Vodafone to file reports with the Commission within thirty (30) days of the date they sign the Consent Agreement, and periodically thereafter, until the divestiture is accomplished.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the Consent Agreement or to modify in any way its terms.

Complaint

IN THE MATTER OF

HEWLETT-PACKARD COMPANYCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4009; File No. 0023220
Complaint, May 15, 2001--Decision, May 15, 2001*

This consent order addresses representations by Respondent Hewlett-Packard Company about its Pocket PC handheld computer -- a personal digital assistant featuring Microsoft Corp.'s Windows CE operating system -- regarding its ability to access the Internet and email accounts. The order, among other things, prohibits the respondent from making any misrepresentations about the ability of any covered device to access the Internet or email accounts, or about any performance characteristic of any covered device affecting access to the Internet or email accounts. The order also prohibits the respondent from making any representation about the ability of any covered device to access the Internet or email accounts without clearly and conspicuously disclosing any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services that consumers must purchase in order to access the Internet or email accounts.

Participants

For the Commission: *Jock Chung, Keith Fentonmiller, Michael Ostheimer, Anne Maher, C. Lee Peeler, and Louis Silversin.*

For the Respondent: *Robert A. Skitol, Drinker, Biddle & Reath LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Hewlett-Packard Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent Hewlett-Packard Company is a Delaware corporation with its principal office or place of business at 3000 Hanover Street, Palo Alto, California 94304.
2. Respondent has manufactured, advertised, offered for sale, sold, and distributed products to the public, including HP Jornada Pocket PC handheld computers. These devices function as personal digital assistants, featuring Microsoft Corp.'s Windows CE operating system. They provide ready access to addresses, tasks, calendars, and memos and are equipped with software programs, including "Pocket" versions of Word, Excel, Outlook, and Internet Explorer.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has participated in the dissemination of cooperative advertisements for the HP Jornada Pocket PC, including but not necessarily limited to the attached Exhibits A and B. Respondent has also disseminated or has caused to be disseminated other advertisements and packaging for the HP Jornada Pocket PC, including but not necessarily limited to the attached Exhibits C through H. These advertisements and packaging contain the following statements and depictions:

A. (Exhibit A: newspaper advertisement)

"Can your palm do that?"

[Depiction: A man next to a close-up of an HP Jornada Pocket PC. The screen of the device shows an e-mail that contains a hyperlink to an Internet URL address. Attached to the e-mail are Microsoft Word and Excel documents.]

"It can if it's holding an **HP Jornada Pocket PC**.
Who wants e-mail without attachments? No one! That's why
the new Pocket PC lets

Complaint

you open all Microsoft® Word and Excel attachments as well as photos and HTML pages. You can also access your ISP, corporate network, Outlook®, and the most popular Internet e-mail accounts*, anytime."

[An extremely fine print disclosure, in approximately 4 point type, in white print on an orange background, at the very bottom of the ad states:

"*Pocket PCs support industry-standard POP3 and MAP4 e-mail protocols. Please check with your ISP to verify its support. Modem required. Sold separately."]

B. (Exhibit B: magazine advertisement)

"Can your palm do that?"

[Depiction: A woman next to a close-up of an HP Jornada Pocket PC. The screen of the device shows the Internet Explorer program running. It displays the <http://mobile.msn.com/pocketpc> Web page which is headlined "msn™ Mobile" and contains hyperlinks to Expedia.com™Travel, [MSNBC News](http://MSNBC.com), and several other services.]

"It can if it's holding an **HP Jornada Pocket PC**.

Who wants only part of the Web when you can have it all? With the new Pocket PC, you can get online with Microsoft® Pocket Internet Explorer, take advantage of The Everyday Web at msn.com, or access any URL*. Order groceries, make a trade or book your next vacation knowing your transaction is secure. Or simply download your favorite pages and take them with you."

[An extremely fine print disclosure, in approximately 4 point type, in white print on an orange background, at the very bottom of the ad states:

"*Online use requires modem, sold separately. msn.com is available free of charge on the World Wide Web. Connect time charges may apply."]

Complaint

C. (Exhibit C: pamphlet)

"Your life. Your style.

Stay on top of your world with the new
HP Jornada 540 Series Color Pocket PC.

It delivers the best of a PC in a slim,
lightweight, and *stylish* package that
fits your life – and your pocket!

Sync, grab, and go [*Depiction: An HP Jornada Pocket PC
being placed inside a sports bag.*]

- Synchronize fast with your desktop PC
- Access contacts, appointments, and e-mail
- View e-mail attachment files

Stay in touch, get online [*Depiction: An HP Jornada*

- Surf the Web from anywhere Pocket PC.]
- Send instant messages to online friends
- Get the latest news, sports scores, and
stock information"

D. (Exhibit D: Web page)

[*Depiction: HP Jornada Pocket PC.*]

As a busy professional, you know every day can be a challenge.
But now there's something that can help you handle it all with
ease: the HP Jornada 540 Series Color Pocket PC. It has
everything you need to effortlessly juggle the details -- and
have fun while you're doing it. All in a slim, lightweight
package that's a perfect fit for your lifestyle.

...

Stay in touch, get online

Check your e-mail and surf the Web. Stay up-to-date with the
latest news, sports scores, and stock information.

...

Complaint

Do it all in style

Designed to fit the way you live, the slim HP Jornada is secure in your hand and small enough to carry anywhere.

E. (Exhibit E: Web page)

"A Hewlett-Packard Company
hpshopping.com United States"

[Depiction: An HP "HP Jornada 545 Pocket PC Jornada Pocket PC.] Introducing the PC companion that helps you handle it all with ease. The HP Jornada 545 Color Pocket PC powered by Windows contains everything you need to juggle your busy lifestyle-and have fun while you're doing it. Check e-mail, review Word and Excel documents, and surf the Web. . . . Super-slim to fit in your hand, and light enough to carry in your pocket, the HP Jornada 545 is perfect for your busy lifestyle."

"Price \$499.00"
*[Hyperlink labeled:
"Add to Basket"]*

F. (Exhibit F: product package)

**"Handle it all with ease
HP Jornada 545 Color Pocket PC**

. . .
Stay Review and act on your e-mail and surf the Web.
Send instant messages to
in touch, online friends and stay up-to-date with the latest
news, sports scores, and
get online stock information. When you're ready to do more,
add a third-party modem card or wireless accessory
using the CompactFlash expansion slot.¹"

Complaint

[Depiction: A man holding an HP Jornada Pocket PC. Next to him are a golf ball, putter, and golf tee.]

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that the HP Jornada Pocket PC contains everything that consumers need to access the Internet and their e-mail accounts, at anytime and from anywhere.
6. In truth and in fact, the HP Jornada Pocket PC does not contain everything that consumers need to access the Internet and their e-mail accounts, at anytime and from anywhere. In order to access the Internet and their e-mail accounts using the Jornada Pocket PC, when away from their computers ("remotely"), consumers must purchase and carry a separate modem or similar device that in most cases must be connected to a land telephone line or a mobile telephone. Moreover, many mobile telephones currently in use in the United States are not compatible with the Jornada Pocket PC. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.
7. In its advertisements respondent has represented that consumers can use the HP Jornada Pocket PC to access the Internet and their e-mail accounts, at anytime and from anywhere. In these advertisements, respondent has failed to disclose or failed to disclose adequately that in order to access remotely the Internet and their e-mail accounts, consumers must purchase and carry a separate modem or similar device. This fact would be material to consumers in their purchase or use of the product. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fifteenth day of May, 2001, has issued this complaint against respondent.

Can your palm do that?

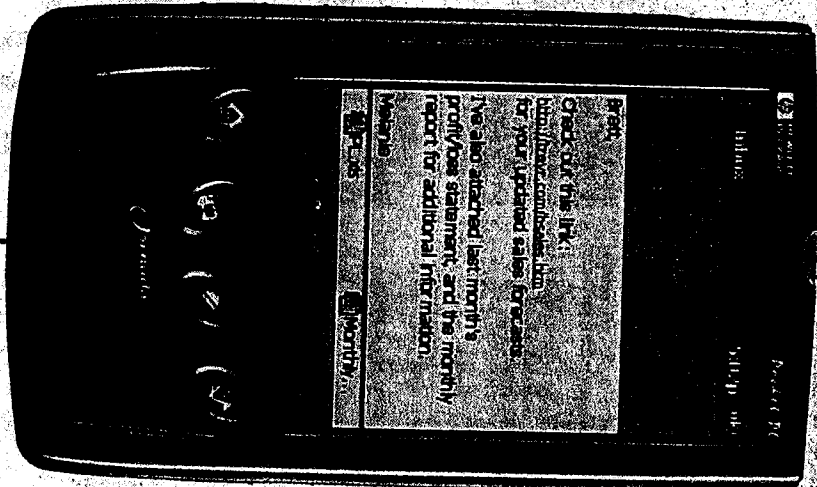
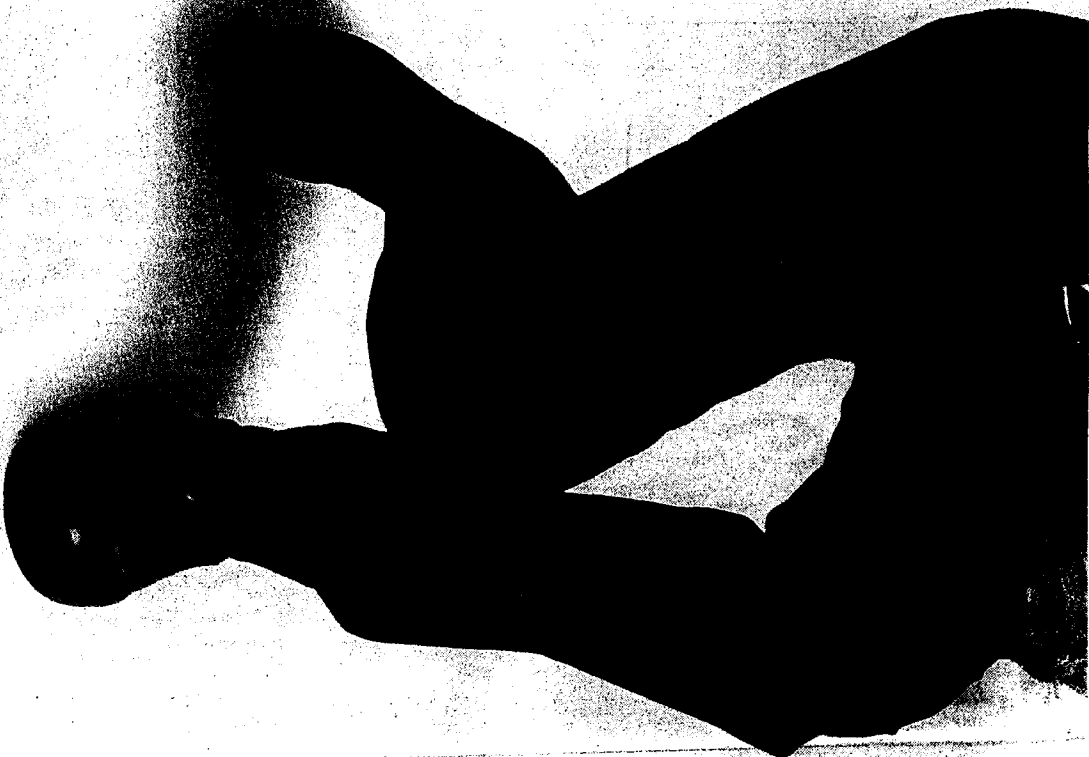


Exhibit A



It can if it's holding an HP Jornada **Pocket PC.**

Who wants e-mail without attachments?
No one! That's why the new Pocket PCs lets
you open all Microsoft® Word and Excel
attachments as well as photos and HTML
pages. You can also access your ISP, corporate
network, Outlook®, and the most popular
Internet e-mail accounts*, anytime. So, the
next time you open your palm...make sure
it's holding an HP Jornada Pocket PC.
**What else can the Pocket PC do?
Go to hp.com/jornada**



Come see Microsoft experts present live in-store
demos of the New Color Pocket PC and sign up for
a chance to win a **FREE** HP Jornada Pocket PC.**

April 19, 1-3pm at the following New York metro area locations:

- | | |
|--|---|
| Circuit City
5204 E. 74th Street (at Broadway) | Office Depot
1441 Broadway (at 41st) |
| CompUSA
420 Fifth Avenue (at 38th) | 542 Second Avenue (at Park) |
| 1775 Broadway (at 57th) | RGS
1220 Sixth Avenue (at 48th) |
| Datavision
445 Fifth Avenue (at 39th) | Staples
575 Lexington Avenue (at 51st) |
| I&R
23 Park Row (at Wall St) | 205 E 42nd (at 2nd)
730 Third Avenue (at 45th) |

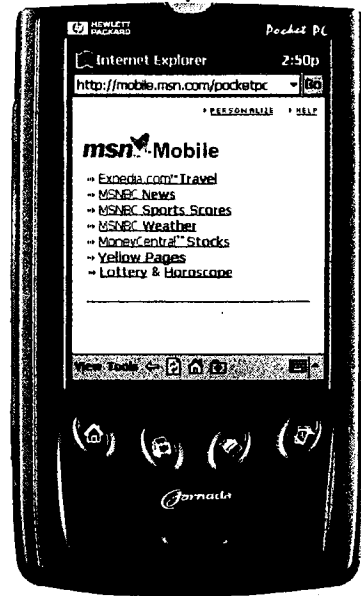
Where do you want to go today?



INVC 1

Microsoft

Can your palm do that?



It can if it's holding an HP Jornada **Pocket PC.**

Who wants only part of the Web when you can have it all? With the new Pocket PC, you can get online with Microsoft® Pocket Internet Explorer, take advantage of The Everyday Web at msn.com, or access any URL*. Order groceries, make a trade or book your next vacation knowing your transaction is secure. Or simply download your favorite pages and take them with you. So, the next time you open your palm...make sure it's holding an HP Jornada Pocket PC.

What else can the Pocket PC do?
Go to hp.com/jornada



Exhibit B

Where do you want to go today?™



invent

*Online use requires modem, sold separately. msn.com is available free of charge on the World Wide Web. Connect time charges may apply.

© 2000 Microsoft Corporation. All rights reserved. Microsoft, MSN, MoneyCentral, Where do you want to go today?, Windows, the MSN logo, and the Windows logo are either registered trademarks or trademarks of Microsoft Corporation in the United States and/or other countries.

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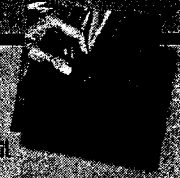
Microsoft®

Your life. Your style

Stay on top of your world with the new HP Jornada 540 Series color PDA. It delivers the power of a PC in a slim, lightweight and robust package that fits your life—and your pocket.

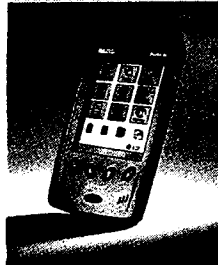
Sync, grab, and go

- Synchronize fast with your desktop PC
- Access contacts, appointments, and e-mail
- View e-mail attachment files



Make free time fun

- Listen to audio books and news
- Hear popular MP3 and WMA music
- Read e-books clearly and comfortably
- Create a digital photo album to share with friends



Do it all in style

- Slim design makes it easy to carry anywhere
- Elegant alloy casing allows you to project professionalism
- Personalize to fit your needs with a variety of accessories

Features and Software

- Fast 32-bit processor
- Rich 65,536-color backlit screen
- CD-quality stereo sound
- Fast synchronization with USB or serial
- CompactFlash Type I expansion slot
- Software: Microsoft Windows for Pocket PC, ActiveSync, and Outlook 2000; Microsoft Pocket PC software including Word, Excel, Outlook, Internet Explorer (including AvantGo.com), Windows Media Player, and more; Palm OS-based Sierra Imaging Image Expert, CE Music Player, ZIO, ZIO Interactive, ZIO Golf, and more

• Accessories: USB cables and other data cables and

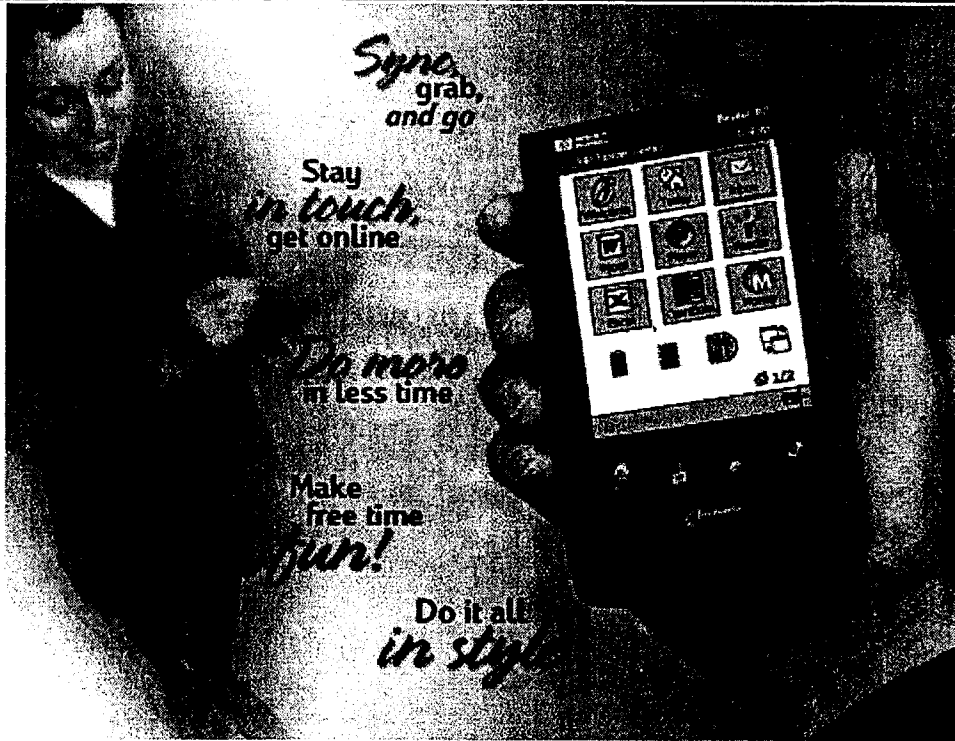
Exhibit C

HP.com Home HP Products HP Services & Support Buy HP



HP Jornada 540 Series

- SEARCH
- ASSISTANCE
- Jornada HOME
- Product Information
- Technical Support
- Where to Buy
- News Room
- Accessories
- Software and Hardware Solutions
- Document Library
- Developer's Corner
- How to Choose
- Promotions
- Register Online



Jornada
Demo

click to download
YAHOO!
Messenger
for use with the HP Jornada

Jornada
Brochures

Jornada 540 Series
Product Specifications

Select a country

United States

BuyOnline

As a busy professional, you know every day can be a challenge. But now there's something that can help you handle it all with ease: the HP Jornada 540 Series Color Pocket PC. It has everything you need to effortlessly juggle the details – and have fun while you're doing it. All in a slim, lightweight package that's a perfect fit for your lifestyle.

Sync, grab, and go

Synchronize with your desktop PC instantly. Carry your contacts and schedule everywhere with Microsoft® Pocket Outlook.

Stay in touch, get online

Check your e-mail and surf the Web. Stay up-to-date with the latest news, sports scores, and stock information.

Do more in less time

View and edit Word and Excel documents anytime, anywhere. Transfer multimedia files faster via USB.

Make free time fun!

Exhibit D

Read electronic books, view photos, listen to digital music, audiobooks, and news, and play games.

Do it all in style

Designed to fit the way you live, the slim HP Jornada is secure in your hand and small enough to carry anywhere.

[540 SERIES HOME](#) | [540 SERIES TOUR](#) | [PRODUCT FEATURES](#) | [SOFTWARE ACCESSORIES](#) | [HP CUSTOMER CARE](#) | [INSIDE THE BOX](#)

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[Use of this site indicates you accept the Terms of Use.](#)

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Exhibit D

HP.com Home



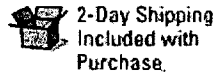
A Hewlett-Packard Company
hpshopping.com

Other Countries

United States



Price: \$499.00



HP Jornada 545 Pocket PC

Introducing the PC companion that helps you handle it all with ease. The HP Jornada 545 Color Pocket PC powered by Windows contains everything you need to juggle your busy lifestyle-and have fun while you're doing it. Check e-mail, review Word and Excel documents, and surf the Web. You can even listen to digital music and read electronic books in brilliant color! Super-slim to fit in your hand, and light enough to carry in your pocket, the HP Jornada 545 is perfect for your busy lifestyle.

Special Features

Sync, grab, and go

- Sync with your desktop PC instantly
- Carry your contacts and schedule everywhere with Microsoft Pocket Outlook

Stay in touch, get online

- Check your e-mail and surf the Web
- Stay up-to-date with the latest news, sports scores, and stock information

Do more in less time

- View and edit Word and Excel documents anytime, anywhere
- Transfer multimedia files faster with the USB cradle or serial cable

Make free time fun

- Read electronic books, view photos, listen to digital music, audio books, and news, and play games

Do it all in style

- Designed to fit the way you live, the super-slim HP Jornada is easy to grip and carry anywhere

Included in the box

- HP Jornada 545 Series Color Pocket PC
- AC Adapter
- USB Cradle
- Serial Cable
- Lithium-Ion Rechargeable Battery
- HP Jornada Quick Start Guide

Software & Support

- HP Jornada CD-ROM
- Microsoft® Windows® for Pocket PC CD-ROM
- Microsoft Outlook 2000 CD-ROM

Warranty

- One-year warranty

For complete product specification, click [here](#).

Exhibit E

- [HP Jornada PC User's Guide](#)
- [HP Jornada Accessories Guide](#)

To add an item to your shopping basket, click the *Add* button.

Product #	Description	Price	Payments as low as
F1824A-ABA	HP Jornada 545 Pocket PC	\$499.00	\$14.89/mo. 

[<< Previous Product](#) | [Products](#) | [Next Product >>](#)

Buy Online or Call 1.888.999.4747

* This page has links which will take you outside the Hewlett-Packard Web site.
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[Privacy Statement](#)

Use of this site indicates you accept the [Terms of Use](#).

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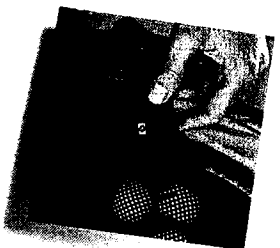
Exhibit E

Handle it all with ease

HP Jornada 545 Color Pocket PC

Sync,
grab,
and go

Synchronize with your desktop PC at the touch of a button. Then carry and access your contacts, tasks, calendars, memos, and e-mail anywhere. Even view e-mail attachment files.



Stay
in touch,
get online

Review and act on your e-mail and surf the Web. Send instant messages to online friends and stay up-to-date with the latest news, sports scores, and stock information. When you're ready to do more, add a third-party modem card or wireless accessory using the CompactFlash expansion slot.¹

in less time

Efficiently review and revise your documents and spreadsheets using familiar pocket versions of Word and Excel. Download digital music, images, and other multimedia files *fast* with the USB cradle.² Instantly find the information you need with quick launch screen icons. And quickly capture your thoughts with the built-in voice recorder.

Make
free time

Listen to your favorite audio books and articles from leading newspapers and magazines. Hear popular MP3 and WMA music and compile your own digital music playlist. Read best-selling e-books. Even create a digital photo album to share with friends. With the stereo-quality audio system and unique, vertically aligned pixel color screen, you can listen, read, and relax in comfort.

Do it all
in style

Designed to fit the way you live, the super-slim HP Jornada features a rubber protection strip to make it easy to grip and carry anywhere. Its elegant alloy casing allows you to project style and professionalism in any environment, while its sleek metal cover provides durability and protects the screen from scratches. You can also personalize it to fit your needs with a variety of accessories.

For more information on the
HP Jornada 545 Color Pocket PC,
please visit our Web site at:
www.hp.com/jornada

 HEWLETT
PACKARD

¹ CompactFlash Type I expansion slot. Modem card and wireless accessories must be purchased separately.

² USB cradle works with Windows 98 and Windows 2000 only. For Windows 95 and NT users, a serial connection is required.

Jornada 545

Standard Features

- Fast 32-bit processor
- 16MB RAM; 16MB ROM
- Rich 65,536-color backlit screen
- CD-quality stereo sound

Convenient, Built-In Software

- Microsoft® Windows® for Pocket PC
- Microsoft Pocket PC software: Word, Excel, Outlook, ActiveSync®, Internet Explorer (including AvantGo.com™), Windows Media Player, Reader, Money, Streets
- LandWare OmniSolve™ 1.01
- Conduits Technologies, Inc. PeaceMaker 1.0
- Exclusive HP applications: settings, backup, home, task switcher, game buttons, security.
- Socket Communications™ Ethernet drivers

Accessories

Customize the HP Jornada to meet your needs! HP offers a comprehensive line of accessories to express your unique style. Please see the accessories guide in this box for details.

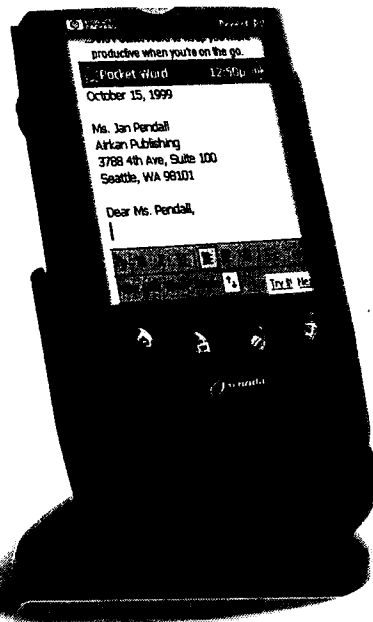


Exhibit F

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Hewlett-Packard Company is a Delaware corporation with its principal office or place of business at 3000 Hanover Street, Palo Alto, California 94304.

Decision and Order

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. Unless otherwise specified, "respondent" shall mean Hewlett-Packard Company, a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. Provided, however, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - C. On a product label, the disclosure shall be in a type size and location on the same display panel as the triggering

Decision and Order

representation sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. In the case of advertisements disseminated by means of an interactive electronic medium such as software, the Internet, or online services, a disclosure made through the use of a hyperlink shall not be deemed "clear and conspicuous" unless the hyperlink itself is clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same webpage, online service page, or other electronic page and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.

4. "Remotely access the Internet or email accounts" shall mean accessing the Internet or email messages when away from any computer.

5. "General-purpose ISP service" shall mean the category of services which allow consumers to access the Internet from personal computers. It shall not include a specific Internet access service, if respondent's product requires use of that specific service to access the Internet.

6. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or

Decision and Order

handheld Internet or email access device that requires the use of an additional device or connection to a telephone land line in order to remotely access the Internet or email accounts, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the ability of such product to access the Internet or email accounts, or any performance characteristic of such product affecting access to the Internet or email accounts.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or handheld Internet or email access device that requires the use of an additional device or connection to a telephone land line in order to remotely access the Internet or email accounts, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the ability of any such product to access the Internet or email accounts unless respondent discloses, clearly and conspicuously, any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services, other than general-purpose ISP service, that consumers must purchase in order to access the Internet or email accounts using such product.

III.

IT IS FURTHER ORDERED that respondent Hewlett-Packard Company and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;

Decision and Order

- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

IT IS FURTHER ORDERED that respondent Hewlett-Packard Company and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future managerial or supervisory employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent Hewlett-Packard Company and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date

Decision and Order

such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent Hewlett-Packard Company and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

This order will terminate on May 15, 2021, or (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as

Decision and Order

though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on February 13, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Hewlett-Packard Company ("HP").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged misleading representations for respondent's HP Jornada Pocket PC handheld computer ("Jornada") -- a personal digital assistant ("PDA"), featuring Microsoft Corp.'s Windows CE operating system. This matter concerns allegedly false and deceptive advertising claims made in cooperative advertisements, other advertisements, and product packaging regarding the ability of the Jornada to access the Internet and email accounts.

According to the FTC complaint, HP falsely claimed that the Jornada contains everything that consumers need to access the Internet and their email accounts, at anytime and from anywhere. In fact, in order to access the Internet and their email accounts using the Jornada, when away from their computers ("remotely"), consumers must purchase and carry a separate modem or similar device that in most cases must be connected to a land telephone line or a mobile telephone; and moreover, many mobile telephones currently in use in the United States are not compatible with the Jornada Pocket PC. The complaint also alleges that in representing that consumers can use the Jornada to access the Internet and their email accounts, at anytime and from anywhere, respondent failed to disclose or failed to disclose adequately that in order to access remotely the Internet and their email accounts, consumers must purchase and carry a separate modem or similar

Analysis

device. The complaint alleges that the failure to disclose this material fact is a deceptive practice.

The proposed consent order contains provisions designed to prevent HP from engaging in similar acts and practices in the future. Specifically, Parts I and II address representations regarding any PDA or handheld Internet or email access device that requires the use of an additional device or connection to a telephone land line in order to access the Internet or email accounts remotely ("covered devices").

Part I of the proposed order prohibits respondent from making any misrepresentations about the ability of any covered device to access the Internet or email accounts, or about any performance characteristic of any covered device affecting access to the Internet or email accounts.

Part II of the proposed order prohibits respondent from making any representation about the ability of any covered device to access the Internet or email accounts unless respondent discloses, clearly and conspicuously, any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services (other than general-purpose ISP service, as defined in the order) that consumers must purchase in order to access the Internet or email accounts.

Parts III through VI of the order require HP to keep copies of relevant advertisements and materials substantiating claims made in the advertisements, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file compliance reports with the Commission. Part VII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official

Analysis

interpretation of the agreement and proposed order or to modify in any way their terms.

Statement

Concurring Statement of Commissioner Orson Swindle

I voted to issue both of these consent orders, because they are adequate relief for the violations alleged in the complaints. Nonetheless, I have strong reservations about the use of unenforceable “voluntary” consumer education. In each of these cases, staff negotiated with the proposed respondent to achieve a consumer education campaign that is being undertaken wholly outside the confines of the order. Consumer education remedies sometimes pose difficult issues, and Commissioners may disagree as to whether a particular consumer education remedy is appropriate and reasonably related to the complaint allegations. Yet the solution for such disagreements is not simply to excise such remedies from the legally enforceable obligations that respondents are undertaking in settlement. If consumer education is important enough to include in negotiations, there likely is some impact on what is achieved in negotiating the terms of the consent order itself. Moreover, to the extent that the FTC promotes such “voluntary” consumer education initiatives in our efforts to publicize the consent agreements, we may see many more deep-pocketed respondents seeking to add a bit of “voluntary” and unenforceable consumer education to a broader promotional campaign in exchange for a weaker order than might otherwise be negotiated.

Complaint

IN THE MATTER OF

MICROSOFT CORPORATION

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

*Docket C-4010; File No. 0023331
Complaint, May 15, 2001--Decision, May 15, 2001*

This consent order addresses representations by Respondent Microsoft Corporation about Pocket PC handheld computers -- personal digital assistants that feature Microsoft's Windows CE operating system -- regarding their ability to access the Internet and email accounts. The order, among other things, prohibits the respondent from making any misrepresentations about the ability of any covered device to access the Internet or email accounts, or about any performance characteristic of any covered device affecting access to the Internet or email accounts. The order also prohibits the respondent from making any representation about the ability of any covered device to access the Internet or email accounts without clearly and conspicuously disclosing any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services that consumers must purchase in order to access the Internet or email accounts.

Participants

For the Commission: *Jock Chung, Keith Fentonmiller, Michael Osthimer, Anne Maher, C. Lee Peeler, and Louis Silversin.*

For the Respondent: *Charles Buffon, Covington & Burling.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Microsoft Corporation, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Microsoft Corporation is a Washington corporation with its principal office or place of business at One Microsoft Way, Redmond, Washington 98052.

Complaint

2. Respondent has designed and developed a Windows CE computer operating system for Pocket PC handheld computers. Respondent licenses this operating system to various manufacturers of Pocket PCs, including Hewlett-Packard Company and Compaq Computer Corp. Pocket PC devices using this operating system, including Hewlett-Packard Company's Jornada Pocket PC and Compaq Computer Corp.'s iPaq Pocket PC, function as personal digital assistants. They provide ready access to addresses, tasks, calendars, and memos and are equipped with software programs, including "Pocket" versions of respondent's Word, Excel, Outlook, and Internet Explorer.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or has caused to be disseminated advertisements for Pocket PCs, including but not necessarily limited to the attached Exhibits A through C. These advertisements contain the following statements and depictions:

A. (Exhibit A: magazine advertisement)

"Can your palm do that?"

[Depiction: A man next to a close-up of an HP Jornada Pocket PC. The screen of the device shows an email that contains a hyperlink to an Internet URL address. Attached to the email are Microsoft Word and Excel documents.]

"Not unless it's holding a **Pocket PC**.

Who wants e-mail without attachments? No one! That's why the new Pocket PC lets you open all Microsoft® Word and Excel attachments as well as photos and HTML pages. You can also access your ISP, corporate network, Outlook®, and the most popular Internet e-mail accounts*, anytime."

Complaint

[An extremely fine print disclosure, in approximately 4 point type, in white print on an orange background, at the very bottom of the ad states:

"*Pocket PCs support industry-standard POP3 and MAP4 e-mail protocols. Please check with your ISP to verify its support. Modem required. Sold separately."]

B. (Exhibit B: magazine advertisement)

"Can your palm do that?"

[Depiction: A woman next to a close-up of a Compaq iPaq Pocket PC. The screen of the device shows the Internet Explorer program running. It displays the <http://mobile.msn.com/pocketpc> Web page which is headlined "msn™ Mobile" and contains hyperlinks to Expedia.com™ Travel, [MSNBC News](http://MSNBC.com), and several other services.]

"Not unless it's holding a **Pocket PC**.

Who wants only part of the Web when you can have it all? With the new Pocket PC, you can get online with Microsoft® Pocket Internet Explorer, take advantage of The Everyday Web at msn.com, or access any URL*. Order groceries, make a trade or book your next vacation knowing your transaction is secure. Or simply download your favorite pages and take them with you."

[An extremely fine print disclosure, in approximately 4 point type, in white print on an orange background, at the very bottom of the ad states:

"*Online use requires modem, sold separately. msn.com is available free of charge on the World Wide Web. Connect time charges may apply."]

C. (Exhibit C: magazine advertisement)

"Can your palm do that?"

Complaint

[Depiction: A man next to a close-up of an HP Jornada Pocket PC. The screen of the device shows an email that contains a hyperlink to an Internet URL address. Attached to the email are Microsoft Word and Excel documents.]

"Not unless it's holding a **Pocket PC**.

Who wants e-mail without attachments? No one! That's why the new Pocket PC lets you open all Microsoft® Word and Excel attachments as well as photos and HTML pages. You can also access your ISP, corporate network, Outlook®, and the most popular Internet e-mail accounts*, anytime."

[A fine print disclosure, in approximately 6 point type, in black print on an orange background, at the very bottom of the ad states:

*"*Pocket PCs support industry-standard POP3 and MAP4 e-mail protocols. Please check with your ISP to verify its support. Modem required. Sold separately."]*

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that Pocket PCs contain everything that consumers need to access the Internet and their email accounts, at anytime and from anywhere.

6. In truth and in fact, Pocket PCs do not contain everything that consumers need to access the Internet and their email accounts, at anytime and from anywhere. In order to access the Internet and their email accounts using Pocket PCs, when away from their computers ("remotely"), consumers must purchase and carry a separate modem or similar device that in most cases must be connected to a land telephone line or a mobile telephone. Moreover, many mobile telephones currently in use in the United States are not compatible with Pocket PCs. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. In its advertisements respondent has represented that consumers can use Pocket PCs to access the Internet and their

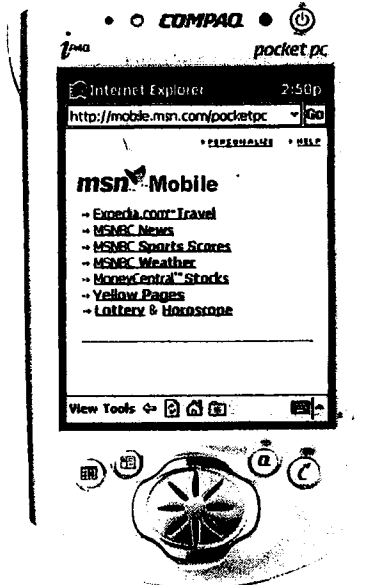
Complaint

email accounts, at anytime and from anywhere. In these advertisements, respondent has failed to disclose or failed to disclose adequately that in order to access remotely the Internet and their email accounts, consumers must purchase and carry a separate modem or similar device. This fact would be material to consumers in their purchase or use of the product. The failure to disclose this fact, in light of the representation made, was, and is, a deceptive practice.

8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this fifteenth day of May, 2001, has issued this complaint against respondent.

Can your palm do that?



Not unless it's holding a **Pocket PC.**

Who wants only part of the Web when you can have it all? With the new Pocket PC, you can get online with Microsoft® Pocket Internet Explorer, take advantage of The Everyday Web at msn.com, or access any URL*. Order groceries, make a trade or book your next vacation knowing your transaction is secure. Or simply download your favorite pages and take them with you. So, the next time you open your palm...make sure it's holding a Pocket PC.

What else can the Pocket PC do?
Go to pocketpc.com



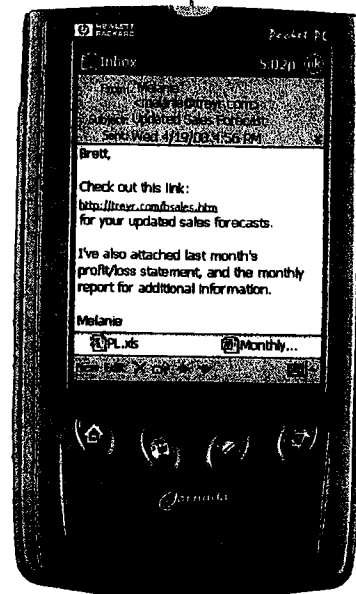
EXHIBIT B

Where do you want to go today?™

Microsoft®

*Online use requires modem, sold separately. Not available free of charge on the World Wide Web. Connect time charges may apply.
© 2000 Microsoft Corporation. All rights reserved. Microsoft, MSN, MoneyCentral, Where do you want to go today?, Windows, the MSN logo, and the Windows logo are either registered trademarks or trademarks of Microsoft Corporation in the United States and/or other countries.

Can your palm do that?



Not unless it's holding a **Pocket PC.**

Who wants e-mail without attachments? No one! That's why the new Pocket PC lets you open all Microsoft® Word and Excel attachments as well as photos and HTML pages. You can also access your ISP, corporate network, Outlook®, and the most popular Internet e-mail accounts*, anytime. So, the next time you open your palm...make sure it's holding a Pocket PC.

What else can the Pocket PC do?
Go to pocketpc.com



EXHIBIT C

*Pocket PC support industry standard POP3 and IMAP4 e-mail protocols. Please check with your ISP to verify its support. Modem required. Sold separately. © 2000 Microsoft Corporation. All rights reserved. Microsoft, Outlook, Where do you want to go today?, Windows, and the Windows logo, are either registered trademarks or trademarks of Microsoft Corporation in the United States and/or other countries.

Where do you want to go today?™

Microsoft

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Microsoft Corporation is a Washington corporation with its principal office or place of business at One Microsoft Way, Redmond, Washington 98052.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

ORDER

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. Unless otherwise specified, "respondent" shall mean Microsoft Corporation, a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. Provided, however, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - C. On a product label, the disclosure shall be in a type size and location on the same display panel as the triggering representation sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

Decision and Order

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. In the case of advertisements disseminated by means of an interactive electronic medium such as software, the Internet, or online services, a disclosure made through the use of a hyperlink shall not be deemed "clear and conspicuous" unless the hyperlink itself is clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same webpage, online service page, or other electronic page and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.

4. "Remotely access the Internet or email accounts" shall mean accessing the Internet or email messages when away from any computer.

5. "General-purpose ISP service" shall mean the category of services which allow consumers to access the Internet from personal computers. It shall not include a specific Internet access service, if respondent's product requires use of that specific service to access the Internet.

6. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or handheld Internet or email access device that requires the use of an additional device or connection to a telephone land line in order to remotely access the Internet or email accounts, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the ability of such product to access

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the Internet or email accounts, or any performance characteristic of such product affecting access to the Internet or email accounts.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or handheld Internet or email access device that requires the use of an additional device or connection to a telephone land line in order to remotely access the Internet or email accounts, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the ability of any such product to access the Internet or email accounts unless respondent discloses, clearly and conspicuously, any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services, other than general-purpose ISP service, that consumers must purchase in order to access the Internet or email accounts using such product.

III.

IT IS FURTHER ORDERED that respondent Microsoft Corporation, and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and

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other communications with consumers or with governmental or consumer protection organizations.

IV.

IT IS FURTHER ORDERED that respondent Microsoft Corporation and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, and directors, and to all current and future managerial or supervisory employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities, except that no such delivery need be made if at that time respondent is not itself directly engaged in the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any personal digital assistant or handheld Internet or email access device that requires the use of an additional device or connection to a telephone land line in order to remotely access the Internet or email accounts.

V.

IT IS FURTHER ORDERED that respondent Microsoft Corporation and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by

Decision and Order

certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent Microsoft Corporation and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VII.

This order will terminate on May 15, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed

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and the later of the deadline for appealing such dismissal or ruling
and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 21, 2000

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Microsoft Corporation ("Microsoft").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves alleged misleading representations about Pocket PC handheld computers ("Pocket PCs") -- personal digital assistants ("PDAs") which feature Microsoft's Windows CE operating system, including Hewlett-Packard Company's Jornada Pocket PC and Compaq Computer Corp.'s iPaq Pocket PC. This matter concerns allegedly false and deceptive advertising claims made in advertisements regarding the ability of Pocket PCs to access the Internet and email accounts.

According to the FTC complaint, Microsoft falsely claimed that Pocket PCs contain everything that consumers need to access the Internet and their email accounts, at anytime and from anywhere. In fact, in order to access the Internet and their email accounts using Pocket PCs, when away from their computers ("remotely"), consumers must purchase and carry a separate modem or similar device that in most cases must be connected to a land telephone line or a mobile telephone; and moreover, many mobile telephones currently in use in the United States are not compatible with Pocket PCs. The complaint also alleges that in representing that consumers can use Pocket PCs to access the Internet and their email accounts, at anytime and from anywhere, Microsoft failed to disclose or failed to disclose adequately that in order to access remotely the Internet and their email accounts, consumers must purchase and carry a separate modem or similar

Analysis

device. The complaint alleges that the failure to disclose this material fact is a deceptive practice.

The proposed consent order contains provisions designed to prevent Microsoft from engaging in similar acts and practices in the future. Specifically, Parts I and II address representations regarding any PDA or handheld Internet or email access device that requires the use of an additional device or connection to a telephone land line in order to access the Internet or email accounts remotely ("covered devices").

Part I of the proposed order prohibits Microsoft from making any misrepresentations about the ability of any covered device to access the Internet or email accounts, or about any performance characteristic of any covered device affecting access to the Internet or email accounts.

Part II of the proposed order prohibits Microsoft from making any representation about the ability of any covered device to access the Internet or email accounts unless Microsoft discloses, clearly and conspicuously, any other products (such as a modem, mobile telephone, or adapter) or Internet or email access services (other than general-purpose ISP service, as defined in the order) that consumers must purchase in order to access the Internet or email accounts.

Parts III through VI of the order require Microsoft to keep copies of relevant advertisements and materials substantiating claims made in the advertisements, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file compliance reports with the Commission. Part VII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Statement

Concurring Statement of Commissioner Orson Swindle

I voted to issue both of these consent orders, because they are adequate relief for the violations alleged in the complaints. Nonetheless, I have strong reservations about the use of unenforceable “voluntary” consumer education. In each of these cases, staff negotiated with the proposed respondent to achieve a consumer education campaign that is being undertaken wholly outside the confines of the order. Consumer education remedies sometimes pose difficult issues, and Commissioners may disagree as to whether a particular consumer education remedy is appropriate and reasonably related to the complaint allegations. Yet the solution for such disagreements is not simply to excise such remedies from the legally enforceable obligations that respondents are undertaking in settlement. If consumer education is important enough to include in negotiations, there likely is some impact on what is achieved in negotiating the terms of the consent order itself. Moreover, to the extent that the FTC promotes such “voluntary” consumer education initiatives in our efforts to publicize the consent agreements, we may see many more deep-pocketed respondents seeking to add a bit of “voluntary” and unenforceable consumer education to a broader promotional campaign in exchange for a weaker order than might otherwise be negotiated.

Complaint

IN THE MATTER OF

VOICE MEDIA INCORPORATED, ET AL.

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

*Docket C-4012; File No. 0023003
Complaint, May 23, 2001--Decision, May 23, 2001*

This consent order addresses representations by Respondent Voice Media Incorporated and its two officers and owners, Respondents Ron Levi and Paul Lesser -- who own and operate several adult entertainment web sites and sell memberships to their sites -- concerning the membership fees charged for those sites. The order, among other things, prohibits the respondents from making any false or misleading representation of material fact -- or omitting material information -- in connection with the advertising, promotion, offering for sale, or sale of any goods or services via the Internet, including, but not limited to, false or misleading representations that they will not charge consumers for goods or services during any free-trial period; (b) that their goods or services are “free,” “without risk,” “without charge,” or words of similar import; or that a request for a consumer’s credit or debit card number is for age verification only. The order also prohibits the respondents from requesting any payment information, other than for purposes of age verification, from any consumer before ensuring that the consumer has received prior notice of a number of material terms and conditions. In addition, the order prohibits the respondents from billing any consumer who has not agreed to purchase goods or services, and from unilaterally changing any terms or conditions of a given offer to a consumer in a way that would increase the consumer’s financial obligations.

Participants

For the Commission: *Nicholas J. Franczyk, John C. Hallerud, Rolando Berrelez, Steven Baker, and [Bureau of Economics].*

For the Respondents: *James Steele, Steele & Persoff.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Voice Media Incorporated, and Ron Levi and Paul Lesser, individually and as officers of the corporation (“Respondents”), have violated the provisions of the Federal Trade Commission

Complaint

Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Voice Media Incorporated is a Nevada corporation with its principal office or place of business at 2533 North Carson Street, Suite 1091, Carson City, Nevada 89706.
2. Respondent Ron Levi is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Voice Media Incorporated.
3. Respondent Paul Lesser is an officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Voice Media Incorporated.
4. At all times relevant to this complaint, the Respondents have maintained a substantial course of trade in the advertising, offering for sale, and sale of Internet-based adult entertainment programs.
5. The acts and practices of the Respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFINITIONS

6. “World Wide Web” or “web” means a system used on the Internet for cross-referencing and retrieving information. A “web site” is a set of electronic documents, usually a home page and subordinate pages, readily viewable on a computer by anyone with access to the Web, standard software, and knowledge of the web site’s location or address.

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7. “Internet” means a worldwide system of linked computer networks that have a common protocol (TCP/IP) to deliver and receive information. The Internet includes, but is not limited to, the following forms of electronic communication: electronic mail, the World Wide Web, newsgroups, Internet Relay Chat, and file transfers.

I.

8. Since at least August 1996, Respondents have operated and promoted one or more web sites offering adult entertainment programs, including, but not necessarily limited to, the following: cybererotica (<http://www.cybererotica.com>), FF5 (<http://www.FF5.com>), clubpix (<http://www.clubpix.com>), boobtropolis (<http://www.boobtropolis.com>), and xxxpassword (<http://www.xxxpassword.com>).

9. Respondents have disseminated, or caused to be disseminated, advertisements for their adult entertainment programs over the Internet. These advertisements contain statements that include, but are not limited to, “100% FREE MEMBERSHIP CLICK HERE!” and “Join Now For Free!”

10. Respondents’ Internet sites instruct consumers to participate in the “free” membership offer by “clicking” hypertext links that state “100% Free Membership Click Here!” or “Next.” Consumers who click on the hypertext links are taken to registration screens. The registration screens instruct consumers to provide identifying information and a credit card number to verify that they are of legal age to access and view adult images, prompt consumers to select a user name and password for access to the online programs, and provide details about the terms and conditions of the free membership. The registration screens associated with Respondents’ Internet sites contain statements that include, but are not limited to:

You are joining us for 1 Week Membership – Free!!!

Complaint

* * *

By clicking on the submit button, you are agreeing to the following:

I have read and agree to the TERMS and CONDITIONS of Membership.

* * *

Free trial membership renews at monthly rates unless canceled within 7 days; and

Complete this form to become a member of CyberErotica.

You are joining us for 1 Week Membership -- FREE! If you choose to remain a member beyond the Trial period, your membership will renew at \$34.95/month until cancelled.

11. Through the means described in Paragraphs 9 and 10, Respondents have represented, expressly or by implication, that they will not charge membership fees to consumers who cancel their free trial memberships within seven days of providing credit or debit card information and agreeing to participate in the free trial membership offers.

12. In truth and in fact, Respondents have:

- a. immediately charged consumers' credit or debit cards for one month's membership fee effective as of the date that the consumers first provided credit or debit card information and agreed to participate in the free trial membership offers; and
- b. in numerous instances, charged monthly membership fees to consumers who canceled within seven days of agreeing to participate in the free trial membership offers.

13. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

Complaint

II.

14. Through the means described in Paragraphs 9 and 10, Respondents have represented, expressly or by implication, that consumers may obtain free access to goods or services and may cancel access to those goods and services without being assessed any fees.

15. In numerous instances, Respondents have failed to disclose clearly and conspicuously:

- a. that Respondents immediately charge consumers' credit or debit cards for one month's membership fee effective as of the date that the consumers first provide credit or debit card information and agree to participate in the free trial membership offers; and
- b. that Respondents treat consumers' submission of credit or debit card information as authorization for Respondents to bill consumers' credit or debit accounts.

16. The facts set forth in Paragraph 15 would be material to consumers in their purchase or use of Respondents' goods or services. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice

17. The acts or practices of Respondents as alleged in this complaint constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-third day of May 2001, has issued this complaint against Respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Midwest Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Voice Media Incorporated is a Nevada corporation with its principal office or place of business at 2533 North Carson Street, Suite 1091, Carson City, Nevada 89706.
2. Respondent Ron Levi is an owner and officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of

Decision and Order

the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Voice Media Incorporated.

3. Respondent Paul Lesser is an owner and officer of the corporate respondent. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of Voice Media Incorporated.

4. The acts and practices of the respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this order, the following definitions shall apply:

1. "Age verification fee" shall mean any fee charged by Respondents to verify that a consumer is of a legal age to view adult entertainment goods or services. Use of an age verification fee shall not preclude Respondents from advertising, promoting, or offering a "free" or "trial" period so long as the amount of the age verification fee is clearly and conspicuously disclosed immediately prior to any "free" or "trial" offer.

2. "Cancellation" shall mean a consumer has communicated to Respondents, in any manner allowed by the cancellation provisions of the terms and conditions of Respondents' offer, the decision to discontinue his or her contractual relationship with Respondents.

Decision and Order

3. “Check-off procedure” shall mean a process by which a consumer is required to click on an item of information, thereby indicating that the consumer has received the information or has agreed to the stated terms.

4. “Clear(ly) and conspicuous(ly)” shall mean of a size and shade appearing on the Web page in a manner so as to be reasonably unavoidable, and is presented prior to the consumer incurring any financial obligation, and uses language and syntax sufficient for an ordinary consumer to read and understand the disclosure. Moreover, nothing contrary to, inconsistent with, or that otherwise interferes with a consumer’s understanding of the disclosure shall be used in any advertisement. Further, a subsequent disclosure only limits or qualifies a prior disclosure and cannot cure a false claim.

5. “Hyperlink” shall mean a link on a Web page that leads to another Web page on the same or a different Web site. Such link must be clear and conspicuous, appear in close proximity to the information it modifies and must be labeled in a manner that conveys the importance, nature and relevance of the information to which it leads.

6. “In or affecting commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

7. “Internet” shall mean a worldwide system of linked computer networks that use a common protocol (TCP/IP) to deliver and receive information. The “Internet” includes but is not limited to the following forms of electronic communication: electronic mail and e-mail mailing lists, the World Wide Web, Web sites, newsgroups, Internet Relay Chat, and file transfers protocols thereon, and remote computer access from anywhere in the world thereto.

8. “Notice” shall mean any method reasonably calculated to inform a consumer, including, but not limited to: by U.S. mail, e-mail, or through a Web site.

Decision and Order

9. “World Wide Web” or “Web” shall mean a system used on the Internet for cross-referencing and retrieving information. A “web site” is a set of electronic documents, usually a home page and subordinate pages, readily viewable on computer by anyone with access to the Web, standard software, and knowledge of the web site’s location or address.

I.

IT IS ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any goods or services, shall not make or assist in the making of any false or misleading representation of material fact, or omission of material information, directly or by implication, orally or in writing, including, but not limited to, any false or misleading representation:

- A. That Respondents will not charge consumers for goods or services during any free-trial period;
- B. That Respondents are offering goods or services that are “free,” “without risk,” “without charge,” or described by words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer to pay for the goods or services;
- C. That a request for a consumer’s credit or debit card number is for age verification only; and
- D. Concerning the purpose or use for which the Respondents request a consumer’s payment, billing, or other personal identifying information.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in

Decision and Order

connection with the advertising, promotion, offering for sale, or sale of any goods or services on or through the Internet, shall not request any payment information, except for purposes of age verification, from any consumer prior to ensuring that the consumer has accessed the following material terms and conditions, which shall be stated clearly and conspicuously, separately from all other disclosures, and in a manner that requires a consumer to separately acknowledge, by a check-off procedure, having received notice of each of the following:

- A. The monthly, or other applicable recurring membership cost, and the length of any free or trial membership;
- B. The way(s) in which a consumer may cancel, including any limitation on the time period during which a consumer must cancel in order to avoid charges;
- C. A telephone number, facsimile number, and e-mail address where consumers can contact Respondents; and
- D. Access to the complete terms and conditions of Respondents' offer, which may be posted on a separate Web page as long as a consumer can obtain access to the page through a direct hyperlink and the information is set forth clearly and conspicuously.

III.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any goods or services on or through the Internet, shall not:

- A. Bill any consumer who has not affirmatively agreed to purchase such goods or services; and

Decision and Order

- B. Bill any consumer after the expiration of any free or trial offer of any length without having first clearly and conspicuously posted notice of the expiration of the offer or provided access to such information by means of a clear and conspicuous hyperlink on Respondents' log-in page. Such a hyperlink should take a consumer directly to a means by which the consumer can immediately learn the expiration date or days remaining in the offer. Such notice shall appear on Respondents' Web site at least once between ten (10) days and three (3) days before the date the consumer's right to cancel any free or trial offer expires. The notice shall inform the consumer that he or she must cancel before the expiration date to avoid incurring any charges, and shall include a clear and conspicuous hyperlink to Respondents' cancellation Web page.

IV.

IT IS FURTHER ORDERED that Respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale of any goods or services, shall not:

- A. Unilaterally change any terms or conditions of Respondents' offer in a way that would increase the consumer's financial obligations to Respondents; or
- B. Materially alter the cancellation or refund procedures or terms,

without first providing a consumer with fifteen (15) days notice and an opportunity to cancel. Such notice shall be made clearly and conspicuously.

Decision and Order

V.

IT IS FURTHER ORDERED that Respondent Voice Media Incorporated, and its successors and assigns, and Respondents Ron Levi and Paul Lesser, shall, for a period of five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying upon receipt of reasonable notice of not less than seven (7) calendar days:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that Respondent Voice Media Incorporated, and its successors and assigns, and Respondents Ron Levi and Paul Lesser, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

VII.

IT IS FURTHER ORDERED that Respondent Voice Media Incorporated, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail or other means of return receipt delivery to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that Respondents Ron Levi and Paul Lesser, for a period of four (4) years after the date of issuance of this order, shall each notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment where the duties and responsibilities of such employment are subject to the provisions of this order. The notice shall include Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Decision and Order

IX.

IT IS FURTHER ORDERED that Respondent Voice Media Incorporated, and its successors and assigns, and Respondents Ron Levi and Paul Lesser, shall within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on May 23, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent who is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 15, 2000

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Voice Media Incorporated and its two officers and owners, Ron Levi and Paul Lesser (the “respondents”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The respondents own and operate several adult entertainment web sites. They sell paid memberships to their sites, and promote them by periodically offering “free” trial memberships. This matter concerns allegedly false and deceptive representations about those trial memberships. The Commission’s proposed complaint alleges that the respondents falsely claimed that they would not charge membership fees to consumers who canceled their trial memberships within seven days of providing credit card information and agreeing to participate in the free trial membership offers. In fact, in numerous instances, the respondents charged monthly membership fees to consumers who canceled within seven days of agreeing to participate in the trial membership offers.

The complaint also alleges that the respondents failed to disclose clearly and conspicuously: (a) that they immediately charge consumers’ credit or debit cards for one month’s membership fee effective as of the date that the consumers first provide credit or debit card information and agree to participate in the free trial membership offers; and (b) that they treat consumers’ submissions of credit or debit card information as authorization to bill consumers’ credit or debit accounts.

Analysis

Part I of the proposed order prohibits the respondents from making any false or misleading representation of material fact, or omission of material information in connection with the advertising, promotion, offering for sale, or sale of any goods or services via the Internet, including, but not limited to, false or misleading representations: (a) that they will not charge consumers for goods or services during any free-trial period; (b) that their goods or services are “free,” “without risk,” “without charge,” or words of similar import denoting or implying the absence of any obligation on the part of the recipient of such offer to pay for the goods or services; and (c) that a request for a consumer’s credit or debit card number is for age verification only.

Part II of the proposed order prohibits the respondents from requesting any payment information, other than for purposes of age verification, from any consumer before ensuring that the consumer has received notice of each of the following material terms and conditions: (a) the applicable membership cost and the length of any free or trial membership; (b) the way in which a consumer may cancel, including any limitation on the time period during which a consumer must cancel in order to avoid charges; (c) a telephone number, facsimile number, and e-mail address where consumers can contact the Proposed Respondents; and (d) access to the complete terms and conditions of the respondents’ offer.

Part III of the proposed order prohibits the respondents from: (a) billing any consumer who has not agreed to purchase goods or services; and (b) billing any consumer after the expiration of any free or trial offer without having first clearly and conspicuously posted notice of the expiration of the offer or provided access to that information by means of a clear and conspicuous hyperlink on their log-in page.

Part IV of the proposed order prohibits the respondents from: (a) unilaterally changing any terms or conditions of their offer in a way that would increase the consumer’s financial obligations; or

Analysis

(b) materially altering the cancellation or refund procedures or terms, without first providing a consumer with fifteen (15) days notice and an opportunity to cancel. The notice must be made clearly and conspicuously.

Parts VI through IX of the proposed order are reporting and compliance provisions. Part X is a provision “sun setting” the order after twenty years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**ETABLISSEMENTS DELHAIZE FRERES
ET CIE “LE LION” S.A., ET AL.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3962; File No. 9910308
Complaint, July 24, 2000--Decision, May 30, 2001*

This consent order addresses the acquisition by Respondent Etablissements Delhaize Freres et Cie “Le Lion” S.A. and its subsidiary, Respondent Delhaize America – a North Carolina corporation that operates most of its stores under the names of “Food Lion” and “Kash N’ Karry” in the Southeast and Mid-Atlantic regions of the United States – of Hannaford Bros. Company, which operates stores under the “Hannaford” or “Shop ‘N Save” banner in New England, New York, Virginia and North Carolina. The order, among other things, requires the respondents to divest 37 Hannaford supermarkets and one Hannaford supermarket site in the relevant markets to three different buyers selected by the respondents – The Kroger Company, Lowe’s Food Stores, Inc., and the Sylvester Group – subject to the approval of the Commission. The order also requires the respondents, for ten years, to provide written notice to the Commission prior to acquiring supermarket assets located in, or any interest in any entity that owns or operates a supermarket located in, the county or counties that include the relevant geographic markets. An accompanying Order to Maintain Assets requires the respondents to maintain the viability, competitiveness and marketability of the assets to be divested, and prohibits them from causing the wasting or deterioration of those assets, pending completion of the required divestitures.

Participants

For the Commission: *Alan B. Loughnan, Michael Joel Bloom, Kay Taylor Hightower, Susan E. Raitt, Theodore Zang, Dara Diomande, Barbara Anthony, David A. von Nirschl, Roberta S. Baruch and Daniel Hosken.*

For the Respondents: *Andrew Berg and Anthony Swisher, Akin, Gump, Strauss, Hauer & Feld, L.L.P., and Christopher MacAvoy, Howrey, Simon, Arnold & White.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that respondent Delhaize America, Inc. (“Delhaize America”), of which respondent Etablissements Delhaize Freres et Cie “Le Lion” S.A. (“Delhaize”) is the majority owner, have entered into an agreement to acquire all of the outstanding voting stock of respondent Hannaford Bros. Co. (“Hannaford”), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such acquisition, 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Definition

1. For the purposes of this complaint:

“Supermarket” means a full-line retail grocery store with annual sales of at least \$2 million that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

Complaint

Etablissements Delhaize Freres et Cie "Le Lion" S.A.

2. Respondent Delhaize is a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at rue Osseghem, 1080 Brussels, Belgium.
3. Respondent Delhaize, through Delhaize America, of which Delhaize is the majority owner, is, and at all times relevant herein has been, engaged in the operation of supermarkets in Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Kentucky, West Virginia, Pennsylvania, Delaware, and Maryland. Delhaize through Delhaize America operates more than 1200 supermarkets in these states under the trade names "Food Lion," "Save 'N Pack," and Kash n' Karry. Delhaize had \$11 billion in total sales in the United States for 1999.
4. Respondent Delhaize is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Hannaford Bros. Co.

5. Respondent Hannaford is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located in Portland, ME.
6. Respondent Hannaford is, and at all times relevant herein has been, engaged in the operation of supermarkets in Virginia, North Carolina, South Carolina, Maine, Massachusetts, New Hampshire, Vermont, and New York. Hannaford operates

Complaint

approximately 50 supermarkets in Virginia, North Carolina, and South Carolina under the "Hannaford" trade name. Hannaford had \$3.46 billion in total sales for 1999.

7. Respondent Hannaford is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Acquisition

8. On August 17, 1999, Delhaize America and Hannaford entered into an Agreement and Plan of Merger. Delhaize America will acquire all of the outstanding voting stock of Hannaford for approximately \$3.5 billion.

Trade and Commerce

9. The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in supermarkets.

10. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")) as well as a deep inventory of those SKUs. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

11. Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at nearby supermarkets.

Complaint

Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

12. Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain prices at supermarkets because they operate significantly different retail formats. None of these stores offers a supermarket's distinct set of products and services that enable consumers to one-stop shop for food and grocery products.

13. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the county or counties that include the following incorporated cities and towns in North Carolina:

- a) the Wilmington, NC MSA;
- b) Columbus County, NC;
- c) Pender County, NC;
- d) Duplin County;
- e) the Greater Raleigh area, consisting of Wake County excluding the cities and towns of Wake Forest, Rolesville, Zebulon, and Wendell;
- f) the Richmond, VA MSA;
- g) the portion of the Norfolk-Virginia Beach-Newport News VA MSA that includes Newport News,

Complaint

Hampton, and other parts of the MSA north of the James River: and

- h) the portion of the Norfolk-Virginia Beach-Newport News VA MSA that includes Norfolk, Virginia Beach, Portsmouth, and other parts of the MSA south of the James River.

Market Structure

14. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each market. Delhaize America and Hannaford would have a combined market share that ranges from 36.7 percent to 93.7% percent in each geographic market. The post-acquisition HHIs in the geographic markets range from 2764 points to 8817 points.

Entry Conditions

15. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant sections of the country.

Actual Competition

16. Delhaize through Delhaize America and Hannaford are actual and direct competitors in the relevant markets.

Effects

17. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of 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, in the following ways, among others:

Complaint

- a) by eliminating direct competition between supermarkets owned or controlled by Delhaize and supermarkets owned and controlled by Hannaford;
- b) by increasing the likelihood that Delhaize will unilaterally exercise market power; and
- c) by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the country.

Violations Charged

18. The Agreement and Plan of Merger between Delhaize America and Hannaford to acquire all of the outstanding voting stock of Hannaford violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition would, if consummated, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fourth day of July, 2000, issues its complaint against said respondents.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of Respondent Hannaford Bros. Co. (“Hannaford”) by Respondent Delhaize America, Inc., formerly Food Lion Inc., (“Delhaize America”) of which Respondent Etablissements Delhaize Freres et Cie “Le Lion” S.A. (“Delhaize”), a Belgian company, is the majority owner, hereinafter referred to as “Respondents,” and Respondents having been furnished with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and;

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to Commission Rule 2.34, 16 C.F.R.

Decision and Order

§ 2.34, now in further conformity with the procedure described in Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Delhaize is a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at rue Osseghem, 1080 Brussels, Belgium.
2. Respondent Delhaize America, the majority owner of which is Delhaize, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 2110 Executive Drive, Salisbury, North Carolina 28145.
3. Respondent Hannaford is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located in Portland, Maine.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Delhaize” means Etablissements Delhaize Freres et Cie “Le Lion” S.A., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Etablissements Delhaize Freres et Cie “Le Lion” S.A. (including, but not limited to, Delhaize America), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Decision and Order

B. “Delhaize America” means Delhaize America, Inc., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Delhaize America, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. “Hannaford” means Hannaford Bros. Co., its directors, officers, employees, agents and representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Hannaford Bros. Co. (including, but not limited to, Boney Wilson & Sons, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. “Respondents” means Delhaize, Delhaize America, and Hannaford, individually and collectively.

E. “Commission” means the Federal Trade Commission.

F. “Acquisition” means Delhaize America’s proposed acquisition of Hannaford pursuant to the Agreement and Plan of Merger dated August 17, 1999.

G. “Schedule A Assets” means the Supermarkets identified in Schedule A of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trade marks, trade dress, service marks, or trade names.

H. “Schedule B Assets” means the Supermarkets identified in Schedule B of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations,

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but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

I. "Schedule C Assets" means the Supermarkets identified in Schedule C of this Order and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents' trade marks, trade dress, service marks, or trade names.

J. "Supermarket" means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; frozen and refrigerated food and beverage products; fresh and prepared meats and poultry; produce, including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

K. "Kroger" means The Kroger Co., a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at 1014 Vine Street, Cincinnati, OH 45202-1100.

L. "Lowe's" means Lowe's Food Stores, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal place of business located at 1381 Old Mill Circle, Suite 200, P.O. Box 24908, Winston Salem, NC 27114-4908.

M. "The Sylvester Group" means the group of sixteen existing affiliated companies doing business as the Sylvester Group that operate twenty-six Piggly Wiggly supermarkets and

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three pharmacies in rural eastern North Carolina.

N. “Kroger Agreement” means the Contract of Sale between Boney Wilson & Sons, Inc., and Kroger Limited Partnership I executed on May 22, 2000, attached hereto as non-public Appendix I, for the divestiture by Respondents to Kroger of the Schedule A Assets.

O. “Lowe’s Agreement” means the Asset Purchase Agreement by and among Boney Wilson & Sons, Inc., Hannaford Bros. Co., Delhaize America, Inc, Lowes’s Food Stores, Inc., and Alex Lee, Inc. executed on May 19, 2000, attached hereto as non-public Appendix II, for the divestiture by Respondents to Lowe’s of the Schedule B Assets.

P. “Sylvester Group Agreement” means the Contract of Sale by and between Boney Wilson & Sons, Inc. and Flockhart Foods, Inc. entered into as of May 22, 2000, attached hereto as non-public Appendix III, for the divestiture by Respondents to the Sylvester Group of the Schedule C Assets.

Q. “Faison” means Faison-Food Stores, L.L.C., a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, Faison Capital Development, Inc., the controlling entity of Faison-Food Stores, L.L.C., and Faison Enterprises, Inc.

R. “Faison Agreement” means the Contract of Sale by and among Boney Wilson & Sons, Inc., and Faison Food Stores, LLC, executed on June 22, 2000, attached hereto as non-public Appendix IV, for the divestiture by Respondents of the underlying fee in the real estate for Hannaford stores numbered 415, 425, 441, 444, and 455, and the underlying lease interest in the real estate for Hannaford stores numbered 442, 426, 439, 424, 428, 436 and 444, as identified in Schedule B, to Faison to be leased back to Lowe’s.

S. “Relevant Areas” means the county or counties that include the following incorporated cities and towns in North Carolina and

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Virginia:

1. the Wilmington, NC MSA;
2. Columbus County, NC;
3. Pender County, NC;
4. Duplin County, NC;
5. the Greater Raleigh area, consisting of Wake County NC excluding the cities and towns of Wake Forest, Rolesville, Zebulon, and Wendell;
6. the Richmond, VA MSA;
7. the portion of the Norfolk-Virginia Beach-Newport News, VA MSA that includes Newport News, Hampton, and other portions of the MSA north of the James River; and
8. the portion of the Norfolk-Virginia Beach-Newport News, VA MSA that includes Norfolk, Virginia Beach, Portsmouth, and other parts of the MSA south of the James River.

T. "Third Party Consents" means all consents from any other person, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.

II.**IT IS FURTHER ORDERED** that:

A. Not later than ten (10) days after the date on which the Order becomes final, Respondents shall divest the Schedule A Assets to Kroger pursuant to and in accordance with the Kroger Agreement. The Kroger Agreement is incorporated by reference by reference into this Order and made a part hereof as non-public Appendix I. Any failure by Respondents to comply with all terms of the Kroger Agreement shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Schedule A Assets to Kroger prior to the date this Order becomes final, and if, at the time the Commission determines to make this

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Order final, the Commission notifies Respondents that Kroger is not an acceptable purchaser of the Schedule A Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Kroger and shall divest the Schedule A Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. Not later than ten (10) days after the date on which the Order becomes final, Respondents shall divest the Schedule B Assets to Lowe's pursuant to and in accordance with the Lowe's Agreement. Provided, however, that not later ten (10) days after the date on which the Order becomes final, Respondents shall divest the underlying fee in the real estate for Hannaford stores numbered 415, 425, 441, 444, and 455, and the underlying lease interests in the real estate for Hannaford stores numbered 442, 426, 439, 424, 428, 436, and 444, as identified in Schedule B, to Faison, a real estate developer, pursuant to the Faison Agreement, to be leased back to Lowe's. The Lowe's Agreement and the Faison Agreement are incorporated by reference into this Order and made a part hereof as non-public Appendix II. Any failure by Respondents to comply with all terms of the Lowe's Agreement or the Faison Agreement shall constitute a failure to comply with this Order.

Provided further, however, that if Respondents have divested the Schedule B Assets to Lowe's prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Lowe's is not an acceptable purchaser of the Schedule B Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Lowe's and shall divest the Schedule B Assets within three (3) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission

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C. Not later than ten (10) days after the date on which the Order becomes final, Respondents shall divest the Schedule C Assets to the Sylvester Group pursuant to and in accordance with the Sylvester Group Agreement. The Sylvester Group Agreement is incorporated by reference into this Order and made a part hereof as non-public Appendix III. Any failure by Respondents to comply with all terms of the Sylvester Group Agreement shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Schedule C Assets to the Sylvester Group prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the Sylvester Group is not an acceptable purchaser of the Schedule C Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with the Sylvester Group and shall divest the Schedule C Assets within three (3) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission

D. Respondents shall obtain all required Third Party Consents prior to the closing of each of the agreements to divest, as described in Paragraphs II.A., II.B. and II.C., or any other agreement(s) approved by the Commission to accomplish the divestitures described in Paragraphs II.A., II.B., or II.C.

E.. The purpose of the divestitures is to ensure the continuation of the Schedule A Assets, Schedule B Assets, and Schedule C Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's complaint.

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III.

IT IS FURTHER ORDERED that:

A. If Respondents have not, within the time periods required, complied with the requirements to divest of Paragraphs II.A., II.B. or II.C., absolutely and in good faith and with the Commission's prior approval and in the manner approved by the Commission, the Commission may appoint a person or persons as trustee or trustees (as used herein "trustee" shall mean "trustee or trustees") to effectuate the divestiture.

B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

C. If a trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after receipt of written notice by the staff of the Commission to Respondents of the identity of any proposed trustee,

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- Respondents shall be deemed to have consented to the selection of the proposed trustee.
2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Assets, Schedule B Assets, and/or the Schedule C Assets.
 3. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
 4. The trustee shall have twelve (12) months from the date the Commission or court approves the trust agreement described in Paragraph III.C.3. to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend the period for no more than two (2) additional periods.
 5. The trustee shall have full and complete access to the personnel, books, records, and facilities related to the assets to be divested or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
 6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each

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- contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to an acquirer as set out in Paragraph II of this Order; provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business days of receiving notification of the Commission's approval.
7. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of Respondents, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the assets to be divested.
 8. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for or

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defense of any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each divestiture required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain the assets to be divested.
12. The trustee shall report in writing to Respondents and the Commission every thirty (30) days concerning the trustee's efforts to accomplish each divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that Respondents shall maintain the viability, marketability, and competitiveness of the Schedule A Assets, Schedule B Assets, and Schedule C Assets, hereinafter collectively and individually referred to as the "Assets To Be Maintained," pending their divestiture, and shall not cause the wasting or deterioration of the Assets To Be Maintained, nor shall they cause the Assets To Be Maintained to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Maintained. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Maintained pursuant to the terms of this Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Maintained in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with

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suppliers, customers, employees, and others having business relations with the Assets To Be Maintained in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any of the Assets To Be Maintained. Respondents shall continue to maintain the inventory of each of the Assets To Be Maintained at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each of the Assets To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

1. maintain operations and departments and not reduce hours at each of the Assets To Be Maintained;
2. not transfer inventory from any of the Assets To Be Maintained other than in the ordinary course of business consistent with past practice;
3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations, in each case in a manner consistent with past practice;
4. maintain the books and records of each of the Assets To Be Maintained;
5. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates any of the Assets To Be Maintained will close;
6. not remove the trade marks, trade dress, service marks, or trade names of Respondents at any of the Assets To Be Maintained;
7. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any of the Assets To Be Maintained; and
8. not change or modify in any material respect the existing

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advertising practices, programs and policies for any of the Assets To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission:

A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, within six (6) months prior to the date of such proposed acquisition, in the county or counties that include the Relevant Areas.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in the county or counties that include the Relevant Areas.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondents or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondents' offer to purchase or lease.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and

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notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

VI.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final:

A. Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket, or any interest in any retail location used as a Supermarket on or after January 1, 1998, in the county or counties that include the Relevant Areas to operate a Supermarket at that site if such Supermarket was formerly owned or operated by Respondents.

B. Respondents shall not remove any fixtures or equipment from a property owned or leased by Respondents in the county or counties that include the Relevant Areas that is no longer in operation as a Supermarket, except (1) prior to and as part of a sale, sublease, assignment, or change in occupancy of such Supermarket; or (2) to relocate such fixtures or equipment in the ordinary course of business to any other Supermarket owned or operated by Respondents.

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VII.**IT IS FURTHER ORDERED** that:

A. Within thirty (30) days after the date Respondents signed the Agreement Containing Consent Orders and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II and III of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II and III of this Order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II and III of the Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in Respondents that may affect compliance obligations arising out of the Order.

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IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to compliance with this Order; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on May 30, 2011.

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Schedule A

The Schedule A Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in Virginia, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

- Hannaford Store No. 427, located at 9480 W. Broad St.,
Richmond, VA
- Hannaford Store No. 474, located at 2738 Hannaford Plaza,
Richmond, VA
- Hannaford Store No. 477, located at 4816 S. Laburnum,
Richmond, VA
- Hannaford Store No. 478, located at 1356 Gaskins Rd.,
Richmond, VA
- Hannaford Store No. 479, located at 3507 W. Cary St., Richmond,
VA
- Hannaford Store No. 480, located at 11400 Huguenot Rd.,
Midlothian, VA
- Hannaford Store No. 481, located at 10921 Hull St., Midlothian,
VA
- Hannaford Store No. 484, located at 7951 Brook Rd., Richmond,
VA
- Hannaford Store No. 486, located at 12201 So. Chalkley, Chester,
VA
- Hannaford Store No. 490, located at 1601 Willow Lawn Dr.,
Richmond, VA
- Hannaford Store No. 430, located at 14246 Warwick Blvd.,
Newport News, VA
- Hannaford Store No. 432, located at 4692 Columbus St., Virginia
Beach, VA
- Hannaford Store No. 483, located at 4625 Shore Dr., Virginia
Beach, VA
- Hannaford Store No. 487, located at 1800 Republic Dr., Virginia
Beach, VA
- Hannaford Store No. 488, located at 101 Village Ave., York Co.,
VA
- Hannaford Store No. 491, located at 2029 Lynnhaven Pkwy.,

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Virginia Beach, VA
Hannaford Store No. 492, located at 205 East Little Creek Rd.,
Norfolk, VA
Hannaford Store No. 493, located at 5237 Providence Rd.,
Virginia Beach, VA
Hannaford Store No. 494, located at 5601 High St. West,
Portsmouth, VA
Hannaford Store No. 496, located at King Richard Dr., Virginia
Beach, VA

Schedule B

The Schedule B Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in North Carolina, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Hannaford Store No. 410, located at 341 South College Rd.,
Wilmington, NC
Hannaford Store No. 415, located at 2316 North College Rd.,
Wilmington, NC
Hannaford Store No. 424, located at 930 High House Rd., Cary,
NC
Hannaford Store No. 425, located at 9600 Strickland Rd., Raleigh,
NC
Hannaford Store No. 426, located at 5309 Carolina Beach Rd.,
Wilmington, NC
Hannaford Store No. 428, located at 2900 Millbrook Rd., Raleigh,
NC
Hannaford Store No. 436, located at 2900 Wake Forest Rd.,
Raleigh, NC
Hannaford Store No. 439, located at 1741 Walnut St., Cary, NC
Hannaford Store No. 441, located at 5051-3 Main St., Shallotte,
NC
Hannaford Store No. 442, located at 4821 Long Beach Rd., S.E.,
Southport, NC
Hannaford Store No. 444, located at 3804 Oleander Dr.,
Wilmington, NC

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Hannaford Store No. 455, located at 1405 W. Williams St., Suite A, Apex, NC
Unbuilt Site, located at Ten Ten Road, Cary, NC

Schedule C

The Schedule C Assets consist of all assets, leases, properties, government permits, customer lists, businesses and goodwill, tangible and intangible, related to or utilized in the Supermarket business operated at the following locations in North Carolina, excluding the trade marks, trade dress, service marks, or trade names of Respondents:

Hannaford Store No. 402, located at 103 South Dudley Street, Burgaw, NC

Hannaford Store No. 408, located at 112A Village Road, Leland, NC

Hannaford Store No. 403, located at 107 South Pine Street, Warsaw, NC

Hannaford Store No. 420, located at 701B White's Crossing Shopping Center, Whiteville, NC

Hannaford Store No. 414, located at 604 Jefferson Street, Whiteville, NC

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[Confidential Appendices I-IV Redacted from Public Record
Version]

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of Respondent Hannaford Bros. Co. (Hannaford) by Respondent Delhaize America, Inc, formerly Food Lion, Inc. (“Delhaize America”), of which Respondent Etablissements Delhaize Freres et Cie “Le Lion” S.A. (“Delhaize”), a Belgian company, is the majority owner, hereinafter referred to as “Respondents,” and the Respondents having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge the Respondents with violations of 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

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing the proposed Decision and Order, an admission by the Respondents of all of the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than the jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

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1. Respondent Delhaize is a corporation organized, existing and doing business under and by virtue of the laws of Belgium, with its office and principal place of business located at rue Osseghem, 1080 Brussels, Belgium.
2. Respondent Delhaize America is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal place of business located at 2110 Executive Drive, Salisbury, North Carolina 28145.
3. Respondent Hannaford is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located in Portland, Maine.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Schedule A Assets, Schedule B Assets, and Schedule C Assets, hereinafter collectively and individually referred to as the “Assets To Be Maintained,” pending their divestiture, and shall not cause the wasting or

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deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of this Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice. Respondents shall not terminate the operation of any of the Assets To Be Divested. Respondents shall continue to maintain the inventory of each of the Assets To Be Divested at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each of the Assets To Be Divested intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:

1. maintain operations and departments and not reduce hours at each of the Assets To Be Divested;
2. not transfer inventory from any of the Assets To Be Divested other than in the ordinary course of business consistent with past practice;
3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and

Order

- satisfy all obligations, in each case in a manner consistent with past practice;
4. maintain the books and records of each of the Assets To Be Divested;
 5. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates any of the Assets To Be Divested will close;
 6. not remove the trade marks, trade dress, service marks, or trade names of Respondents at any of the Assets To Be Divested;
 7. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any of the Assets To Be Divested; and
 8. not change or modify in any material respect the existing advertising practices, programs and policies for any of the Assets To Be Divested, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.
- B. Pending the divestiture or transfer of each of the respective Assets, Respondents shall adhere to and abide by the Kroger Agreement, the Lowe’s Agreement and the Sylvester Group Agreement, which agreements are incorporated by reference into this Order to Maintain Assets and made a part hereof, and are also appended to the attached Decision and Order.

Order

III.

IT IS FURTHER ORDERED that at any time after the Commission issues this Order to Maintain Assets, the Commission may appoint an Interim Trustee as provided in the attached Decision and Order.

IV.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in Respondents that may affect compliance obligations arising out of this Order to Maintain Assets, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation.

V.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

Order

VI.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after all of the divestitures or transfers of the Assets, as described in and required by the Decision and Order contained in the Consent Agreement, are completed.

By the Commission.

Analysis

**Analysis of the Complaint and Proposed Consent Order to
Aid Public Comment**

Issued when the Commission tentatively approved a proposed consent order on July 24, 2000

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from Etablissements Delhaize Freres et Cie "Le Lion" S.A. ("Delhaize"), Delhaize America, Inc. ("Delhaize America"), and Hannaford Bros. Co. ("Hannaford") (collectively "the Proposed Respondents"), an Agreement Containing Consent Order ("the proposed consent order"). The Proposed Respondents have also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to remedy likely anticompetitive effects arising from the proposed Agreement and Plan of Merger between Delhaize, Delhaize America, and Hannaford to acquire all of the outstanding voting stock of Hannaford.

II. Description of the Parties and the Proposed Acquisition

Delhaize America, a North Carolina corporation, which operates most of its stores under the names of "Food Lion" and "Kash N' Karry," has over 1,200 supermarkets in the Southeast and Mid-Atlantic regions of the United States. Food Lion stores are situated in Virginia, North Carolina, South Carolina, Georgia, Florida, Tennessee, Kentucky, West Virginia, Pennsylvania, Delaware, and Maryland. Delhaize America's total sales for fiscal year 1999 were \$11 billion, with most generated by Food Lion stores' operations.

Hannaford, a publicly traded firm, is a Maine corporation with executive offices located in Scarborough, Maine. Approximately one-fourth of its common stock is owned by the Sobey family of Stellarton, Nova Scotia, Canada, and its various affiliated trusts and companies. Hannaford's total sales for fiscal year 1999 were \$3.46 billion. Hannaford operates about 100 stores under the "Hannaford" or "Shop 'N Save" banner in metropolitan New

Analysis

England and New York markets, plus about 50 stores under the “Hannaford” banner in Virginia and North Carolina markets. Hannaford entered the Southeast in the mid-1990's. The company's supermarkets are located in Maine, Massachusetts, New Hampshire, Vermont, New York, North Carolina, Virginia, and South Carolina.

Under the terms of the merger agreement, dated August 17, 1999, Delhaize America will acquire all of Hannaford's outstanding voting stock for approximately \$3.6 billion.

III. The Draft Complaint

The draft complaint alleges that the relevant line of commerce (*i.e.*, the product market) is the retail sale of food and grocery items in supermarkets. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units ("SKUs")), as well as a deep inventory of those SKUs in a variety of brand names and sizes. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space. Supermarkets in North Carolina and Virginia, where the parties propose to divest supermarkets, tend to be at least 20,000 square feet, selling some 25,000-35,000 SKUs. So called “supercenters” operated by mass merchants such as WalMart, which have full-line supermarkets attached to general merchandise stores, are included in the product market.

Supermarkets compete primarily with other supermarkets that provide one-stop shopping for food and grocery products. Supermarkets base their food and grocery prices on the prices primarily of food and grocery products sold at nearby supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores such as club stores or limited assortment stores, and do not significantly

Analysis

change their food and grocery prices in response to prices at other types of stores. Most consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

Retail stores other than supermarkets that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), club stores, military commissaries, and mass merchants, do not effectively constrain most prices at supermarkets. These other stores operate significantly different retail formats and sell far more limited assortments of items or in the case of military commissaries are only open to a limited population base. None of these formats would constrain a price increase taken by supermarkets in the geographic markets.

The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the county or counties that include the following incorporated cities and towns. In Virginia the relevant geographic markets are: (a) a market consisting of the Richmond MSA; and (b) two markets that are part of the Norfolk-Virginia Beach-Newport News MSA (also known as the Tidewater area) -- the Tidewater Peninsula (Newport News, Hampton and other portions of the peninsula north of the James River), and Southern Tidewater (including Norfolk, Virginia Beach, Portsmouth, and other parts of the MSA south of the James River). In North Carolina the relevant geographic markets are: (a) the Wilmington MSA; (b) Columbus County; (c) Duplin County; (d) Pender County; and (e) "greater Raleigh," which includes Wake County, excluding the towns of Wake Forest, Rolesville, Zebulon, and Wendell.

Food Lion and Hannaford are actual and direct competitors in all of the above listed markets. The acquisition will eliminate that competition. The draft complaint alleges that each of the post-merger markets would be highly concentrated, whether measured

Analysis

by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.¹ The acquisition would substantially increase concentration in each market. Delhaize America and Hannaford would have a combined market share that ranges from 35 percent to 94 percent in each geographic market. The post-acquisition HHIs in the geographic markets range from 2562 points to 8817 points.

Concentration levels in the geographic markets alleged in the draft complaint would not be materially different even if club stores and limited assortment stores were included in the product market. The draft complaint further alleges that entry is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

The draft complaint alleges that Delhaize America's proposed acquisition of all of the outstanding voting stock of Hannaford, if consummated, may substantially lessen competition in the relevant markets in violation of 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, by eliminating direct competition between supermarkets owned or controlled by Delhaize and supermarkets owned or controlled by Hannaford; by increasing the likelihood that Delhaize will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining supermarket firms. Each of these effects raises the likelihood that the prices of food, groceries or services will increase, and the quality and selection of food, groceries or services will decrease, in the geographic markets alleged in the proposed complaint.

IV. Terms of the Agreement Containing Consent Order ("the proposed consent order")

¹ The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Analysis

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition.² Under the terms of the proposed consent order, the Proposed Respondents must divest 37 identified Hannaford supermarkets and one identified Hannaford supermarket site in the relevant markets to three different up-front buyers. These buyers were selected by the parties and presented to the Commission for its review.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. When divestiture is an appropriate remedy for a supermarket merger, the Commission requires the merging parties to find a buyer for the divested stores. A proposed buyer must not itself present competitive problems. For example, the Commission is less likely to approve a buyer that already has a large retail presence in the relevant geographic area than a buyer without such a presence. The Commission is preliminarily satisfied that the purchasers presented by the parties are well qualified to run the divested stores and that divestiture to these purchasers poses no separate competitive issues. Public comments may address the suitability of the designated acquirers to acquire the supermarkets at issue.

The three up-front buyers and the number of stores each is acquiring are as follows: Kroger Co. (20 stores in Virginia), Lowe's Food Stores, Inc. (12 stores and one site in North Carolina), and the Sylvester Group (five stores in North Carolina). Kroger, headquartered in Ohio, operates 2,300 supermarkets in 31 states. Kroger is buying the stores in the Richmond and Tidewater areas where it does not currently operate supermarkets. Lowe's, a North Carolina corporation, operates 86 supermarkets throughout North Carolina and Virginia. Lowe's is buying supermarkets in

² Acceptance of the proposed consent order for public comment terminates the Hart-Scott-Rodino waiting period and enables Delhaize America to immediately acquire the Hannaford voting stock.

Analysis

Wilmington and Raleigh. Lowe's has a small presence in Raleigh, operating two supermarkets in that market, but operates no supermarkets in Wilmington. The Sylvester Group, a family-owned firm, operates 26 "Piggly Wiggly" supermarkets in rural North Carolina and will acquire five stores. The Sylvester Group operates one store in Duplin County, but the Hannaford it is acquiring is 20 miles from that store. A list of the specific supermarkets that Delhaize America and Hannaford must divest to each of the up-front buyers is attached at the end of this Analysis of the Draft Complaint and Proposed Consent Order to Aid Public Comment.

The proposed consent order requires that, no later than 10 days after the date on which the consent order becomes final, the Proposed Respondents shall divest these assets pursuant to and in accordance with their agreements with the buyers. The amount of time required for the divestitures varies with each of the buyers, based on the buyer's need to convert large numbers of new stores into its operations.

The proposed consent order also requires the Proposed Respondents to include rescission provisions in its up-front buyer agreements that allow it to rescind the transaction(s) if the Commission, after the comment period, decides to reject any of the up-front buyers. If, at the time the Commission decides to make the proposed consent order final, the Commission notifies the Proposed Respondents that any of the up-front buyers to which they have divested a supermarket or site is not an acceptable acquirer, or that any up-front buyer agreement is not an acceptable manner of divestiture, then the Proposed Respondents must immediately rescind the transaction in question and divest those assets within three months after the proposed consent order becomes final. At that time, the Proposed Respondents must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event that any Commission-approved buyer is unable to take or keep possession of any of the supermarkets identified for divestiture, a trustee that

Analysis

the Commission may appoint has the power to divest any additional ancillary assets and effect such arrangements as are necessary to satisfy the requirements of the proposed consent order.

The proposed consent order specifically requires the Proposed Respondents to:

1) maintain the viability, competitiveness and marketability of the assets to be divested; (2) not cause the wasting or deterioration of the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair their marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve existing relationships with suppliers, customers and employees; and (6) keep the supermarkets open for business and maintain the inventory of products in each store consistent with past practice. The proposed consent order also contains more specific details relating to maintaining store operations.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or site identified in the order that Delhaize America and Hannaford have not divested to satisfy the requirements of the proposed consent order. The proposed consent order also enables the Commission to seek civil penalties against Delhaize or Delhaize America for non-compliance with the proposed consent order.

For a period of 10 years from the date the proposed consent order becomes final, the Proposed Respondents are required to provide written notice to the Commission prior to acquiring supermarket assets located in, or any interest (such as stock) in any entity that owns or operates a supermarket located in the county or counties that include the relevant geographic areas. Proposed Respondents may not complete such an acquisition until they have provided information requested by the Commission. This provision does not restrict the Proposed Respondents from constructing new supermarket facilities on their own; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets within the previous six months.

Analysis

For a period of 10 years, the proposed consent order also prohibits the Proposed Respondents from entering into or enforcing any agreement that restricts the ability of any person that acquires any supermarket, any leasehold interest in any supermarket, or any interest in any retail location used as a supermarket on or after January 1, 1998, to operate a supermarket at that site if such supermarket was formerly owned or operated by the Proposed Respondents in the county or counties that include the relevant geographic areas. In addition, the Proposed Respondents may not remove fixtures or equipment from a store or property owned or leased in these counties that is no longer in operation as a supermarket, except (1) prior to a sale, sublease, assignment, or change in occupancy, or (2) to relocate such fixtures or equipment in the ordinary course of business to any other supermarket owned or operated by Proposed Respondents.

The Proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within 30 days following the date on which they signed the proposed consent, every 30 days thereafter until the divestitures are completed, and annually for a period of 10 years.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of supermarkets to the various independent buyers listed below, in order to aid the

Analysis

Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

ATTACHMENT
TO ANALYSIS OF THE COMPLAINT
AND PROPOSED CONSENT ORDER TO AID PUBLIC
COMMENT

Supermarkets Divested to Kroger:

Hannaford Store No. 427, located at 9480 W. Broad St.,
Richmond, VA

Hannaford Store No. 474, located at 2738 Hannaford Plaza,
Richmond, VA

Hannaford Store No. 477, located at 4816 S. Laburnum,
Richmond, VA

Hannaford Store No. 478, located at 1356 Gaskins Rd.,
Richmond, VA

Hannaford Store No. 479, located at 3507 W. Cary St., Richmond,
VA

Hannaford Store No. 480, located at 11400 Huguenot Rd.,
Midlothian, VA

Hannaford Store No. 481, located at 10921 Hull St., Midlothian,
VA

Hannaford Store No. 484, located at 7951 Brook Rd., Richmond,
VA

Hannaford Store No. 486, located at 12201 So. Chalkley, Chester,
VA

Hannaford Store No. 490, located at 1601 Willow Lawn Dr.,
Richmond, VA

Analysis

Hannaford Store No. 430, located at 14246 Warwick Blvd.,
Newport News, VA

Hannaford Store No. 432, located at 4692 Columbus St., Virginia
Beach, VA

Hannaford Store No. 483, located at 4625 Shore Dr., Virginia
Beach, VA

Hannaford Store No. 487, located at 1800 Republic Dr., Virginia
Beach, VA

Hannaford Store No. 488, located at 101 Village Ave., York Co.,
VA

Hannaford Store No. 491, located at 2029 Lynnhaven Pkwy.,
Virginia Beach, VA

Hannaford Store No. 492, located at 205 East Little Creek Rd.,
Norfolk, VA

Hannaford Store No. 493, located at 5237 Providence Rd.,
Virginia Beach, VA

Hannaford Store No. 494, located at 5601 High St. West,
Portsmouth, VA

Hannaford Store No. 496, located at King Richard Dr., Virginia
Beach, VA

i

Supermarkets and Unbuilt Site Divested to Lowe's:

Hannaford Store No. 410, located at 341 South College Rd.,
Wilmington, NC

Hannaford Store No. 415, located at 2316 North College Rd.,
Wilmington, NC

Hannaford Store No. 424, located at 930 High House Rd., Cary,
NC

Hannaford Store No. 425, located at 9600 Strickland Rd., Raleigh,
NC

Analysis

Hannaford Store No. 426, located at 5309 Carolina Beach Rd.,
Wilmington, NC

Hannaford Store No. 428, located at 2900 Millbrook Rd., Raleigh,
NC

Hannaford Store No. 436, located at 2900 Wake Forest Rd.,
Raleigh, NC

Hannaford Store No. 439, located at 1741 Walnut St., Cary, NC

Hannaford Store No. 441, located at 5051-3 Main St., Shallotte,
NC

Hannaford Store No. 442, located at 4821 Long Beach Rd., S.E.,
Southport, NC

Hannaford Store No. 444, located at 3804 Oleander Dr.,
Wilmington, NC

Hannaford Store No. 455, located at 1405 W. Williams St., Suite
A, Apex, NC

Unbuilt Site, located at Ten Ten Road, Cary, NC

Supermarkets Divested to Ward Sylvester:

Hannaford Store No. 402, located at 103 South Dudley Street,
Burgaw, NC

Hannaford Store No. 408, located at 112A Village Road, Leland,
NC

Hannaford Store No. 403, located at 107 South Pine Street,
Warsaw, NC

Hannaford Store No. 420, located at 701B White's Crossing
Shopping Center, Whiteville, NC

Hannaford Store No. 414, located at 604 Jefferson Street,
Whiteville, NC

Complaint

IN THE MATTER OF

STOKER, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE SMOKELESS TOBACCO ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

*Docket C-4013; File No. 0123015
Complaint, May 31, 2001--Decision, May 31, 2001*

This consent order addresses Respondent Stoker, Inc.'s manufacturing, packaging, importing, and advertising of smokeless tobacco products; these activities are subject to the Comprehensive Smokeless Tobacco Health Education Act of 1986 -- and Commission regulations promulgated pursuant to that statute -- and the Act and the regulations require smokeless tobacco product packages and advertisements to bear specified health warnings. The order, among other things, prohibits the respondent from violating any provision of the Smokeless Tobacco Act or the Commission regulations. It also requires the respondent to keep copies of relevant packaging and advertisements and to provide copies of the order to certain of its personnel.

Participants

For the Commission: *Michael Ostheimer, Maame A. Gyamfi, Anne Maher, C. Lee Peeler, and Russell Porter.*

For the Respondent: *Benjamin O. Tayloe, Jr., Patton Boggs, LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Stoker, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Stoker, Inc., is a Tennessee corporation with its principal office or place of business at 3846 Sharon Highway 89, Dresden, Tennessee, 38225-1756.

Complaint

2. Respondent has manufactured, packaged, and imported for sale or distribution within the United States, and has advertised within the United States, smokeless tobacco products. These activities are subject to the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401, *et seq.* (“Smokeless Tobacco Act”), and the regulations promulgated pursuant thereto, 16 C.F.R. §§ 307, *et seq.* (“regulations”). The Smokeless Tobacco Act and the regulations require smokeless tobacco product packages and advertisements bear specified health warnings. 15 U.S.C. § 4402, 16 C.F.R. § 307.4.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has manufactured, packaged, and imported for sale or distribution within the United States, and has advertised within the United States, smokeless tobacco products, including but not necessarily limited to products, the packaging and advertising of which are attached as Exhibits A through D, and bear health warnings in the following manner:
 - A. A label for a sixteen ounce (16 oz.) package of Red Label smokeless tobacco. The health warning statement is printed in 5 point type. (Exhibit A).
 - B. A label for a sixteen ounce (16 oz.) package of Wintergreen smokeless tobacco. The health warning statement is printed in 5 point type. (Exhibit B).
 - C. A package intended for use as a retail dispenser of individual packages of Our Pride Peach Chewing Tobacco. The health warning statement is located on the top rear of the dispenser. When the dispenser is opened and displayed as intended, a flap in front of the warning is folded up and the health warning is not visible to the public from the dispenser’s normal viewing position. (Exhibit C).

Complaint

D. A point-of-sale advertisement for Oliver Twist smokeless tobacco with a display area measuring 20 ¼ square inches. The health warning statement is printed in 4 ½ point type and appears within a circle whose diameter is one-half inch. (Exhibit D).

5. Through the means described in Paragraph 4, including but not necessarily limited to Exhibits A and B, respondent has distributed or caused to be distributed in commerce, smokeless tobacco products, the packaging of which did not bear health warning statements in conspicuous and legible type, as required by the Smokeless Tobacco Act, 15 U.S.C. § 4402(b)(1)(B), and the regulations, 16 C.F.R. § 307.6(b).

6. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit C, respondent has distributed or caused to be distributed in commerce, smokeless tobacco products that did not bear health warning statements in a conspicuous and prominent place on the package, as required by the Smokeless Tobacco Act, 15 U.S.C. § 4402(b)(1)(A), and the regulations, 16 C.F.R. § 307.6(a).

7. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit D, respondent has advertised smokeless tobacco products the advertising of which did not bear health warning statements in conspicuous and legible type and with a circle of the size determined by the Federal Trade Commission, as required by the Smokeless Tobacco Act, 15 U.S.C. § 4402(b)(2)(A) and (C), and the regulations, 16 C.F.R. § 307.7(a)-(c).

8. Since 1987, respondent manufactured, packaged, or imported smokeless tobacco products while failing to submit a plan to the Federal Trade Commission that specified the method respondent would use to rotate, display, and distribute the health warning statements on its packages and advertisements, as required by the

Complaint

Smokeless Tobacco Act, 15 U.S.C. § 4402(d), and the regulations, 16 C.F.R. §§ 307.4(c), 307.11-307.12.

9. The acts and practices of respondent alleged in this complaint have constituted, and now constitute, violations of the Smokeless Tobacco Act and the implementing regulations, and by virtue of Section 5 of the Smokeless Tobacco Act, 15 U.S.C. § 4404, constitute violations of Section 5 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this thirty-first day of May, 2001, has issued this complaint against respondent.

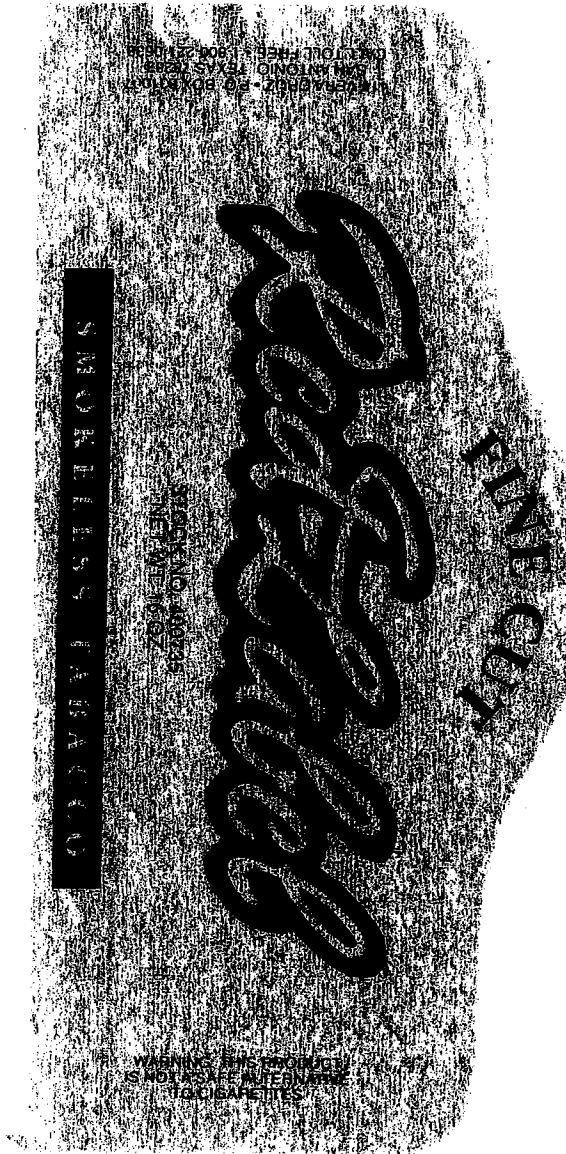


EXHIBIT A

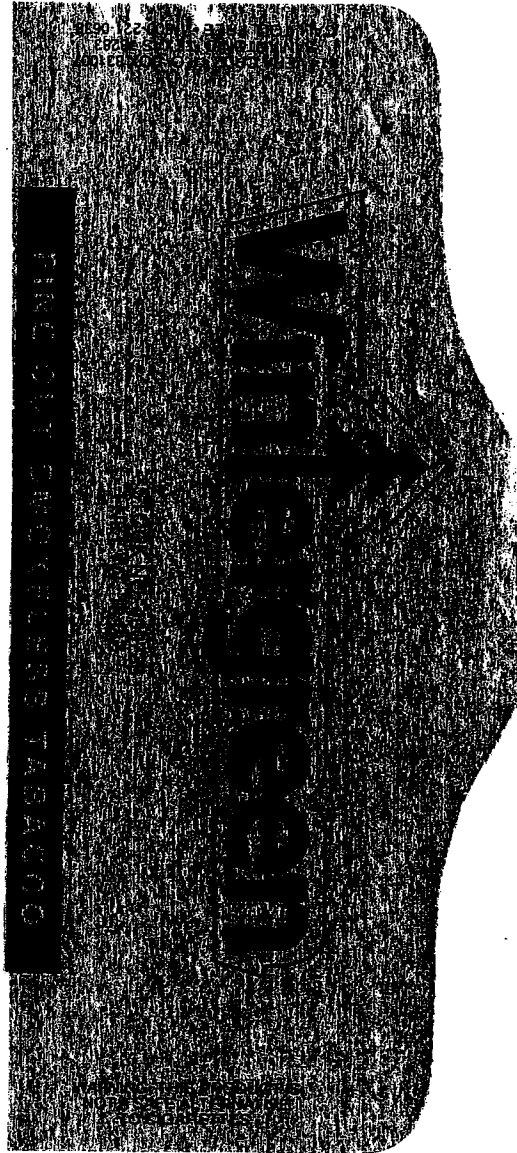
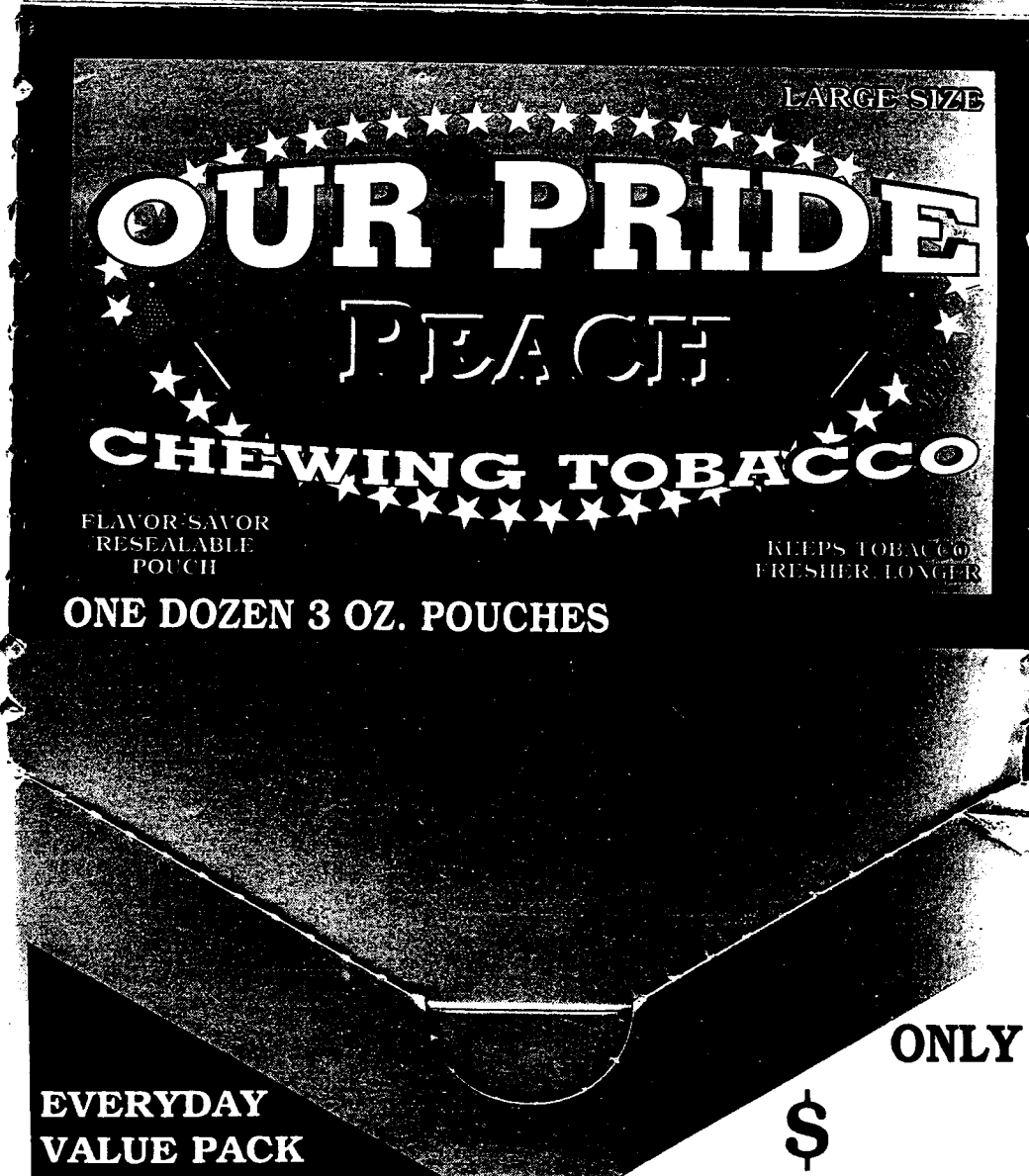


EXHIBIT B

WARNING: THIS PRODUCT
MAY CAUSE GUM DISEASE
AND TOOTH LOSS.

LARGE SIZE

EVERYDAY VALUE PRICE



LARGE SIZE

OUR PRIDE
PEACH
CHEWING TOBACCO

FLAVOR SAVOR
RESEALABLE
POUCH

KEEPS TOBACCO
FRESHER LONGER

ONE DOZEN 3 OZ. POUCHES

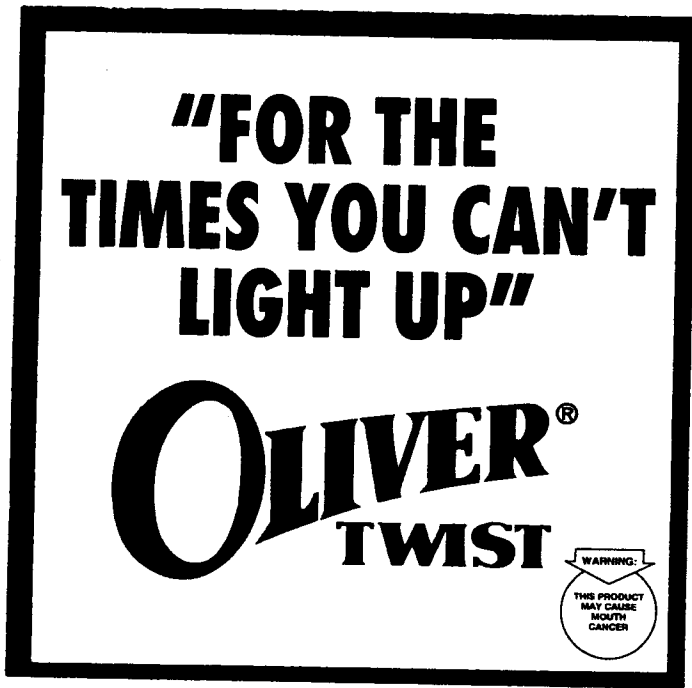
**EVERYDAY
VALUE PACK**

ONLY

\$

(This exhibit has been
reduced)

EXHIBIT C



Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Stoker, Inc., is a Tennessee corporation with its principal office or place of business at 3846 Sharon Highway 89, Dresden, Tennessee, 38225-1756.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding in the public interest.

Decision and Order

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Smokeless Tobacco Act" shall mean the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401, *et seq.*, and as amended.
2. "Implementing regulations" shall mean the regulations promulgated pursuant to the Smokeless Tobacco Act found at 16 C.F.R. §§ 307, *et seq.*, and as amended.
3. "Smokeless tobacco" shall mean as defined in Section 9 of the Smokeless Tobacco Act, 15 U.S.C. § 4408(1).
4. Unless otherwise specified, "respondent" shall mean Stoker, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
5. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with manufacturing, importing, packaging, labeling, advertising, promotion, offering for sale, sale, or distribution of any smokeless tobacco product, shall not violate any provision of the Smokeless Tobacco Act or the implementing regulations.

II.

IT IS FURTHER ORDERED that respondent Stoker, Inc. and its successors and assigns shall, for five (5) years after the last dissemination of any package or advertisement covered by this

Decision and Order

order, maintain and upon request make available to the Federal Trade Commission for inspection and copying all smokeless tobacco product packaging and advertisements.

III.

IT IS FURTHER ORDERED that respondent Stoker, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent Stoker, Inc. and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent, its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on May 31, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on April 10, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Stoker, Inc. ("Stoker").

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves respondent's manufacturing, packaging, importing, and advertising of smokeless tobacco products. These activities are subject to the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. §§ 4401, *et seq.* ("Smokeless Tobacco Act"), and the regulations promulgated pursuant thereto, 16 C.F.R. §§ 307, *et seq.* ("regulations"). The Smokeless Tobacco Act and the regulations require that smokeless tobacco product packages and advertisements bear specified health warnings. The FTC complaint alleges that Stoker failed to comply with those requirements in several respects.

First, the complaint alleges that certain of Stoker's smokeless tobacco products did not bear the health warning statements in conspicuous and legible type, in violation of the Smokeless Tobacco Act and the regulations. According to the FTC complaint, these products include sixteen ounce packages of smokeless tobacco that had the health warning statements printed in 5 point type.

The complaint also alleges that certain of Stoker's smokeless tobacco products violated the Act and the regulations because they did not bear the health warning statements in a conspicuous and prominent place on the package, in violation of the Smokeless Tobacco Act and the regulations. The complaint contends that

Analysis

one such product is distributed in a package that functions as a retail dispenser of individual packages. The health warning is on the top rear of the dispenser, but when the dispenser is opened and displayed as intended, the health warning is not visible to the public from the dispenser's normal viewing position.

Furthermore, the complaint alleges that certain of Stoker's smokeless tobacco advertising did not bear the health warning statements in conspicuous and legible type and within the correct size circle and arrow format. According to the complaint, one such advertisement had a display area measuring 20¼ square inches and had the health warning statement printed in 4½ point type and appearing within a one-half inch diameter circle.

Finally, the complaint alleges that since 1987, Stoker has manufactured, packaged, or imported smokeless tobacco products without submitting a plan to the FTC specifying the method it would use to rotate, display, and distribute the health warning statements on its packages and advertisements, in violation of the Act and the regulations.

Violations of the Smokeless Tobacco Act and the regulations also constitute violations of Section 5 of the FTC Act.

The proposed consent order is designed to prevent Stoker from engaging in similar acts and practices in the future. Part I of the proposed order prohibits respondent from violating any provision of the Smokeless Tobacco Act or the regulations.

Parts II through V of the order require Stoker to keep copies of relevant packaging and advertisements, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file compliance reports with the Commission. Part VI provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official

Analysis

interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF**GATEWAY, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4015; File No. 9923276
Complaint, June 22, 2001--Decision, June 22, 2001*

This consent order addresses advertising by Respondent Gateway, Inc. for its Internet access service, "Gateway.net." The order, among other things, prohibits the respondent from misrepresenting the price or cost of any "Internet access service" -- defined as "any service that enables a consumer to access the Internet or any other electronic network" -- or of any "toll-free" telephone number. The order also prohibits the respondent from making representations regarding the price or cost of any "1-800" or "toll-free" telephone number provided to the consumer by Gateway unless it clearly and conspicuously discloses the dollar amounts of any hourly surcharges and any other fees it charges for the use of such numbers. In addition, the order requires the respondent to clearly and prominently disclose that consumers may have to pay long distance telephone charges, hourly surcharges, or other costs in excess of local telephone service charges to access any Internet access service. The order also requires the respondent to maintain customer support to answer consumer inquiries regarding any Internet access service -- including but not limited to an adequately staffed toll-free number where consumers can determine whether they have a local access number for such service -- and to refund all charges for "toll free" numbers paid by local access plan Gateway.net customers who registered for the plan between January 19, and April 1, 1999, and who paid such fees until August 15, 1999.

Participants

For the Commission: *Linda K. Badger, Matthew D. Gold, Erika Wodinsky, Jeffrey Klurfeld, and Louis Silversin.*

For the Respondent: *C. Teigue Thomas, and Ronald E. Naves, Jr., Gateway Inc., and Christine A. Varney and Lynda Marshall, Hogan & Hartson L.L.P.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Gateway, Inc., a corporation (“respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Gateway, Inc. is a Delaware corporation with its principal office or place of business at 610 Gateway Drive, North Sioux City, South Dakota 57049.
2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed products and services to the public, including personal computers, computer peripherals, software, and Internet services.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or has caused to be disseminated advertisements for certain of its personal computers, including but not necessarily limited to the attached Exhibits A through F. These advertisements contain the following statements and depictions:
 - a. [MAGAZINE ADVERTISEMENT]

**“The Gateway Essential Line:
powerful PCs at practical prices.**

Okay, maybe you don’t need an astrophysics supercomputer. But you still want a fast processor and ample memory and drive space. Look no further than Gateway Essential PCs. With video, sound and Intel processors - and affordable prices - they’re compromise-free

Complaint

PCs. Each one includes a year on the Internet.¹ Pick a model, and we'll customize it the way you want.

Gateway Essential 400c

...

1-Year gateway.net Internet Access¹

...

[Footnote 1 appears as follows four pages later at the bottom of the page, in the eighth line of eleven lines of fine print disclosures, in approximately 4-point type:] 1. No monthly fee 1st year. Rural access \$3.95/hour. Local access \$1.50/hour over 150 hours per month. 12 months from delivery. Must register w/30 days of delivery.” (Exhibit A)

b. [NEWSPAPER ADVERTISEMENT]

**“GET A GATEWAY ESSENTIAL PC WITH
INTERNET INCLUDED.¹
LESS THAN A DOLLAR A DAY.**

An unbelievable computer that actually comes with a year of Internet access¹

...

GATEWAY ESSENTIAL 400c

...

**• 1-YEAR GATEWAY.NET INTERNET ACCESS
(\$240 VALUE)**

...

Complaint

[Footnote 1 appears as follows at the bottom of the page, in the second line of five lines of fine print disclosures, in approximately 2-point type:] 1. No monthly fee for first year. Rural access \$3.95/hour. Local access \$1.50/hour over 150 hours. 12 months runs from delivery. Must register w/30 days of delivery. \$240 based on standard month to month fee.” (Exhibit B)

c. [NEWSPAPER ADVERTISEMENT]

“Print it. Free.

With a free color printer from Gateway, you could print everything from pie recipes to pie charts. . . . Right now, we’ll also include one full year of Internet access¹ absolutely free.

[Footnote 1 appears as follows in a black box with white writing at the bottom of the page, in approximately 4-point type:] No monthly fee 1st year. Rural access \$3.95/hour. Local access \$1.50/hour over 150 hours per month. 12 months runs from delivery. Must register w/30 days of delivery.” (Exhibit C)

d. [TELEVISION ADVERTISEMENT]

“[Depiction: Two computer boxes on a table in a darkened room. A spotlight scans one of the boxes, revealing a question mark on the label. The other box bears the Gateway name and logo.]

VO: When you buy a bargain basement PC, what you’re really buying is a mystery box.

[Depiction: A Gateway box]

VO: Will there be a monitor? Probably not.* Lots of software? Ha! A year on the Internet?

Complaint

[*Super appears in white at the bottom of the screen]: No monthly fee 1st year. Rural access \$3.95/hour. Local access \$1.50/hour over 150 hours. 12 months runs from delivery. Must register within 30 days of delivery.

VO: Twenty-four hour tech support? Dream on.

[Super ends. Depiction: close up of the Gateway box alone]

VO: With a Gateway Essential PC, you know exactly what you're getting:

[Depiction of a hand lifting box up to reveal the complete PC system underneath]

VO: ...a monitor, great software, award-winning tech support,

[Super appears at top of screen in black letters framed in a box:] as low as \$28/mo. for 48 mo. or \$999

...

VO: ...and Internet access for \$28 a month or a dollar a day. No mystery there!

[Depiction: Gateway logo, Super in bold black print:]

Connect with us /1-800-

Gateway/www.gateway.com/Gateway is our trademark.

VO: Call 1-800 Gateway for a new Gateway Essential PC with an Intel celeron processor." (Exhibit D)

e. [MAGAZINE ADVERTISEMENT]

"Let's talk about the ultimate traveling companion.

...

Complaint

All these add-ons are available when you purchase a Gateway system.

...

gateway.net
\$14.95/mo.⁴

[Footnote 4 appears as follows at the bottom of the page, in the eleventh line of eleven lines of fine print disclosures, in approximately 4-point type:] 4. gateway.net pricing based on 6-month commitment. \$15 fee for early cancellation.” (Exhibit E)

f. [ONLINE REGISTRATION SCREEN]

“Phone Book

...

Toll Free (888) 709-4076”
(Exhibit F)

5. Through the means described in Paragraph 4, including but not necessarily limited to Exhibits A through D, respondent has represented, expressly or by implication, that with the purchase of the advertised computer models, one year of Gateway.net Internet access would be free or included at no extra charge.
6. In truth and in fact, with the purchase of the advertised computer models, for many consumers one year of Gateway.net Internet access was not free or included at no extra charge because these customers incurred long distance charges to access Gateway.net or were charged \$3.95 per hour to use respondent’s 1-888 telephone number to access the service. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

Complaint

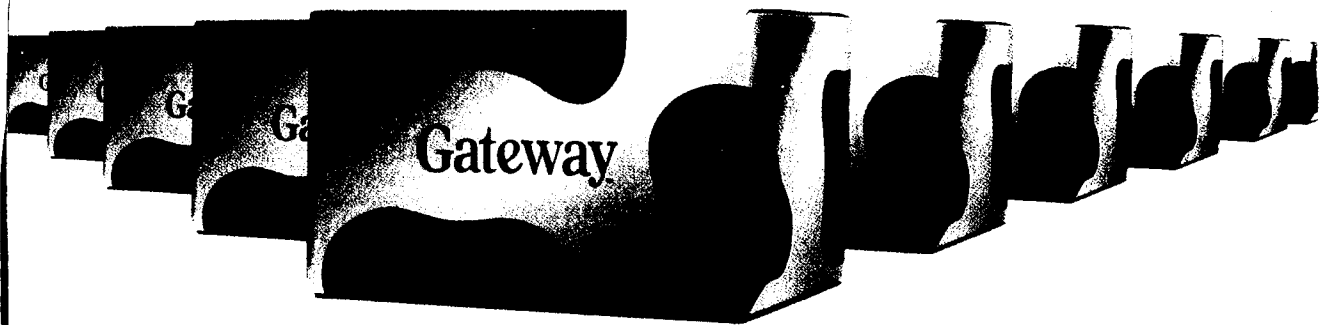
7. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit E, respondent has represented, expressly or by implication, that with the purchase of the advertised computer models, the total cost to consumers for Gateway.net Internet access would be a flat fee, such as \$14.95 per month.
8. In truth and in fact, with the purchase of the advertised computer models, the total cost to many consumers for Gateway.net Internet access was not a flat fee, such as \$14.95 per month because these customers incurred long distance charges to access Gateway.net or were charged \$3.95 per hour to use respondent's 1-888 telephone number to access the service. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.
9. Through the means described in Paragraph 4, including but not necessarily limited to Exhibit F, respondent has represented, expressly or by implication, that the use of respondent's "toll free" 1-888 number to connect to the Internet was free to consumers.
10. In truth and in fact, the use of respondent's "toll free" 1-888 telephone number to connect to Gateway.net was not free to consumers. Consumers were charged \$3.95 per hour for the use of this number. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.
11. In its advertising and sale of certain computer models, respondent has represented, expressly or by implication, that the cost of using the Internet for one year would be zero, or that Internet service could be purchased for a flat monthly fee, such as \$14.95 a month. Respondent has failed to disclose adequately before purchase that many consumers would incur significant, additional costs such as long distance telephone charges or charges for the use of "toll free" 1-888 numbers to connect to the Internet. This fact would be material to consumers in their purchase or use of

Complaint

the service or product. The failure to adequately disclose this fact, in light of the representation made, was, and is, a deceptive practice.

12. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-second day of June, 2001, has issued this complaint against respondent.



67% of Gateway buyers have
purchased a Gateway™ PC before.

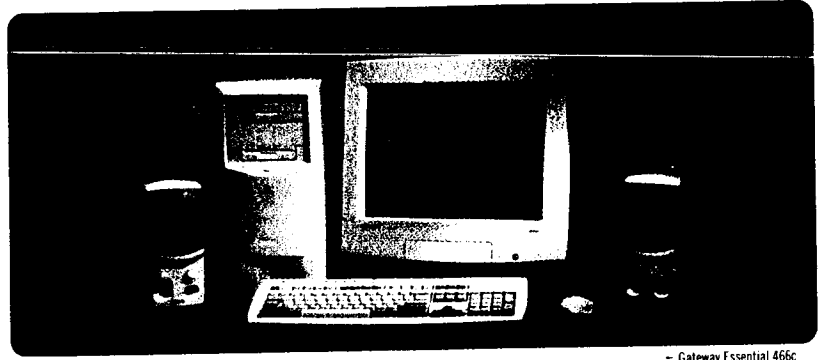
Thanks, Gateway owners, for making us #1
in customer loyalty.**



EXHIBIT A

Gateway[™]
Connect with us.

Source: ACNielsen Tech*Watch™ U.S. households owning a Gateway PC who purchased January - March 1999. 67.4% purchased another Gateway system.
Source: ACNielsen Tech*Watch October 1998 - March 1999.



Gateway Essential 466c

The Gateway™ Essential Line: powerful PCs at practical prices.

Okay, maybe you don't need an astrophysics supercomputer. But you still want a fast processor and ample memory and drive space. Look no further than Gateway Essential PCs. With video, sound and Intel® processors—and affordable prices—they're compromise-free PCs. Each one includes a year on the Internet.¹ Pick a model, and we'll customize it the way you want.

Gateway Essential 400c

- Intel® Celeron™ Processor 400MHz with 128K Cache
- 32MB SDRAM
- EV500 15" Monitor (13.9" viewable)
- 8MB AGP Graphics
- 6.8GB Ultra ATA Hard Drive
- 40X Max² Variable CD-ROM
- SoundBlaster® AudioPCI™ 64D
- GCS-200 Speakers by Cambridge® SoundWorks
- 56K³ Internet/Fax Modem
- Micro-Tower Case
- Microsoft® Windows® 98 Second Edition
- Microsoft Works Suite 99
- 1-Year Parts, Labor & Limited Warranty On-site Service*
- 1-Year gateway.net™ Internet Access¹

\$999 or as low as \$28/mo. for 48 mos. through our Your.)WareSM program

All Gateway Essential PCs include:

- 3.5" Diskette Drive
- Keyboard, Mouse
- Year 2000 Compliance⁴

Gateway Essential 466c

- Intel Celeron Processor 466MHz with 128K Cache
- 64MB SDRAM
- EV700 17" Monitor (15.9" viewable)
- 8MB AGP Graphics
- 13.6GB Ultra ATA Hard Drive
- 40X Max² Variable CD-ROM
- SoundBlaster AudioPCI 64D
- GCS-200 Speakers by Cambridge SoundWorks
- 56K³ Internet/Fax Modem
- Micro-Tower Case
- Microsoft Windows 98 Second Edition
- Microsoft Works Suite 99
- 1-Year Parts, Labor & Limited Warranty On-site Service*
- 1-Year gateway.net Internet Access¹

\$1299 or as low as \$37/mo. for 48 mos. through our Your.)Ware program

Upgrade any system:

- Add a Gravis™ GamePad Pro USB - \$19
- Upgrade from EV500 15" to EV700 17" Monitor (15.9" viewable) - \$115
- Upgrade from EV700 17" to EV910 19" Monitor (18" viewable) - \$130
- Add a Hewlett®-Packard DeskJet® 812C Color Printer - \$199
- Add a 100MB Iomega® ZIP BUILT-IN™ Internal Drive w/1 ZIP Disk - \$79

Gateway Essential 450SE

- Intel Pentium® III Processor 450MHz with 512K Cache
- 64MB SDRAM
- EV700 17" Monitor (15.9" viewable)
- 16MB NVIDIA™ RIVA TNT™ AGP Graphics
- 13.6GB Ultra ATA Hard Drive
- 40X Max² Variable CD-ROM
- SoundBlaster AudioPCI 64D
- GCS-200 Speakers by Cambridge SoundWorks
- 56K³ Internet/Fax Modem
- Mid-Tower Case
- Canon Color Printer
- Microsoft Windows 98 Second Edition
- Microsoft Works Suite 99
- 3-Year Parts & Labor, 1-Year Limited Warranty On-site Service*
- 1-Year gateway.net Internet Access¹

\$1499 or as low as \$42/mo. for 48 mos. through our Your.)Ware program

- Upgrade to a DVD-ROM Drive - \$80
- Upgrade to a Boston Acoustics® 3-Piece Speaker System - \$30



Get in touch with us for more information, and for the most current pricing.

CALL 1 800 846 5257	CLICK www.gateway.com	COME IN Gateway Country SM
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Gateway's Solutions and Your:~Ware™ Program:

Choose any Gateway Essential or Gateway Performance PC, and you can customize it with the following solution packages. We test out software titles and accessories to find the best products, and package them for better value. It's a great way to save on a computer for back-to-school.

KidBuilder '99 Preschool-Kindergarten

CTW/Sesame Street®: Toddlers Deluxe
Reader Rabbit's® Kindergarten
Dr. Seuss Preschool
Schoolhouse Rock® Thinking Games
CTW/Sesame Street:
Elmo's Preschool Deluxe
Dr. Seuss: The Cat in the Hat
Reader Rabbit's Reading

\$99

KidBuilder '99 Grades 1-4

Reader Rabbit's 1st Grade
Super Solvers® Mission T.H.I.N.K.™
The ClueFinders™: 4th Grade Adventures
Reader Rabbit's Math Ages 6-9
Arthur's™ Computer Adventure
Schoolhouse Rock: Grammar Rock®
Madeline™ Thinking Games Deluxe

\$99

KidBuilder '99 Grades 5-8

The Oregon Trail® 3rd Edition –
Pioneer Adventures
The Princeton Review Algebra 1
Compton's® 3D World Atlas Deluxe™
BodyWorks® 6.0
Super Solvers Reading Ages 9-12
Where in the World is Carmen Sandiego?®
Deluxe Edition

\$99

Learning 2000™ Software

This massive library of multimedia educational software incorporates interactive video, audio, text and illustrations to teach kids core learning skills: reading, writing, math and algebra. It is the ultimate resource for students from ages 8-18.

\$99

for a limited time with system purchase.
(\$599 retail value)

Total Travel Package

Rand McNally® TripMaker™ Deluxe
1999 Edition
Rand McNally StreetFinder™ Deluxe
Rand McNally wire-bound Road Atlas
& Travel Guide
Mindscape's® World Atlas & Almanac
1-year prepaid basic membership to AAA†
(for Gateway clients who are already AAA
members, the monies would be applied
to renewal)

\$129 (\$199 with Global
Positioning Satellite)

Family Entertainment Package

SketchBoard™ Drawing Tablet
Hasbro Interactive™ Classic Games
Pictionary®, Boggle®, Scrabble®, Sorry!®,
Ultimate Yahtzee®, Clue®, Murder at
Boddy Mansion, The Game of Life®

\$149 (\$119 after \$30 SketchBoard
mail-in rebate)

Deluxe Reference Bundle

PrintMaster® Deluxe 7.0
1999 Grolier Multimedia Encyclopedia®
Deluxe Edition
Rand McNally TripMaker® Deluxe 1999 Edition
Rand McNally StreetFinder®
Deluxe 1999 Edition
Mindscape's® World Atlas & Almanac
Home Medical Advisor

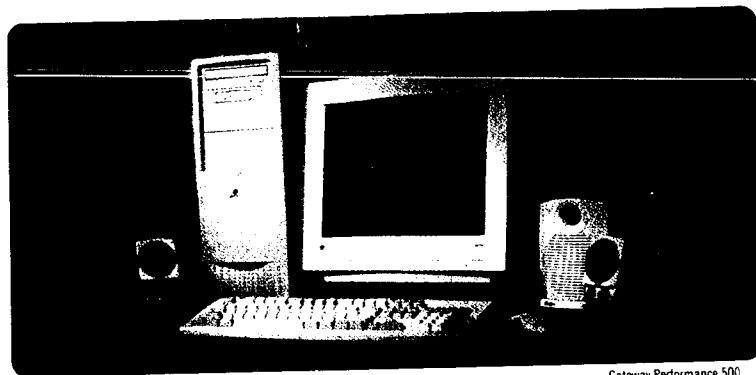
\$99

What is the Your:~Ware™ program and why is it for you? Your:~Ware is our way of helping you personalize your order in every way. First, choose a model from any of our lines of PCs. Then add on any peripherals, accessories or solution packages (like the ones above) to get exactly the right computer. Then we'll help you decide which service option and financing plan are best for you. And finally, you can trade in your Gateway PC toward the purchase of a new one after two years.* The Your:~Ware program is how we get your computer to fit you perfectly.

Check out www.gateway.com™ and choose from over 30,000 hardware accessories and software titles.

Ad Code # 000254

*Call 1-800-GATEWAY or write to Gateway Terms & Conditions, P.O. Box 1951, North Sioux City, SD 57049-1951 for a free copy of our limited warranties and on-site service agreements. On-site customers: If Gateway determines on-site service is necessary, it will be provided for product in the continental United States, Alaska, Hawaii, Puerto Rico and Canada (excluding mice, keyboards, portable docking stations, external peripherals and monitors). You may be asked to take your PC to a Gateway location for warranty service. See agreements for specific terms and limitations. **Loan financing available on approved credit through independent lender. Payments based on 48-month term and an Annual Percentage Rate as low as 14.9%. Your APR may be higher. 2% access check fee (\$2min/\$15max.); not applicable to Gateway purchases. Gateway purchases will qualify for the Your:~Ware program by: 1) financing through a Gateway authorized lender; 2) purchasing an additional software or solution bundle; or 3) purchasing support package upgrades. Trade-in available between the first day of the 24th month and the last day of the 49th month after delivery of Your:~Ware product. Gateway will give you the average wholesale value for the product in good condition using the then current Onon Blue Book or similar commercially reasonable industry standard as determined in Gateway's sole discretion. Other terms and conditions apply. Call for details. ***Offer expires 9/20/99. †AAA membership subject to rules and membership approval of local AAA club in your area. If your membership is not approved by your local club, the national AAA office will issue you a refund in the amount of a one year basic membership for that local club.



Gateway Performance 500

The Gateway™ Performance Line: serious computers with serious components.

Looking for a PC that's not fooling around? One with blazing processor speeds that's tricked out with the highest-end components? Bring on the Gateway Performance PCs—our line of top-tier machines. With the latest processor technology, lots of room to expand and intense multimedia prowess, they're dialed up to power-user levels.

Gateway Performance 500

- Intel® Pentium® III Processor 500MHz with 512K Cache
- 128MB SDRAM
- EV700 .28 Screen Pitch 17" Monitor (15.9" viewable)
- 16MB 3Dfx® Voodoo™ 3 3000G AGP Graphics**
- 13.6GB Ultra ATA 66 7200 RPM Hard Drive
- 6X DVD-ROM Drive & MPEG2 Decoder
- SoundBlaster® AudioPCI™ 64D
- Boston Acoustics® BA735™ Digital Speakers w/Subwoofer**
- 3Com® U.S. Robotics® 56K¹ PCI Voice WinModem®
- 8-Bay Mid-Tower Case
- Microsoft® Windows® 98 Second Edition
- MS® Works Suite 99 Software

\$1699 or as low as **\$48/mo.** for 48 mos. through our YourWare™ program*

All Gateway Performance PCs include:

- 3.5" Diskette Drive
- MultiFunction Keyboard, Mouse
- Year 2000 Compliance⁴
- 3-Year Parts & Labor Limited Warranty / 1-Year On-site Warranty Service**

Gateway Performance 550

- Intel Pentium III Processor 550MHz with 512K Cache
- 128MB SDRAM
- VX900 .26 Screen Pitch 19" Monitor (18" viewable)
- 32MB NVIDIA™ RIVA TNT2® AGP Graphics**
- 13.6GB Ultra ATA 66 7200 RPM Hard Drive
- 6X DVD-ROM Drive & MPEG2 Decoder
- SoundBlaster AudioPCI 64D
- Boston Acoustics BA735 Digital Speakers w/ Subwoofer**
- 3Com U.S. Robotics 56K¹ PCI Voice WinModem
- 8-Bay Mid-Tower Case
- Microsoft Windows 98 Second Edition
- MS Works Suite 99 Software

\$2199 or as low as **\$62/mo.** for 48 mos. through our YourWare program*

Upgrade any system:

- Add a 100MB Iomega® ZIP BUILT-IN™ Internal Drive w/1 ZIP Disk - \$79
- Upgrade from EV700 17" to EV910 19" Monitor (18" viewable) - \$130
- Upgrade from EV700 17" to VX900 19" Monitor (18" viewable) - \$230
- Upgrade from 16MB 3Dfx Voodoo 3 3000G to 32MB NVIDIA RIVA TNT2 AGP Graphics - \$70

Gateway Performance 600

- Intel Pentium III Processor 600MHz with 512K Cache
- 128MB SDRAM
- VX900 .26 Screen Pitch 19" Monitor (18" viewable)
- 32MB NVIDIA RIVA TNT2 AGP Graphics**
- 20.5GB Ultra ATA 66 7200 RPM Hard Drive
- 6X DVD-ROM Drive & MPEG2 Decoder
- SoundBlaster Live!Value with Digital Audio Output**
- Boston Acoustics BA735 Digital Speakers w/Subwoofer**
- 3Com U.S. Robotics 56K¹ PCI Voice WinModem
- Intel® AnyPoint™ Home Networking**
- 8-Bay Mid-Tower Case
- Microsoft Windows 98 Second Edition
- MS Works Suite 99 Software

\$2399 or as low as **\$67/mo.** for 48 mos. through our YourWare program*

- Upgrade to a 10-Bay Tower Case - \$50
- Upgrade to MS Office 2000 Small Business Software - \$199
- Add 1-Year gateway.net™ Internet Access¹ - \$129

Gateway Performance 600XL

- Intel Pentium III Processor 600MHz with 512K Cache
- 128MB SDRAM
- VX900 .26 Screen Pitch 19" Monitor (18" viewable)
- 32MB NVIDIA RIVA TNT2 Ultra AGP Graphics**
- TV/FM Tuner Card
- 27.3GB Ultra ATA 66 7200 RPM Hard Drive
- 6X DVD-ROM Drive & MPEG2 Decoder
- Philips® CD-RW (CD-Rewritable) Drive with Media
- SoundBlaster Live!Value with Digital Audio Output**
- Boston Acoustics Digital MediaTheater™ Dolby® Digital Speakers w/Subwoofer**
- 3Com U.S. Robotics 56K¹ PCI Voice WinModem
- Intel AnyPoint Home Networking**
- 10-Bay Tower Case
- Microsoft Windows 98 Second Edition
- MS Office 2000 Small Business Software

\$2999 or as low as **\$84/mo.** for 48 mos. through our YourWare program*

Ask us for details about software training offered at our Gateway Country® stores.



Gateway's Solutions and Your:)WareSM Program:

Choose any Gateway Essential or Gateway Performance PC, and you can customize it with the following solution packages. We test out software titles and accessories to find the best products, and package them for better value. It's a great way to save on a computer for back-to-school.

KidBuilder '99 Preschool-Kindergarten

CTW/Sesame Street[®]: Toddlers Deluxe
Reader Rabbit's[™] Kindergarten
Dr. Seuss Preschool
Schoolhouse Rock[®] Thinking Games
CTW/Sesame Street:
Elmo's Preschool Deluxe
Dr. Seuss: The Cat in the Hat
Reader Rabbit's Reading

\$99

KidBuilder '99 Grades 1-4

Reader Rabbit's 1st Grade
Super Solvers[®] Mission T.H.I.N.K.™
The Cluefinders[™]: 4th Grade Adventures
Reader Rabbit's Math Ages 6-9
Arthur's[™] Computer Adventure
Schoolhouse Rock: Grammar Rock[®]
Madeline[™] Thinking Games Deluxe

\$99

KidBuilder '99 Grades 5-8

The Oregon Trail[™] 3rd Edition –
Pioneer Adventures
The Princeton Review Algebra 1
Compton's[™] 3D World Atlas Deluxe™
BodyWorks[™] 6.0
Super Solvers Reading Ages 9-12
Where in the World is Carmen Sandiego?[®]
Deluxe Edition

\$99

Learning 2000[™] Software

This massive library of multimedia educational software incorporates interactive video, audio, text and illustrations to teach kids core learning skills: reading, writing, math and algebra. It is the ultimate resource for students from ages 8-16.

\$99 for a limited time with
system purchase.***
(\$599 retail value)

Total Travel Package

Rand McNally[®] TripMaker[™] Deluxe
1999 Edition
Rand McNally StreetFinder[™] Deluxe
Rand McNally wire-bound Road Atlas
& Travel Guide
Mindscape's[®] World Atlas & Almanac
1-year prepaid basic membership to AAA†
(for Gateway clients who are already AAA
members, the monies would be applied
to renewal)

\$129 (\$199 with Global
Positioning Satellite)

Family Entertainment Package

SketchBoard[™] Drawing Tablet
Hasbro Interactive[™] Classic Games
Pictionary[®], Boggle[®], Scrabble[®], Sorry![®]
Ultimate Yahtzee[®], Clue[®], Murder at
Boddy Mansion, The Game of Life[®]

\$149 (\$119 after \$30 SketchBoard
mail-in rebate)

Deluxe Reference Bundle

PrintMaster[®] Deluxe 7.0
1999 Grolier Multimedia Encyclopedia[®]
Deluxe Edition
Rand McNally TripMaker[™] Deluxe 1999 Edition
Rand McNally StreetFinder[™]
Deluxe 1999 Edition
Mindscape's[™] World Atlas & Almanac
Home Medical Advisor

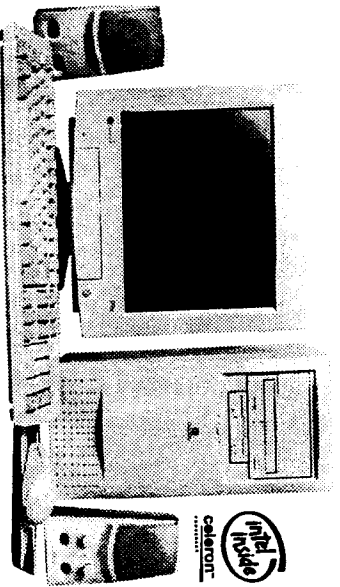
\$99

What is the Your:)WareSM program and why is it for you? Your:)Ware is our way of helping you personalize your order in every way. First, choose a model from any of our lines of PCs. Then add on any peripherals, accessories or solution packages (like the ones above) to get exactly the right computer. Then we'll help you decide which service option and financing plan are best for you. And finally, you can trade in your Gateway PC toward the purchase of a new one after two years. The Your:)Ware program is how we get your computer to fit you perfectly.

Check out www.gateway.com and choose from over 30,000 hardware accessories and software titles.

Ad Code: # 0902/99

*Call 1-800-GATEWAY or write to Gateway Terms & Conditions, P.O. Box 1951, North Sioux City, SD 57049-1951 for a free copy of our limited warranties and on-site service agreements. On-site customers: If Gateway determines on-site service is necessary, it will be provided for product in the continental United States, Alaska, Hawaii, Puerto Rico and Canada (excluding mice, keyboards, portable docking stations, external peripherals and monitors). You may be asked to take your PC to a Gateway location for warranty service. See agreements for specific terms and limitations. **Loan financing available on approved credit through independent lender. Payments based on 48-month term and an Annual Percentage Rate as low as 14.9%. Your APR may be higher. 2% access check fee (\$2min / \$15max.), not applicable to Gateway purchases. Gateway purchases will qualify for the Your:)Ware program by: 1) financing through a Gateway authorized lender; 2) purchasing an additional software or solution bundle; or 3) purchasing support package upgrades. Trade-in available between the first day of the 24th month and the last day of the 49th month after delivery of Your:)Ware product. Gateway will give you the average wholesale value for the product in good condition using the then current Orion Blue Book or similar commercially reasonable industry standard as determined in Gateway's sole discretion. Other terms and conditions apply. Call for details. ***Offer expires 5/20/99. TAAA membership subject to rules and membership approval of local AAA club in your area. If your membership is not approved by your local club, the national AAA office will issue you a refund in the amount of a one year basic membership for that local club.

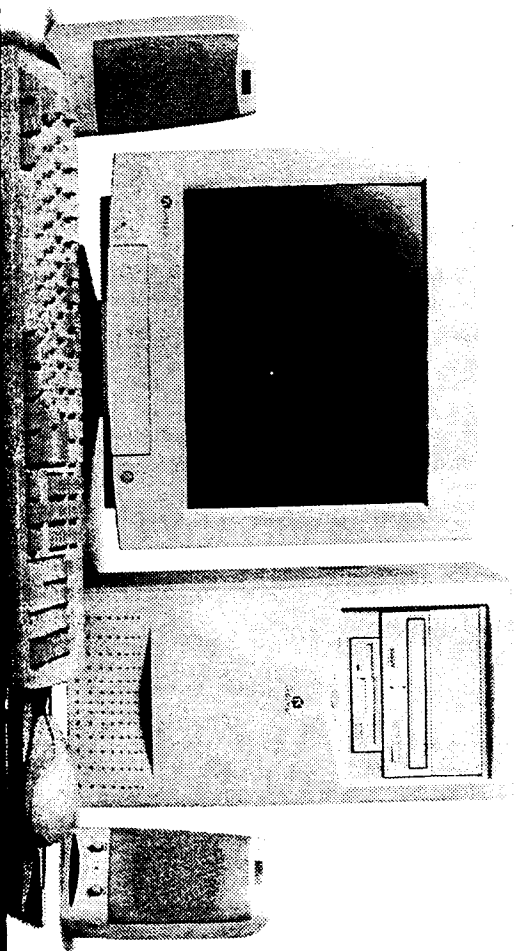


**GET A GATEWAY™ ESSENTIAL PC
WITH INTERNET INCLUDED:
LESS THAN A
DOLLAR A DAY.**

An unbelievable computer that actually comes with a year of Internet access — only \$28 a month? That's less than a dollar a day. And this isn't just any computer. It's a loaded Gateway Essential PC with an Intel® Celeron™ processor, monitor, Internet and software. Let's face it folks, buying a computer just doesn't get any better than this.

GATEWAY™ ESSENTIAL 400c

**Some PCs include a mouse pad.
For \$1299, this one includes the
Internet for a year.
(And a mouse pad.)**



"Mystery Box -Free ISP"

QGTY3997

6/8/99

OPEN ON TWO BOXES, ONE CORRUGATED BROWN WITH QUESTION MARKS. THE OTHER IS THE GATEWAY BOX. A HAND COMES IN TO PULL THE GATEWAY BOX AWAY TO REVEAL THE FULLY LOADED GATEWAY PC. DETAILED VIDEO INSTRUCTIONS TO FOLLOW.

VO:

When you buy a bargain basement PC, what you're really buying is a mystery box.

Will there be a monitor? Probably not.

Lots of software? Ha.

A free year on the Internet?

Legal Super:

For a limited time. No monthly fee 1st year. Rural access \$3.95/hour. Local access \$1.50/hour over 150 hours. 12 months runs from delivery. Must register w/in 30 days of delivery.

24/7 tech support? Dream on.

With a Gateway Essential PC, you know exactly what you're getting.

Monitor, great software, award-winning tech support and free Internet access, for \$28 a month. No mystery there.

Supers:

As low as \$28/mo. for 48 mo. or \$999

Legal Super:

Prices exclude shipping and handling and taxes. Loan financing available on approved credit through independent lender. APR as low as 14.9% 2% check access fee (\$2 min/\$15 max.). Restrictions apply. Call for details.

Call 1-800-GATEWAY for a Gateway Essential PC with an Intel Celeron processor.

Supers:

1-800-GATEWAY

free Internet

End frame:

Gateway logo

1-800-GATEWAY

www.gateway.com

Intel logo

000081

Gateway

EXHIBIT D

Let's talk about the traveling companion

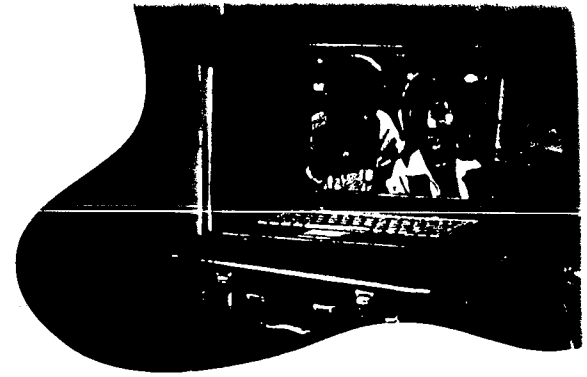


On the road again? We'll build you a portable with all the power of a desktop PC. So you can do spreadsheets, send e-mails, make presentations, and more, to make you just as productive as back at the office. Pentium® II play games and watch DVD movies to make traveling more fun. Pentium® II and 9100 each won the August '98 *PC Magazine* Editor's Choice award, and the Pentium® II 9100 won the magazine's Best Buy Award as well. With the best portables on the market, there's no more reason why customers who buy another computer come home to Gateway.

EXHIBIT E

the ultimate nion.


With the power and features
of desktop PCs, laptops, PDAs,
e-mails, make presentations
anywhere. You can even
work on the go. More fun. The Solo[®] 2500
and the Solo 2500 won't
be in the market, it's just one
to Gateway.




The latest thing in portables

Every Gateway client is unique, and so is every Gateway PC. The systems here are just examples of what we can build for you.


King of the Road Solo 5150LS

-  14.1" XGATFT Color Display
- Intel[®] Pentium[®] II Processor 233MHz with 512K Cache
- 64MB SDRAM (expandable to 160MB)
- 2.5MB 256-Bit Graphics Accelerator
- Modular DVD-ROM II Drive & 3.5" Disk Drive
- 4GB Ultra ATA Hard Drive
- Lithium Ion Battery W/By Gauge & AC Pack
- 2 USB Ports, CardBus & Zoomed Video Support
- NTSC/PAL Video Output
- Integrated 16-Bit Sound & Stereo Speakers
- TelePath[®] 56K¹ Modem for Windows
- Deluxe Leather Case
- EZ Pad[®] Pointing Device

-  Microsoft[®] Windows[®] 98 & MS[®] Office 97, Small Business Edition plus Bookshelf[®] 98


LapLink[®] V.7.5 for Windows 98 & McAfee[®] VirusScan

-  Gateway Gold[™] Service² for Portable PCs

 As low as
\$81/mo.


for 48 mos. or \$2899³


The Portable Desktop Solo 9100LS

-  14.1" XGA TFT Color Display
- Intel Pentium II Processor 266MHz with 512K Cache
- 64MB SDRAM (expandable to 192MB)
- 4MB SGRAM 3-D Graphics Accelerator
- Modular DVD-ROM Drive & 3.5" Disk Drive
- 6GB Ultra ATA Hard Drive
- Lithium Ion Battery & AC Pack
- 2 USB Ports, CardBus & Zoomed Video Support
- NTSC/PAL Video Input & Output
- 16-Bit Wavetable Sound & Altec Lansing[®] Speakers
- TelePath 56K¹ Modem for Windows
- Deluxe Leather Case
- EZ Pad Pointing Device

-  Microsoft Windows 98 & MS Office 97, Small Business Edition plus Bookshelf 98

LapLink V.7.5 for Windows 98 & McAfee VirusScan

-  Gateway Gold Service² for Portable PCs

 As low as
\$95/mo.

for 48 mos. or \$3399³

Other goodies

All these add-ons are available when you purchase a Gateway system.

Canon[®] BJC[®]-80 Color Bubble Jet Printer (\$299)

Kensington[®] Saddlebag (\$79)

MS Professional Resource Suite (\$99)





PC Card Modem with Cellular Support (\$50 upgrade from Winmodem)

Kensington Master Lock[®] (\$39)

gateway.netSM
\$14.95/mo.⁴

Frequent Flier

Solo 2500SE

-  12.1" TFT Color Display
- Intel Pentium Processor with MMX[™] Technology 200MHz
- 32MB SDRAM (expandable to 160MB)
- 2MB Graphics Accelerator w/ 64K Colors
- Integrated 8X min/20X max CD-ROM Drive & 3.5" Disk Drive
- 2GB Ultra ATA Hard Drive
- NiMH Battery & AC Pack
- USB Ports, CardBus & Zoomed Video Support
- NTSC/PAL Video Output
- Integrated 16-Bit Sound & Stereo Speakers
- TelePath 56K¹ Modem for Windows
- Casual Case
- EZ Pad Pointing Device
-  Microsoft Windows 98 & MS Home Essentials[™]
- LapLink V.7.5 for Windows 98 & McAfee VirusScan
-  Gateway Gold Service² for Portable PCs
-  As low as
\$50/mo.
- for 48 mos. or \$179

P4



Let's talk about your Gateway

888-888-2013

www.gateway.com/yourware

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The Affordable Portable.

Whether you work in a downtown office or downstairs at home, the agreeably priced Solo® 2500SE and 2500LS are all business. Both are powered by Intel processors. They give you 12.1" TFT color screens for clear, brilliant color; superior 16-bit sound; stereo speakers; plus, integrated CD-ROM and diskette drives. And have you heard? Gateway can customize a portable to fit your specific needs.

The 2500SE. The even more powerful 2500LS. Whichever one is right for your career and life, we're talking two powerful portables that are raring to go.





Solo® 2500SE Your Basic Business Partner



12.1" TFT Color Display
 Intel® Pentium® Processor with MMX™ Technology 200 MHz
 32MB SDRAM (expandable to 160MB)
 2MB Graphics Accelerator w/ 64K Colors
 Integrated 8X min/20X max CD-ROM Drive & 3.5" Diskette Drive
 2GB Ultra ATA Hard Drive
 NiMH Battery & AC Pack
 USB Ports, CardBus & Zoomed Video Support
 NTSC/PAL Video Output
 Integrated 16-Bit Sound & Stereo Speakers
 TelePath® 56K Modem for Windows
 EZ Pad® Pointing Device
 Carrying Case



Microsoft® Windows® 98
 Microsoft Home Essentials™
 LapLink® V.7.5 for Windows 98
 McAfee® VirusScan



Gateway Gold™ Service²
 for Portable PCs



GoldValue Lease \$64/mo. for 36 mos.³
 or \$1799

Solo 2500LS The Business Builder



12.1" TFT Color Display
 Intel Pentium II Processor 233MHz w/ 512K Cache
 32MB SDRAM (expandable to 160MB)
 2MB Graphics Accelerator w/ 64K Colors
 Integrated DVD II Drive & 3.5" Diskette Drive
 4GB Ultra ATA Hard Drive
 Lithium Ion Battery & AC Pack
 USB Ports, CardBus & Zoomed Video Support
 NTSC/PAL Video Output
 Integrated 16-Bit Sound & Stereo Speakers
 TelePath 56K Modem for Windows
 EZ Pad Pointing Device
 Carrying Case



Microsoft Windows 98
 Microsoft Office 97, Small Business Edition plus Bookshelf® 98
 LapLink V.7.5 for Windows 98
 McAfee VirusScan



Gateway Gold Service²
 for Portable PCs



GoldValue Lease \$89/mo. for 36 mos.³
 or \$2499

call 888-888-2013

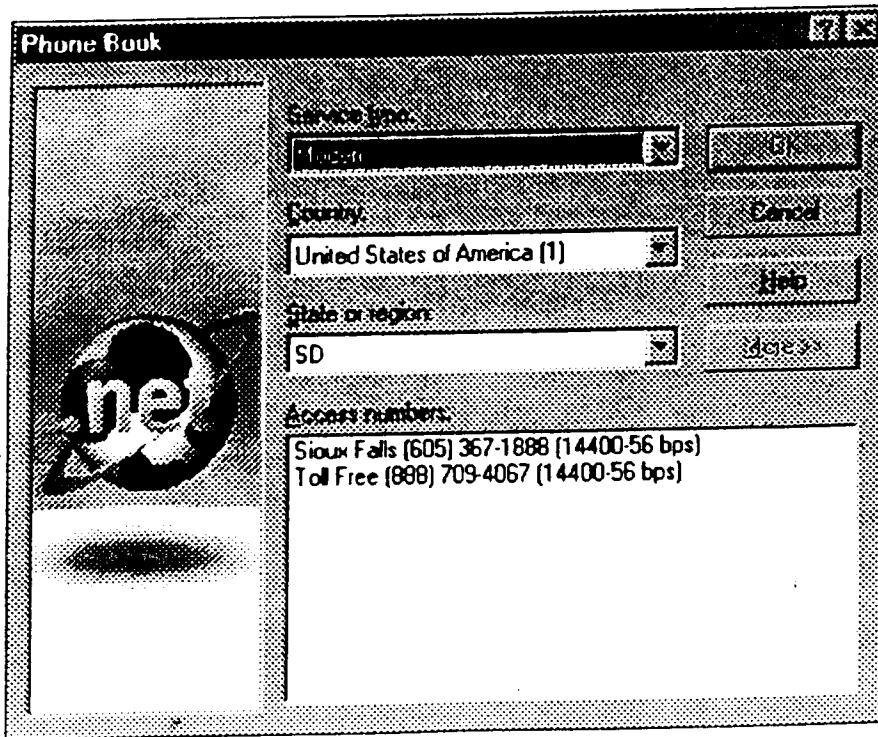
www.gateway.com

Let's talk about your



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Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Western Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Gateway, Inc. ("Gateway"), is a Delaware corporation with its principal office or place of business at 610 Gateway Drive, North Sioux City, South Dakota 57049.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

ORDER

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondent” shall mean Gateway, Inc., its successors and assigns and its officers, agents, representatives, and employees.
2. “Clear(ly) and conspicuous(ly)” shall mean as follows:
 - a. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement if the claim triggering the disclosure is presented by both audio and visual means. In any claim presented solely through visual or audio means, the disclosure may be made through the same means in which the claim is presented. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.
 - b. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.
 - c. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently

Decision and Order

noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. In the case of advertisements disseminated by means of an interactive electronic medium, such as software, the Internet, and online services, a disclosure made “through the use of a hyperlink” shall mean a hyperlink that in itself is clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same Web page, online service page or other electronic page, and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display window or panel.
4. “Internet access service” shall mean any service that enables a consumer to access the Internet or any other electronic network.
5. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Internet access service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

- A. the price or cost to consumers of such service or what is included in the price of any such service; or
- B. the price or cost incurred by consumers, if any, for the use

Decision and Order

of "1-800," "1-877," or "1-888" telephone numbers, or any other telephone numbers for which respondent is the toll free subscriber.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Internet access service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the use of "1-800," "1-877," or "1-888" telephone numbers, or any other telephone numbers for which respondent is the toll free subscriber unless it discloses, clearly and conspicuously, the dollar amounts of any hourly surcharges and any other fees charged by respondent for use of such numbers.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Internet access service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the price or cost to consumers of such service, unless it discloses, clearly and conspicuously:

- A. that consumers may have to pay long distance telephone charges, hourly surcharges, and other fees in excess of local telephone service charges to access the service, if that is the case;
- B. the dollar amounts of any such hourly surcharges and any other such fees, other than fees which are not within the control of respondent or any of its promotional partners providing the service; and

Decision and Order

- C. a means for each consumer to ascertain whether he or she would incur such fees or charges to access the service, such as a list of local access numbers available on the Internet or other electronic network; and
- D. that consumers should contact their local telephone company to determine whether using the access telephone number for the location closest to them will incur charges in excess of local telephone service charges.

Provided, that in the case of advertisements disseminated through an interactive electronic medium, respondent may make the disclosures required by Part III. A through D above through the use of a hyperlink labeled: “Additional Phone Charges May Apply. Click Here.”

Provided, further, that in the case of television advertisements, respondent may comply with Part III. A through D above by making the audio and visual disclosures through the use of the phrase “Additional Phone Charges May Apply. Call [a telephone number which is free to consumers] for Details,” and by clearly and conspicuously disclosing the information required by Part III. A through D above at the time consumers contact respondent through the telephone number.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any Internet access service, in or affecting commerce, shall prior to consumers incurring any financial obligation for such service or any other product or service sold in connection with such service, maintain adequate customer support to respond to consumer inquiries, including but not limited to, an adequately staffed, telephone number which is free to consumers and a directory on the Internet, to determine the telephone numbers available for accessing any such service and the town or city where those numbers are located.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall offer reimbursement to certain local access subscribers to Gateway.net services as provided in this Part.

- A. Respondent shall reimburse any Gateway.net local access subscriber, within thirty (30) days of receipt of the subscriber's "Reimbursement Notification and Request," attached as Appendix A to this order, as required under subpart B of this Part, who:
1. between January 19 and April 1, 1999 registered as a local access subscriber to the Gateway.net service;
 2. between January 19, 1999 and August 15, 1999 incurred charges for the use of a "1-800," "1-877," or "1-888" telephone number while registered as a local subscriber;
 3. has not been previously reimbursed for these charges;
and
 4. within sixty (60) days of receipt of Appendix A provides respondent with a signed statement that s/he requests reimbursement and has not previously been reimbursed for these charges.
- B. Respondent shall send, within forty-five (45) days after the date of service of this order, by first class mail, exact copies of the "Reimbursement Notification and Request" attached hereto as Appendix A to the last known address of any Gateway.net local access subscriber who, according to respondent's records, paid any fee for the use of a "1-800," "1-877," or "1-888" telephone number between January 19, 1999 and August 15, 1999 and has not received full reimbursement for such use. Respondent shall include a pre-addressed, postage paid envelope for consumers to return a signed "Reimbursement Notification and Request."

Decision and Order

The front of the envelope transmitting Appendix A shall be in the form set forth in Appendix B to this order. The phrase "ATTENTION: REIMBURSEMENT OFFER" shall appear on the front of the envelope in typeface equal or larger in size to 14 point. The words "FORWARD & ADDRESS CORRECTION REQUESTED" shall appear in the upper left-hand corner, one-quarter of an inch beneath the return address. Except as otherwise provided by this order, no information other than that required by this Part shall be included in or added to the above items, nor shall any other material be transmitted therewith.

Respondent shall also mail the "Reimbursement Notification and Request" and a pre-addressed, postage paid envelope, to any such local access subscriber whose mailing is returned by the U.S. Postal Service as undeliverable and for whom respondent thereafter obtains a corrected address via the National Change of Address ("NCOA") registry. Respondent shall retain a NCOA licensee to update its list of such local access subscribers under this subpart by processing the list through the NCOA database. The mailing required by this subpart shall be made within ten (10) days of respondent's receipt of a corrected address or information identifying each such local access subscriber.

- C. Respondent shall send reimbursement checks to local access subscribers, under subpart B of this Part, who complete and return to respondent the "Reimbursement Notification and Request" set forth in Appendix A to this order, postmarked within sixty (60) days of receiving it, and who fulfill the requirements set forth in subpart A of this Part. Respondent shall send each reimbursement check by first-class mail, postage prepaid, within thirty (30) days of receipt of each local subscriber's completed "Reimbursement Notification and Request." The front of the envelope transmitting reimbursement checks shall be in the form set forth in Appendix C to this order.

Decision and Order

- D. Within one (1) year after the date of service of this order, respondent shall furnish to the Commission a list of the local access subscribers who have applied for reimbursement pursuant to subparts B and C of this Part, the amount of each reimbursement request, and the date of mailing and amount of the reimbursement provided to each applicant.
- E. Respondent shall, for three (3) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:
1. Sufficient records to identify:
 - a. The name and last known address of each person sent a notification pursuant to this order and the date the notification was mailed; and
 - b. The name and address of each person who is notified by respondent that his or her reimbursement application is deficient;
 2. Sample copies of all letters, descriptions, applications and forms sent to local access subscribers or others pursuant to this order; and
 3. Each and every reimbursement application received.

VI.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation, provided, however, that multiple versions of

Decision and Order

advertisements and promotional materials need not be maintained or submitted if they differ only in representations not at issue in this order; and

- B. All materials that were relied upon in disseminating the representation.

VII.

IT IS FURTHER ORDERED that respondent and its successors and assigns, shall deliver a copy of this order to all current and future officers and directors, and to all current and future managing employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver a copy of this order to current personnel within thirty (30) days after the date of service of this order, and, for a period of three (3) years from the date of service of this order, to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

IT IS FURTHER ORDERED that respondent and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Decision and Order

IX.

IT IS FURTHER ORDERED that respondent and its successors and assigns, shall, within ninety (90) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on June 22, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Chairman Muris not participating.

Decision and Order

APPENDIX A**REIMBURSEMENT NOTIFICATION AND REQUEST**

[Name and Address of Recipient]

Dear [NAME]:

Our records indicate that you registered as a local access subscriber to Gateway.net between January 19, 1999 and April 1, 1999, and that you incurred charges for the use of that service between January 19, 1999 and August 15, 1999. Gateway is offering reimbursement to certain Gateway.net subscribers who, by error, were not adequately warned that they would be charged \$3.95 per hour for the use of a toll-free telephone number to access the service. Gateway initiated this reimbursement program in August, 1999 and is committed to providing refunds to customers who did not understand that a fee would be charged for the use of these numbers. We would, therefore, like to offer you reimbursement for the fees you paid, if we have not already done so.

Gateway recently settled a dispute with the Federal Trade Commission that dealt with, among other things, the adequacy of advertising disclosures to warn customers of possible phone charges for Internet access. Our agreement with the Commission provides that we continue the process we had already begun of refunding fees to customers such as you.

To request and receive your refund, simply ***sign the bottom of this letter***, stating that you have not already received reimbursement from us, ***and return the entire letter*** within 60 days in the enclosed, postage pre-paid envelope. You should return this original letter, and make a copy for your records. If you have not been fully reimbursed already, we will be pleased to send you a check within one month after we receive your signed

Decision and Order

form. If you have any questions about this letter, please call us at [toll-free telephone number].

Sincerely,

[gateway.net]

REIMBURSEMENT REQUEST

I have not been reimbursed for the \$3.95 per hour charges I incurred to access Gateway.net between January 19, 1999 and August 15, 1999; and

I request that a check be sent for the charges I paid.

Signed: _____

Decision and Order

APPENDIX B

REIMBURSEMENT NOTICE LETTER ENVELOPE

Gateway, Inc.
[address]

FORWARD & ADDRESS CORRECTION REQUESTED

[Address or address window]

**ATTENTION: NOTICE OF REIMBURSEMENT
ENCLOSED**

Decision and Order

APPENDIX C

REIMBURSEMENT CHECK ENVELOPE

Gateway, Inc.
[address]

FORWARD & ADDRESS CORRECTION REQUESTED

Window Envelope
[Indicates a check is enclosed]

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on May 4, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Gateway, Inc. (“Gateway”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Gateway advertises and sells personal computers, computer peripherals, software, and Internet services to the public. This matter concerns allegedly false and deceptive advertising of Gateway's Internet access service, “Gateway.net.” The Commission's proposed complaint alleges that Gateway advertised that with the purchase of certain computer models, Gateway.net Internet access service would be included for free for one year, or could be purchased for a flat fee, such as \$14.95 a month. In fact, for many consumers one year of Gateway.net was not free or obtainable for a flat fee, because these customers incurred long distance charges to access Gateway.net, or were charged \$3.95 per hour by Gateway for the use of a “toll-free” telephone number to access the service. The Commission's proposed complaint challenges these “free” or “flat-fee” ads as both misrepresentations and as failures to disclose material facts under Section 5 of the FTC Act. Further, the complaint alleges that Gateway falsely represented that the use of its “toll free” 1-888 number to connect to the Internet was free to consumers. In fact, Gateway charged consumers \$3.95 per hour for the use of this “toll-free” number.

The proposed consent order contains provisions designed to prevent Gateway from engaging in similar acts and practices in the future. Part I of the proposed order prohibits the company

Analysis

from misrepresenting the price or cost of any Internet access service, or of any "toll-free" telephone number. Under the order, the term "Internet access service" is defined as "any service that enables a consumer to access the Internet or any other electronic network."

Part II of the order prohibits representations regarding the price or cost of any "1-800" or "toll-free" telephone number provided to the consumer by Gateway unless it discloses, clearly and conspicuously, the dollar amounts of any hourly surcharges and any other fees it charges for the use of such numbers. Part III of the proposed order requires that Gateway clearly and prominently disclose that consumers may have to pay long distance telephone charges, hourly surcharges, or other costs in excess of local telephone service charges to access any Internet access service. Gateway must disclose the dollar amounts of any such fees within its control or the control of any of its promotional partners providing the service. It must also provide a means for each consumer to ascertain whether he or she would incur such fees to access the service, and inform consumers that they should contact their local telephone company to determine whether using the access telephone number for the location closest to them will result in charges in excess of local telephone service charges.

___Part IV of the order requires that Gateway maintain customer support to answer consumer inquiries regarding any Internet access service, including but not limited to, an adequately staffed toll-free number where consumers can determine whether they have a local access number for such service.

Part V is a redress provision requiring that Gateway refund all charges for "toll free" numbers paid by local access plan gateway.net customers who registered for the plan between January 19, and April 1, 1999, and who paid such fees up until August 15, 1999. Parts VI through IX of the proposed order contain the usual reporting and compliance provisions, and, Part X is a provision "sunsetting" the order after twenty years, with certain exceptions.

Analysis

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

JUNO ONLINE SERVICES, INC.

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

*Docket C-4016; File No. 0023061
Complaint, June 25, 2001--Decision, June 25, 2001*

This consent order addresses representations that Respondent Juno Online Services -- an Internet service provider with approximately 842,000 subscribers to its fee-based services and nearly 4 million total active subscribers -- made for its "free" and fee-based online services. The order, among other things, prohibits the respondent from misrepresenting the price or cost of any electronic mail, Internet or other online service; the ability or terms by which consumers can cancel these Internet services; the amount of time consumers have to use these services during a free trial period before fees are charged; that Internet service is available for purchase, when it is not; or why it requests or collects credit card or any other personal identifying information from consumers. The order also prohibits the respondent from beginning to compute the billing cycle or free trial period for its Internet services before the consumer is able to use these services. In addition, the order requires the respondent to clearly and conspicuously disclose obligations that consumers have -- and the procedures they must follow -- to effectively cancel their Internet service. The order also requires the respondent to maintain adequate customer support to promptly handle requests for cancellation, terminating service before the next billing cycle. In addition, the order requires the respondent to disclose clearly and conspicuously potential toll charges associated with using its services and any cancellation penalties, and to provide consumers with reasonable means to determine the telephone numbers available for accessing its Internet services, and the town or city where these numbers are located. The order also prohibits the respondent from using or disclosing the personal identifying information obtained by the company in connection with its deceptive dry test advertisements.

Participants

For the Commission: *Laura Sullivan, Tara Hurley, Darren A. Bowie, C. Lee Peeler, and Louis Silversin.*

For the Respondent: *James H. Sneed, Amy Hancock, and Thomas B. Ensign, McDermott, Will & Emery, and Alice Lin Geene, Juno Online Services.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Juno Online Services, Inc., a corporation (“respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Juno Online Services, Inc. is a Delaware corporation with its principal office or place of business at 1540 Broadway, New York, NY 10036.
2. Respondent has developed, advertised, offered for sale, sold and distributed to the public free electronic mail and Internet access services, including Juno Basic electronic mail service and Juno Free Web service, as well as fee-based electronic mail and Internet access products and services, including Juno Gold electronic mail service and Juno Premium Web service. Respondent underwrites the cost of its free and reduced fee products and services by directing third-party advertisements and promotions to its subscribers. Respondent has offered for sale, sold and distributed such products and services through its Internet Web site www.juno.com, a toll-free telephone number and CD-ROM promotional disks distributed to consumers.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.
4. Respondent has disseminated or has caused to be disseminated advertisements and promotional materials for its electronic mail and Internet access services, including Juno Basic electronic mail service, Juno Gold electronic mail service, Juno Premium Web service and Juno Free Web service; and also has disseminated or caused to be disseminated advertisements and promotional materials for rebate programs conditioned on subscription to its fee-based Internet access services, which were offered in

Complaint

connection with the promotion and sale of various third party computer and Internet-related products, including, but not limited to, computers, printers, MP3 players and software programs. These advertisements and promotional materials, including, but not limited to, Exhibits A through E, which were disseminated through various means, including the Internet, electronic mail, toll-free telephone numbers, print, television, radio and direct mail, contain the following statements and depictions:

Advertising and Promotional Materials for “Free” Internet Trial Offers and “Free” Internet Service

Exhibit A: Full page newspaper advertisement

100% off

[appears in center of ad]

[The following statement appears at the bottom of the page in fine print.]

“Starting now, Juno is offering full Internet access for free. From free Web access to premium dial-up and broadband services, *everybody’s getting it.*” (emphasis in original).

[company name and logo]

www.juno.com

Exhibits B(1) through B(5): Banner ad for respondent’s Premium Web service with click-through display screens. This banner ad was disseminated throughout the World Wide Web and embedded into the top border of electronic mail messages viewed by subscribers of respondent’s electronic mail services. The banner ad consists of several different panels that automatically rotate, each of which, when clicked, leads consumers to a series of promotional and registration screens.

Exhibit B(1): Initial banner ad panel

Complaint



[hyperlink
to Exhibit
B(3)]

Exhibit B(2): Next banner ad panel



[hyperlink to Exhibit
B(3)]

Complaint

Exhibit B(3): Banner ad click-through screen displayed by clicking on Exhibits B(1) or B(2)

The banner ad is enclosed in a black border. At the top, a grey bar contains the text "150 HOURS FREE JUNO WEB" in white, with "FREE" being the largest word. Below this, three numbered points are listed in italics: ① *It's easy, convenient, and you ALREADY have everything you need.*; ② *There's NO RISK! Cancel and owe nothing during your FREE trial if you're not happy.*; ③ *Juno is the company you trust.* Below the list, on the left, is the text "Sign up today and save!" followed by "[link to Exhibit B(4)] →". On the right, a grey box contains the text "YES! I'm Interested!". At the bottom, a grey bar contains three buttons: "Click 'More Information' for details.", "No Thanks", and "More Information".

150 HOURS FREE JUNO WEB

① *It's easy, convenient, and you ALREADY have everything you need.*

② *There's NO RISK! Cancel and owe nothing during your FREE trial if you're not happy.*

③ *Juno is the company you trust.*

Sign up today and save!
[link to Exhibit B(4)] →

YES!
I'm Interested!

Click "More Information" for details. No Thanks More Information

Complaint

Exhibit B(4): Banner ad click-through screen displayed by clicking on the “Yes! I’m Interested” link in Exhibit B(3)

<p>Just Complete This Simple Form For 150 FREE Hours of Juno Web!</p>	<p>It’s FREE! Sign Up Today!</p>
<p>1. Fill Out Your Credit Card Number and Expiration Date:</p> <p style="text-align: center;">* * * * *</p>	<p>THE JUNO 100% SATISFACTION GUARANTEE</p>
<p>2. Confirm Your Billing Information:</p> <p style="text-align: center;">* * * * *</p> <p>[link to Exhibit B(5)]</p>	<p>If you are not completely convinced during your FREE trial that Juno Web is the best way to experience the World Wide Web, you can cancel and owe nothing. That’s a guarantee.</p> <p style="text-align: right;">→ *Terms and Conditions</p>
<p>3. Click Here To Sign Up Now!</p>	<p>System Requirements</p>
<p>I authorize you to charge me at a rate of \$19.95 per month following my FREE 150 hours in my first month as a Juno Web subscriber.*</p>	<p>No Thanks Back</p>

(Clicking on “Click Here to Sign Up Now!” registers consumers for respondent’s Premium Internet service.)

Exhibit B(5): Pop-up window viewed only if the consumer clicks on the “Terms and Conditions” link in Exhibit B(4) prior to registering for respondent’s Premium Internet service

Juno Web is a personal Internet service. Juno Web is intended for the personal use of individual Juno members (and members of their immediate households), and not for corporate or commercial

Complaint

use, or for use by organizations or other groups of users. Juno Web service is not available outside of the United States. Connections exceeding 10 hours in length are prohibited, as are simultaneous connections by two or more computers through a single Juno account. Local telephone charges may apply. See Juno's service agreement for additional terms and conditions. **Exhibits C(1) and C(2):** Promotional CD-ROM package containing installation software for respondent's Free Internet access service. The promotional CD-ROM was sent unsolicited or at the request of consumers who called the phone number 1-800-TRY-JUNO or visited respondent's Internet Web site www.juno.com.

Exhibit C(1): Front cover of promotional CD-ROM package

NO STRINGS ATTACHED

FREE

INTERNET ACCESS!

YES! COMPLETELY

FREE!

**GET
ONLINE
TODAY . . .
COMPLETELY
FREE!**

NO HIDDEN COSTS!

[company name and logo][Consumer address]

Complaint

Exhibit C(2): Back cover of promotional CD-ROM package, which exposes the front side of a CD-ROM through clear packaging

[top of the package]

Start Exploring The Internet - Completely FREE!

[exposed front side of the promotional CD-ROM, which appears in the center of the package]

[company name and logo]

**YOUR FREE
INTERNET ACCESS
STARTS HERE!**

[The following statement appears along the outer rim of CD-ROM in approximately five point type.]

“[copyright and trademark information.] Local telephone charges may apply. Users of Juno must agree to the terms of Juno’s Service Agreement, which is displayed during account creation.”

Exhibits D(1) and D(2): Two of the screens displayed during installation of respondent’s Premium Internet access software contained on a promotional CD-ROM. After consumers have registered for respondent’s Internet service and have provided credit card and other billing information, the display screens below guide them in selecting telephone access numbers to connect to the Internet. Screens displayed earlier in the installation process require consumers to identify the telephone number from which their computers are calling and to supply respondent with other basic information that is necessary to set up an Internet access connection.

Complaint

Exhibit D(1): Software installation display screen containing a subset of respondent's available access numbers, which is based on information previously provided by the consumer, such as the telephone number from which his or her computer is calling.

Access Numbers: Web

The box below lists access numbers for connecting to the Web. Please select all of the access numbers that are local to you to use when you want to connect to the World Wide Web. The more numbers you select, the easier it will be to connect to the Web through Juno.

The star symbol indicates a recommended Web number (click "Help" for more details on recommended numbers.)

Web Access Numbers: Web	Modem Support
xxx-xxx-xxxx (town) ☆ xxxxx	

[Subset of access numbers. Respondent places a gold star (☆) next to those access numbers it recommends that the consumer use.]

Show all numbers available nationwide

Help Cancel Back

Exhibit D(2): Pop-Up scroll-down window viewed only if the consumer clicks on "Help" in Exhibit D(1) prior to selecting which access number(s) to use when connecting to the Internet.

* * * * *

A phone number with a star next to it is a recommended number. Juno monitors its network of access numbers on a regular basis to provide the best service possible. We track call volume, performance, and coverage of our access numbers, and take this

Complaint

information into account when making recommendations. *A star doesn't necessarily indicate that a number is local for you, however.* If you're not sure whether a phone number is local, please contact your phone company to determine what charges you'd incur for the call.

* * * * *

(emphasis in original)

Exhibits E(1) through E(3): Web Advertisement for respondent's Free and Premium Internet access services with click-through display windows

Exhibit E(1): Full page advertisement on respondent's Web site www.juno.com

[company logo] **Juno** Everybody's Getting It.
Download your FREE software today!

Complaint

YOU CHOOSE OR

<p>Juno FREE Internet Access Click Here</p> <p>FREE! No Charges No fees.</p> <p>● Available nationwide</p> <p>* * * * *</p> <p>? Click here to learn more about Juno FREE Internet Access.</p> <p>YES, I want Juno FREE Internet Access Click Here</p>	<p>Juno Premium Internet Access Click Here</p> <p>Get 150 hours FREE! in your first month, just \$9.95/month thereafter</p> <p>● Thousands of access numbers across the U.S.</p> <p>* * * * *</p> <p>? Click here to learn more about Juno Web, our premium Internet access service.</p> <p>YES, I want my FREE trial of Juno Web Click Here</p>
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(Clicking on “Click Here” in Exhibit E(1) triggers the immediate download of either the software for respondent’s Free Internet Access service or that for respondent’s Premium Internet Access service.)

Exhibit E(2): Pop-up window with scroll-down screen that is displayed by clicking on the “[Click here](#) to learn more about Juno FREE Internet Access service.” link in Exhibit E(1).

Complaint

Juno FREE Internet Access

[mock banner advertisement]

It's So Easy . . .

When you try Juno's FREE Internet access service, you'll get:

- **The Juno Guide!**

* * * * *

- **Fast reliable connections at speeds up to 56K**

* * * * *

Click here to download

Exhibit E(3): Pop-up window displayed by clicking on the "Click here to learn more about Juno Web, our premium Internet access service." link in Exhibit E(1).

Complaint

150 Hours FREE!

in your first month

What do I get with Juno Web that I don't get with the free basic service?

- Priority access to thousands of dial-up numbers across the country to help you avoid busy signals
- Toll-free, live customer support with no fees of any sort
- Fewer advertisements while you're online

Plus, you'll enjoy 150 FREE hours during your first month of service - so you can try out Juno Web with no risk at all!

[Click here to download](#)

Complaint

Advertising and Promotional Materials for the “Print the Web”
Rebate Program

5. Respondent also has disseminated, or caused to be disseminated, advertisements and promotional materials for its \$200 “Print the Web” rebate program, including, but not limited to, Exhibits F through H. Under this program, purchasers of various jetprinters sold by Lexmark International, Inc. received a \$200 rebate from Juno conditioned on subscription to Juno’s fee-based Internet access service for one year at \$19.95 a month. Respondent participated in the preparation and review of all advertisements and promotional materials disseminated by Lexmark for the Print the Web rebate program and had final approval for any rebate coupons and any CD-ROM promotional disks containing installation software, both of which were distributed as part of the offer. Respondent’s Internet access installation software was either on a CD-ROM disk provided at the time a Lexmark jetprinter was purchased, or downloaded from respondent’s Web site at <http://dl.www.juno.com/get/lexmark>. Advertisements and promotional materials for this program contain the following statements and depictions:

Exhibit F: Juno/Lexmark “Print the Web” rebate coupon distributed at point of sale

[Inside of rebate coupon]

**How to get up to a \$200 “Print the Web”
Rebate**

To Qualify for the Print the Web Rebate Offer, purchase one of the following Lexmark Color JetPrinters: Z11, 3200, Z31, Z51, and sign up for one year of Juno Web @\$19.95/month.

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[outlines 3 steps consumer must complete to receive rebate]

[the following text appears on the right side of coupon, in approximately seven point type]

* * * * *

Terms and conditions: Offer subject to credit approval and your acceptance of Juno's Service Agreement. Requires minimum commitment of 1 year (12 months) to Juno Web at a monthly rate of \$19.95. Cancellation of Juno Web service prior to the end of the commitment terms will result in your credit card being charged the full amount of the rebate plus a \$50 cancellation fee. You must be 18 years or older. Offer valid only to new Juno Web subscribers. A major credit card is required. Local telephone charges may apply. Availability of access to Juno may be limited, especially during peak times.

* * * * *

Exhibit G(1) through G(3): Three of the screens displayed during installation of respondent's Internet access software from the CD-ROM that was distributed as part of the Juno/Lexmark "Print the Web" rebate program.

Exhibit G(1): Initial Registration Screen

Complaint

**I want Juno Web and
my
“Print the Web”
Rebate!**

YES, I want to sign up for 1 year of Juno Web, which entitles me to my mail-in rebate.* I authorize Juno to charge the credit card shown below at the low rate of \$19.95 per month for my Juno Web service.

[request for credit card number and
expiration date]

* * * * *

* To receive your rebate, follow the instructions on the “Print the Web” Rebate Coupon. You will need an original Rebate Code Certificate which will be sent to you by postal mail after you activate your Juno Web subscription. See additional terms and conditions on the certificate and by clicking below.

Terms and Conditions **System Requirements**

Help Cancel Back **Next**

(Clicking on the “Terms and Conditions” link in Exhibit G(1) displays a general statement, similar to the statement cited in Exhibit B(5), about respondent’s Premium Internet service. Clicking on the “Next” link in Exhibit G(1) registers consumers for respondent’s Premium Internet service and leads them to a series of additional screens, including Exhibits G(2) and G(3) cited below.)

Complaint

Exhibit G(2): Screen with scroll-down window displaying initial paragraphs of respondent's Service Agreement, which is non-printable. Consumers must use the scroll bar at the right of the window to move through the text of the agreement

Getting Started

Like other online services, Juno has a Service Agreement, whose terms members must accept before they can use the service. Juno's Service Agreement is displayed below.

Juno Online Services, L.P.
Service Agreement

This version of the service agreement is current as of August 3, 1998. From time to time, Juno may modify the Service Agreement upon notice to its members. To receive a copy of the most recent version by e-mail, send a message to 'service.agreement@faq.juno.com'.

Please read this agreement carefully.

The Juno online service (the "Service") is operated by, and consists of computer online, interactive information, communication and transaction services provided by, Juno Online Services, L.P. (Juno Online Services, L.P. and its successors and assigns are defined in this Agreement as "Juno LP".)

Do you accept the terms of the Juno Service Agreement displayed above?

Please type 'yes' or 'no':

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Exhibit G(3): Screen with scroll-down window displaying Section 5.3 of respondent's Service Agreement, which appears only after scrolling through numerous lines of text.

Exhibit H: Full page advertisement on respondent's Web site www.juno.com

<p>Get Juno</p> <p>What is Juno?</p> <p>What is Juno Web?</p> <p>Questions (FAQ)</p> <p>System Requirements</p> <p>Download Instructions</p> <p>Bundling Juno</p>	<p>SIGN UP FOR JUNO WEB AND GET UP TO \$200 WITH YOUR "PRINT THE WEB" REBATE!</p> <p>* * * * *</p> <p>● Fast, reliable access nationwide</p>	<p>DOWNLOAD NOW!</p>
---	---	--

* * * * *

(None of the hyperlinks in Exhibit H provides further details about the rebate offer. Clicking on "Download Now" in Exhibit H triggers the immediate download of the software for respondent's Premium Internet service.)

"Dry Test" Marketing Advertisements

6. In the fall of 1999, on numerous occasions, respondent disseminated advertisements and promotional materials, including, but not limited to, Exhibit I, to subscribers of its

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electronic mail services, offering its Premium Internet service at the price of 3 cents per minute, as well as similar advertisements and promotional materials offering the service at various other prices, including the price of 5 cents per minute and another price of \$4.95 a month. These advertisements and promotional materials contain the following statements and depictions:

Getting Started

Like other online services, Juno has a Service Agreement, whose terms members must accept before they can use the service. Juno's Service Agreement is displayed below.

5.2. If Juno LP does not receive the amount of your account balance within 30 days of the invoice date, an additional 1.5% (or the highest amount permissible by law, if less) per month of the amount outstanding may be added to your invoice as a late charge. You shall be liable for all attorney and collection fees arising out of Juno LP's efforts to collect any unpaid balance of your account. If you believe that a billing discrepancy has occurred, you must notify Juno LP within 90 days after the date on which it first appeared on your credit card account statement or such amounts will be deemed to have been accepted by you. You agree to release Juno LP from any liability for any error or discrepancy that is reported to Juno LP after such period.

5.3. Your subscription to any billable portion of the Service will continue and renew automatically, unless terminated by Juno LP or until you notify Juno LP by telephone or in such other fashion as is then deemed acceptable by Juno LP of your decision to terminate your subscription to a billable portion of the Service. Juno LP reserves the right

Do you accept the terms of the Juno Service Agreement displayed above?

Please type 'yes' or 'no':

Complaint

Exhibit I: Banner ad embedded in electronic mail**NEW from Juno!** Get on the World Wide Web for only . . .

3 ¢ a minute
Now is the best time to try Juno Web.
At only 3¢ per minute, you're in control of how much - or how little - you spend.

- 1 No monthly fee
- 2 No minimum spending requirement
- 3 A one-time setup fee of just \$25

[Close](#)
[Tell me more](#)

Click Here to Get Started!

(Clicking on “Click Here to Get Started!” leads consumers to a screen requiring consumers to provide credit card and other personal identifying information, including name, address and telephone number, in order to register for the advertised Internet service.)

Deceptive Practices Related to “Free” Internet Trial Offers

7. Through the means described in Paragraph 4, including, but not limited to, Exhibits B and E, respondent has represented, expressly or by implication, that consumers who participate in its free trial offers for its Premium Web service can cancel at any time before a free trial period expires and incur no monthly charges or fees.

8. In truth and in fact, in numerous instances, despite reasonable efforts to do so, consumers were unable to cancel the service

Complaint

before the free trial period expired and incurred monthly charges or fees. Respondent did not permit consumers to cancel its Internet access service through any means other than calling the telephone number 1-888-811-5866. Respondent did not disclose this phone number to consumers, however, until they attempted to cancel the service through other means, such as respondent's numerous other published toll-free phone numbers, electronic mail or regular mail. Consumers who contacted respondent to cancel their Internet access service through one of respondent's other toll-free phone numbers were told that no one at that number was authorized to cancel the service and that they must call 1-888-811-5866. Consumers who requested cancellation of their Internet access service through electronic mail received an electronic mail response four to eight days later stating that respondent did not accept cancellations received via electronic mail for security reasons and that consumers must call 1-888-811-5866 to cancel their Internet access service. Furthermore, in numerous instances, when consumers called the 1-888-811-5866 cancellation number, they were unable to reach a customer representative for periods of 20 minutes or longer. As a result, many consumers discontinued their efforts to cancel their Internet service before the free trial period expired and incurred monthly charges or fees. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. Through the means described in Paragraph 4, including, but not limited to, Exhibits B and E, respondent has represented that a reasonable means of cancellation is available to consumers who participate in its free trial offers for Premium Web service and, thus, participating consumers can cancel before incurring any monthly charges or fees. Respondent has failed to disclose or has failed to disclose adequately the procedures consumers must follow to cancel respondent's Premium Web service. This fact would be material to consumers in deciding whether to participate in respondent's free trial offers for Premium Web service and in their use of the service. The failure to adequately disclose these facts, in light of the representation made, was, and is, a deceptive practice.

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10. Through the means described in Paragraph 4, including, but not limited to, Exhibit B, respondent has represented that consumers who participate in its free trial offer for its Premium Web service have 150 hours to use its service without incurring any monthly charges or fees. Respondent has failed to disclose or has failed to disclose adequately that consumers must use the 150 hours of free service within one month to avoid incurring charges of \$19.95 a month. This fact would be material to consumers in participating in respondent's free trial offer for its Premium Web service. The failure to adequately disclose this fact, in light of the representation made, was, and is, a deceptive practice.

11. Through the means described in Paragraph 4, including, but not limited to, Exhibit E, respondent has represented, expressly or by implication, that consumers who participate in its free trial offers for its Premium Web service have one month to use its service for up to 150 hours without incurring any monthly charges or fees.

12. In truth and in fact, in numerous instances, consumers had substantially less than one month to use respondent's Premium Web service for up to 150 hours without incurring any monthly charges or fees. Consumers who wanted to participate in the offer were required to order from respondent a CD-ROM containing installation software for respondent's Premium Web service. Consumers who requested the CD-ROM through respondent's toll-free telephone number (1-800-TRY-JUNO), electronic mail or other means were unable to register and use the service until they first installed the software from the CD-ROM onto their computers. The free trial period, however, began to run from the time consumers made their initial request for the installation CD-ROM, and not from the time they installed the software and registered to use the service. In numerous instances, consumers did not receive the installation CD-ROM until 10 to 14 days after they requested it, substantially shortening their one month free trial period. Unaware of the shortened trial period, these consumers continued to use respondent's Internet service for up to one month from the time they installed the CD-ROM. As a result,

Complaint

many consumers incurred monthly charges or fees without having a full 30 days to use respondent's Internet service for free. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

Deceptive Practices Related to Undisclosed Toll Charges

13. Through the means described in Paragraph 4, including, but not limited to, Exhibit C, respondent has represented, expressly or by implication, that consumers using respondent's free Internet service will incur no costs.

14. In truth and fact, consumers do incur costs in using respondent's free Internet service. In numerous instances, consumers lack a local access telephone number to connect to respondent's free Internet service and must pay long distance telephone charges. Therefore, the representation set forth in Paragraph 13 was, and is, false or misleading.

15. Through the means described in Paragraph 4, including, but not limited to, Exhibits A through E, respondent has represented:

- A. that the total cost to consumers of using respondent's fee-based Internet services is \$19.95 or \$9.95 a month;
- B. that the total cost to consumers of using respondent's free Internet services and of participating in respondent's free trial period offers is zero; and
- C. in certain advertisements, that its Premium Web service has thousands of access numbers available nationwide.

Respondent has failed to disclose or failed to disclose adequately that many consumers lack local access telephone numbers and must pay long distance charges to access respondent's services, and that the telephone numbers respondent provides to consumers and/or recommends that consumers use to access its services, including telephone numbers marked with a gold star, are in some

Complaint

cases long distance numbers. These facts would be material to consumers who subscribe to respondent's services. The failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

Deceptive Practices Related to the "Print the Web" Rebate Program

16. Through the means described in Paragraph 5, including, but not limited to, Exhibits F through H, respondent has represented that consumers who purchase certain jetprinters sold by Lexmark International, Inc. and register for respondent's Premium Web Internet service for one year will receive a rebate of up to \$200. In these advertisements, respondent has failed to disclose or has failed to disclose adequately:

that consumers who cancel their Premium Web Internet service within one year must repay the entire rebate received and pay a \$50 cancellation fee;

- A. that respondent does not provide local access telephone numbers in all areas, and therefore that many consumers must pay long distance telephone charges to access respondent's Premium Web Internet service; and
- B. that respondent automatically renews all subscriptions for its Premium Web Service after the one year period has ended, unless consumers contact respondent and affirmatively cancel respondent's service.

These facts would be material to consumers in their purchase or use of the products or services. The failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

17. By preparing, reviewing and having final approval of the advertising and promotional materials disseminated by Lexmark in connection with the Juno/Lexmark "Print the Web" rebate

Complaint

offer, referred to in Paragraph 5, including, but not limited to, Exhibits F and G, and by providing Lexmark with such advertising and promotional materials, respondent has furnished the means and instrumentalities to Lexmark to engage in deceptive acts and practices in violation of Section 5(a) of the Federal Trade Commission Act.

Deceptive Practices Related to “Dry Test” Marketing

18. Through the means described in Paragraph 6, including, but not limited to, Exhibit I, respondent has represented, expressly or by implication, that at the time it disseminated such advertisements:

- A. it was offering Internet access service at the price of 3 or 5 cents per minute, and at the price of \$4.95 a month; and
- B. it was requesting consumer credit card and other personally identifying information to register consumers for its Internet access service at such advertised prices.

19. In truth and in fact, at the time respondent disseminated such advertisements:

- A. it did not provide any consumer with Internet access at the advertised price of 3 or 5 cents per minute or at the price of \$4.95 a month; and
- B. it did not request consumer credit card and other personally identifying information to register consumers for its Internet access service at such advertised prices.

Respondent informed consumers who registered for these services that it only disseminated such advertisements and promotions to test market demand for its Internet access service at the prices advertised. In fact, its Internet access service was never offered to consumers for the prices advertised. Therefore, the

Complaint

representations set forth in Paragraph 18 were, and are, false or misleading.

20. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-fifth day of June, 2001, has issued this complaint against respondent.

100% off

Starting now, Juno is offering full Internet access for free
From free Web access to premium dial-up and broadband services, *everybody's getting it.*



© Copyright 1998 Juno Online Services, Inc. All rights reserved.



Document Name: B2M1 1&1 100% off.ppt Date: 10/19/98 12:00 PM
User Name: W. H. Shaffer Project: 1998000 0 04 PM
Path: C:\Programs\Microsoft\Powerpoint\B2M1\B2M100%off.ppt
Description: 100% off Juno Web access to premium dial-up and broadband services. *everybody's getting it.*
v1.0000
Colors: Black, Cyan, Magenta, White, Yellow, Green, ...

Page	Count
1	1
2	1
3	1
4	1
5	1
6	1
7	1
8	1
9	1
10	1
11	1
12	1
13	1
14	1
15	1
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50	1

ALIC
JOYDOP 0002
- 010 -
PREPARED BY: GDC

COMPOSITE B2I
Title: 1F 1 P
alternate version 3

Juno - Demo [] [] [X]

File Edit Features Options Advertisements Exit Help

Read **Write**

FREE AND EASY!!

CLICK HERE!! CLICK HERE!! CLICK HERE!! CLICK HERE!!

Folder: **Inbox** [] There are no messages in this folder.

From	Subject	Date	Status
------	---------	------	--------

Reply

Forward

Delete

Print

Move to Folder

Copy to Folder

Get New Mail

Address Book

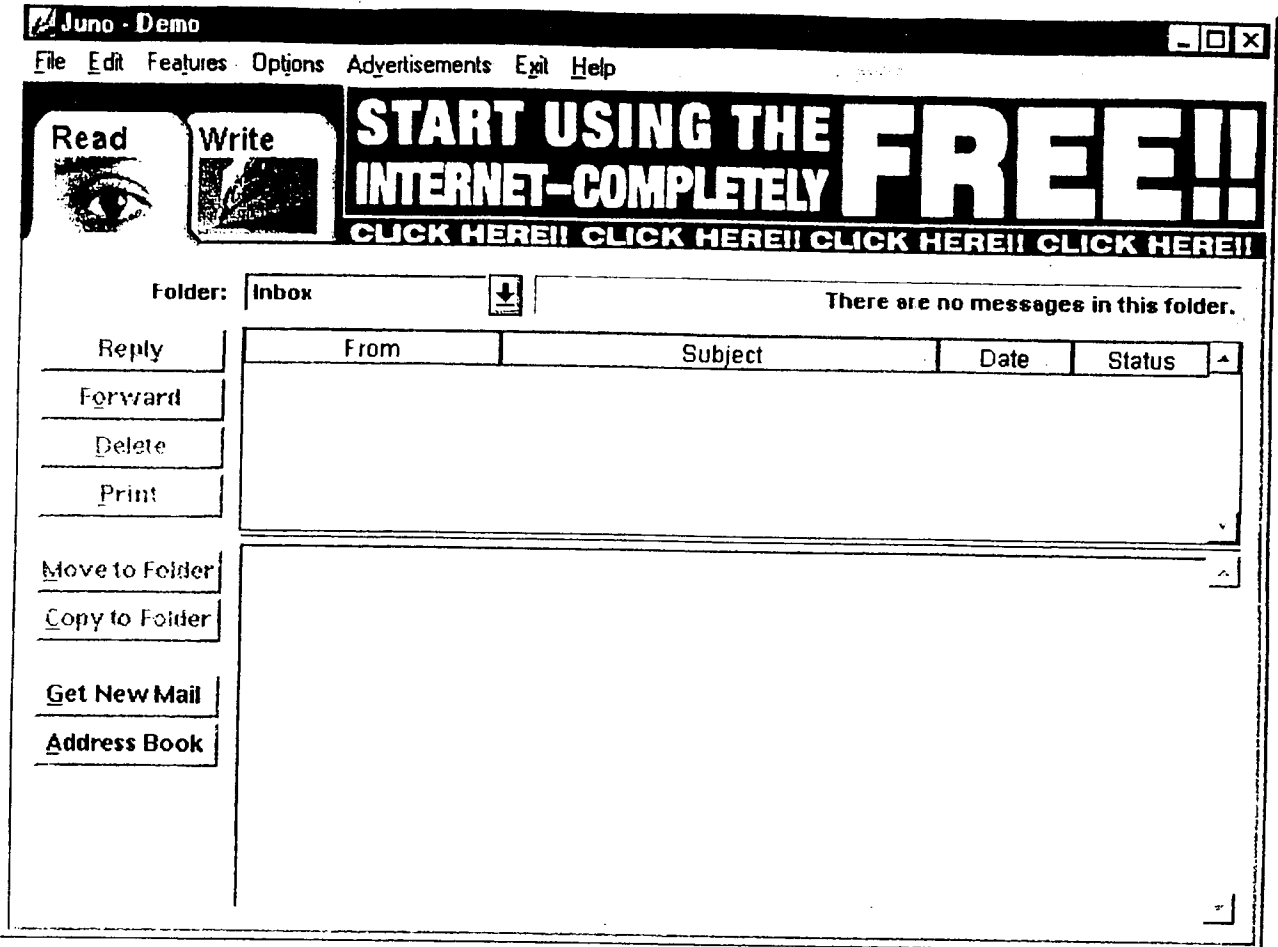


Exhibit B-2

Juno Web X

150 HOURS FREE JUNO WEBSM

Now you have the best of Juno, and it's time to try the Web.

- 1** *It's easy, convenient, and you ALREADY have everything you need.*
- 2** *There's NO RISK! Cancel and owe nothing during your FREE trial if you're not happy.*
- 3** *Juno is the company you trust.*

Sign up today and save!

Click "More Information" for details.

YES!
I'm Interested!

No Thanks More Information

Exhibit B-3

Juno Web x

Just Complete This Simple Form For 150 FREE Hours of Juno WebSM!

1. Fill Out Your Credit Card Number and Expiration Date: 
(MC, Visa, AmEx, Discover)

Month: Year:

2. Confirm Your Billing Information:

Super Dog M Richardson
1540 Avenue of the Americas
Juno Online Services
New Yorkles, NY 10038
Phone: 2127773456

[Click Here](#) if your contact address is different from your billing address.

3. [Click Here To Sign Up Now!](#)

I authorize you to charge me at a rate of \$19.95 per month following my FREE 150 hours in my first month as a Juno Web subscriber.*

**It's FREE!
Sign Up Today!**

**THE
JUNO 100%
SATISFACTION
GUARANTEE**

If you're not completely convinced during your FREE trial that Juno Web is the best way to experience the World Wide Web, you can cancel and owe nothing. That's a guarantee.

[*Terms and Conditions](#)

[System Requirements](#)

[No Thanks](#)

[Back](#)

Exhibit B-4

Terms and Conditions X

Juno Web is a personal Internet service. Juno Web is intended for the personal use of individual Juno members (and members of their immediate households), and not for corporate or commercial use, or for use by organizations or other groups of users. Juno Web service is not available outside of the United States. Connections exceeding 10 hours in length are prohibited, as are simultaneous connections by two or more computers through a single Juno account. Local telephone charges may apply. See Juno's Service Agreement for additional terms and conditions.

NO STRINGS ATTACHED!

FREE

INTERNET ACCESS!

YES! COMPLETELY

FREE!

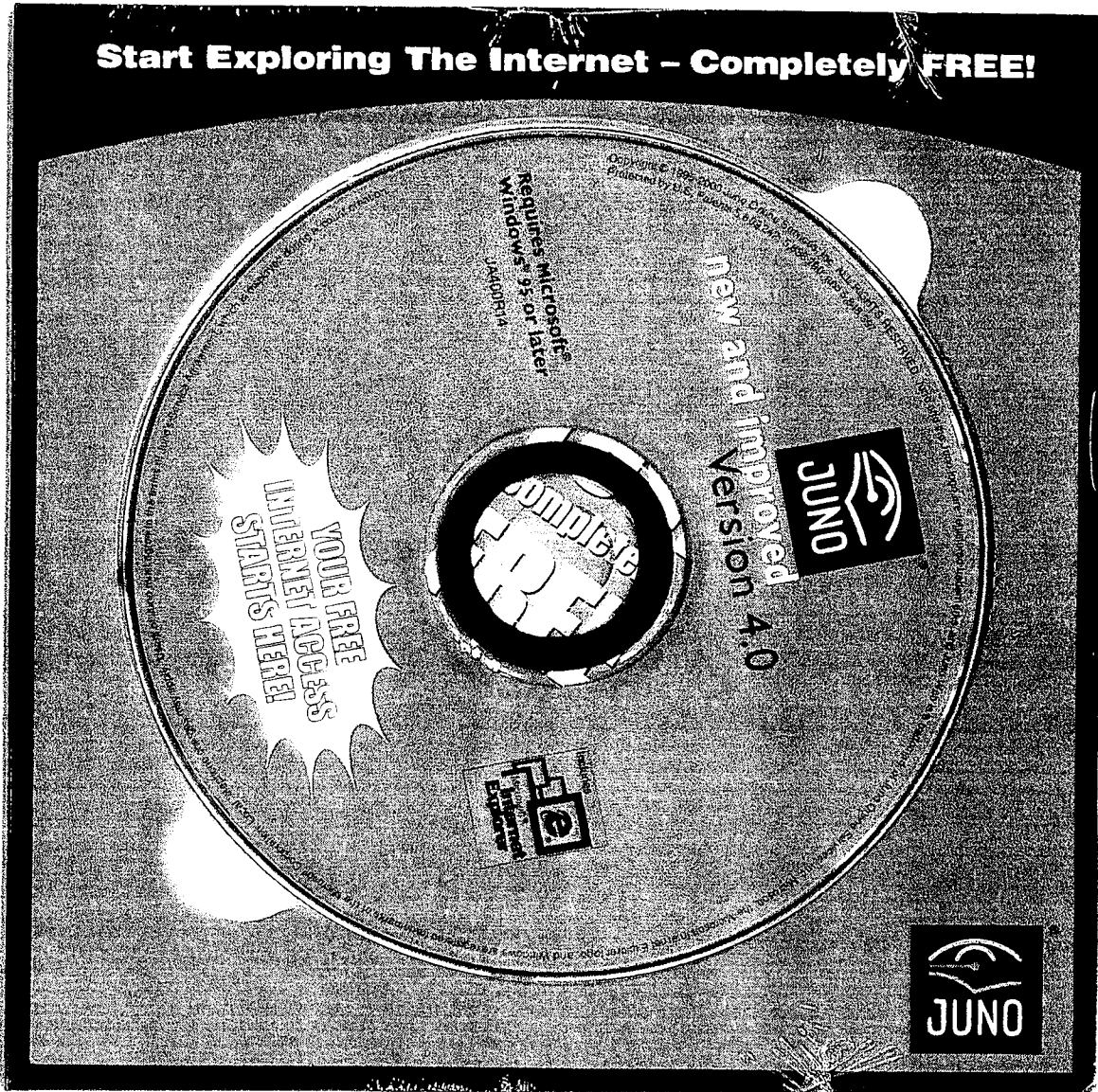
NO HIDDEN COSTS!

**GET
ONLINE TODAY...
COMPLETELY
FREE!**


JUNO

Presorted
Standard
U.S. Postage
PAID
Juno Online
Services, Inc.

Start Exploring The Internet - Completely FREE!



- My Computer
- My Documents
- Network Neighborhood
- Recycle Bin
- My Briefcase
- Netscape Communicator
- Internet Explorer

monroek2 - Juno

File Edit Connection Options Advertisements Exit Help

Access Number Setup and Selection

Access Numbers: Web

✓ Connection Setup
Access Numbers


The box below lists access numbers for connecting to the Web. Please select all the access numbers that are local to you to use when you want to connect to the WorldWide Web. The more numbers you select, the easier it will be to connect to the Web through Juno.

The star symbol indicates a recommended Web number (click 'Help' for more details on recommended numbers).

Web Access Numbers	Modem Support
<input checked="" type="checkbox"/> DC: Washington, (202) 360-4508	★ 56.0 - V.90
<input type="checkbox"/> MD: Waldorf, (301) 638-4888	☆ 56.0 - V.90, X2
<input type="checkbox"/> PA: Rockville, (301) 637-4508	☆ 56.0 - V.90
<input type="checkbox"/> PA: Waldorf, (301) 861-4508	☆ 56.0 - V.90
<input type="checkbox"/> VA: Alexandria, (703) 350-4508	☆ 56.0 - V.90

Show all numbers available nationwide

Help Cancel < Back Next



AOL Saved Files

Exhibit D-1

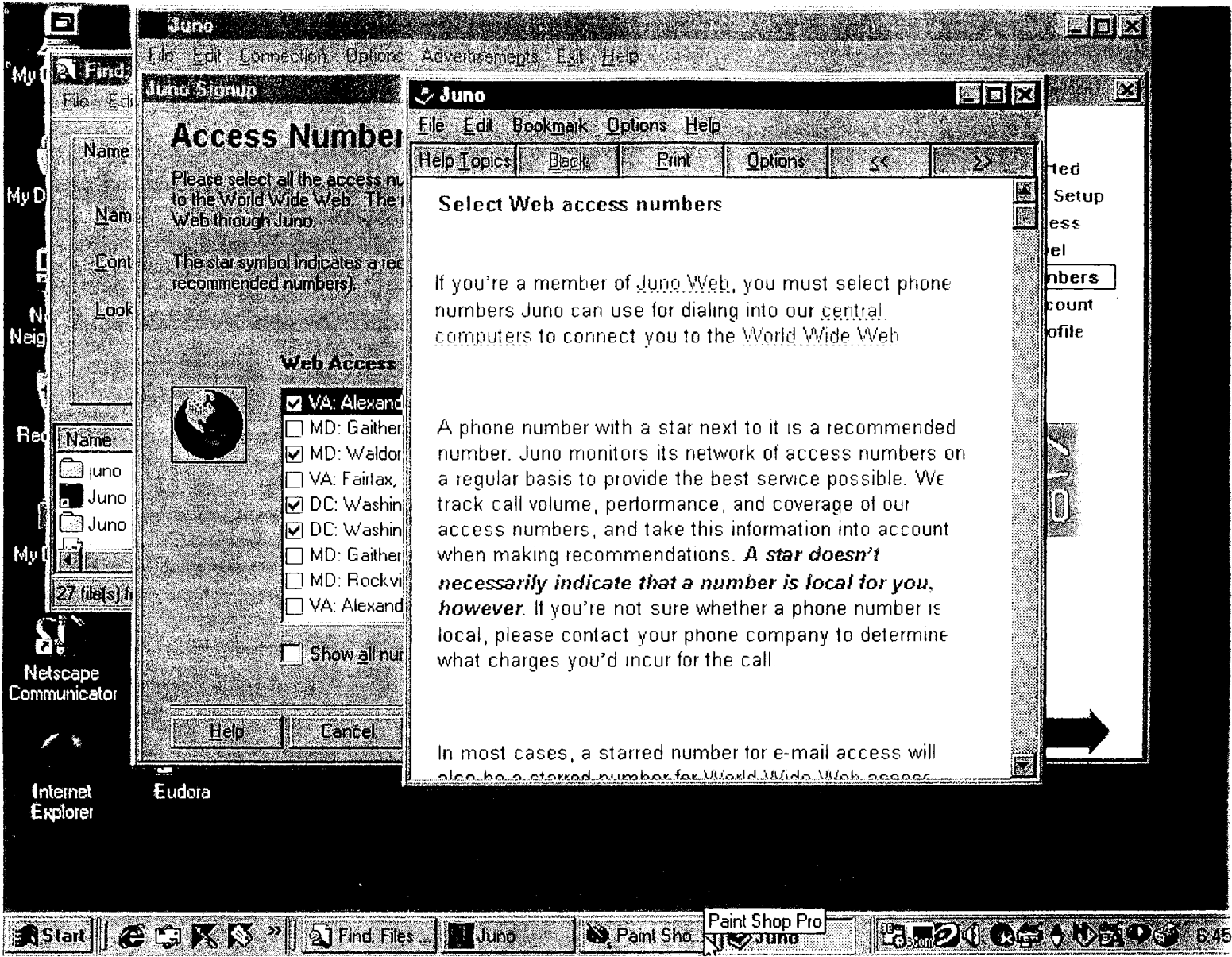


Exhibit D-2



Juno Everybody's Getting It.
Download your **FREE** software today!

YOU CHOOSE

Juno
FREE Internet Access
Click here.

OR

Juno Web
Premium Internet Access
Click here.

FREE!

No charges.
No fees.

Get **150** Hours
FREE!
in your first month,
just \$9.95/month thereafter.

- Available nationwide
- Access to any site on the Internet
- Includes award-winning free e-mail with file attachment capability

- Thousands of access numbers across the U.S.
- Free, live customer support, 7 days a week
- Priority access to our nationwide network
- Includes award-winning free e-mail with file attachment capability

? [Click here](#) to learn more about Juno **FREE** Internet Access.

? [Click here](#) to learn more about Juno Web, our premium Internet access service.

YES, I want Juno
FREE Internet Access
Click here.

YES, I want my FREE trial
of Juno Web
Click here.

[Click here](#) for downloading instructions and export limitations.



Juno's software is free! Download it directly,
or click above to order a CD-ROM by US Mail.

File Edit View Go Communicator Help

Back Forward Reload Home Search Net

Bookmarks Netsite: http://dl.www.juno.com/ge

WebMail Instant Message Contact People

FREE!

No charges.
No fees.

- Available nationwide
- Access to any site on the
- Includes award-winning file e-mail with file attachment capability

[Click here to learn more about Juno FREE Internet Access](#)

YES, I want Juno FREE Internet Access
[Click here](#)

Tell Me More About Juno - Netscape

Juno FREE Internet Access

Welcome to Juno

It's So Easy...

When you try Juno's FREE Internet access service, you'll get:

- The Juno Guide!** In order for you to get free access to the Internet, Juno will place a separate window on your screen called the Juno Guide. The window floats on top of your Internet browser and contains helpful navigation links and buttons, as well as advertisements that contain special offers!
- Fast, reliable connections at speeds up to 56K**

[Close](#) [Click here to download](#)

Document: Done

Start | Canno | Juno | My Ne | Juno... | Tell | Paint

11:23 AM

File Edit View go Communicator Help

Back Forward Reload Home Search Netscape Print Security

Bookmarks Netsite <http://dl.www.juno.com/get/web>

WebMail Instant Message Contact People Yellow Pages

FREE!

No charges.
No fees.

- Available nationwide
- Access to any site on the Internet
- Includes award-winning free e-mail with file attachment capability

[? Click here to learn more about Juno FREE Internet Access.](#)

YES, I want Juno FREE Internet Access
[Click here.](#)

Tell Me More About Juno Web - Netscape

150 Hours FREE!

In your first month

What do I get with Juno Web that I don't get with the free basic service?

- Priority access to thousands of dial-up numbers across the country to help you avoid busy signals
- Toll-free, live customer support with no fees of any sort
- Fewer advertisements while you're online

Plus, you'll enjoy 150 FREE hours during your first month of service—so you can try out Juno Web with no risk at all!

[Close](#) [Click here to](#)

YES, I want my FREE trial of Juno Web
[Click here.](#)

Document Done

Start | Canno | Juno | My Ne | Juno | Tell | Paint | 11:24 AM

How to get up to a \$200 "Print the Web" Rebate

To Qualify for the Print the Web Rebate Offer, purchase one of the following Lexmark Color, Jetprinters: Z11, 3200, Z31, Z51 and sign up for one year of Juno Web SM @ \$19.95/month

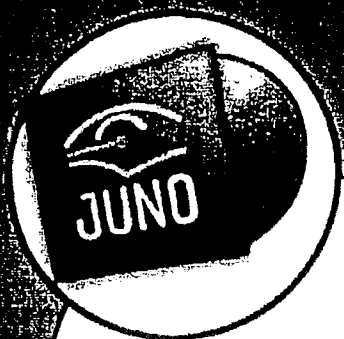
- 1) Install Juno Web software & sign up for one year of Juno Web
A Juno Web installation CD-ROM should be inside your Lexmark printer box. If not, download it @: <http://dl.www.juno.com/ge/lexmark> or to receive CD-ROM by mail, call 877-211-5866
- 2) Upon sign up, Juno will send you a Rebate Code Certificate via US Mail (allow 10 days for receipt)

- 3) Then send the Rebate Code Certificate you received with a completed Print the Web Rebate Offer Request Form, and required materials listed below

Terms and Conditions: Offer subject to credit approval and your acceptance of Juno's Service Agreement. Requires minimum commitment of 1 year (12 months) to Juno Web at monthly rate of \$19.95. Cancellation of Juno Web service prior to the end of the commitment term will result in your credit card being charged the full amount of the rebate plus a \$50 cancellation fee. Offer valid only to new Juno Web subscribers. A major credit card is required. Local telephone charges may apply. Availability of access to Juno may be limited, especially during peak times. Please keep copies of all materials submitted. Materials received become the property of recipient. Additional information regarding this rebate may be required. Reproduction, sale, trading or purchase of rebate forms or proofs of purchase is prohibited. Fraudulent submissions and/or use of multiple addresses or P.O. Boxes to obtain multiple rebates is fraudulent and could result in federal prosecution under U.S. Mail Fraud Statute (18 USC Sections 1341 and 1342), Void where prohibited, based or restricted by Federal, State, local or other law. Only purchases made by an original purchaser are valid. Juno Online Services employees and contractors, and Lexmark dealers, retailers, distributors and resellers and their employees, are ineligible. Not responsible for lost, late or misdirected mail. Incomplete, illegible, postage due mail or requests will not be honored. Not valid on used or refurbished products or demerit/loyalty models. Questions regarding this rebate may be directed to 877-339-9475. Please allow up to 10 weeks for receipt of rebate check. Please be sure to allow up to 10 weeks for delivery of rebate before calling to inquire about your rebate status. Rebate checks will be paid in U.S. Dollars only. Rebate checks not cashed within 90 days of the issuance are void and cannot be reissued. ALL REQUESTS NOT IN COMPLIANCE WITH THE TERMS AND CONDITIONS WILL BE REJECTED. This document is furnished "AS IS". See request form below for additional terms and conditions.

Detach rebate form here

Juno Signup



I want Juno Web and my 'Print the Web' Rebate!

YES, I want to sign up for 1 year of Juno Web, which entitles me to my mail-in rebate.* I authorize Juno to charge the credit card shown below at the low rate of \$19.95 per month for my Juno Web service.

Credit Card Number:
(MC, Visa, AmEx, Discover)


Expiration Date: *Month* *Year*

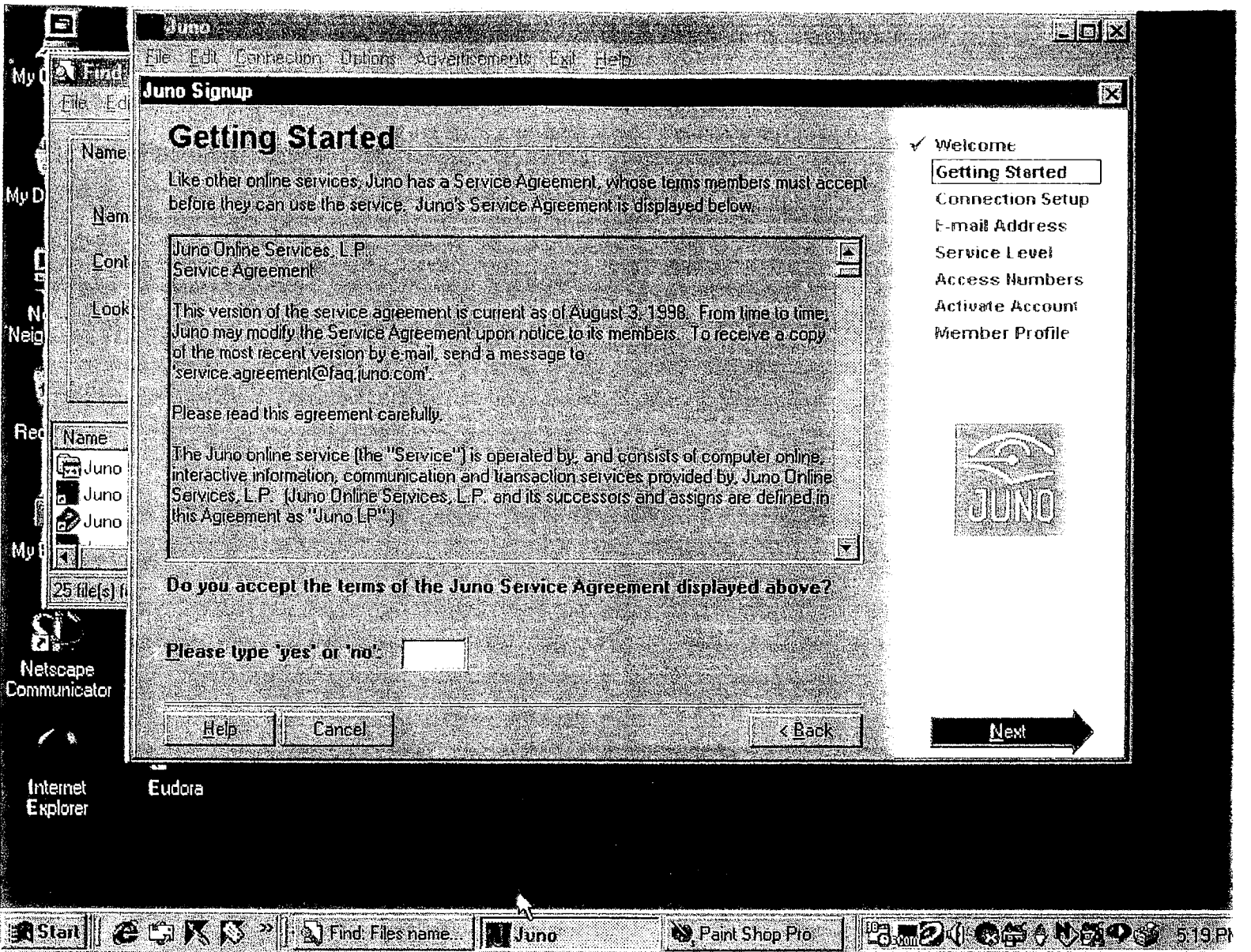
Note: For your security, the information you enter is kept strictly confidential.

* To receive your rebate, follow the instructions on the 'Print the Web' Rebate Coupon. You will need an original Rebate Code Certificate which will be sent to you by postal mail after you activate your Juno Web subscription. See additional terms and conditions on the certificate and by clicking below.

[Terms and Conditions](#) [System Requirements](#)

[Help](#) [Cancel](#) [Back](#) [Next](#)





Getting Started

Like other online services, Juno has a Service Agreement, whose terms members must accept before they can use the service. Juno's Service Agreement is displayed below.

Juno Online Services, L.P.
Service Agreement

This version of the service agreement is current as of August 3, 1998. From time to time, Juno may modify the Service Agreement upon notice to its members. To receive a copy of the most recent version by e-mail, send a message to 'service.agreement@faq.juno.com'

Please read this agreement carefully.

The Juno online service (the "Service") is operated by, and consists of computer online, interactive information, communication and transaction services provided by Juno Online Services, L.P. (Juno Online Services, L.P. and its successors and assigns are defined in this Agreement as "Juno LP.")

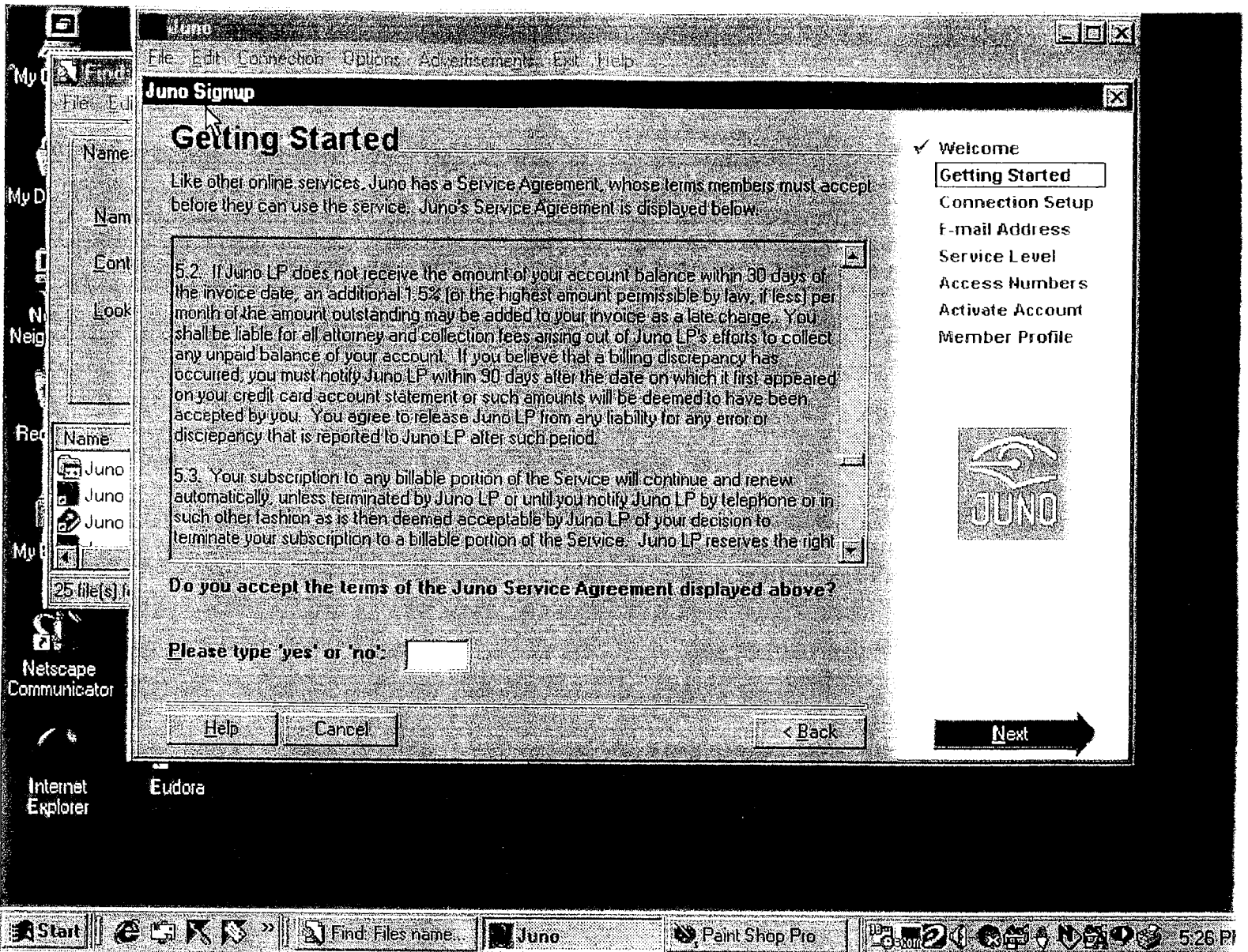
Do you accept the terms of the Juno Service Agreement displayed above?

Please type 'yes' or 'no':

Help Cancel < Back Next

- ✓ Welcome
- Getting Started
- Connection Setup
- E-mail Address
- Service Level
- Access Numbers
- Activate Account
- Member Profile





Juno Signup

Getting Started

Like other online services, Juno has a Service Agreement, whose terms members must accept before they can use the service. Juno's Service Agreement is displayed below.

5.2. If Juno LP does not receive the amount of your account balance within 30 days of the invoice date, an additional 1.5% (or the highest amount permissible by law, if less) per month of the amount outstanding may be added to your invoice as a late charge. You shall be liable for all attorney and collection fees arising out of Juno LP's efforts to collect any unpaid balance of your account. If you believe that a billing discrepancy has occurred, you must notify Juno LP within 90 days after the date on which it first appeared on your credit card account statement or such amounts will be deemed to have been accepted by you. You agree to release Juno LP from any liability for any error or discrepancy that is reported to Juno LP after such period.

5.3. Your subscription to any billable portion of the Service will continue and renew automatically, unless terminated by Juno LP or until you notify Juno LP by telephone or in such other fashion as is then deemed acceptable by Juno LP of your decision to terminate your subscription to a billable portion of the Service. Juno LP reserves the right

Do you accept the terms of the Juno Service Agreement displayed above?

Please type 'yes' or 'no':

Help

Cancel

< Back

Next >

✓ Welcome

Getting Started

Connection Setup

E-mail Address

Service Level

Access Numbers

Activate Account

Member Profile



JUNO

ABOUT JUNO | ADVERTISING | NEWS | INVESTING | CAREERS | CONTACT JUNO

Juno Home > Get Juno

[Get Juno](#)[What Is Juno?](#)[What Is Juno Web?](#)[Questions \(FAQ\)](#)[Access Numbers](#)[System Requirements](#)[Download Instructions](#)[Bundling Juno](#)**DOWNLOAD NOW!****Downloading**

You can download Juno version 3.0 for free by clicking on the 'Download Now!' button above.

- **So EASY to use!**
- **Fast, reliable access nationwide**
- **Free technical support 7 days a week**

About Juno

Juno was designed for people who wish to use the Internet but don't want all the complexity and confusion that other online services offer. Our aim is to meet different people's needs differently: one size does not fit all on the Internet, and what's right for someone else might not be right for you. That's why we offer three levels of service. You start with the one you feel most comfortable with and 'graduate' to a higher level only when you want to. Simple, reliable service that gives you exactly what you want—that's the Juno difference.

**Version 3.0 System Requirements**

Please note our minimum system requirements: You'll need at least a 486 PC (Pentium recommended), 8MB of RAM, 25MB of free disk space, Windows[®] 95 or later (or Windows NT 4.0), a 9600-baud modem (14400-baud or faster recommended), a CD-ROM drive, and an SVGA monitor. We do not have either DOS or Macintosh versions of the software (and do not currently plan to develop such versions). If you have any questions, [click here](#) to find out if your computer meets the minimum requirements.

Downloading Instructions

The download should take approximately 20 minutes with a 28.8 Kbps modem.

Depending on your browser configuration, a dialog box may appear asking whether you'd like to open the file or save it to disk; select 'Save It to Disk.' A dialog box will then ask you to choose a directory. You can choose any directory on your hard drive; we recommend that you choose 'Desktop' to make the software easy to find once it's downloaded. (If you save it to 'Desktop,' an icon named 'junoinst.exe' will appear on your Windows desktop.) Please note that the download will not fit onto a high-density floppy disk.

Once the download is completed:

1. If you're using an older version of the software, we recommend that you back up your mail folders before upgrading.

2. If you saved the file to 'Desktop,' close your Web browser and look on your Windows desktop for an icon labeled 'junoinst.exe'. Double-click on this icon.
3. If you saved the file to a different location, click on the Windows Start button and select 'Find', then 'Files or Folders'. Search for 'junoinst.exe', and then double-click on the file once it's found.
4. Follow the installation instructions on the screen to install the software.

Export Limitations

The Juno software includes certain cryptographic software that is subject to export controls under the U.S. Export Administration Act. The Juno software may not be exported outside of the United States or to any foreign entity or 'foreign person' as defined under applicable U.S. government regulations (including without limitation any person who is not a citizen, national, or lawful permanent resident of the United States). By downloading the Juno software, you are acknowledging and agreeing to the foregoing limitations on your right to export or re-export the Juno software. By downloading the Juno software, you are also representing and warranting that you are neither on any of the U.S. government's lists of export precluded parties nor otherwise ineligible to receive software containing cryptography that is subject to export controls under the U.S. Export Administration Act.



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Juno and the Juno logo are registered trademarks,
and Juno Gold and Juno Web are trademarks, of Juno Online Services, Inc.
This Web site also contains trademarks of other companies.

Juno Web - Now only 3 cents a minute!

NEW from Juno! Get on the World Wide Web for only...

3¢ a minute

Now is the best time to try Juno Web. At only 3¢ per minute, you're in control of how much—or how little—you spend.

- 1 No monthly fee
- 2 No minimum spending requirement
- 3 A one-time setup fee of just \$25

[Close](#) [Tell Me More](#)

[Click Here to Get Started!](#)

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated or that the facts, as alleged in the complaint, other than jurisdictional facts, are true; and

The Commission having considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional finding and enters the following order:

1. Proposed respondent Juno Online Services, Inc. is a Delaware corporation with its principal office or place of business at 1540 Broadway, New York, NY 10036.

Decision and Order

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, "respondent" shall mean Juno Online Services, Inc., a corporation, its successors and assigns and its officers, agents, representatives, and employees.
2. "Clearly and conspicuously" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. Provided that, in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. Provided further that, in any advertisement communicated through interactive media which is presented predominantly through visual or audio means, the disclosure may be made through the same means in which the ad is predominantly presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, with a degree of contrast to the background against which it appears, and shall appear on the screen for a duration and in a location, sufficiently noticeable for an ordinary consumer to read and comprehend it.
 - B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

Decision and Order

- C. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

3. In the case of advertisements disseminated by means of an interactive medium, such as the Internet, online services and software, a disclosure made "through the use of a hyperlink" shall mean a hyperlink that in itself is clear and conspicuous, is clearly identified as a hyperlink, is labeled to convey the nature and relevance of the information it leads to, is on the same Web page or other electronic page, and proximate to the triggering representation, and takes the consumer directly to the disclosure on the click-through electronic page or other display screen or panel.
4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any electronic mail, Internet, or other online service in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication:

- A. the price or cost to consumers of such service;
- B. the ability of or terms by which consumers can cancel any such service;
- C. the amount of time consumers have to use such service

Decision and Order

during any free trial period without incurring any charges or fees;

- D. that any such service is available for purchase when it is not; and
- E. the purpose for which respondent is requesting or collecting credit card or any other personally identifying information from consumers.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any electronic mail, Internet or other online service, in or affecting commerce, shall not begin to compute:

- A. the billing cycle for such service; or
- B. any free trial period for such service,

until the consumer is able to access such electronic mail, Internet or other online service.

Provided that, where an existing subscriber to any of respondent's services requires a software upgrade or any new or existing subscriber requires a hardware installation to use any such electronic mail, Internet or other online service in the manner advertised, respondent may comply with this Part if it provides clear and conspicuous notice, prior to such subscriber registering for such service, of the date certain from which respondent will begin to compute the (i) billing cycle for such service; or (ii) any free trial period for such service.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in

Decision and Order

connection with the advertising, promotion, offering for sale, sale or distribution of any electronic mail, Internet or other online service, in or affecting commerce, shall disclose, clearly and conspicuously:

- A. in any advertisements or promotional materials for such service, any and all obligations of the consumer to cancel the service to avoid incurring any charges or fees; and
- B. during the registration process for any such service and thereafter, in a manner that is readily accessible by consumers: (1) all cancellation procedures consumers must follow to cancel the service; and (2) the date certain by which consumers must cancel the service to avoid incurring any charges or fees.

Provided that, for the purposes of Part III. B, the information respondent is required to clearly and conspicuously disclose shall be deemed “readily accessible” if respondent makes such information available to consumers:

- 1. through the use of a clear and conspicuous hyperlink on respondent’s Web site, that is labeled to convey the nature and relevance of the information it leads to, and directly takes the consumer to the information required by Part III. B on the click-through electronic page or other display screen or panel; and
- 2. through the use of a toll free telephone number.

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any electronic mail, Internet or other online service, in or affecting commerce, shall:

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- A. provide to consumers reasonable means to cancel any such service, including, but not limited to, means to cancel electronically and through a toll-free telephone number.

Provided that, respondent shall only be required to clearly and conspicuously disclose the means to cancel electronically to any consumer whose request for cancellation through a toll-free telephone number is not answered by respondent within 2 minutes;

- B. maintain adequate customer support to receive and process consumers' requests for cancellation of any such service; and
- C. process promptly any consumer's request for cancellation of any such service and terminate such service prior to the next billing cycle.

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any electronic mail, Internet or other online service that is sold or distributed in connection with the purchase of another product or service, shall not make any representation, in any manner, expressly or by implication, about the price or cost to consumers of such electronic mail, Internet or other online service, or of such other products or services, unless it clearly and conspicuously discloses:

- A. the dollar amounts of any and all fees, charges, rebate repayments, and other costs consumers are required to pay to cancel any such electronic mail, Internet or other online service;
- B. that consumers may have to pay long distance telephone charges, or if it is the case, any other costs in excess of

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- local telephone service charges to access such electronic mail, Internet, or other online service;
- C. the dollar amounts of any costs assessed by respondent, if any;
 - D. means for consumers to determine the telephone numbers available for accessing such electronic mail, Internet, or other online service and the town or city where those numbers are located; and
 - E. that consumers should contact their local telephone company to determine whether using the access telephone number for the location closest to them will incur charges in excess of local telephone service charges.

Provided that, in the case of advertisements disseminated by means other than through an interactive electronic medium, respondent may comply with Part V. E above by making a clear and conspicuous disclosure of the information required by that subpart at the time consumers inquire, through means provided by respondent, about the availability of telephone numbers for accessing any such electronic mail, Internet or other online service and the town or city where those numbers are located.

Provided further that, in the case of advertisements disseminated through an interactive electronic medium, respondent may make the disclosures required by this Part through the use of a hyperlink as follows:

1. For Part V. A above, any hyperlinks used must be labeled: “Early Cancellation May Result in Additional Charges. Click Here.”; and
2. For Part V. B through E above, any hyperlinks used must be labeled: “Additional Phone Charges May Apply. Click Here.”

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VI.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any electronic mail, Internet or other online service not covered under Part V of this order, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the price or cost to consumers of such service, unless it clearly and conspicuously discloses:

- A. that consumers may have to pay long distance telephone charges or, if it is the case, any other costs in excess of local telephone service charges to access such electronic mail, Internet, or other online service;
- B. the dollar amounts of any costs assessed by respondent, if any;
- C. means for consumers to determine the telephone numbers available for accessing any such service and the town or city where those numbers are located; and
- D. that consumers should contact their local telephone company to determine whether using the access telephone number for the location closest to them will incur charges in excess of local telephone service charges.

Provided that, respondent may comply with Part VI. A through D above, if it:

1. in the case of advertisements disseminated through an interactive electronic medium, discloses the information required by Part VI. A through D above, through the use of a hyperlink labeled “Additional Phone Charges May Apply. Click Here.”; and

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2. discloses, clearly and conspicuously, in advertisements and promotional materials disseminated by means other than through an interactive electronic medium that “Additional Phone Charges May Apply” and also discloses, clearly and conspicuously and prior to the consumer registering for any such service, the information required by Part VI. A through D above.

VII.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale or distribution of any electronic mail, Internet or other online service that is sold or distributed in connection with the purchase of another product or service, in or affecting commerce, shall:

- A. provide reasonable means that are readily accessible to consumers, including at a minimum a toll-free telephone number and a directory accessible on its Web site, to determine the telephone numbers available for accessing any such service and the town or city where those numbers are located; and
- B. maintain adequate customer support to respond to consumer inquiries regarding the telephone numbers available for accessing any such electronic mail, Internet or other online service and the town or city where those numbers are located.

VIII.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division or other device, shall refrain from using or disclosing, except as required in connection with a judicial, legislative or administrative investigation or proceeding or to respond to a request made by a government agency, any personal identifying information retained in its archived database that it collected prior to the entry of this order

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in connection with the advertising, promotion or offering for sale of any electronic mail, Internet or other online service that respondent advertised for sale, but failed to provide to consumers. By signing this order, respondent hereby certifies that, in connection with advertisements and promotions referred to in this Part: (i) respondent did not transmit to its server(s) any of the credit card information it solicited from consumers; (ii) it has deleted from its server(s) all of the other personal identifying information that it did collect from consumers; and (iii) it did not share such information with any third party. The Commission's acceptance of this settlement is contingent upon the above certification.

IX.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall not provide the means and instrumentalities to any other party in making any deceptive representation or deceptive material omission prohibited by this order, in connection with the advertising, promotion, offering for sale, sale, or distribution of any electronic mail, Internet, or any other online service.

X.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall offer reimbursement to certain present and former subscribers of its electronic mail and Internet access services as provided in the Part.

SUBSCRIBERS ELIGIBLE FOR REDRESS NOTIFICATION
LETTERS

- A. Respondent shall notify by the means required in subpart B of this Part any present or former subscriber of its electronic mail or Internet service who prior to service of this order:

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1. subscribed to such service as part of a rebate program that required the purchase of another product or service and subscription to respondent's Internet access service for a period of more than a month; or
2. canceled his or her subscription(s) to such service and:
 - a. identified the unavailability of a local access number as a reason for the cancellation(s); or
 - b. complained to respondent about incurring long distance telephone toll charges ("toll charges") through the use of such service.

REDRESS NOTIFICATION LETTERS

- B. Respondent shall send, within thirty (30) days from the date of service of this order, by first-class mail to the last known address of each subscriber exact copies of:
1. the "Refund Offer Notification Letter and Application Form," attached hereto as Attachment A, to subscribers identified under subpart A.1 of this Part; and
 2. the "Refund Offer Notification Letter and Application Form," attached hereto as Attachment B, to subscribers identified under subpart A.2 of this Part.

The front of the envelope transmitting Attachment A shall be in the form set forth in Attachment C to this order. The phrase "ATTENTION: Important Information Inside - JUNO LONG DISTANCE Refund Program" shall appear on the front of the envelope in typeface equal or larger in size to 14 point. The front of the envelope transmitting Attachment B shall be in the form set forth in Attachment D to this order. The phrase "ATTENTION: Important Information Inside- JUNO LONG DISTANCE Refund Program" shall appear on the front of the envelope in typeface equal or larger in size to 14 point. The words "FORWARD & ADDRESS CORRECTION REQUESTED" shall appear in the

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upper left-hand corner of each envelope, one-quarter of an inch beneath the return address. Except as otherwise provided by this order, no information other than that required by this Part shall be included in or added to the above items, nor shall any other material be transmitted therewith. Respondent shall also mail the appropriate "Refund Offer Notification Letter and Application Form" to any such former subscriber whose mailing is returned by the U.S. Postal Service as undeliverable and for whom respondent thereafter obtains a corrected address via the National Change of Address ("NCOA") registry. Respondent shall retain a NCOA licensee to update its list of such former subscribers under this subpart by processing the list through the NCOA database. The mailing required by this subpart shall be made within ten (10) days of respondent's receipt of a corrected address or information identifying each such former subscriber.

C. Respondent shall send, by first class mail, exact copies of:

1. the "Refund Offer Notification Letter and Application Form" attached hereto as Attachment A to any subscriber identified under subpart A.1 of this Part who contacts respondent to request reimbursement within one hundred eighty (180) days after the date of service of this order; and
2. the "Refund Offer Notification Letter and Application Form" attached hereto as Attachment B to any subscriber identified under subpart A.2 of this Part who contacts respondent to request reimbursement within one hundred and eighty (180) days after the date of service of this order.

Respondent shall mail Attachment A or Attachment B to the address provided by such subscribers within ten (10) days after the date of the request. The front of the envelope transmitting Attachment A shall be in the form set forth in Attachment C to this order and the front of the envelope transmitting Attachment B shall be in the form set forth in Attachment D to this order.

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REDRESS

- D. Respondent, within thirty (30) days of receipt of a subscriber's "Refund Application Form," appended to either Attachment A or Attachment B of this order, shall:
1. reimburse all subscribers identified under subparts A.1 or A.2 of this Part for any toll charge(s) incurred prior to the date of service of this order and through use of respondent's Internet service within sixty (60) days of subscription to such service, for which any such subscriber has not been previously reimbursed. Provided that, in cases where any such subscriber has received partial reimbursement for such toll charge(s), respondent shall reimburse such subscriber for the remainder of such charge(s.) Provided further that, each such subscriber identified under subparts A.1 or A.2 of this Part shall provide respondent with a copy of the subscriber's telephone bill(s) reflecting the toll charge(s) incurred. Provided, however, in the event a subscriber who applies for reimbursement incurred such telephone charge(s) at least 18 months prior to the date his or her "Refund Application Form," appended to either Attachment A or Attachment B of this order, is postmarked, respondent shall:
 - a. reimburse an amount not to exceed one hundred dollars (\$100) to any such subscriber who provides:
 - (1) a written declaration indicating the amount of the telephone charges incurred and that his or her telephone company is unable to send a copy of the telephone bill(s) because such charges were incurred at least 18 months prior to the date such declaration is signed; and
 - (2) a copy of a check (or checks) or other form of payment for the toll charge(s); and

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of the toll charge(s) incurred and fails to do so, or who fails to otherwise apply properly for a reimbursement, of any error in such subscriber's "Refund Application Form," and shall provide a reasonable opportunity for such subscriber to rectify any such error.

RECORD KEEPING

- G. Respondent within thirty (30) days from service of this order, shall compile and furnish to the Commission separate lists of subscribers identified under (1) subpart A.1 of this Part and (2) subpart A.2 of this Part. Such lists shall contain the name and last known address of each subscriber eligible under subparts A.1 and A.2 of this Part.
- H. Within one (1) year after the date of service of this order, respondent shall furnish to the Commission separate lists of the subscribers of respondent's Internet service who have applied for reimbursement pursuant to subparts A.1 and A.2 of this Part, the amount of each reimbursement request, and the date of mailing and amount of the reimbursement provided to each applicant.
- I. Respondent shall, for three (3) years after the date of service of this order, maintain and upon request make available to the Federal Trade Commission or its staff for inspection and copying:
 - 1. Sufficient records to identify:
 - a. The name and last known address of each person sent a notification pursuant to this Part and the date the notification was mailed; and
 - b. The name and address of each person who is notified by respondent that his or her reimbursement application is deficient;

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2. Sample copies of all letters, descriptions, applications and forms sent to subscribers identified in (1) subpart A.1 and (2) subpart A.2 of this Part, or others pursuant to this order; and
3. Each and every reimbursement application received.

XI.

IT IS FURTHER ORDERED that respondent Juno Online Services, Inc. and its successors and assigns shall for five (5) years after the last date of dissemination of any representation covered by this order maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation.
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

XII.

IT IS FURTHER ORDERED that respondent Juno Online Services, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order.

Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future

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personnel within thirty (30) days after the person assumes such position or responsibilities.

XIII.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall within thirty (30) days after the date of service of this order, send by first-class mail, return receipt requested, exact copies of this order and the notice attached hereto as Attachment F, to any third party with which respondent has entered into a contract or any other agreement, prior to the entry of this order, for the advertising, promotion, or sale of respondent's electronic mail, Internet, or other online service as part of any rebate program requiring the purchase of another product or service and subscription to respondent's Internet access service for a period of more than a month.

XIV.

IT IS FURTHER ORDERED that respondent Juno Online Services, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as practicable after obtaining such knowledge. All notices required by the Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

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XV.

IT IS FURTHER ORDERED that respondent Juno Online Services, Inc., and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XVI.

This order will terminate twenty on June 25, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further that, if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Chairman Muris not participating.

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ATTACHMENT A

**LETTER TO CUSTOMERS WHO PARTICIPATED IN A
JUNO REBATE PROGRAM**

[To be printed on Juno letterhead]

[Date]

[Name and address of recipient]

[Juno e-mail address/user name]

Re: REFUND FOR SUBSCRIBERS TO JUNO'S
ELECTRONIC MAIL AND/OR INTERNET SERVICES
("JUNO'S SERVICES") WHO PARTICIPATED IN A JUNO
REBATE OFFER

DEADLINE: [Insert date]

Dear [Recipient's name]:

You may be eligible for a refund from Juno Online Services, Inc. for certain long-distance telephone charges incurred in connection with using Juno's services.

Juno recently settled a dispute with the Federal Trade Commission that dealt with the adequacy of some of its advertising disclosures. As part of the settlement, Juno has agreed to refund certain customers for long-distance telephone charges incurred through the use of Juno's services during the first two months after you subscribed to such services.

You are eligible for a refund for long distance telephone charges incurred through the use of Juno's services on the first two monthly telephone bills you received after subscribing to such services:

- If you have not already been refunded in full for such long-distance telephone charges from Juno. (**Note:** If you already

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received a partial refund for such long-distance telephone charges, you are still eligible to recover the rest of these charges.); AND

- If you provide proof of such long-distance telephone charges. (**Note:** The refund is limited to charges incurred through the use of Juno's services on telephone bills you received during the first two months after you subscribed to such services.)

Here's how to apply for your refund:

1. Complete the attached form.
2. Attach proof of the long-distance telephone charges you incurred through the use of Juno's services during the first two months after you subscribed to such services. You can either:
 - Provide a **copy of the itemized portion of your telephone bill(s)** showing the amount of the long-distance charges you paid. If you don't have a copy of your bill(s), ask your telephone company for a copy (**Note:** If you incurred the long distance charges within the last 18 months, you are required to provide a copy of your telephone bill in order to receive a refund.); **OR**

If your telephone company tells you that it is unable to send you a copy of the itemized portion of your telephone bill(s) because you incurred the long-distance charges in question 18 months ago or earlier-

- Provide a **signed statement** indicating that the telephone company is unable to send you a copy of your telephone bill(s) because you incurred the long-distance charges 18 months ago or earlier and specifying the amount of the long-distance charges you paid in connection with using Juno's services, and also provide **proof that you paid such long-distance charges** – for example, a copy of a check. If you don't have a copy of your check(s), ask your bank for a copy; **OR**

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- Provide a **signed statement** indicating that the telephone company is unable to send you a copy of your telephone bill(s) because you incurred the long distance charges 18 months ago or earlier and specifying the amount of the long-distance charges you paid in connection with using Juno's services.

Please Note: If you cannot provide a copy of the itemized portion of your telephone bill showing the amount of the long-distance charges you paid in connection with using Juno's services, the amount of your reimbursement will be limited. **So, you should provide a copy of the itemized portion of your telephone bill if you can, and you must provide a copy of your telephone bill to receive a refund if you incurred the long-distance charges within the last 18 months.** If you provide proof of payment such as a copy of a check rather than a copy of your telephone bill, your reimbursement will be limited to a maximum of \$100. If you only provide a written statement indicating the amount of the long-distance charges you paid in connection with using Juno's services, your reimbursement will be limited to a maximum of \$50. In connection with processing your refund request, Juno may verify that you actually used the Juno services as claimed.

3. Return the completed form and your proof of payment to:
[Insert fulfillment address here].

YOU MUST APPLY FOR YOUR REFUND BY (INSERT DATE) WITHIN [Insert Date 60 days after mailing here]. We will honor all eligible claims within 30 days after we receive them.

If you have any questions, please call us, toll-free, at 1-800

Sincerely,

[]

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To: Juno Online Services, Inc.

[Address to Be Inserted]

From:

(Name)

(Mailing Address)

(City, State, and Zip Code)

(Telephone Number)

_____@juno.com

(Juno e-mail address/user name)

Please refund me in the amount of \$_____ for the long-distance charge(s) I incurred through the use of Juno's services during the first two months after subscribing to such services. As proof of my claim I am attaching:

- a copy of the **itemized portion of my telephone bill(s)** showing the amount of the long-distance telephone charges I incurred through the use of Juno's services;
- a copy of my **check or other form of payment** for the long-distance telephone charges I incurred through the use of Juno's services. **I am not attaching a copy of the itemized portion of my telephone bill(s)**, but I declare under penalty of perjury, to the best of my knowledge, that my telephone company is unable to send me a copy of my telephone bill(s) because I incurred the long distance charges 18 months ago or earlier and that I was billed long-distance charges of \$_____ as a result of my use of Juno's services; or
- I am not attaching a copy of the itemized portion of my telephone bill(s) or a copy of my check or other form of payment**, but I declare under penalty of perjury, to the best of my knowledge, that my telephone company is unable to

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send me a copy of my telephone bill(s) because I incurred the long distance charges 18 months ago or earlier and that I was billed long-distance charges of \$_____ as a result of my use of Juno's services.

I confirm that:

- I incurred the long-distance telephone charges through my use of Juno's services; and
- I have not already been fully refunded by Juno Online Services, Inc. for such long-distance telephone charges.

I declare under penalty of perjury under the laws of the United States of America that this information is true and correct to the best of my knowledge.

Date

Signature

Name (printed)

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ATTACHMENT B**LETTER TO CUSTOMERS WHO CANCELED THEIR
SERVICE AND NAMED TOLL CHARGES AS A REASON**

[To be printed on Juno letterhead]

[Date]

[Name and address of recipient]

[Juno e-mail address/user name]

Re: REFUND OFFER FOR SUBSCRIBERS TO JUNO'S
ELECTRONIC MAIL AND/OR INTERNET
SERVICES ("JUNO'S SERVICES")

DEADLINE: [Insert date]

Dear [recipient's name]:

You may be eligible for a refund from Juno Online Services, Inc. ("Juno") for certain long-distance charges incurred through the use of Juno's services.

Juno recently settled a dispute with the Federal Trade Commission that dealt with the adequacy of some of its advertising disclosures. As part of the settlement, Juno has agreed to refund certain customers for the long-distance charges incurred through the use of Juno's services during the first two months after you subscribed to such services.

You are eligible for a refund if you:

- canceled your Juno service on or before [insert date];
- canceled your Juno service within 90 days of subscribing to the service and (1) identified the unavailability of a local access number as a reason for your cancellation; OR (2) complained to Juno about incurring long-distance charges through your use of the service;

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- have not already received a full refund for long-distance charges incurred through the use of Juno's services from Juno (**Note:** If you already received a partial refund for such long-distance telephone charges, you still are eligible to recover the rest of these charges); AND
- provide proof of the long-distance charges (**Note:** The refund is limited to charges incurred through the use of Juno's services on telephone bills received during the first two months after you subscribed to such services.)

Here's how to apply for your refund:

1. Complete the attached form.
2. Attach proof of the long-distance charges you incurred through the use of Juno's services. You can either:
 - Provide a **copy of the itemized portion your telephone bill(s)** showing the amount of the long-distance charges you paid. If you don't have a copy of your bill(s), ask your telephone company for a copy (**Note:** If you incurred the long-distance charges within the last 18 months, you are required to provide a copy of your telephone bill in order to receive a refund); **OR**

If your telephone company tells you that it is unable to send you a copy of the itemized portion of your telephone bill(s) because you incurred the long distance charges in question 18 months ago or earlier -

- Provide a **signed statement** indicating that the telephone company is unable to send you a copy of your telephone bill(s) because you incurred the long-distance charges 18 months ago or earlier and specifying the amount of the long-distance charges you paid in connection with using Juno's services, and also provide **proof that you paid such long-distance charges** - for example, a copy of a check. If you don't have a copy of your check(s), ask your bank for a copy; **OR**

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- Provide a **signed statement** indicating that the telephone company is unable to send you a copy of your telephone bill(s) because you incurred the long distance charges 18 months ago or earlier and specifying the amount of the long-distance charges you paid in connection with using Juno's services.

Please Note: If you cannot provide a copy of the itemized portion of your telephone bill showing the amount of the long-distance charges you paid, the amount of your reimbursement will be limited. **So, you should provide a copy of the itemized portion of your telephone bill if you can, and you must provide a copy of your telephone bill to receive a refund if you incurred the long distance charges within the last 18 months.** If you provide proof of payment such as a copy of a check rather than a copy of your telephone bill, your reimbursement will be limited to a maximum of \$100. If you only provide a written statement indicating the amount of the long-distance charges you paid in connection with using Juno's services, your reimbursement will be limited to a maximum of \$50. In connection with processing your refund request, Juno may verify that you actually used the Juno services as claimed.

3. Return the completed form and your proof of payment to:
[Insert fulfillment address here].

YOU MUST APPLY FOR YOUR REFUND BY [INSERT DATE] WITHIN [Insert 60 days after mailing here]. We will honor all eligible claims within 30 days after we receive them.

If you have questions, please call us, toll-free, at 1- 800-____-____.

Sincerely,

[]

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To: Juno Online Services, Inc.

[Address to Be Inserted]

From:

(Name)

(Mailing Address)

(City, State, and Zip Code)

(Telephone Number)

_____@juno.com

(Juno E-mail Address/User Name)

Please refund me in the amount of \$_____ for the long-distance charge(s) I incurred through the use of Juno's services during the first two months after subscribing to such service:

As proof of my claim, I am attaching:

- a copy of the **itemized portion of my telephone bill(s)** showing the amount of the long-distance telephone charges I incurred through the use of Juno's services;
- a copy of my **check or other form of payment** for the long-distance telephone charges I incurred through the use of Juno's services. **I am not attaching a copy of the itemized portion of my telephone bill(s)**, but I declare under penalty of perjury, to the best of my knowledge, that my telephone company is unable to send me a copy of my telephone bill(s) because I incurred the long distance charges 18 months ago or earlier and that I was billed long-distance charges of \$_____ as a result of my use of Juno's services; or
- I am not attaching a copy of the itemized portion of my telephone bill(s) or a copy of my check or other form of payment**, but I declare under penalty of perjury, to the best

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of my knowledge, that my telephone company is unable to send me a copy of my telephone bill(s) because I incurred the long distance charges 18 months ago or earlier and that I was billed long-distance charges of \$_____ as a result of my use of Juno's services.

I confirm that:

- I incurred the long-distance telephone charges through my use of the Juno's service;
- I have not already been fully refund by Juno Online Services, Inc. for such long-distance telephone charges;
- One reason that I canceled my subscription to the Juno service was the long-distance telephone charges I incurred;
- I canceled my subscription to the Juno service within 90 days of initiating the subscription and on or before [insert date].

I declare under penalty of perjury under the laws of the United States of America that this information is true and correct to the best of my knowledge.

Date

Signature

Name (printed)

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ATTACHMENT C

REFUND NOTICE LETTER ENVELOPE

Juno Online Services, Inc.
[address]

FORWARD & ADDRESS CORRECTION REQUESTED

Window Envelope

[The following statement is to appear in a box, on the left hand side of the envelope in red, in extra large typeface equal or larger in size to 14 point, bold type face].

**ATTENTION: Important
Information Inside – JUNO LONG
DISTANCE Refund Program**

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ATTACHMENT D

REFUND NOTICE LETTER ENVELOPE

Juno Online Services, Inc.
[address]

FORWARD & ADDRESS CORRECTION REQUESTED

Window Envelope

[The following statement is to appear in a box, on the left hand side of the envelope in red, in extra large typeface equal or larger in size to 14 point, bold type face]

**ATTENTION: Important
Information Inside – JUNO LONG
DISTANCE Refund Program**

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ATTACHMENT E

REFUND CHECK ENVELOPE

Juno Online Services, Inc.

[address]

FORWARD & ADDRESS CORRECTION REQUESTED

Window Envelope

[indicates a check is enclosed]

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ATTACHMENT FBY U.S. MAIL

[to be printed on Juno Online Services, Inc. letterhead]

[date]

Dear [manufacturer]

This letter is to inform you that Juno recently voluntarily entered into a settlement agreement, or consent order, with the Federal Trade Commission (“FTC”) regarding certain aspects of the advertising for our Internet access services. The settlement requires us to notify any party with whom we have agreed to advertise, promote or sell our Internet services to stop using advertising or promotional materials that do not make certain disclosures required by the settlement. This letter summarizes the FTC’s allegations and those order provisions that are most relevant to our business relationship.

The FTC’s Allegations

___The FTC alleges in part that Juno represented that consumers who purchased computer-related products would receive cash rebates for subscribing to our fee-based Internet access services for a minimum period of time. The complaint challenges as deceptive our failure to disclose or adequately disclose in making these representations the following information:

- Consumers who cancel their Premium Web Internet service within this minimum period of time must repay the entire rebate received and pay a cancellation fee;

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- We do not provide local access telephone numbers in certain areas, and therefore, some consumers may have to pay long distance telephone charges to access our Internet services; and
- We automatically renew all subscriptions to our Internet access services on a month-to-month basis after the minimum commitment period has ended, unless our members contact us to cancel the service.

The Consent Order Provisions

The consent order we entered into requires, among other things, that advertisements and promotional materials for any Juno Internet access service that is sold or distributed in connection with the purchase of another product or service, must include the following information, in a clear and conspicuous manner, where a price or cost claim is made about our service and/or these other products and services:

- The dollar amounts of any and all fees, charges, rebate repayments, and other costs consumers must pay if they cancel our Internet service;
- That consumers may have to pay long distance telephone charges, or if it is the case, that consumers may have to pay other costs in excess of local telephone service charges to use our Internet service;
- The means we provide for consumers to find out the telephone numbers available for accessing our Internet service and the town or city where those numbers are located; and
- That consumers should contact their local telephone company to determine whether using the access telephone number in a location closest to them to access our service will result in charges in addition to local telephone service charges.

One means for us to notify consumers that they should contact their local phone company to determine whether an access number

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is local is to make this disclosure when they inquire about what access numbers we have available. The settlement further allows for the appropriate disclosures to be made in Internet advertisements by using hyperlinks that lead directly to the information above. These hyperlinks must appear on the same Web page and near to claims about the price or cost of our Internet access service, or other products or services sold in conjunction with our service. The hyperlink that leads to information about cancellation charges and fees must be labeled “Early Cancellation May Result in Significant Charges. Click Here.”; and the one that leads to information about long distance and other toll charge information must be labeled “Significant Phone Charges May Apply.”

As part of our settlement with the FTC, Juno is taking steps (such as sending you this letter) to ensure that our promotional partners stop using advertising or promotional materials that do not fully comply with the requirements described above.

Thank you for your assistance. If you have any questions, please feel free to call us at [].

Sincerely,

President
Juno Online Services, Inc.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on May 4, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Juno Online Services, Inc. (“Juno”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

Juno is an Internet service provider with approximately 842,000 subscribers to its fee-based services and nearly 4 million total active subscribers. Juno typically charges subscribers a flat monthly fee for its fee-based services. The company’s subscriber revenues reached nearly \$34.5 million for 1999 and \$73.9 million last year.

This matter concerns allegedly false claims for its “free” and fee-based online services. The Commission’s proposed complaint alleges:

- Juno falsely represented that consumers participating in its free trial periods for its fee-based Internet service could cancel at any time before the free trial expired and avoid incurring charges, and Juno failed to disclose the restrictive procedures that subscribers must follow to cancel this service;
- Juno misrepresented the duration of its free trial offers for its fee-based service and, in other instances, failed to disclose that these free trial periods must be completed within a month;
- Juno misrepresented that there were no additional costs associated with using its free Internet service, and failed to adequately disclose important information about potential long

Analysis

distance telephone toll charges (“toll charges”) in promoting its free, fee-based and free trial period offers;

- Juno failed to adequately disclose in its advertising for certain rebate programs both the possibility of incurring toll charges while using its fee-based Internet service and applicable cancellation penalties; and
- Juno misrepresented that its Internet service was available for purchase at certain prices, when it was not, and concurrently misrepresented the purpose for which it solicited credit card and other personal identifying information from consumers

The proposed consent order contains several provisions designed to prevent Juno from engaging in similar acts and practices in the future and requires redress for certain injured consumers.

Part I of the proposed consent order prohibits Juno from misrepresenting the price or cost of any electronic mail, Internet or other online service (“Internet services”). The Part also prohibits Juno from misrepresenting the ability or terms by which consumers can cancel these Internet services, or the amount of time consumers have to use these services during a free trial period before fees are charged. Part I further prohibits Juno from falsely representing that Internet service is available for purchase - when it is not - and from falsely representing why it requests or collects credit card or any other personal identifying information from consumers.

Part II of the proposed consent order prohibits Juno from beginning to compute the billing cycle or free trial period for its Internet services before the consumer is able to use these services. In cases, however, where it is necessary to provide consumers with a software upgrade or hardware installment before they can use these services as advertised, Juno can comply with this Part if it clearly and conspicuously discloses when it will begin to

Analysis

compute the billing cycle or free trial period for these consumers *before* they register for these services.

Part III of the proposed consent order requires Juno to clearly and conspicuously disclose obligations that consumers have to cancel their Internet service and the procedures consumers must follow to effectively cancel their service.

Part IV of the proposed consent order requires Juno to provide consumers with reasonable means to cancel its Internet services, at a minimum providing for cancellation through e-mail and a toll-free telephone number. The Part further requires Juno to maintain adequate customer support to promptly handle requests for cancellation, terminating service before the next billing cycle.

Parts V and VI of the proposed consent order require Juno to disclose clearly and conspicuously potential toll charges associated with using its services and any cancellation penalties.

Part VII of the proposed consent order requires that Juno provides consumers with reasonable means to determine the telephone numbers available for accessing its Internet services and the town or city where these numbers are located - at least making this information available in a directory posted on its Web site and through a toll-free telephone number. The Part further requires Juno to maintain adequate customer support to respond to consumer inquiries about its access telephone numbers.

Part VIII of the proposed consent order prohibits Juno from using or disclosing the personal identifying information obtained by the company in connection with its deceptive dry test advertisements. The Part further conditions the Commission's approval of this consent order on the veracity of representations made by Juno that: (1) it did not collect credit card numbers provided by consumers responding to these dry test advertisements; (2) it has since deleted any other personal identifying information that it did collect from consumers in

Analysis

connection with these advertisements; and (3) it did not share this information with any third party.

Part IX of the proposed consent order prohibits Juno from providing the means and instrumentalities for any third party to violate any provision of the consent order.

Part X of the proposed consent order requires Juno to offer reimbursement to certain consumers for toll charges incurred in the first two months of subscribing to its Internet services. Eligible consumers include those who: (a) subscribed to Juno's Internet service as part of a rebate program that required the purchase of another product or service and subscription to respondent's Internet services for a period of more than a month; and (b) cancelled their subscription and either (i) identified the unavailability of a local access number as a reason for the cancellation; or (ii) complained to Juno about incurring telephone toll charges. Eligible consumers are required to supply Juno with a copy of their telephone bill(s) reflecting the amount of the toll charges that they incurred. Consumers, however, who incurred such toll charges at least 18 months prior to the date on which they mailed their application form, also can prove their claim with (a) a copy of a check or other form of payment; or (b) a written declaration indicating the amount of the toll charges that they incurred. Consumers who provide these alternative proofs of claim are entitled to receive a reimbursement not to exceed a maximum dollar amount.

Parts XI through XV of the proposed consent order are standard record keeping and compliance provisions. Part XIII requires that respondent provides a summary and explanation of the consent order requirements and the consent order to all retailers and other parties who promoted its Internet services as part of a rebate program. Part XVI of the proposed consent order "sunsets" the order after twenty years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official

Analysis

interpretation of the agreement and proposed order or to modify in any way their terms.

Response to Petition

February 23, 2001

VIA FACSIMILE AND EXPRESS MAIL

Federated Department Stores, Inc.
c/o Elroy H. Wolff, Esquire
Brian C. Kalt, Esquire
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006

Telephone: (202) 736-8000

Facsimile: (202) 736-8711

Re: Petition of Federated Department Stores, Inc., on Behalf
of its Subsidiary, FACS Group, Inc., To Quash Civil
Investigative Demand -- File No. 992-3271

Dear Messrs. Wolff and Kalt:

This letter constitutes the Federal Trade Commission's ("FTC" or "Commission") ruling on the petition you filed on behalf of Federated Department Stores, Inc. and its subsidiary, FACS Group, Inc. (collectively "petitioner"), to quash a civil investigative demand ("CID") issued by the FTC on May 30, 2000 (the "petition"). The petition is denied for the reasons stated below. Petitioner is directed to produce the documents and answer the interrogatories required by the CID on or before March 12, 2001, and appear at 9:00 a.m. on March 23, 2001, for the testimonial hearing.

Your petition has been referred to the full Commission for a determination in the first instance (*see* 16 C.F.R. § 2.7(d)(4) (2000)); and this letter sets out the determination of the full Commission. Accordingly, the typical opportunity to request full Commission review of a ruling by a designated Commissioner is superseded in this case. *See* 16 C.F.R. § 2.7(f) (2000).

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I. BACKGROUND

Federated Department Stores, Inc. (“Federated”) is the ultimate parent of several large department store chains, including Macy’s and Bloomingdale’s. Federated also has related direct mail catalog and internet sales operations. These department stores and retail operations offer private label credit cards to consumers. The credit cards are issued by a bank, an indirect subsidiary of Federated, called the FDS Bank.¹ Another Federated subsidiary, FACS Group, Inc. (“FACS Group”), which is not a bank, performs various services for the FDS Bank in connection with the credit cards.²

¹ At the time the petition was filed, Federated’s bank, FDS National Bank, was a limited purpose national bank in the business of issuing credit cards. As a national bank, FDS was chartered and subject to regulatory oversight by the Office of the Comptroller of the Currency (“OCC”). While petitioner has not filed any supplement to its petition, press reports state that the bank has now received a charter as a federal savings bank, which, in turn, permits it to expand its banking activities beyond issuing credit cards. As part of this change, the bank has been renamed FDS Bank. *See* Gene Fox, *Federated Department Stores to Open Own Bank*, Dayton Business Journal, April 30, 1999, available at <http://dayton.bcentral.com/dayton/stories/1999/05/03/newscolumn3.html>, and Julie Thompson, *Retailer Banking on Credit Cards*, Dayton Business Journal, July 28, 2000, available at <http://dayton.bcentral.com/dayton/stories/2000/07/31/story1.html>, and follow-up confirmation at http://www.cardforum.com/html/news/031300_4.htm (March 13, 2000, *Federated Gets New Bank Charter*). As a savings bank, regulatory oversight shifts to another of the multiple federal banking agencies: the Office of Thrift Supervision (“OTS”). The Commission’s analysis and conclusion here are applicable to savings associations and their contractors as well.

² According to the Affidavit of Amy Hanson, Senior Vice President of Credit Services of FDS National Bank, “FACS

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According to Federated's web site (<http://www.federated-fds.com/home.asp>), "approximately 40 percent of customer purchases are through the use of these credit cards. Each business day, Federated collects, organizes and analyzes millions of customer transactions." "Federated customers opened more than 3.4 million new proprietary charge accounts in 1999, bringing the total number of accounts on record to 67.4 million. In all, more than 26 million individual customers used their Federated store charge accounts in 1999."

The FTC is the primary enforcer of the Fair Credit Reporting Act ("FCRA"),³ which seeks to ensure accuracy and fairness in the consumer reporting process. Among other things, the FCRA regulates those who furnish information to consumer reporting agencies. For example, the statute imposes a duty to reinvestigate disputed report entries. Simply put, when a consumer challenges the accuracy of an item on his or her credit report, the company that furnished the information is required to investigate and determine the challenged item's accuracy. The FTC investigation that gave rise to the CID at issue here seeks to determine whether the parties being investigated are complying with the FCRA.

On May 30, 2000, the Commission issued a CID to Federated in connection with its investigation of potential FCRA violations.

performs services with regard to obtaining credit reports from credit reporting agencies, applying the bank's underwriting guidelines to the information contained in those reports, providing required disclosures to applicants and customers of the Bank, handling customer account disputes, and furnishing customer account information to consumer reporting agencies, all on behalf of and at the direction of the Bank." *Affidavit of Amy Hanson* (Exhibit 5 to the Petition) ¶ 2.

³ 15 U.S.C. §§ 1681 - 1681u (2000). As discussed in detail below, under the FCRA, enforcement authority with respect to banks (as well as a few other specified businesses not relevant here) is committed to other federal agencies. *Id.* at 1681s.

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The CID sought production of specified categories of documents, the submission of narrative responses to written interrogatories, and Federated's appearance at a testimonial hearing.

On June 15, 2000, Federated filed its petition to quash the CID. In its petition, Federated states that the only Federated entity with responsive materials is FACS Group. Federated argues that, although FACS Group is not a bank but simply a company that provides services to a bank, the Commission lacks jurisdiction over FACS Group because the Office of Comptroller of the Currency ("OCC") has exclusive FCRA jurisdiction over FACS Group through the operation of the Bank Service Company Act ("BSCA").

After careful review of the CID, the petition, the declarations and various correspondence Federated filed with the petition, and the relevant statutes and case law, the Commission finds that none of petitioner's arguments provides a basis for quashing the CID.

II. ANALYSIS

The FCRA incorporates the procedural, investigative, and enforcement powers set forth in the FTC Act "as though the applicable terms and conditions of the Federal Trade Commission Act were part of [the FCRA]." 15 U.S.C. § 1681s(a) (2000). The FTC Act authorizes the Commission to issue CIDs to gather information and to seek enforcement of its CIDs in federal district court. *See* 15 U.S.C. § 57b-1 (2000). In deciding whether to enforce compulsory process issued by the Commission, courts are to consider only whether (a) the investigation at issue is within the Commission's authority, (b) the information sought is reasonably relevant to the investigation, and (c) the request is not unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992). Here, petitioner asserts that the Commission lacks authority to issue the CID to Federated.

Specifically, petitioner asserts that the OCC has exclusive jurisdiction to enforce the FCRA against companies, like FACS Group, which provide business services to national banks. To

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arrive at this result, petitioner reads the FCRA provisions granting enforcement jurisdiction over various types of “banks” to the federal banking agencies⁴ in conjunction with a provision of the Bank Service Company Act, 12 U.S.C. § 1867(c) (2000), which permits the banking agencies to reach the activities of contractors and others providing services to banks. In essence, petitioner argues that when Congress excluded specified banking institutions from the FTC’s jurisdiction under FCRA (*e.g.*, “national banks” and “savings associations”),⁵ Congress also excluded anyone the banking agencies can reach as part of their oversight of these actual banking institutions. The plain language of the FCRA and the BSCA do not support petitioner’s argument. Petitioner also cites various passages from the legislative histories of these Acts and other related statutes to support its argument that all banking agency authority to enforce the FCRA is exclusive and that

⁴ These are the OCC, Federal Reserve Board, Office of Thrift Supervision (“OTS”), and Federal Deposit Insurance Corporation. The OTS now has authority parallel to that of BSCA § 1867(c) under 12 U.S.C. § 1464(d)(7), added in 1998.

⁵ These exclusions mirror those found in Section 45 of the FTC Act, which provides, in relevant part:

The Commission is hereby empowered and directed to prevent persons, partnerships, and corporations, *except banks, savings and loan institutions* described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, and corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

15 U.S.C. § 45(a)(2) (2000) (emphasis added).

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therefore the FTC is excluded from enforcement wherever a banking agency has authority under *any* law.⁶ Petitioner's arguments do not support a finding that the banking agencies have exclusive jurisdiction over bank service providers, such as FACS Group.⁷

As detailed below, petitioner's arguments fail because the language of the FCRA is clear on its face, the FCRA jurisdictional provisions are unaffected by the BSCA, and resort to legislative history is unnecessary. Moreover, nothing in the legislative history that petitioner cites contradicts our conclusion here that the FTC has authority to enforce the FCRA against non-banks, including those companies that contract with banks to perform clerical, administrative, and other functions for and on behalf of banks. Petitioner's argument is further refuted by a provision of the recently passed Gramm-Leach-Bliley Act which explains that the exclusions for "banks" and "savings associations" contained in

⁶ Petitioner also cites an FTC administrative law judge's initial decision in *Dillard's Department Stores, Inc.*, (Dkt. No. 9269), 1995 FTC LEXIS 62. That case involved the Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*, which contains enforcement provisions parallel to those in the FCRA. The ALJ in that case adopted a jurisdictional argument similar to that advanced by petitioner here. However, the Commission subsequently dismissed the *Dillard's* matter on other grounds without reviewing the ALJ decision, and denied as unnecessary a motion to vacate the decision. 1996 FTC LEXIS 49. Although that case is not now before the Commission on review of the ALJ's ruling on this legal point, we here conclude that the ALJ's determination of that legal point was incorrect.

⁷ While we reject petitioner's contention that the banking agencies' have *exclusive* FCRA jurisdiction over bank service providers, we do not question the ability of those agencies to reach the FCRA conduct of bank service providers. In short, we believe the FTC and the banking agencies have *concurrent* jurisdiction over these non-bank entities. *See infra* note 19.

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the FTC Act and statutes enforced through it, such as the FCRA, shall not be read to exclude non-bank affiliates, such as FACS Group. At base, non-bank entities working with a bank, as separate companies, have an obligation, independent of the bank's own obligation, to comply with the FCRA. In this area of overlapping jurisdiction, the Commission coordinates with the banking agencies to ensure fair and efficient administration of the FCRA.⁸

A. THE UNAMBIGUOUS LANGUAGE OF THE FCRA APPOINTS THE FTC TO ENFORCE THE STATUTE WITH RESPECT TO FACS GROUP

“Statutory construction must begin with the language employed by the Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Park 'n Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). Furthermore, “[a]bsent a clearly expressed legislative intention to the contrary, [the statute’s] language must ordinarily be regarded as conclusive.” *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The statute at the heart of this matter is the FCRA. The language of the FCRA’s administrative enforcement section, 15 U.S.C. § 1681s, is plain. It commits the power to enforce the FCRA to the Federal Trade Commission “except to the extent that enforcement of the requirements imposed under [the FCRA] is *specifically committed to some other government agency under subsection (b) hereof*.” 15 U.S.C. § 1681s(a) (2000) (emphasis added). Subsection (b) of the FCRA specifically commits only

⁸ It is not unusual that two different agencies have concurrent jurisdiction. In similar situations, the Commission also coordinates with those other agencies, such as the Food and Drug Administration, Consumer Product Safety Commission, and Environmental Protection Agency.

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“national banks” (and certain other entities not relevant here) and “savings associations” to the OCC and the OTS, respectively.⁹

While Federated’s FDS National Bank, now a savings association called FDS Bank,¹⁰ clearly falls under these exceptions to the FTC’s jurisdiction specified in the FCRA, FACS Group does not. FACS Group is not a national bank or savings association (or any other entity listed in subsection (b) of Section 1681s), and thus is not exempted from the FTC’s jurisdiction under the FCRA. Subsection (b) does not specifically commit FCRA enforcement authority to the banking agencies with respect to non-bank companies that provide services to banks or with

⁹ The relevant portions of subsection (b) read as follows:

(b) Enforcement by other agencies

Compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to subsection (d) of section 1681m of this title shall be enforced under –

(1) section 8 of the Federal Deposit Insurance Act, in the case of –

(A) national banks . . . by the Office of the Comptroller of the Currency;

* * *

(2) section 8 of the Federal Deposit Insurance Act, by the Director of the Office of Thrift Supervision, in the case of a savings association the deposits of which are insured by the Federal Deposit Insurance Corporation.

* * *

15 U.S.C. § 1681s(b) (2000).

¹⁰ See *supra* note 1.

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respect to all entities or activities subject to those agencies' oversight under other law.¹¹

Federated's petition (p. 4) also refers to subsection (d) of Section 1681s, which authorizes the various agencies identified in subsection (b) to use all the powers they have under any statute (which, of course, includes the BSCA) to enforce the FCRA.¹² This provision, however, does not support Federated's argument. Subsection (d) does not affect the FCRA's allocation of enforcement authority to the FTC. The statute provides expressly in subsection (a) that the only exclusions from FTC authority are those set forth in subsection (b). Petitioner has simply read out of the FCRA the language granting the FTC enforcement authority except as "specifically committed" to another agency "under subsection (b)" of the statute. Subsection (d) in no way conflicts with the FTC's authority over non-bank companies pursuant to

¹¹ See *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent").

¹² FCRA subsection (d) provides:

For the purpose of the exercise by any agency referred to in subsection (b) of this section of its powers under any Act referred to in that subsection, a violation of any requirement imposed under this subchapter shall be deemed to be a violation of a requirement imposed under that Act. In addition to its powers under any provision of law specifically referred to in subsection (b) of this section, each of the agencies referred to in that subsection may exercise, for purposes of enforcing compliance with any requirement imposed under this subchapter any other authority conferred on it by law.

15 U.S.C. § 1681s(d) (2000).

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subsection (b).

The language of the statute is plain on its face: the FTC has FCRA jurisdiction over FACS Group.

Our conclusion here is consistent with the precedent addressing this issue. Prior determinations of the Commission and court decisions have concluded that the exclusions from FTC jurisdiction under the FTC Act and the consumer credit laws such as the FCRA do not extend to an otherwise non-exempt company by virtue of contracting with an exempt entity.¹³

¹³ For example, in promulgating the Telemarketing Sales Rule, implementing the Telemarketing Act which gives the FTC jurisdiction identical to that of the FTC Act, the Commission declined to adopt a provision urged by some commenters to exclude the agents of otherwise exempt entities. The Commission explained:

[A] nonbank company that contracts with a bank to provide services on behalf of the bank and a non-airline company that contracts with an airline to provide services on behalf of the airline, are not exempt from the FTC Act. . . . The Commission is not aware of any reason why the Final Rule should create a special exemption for such companies when the FTC Act does not do so. Accordingly, the final rule does not include special provisions regarding exemptions of parties acting on behalf of exempt organizations; where such a company would be subject to the FTC Act, it would be subject to the Final Rule as well.

60 Fed. Reg. 43841, 43843 (Aug. 23, 1995).

See also, e.g., Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980) (firm that contracted with airlines to publish airline schedules was not exempt from FTC Act under air carrier exemption); *FTC v. Saja*, 1997-2 Trade Cas. (CCH) P71,952 (D. Az. 1997) (telemarketer for nonprofit organization could not

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**B. SUBSECTION 1867(c) OF THE BANK SERVICE
COMPANY ACT DOES NOT DIVEST THE FTC OF ITS
FCRA JURISDICTION**

Petitioner argues that jurisdiction to enforce the FCRA against FACS Group is committed *exclusively* to the banking agencies (OCC or OTS) because the Bank Service Company Act permits the banking agencies to reach activities engaged in by FACS Group. Nothing in the BSCA, alone or when read in conjunction with the FCRA, supports petitioner's exclusive jurisdiction argument with respect to non-bank entities such as FACS Group. Indeed, as discussed *supra*, the terms of the FCRA contradict such an assertion.

Subsection 1867(c) of the BSCA gives the banking agencies the authority to regulate and examine the activities of certain non-bank entities providing specified services to banks.¹⁴ In relevant part, the subsection reads:

[W]henever a bank that is regularly examined by an appropriate federal banking agency, or any subsidiary or affiliate of such a bank that is subject to examination by that

invoke the FTC Act nonprofit exemption); *FTC v. Greentree Acceptance, Inc.*, Civ. No. 4-86-469-K (N.D. Tex., Sept. 30, 1987) (FTC enforces FCRA and Equal Credit Opportunity Act as to subsidiary of savings & loan institution that provided the savings & loan with contract servicing, because the servicer was not itself a savings & loan or other institution allocated to another government agency under those statutes).

¹⁴ The BSCA specifies the following as the permissible activities for companies serving banks: "check and deposit sorting and posting, computation and posting of interest and other credits and charges, preparation and mailing of checks, statements, notices, and similar items, or any other clerical, bookkeeping, accounting, statistical, or similar functions performed for a depository institution." 12 U.S.C. § 1863 (2000).

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agency, causes to be performed for itself, by contract or otherwise, any services authorized under this chapter, whether on or off its premises –

(1) such performance shall be subject to regulation and examination by such agency to the same extent as if such services were being performed by the bank itself on its own premises

12 U.S.C. § 1867(c) (2000). Thus, when banks contract with separate companies to perform certain services, the banking agency may regulate and examine the performance of those services. Other provisions of the BSCA authorize banks to own specifically defined non-bank entities (bank service companies) to provide those services to banks, and provide the banking agencies with broad authority over those entities.¹⁵

Subsection 1867(c) ensures that banks cannot place any potentially relevant activities beyond the reach of the banking agencies by hiring a non-bank to perform those activities. Plainly, the banking agencies' mandate to ensure the safety and soundness of banks would be frustrated if the agencies could not examine the performance of these contractors.

Nowhere in the BSCA did Congress state that in extending the reach of the banking agencies to such service providers it also intended to displace the usual jurisdiction of the FTC over these non-bank entities. Nothing in the BSCA suggests that the banking agencies have *exclusive* jurisdiction over these non-banks. As the chief counsel of the OTS explained, in a 1991 memorandum

¹⁵ We note that “bank service corporation” is defined to mean a company organized to perform certain services for banks, “all of the capital stock of which is owned by one or more insured banks.” 12 U.S.C. § 1861(b)(2) (2000). FACS Group is not owned by the FDS Bank, and therefore does not qualify as a bank service company. *See* Petition at Ex. 3, Attachment 1 (chart showing corporate structure).

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addressing the OTS' power to enforce the FCRA and other consumer credit laws against certain non-bank entities: "Congress consciously chose to give the federal banking agencies broad enforcement jurisdiction that in some cases overlaps with the jurisdiction of other governmental agencies so as to enable the banking agencies to fulfill their statutory mandate to protect the deposit insurance funds." Gen. Couns. Mem. 1991 OTS LEXIS 78, p. 13 (Dec. 27, 1991).

Notably, although the FCRA was enacted after the BSCA, which permitted creation and contracting with non-bank entities to provide services to banks, the FCRA's assignments to the banking agencies specify only banking institutions themselves. The FCRA does not mention any specific commitment to the banking agencies of non-bank entities, such as bank service companies or others contracting to provide services to banks, or of those services themselves. Both the BSCA and FCRA have been amended several times since 1970, but in none of these amendments has Congress suggested, or enacted language creating, exclusive banking agency jurisdiction over non-bank entities or their services.¹⁶

¹⁶ Indeed, the BSCA itself did not initially grant jurisdiction over these non-bank entities to the banking agencies. Rather, it simply provided that banks could only obtain certain services from entities that provided assurances that they would submit those services for banking agency examination and regulation. Congress did not grant the banking agencies authority over non-bank services as a matter of law until 1978, eight years after the FCRA was enacted. Thus, Congress in 1970 could hardly have viewed the BSCA as having created exclusive banking agency jurisdiction over non-bank service providers. *See* Pub. L. 87-856, § 5, 1962 U.S.C.C.A.N. (76 Stat.) 1333; Pub. L. 95-630, § 308, 1978 U.S.C.C.A.N. (92 Stat.) 3641.

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C. RESORT TO LEGISLATIVE HISTORY IS UNNECESSARY AND DOES NOT CONTRADICT THE FTC'S READING OF THE STATUTES IN ANY EVENT

Resort to legislative history is unnecessary where the language of the statute is clear. As the Supreme Court stated in *Ex parte Collett*, 337 U.S. 55 (1949):

[T]here is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. This canon of construction has received consistent adherence in our decisions.

Id. at 61 (internal quotations and citations omitted). Petitioner, nevertheless, seeks to overcome the plain meaning of the statutes by discussing the legislative history of the FCRA, the BSCA, the Truth in Lending Act (“TILA”) 15 U.S.C. §§ 1601-1667(f) (2000), and the Gramm-Leach-Bliley Act, Pub. L. No. 106-1021; 113 Stat. 1338. As discussed below, the legislative history cited by petitioner is consistent with the Commission’s holding here.

Petitioner, while recognizing that the legislative history of the FCRA is sparse, cites language summarizing the enforcement authority under the statute: “Compliance on the part of financial institutions or common carriers regulated by another Federal agency would be enforced by that agency, using its existing enforcement authorities to bring about compliance.” Petition at 8 *citing* 116 Cong. Rec. HI0052 (daily ed. Oct. 13, 1970) (statement of Rep. Sullivan). Petitioner reads this language as dictating that anyone made subject to another agency’s jurisdiction under any other law is thereby excluded from the FTC’s FCRA jurisdiction. Such a gloss is simply not supported by the text of the FCRA. The quoted passage is no more than a short-hand description of the FCRA’s enforcement allocation provisions enacted in Section

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1681s. This history is consistent with the Commission's interpretation of that Section as discussed above.

Petitioner next looks to the legislative history of the TILA as instructive in interpreting the FCRA. Petition at 8-10. As with the FCRA history, the TILA passages recognize that the banking agencies will enforce the statute against "national banks," "savings and loan institutions," and other banking institutions in accordance with their "existing lines of responsibility." This simply echoes the exclusions contained in the FTC Act.¹⁷ Entities that are not banks, on the other hand, were traditionally, and remain, within the FTC's existing lines of responsibility.

Enactment of laws such as the BSCA that expand the banking agencies' authority to reach non-bank firms outside their traditional missions in order to further those missions did not remove those non-bank firms from the FTC's authority. Neither the text nor the legislative history of the BSCA provides any hint that the BSCA impliedly amended the FTC Act to remove authority from the Commission. Indeed, in discussing the BSCA legislative history, Petitioner cites nothing to support its contention that when banking agencies can reach a service provider's activities, those activities are automatically placed beyond the reach of other federal agencies with jurisdiction under another statute.

In sum, none of the legislative history cited by Federated supports its contention that Congress intended the banking agencies to have exclusive FCRA jurisdiction over contractors providing services to banks.

¹⁷ *See supra* note 5.

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D. SECTION 133(A) OF THE GRAMM-LEACH-BLILEY ACT REMOVES ANY UNCERTAINTY REGARDING THE COMMISSION'S AUTHORITY

The recently enacted Gramm-Leach-Bliley Act (“GLBA”) is aimed at allowing banking institutions and other types of financial services companies to affiliate. Section 133(a) of the Act, provides, in relevant part, that

Any person . . . that is directly or indirectly under common control with any bank or savings association . . . and not itself a bank or savings association shall not be deemed to be a bank or savings association for purposes of any provisions applied by the Federal Trade Commission under the Federal Trade Commission Act.

15 U.S.C. § 41 note (a) (2000) (Clarification of Federal Trade Commission Jurisdiction). The FCRA provisions are applied under the FTC Act. *See* p. 3 above. Here, Federated exercises common control over FACS Group and the FDS Bank, and FACS Group, itself, controls the FDS Bank. Petition at Ex. 3, Attachment 1 (chart of Federated corporate structure). FACS Group is not a bank or savings association, and the GLBA dictates that FACS Group “shall not be deemed a bank or savings association” for purposes of the FCRA.

Petitioner attempts to escape the plain language of the GLBA in precisely the same way it attempts to escape the plain language of the FCRA: by pointing to the BSCA. Petitioner argues that it is not relying on FACS Group’s affiliate status to avoid the FTC’s jurisdiction under the FCRA, but rather its status as a contractor subject to banking agency jurisdiction under the BSCA. As shown above, the BSCA neither affects the allocation of jurisdiction established in the FCRA nor commits exclusive law enforcement jurisdiction over third-party bank service providers to the banking agencies.

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E. CONCURRENT JURISDICTION DOES NOT POSE A CONFLICT

Ultimately, petitioner suggests that statutes extending banking agency authority to reach certain non-banking entities or activities would necessarily conflict with a view that the FCRA grants similar authority to the FTC. In essence, petitioner presumes that, wherever a banking agency has authority, that authority is exclusive. That is an unsupported and unsupportable presumption, merely imported from banking agencies' exclusive jurisdiction over national banks and other chartered banking institutions, themselves. The GLBA expressly negates any general inference that banking agency jurisdiction is exclusive, by expressly preserving FTC jurisdiction over non-bank parents, subsidiaries, and other affiliates of banking institutions notwithstanding extensive banking agency powers over such entities.¹⁸ And nothing in the statutes or legislative history here supports a specific inference of exclusive jurisdiction with respect to bank service providers. To the contrary, the FCRA itself appoints the Commission to enforce that statute in such circumstances, while the BSCA apparently grants that authority to the OCC. We read two federal statutes consistently if possible, *see, e.g., U.S. v. Borden Co.*, 308 U.S. 188, 198 (1939), and we find the FCRA and BSCA are consistent; they simply create an area of concurrent jurisdiction.¹⁹

¹⁸ *See, e.g.*, 12 U.S.C. § 1818(b)(3) and (9) (2000).

¹⁹ Indeed, courts have often recognized that both the FTC and a specialized regulatory agency may have overlapping authority under different statutory schemes. *See, e.g., FTC v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977); *see also Thompson Medical Co. v. FTC*, 791 F.2d 189, 192 (D.C. Cir. 1986) (FTC can regulate drug-related advertising regardless of Food and Drug Administration's authority to regulate advertisers; "[n]owhere in the case law or in the FTC's grant of authority is there even a hint that the FTC's jurisdiction is so constricted").

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While we conclude that the FTC has FCRA jurisdiction over bank service providers like FACS Group, we are also mindful that potential complications exist in areas of concurrent jurisdiction. The FTC routinely communicates with the banking agencies to ensure the fair and consistent application of the consumer credit laws to bank service providers. As the D.C. Circuit Court explained in *Municipal Intervenors Group v. Federal Power Commission*, 473 F.2d 84 (D.C. Cir. 1972):

The law takes into account the necessities of government regulation, and in particular the needs of cooperation and coordination at the joints of jurisdiction where two or more agencies of the government are involved. . . . The law presumes implied power in a government agency - unless precluded by a contrary provision expressed or clearly discernable in its organic statute - to cooperate with other government agencies concerning intermesh of jurisdiction or other matters of mutual concern.

Id. at 90. FCRA authority over contractors providing services to a bank is just such a “joint of jurisdiction,” and is an area where the FTC and the banking agencies cooperate to avoid duplication of efforts and inconsistent remedies. The Commission’s acknowledgment of the value of such interagency cooperation, however, in no way affects or diminishes Federated’s obligation to comply with lawful process.²⁰

III. CONCLUSION

The Commission’s CID is proper and statutorily authorized. The petition is denied, and pursuant to Rule 2.7(e), 16 C.F.R. § 2.7(e), petitioner is directed to respond to, and otherwise comply

²⁰ Furthermore, under the *Oklahoma Press* doctrine, as a general matter, jurisdictional challenges to an agency’s authority cannot properly be asserted at the investigatory phase, and need not be fully addressed before litigation. See *Oklahoma Press Publishing, Co. v. Walling*, 327 U.S. 186, 214 (1946).

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with, the CID by producing the requested documents and submitting its interrogatory answers on or before March 12, 2001, and appearing for a testimonial hearing at 9:00 a.m. on March 23, 2001.

By direction of the Commission.