

IN THE MATTER OF

HOWARD S. BERG

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

Docket C-3812. Complaint, June 8, 1998--Decision, June 8, 1998

This consent order requires, among other things, the Texas-based advertiser and distributor, who participated in the production of program-length television commercials promoting Howard Berg's Mega Reading, to possess substantiation for claims regarding the benefits, performance or efficacy of any product or program he advertises, promotes, sells or distributes in the future.

Appearances

For the Commission: *Russell Damtoft, Mary Tortorice, Charluta Pagar, Theresa McGrew, and C. Steven Baker.*

For the respondent: *Wallace Collins, Stein & Stein, New York, N.Y.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Howard S. Berg, individually ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Howard S. Berg has advertised, offered for sale, sold, and distributed products to the public, including Howard Berg's Mega Reading. Individually or in concert with others, he participated in the acts or practices alleged in this complaint. He resides at 1001 Greenbriar Lane, Mc Kinney, TX.

2. Respondent participated with Tru-Vantage International, L.L.C. and Kevin Trudeau in the production of a program-length television commercial which runs for 30 minutes or less and fits within normal television broadcasting time slots. The television commercial was and is broadcast on network, independent and cable television stations throughout the United States. During the television commercial, respondent acted as the guest and promoted Howard Berg's Mega Reading.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has created, and disseminated advertisements for Howard Berg's Mega Reading, including but not necessarily limited to the attached Exhibit A. This advertisement contains the following statements:

Berg: I teach children not just how to read faster but to comprehend, retain and stay focused. . . . So, Mega Reading is a complete accelerated learning system that doesn't just teach you to read quickly.

Trudeau: Right.

Berg: On a skimming level.

Trudeau: Right.

Berg: But to comprehend, apply and use it. Even under test situations.

Berg: I'm working with companies like Pfizer, Mobil Oil, that have high tech reading. And they used it because it was easy to retain complicated information.

Trudeau: So, even the detailed complicated material, people can read quickly and grasp it and comprehend it and recall it.

Berg: Over long periods of time.

Berg: They hired me to train their editors not only in how to speed read but how to make books easier to comprehend, because my program teaches people how to understand text.

Trudeau: Right.

Berg: Not just blur through it.

Trudeau: Folks, if you want more information on Howard's program, Mega Reading program, it's a home study course that you can go through at your leisure and it will virtually release your own super reading speed, mega reading. You'll be able to read almost as fast as Howard. Virtually quadruple, five, ten times your reading speed right now.

Berg: I have a letter here from a girl who has brain damage.

Trudeau: Right.

Berg: Brain damage. She was in a car accident and half her brain stopped functioning. It was electrically dead.

Trudeau: Right.

Berg: And she writes. It says that on a coffee break in my word shop, she went three to 600 words per minute. This is someone with severe brain damage. So yes, it works for anyone. And you can't get worse than that.

Berg: At the end of the workshop, every child and parent had at least doubled except for one.

Trudeau: Uh-huh.

Berg: That child was reading at five seconds a page and I quizzed her.

Trudeau: Five seconds.

Berg: Five seconds a page. And the vice principal was there.

Trudeau: And they're reading it?

Berg: Comprehending it and retaining it.

Berg: Anybody. In fact, I had a blind student in Huntsville, Alabama. *****

Trudeau: Yeah.

Berg: I swear to you it's true.

Trudeau: Wait a minute. You can't read if you can't see.

Berg: She was reading in Braille.

Trudeau: Oh, okay.

Berg: And she took the program to learn the memory skills. Because a lot of people when they hear speed reading, they think fast reading. With Mega Reading it's not just fast reading, it's fast learning. Remember what Tommy said, it's a complete accelerated learning program. And what I teach them is storing, retrieving, recalling, focusing.

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that Howard Berg's Mega Reading is successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material.

6. In truth and in fact Howard Berg's Mega Reading is not successful in teaching anyone, including adults, children and disabled individuals, to significantly increase their reading speed while substantially comprehending and retaining the material. Therefore, the representation set forth in paragraph five was, and is, false or misleading.

7. Through the means described in paragraph four, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in paragraph five, at the time the representation was made. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Azcuenaga registered a vote in the affirmative for this complaint.

HOWARD S. BERG

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Complaint

EXHIBIT A

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FEDERAL TRADE COMMISSION

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FTC MATTER NO.: 942-3278

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TITLE: HOWARD BERG'S MEGA READING
TELEVISION INFOMERCIAL

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PAGES: 1 THROUGH 31

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TRUDEAU COMPLAINT EXHIBIT L
TRU-VANTAGE COMPLAINT EXHIBIT A
BERG COMPLAINT EXHIBIT A

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EXHIBIT A

1 MR. TRUDEAU: Thanks for watching. I'm Kevin Trudeau,
2 and this is another edition of Vantage Point. How would you like
3 to read 25,000 words a minute? How about reading an entire book
4 just like this in about twenty minutes instead of ten hours?
5 Imagine reading a newspaper or magazine in a fraction of the time
6 it would normally take. Well, my guest today can do just that as
7 well as comprehend and remember everything. Howard Berg is the
8 world's fastest reader. He's in the Guinness Book of World
9 Records. He's the founder of the Berg Reading Institute and
10 author of Mega Reading. He's been featured on virtually
11 thousands of radio and television shows as well as written about
12 in literally hundreds of newspapers and magazines all around the
13 world. Howard, thanks for being my guest today.

14 MR. BERG: Well, it's great to be here, Kevin.

15 MR. TRUDEAU: OK, you take a book like this, and how
16 long would it take you to read it?

17 MR. BERG: Well, top speed, five or six minutes.

18 MR. TRUDEAU: Five or six minutes.

19 MR. BERG: I've been tested. I was on "Regis and
20 Kathie Lee," and they gave me a book about that size.

21 MR. TRUDEAU: This would be a great book to read, by the
22 way, for somebody, obviously Warren Buffet is the world's
23 greatest investor.

24 MR. BERG: Yes, and they had me read a book, and they
25 told me I was going to talk about the book but they changed the

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EXHIBIT A

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1 game when I got there. Instead, they had the author come on as a
2 surprise to test me and see me if I had really learned the book.
3 And I got every question right, by not just reading it, but
4 retaining and comprehending and focusing.

5 MR. TRUDEAU: Now this was on "Regis and Kathie Lee,"
6 and the book was about, how long a book was it?

7 MR. BERG: Between 240 and 300 pages.

8 MR. TRUDEAU: And how long did it take you to read that
9 book?

10 MR. BERG: I read it like four times, so it took twenty
11 minutes. I was memorizing, I wasn't reading, I was memorizing it
12 for a test.

13 MR. TRUDEAU: Wait a minute, let me make sure I got
14 this straight. You took a book, it took you twenty minutes to
15 read it four times, to memorize it. Now, here's the question.
16 Obviously, you're the world's fastest reader. You're in the
17 Guinness Book of World Records. Is this something that everybody
18 can do, or is it just a gift that you have?

19 MR. BERG: Let me tell you, someone else asked me that
20 question. I was in Canada, and Dini Petty who's a national talk
21 show host in Canada said the same thing. She said, "Howard, it
22 sounds too good to be true that anyone could do it." I said,
23 "Dini, how about you pick a few audience members, and you and
24 them come to my workshop in Toronto, and we'll see what happens."
25 So Dini and her audience showed up. One of them was a student.

EXHIBIT A

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1 one of them was a professional. Dini forgot her glasses, so
2 someone had to run back and get them. It's good to have your own
3 talk show. And at the end of the workshop, Dini had slightly
4 doubled, and the two other people were close to quadrupling their
5 reading speed.

6 MR. TRUDEAU: That workshop is just a couple hours.

7 MR. BERG: Less than four hours. And they went on
8 national television in Canada. And Dini went on the air and
9 says, "Howard's really onto something. I think everyone in
10 Canada should be using this." And then off the air, she came up
11 to me, and she said, "I have a son, and I wanted to know if the
12 next time you're in Toronto, could my son please come to your
13 workshop, because I think every child should be getting these
14 skills. Because I know how much they helped me."

15 MR. TRUDEAU: So now your course actually releases a
16 person's natural ability to speed read.

17 MR. BERG: And it's easy, it's fun, and it's
18 systematic.

19 MR. TRUDEAU: We're going to test you right now. I
20 have over here, by the way, stacks of books, and we're going to
21 test Howard. The first book I have is by Jerry Spence, How To
22 Argue And Win Every Time, Jerry Spence. I love this guy, by the
23 way, he's fantastic. And I'm going to give you a little portion
24 of this book, Howard, and I want you to read it. We're going to
25 time Howard and see how fast it's going to take him. Then I'm

EXHIBIT A

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1 going to quiz him. This is an easy one, we'll start off as an
2 easy one. It's just about the author. A great book, it's about
3 the author. OK, now hold on, here's the page, put your finger in
4 there, don't open it yet. OK, now hold on because I'm going to
5 time you with my stopwatch. OK, ready?

6 MR. BERG: Yes

7 MR. TRUDEAU: Go.

8 MR. BERG: Good

9 MR. TRUDEAU: About --- little over four seconds.

10 MR. BERG: I haven't warmed up yet.

11 MR. TRUDEAU: Four seconds?. OK, now give me the book.

12 MR. BERG: OK

13 MR. TRUDEAU: Now you've read that?

14 MR. BERG: Yes, I have.

15 MR. TRUDEAU: OK. Well, I'm going to test you on a
16 couple questions on this thing.

17 MR. BERG: No problem.

18 MR. TRUDEAU: All right. First thing -- now, by the
19 way, I went through these books that I'm going to be giving
20 Howard and it took me eight hours yesterday. Because I went to
21 the book store, bought a whole bunch of books, and I said I'm
22 just going to buy random books and we're going to test you.
23 Okay.

24 Now, it talks about in here the different people that
25 he was the defense attorney for.

EXHIBIT A

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1 MR. BERG: Yes, it did.

2 MR. TRUDEAU: Give me a couple of the people.

3 MR. BERG: There were two. There was Randy Weaver

4 MR. TRUDEAU: Right.

5 MR. BERG: And Imelda Marcos.

6 MR. TRUDEAU: Correct. Where does he live?

7 MR. BERG: Jackson Hole, Wyoming.

8 MR. TRUDEAU: Correct. And he has a wife. What's his

9 wife's name?

10 MR. BERG: Emma Jean.

11 MR. TRUDEAU: Correct. Emma Jean.

12 MR. BERG: Yes.

13 MR. TRUDEAU: All right. Hold on, we're going to --

14 MR. BERG: A little slow.

15 MR. TRUDEAU: Well, a little slow. Okay. We're going

16 to make it a little bit tougher now. Here's an other book.

17 Here's another book. Math Magic by Scott Flansburg. Scott is a

18 good friend of mine. We're going to have Scott on the show.

19 He's the human calculator.

20 Now, this book teaches you how to do math calculations

21 in your head. Now, this is going to be a good test, folks. Now

22 -- because imagine this. What -- the techniques -- the

23 technology that Howard has -- Howard has that he teaches people

24 is how to read books and obviously knowledge is power but only if

25 you can remember to and use it.

EXHIBIT A

1 MR. BERG: And apply it.

2 MR. TRUDEAU: And apply it. Okay. So, I'm going to
3 give you a chapter. This is the entire chapter seven.

4 MR. BERG: Okay.

5 MR. TRUDEAU: I'm going to time you.

6 MR. BERG: Okay.

7 MR. TRUDEAU: Let's get this cleared out here. And
8 this is on multiplication tricks.

9 MR. BERG: Okay.

10 MR. TRUDEAU: You're going to read this. And then I'm
11 going to test your multiplication skills because this is going to
12 teach you how to do multiplication in your head.

13 MR. BERG: Do I get to use a calculator?

14 MR. TRUDEAU: No calculator.

15 MR. BERG: Okay.

16 MR. TRUDEAU: Okay. All right, hold on. Hold on, I'm
17 going to time you. I'll say go. Ready, set, go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: Okay.

21 MR. TRUDEAU: Twenty four seconds. Twenty four and a
22 half seconds.

23 MR. BERG: There was a lot of pages.

24 MR. TRUDEAU: A lot of pages. Now, you're telling me
25 you read that?

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EXHIBIT A

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1 MR. BERG: I learned it.

2 MR. TRUDEAU: You learned it?

3 MR. BERG: Yes, and so could you. That's the whole
4 point.

5 MR. TRUDEAU: All right. Well, let me test you on
6 this. This is on multiplication -- it's on multiplication
7 skills. Okay?

8 MR. BERG: Okay.

9 MR. TRUDEAU: Let me give you a couple of
10 multiplication tables here. Okay. 45 times 45?

11 MR. BERG: That would be 2,025.

12 MR. TRUDEAU: You just did that in your head?

13 MR. BERG: That's right. It teaches you how to do it.
14 That's the whole point.

15 MR. TRUDEAU: You don't have a calculator here by the
16 way? Can we -- Paul, make sure we get that -- I want to make
17 sure someone gives me a thumbs up if that's the right answer.
18 Let me give you another one here.

19 MR. BERG: It's right. Okay.

20 MR. TRUDEAU: 75 times 75?

21 MR. BERG: 5,625.

22 MR. TRUDEAU: I want Paul to make sure -- give me like
23 some -- we got a thumbs up there? He's right.

24 MR. BERG: Of course I'm right.

25 MR. TRUDEAU: And you learned that just now?

EXHIBIT A

8

1 MR. BERG: That's the whole point, Kevin. It's
2 something everyone should be doing. You know, the United States
3 has been rated in 49th position in literacy by the United
4 Nations. I think all our viewers should be concerned. They just
5 had a front page story in USA Today about how our education
6 system is failing to teach the students.

7 MR. TRUDEAU: Uh-huh.

8 MR. BERG: Time Magazine talked about the educational
9 crisis. Even the teachers unions are becoming concerned.
10 Governor Bush has just made the most highest priority in his
11 second term of office is teaching reading skills, because 25
12 percent of the children in Texas don't know how to read. This is
13 what it's about.

14 I teach children not just how to read faster but to
15 comprehend, retain and stay focused. Because face it, how many
16 times have you or the people at home take a test or gone to an
17 important meeting and got tense. You got frightened. You got
18 worried. And all that information that you stored and worked so
19 hard at learning was forgotten.

20 So, Mega Reading is a complete accelerated learning
21 system that doesn't just teach you to read quickly.

22 MR. TRUDEAU: Right.

23 MR. BERG: On a skimming level.

24 MR. TRUDEAU: Right.

25 MR. BERG: But to comprehend, apply and use it. Even

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EXHIBIT A

1 under test situations.

2 MR. TRUDEAU: And it just takes a few short hours to
3 learn. Correct?

4 MR. BERG: Couple of hours. That's it.

5 MR. TRUDEAU: Now, let me ask you a question. There's
6 been speed reading courses been around for years.

7 MR. BERG: That's true.

8 MR. TRUDEAU: Evelyn Wood is probably the most common
9 and I'm sure there's dozens of other speed reading courses.

10 MR. BERG: Yes, and some of them are quite good.

11 MR. TRUDEAU: But the biggest challenge most people
12 found is, number one, it took days, weeks, months of practice and
13 training.

14 MR. BERG: Absolutely. Hours a day.

15 MR. TRUDEAU: Right.

16 MR. BERG: With days, weeks and months. It's not just
17 days, weeks, and months, but hours a days each of those days.

18 MR. TRUDEAU: So, how is yours different than those in
19 that respect?

20 MR. BERG: First of all, the program takes less than
21 four hours to learn.

22 MR. TRUDEAU: That's it?

23 MR. BERG: That's it.

24 MR. TRUDEAU: One time?

25 MR. BERG: One time.

EXHIBIT A

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1 MR. TRUDEAU: Like learning how to ride a bike.

2 MR. BERG: And you never forget how once you know how.
3 Once you release it, it's there.

4 MR. TRUDEAU: You're releasing someone's ability. So,
5 it's radically different than these other courses.

6 MR. BERG: Can you cross the street and look at the
7 traffic and know where you're going? Look at all the information
8 that your brain has to process in an instant. That's same brain
9 should be reading a book just as effortlessly and that's what I
10 teach.

11 MR. TRUDEAU: Well, now -- so, these other courses that
12 have been out there, your program is a revolutionary -- it's
13 totally different.

14 MR. BERG: Let me tell you a story, Kevin.

15 MR. TRUDEAU: Yeah.

16 MR. BERG: The former president of Evelyn Wood, the
17 chairman of Evelyn Wood is Maurice Thompson, Jr. I have a letter
18 from him.

19 MR. TRUDEAU: Right.

20 MR. BERG: Tommy asked me to train him and his family
21 last September. The former president of Evelyn Wood asked me to
22 train his family. Now, this is the man who knows speed reading.

23 MR. TRUDEAU: Right.

24 MR. BERG: His son quadrupled -- I think he went from
25 two to 400 words a minute in less than four hours. And he

EXHIBIT A

11

1 mentioned how his grades immediately shot up from the previous
2 term. And would you like to read the comment he has on the
3 bottom. I'm really proud of this. This is the former president
4 of Evelyn Wood.

5 MR. TRUDEAU: It says, I feel you have moved one step
6 beyond speed reading --

7 MR. BERG: That's right.

8 MR. TRUDEAU: -- to speed learning. Bringing the
9 discipline to the 21st first century.

10 MR. BERG: Exactly. Now, I'm proud of that.

11 MR. TRUDEAU: So, what you're actually have is really a
12 revolutionary break through in what you've developed.

13 MR. BERG: Totally different. Now, other programs were
14 mechanical. That's why they took so long. They required
15 repetition. Like learning to type or playing an instrument, to
16 work.

17 MR. TRUDEAU: Right.

18 MR. BERG: And a lot of people found they loss their
19 speeds almost as quickly as they gained them.

20 MR. TRUDEAU: Right.

21 MR. BERG: I read 80 to 90 pages a minute at my top
22 speed. But I don't read 80 to 90 pages a minute every time I
23 open a book. Sometimes I want to relax. Sometimes I'm a little
24 tired, I want to read in bed.

25 MR. TRUDEAU: Right.

EXHIBIT A

12

1 MR. BERG: So, I have that option. With the other
2 programs because it was conditioned, it was all or nothing. If
3 you slowed down, that was the end of your speed. And most people
4 told me they only got a very superficial understanding, like a
5 skim.

6 I'm working with companies like Pfizer (Phonetic),
7 Mobil Oil, that have high tech reading. And they used it because
8 it was easy to retain complicated information.

9 MR. TRUDEAU: So, even the detailed complicated
10 material, people can read quickly and grasp it and comprehend it
11 and recall it.

12 MR. BERG: Over long periods of time.

13 MR. TRUDEAU: Now, how about students? Means straight
14 As with less study time?

15 MR. BERG: Not only do they get straight As with less
16 study time, but think about this, Kevin, they get better self
17 esteem. They begin to feel confident. Now, you spend over
18 15,000 hours when you go to school.

19 MR. TRUDEAU: Right.

20 MR. BERG: Think about that. And out of all of those
21 hours and the people at home think about it, too, how many of
22 those hours did they spend teaching you how to learn?

23 MR. TRUDEAU: Right.

24 MR. BERG: They call it an education system and they
25 never even teach you how to learn.

EXHIBIT A

13

1 MR. TRUDEAU: And people obviously in business because
2 you work with virtually dozens of major corporations and Fortune
3 500 companies.

4 MR. BERG: All over the country.

5 MR. TRUDEAU: So, people can make more money because
6 there's so much material to learn today, so much reading that
7 people have to grasp.

8 MR. BERG: I have an interesting letter here from
9 Pfeiffer. Pfeiffer is the leading publisher in the world on
10 human resource training materials.

11 MR. TRUDEAU: Okay.

12 MR. BERG: Every corporate trainer has heard of these
13 people.

14 MR. TRUDEAU: Right.

15 MR. BERG: They hired me to train their editors not
16 only in how to speed read but how to make books easier to
17 comprehend, because my program teaches people how to understand
18 text.

19 MR. TRUDEAU: Right.

20 MR. BERG: Not just blur through it.

21 MR. TRUDEAU: Right.

22 MR. BERG: And the head editor -- the managing editor
23 says here that this program that I gave him gave him a distinct
24 advantage to their publishing program.

25 MR. TRUDEAU: Hmm.

EXHIBIT A

14

1 MR. BERG: That's the managing editor of the world's
2 largest human resource publisher. Here's a letter from the York
3 Prep School. The head master is Ronnie Stewart. He's an Oxford
4 graduate. This man knows education.

5 MR. TRUDEAU: Right.

6 MR. BERG: You don't get better than Oxford. And
7 here's what it says. "Howard, just a note to let you know how
8 positive the feedback was of your lectures to the 11th and 12th
9 grades. So positive in fact, that whenever it's convenient for
10 you, I would love -- I like that word -- I would love for you to
11 come and do the ninth and tenth grades on a similar basis." And
12 we've already booked them.

13 ON SCREEN: For more info call: 1-800-233-9666. This
14 is a paid commercial program for Tru-Vantage International.

15 MR. TRUDEAU: That's great. Folks, if you want more
16 information on Howard's program, Mega Reading program, it's a
17 home study course that you can go through at your leisure and it
18 will virtually release your own super reading speed, mega
19 reading. You'll be able to read almost as fast as Howard.
20 Virtually quadruple, five, ten times your reading speed right
21 now. Call the number on your screen. And I've worked out a
22 special arrangement with Howard. He'll give you an over 50
23 percent discount off the regular price of the program. So, call
24 right now to get some more information on it.

25 Now, let's -- let's continue with the testing here

EXHIBIT A

15

1 got another book. How to Win Friends and Influence People by
2 Dale Carnegie. Great book. Everybody should read this book.
3 Now, let's see. I went through this last night and I got chapter
4 six. I want you to read the entire chapter six and give us a
5 quick synopsis of the chapter.

6 Okay. Now, I'm going to time you again. And folks,
7 the important thing is what Howard is saying is every single
8 person -- now, you've taught how many -- what thousands and
9 thousands of people?

10 MR. BERG: Thousands. Can I say something?

11 MR. TRUDEAU: Yeah.

12 MR. BERG: I have a letter here from a girl who has
13 brain damage.

14 MR. TRUDEAU: Right.

15 MR. BERG: Brain damage. She was in a car accident and
16 half her brain stopped functioning. It was electrically dead.

17 MR. TRUDEAU: Right.

18 MR. BERG: And she writes. It says that on a coffee
19 break in my word shop, she went three to 600 words per minute.
20 This is someone with severe brain damage. So yes, it works for
21 anyone. And you can't get worse than that.

22 MR. TRUDEAU: At what age, by the way? How old?

23 MR. BERG: The youngest student I ever had was eight.
24 I was in Toronto. I was doing a live workshop and the vice
25 principle of a school was there with his wife. His name was Ted.

EXHIBIT A

16

1 Ted said, "Howard, we would really love for you to come to our
2 elementary school. My wife and I just quadrupled."

3 MR. TRUDEAU: Right.

4 MR. BERG: And we think you can do this for our kids.
5 I said, how old are they? He said third, fourth grade. I said,
6 it's kind of young. Normally, in that age group I teach the
7 memory and learning skills. And I've done that all over the
8 country because a lot of kids aren't reading yet at that age.

9 MR. TRUDEAU: Right.

10 MR. BERG: He said, our students are reading and
11 reading well. Let's try it. I said, fine. And the parents
12 came. How many things did parents do today with their families?

13 MR. TRUDEAU: Right, right, right.

14 MR. BERG: Okay. At the end of the workshop, every
15 child and parent had at least doubled except for one.

16 MR. TRUDEAU: Uh-huh.

17 MR. BERG: That child was reading at five seconds a
18 page and I quizzed her.

19 MR. TRUDEAU: Five seconds.

20 MR. BERG: Five seconds a page. And the vice principal
21 was there.

22 MR. TRUDEAU: And they're reading it?

23 MR. BERG: Comprehending it and retaining it.

24 MR. TRUDEAU: All right. Well, we're going to test you
25 right now. Okay, this is chapter six.

EXHIBIT A

17

1 MR. BERG: Okay.

2 MR. TRUDEAU: Dale Carnegie's How to Win Friends.
3 Ready?

4 MR. BERG: Yes.

5 MR. TRUDEAU: Go.

6 (Whereupon, there was a brief pause while Mr. Berg was
7 reading the book.)

8 MR. TRUDEAU: This is amazing. You're reading it?
9 Okay, give it back. That was about 16 seconds.

10 MR. BERG: Right.

11 MR. TRUDEAU: Okay. Now, tell us -- just give me a
12 quick synopsis of that chapter.

13 MR. BERG: Well, the concept was make people feel
14 important and do it sincerely. And by the way, Kevin, you're
15 doing an excellent job with this show and I really mean that.

16 MR. TRUDEAU: Thank you very much. Okay, wait --
17 you're -- the name of that chapter by the way was, How To Get
18 People To Like You.

19 MR. BERG: By the way, one of my favorite uses of speed
20 reading is learning new skills such as I just showed you.

21 MR. TRUDEAU: Right.

22 MR. BERG: Learning how to use a computer or do better
23 with relationships. So, this -- (inaudible) -- anything.

24 MR. TRUDEAU: To learning anything. Tell us a little
25 about that chapter.

EXHIBIT A

f8

1 MR. BERG: Okay, it starts off he's in a post office
2 and he see's a postal employee that he's familiar with and the
3 guy looks very very depressed and down. And he starts talking to
4 the guy and finds out the guy feels that nobody really
5 appreciates what he's doing.

6 MR. TRUDEAU: Uh-huh.

7 MR. BERG: And so, he starts telling the guy how
8 important he is and how much he appreciates him. And the guy
9 just perks up and he says that's what it's all about. You want
10 people to like you. Let them know how important they are and it
11 improves their self esteem. And they relate that to you as the
12 cause.

13 MR. TRUDEAU: Uh-huh. Now, what -- there was a
14 principle discussed in this.

15 MR. BERG: Yes, the principle was make people feel
16 important and be sincere.

17 MR. TRUDEAU: Make people feel important and -- now,
18 you just said almost verbatim. It says make people feel
19 important and do it sincerely.

20 MR. BERG: Well, you may not get every word. You know,
21 when you're going a page and a half a second, you might miss an L
22 Y. Okay.

23 MR. TRUDEAU: And actually, -- wait a minute. Wait, we
24 got to do another book now.

25 MR. BERG: Okay.

EXHIBIT A

19

1 MR. TRUDEAU: This book by the way, this is my book.
2 This is my book, Kevin Trudeau's, Mega Memory. Everybody should
3 read this book. Everybody go out and get this book. It's my
4 book Mega Memory. Now, it's the first -- you know we sold three
5 and a half million copies of my Mega Memory program.

6 MR. BERG: That's a lot.

7 MR. TRUDEAU: Yeah, and this is a great book. Just
8 says published by William Morrow. It's in all the Book stores.
9 Call, you can get it.

10 MR. BERG: Now, make the call.

11 MR. TRUDEAU: Now, make the call now. Now, I want you
12 to read just chapter one.

13 MR. BERG: Okay.

14 MR. TRUDEAU: On how to use this book, and then give us
15 a quick synopsis on this. Not that we don't trust you. Go.

16 (Whereupon, there was a brief pause while Mr. Berg was
17 reading the book.)

18 MR. BERG: Okay, that's 11 pages.

19 MR. TRUDEAU: About 16 seconds.

20 MR. BERG: Okay. And I'm getting closer to my speed.

21 MR. TRUDEAU: And you read this? You read this?

22 MR. BERG: Yes. It's first -- it sets the ground
23 rules.

24 MR. TRUDEAU: And anybody who gets this course from us
25 can do what you just did?

EXHIBIT A

20

1 MR. BERG: Thousands of people are doing what I just
2 did.

3 MR. TRUDEAU: All right, tell me about the book. I
4 know all about it because I just wrote it.

5 MR. BERG: Okay. I guess you would know. This is like
6 Regis and Kathy Lee all over.

7 MR. TRUDEAU: Yeah, the author. Exactly. Okay.

8 MR. BERG: Well, it starts off talking about what you
9 should do to develop your mega memory, about setting up a
10 specific time and place to do it, avoiding certain foods, how
11 much time you should be doing, how to prepare yourself. And
12 that's essentially what the first chapter is about. Getting set.

13 MR. TRUDEAU: Now, there was four things I mentioned.
14 The four steps you go through.

15 MR. BERG: Yes, there were. Let me think. First there
16 was unconscious incompetence, where you don't know what you're
17 doing.

18 MR. TRUDEAU: Right.

19 MR. BERG: You don't even know you don't know what
20 you're doing.

21 MR. TRUDEAU: Right.

22 MR. BERG: The second one was conscious incompetence,
23 where you know you don't know what you're doing.

24 MR. TRUDEAU: Right, right.

25 MR. BERG: Okay. And the third one -- the third one

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EXHIBIT A

21

1 was conscious competence, where you know what you're doing
2 but you have to think about it. Sort of like when you're riding
3 a bike and you know you have to think how to stay on the bike.

4 MR. TRUDEAU: Right.

5 MR. BERG: And the fourth step was unconscious
6 competence, where it's at released skill and you're doing
7 instinctively. You don't have to think about it.

8 MR. TRUDEAU: That's the point I want to talk about.
9 Because your course gets people very quickly to that unconscious
10 competence level where it happens automatically.

11 MR. BERG: In hours. In hours.

12 MR. TRUDEAU: So, it's like learning how to ride a bike
13 or learning how to swim. You don't have to practice and practice
14 and practice. You're just releasing the skill.

15 MR. BERG: No. I have a story about that.

16 MR. TRUDEAU: Hold on for one second because I want to
17 tell people how to get this program.

18 MR. BERG: Okay. Okay.

19 MR. TRUDEAU: If people do want more information on
20 Howard's program The Mega Reading Home Study Course -- folks,
21 this works for everybody. Thousands of people have gone through
22 it. I highly endorse and recommend this program. Howard is the
23 world's fastest reader. There is nothing out there like it
24 anywhere in the world. It'll work for anyone about eight to ten
25 years and up. If you have a student in your life, you need to

EXHIBIT A

22

1 get it for them. If you're in business, if you read papers, if
2 you like to read novels --

3 MR. BERG: The Sunday paper.

4 MR. TRUDEAU: You'll learn this information, you'll
5 read it quickly and you'll be able to recall it. Call the number
6 on your screen. And again, we worked out a special arrangement
7 with Howard. You will get a 50 percent discount while we're on
8 the show. You can call right now and get more information on
9 this program. So, call the number.

10 MR. BERG: You mentioned how you don't have to
11 practice.

12 MR. TRUDEAU: Right.

13 MR. BERG: I have an interesting story. One of my
14 students called me and was really excited. A grandmother and she
15 learned how to do this at my live program and then she didn't use
16 for like six weeks.

17 MR. TRUDEAU: Right.

18 MR. BERG: And with any speed reading program if you
19 don't use it for six weeks, you can kiss it goodbye. It's over.

20 MR. TRUDEAU: Right.

21 MR. BERG: Her grandson came to her. He had a book
22 report and he needed her to help him. She read the book in 15
23 minutes. He got an A. She said, Howard, I don't know he did it.
24 I haven't use the program in six weeks. I opened the book and
25 like that it came right back to me. I said that's what it's

EXHIBIT A

23

1 about. You already have the ability. I'm just showing you how
2 to release it.

3 MR. TRUDEAU: Well, we're going -- we're going to test
4 you again. I keep testing you because this is really impressive
5 to me. All right, I got another book here. And I went to the
6 book store and picked these up. Rush Limbaugh, See I Told You
7 So. I like Rush by the way. We advertise a lot on his show.
8 Rush is a great guy.

9 MR. BERG: Um-hum.

10 MR. TRUDEAU: I have a personally autographed copy of
11 this book by the way.

12 MR. BERG: Do you?

13 MR. TRUDEAU: Yes, Rush sent to me. Okay. I want you
14 to read a chapter here. Let me see if I can find the chapter
15 about Rush. We went to Rush. Okay.

16 MR. BERG: Don't rush.

17 MR. TRUDEAU: Don't rush, don't rush. Now, by the way,
18 when I'm finding this chapter -- because I read things last
19 night. Okay?

20 MR. BERG: Yeah.

21 MR. TRUDEAU: Anybody can do this I mentioned?

22 MR. BERG: Anybody.

23 MR. TRUDEAU: And the age -- how old was the oldest
24 person that went through this?

25 MR. BERG: I had a woman at 88 years old and she's in

EXHIBIT A

24

1 Pasadena. And she took the program and I told them where I was
2 staying. The next day in my hotel I get a phone call and I say
3 oh, what's wrong. I said nobody calls me. Everybody learns it.

4 MR. TRUDEAU: Right.

5 MR. BERG: I say what's the problem. She says no
6 problem. I just called to tell you -- her name was Ruth. She
7 says, Howard, I went home after taking your program. I'm 83
8 years old and I read two 300 page books in under three hours.
9 I'm 83 years old.

10 MR. TRUDEAU: Wow.

11 MR. BERG: Do you know how happy I am? She says, I
12 don't know how much more time I have left, but there's so many
13 things I want to do and learn and you've just given me the tools
14 for doing it.

15 MR. TRUDEAU: You know, there are so many books out
16 there with so much material that -- newspapers, publications for
17 business people, you know, magazines, publications they have to
18 read, books and all these manuals. Learning computers. Thick
19 manuals.

20 MR. BERG: Thick manuals.

21 MR. TRUDEAU: You know, you were telling me that you
22 learned computers in one night.

23 MR. BERG: That's absolutely true. I bought at K-Pro
24 II (phonetic). Never saw or used a computer before. The first
25 night I hooked up everything.

EXHIBIT A

25

1 MR. TRUDEAU: Right.

2 MR. BERG: I learned Wordstar, DataStar, and Formstar
3 and published an article the next day. And that's the truth.
4 And I'll tell you a little funny story.

5 MR. TRUDEAU: And anybody can do this, right?

6 MR. BERG: Anybody can do it. And what happened was
7 the margins weren't perfect and I thought something was wrong.
8 And then someone said, do you know it takes 80 hours normally to
9 do what you did in three. And I said I guess I should feel a
10 little bit better then.

11 MR. TRUDEAU: Now, by the way, before -- well, I want
12 to do this test. I am going to have one more test. Okay. We
13 got one more. This is the chapter. Put your finger in there.
14 I'm going to get my little trusty -- this is for amazing on the
15 time. Ready?

16 MR. BERG: Yep.

17 MR. TRUDEAU: Go.

18 (Whereupon, there was a brief pause while Mr. Berg was
19 reading the book.)

20 MR. BERG: The pages are sticking. Okay. Well, that
21 slowed me down a bit.

22 MR. TRUDEAU: Okay, yeah. Still about 17 seconds.

23 MR. BERG: Okay, I apologize for that.

24 MR. TRUDEAU: Okay. All right. It's Rush's book.

25 Now, what was the gist of that book?

EXHIBIT A

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1 MR. BERG: The gist was that government's too big.
2 We've got to make it smaller and vote conservative republican.
3 Okay. But he really has a lot of points. He talks about welfare
4 and how about 27 or 28 cents out of every dollar gets to the
5 reciprocate because the rest of that is being spent on
6 administration. And that's an example how government waste is
7 not helping us.

8 MR. TRUDEAU: And that's -- when you were on Regis and
9 Kathy Lee, you had the author come in. You read the book.

10 MR. BERG: (Inaudible).

11 MR. TRUDEAU: And he gave you very tough questions.

12 MR. BERG: I still remember one of them. He asked me
13 what did he say about -- let's see. He asked me several
14 questions. He asked me what did he say about the Pirates of
15 Penzance. It was a trick question. The book was called Going to
16 Movies and it was a vignette. Every two pages was another movie.
17 So, it wasn't a story. It was hundreds of little movie
18 vignettes.

19 MR. TRUDEAU: Right.

20 MR. BERG: And I said, Craig, that's a trick question.
21 Because it wasn't -- there was chapter in there about a different
22 movie and the Pirates of Penzance was used as an example of how
23 if the director had used the techniques of Pirates of Penzance
24 intent instead of the techniques he had chosen, his movie would
25 have been a better picture. I said, so you're actually trying to

EXHIBIT A

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1 trick me because that wasn't even what the chapter was about.

2 MR. TRUDEAU: So, anybody can do this?

3 MR. BERG: Anybody. In fact, I had a blind student in
4 Huntsville, Alabama.

5 MR. TRUDEAU: Yeah.

6 MR. BERG: I swear to you it's true.

7 MR. TRUDEAU: Wait a minute. You can't read if you
8 can't see.

9 MR. BERG: She was reading in Braille.

10 MR. TRUDEAU: Oh, okay.

11 MR. BERG: And she took the program to learn the memcry
12 skills. Because a lot of people when they hear speed reading,
13 they think fast reading. With Mega Reading it's not just fast
14 reading, it's fast learning. Remember what Tommy said, it's a
15 complete accelerated learning program. And what I teach them is
16 storing, retrieving, recalling, focusing.

17 Here's an important skill. Knowing what to look for.
18 How many times have you studied for a test -- people at home.
19 You study for a test, you take the test and none of the questions
20 you studied are asked. Everything else they ask. You go to an
21 important meeting and everything you thought was important was
22 not asked.

23 Well, if you don't know what to look for, you're going
24 to miss it. And I teach how to figure out what to look for.

25 MR. TRUDEAU: Now, you're not -- I was just --

EXHIBIT A

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1 interesting to note because obviously there are so many books out
2 there, like Wealth Without Risk by Charles Givens (phonetic)
3 which is a phenomenal book, How to Attract Anyone Anytime by
4 Susan Raven (phonetic), Les Brown (phonetic), Live Your Dreams.
5 There are so many phenomenals out -- Mary K. Ash (phonetic) and
6 we can't do all of these.

7 MR. BERG: No.

8 MR. TRUDEAU: (Inaudible).

9 MR. BERG: I could.

10 MR. TRUDEAU: Yeah.

11 Well that's -- this is the amazing thing. How about
12 learning David Letterman's top ten list.

13 MR. BERG: I did a show America's Talking about a year
14 ago. They had me read 18 700 page books in an hour and a half
15 and they quizzed me on them and I got every question right.

16 MR. TRUDEAU: Well, like -- I got Larry King's book. I
17 got Bill Gates' book. I got Colin Powell. I got -- now, the
18 Internet for Dummies, if people want to learn how to run the
19 Internet. I got -- here's magazines.

20 MR. BERG: By the way, Forbes Magazine just did an
21 article on this.

22 MR. TRUDEAU: No kidding.

23 MR. BERG: Forbes said this is a wonderful program for
24 business people.

25 MR. TRUDEAU: I got the New York Times. I got all this

EXHIBIT A

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1 -- now, how about biology. I mean look at -- folks, look at
2 these books. And I'm putting these all in front me just to show
3 you the point here. Calculus. Now, you're telling me -- this is
4 what kids have to go through in school.

5 MR. BERG: Right.

6 MR. TRUDEAU: Look at this book. They have read this.
7 You're telling me -- I know this is a mess here. But if a person
8 calls and gets your program, they'll be able to go through these
9 books. Now, let's be honest here. I got all these books here.
10 See if you can get a wide shot of this. I got Howard Stern's
11 book. I was invited to Howard Stern's birthday party.

12 MR. BERG: I read his book Private Parts in six minutes
13 on Comedy Central and then he tested me on the book and I got it
14 right.

15 MR. TRUDEAU: Howard did?

16 MR. BERG: Right.

17 MR. TRUDEAU: Howard did?

18 MR. BERG: I was on John Stewart's (phonetic) show and
19 Howard was the guest. He had just written Private Parts. It's
20 as thick as this book.

21 MR. TRUDEAU: Right.

22 MR. BERG: It took me I think six and a half minutes to
23 read and then he quizzed me and I got all the questions right.

24 MR. TRUDEAU: Okay. If somebody buys your program and
25 goes through like everything that's on the desk right here, the

EXHIBIT A

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1 New York Times, all these books, how long would it take them to
2 do that? First it takes them a few hours to learn the technique.
3 Right?

4 MR. BERG: I would -- it just takes about three --
5 three, four hours to learn the technique.

6 MR. TRUDEAU: Normally it would take, what, a week?
7 Two, three weeks? A hundred hours to learn all this stuff -- to
8 go through all this stuff?

9 MR. BERG: I would say for the average person that
10 would be being kind.

11 MR. TRUDEAU: So, maybe 150 to 200 hours?

12 MR. BERG: I'd say several months for some of the
13 science books for certain people.

14 MR. TRUDEAU: That's right because that's all
15 scientific.

16 MR. BERG: It's not just light reading there.

17 MR. TRUDEAU: A person calls and gets your program, how
18 long?

19 MR. BERG: I'd say you could do that easily in at least
20 a month tops. Two weeks to a month depending upon your
21 background.

22 MR. TRUDEAU: Folks, you heard this. You can call
23 right now, get Howard's program. It takes just a few short
24 hours. It's easy. It's fun. Anybody can do it. You'll be the
25 greatest conversationalist. Kids get straight As with less study

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EXHIBIT A

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1 time. You'll make more money in business because you'll be able
2 to remember all the information. Call the number on your screen.
3 You'll get a 50 percent discount to boot. This is Kevin Trudeau,
4 thanks for watching. This has been another edition of Vantage
5 Point.

6 ON SCREEN: For more information or to order Howard
7 Berg's Mega Reading call: 1-800-283-9666.
8 Tru-Vantage International, 7300 Lehigh Avenue, Niles, IL 60714
9 (847)647-0300.

10 The proceeding has been a paid advertisement for Tru-
11 Vantage International.

12 (Whereupon, the taping was concluded.)
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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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, his attorney, 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, 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 Howard S. Berg resides at 1001 Greenbriar Lane, McKinney, TX.
2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean Howard S. Berg, individually and his agents, representatives and employees.

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

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Howard Berg's Mega Reading or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, that such product is successful in teaching anyone, including adults, children and disabled individuals, to increase their reading speed above 800 words per minute while substantially comprehending and retaining the material. For purposes of this Part, "substantially similar product" shall mean any product that is substantially similar in components, techniques, composition and properties.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program purported to significantly increase one's reading speed in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate

must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondent Howard S. Berg shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

IV.

It is further ordered, That respondent Howard S. Berg, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent Howard S. Berg shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

This order will terminate on June 8, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

By the Commission.¹

¹ Prior to leaving the Commission, former Commissioner Azcuenaga registered a vote in the affirmative for this Decision & Order.

IN THE MATTER OF

DEGUSSA AKTIENGESELLSCHAFT, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3813. Complaint, June 10, 1998--Decision, June 10, 1998*

This consent order allows, among other things, the New Jersey-based subsidiary of Degussa Aktiengesellschaft to acquire E.I. du Pont de Nemours & Co.'s Gibbons Plant in Alberta, Canada, and prohibits the respondents from acquiring more than one percent of the stock, equity or other interest in DuPont's plants in Tennessee and Ontario, Canada, without the Commission's prior approval. In addition, the consent order requires the respondents to limit to one percent their acquisition of the stock, equity or interest in any assets used in the manufacture, distribution or sale of hydrogen peroxide in North America, without prior notification to the Commission.

Appearances

For the Commission: *Robert Tovsky, Joseph Krauss and William Baer.*

For the respondents: *Richard Steuer, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Degussa Aktiengesellschaft ("Degussa A.G."), through its wholly-owned subsidiary, Degussa Corporation ("Degussa"), entered into a letter of intent to acquire hydrogen peroxide production assets of E. I. du Pont de Nemours & Co. ("DuPont"), and that the acquisition, if consummated, would have resulted in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

A. THE RESPONDENTS

1. Respondent Degussa A.G. is a corporation organized, existing, and doing business under and by virtue of the laws of

Germany with its principal executive offices located at Weissfrauenstrasse 9, D-60287 Frankfurt am Main, Germany.

2. Degussa A.G. had worldwide sales exceeding \$8.7 billion in 1997. Degussa A.G. engages in the development and manufacture of chemicals, pharmaceutical specialties, and precious metals.

3. Respondent Degussa is a wholly-owned subsidiary of Degussa A.G. with its principal executive offices located at 65 Challenger Road, Ridgefield Park, New Jersey.

4. Degussa has manufacturing and distribution facilities situated throughout the United States, Canada, and Mexico, and produces widely diverse products in the markets for chemicals, pigments, metals, and dental materials. One of its major products is hydrogen peroxide. In 1996, Degussa had sales in excess of \$2.3 billion, to which sales of hydrogen peroxide contributed \$65 million.

5. DuPont is a publicly-traded corporation with reported revenues in 1996 of \$43.8 billion and net income of \$3.6 billion. DuPont is one of the largest chemical companies in the world, operating about 175 manufacturing and processing facilities in approximately 70 countries. DuPont is engaged in diverse businesses including chemicals, fibers, films, polymers, petroleum, agricultural products, biotechnology, and pharmaceuticals. In 1996, DuPont posted sales of hydrogen peroxide of \$156 million in North America.

6. At all times relevant herein, respondents Degussa A.G. and Degussa have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

B. THE PROPOSED ACQUISITIONS

7. On July 30, 1997, Degussa A.G., through its wholly-owned subsidiary, Degussa, and DuPont signed a Letter of Intent setting out the principal elements of a proposed transaction, whereby Degussa would acquire the assets of DuPont's worldwide hydrogen peroxide business, including its North American production facilities in Memphis, Tennessee; Maitland, Ontario; and Gibbons, Alberta, in exchange for \$325 million.

8. After being advised by Commission staff of potential competitive issues and concerns in connection with the proposed acquisition of all of DuPont's North American hydrogen peroxide

production, Degussa and DuPont modified their original proposal, to an acquisition by Degussa only of DuPont's Gibbons, Alberta hydrogen peroxide plant, in exchange for approximately \$147 million.

C. RELEVANT MARKET

9. The relevant line of commerce in which to analyze the effects of Degussa's proposed acquisition of DuPont's hydrogen peroxide production assets is the manufacture, marketing and sale of hydrogen peroxide.

10. Hydrogen peroxide is an inorganic chemical that is used in disparate applications as an oxidizing agent to encourage different chemical reactions. The paper and pulp industry is by far the most significant consumer of hydrogen peroxide in North America, where hydrogen peroxide is used in the pulp bleaching process. Other significant users include textile manufacturers, which also use hydrogen peroxide as a bleach; chemical manufacturers, which use hydrogen peroxide to initiate reactions that yield organic peroxides; and mining companies, which use hydrogen peroxide to detoxify waste by-products from mining operations.

11. A small but significant and non-transitory price increase would not affect the current level of consumption in any of the significant end-use applications.

12. The relevant geographic market in which to analyze the effects of Degussa's proposed acquisition of DuPont's hydrogen peroxide production assets is North America. Hydrogen peroxide is a volatile substance that must be transported in an aqueous solution. As a result, between thirty and seventy percent of all volumes shipped are composed of water. Thus, transportation costs make transoceanic shipment commercially impractical and impede imports from rising above a *de minimis* level.

D. MARKET STRUCTURE

13. The North American market for hydrogen peroxide is highly concentrated. Seven manufacturers currently possess all of the North American production capacity. Moreover, the North American manufacturers are also the major hydrogen peroxide manufacturers in the world. The proposed acquisition, as originally proposed, would rest control over approximately eighty-one percent of production capacity with the three largest manufacturers, Degussa, Solvay

Interox and FMC Corporation, and increase the Herfindahl-Hirschmann Index by 575 points, from 1969 to 2544. The proposed acquisition, as modified, would result in virtually no change in market concentration.

14. Degussa has a single hydrogen peroxide manufacturing facility in Mobile, Alabama, and distribution centers located throughout the United States and Canada. Degussa's Mobile facility affords Degussa a North American capacity share in excess of eleven percent.

15. DuPont has one hydrogen peroxide production facility in the United States and two facilities in Canada, in the provinces of Ontario and Alberta, which together constitute nearly twenty-six percent of the North American hydrogen peroxide production capacity.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

17. The minimum viable scale of a hydrogen peroxide production facility, which is necessary to ensure a reasonable rate of return and to deter or counteract potential anticompetitive effects, likely precludes new entry. The prevailing hydrogen peroxide technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- *i.e.*, the production of hydrogen peroxide. It can not economically be shifted toward another use. Therefore, all returns on investment must be derived from hydrogen peroxide sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky. Furthermore, current overcapacity, as well as announced expansions by existing producers, serve as additional deterrents to new entry.

18. Small-scale on-site production technology may at some indeterminate time facilitate small-scale production by large consumers of hydrogen peroxide. However, today such technology remains higher cost than large-scale hydrogen peroxide production and commercially suspect. Most consumers, moreover, view hydrogen peroxide production as a business separate and apart from

their own and are resistant to incurring either the risk or the costs associated with on-site production. For these reasons, the price of hydrogen peroxide would need to rise substantially from existing levels before on-site production would become economical. In any event, few customers have sufficient demand to support efficiently even a small-scale on-site production facility. This technology, therefore, fails to provide an adequate deterrent against potential anticompetitive behavior.

F. EFFECTS OF THE PROPOSED ACQUISITION

19. The proposed acquisition, as originally proposed and if consummated, would likely have led to a substantial lessening of competition in the North American hydrogen peroxide market by enabling the firms remaining in the market after the acquisition to engage more successfully and more completely in coordinated interaction, in the following ways, among others:

- a. The original proposed acquisition would increase concentration substantially in a market that already is highly concentrated;
- b. Hydrogen peroxide is a highly homogeneous product that is purchased primarily on the basis of price;
- c. Reliable pricing information is available due to the use of delivered pricing, the practice of advance announcement of price increases, and customer arrangements including meet-or-release clauses;
- d. There is a past history of express collusion among hydrogen peroxide producers in Europe from the early 1960s through the late 1970s, including producers that after the acquisition would be the leading producers in North America;
- e. Industry practices may serve to facilitate interdependence and coordination in a concentrated market, including sales of hydrogen peroxide between producers that may have the effect of avoiding competitive conflict;
- f. Over several years, producers have maintained large differentials in pricing among different end-uses for a product that is essentially indistinguishable in its performance characteristics;
- g. Partly as a result of the originally proposed DuPont acquisition, Degussa would have been unlikely to pursue or proceed as quickly with planned internal expansions; and

- h. Documents project higher hydrogen peroxide prices as a result of the originally proposed acquisition.

G. VIOLATIONS CHARGED

20. The acquisition of DuPont's hydrogen peroxide production assets by Degussa, if consummated as originally proposed, would have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Degussa Corporation, a wholly-owned subsidiary of Degussa Aktiengesellschaft (collectively "Degussa") of the North American hydrogen peroxide assets of E.I. duPont de Nemours & Co. ("DuPont"), and respondents having been furnished with a copy of a draft of complaint which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; 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 the 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 Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of 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 Degussa Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 65 Challenger Road, Ridgefield Park, New Jersey.

2. Respondent Degussa Aktiengesellschaft is a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Weissfrauenstrasse 9, D-60287 Frankfurt am Main, Germany.

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

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

1. "*Respondents*" or "*Degussa*" means Degussa Corporation and Degussa Aktiengesellschaft, their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their subsidiaries, divisions, groups and affiliates controlled by Degussa Corporation and Degussa Aktiengesellschaft, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*DuPont*" means E.I. DuPont de Nemours & Co., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1007 Market Street, Wilmington, Delaware.

C. "*Commission*" means the Federal Trade Commission.

D. "*Retained Plants*" means the DuPont hydrogen peroxide plants in Memphis, Tennessee, and Maitland, Ontario, Canada, which Degussa does not propose to acquire from DuPont.

E. "*Gibbons Plant*" means the DuPont Hydrogen Peroxide plant in Gibbons, Alberta, Canada which Degussa proposes to acquire from DuPont.

II.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Degussa shall not, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in the Retained Plants; or

B. Acquire the Retained Plants or any assets of the Retained Plants (excluding the non-exclusive technology licenses that Degussa proposes to acquire in connection with the acquisition of the Gibbons Plant from DuPont).

III.

It is further ordered, That for a period of ten (10) years from the date this order becomes final, Degussa shall not, without prior notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire more than 1% (or, for investment purposes, 5%), of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in any assets used or previously used (and still suitable for use) in the manufacture, distribution or sale of hydrogen peroxide in North America; or

B. Acquire, in any calendar year, assets, valued at over \$15 million, used or previously used (and still suitable for use) in the manufacture, distribution or sale of hydrogen peroxide in North America; provided, however, that nothing herein shall prohibit Degussa, without prior notification to the Commission, from building new or expanding existing hydrogen peroxide manufacturing capacity.

Said prior notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the

Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, respondents shall not consummate the transaction until twenty (20) days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by paragraph III of this order for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

IV.

It is further ordered, That one (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II and III of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request and reasonable notice, respondents shall permit any duly authorized representative of the Commission:

A. Access, during normal office hours and in the presence of counsel, to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this order; and

B. Upon five (5) days' notice to the respondents, and without restraint or interference, to interview officers, directors, employees,

agents or independent contractors of the respondents, who may have counsel present.

VI.

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

VII.

It is further ordered, That this order shall terminate on June 10, 2008.

IN THE MATTER OF

ETHYL CORPORATION

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

Docket C-3814. Complaint, June 16, 1998--Decision, June 16, 1998

This consent order requires, among other things, the Virginia-based manufacturer of lead anti-knock gasoline additives to modify its supply agreement with The Associated Octel Company. In addition, the consent order prohibits the respondent from disclosing to competitors historical, current, or future prices. The consent order also requires the respondent to notify the Commission prior to acquiring the assets of any firm engaged in the distribution of lead anti-knock compounds in the United States, or the manufacturing of lead anti-knock compounds worldwide.

Appearances

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondent: *Jonathan Rich, Morgan, Lewis & Bockius, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Associated Octel Company Ltd., Great Lakes Chemical Corporation, and Ethyl Corporation, corporations, hereinafter sometimes collectively referred to as "respondents," have violated the provisions of Section 5 of the Federal Trade Commission Act, 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 purpose of this complaint, "lead antiknock compounds" means gasoline additives that contain tetraethyl or tetramethyl lead, and that increase the octane rating of gasoline. Currently in the United States, lead antiknock compounds are added to aviation gasoline for piston engine aircraft and to certain motor gasoline for racing cars.

PAR. 2. Respondent Great Lakes Chemical Corporation ("Great Lakes") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Great Lakes Boulevard, West Lafayette, Indiana.

PAR. 3. Respondent The Associated Octel Company Ltd. ("Octel") is a corporation organized and existing under and by virtue of the laws of the United Kingdom with its office and principal place of business located at Oil Sites Road, Ellesmere Port, South Wirral, England, United Kingdom. Octel is a wholly-owned subsidiary of Great Lakes.

PAR. 4. Octel is now, and has for several years been, the world's largest manufacturer and seller of lead antiknock compounds. As of 1993, Octel operated production facilities in Ellesmere Port, England, Bussi, Italy and Paimboeuf, France. Its sales of lead antiknock compounds in 1993 were in excess of \$540 million, representing approximately 60 percent of worldwide sales of lead antiknock compounds.

PAR. 5. For several years up to and including 1993, Octel sold lead antiknock compounds to independent distributors for resale to refineries and gasoline blenders located throughout the United States. In 1994, Octel began to sell directly to U.S. customers.

PAR. 6. Respondent Ethyl Corporation ("Ethyl") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 330 South Fourth Street, Richmond, Virginia.

PAR. 7. Ethyl was for several years the second largest manufacturer of lead antiknock compounds in the world. As of 1993, Ethyl operated one production facility located in Sarnia, Ontario. Its sales of lead antiknock compounds in 1993 were in excess of \$245 million, representing approximately 30 percent of worldwide sales of lead antiknock compounds.

PAR. 8. During the relevant time period, Ethyl has sold lead antiknock compounds to refineries and gasoline blenders located throughout the United States.

PAR. 9. The acts and practices of Octel and Ethyl, including the acts and practices alleged herein, are in commerce or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 10. The relevant line of commerce in which to evaluate the competitive effects of respondents' acts and practices is the manufacture and sale of lead antiknock compounds.

PAR. 11. The relevant geographic market is the world.

PAR. 12. The relevant market set forth above is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or two-firm and four-firm concentration ratios.

PAR. 13. Entry into the relevant market is difficult or unlikely.

PAR. 14. Between October 1993 and March 1994, Octel and Ethyl entered into a series of contracts, agreements, and understandings -- written and unwritten -- regarding the manufacture, distribution, and sale of lead antiknock compounds. Among the important undertakings are the following:

- (a) Ethyl agreed to cease manufacturing lead antiknock compounds.
- (b) Octel agreed to supply to Ethyl each year, for re-sale, a limited volume of lead antiknock compounds at a discount price.
- (c) Octel and Ethyl agreed that the maximum volume of lead antiknock compounds supplied to Ethyl each year through 1998 would be thirty five thousand metric tons. Octel and Ethyl agreed that the maximum volume of lead antiknock compounds supplied to Ethyl during each subsequent year would be a fixed portion of Octel's annual capacity to manufacture compounds. Under the contract, Octel is free to reduce its productive capacity, but must notify Ethyl one year in advance of such action.
- (d) Octel and Ethyl agreed that the price of lead antiknock compounds purchased by Ethyl for re-sale to customers in the United States and certain other countries would be adjusted each year, depending upon the change in the average sale price charged by Octel to retail customers located in the United States and certain other countries.
- (e) Octel agreed to notify Ethyl each year of the change in the average sale price charged by Octel to retail customers located in the United States and certain other countries, and to make its books and records, including sales contracts and invoices, available for inspection by an independent auditor reporting to Ethyl.
- (f) Octel agreed to cease the bulk shipping of lead antiknock compounds, and to transfer to Ethyl certain ocean going vessels dedicated to transporting lead antiknock compounds.

- (g) Ethyl agreed to provide to Octel all bulk shipping services required by Octel for the distribution of lead antiknock compounds.

PAR. 15. In March 1994, Ethyl closed its facility for the production of lead antiknock compounds located in Sarnia, Ontario.

PAR. 16. The acts and practices of respondents, as alleged herein, had the effect, or the tendency and capacity, to increase the likelihood of coordinated interaction among sellers of lead antiknock compounds, to restrain competition unreasonably, to increase prices and to injure consumers.

PAR. 17. The acts and practices of respondents, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. These acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission ("the 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 the respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the 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 has reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for sixty (60) days, now in further conformity with the procedure described 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 Ethyl Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 330 South Fourth Street, Richmond, Virginia.
2. The Federal Trade Commission has jurisdiction of the subject matter of the 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 Ethyl Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Ethyl Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Commission*" means the Federal Trade Commission.

C. "*Great Lakes*" means Great Lakes Chemical Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Great Lakes Chemical Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

D. "*Octel*" means The Associated Octel Company Limited, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by The Associated

Octel Company Limited, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

E. "*Supply Contract*" means the Agreement for Supply of Lead Antiknock Compounds dated as of the 22nd day of December 1993 between The Associated Octel Company Limited and Ethyl Corporation, and includes all schedules thereto.

F. "*Compounds*" means lead antiknock compounds of the types described in Schedule B to the Supply Contract, and includes tetraethyl lead and tetramethyl lead.

G. "*Force Majeure Event*" means an event or circumstance beyond the reasonable control of the manufacturer of Compounds affected thereby, including fire, storm, flood, act of God, war, or explosion. No event or circumstance shall constitute a Force Majeure Event if such event or circumstance could have been prevented through the exercise of reasonable diligence.

H. "*United States*" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

It is ordered, That within thirty (30) days from the date this order becomes final, respondent shall amend the Quantities Term of the Supply Contract to provide that, during each calendar year:

A. With respect to supplies of Compounds for Ethyl customers located in the United States, Octel shall make available for sale to Ethyl all such quantities of Compounds as Ethyl may order from time to time for supply to such customers; and

B. With respect to supplies of Compounds for Ethyl customers located outside of the United States, the maximum quantity of Compounds available for sale from Octel to Ethyl shall not be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States.

III.

It is further ordered, That within thirty (30) days from the date this order becomes final, respondent shall amend the Price Term of the Supply Contract to provide that:

A. With respect to supplies of Compounds purchased by Ethyl from Octel for resale in the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any other customer or group of customers; and

B. With respect to supplies of Compounds purchased by Ethyl from Octel for resale outside the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any customer or group of customers located in the United States.

IV.

It is further ordered, That respondent shall not enter into any contract modification, contract, agreement, or understanding with Great Lakes or Octel relating to the supply of Compounds: (A) that directly or indirectly limits the quantity of Compounds available to Ethyl from Octel for resale in the United States; (B) that provides that the maximum quantity of Compounds available from Octel to Ethyl for resale outside of the United States shall be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States; (C) that provides that the price of Compounds purchased by Ethyl for resale within the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any other customer or group of customers, and/or (ii) the quantity of Compounds purchased by Ethyl; or (D) that provides that the price of Compounds purchased by Ethyl for resale outside of the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any customer or group of customers located in the United States, and/or (ii) the quantity of Compounds purchased by Ethyl for resale within the United States.

V.

It is further ordered, That respondent shall not provide, disclose, or otherwise make available to Great Lakes or Octel, directly or through an intermediary, information regarding respondent's historical, current, or future prices for Compounds sold to customers located in the United States. Provided, however, that this paragraph

shall not apply to the disclosure of historical price information for transactions consummated in full more than twenty four (24) months prior to the time of disclosure.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final:

A. Except as provided in paragraph VI.B below, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire any stock, share capital, equity or other interest in any person or concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the three years preceding such acquisition engaged in, the distribution of Compounds in or to the United States, or the manufacture of Compounds anywhere in the world; or

2. Acquire any assets used or previously used (and still suitable for use) in the distribution of Compounds in the United States, or the manufacture of Compounds anywhere in the world; or

3. Sell or transfer Compounds to any person or concern engaged in at the time of such sale or transfer, or within the three years preceding such sale or transfer engaged in, the manufacture of Compounds anywhere in the world.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for

additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondent shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

B. The conditions set forth in paragraph VI.A shall not be applicable to any acquisition for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a. The conditions set forth in paragraph VI.A.2 shall not be applicable to the acquisition from any person during any calendar year of assets having an aggregate fair market value of less than \$2 million. The conditions set forth in paragraph VI.A.3 shall not be applicable to the sale or transfer of Compounds from respondent to Great Lakes or Octel. The conditions set forth in paragraph VI.A.3 also shall not be applicable to the sale or transfer of Compounds from respondent to any person where the aggregate volume of Compounds sold or transferred to such person during the calendar year does not exceed the greatest of: (i) one million pounds, (ii) 20 percent of such person's production of Compounds during the preceding calendar year, or (iii) the shortfall in the annual production of Compounds by such person, relative to such person's historical production levels, where such shortfall is caused by a Force Majeure Event.

C. The conditions set forth in paragraphs VI.A.1 and VI.A.3 shall not be applicable to the acquisition of any interest in, or the sale of Compounds to, any person who, at the time of such transaction or within the preceding three years, owned less than 20 percent of the equity stock of Octel, and was not otherwise engaged in the distribution of Compounds in or to the United States or the manufacture of Compounds anywhere in the world.

D. In any action by the Commission alleging violations of this order, respondent shall bear the burden of proof with regard to demonstrating that the aggregate volume of Compounds sold or transferred by respondent to any person does not exceed: (i) 20 percent of such person's production of Compounds during the preceding calendar year, and/or (ii) the shortfall in the annual production of Compounds by such person, relative to such person's historical production levels, and that such shortfall is caused by a Force Majeure Event.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order. Such report shall include a copy of the revised Supply Contract, executed by Ethyl and Octel, and incorporating the contract amendments specified in paragraphs II and III of this order.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

X.

It is further ordered, That respondent shall:

A. Within thirty (30) days after the date on which this order becomes final, send by first class mail a copy of this order to: (i) all of the directors of Ethyl Corp. and of each corporation within respondent that is engaged in the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Directors"); (ii) all of the officers of Ethyl Corp. and of each corporation within respondent that is engaged in the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Officers"); and (iii) all of respondent's management employees with responsibility for the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Management Employees");

B. For a period of three (3) years after the date on which this order becomes final, mail by first class mail a copy of this order to each person who becomes a Director, Officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with respondent; and

C. For a period of three (3) years after the date on which this order becomes final, require each of its Directors, Officers, and Management Employees to sign and submit to respondent within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject Ethyl Corporation to penalties for violation of the order.

XI.

It is further ordered, That this order shall terminate on June 16, 2018.

IN THE MATTER OF

THE ASSOCIATED OCTEL COMPANY LTD., ET AL.

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

*Docket C-3815. Complaint, *1 June 16, 1998--Decision, June 16, 1998*

This consent order requires, among other things, The Associated Octel Company and the Great Lakes Chemical Corporation to modify its supply agreement with Ethyl Corporation. In addition, the consent order prohibits the respondent from disclosing to competitors historical, current, or future prices. The consent order also requires the respondents to notify the Commission prior to acquiring the assets of any firm engaged in the distribution of lead anti-knock compounds in the United States, or the manufacturing of lead anti-knock compounds worldwide.

Appearances

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondents: *Sam Haubold, Kirkland & Ellis and Kevin Arquit, Rogers & Wells, Washington, D.C.*

DECISION AND ORDER

The Federal Trade Commission ("the 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 the 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 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 has reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent The Associated Octel Company Limited is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom with its office and principal place of business located at Oil Sites Road, Ellsemere Port, South Wirral, England, United Kingdom.

2. Respondent Great Lakes Chemical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Great Lakes Boulevard, West Lafayette, Indiana.

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

ORDER

I.

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

A. "*Octel*" means The Associated Octel Company Limited, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by The Associated Octel Company Limited, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*Great Lakes*" means Great Lakes Chemical Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups,

and affiliates controlled, directly or indirectly, by Great Lakes Chemical Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

C. "*Respondents*" means Octel and Great Lakes.

D. "*Commission*" means the Federal Trade Commission.

E. "*Ethyl*" means Ethyl Corporation, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by Ethyl Corporation, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

F. "*Supply Contract*" means the Agreement for Supply of Lead Antiknock Compounds dated as of the 22nd day of December 1993 between The Associated Octel Company Limited and Ethyl Corporation, and includes all schedules thereto.

G. "*Compounds*" means lead antiknock compounds of the types described in Schedule B to the Supply Contract, and includes tetraethyl lead and tetramethyl lead.

H. "*Compound Manufacturing Facilities*" means the Great Lakes and/or Octel facilities currently or formerly used for the manufacture of Compounds and located in Ellesmere Port, England, Bussi, Italy, Paimboeuf, France, and Biebesheim, Germany.

I. "*Force Majeure Event*" means an event or circumstance beyond the reasonable control of the manufacturer of Compounds affected thereby, including fire, storm, flood, act of God, war, or explosion. No event or circumstance shall constitute a Force Majeure Event if such event or circumstance could have been prevented through the exercise of reasonable diligence.

J. "*United States*" means the fifty states, the District of Columbia, the Commonwealth of Puerto Rico, and all territories, dependencies, and possessions of the United States of America.

II.

It is ordered, That within thirty (30) days from the date this order becomes final, respondents shall amend the Quantities Term of the Supply Contract to provide that, during each calendar year:

A. With respect to supplies of Compounds for Ethyl customers located in the United States, Octel shall make available for sale to

Ethyl all such quantities of Compounds as Ethyl may order from time to time for supply to such customers; and

B. With respect to supplies of Compounds for Ethyl customers located outside of the United States, the maximum quantity of Compounds available for sale from Octel to Ethyl shall not be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States.

III.

It is further ordered, That within thirty (30) days from the date this order becomes final, respondents shall amend the Price Term of the Supply Contract to provide that:

A. With respect to supplies of Compounds purchased by Ethyl from Octel for resale in the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any other customer or group of customers; and

B. With respect to supplies of Compounds purchased by Ethyl from Octel for resale outside the United States, the selling price shall not be calculated by reference to, affected by, or dependent upon, directly or indirectly, the price received by Octel for Compounds sold to any customer or group of customers located in the United States.

IV.

It is further ordered, That respondents shall not enter into any contract modification, contract, agreement, or understanding with Ethyl relating to the supply of Compounds: (A) that directly or indirectly limits the quantity of Compounds available to Ethyl from Octel for resale in the United States; (B) that provides that the maximum quantity of Compounds available from Octel to Ethyl for resale outside of the United States shall be diminished by, affected by, or dependent upon the quantity of Compounds purchased by Ethyl for supply to customers located in the United States; (C) that provides that the price of Compounds purchased by Ethyl for resale within the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any other customer or group of customers, and/or (ii) the quantity of Compounds purchased by Ethyl; or (D) that

provides that the price of Compounds purchased by Ethyl for resale outside of the United States is calculated by reference to, affected by, or dependent upon, directly or indirectly (i) the price received by Octel for Compounds sold to any customer or group of customers located in the United States, and/or (ii) the quantity of Compounds purchased by Ethyl for resale within the United States.

V.

It is further ordered, That respondents shall not provide, disclose, or otherwise make available to Ethyl, directly or through an intermediary, information regarding respondents' historical, current, or future prices for Compounds sold to customers located in the United States. Provided, however, that this paragraph shall not apply to the disclosure of historical price information for transactions consummated in full more than twenty four (24) months prior to the time of disclosure.

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final:

A. Except as provided in paragraph VI.B below, respondents shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

1. Acquire any stock, share capital, equity or other interest in any person or concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the three years preceding such acquisition engaged in, the distribution of Compounds in or to the United States, or the manufacture of Compounds anywhere in the world; provided, however, that individual employees or directors of respondents and each pension, benefit, or welfare plan or trust controlled by respondents may acquire, for investment purposes only, an interest of not more than two (2) percent of the stock or share capital of such person or concern; or

2. Acquire any assets used or previously used (and still suitable for use) in the distribution of Compounds in the United States, or the manufacture of Compounds anywhere in the world; or

3. Sell or transfer Compounds to any person or concern engaged in at the time of such sale or transfer, or within the three years preceding such sale or transfer engaged in, the manufacture of Compounds anywhere in the world.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondents shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

B. The conditions set forth in paragraph VI.A shall not be applicable to any acquisition for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a. The conditions set forth in paragraph VI.A.2 shall not be applicable to the acquisition from any person during any calendar year of assets having an aggregate fair market value of less than \$2 million. The conditions set forth in paragraph VI.A.3 shall not be applicable to the sale or transfer of Compounds from respondents to Ethyl. The conditions set forth in paragraph VI.A.3 also shall not be applicable to the sale or transfer of Compounds from respondents to any person where the aggregate volume of Compounds sold or transferred to such person during the calendar year does not exceed the greatest of: (i) one million pounds, (ii) 20 percent of such person's production of Compounds during the preceding calendar year, or (iii) the shortfall in the annual production of Compounds by

such person, relative to such person's historical production levels, where such shortfall is caused by a Force Majeure Event.

C. The conditions set forth in paragraphs VI.A.1 and VI.A.3 shall not be applicable to the acquisition of any interest in, or the sale of Compounds to, any person who, at the time of such transaction or within the preceding three years, owned less than 20 percent of the equity stock of Octel, and was not otherwise engaged in the distribution of Compounds in or to the United States or the manufacture of Compounds anywhere in the world.

D. In any action by the Commission alleging violations of paragraph VI.A.3 and/or paragraph VI.B of this order, respondents shall bear the burden of proof with regard to demonstrating that the conditions set forth in paragraph VI.B have been satisfied.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final, each respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which that respondent has complied and is complying with this order. Such report shall include a copy of the revised Supply Contract, executed by Ethyl and Octel, and incorporating the contract amendments specified in paragraphs II and III of this order.

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this order.

VIII.

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

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondents relating to any matters contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents.

X.

It is further ordered, That respondents shall:

A. Within thirty (30) days after the date on which this order becomes final, send by first class mail a copy of this order, to all of their directors, officers, and management employees with responsibility for the manufacture, purchase and/or sale of Compounds (hereinafter referred to as "Management Employees");

B. For a period of three (3) years after the date on which this order becomes final, mail by first class mail a copy of this order to each person who becomes a director, officer, or Management Employee, within thirty (30) days of the commencement of such person's employment or affiliation with respondents; and

C. For a period of three (3) years after the date on which this order becomes final, require each of their directors, officers, and Management Employees to sign and submit to respondents within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject The Associated Octel Company Limited and/or Great Lakes Chemical Corporation to penalties for violation of the order.

XI.

It is further ordered, That the obligations of Great Lakes Chemical Corporation under this order shall terminate on July 1, 1998 if, prior to that date, (A) Great Lakes Chemical Corporation divests or otherwise disposes of all of its Compounds business, including the Compound Manufacturing Facilities, thereby creating a new, independent publicly traded company ("Newco"); (B) in advance of such divestiture or disposition referenced above, Great Lakes Chemical Corporation causes its then subsidiary Newco to commit, formally and in writing, that Newco shall be bound by the terms of this Consent Order and considered as a respondent thereto; and (C) Great Lakes Chemical Corporation submits to the Commission documents sufficient to show that requirements (A) and (B) have been accomplished in a timely manner. This paragraph shall not be construed so as to terminate the obligations under this order of Octel or Newco under any circumstances.

XII.

It is further ordered, That this order shall terminate on June 16, 2018.

IN THE MATTER OF

ALTMeyer HOME STORES, INC.

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

Docket C-3816. Complaint, June 16, 1998--Decision, June 16, 1998

This consent order requires, among other things, the Pennsylvania-based retailer of draperies and curtains to comply with the notification provisions of the Fair Credit Reporting Act when job applicants are denied employment and information in the applicants' credit records played a role in the denials.

Appearances

For the Commission: *John Hallerud* and *C. Steven Baker*.

For the respondent: *Thomas Farnan, Robb, Leonard & Mulvihill*,
Pittsburgh, PA.

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 Altmeyer Home Stores, 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:

DEFINITIONS

For the purposes of this complaint, the following definitions are applicable. The terms "*consumer*," "*consumer report*," and "*consumer reporting agency*" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d) and 1681a(f).

PARAGRAPH 1. Respondent Altmeyer Home Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and

principal place of business located at Central City Plaza, New Kensington, Pennsylvania.

PAR. 2. Respondent, in the ordinary course and conduct of its business, uses information in consumer reports obtained from consumer reporting agencies in the consideration, acceptance, and denial of applicants for employment with respondent.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent, in the ordinary course and conduct of its business, has denied applications or rescinded offers for employment with respondent based in whole or in part on information supplied by a consumer reporting agency, but has failed to advise consumers that the information so supplied contributed to the adverse action taken on their applications or offers for employment, and has failed to advise consumers of the name and address of the consumer reporting agency that supplied the information.

PAR. 5. By and through the practices described in paragraph four, respondent has violated the provisions of Section 615(a) of the Fair Credit Reporting Act, 15 U.S.C. 1681m(a).

PAR. 6. By its aforesaid failure to comply with Section 615(a) of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof, respondent has engaged in unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

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 Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, its 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 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 Altmeyer Homes Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at Central City Plaza, New Kensington, Pennsylvania.

2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

ORDER

For the purpose of this order, the terms "*consumer*," "*consumer report*," and "*consumer reporting agency*" shall be defined as provided in Sections 603(c), 603(d), and 603(f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), 1681a(d), and 1681a(f).

I.

It is ordered, That respondent Altmeyer Home Stores, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device do forthwith cease and desist from failing to comply with Section 615 of the Fair Credit Reporting Act, as it existed on October 1, 1995, as it has been amended, effective September 30, 1997, and as it may be amended in the future.

As provided by Section 615(c) of the Fair Credit Reporting Act, respondent shall not be held liable for any violation of Section 615 of the Fair Credit Reporting Act if it shows by a preponderance of the evidence that at the time of the alleged violation it maintained reasonable procedures to assure compliance with Section 615 of the Fair Credit Reporting Act.

II.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, documents demonstrating compliance with the requirements of Part I of this order, such documents to include, but not be limited to, all employment evaluation criteria relating to consumer reports, instructions given to employees regarding compliance with the provisions of this order, all notices or a written or electronically stored notation of the description of the form of notice and date such notice was provided to applicants pursuant to any provisions of this order, and the complete application files for all applicants for whom consumer reports were obtained for whom offers of employment are not made or have been withheld, withdrawn, or rescinded based, in whole or in part, on information contained in a consumer report.

III.

It is further ordered, That respondent and its successors and assigns shall, for five (5) years from the date of issuance of this order, deliver a copy of this order at least once per year to all persons responsible for the respondent's compliance with Section 615(a) of the Fair Credit Reporting Act.

IV.

It is further ordered, That respondent and its successors and assigns shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation that may affect compliance obligations arising under this order, including, but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any

acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that with respect to any proposed change in the corporation about which respondent learns less than thirty days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

V.

It is further ordered, That respondent and its successors and assigns shall, within sixty (60) days of the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

It is further ordered, That this order will terminate on June 16, 2018, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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

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

Complaint

125 F.T.C.

IN THE MATTER OF

THE WILLIAMS COMPANIES, INC.

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

Docket C-3817. Complaint, June 17, 1998--Decision, June 17, 1998

This consent order allows, among other things, the merger between The Williams Companies, Inc., ("Williams") and MAPCO Inc., both based in Oklahoma, and requires Williams to provide Midwest pipeline capacity to Kinder Morgan Energy Partners, an operator of propane terminals, and to allow any new competing pipeline to connect to its Wyoming gas processing plants.

Appearances

For the Commission: *Frank Lipson, Phillip Broyles & William Baer.*

For the respondent: *Tom Smith, Jones, Day, Reavis & Pogue, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("FTC" or "Commission"), having reason to believe that respondent The Williams Companies, Inc. ("Williams"), a corporation, and MAPCO Inc. ("MAPCO"), a corporation, have entered into an agreement and plan of merger for Williams to acquire all of the voting securities of MAPCO, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such agreement and merger, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Williams is a corporation organized, existing and doing business under and by virtue of the laws of the State of

Delaware, with its office and principal place of business located at One Williams Center, Tulsa, Oklahoma.

2. Respondent Williams is, and at all times relevant herein has been, a diversified energy products company engaged in the transportation and sale of natural gas and related activities; natural gas gathering, processing, and treating activities; the transportation and terminaling of petroleum products and natural gas liquids, including propane; hydrocarbon exploration and production activities; the production and marketing of ethanol; and the provision of a variety of other products and services to the energy industry.

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

II. MAPCO AND THE PROPOSED ACQUISITION

4. MAPCO is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1800 South Baltimore Avenue, Tulsa, Oklahoma.

5. MAPCO is, and at all times relevant herein has been, a diversified energy products company engaged in the transportation by pipeline of natural gas liquids ("NGLs"), anhydrous ammonia, crude oil and refined petroleum products; the transportation by truck and rail of NGLs and refined petroleum products; the refining of crude oil; the marketing of NGLs, refined petroleum products and crude oil; and NGL processing and storage.

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

7. On or about November 23, 1997, Williams and MAPCO entered into an agreement and plan of merger whereby Williams would acquire all of the outstanding voting securities of MAPCO, and MAPCO would become a wholly-owned subsidiary of Williams. Under the agreement, each share of MAPCO common stock will be exchanged for shares of Williams common stock and preferred stock

purchase rights. Based on relative valuations at the time of the agreement, the transaction is valued at approximately \$2.7 billion.

III. TRADE AND COMMERCE

A. *Midwest Propane*

8. A relevant line of commerce in which to evaluate the effects of this acquisition is the transportation by pipeline and terminaling of propane.

9. Relevant sections of the country in which to evaluate the effects of this acquisition on the relevant line of commerce are: (a) central Iowa, including Des Moines and Ogden; (b) northern Iowa and southern Minnesota, including Clear Lake and Sanborn, Iowa, and Mankato, Minnesota; (c) eastern Iowa, including Iowa City; (d) southern Wisconsin and northern Illinois, including Janesville, Wisconsin and Rockford, Illinois; and (e) north central Illinois, including Tampico and Farmington.

10. MAPCO owns and operates pipelines that transport propane to terminals owned and operated by MAPCO that service the relevant sections of the country.

11. Williams owns and operates pipelines that transport propane to terminals owned and operated by Kinder Morgan Operating L.P. "A" ("Kinder Morgan"), a Delaware limited partnership, that service the relevant sections of the country. Williams has agreements with Kinder Morgan pursuant to which customers of Kinder Morgan ship propane on pipelines owned by Williams to terminals owned by Kinder Morgan in the relevant sections of the country. Because it owns and operates said pipelines, Williams effectively controls the delivery of propane to the Kinder Morgan terminals under such agreements.

12. Respondent Williams, through its ownership and operation of the pipelines and through its agreements with Kinder Morgan, competes with MAPCO in the transportation and terminaling of propane in each relevant section of the country.

13. The markets for the transportation by pipeline and terminaling of propane in the relevant sections of the country are highly concentrated and would become substantially more highly concentrated as a result of the acquisition.

14. Entry into the transportation by pipeline and terminaling of propane in the relevant sections of the country is difficult.

B. Pipeline Transportation of Raw Mix from Southern Wyoming

15. Raw mix is a mixture of natural gas liquids, consisting of at least two or more of the following components: propane, ethane, butanes, and pentanes-plus. Raw mix is processed into these individual component products at fractionation facilities.

16. MAPCO owns the only pipeline for the transportation of raw mix from gas processing plants in southern Wyoming to Hobbs, New Mexico, where it connects with other pipelines for transportation to major fractionation facilities in Texas, Oklahoma, and Kansas.

17. Williams owns and operates two large gas processing plants in southern Wyoming. At these plants, Williams extracts raw mix from natural gas produced from gas wells, for itself and for other well owners.

18. A relevant line of commerce and section of the country in which to evaluate the effects of this acquisition is the transportation by pipeline of raw mix from southern Wyoming to New Mexico, Texas, Oklahoma, and Kansas.

19. Prior to the acquisition agreement, MAPCO believed that its monopoly over the pipeline transportation of raw mix from southern Wyoming was in jeopardy. It was concerned that a new pipeline would be built to transport raw mix from southern Wyoming to fractionation facilities in Texas, Kansas and Oklahoma, and that such a pipeline would capture a significant portion of MAPCO's volume. MAPCO perceived that Williams was an important participant in any such new pipeline, because of the location of Williams' gas processing plants and the volume of raw mix extracted at these plants.

20. Because of its concern about the possible construction of a competing pipeline, MAPCO planned to expand the capacity of its pipeline and to offer a discounted tariff in exchange for long-term volume commitments.

21. Williams in fact had discussions with other interested parties concerning the construction of a pipeline to by-pass the MAPCO pipeline. Williams terminated these discussions when it entered into the agreement and plan of merger with MAPCO.

22. Entry into the pipeline transportation of raw mix from southern Wyoming is difficult.

23. After the acquisition Williams will no longer have an incentive to participate in, or cooperate with, a competing pipeline.

Without Williams' participation or cooperation, the prospects for such a competing pipeline are substantially reduced. Owners of raw mix extracted at Williams' gas processing plants will continue to have no choice other than MAPCO for transporting their raw mix to major fractionation centers. Without the threat of a competing pipeline, MAPCO will have less of an incentive to expand its pipeline or to offer a reduced tariff.

IV. EFFECT OF THE PROPOSED TRANSACTION

24. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition or tend to create a monopoly in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45. In particular, the proposed acquisition will:

A. Eliminate actual, direct and substantial competition between Williams and MAPCO in the pipeline transportation and terminaling of propane in the relevant sections of the country;

B. Increase concentration in the pipeline transportation and terminaling of propane in the relevant sections of the country;

C. Increase the ability of the combined Williams and MAPCO, unilaterally and through coordinated interaction, to exercise market power in the pipeline transportation and terminaling of propane in the relevant sections of the country;

D. Insure the ability of the combined Williams and MAPCO to exercise market power in the transportation of raw mix from southern Wyoming; and

E. Increase barriers to entry into the relevant markets.

V. VIOLATIONS CHARGED

25. The agreement and plan of merger between Williams and MAPCO constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

26. The proposed acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the voting securities of MAPCO Inc. ("MAPCO") by The Williams Companies, Inc. ("Williams"), and it now appearing that Williams, hereinafter sometimes referred to as "respondent," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement 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 Williams is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Williams Center, Tulsa, OK.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

- A. “*Williams*” means The Williams Companies, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The Williams Companies, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “*MAPCO*” means MAPCO Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by MAPCO Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “*Commission*” means the Federal Trade Commission.
- D. “*Competing Pipeline*” means any existing, planned or proposed pipeline owned or operated by anyone other than Williams or MAPCO that transports, or is intended to transport, Raw Mix from Gas Processing Plants in Wyoming, directly or indirectly, to any Fractionation Plant located in Kansas, Oklahoma, New Mexico or Texas.
- E. “*Connection Agreement*” means an agreement between Williams or MAPCO and a Competing Pipeline that provides for, among other things, the connection of a pipeline and the associated installation of valves, measurement apparatus, flanges and other devices necessary to deliver Raw Mix from a Williams Wyoming Gas Processing Plant to a Competing Pipeline and to measure the volume of such Raw Mix.
- F. “*Fractionation Plant*” means a facility that separates Raw Mix into its individual components.
- G. “*Gas Processing Plant*” means any facility that separates Raw Mix from methane.
- H. “*Kinder Morgan*” means Kinder Morgan Operating L.P., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled, directly or indirectly, by Kinder Morgan,

and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- I. "*KM Agreement*" means the Pipeline Lease and Operating Agreement between Kinder Morgan and Williams, dated March 3, 1998, and attached hereto as Confidential Exhibit A.
- J. "*KM Terminals*" means the propane terminals owned or operated by Kinder Morgan at Des Moines, Clear Lake and Iowa City, Iowa and Tampico and Rockford, Illinois, and all tangible and intangible assets used in operating said terminals, that receive, or that can receive, propane in whole or in part from the Williams NGL System.
- K. "*Propane*" means a colorless paraffinic hydrocarbon product with a chemical formula of C_3H_8 that is derived either as a by-product of petroleum refining or from natural gas processing, and that can be used for heating, cooking, agricultural crop drying, as a petrochemical feedstock, and for other applications.
- L. "*Proposed Acquisition*" means the proposed acquisition of the voting securities of MAPCO by Williams.
- M. "*Raw Mix*" means a mixture of natural gas liquids, consisting of at least two or more of the following components: propane, ethane, butanes, and pentanes-plus.
- N. "*Respondent*" means "Williams."
- O. "*Terminaling*" means all services performed by a facility that provides temporary storage of propane received from a pipeline and the redelivery of propane from storage facilities into transport or tanker trucks.
- P. "*Williams NGL System*" means the assets owned by Williams comprising the following pipeline segments: Plattsburg, Missouri to Des Moines, Iowa; Des Moines, Iowa to Clear Lake, Iowa; Des Moines, Iowa to Iowa City, Iowa; and Iowa City to Clinton, Iowa/Middlebury Junction, Illinois.
- Q. "*Williams Wyoming Gas Processing Plant*" means any Gas Processing Plant owned or operated, in whole or in part, by Williams or MAPCO in the State of Wyoming, including plants located at or near Opal and Echo Springs, Wyoming.

II.

It is further ordered, That:

- A. Respondent shall comply with the KM Agreement, including, but not limited to, the provision of pipeline capacity to Kinder Morgan to service the KM Terminals pursuant to the terms and conditions of the KM Agreement.
- B. Respondent shall not cancel the KM Agreement for any reason except pursuant to the provisions of paragraph 4.5 thereof. If respondent determines to cancel the KM Agreement pursuant to such provisions, respondent shall provide the Commission with at least ninety (90) days' prior written notice of such cancellation. At the time of such notice, respondent shall designate, subject to the approval of the Commission, a proposed successor to Kinder Morgan's rights and interests under the KM Agreement. If no successor in interest has been approved by the time of such cancellation, the Commission may appoint a trustee pursuant to paragraph V of this order.
- C. Notwithstanding Section 16.1 of the KM Agreement, if Kinder Morgan sells any of the KM Terminals, respondent shall, not later than thirty (30) days after such sale, enter into a pipeline capacity lease and operating agreement with the acquirer of such KM Terminals that is substantially identical to the KM Agreement with respect to such terminals, and consistent with the purpose of this order. Respondent shall provide a copy of such agreement to the Commission not less than ten (10) days prior to its execution.
- D. Until the date at which all of respondent's obligations under the KM Agreement expire, respondent shall not, without prior approval of the Commission, make or agree to any modifications with respect to any term or terms of the KM Agreement.
- E. Respondent shall provide to the Commission, no later than thirty (30) days after their receipt or transmittal, copies of all communications between Kinder Morgan, or its successor in interest, and respondent regarding changes in or alleged breaches of the KM Agreement.
- F. The purpose of this paragraph II of this order is to ensure Kinder Morgan's access to pipeline capacity, as set forth in the KM Agreement, to prevent the elimination of Kinder Morgan as a competitor in the transportation and terminaling of propane at the KM Terminals, and to remedy the lessening of competition in the

transportation and terminaling of propane in Illinois, Iowa, Wisconsin, and Minnesota resulting from the acquisition as alleged in the Commission's complaint.

III.

It is further ordered, That:

- A. Within thirty (30) days of receipt of a written request from a Competing Pipeline, respondent shall enter into a Connection Agreement for the connection of such Competing Pipeline to each Williams Wyoming Gas Processing Plant. The terms and conditions of such Connection Agreement shall be the terms customarily used by such Competing Pipeline to connect to other Gas Processing Plants. If the respondent and a Competing Pipeline are unable to agree on the terms and conditions of a Connection Agreement, the Competing Pipeline may elect to cause the issue to be submitted to outside, independent, binding arbitration in accordance with the procedures in Exhibit B hereto. Respondent shall provide the Commission with a copy of each written request from a Competing Pipeline within ten (10) days after respondent receives such request.
- B. Respondent shall connect each Williams Wyoming Gas Processing Plant that is the subject of a Connection Agreement to a Competing Pipeline under the terms and conditions established by such Connection Agreement. All steps necessary to effectuate such connection shall be accomplished by respondent within 180 days after the execution of such Connection Agreement.
- C. From the date on which the agreement is signed until the earlier of (a) three days after the Commission rejects this agreement or (b) 120 days after the date this order becomes final, respondent shall not enter into any new or renewed agreement to process natural gas at any Williams Wyoming Gas Processing Plant pursuant to which the producer or seller of natural gas gives up its right, for a term of more than one year, to sell or otherwise dispose of its Raw Mix.
- D. The purpose of this paragraph III of this order is to ensure that the acquisition does not reduce the likelihood that a Competing Pipeline may be constructed to service Gas Processing Plants in Southwestern Wyoming.

IV.

It is further ordered, That:

- A. Respondent shall immediately notify the Commission of the initiation of any arbitration proceedings, agreements, or changes in agreements, involving any of the matters in this order.
- B. Judgment upon the decision rendered by any arbitrator(s) pursuant to this order or pursuant to any agreements entered into pursuant to this order may be entered in any court having jurisdiction thereof. The decision of the arbitrator, after confirmation by the court pursuant to the Federal Arbitration Act, 9 U.S.C. 1, *et seq.*, or succeeding statutory provisions, shall be final and binding upon the parties, and the failure of respondent thereafter to abide by the arbitrator's decision shall be a violation of this order.

V.

It is further ordered, That:

- A. If respondent has not selected a successor to Kinder Morgan's rights and interests under the KM Agreement as required by paragraph II.B of the order, the Commission may appoint a trustee (or trustees) to select a successor and to lease the Williams NGL System, subject to the prior approval of the Commission. If the trustee does not select a successor to Kinder Morgan's rights and interests under the KM Agreement, then the trustee may divest the Williams NGL System. Such divestiture shall be at no minimum price, to an acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.
- B. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the

Commission, for any failure by the respondent to comply with this order.

- C. If a trustee is appointed by the Commission or a court pursuant to the terms of this order, respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall appoint a trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in leasing, acquisitions and divestitures. If respondent has not opposed, in writing, including the reasons for opposing, the selection of the proposed trustee, within ten (10) days after notice by the staff of the Commission to respondent of the identity of the proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to lease or divest the assets as described in paragraph V.A of this order. Such sale or lease, if it occurs prior to January 1, 2001, shall require that the lessee or buyer shall, for each year for five (5) years from the date of lease or sale, dedicate to the transportation of propane an amount of capacity equivalent to the average annual throughput of propane during the previous five-year period on that portion of the pipeline extending from Plattsburg Junction, Missouri, to Des Moines, Iowa.
 3. Within ten (10) days after appointment of the trustee, respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to lease or divest the assets as described in paragraph V.A of this order.
 4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph V.C.3 to effectuate paragraph V.A of this order, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of how the trustee intends to effectuate paragraph V.A of this order or believes that compliance can be achieved within a reasonable time, this period may be extended by the Commission,

or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the assets involved or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the lease or divestiture. Any delays in the lease or divestiture caused by respondent shall extend the time for leasing or divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to lease or divest expeditiously at no minimum price. The transactions shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order, provided, however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall lease or divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.
7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the leases or divestitures and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at

least in significant part on a commission arrangement contingent on the trustee's leasing or divesting the assets to be leased or divested.

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

VI.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondent shall not, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, joint ventures, or otherwise:

- A. Acquire any stock, share capital, equity, partnership, membership or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such acquisition, in providing terminaling or pipeline transportation for propane located in Iowa or in any contiguous states within seventy (70) miles of the Iowa border; or
- B. Acquire any assets used or previously used (and still suitable for use) for terminaling or pipeline transportation of propane in Iowa

or in any contiguous states within seventy (70) miles of the Iowa border.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. 803.20), respondent shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

VII.

It is further ordered, That:

- A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraph III.C of this order, respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraph III.C of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraph III.C of this order, including a description

of all substantive contacts or negotiations for the leases or divestitures and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning leases or divestitures.

- B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with each provision of this order.

VIII.

It is further ordered, That:

- A. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the order.
- B. Upon consummation of the acquisition, respondent shall cause the merged entity to be bound by the terms of this order.

IX.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request, respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of respondent relating to any matters contained in this order; and
- B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent.

X.

It is further ordered, That this order shall terminate on June 17, 2018.

[Confidential Exhibits A and B redacted from public record version.]

**Re: Postal Careers Institute, Incorporated, Petition
to Quash Civil Investigative Demand.
File No. 972-3282.**

February 25, 1998

Dear Mr. Venzara:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Quash ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The Petition is denied for the reasons stated below. As also set forth below, the new deadline for Postal Careers Institute, Incorporated ("PCI" or "Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demand ("CID") is Friday, March 13, 1998.

PCI has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter. The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- March 13, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. BACKGROUND

The CID was issued to Petitioner on December 22, 1997, pursuant to the Commission's omnibus resolution of December 8, 1997. The resolution authorizes the use of compulsory process in a non-public investigation to determine whether unnamed enterprises that purport to provide consumers with job placement, career counseling, vocational education, vocational training, and other career related services have engaged or are engaging in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The resolution also authorizes investigation to determine whether action to obtain redress of injury to consumers or others would be in the public interest. The CID specified a return date of January 16, 1998.

Commissioner Anthony has carefully reviewed the Petition. The procedural defects in the Petition and each of Petitioner's objections are discussed separately below.

II. PROCEDURAL DEFECTS

Commission Rule 2.7, 16 CFR 2.7, provides succinct and clear guidance regarding the requirements for submitting a petition to limit or quash compulsory process. Petitioner ignored virtually every one of the dictates of this rule.

A. The Petition Was Not Timely Filed

Subsection (d)(1) of Rule 2.7 provides that petitions to quash must be filed with the Secretary "within twenty days after service ... or, if the return date is less than twenty days after service, prior to the return date." 16 CFR 2.7(d)(1). Thus, at the least, PCI was required to file its petition on or before the return date, January 16, 1998. Although Petitioner dated the document January 15, 1998, the notary block reflects that it was not signed until January 16th. Moreover, the Petition was not received by the Secretary until January 20, 1998, four days after the return date.¹

While, in this instance, the Secretary did not reject this untimely filing outright, Petitioner should consider itself on notice that the Commission expects strict adherence to all procedural rules.

B. Petitioner Failed to Comply With Rule 2.7(d)(2)

Even more serious than the fact that the Petition was filed late and without the required number of copies is the fact that Petitioner failed to comply with Rule 2.7(d)(2), which provides, in relevant part:

Each Petition shall be accompanied by a signed statement representing that counsel for petitioner has conferred with counsel for the Commission in a good faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement.... The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference.

16 CFR 2.7(d)(2). PCI failed to provide the required statement.

The conferral requirement is mandatory. Orderly process and judicial economy considerations dictate that efforts to resolve compulsory process disputes be exhausted at the staff level before being brought before the Commission. Those served with compulsory

¹ Even when it was ultimately received by the Secretary's office, the Petition was not accompanied by the correct number of copies (twenty) as required by Rule 4.2(c), 16 CFR 4.2(c).

process do not have a choice, but rather, *must* engage in good faith negotiations with the Commission staff regarding their objections to a given request. Furthermore, these negotiations must be documented in the statement required by Rule 2.7(d)(2).

The Commission understands from the staff attorneys conducting this investigation that they have repeatedly invited PCI to engage in discussions regarding PCI's objections and concerns relating to the CID, but that Petitioner has failed to make a good faith attempt to resolve these issues. Nevertheless, the staff remains willing to engage in such discussions. The Commission strongly urges PCI to take advantage of the staff's offer and to do so immediately.

C. Petitioner Failed to Comply With Rule 2.7(d)(1)

Rule 2.7(d)(1) provides, in relevant part, that petitions "shall set forth all assertions of privilege or other factual and legal objections to the ... civil investigative demand, *including all appropriate arguments, affidavits and other supporting documentation.*" 16 CFR 2.7(d)(1) (emphasis added). The instant Petition fails to meet this basic requirement. It consists of five extremely short double-spaced paragraphs, each asserting a distinct objection. These paragraphs make broad assertions without offering any support, explanation, or reasoned argument. In addition, no supporting affidavits or documents are included. Petitioner's conclusory and unsupported assertions fall far short of the standard set forth in Rule 2.7(d)(1).

III. SPECIFIC OBJECTIONS

In addition to its procedural deficiencies, the Petition is substantively without merit. None of Petitioner's objections justify quashing or limiting the CID.

A. Confidentiality

PCI first complains that "[t]he FTC has not kept the investigation of Postal Careers Institute confidential...." Petition ¶ 1. PCI provides absolutely no explanation, example, or support for this assertion. Lacking any mention whatsoever of any specific instance where a confidentiality obligation was breached, this unsupported assertion must be rejected.

B. Burden

PCI next complains that the requests are "broad and undefined" and adds that compliance would impose an "undue financial burden" upon PCI. Petition ¶ 2. Again PCI fails to elaborate or give examples. This conclusory argument must be rejected for at least three reasons.

First, breadth and ambiguity issues are precisely the types of issues that are supposed to be negotiated between petitioner and the Commission staff pursuant to Rule 2.7(d)(2). Given that Petitioner failed to engage in these mandatory negotiations, its complaints in this regard ring particularly hollow. As stated above, the staff attorneys continue to stand ready to discuss these matters.

Second, Petitioner has failed to specify which requests it considers unclear or too broad and in what respect. The Commission cannot be expected to guess which requests PCI finds objectionable and why.

Third, Petitioner has failed to offer any explanation of why it would be financially burdensome to comply with the CID. Likewise, it has failed to offer any documents or affidavits evidencing the expected financial impact of compliance.

C. Release of Information to United States Postal Service

PCI next claims that it and its students might suffer irreparable harm if the FTC released information gathered during the investigation to the United States Postal Service ("USPS"). Petition ¶ 3. As with all the rest of its allegations, PCI fails to elaborate or provide any support for this contention.

PCI adds the unsupported assertion that "[t]he FTC has already released information from the investigation to the [USPS]." *Id.* However, PCI fails to supply any specific details or any evidence showing that a release actually occurred, identifying what information was released, or demonstrating that such release was improper or unlawful.

Moreover, the Commission's rules anticipate and authorize sharing information with other government agencies and law enforcement authorities. For example, Section 15.7.1 of the Commission's Operating Manual provides that "staff may advise federal, state, and local law enforcement agencies of the existence of an investigation, the identity of the target, and the general nature of the information in the agency's files." Likewise, Section 4.11(c) of

the Commission's Rules, 16 CFR 4.11(c) sets forth the procedures for making more detailed disclosures to law enforcement agencies. In short, the lawful sharing of information between government agencies is not a valid ground upon which to resist compulsory process.

D. Alleged Failure to Specify Applicable Laws

PCI next contends that the FTC has failed to inform PCI "of any alleged violation or the provisions of law that are applicable." Petition ¶ 4. This contention is untrue. The resolution authorizing the use of compulsory process in this investigation, which is incorporated in the CID by reference as well as attached thereto, spells out the nature and scope of the investigation.

To investigate the advertising, marketing, promotion, offering for sale, and sale of enterprises that purport to provide consumers with job placement, career counseling, vocational education, vocational training, and other career related services, for the purpose of determining whether unnamed persons, partnerships or corporations, or others that are engaged in the advertising, marketing, promotion, offering for sale or sale of such services, or that assist such persons or entities, have engaged or are engaging in unfair or deceptive practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Thus, the CIDs do, in fact, adequately notify PCI of the purpose and scope of the investigation, the nature of the conduct under investigation, and the applicable provisions of law, as required by Section 2.6 of the Commission's Rules, 16 CFR 2.6.

E. Issuance of CIDs to PCI Employees

Finally, PCI claims that CIDs served by the FTC upon current PCI employees somehow "limit [PCI's] ability to properly and timely respond...." Petition ¶ 5. PCI again fails to elaborate on or otherwise provide any support for its assertion. The only individual upon whom the FTC has served a CID in this matter is Alice V. Lanoie, a New Hampshire resident who has served as a bookkeeper for PCI. In its Petition, PCI failed to identify Ms. Lanoie as a PCI employee or indicate how service upon her has interfered with the company's ability to respond to the CID directed to it. Moreover, the Commission would further suggest that to the extent any such interference has any basis in fact, it would be yet another issue best dealt with in negotiations with the Commission staff.

In sum, the Petition is nothing more than a series of unsubstantiated and meritless assertions. Both its last-minute timing and then its lack of substance strongly suggest that the Petition was submitted by PCI merely as a delaying tactic.

IV. CONCLUSION

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioner is directed to comply with Civil Investigative Demand on or before Friday, March 13, 1998.

**Re: Postal Careers Institute, Incorporated, Petition
for Full Commission Review. File No. 972-3282.**

March 13, 1998

Dear Mr. Exposito:

The Commission has considered (1) the Petition to Quash filed on behalf of Postal Careers Institute, Incorporated ("PCI") by Anthony Venzara; (2) the underlying Civil Investigative Demands; (3) the February 25, 1998, letter ruling by Commissioner Anthony denying the Petition to Quash; (4) PCI's request for full Commission review of the letter ruling; and (5) PCI's motion for an extension of time to file the request for full Commission review. For the reasons set forth below, the Commission denies PCI's motion for an extension of time as moot and affirms the February 25, 1998 letter ruling denying PCI's Petition to Quash.

Turning first to PCI's motion for an extension of time to file its request for full Commission review, the Commission denies the motion as moot. PCI's request was timely filed on March 3, 1998, one day before the deadline, and therefore, no extension is needed.¹

Turning next to PCI's motion for review of Commissioner Anthony's ruling, the Commission has determined that the motion raises no issues that were not fully considered and addressed in the earlier ruling. Indeed PCI's request for review adds nothing to its Petition to Quash. Rather, PCI merely emphasizes the fact that the Petition was prepared by a non-attorney -- a fact that was known to Commissioner Anthony when preparing her ruling. Based solely upon this fact, PCI asks the Commission to construe the Petition to Quash liberally and reverse the prior ruling. However, no matter who prepares a petition to quash, certain basic elements are required; a petitioner must at a minimum (1) confer with staff in a good faith effort to resolve its objections before filing the petition, (2) state specific objections and explain them, and (3) present whatever

¹ Rule 2.7(f) allows a petitioner to seek review "within three days after service of a ruling by the designated Commissioner denying all or a portion of the relief requested in its petition." 16 CFR 2.7(f). Service was accomplished on Friday, February 27, 1998, when PCI received the ruling by mail. *See* 16 CFR 4.4 (service). While the Secretary's office also transmitted the ruling to PCI by facsimile on or about February 26, 1998, the facsimile copy was merely provided as a courtesy and was not intended to constitute service. Therefore, PCI's right to seek review did not expire until Wednesday, March 4th. *See* 16 CFR 4.3 (computation of time).

evidence it can muster to support its contentions. PCI did none of these things. Instead, it failed to confer with staff² and presented only unsupported, general, and vague objections. The fact that a layperson prepared the Petition to Quash neither justifies these fundamental failures and omissions nor transforms the otherwise insufficient Petition into one that should be granted.

Accordingly, the full Commission concurs with, and hereby adopts, the February 25, 1998 letter ruling by Commissioner Anthony in this matter. As set forth in the letter ruling, Petitioner must comply with the Civil Investigative Demands on or before Friday, March 13, 1998.

² PCI's motion for review includes a certification attesting to PCI's efforts to "agree on or to narrow the issues involved in this motion" by contacting Gregory Ashe, a staff attorney responsible for the investigation, on February 26, 1998. Mr. Ashe, however, sent PCI's counsel a letter, dated March 5, 1998, acknowledging that a telephone conversation between the two did take place on the date in question, but adding:

I do not recall having any substantive discussions as to PCI's problems with the CIDs. Neither do I recall any discussions as to narrowing the scope of the CIDs. In fact, I do not recall having any conversations regarding any of the issues raised in either PCI's motion to extend time or PCI's motion to review.

PCI's counsel has yet to respond.

While the intended meaning of PCI's certification is somewhat unclear, what is clear is that it does not appear to meet the requirements imposed by Rule 2.7(d)(2), 16 CFR 2.7(d)(2), that a petitioner confer with the staff in a good faith attempt to resolve or narrow its objections to the subpoena or civil investigative demand.

**Re: National Claims Service, Inc., Petition to Limit
Civil Investigative Demands. File No. 952-3169.**

June 2, 1998

Dear Mr. Hodgson:

This letter advises you of the Federal Trade Commission's ruling on the above-referenced Petition to Limit ("Petition"). The decision was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4).

The petition is denied for the reasons stated below. As also set forth below, the new deadline for National Claims Service, Inc. ("NCS" or "Petitioner") to respond to, and otherwise comply with, the Civil Investigative Demands ("CID") is Tuesday, June 16, 1998.

NCS has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹ The filing of a request for review by the full Commission does not stay or otherwise affect the new return date -- June 16, 1998 -- unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

I. BACKGROUND

NCS markets a medical billing business opportunity. As part of its marketing efforts, NCS provides prospective purchasers with the names of "successful" NCS customers as references. NCS also makes various express and implied earnings claims about its billing center opportunities to prospective purchasers. Over the past several years, the Commission has routinely investigated companies offering business opportunities in order to determine, among other things, whether the representations made by these companies during their sales efforts are fair and accurate.

On March 18, 1997, pursuant to its omnibus resolution, dated July 10, 1980, the Commission issued two CIDs to the Petitioner, one requesting written responses and the other seeking documents. The July 10, 1980 resolution authorizes the use of compulsory process in a non-public investigation to determine whether unnamed persons,

¹ This letter is being delivered by facsimile and by express mail. The facsimile is being provided only as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the express mail copy of this letter.

partnerships, or corporations engaged in the sale of franchises, business opportunities, distributorships and other forms of businesses to consumers have been or are engaged in unfair or deceptive acts or practices in violation of 16 CFR Part 436 and/or Section 5 of the Federal Trade Commission Act. The resolution also authorizes investigation to determine whether action to obtain redress of injury to consumers or others would be in the public interest. Both CIDs specified a return date of April 3, 1998. Petitioner subsequently requested, and the staff granted, two extensions which resulted in a new return date of April 24, 1998.

On or about April 24, 1998, NCS produced objections and partial responses to the CIDs and simultaneously served its Petition to Limit. Among the information the CIDs requested and NCS failed to produce is: (1) the identity of its billing center purchasers or licensees (*i.e.*, customers); (2) the identity of the individuals whose names or initials appear in the testimonials widely used by NCS in its sales solicitations; (3) complete copies of consumer complaints received by NCS; and (4) documents showing the amount of revenues NCS has generated through its sales. The Commission staff maintains that without this basic information, they cannot complete their investigation.

By its Petition, NCS seeks to be excused from providing any further responses to the CIDs. It presents four arguments in support of its Petition: (1) production of the omitted information would be unduly burdensome and oppressive; (2) some of the information requested is not available to NCS, namely, the success or failure rates of its customers; (3) the demands violate contractual, statutory, and constitutional privacy rights of NCS and its customers; and (4) the Commission is unfairly pursuing case-by-case investigations rather than commencing a rulemaking proceeding.

Commissioner Anthony has carefully reviewed the Petition to Limit, Petitioner's "Supplement to Petition to Limit Re: Privacy Rights," dated May 15, 1998 ("Supplement"), and Petitioner's "Second Supplement to Petition to Limit Re: Privacy Rights and Re: Cooperation" ("Second Supplement"). None of Petitioner's arguments, which are addressed separately below, provide a basis for excusing Petitioner from providing the additional information specified in the CIDs.

II. ANALYSIS

The Federal Trade Commission Act grants the Commission extensive investigatory powers. *See* 15 U.S.C. 46, 49, 50, and 57b-1. These powers are essential to allow the Commission to carry out its broad mandate. As the Supreme Court explained almost fifty years ago, an investigation by the Commission is "analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probably violation of the law." *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

Among the Commission's investigatory powers is the ability to use civil investigative demands to gather information and the concomitant right to enforce those demands in the federal district courts. *See* 15 U.S.C. 57b-1. The federal courts apply a deferential standard in deciding whether to enforce compulsory process issued by the Commission, asking only whether (i) the information sought is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not too indefinite or unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). While this matter is, of course, not presently before a federal court, it is worth noting that the CIDs issued to NCS plainly meet all three of these criteria. It cannot reasonably be contested that this investigation is authorized by the Commission's statutory mandate and that the CIDs seek information relevant to the investigation at hand. Petitioner has not even argued that the CIDs are too indefinite, and, as detailed below, has failed to make any showing that the CIDs are unduly burdensome.

A. Burden

Petitioner complains that the CIDs are oppressive and burdensome because they "will require petitioner to search thousands of pieces of paper and to segregate and transport the same." Petition at 2. Petitioner adds that as a small company with a small profit margin, it cannot afford what it claims would be a "significant diversion of

personnel and financial resources." This is a legally deficient objection.

First, *all* compulsory process specifications require the recipient to expend some effort to respond. If the mere fact that documents would have to be examined and that resources would have to be expended provided a basis for resisting production, compulsory process would be rendered useless.

Second, an examination of the CIDs themselves reveals that the specifications are narrow and focused in scope. The principal outstanding specifications require NCS to identify its purchasers/licensees, the testimonialists, and its employees, and to provide information regarding its revenues. This basic information is very important to the staff's investigation. The specifications requesting this information are essentially standardized and cannot accurately be characterized as overbroad or unreasonable.

Third, Petitioner offers no details regarding the nature of the burden it alleges and absolutely no evidence that such a burden exists. Rather, the Petition to Limit contains only a single paragraph (numbered lines 15 to 28 on page 2) regarding burden, and that paragraph contains nothing but vague generalizations and conclusory statements. Petitioner does not refer to any particular specifications contained in the CIDs and does not explain what aspects of its record-keeping system make compliance burdensome.² In addition, Petitioner has not provided a single affidavit or shred of documentary evidence supporting the existence of this alleged burden. *See United States v. Stuart*, 489 U.S. 353, 360 (1989) (holding that the investigated party bears the burden of proving that the subpoena is unduly burdensome).

In short, Petitioner's burden allegation must be rejected as completely unsubstantiated. At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (*e.g.*, the person-hours and cost

² While the form (paper or electronic) of the records at issue does not change the analysis, given that the business opportunity offered by Petitioner involves electronic processing of massive amounts of information, the Commission would be surprised if most of the records being sought by the Commission were not maintained by NCS in computer files. These computer files could be printed or downloaded to a storage device with the touch of a button.

of meeting the particular specifications at issue). Petitioner has failed to do any of these things.

B. Information Requested Is Unavailable

Petitioner next objects that the CIDs seek information that is not available to it. Specifically, Petitioner argues that it "does not possess sufficient data to accurately specify the typical success or failure rates of its licensees." Petition at 3. Petitioner does not cite to the particular specifications that it contends seek this information.

First, even assuming that the CIDs request this information, which they do not, Petitioner's statement that it has no such information is a *response*, not an objection, and, therefore, is misplaced in the context of a petition to limit.

Second, and even more importantly, the CIDs do not include a specification requiring Petitioner to specify the typical success or failure rate of its licensees. Indeed, it is precisely to investigate the experiences of NCS billing center purchasers that the Commission has requested the identity of those purchasers and the testimonialists. Petitioner's argument amounts to a *non sequitur* and must be rejected.

C. Privacy Claims

In support of its refusal to provide information identifying its customers/licensees as well as information regarding its employees, Petitioner asserts privileges based upon privacy rights it contends arise from, among other sources, California state law, the U.S. Constitution, and confidentiality provisions contained in its contracts with its customers. All of these arguments are without merit.

As a general matter, the fact that a respondent considers information confidential is not grounds for resisting compulsory process. *See, e.g., FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 908 (5th Cir. 1978); *FTC v. Tuttle*, 244 F.2d 605, 616 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1957). This is true even if a subpoena or CID requests personal information about third parties. *See FTC v. Shaffner*, 626 F.2d 32, 37-38 (7th Cir. 1980) (information about debtors); *FTC v. Manager, Retail Credit Co.*, 515 F.2d 988, 993 (D.C. Cir. 1975) (consumer credit reports). As the court in *FTC v. Invention Submission Corp.*, so succinctly explained:

Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought. So

long as the subpoena meets the requirements of the FTC Act, is properly authorized, and within the bounds of relevance and reasonableness, the confidential information is properly requested and must be complied with.

1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993).³

The main thrust of Petitioner's privacy argument is founded on an assertion of California state law privacy rights applicable to discovery disputes arising in civil litigation. Relying on these California precedents, Petitioner contends that the Commission is obligated to show that the information sought is "directly relevant" to a cause of action, the Commission has a "particularized need" for the information, and the information is "essential" to determining the truth of the matter in dispute. These state law discovery standards are completely misplaced in the context of a statutorily authorized investigation undertaken by a federal agency.

First, Petitioner's assertion of California law is fundamentally flawed because this is a federal, and not a state, matter. This is a federal investigation of potential violations of Section 5 of the Federal Trade Commission Act. "Investigations for federal purposes may not be prevented by matters depending on state law." *United States v. Cortese*, 410 F. Supp. 1380, 1381-82 (E.D. Pa. 1976), *aff'd* 540 F.2d 640 (3rd Cir. 1976). In short, state law privileges do not apply here.⁴

³ While Petitioner objects to providing the requested information to the FTC in the first instance and is not merely concerned about maintaining its non-public status, it is worth noting that this investigation is non-public. Under the Commission's own rules any confidential information provided to the Commission will be used only for law enforcement purposes in determining whether the law has been violated, and will not be made publicly available without recourse to proper procedures. See 16 CFR 4.10. Indeed, pursuant to Section 10 of the FTC Act and Rule 4.10(c), 16 CFR 4.10(c), it is a crime for an FTC employee to improperly reveal confidential information gathered in the course of a non-public investigation.

⁴ Petitioner's assertion that federal courts will honor state law privileges (Petition at 3-4) overstates, and as such, misstates, the law. State privileges will be applied by federal courts only when the federal court will be applying state law to determine the outcome of the case, such as when a state law claim is brought to a federal court based upon its diversity jurisdiction. See Fed.R.Evid. 501. In either an enforcement proceeding or a Section 5 suit brought in a federal district court, federal law and, therefore, the federal law of privilege would apply. *Linde Thompson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("The nature of a subpoena enforcement proceeding . . . rests soundly on federal law, and federal law of privilege governs any restrictions on the subpoena's scope"). Petitioner has not articulated any applicable federal privilege. Indeed, the only support Petitioner offers for its vague assertion of a federal privilege is a passing reference to the U.S. Constitution generally and a citation to *Griswold v. Connecticut*, 381 U.S. 479 (1965), a reproductive rights privacy case that has no bearing on the instant matter.

Second, Petitioner fails to appreciate the distinction between an investigation undertaken by the Commission pursuant to its statutory authority and discovery undertaken by a private litigant involved in a lawsuit. While both of these activities are "investigatory" in nature, their bases and aims are quite different, and so too, therefore, are the rules that govern them. As the Ninth Circuit explained in *EEOC v. Deer Valley Unified School Dist.*, 968 F.2d 904 (9th Cir. 1992):

The function of administrative investigatory subpoenas differs from that of the discovery provisions of the Federal Rules of Civil Procedure. The discovery provisions apply to actions that have already been filed with the court, and the parties are seeking to develop evidence for the action that is before the court. The statutory subpoena authority, on the other hand, is designed for administrative investigations, which may or may not result in any further action before the district court. The enforcement is dependent upon the interpretation of statutory authority, not interpretations of the discovery provisions of the Federal Rules of Civil Procedure.

Id. at 906; *see also Linde*, 5 F.3d at 1513 ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it"); *EPA v. Alyeska Pipeline Service Co.*, 836 F.2d 443, 447 (9th Cir. 1988) ("An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate"(internal citations omitted)). Thus, Petitioner's privacy arguments begin from the mistaken premise that California or federal discovery rules apply here; they do not. As such, all of Petitioner's arguments that the Commission cannot meet California's "particularized need" and related standards are inapposite.

Moreover, the "particularized need" standards urged by petitioner are simply relevancy thresholds that must be met before a California court will compel the production of certain private information. The relevancy inquiry applicable to administrative compulsory process is much different than the inquiry applicable to civil litigation discovery:

Unlike a court which gathers information only as it relates to issues relevant to the litigation at hand, an agency in its acquisition of facts is not bound by the parameters of a particular case or controversy...Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

FTC v. Invention Submission Corp., 1991-1 Trade Cas. (CCH) at 65,351. In the seminal case of *FTC v. Texaco*, the court explained that "an investigating agency is under no obligation to propound a narrowly focused theory of a *possible* future case" and that "the agency's subpoena requests may be measured only against the general purposes of its investigation." 555 F.2d 862, 874 (D.C. Cir. 1977), *cert. denied*, 431 U.S. 974 (1977) (emphasis original). Here, the disputed specifications plainly seek information that is directly relevant to the general purpose of this investigation, namely, to determine whether NCS has engaged in any deceptive acts or practices in marketing its business opportunity. In order to determine the scope of the representations NCS made to its customers, and whether or not those representations were borne out by the consumers' experiences, the Commission must contact at least a sampling of the consumers. Likewise, in order to determine whether the testimonialists are telling the truth about their experiences, the Commission must contact them. The representations made by NCS orally and in its advertisements cannot be judged true or false on their face; such representations can only be judged in light of empirical data.⁵ That data can only come from Petitioner's licensees.

Petitioner also relies upon confidentiality provisions contained in its contracts with its customers whereby NCS promises not to reveal any information about the customers to third-parties without prior approval. These provisions have no effect on Petitioner's obligation to respond to the CIDs. This very same argument was rejected by the court in the *Invention Submission* case. The court enforced the subpoenas reasoning that "any other state of affairs would undermine the Commission's mandate to investigate unfair business practices and allow any organization under investigation to escape scrutiny

⁵ In its Supplement, Petitioner, starting again from California discovery law, argues that contacting consumers is not "essential" here based upon Commission precedent standing for the proposition that the Commission does not need to present testimony from actual consumers in order to make out a deception claim and instead may apply a "reasonable consumer" standard. Even ignoring the fact that the California requirement is inapplicable, Petitioner's reliance on the reasonable consumer standard is misguided. The Commission will find deception in cases where "there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Deception Statement*, 103 FTC 174, 176 (1983), published as an appendix to *Cliffdale Associates, Inc.*, 103 FTC 110 (1984). The reasonable consumer standard, therefore, goes to the issue of whether the target consumers are likely to be deceived by the advertiser's misrepresentation. That is, the standard does not even come into play until a misrepresentation -- "an express or implied statement contrary to fact" -- has already been found. *Id.* at 175 n.4. Here, investigation is necessary to determine this threshold issue of whether Petitioner's representations were "contrary to fact."

simply by protecting all information under confidentiality agreements." 1991-1 Trade Cas. (CCH) at 65,353.

With regard to its employees, Petitioner argues that it would violate their privacy rights if it were to provide their home addresses and telephone numbers. The Invention Submission court also considered and rejected this very argument, holding: "Agencies have discretion to fashion how investigations are conducted. Since employees will not speak freely if they are under the watchful eye of management, the agency's desire to conduct interviews away from the workplace is neither arbitrary nor an abuse of discretion." *Id.* at 65,352 n.23.

At the end of its initial argument on the privacy issue (Petition at 9-10), Petitioner is perhaps the most forthright about the actual reason that it opposes providing the names of its customers to the FTC. Petitioner admits that it is concerned that consumers contacted by the staff may be inspired to register complaints that they would not otherwise have made. Petitioner contends that the staff might "create or manufacture consumer dissatisfaction against Petitioner where none has heretofore been expressed." Petition at 9. This is yet another argument considered and rejected by the court in Invention Submission:

Although respondent envisions a doomsday scenario in which overzealous investigators ask leading questions and plant seeds of distrust and suspicion in the minds of interviewees, the court is convinced that plaintiff's apprehensions are unfounded and insufficient to overcome the FTC's presumptive right to access to individuals and records. . . . If this court were to acknowledge [respondent's] highly speculative fears of damage to corporate reputations adequate to defeat the agency's information requests, the FTC's subpoena power would be rendered powerless and serious investigation of corporate behavior would be a futile exercise.

1991-1 Trade Cas. (CCH) at 65,352. For these same reasons, Petitioner's objection here is rejected.⁶

In an effort to reach a compromise and in response to Petitioner's concern that by merely contacting its customers, the FTC might somehow raise concerns in the customers' minds that NCS has

⁶ This conclusion is not changed by Petitioner's vague reference to a consumer that it believes was contacted by the FTC who later sought a refund and its speculative assertion that there is an improper cause and effect relationship between the two events. While contact with the FTC might alert a consumer to his or her rights or embolden the consumer to act if the consumer believes he or she suffered a wrong, such contact does not create the wrong.

engaged in deceptive practices, staff contacted Petitioner's counsel and offered to tell interviewees that it is investigating the industry generally, and not just NCS. The idea for this offer came directly from the Invention Submission opinion where the court commented favorably on this practice:

[T]he agency has stipulated that in conversations with customers and databank participants, it will state that the Commission is investigating the idea promotions industry generally and that no specific allegations of wrongdoing have been made. These prefatory remarks recharacterizing the nature of the investigation should allay [respondent's] fears of false incrimination.

Id. In its Second Supplement, Petitioner rejected this offer suggesting both that it was misleading and that it ignored the privacy rights of the interviewees themselves. Petitioner's assertion that the representation would be misleading and improper is baseless. Indeed, the representation is true; the marketing practices of the business opportunity industry are a topic of widespread and longstanding investigation by the Commission as evidenced by, among other things, the 1980 Resolution authorizing such investigations. As for the privacy rights of the third-parties, those arguments have been addressed and rejected above. *See Shaffner*, 626 F.2d at 37-38 (information about debtors); *Manager, Retail Credit Co.*, 515 F.2d at 993 (consumer credit reports).

D. Rulemaking Versus Litigation

Petitioner's final argument amounts to an allegation that it is unfair for the Commission to proceed against medical billing business opportunity providers on a case-by-case enforcement basis and that the Commission should instead proceed through a rulemaking. This argument has absolutely no basis in law. The fact that the Commission has exercised its prerogative to proceed by investigation and, where appropriate, administrative adjudication or federal court litigation has absolutely no effect on Petitioner's obligation to respond to the CIDs at issue here.

First, and most importantly, no rulemaking is needed. This series of investigations is aimed at uncovering deceptive trade practices under Section 5 of the FTC Act and violations of the Commission's Franchise Rule, 16 CFR Part 436. No special rules tailored to the

medical billing business opportunity industry are required.⁷ The main issues under investigation with respect to NCS are basic: whether Petitioner has made false representations regarding income potential and whether Petitioner has used phony or exaggerated testimonials to market its product. In short, this is not a situation where guidance as to required behavior is inadequate or lacking; instead it is a situation where investigation is necessary in order to root out potential violations of existing and well-established rules and laws.⁸

Second, Petitioner has not filed a petition to commence a rulemaking proceeding as required pursuant to Section 1.9 of the Commission's Rules, 16 CFR 1.9. Even if such a petition were filed, its filing would not affect the ongoing investigation. Indeed, even if NCS filed a rulemaking petition that was denied, NCS would have to wait until the Commission brought an action against it before it could appeal the rulemaking versus adjudication issue to a federal court. *Weight Watchers International v. FTC*, 47 F.3d 990, 992 (9th Cir. 1995).

Finally, it is nothing short of a bedrock principle of administrative law that agencies have broad discretion in determining whether to proceed by rulemaking or adjudication. *See, e.g., Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1328-29 (9th Cir. 1982) ("It is well settled that the decision whether to proceed by adjudication or rule-making lies in the first instance within the agency's discretion." (citations and internal quotations omitted)); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292-94 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (Chenery II), *reh'g denied*, 332 U.S. 783 (1947). The fact that it might be more convenient for Petitioner if the Commission proceeded by rulemaking imposes absolutely no limits on the Commission's discretion here.

⁷ Indeed, in addition to Section 5, itself, and the Franchise Rule, the Commission has already adopted guides concerning the use of testimonials and endorsements in advertising, *see* 16 CFR Part 255.

⁸ Petitioner's arguments that it should not have to bear the expenses associated with an investigation because it believes that many of its competitors are not being investigated are untenable. Without addressing the accuracy of that belief, the Commission necessarily has prosecutorial discretion in identifying the targets of its investigations. Without the discretion to proceed against whom it sees fit, when it sees fit, the Commission's investigative and prosecutorial powers would be rendered useless. Petitioner has not even suggested, much less offered any evidence, that the Commission improperly chose NCS for investigation.

E. Request for Oral Argument

In both its Petition and again in its Supplement, Petitioner requested an oral argument. These requests are denied. Petitioner submitted three briefs in this matter totaling twenty-six pages. No oral argument is necessary to further illuminate the points presented in these extensive briefs.

III. CONCLUSION

This is an absolutely proper and statutorily authorized investigation. These CIDs seek information that is plainly relevant to that investigation and have been crafted to avoid placing an undue burden on NCS. Moreover, as noted above, NCS has failed to make any evidentiary showing whatsoever as to burden.

For the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), Petitioner is directed to comply with the Civil Investigative Demands on or before Tuesday, June 16, 1998.

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