IN THE MATTER OF

TEXACO INC. and GETTY OIL COMPANY

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

Docket C-3137. Complaint, July 10, 1984—Decision, July 10, 1984

This Consent Order requires Texaco Inc., among other things, to divest within 12 months to a Commission-approved purchaser, all the Getty assets and properties listed in Schedule A (excluding the assets listed in Schedule C). Should Texaco fail to timely divest the Schedule A properties, a trustee appointed by the court or the Commission will have 18 months in which to effect divestiture of the remaining assets. Until such time as the specified properties have been divested, Texaco is required to maintain their viability and marketability, and hold them separate and apart in accordance with the terms and provisions set forth in the Order. Texaco is further required, for a period of ten years, to take the following actions: 1) vote its shares in favor of any proposal to increase the capacity or enhance the ability of the Colonial Pipeline Company to transport refined product north of Dorsey Junction, Maryland; 2) offer Getty customers using the Getty pipeline from Santa Fe Springs to Los Angeles in 1983 access to that pipeline under the 1983 terms and conditions; and 3) refrain from acquiring, without prior Commission approval, any concern engaged in the refining or wholesale distribution of gasoline or middle distillates in certain states or in transporting any petroleum product by pipeline in or into Colorado. Additionally, for a period of five years, Texaco is required to sell to customers of Getty in 1983 (excluding 10 major oil companies), and to other West Coast refiners, California crude oil of similar grade and quality to that sold in 1983 on the contractual terms listed in Schedule B.

Appearances

For the Commission: *Marc G. Schildkraut.*

For the respondents: *William C. Weitzel, Jr.* and *C. Benjamin Crisman, Jr.,* in-house counsel, White Plains, N.Y., for respondent Texaco Inc. and *Jack Leone,* Los Angeles, Ca., for respondent Getty Oil Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, Texaco Inc., a corporation subject to the jurisdiction of the Federal Trade Commission, intends to acquire, or has acquired the stock or assets of respondent Getty Oil Company, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act

(15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions

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

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

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

c. *The acquisition* means the transaction described, in whole or in part, in paragraph 14 of this Complaint.

d. *Aviation gasoline* means that product as defined in connection with Department of Energy Form EIA–810, Monthly Refinery Report, product code 111.

e. *Gasoline* means motor gasoline as defined in connection with Department of Energy Form EIA–810, Monthly Refinery Report, product codes 132 and 133.

f. *Jet fuels* means naptha-type and kerosene-type jet aircraft fuel, as defined in connection with Form EIA–810, Monthly Refinery Report, product codes 211 and 213.

g. *Middle distillates* means the products commonly known as number one fuel oil (kerosene), and number two fuel oil (home heating, diesel), as defined in connection with Department of Energy Form EIA–810, Monthly Refinery Report, product codes 311 and 411.

h. *Refined light products* means aviation gasoline, gasoline, jet fuels, and middle distillates.

i. *Heavy crude oil* means crude oil below 20 API gravity.

j. *Terminal* means a facility used for receipt, storage, and distribution of gasoline, middle distillates, or jet fuel, and which receives product directly via pipeline, navigable waterway or from an adjacent refinery.

II. Respondents

A. *Texaco*

2. Respondent Texaco is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at White Plains, New York.

3. Respondent Texaco is a fully integrated petroleum company, engaged in the exploration for and production of crude oil and natural gas, refining, the transportation of crude oil, natural gas and refined products, and the distribution and marketing of refined products and natural gas.

4. In 1982, respondent Texaco had revenues of about $48 billion, assets of about $27 billion, and net income of about $1.28 billion.

5. In 1982, respondent Texaco ranked sixth in the United States in crude oil production, eighth in domestic crude oil reserves, fifth in refining capacity, and fourth in gasoline sales.

6. Respondent Texaco has refineries located at Wilmington, California; Lawrenceville, Illinois; Convent, Louisiana; Westville, New Jersey; Port Arthur, Texas; Port Neches, Texas; Amarillo, Texas; El Paso, Texas; and Anacortes, Washington, with a combined refining capacity of 937 thousand barrels per day. In 1982, Texaco sold its refineries in West Tulsa, Oklahoma and shut down its refinery in Casper, Wyoming.

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

B. *Getty*

8. Respondent Getty is a corporation organized and doing business under the laws of the state of Delaware with its executive offices at Los Angeles, California.

9. Respondent Getty is a fully integrated petroleum company, engaged in the exploration for and production of crude oil and natural gas, refining, the transportation of crude oil, natural gas and refined products, and the distribution and marketing of refined products and natural gas.

10. In 1982, respondent Getty had revenues of about $12.3 billion, assets of about $9.9 billion, and net income of about $692 million.

11. In 1982, respondent Getty ranked 10th nationally in crude oil production, 6th in United States crude oil reserves, 18th in United States refining capacity, and 16th in United States motor gasoline sales.

12. Respondent Getty has refineries located at Bakersfield, California; Delaware City, Delaware; and El Dorado, Kansas, with a combined refining capacity of about 278 thousand barrels per day.

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

III. The Acquisition

14. On January 9, 1984, Texaco commenced a tender offer for 35 percent of Getty voting securities with the intention of effectuating a follow-up merger for the remaining outstanding shares; and on January 6, 1984, Texaco and Getty entered into a merger agreement pursuant to which Getty granted Texaco an option to purchase authorized but unissued shares constituting approximately 10.2 percent of the total Getty shares that would be outstanding after such issuance. Further, on or about January 6, 1984, and January 8, 1984, Texaco entered into agreements to purchase voting securities constituting approximately 11.8 percent and 40.2 percent, respectively, of the outstanding Getty shares. The total value of the transaction is about $10.1 billion and, if consummated, would result in the second largest petroleum company in the United States in terms of assets.

IV. Trade and Commerce

A. *Manufacture of Refined Light Products in the Northeast United States*

15. One relevant line of commerce in which to evaluate the effects of the acquisition is the manufacture of refined light products.

16. The relevant section of the country is the Northeast region, composed of Maryland, Delaware, eastern Pennsylvania, New Jersey, eastern New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Vermont and Maine, and any submarket thereof. This relevant section of the country also includes the United States possession of the Virgin Islands.

17. The manufacture of refined light products in the relevant section of the country is moderately concentrated.

18. Respondents Texaco and Getty are actual competitors of each other and of other firms in the manufacture of refined light products in the relevant section of the country. Respondent Texaco owns a refinery in Westville, New Jersey, that manufactures refined light products. Respondent Getty owns a refinery in Delaware City, Delaware, that manufactures refined light products.

19. Refineries in the Northeast region have a locational advantage over Gulf Coast refineries in the supply of refined light products to the relevant section of the country.

20. Refineries in the Gulf Coast area are unlikely to be able to expand substantially, and within a reasonable period of time, shipments of refined light products to the relevant section of the country on Colonial Pipeline due to the likelihood of capacity constraints on the pipeline.

21. Foreign imports of refined light product into the relevant section of the country are unlikely within a reasonable period of time to provide substantial competition to the manufacturers of refined light product in the relevant section of the country.

22. Conditions of entry into the manufacture of refined light products in the relevant section of the country are difficult.

23. Texaco's incentives concerning the level of prices and outputs of refined light products in the relevant section of the country are affected by Texaco's share of refining capacity in the Northeast region. Texaco's share of refined light product supply into the Northeast region, Texaco's ownership share of Colonial Pipeline, and Texaco's level of shipments into the Northeast region on Colonial Pipeline.

B. *Transportation of Refined Light Products*

24. One relevant line of commerce in which to evaluate the effects of the acquisition is long distance transportation of refined light petroleum products into consuming regions. Within this market, petroleum product pipelines represent another relevant line of commerce.

25. One relevant section of the country is the Northeast region composed of Maryland, Delaware, eastern Pennsylvania, New Jersey, eastern New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, Vermont, and Maine.

26. Another relevant section of the country is the State of Colorado.

27. Transportation of refined petroleum products into the relevant sections of the country is highly concentrated.

28. Refinery capacity for refined light products in the State of

Colorado is not adequate to meet demand and substantial amounts of refined light products are transported into the State of Colorado.

29. There are four pipelines capable of transporting refined light products into the State of Colorado: The Wyco Pipe Line; The Medicine Bow Products Pipeline System; the Chase Pipe Line; and a pipeline owned by Phillips and Diamond Shamrock that runs from Borger, Texas, to Aurora, Colorado, near Denver.

30. The Wyco Pipe Line is jointly owned by Texaco (40 percent), Amoco (40 percent), and Mobil (20 percent). The South Line of the Wyco Pipe Line runs from Cheyenne, Wyoming, through Denver, Colorado, and terminates in Colorado Springs, Colorado.

31. The Chase Pipe Line is owned by Getty (50 percent) and Koch Oil Company (50 percent). It runs from El Dorado, Kansas to the Denver, Colorado area.

32. Texaco's incentives with respect to the level of tariffs on the Wyco Pipe Line and Chase Pipe Line are affected by Texaco's ownership share of pipelines capable of transporting refined light product into the State of Colorado.

33. Refinery capacity for refined light products in the Northeast region is not adequate to meet demand for refined light products in this relevant section of the country. The Colonial Pipeline is the dominant means of transporting additional refined light products into the Northeast region, supplying approximately 36.9 percent of total consumption of refined light products in the relevant section of the country in 1982. Four firms (Texaco, Gulf, Amoco, and CITGO Pipeline Investment Company) account for approximately 59.35 percent of ownership of the Colonial Pipeline.

34. Conditions of entry into the business of the transportation of refined light products by pipeline into the relevant sections of the country are difficult.

35. Respondents Texaco and Getty are actual competitors of each other and of other firms in the transportation of refined light products in the Northeast region. Respondent Texaco holds an ownership share of about 14.3 percent of the Colonial Pipeline. Respondent Getty owns 100 percent of the Getty Eastern Products Pipeline.

36. Tariff rates on the Colonial Pipeline are set by action of the Colonial Board of Directors.

37. Texaco's incentives concerning the level of tariffs on the Colonial Pipeline and expansion of the Colonial Pipeline are affected by Texaco's ownership share of Colonial Pipeline, Texaco's level of shipments on the Colonial Pipeline, Texaco's refining capacity in the Northeast region, and Texaco's share of petroleum product supply in the Northeast region.

C. *Marketing of Gasoline and Middle Distillate*

38. One relevant line of commerce in which to evaluate the effects of the acquisition is the wholesale distribution of gasoline and middle distillate and submarkets thereof.

39. The relevant sections of the country are the areas served by terminal clusters in or near the following cities and areas:

a. New Haven, Connecticut
b. Portland, Maine
c. New York City, New York
d. the Delaware River Valley
e. Providence, Rhode Island
f. Colorado Springs, Colorado
g. the Delmarva Peninsula.

40. The wholesale gasoline and middle distillate markets described in paragraphs 38 and 39 are concentrated with substantial shares of wholesale gasoline and middle distillate sales in each of the relevant sections of the country accounted for by respondents Texaco and Getty.

41. Conditions of entry into the wholesale distribution of gasoline and middle distillate are difficult.

42. Respondents Texaco and Getty are actual competitors of each other and of other firms in the wholesale distribution of gasoline and middle distillate in the relevant sections of the country. The combination of Texaco and Getty would increase the levels of concentration and combine their shares in the relevant sections of the country.

43. Texaco's incentives concerning the level of prices and output of gasoline and middle distillate sold from terminals and the price of and access to available terminal facilities are affected by Texaco's share of terminal capacity within each terminal cluster.

D. *Sale, Transportation and Refining of California Heavy Crude Oil into Petroleum Products*

44. One relevant line of commerce in which to evaluate the effects of the acquisition is the sale of heavy crude oil.

45. Another relevant line of commerce in which to evaluate the effects of the acquisition is the transportation of crude oil through pipelines including trunk lines and gathering lines.

46. For the sale and transportation of crude oil, one relevant section of the country is the State of California.

47. Another relevant line of commerce in which to evaluate the effects of the acquisition is the refining of crude oil into petroleum products.

48. For the refining of crude oil into petroleum products, one rele-

vant section of the country is the West Coast of the United States, extending from the State of California to the State of Washington.

49. Concentration in the relevant markets is high and entry conditions are difficult.

50. Both Getty and Texaco own refineries in the relevant market. Getty owns a refinery in Bakersfield, California. Texaco owns a refinery in Wilmington, California and Anacortes, Washington.

51. Getty produces substantially more heavy crude oil than it can refine on the West Coast.

52. Texaco produces substantially less heavy crude oil than it can refine on the West Coast.

53. Texaco owns and operates a proprietary pipeline system to gather heavy crude oil in the San Joaquin Valley of California.

54. Getty owns and operates a proprietary pipeline system that gathers heavy crude oil in the San Joaquin Valley and transports heavy crude oil from Bakersfield to the San Francisco area.

55. Texaco's West Coast refineries compete with the refineries of non-integrated refiners.

56. Texaco has an incentive to increase its refining of heavy crude oil and to lessen competition from non-integrated refiners.

57. The acquisition of Getty is likely to increase Texaco's incentives and ability to deny non-integrated refiners heavy crude oil and access to proprietary pipelines.

V. Effects

58. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant lines of commerce and relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. actual competition between respondents Texaco and Getty in the relevant lines of commerce and relevant sections of the country will be eliminated; and

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

59. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant lines of commerce and relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following additional ways, among others:

a. Texaco may have the incentive and ability to and may raise price levels and restrict output of refined light products from its Northeast region refining capacity because the acquisition increases Texaco's share of refining capacity in and pipeline capacity into the Northeast region, and increases Texaco's share of refined light product supply in the Northeast region.

b. Texaco may be likely to support and secure a higher level of tariffs on the Colonial Pipeline and oppose expansion of the Pipeline because the acquisition increases Texaco's refining capacity in the Northeast, increases Texaco's share of petroleum product supply in the Northeast, and decreases Texaco's relative shipment requirements on the Colonial Pipeline.

c. Texaco may be likely to support and secure a higher level of tariffs on the Wyco Pipe Line and Chase Pipe Line because the acquisition increases Texaco's share of pipeline capacity in the State of Colorado and increases its share of refined light product supply in the State of Colorado.

d. Control by Texaco of Getty's marketing operations is likely to reduce price competition in gasoline and middle distillate marketing provided by Getty and by independent private brand marketers previously supplied by Getty in the relevant sections of the country.

e. Texaco may have the incentive and ability to and may raise price levels and restrict output from gasoline and middle distillate terminals and raise the level of price and limit access to available terminal facilities in certain terminal clusters because the acquisition will increase Texaco's share of terminal capacity in these terminal clusters.

f. For reasons unrelated to the efficient use of resources, Texaco may have the incentives and ability to and may deny access to heavy crude oil and to proprietary pipeline transportation to non-integrated refiners, thereby increasing the difficulty of entry into West Coast refining, decreasing the competitive significance of non-integrated West Coast refiners, and increasing concentration in West Coast refining.

VI. Violation Charged

60. The proposed acquisition of the stock and assets of Getty by Texaco, as set forth in paragraph 14 herein, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Pertschuk dissented.

Decision and Order

The FTC having initiated an investigation of the proposed acquisition of shares of Getty Oil Company ("Getty") by Texaco Inc. ("Texaco"), and Texaco having been furnished with a copy of a draft complaint that the Bureau of Competition has presented to the Commission for its consideration, and which, if issued by the Commission would charge Texaco and Getty with violations of the Clayton Act and Federal Trade Commission Act; and

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules and the recommendation of its staff, and having concluded that the consent agreement should be modified along the lines suggested by staff, with changes; and

Respondent Texaco and complaint counsel having thereafter executed and submitted a revised agreement containing consent order dated July 9, 1984, containing modifications agreed to by the Commission; and

The executed agreement dated July 9, 1984, as modified, containing the following consent order, an admission by respondent Texaco of all the jurisdictional facts set forth in the 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 the complaint, and waivers as required by the Commission's Rules;

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

1. Respondent Texaco Inc. is a corporation organized, existing and doing business under and by the virtue of the laws of Delaware with its executive office located at 2000 Westchester Avenue, White Plains, New York.

2. Respondent Getty Oil Company, a wholly owned subsidiary of

Texaco, is a corporation organized and doing business under and by virtue of the laws of Delaware, with its executive office at 3810 Wilshire Boulevard, Los Angeles, California.

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.

As used in this order the following definitions shall apply:

(a) the *Acquisition* means Texaco's acquisition of the common stock of Getty.

(b) *Schedule A Properties* means the assets and businesses listed in Schedule A of this Order.

(c) *Getty* means Getty Oil Company, as it was constituted prior to the acquisition, including its parents, predecessors, subsidiaries, divisions, groups, affiliate entities, and their directors, officers, employees, agents and representatives, and their successors and assigns.

(d) *Texaco* means Texaco Inc., its predecessors, subsidiaries, divisions, groups, affiliate entities, and their directors, officers, employees, agents and representatives, and their successors and assigns.

II.

It is ordered, That:

(A) Within 12 months of the date of service of this order, Texaco shall divest, absolutely and in good faith, the Schedule A properties.

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

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

(D) If a trustee is appointed by a court or the Commission pursuant to Paragraph II(C) of this order, Texaco shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

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

2. The trustee shall have the power and authority to divest any Schedule A properties that have not been divested by Texaco within the time period for divestiture in paragraph II(A). The trustee shall have 18 months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and if the trustee was appointed by a court, subject also to the prior approval of the court. If, however, at the end of the 18-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission or by the court, if the trustee was appointed by a court.

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

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

5. The trustee shall serve at the cost and expense of Texaco on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the court or the Commission of the account of the trustee, including fees for his or her services, all remaining monies shall be paid to Texaco and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

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

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

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

(E) Texaco shall maintain the viability and marketability of the Schedule A properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear.

(F) Until such time as the Schedule A(1) assets have been divested, Texaco shall continue to hold the Getty assets in Schedule A(1) separate and apart in a subsidiary or subdivision on the following terms and conditions:

1. Texaco shall not exercise direction or control over, or influence directly or indirectly, the day-to-day operations or personnel of the subsidiary or subdivision except as necessary to comply with this order;

2. Except as required by law and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending litigation or negotiating agreements to dispose of assets, Texaco shall not have access to any material confidential information relating to the subsidiary's or subdivision's operations not in the public domain. "Material confidential information" as used herein means competitively sensitive or proprietary information not independently known to Texaco from sources other than from the subsidiary or subdivision, and includes, but is not limited to, customer lists, price lists, price information, price zones, marketing methods, patents, technologies, processes, or other trade secrets.

(G) Until such time as the Schedule A(2)(a) or (b) assets have been divested, Texaco shall not exercise direction or control over, influence directly or indirectly, or exercise any voting rights with respect to the Wyco Pipe Line.

III.

It is further ordered, That, within (60) days after the date of service of this order, and every sixty (60) days thereafter until Texaco has fully complied with the provisions of Paragraph II of this order, Texaco shall submit to the Federal Trade Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying with, or has complied with that provision. Texaco shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of properties specified in paragraph II of this order, including the identity of all parties contacted. Texaco also shall include in its compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning divestiture.

IV.

It is further ordered, That, for ten (10) years following the date that this order shall become final, Texaco shall support, vote in favor of and take no action to impede any and all proposals and actions (including placing the matter on agenda for discussion, study proposals, feasibility studies, or engineering studies) that have been made or supported by any owner of an interest in the Colonial Pipeline Company to expand, extend, or otherwise increase the capacity of the Colonial Pipeline north of Dorsey Junction, Maryland or otherwise to increase or enhance the ability of the Colonial Pipeline to transport refined product north of Dorsey Junction, Maryland.

V.

It is further ordered, That Texaco sell California crude oil of similar grade and quality to that sold by Getty in 1983 to each Eligible Purchaser in accordance with the terms and conditions listed in Schedule B.

VI.

It is further ordered, That, for ten (10) years following the date that this order shall become final, Texaco shall offer access to Getty's pipeline from Santa Fe Springs to Los Angeles to any Getty customer using the pipeline in 1983 in accordance with the terms and conditions in effect in 1983. Transportation fees shall be the fees levied for Getty's most recent arrangement in effect in December 1983 for comparable transportation, adjusted for the "Fuels and Related Products and Power Index," as published in "Producer Prices and Price Index," U.S. Department of Labor, Bureau of Labor Statistics. Any disputes between Texaco and any customer shall be settled by arbitration. If the parties are unable to agree on an arbitrator, the dispute shall be settled pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties and judgment thereupon may be entered in any court of competent jurisdiction. A violation by Texaco of any order of the arbitrator shall be a violation of this order.

VII.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten (10) years from and after the date of service of this order, Texaco shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, assets used or previously used in (and still suitable for use in), any interest in, or the whole or any part of the stock, or share capital of any company that is engaged in:

(A) refining or the wholesale distribution of gasoline or middle distillates (including terminals and bulk plants) in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, or the District of Columbia; or

(B) any petroleum product pipeline transportation in or into Colorado.

Provided, however, these prohibitions shall not relate to the construction of new facilities or participation in joint ventures in which Texaco is a participant on the date of service of the order.

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

VIII.

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

(A) Access during the office hours 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 Texaco relating to any matters contained in this order; and

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

IX.

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

Commissioner Pertschuk dissented.

Schedule A

Schedule of Assets and Operations

1. Getty's petroleum-related assets, including the "Getty" brand name, "Getty" trademark, and product inventories located in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, West Virginia, and the District of Columbia, other than the Getty refinery located in Delaware and the Getty inventories, crude handling facility, product pipeline, and terminal connected to the refinery, and 30 of the properties listed in Schedule C. Texaco's terminal facility near Salisbury, Maryland. Texaco's Eagle Point Refinery (Westville, N.J.), including any crude handling facilities, terminals, inventories, or wholly-owned pipelines connected to the refinery. (The assets in this Paragraph, A(1), need not be divested as one package unless the Commission should so require in accordance with the terms of Paragraph II B of this Order.)

2. Either

a. Texaco's interest in the Wyco Pipe Line, or

b. The Getty Refining and Marketing Company's El Dorado, Kansas refinery and inventories, as well as related feedstock pipelines and terminals including Getty's interest in the Conway, Kansas storage facility and related terminals and pipelines; Osage Pipeline Co.; Boyer terminal, the Oklahoma-Kansas portion of Getty Pipeline, Inc. and Getty Crude Gathering, Inc.; the Cushing Crude Terminal; and the natural gas pipeline serving the refinery owned by Getty Gas Gathering, Inc. In addition, the Getty Refining and Marketing Company's marketing, sales and transportation assets, inventories, and the "Skelly" and "Surfco" brand names and trademarks for use in the sale of gasoline and middle distillate, in: Colorado, Illinois, Indiana, Iowa, Kansas, Minnesota, Michigan, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Wisconsin, Wyoming and Texas and Getty's ownership interest in the Chase Transportation Company and the Chase Terminal Co. and any other product pipelines connected to the El Dorado refinery.

Schedule B

Terms and Conditions

1. *Eligible Purchasers*—Texaco shall offer California crude oil on the contractual terms and conditions set out below, to the following entities:

(a) all purchasers of California crude oil from Getty in 1983 except Atlantic Richfield Co., British Petroleum Co., Chevron USA Inc., Exxon Co., Gulf Oil Co., Mobil Oil Corp., Phillips Petroleum Co., Shell Oil Co., Standard Oil Co. (Ohio), and Union Oil Co. and each of their affiliates, including affiliates acquired in whole or in part after the date that this order shall become final ("Excluded Companies");

(b) entities other than Excluded Companies that acquired Getty California crude oil (including crude oil obtained by Getty through production, acquisition or exchange) during 1983 from an Excluded Company under a contract of three months or more in duration (For the purposes of this provision and Paragraph B(5)(b), the acquisition of Getty California crude oil by an entity shall include any contractual arrangement for the receipt of a net volume of crude oil that confers on such entity the right to receive or to direct the sale, exchange or other disposition of Getty California crude oil to or by or through another);

(c) entities that have refineries located in PADD V and that had a total refining capacity worldwide of less than 100,000 barrels/day in December 1983.

Notwithstanding such offer Texaco and any Eligible Purchaser may agree to other terms and conditions.

2. *Term*—From the date of termination of the contract on which Texaco's supply obligation is based or from 45 days after the date that this Order shall become final, if no contract exists, until July 1, 1989, or such shorter term desired by the Eligible Purchaser.

3. *Price*—The maximum price shall be determined as follows:

(a) The arithmetic average of the prices posted for crude oil in the field where posted by any company that produced during the previous calendar year not less than 25,000 barrels/day of the crude oil produced in the state of California. *Provided, however,* that Texaco's posting shall not account for more than 25 percent in the average price.

(b) If one or more of the posters in a field, satisfying the criteria in Paragraph B(3)(a), above, except Texaco, shall post a price for crude oil in that field higher than the average for a period of at least ninety (90) consecutive days, then, commencing on the 91st day, the price shall be the highest price so posted for more than ninety (90) consecutive days. This price shall remain in effect so long as it remains highest. Thereafter the price shall revert to the price as determined by subparagraph (a).

(c) If there is no posted price for a crude oil in a field from which crude oil is sold, the price for that crude oil shall be the price determined in accordance with subparagraph (a) for similar crude oil from the nearest field in California, with adjustment for gravity in accordance with prevailing practice in the industry at the time and place.

4. *Delivery*—If appropriate based on the location of the crude oil and the desired destination of the Eligible Purchaser, through Getty's or Texaco's existing pipelines (directly or through normal and customary accommodations with competitors' pipeline transportation systems to the extent Getty or Texaco engaged in such accommodations in their past course of dealings and to the extent such accommodations remain available to Texaco) on conditions similar to conditions in December 1983. Transportation fees shall be the fees levied for Getty's most recent arrangement in effect in December 1983 for comparable transportation, adjusted for the "Fuels and Related Products and Power Index," as published in "Producer Prices and Price Index," U.S. Department of Labor, Bureau of Labor Statistics. *Provided, however,* that the fees may include a

reasonable return on any new investment to expand the capacity or extend the length of the pipelines.

5. *Volume per year*—

(a) Texaco shall offer to each Eligible Purchaser under Paragraph B(1)(a) the percentage set out in Paragraph B(5)(d) of the volume of California crude oil such purchaser acquired from Getty in 1983.

(b) Texaco shall offer to each Eligible Purchaser under Paragraph B(1)(b) the percentage set out in Paragraph B(5)(d) of the volume of Getty California crude oil such purchaser acquired from any Excluded Company in 1983. *Provided, however,* that Texaco may provide such volume under an existing contract to the extent the Eligible Purchaser has contracted with Texaco for net purchases of California crude oil. In the event of any such contract, Texaco shall offer to rescind such contract and substitute therefor a new contract pursuant to this order.

(c) If any Eligible Purchaser under Paragraph (B)(1)(a) and B(1)(b) should take less than the volume of crude oil that Texaco is required to offer, the Eligible Purchaser's future rights are proportionally reduced but Texaco shall make the volume not taken available for sale, under the terms and conditions set out herein, to Eligible Purchasers under Paragraph B(1)(c). *Provided, however,* Texaco shall not be required to prorate among all such Eligible Purchasers but may sell to any one or more of them so long as such volume is sold.

(d) In each year, Texaco shall apply the following percentage to determine the volume it must offer to each Eligible Purchaser under Paragraphs B(5)(a) and (b):

1984 –	81 percent
1985 –	83 percent
1986 –	86 percent
1987 –	90 percent
1988 –	100 percent
1989 –	100 percent.

6. *Exchanges and Buy-Sell Arrangements*—Texaco shall have no obligation to offer crude oil under Paragraph V and Schedule B of this order for any volume of crude oil acquired in 1983 from Getty or an Excluded Company through an exchange or buy-sell arrangement to the extent that no net sale of crude oil occurred.

7. *Resale*—Texaco shall not condition any sale under this order on any requirement for resale or exchange of any crude oil. *Provided, however,* that the parties may agree to exchanges or buy-sell arrangements that facilitate the delivery of crude oil and do not diminish the net volume sold, subject to normal pipeline differentials and volume allowances.

8. *Practicality*—Texaco shall not be required to deliver crude oil to the extent that Getty's production has ceased or been reduced in the course of normal operations below its 1983 level in California. *Provided, however,* any volumes not sold because production has ceased or been reduced shall be sold to the Eligible Purchaser on the same terms and conditions when production recommences, even after July 1, 1989.

9. *Arbitration*—Any dispute between Texaco and any party with a claim under Paragraph V and Schedule B of this order shall be settled by arbitration. In any case, where the application of the terms of Paragraph V and Schedule B is not clear, the arbitrator shall resolve disputes in a manner that satisfies the objectives of this order. If the parties are unable to agree on an arbitrator within thirty (30) days, the dispute shall be settled pursuant to the Commercial Arbitration Rules and the procedures of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties and judgment thereupon may be entered in any court of competent jurisdiction. A violation by Texaco of any order of the arbitrator shall be a violation of this order.

10. *Other*—The contract will be subject to force majeure and other customary terms to be negotiated, consistent with terms customary in the industry, including customary credit terms consistent with the terms that would be available to the Eligible Purchaser in an arm's-length purchase of crude oil. The contract may be subject to prospective prorationing to compensate for inconsistent arbitration decisions or arbitration awards for past violations of this order that would require Texaco to sell more than 100 percent of the volume that Texaco is required and has committed to sell under this order.

Schedule C

GETTY NORTHEAST PROPERTIES

Withheld Properties

1.	Massachusetts	–	1 Powder Mill Rd.	c/o	Maynard, MA.
2.			1060 Old Conn. Path	c/o	Framingham, MA.
3.			221 Main St.	c/o	Gardner, MA.
4.			245 N. Main St.	c/o	Randolph, MA.
5.			609 Park Ave.	c/o	Worcester, MA.
6.			671 Washington St.	co/LL	Quincy, MA.
7.			437 High Plain St.	L/b	Walpole, MA.
8.			835 Rockdale Ave.	c/o	New Bedford, MA.
9.			150 Plymouth Ave.	c/o	Fall River, MA.
10.			964 Boylston St.	c/o	Newton, MA.
11.			346 Sea St.	L/b	Quincy, MA.
12.	Connecticut	–	156 Boston Post Rd.	co/LL	Waterford, CT.
13.	Rhode Island	–	33 Jefferson Blvd.	c/o	Warwick, R.I.
14.			1307 Post Rd.	c/o	Warwick, R.I.
15.			1669 Warwick Ave.	c/o	Warwick, R.I.
16.			722 Willett Ave.	c/o	E. Providence, R.I.
17.			495 Tower Hill Rd.	c/o	E. Kingston, R.I.
18.			2501 W. Shore Rd.	L/B	Warwick, R.I.
19.	New York	–	1128 E. Gun Hill Rd.	co/LL	Bronx, N.Y.
20.			1133 Jerome Ave.	L/B	Bronx, N.Y.
21.			1740 Jerome Ave.	L/B	Bronx, N.Y.
22.			1881 Forest Ave.	c/o	Staten Island, N.Y.
23.			1124 First Ave.	L/B	New York, N.Y.
24.			1981 Ocean Ave.	L/B	Brooklyn, N.Y.
25.			920 Hylan Blvd.	L/B	Staten Island, N.Y.
26.			39-15 College Pt. Blvd.	L/B	New York, N.Y.
27.			152 10th Ave.	L/B	New York, N.Y.
28.			571 Coney Island Ave.	L/B	Brooklyn, N.Y.
29.	New Jersey	–	350 Preakness Ave.	c/o	Paterson, N.J.
30.			Rt. 30 - McLean Blvd.	c/o	Paterson, N.J.
31.			132 Rt. 46	c/o	Budd Lake, N.J.
32.			Rt. 9 & Locust St.	c/o	Lakewood, N.J.
33.			Rt. 88 (South Side)	c/o	Bricktown, N.J.
34.			551 W. Front St.	c/o	Plainfield, N.J.
35.			1650 Lincoln Hwy (Rt. 27)	c/o	Edison Twnp., N.J.

36.			1121 St. George Ave.	c/o	Woodbridge, N.J.
37.			Sicklerville & Andrews Rd.	co/LL	Winslow Twnp., N.J.
38.			2031 Rt. 22 (Westbd)	co/LL	Union, N.J.
39.			White Horse Pk & Franklin	co/LL	Berlin, N.J.
.0.			48 French St.	co/LL	New Brunswick, N.J.
41.			Rt. 130 & Willow Dr.	L/b	Cinnaminson, N.J.
42.			County Line Rd.	L/b	Jackson Twp., N.J.
43.			Delsea Drive	L/b	Deptford Park, N.J.
44.			Rt. 20 North	L/b	Paterson, N.J.
45.			Rt. 35 & Poole Ave.	L/b	Hazlet, N.J.
46.			Rt. 22 (East)	L/b	Hillside, N.J.
47.			Middlesex & Main St.	L/b	Metuchen, N.J.
48.			2352 Morris Ave.	c/o	Union, N.J.
49.			Egg. Harbor Rd.	c/o	Washington, N.J.
50.			738 Cedar Lane	L/b	Teaneck, N.J.
51.			2284 Rt. #4	c/o	Fort Lee, N.J.
52.	Pennsylvania	–	Hunt Pk & Clearfield	c/o	Philadelphia, PA.
53.			6900 Frankford Rd.	c/o	Philadelphia, PA.
54.			Rt. 29 & Chestnut St.	c/o	Emmons, PA.
55.			3024 New Rogers Rd.	c/o	Bristol Twnp., PA.
56.			Albright & Tilghman	c/o	Allentown, PA.
57.			U.S. 202 & P.A. Trnpk.	c/o	King of Prussia, PA.
58.			Bustleton & Buck Rds.	c/o	Feasterville, PA.
59.	Maryland	–	121 South Bond St.	c/o	Bel Air, MD.
60.			149 Back River Rd.	c/o	Baltimore, MD.
61.			Oakleigh Rd.	L/b	Parkville, MD.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

Contrary to what appears to be prevailing Commission policy, Congress did not direct the antitrust agencies to strain the seams of the consent agreement-partial divestiture process to preserve massive mergers. We could have sued to enjoin this acquisition and we should have.

The final order as adopted by the majority has two major flaws. It fails to remedy a major competitive problem concerning independent refiners in California and instead creates a highly regulatory, incredibly complex and temporary crude supply program. Second, it fails to incorporate safeguards recently included in the *Socal/Gulf* agreement and, therefore, risks the ultimate unsuccessful divestiture and closing of assets which must be spun off under the order. [49 FR 23812, June 7, 1984]

The staff's theory concerning the west coast crude oil market is that Getty has been the largest supplier of heavy crude oil to non-integrated refiners in California. Texaco does not have the same incentives as Getty to supply independent refiners, in large part because of the Windfall Profits Tax, and, therefore, is more likely to divert crude to its own refinery system. Such a diversion would endanger the long run viability of refiners there and provide a means and added incentive for Texaco to attempt to acquire them at distress prices.

The Commission accepts this theory but opts for the inadequate remedy of requiring Texaco to supply crude oil for five years to independent refiners. This crude allocation scheme has become more complex between the initial and final versions of the order because of new questions about how to calculate price, volume, and related terms such as transportation and credit. The staff has done a good job under the circumstances in constructing a complex system which attempts to be fair, but the resulting scheme is incredibly complex and uncertain, as indicated by the fact that its features were still being revised and new problems discovered even within the last few days. According to staff, Texaco itself argued in negotiations that it foresaw the possibility of large numbers of disputes and that the resolution of them "might take 100 years." As the Deputy Director of the Bureau of Economics argues, for the FTC to recreate the Petroleum Entitlements Program when the agency has consistently challenged the regulatory actions of other agencies is inappropriate.[1] Moreover, the

[1] It is frequent Commission practice for an individual Commissioner to state publicly the theories and findings of staff in explaining his or her decision on a Commission decision if no confidential commercial information is disclosed. Nevertheless, the General Counsel recently prepared a memorandum interpreting our confidentiality rules as forbidding any individual Commissioner from stating publicly any staff arguments or conclusions prepared to aid Commission deliberations unless a majority of the Commission agrees. Needless to say, this sweeping interpretation would mean that the majority could pick and choose which staff findings an individual Commissioner could disclose. Thus, it provides ample opportunity for suppression of dissenting views as well as making the

(footnote cont'd)

majority's confident reliance on only a five year requirement is speculative and may well prove inadequate.[2]

The second problem is that the order does not include the safeguards that were built into the provisionally accepted *Socal/Gulf* order, in particular, holding the two companies separate until the proposed divestitures are approved and providing for additional assets, including crude oil, to be divested in order to insure spun off assets remain viable. The staff makes an argument that the concerns that necessitated the safeguards in *Socal/Gulf* are not applicable here. I disagree. The general proposition that was recognized in *Socal/Gulf* was that divestiture of oil company assets, particularly refineries, may not result in viable entities. One way to ensure these divestitures are successful is to include additional assets, such as a crude oil supply, in the divestiture package, and to hold the merging companies separate—and in effect retain the option to challenge the underlying transaction—if the divestitures prove to be unworkable.

The Commission justifiably claimed that the *Socal/Gulf* agreement was a major improvement over prior partial divestiture orders. But now, without any real ground for treating this agreement differently, it refuses to adopt the *Socal/Gulf* approach. The risk of unsuccessful divestitures arose most clearly in the case of the two refineries—Eagle Point and El Dorado. In the case of the El Dorado refinery, the Commission purports to have solved the problem of preserving it by allowing Texaco to retain it, along with pipeline and other assets, and instead divest its interest in the Wyco pipeline. Originally, staff says, the inclusion of the El Dorado refinery in the divestiture package with the Chase pipeline was justified on the grounds that this pipeline divestiture would not be viable without a refinery. It is not entirely clear why now the Wyco pipeline interest can be divested alone, but no additional assets are needed to insure viability. As for Eagle Point, the Commission hopes for the best.

Given that the Commission has not included any special safeguards in this order, it is enlightening to review the administration's response to Congressional consideration of H.R. 5452, introduced by Congressman Florio, which would insure that an oil company merger did not become final until the divestitures were approved.[3] The Justice Department opposed this bill, arguing: "its basic goals . . . are fully protected by existing procedures. . . . If a hold separate order is required pending any given divestiture, it can be obtained through

process of Commissioners communicating with the public about what the agency is doing and thinking extremely cumbersome. The General Counsel's opinion has fortunately never been adopted by the Commission. It is impractical, contrary to past practice and highly inadvisable. I decline to follow it.

[2] *See, e.g.*, the Comments of California Attorney General John K. Van de Kamp (Comment No. 283) and independent refiner comments (No. 228, 236, 237, 240, 263).

[3] Similar legislation was introduced in the Senate by Senator Kassebaum.

consent or litigation."[4] Thus, we have the spectacle of the FTC failing to include safeguards in one merger order that it said were necessary in a similar case weeks ago, while the Justice Department opposes additional legislation on the grounds that the antitrust agencies can obtain these safeguards through existing procedures.

Conclusion

The error of the majority in this case has been to accept too readily the presumption that, whatever we do, the basic transaction must be preserved. As a result, we have accepted an extremely complex and uncertain partial divestiture plan along with a temporary and highly regulatory crude oil entitlements program. I continue to believe the Commission would have been more faithful to the Congressional intent behind Section 7 of the Clayton Act by seeking to enjoin this merger.

[4] Letter from Robert A. McConnell, Assistant Attorney General for Legislative Affairs, to Congressman James J. Florio, June 13, 1984, p.6.

IN THE MATTER OF

GENSTAR LIMITED

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

Docket No. C-3049. Consent Order, Nov. 10, 1980—Modifying Order, July 12, 1984

This order reopens the proceeding and modifies the Commission's Order issued on Nov. 10, 1980 (96 F.T.C. 795) to permit respondent to both ship cement from its Tilbury Island Plant in British Columbia to California, Oregon, Washington and Nevada, and acquire cement distribution terminals in those four states without prior Commission approval.

ORDER MODIFYING DECISION AND ORDER

Genstar Limited has requested that the Commission modify its Order in Docket No. C-3049 (1) to relieve Genstar of its obligation under Paragraph II of the Order to obtain, until January 31, 1990, Commission approval to ship cement it produces outside the United States to cement facilities it owns in the four-state area of Washington, Oregon, Nevada, and California ("four-state area"), and (2) to relieve Genstar of its obligation under Paragraph VII(B) to obtain, until January 31, 1985, Commission approval before acquiring active cement terminals in the four-state area. After duly considering Genstar's petition, the Commission has determined that Genstar has demonstrated changed circumstances of fact that warrant reopening of the Order, and that the Order should be modified in the manner that Genstar requests.

Before 1980, when Genstar acquired the Flintkote Company, Genstar had no cement plants in the relevant market and did not sell directly to end-users; Genstar, however, supplied cement to cement producers in the market. Genstar's proposed acquisition of Flintkote, the third largest competitor in the area, presented several alleged anticompetitive possibilities.

The Commission and Genstar agreed to a cease and desist Order against Genstar that allowed the proposed acquisition to take place, but that contained provisions designed to eliminate the possible anticompetitive effects of the acquisition. Paragraphs II and III, in conjunction with the cement terminal moratorium provision contained in Paragraph VII(B), were designed to avoid the possibility that Genstar would dominate the market through the combination of its status as a major supplier and its ownership of Flintkote. Paragraph II restricts Genstar's ability to import cement into the relevant area for its own use, and Paragraph III requires Genstar until December 31, 1984, to make available to producers in the market excess cement produced by the Canadian plant from which Genstar supplies cement to the relevant area. The provision in Paragraph VII(B) that restricts Genstar's ability to acquire active cement terminals in the relevant market was an adjunct to Paragraphs II and III.

When the Commission accepted the consent Order, it recognized that the Order's import restrictions would limit Genstar's ability to compete to its fullest in the relevant market; however, the provisions were believed to be necessary during the period of short supply that then prevailed, to eliminate the opportunity for Genstar to effect an anticompetitive supply squeeze. Due to increased capacity in the relevant market, such an event no longer is a realistic possibility. Consequently, there no longer is any reason to restrict Genstar from competing fully in the market. This changed circumstance of fact and the public interest therefore require modification of the Order. Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is ordered, That the Order be, and it hereby is, modified by (1) deleting Paragraph II of the Order, and (2) substituting for Paragraph VII(B) of the Order the following:

VII.

It is further ordered, That prior to January 31, 1985 Genstar shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of:

* * * * * * *

B. any Product manufacturing plant located in any Cement Market Area.

Commissioner Calvani dissented.

IN THE MATTER OF

BROWN SHOE COMPANY, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7606. Modified Order, August 3, 1966—Order to Set Aside, July 16, 1984

This order grants petition of Brown Group, Inc. (formerly Brown Shoe Company, Inc. and hereafter "Brown") to reopen the proceeding in Docket No. 7606 and set aside the 1966 order entered against Brown which prohibited the company from entering into agreements that would prevent retailers from deciding to purchase a competitor's line of shoes or the amount of competitor's shoes to stock. Upon considering Brown's petition, the public comments and other relevant information, the Commission found that granting respondent's request would be in the public interest. The Commission noted that given the present characteristics of the shoe industry and Brown's lack of market power to exclude competitors, the 1966 order now serves no procompetitive purpose and may impede respondent's efforts to achieve efficient distribution of its products through law practices available to its competitors. Accordingly, the proceeding in Docket No. 7606 is reopened and the Commission's order of August 3, 1966, 70 F.T.C. 491, is set aside.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED AUGUST 3, 1966

By a petition filed on March 19, 1984, respondent Brown Group, Inc. (formerly Brown Shoe Company, Inc. and hereafter "Brown") requests that the Commission reopen the proceeding in Docket No. 7606 and set aside the order against Brown. Upon consideration of Brown's petition, the public comments, and other relevant information, the Commission now finds that the public interest warrants reopening the proceeding and setting aside the order.

The record describes an industry in which any attempt by Brown to impose exclusive dealing on retailers today would have no significant anticompetitive effects. Imports have dramatically penetrated the market, representing about 60 percent of present domestic consumption. Some 300 manufacturers account for U.S. production, with 25 providing about half of domestic output. There is no evidence that within this fragmented market structure any single competitor, whether a domestic manufacturer or supplier of imports, has significant market power to exclude other competitors. To the contrary, significant entry continues to occur, demonstrating a lack of natural or artificial barriers to entry.

Given the present characteristics of the shoe industry and that Brown does not have market power by which it may exclude competitors, the order now serves no procompetitive purpose and may impede

Brown's efforts to achieve efficient distribution of its products through lawful practices available to its competitors.

Accordingly,

It is ordered, That this matter be, and it hereby is reopened, and that the Commission's August 3, 1966 order be and it is hereby set aside.

IN THE MATTER OF

CALIFORNIA-TEXAS OIL COMPANY, ET AL.

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

Docket C-3138. Complaint, July 16, 1984—Decision, July 16, 1984

This consent order requires a Glendale, Ca. company and its corporate president to cease making mileage or emission improvement claims for the "AWECO Mileage Extender" or any gasoline additive or automotive device, unless the claims can be substantiated by competent and reliable scientific tests. Respondents must also prominently disclose any material limitations or inferences that can be drawn from test results used to substantiate mileage or emission reduction claims. The order further bars the company from making any fuel economy or automotive emission performance claims using the phrase "up to" or words of similar import, unless a substantial number of consumers, under normal driving conditions, can achieve the maximum level of performance claimed.

Appearances

For the Commission: *Paul R. Roark,* Los Angeles, Ca.

For the respondent: *Pro se.*

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 California-Texas Oil Company, a California corporation, and Eileen M. Robertson, individually and as an officer and director of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said 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. Respondent California-Texas Oil Company ("CTO of California") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 605 N. Louise Street, Glendale, California.

Respondent Eileen M. Robertson is president, a director and part owner of CTO of California. She formulates, directs and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Her address is the same as that of CTO of California.

PAR. 2. Respondents are now and for some time past have been engaged in manufacturing, offering for sale, sale, and distribution of a product known as AWECO Mileage Extender (hereinafter "AWECO"). Respondents, in connection with their offering AWECO for sale, have also published and disseminated, and now publish and disseminate, advertisements and other sales promotional materials for the purpose of promoting the sale of AWECO. AWECO is an automobile gasoline additive advertised to be a means of substantially improving fuel economy in automobiles and of reducing automobile emissions.

PAR. 3. In the course and conduct of their said business, respondents have disseminated and caused the dissemination of certain advertisements of AWECO by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, television broadcasts of interstate transmission and the insertion of advertisements in newspapers with interstate circulations, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of AWECO in or affecting commerce.

PAR. 4. Among the advertisements and other sales promotional materials disseminated by respondents are the advertisements identified as Exhibit A, which is attached hereto.

PAR. 5. Through the use of the advertisements referred to in Paragraph Four and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that:

a. Use of AWECO in an automobile is proven to increase mileage by an average of 15%.

b. Use of AWECO is an automobile is proven to increase mileage by 15%, or close to 15%.

c. Use of AWECO in an automobile is proven to increase mileage by up to 15%.

d. Use of AWECO in an automobile is proven to substantially improve fuel economy.

e. Competent and reliable tests prove the fuel economy claims made for AWECO.

PAR. 6. By and through the use of these and other representations, respondents have represented, directly or by implication, that:

a. Use of AWECO in an automobile will increase mileage by an average of 15% under circumstances normally and expectably encountered by consumers.

b. Use of AWECO in an automobile will increase mileage by 15% or close to 15% under circumstances normally and expectably encountered by consumers.

c. Use of AWECO in an automobile will increase mileage by up to 15% under circumstances normally and expectably encountered by consumers.

d. Use of AWECO in an automobile will substantially improve fuel economy under circumstances normally and expectably encountered by consumers.

e. Competent and reliable tests prove the fuel economy claims made for AWECO.

PAR. 7. In truth and in fact, contrary to respondents' representations in Paragraph Five:

a. Few, if any, consumers under circumstances normally and expectably encountered will, when using AWECO as directed in an automobile, extend mileage by an average of 15%, by 15%, or by up to 15%.

b. Few, if any, consumers under circumstances normally and expectably encountered will, when using AWECO as directed in an automobile, substantially improve fuel economy.

c. No competent and reliable tests prove the fuel economy claims made for AWECO.

Therefore, said advertisements and other sales promotional materials disseminated by respondents are false or deceptive.

PAR. 8. At the time respondents made the representations alleged in Paragraph Five of the complaint, they did not possess and rely upon a reasonable basis for such representations because, *inter alia:*

a. Respondents' tests were not designed or conducted to assess product performance in a manner appropriate and relevant to the representations made. For example:

1. Road tests were conducted under conditions different from those recommended in the instructions to consumers,

2. Both the drivers in the road tests and those conducting the tests knew when the additive was being added to the vehicles and were encouraged to perform in such way as to assure favorable results for the additive,

3. Cars showing favorable results were tested repeatedly to skew the test results, and

4. Alternator tests were conducted using two different engines in such a way as to make it impossible to know whether the differences in test results were attributable to the presence of the additive or to differences in the engines.

b. Even if respondents' test design and conduct were appropriate, they did not accurately rely upon the test results in making their performance representations. For example, despite the fact that the road tests showed an average miles per gallon increase in fuel economy of 9%, many of respondents' advertisements contained claims that AWECO would extend mileage by 15%.

c. Respondents' performance representations ignored unfavorable test data. For example:

1. Respondents systematically excluded cars from their road tests that showed no or little mileage improvement from the use of AWECO,

2. Respondents ignored chassis dynamometer tests that showed only a 1.6% increase in urban fuel economy driving and 2.22% increase in highway fuel economy, and

3. Respondents ignored road tests conducted by an independent laboratory that showed only a .99% increase in fuel economy.

Therefore, said advertisements and other sales promotional materials are deceptive and unfair.

PAR. 9. Exhibit A and other advertisements and sales promotional materials disseminated by respondents represent, directly or by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Five. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements and other sales promotional materials disseminated by respondents are deceptive and unfair.

PAR. 10. In the course and conduct of their business, and at the times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products for improving automobile mileage and reducing automobile emissions.

PAR. 11. The use by respondents of the aforesaid false or deceptive representations, and the dissemination of the aforesaid false or deceptive advertisements and other sales promotional materials have had and now have the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

EXHIBIT A

AWECO

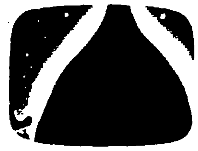
TITLE "GROW"
JOB NO.: TBD

LENGTH: 30 SECONDS
DATE: 5 10 80

VOCAL: WATCH YOUR MILEAGE...

GROW...


GROW...


GROW...

WITH AWECO.

ANNCR (VO): Introducing...

AWECO Mileage Extender.

Proven to increase MPG up to 15%.

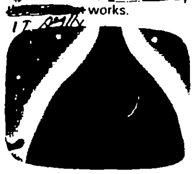
For most drivers, that's 1500 extra miles a year.
VOCAL: AWECO

ANNCR (VO): [redacted] works.

VOCAL: WATCH YOUR MILEAGE...

GROW...


GROW


GROW...

WITH...

AWECO.

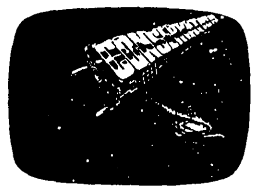

MUSIC: BUTTON

AWECO

TITLE: "GALAXY"
JOB NO.: TBD

LENGTH: 30 SECONDS
DATE: 5/10/80

MUSIC SPACEY

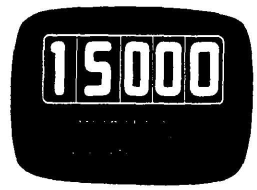


ANNCR (VO): Out of the galaxy of theories orbiting the gasoline crisis...

one real answer has taken shape.

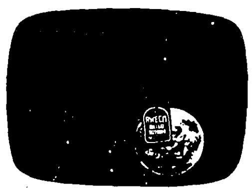
AWECO Mileage extender.

Proven to increase mileage up to 15%.

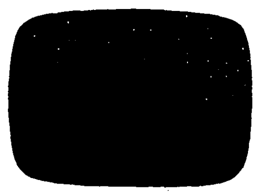


For most drivers, that's 1500 extra *miles a year.*

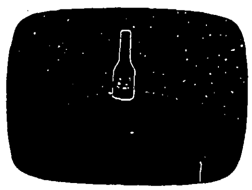
AWECO. ~~[illegible]~~ works.
IT REALLY



SFX: CAR SPEEDING AWAY
MUSIC: UP FULL

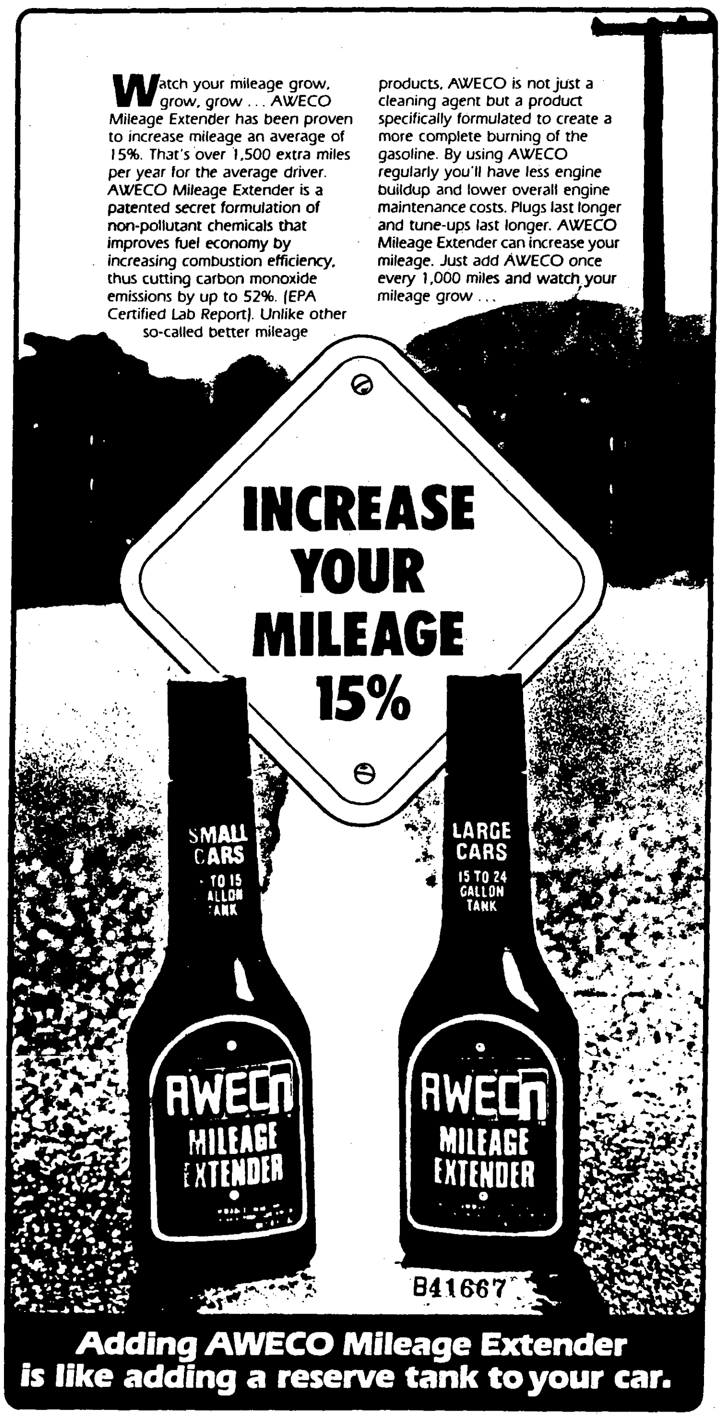


ANNCR (VO): It will save you gas...



and it will do it *now.*

AWECO.


Watch your mileage grow, grow, grow . . . AWECO Mileage Extender has been proven to increase mileage an average of 15%. That's over 1,500 extra miles per year for the average driver. AWECO Mileage Extender is a patented secret formulation of non-pollutant chemicals that improves fuel economy by increasing combustion efficiency, thus cutting carbon monoxide emissions by up to 52%. (EPA Certified Lab Report). Unlike other so-called better mileage products, AWECO is not just a cleaning agent but a product specifically formulated to create a more complete burning of the gasoline. By using AWECO regularly you'll have less engine buildup and lower overall engine maintenance costs. Plugs last longer and tune-ups last longer. AWECO Mileage Extender can increase your mileage. Just add AWECO once every 1,000 miles and watch your mileage grow . . .
INCREASE YOUR MILEAGE 15%
SMALL CARS
LARGE CARS
15 TO 24 GALLON TANK
AWECO
MILEAGE EXTENDER
AWECO
MILEAGE EXTENDER
B41667
Adding AWECO Mileage Extender is like adding a reserve tank to your car.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

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

1. Respondent California-Texas Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1173 North Westmoreland Avenue, in the City of Los Angeles, State of California.

Respondent Eileen M. Robertson is an officer of said corporation. She formulates, directs and controls the policies, acts and practices of said corporation, and her principal office and place of business is located at the above stated address.

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

Order

I.

It is ordered, That respondent California-Texas Oil Company, a corporation, its successors and assigns, and its officers, and respondent Eileen M. Robertson, individually and as an officer and director of the corporate respondent, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of the gas additive known as AWECO Mileage Extender ("AWECO"), any other fuel additive, any engine oil additive, or any automobile retrofit device, as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. Representing, directly or by implication, that any such additive or device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle or other motor vehicle unless:

1. Such representation is true;
2. At the time of making such representation, respondents possess and rely upon, as substantiation for the representation, written results of competent and reliable scientific testing that isolate the effects of the additive or device. Respondents may use such tests as the then current urban dynamometer driving schedule (40 C.F.R. 86, Appendix I) or the then current highway fuel economy driving schedule (40 C.F.R. 600, Appendix I) established by the Environmental Protection Agency or other tests of an equivalent competency and reliability; and
3. Respondents, when using the results of any test(s) required by this Part, clearly and prominently disclose with such representation any material limitation upon the test results or inferences that can be drawn from the results.

b. Representing, directly or by implication, that any such additive or device will or may result in a reduction in automotive emissions from the operation of an automobile, truck, recreational vehicle or other motor vehicle when installed in such vehicle unless:

1. Such representation is true;
2. At the time of making such representation, respondents possess and rely upon written results of competent and reliable scientific

testing, as substantiation for the representation, done by a laboratory using tests such as, or equivalent in competency and reliability to, a chassis dynamometer test performed according to the 1975 Federal Test Procedure; and

3. Respondents, when using the results of any test(s) required by this Part, clearly and prominently disclose with such representation any material limitation upon the test results or inferences that can be drawn from the results.

c. Making any fuel economy or automotive emissions performance claim which uses the phrase "up to" or words of similar import, unless the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances normally and expectable encountered by consumers.

d. Representing, directly or by implication, that any performance claim about any such additive or device is based upon any competent and reliable test(s) or survey(s), unless such representation is true.

e. Misrepresenting, in any manner, the purpose, content, or conclusion of any test or survey pertaining to any such additive or device.

For the purposes of Part I, a competent and reliable test means one in which persons qualified to do so conduct the test and evaluate its results in an objective manner using procedures that ensure accurate and reliable results.

II.

It is further ordered, That respondents, in connection with the advertising, labeling, offering for sale, sale or distribution of any product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain accurately the following records, which shall be available for inspection by Commission staff upon request: copies of and dissemination schedules for all advertisements and labels, other sales promotional materials, and post-purchase materials disseminated by respondents directly or through any business entity; copies of all documents generated by the requirements of Parts III and IV of this order. Such documentation shall be retained by respondents for a period of three (3) years from the last date any such advertising or material is disseminated, except that documentation relating to Parts III and IV of the order shall be retained by respondents for a period of three (3) years from the last date a copy of this order is disseminated.

III.

It is further ordered, That respondents do forthwith distribute a copy of this order to all operating divisions of the corporate respondent, and to all present or future personnel, agents or representatives of respondents having sales, advertising, or policy responsibilities with respect to the subject matter of this order, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

IV.

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

V.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of her present business or employment. In addition, for a period of 5 years from the date of service of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business employment in which the respondent is newly engaged as well as a description of the individual respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VI.

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