IN THE MATTER OF

MEDICAL STAFF OF JOHN C. LINCOLN HOSPITAL & HEALTH CENTER

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3166. Complaint, Sept. 26, 1985—Decision, Sept. 26, 1985

This consent order requires an unincorporated association of physicians and other practitioners who have been granted privileges by John C. Lincoln Hospital & Health Center in Phoenix, Ariz. to admit and attend patients, among other things, to cease threatening or participating in any: (1) boycott or concerted refusal to deal, including a refusal to refer, admit or treat patients; (2) unreasonably discriminatory action against a health care facility or professional; or (3) coercive action to influence any reimbursement or insurance determination, if the purpose or effect of such conduct would be to impede the development or operation of an urgent care center or other health care facility or institution in the Arizona counties of Maricopa, Pinal, Yavapai or Gila. Respondent is not prohibited from participating in any policy-making or medical review activities at the hospital, when such conduct does not constitute, and is not part of, a boycott or refusal to deal. Additionally, respondent is required to file compliance reports with the Commission at specified times and provide copies of the complaint and order to all present and future members of the Medical Staff.

Appearances

For the Commission: *Raymond L. Randall* and *Nina B. Hale.*

For the respondents: *Gerald A. Gaffaney, Mariscal, Weeks, McIntyre & Friedlander,* Phoenix, Ariz.

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 the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. John C. Lincoln Hospital & Health Center (hereinafter "Lincoln Hospital" or "the Hospital") is a nonprofit corporation organized and existing under the laws of the State of Arizona and operating a general acute care hospital. The principal physical facili-

ties of Lincoln Hospital are located at 9211 North Second Street, Phoenix, Arizona.

PAR. 2. Respondent Medical Staff of John C. Lincoln Hospital & Health Center (hereinafter "Medical Staff") is an unincorporated association, organized and existing under the laws of the State of Arizona, and is located at Lincoln Hospital, Phoenix, Arizona. It is composed of the physicians and other practitioners who have been granted privileges to attend patients at Lincoln Hospital.

PAR. 3. Most, if not all, of the members of the Medical Staff are engaged in the business of providing medical services for a fee. Except to the extent that competition has been restrained as herein alleged, most, if not all, of the Medical Staff's members have been and are now in competition among themselves and other health care providers in the Phoenix metropolitan area.

PAR. 4. The Medical Staff's purposes include providing the organizational structure through which the "benefits of membership on the Staff may be obtained by individual practitioners" and providing "a means through which the Medical Staff may participate in the Hospital's policy-making and planning process." By virtue of its purposes and activities, the Medical Staff is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the Commission's jurisdiction.

PAR. 5. In the course and conduct of their businesses and professions, physicians in the Phoenix metropolitan area charge fees and collect payments that, in substantial part, are paid directly or indirectly with federal funds or funds received interstate from insurance companies, employers, and other payers. The flow of said funds is affected by competition among physicians in the Phoenix metropolitan area and by the acts and practices of the Medical Staff and its members as hereinafter alleged. Said acts and practices are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 6. In December 1982, the Board of Directors of Lincoln Hospital announced its plan to operate an urgent care center approximately three miles south of the hospital. The urgent care center, which opened on March 21, 1983, was designed to provide treatment to patients with urgent, but not life-threatening, conditions without the need for an appointment.

PAR. 7. Beginning in January 1983, the Medical Staff, acting as a combination of its members or in conspiracy with at least some of its members or others, joined in a common plan to coerce, intimidate, and threaten to boycott Lincoln Hospital in order to induce cancellation of the Hospital's involvement with any urgent care center in competition with members of the Medical Staff.

PAR. 8. The Medical Staff and members of the Medical Staff engaged in the following conduct, among other things, in furtherance of the aforesaid combination or conspiracy:

A. At a special meeting of the Medical Staff's Executive Committee on January 31, 1983, physicians of the Executive Committee and the Medical Staff's Family Practice Department expressed "concern" about the "impossibility" of their continuing to "support" with admissions a hospital engaged in competition with them and adopted a resolution that Lincoln Hospital should not engage in the "corporate practice of medicine" in "competition with private physicians who support the hospital."

B. On February 3, 1983, the Medical Staff Executive Committee, which is empowered to represent and act on behalf of the Medical Staff, voted that the Hospital's plans for the urgent care center were "not acceptable" to the Medical Staff.

C. On March 29, 1983, a member of the Medical Staff transmitted to each member of Lincoln Hospital's board of directors a document, which he claimed reflected the attitude of Medical Staff members, that (1) criticized the planned urgent care center and (2) stated that physicians would "take their patients (and their patient-generated revenues) to a friendlier competing facility."

D. On March 31, 1983, the Medical Staff Executive Committee voted that the Hospital should close the urgent care center.

E. On April 11, 1983, a Medical Staff member wrote to every Lincoln Hospital board member that Lincoln Hospital could "ill afford" any "alienation" of its Medical Staff in light of a new competing hospital being opened nearby, and cited an attached "position paper" adopted by the Maricopa County Medical Society recommending that physicians "not support" facilities that engage in "unfair competition" with them and that physicians should "stand together" as "admitters" of patients to such hospitals.

F. In April 1983, other members of the Medical Staff wrote letters to the members of the Lincoln Hospital board resigning from the Medical Staff or threatening to cease admitting patients to the Hospital because of the Hospital's operation of the urgent care center.

PAR. 9. On April 15, 1983, as a result of the aforesaid combination or conspiracy and conduct, the Hospital announced the closing of its urgent care center.

PAR. 10. The purposes or effects and the tendency and capacity of the combination or conspiracy and acts and practices described in Paragraphs Seven and Eight are and have been to restrain trade unreasonably and hinder competition in the provision of health care

services in the Phoenix metropolitan area, and to deprive consumers of the benefits of competition in the following ways, among others:

A. Patients have been limited in their ability to choose among a variety of alternative types of health care facilities competing on the basis of price, service, and quality;

B. Other hospitals may be deterred from operating similar facilities that might compete with the private practices of physicians on medical staffs;

C. The development of a competitive, convenient, cost-effective and innovative form of health care facility has been hindered;

D. Lincoln Hospital's ability to compete with other hospitals in the Phoenix metropolitan area has been restrained.

PAR. 11. The combination or conspiracy described above constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination or conspiracy is continuing and will continue absent the entry against Respondent of appropriate relief.

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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, 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 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 sixty (60) 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 Medical Staff of John C. Lincoln Hospital & Health Center is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its office and principal place of business located at 9211 North Second Street, in the city of Phoenix, State of Arizona.

2. 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 for purposes of this order, the following definitions shall apply:

A. *Respondent* or *the Medical Staff* means the Medical Staff of John C. Lincoln Hospital & Health Center, its officers, committees, representatives, delegates, agents, employees, successors, or assigns. The Medical Staff is an unincorporated association of physicians and other practitioners who have been granted privileges by John C. Lincoln Hospital & Health Center to admit and attend patients in John C. Lincoln Hospital & Health Center.

B. *Lincoln Hospital* means John C. Lincoln Hospital & Health Center, a non-profit corporation organized and existing under and by virtue of the laws of the State of Arizona that operates a general acute care hospital.

C. *Urgent care center* means a freestanding health care delivery facility that is designed and staffed to provide treatment to patients with non-life threatening, but nevertheless urgent, conditions on a non-appointment, episodic basis.

D. *Corrective action* means action taken pursuant to and in conformance with the Medical Staff's bylaws against any person with clinical privileges at Lincoln Hospital who fails to provide evidence of eligibility to purchase malpractice insurance or whose activities or professional conduct are detrimental to patient safety, the delivery of quality patient care, or are unreasonably disruptive to the operation of Lincoln Hospital.

II.

It is ordered, That Respondent shall cease and desist from, directly or indirectly or through any device:

A. Making, or joining in any plan to make, any express or implied threat of any unreasonably discriminatory action against a health care facility, institution, or professional, any coercive action to influence any reimbursement or insurance determination, or any boycott or concerted refusal to deal, including a refusal to refer, admit, or treat patients, or

B. Suggesting, encouraging, initiating, engaging in, or participating in any unreasonably discriminatory action against a health care facility, institution, or professional, any coercive action to influence any reimbursement or insurance determination, or any boycott or concerted refusal to deal, including a refusal to refer, admit, or treat patients,

for the purpose of, or with the effect or likely effect of, impeding the development or operation of an urgent care center or other health care facility or institution in the Arizona counties of Maricopa, Pinal, Yavapai, or Gila.

III.

It is further ordered, That this order shall not be construed to prohibit Respondent or its members from engaging, pursuant to the Medical Staff's bylaws, in credentialling, corrective action, utilization review, quality assurance, peer review, or hospital policy-making activities at Lincoln Hospital, where such conduct neither constitutes nor is part of any boycott, concerted refusal to deal, discrimination, or coercion, the purpose, effect, or likely effect of which is to impede unreasonably the development or operation of an urgent care center or any other health care facility or institution.

IV.

It is further ordered, That this order shall not be construed to prevent Respondent from exercising rights guaranteed against infringement by the First Amendment of the United States Constitution, including the right to petition any federal or state executive, legislative, judicial, or administrative agency or body, concerning legislation, rules, regulations, or procedures, or from engaging in any

activities which are exempt from the antitrust laws under the state action doctrine or the *Noerr-Pennington* Doctrine.

V.

It is further ordered, That Respondent shall:

A. Within thirty (30) days after this order becomes final, mail a copy of this order and of the complaint in this proceeding to each officer and to each physician who is a member of the Medical Staff on that date, and, for a period of five (5) years after that date, provide a copy of such order and complaint to each physician who becomes a member of the Medical Staff.

B. Within one hundred and twenty days (120) after this order becomes final, and at such other times as the Commission may by written notice to the Respondent require, file or cause to be filed with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

C. In addition to the report required by Section V.B., within one year after this order becomes final, and annually for a period of five (5) years on or before the anniversary of the date on which this order becomes final, and at such other times as the Commission may by written notice require, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which the Medical Staff has complied and is complying with this order.

D. For a period of five years after this order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Part II of this order

VI.

It is further ordered, That the Respondent notify the Commission at least thirty (30) days prior to any proposed change in the Medical Staff that may affect compliance obligations arising out of this order.

IN THE MATTER OF

HOSPITAL CORPORATION OF AMERICA

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3167. Complaint, Sept. 30, 1985—Decision, Sept. 30, 1985

This consent order requires a Nashville, Tenn. for-profit hospital chain, among other things, to divest three of the hospitals it acquired from Forum Group, Inc. to Commission-approved acquirers within 12 months after the order becomes final. If respondent cannot divest within the time specified, the Commission will appoint a trustee to make the divestitures. Respondent is prohibited from reacquiring the assets of any of the divested hospitals for 10 years without prior Commission approval. Additionally, respondent is required to provide advance notification to the Commission before acquiring any psychiatric hospital or unit, or any general acute care hospital operating a psychiatric unit, in the Norfolk, Va., area, or any general acute care hospital in the Midland/Odessa, Tex. area, unless such acquisition price does not exceed one million dollars ($1,000,000). Further, respondent is required to file compliance reports with the Commission at specified times and make records available to Commission staff.

Appearances

For the Commission: *Raymond L. Randall, Oscar M. Voss, Nina B. Hale* and *Linda M. Brody.*

For the respondents: *William D. Iverson* and *G.M. Chester, Jr., Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Hospital Corporation of America, a corporation subject to the jurisdiction of the Federal Trade Commission, has, through an acquisition of assets and voting securities, acquired several hospitals from Forum Group, Inc., a corporation subject to the jurisdiction of the Federal Trade 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 that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *HCA* means Hospital Corporation of America and its subsidiaries.

(b) *Forum* means Forum Group, Inc. and its subsidiaries.

(c) *Hospital* means a health facility, other than a federally-owned facility (such as a military or Veterans Administration hospital), having a duly organized governing body with overall administrative responsibility and an organized professional staff that provides 24-hour inpatient care, and that may also provide outpatient services.

(d) *General acute care hospital* means a hospital which has as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

(e) *Psychiatric hospital* means a hospital which has as a primary function the provision of inpatient services for psychiatric diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

(f) *Psychiatric unit* means a department, unit, or other organizational subdivision of a general acute care hospital that has as a primary function the provision of inpatient services for psychiatric diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

(g) *Norfolk MSA* means the Norfolk-Virginia Beach-Newport News, Virginia Metropolitan Statistical Area, as defined by the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President as of January 1, 1985.

(h) *Midland/Odessa Area* means the area comprising Ector and Midland counties in Texas.

II. RESPONDENT - HOSPITAL CORPORATION OF AMERICA

2. HCA is a corporation organized and doing business under the laws of the State of Tennessee with its office and principal place of business located at One Park Plaza, Nashville, Tennessee.

3. HCA is primarily engaged in the operation and management of hospitals in the United States and in foreign countries. HCA is the largest for-profit hospital chain in the United States. It owns, leases, or manages more than 350 general acute care hospitals in over 40 States, and more than 25 psychiatric hospitals in over 10 States. In 1983, its revenues from domestic hospital operations exceeded $3.7

billion. By virtue of its activities, HCA is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the jurisdiction of the Federal Trade Commission.

4. At all times relevant herein, HCA has been and is now engaged in activities that are in or affect commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business activities are in or are affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. HCA does business in a number of States and foreign countries. HCA in general, and the hospitals it owns or manages in the Norfolk MSA and the Midland/Odessa Area in particular, engage in interstate commerce.

III. THE ACQUISITION

5. On or about October 12, 1984, HCA entered into an agreement under which HCA would acquire from Forum most of Forum's general acute care hospitals and psychiatric hospitals through the purchase of certain assets and related voting securities for approximately $195 million. Consummation of this acquisition (hereinafter "the acquisition") was completed on April 2, 1985.

6. Forum is a for-profit corporation organized and doing business under the laws of the State of Indiana with its office and principal place of business located at 8900 Keystone Crossing, Indianapolis, Indiana.

7. Prior to the acquisition, Forum owned general acute care hospitals and psychiatric hospitals in at least seven States. Forum also owns and operates nursing homes, facilities for the developmentally disabled, and retirement living complexes. Its fiscal 1984 operating revenues were approximately $110 million. By virtue of its activities, Forum is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and is subject to the jurisdiction of the Federal Trade Commission.

8. At all times relevant herein, Forum has been and is now engaged in activities that are in or affect commerce within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business activities are in or are affecting commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Forum does business in a number of States. Forum in general, and the hospitals it owned in the Norfolk MSA and the Midland/Odessa Area in particular, engage in interstate commerce.

IV. COUNT I: PSYCHIATRIC HOSPITAL SERVICES—THE NORFOLK MSA

Trade and Commerce

9. The allegations of Paragraphs 1 through 8, inclusive, of this complaint are hereby incorporated by reference.

10. One relevant product market in which to evaluate the effects of the acquisition is psychiatric services provided by psychiatric hospitals and psychiatric units, excluding long-term treatment of chronic mental illness, and also excluding such treatment and other services provided by Federally-owned facilities and State mental hospitals ("psychiatric hospital services").

11. One relevant geographic market in which to evaluate the effects of the acquisition is the Norfolk MSA.

12. Among the hospitals HCA acquired from Forum were two psychiatric hospitals in the Norfolk MSA, Virginia Center for Psychiatry - Portsmouth in Portsmouth, Virginia, and Virginia Center for Psychiatry - Norfolk in Norfolk, Virginia.

13. At the time HCA acquired these hospitals, HCA already owned and operated a psychiatric hospital in the Norfolk MSA, Peninsula Hospital in Hampton, Virginia.

14. Prior to the acquisition, HCA and Forum were competitors in the psychiatric hospital services market in the Norfolk MSA.

15. At the time of the acquisition, HCA's Peninsula Hospital had approximately a 15 percent share of the psychiatric hospital services market in the Norfolk MSA based on licensed psychiatric beds and approximately a 12 percent share of the market based on the number of patient days of inpatient psychiatric care provided in 1983 ("1983 psychiatric patient days"). HCA's market share after the acquisition of the two psychiatric hospitals identified in paragraph 12 above increased to approximately 45 percent based on licensed psychiatric beds, an increase of 30 percent, and approximately 38 percent based on 1983 psychiatric patient days, an increase of 26 percent.

16. Prior to the acquisition, the psychiatric hospital services market in the Norfolk MSA was already concentrated. Concentration increased substantially as a result of the acquisition. The Herfindahl-Hirschman Index ("HHI") increased approximately 890 points, from approximately 1700 to approximately 2590, based on the number of licensed psychiatric beds. The HHI increased approximately 460 points, from approximately 1590 to approximately 2050, based on 1983 psychiatric patient days.

17. Barriers to entry into the psychiatric hospital services market in the Norfolk MSA are high. These barriers include, among other things, the requirement under the Virginia health planning laws, *Va. Code* Section 32.1–102.1 *et seq.*, that State government approval be

obtained prior to entry into the market. Because State government health planning officials project that, for purposes of health planning law implementation, the capacity of existing firms will likely exceed estimated demand for the foreseeable future, it is unlikely that such approval will be granted for new entry into the market in the foreseeable future.

Effects of the Acquisition

18. The effects of HCA's acquisition of the two Forum psychiatric hospitals in the Norfolk MSA may be substantially to lessen competition in the psychiatric hospital services market in the Norfolk MSA in, among others, the following ways:

(a) actual competition between HCA and Forum in the relevant market has been eliminated;
(b) Forum has been eliminated as a substantial independent competitor in the relevant market; and
(c) actual competition among the remaining competitors in the relevant market may be lessened.

Violation Charged

19. The acquisition of Virginia Center for Psychiatry - Portsmouth and Virginia Center for Psychiatry - Norfolk by HCA constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

V. COUNT II: GENERAL ACUTE CARE HOSPITAL SERVICES— THE MIDLAND/ODESSA AREA

Trade and Commerce

20. The allegations of Paragraphs 1 through 8, inclusive, of this complaint are hereby incorporated by reference.
21. One relevant product market in which to evaluate the effects of the acquisition is general acute care hospital services.
22. One relevant geographic market in which to evaluate the effects of the acquisition is the Midland/Odessa Area in Texas.
23. Among the hospitals HCA acquired from Forum was Parkview Hospital, a general acute care hospital in Midland, Texas, as well as a planned new facility in Midland that, if and when it is completed, will be named "Doctors' Hospital of the Permian Basin" and will replace Parkview Hospital. (These two facilities will be hereinafter referred to collectively as "Parkview".)
24. At the time HCA acquired Parkview, HCA was already operating under a management contract one of the three other general

acute care hospitals in the Midland/Odessa Area, Medical Center Hospital in Odessa, Texas. Pursuant to the management contract, HCA manages the day-to-day operations of the hospital. HCA's specific responsibilities under the contract include, among other things, providing to the hospital an administrator and controller (both of whom serve as employees of HCA, as well as the hospital); making recommendations to the hospital's Board of Managers regarding hospital charges, capital improvements, and changes in the scope of services offered by the hospital; assisting in preparation of the hospital's budget, and its short-, medium-, and long-term plans; making recommendations regarding recruiting, hiring, firing, training, promotion, and assignment of, and compensation for, hospital employees; providing HCA staff consultants to the hospital as necessary; obtaining necessary licenses and permits for the hospital; and making recommendations for maintaining the hospital's compliance with accreditation standards and government regulations. As a result of its contractual relationship with the hospital, HCA has a significant role in determining the manner in which Medical Center Hospital competes with other hospitals.

25. Prior to the acquisition, HCA and Forum were competitors in the general acute care hospital services market in the Midland/Odessa Area.

26. At the time of the acquisition, Medical Center Hospital had approximately a 50 percent share of the general acute care hospital services market in the Midland/Odessa Area based on licensed general acute care beds and approximately 55 percent of the market based on the number of 1983 inpatient days. After the acquisition of Parkview, HCA controlled, either through ownership or management contract, hospitals with a combined share of 58 percent of the relevant market based on licensed general acute care beds, an increase of 8 percent, and approximately 60 percent based on 1983 inpatient days, an increase of 5 percent.

27. Prior to the acquisition, the general acute care hospital services market in the Midland/Odessa Area was already highly concentrated. Concentration increased substantially as a result of the acquisition. The HHI increased approximately 820 points, from approximately 3530 to approximately 4350, based on the number of licensed general acute care beds. The HHI increased approximately 560 points, from approximately 3990 to approximately 4550, based on 1983 inpatient days.

28. Barriers to entry into the general acute care hospital services market in the Midland/Odessa Area are substantial. Significant time delays, substantial excess capacity in the market, and other obstacles may impede or discourage new entrants into the market. It is unlike-

ly, for at least a substantial time period, that new entry will deter or prevent collusive or other anticompetitive conduct in the market.

Effects of the Acquisition

29. The effect of HCA's acquisition of Parkview from Forum may be substantially to lessen competition in the general acute care hospital services market in the Midland/Odessa Area in, among others, the following ways:

(a) actual competition between HCA and Forum in the relevant market has been eliminated;
(b) Forum has been eliminated as a substantial independent competitor in the relevant market; and
(c) actual competition among the remaining competitors in the relevant market may be lessened.

Violation Charged

30. The acquisition of Parkview by HCA constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton Act and the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional allegations 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, 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 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 sixty (60) 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 Hospital Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at One Park Plaza, in the City of Nashville, State of Tennessee.

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.

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

A. *HCA* means Hospital Corporation of America, a corporation organized under the laws of Tennessee, with its principal executive office at One Park Plaza, Nashville, Tennessee, and its directors, officers, agents, employees, and representatives, and its subsidiaries, divisions, affiliates, successors, and assigns.

B. *Forum* means Forum Group, Inc. and its subsidiaries, divisions, affiliates, successors, and assigns.

C. *Hospital* means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative responsibility and an organized professional staff that provides 24-hour inpatient care, and that may also provide outpatient services.

D. *General acute care hospital* means a hospital which has as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

E. *Psychiatric hospital* means a hospital which has as a primary function the provision of inpatient services for psychiatric diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

F. *Psychiatric unit* means a department, unit, or other organizational subdivision of a general acute care hospital that has as a primary function the provision of inpatient services for psychiatric

diagnosis, treatment, and care of persons suffering from mental illness or emotional disturbance, and may also provide treatment for alcohol or drug abuse.

G. *Norfolk MSA* means the Norfolk-Virginia Beach-Newport News, Virginia Metropolitan Statistical Area, as defined as of January 1, 1985 by the Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President.

H. *Midland/Odessa Area* means the area comprising Ector and Midland counties in Texas.

I. *Acquire* a hospital or psychiatric unit means to directly or indirectly acquire all or any part of the stock or assets of a hospital or psychiatric unit, or enter into any other arrangement by which HCA obtains direct or indirect ownership of, or otherwise begins to operate, a hospital or psychiatric unit; *provided, however,* that if an order is issued and becomes final in *Hospital Corporation of America,* FTC Docket No. 9161 [106 F.T.C. 361 (1985)], that requires HCA to obtain the prior approval of, or provide advance notification to, the Federal Trade Commission with respect to any hospital management contracts, then as of that date, *operate a hospital or psychiatric unit* shall be deemed to include management of a hospital or a psychiatric unit pursuant to a management contract.

II.

It is ordered, That within twelve (12) months from the date this order becomes final, HCA shall divest, absolutely and in good faith, all of the stock and assets specified in Schedule A. The purpose of the divestitures is to reestablish the hospitals listed in Schedule A as viable competitors. The divestitures shall be subject to the prior approval of the Federal Trade Commission.

Pending divestiture, whether by HCA or by a trustee as provided for in Section III below, HCA shall continue to operate the facilities to be divested, and take all measures necessary to maintain those facilities in their present condition and to prevent any deterioration, except for normal wear and tear, of any of the assets to be divested so as not to impair their present operating abilities or market value.

For a period of ten (10) years from the date this order becomes final, HCA shall not, directly or indirectly, reacquire any interest in any Schedule A stock or assets required to be divested by this Section II of this order without the prior approval of the Federal Trade Commission.

III.

A. If HCA has not divested all of the properties, assets, or enterprises required to be divested pursuant to Section II of this order within the 12-month period provided therein, the Federal Trade Commission may select a trustee to effect any ordered divestitures yet to be accomplished. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If the Federal Trade Commission should elect to appoint a trustee, it shall not be precluded from seeking civil penalties and other relief available to it for any failure by HCA to comply with this order. If the Federal Trade Commission should not elect to appoint a trustee under this Section III of this order, it shall not be precluded from seeking civil penalties, the appointment by the courts of a trustee to effect the divestitures, and other relief available to it, for any failure by HCA to comply with this order.

B. Any trustee appointed by the Federal Trade Commission pursuant to this Section III shall have the following powers, authority, duties, and responsibilities:

1. The trustee shall have the exclusive power and authority to divest any properties, assets, or enterprises required to be divested pursuant to Section II of this order that have not been divested by HCA within the time period for the divestitures provided therein. The trustee shall have twelve (12) months from the date of appointment to accomplish the divestitures, which shall be subject to the prior approval of the Federal Trade 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 Federal Trade Commission. In addition, any delays in divestiture caused by HCA shall extend the time for divestiture in accordance with the delay caused.

2. The trustee shall have full and complete access to the personnel, books, records and facilities of any property, asset, or enterprise that the trustee has the duty to divest, and HCA shall develop such financial or other information relevant to the properties, assets, or enterprises to be divested as the trustee may reasonably request. HCA shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

3. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with this order's absolute and unconditional obligation to divest and the purposes of the divestitures as stated in Section II of this order.

4. The trustee shall serve, without bond or any other security, at the cost and expense of HCA on such reasonable and customary terms and conditions as the Federal Trade Commission may set. The trustee shall have authority to retain, at the cost and expense of HCA, such consultants, attorneys, investment bankers, business brokers, accountants, appraisers, and other representatives and assistants as are reasonably necessary to assist in the divestitures. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Federal Trade Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to HCA 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 divesting the trust property.

5. HCA shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities to which the trustee may become subject, arising in any manner out of, or in connection with, the trustee's duties under this order, unless the Federal Trade Commission determines that such losses, claims, damages, or liabilities arose out of the misfeasance, negligence, or the willful or wanton acts or bad faith of the trustee.

6. Promptly upon appointment of the trustee and subject to the approval of the Federal Trade Commission, HCA shall, subject to the Federal Trade Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause the divestitures.

7. If the trustee ceases to act or fails to act diligently, the Federal Trade Commission shall appoint a substitute trustee.

8. The trustee may ask the Federal Trade Commission to issue, and the Federal Trade Commission may issue, such additional orders or directions as may be necessary and appropriate to accomplish the divestitures required under this order.

9. The trustee shall have no obligation or authority to operate or maintain any of the properties, assets, or enterprises required to be divested pursuant to Section II of this order.

10. The trustee shall report in writing to HCA and the Federal Trade Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, HCA shall not, without providing advance

notification to the Federal Trade Commission, acquire: (1) any psychiatric hospital, any psychiatric unit, or any general acute care hospital operating a psychiatric unit, in the Norfolk MSA; or (2) any general acute care hospital in the Midland/Odessa Area. Such advance notification shall be provided when HCA executes a letter of intent or enters into an agreement to make such an acquisition, whichever is earlier.

The notification required by this section shall be the Notification and Report form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended, and shall be prepared and transmitted in accordance with the requirements of that Part. This notification requirement shall apply to HCA and shall not apply to any party that HCA seeks to acquire. HCA shall also provide at the same time of the filing of the Notification and Report Form supplemental information, either in HCA's possession or reasonably available to HCA, relating to the hospital to be acquired, the HCA hospital(s) in that geographic area, and identification and assessment of the area hospital market, as specified in Schedule B. In addition, HCA shall comply with reasonable requests by Commission staff for additional information within fifteen (15) days of service of such requests.

Provided, however, That no acquisition shall be subject to the notification requirements of this section: (1) if the acquisition is by purchase, and the consideration paid for the hospital or any rights or interest therein, including assumption by HCA of any liabilities, does not exceed one million dollars ($1,000,000); or (2) if notification of the acquisition is required to be made, and in fact is made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That HCA shall, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until it has fully complied with the provisions of Section II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with these provisions.

Such compliance reports shall include, in addition to any other information that the staff of the Federal Trade Commission may reasonably request, a summary of all contacts and negotiations with potential purchasers of the stock, assets, or other rights or interests to be divested under this order, the identity and address of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

VI.

It is further ordered, That HCA, upon written request of the Secretary of the Federal Trade Commission or the Director of the Bureau of Competition of the Federal Trade Commission made to HCA at its principal office, for the purpose of securing compliance with this order, and for no other purpose, and subject to any legally recognized privilege, shall permit duly authorized representatives of the Federal Trade Commission:

1. reasonable access during the office hours of HCA, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, reports, and other records and documents in HCA's custody, possession or control that relate materially and substantially to any matter contained in this order; and

2. an opportunity, subject to the reasonable convenience of HCA, to interview officers or employees of HCA, who may have counsel present, regarding such matters.

VII.

It is further ordered, That HCA shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed corporate change, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance with the obligations arising out of this order.

SCHEDULE A: STOCK AND ASSETS TO BE DIVESTED

A. All stock, and all assets (including, but not limited to, properties, licenses, land, and other rights and privileges, tangible or intangible), acquired by HCA directly or indirectly from Forum in connection with any of the following hospitals:

1. Parkview Hospital, in Midland, Texas;
2. Doctors' Hospital of the Permian Basin, in Midland, Texas (a planned new facility which, if and when it is completed, will replace Parkview Hospital);
3. Virginia Center for Psychiatry - Norfolk, in Norfolk, Virginia; and
4. Virginia Center for Psychiatry - Portsmouth, in Portsmouth, Virginia,

including specifically all stock of Doctors' Hospital Permian Basin, Inc. (a Texas corporation), and whatever assets may have been acquired by HCA directly or indirectly from that corporation, from Midland Hospital Corporation (a Texas corporation), or from Norfolk Psychiatric Center, Inc. or Portsmouth Psychiatric Center, Inc. (both Virginia corporations).

B. All improvements made to the hospitals and related assets specified in paragraph A above subsequent to their acquisition by HCA

SCHEDULE B: SUPPLEMENTAL INFORMATION TO ACCOMPANY NOTIFICATION OF A HOSPITAL ACQUISITION

The supplemental information HCA is required to submit with its notification to the Federal Trade Commission of a hospital acquisition, pursuant to Section IV of this order, shall include a full description of the acquisition (including a copy of the acquisition agreement), to the extent such information is not already provided in the Notification and Report form submitted by HCA, and shall also include, where available, patient flow data, annual management and strategic plans, hospital utilization and revenue data, and documents relating to market share, formulation of hospital prices, competitive interaction among area hospitals, implementation of certificate of need standards in the area, planned efficiencies, relations with third-party payers, and physician admitting patterns.

IN THE MATTER OF

INTERNORTH, INC., ET AL.

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

Docket C-3168. Complaint, Sept. 30, 1985—Decision, Sept. 30, 1985

This consent order requires InterNorth, Inc. (INI), the Omaha, Neb. acquirer of the Houston Natural Gas Corporation, among other things, to divest within 12 months from the date of the order to a Commission-approved buyer, all the properties listed on Schedule A, and to terminate all rights and obligations it may have on the contracts listed on Schedule B. Should INI fail to complete the required divestiture within the allotted time, a trustee, appointed by the court or the Commission, will be given 18 months from the date of appointment to divest the remaining Schedule A properties. Until those properties are divested, INI is required to use its best efforts to maintain them as ongoing, viable enterprises. The order further prohibits the company, for a period of ten years, from acquiring any assets or interests of a company that is engaging in the gathering or transportation of natural gas in the Permian basin or the Panhandle whose acquisition price is $15 million or more, and from entering into any agreement or venture for the joint purchasing, gathering, or transportation of natural gas in the Permian basin or the Panhandle without prior Commission approval.

Appearances

For the Commission: *Marc G. Schildkraut.*

For the respondents: *D. Stuart Meiklejohn, Sullivan & Cromwell,* New York City, for respondent InterNorth, Inc. and *Richard D. Kinder,* Houston, Tex., in-house counsel, for respondent Houston Natural Gas Corp.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, InterNorth, Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, intends to acquire, or has acquired the stock or assets of respondent Houston Natural Gas Corporation, 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, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:

a. *INI* means InterNorth, Inc., its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which INI is a participant. The words *subsidiary, affiliate* and *joint venture* refer to any partial (10 percent or more) as well as total ownership or control.

b. *HNG* means Houston Natural Gas Corporation, its predecessors, subsidiaries, divisions, groups, affiliate entities, and each of their past or present directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which HNG is a participant. The words *subsidiary, affiliate* and *joint venture* refer to any partial (10 percent or more) as well as total ownership or control.

c. The acquisition means the transaction described, in whole or in part, in Paragraph 14 of this complaint.

II. RESPONDENTS

A. *INI*

2. Respondent INI is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at 2223 Dodge Street, Omaha, Nebraska.

3. Respondent INI owns businesses that operate at several levels in the natural gas transportation and distribution industry. In addition, respondent INI engages in the exploration for and production of oil and gas, in the production, transportation, and marketing of liquid fuels and in the production and marketing of petrochemicals.

4. Respondent INI had 1984 sales of $7.5 billion and assets of $6.1 billion as of December 31, 1984.

5. In 1984, respondent INI owned and operated the longest natural gas pipeline system in the United States. INI's pipeline division owned and operated a natural gas pipeline system in the United States consisting of over 23,000 miles of pipeline. INI also owned and operated various other natural gas gathering and transmission facilities. Most of INI's system is interstate pipeline.

6. Respondent INI wholly or partially owns (or owns interests in companies that wholly or partially own) the following natural gas pipelines in the United States: Northern Natural Gas Company Pipeline System; TransTexas Pipeline; Overthrust Pipeline; Tiger Ridge

Pipeline System; Northern Border Pipeline; Trailblazer Pipeline; Cognac Pipeline; NIPCO Louisiana Pipeline; Central Texas Loop Pipeline; Seagull Shoreline System; Matagorda Offshore Pipeline System; and several pipelines used for the local distribution of natural gas that are operated by Peoples Natural Gas Company, a division of INI.

7. At all times relevant herein, respondent INI has been and is now 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. *HNG*

8. Respondent HNG is a corporation organized and doing business under the laws of the state of Texas with its executive offices at 1200 Travis Street, Houston Texas.

9. Respondent HNG engages in the transmission and sale of natural gas, in the exploration for and production of oil and gas, and in hydrocarbons processing and marketing.

10. Respondent HNG had 1984 sales of $2.0 billion and assets of $3.7 billion, as of December 31, 1984.

11. In late 1984, respondent HNG acquired the Florida Gas Transmission Company and the Transwestern Pipe Line Company, for the first time making respondent HNG an interstate pipeline company. Until these acquisitions, respondent HNG had been exclusively an intrastate pipeline system.

12. In 1984, respondent HNG wholly or partially owned the following intrastate pipelines: Llano, Inc.; Oasis Pipeline Company; Intratex Gas Company; Houston Pipeline Company; Red River Pipeline; HPI Transmission, Inc.; Black Marlin Pipeline Company; Valley Pipelines, Inc.; A-S Pipeline; Texoma Pipeline; and other smaller pipelines.

13. At all times relevant herein, respondent HNG has been and is now 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.

III. THE ACQUISITION

14. On or about May 3, 1985, INI commenced a cash tender offer for up to 100 percent of the outstanding shares of HNG common stock at a price of $70 per share with the intent of effecting a merger of InterNorth Holdings, Inc., a Texas corporation wholly-owned by INI,

into HNG, pursuant to which HNG would become a wholly-owned subsidiary of INI, all as contemplated in that certain Merger Agreement entered into among INI, its subsidiary, and HNG on May 2, 1985. HNG's Board of Directors has approved the tender offer and recommended its acceptance by HNG shareholders. If all the currently outstanding HNG common shares are tendered to INI, the total value of the transaction is about $2.3 billion and, if consummated, it would result in the largest natural gas transportation company in the United States in terms of assets.

IV. TRADE AND COMMERCE

A. *Purchase and Transportation of Natural Gas*

15. One relevant line of commerce in which to evaluate the effects of the acquisition is the purchase of natural gas in producing fields and basins, and the transportation of natural gas from producing fields and basins to consumers.

16. One relevant section of the country is the Permian Basin, composed of "producing districts 8, 8A and 7C" as defined by the Texas Railroad Commission and "New Mexico-East" as defined by the U.S. Department of Energy.

17. Another relevant section of the country is the Panhandle region, composed of "producing district 10" as defined by the Texas Railroad Commission and the counties of Beaver, Beckham, Cimarron, Ellis, Harmon, Harper, Roger Mills, Texas and Woodward in Oklahoma.

18. Consumption of natural gas in these two sections of the country is substantially below production in the area, with the result that most production in the area is transported by pipelines to consuming areas on the Texas Gulf Coast and elsewhere in the United States.

19. The business of buying and transporting by pipeline natural gas in and out of these respective sections of the country is concentrated.

20. It is difficult to enter into the business of buying and transporting natural gas by pipeline in these respective sections of the country.

21. INI is the sole owner of the Northern Natural Gas Company Pipeline System that runs from the Permian Basin to the Panhandle and from the Panhandle to consuming areas to the north of the Panhandle, including but not limited to the states of Minnesota and Wisconsin.

22. INI is also an owner of an undivided 50 percent interest in the TransTexas Pipeline that runs from the Permian Basin to New Braunfels, Texas, where the Pipeline connects to pipelines that serve areas on the Texas Gulf Coast.

23. HNG is the sole owner of Llano, Inc., that owns a gathering pipeline system in the Permian Basin.

24. HNG is also the sole owner of the Transwestern Pipe Line Company which owns a pipeline system that runs from both the Permian Basin and the Panhandle to consuming areas to the west of the Permian Basin and the Panhandle, including but not limited to California.

25. HNG is also an owner of 50 percent of the Oasis Pipeline Company which owns a pipeline that runs parallel to the TransTexas Pipeline from the Permian Basin to New Braunfels, and continues to the Texas Gulf Coast consuming area.

26. HNG is also an owner of 25 percent partnership interest in the Red River Pipeline which owns a pipeline that runs from the Panhandle to the Permian Basin, where the Pipeline connects to pipelines that serve areas located outside of the Permian Basin.

27. Respondents INI and HNG are direct and substantial competitors in the business of purchasing and transporting natural gas in and from producing fields and basins to consuming areas.

B. *Transportation and Sale of Natural Gas*

28. One relevant line of commerce in which to evaluate the effects of the acquisition is the transportation and sale of natural gas by pipeline in consuming areas.

29. One relevant section of the country is the Texas Gulf Coast, composed of "producing districts 2, 3 and 4" as defined by the Texas Railroad Commission.

30. The business of selling and transporting by pipeline natural gas in and into the Texas Gulf Coast consuming area is concentrated.

31. It is difficult to enter into the business of selling and transporting natural gas by pipeline in the Texas Gulf Coast consuming area.

32. HNG is the largest competitor in the business of transporting and selling natural gas in the Texas Gulf Coast consuming area.

33. INI is a competitor of HNG through INI's joint venture known as "Nor-Val", a partnership created in February, 1985, between INI and Valero Transmission Company.

34. INI also competes with HNG by virtue of INI's ownership of 50 percent of the TransTexas Pipeline. TransTexas Pipeline is connected to pipelines serving the Texas Gulf Coast consuming areas at New Braunfels. Some of these pipelines at New Braunfels are owned by Valero Transmission Company. Valero Transmission Company has dedicated capacity to transport natural gas for Nor-Val into the Texas Gulf Coast consuming area.

35. HNG is an owner of 50 percent of the Oasis Pipeline that runs parallel to the TransTexas Pipeline from the Permian Basin to New Braunfels, and continues to the Texas Gulf Coast consuming area.

36. Respondents INI and HNG are direct and substantial competi-

tors in the business of transporting and selling natural gas in the Texas Gulf Coast consuming area.

V. EFFECTS

37. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant lines of commerce and 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. actual competition between respondents INI and HNG in the relevant lines of commerce and relevant sections of the country will be eliminated;

b. actual competition between competitors generally in the relevant lines of commerce and relevant sections of the country will be lessened; and

c. concentrations in the relevant lines of commerce and relevant sections of the country will be increased, therefore increasing the likelihood of collusion.

VI. VIOLATION CHARGED

38. The proposed acquisition of the stock and assets of HNG by INI, as set forth in Paragraph 14 herein, 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.

Decision and Order

The FTC having initiated an investigation of the proposed acquisition of shares of Houston Natural Gas Corporation ("HNG") by InterNorth, Inc. ("INI"), and INI and HNG ("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 respondents with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by 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 considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules and the recommendation of its staff, and having concluded that the consent agreement should be accepted; and

Now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission issues its complaint, makes the following jurisdictional findings and enters the following order:

1. INI is a corporation organized under the laws of Delaware with its executive office at 2223 Dodge Street, Omaha, Nebraska.

HNG is a corporation organized under the laws of Texas with its executive office at 1200 Travis Street, Houston, Texas.

2. 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.

As used in this order the following definitions shall apply:

(a) *Acquisition* means INI's acquisition of shares of the Common Stock of HNG.

(b) *Schedule A Properties* means the assets and businesses listed in Schedule A of this order. *Schedule B Contracts* mean the contracts listed in Schedule B of this order.

(c) *INI* means InterNorth, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by INI and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(d) *HNG* means Houston Natural Gas Corporation, as it was constituted prior to the acquisition, including its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by HNG, and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(e) *Permian Basin* means the counties currently included in Texas Railroad Commission Districts 7C, 8 and 8A and that portion of the state of New Mexico currently defined as *New Mexico—East* by the United States Department of Energy for purposes of reporting on form EIA–23.

road Commission District 10 and the following counties in Oklahoma: Beaver, Beckham, Cimarron, Ellis, Harmon, Harper, Roger Mills, Texas, Woodward.

(g) *Texas Gulf Coast* means the counties currently included in Texas Railroad Districts 2, 3 and 4.

(h) *Texas Gulf Coast Pipeline Company* means a company, other than INI, that delivered, in the twelve months preceding the date of any agreement of the kind described in paragraph IV(D), a daily average of at least 100 million cubic feet/day of natural gas to the Texas Gulf Coast for consumption therein. For the purposes of this definition, the deliveries of any entity acquired by a company during the preceding twelve months shall be deemed to be deliveries of the company for the entire, preceding, twelve-month period.

II.

It is ordered, That:

(A) Within 12 months of the date this order becomes final, INI shall divest, absolutely and in good faith, the Schedule A Properties.

(B) Within 12 months of the date this order becomes final, INI shall terminate all rights and obligations it may have on the contracts listed on Schedule B.

(C) Divestiture of the Schedule A Properties shall be made only to an acquirer or acquirers, and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the Schedule A Properties and the dissolution of the Schedule B Contracts is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the same business in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) If INI has not divested the Schedule A Properties within the 12-month period, INI shall consent to the appointment of a trustee in any action that the Federal Trade Commission may bring 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. In the event the court declines to appoint a trustee, INI shall consent to the appointment of a trustee by the Commission pursuant to this order. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by INI to comply with paragraphs II(B) through VI of this order.

(E) If a trustee is appointed by a Court or the Commission pursuant to Paragraph II(D) of this order, INI shall consent to the following

terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to INI's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any Schedule A Properties that have not been divested by INI within the time period for divestiture in Paragraph II(A). The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee was appointed by a court, subject also to the prior approval of the court. If, however, at the end of the 18-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 by the court, if the trustee was appointed by a court.

3. The trustee shall have full and complete access to the personnel, books, records, and facilities of any business that the trustee has the duty to divest, and INI shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. INI shall cooperate with the trustee and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

4. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in Paragraph II(C).

5. The trustee shall serve at the cost and expense of INI on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to INI 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 divesting the trust property.

6. Promptly upon appointment of the trustee and subject to the approval of the Commission, INI shall, subject to the Commission's prior approval and consistent with provisions of this order, execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to cause divestiture.

7. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

8. The trustee shall report in writing to INI and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

(F) INI shall maintain the viability and marketability of the Schedule A Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear. INI shall use its best efforts to ensure that the Schedule A Properties continue to be ongoing, viable enterprises engaged in the same business in which the Schedule A Properties are presently employed.

III.

It is further ordered, That, within sixty (60) days after the date this order becomes final and every sixty days thereafter until INI has fully complied with the provisions of Paragraph II of this order, INI 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 with, or has complied with that provision. INI shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of properties specified in Paragraph II of this order, including the identity of all parties contacted. INI also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

IV.

It is further ordered, That for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date this order becomes final, INI shall cease and desist from (A) acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used in (and still suitable for use in), any interest in or the whole or any substantial part of the stock or share capital of any company that is engaged in the gathering or transportation of natural gas in the Permian Basin or Panhandle (except, however, that, with respect to any particular transaction, INI may, without prior approval of the Commission, (i) acquire any such assets used in the gathering or transportation of natural gas in the Permian Basin or Panhandle so long as the acquisition price of such assets so used is less than $15 million, and (ii) acquire such stock of any such compa-

ny so long as the fair market value—as computed in the manner contemplated by 16 C.F.R. 801.10—of assets held by such company that are used in the gathering or transportation of natural gas in the Permian Basin or Panhandle is less than $15 million), (B) entering into, without prior approval of the Federal Trade Commission, any agreement or venture for the joint purchasing, joint gathering or joint transportation of natural gas in the Permian Basin or the Panhandle with any other party that owns natural gas transportation facilities in the same area, (C) entering into, without prior approval of the Federal Trade Commission, any agreement, pursuant to the April 10, 1985 agreement in principle between El Paso Natural Gas Company and INI, for the purchasing, gathering or transportation of natural gas in the Permian Basin or the Panhandle, (D) entering into, without prior approval of the Federal Trade Commission, any agreement with a Texas Gulf Coast Pipeline Company for the joint marketing of natural gas sold in and to be consumed in the Texas Gulf Coast in connection with which the joint marketing effort contemplates in excess of three unrelated sales transactions, or (E) tendering to The Dow Chemical Company or to Tenngasco, Inc. or receiving from either of these any new gas purchase contracts under the terms of the Gas Supply Agreement dated February 1, 1972, between Intratex Gas Company, The Dow Chemical Company, and Tenngasco, Inc. The prohibitions of this Paragraph IV shall not apply to the (i) construction by INI, without any joint venture participants, of new facilities, or (ii) additions by INI, without any joint venture participants, to existing facilities, or (iii) additions to existing joint venture facilities under existing joint venture arrangements.

One year from the date of service of this order and annually thereafter INI shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to INI and HNG made to its principal office, INI and HNG shall permit any duly authorized representatives of the Commission:

A. Access, during office hours 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 INI or HNG relating to any matters contained in this order; and

B. Upon five days notice to INI or HNG and without restraint or interference from them, to interview officers or employees of respondents who may have counsel present, regarding such matters.

VI.

It is further ordered, That INI notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change that may affect compliance obligations arising out of the order.

SCHEDULE A

1. Fifty percent (50%) of HNG's stock in Oasis Pipeline Company, a Delaware Corporation.

2. Fifty percent (50%) of Intratex's dedicated capacity under a certain Gas Transportation Agreement dated February 1, 1972 by and between Oasis and Intratex Gas Company, an HNG subsidiary.

3. The partnership interest held by HNG in Red River Pipeline, a Texas general partnership.

4. Llano, Inc.

5. The fifty percent (50%) undivided interest in the TransTexas Pipeline that was acquired pursuant to the Purchase Agreement, dated as of February 28, 1985 by and among Valero Energy Corporation, Valero Transmission Company, INI, Inc., and Northern Texas Intrastate Pipeline Company.

6. Rights and obligations under the following agreements:

a. Ownership Agreement, dated as of February 28, 1985 between Northern Texas Intrastate Pipeline Company and Valero Transmission Company.

b. Pipeline Operating Agreement, dated as of February 28, 1985 between Northern Texas Instrastate Pipeline Company and Valero Transmission Company.

c. Gas Transportation Agreement No. 5201–972, dated as of February 28, 1985 between Valero Transmission Company and Northern Natural Gas Company.

SCHEDULE B

Rights and obligations under the Nor-Val Gas Company Partnership Agreement, dated February 1, 1985, as amended April 1, 1985.

IN THE MATTER OF

AMERICAN SOCIETY OF SANITARY ENGINEERING

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

Docket C-3169. Complaint, Oct. 3, 1985—Decision, Oct. 3, 1985

This consent order requires, among other things, that a Bay Village, Ohio organization ("ASSE"), whose members consist of manufacturers of plumbing products and others associated with the plumbing industry, to cease refusing written requests for issuance of a standard or modification of an existing standard for a product because the product is patented or produced by only one or a limited number of manufacturers. The order also bars the society from failing to take sought action when it has already issued a standard, modification of a standard or a seal of approval covering a competing product and the applicant has demonstrated that its product adequately meets required performance goals. Should ASSE fail to issue the requested standard, modification or seal of approval, it is required to provide the applicant with a statement of the justification and bases for the failure, together with a reasonable opportunity to respond, and to maintain copies of relevant submissions and responses. Additionally, the society is required to incorporate the requirements of Parts I and II of the order into its Bylaws, and publish them in both its *Yearbook* and *Standards Handbook*.

Appearances

For the Commission: *Eugene R. Curry.*

For the respondents: *Sanford Schwartz, Rippner, Schwartz & Carlin,* Cleveland, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that respondent American Society of Sanitary Engineering, a corporation, has violated and is violating Section 5 of the Federal Trade Commission Act and that this proceeding is in the public interest, hereby issues this complaint.

PARAGRAPH 1. Respondent American Society of Sanitary Engineering ("ASSE") is a non-profit District of Columbia corporation, with its principal place of business in Bay Village, Ohio. ASSE's membership consists of plumbers, plumbing equipment manufacturers, plumbing designers, plumbing contractors, plumbing inspectors, sanitary inspectors, health officers, architects, and engineers.

PAR. 2. ASSE, together with its members, is engaged in the business

of developing, promulgating, promoting, and selling of plumbing product standards and seals of approval.

PAR. 3. Many members of ASSE are engaged in providing plumbing equipment and services for profit. A substantial portion of ASSE's activities relate to standards development and product approval that is of commercial benefit to many of its members. ASSE is now, and at all times relevant herein has been, a corporation organized for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 4. ASSE, its members and its officers:

(a) develop standards that are distributed and adopted throughout the United States;

(b) send by mail plumbing standards and other publications dealing with plumbing to plumbing professionals located throughout the United States;

(c) collect dues from members located throughout the United States.

ASSE's business is now, and at all times relevant herein has been, in or affecting comerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

PAR. 5. Members of ASSE are now and have been in competition among themselves and with others who design, install or manufacture plumbing equipment.

PAR. 6. ASSE standards for plumbing products prescribe implicit and explicit performance and design requirements for various types of plumbing products, and set forth the test methods to be used to measure performance against those requirements.

PAR. 7. Manufacturers of plumbing products participate in the development of ASSE standards by:

(a) providing technical expertise upon which standards are based;

(b) participating in drafting proposed standards;

(c) underwriting the costs of standards development;

(d) participating in various ASSE committees which review proposed standards and applications for standards; and

(e) chairing ASSE committees, serving on the ASSE Board of Directors, and holding other key administrative and policy positions within ASSE.

PAR. 8. ASSE promotes reliance on its standards and seal of approval program by building code and regulatory officials as a substitute for the evaluation of plumbing products by those officials and as a basis for approval of these products for sale in their jurisdictions. ASSE represents that its standards and seal of approval program provides an objective, independent, expert analysis of the acceptability of plumbing products covered by ASSE standards. In addition,

ASSE represents that it is the leader among standards developers in developing new standards to incorporate the state of the art in technology and innovative designs.

PAR. 9. As a result, and because most state and local building code and regulatory officials do not have the technical or financial resources to evaluate the performance characteristics of plumbing products, there is extensive reliance upon ASSE standards and seals of approval. Thirty states and numerous local jurisdictions have adopted ASSE standards into their building codes. In those jurisdictions, evidence of compliance with ASSE standards is the sole means of obtaining approval for sale. In addition, ASSE standards and seals of approval are relied upon by model code groups (*i.e.*, organizations which develop model building codes for adoption by state and local authorities), federal agencies, and foreign governments as a means of determining the acceptability of plumbing products.

PAR. 10. Because of extensive reliance upon the ASSE standards program, evidence of compliance with an ASSE standard is essential for manufacturers of plumbing products to do business in many markets. Evidence of compliance with ASSE standards confers important competitive benefits upon manufacturers by easing entry into markets, even where compliance to an ASSE standard is not required by law.

PAR. 11. ASSE promulgates a group of standards for backflow prevention products. Backflow is the unintended reversal of the flow of possibly contaminated water back into the potable water distribution system. ASSE represents that it has the most complete group of backflow prevention standards in the world.

PAR. 12. In 1964, ASSE, with the support of eighteen manufacturers of plumbing devices, developed a standard, ASSE 1002, for ballcock valves which control the supply of water into toilet flush tanks. Valves performing this function are referred to as toilet tank fill valves. A ballcock valve is opened or closed by means of a float or similar device. ASSE 1002 specifies that ballcock valves must be equipped with a vacuum breaker or air gap to prevent backflow. ASSE 1002 is the only standard developed by ASSE for toilet tank fill valves.

PAR. 13. As a result of ASSE's representations as to its expertise in plumbing generally, and in all types of backflow prevention devices in particular, and its representations as to its leadership in incorporating innovative technology into its standards program, many building code and regulatory officials and others are led to believe that ASSE-approved ballcock valves are the only appropriate, acceptable, and adequate means of preventing backflow from toilet tanks

ry officials and others rely on ASSE 1002 as the only standard for evaluating the acceptability of toilet tank fill valves.

PAR. 14. J.H. Industries, Inc., (J.H.) a California corporation with its principal place of business at 980 Rancheros Drive, San Marcos, California, manufactures an innovative toilet tank fill valve, under the brand name Fillpro. The Fillpro valve differs from ballcock valves in that it uses a pressure sensitive diaphragm to control the water level and a double check valve to prevent backflow rather than an air gap or vacuum breaker. J.H., in marketing the Fillpro valve, represents that its design offers performance advantages over ballcock valves. These include: that use of the Fillpro valve by toilet manufacturers would permit greater flexibility in design of toilets resulting in lower material costs; that the Fillpro valve is safer than ballcock valves because it is less likely than ballcock valves to be incorrectly installed so as to allow backflow; that the Fillpro valve has fewer moving parts than ballcock valves and therefore needs replacement less frequently; that the Fillpro valve operates more quietly than ballcock valves; and that the Fillpro valves can be adjusted to regulate the water level in the flush tank to conserve water.

PAR. 15. Because ASSE 1002 specifies ballcocks equipped with vacuum breakers or air gaps as the only acceptable design for a toilet tank fill valve, the Fillpro valve is, by ASSE's definition, nonstandard. Without an ASSE standard for evaluating the Fillpro valve, J.H. has no means to establish to building code and regulatory officials and others who rely on ASSE standards that the Fillpro valve adequately prevents backflow.

PAR. 16. J.H. has developed credible evidence to demonstrate that the Fillpro valve protects against backflow at least as well as ballcock valves. On the basis of this evidence, several model code groups, local jurisdictions, and foreign countries have approved the Fillpro valve for sale. This evidence includes:

(a) testing by Truesdail Laboratories, Inc., an independent laboratory, against a version of ASSE 1002 modified by J.H. to reflect the design differences between the Fillpro valve and ballcock valves that resulted in a finding that the Fillpro valve adequately prevented backflow;

(b) testing by the National Sanitation Foundation, which is accredited by ASSE for testing products according to ASSE standards, against a new standard, developed by J.H. with the assistance of an independent expert, based on performance requirements of two ASSE standards that determined that the Fillpro valve provided adequate protection against backflow; and

(c) the expert opinion of ASSE's Standards Coordinator who assist-

ed in drafting the standard described in (b), above, and who stated that, after reviewing the test results based upon that standard "the Fillpro valve has demonstrated its backflow preventing capabilities."

PAR. 17. ASSE has refused to modify or develop a standard for evaluating the Fillpro valve. As a result, J.H. has been hindered or prevented from marketing the Fillpro valve in jurisdictions which rely on ASSE standards. These restrictions limit J.H.'s sales in the market for replacement valves installed by plumbers and consumers and in the market for valves installed as original equipment by manufacturers of toilets.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1 through 17 are incorporated by reference herein as if fully set forth verbatim.

PAR. 18. In 1975, J.H. requested that ASSE modify ASSE 1002 to permit the use of a double check valve as a means of preventing backflow in toilet tank fill valves. J.H. supported its request with the evidence described in Paragraph 16(a), above. ASSE rejected the revision proposed by J.H. on the ground that J.H.'s proposal "was contrary to established practices for the prevention of backflow" and that ASSE-approved ballcocks were the only acceptable means for preventing backflow. ASSE did not address or identify any inadequacies in the evidence offered in support of the proposed revision, nor did ASSE provide any evidentiary support for exclusive reliance on the existing design (*i.e.*, ballcocks with air gaps or vacuum breakers) to prevent backflow.

PAR. 19. In adopting the policies and engaging in the acts and practices described in Paragraph 18, ASSE has acted as a combination of or in a combination with one or more of its manufacturer members.

PAR. 20. ASSE had no reasonable basis or justification for rejecting the innovative design and relying on ballcocks with vacuum breakers or air gaps as the only acceptable design for toilet tank fill valves. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs 1 through 17 are incorporated herein as if set forth verbatim.

PAR. 21. In 1978, J.H. developed a standard for evaluating its product by drawing from applicable portions of existing ASSE standards. J.H. has requested that ASSE adopt this standard on several occasions and supported that request with the evidence described in

Paragraph 16. ASSE has refused to adopt the proposed standard or even to consider the standard and supporting evidence. ASSE justified its refusal on the ground that ASSE has a policy of refusing to develop a standard for a product which is patented or manufactured by only one manufacturer.

PAR. 22. In adopting the policies and engaging in the acts and practices described in Paragraph 21, ASSE has acted as a combination of or in a combination with one or more of its manufacturer members.

PAR. 23. ASSE has no reasonable basis or justification for its refusal to develop standards for products manufactured by only one manufacturer. Therefore, ASSE's refusal constitutes a concerted refusal to deal with J.H.

PAR. 24. The purposes or effects of the acts and practices described in Paragraphs 17 through 23 are and have been to unreasonably restrain trade and hinder competition in the manufacture and sale of plumbing devices in numerous geographic markets, and to unreasonably deprive consumers of the benefits of competition in the following ways, among others:

(a) an innovative product has been excluded from various geographic markets of the United States;

(b) building code and regulatory officials and buyers of toilet tank fill valves have been misled to believe that the product will not perform adequately to prevent backflow when compared to ballcock valves; and

(c) building and regulatory code officials and buyers of toilet tank fill valves have been deprived of information about the performance of the product.

PAR. 25. The policies, acts, and practices described in Paragraphs 17 through 23 are in or affect commerce as commerce is defined in the Federal Trade Commission Act.

PAR. 26. The policies, acts and practices and combination described above were and are to the prejudice or injury of the public, and constituted and now constitute unfair acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The alleged conduct is continuing in nature and will continue in the absence of the relief requested.

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 the 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 violation 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 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 also containing 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 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 sixty (60) days, and having duly considered the comments filed thereafter by interested parties pursuant to Section 2.34 of the Rules and having revised the consent order in response to these comments to clarify the intended operation of the order, 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. Proposed respondent is organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at P.O. Box 9712, in the Town of Bay Village, in the State of Ohio.

2. 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

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

ASSE means the American Society of Sanitary Engineering, its successors and assigns.

Competent and reliable testing criteria means a method or methods of testing or evaluation to measure whether the performance of a given product satisfies the implicit or explicit performance goals that underlie a standard. A rebuttable presumption of competence and reliability shall exist for testing criteria that are developed by a testing laboratory or expert that has been relied upon by ASSE to judge the acceptability of other products covered by standards

Competing products means products sold or available in the market that can be used for substantially the same end use as the applicant's product.

Reasonable standard-setting criteria means criteria which are consistently applied in the development or modification of a standard and which promote the legitimate self-regulatory goals of ASSE, such as assuring a reasonable and adequate level of safe and effective performance for a product. It shall not be reasonable for ASSE to require that the performance level for an applicant's product exceed the performance level required of competing products.

I.

It is ordered, That respondent American Society of Sanitary Engineering, its successors and assigns, and respondent's officers, agents, representatives, employees, and committees, directly or through any corporate or other device, in connection with any standard or seal of approval in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (hereinafter standard or seal of approval), do forthwith cease and desist, from directly or indirectly failing to issue a new standard, a modification of an existing standard, or a seal of approval for any reason, including that the product to be covered by the requested standard, modification or seal is patented or produced by only one manufacturer or a limited number of manufacturers, whenever

(1) ASSE has received a written application requesting such action,

(2) ASSE has already issued a standard, modification of a standard or a seal of approval covering any competing product(s),

(3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing product(s) (*e.g.,* the applicant has proposed competent and reliable testing criteria for the product and, under the proposed criteria, has demonstrated that the product meets the existing standard's performance goals), and

(4) ASSE does not at that time possess or rely upon a justification for failing to issue the requested standard, modification, or seal of approval that would satisfy reasonable standard-setting criteria.

II.

It is further ordered, That whenever (1) ASSE receives for any product a written application requesting that ASSE issue a new stan-

dard, a modification of an existing standard, or a seal of approval, (2) ASSE has already issued a standard, a modification of a standard, or a seal of approval covering any competing product(s), (3) the applicant has reasonably established in its application that its product adequately meets the implicit or explicit performance goals required by the existing standard covering any competing products, and (4) ASSE fails to issue the requested standard, modification, or seal of approval, ASSE shall:

A. provide to the applicant a written statement of the justification and bases for the failure, including the identification of the standard setting criteria and tests or other evidence or information upon which ASSE relied;

B. provide to the applicant a reasonable opportunity to respond;

C. if the applicant responds in writing, provide the applicant a written statement of the justifications and bases for the final decision which addresses all the issues raised by the applicant's response, including the identification of the standard-setting criteria and tests or other evidence or information upon which ASSE relied; and

D. maintain copies of the applicant's submissions, of all responses made to the applicant, of the applicant's responses thereto, if any, and of the justifications and bases for the final decisions.

III.

It is further ordered, That ASSE shall incorporate the requirements of Parts I and II of this order in its Bylaws and publish the requirements of Parts I and II of this order in the *ASSE Standards Handbook* and the *ASSE Yearbook.*

IV.

It is further ordered, That ASSE shall:

A. maintain in a separate file for a period of at least ten (10) years after the date of service of this order and, upon request, make available to the Federal Trade Commission for inspection and copying every application for issuance or modification of an ASSE standard or issuance of a seal of approval and all documents that discuss, refer, or relate thereto;

B. notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent that may affect compliance obligations arising out of this order, including but not limited to dissolution, assignment, a sale resulting in the emergence of a successor organization, or the creation or dissolution of subsidiaries; and

C. within sixty (60) days from the date of service of this order submit a report, in writing, to the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ATLAS SUPPLY CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket 5794. Order, July 19, 1951—Modifying Order, Oct. 8, 1985

The Federal Trade Commission has denied a request from Atlas Supply Co. and its parent companies to set aside a 1951 cease and desist order (48 F.T.C. 53), but has modified the order by deleting one provision that restricted the joint purchasing activities of respondents.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 19, 1951

On June 7, 1985, Atlas Supply Company ("Atlas") and its shareholders, Amoco Oil Holding Company, The Standard Oil Company (Ohio), Chevron U.S.A. Inc., and Exxon Corporation filed a "Request To Reopen And Set Aside Cease And Desist Order" ("Request"), pursuant to Section 5(b) of The Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding and terminate the cease and desist order issued on July 19, 1951 ("the order").

The order contains five substantive ordering paragraphs. The first two ordering paragraphs require Atlas and its shareholders to cease and desist from receiving or transmitting commissions, brokerage, or other compensation in connection with their purchases of automobile tires, tubes, batteries or other automobile parts or accessories ("TBA") in violation of Section 2(c) of the Robinson-Patman Act. The third and fourth ordering paragraphs require respondents to cease and desist from knowingly inducing or accepting discriminatory prices in connection with their TBA purchases in violation of Section 2(f) of the Robinson-Patman Act unless a cost saving or good faith meeting of competition justification exists. The fifth ordering paragraph, which was issued pursuant to Section 5 of the Federal Trade Commission Act, prohibits respondents from using their combined purchasing power in connection with their TBA purchases to obtain any "price, discount, rebate, allowance or other treatment from a seller which is preferential to that allowed, afforded or made available by such seller" to competitors of any of the respondents. After reviewing the Request, the Commission has concluded that respondents have not made a satisfactory showing that changed circumstances or public interest considerations require that the Robinson-Patman Act provisions of the order be terminated. The Commission has determined,

however, that it is in the public interest to modify the order to set aside the provision that prohibits Atlas and its shareholders from using their combined purchasing power to obtain preferential treatment from suppliers in connection with their joint TBA purchases.

Respondents have not shown how they are harmed by their obligation to comply with the Section 2(c) and 2(f) provisions of the order which they concede "do little more than repeat the Robinson-Patman Act . . ." Request, p.4. Respondents do not assert that the conduct in which they engaged prior to 1951 is no longer violative of the Robinson-Patman Act nor do they make any showing that the R-P provisions of the order inhibit lawful activity in which they wish to engage. Because the Section 2(c) and 2(f) provisions of the order merely require compliance with the law, they do not put respondents at a disadvantage with respect to their competitors who are also obliged to obey the law, nor do they impose any restrictions on respondents' lawful activities. Respondents' primary argument is that in view of the passage of thirty-four years since the order was issued there is no reason to suppose that the resumption of joint purchasing by Atlas and the other respondents would be accompanied by violations of the Robinson-Patman Act. However, the deterrent effect of law enforcement actions by the Commission could be adversely affected if the Commission were to sunset conduct orders that do no more than require compliance with the law. And in recent cases the Commission has declined to terminate conduct orders solely because of their age. *See, e.g., William H. Rorer, Inc.,* Docket No. 8599, Modifying Order issued September 14, 1984 [104 F.T.C. 544] (Commission declined to set aside a 17-year old order issued under Section 2(a) of the Robinson-Patman Act, although it did terminate fencing in provisions); *National Dairy Products Corp.,* 100 F.T.C. 431 (1982) (Commission declined either to rescind or terminate in five years a perpetual order issued under Section 2(a) of the Robinson-Patman Act); *ABC Vending Corp.,* Docket No. 7652 (Letter from Secretary of the Commission to Arthur H. Kahn, Esquire, dated January 28, 1982. Commission declined to set aside perpetual order provision based on Section 2(f) of the Robinson-Patman Act that "merely restates the law that must be adhered to by the respondent . . . and consequently does not hinder the respondent's ability to compete.").

On the other hand, the Commission has concluded that the public interest warrants modifying the order to set aside its fifth ordering paragraph which prohibits Atlas and its shareholders from using their combined purchasing power to obtain preferential treatment from suppliers in connection with their joint TBA purchases. As the Request observes, this provision does not define "preferential" nor, in contrast to the Robinson-Patman Act provisions of the order, does it

include any specific recognition of the availability of a cost justification or meeting competition defense. Request, p.4. It thus forbids conduct that would be lawful under the Robinson-Patman Act. To the extent that this provision was included in the order out of concern that the market growth which had been experienced by the Atlas brands from 1930 to 1949 threatened a recurrence, in TBA at least, of the monopoly power of the original Standard Oil Company, Request, p.5, respondents have demonstrated that in the thirty-four years since the order was issued there has been no such recurrence of monopoly power with respect to TBA and no tendency in that direction. In contrast to the situation at the time the order issued when it was stipulated that Atlas products approximated ten percent of the total replacement sales of TBA products in the United States, Atlas brands today represent TBA market shares ranging from a high of 3.26 percent (oil filters) to a low of 0.176 percent (remanufactured starters and alternators). Nevertheless, according to the Request, the breadth of the possible reach of the fifth ordering paragraph has caused Atlas and its shareholders to forego any consideration of joint purchasing regardless of efficiencies or competitive considerations. Request, p.5. The fifth ordering paragraph initially served a legitimate purpose in that it assured the termination of the violations of the Robinson-Patman Act that had been associated with respondents' joint purchasing activities. It appears, however, that this provision of the order has long since accomplished its remedial purpose and is now serving to inhibit respondents from engaging in lawful competitive behavior. Despite the passage of thirty-four years since the order issued, respondents' competitors in the TBA industry have not been placed under any comparable restraint. Moreover, in many instances joint buying groups may facilitate pro-competitive economies and efficiencies without significant countervailing anticompetitive effects. Request, pp. 10–12.

Accordingly, *it is ordered,* that this matter be, and it hereby is, reopened, and that the fifth ordering paragraph of the Commission's order issued on July 19, 1951, shall be of no further force and effect as of the effective date of this modifying order.

IN THE MATTER OF

BOC INTERNATIONAL, LIMITED, ET AL.
(formerly known as British Oxygen Company, Limited)

Docket 8955. Interlocutory Order, October 9, 1985.

ORDER LIFTING *IN CAMERA* TREATMENT AND PLACING EXHIBITS ON THE PUBLIC RECORD

By order of January 14, 1978, the Commission temporarily reinstated *in camera* treatment for certain evidentiary exhibits in this matter, pending receipt of answers to, and resolution of, motions for extension of the *in camera* treatment of these documents by BOC for one year and Airco for three months or until document production was complete in another proceeding. On May 14, 1980, the Commission dismissed the complaint in this matter without resolving the motions, thus leaving the documents in an *in camera* status.

On January 5, 1985, access was requested under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for documents submitted during investigation of companies in the industrial gas industry. All responsive documents were examined pursuant to the request to ascertain whether they were protected from mandatory public disclosure by the exemptions contained in the FOIA. That examination included analysis of whether the exhibits described below warranted continuing *in camera* protection. Because, as explained below, the Commission has determined that *in camera* treatment is no longer justified, the documents will become part of the public record in this matter. Accordingly, no FOIA exemptions will apply to them.

The exhibits in question were entered into evidence in the matter of *British Oxygen Company, Limited,* D. 8955, [86 F.T.C. 1241 (1975), *dismissed,* 95 F.T.C. 805 (1980)] as CX 78, 95, 161, 162, 163, 232, 254, 255, and 301. They consist of business records containing financial information that was sensitive to the parties at the time it was introduced into evidence in 1974 and other information reflecting BOC's interest during the period from 1970 through 1973 in entering the United States industrial gas market. The exhibits also comprise reports of interviews held in 1973 with Airco's two top executives. The latter group of documents includes evaluations made twelve years ago of Airco's top executives and its Board of Directors.

There is a strong public interest in holding all aspects of Commission adjudicative proceedings open to interested persons for public inspection and understanding. Accordingly, the Commission's Rules of Practice provide for issuance of *in camera* orders only in unusual

and exceptional circumstances. 16 C.F.R. 3.45(b). Those circumstances occur only on a showing that placing the documents on the public record would result in a clearly defined, serious injury to the corporation submitting the documents. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Co.*, 90 F.T.C. 455 (1977).

In cases such as these, where the information is old, an even greater burden is placed on the submitter. Even where a clearly defined, serious injury can be demonstrated when close in time, its basis is normally removed by the passage of years. *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 334 (1967). Unless the documents can be used to make such a convincing showing of significant insight into current operations that serious competitive injury would result, continued *in camera* treatment is not justified. *General Foods Corp.*, 95 F.T.C. 352 (1980).

The Commission has examined the business records at issue of Airco and BOC to determine whether they presently deserve the *in camera* protection that has been accorded to them. Information contained in these records is at least 12 years old. Without addressing whether publication might have caused a clearly defined, serious injury had the records been disclosed in 1974, the Commission has determined that any sensitivity that may have existed has been removed by passage of twelve years. Specifically, the Commission recognizes that in some instances old data may be used to extrapolate information that would provide significant insight into current business operations. In this instance, however, the Commission believes that the passage of twelve years makes the construction of a current, accurate model impossible. Thus, we find that disclosure of the business records would not result in the clearly defined, serious injury necessary to justify continued *in camera* protection.

Similarly, the Commission has concluded that public disclosure of the twelve year old comments evaluating the performance of Airco's officers and directors would create nothing more than a slight embarrassment to the individuals involved, not a clearly defined, serious injury. The Commission has previously held that "the mere embarrassment of the movant should not foreclose public disclosure." *Hood, supra* at 1188–89. For these reasons,

It is ordered, That the *in camera* status of exhibits CX 78, 95, 161, 162, 163, 232, 254, 255, and 301 be lifted.

It is further ordered, That the Secretary notify the companies by mail of our determination to lift the *in camera* status of the exhibits referenced above; and that the Secretary place the exhibits in this matter on the public record no sooner than ten (10) calendar days after receipt of this notification by the parties.

IN THE MATTER OF

BOC INTERNATIONAL, LIMITED, ET AL.
(formerly known as British Oxygen Company, Limited)

Docket 8955. Interlocutory Order, October 9, 1985.

NOTICE OF INTENT TO RELEASE CONFIDENTIAL INFORMATION

This is to advise BOC International, Limited, BOC Financial Corporation, BOC Holdings Limited, British Oxygen Investments, Limited and Airco, Incorporated ("the companies") that, pursuant to the Commission's order in Docket 8955, the Commission intends to place on the public record certain exhibits introduced into evidence in Docket No. 8955 in an *in camera* status. [86 F.T.C. 1241 (1975)]

By order of January 14, 1978, the Commission temporarily reinstated *in camera* treatment for these exhibits, pending receipt of answers to, and resolution of, motions for extension of the *in camera* treatment of these documents by BOC for one year and Airco for three months or until document production was complete in another proceeding. On May 14, 1980, the Commission dismissed the complaint in this matter without resolving the motions, thus leaving the documents in an *in camera* status. [95 F.T.C. 805 (1980)]

On January 5, 1985, access was requested under the Freedom of Information Act, 5 U.S.C. 552 ("FOIA"), for documents submitted during investigation of companies in the industrial gas industry. All responsive documents were examined pursuant to the request to ascertain whether they were protected from mandatory public disclosure by the exemptions contained in the FOIA. That examination included analysis of whether the exhibits described below warranted continuing *in camera* protection. Because, as explained below, the Commission has determined that *in camera* treatment is no longer justified, the documents will become part of the public record in this matter. Accordingly, no FOIA exemptions will apply to them.

The exhibits in question were entered into evidence in the matter of *British Oxygen Company, Limited,* D. 8955, as CX 78, 95, 161, 162, 163, 232, 254, 255, and 301. They consist of business records containing financial information that was sensitive to the parties at the time it was introduced into evidence in 1974 and other information reflecting BOC's interest during the period from 1970 through 1973 in entering the United States industrial gas market. The exhibits also comprise reports of interviews held in 1973 with Airco's two top executives. The latter group of documents includes evaluations made twelve years ago of Airco's top executives and its Board of Directors.

There is a strong public interest in holding all aspects of Commission adjudicative proceedings open to interested persons for public inspection and understanding. Accordingly, the Commission's Rules of Practice provide for issuance of *in camera* orders only in unusual and exceptional circumstances. 16 C.F.R. 3.45(b). Those circumstances occur only on a showing that placing the documents on the public record would result in a clearly defined, serious injury to the corporation submitting the documents. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Co.*, 90 F.T.C. 455 (1977).

In cases such as these, where the information is old, an even greater burden is placed on the submitter. Even where a clearly defined, serious injury can be demonstrated when close in time, its basis is normally removed by the passage of years. *Columbia Broadcasting System, Inc.*, 72 F.T.C. 27, 334 (1967). Unless the documents can be used to make such a convincing showing of significant insight into current operations that serious competitive injury would result, continued *in camera* treatment is not justified. *General Foods Corp.*, 95 F.T.C. 352 (1980).

The Commission has examined the business records at issue of Airco and BOC to determine whether they presently deserve the *in camera* protection that has been accorded to them. Information contained in these records is at least 12 years old. Although it appears that publication might have caused a clearly defined, serious injury had the records been disclosed in 1974, any sensitivity that had existed has been removed by passage of twelve years. We have studied the records to determine whether the sensitivity of the information may be preserved by virtue of the possibility that the data may be used to make a convincing showing of insight into operations of BOC's current businesses. In this instance, however, the passage of twelve years makes the construction of a current, accurate model impossible. Thus, we cannot find that the business records demonstrate the clearly defined, serious injury necessary for continued *in camera* status.

We have also examined documents containing the evaluations of Airco's officers and directors to determine whether they warrant continued *in camera* status. We have concluded as a result of our examination that public disclosure of the twelve year old comments would create nothing more than a slight embarrassment to the individuals involved, not a clearly defined, serious injury to BOC. Accordingly, in cases such as this, we have held that "the mere embarrassment of the movant should not foreclose public disclosure." *Hood, supra* at 1188–89.

For the reasons expressed above, the Commission will lift the present *in camera* status of the exhibits CX–78, CX–95, CX–161, CX–162, CX–163, CX–232, CX–254, CX–255 and CX–301 entered into evi-

dence in the course of adjudication in D. 8955. The documents will be placed on the public record no sooner than then (10) calendar days following service of this notice on the companies.

IN THE MATTER OF

MICHIGAN OPTOMETRIC ASSOCIATION

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

Docket C-3170. Complaint, Oct. 10, 1985—Decision, Oct. 10, 1985

This consent order requires the Michigan Optometric Association, among other things, to cease prohibiting, restricting or restraining any optometrist from: (1) entering into or affiliating with a corporate practice; (2) practicing in any location; or (3) disseminating truthful, non-deceptive information. Additionally, the Association is required to repeal those Bylaws and Standards of Conduct that conflict with the order. Further, the Association is required to send notice of the order to: (1) all optometrists who resigned or were terminated because they engaged in a corporate practice or practiced in a retail location; (2) all members of the Association; (3) all other optometrists currently licensed in the State of Michigan; and (4) everyone to whom the Association sends an application for membership for the next five years.

Appearances

For the Commission: *Robert P. Weaver.*

For the respondent: *William R. Ralls,* Lansing, Mich.

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 the Michigan Optometric Association, a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Michigan Optometric Association is a corporation formed pursuant to the laws of the State of Michigan, with its mailing address at 530 West Ionia Street, Suite A, Lansing, Michigan.

PAR. 2. Respondent is a professional association organized in substantial part to represent the interests of optometrists who practice in Michigan as well as the profession of optometry in Michigan. Respondent has approximately six hundred thirty (630) members, constituting approximately two-thirds of the practicing optometrists in Michigan. A significant portion of respondent's activities furthers its

members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

PAR. 3. Respondent's members are engaged in the business of providing optometric care or services for a fee. Some are also engaged in the sale of optical goods and devices. Except to the extent that competition has been restrained as herein alleged, respondent's members have been and are now in competition among themselves.

PAR. 4. In the conduct of their business, respondent's members receive substantial sums of money, which monies flow across state lines, from the federal government and from private insurers for rendering optometric services; they prescribe and sell optical goods and devices that are shipped in interstate commerce; they receive and treat patients from other states; and they use supplies and equipment that are shipped across state lines. The acts or practices described below are in interstate commerce; or affect the interstate activities of respondent's members, third parties who pay for optometric services, other third parties, and some patients of respondent's members; and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)).

PAR. 5. The practice of optometry is defined by Michigan law to include: the examination of the human eye to detect abnormal conditions that may be corrected by lenses or other mechanical devices; the determination of visual ability or muscular equilibrium of the human eye; the adjustment of lenses used to correct an abnormal condition of the human eye; the examination and fitting of the human eye for contact lenses; and the use of certain pharmaceutical agents in the examination of the human eye. Michigan law also provides that a layperson may, pursuant to a written prescription of a licensed optometrist or physician, sell eyeglasses as an article of merchandise.

PAR. 6. In Michigan, most optometric services have traditionally been provided by optometrists practicing as sole proprietorships, as partners in partnerships, as shareholders of professional corporations, or as employees of proprietorships, partnerships, professional corporations, hospital clinics, or health maintenance organizations.

PAR. 7. For purposes of this complaint, *corporate practice* shall mean practice by an optometrist as an owner of, an employee of, or an affiliate of a business corporation that is not a hospital clinic, health maintenance organization, or professional corporation. Some optometric services in Michigan are provided by optometrists engaging in corporate practices.

PAR. 8. For various reasons, including their scale of operation, corporate practices are often able to deliver optometric services and to provide quality optical goods and devices at prices lower than those

generally charged for comparable services or items by traditional optometrists or independent opticians.

PAR. 9. For purposes of this complaint, *retail location* shall mean a location of a practice in a department, division, or section of a retail, department, or discount store. Some optometric services in Michigan are provided by optometrists practicing in retail locations. Optometrists can increase consumer access to optometric care and can achieve operating efficiencies through the use of retail locations.

PAR. 10. In selecting an optometrist and/or provider of optical goods, consumers consider factors such as quality of service, price and other terms of sale, reputation, experience, availability of different types or styles of optical goods, and location and other convenience factors. Advertising in a variety of media, including billboards, and at store locations, enables optometrists to inform consumers about these factors. Such truthful, non-deceptive advertising benefits consumers by increasing the information available to them and promoting competition among optometrists.

PAR. 11. Respondent has restrained competition in the delivery of optometric services and the sale of optical goods and devices in Michigan by acting as a combination of at least some of its members, or by combining and conspiring with at least some of its members, to restrict the use of corporate practices and retail locations, and to restrict dissemination by optometrists of truthful, non-deceptive information to consumers. In particular, respondent has combined or conspired with at least some of its members to:

(A) Prohibit or restrict optometrists from providing or offering to provide optometric services through a corporate practice, or from selling or offering to sell optical goods and devices to the public through a corporate practice;

(B) Prohibit or restrict optometrists from providing or offering to provide optometric services in a retail location, or from selling or offering to sell optical goods and devices to the public in a retail location; and

(C) Prohibit or restrict optometrists from disseminating information to consumers through truthful, non-deceptive advertising.

PAR. 12. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

(A) Requesting the resignation and terminating the membership of optometrists who provide services or sell optical goods and devices through a corporate practice;

those optometrists who provide services or sell optical goods and devices other than through a corporate practice;

(C) Requesting the resignation and terminating the membership of optometrists who provide services or sell optical goods and devices in a retail location;

(D) Adopting and maintaining a bylaw restricting membership to those optometrists who provide services or sell optical goods and devices other than in a retail location; and

(E) Adopting and maintaining standards of conduct that prohibit optometrists from:

(1) displaying their names in the lobby or public hall of a building in any manner that stands out from a listing of other occupants of the building;

(2) using professional cards, billboards, letterhead, or stationery containing any information other than certain limited items;

(3) using large signs or any representations of eyes, eyeglasses, or the human head; and

(4) using lettering that is larger than a specified size on windows or doors.

PAR. 13. The purposes or effects of the combination or conspiracy and acts or practices of respondent as described in Paragraphs Eleven and Twelve have been and are to unreasonably restrain competition and injure consumers in one or more of the following ways, among others:

(A) Competition in the delivery of optometric services and the sale of optical goods and devices on the basis of price, service, and quality has been frustrated and restrained;

(B) Consumers have been deprived of the benefits of a variety of truthful, non-deceptive information about optometric services and optical goods and devices; and

(C) Consumers have been deprived of the potential cost savings, convenience, and efficiency benefits of corporate practices and retail locations in their purchases of optometric services and optical goods and devices.

PAR. 14. The combination or conspiracy and acts or practices described above constitute unfair methods of competition or unfair or deceptive acts or practices that violate Section 5 of the Federal Trade Commission Act. The combination or conspiracy, the acts or practices, and the effects thereof are continuing and will continue unless the Commission enters appropriate relief against respondent.

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 Cleveland Regional Office 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 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, 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 sixty (60) 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 Michigan Optometric Association is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Michigan, with its mailing address at 530 West Ionia Street, Suite A, Lansing, Michigan.

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

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

(A) *Respondent* means the Michigan Optometric Association, its directors, trustees, councils, committees, officers, representatives,

(B) *Optometrist* means any individual duly licensed to engage in the practice of optometry in the State of Michigan.

(C) *Corporate practice* means practice by an optometrist as an owner of, an employee of, or an affiliate of a business corporation that is not a hospital clinic, health maintenance organization, or professional corporation.

(D) *Retail location* means the location of a practice in a department, division, or section of a retail, department, or discount store.

II

It is ordered, That respondent, directly, indirectly, or through any corporate or other device, in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

(A) Prohibiting, restricting, or restraining any optometrist from entering into or affiliating with a corporate practice, through any means, including, but not limited to:

(1) Declaring it to be an unethical or otherwise objectionable practice in violation of the respondent's constitution, bylaws, standards of conduct, code of ethics, or policies, for any optometrist to enter into or affiliate with a corporate practice;

(2) Expelling or suspending, or threatening to expel or suspend, any optometrist from membership, or refusing to grant membership to any optometrist, or taking any other disciplinary action against any optometrist, for entering into or affiliating with a corporate practice; and

(3) Adopting or maintaining any constitution, bylaw, standard of conduct, code of ethics, or policy that prohibits any optometrist from entering into or affiliating with a corporate practice;

(B) Prohibiting, restricting, or restraining any optometrist from practicing in any location, through any means, including, but not limited to:

(1) Declaring it to be an unethical or otherwise objectionable practice in violation of the Respondent's constitution, bylaws, standards of conduct, code of ethics, or policies, for any optometrist to practice in a retail location;

(2) Expelling or suspending, or threatening to expel or suspend, any optometrist from membership, or refusing to grant membership to any optometrist, or taking any other disciplinary action against any optometrist, for practicing in a retail location; and

(3) Adopting or maintaining any constitution, bylaw, standard of conduct, code of ethics, or policy that prohibits any optometrist from practicing in a retail location; and

(C) Restricting, regulating, prohibiting, impeding, declaring unethical, interfering with, or advising against the advertising, publication, or dissemination of information about optometric services or optical goods and devices that are offered for sale or made available by an optometrist or by any organization with which an optometrist is affiliated, through any means, including, but not limited to, adopting, maintaining, or enforcing any constitution, bylaw, standard of conduct, code of ethics, or policy that prohibits any optometrist from:

(1) Displaying an optometrist's name in the lobby or public hall of a building in any manner that stands out from a listing of other occupants of the building;

(2) Using professional cards, billboards, letterhead, or stationery containing any information other than certain limited items;

(3) Using large signs, or depictions in advertising that contain representations of eyes, eyeglasses, or the human head; and

(4) Using lettering that is larger than a specified size on windows or doors, or displaying ophthalmic materials and certificates visible from other than just within the opthalmic office.

Provided, That nothing contained in this part shall prohibit respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III

It is further ordered, That respondent shall:

(A) No later than ninety (90) days after the date this order becomes final, remove from its constitution, bylaws, standards of conduct, codes of ethics, and any other policy statements of respondent, any provision, rule, standard, interpretation, or policy statement that is inconsistent with Part II of this order, by amendment, revision, or in such other manner as to eliminate the inconsistency, including, but not limited to, removal of respondent's Bylaws, Article I, Sections 1(A)(b) and (c), and respondent's Standards of Conduct, Article III, Sections (B)(c), (e), (f), and (g); and

(B) Within one hundred twenty (120) days after the date this order becomes final, publish in the *Michigan Optometrist* or, if that publica-

date this order becomes final, in any successor publication, notice of the removal or amendment of any such provision, rule, standard, interpretation, or policy statement as described above.

IV

It is further ordered, That respondent shall:

(A) Within sixty (60) days after the date this order becomes final, send by first-class mail the letter attached hereto as Attachment A, an application for membership, and a copy of this order and the attached complaint to each optometrist whose membership was terminated or who resigned, and for which the basis of such termination or resignation was his or her corporate practice status or practice in a retail location [*e.g.*, a violation of respondent's Bylaws, Article I, Section 1(A)(b) or (c)]; offer to reinstate any such optometrist's membership in respondent; and if any optometrist so desires, reinstate such membership within thirty (30) days after the application is returned, *provided,* the optometrist meets respondent's current requirements for membership as they are generally applied to all existing members and, *provided,* these requirements are fair and reasonable;

(B) Within sixty (60) days after the date this order becomes final, send by first-class mail the letter attached hereto as Attachment B, an application for membership, and a copy of this order and the attached complaint to every optometrist who is licensed to practice in the State of Michigan, but who has not been notified pursuant to Part IV(A) of this order and is not a member of respondent;

(C) Within sixty (60) days after the date this order becomes final, and ten (10) days prior to the publication of this order and the attached complaint pursuant to Part IV(D) of this order:

(1) send by third-class mail the letter attached hereto as Attachment C to every optometrist who is a member of respondent, or

(2) at the respondent's option, include the letter attached hereto as Attachment C as a separate two (2) page insert in the front of any third-class mailing sent in the respondent's normal course of business to every optometrist who is a member of respondent, *provided, however,* the total mailing to each optometrist does not exceed ten (10) pages;

(D) Within sixty (60) days after the date this order becomes final, publish a copy of this order and the attached complaint in the *Michigan Optometrist* or, if that publication is no longer in existence sixty (60) days after the date this order becomes final, in any successor publication; and

(E) For a period of five (5) years after the date this order becomes final, include the notice attached hereto as Attachment D in or with

every application for membership sent, disseminated, or distributed by respondent to any person. The notice shall be printed as a separate paragraph in type at least as large as the type face of the major portion of the text of the application, and in such manner that it is clear and prominent.

V

It is further ordered, That respondent shall:

(A) Within one hundred twenty (120) days after the date this order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order, including, but not limited to, a copy of each constitution, bylaw, standard of conduct, code of ethics, or policy statement that was revised or amended to assure compliance with this order;

(B) Annually, for a period of two (2) years after the date this order becomes final, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with any activity covered by Parts II, III, and IV of this order, including, but not limited to, the rendering of any advice or interpretation with respect to any corporate practice, retail location, or advertising involving any optometrist; and

(C) For a period of five (5) years after the date this order becomes final, maintain, and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with any activity covered by Parts II, III, and IV of this order, including, but not limited to: the rendering of any advice or interpretation with respect to any corporate practice, retail location, or advertising involving any optometrist; rulemaking and enforcement proceedings; and written communications, and any summaries of oral communications, to or from the respondent.

VI

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, association, or other entity, or any other change in the respondent that may affect compliance obligations arising out of this order.

ATTACHMENT A

Dear Dr. _____:

This letter is to inform you of a Consent Order (copy enclosed) that we have signed with the Federal Trade Commission. Our agreement to this Order is for settlement purposes only, and does not constitute an admission of a law violation by the Michigan Optometric Association. Under the terms of this Order, the Association has agreed that we will not prevent any optometrist from entering into or affiliating with a corporate practice, practicing in a retail location, or using any form of truthful, non-deceptive advertising.

Specifically, we have revised our Bylaws and Standards of Conduct to reflect the requirements of the Consent Order, including:

1. Removal of Article I, Sections 1(A)(b) and (c) of the Bylaws, which stated that Association membership is only open to a licensed optometrist who:

"(b) Practices optometry primarily as a proprietor, as a shareholder or shareholder-employee of a professional corporation; or as a partner in a partnership; or as an employee of a proprietorship, professional corporation or partnership; or as an employee of a health maintenance organization or hospital clinic, and

"(c) Practices optometry primarily in an office which is not held out to the public as a department, division or section of a retail store;" and

2. Removal of Article III, Sections (B)(c), (e), (f), and (g) of the Standards of Conduct, which prohibited certain methods of providing information about optometric services.

Therefore, even though you are affiliated with a corporate practice or practice in a retail location, you now qualify for membership in the Michigan Optometric Association, and you have a right to reinstatement of your membership provided that you still meet current membership requirements of the Association. If you wish to reinstate your membership, please do the following:

1. Fill out the enclosed application form. Please note, however, that you do not have to obtain the signatures of two current members of the Association for reinstatement.
2. If you have unpaid dues from your former period of membership, a statement is enclosed with this letter. If you have questions regarding the amount due, please contact us. Payment for any outstanding dues should be enclosed with the application.
3. You must also enclose payment for current applicable dues.
4. Return the application and payment to the Association.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Michigan Optometric Association

ATTACHMENT B

Dear Dr._____:

This letter is to inform you of a Consent Order (copy enclosed) that we have signed with the Federal Trade Commission. Our agreement to this Order is for settlement

purposes only, and does not constitute an admission of a law violation by the Michigan Optometric Association. Under the terms of this Order, the Association has agreed that we will not prevent any optometrist from entering into or affiliating with a corporate practice, practicing in a retail location, or using any form of truthful, non-deceptive advertising.

Specifically, we have revised our Bylaws and Standards of Conduct to reflect the requirements of the Consent Order, including:

1. Removal of Article I, Sections 1(A)(b) and (c) of the Bylaws, which stated that Association membership is only open to a licensed optometrist who:

"(b) Practices optometry primarily as a proprietor, as a shareholder or shareholder-employee of a professional corporation; or as a partner in a partnership; or as an employee of a proprietorship, professional corporation or partnership; or as an employee of a health maintenance organization or hospital clinic, and

"(c) Practices optometry primarily in an office which is not held out to the public as a department, division or section of a retail store;" and

2. Removal of Article III, Sections (B)(c), (e), (f), and (g) of the Standards of Conduct, which prohibited certain methods of providing information about optometric services.

Consequently, membership in the Michigan Optometric Association is now open to any optometrist licensed to practice in Michigan, regardless of the structure or location of his or her practice, and you are welcome to apply. We have enclosed a membership application for your convenience.

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Michigan Optometric Association

ATTACHMENT C

Dear Dr._____:

This letter is to inform you of a Consent Order that we have signed with the Federal Trade Commission. Our agreement to this Order is for settlement purposes only, and does not constitute an admission of a law violation by the Michigan Optometric Association. Under the terms of this Order, the Association has agreed that we will not prevent any optometrist from entering into or affiliating with a corporate practice, practicing in a retail location, or using any form of truthful, nondeceptive advertising.

Specifically, we have revised our Bylaws and Standards of Conduct to reflect the requirements of the Consent Order, including:

1. Removal of Article I, Sections 1(A)(b) and (c) of the Bylaws, which stated that Association membership is only open to a licensed optometrist who:

"(b) Practices optometry primarily as a proprietor, as a shareholder or shareholder-employee of a professional corporation; or as a partner in a partnership; or as an employee of a proprietorship, professional corporation or partnership; or as an employee of a health maintenance organization or hospital clinic, and

"(c) Practices optometry primarily in an office which is not held out to the public as a department, division or section of a retail store;" and

2. Removal of Article III, Sections (B)(c), (e), (f), and (g) of the Standards of Conduct, which prohibited certain methods of providing information about optometric services.

Consequently, membership in the Michigan Optometric Association is now open to any optometrist licensed in the State of Michigan, regardless of the structure or location of his or her practice. For your information, a complete copy of the Federal Trade Commission's Complaint and the Consent Order will appear in the [Month, 19__] issue of the *Michigan Optometrist.*

If you have any questions, please feel free to contact us.

Sincerely,

(Name and Title)
Michigan Optometric Association

ATTACHMENT D

The Michigan Optometric Association welcomes all optometrists to apply for membership regardless of the type or location of their practice. The Association treats all optometrists equally, in accordance with an agreement it entered into with the Federal Trade Commission on [insert date of issuance of the Consent Order]. If you have any questions about this policy, feel free to call the Association at (517) 482–0616 or the Federal Trade Commission at (216) 522–4207.

IN THE MATTER OF

WRIGHT-PATT CREDIT UNION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3171. Complaint, Oct. 21, 1985—Decision, Oct. 21, 1985

This consent order requires a Fairborn, Ohio, credit union, among other things, to cease failing to tell consumers, when applications for credit are denied because of information contained in credit reports (including non-derogatory information), that the adverse action had been taken on the basis of such information; and provide the rejected credit applicants with the names and addresses of the credit bureaus that had submitted the reports. The order further bars the organization from failing to identify applications submitted between Sept. 1, 1983 and the date of issuance of the order, for which adverse action had been taken on the basis of information obtained from a consumer reporting agency, and to send to those rejected applicants who had not been given the legally-required disclosures, a copy of the notification letter attached to the order as Appendix A.

Appearances

For the Commission: *Eileen M. Harrington.*

For the respondents: *Robert G. Palmer, Palmer & Perdue,* Columbus, Ohio.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act, 15 U.S.C. 1681, *et seq.* and the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.* and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Wright-Patt Credit Union, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint and the accompanying order the following definitions are applicable:

A. The terms *consumer, consumer report, consumer reporting agency* and *person* shall be defined as provided in Section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a.

B. The term *no file response* shall be defined as a consumer report consisting of a response by a consumer reporting agency to respondent's request for information on a given credit applicant indicating that the consumer reporting agency has no credit history information in its files under the name and other identifiers supplied by respondent.

C. The term *non-derogatory information* shall be defined as information in a consumer report, furnished to respondent by a consumer reporting agency, consisting of an insufficient number of accounts reported, the absence or presence of certain types of credit accounts, the presence of new credit accounts with credit histories too short to meet the respondent's criteria for granting credit or insufficient positive information to meet such criteria.

PAR. 2. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its principal office and place of business located at 2455 Executive Park Boulevard, City of Fairborn, State of Ohio. Respondent is a state chartered, federally insured credit union.

PAR. 3. Respondent, in the ordinary course and conduct of its business, uses information in consumer reports obtained from consumer reporting agencies in the evaluation of applications for credit to be used for personal, family or household purposes. In a substantial number of instances respondent denies credit applications from consumers applying for credit that they intend to use for personal, family or household purposes. The Commission has jurisdiction of the subject matter of this proceeding and of respondent, as provided by Section 621 of the Fair Credit Reporting Act, 15 U.S.C. 1681s, and the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*

PAR. 4. Respondent, in the ordinary course and conduct of its business, obtains consumer reports from consumer reporting agencies. In a substantial number of instances subsequent to April 25, 1971, respondent has denied consumers credit for personal, family or household purposes based wholly or partly on information contained in consumer reports (including non-derogatory information such as insufficient positive information or a "no file" response) from the consumer reporting agency. In such instances, respondent has failed to disclose to the consumer at the time when such adverse action was communicated that the credit denial was based wholly or partly on information in a consumer report from a consumer reporting agency and to supply to the consumer the name and address of the consumer reporting agency making the report.

PAR. 5. By and through the use of the practices described in Paragraph Four, during the period from April 25, 1971 to the present

respondent has violated and is violating the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 6. Pursuant to Section 621(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a), the acts and practices set forth in this complaint as violations of the Fair Credit Reporting Act constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

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 respondents with violations of the Federal Trade Commission Act and the Fair Credit Reporting 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, 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 the 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 sixty (60) 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 Wright-Patt Credit Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 2455 Executive Park Boulevard, in the City of Fairborn, State of Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding

ORDER

Definitions: For the purpose of this order the following definitions are applicable:

A. The terms *consumer, consumer report, consumer reporting agency* and *person* shall be defined as provided in Section 603 of the Fair Credit Reporting Act, 15 U.S.C. 1681a.

B. The term *no-file response* shall be defined as a consumer report consisting of a response by a consumer reporting agency to respondent's request for information on a given credit applicant indicating that the consumer reporting agency has no credit history information in its files under the name and other identifiers supplied by respondent.

C. The term *non-derogatory information* shall be defined as information in a consumer report, furnished to respondent by a consumer reporting agency, consisting of an insufficient number of accounts reported, the absence or presence of certain types of credit accounts, the presence of new credit accounts with credit histories too short to meet the respondent's criteria for granting credit, or insufficient positive information to meet such criteria.

I.

It is ordered, That respondent Wright-Patt Credit Union, Inc., 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 any application by a consumer for credit that is primarily for personal, family or household purposes, do forthwith cease and desist from:

1. Failing, whenever credit for personal, family or household purposes involving a consumer is denied wholly or partly or the charge for such credit is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency (including non-derogatory information such as insufficient positive information or a no-file response), to disclose to the applicant at the time the adverse action is communicated to the applicant a) that the adverse action was based wholly or partly on information contained in such a consumer report and b) the name and address of the consumer reporting agency making the report.

2. Failing to review each application for consumer credit for which it took adverse action between September 1, 1983, and the date of service of this order, to identify each of those applications for which

such adverse action was taken based wholly or partly upon information obtained from a consumer reporting agency.

3. Failing, within sixty (60) days of the date of service herein of this order, for each application identified according to Paragraph 2 above, to send the applicant, as specified herein, a copy of the notice letter attached hereto as Appendix A and described herein. The letter shall bear the name and address of the applicant as shown on the application, the date of mailing, and the name Wright-Patt Credit Union, Inc. No information other than that required by this paragraph shall be included in the notice letter, nor shall any other material be sent to the applicant with the notice letter. The notice letter shall disclose the name and address of the consumer reporting agency that prepared the report used according to Paragraph 2 above, together with the specific, principal reason(s) for the adverse action based on this information. A notice letter need not be sent to any applicant whose application was identified pursuant to Paragraph 2 above, if the application file clearly shows that respondent Wright-Patt Credit Union, Inc. has previously sent the applicant an adverse action notification in response to the application that complied in all respects with the provisions of Paragraph 1 of this order.

II.

It is further ordered, That respondent shall maintain for at least three (3) years and upon request make available to the Federal Trade Commission for inspection and copying documents that will demonstrate compliance with the requirements of this order. Such documents shall include, but are not limited to, all credit evaluation criteria instructions given to employees regarding compliance with the provisions of this order, any notices provided to consumers pursuant to any provisions of this order and the complete application file to which they relate.

III.

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of the order.

IV.

It is further ordered, That respondent shall deliver a copy of this order to cease and desist to all present and future employees engaged in reviewing or evaluating consumer reports or other third party information in connection with applications for credit to be used for personal, family or household purposes, or engaged in preparing or furnishing notices to consumers as required by this order.

V.

It is further ordered, That respondent shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

ATTACHMENT A

Dear

A review of our records indicates that we denied a credit application you submitted sometime after September 1, 1983. At that time we may not have told you a source(s) of information we relied upon as federal law required.

Whenever a creditor rejects a credit application the Equal Credit Opportunity Act requires the creditor to tell the applicant the specific principal reasons for its decision. The Fair Credit Reporting Act requires the creditor to tell the applicant whenever the reasons for its decision are based on information obtained from a credit reporting agency (such as a credit bureau) or from another third party (such as an employer). The Fair Credit Reporting Act also entitles the applicant to learn from the credit bureau what information is contained in his or her credit file and to learn from the creditor the nature of other third party information that the creditor relied on in rejecting the application. We have agreed with the Federal Trade Commission to provide you this information at this time.

In denying your application, we relied upon information concerning your credit worthiness from the following consumer reporting agency or one or more third party sources:

Name _____
Address _____
_____

You have the right to contact the agency listed above to obtain complete information concerning your credit bureau file. However, that agency does not know why credit was denied, since it did not make that decision. We denied your credit application for the following reason(s):

_____

_____

_____

Sincerely,

Wright-Patt Credit Union