

IN THE MATTER OF  
MTH HOLDINGS, INC., 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-3266. Complaint, Oct. 6, 1989—Decision, Oct. 6, 1989*

This consent order requires, among other things, MTH, an investment banking firm, to divest grocery stores in Vermont and New York to eliminate antitrust concerns that would be created by its acquisition of GU Acquisition Corporation, a holding company that owns and operates the Grand Union Company grocery store chain. In addition, for ten years, MTH must seek prior FTC approval before acquiring any grocery stores in any of the New York or Vermont counties in which the divestitures must be made.

*Appearances*

For the Commission: *David Conn, Daniel P. Ducore and Ronald B. Rowe.*

For the respondents: *William Pelster, Mohr, Skadden, Arps, Meagher & Flom, Washington, D.C. Mark Leddy, Cleary, Gottlieb, Steen & Hamilton, Washington, D.C. and Kenneth E. Newman, Donovan, Leisure, Newton & Irvine, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, MTH Holdings, Inc. and GU Acquisition Corporation, corporations subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 8 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement and the actions of the respondents to implement that agreement constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, hereby issues its complaint, stating its charges as follows:

#### DEFINITIONS

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

a. "*Retail grocery store*" means any retail food store of 10,000 or more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; nonedible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

b. "*P & C*" means P & C Food Markets, Inc., its parents, including The Penn Traffic Company and MTH Holdings, Inc., predecessors, subsidiaries, divisions and groups controlled by P & C and their respective directors, officers, partners, employees, agents and representatives, and their successors and assigns.

c. "*Grand Union*" means The Grand Union Company, an indirect wholly owned subsidiary of GU Acquisition Corporation, through which GU Acquisition Corporation is engaged in the retail grocery business. Grand Union includes its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GU Acquisition Corporation and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

#### MTH HOLDINGS

2. Respondent MTH Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York with its executive offices located at 331 Madison Avenue, New York, New York.

3. Respondent MTH Holdings is, and at all times relevant herein has been, engaged in the retail sale and distribution of food and grocery items in retail grocery stores. For the year ending December 31, 1988, P & C, a subsidiary of MTH Holdings, Inc., had net sales of \$1.1 billion.

4. Respondent MTH Holdings 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.

#### GU ACQUISITION CORPORATION

5. Respondent GU Acquisition Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its executive offices located at 25 Old Kings Highway Road, Darien, Connecticut.

6. Respondent GU Acquisition Corporation is, and at all times relevant herein has been, engaged in the retail sale and distribution of food and grocery items in retail grocery stores. For the year ending December 31, 1988, Grand Union, a subsidiary of GU Acquisition Corporation, had net sales of \$2.5 billion.

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

#### ACQUISITION

8. On or about April 11, 1989, MTH Holdings and Salomon Inc entered into an agreement with GU Acquisition Corporation whereby MTH Holdings and Salomon Inc will purchase the assets and operations of Grand Union. There are 22 cities and towns where both Grand Union and P & C operate retail grocery stores.

#### TRADE AND COMMERCE

##### *A. Relevant Line of Commerce*

9. A relevant line of commerce in which to analyze MTH Holdings' and Salomon Inc's acquisition of GU Acquisition Corporation is the retail sale and distribution of food and grocery items in retail grocery stores.

##### *B. Relevant Sections of the Country*

10. Relevant sections of the country are the following towns and cities:

- a. Cobleskill, New York;
- b. Oneonta, New York;
- c. Ticonderoga, New York:

- d. Barre/Montpelier/Berlin, Vermont;
- e. Bennington, Vermont;
- f. Brattleboro, Vermont;
- g. Burlington, Vermont Metropolitan Statistical Area;
- h. Manchester, Vermont;
- i. Morrisville, Vermont;
- j. Rutland/North Clarendon/West Rutland, Vermont;
- k. Springfield, Vermont; and
- l. Windsor, Vermont.

#### MARKET STRUCTURE

11. The retail sale of food and grocery items in retail grocery stores in the relevant sections of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by two-firm and four-firm concentration ratios.

#### ENTRY CONDITIONS

12. Entry into the retail sale of food and grocery items in retail grocery stores in the relevant sections of the country described in paragraph 10 is difficult.

#### ACTUAL COMPETITION

13. Grand Union and P & C are actual competitors in the relevant line of commerce and sections of the country described in paragraphs 9 and 10.

#### EFFECTS

14. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between Grand Union and P & C;
- b. By increasing the likelihood that P & C will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion

all of which increases the likelihood that firms will increase prices and restrict output of food and groceries both in the near future and for a longer period of time.

## VIOLATIONS CHARGED

15. The proposed acquisition of Grand Union by MTH Holdings and Salomon Inc violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the transaction pursuant to which MTH Holdings, Inc. ("MTH") and Salomon Inc ("Salomon") will acquire the issued and outstanding stock of GU Acquisition Corporation, ("GUAC") and MTH and GUAC (collectively, "Respondents"), 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 the respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing 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 had reason to believe that respondents have violated Section 5 and Section 7, 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 MTH Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New

York with its executive offices located at 331 Madison Avenue, New York, New York.

2. Respondent GU Acquisition Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its executive offices located at 25 Old Kings Highway Road, Darien, Connecticut.

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

#### ORDER

##### I.

As used in this order, the following definitions shall apply:

a. "*Acquisition*" means MTH's acquisition of the issued and outstanding common stock of GUAC.

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

c. "*GND Holdings Corporation*" means the entity formed by MTH and Salomon to acquire GUAC. GND Holdings Corporation includes its successors and assigns.

d. "*The Grand Union Company*" means an indirect wholly owned subsidiary of GUAC, through which GUAC is engaged in the retail grocery business. The Grand Union Company includes its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GUAC and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

e. "*GUAC*" means GU Acquisition Corporation, its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GUAC and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

f. "*MTH*" means MTH Holdings, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by MTH (including P&C Food Markets, Inc.) and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

g. "*Respondents*" means GUAC and MTH.

h. "*Retail grocery store*" means any retail food store of 10,000 or

more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

i. "*Schedule A Properties*" means the assets and businesses listed in Schedule A of this order.

j. "*Schedule B Properties*" means the assets and businesses listed in Schedule B of this order.

k. "*Properties*" means the Schedule A Properties and the Schedule B Properties.

## II.

*It is ordered, That:*

(A) Within nine (9) months of the date this order becomes final, the respondents shall divest, absolutely and in good faith (a) the Schedule A Properties, as well as any additional assets and businesses that (i) the respondents may at their discretion include as a part of the assets to be divested and are acceptable to the acquiring entity and the Commission, or (ii) the Commission shall require to be divested to ensure the divestiture of the Schedule A Properties as ongoing, viable enterprises, engaged in the businesses in which the Properties are presently employed. *Provided, however*, the respondents may only divest the stores of P&C Food Markets, Inc. listed in Schedule A if such stores have been operated consistent with past practices and the respondents have in no way acted to reduce the value or competitive viability of such stores. *Provided, further*, the respondents shall have twelve (12) months from the date this order becomes final to divest, absolutely and in good faith the Schedule A property in Bennington, Vermont.

(B) The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until such time as the respondents have divested either the Schedule A Properties or a trustee has divested the Schedule B Properties or until such other time as the Agreement to Hold Separate provides, and the respondents shall comply with all terms of said Agreement.

(C) Divestiture of the Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Properties is to ensure the

continuation of the assets as ongoing, viable retail grocery stores engaged in the same businesses in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) The respondents shall take such action as is necessary to maintain the viability and marketability of the 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.

### III.

*It is further ordered, That:*

(A) If the respondents have not divested, absolutely and in good faith and with the Commission's approval, the Schedule A Properties within the time set out in paragraph II(A), the respondents shall consent to the appointment by the Commission of a trustee to divest the Schedule B Properties. In the event that the Commission brings an action pursuant to 5 (1), of the Federal Trade Commission Act, 15 U.S.C. 45 (1), or any other statute enforced by the Commission, the respondents shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by the respondents to comply with this order.

(B) If a trustee is appointed by the Commission or a court pursuant to paragraph III(A) of this order, the respondents shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of the respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

(2) The trustee shall have the power and authority to divest the Schedule B Properties.

(3) The trustee shall have eighteen (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 is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-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 for a court-appointed trustee. *Provided, however,* that the Commission or court may only extend the divestiture period two (2) times.

(4) The trustee shall have full and complete access to the personnel, books, records and facilities related to those assets that the trustee has the duty to divest. The respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. The respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

(5) Subject to the respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II(C) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Schedule B Properties. The divestiture shall be made in the manner set out in paragraph II(C); *provided, however,* if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such purchaser, the trustee shall divest to the acquiring entity or entities selected by the respondents from among those approved by the Commission.

(6) The trustee shall serve at the cost and expense of the respondents, on such reasonable and customary terms and conditions as the Commission or a court may set, including the employment of accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule B Properties.

(7) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, the respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III (A) of this order.

(9) The trustee shall report in writing to the respondents and the Commission every sixty (60) days from the date of appointment concerning the trustee's efforts to accomplish divestiture.

#### IV.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with the provisions of paragraphs II and III of this order, the respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying or have complied with those provisions. The respondents shall include in their compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of assets or businesses specified in paragraph II of this order, including the identity of all parties contacted. The respondents also shall include in their compliance reports, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning divestiture, and a description of the status of all regulatory proceedings filed in accordance with this order.

#### V.

*It is further ordered,* That, for a period commencing on the date this order becomes final and continuing for ten (10) years, the respondents shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store or leasehold interest in any retail grocery store, including any facility that has operated as a retail grocery store within six (6) months of the date of the offer of purchase, or any interest in or the stock or share capital of any entity that owns any interest in or operates any retail grocery store or any interest in or the stock or share capital of any entity that owned any interest in or operated any retail grocery store within six (6) months of the date of the offer of purchase in the following counties:

1. Chittenden County, Vermont
2. Windham County, Vermont
3. Rutland County, Vermont
4. Washington County, Vermont
5. Lamoille County, Vermont
6. Windsor County, Vermont
7. Bennington County, Vermont
8. Essex County, New York
9. Schoharie County, New York
10. Otsego County, New York.

(Hereinafter "Retail Grocery Interests"). *Provided, however*, that these prohibitions shall not relate to the construction of new facilities or the leasing of facilities that have not operated as retail grocery stores within six months of the date of the offer to lease. *Provided, further*, that the respondents may acquire, for investment purposes only, an interest of not more than five (5) percent of the stock or share capital of any concern. *Provided, additionally*, only if, the respondents have provided the Commission with thirty (30) days prior notice of the acquisition set out in this proviso, these prohibitions shall not relate to the acquisition of an interest in the stock or capital share of any concern that has no Retail Grocery Interests at the time the respondents announce to the public an intention to acquire an interest in the concern and has no more than 40,000 square feet of Retail Grocery Interests at the time of the acquisition of the stock or capital share of said concern.

One (1) year from the date this order becomes final and annually for nine (9) years thereafter the respondents shall file with the Federal Trade Commission a verified written report of their compliance with this paragraph.

## VI.

*It is further ordered*, That the respondents shall notify the Federal Trade 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, dissolution or sale of subsidiaries or any other change that may affect compliance obligations arising out of the order.

### SCHEDULE A

#### Assets, Interests and Businesses

The retail grocery stores presently owned or operated by The Grand Union Company or by P&C Food Markets, Inc. in the following locations:

1. One (1) in Morrisville, Vermont;
2. One (1) in Barre/Montpelier/Berlin, Vermont;
3. One (1) in Windsor, Vermont;
4. One (1) in Springfield, Vermont;
5. One (1) in Brattleboro, Vermont;
6. One (1) in Bennington, Vermont;
7. One (1) in Manchester, Vermont;
8. Two (2) in the Rutland, Vermont area, which area shall include North Clarendon and West Rutland, Vermont;
9. Four (4) in the Burlington, Vermont, Metropolitan Statistical Area;
10. One (1) in Cobleskill, New York;
11. One (1) in Ticonderoga, New York; and
12. One (1) in Oneonta, New York.

The assets to be divested shall include the grocery business operated, all assets, inventory, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

#### SCHEDULE B

##### Assets, Interests and Businesses

All the retail grocery stores presently owned or operated by The Grand Union Company in the following locations:

1. Chittenden County, Vermont
2. Windham County, Vermont
3. Rutland County, Vermont
4. Washington County, Vermont
5. Lamoille County, Vermont
6. Windsor County, Vermont
7. Bennington County, Vermont
8. Ticonderoga, New York
9. Schoharie County, New York
10. Otsego County, New York.

The assets to be divested shall include the grocery business operated, all assets, inventory, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

Complaint

112 F.T.C.

IN THE MATTER OF

ROBERT G. KOSKI, D.O.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9225. Complaint, Feb. 13, 1989—Dismissal Order, Oct. 10, 1989*

The Federal Trade Commission issued a complaint against Dr. Robert G. Koski alleging that he conspired to boycott Marquette General Hospital, to prevent it from opening a clinic. In light of newly discovered evidence, the Commission has decided to dismiss the complaint.

*Appearances*

For the Commission: *David R. Pender* and *Paul J. Nolan*.

For the respondent: *Larry J. Saylor, Miller, Canfield, Paddock & Stone*, Detroit, Mi. and *Richard D. Carr*, Munising, Mi.

## 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 Robert G. Koski, D.O. ("respondent"), has 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 in that respect its charges as follows:

PARAGRAPH 1. Respondent is a doctor of osteopathy licensed by the State of Michigan. He specializes in the practice of anesthesia, and practices in the Upper Peninsula of Michigan in Dickinson County. His office address is Dickinson County Memorial Hospital, 400 Woodward Avenue, Iron Mountain, Michigan.

PAR. 2. Respondent has been on the active Medical Staff of Dickinson County Memorial Hospital ("Medical Staff") since at least September, 1986. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Dickinson County Memorial Hospital. The Medical Staff's physician members constitute almost all of the practicing physicians in Dickinson County.

PAR. 3. Respondent has been a member of the Dickinson-Iron County Medical Society since at least September, 1986. The Dickinson-Iron Medical Society is composed of physicians in the private practice of medicine in Dickinson County and in Iron County, in the Upper Peninsula of Michigan. The Dickinson-Iron County Medical Society's physician members constitute almost all of the practicing physicians in Dickinson County, in Iron County, and on the Medical Staff.

PAR. 4. Except to the extent that competition has been restrained as alleged herein, the respondent has been and now is in actual or potential competition with other physicians or health care practitioners in the provision of health care services in or near Dickinson County. The respondent is engaged in the business of providing health care services to patients for a fee.

PAR. 5. The Delta County Medical Society is composed of physicians in the private practice of medicine in Delta County in the Upper Peninsula of Michigan. The Delta County Medical Society's physician members constitute almost all of the practicing physicians in Delta County.

PAR. 6. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Dickinson County Hospitals, a non-profit organization, operates two hospitals in Dickinson County—Dickinson County Memorial Hospital, a 110-bed hospital in the city of Iron Mountain, and Anderson Hospital, a 19-bed hospital in the city of Norway. The Veterans' Administration operates the only other hospital in Dickinson County. Residents of the county receive most of their health care services from physicians and other health care practitioners on the Medical Staff, including respondent Koski, and from Dickinson County Memorial Hospital. For diagnosis and treatment using some complex medical procedures, or by physicians who practice specialties not available in Dickinson County, residents of Dickinson County usually travel to physicians and/or hospitals in Green Bay, Wisconsin (approximately 85 miles south of Dickinson County), Marquette, Michigan (approximately 85 miles north of Dickinson County), or Marshfield, Wisconsin (approximately 140 miles southwest of Dickinson County).

PAR. 8. Marquette General Hospital, which is located in the city and

county of Marquette, in the Upper Peninsula of Michigan, is a tertiary care hospital that provides specialized diagnostic and treatment services not available at smaller hospitals in the Upper Peninsula of Michigan, such as Dickinson County Memorial Hospital and Anderson Hospital. Marquette General Hospital provides tertiary care services in such areas as cardiac care, oncology, neurological services, neonatal services, and nephrology. Many specialty and subspecialty physicians on Marquette General Hospital's Medical Staff receive a significant number of referrals from physicians in other parts of the Upper Peninsula, because they offer diagnostic and treatment techniques not available locally. Marquette General Hospital, in turn, derives a substantial portion of its revenues as a result of tests and hospital admissions of patients who were referred to physicians on its medical staff by physicians in other parts of the Upper Peninsula.

PAR. 9. On September 3, 1986, Marquette General Hospital announced plans to build a multispecialty medical office in Kingsford, Michigan, the second largest city in Dickinson County. Kingsford borders Iron Mountain, the largest city in the county, and is within several miles of the Wisconsin border. Marquette General Hospital planned to staff the new office with three salaried primary care physicians, to have some specialty and subspecialty physicians visit Dickinson County more frequently, and to offer some specialized physician services and diagnostic tests that were not previously available in Dickinson County. Marquette General Hospital officials believed that their new medical office in Kingsford would provide valuable primary care and specialty services to consumers of health care services in the Dickinson County area and consequently would attract a substantial number of patients to, and enhance the revenues of, Marquette General Hospital. Marquette General Hospital officials believed the new medical office would permit it to compete more effectively with hospitals in Green Bay, Wisconsin, and Marshfield, Wisconsin, for patients in the Dickinson County area.

PAR. 10. The respondent, other health care practitioners in the Dickinson County area, and the Medical Staff saw as a competitive threat the prospect of increased competition from both specialty and primary care physicians who would work in Marquette General Hospital's planned office in Dickinson County, including the salaried primary care physicians who would work there. As a result, beginning in September 1986, the respondent and other health care practitioners in the Dickinson County area entered into a combination or conspiracy

to coerce, intimidate, threaten to boycott, or boycott Marquette General Hospital and its physicians in order to prevent the proposed new medical office from offering services to consumers in competition with them. In September 1986, the Medical Staff and the Dickinson-Iron County Medical Society, acting as combinations of their members or in conspiracy with at least some of their members, joined in the conspiracy to suppress competition from Marquette General Hospital's proposed new medical office in Kingsford, Michigan. In November 1986, the Delta County Medical Society, acting as a combination of its members or in conspiracy with at least some of its members, joined in the conspiracy. Throughout the course of the conspiracy, the Dickinson-Iron County Medical Society provided support to, and advised its physician members of, the actions undertaken in furtherance of the combination or conspiracy to suppress competition from the proposed new medical office.

PAR. 11. In furtherance of the aforesaid combination or conspiracy, and as described in paragraphs twelve through twenty below:

A. Respondent Koski, other health care practitioners in the Dickinson County area, the Medical Staff, and the Dickinson-Iron County Medical Society, in response to the Marquette General Hospital's plan to establish a medical office in Dickinson County.

1. Threatened to refuse to refer, or refused to refer, patients to specialist physicians practicing at a Marquette General Hospital medical office in Dickinson County;

2. Agreed to refuse to enter into any contractual relationship with, including possible salaried employment in, Marquette General Hospital's medical office in Dickinson County; and

3. Solicited physicians throughout the Upper Peninsula of Michigan to join in a combination or conspiracy to threaten to cease referring, or to cease referring, patients to physicians practicing at Marquette General Hospital.

B. Respondent Koski, other health care practitioners in the Dickinson County area, the Medical Staff, the Dickinson-Iron County Medical Society, and the Delta County Medical Society threatened to cease referring, or ceased to refer, patients to specialist physicians practicing at Marquette General Hospital.

PAR. 12. On September 4, 1986, the Medical Staff, at an emergency meeting held to discuss the proposed Marquette General Hospital medical office, authorized an Ad-hoc Executive Committee of the



Medical Staff to "actively pursue effective counter measures to this move by Marquette," *i.e.*, its plan to open the clinic. The president of the Dickinson-Iron County Medical Society was named to this committee. This committee met on September 8, 1986, and approved the issuance of a press release which stated in part that: (1) the Medical Staff objected to the establishment of the new medical office in Dickinson County, which was not under "local control," and (2) the new medical office "not only brings in specialists unavailable locally, but also competes directly with services and specialties already present in our hospital." Substantial portions of this press release subsequently appeared in the local newspapers.

PAR. 13. On September 13, 1986, the Medical Staff met and the physicians and other health care practitioners present, including respondent Koski, voted unanimously to approve the following commitment and to seek a written commitment to that effect from each Medical Staff member:

We the Medical Staff of DCH, support the right of the individual practitioner to be non-aligned to any specific institution and, therefore, pledge that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof.

One or more members of the Medical Staff distributed a typed version of this statement to the members of the Medical Staff, and it was signed by many of them. On September 22, 1986, the Medical Staff approved a second statement expressing opposition to the medical office. This second statement, which served the same purpose as the first statement, read as follows: "I am opposed to Marquette General Hospital placing a clinic in Dickinson County." Shortly thereafter, the second statement was distributed to, and signed by, almost every member of the Medical Staff, including respondent Koski.

PAR. 14. On September 29, 1986, three members of the Medical Staff met, on behalf of the Medical Staff and its individual members including respondent Koski, with physician representatives of the Medical Staff of Marquette General Hospital. At this meeting, these three individuals presented the Marquette physicians with a statement, dated September 29, 1986, which (1) expressed the united opposition of the Medical Staff and its individual members to Marquette General Hospital's plan to open the new medical office in Dickinson County, and (2) stated they would use "whatever means necessary" to prevent the new office from offering services to patients in competition with them. The Chief of the Medical Staff, relying on

the statements of opposition referred to in paragraph thirteen above, including that of respondent Koski, signed this letter as "Chief of Staff and Representative of the Forty-two (42) Physicians on the Medical Staff."

PAR. 15. The Tri-County Medical Society and the Delta County Medical Society have physician members who frequently refer patients to physicians on the staff of Marquette General Hospital. A significant number of these patients undergo tests at, or are admitted to, Marquette General Hospital. On or about January, 1986, officers of the Dickinson-Iron County and Delta County Medical Societies discussed "turf protection and it was unanimously voted by all parties concerned that our relationship with Marquette is favorable and we wish to continue this, however all communities absolutely insist on having the freedom to choose a consultant and recent moves by Marquette administration which signify a move towards mandatory consultation will be aggressively opposed by our societies jointly." This action took place because members of the Dickinson-Iron County and Delta County Medical Societies were concerned that physicians who signed such contracts would increase their referrals to specialists at Marquette General Hospital and decrease their referrals to specialists who belonged to the respondent medical societies. On October 7, 1986, respondent Koski and another individual, as representatives of the other individual members of the Medical Staff and of the Medical Staff, solicited the Tri-County Medical Society in Calumet, Michigan, to join the combination or conspiracy described in paragraphs ten through fourteen. On October 21, 1986, four individuals as representatives of the Medical Staff and of the individual members of the Medical Staff including respondent Koski, and one representative of the Dickinson-Iron County Medical Society, solicited the Delta County Medical Society in Escanaba, Michigan, to join the conspiracy described in paragraphs ten through fourteen.

PAR. 16. After respondent Koski and the other individuals solicited the participation of the Tri-County and Delta County Medical Societies as discussed in paragraph fifteen, the Tri-County Medical Society advised its membership to write individual letters personally expressing their opinion to the physicians in Marquette, but took no other action. On November 18, 1986, however, the Delta County Medical Society unanimously approved a letter that stated the society's official position. The Delta County Medical Society sent this letter to the Presidents of both the Dickinson-Iron County and Marquette-Alger

Medical Societies. This letter stated that "if the clinic is constructed as proposed, there will be a definite change in the referral patterns of many Delta County physicians and perhaps physicians in other U.P. counties. We feel that this would be unfortunate for all involved." Officials of Marquette General Hospital saw this as a threat to cut referrals to physicians on its medical staff. One purpose of the letter was to put pressure on Marquette General not to open a similar clinic in the Delta County area. The president of the Delta County Medical Society, accompanied by two society members, thereafter spoke at a meeting of the Marquette-Alger Medical Society and told them "they would have to be aware [a number of Delta] physicians would no longer utilize the services of Marquette unless their patient specifically requested it."

PAR. 17. On October 10, 1986, the Medical Staff Ad-hoc Executive Committee, which was empowered to represent and act on behalf of the Medical Staff and the individual members of the Medical Staff including respondent Koski, sent a letter to many members of the Medical Staff and to most, if not all, of the physicians in the Upper Peninsula, including physicians on the Medical Staff of Marquette General Hospital. The letter included the following statements: (1) that the Medical Staff intended to do "everything in our power" to prevent the Kingsford, Michigan, medical office from opening as planned; (2) that Upper Peninsula physicians should "reevaluate our relationship with Marquette"; and (3) that Marquette physicians were not welcome in Dickinson County "as salaried employees whose purpose in our community will be to direct traffic to" Marquette. The ten members of the Ad-hoc Executive Committee signed this letter as the "Ad hoc Executive Committee on behalf of the forty-two physicians of Dickinson County Hospitals." Officials of Marquette General Hospital perceived these statements as a threat to cut referrals to physicians on its Medical Staff.

PAR. 18. On December 10, 1986, the Medical Staff held a special meeting and voted unanimously that they "remain firmly opposed to the Marquette Clinic." The Medical Staff confirmed its opposition in a March 2, 1987, letter from the chief of the Medical Staff and the spokesman for the Medical Staff, to the chief of the Marquette General Hospital Medical Staff.

PAR. 19. As a result of the actions described in paragraphs ten through eighteen, Marquette General Hospital opened a medical office in Kingsford that was smaller than its originally proposed medical

office building. This medical office did not offer primary care services to consumers as had originally been planned by Marquette General Hospital. On May 11, 1987, as a result of the actions of the Medical Staff, respondent Koski and other individual members of the Medical Staff, the Dickinson-Iron County Medical Society, and the Delta County Medical Society, as set forth above, Marquette General Hospital suspended action on its plan to offer primary care services at its Kingsford medical office.

PAR. 20. No health care practitioner in Dickinson County has agreed to work in the Marquette General Hospital medical office, and unless requested to do so by their patients, many of these health care practitioners continue to refuse to refer patients to physicians who provide specialized services at the Kingsford medical office.

PAR. 21. The purposes or effects or the tendency and capacity of the combination or conspiracy and conduct described in paragraphs ten through twenty are and have been to restrain trade unreasonably in the provision of health care services in or near Dickinson County, Michigan, and deprive consumers of the benefits of competition, in the following ways, among others:

A. Hindering competition among physicians and hospitals in the provision of health care services;

B. Depriving consumers of their ability to choose among a variety of alternative types of health care facilities and primary care and specialty physicians competing on the basis of price, service, and quality;

C. Impairing Marquette General Hospital's efforts to increase consumer access to primary care and specialty medical services, including services offered by salaried primary care physicians; and

D. Deterring other hospitals or medical clinics from operating medical facilities in competition with the private practice of physicians.

PAR. 22. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation, or the effects thereof, as herein alleged, is continuing and will continue in the absence of the relief herein requested.

#### ORDER DISMISSING COMPLAINT

On February 13, 1989, the Commission issued a complaint charging

that Dr. Robert G. Koski conspired with other health care practitioners, the Dickinson County Memorial Hospital Medical Staff, and two medical societies to boycott Marquette General Hospital to prevent it from opening a clinic. The complaint charged that on September 13, 1986, members of the Medical Staff, including Dr. Koski, voted to adopt a resolution pledging "that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof."

Complaint counsel have moved that the Commission dismiss the complaint against Dr. Koski, and the Administrative Law Judge has certified the motion to the Commission. Although the minutes of the Medical Staff meeting, of September 13, 1986, indicate that Dr. Koski was present at the meeting, subsequent to the issuance of the complaint the respondent produced evidence establishing that he left the meeting prior to the boycott vote. That evidence included hospital records indicating that Dr. Koski was in surgery at the time of the boycott vote and a corroborating affidavit by a nurse anesthetist. In light of the newly discovered evidence, the Commission has decided to dismiss the complaint.

The complaint is hereby dismissed.

## IN THE MATTER OF

## ARKLA, 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-3265. Complaint, Oct. 10, 1989—Decision, Oct. 10, 1989*

This consent order requires, among other things, a Shreveport, La. corporation to divest the TransArk assets and also requires that the divestiture be made to a Commission-approved acquirer or acquirers. In addition, respondent is also required to obtain prior Commission approval and to apply to the Federal Energy Regulatory Commission for approval under that agency's abandonment procedures.

*Appearances*

For the Commission: *Marc G. Schildkraut, Ronald B. Rowe and David C. Dickey.*

For the respondent: *Ky P. Ewing, Jr., Page I. Austin, and Neil W. Imus, Vinson & Elkins, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Arkla, Inc., a corporation subject to the jurisdiction of the Commission, entered into an agreement to acquire, took actions to implement the agreement to acquire, and did in fact acquire, certain assets from the TransArk Transmission Co. ("TransArk") in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it 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 apply:
  - a. "Arkla" means Arkla, Inc., its subsidiaries, divisions and groups

controlled by Arkla, its directors, officers, employees, agents and representatives, and their successors and assigns.

b. The "*Affected Portion of the Arkoma Basin*" means the following counties in Arkansas: Sebastian, Crawford, Logan, Franklin, Johnson, Pope, Scott and Yell.

c. "*Conway-Morrilton-Russellville corridor*" means the area within the state of Arkansas located within 10 miles of the portion of the TransArk pipeline that is west of Conway, Arkansas and east of Russellville, Arkansas. [2]

d. "*The acquisition*" means the transaction described, in whole or in part, in paragraph 8 of this complaint.

e. "*Transportation*" means transportation of natural gas for one's own account as well as for others.

## II. ARKLA

2. Respondent Arkla is a corporation organized and doing business under the laws of the State of Delaware with its principal places of business in Shreveport, Louisiana and Little Rock, Arkansas. Arkla is involved in all sectors of the natural gas industry, including the production, purchase, gathering, storage, transmission, distribution, and sale of natural gas in Arkansas, Missouri, Louisiana, Texas, Mississippi, Tennessee, Oklahoma, and Kansas.

3. Arkla, in conducting its natural gas transmission and distribution business, operates through three divisions: Arkla Energy Resources ("AER"), Arkansas Louisiana Gas Company ("ALG"), and Entex. AER operates gathering systems and an interstate transmission system that extends through portions of Arkansas, Louisiana, Mississippi, Missouri, Kansas, Oklahoma, Tennessee, and Texas. ALG operates local distribution companies in Arkansas, Louisiana, Kansas, Oklahoma, and Texas. Entex operates local distribution companies and intrastate transmission systems in Texas, Louisiana and Mississippi. Arkla also owns Mississippi River Transmission Corporation ("MRT"), which owns an interstate transmission system that extends through Louisiana, Arkansas, Missouri and Illinois.

4. At all times relevant herein, respondent Arkla has been and is now engaged in "commerce" as 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. TRANSARK AND ITS OWNERS

5. At the time of the acquisition, TransArk was a general partnership organized and doing business under the laws of the state of Delaware with its principal place of business in Dallas, Texas. The owners of TransArk were subsidiaries of Lear Petroleum Co. ("Lear") and Esco Exploration Co. ("Esco"). Lear owned a 75 percent interest and Esco owned a 25 percent interest in TransArk.

6. Lear is a corporation organized and doing business under the laws of the state of Delaware with its principal place of business in Dallas, Texas. At the time of the acquisition, Lear was involved in the production, purchase, gathering, transmission [3] and sale of gas in several states including Texas, Louisiana, Oklahoma and Arkansas.

7. Esco is a corporation organized and doing business under the laws of the state of Delaware with its principal place of business in Tulsa, Oklahoma. At the time of the acquisition, Esco was involved in the production, purchase, gathering and sale of natural gas in several states including Oklahoma and Arkansas.

### IV. THE ACQUISITION

8. During the spring of 1986, Lear and Esco initiated discussions with Arkla relating to the TransArk pipeline project, including discussions relating to the possible acquisition by Arkla of an interest in TransArk. On or about May 21, 1986, Lear and Esco proposed that Arkla and TransArk commence negotiations for the acquisition by Arkla of a 100 percent interest in the TransArk pipeline. On or about July 29, 1986, Arkla, Lear and Esco executed a definitive agreement for Arkla's acquisition from TransArk of the TransArk pipeline and certain other assets. Arkla created a separate subsidiary of AER, called AER—Arkansas Gas Transit Co., to acquire and own the TransArk pipeline and other assets obtained from TransArk. In September 1986, following expiration of the Hart-Scott-Rodino waiting period, the parties closed the transaction.

### V. RELEVANT MARKETS

9. One relevant line of commerce in which to assess the competitive effects of the acquisition is the transportation of gas out of a gas producing area. For this line of commerce, a relevant section of the country in which to assess the competitive effects of the acquisition is the Affected portion of the Arkoma Basin.

10. Another relevant line of commerce in which to assess the



competitive effects of the acquisition is the transportation of gas into a gas consuming area. For this line of commerce, a relevant section of the country in which to assess the competitive effects of the acquisition is the Conway-Morrilton-Russellville corridor.

#### VI. MARKET STRUCTURE

11. The market for the transportation of gas out of the Affected portion of the Arkoma Basin is highly concentrated.

12. The market for the transportation of gas into the Conway-Morrilton-Russellville corridor is highly concentrated.

13. Entry into the relevant markets is very difficult or unlikely. [4]

#### VII. COMPETITION

14. At the time of the acquisition, Arkla was an actual competitor in each of the relevant markets. At the time of the acquisition, TransArk was an actual potential competitor, an actual competitor and/or a perceived potential competitor in each of the relevant markets.

#### VIII. COUNT ONE

##### *Lessening of Actual Potential Competition*

15. The Commission repeats and realleges the allegations of paragraphs 1 through 14, inclusive, of this complaint, as if fully set forth herein.

16. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant markets in the following ways among others:

- a. By eliminating the most likely potential entrant or one of the most likely potential entrants into the market;
- b. By eliminating actual potential competition between TransArk and Arkla and between TransArk and any other competitors;
- c. By increasing market concentration, thereby facilitating collusion and dominant firm behavior;
- d. By eliminating the potential for substantial market deconcentration as a result of the independent entry of TransArk, thereby facilitating collusion and dominant firm behavior.

17. The acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. Section 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## IX. COUNT TWO

*Lessening of Actual Competition*

18. The Commission repeats and realleges the allegations of paragraphs 1 through 14, inclusive, of this complaint, as if fully set forth herein. [5]

19. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant markets in the following ways among others:

a. By eliminating actual competition between TransArk and Arkla and between TransArk and other competitors;

b. By increasing market concentration, thereby facilitating collusion and dominant firm behavior.

20. The acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## X. COUNT THREE

*Lessening of Perceived Potential Competition.*

21. The Commission repeats and realleges the allegations of paragraphs 1 through 14, inclusive, of this complaint, as if fully set forth herein.

22. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant markets in the following ways among others:

a. By eliminating the most significant or one of the most significant potential entrants into the market;

b. By eliminating the perceived threat of future competition between TransArk and Arkla and between TransArk and other competitors;

c. By increasing market concentration, thereby facilitating collusion and dominant firm behavior.

23. The acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of Arkla Inc.'s ("Arkla") acquisition of the pipeline and other assets owned by the TransArk Transmission Co. ("TransArk"), and the respondent Arkla having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of 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 Arkla, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Arkla of all 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 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 respondent has violated Section 5 and Section 7, 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 [2] 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 makes the following jurisdictional findings and enters the following order:

1. Respondent Arkla is a corporation organized and existing under the laws of the State of Delaware with its executive offices located at 525 Milam Street, Shreveport, Louisiana.

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

## ORDER

## I.

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

(a) "*Acquisition*" means Arkla's acquisition of the assets of TransArk.

(b) "*Arkla*" means Arkla, Inc., its subsidiaries, divisions, groups, and affiliates controlled by Arkla and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(c) "*TransArk*" means TransArk Transmission Company, a partnership of Producer's Gas Company and Omega Pipeline Company.

(d) The "*Affected Portion of the Arkoma Basin*" means the following counties in Arkansas: Sebastian, Crawford, Logan, Franklin, Johnson, Pope, Scott and Yell.

(e) An "*Affected Portion of the Arkoma Basin Pipeline*" means a pipeline facility other than one owned by Arkla that extends from a point within the Affected Portion of the Arkoma Basin to a point outside of such area with the capacity to transport at least twenty-five (25) million cubic feet per day of natural gas through such facilities out of the Affected Portion of the Arkoma Basin.

(f) The "*Russellville-Morrilton-Conway Corridor*" means the area within the State of Arkansas that is within 10 miles in any direction of that portion of the TransArk pipeline that is west of Conway, Arkansas and east of Russellville, Arkansas.

(g) A "*Russellville-Morrilton-Conway Corridor Pipeline*" means a pipeline facility other than one owned by Arkla that extends to a point within the Russellville-Morrilton-Conway Corridor from a point outside of such area with the capacity to deliver through such facilities at least twenty-five (25) million cubic feet per day of natural gas into the Russellville-Morrilton-Conway Corridor.

(h) The "*TransArk assets*" means the assets, including the pipeline and right of way, acquired by Arkla from TransArk pursuant to the Acquisition, except for the 2.45 miles of pipeline and other assets that were sold by Arkla to Arkansas Oklahoma Gas Co., pursuant to that certain Purchase Agreement dated September 7, 1987, as further identified in Schedule A hereof.

(i) The “*TransArk pipeline*” means the pipeline acquired by Arkla from TransArk. [4]

(j) “*Arkla Pipeline Assets*” means an undivided interest, consisting of the capacity to receive and deliver in the aggregate 75 million cubic feet of gas per day, in the portions of Arkla Energy Resources’ gas pipeline transmission system and gas gathering facilities identified in Schedule B hereof.

## II.

*It is further ordered, That:*

(A) Within twelve (12) months of the date this order becomes final, Arkla shall enter into a final agreement to divest (a) the TransArk assets, absolutely and in good faith, conditioned only on Commission approval and other regulatory approvals. *Provided, however*, Arkla may enter into a final agreement to divest, absolutely and in good faith, (b) the Arkla Pipeline Assets, if the Commission, in its sole discretion approves the substitute divestiture of the Arkla Pipeline Assets for the TransArk assets. Within eighteen (18) months of the date this order becomes final, Arkla shall divest, absolutely and in good faith, (a) the TransArk assets or (b) if the Commission in its sole discretion approves the substitute divestiture, the Arkla Pipeline Assets.

(B) Divestiture shall be made only to an acquirer or acquirers that receive the prior approval of the Federal Trade Commission and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the TransArk assets or Arkla Pipeline Assets is to remedy the lessening of competition resulting from the acquisition as alleged in the Federal Trade Commission’s complaint.

(C) Following the time that this order becomes final and no later than thirty (30) days after receiving the prior approval of the Federal Trade Commission required by paragraph II(B) hereof, Arkla shall in good faith (1) apply to the Federal Energy Regulatory Commission for abandonment of the TransArk assets or the Arkla Pipeline Assets and (2) apply for and cause the acquirer as part of the agreement to apply for approvals by the Federal Energy Regulatory Commission and any other state or federal agency from which approval must be obtained before Arkla may divest and the acquirer may acquire, own and operate the TransArk assets or acquire and own the Arkla Pipeline

Assets. Arkla shall cooperate with and shall support in good faith with all due diligence and expedition the acquirer in obtaining necessary regulatory approvals, including filing a statement that demonstrates Arkla's support for each such application. Arkla shall take no action to impede or interfere with the necessary regulatory approvals. *Provided, however,* that nothing herein shall preclude Arkla from seeking approval for the construction and operation by it of additional facilities as part of any application other than (a) the applications seeking abandonment of the TransArk assets or the [5] Arkla Pipeline Assets or (b) the applications seeking approval of divestiture of the TransArk assets or the Arkla Pipeline Assets.

(D) In the agreement to divest the TransArk assets, Arkla may include such provisions as are necessary to provide for the exchange between Arkla and the operator of the TransArk assets of up to twenty (20) million cubic feet of gas per day between (a) points on the TransArk system proximate to the areas served at retail by Arkla, and (b) points on the Arkla system in Arkansas interconnected with or proximate to other pipelines to which the TransArk facility may be connected from time to time. This exchange agreement shall be subject to the prior approval of the Federal Trade Commission to ensure that it is consistent with the purposes of this order.

(E) Arkla shall maintain the viability and marketability of the TransArk assets, until the divestiture required under paragraph II(A) hereof is completed, and shall not cause or permit the destruction, removal or impairment of any assets to be divested except in the ordinary course of business and except for ordinary wear and tear. Arkla shall ensure that, until the divestiture required under paragraph II(A) hereof is completed, the TransArk assets continue to be viable, and used in the business of transporting natural gas.

### III.

*It is further ordered, That:*

(A) If Arkla has not received prior Commission approval of a final agreement to divest, absolutely and in good faith, the TransArk assets or the Arkla Pipeline Assets within twelve (12) months of the date this order becomes final, or has not divested, absolutely and in good faith, the TransArk assets or the Arkla Pipeline Assets within eighteen (18) months of the date this order becomes final, Arkla shall consent to the appointment by the Federal Trade Commission of a trustee to divest

the TransArk assets. In the event that the Federal Trade Commission brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Arkla shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Federal Trade Commission from seeking civil penalties or any other relief available to it for any failure by Arkla to comply with this order. *Provided, however,* that if

(a) Arkla has, within six (6) months of the date this order becomes final, entered into and filed for approval with the Commission a final agreement to divest, absolutely and in good faith, the TransArk assets or [6]

(b) Arkla has, within three (3) months of the date this order becomes final, entered into and filed for approval with the Commission a final agreement to divest, absolutely and in good faith, the Arkla Pipeline Assets or

(c) In the event that the Commission disapproves of a substitute divestiture of the Arkla Pipeline Assets, Arkla has, within six (6) months of the date of such disapproval, entered into and filed for approval with the Commission a final agreement to divest, absolutely and in good faith, the TransArk assets and

(d) Arkla has applied for all necessary regulatory approvals required for the consummation of the approved divestiture within thirty (30) days after receiving the Commission's approval of the divestiture,

the Commission shall not appoint a trustee or seek civil penalties or other relief until six (6) months after the Commission, Federal Energy Regulatory Commission or any other state or federal agency denies approval of the divestiture or acquisition, unless the Commission determines that Arkla has not in good faith, with all due diligence and expedition, supported obtaining the necessary regulatory approval required for the consummation of the divestiture of such assets to the acquirer approved by the Commission. *Provided, further,* that if following any such denial by the Commission, Federal Energy Regulatory Commission or any other state or federal agency

(i) Arkla has, within six (6) months thereafter, entered into and filed for approval with the Commission a substitute final agreement to divest, absolutely and in good faith, the TransArk assets or the Arkla Pipeline Assets or

(ii) In the event that the Commission disapproves of the substitute

divestiture of the Arkla Pipeline Assets, Arkla has, within three (3) months of the date of such disapproval, entered into and filed for approval with the Commission a final agreement to divest, absolutely and in good faith, the TransArk assets and in either event

(iii) Arkla has applied for all necessary regulatory approvals required for the consummation of such divestiture within thirty (30) days after receiving the Commission's approval of the divestiture, [7] the Commission shall not appoint a trustee or seek civil penalties or other relief until the Commission, Federal Energy Regulatory Commission or any other state or federal agency denies approval of the divestiture or acquisition, unless the Commission determines that Arkla has not in good faith, with all due diligence and expedition, supported obtaining the necessary regulatory approvals required for the consummation of its divestiture of such assets to the acquirer approved by the Commission.

(B) If a trustee is appointed by the Federal Trade Commission or a court pursuant to paragraph III(A) of this order, Arkla shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

(1) The Federal Trade Commission shall select the trustee, subject to the consent of Arkla, which consent 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 the TransArk assets required to be divested by paragraph II(A) of this order.

(3) The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Federal Trade Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Federal Trade Commission, or by the court for a court-appointed trustee. *Provided, however,* that the Federal Trade Commission, or court may only extend the divestiture period two (2) times.

(4) No later than thirty (30) days after receiving the prior approval of the Federal Trade Commission, and if the trustee is appointed by a court, following also the prior approval of the court, of the divestiture



proposed by the trustee, Arkla shall in good faith (1) apply to the Federal Energy Regulatory Commission for abandonment of the TransArk assets; and (2) apply for (and cause the acquirer as part of the agreement to apply for) approvals by the Federal Energy Regulatory Commission and any other state or federal agency from which approval must be obtained before Arkla may divest and the acquirer may acquire, own and [8] operate the TransArk assets. Arkla shall cooperate with and shall support in good faith with all due diligence and expedition the acquirer in obtaining necessary regulatory approvals, including filing a statement that demonstrates Arkla's support for each such application. Arkla shall take no action to impede or interfere with the necessary regulatory approvals. *Provided, however,* that nothing herein shall preclude Arkla from seeking approval for the construction and operation by it of additional facilities as part of any application other than the applications seeking abandonment of the TransArk assets or the applications seeking approval of divestiture of the TransArk assets.

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

(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 Federal Trade Commission, subject to Arkla's absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II(B) of this order. If the trustee receives bona fide offers from more than one prospective purchaser, the Commission shall determine whether to approve each such purchaser, and the trustee shall divest to the purchaser, selected by Arkla from among those approved by the Commission.

(7) The trustee shall serve at the cost and expense of Arkla, on such reasonable and customary terms and conditions as the Federal Trade Commission or a court may set, including the employment of accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies and properties derived from the sale and all expenses incurred. Following accomplishment of the divestiture and after approval by the Federal Trade 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 [9] Arkla and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the TransArk assets.

(8) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Federal Trade Commission and, in the case of a court-appointed trustee, of the court, Arkla shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture.

(9) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III(A) of this order.

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

#### IV.

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

#### V.

*It is further ordered,* That, for a period commencing on the date this order becomes final and continuing for ten (10) years from and after the date of this order becoming final, Arkla shall cease and

desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through [10] subsidiaries or otherwise, assets used or previously used by (and still suitable for use by), any interest in, or the stock or share capital of any Affected Portion of the Arkoma Basin Pipeline, of any Russellville-Morrilton-Conway Corridor Pipeline or of any entity that owns any assets, interest or stock or share capital in any such Pipeline. *Provided, however,* that these prohibitions shall not relate to (1) the construction of new facilities or (2) the continuation of the lease by Arkla from Arkansas Western Gas Company of those facilities described in that certain lease between those companies dated October 25, 1951. *Provided further,* if, and only if, Arkla has provided the Federal Trade Commission with thirty (30) days prior notice of either the reservation or acquisition set out in this proviso, these prohibitions shall not relate to (1) the reservation in the ordinary course of business of not more than twenty (20) percent of the firm capacity of any pipeline or (2) the acquisition by Arkla of any entity which, at the time of such acquisition, directly or indirectly owns any assets, interest, or stock or share capital in any such Pipeline, the fair market value of which assets, interest, or stock or share capital is in the aggregate no greater than twelve (12) million dollars. One year from the date this order becomes final and annually for nine years thereafter Arkla shall file with the Federal Trade Commission a verified written report of its compliance with this paragraph.

## VI.

*It is further ordered,* That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Arkla made to its principal office, Arkla shall permit any duly authorized representatives of the Federal Trade 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 Arkla relating to any matters contained in this order; and

(B) Upon five days notice to Arkla and without restraint or interference from Arkla, to interview officers or employees of Arkla who may have counsel present, regarding such matters. [11]

## VII.

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

## SCHEDULE A

The easements and line pipe in place and the records and equipment used in connection therewith beginning at Sun Milepost 216 + 4592' (1' east of ML Block Valve at State Hwy. 45 at Fort Smith, Sebastian County, Arkansas) and ending at Sun Milepost 371 + 4960' (at McRae, White County, Arkansas) as acquired by Arkla from the TransArk partnership (designated by Arkla as its AER Line No. BT-14 and the western most portion of its MRT Line No. A-294), together with the easements and line pipe in place and equipment used in connection therewith constructed by Arkla in conjunction with the foregoing as follows:

- (i) The taps on such facilities necessary to connect them with Arkla's meter run at the interconnection between such facilities and (a) Arkla's AER Line No. BT-16 in Franklin County, Arkansas and (b) Arkla's AER Line No. JM-30 in Faulkner County, Arkansas;
- (ii) The relocations of such facilities constructed by Arkla as follows:
  - (a) Approximately 5,360' of 12-inch pipe between old station numbers 5109 + 34' and 5141 + 48';
  - (b) Approximately 7,204' of 12-inch pipe between old station numbers 3799 + 36' and 3832 + 54';
  - (c) Approximately 23,369' of 12-inch pipe between old station numbers 5299 + 51' and 5406 + 64';
  - (d) Approximately 1,400' of 12-inch pipe between old station numbers 4375 + 63' and 4389 + 63';
  - (e) Approximately 1,731' of 12-inch pipe between old station numbers 5052 + 44' and 5069 + 75';
  - (f) Approximately 1,500' of 12-inch pipe between old station numbers 5670 + 61' and 5685 + 61';
  - (g) Approximately 300' of 12-inch pipe between old station numbers 6873 + 31' and 6870 + 31';

(h) Approximately 160' of 12-inch pipe between old station numbers 1349 + 07' and 1350 + 67';

(j) Approximately 121' of 12-inch pipe between Mileposts 364 + 2569' and 364 + 2690';

(iii) The additional facilities constructed by Arkla appurtenant to such facilities as follows:

(a) A pigging receiver, composed of a 12-inch valve, a 10 foot barrel made of heavywall 16-inch pipe and a 4-inch blowdown valve, located between old station numbers 6873 + 31' and 6870 + 31';

(b) A 12-inch main line valve located between old station numbers 1349 + 07' and 1350 + 67'; and

(c) A 12-inch main line valve and 4-inch blowdown valve located at Milepost 346 + 4723'.

(iv) The tap to be constructed on such facilities necessary to connect them with Arkla's MRT meter run located at Milepost 371 + 4960' (at McRae, White County, Arkansas);

less that portion of the foregoing previously sold by Arkla to Arkansas Oklahoma Gas Company pursuant to that certain Purchase Agreement dated September 7, 1987.

Arkla hereby represents and warrants that the above includes all of the assets acquired by it from TransArk, together with all of the improvements and changes made thereto by Arkla from the date of such acquisition and as of March 7, 1989.

#### SCHEDULE B

##### Arkla Pipeline Assets

(1) *Transmission.* The easements and line pipe in place and equipment in place associated with that portion of Arkla Energy Resources' transmission facilities as the same may exist as of March 1, 1989, and designated O, O-1-O, J, T, B (north of the intersection between line B and J in Pope County, Arkansas), BT-1, BT-1-A, B-106, BM-15, BM-10, BT-1-B, BT-16 and BT-14 commencing at the outlet side of Arkla's Chandler Compressor Station located in Latimer County, Oklahoma and extending easterly through Latimer and Le Flore Counties, Oklahoma and Sebastian, Crawford, Franklin, Logan, Johnson, Yell, Perry, Garland, Hot Spring, Pope, Conway, Faulkner, White, Grant, and Jefferson Counties, Arkansas to the points at which the lines designated J, BT-14, and T interconnect with the gas pipeline

transmission system owned and operated by Mississippi River Transmission Corporation.

(2) *Gathering*. The easements and line pipe in place and equipment in place associated with that portion of Arkla Energy Resources' gathering facilities as the same may exist as of March 1, 1989, located in Haskell, Latimer and Le Flore Counties, Oklahoma, and Crawford, Pope, Yell, Franklin, Johnson, Logan and Sebastian Counties, Arkansas.

Complaint

112 F.T.C.

IN THE MATTER OF

ROBERT LEWIS WILKS, D/B/A/ BARBER FUNERAL HOME

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3267. Complaint, Oct. 13, 1989—Decision, Oct. 13, 1989*

This consent order prohibits, among other things, a Springfield, Tenn. funeral home director from doing business as a funeral service provider, or from having any business relationship with any entity selling or offering to sell funeral goods or services to the public.

*Appearances*

For the Commission: *Mamie Kresses* and *Lydia Parnes*.

For the respondent: *Robert M. Crawford*, Springfield, Tn.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Robert Lewis Wilks, individually and doing business as Barber Funeral Home, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Robert Lewis Wilks was the owner and operator of the Barber Funeral Home, a sole proprietorship, in Springfield, Tennessee. He is currently incarcerated at the Robertson County Jail, 500 Willow Street, Springfield, Tennessee. At all times relevant to this complaint, respondent, a licensed funeral director and embalmer in the states of Tennessee and Kentucky, has directed and controlled the business acts and practices of the Barber Funeral Home.

PAR. 2. Since at least 1968, respondent has been engaged in the business of selling caskets, vaults, and other funeral goods to customers making funeral arrangements.

PAR. 3. Since at least 1968, respondent has been engaged in the

business of selling funeral services to his customers, such as funeral supervision, care and preparation of the deceased for services and burials, and the burial or other final disposition of the bodies of the deceased.

PAR. 4. In the course and conduct of his business, respondent has engaged in the sale of funeral goods and services to consumers in Tennessee and Kentucky, and has thus maintained a substantial course of trade in or affecting commerce as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. 44.

PAR. 5. In connection with the sale and provision of funeral goods and services to consumers, respondent has represented to consumers, directly or by implication, that he provides the caskets, burial vaults, and services selected and purchased by his customers.

PAR. 6. In truth and in fact, in numerous instances since 1981, respondent buried deceased persons without the caskets or burial vaults selected and purchased by his customers. Therefore, respondent's representations as set forth in paragraph five are false and misleading, and constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5 of the FTC Act.

PAR. 7. In connection with the sale and provision of funeral goods and services to consumers, respondent, in numerous instances, has desecrated the bodies and graves of the deceased by such actions as dumping trash into the caskets or graves, and burying bodies without the caskets or burial vaults selected and purchased by his customers.

PAR. 8. Respondent's acts and practices, as set forth in paragraph seven, have caused substantial consumer injury without offsetting benefits to consumers and competition, and cannot reasonably be avoided by consumers, and thus constitute unfair acts or practices, in or affecting commerce, in violation of Section 5 of the FTC Act.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent, Robert Lewis Wilks, and the respondent having been furnished thereafter with a copy of a complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission



having thereafter executed an agreement containing a consent order, an admission by the respondent of all of the jurisdictional facts set forth in the aforesaid 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, waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has violated the Federal Trade Commission Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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) Robert Lewis Wilks ("Wilks") is a resident of the State of Tennessee, with his current residence at the Robertson County Jail, 500 Willow Street, Springfield, Tennessee.

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

#### ORDER

##### PART I.

*It is ordered,* That respondent Robert Lewis Wilks, individually and doing business as Barber Funeral Home, and respondent's representatives, agents, employees, successors or assigns, directly or through any corporation, subsidiary, division or other device, shall forthwith cease and desist from transacting business as a funeral service provider or having any affiliation with any person or entity that sells or offers to sell funeral goods or services to the public.

##### PART II.

*It is further ordered,* That for a period of ten (10) years from the date of service of this order or the date of respondent's release from incarceration, should he be convicted of any crimes charged in the

indictments presented by the State of Tennessee, whichever occurs later, respondent shall promptly notify the Commission of any change of name, residence, business address, occupation, place of business, or place of employment. Respondent's notification shall be made by submitting a report in writing, by certified mail, to the Federal Trade Commission, Bureau of Consumer Protection, 6th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580, or to such other address as the Commission or its designated staff shall by written notice require.

The expiration of this notice provision shall not affect any other provision of this order.

## IN THE MATTER OF

STRUCTURAL ENGINEERS ASSOCIATION OF  
NORTHERN CALIFORNIA, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3268. Complaint, Nov. 2, 1989—Decision, Nov. 2, 1989*

This consent order prohibits, among other things, an association of approximately 1,000 engineers from restricting truthful advertising, price competition, and the offering of services to clients of other engineers.

*Appearances*

For the Commission: *Ralph E. Stone* and *Jeffrey A. Klurfeld*.

For the respondent: *Paul Fartessa, (President)*, San Francisco, Ca.

## 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 Structural Engineers Association of Northern California, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated and is violating 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 as follows:

PARAGRAPH 1. Respondent Structural Engineers Association of Northern California, Inc. ("SEAONC"), is a corporation formed pursuant to the laws of the State of California. SEAONC is a voluntary professional association of approximately 1,000 structural engineers who comprise over 70% of the Northern California licensed structural engineers and civil engineers who perform structural engineering. Its principal business office is at 217 Second Street, San Francisco, California.

PAR. 2. SEAONC's members are generally engaged in the business of providing structural engineering services for a fee. Except to the

extent that competition has been restrained as alleged herein, SEAONC's members have been and are now in competition among themselves and with other structural engineers.

PAR. 3. SEAONC engages in substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, SEAONC is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. The acts and practices of SEAONC, including the acts and practices alleged herein, have been in, or are affecting, commerce, within the meaning of the Federal Trade Commission Act.

PAR. 5. SEAONC has acted as a combination of its members or has conspired with at least some of its members to hinder, frustrate, or restrict competition among structural engineers in Northern California, by restricting or attempting to restrict its members from:

- A. Soliciting business by truthful advertising;
- B. Engaging in price competition; and
- C. Providing services to persons or entities that are the clients of other engineers.

PAR. 6. In furtherance of this combination or conspiracy, SEAONC has enacted and published Sections 2, 20, and 25 of its canons of ethics that:

- A. Prohibit its members from advertising their work or merit in a self-laudatory manner;
- B. Require that its members when engaging in engineering work uphold the principle of appropriate and adequate compensation for engineers and for employees in subordinate capacities; and
- C. Prohibit its members from reviewing the work performed by another engineer for the same client except with reason to believe that the other engineer's contract for services is not in contention.

PAR. 7. The purposes or effects of the combination or conspiracy and acts or practices of SEAONC as described above have been and are to restrain competition unreasonably and to injure consumers in one or more of the following ways, among others:

- A. By depriving consumers of truthful information pertinent to the selection of a structural engineer;
- B. By restraining competition with respect to the prices charged for structural engineering services;
- C. By preventing consumers from obtaining an expert second opinion of a structural engineer's work; and

D. By hindering competition among structural engineers in the provision of structural engineering services.

PAR. 8. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. Such combination or conspiracy, or the effects thereof, is continuing and will continue in the absence of the relief herein requested.

Chairman Steiger not participating.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Structural Engineers Association of Northern California, Inc. ("SEAONC" or "respondent"), and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law had 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. SEAONC is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. with its

principal business address located at 217 Second Street, San Francisco, California.

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, for purposes of this order, "SEAONC" means the Structural Engineers Association of Northern California, Inc., and its board of directors, committees, officers, delegates, representatives, agents, employees, successors, and assigns.

### II.

*It is further ordered*, That SEAONC shall cease and desist, directly or through any corporate or other device, in connection with its activities, in or affecting commerce, as 'commerce' is defined in the Federal Trade Commission Act, from:

A. Restricting, regulating, impeding, declaring unethical, interfering with or advising against truthful, non-deceptive advertising;

B. Restricting, regulating, impeding, declaring unethical, interfering with or advising about the consideration offered or provided to any engineer in return for the sale or purchase of his or her professional services; and

C. Restricting, regulating, impeding, declaring unethical, interfering with or advising against any engineer providing or offering to provide services to persons or entities that are the clients of other engineers.

*Provided, however*, that nothing contained in this order shall prohibit SEAONC from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to: (1) representations, including unsubstantiated representations, that SEAONC reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act; and (2) the notice to be provided to an engineer prior to any review of his work by another engineer.

## III.

*It is further ordered,* That SEAONC shall:

A. Within thirty (30) days after this order becomes final, remove from its canons of ethics, and from any other existing policy statement or guideline of SEAONC, any provision, interpretation or policy statement which is inconsistent with the provisions of Part II of this order;

B. Within sixty (60) days after this order becomes final, publish in the *Structural Engineers Association of Northern California News* or in any successor publication the revised versions of such documents, statements, or guidelines, and a copy of this order;

C. Within sixty (60) days after this order becomes final, file a verified report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this order;

D. For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which SEAONC has complied, and is complying with this order; and

E. Notify the Commission at least thirty (30) days prior to any proposed change in SEAONC, such as dissolution, reorganization, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

Chairman Steiger not participating.

## Complaint

## IN THE MATTER OF

LEE M. MABEE, JR., M.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9214. Complaint, July 12, 1988—Decision, Nov. 15, 1989*

This consent order prohibits, among other things, a Sioux Falls, S.D. physician from conspiring to refuse to deal with the Medical School's residency program or physicians affiliated with the school, or to interfere with the operation of the Medical School's OB/GYN department or faculty, or from preventing or restricting competition in the provision of OB/GYN care in the Sioux Falls, S.D., area.

*Appearances*

For the Commission: *Michael E. Antalics* and *Michael McNeely*.

For the respondent: *Robert L. Mabee*, Sioux Falls, S.D. and *John A. Cotler, Larkin, Hoffman, Daly & Lindgren, LTD*, Minneapolis, Mn.

## 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 respondent has violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The address of a respondent Lee M. Mabee, Jr., M.D., is 1201 South Euclid Avenue, Suite 306, Sioux Falls, South Dakota.

PAR. 2. Respondent is a physician licensed by the State of South Dakota who specializes in the practice of obstetrics and gynecology, and who practices medicine in Sioux Falls, South Dakota (hereinafter "Sioux Falls").

PAR. 3. Fees and other payments for respondent's medical services are paid, at times, by patients or third-party payors that are located in states other than South Dakota. Respondent purchases and uses drugs, supplies and equipment manufactured outside of South Dakota,



and treats patients who are residents of neighboring states. Respondent also recruits obstetricians/gynecologists who reside outside of South Dakota to practice in his medical practice. As a result, respondent's general business practices, and the conduct described below, affect the interstate purchase of medical supplies and products, the treatment of patients from out of state, the interstate billing of patients, and the interstate recruitment of physicians who practice or teach obstetrics and gynecology or subspecialties of those disciplines. Respondent's general business practices, and the acts and practices described below, are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45 (a)(1).

PAR. 4. Except to the extent that competition has been restrained as alleged herein, respondent has been and is now in actual or potential competition with other obstetrician/gynecologists in the provision of obstetrical/gynecological ("OB/GYN") care and in the provision of OB/GYN instruction in Sioux Falls.

PAR. 5. The University of South Dakota School of Medicine is the only medical school in South Dakota; its main campus is located in Sioux Falls. In addition to its program of medical education that leads to the M.D. degree, the Medical School offers several residency training programs, which provide education in medical specialties. The Medical School utilizes both full-time and part-time faculty members in its medical education programs, and uses its part-time faculty, called "clinical" faculty, to perform a much greater share of teaching duties than do most medical schools. Using clinical instructors gives students exposure to physicians with extensive practical experience, and makes some or all of the clinical faculty's patients available to the students for instructional purposes; it also reduces the Medical School's operating budget, as it is usually far more costly to hire full-time instructors than to hire clinical instructors to provide the equivalent amount of instruction.

PAR. 6. The physicians on the Medical School's clinical faculty have as their principal occupation the private practice of medicine in their respective communities. Most members of the Medical School's full-time faculty also treat some private patients by participating in the University of South Dakota Medical Service Plan ("MSP"), a multi-disciplinary group practice that is controlled by the Medical School. Through the MSP, full-time faculty members treat both indigent and paying patients, with the Medical School and the physician who treats

a paying patient sharing any fees received by the MSP. Although they treated private patients, prior to 1984 the vast majority of the physicians on the full-time faculty did not compete in any significant way with clinical faculty members or other private practitioners for paying patients. Instead, they practiced in a manner that was "complementary" to local private practitioners, generally confining their treatment of paying patients to specialties or subspecialties not served by the local, private medical community. The full-time faculty members generally did not, and still do not, attempt to attract patients directly, but instead primarily receive their paying patients through referrals from physicians in private practice.

PAR. 7. The Medical School has operated an OB/GYN residency program since 1956. The program is headquartered in Yankton, South Dakota, a city with a population of 19,000, located eighty-two miles south of Sioux Falls. Originally, the Yankton campus was the program's only year-round location, with residents doing short rotations at Sioux Falls and other sites to receive specialized training. In the early 1980's, however, in response to evolving accreditation standards requiring additional subspecialty training, the Medical School gradually increased the length of rotations at its Sioux Falls campus, because Sioux Falls is the only location in the State with the facilities, personnel and patients needed to give residents sufficient OB/GYN subspecialty experience. Expanding the residency program in Sioux Falls raised the prospect of increasing the supply of OB/GYN specialists in Sioux Falls, because residents sometimes find it desirable to establish their practices in the community where they receive their residency training.

PAR. 8. Because of the expansion of the residency program in Sioux Falls, the Medical School needed to increase its OB/GYN faculty there. In July 1984, to prepare for longer rotations by residents in the 1984-1985 school year, the Medical School hired James R. Thomas, Ph.D., M.D., a perinatologist, to serve on its OB/GYN full-time faculty in Sioux Falls. Perinatology is an OB/GYN subspecialty that focuses on maternal-fetal medicine and high-risk pregnancies. Then, to accommodate the further expansion of the Sioux Falls residency program to a year-round schedule in the 1985-1986 school year, the Medical School added another full-time OB/GYN instructor, Robert W. Wilson, M.D., and increased the clinical faculty teaching OB/GYN residents in Sioux Falls from two to eight members.

PAR. 9. The Medical School hired Dr. Thomas both to teach medical

students and to start a perinatal center in Sioux Falls, which the Medical School hoped would eventually have a staff of three or four perinatologists. His recruitment was a first step in the Medical School's plan to recruit for its full-time faculty physicians trained in three OB/GYN subspecialty fields that the Medical School believes are inadequately served by South Dakota's private practitioners: perinatology, gynecologic oncology, and reproductive endocrinology. These subspecialists would not only teach and do research, but would also spend a substantial portion of their time caring for patients in treatment centers located in the two major Sioux Falls hospitals.

PAR. 10. Dr. Thomas was the first practicing perinatologist in Sioux Falls. Prior to the arrival of Dr. Thomas in Sioux Falls, women in South Dakota who were experiencing a high-risk pregnancy were referred out of state, or were treated locally by obstetricians who are not perinatologists.

PAR. 11. Unlike other members of the full-time faculty, Dr. Thomas began to advertise and directly solicit patients shortly after he joined the faculty, indicating his availability to provide general OB/GYN services as well as perinatal services. Specifically, in October 1984, Dr. Thomas placed an advertisement in the local daily newspaper, which ran weekly for ten weeks and which stated that he was an "Obstetrician, Gynecologist and Perinatologist," and offered the "new special service" of perinatology. Dr. Thomas also placed a large personal yellow pages advertisement, which appeared in the edition that was distributed in April 1985, and contained similar information under a banner reading "Comprehensive Women's Health Care."

PAR. 12. From the autumn of 1984 through the spring of 1985, respondent along with several other local private practice obstetricians, complained to Medical School officials, in at least two meetings and through telephone calls, direct conversations and written communications, about Dr. Thomas's seeking to treat private patients. They wanted Dr. Thomas to stop competing with private practitioners and to limit his practice to the full-time faculty's traditional "complementary" role, as described above in Paragraph Six. In addition, after his yellow pages advertisement appeared, respondent and some or all of the other local obstetricians stopped or decreased their referring of paying patients to Dr. Thomas, treating high-risk pregnancies themselves, or sending such patients to perinatologists in other states.

PAR. 13. In August 1985 the Medical School continued its plan to recruit subspecialists it considered to be needed in South Dakota. hv

placing in *The Journal of Obstetrics/Gynecology* a recruitment advertisement for additional perinatologists. The Medical School's recruitment of such full-time OB/GYN faculty members in Sioux Falls posed and continues to pose a competitive threat to respondent because (a) subspecialists on the full-time faculty may treat paying patients, with or without complex problems, that respondent would otherwise treat; and (b) recruitment by the Medical School may make it more difficult or less profitable for respondent to expand his medical practice by recruiting OB/GYN subspecialists.

PAR. 14. In personal conversations and medical staff meetings, respondent, along with other local obstetricians, complained to the Medical School about the recruitment advertisement and demanded that the Medical School do no recruiting for its full-time OB/GYN faculty without consulting with its clinical OB/GYN faculty. In addition, respondent and some of the other obstetricians met several times to discuss and draft a written presentation to the Medical School. On September 24, 1985, respondent and eleven other physicians, who constituted every private practice obstetrician/gynecologist in Sioux Falls, sent a letter signed by each of them (the "resignation letter") to officials of the Medical School and of the two major Sioux Falls hospitals, withdrawing their support from the Medical School's OB/GYN residency program because of the actions of the Medical School and its faculty described in paragraphs nine, ten, eleven and thirteen. The letter stated that local "private sector physicians" were capable of providing all high-risk pregnancy care needed in the Sioux Falls region and that the Medical School was seeking to hire additional perinatologists for a perinatal center to be located at Sioux Valley Hospital, despite implied promises that the Medical School would not actively enter into the "private sector of health care." The letter also said it was "incongruous" that Sioux Valley Hospital would "subsidize" the Medical School's Obstetrical Department through purported rent, staffing and marketing subsidies, and a referral system for high risk obstetrical patients that would give preferential treatment to the Medical School's perinatologists. The other obstetricians subsequently told the Medical School that they would stop participating in the residency program as of June 30, 1986. The letter indicated, however, that those obstetricians currently teaching undergraduate medical students would continue to do so.

PAR. 15. The resignation letter constituted an explicit attempt by

respondent and the other obstetricians to use their power as the only physicians available to serve on the clinical OB/GYN faculty in Sioux Falls to force the Medical School to limit the medical practice of Dr. Thomas and any additional full-time OB/GYN faculty members residing in Sioux Falls. Thereafter, respondent and the other obstetricians agreed to negotiate only collectively as to the terms upon which they would teach in the residency program and demanded as a condition to the agreement of any of them to teach in the residency program (a) that Dr. Thomas and the Medical School not advertise; (b) that full-time faculty members treat only those paying patients referred to them by Sioux Falls private practitioners; (c) that the Medical School either stop all recruitment of full-time OB/GYN faculty members and all plans to establish OB/GYN subspecialty centers, or establish a board, controlled by the respondent and the other obstetricians, that would have veto power over OB/GYN recruiting decisions; and (d) that Dr. Thomas, the dean and the OB/GYN residency director be fired.

PAR. 16. Early in 1986, in response to demands and threats by respondent and the other obstetricians, the Medical School dean instructed full-time OB/GYN faculty not to place individual advertisements in the newspapers or the yellow pages, and, for a while, not to see private patients outside their subspecialty areas. Nevertheless, respondent and the other obstetricians continued to make the demands listed in paragraph fifteen and also took joint actions aimed at closing down the year-round OB/GYN residency program in Sioux Falls. These actions included attempts to induce the two Sioux Falls hospitals, which had been paying stipends to four OB/GYN residents, to stop such payments after June 30, 1986. Due to these efforts, only one resident received funding in Sioux Falls for the 1986-1987 school year. Some or all of the other obstetricians also sought to prevent the Medical School's hiring of full-time OB/GYN faculty members needed to continue the residency program in Sioux Falls. For example, they successfully deterred two applicants from accepting positions on the full-time faculty by telling them, in interviews arranged by the Medical School, that they would receive no referrals if they joined the full-time faculty, and by indicating generally that the applicants would face an antagonistic local medical community.

PAR. 17. On June 30, 1986, the other obstetricians who were on the clinical faculty stopped teaching in the residency program.

PAR. 18. The actions of respondent and the other obstetricians have

significantly hindered the operation of the Medical School's OB/GYN residency program. Because there were no other obstetrician/gynecologists in Sioux Falls to teach as clinical faculty members, and because the Medical School was unable to hire full-time faculty members before the start of the 1986-1987 school term, the Medical School was forced to assume considerable added expenses and to find alternative locations for its OB/GYN residents, sending them to Indian Health Service facilities in western South Dakota and Alaska. The geographic dispersion of the residents, the loss of experienced faculty members, the inadequacy of subspecialty experience in locations other than Sioux Falls and the lack of funding all threaten the program's accreditation status. The program has recently been placed on probation for four years by the Accreditation Council for Graduate Medical Education because of these deficiencies. The Medical School has decided not to accept any new residents for the 1987-1988 school year, indicating that the program may be phased out over the next three years. The uncertainty over the future of the residency program makes it more difficult to attract high quality residents and faculty and has caused three of the six remaining OB/GYN residents to transfer to programs at other medical schools. If the OB/GYN residency program is forced to close, South Dakota would also lose an important source of new OB/GYN specialists, and many members of the OB/GYN full-time faculty may also leave the State.

PAR. 19. The acts and practices described in paragraphs twelve through seventeen were undertaken as part of a combination or conspiracy by and among respondent and the other obstetricians to eliminate or limit competition in the provision of OB/GYN care through the use of coercive practices, including threats to boycott and actual boycotts. The combination or conspiracy was directed at restricting competition in Sioux Falls from (1) members of the Medical School's full-time faculty, (2) any clinic or medical center established by the Medical School or the local hospitals, and (3) graduating residents of the Medical School's OB/GYN residency program.

PAR. 20. The purposes, effects, tendency, or capacity of the combination or conspiracy alleged in paragraph nineteen and the acts and practices alleged in paragraph twelve through seventeen are or have been to restrict competition for the provision of OB/GYN care and for the provision of OB/GYN instruction among obstetricians/gynecologists in the Sioux Falls area, and thereby to deprive

consumers of the benefits of competition, in the following ways, among others:

A. With respect to the provision of OB/GYN care,

(a) Members of the Medical School's full-time faculty have been restrained from competing for patients and from receiving referrals of patients from respondents;

(b) The Medical School has been restrained (i) from competing through its Medical Service Plan for private patients in the Sioux Falls area needing general or subspecialty OB/GYN care, and (ii) from hiring full-time OB/GYN faculty members and establishing research and treatment centers to satisfy the medical needs of both indigent and paying patients in South Dakota and neighboring states for subspecialty OB/GYN care;

(c) OB/GYN subspecialists who wish to practice in Sioux Falls face increased entry barriers due to threatened or actual withholding or referrals; and

(d) Consumers in South Dakota and neighboring states have been, are or may be: (i) limited in their ability to choose freely among obstetricians/gynecologists in Sioux Falls, (ii) restricted in their ability to obtain subspecialty treatment, and (iii) if the OB/GYN residency program closes, deprived of the competition and treatment options created in Sioux Falls by members of the Medical School's full-time faculty or by graduates of the residency program;

B. With respect to the provision of OB/GYN instruction,

(a) The refusal by respondent and the other obstetricians to provide OB/GYN instruction to residents has eliminated competition among them to serve on the clinical faculty of the Medical School;

(b) The Medical School, as a buyer of OB/GYN instruction, has been, is or may be (i) prevented from hiring clinical faculty members, (ii) hindered in its attempts to hire full-time faculty members, (iii) forced to pay stipends to its residents that would otherwise have been paid by sponsoring hospitals in Sioux Falls, and (iv) restrained from operating its OB/GYN residency program in the manner that it deems most appropriate, which may in turn lower the quality of the program, and force it to lose its accreditation and close;

(c) Current and future students of the Medical School may (i) pay increased tuition or accept reduced stipends to offset higher operating costs incurred by the Medical School, and (ii) find that the Medical

School offers lower quality OB/GYN training, especially in subspecialty fields, or no OB/GYN residency training; and

(d) Consumers in South Dakota and neighboring regions may (i) receive lower quality OB/GYN care, and (ii) may have to pay increased medical fees to offset higher education costs for the Medical School's undergraduate and graduate students.

PAR. 21. The combination, conspiracy, acts and practices described above constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination or conspiracy, or the effects thereof, is continuing and will continue absent the entry against the respondent of appropriate relief.

#### DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with a violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been furnished with a copy of that complaint, together with a notice of contemplated relief; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all of 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its 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, now in further conformity with the procedures prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent is a licensed physician and doing business under and by virtue of the laws of the State of South Dakota, with his office and



principal place of business located at the address listed in the complaint attached hereto.

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

#### ORDER

##### I.

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

A. "*Respondent*" means Lee M. Mabee, Jr., M.D.

B. "*Medical School*" means University of South Dakota School of Medicine.

C. "*OB/GYN Center*" means any medical facility or program established to provide obstetrical or gynecological care, research or education.

##### II.

*It is ordered*, That the respondent shall forthwith, directly, indirectly, or through any corporate or other device, in connection with the provision of health care services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, cease and desist from entering into, attempting to enter into, organizing, continuing or acting in furtherance of any agreement or combination, either express or implied, with any physician(s), to refuse or threaten to refuse to deal with, or otherwise coerce, any person or entity for the purpose or with the effect of interfering with the operation of the academic or clinical programs of the Medical School's obstetrical/gynecological ("OB/GYN") department or faculty, or of preventing or restricting competition from any person or entity for the provision of OB/GYN care in the Sioux Falls, South Dakota, area, including, but not limited to any agreement or combination to:

(1) Refuse or threaten to refuse to serve on the faculty of the Medical School;

(2) Make joint demands or joint decisions as to any term or condition for serving on the faculty of the Medical School;

(3) Refuse, or threaten to refuse, to refer patients to receive

referrals of patients from, or provide any other form of professional cooperation to, any physician, based on his or her affiliation or prospective affiliation with the Medical School, or with any OB/GYN center, or on his or her treatment of, or attempts to attract, private patients;

(4) Interfere in a coercive manner with any attempt by the Medical School to recruit physicians to work in the Sioux Falls area, or to negotiate jointly with the Medical School concerning any term or condition with respect to its recruitment or hiring of such physicians;

(5) Refuse or threaten to refuse to admit patients to any hospital or other medical facility, based on the relationship of the hospital or facility with the Medical School, or based on the actual or prospective operation or funding, in whole or part, of any OB/GYN center by the hospital or facility; or

(6) Coerce the Medical School, any physician, or any other entity to eliminate, limit or restrict advertising for OB/GYN services in the Sioux Falls area.

*Provided*, that nothing in this order shall prohibit respondent from entering into an agreement or combination with any physician with whom respondent practices medicine in partnership or in a professional corporation, or who is employed by the same person as respondent.

### III.

*It is further ordered, That:*

A. Respondent shall, within thirty (30) days after this order becomes final, mail a copy of this order and of the complaint in this proceeding to the Administrator, the Chairman of the Board of Directors, and the chief officer of the medical staff of Sioux Valley Medical Center and McKennan Hospital, in Sioux Falls.

B. Respondent shall, within sixty (60) days after service of this order, and at any time the Commission, by written notice, may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which respondent has complied with this order.

C. If respondent, at any time, discontinues his present business or employment, he shall promptly notify the Commission of such discontinuance. In addition, for a period of seven (7) years after this order becomes final, respondent shall promptly notify the Commission

whenever he enters into any new business or employment whose activities involve the provision of OB/GYN services in the Sioux Falls area. Each such notice shall include respondent's new business address and a statement of the nature of the business or employment in which respondent is newly engaged as well as a description of 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.

Commissioner Owen not participating.

IN THE MATTER OF  
LOUISIANA-PACIFIC CORPORATION

*Docket C-2956. Interlocutory Order, November 15, 1989*

ORDER

This matter having been heard by the Commission on the briefs and oral argument of Louisiana-Pacific Corporation and of the Bureau of Competition in support of and in opposition to modification of the order in Docket No. C-2956, for the reasons stated in the accompanying opinion, the Commission has determined to deny the petitions to modify the order. Accordingly,

*It is ordered*, That the petitions to modify the order in Docket No. C-2956 be, and they hereby are, denied.

By the Commission.\*

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

The 1979 consent order in this matter was designed to resolve the Commission's concern that Louisiana-Pacific's proposed acquisition of Fibreboard Corporation would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The order required Louisiana-Pacific, among other things, to divest within two years from the date of the order a fiberboard plant at Rocklin, California, and to obtain prior Commission approval of any acquisitions in the defined market for a period of ten years. In 1980 and in 1981, Louisiana-Pacific asked the Commission to set aside these provisions of the order.

The Commission in 1980 and in 1981 denied the two petitions to reopen and modify the consent order filed by Louisiana-Pacific, on the ground that Louisiana-Pacific had failed to make a satisfactory showing of changed conditions of law or fact or public interest considerations sufficient to require reopening. In the subsequent civil penalty action, initiated by the Commission in 1981 for Louisiana-Pacific's failure to divest as required by the order, the District Court

\*Prior to leaving the Commission, former Commissioner Machol registered her vote in the affirmative for the Order and the Opinion of the Commission in this matter. Commission Owen did not register a vote in this matter.

found that Louisiana-Pacific had violated the order and imposed a civil penalty of \$4 million. *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504 (D. Or. 1982). On appeal, the Court of Appeals for the Ninth Circuit vacated the civil penalty award on the ground that the Commission had not adequately explained its reasons for denying the 1981 petition to reopen. *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445 (9th Cir. 1985). Although the Commission issued a statement of its reasons for denying the petition, Letter to John C. Hart, June 5, 1986, the District Court did not consider the findings but remanded to the Commission with instructions to reopen the order and consider modification. *United States v. Louisiana-Pacific Corp.*, 654 F. Supp. 962 (D. Or. 1987), *appeal dismissed*, 846 F.2d 43 (9th Cir. 1988). The history of this proceeding is described in greater detail in Part I below and in the June 5, 1986, letter of the Commission to John C. Hart.

The issue in this proceeding is whether the Commission should have modified, altered or set aside the order in this matter in response to the 1981 petition of Louisiana-Pacific Corporation to reopen and modify the order and, if so, how.<sup>1</sup> The Commission has considered the matter on the briefs and oral [2] argument of the respondent and of the Bureau of Competition. For the reasons stated below, the petition to modify the order is denied.

### I. Background

The consent order was negotiated after the Commission, on June 7, 1978, authorized its staff to seek a preliminary injunction under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), to block Louisiana-Pacific's proposed acquisition of Fibreboard Corporation, pending administrative adjudication of the lawfulness of the acquisition. The Commission considered memoranda submitted by Louisiana-Pacific (dated May 24, 1978) and Fibreboard (dated May 23 and June 6, 1978) before making its decision to seek a preliminary injunction.<sup>2</sup>

Instead of proceeding immediately to court, the Commission directed its staff to explore Louisiana-Pacific's offer, submitted by its attorneys, to settle the matter by divesting the medium density fiberboard plant at Rocklin, California, then owned by Fibreboard.

<sup>1</sup> Accordingly, we consider here the allegations of the 1981 petition. Subsequent developments are not at issue.

<sup>2</sup> Copies of these memoranda are Exhibits 4, 5 and 6 in Bureau of Competition's Exhibits to Answer to Louisiana-Pacific Corporation's Response to Order Reopening Order (hereafter "Exhibit —").

After two weeks of settlement negotiations, Louisiana-Pacific offered to divest the Rocklin plant or, at its discretion, to waive its option to purchase a particleboard plant at Ukiah, California, then owned by Georgia-Pacific Corporation and leased, with an option to purchase, by Louisiana-Pacific. On June 23, 1978, the Commission rejected Louisiana-Pacific's settlement proposal and directed its staff to seek an injunction, unless Louisiana-Pacific would agree to divest the Rocklin plant and to accept a limited restriction on certain future acquisitions. Louisiana-Pacific agreed to the settlement and signed the consent agreement on June 26, 1978. In exchange for Louisiana-Pacific's agreement to the terms of the order, the Commission discontinued its plan to seek a preliminary injunction to prevent the acquisition of Fibreboard Corporation and terminated its prosecution of the matter.

The Commission issued its complaint and the order in settlement of the complaint on February 27, 1979. The order became final on March 28, 1979. The complaint alleged that Louisiana-Pacific's acquisition of Fibreboard Corporation would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. *Louisiana-Pacific Corp.*, Docket No. C-2956, [3] 93 FTC 308 (1979).<sup>3</sup> The order, to which Louisiana-Pacific consented, required Louisiana-Pacific to divest within two years from the date of the order the medium density fiberboard plant in Rocklin, California, and for a period of ten years from the date of the order to obtain the approval of the Commission before making certain acquisitions.

Less than one year after the order was final, in a petition dated February 4, 1980, supplemented by a letter dated June 11, 1980, Louisiana-Pacific asked the Commission to set aside the divestiture requirement and the prior approval clause.<sup>4</sup> The Commission considered the request and determined that the petition failed to demonstrate changes of fact or law or considerations affecting the public interest that warranted reopening the order. The Commission issued its decision and notified Louisiana-Pacific of the denial of the petition to reopen by letter dated June 26, 1980.

<sup>3</sup> Count I of the Commission's complaint challenged Louisiana-Pacific's acquisition of Fibreboard Corporation; Count II of the complaint challenged its 1976 acquisition from Evans Products of a particleboard plant in Missoula, Montana, and its 1976 lease from Georgia-Pacific of a particleboard plant at Ukiah, California. The five-year lease gave Louisiana-Pacific an option to buy the Ukiah plant at the end of three years. The consent order settled both counts of the complaint.

<sup>4</sup> Exhibits 1 & 2. Exhibit 1 includes Louisiana-Pacific's 1980 Petition to Reopen and its Memorandum in Support of Petition To Reopen Proceedings for the Purpose of Modifying a Final Order (hereafter "1980 Memorandum").

On June 25, 1981, three months after the date by which Louisiana-Pacific had agreed to divest the Rocklin plant, Louisiana-Pacific filed its second petition to reopen the order, again asking the Commission to set aside the requirement to divest.<sup>5</sup> The second petition incorporated by reference the first petition to reopen and alleged additional grounds for the requested modification. The Commission again considered Louisiana-Pacific's request and again determined that Louisiana-Pacific had not made a sufficient showing under Section 5(b) of [4] the Federal Trade Commission Act, 15 U.S.C. 45(b), to require reopening of the order. The Commission issued its decision by letter dated July 31, 1981.

In the Commission's subsequent action against Louisiana-Pacific for failure to divest the Rocklin plant in violation of the order, Louisiana-Pacific counterclaimed, alleging that the Commission's denial of the second petition to reopen the order was improper. The District Court granted the government's motion for summary judgment on the merits of the counterclaim. *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 501 (D. Or. 1982). The District Court also found that Louisiana-Pacific had violated the order and imposed a \$4 million civil penalty, largely because Louisiana-Pacific had not made a good faith effort to divest the plant. *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504, 510 (D. Or. 1982). On appeal, the court of Appeals for the Ninth Circuit found that the Commission's statement of reasons for denying Louisiana-Pacific's 1981 petition lacked sufficient detail and instructed the District Court to require from the Commission a fuller statement of reasons for the denial of the June 25, 1981, petition. *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445 (9th Cir. 1985). The Commission provided its statement of reasons for the denial of the 1981 petition by letter dated June 5, 1986.

On application for reinstatement of the civil penalty, the District Court concluded that the decision of the Court of Appeals required the Commission to reopen the order to consider whether the order should have been modified, altered or set aside in response to Louisiana-Pacific's 1981 petition to reopen.<sup>6</sup> The District Court concluded that

<sup>5</sup> Exhibit 3 (hereafter "1981 Petition"). In 1981, Louisiana-Pacific had not yet divested the Rocklin plant. Final divestiture of the Rocklin plant was approved by the District Court in December 1983, after the court-appointed trustee had obtained eleven offers during a 90-day search. See *United States v. Louisiana-Pacific Corp.*, 569 F. Supp. 1138 (D. Or.), *reconsideration denied*, 569 F. Supp. 1141 (D. Or. 1983).

<sup>6</sup> Louisiana-Pacific filed a third petition to reopen and modify the order on November 9, 1988. In the 1988 petition, Louisiana-Pacific asked the Commission to set aside the order in its entirety and to dismiss the civil penalty action pending in the District Court. The Commission denied the petition by letter dated March 9, 1989, to Clifford N. Carlsen, Jr., Esq., and Michael E. Arthur, Esq.

the order should be reopened on the theory that “[t]he Ninth Circuit’s opinion makes clear that a satisfactory showing [sufficient to require reopening] is made if the petition states with particularity the changed conditions” and that “LP stated the changed conditions with particularity”<sup>7</sup>

The FTC must [reopen and consider modification] in this case because LP stated the changed conditions with particularity. Specifically, LP pointed to its reduced capacity for production of particleboard and medium density fiberboard. This reduction [5] tended to show a reduction of market power in the relevant market. Also, LP pointed to the then depressed conditions in the forest products industry, which made the divestiture of the Rocklin plan[t] more onerous than originally thought.

*United States v. Louisiana-Pacific Corp.*, 654 F. Supp. 962, 965 (D. Or. 1987), *appeal dismissed*, 846 F.2d 43 (9th Cir. 1988).<sup>7</sup> Although the Commission respectfully disagrees with the court’s standard for reopening, the matter of reopening has been resolved by the District Court for the purpose of this remand proceeding, and the issue here is whether the order should be modified, altered or set aside and, if so, how. Pursuant to the District Court’s decision, the Commission instituted this adjudicative proceeding.

## II. Standard for Modifying a Final Order of the Commission

Modification of a final order is warranted when significant unanticipated changes in circumstances or considerations of the public interest eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *See, e.g., Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (no modification for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drug Stores Northwest, Inc.*, Docket No. C-3039, Letter to H. B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers that the order sought to remedy); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification warranted by “clear showing” of changes that eliminate reasons for order or such that the order causes unanticipated hardship). For example, it may be in the public interest to modify an order “to relieve

<sup>7</sup> The Commission appealed from the District Court’s decision on the ground that the District Court incorrectly construed the standard under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), for reopening final Commission orders. The Court of Appeals decided that the District Court’s remand order was not appealable and dismissed for lack of appellate jurisdiction. The Commission preserves the issue of the proper standard for reopening (as distinguished from the standard for modification after reopening) for future proceedings in this and other cases.



any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). In addition, the Commission will consider the reasons favoring modification and any reasons not to modify the order. *See, e.g., Chevron Corp.*, Docket No. C-3147, 105 FTC 228 [6] (1985) (modification warranted in public interest when potential harm to respondent's ability to compete outweighs any further need for order).

In reopening proceedings, the petitioner has the burden of showing why an order should be modified. *See Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *United States v. Swift & Co.*, 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961) (consent "decree must enjoy a solid presumption that it was founded on fact and supported by reason"); *see Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for [not reopening] except in the most extraordinary circumstances"); *United States v. Swift & Co.*, 286 U.S. 106, 120 (1932) (denying request to modify consent order: "What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing."); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to Commission order).

Louisiana-Pacific asserts that the District Court's conclusion that the Commission must reopen the order is tantamount to a conclusion that the Commission must modify the order. R.I.B. at 2; R.R.B. at 8-9.<sup>8</sup> This could be true only if Louisiana-Pacific's allegations of changed conditions were in fact equivalent to "changed conditions

<sup>8</sup> We use the following abbreviations in this opinion:

- |        |   |
|--------|---|
| R.I.B. | Louisiana-Pacific's Response to Commission Order of August 9, 1988, Reopening Consent (Respondent's Initial Brief)                          |
| R.R.B. | Rebuttal of Louisiana-Pacific Corporation (Respondent's Rebuttal Brief)   |
| C.A.B. | Bureau of Competition Answer to Louisiana-Pacific Corporation's Response to Order Reopening Order (Bureau of Competition's Answering Brief) |

[that] require such order to be altered, modified, or set aside," within the meaning of [7] Section 5(b) of the Federal Trade Commission Act.<sup>9</sup> Neither the Commission nor the courts have found such equivalence.<sup>10</sup> The Court of Appeals said that Louisiana-Pacific's petition to reopen contained "substantive allegations that are not facially frivolous," but the Court of Appeals also said that "[w]e do not suggest that L-P's petitions required the FTC to modify the consent order." 745 F.2d at 1449-50.<sup>11</sup> The District Court "express[ed] no opinion on what the FTC should conclude" after reopening and said that "the legislative history makes clear that the FTC is not required to modify the order simply because it is required to *consider* modification." 654 F. Supp. at 965 (emphasis in original). See also S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979) ("this section does not require that the Commission modify any final order").

Louisiana-Pacific also incorrectly asserts that the decisions of the District Court and the Court of Appeals "contemplate and require" the Commission to consider additional evidence and testimony. R.I.B. at 6. The Court of Appeals said that the Commission could not summarily reject a petition to [8] reopen, "other than one that is meritless on its face, without making findings and without offering a clear statement of its reasons for rejecting the petition." 754 F.2d at 1449. The Court of Appeals said that it could not "evaluate the respective claims of the parties" because the Commission had not provided a statement of its reasons for denying Louisiana-Pacific's petition, *id.*, and it remanded to the District Court with instructions to require the Commission "to enter specific findings with regard to L-P's petitions." *Id.*, at 1450. This is not a requirement to hold an evidentiary hearing. The District Court remanded to require the

<sup>9</sup> Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order . . . should be altered, modified, or set aside, in whole or in part, if the [respondent] . . . makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made." S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979).

<sup>10</sup> Indeed, the District Court's application of a different standard for reopening—"changed conditions [stated] with particularity"—was the basis for the Commission's appeal of the remand order. See note 7 *supra*. The Court of Appeals said that the changed conditions must be of the type that require modification but did not consider whether Louisiana-Pacific's allegations met this standard. 754 F.2d at 1449 nn.3 & 4.

<sup>11</sup> The Court of Appeals, considering the appeal from the District Court's remand order, said that "the order of remand does not dictate the result of the reconsideration. The FTC may or may not find that the consent decree should be modified." 846 F.2d at 44.

Commission to consider modification and also did not require an evidentiary hearing.

Evidentiary hearings are not required in adjudicative proceedings when there are no disputed issues of material fact. *E.g.*, *Consolidated Oil & Gas, Inc., v. FERC*, 806 F.2d 275, 279-80 (D.C. Cir. 1986); *Louisiana Land & Exploration Co. v. FERC*, 788 F.2d 1132, 1137-38 (5th Cir. 1986); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1362-64 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986). The Commission, in considering Louisiana-Pacific's petitions to reopen, has not disputed the basic facts alleged by Louisiana-Pacific. Rather, for the purpose of evaluating Louisiana-Pacific's petitions, the Commission has assumed that the factual assertions were true. *See* September 13, 1988, Order of the Commission, at 2.<sup>12</sup> Although Louisiana-Pacific has argued that the Commission "cannot properly determine that no facts are in dispute, because it has not heard all the facts that L-P is entitled to place before it," R.I.B. at 7, Louisiana-Pacific has not in its briefs, at oral argument or by motion attempted to show any material controverted facts that require resolution.<sup>13</sup> *See* R.R.B. at 14 n.1.<sup>14</sup> [9]

Louisiana-Pacific argues that because the order is a consent order, unsupported by written findings of fact and an opinion, the Bureau of Competition must be required to "introduce the factual premises underlying the complaint" to provide Louisiana-Pacific "with a point of departure for its allegations of change." R.R.B. at 18. Louisiana-Pacific also argues that the Bureau of Competition should offer affirmative evidence to show that "in 1981, L-P's retention of Rocklin would have been anticompetitive in any way, or that divestiture was still needed or would have been procompetitive" and that the

<sup>12</sup> The Order, denying Louisiana-Pacific's request to refer the matter to an administrative law judge, stated that "[t]he factual allegations of Louisiana-Pacific's 1981 petition to reopen the consent order are not disputed, and the respondent has not disclosed in its Motion for Referral any controverted facts that require resolution."

<sup>13</sup> Counsel for Louisiana-Pacific stated at oral argument that any additional facts presented by Louisiana-Pacific would not be new but would support the factual allegations already made in the petitions. Oral Argument Tr. at 48.

<sup>14</sup> Louisiana-Pacific asserted that it "would expect to introduce, among other things, evidence of the type contained in L-P's" November 8, 1988, petition to reopen and modify the order. The 1988 petition, however, introduced no new facts warranting reopening but argued, as in earlier petitions, that the product market was unconcentrated, that Louisiana-Pacific lacked market power and that the absence of a challenge to certain acquisitions by Georgia-Pacific demonstrated the lack of need for this order. Louisiana-Pacific also argued in the 1988 petition that reopening and modification would be appropriate because of the 1988 "spin-off" of Fibreboard and the lack of financial benefit to Louisiana-Pacific from Fibreboard or Rocklin. Louisiana-Pacific also argued that the prior approval clause imposed a competitive disadvantage and was no longer necessary and that further proceedings were not in the public interest. The prior approval clause has now expired by the terms of the order.

Commission should “render *de novo* findings regarding the continued need for divestiture of the Rocklin facility.” R.R.B. at 3-4. These arguments seriously misperceive the petitioner’s burden in an order modification proceeding.

Because the order, entered on the considered consent of the parties, “enjoy[s] a solid presumption that it was founded on fact and supported by reason,” petitioners seeking modification “bear the burden of proof on their petitions, and the burden is heavy.” *United States v. Swift & Co.*, 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff’d per curiam*, 367 U.S. 909 (1961). Because a final order is presumptively valid, the continued need for the remedy imposed by the order is relevant if a need for modifying the order is demonstrated in the first instance, but the burden is not on the proponents of the order to justify it. Rather, the burden is on the petitioner to “show that the decree when entered was supported by conditions which have so altered with the passage of time that the restraint can no longer be justified, and that they are suffering injury, without countervailing advantage to the public interest.” 189 F. Supp. at 906.

Louisiana-Pacific apparently would litigate the complaint now, more than ten years after the Fibreboard acquisition occurred, although the Commission terminated its prosecution of the matter in 1978, when Louisiana-Pacific signed the consent order. Proving a violation now, or even in 1980 or 1981, after the parties had negotiated a final consent order in settlement of the complaint, is beyond the scope of modification proceedings. By consenting to an order, respondents “relinquished the right to insist that an offense be proved, and the right to show that no [10] violation had been committed. Having accepted a decree drawn on the theory of a violation of the antitrust laws, they cannot [later] vacate or modify the decree on the ground that the theory was unsound.” *United States v. Swift & Co.*, 189 F. Supp. at 907, *citing*, *Swift & Co. v. United States*, 276 U.S. 311 (1929); *see also* *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (decree “is not subject to impeachment in its application to the conditions that existed at its making”).

Although the factual allegations of Louisiana-Pacific’s petitions to reopen are undisputed, the conclusions to be drawn from those facts are disputed. Accepting Louisiana-Pacific’s basic factual allegations as true does not mean that the Commission must also adopt the inferences and conclusions preferred by Louisiana-Pacific. The conclusions and inferences from those undisputed facts are to be drawn by

the Commission. *See, e.g., Corn Products Refining Co. v. FTC*, 324 U.S. 726, 739 (1945); *FTC v. Pacific States Paper Trade Association*, 273 U.S. 52, 63 (1927) ("The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission."). For example, the fact that economic conditions changed between 1978 and 1981 is not disputed, but this does not mean that the Commission must also agree with Louisiana-Pacific's conclusion from this basic fact that modification of the order is required. *See* R.R.B. at 25. Our responsibility, under the order of the District Court, is to consider whether the facts alleged by Louisiana-Pacific are sufficient to warrant modification of the consent order.

We also reject Louisiana-Pacific's assertion that the record in this proceeding must be limited to the jurisdictional facts alleged in the complaint and the facts alleged in Louisiana-Pacific's petitions to reopen. R.I.B. at 14. The "nonadjudicative" facts cited by Louisiana-Pacific—the Commission's decisions to seek a preliminary injunction to prevent Louisiana-Pacific's acquisition of Fibreboard and to issue a complaint with the consent order, the compliance reports submitted by Louisiana-Pacific under the order<sup>15</sup> and the [11] Commission's decisions to deny Louisiana-Pacific's 1980 and 1981 petitions to reopen and to seek enforcement of the order and civil penalties for violation of the order—all are matters of record and, so far as we are aware, undisputed. Although Louisiana-Pacific apparently would exclude from the record the pre-order memoranda submitted to the Commission by Louisiana-Pacific and Fibreboard, Louisiana-Pacific has not asserted that those memoranda are inaccurate or erroneous.<sup>16</sup>

<sup>15</sup> Louisiana-Pacific does not dispute the truth of its compliance reports but asserted at oral argument that they "had to do with correspondence and writings" and were "not a full record" of Louisiana-Pacific's efforts to divest. Oral Argument Tr. at 11-14. This assertion is belied by (1) Louisiana-Pacific's statement that the "specifics" of its efforts to divest Rocklin "are set out in detail in L-P's bimonthly reports of compliance," 1981 Petition at 3; and (2) the June 10, 1981, affidavit of Donald R. Kayser, a vice president of Louisiana-Pacific, stating that each of the eight compliance reports provided, as required by the order, "a complete set of all correspondence . . . summaries of telephone conversations, plant inspections and all other activities and efforts directed at divestiture" of the Rocklin plant. 1981 Petition exhibit 1, at 2. The possibility that individual employees and officers may have "had personal contact with prospective purchasers of the Rockland [sic] plant," Oral Argument Tr. at 12, that were not mentioned in Louisiana-Pacific's compliance reports is not, however, relevant to this proceeding.

Louisiana-Pacific asserts that it must be permitted "to rebut inferences that might be drawn from compliance reports standing alone." R.R.B. at 29. There would be no end to the adjudicative process if a party were permitted an additional hearing to attempt to rebut every inference drawn from the evidence by the adjudicative body.

<sup>16</sup> Indeed, Louisiana-Pacific's 1980 petition "dr[e]w significantly" on the 1978 memoranda. 1980 Memorandum at 1 n.1. In any event, the Commission has not relied in this opinion or in the 1986 Findings (Letter to John C. Hart, June 5, 1986) on facts alleged in the 1978 pre-order memoranda of Louisiana-Pacific or Fibreboard to contradict factual allegations made by Louisiana-Pacific in its petitions to reopen. Rather, the

Despite its general assertions of the possibility of prejudice "when the agency takes official notice of a material and contested adjudicative fact," R.I.B. at 17, Louisiana-Pacific has made no specific claims of prejudice, nor has it identified any material, contested facts, although it has had the opportunity to do so, in its motion to refer the matter to an administrative law judge, in its briefs and oral argument in this proceeding or in any additional motion it was at liberty to file. Courts customarily take notice of their respective records in ongoing proceedings, and the principle seems equally applicable here. *See C. McCormick, Evidence* 927 (3d ed. 1984). [12]

### III. Alleged Changed Conditions of Fact

Louisiana-Pacific alleged in its 1980 and 1981 petitions to reopen that economic conditions in the forest products industry had changed since the order issued in 1979 and that, in response to those economic conditions, Louisiana-Pacific had reduced its capacity to produce particleboard and multiple-density fiberboard. Louisiana-Pacific argued in its petitions that these changed conditions "dispelled any probability of adverse competitive effects on which the 1978 complaint might have been based" and, therefore, required modification of the order. R.I.B. at 23. Louisiana-Pacific also argued that as a result of changed economic conditions, it could not divest the Rocklin plant at a price that Louisiana-Pacific considered to be fair. We have considered these allegations and conclude that these changed conditions are not sufficient to warrant modification of the order.

#### A. Capacity Reductions

In its petitions, Louisiana-Pacific claimed that its decisions to reduce its particleboard and medium density fiberboard production capacity, in light of economic conditions, constituted changed conditions of fact that made divestiture of the Rocklin plant unnecessary.<sup>17</sup> Louisiana-Pacific asserted that because its 1981 capacity was less than its capacity in 1978, its 1981 capacity could not be "regarded as

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1978 memoranda have been cited to the extent that they show that arguments made by Louisiana-Pacific in its petitions to reopen were not new arguments but were arguments made by the parties and considered by the Commission before the order was entered.

<sup>17</sup> In the 1980 petition, Louisiana-Pacific described some reduction in its production capacity and offered to forgo its option to purchase additional capacity at Ukiah. In the 1981 petition, Louisiana-Pacific reported that it had not exercised its option to purchase Ukiah, principally because of economic conditions in the forest products industry. *See* R.I.B. at 20. In both petitions, Louisiana-Pacific argued that the reduction in capacity eliminated any need for the divestiture required by the order. *See* R.I.B. at 34.

unlawfully anti-competitive or unduly concentrative." 1981 petition at 10-11.<sup>18</sup> [13]

The gist of this argument is that Louisiana-Pacific's unilateral business decisions to reduce internal capacity levels obviated the need for the remedy provided in the consent order. The remedial purpose of the order, however, was not to reduce Louisiana-Pacific's or the industry's capacity to produce the relevant product, and Louisiana-Pacific's unilateral decision to reduce its capacity simply was not responsive to the competitive concerns identified by the Commission in its complaint or to the remedial purposes of the order.<sup>19</sup>

The Commission's order in this case sought to remedy the lessening of competition and the increase in concentration that the Commission believed would result from Louisiana-Pacific's acquisitions and, through divestiture, to preserve the potential for deconcentration in the relevant markets. A divestiture that places assets in the hands of another firm is the most effective means of restoring competition to its preacquisition condition. *See, e.g., United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326-33 (1961); *RSR Corp. v. FTC*, 602 F.2d 1317, 1326 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("Once a violation of Section 7 has been established, divestiture is the usual remedy."). The order in this case required Louisiana-Pacific to divest an identified unit of its capacity to an independent firm for the purpose of restoring competition.

Louisiana-Pacific elected to change its internal capacity levels with full knowledge of its obligation under the order to divest the Rocklin plant. Such changes, brought about by business decisions uniquely within Louisiana-Pacific's control, are not significant or unforeseen changes of the kind that eliminate the need for the divestiture required by the order.<sup>20</sup> [14] Instead, Louisiana-Pacific's argument

<sup>18</sup> Louisiana-Pacific observed in its 1981 petition that its capacity was then below the level of its capacity in 1976, after its acquisition of a particleboard plant from Evans Products (*see note 3 supra*). Louisiana-Pacific argued that because the Commission did not challenge the Evans acquisition in 1976, the Commission must have decided that Louisiana-Pacific's capacity at that time was acceptable. 1981 Petition at 10. This conclusion clearly was unwarranted. Commission inaction with respect to a particular transaction is no more than a decision that enforcement action would not be in the public interest, based on the facts unique to that transaction. In addition, as discussed below, Louisiana-Pacific's production capacity, standing alone, is not probative of competition in the market or of the need for divestiture.

<sup>19</sup> Louisiana-Pacific's argument incorrectly suggests that the purpose of the divestiture order was to penalize Louisiana-Pacific for the alleged law violation by reducing its productive capacity. *See also* 1980 Memorandum at 4 ("punitive order of divestiture"). Rather, the purpose was to increase competition and reduce concentration by placing assets in the hands of an independent competitor.

<sup>20</sup> Although Louisiana-Pacific's obligation to divest the Rocklin plant was outstanding, Louisiana-Pacific chose to reduce its capacity not by divesting the Rocklin plant but by closing two other plants in early 1980. 1981 Petition at 6-9. While Louisiana-Pacific was closing plants, allegedly in response to economic conditions, it was investing additional capital to improve the Rocklin plant. 1980 Memorandum at 75-76.

suggests that the Commission's ability to effect relief with respect to anticompetitive acquisitions (or indeed to correct any competitive problem under Section 5 of the Federal Trade Commission Act) would be avoidable at the discretion of the respondent. Such a result clearly would be contrary to the public interest in redressing violations of the law<sup>21</sup> and in repose and finality of orders.

Louisiana-Pacific's unilateral capacity reduction would not promote competition<sup>22</sup> or achieve deconcentration as would a divestiture.<sup>23</sup> Even if we assume that a shift in Louisiana-Pacific's relative position in the market would be determinative, Louisiana-Pacific has not alleged anything that would tell us whether other industry members, in response to the same economic conditions, changed their respective capacity in a way that affected market concentration, total market size or the relative size of competitors in the market.<sup>24</sup> Louisiana-Pacific made no claim of changes in structural characteristics of the market, such as ease of entry, that might obviate the need for the divestiture required by the order. Compare *Genstar Limited*, Docket No. C-3049, 104 FTC 264 (1984) (modification granted on showing of increased industry capacity that eliminated need for order restrictions). [15]

Louisiana-Pacific's decisions to reduce its production capacity and its reductions in capacity were not significant or unforeseeable changes in competitive conditions that would obviate the need for the remedy provided in the order or that would impose on Louisiana-Pacific any burden different from that contemplated when Louisiana-Pacific agreed to the order. See *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification appropriate on clear showing of changes that have eliminated reasons for order or such that order causes unanticipated hardship).

Louisiana-Pacific also argued that its decision to waive its option to

<sup>21</sup> In *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. at 332-333, the Court said that when the purpose is to remedy an anticompetitive acquisition, "[t]he decree of the courts must be faithfully executed and no form of dissolution be permitted that in substance or effect amounts to restoring the combination which it was the purpose of the decree to terminate," quoting *United States v. Union Pacific R. Co.*, 226 U.S. 470, 477 (1913).

<sup>22</sup> Decisions to reduce output can in certain circumstances themselves signal antitrust problems. See *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989).

<sup>23</sup> Counsel for Louisiana-Pacific agreed at oral argument that a single firm's reduction in capacity does not necessarily reduce that firm's market share. Oral Argument Tr. at 53.

<sup>24</sup> Louisiana-Pacific attempts to demonstrate a decline in its market share by computing its 1981 capacity as a percentage of 1978 industry capacity. R.I.B. at 21-22; 1980 Memorandum at 48-51. This computation does not convey information about Louisiana-Pacific's market share in 1981. Similarly, the percentage change in Louisiana-Pacific's capacity between 1978 and 1981, R.I.B. at 21-22, does not convey information about Louisiana-Pacific's market position.



purchase the Ukiah plant was equivalent to a divestiture and that, therefore, the anticompetitive effects of one acquisition challenged by the Commission would be "fully dissipated" when the Ukiah lease expired in August 1981. 1981 Petition at 7; *see* R.I.B. at 34.<sup>25</sup> The alternative of a Ukiah "divestiture" (*i.e.*, waiving the option to purchase Ukiah) was presented to and considered and rejected by the Commission before Louisiana-Pacific agreed to the consent order in this case and, therefore, did not constitute a changed condition of fact. In June 1978, Louisiana-Pacific offered to forgo its option to purchase the Ukiah plant in lieu of divesting the Rocklin plant. The Commission determined in 1978, before Louisiana-Pacific signed the consent order, that the "Ukiah option" offered by Louisiana-Pacific was less consistent with the public interest in maintaining competition than the divestiture of the Rocklin plant. Three days later, on June 26, 1978, after the Commission had rejected the "Ukiah option" in settlement of the case, Louisiana-Pacific agreed to the order requiring divestiture of the Rocklin plant. Louisiana-Pacific's decision to forgo its option on the Ukiah property was not a changed condition within the meaning of Section 5(b), because the Commission had considered this specific possibility before the order was entered.

#### *B. Economic Conditions*

In its 1981 petition, Louisiana-Pacific argued that elimination of the divestiture obligation was required because, as a result of high interest rates and depressed conditions in the forest products industry, the company had been unable to divest the Rocklin plant at a price that Louisiana-Pacific [16] considered to be fair.<sup>26</sup> 1981 Petition at 3; R.I.B. at 28. Louisiana-Pacific argued that it should not be required to forgo the substantial profits that it believed it could have gained by selling the Rocklin plant in a healthier economic environment.

The price that Louisiana-Pacific could obtain for the Rocklin plant was not a changed condition of fact that warranted modification of the order, because the order required Louisiana-Pacific to divest the Rocklin plant unconditionally, without regard to price. *See United States v. Beatrice Foods Co.*, 344 F. Supp. 104, 116-17 (D. Minn. 1972), *aff'd*, 493 F.2d 1259, 1275 (8th Cir. 1974), *cert. denied*, 429 U.S. 961 (1975) (inability to obtain subjectively desired "fair price"

<sup>25</sup> Louisiana-Pacific shut down the Ukiah plant in mid-1980. R.I.B. at 20.

<sup>26</sup> Louisiana-Pacific argues that "unforeseen economic conditions so profoundly depressed the market value of the Rocklin plant that it was impossible for L-P to sell into such a market without accepting an unintended and unwarranted forfeiture of between \$20 and \$25 million." R.I.B. at 28.

not a defense to civil penalty action for failure to make timely divestiture); accord, *United States v. Papercraft Corp.*, 393 F. Supp. 415 (W.D. Pa. 1975), *aff'd*, 540 F.2d 131 (3d Cir. 1976); *United States v. Swingline, Inc.*, 371 F. Supp. 37 (E.D.N.Y. 1974).<sup>27</sup> Because the order required Louisiana-Pacific to divest unconditionally, Louisiana-Pacific had no right to expect or to condition divestiture on a certain price for Rocklin in any market and, therefore, could not claim that modification of the order was required because it might have to sell the plant at a price lower [17] than what it subjectively considered fair.<sup>28</sup> Changed economic conditions resulting in a price for Rocklin that Louisiana-Pacific deemed insufficient did not constitute changed conditions that warranted modification of the order.

Louisiana-Pacific did not argue that economic conditions made divestiture of the Rocklin plant impossible but only that it would be unlikely to get the price it wanted. See R.I.B. at 28; 1981 Petition at 3. Compare *RSR Corp.*, Docket No. 8959, 98 FTC 872 (1981) (divestiture order modified on public interest grounds after respondent claimed that no buyer available "at any price"). Louisiana-Pacific's petition stated only (1) that economic conditions in the forest products industry had changed for the worse and (2) that Louisiana-Pacific could not sell Rocklin at a "fair" price.<sup>29</sup> 1981 Petition at 25. Louisiana-Pacific did not claim that economic conditions, as opposed to its unwillingness to accept a lower price, were the reason that it failed to divest the plant within the time required by the order.<sup>30</sup> Indeed, in its 1981 petition, Louisiana-Pacific admitted that it could divest Rocklin, notwithstanding economic conditions, if it would

<sup>27</sup> Louisiana-Pacific concedes that *Beatrice* stands for the proposition that "a respondent is not excused from its consent order obligations when it can obtain only an unexpectedly low price for the property ordered divested." R.R.B. at 26 (emphasis in original). The *Beatrice* court also noted that nothing in the order "suggests anything to indicate that defendant's divestiture obligation under the order was to be affected by the price defendant received." 344 F. Supp. at 116.

Louisiana-Pacific argues that the modified order in *RSR Corp.*, Docket No. 8959, 98 FTC 872 (1981), establishes a different rule, because it "contains language affirmatively establishing an absolute divestiture obligation." R.R.B. at 27. This is incorrect. The *RSR* order, modified in the public interest after *RSR* claimed that it could not divest "at any price," required an auction "at no minimum price." The no-minimum-price provision in *RSR* describes the terms of the auction. Neither auctions nor no-minimum-price provisions are usual terms in divestiture orders.

<sup>28</sup> The divestiture of the Rocklin plant was required by the Commission to remedy an allegedly unlawful acquisition. Louisiana-Pacific, having agreed to the remedy in settlement of the complaint, could not later unilaterally set a price on the remedy.

<sup>29</sup> In its 1980 petition, Louisiana-Pacific argued that Rocklin was "a valuable production facility" and that divestiture would be unjust in view of Louisiana-Pacific's recent capital investments to improve Rocklin. 1980 Memorandum at 6 & 75-76.

<sup>30</sup> Louisiana-Pacific was three times reminded by the staff of the Commission that Louisiana-Pacific was not entitled to any subjectively desired price for the plant. Exhibits 7, 8 & 9 (letters to James W. Lock, Assistant General Counsel, Louisiana-Pacific Corp., April 10, 1980 (at 3), December 18, 1980, and February 5, 1981).

accept a price lower than its subjectively determined "fair price." 1981 Petition at 3 & 25.

Louisiana-Pacific's claims in its 1981 petition that changed economic conditions would require sale of the Rocklin plant at a "distress" price, resulting in a "forfeiture of between twenty and twenty-five million dollars," 1981 Petition at 25; R.I.B. at 28, were conclusory statements, unsupported by the law or the facts. "Forfeiture" implies some right to a particular, higher price, but Louisiana-Pacific had no right to a particular price for Rocklin. The "\$20 to 25 million forfeiture" suggests that the Rocklin plant had a market value of approximately \$40 million (which was Louisiana-Pacific's asking price for the [18] plant in 1980 and 1981). The most accurate indications in the record of the plant's market value are the offers for Rocklin when Louisiana-Pacific put the plant up for bid: those bids, received in December 1980, ranged from \$17 million to \$25 million.<sup>31</sup> Louisiana-Pacific rejected all of them.

In its 1981 petition, Louisiana-Pacific did not contend that adverse economic conditions or high interest rates had existed in 1979 or the first half of 1980, which constituted the greater part of the divestiture period. Rather, according to the petition, these conditions began in late 1980 and continued to the date of the petition, June 1981—the last five months of the two-year divestiture period and the first three months after the divestiture period ended. 1981 Petition at 6. The March 1979 consent order required Louisiana-Pacific to divest the Rocklin plant within two years. Louisiana-Pacific chose to seek offers for the Rocklin plant during only one thirty-day period in 1979 and did not offer the plant for sale again until one year later, in July 1980. Louisiana-Pacific's compliance reports show that the company did not attempt to market Rocklin during fourteen of the twenty-four months of the divestiture period.<sup>32</sup> [19] Louisiana-Pacific's election to wait

<sup>31</sup> Louisiana-Pacific did not claim that it would have lost money if it had accepted any of these bids. See 1981 Petition Exhibit 1. The District Court concluded that Louisiana-Pacific's asking price for the Rocklin plant "was too high," 554 F. Supp. at 510, and said:

Various values were placed upon Rocklin: its book value of \$11.7 million; a "tax basis" of \$12 million, an estimated sale price/fair value of \$20 million; a "replacement" value of \$21 million; an "in-house" evaluation of \$12-15 million; an "independent" appraisal price of \$35 million, a "probable value" of \$6-8 million and asking prices of up to \$40 million. The only conclusion supported by the evidence is that Rocklin was worth what defendant could get for it.

*Id.* at 508.

<sup>32</sup> Louisiana-Pacific knew at least from the Commission's June 1986 Findings that the Commission inferred from the facts recited in the compliance reports that efforts to divest Rocklin had been minimal. See also letter to Robert E. Liedquist, Esq., from the Commission (March 30, 1981) (denying request for extension of time to divest, in part because "efforts to divest do not exhibit sufficient diligence to warrant the relief requested") (Exhibit 10). Louisiana-Pacific did not argue that different inferences might be drawn from its compliance

until late in the divestiture period to sell the Rocklin plant, perhaps to its financial detriment,<sup>33</sup> and its determination to obtain a particular price for the plant were choices that Louisiana-Pacific made with full knowledge of the provisions of the order, not changed conditions of fact. Even if they were changed conditions of fact, they would not be changes sufficient to warrant modification, because Louisiana-Pacific was required to divest without regard to price.<sup>34</sup> [20]

In its petitions, Louisiana-Pacific cited economic conditions that varied over time resulting in reductions in its production capacity and its inability to divest the Rocklin plant at a "fair" price as changed conditions of fact that warranted modification of the order. We find that the alleged changes were not significant changes in fact that warranted modification of the order and that the alleged changes did not alter the nature of Louisiana-Pacific's obligations under the order. See S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979); see also *United States v. Swift & Co.*, 286 U.S. 106 (1932).

#### IV. Alleged Changes in Law

Louisiana-Pacific claimed that modification of the order was required by changes in the law as allegedly reflected in decisions of the Commission entered after June 1978, when Louisiana-Pacific signed the consent order in this case.<sup>35</sup> There was no change in the

reports or identify any material issues of disputed fact in them. See note 15 *supra*. The sole issue that Louisiana-Pacific identifies—"the Bureau neglects to inform the Commission that . . . L-P was investing substantially in the Rocklin plant," R.R.B. at 29, was fully alleged in Louisiana-Pacific's petitions. See note 29 *supra* & note 33 *infra*.

Louisiana-Pacific's efforts to divest Rocklin were fully litigated in District Court. The court found that Louisiana-Pacific "did not make any significant effort to divest prior to July of 1980," and that Louisiana-Pacific "admit[ted] that its efforts lacked the maximum effort" between August 1979 and July 1980. 554 F. Supp. at 509.

<sup>33</sup> Louisiana-Pacific suggests that its divestiture efforts should be construed in light of the fact that "L-P was investing substantially in the Rocklin plant in order to make it more attractive to potential buyers, and hence more marketable." R.R.B. at 29. Louisiana-Pacific had earlier argued that in view of its investments to improve the Rocklin plant, requiring divestiture under the order would "perpetuate an injustice." 1980 Memorandum at 76.

<sup>34</sup> The 1981 petition does not make entirely clear whether Louisiana-Pacific claimed that its alleged inability to obtain a higher price for the Rocklin plant was a change in fact or a public interest consideration. In view of the unconditional obligation to divest in order to remedy alleged anticompetitive effects, Louisiana-Pacific's interest in a higher price for the plant did not raise public interest concerns and was outweighed by the public interest in attaining the remedial purposes of the order and in finality and repose of orders. See *RSR Corp.*, Docket No. 8959, 88 FTC 800, 895 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("[T]he possibility that a corporation . . . may suffer some loss of value as a result of actions necessary to redress the results of the corporation's illegal conduct can be of no relevance to the determination of proper relief in a Section 7 case. . . . The antitrust laws would deserve little respect if they permitted those who violated them to escape with the fruits of their misconduct on grounds that imposition of an effective remedy would incidentally result in even a substantial monetary loss." (Citation omitted.)).

<sup>35</sup> In its 1980 petition, Louisiana-Pacific cited *Coca-Cola Bottling Co.*, 93 FTC 110 (issued January 23, 1979, one month before issuance of the order in this case); *The Pillsbury Co.*, 93 FTC 966 (1979); and *SKF*

(footnote cont'd)

statutory or decisional law that had the effect of bringing the terms of the order into conflict with existing law and, therefore, required modification. See *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961); *Ferrell v. Pierce*, 743 F.2d 454, 461-66 (7th Cir. 1984); *Bulova Watch Co.*, 102 FTC 1834 (1983) (change in law applicable to nonprice vertical restraints); *Lenox, Inc.*, Docket No. 8718, Order Granting in Part and Denying in Part Request To Reopen and Set Aside Order (April 19, 1989). Instead, the decisions cited by Louisiana-Pacific simply reflected the application of existing principles of law to different factual situations. Louisiana-Pacific's arguments concerning alleged changes in the law were [21] primarily attempts to argue again issues that had been fully considered by the Commission before Louisiana-Pacific agreed to be bound by the order.<sup>36</sup>

Louisiana-Pacific's petitions appear to claim that the Commission applied a *per se* rule of illegality based solely on market share statistics in evaluating the proposed Louisiana-Pacific/Fibreboard transaction and that this approach was rejected in subsequent decisions of the Commission. See 1980 Memorandum at 13-14, 52-53, 65.<sup>37</sup> This argument mischaracterizes the analysis of the transaction, because there is not and was not then a *per se* rule for evaluating horizontal mergers. Market share and concentration data weigh heavily in the analysis, but, standing alone, these data are not dispositive of legality. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

Because Louisiana-Pacific elected to enter into a consent agreement instead of litigating its view of the issues, the Commission had no occasion to prepare a written opinion stating its analysis of the facts in this case. The issues discussed in the cases cited by Louisiana-

*Industries, Inc.*, 94 FTC 6 (1979). In its 1981 petition, Louisiana-Pacific cited *Heublein, Inc.*, 96 FTC 385 (1980); and *RSR Corp.*, 656 F.2d 718 (D.C. Cir. 1981). See R.I.B. at 39-44. Louisiana-Pacific's citation of *RSR Corp.* is especially puzzling; the court affirmed denial of RSR's petition to reopen because the same product market arguments urged in support of reopening had been considered and rejected by the Commission and the Ninth Circuit in *RSR Corp.*, 88 FTC 800 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

<sup>36</sup> Louisiana-Pacific argued in 1980 as a basis for modification "that the proposed merger was lawful in all respects" and that the consent order was based on "erroneous premise[s] of fact and conclusion[s] of law" concerning relevant markets and competitive effects. 1980 Memorandum at 15-16 & *passim*. Louisiana-Pacific also stated that "stripped down to essentials," the petition requested a "reappraisal" of the order. *Id.* at 80. Compare R.R.B. at 2 n.1 ("L-P does not intend by its Petition to withdraw its consent to the order in this case, or to attack the order's validity."):

<sup>37</sup> Louisiana-Pacific asserted that "[t]he order is founded in multiple underlying error, compounded by a conclusive presumption of illegality based upon a rigid doctrine of quantitative substantiality rejected by a long line of cases that hold that Section 7 does not admit to an interpretation grounded in *per se* illegality." 1980 Memorandum at 52-53. Compare R.R.B. at 32 n.9 ("L-P does not contend that the Commission applied a *per se* rule of illegality to its challenge of the Fibreboard acquisition.").

Pacific, however, such as market definition, product cluster, degree of competitive overlap, the financial condition of the companies and the likely competitive effect of the transaction, were discussed in materials submitted to the Commission by Louisiana-Pacific and Fibreboard in 1978 and considered by the Commission before it accepted the consent agreement that Louisiana-Pacific signed. See *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (“The injunction, whether right or wrong, is not subject to impeachment in its application [22] to the conditions that existed at its making.”); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (assertions “considered in detail” before order entered not basis for reopening order).

Louisiana-Pacific’s principal argument is that subsequent cases demonstrate a different approach to product market analysis from that used in 1978 when Louisiana-Pacific signed the consent order in this matter, but the product market analysis in the cases cited by Louisiana-Pacific does not demonstrate a change in law.<sup>38</sup> In the cases cited by Louisiana-Pacific, the Commission relied for its product market analysis on the same traditional principles that it relied on in *Beatrice Foods Co.*, 86 FTC 1, 55-59 (1975), *aff’d*, 540 F.2d 303 (7th Cir. 1976), a case cited by Louisiana-Pacific in 1978 in its pre-order memorandum in support of its market definition arguments.<sup>39</sup> The Commission applied the same principles in 1976, in *RSR Corp.*, 88 FTC 800 (1976), *aff’d*, 602 F.2d 1317, 1320-22 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), a case cited by Louisiana-Pacific in its 1981 petition to support its product market arguments. 1981 Petition at 14-18. Although Louisiana-Pacific may continue to disagree with the product market alleged in the Commission’s complaint, as it did before it signed the consent order, the cases do not demonstrate a change in the law concerning product market definition between 1979 and 1981, and there simply is no reason to think that in applying the law concerning product market definition the Commission departed from established principles when it issued the Louisiana-Pacific order in 1979.

Louisiana-Pacific suggested that a change in the law could be inferred from the fact that the Commission did not challenge Georgia-

<sup>38</sup> Louisiana-Pacific argues that subsequent cases show that the Commission’s complaint erroneously included multidensity fiberboard and particleboard in the same product market. R.I.B. at 24-26, 36-45; R.R.B. at 31-32. Louisiana-Pacific made the same argument—that the alleged product market was erroneous under existing precedent—in its 1978 pre-order memorandum. 1978 Louisiana-Pacific Memorandum at 11-19 (Exhibit 4).

<sup>39</sup> 1978 Louisiana-Pacific Memorandum at 18 (Exhibit 4).

Pacific Corp.'s acquisition of Holly Hill Lumber Co. The Commission's inaction in any particular case, however, is nothing more than a determination that law enforcement action is not in the public interest, based on the facts of that case. There simply is no basis for inferring a "change in law" from the exercise of prosecutorial discretion in particular cases. [23]

Louisiana-Pacific also argued that permitting Georgia-Pacific to acquire Holly Hill while requiring Louisiana-Pacific to divest under the order "illustrates the very situation Congress sought to remedy when it enacted Section 5(b)—namely, one in which 'changed conditions have caused a company under order to be unfairly disadvantaged vis-a-vis its competitors.'" R.I.B. at 45.<sup>40</sup> This argument is based on the unfounded assumption that the two fact situations were identical in all respects. In response to a similar argument, the Supreme Court held that, absent patent abuse of discretion, the Commission is not obliged to withhold enforcement of an order on the respondent's claim that its competitors, not under order, are engaged in similar unlawful conduct. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries v. FTC*, 355 U.S. 411 (1958).

Louisiana-Pacific also sought modification of the ten-year prior approval requirement of the order, on the ground that the requirement was "unsupported by any violation of law and essentially unnecessary when viewed in the context of the premerger notification obligations of L-P" under the Hart-Scott-Rodino amendments to the Clayton Act. 1980 Petition at 3.<sup>41</sup> The premerger notification requirements of the Clayton Act did not constitute a change in the law requiring modification of the order, because the premerger notification program is not coextensive with the order's prior approval requirement. The Commission generally has continued to include prior approval clauses in its merger orders since the enactment of the Hart-Scott-Rodino amendments. In addition, Louisiana-Pacific was fully aware of the Hart-Scott-Rodino amendments at the time it agreed to the terms of this order (the Act was passed in 1977; in 1978, only the implementing regulations needed to be promulgated) and was free to raise during negotiation reliance on the statutory premerger notification

<sup>40</sup> S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979), indicates that the Commission should consider modification if outstanding orders impose disparate relief for comparable misconduct on competing firms.

<sup>41</sup> Louisiana-Pacific's argument that the prior approval requirement was "unsupported by any violation of law" is a request to reconsider the premises of the order, not a basis for modification of the order. By its consent, Louisiana-Pacific "relinquished the right to insist that an offense be proved, and the right to show that no violation had been committed." *United States v. Swift & Co.*, 189 F. Supp. at 907.

requirements rather than a prior approval clause to monitor the relevant markets.

The "changes in law" alleged by Louisiana-Pacific were not changes in legal principles but instead reflected the application by the Commission of existing law in different factual contexts. [24] Section 5(b) contemplates a significant change in the law that would bring the order into conflict with existing law before the change would be such as to require modification of a final order. Louisiana-Pacific did not identify any such changes in its petitions, and we find that no such changes in the statutory or decisional law had occurred. Accordingly, no modification is warranted by changes in law.

#### V. Alleged Public Interest Considerations

Louisiana-Pacific asserted in its petitions that modification of the order to eliminate the divestiture requirement would serve the public interest, but Louisiana-Pacific's "public interest" arguments were essentially a request that the Commission reconsider the premises of the order. These arguments did not demonstrate a need for modifying the order, but were an attempt by Louisiana-Pacific to rescind its consent to the order and argue again the issues that the consent agreement resolved. These arguments did not raise public interest issues, and they disregarded the strong public interest in repose and finality. *See RSR Corp. v. FTC*, 656 F.2d 718 (D.C. Cir. 1981) (modification denied when same issues had been litigated fully before the Commission and the Ninth Circuit).<sup>42</sup>

As public interest considerations, Louisiana-Pacific argued that the Commission had not considered all of the relevant factors before entering the order and that the Commission was "never fully apprised of the circumstances" of the merger. Louisiana-Pacific also implied that the arguments advanced by Louisiana-Pacific and Fibreboard before Louisiana-Pacific signed the consent agreement were not fully considered by the Commission. 1980 Memorandum at 2; *see R.R.B.* at 36 n.11. This is yet another attempt to reargue the premises of the order.

Every material argument that Louisiana-Pacific advanced to the Commission in its 1980 and 1981 petitions to reopen was presented to the Commission before Louisiana-Pacific signed the consent agreement. In May 1978, both Louisiana-Pacific and Fibreboard were

<sup>42</sup> The court in *RSR* said that "[b]oth the Supreme Court and this court consistently have subscribed to the rule that administrative agencies are not to be required to reopen their final orders 'except in the most extraordinary circumstances.'" 656 F.2d at 721 (footnote omitted).



informed that the Commission's staff intended to recommend that the Commission seek a preliminary injunction to prevent consummation of the merger. Both companies were informed of the staff's views of the appropriate market definitions and of the likely competitive effects and were invited to submit memoranda in support of their views on these and other relevant [25] issues. Both companies prepared memoranda that were forwarded to the Commission, *see* note 2 *supra*, and considered by it in making its decision to take enforcement action. Every material argument concerning market definition and competitive effects that was advanced in Louisiana-Pacific's 1980 petition was also stated in one or both of the 1978 pre-order memoranda submitted by Louisiana-Pacific and Fibreboard. Indeed, substantial portions of Louisiana-Pacific's 1980 petition are taken virtually verbatim from the 1978 memoranda, and the petition states that it "draws significantly upon" the 1978 memoranda. 1980 Memorandum at 1 n.1.

Louisiana-Pacific argued in its petitions to reopen and in 1978 that medium density fiberboard and particleboard should not be included in the same product market and that, if the two were included in the same market, other products should be included in the same "product cluster."<sup>43</sup> Louisiana-Pacific also argued in its petitions and in 1978 that the geographic markets alleged in the complaint were improperly defined.<sup>44</sup> Both before and after the order was entered, Louisiana-Pacific argued that market shares were improperly based on capacity<sup>45</sup> and that factors other than market share, especially Fibreboard's distressed financial condition<sup>46</sup> and Louisiana-Pacific's need for timber,<sup>47</sup> should be considered in analyzing the merger. Because the Commission considered these arguments before accepting the order in this case, Louisiana-Pacific's claim that the Commission did not consider these arguments was unfounded and does not present a public interest basis for modifying the order. In such circumstances, the public interest requires finality. *See RSR Corp. v. FTC*, 656 F.2d 718, 721 (D.C. Cir. 1981).

<sup>43</sup> 1978 Louisiana-Pacific Memorandum at 11-19 (Exhibit 4); 1980 Memorandum at 16-40; 1981 Petition at 11-12.

<sup>44</sup> 1978 Louisiana-Pacific Memorandum at 19-26 (Exhibit 4); 1980 Memorandum at 40-46; 1981 Petition at 20-24.

<sup>45</sup> 1978 Louisiana-Pacific Memorandum at 25 (Exhibit 4); 1980 Memorandum at 46-52; 1981 Petition at 20-24.

<sup>46</sup> May 1978 Fibreboard Memorandum at 13-28 (Exhibit 5); June 1978 Fibreboard Memorandum at 11-14 (Exhibit 6); 1980 Memorandum at 15, 57-60; 1981 Petition at 26.

<sup>47</sup> 1978 Louisiana-Pacific Memorandum at 2-3, 9-11 (Exhibit 4); May 1978 Fibreboard Memorandum at 4-7 (Exhibit 5); 1980 Memorandum at 7-12.

Louisiana-Pacific also asserted that elimination of the divestiture requirement would be in the public interest, because the Rocklin plant was profitable and income from it would enhance [26] Louisiana-Pacific's ability to support and expand other of its businesses. 1980 Memorandum at 75-76. This argument says only that the order imposed a burden on Louisiana-Pacific, and it misperceives the public interest standard for reopening and modification of Commission orders.

The Commission may determine that modification would be in the public interest if the respondent demonstrates that the order impedes competition. *E.g.*, *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). When such a showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make the modification. Louisiana-Pacific, however, made no showing that the requirement to divest the Rocklin plant would injure competition in the relevant market or would competitively disadvantage Louisiana-Pacific in any way that was not contemplated when the order was entered. In the usual case, an acquiring company presumably contemplates that the acquired assets will be profitable, and the company would rather retain than divest those assets. Some loss of prospective profits attributable to particular assets is, therefore, reasonably foreseeable whenever the Commission requires a divestiture to remedy the alleged anticompetitive effects of a proposed acquisition. This is not sufficient reason to forestall imposition of a divestiture order in the first place, *see United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961), or to avoid compliance with the order after the fact. The claim that the Rocklin plant was profitable was not a showing that the order imposed a burden that was not contemplated when Louisiana-Pacific agreed to the order or that the order impeded competition. The argument that Louisiana-Pacific should retain those profits was insufficient to outweigh the public interest in the remedy provided by the order and in the finality and repose of Commission orders.

Louisiana-Pacific also argued that its acquisition of Fibreboard was inconsequential in comparison to cases in which the Commission had not required divestiture and, therefore, that no divestiture should have been required in this case. 1980 Memorandum at 76-80. The cases cited by Louisiana-Pacific, however, involved different transactions in different markets and, as Louisiana-Pacific correctly noted, different remedies. As discussed above, each transaction involves the applica-

tion of existing principles of law to particular facts. In addition, the cases cited by Louisiana-Pacific in support of this argument were consent agreements, and the remedy in each case, as in this one, is affected by the give and take of negotiations. The fact that the Commission may have negotiated different remedies with other respondents is, absent a change in the law or a showing of unfair competitive disadvantage, *see* S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979), irrelevant to the remedy that was negotiated between the Commission and Louisiana-Pacific. [27]

This argument, like Louisiana-Pacific's other alleged public interest arguments, did not demonstrate a need for modifying the order but instead was an attempt to question the premises of the order to which Louisiana-Pacific had agreed. In effect, Louisiana-Pacific argued that the divestiture requirement should be modified because Louisiana-Pacific should not have agreed to the order in the first place. A consent order, like a litigated order, is subject to modification when it "has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 114-15. This principle has not been shown to apply in this case.

Louisiana-Pacific did not identify any public interest consideration sufficient to warrant modification of the order. Accordingly, we conclude that the public interest did not require modification of the order.

## VI. Conclusion

We find that Louisiana-Pacific did not in either its 1980 or its 1981 petition to reopen make a showing that required modification of the order, because Louisiana-Pacific did not allege a significant change affecting the order or an unfair disadvantage resulting from it. Louisiana-Pacific's petitions did not allege significant changes in fact or law affecting the order but rather repeated arguments that had been presented to and considered and rejected by the Commission before the order was entered. It is appropriate to modify an order if it appears that the continued application of the order will be inequitable or that extraordinary changes in circumstances have eliminated the need for the order. But Louisiana-Pacific made no such showing. Instead, Louisiana-Pacific sought reconsideration of the terms of the order, under essentially the same conditions that prevailed when it agreed to those terms.

The reduction in the company's production capacity was self-

imposed and was undertaken with full knowledge of the requirements of the order. The petitions were silent as to the competitive effects of the capacity reduction and did not describe how this action by Louisiana-Pacific might accomplish the remedial purposes of the order. Even if changed economic conditions affected Louisiana-Pacific's ability to obtain the price that it wanted for the Rocklin plant, because the order obligation to divest was not conditioned on a particular price, those conditions did not alter the nature of Louisiana-Pacific's obligations to divest. The burdens that the order imposed on Louisiana-Pacific were essentially the same both before and after the changes alleged by Louisiana-Pacific. [28]

The changes alleged by Louisiana-Pacific were not significant changes that eliminated the need for the remedy provided in the order or such that the order caused unforeseen injury to Louisiana-Pacific. The cases that, according to Louisiana-Pacific, demonstrated changes in the law did not manifest any change but demonstrated instead the application of existing principles of law to different facts. Louisiana-Pacific pointed to no other consideration that required modification of the order. The fact that the order required Louisiana-Pacific to sell a profitable plant was clearly not a changed condition or a public interest consideration that would require modification of the order.

Accordingly, Louisiana-Pacific's petitions to modify the order in Docket No. C-2956 are denied.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

In reiterating my support for the Commission opinion, I also wish to take issue with Louisiana-Pacific's contention that an economic downturn in the forest products industry eliminated any prospect for anticompetitive effects here. Respondent's Initial Brief at 23. This argument is hardly convincing even if one concludes that a sharp recession or depression did occur in the industry. After all, downturns are hardly unknown in cyclical industries and often turn out to be short-lived phenomena that do not yield the kind of longer-term relief sought by the Commission in requiring divestiture.

In addition, although a downturn may create temporary excess capacity in an industry, this by itself does not preclude anticompetitive activity or effects. Indeed, cartels have formed under such conditions. See A. Phillips, *Market Structure, Organization and Performance* 105 (1962) (on *Addyston Pipe*); F. Scherer, *Industrial Market*

*Structure and Economic Performance* 500-01 (2d ed. 1980) (on *Socony-Vacuum Oil Co.*). Nor does excess capacity alone necessarily reduce the likelihood of collusion. See *FTC v. Elders Grain, Inc.*, 1989-1 Trade Cas. (CCH) ¶68,411 at 60,263 (7th Cir. Jan. 30, 1989); see also Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J. Law & Econ. 13, 17 (1974). Accordingly, a party to a consent order does not meet its burden of demonstrating changed circumstances simply by pointing to subsequent economic hard times in a particular industry.

CONCURRING STATEMENT OF COMMISSIONER MARGOT E. MACHOL

I fully concur in the opinion of the Commission. I write separately only to emphasize a fundamental point of which Louisiana-Pacific appears to have lost sight rather early in this grossly overextended proceeding: Commission orders, whether issued at the conclusion of litigation or by consent, mean what they say. Neither sort of order is entered lightly or capriciously by the Commission, but upon due consideration of its consequences and of the injury to competition and consumers it is intended to redress. A party under either sort of order is fully obligated by law to obey its terms, unless and until they are modified in accordance with our statute and rules.

A special consideration, however, stems from the nature of the consent-order process. When, as in this instance, an order has been entered as the outcome of a process of negotiation and compromise between the Commission and a respondent (or potential respondent), the Commission is warranted in assuming that the party has undertaken its obligation in full contemplation of its gravity and without reservation or purpose of evasion. No such party should suppose that the consent process is simply the opening gun in a course of foot-dragging and conclusory assertions of changed circumstances.

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Interlocutory Order

IN THE MATTER OF

THE NEW ENGLAND MOTOR RATE BUREAU, INC.

*Docket 9170. Interlocutory Order, November 17, 1989*

ORDER

Respondent and complaint counsel agree that, pursuant to Section 3.82(d)(2) of the Commission's Rules of Practice, respondent's application for attorney's fees and expenses under the Equal Access to Justice Act should be held in abeyance pending final disposition of respondent's appeal of the Commission decision.

It is so ordered.

Interlocutory Order

112 F.T.C.

IN THE MATTER OF

## MOTOR TRANSPORT ASSOCIATION OF CONNECTICUT, INC.

*Docket 9186. Interlocutory Order, November 17, 1989*ORDER DENYING REQUEST FOR AN AWARD  
UNDER THE EQUAL ACCESS TO JUSTICE ACT

This case was dismissed by the Commission's Final Order dated August 25, 1989. Respondent Motor Transport Association of Connecticut, Inc. (the "Association") now requests attorney's fees and costs under the Equal Access to Justice Act ("the Act"), 5 U.S.C. 504. The Act provides such an award for eligible parties that prevail in a Commission proceeding unless the "Commission's position in the proceeding was substantially justified or special circumstances make the award unjust."<sup>1</sup>

On September 18, 1984, the Commission issued a complaint alleging that the Association had violated Section 5 by fixing prices for the intrastate transportation of property in Connecticut. By a Joint Stipulation dated November 17, 1986, the parties stipulated the facts. The Initial Decision to dismiss the complaint was filed on January 9, 1987, and affirmed by the Commission's Final Order.

A. *The Act*

Under the Equal Access to Justice Act, an eligible party that prevails in a Commission proceeding may receive attorney's fees and other expenses unless the Commission's position was "substantially justified." Congress passed the Act "in response to its concern that persons 'may be deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights.'" *Sullivan v. Hudson*, 109 S.Ct. 2248, 2253 (1989). The government has the burden of proving that its position was substantially justified by a preponderance of the evidence. *Sierra Club v. Secretary of Army*, 820 F.2d 513, 517 (1st Cir. 1987). An award under the Act does not follow automatically in every case where the private party prevails over the government, however, and the fact that the government lost in the underlying litigation does not create a presumption that its position

<sup>1</sup> Docket 9016(a)

was not substantially justified. *Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988).

### B. *The Applicant*

The Association is a prevailing party and a tax-exempt organization with ten employees. It is an eligible applicant. Rule 3.81(d)(2)(iii).

### C. *The Commission's Position*

#### 1. "Substantially justified"

Government action is substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 108 S.Ct. 2541, 2550, n.2 (1988). The test is met when there is "such relevant evidence as a reasonable mind might accept adequate to support a conclusion"; "if there is a 'genuine dispute'"; or "if reasonable people could differ as to [the appropriateness of the contested action]." *Id.* at 2550. While the standard requires more than conduct that is "merely undeserving of sanctions for frivolousness," it does not require that the action be "justified to a high degree"; the action need only "satisfy a reasonable person." *Id.*

#### 2. Uncertain law

Novel or difficult issues of law are evidence of a "genuine dispute" and "substantial justification."<sup>2</sup> "[I]f the governing law is unclear or in flux, it is more likely that the government's position will be substantially justified." *Martinez v. Secretary of Health & Human Services*, 815 F.2d 1381, 1383 (10th Cir. 1987). The existence of important and doubtful questions of law, the fact that the matter represents a case of first impression and the absence of adverse precedent may be considered. *Edwards v. McMahon*, 834 F.2d 796, 802-03 (9th Cir. 1987); see also *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988) (clarity of existing law a factor to be considered).<sup>3</sup>

#### 3. The complaint

At the time the complaint in this case was issued, two circuit courts had held that price fixing pursuant to state statutes such as existed in

<sup>2</sup> The government "need only show that its theory . . . was a good faith extension of existing law in order to be substantially justified." *S.E.C. v. Kluesner*, 834 F.2d 1438, 1443 (8th Cir. 1987).

<sup>3</sup> Complaint counsel's theory in this case would also seem to involve the "special circumstances" standard of the Act and Rule 3.81(a). That provision is a "safety valve" designed to "insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." *Russell v. National Mediation Board*, 775 F.2d 1284, 1290 (5th Cir. 1985).



Connecticut was *per se* unlawful. *United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532 (5th Cir. 1983); *United States v. Title Insurance Rating Bureau of Arizona, Inc.*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied*, 467 U.S. 1240 (1984). The state action defense in both instances had been rejected because the price fixing was not required by state law. At the time the complaint was issued here, the Association's conduct would have been considered *per se* unlawful in those circuits. That the Fifth Circuit's opinion in *Southern Motor Carriers* was later reversed by the Supreme Court, 471 U.S. 48 (1985),<sup>4</sup> does not affect the reasonableness of the issuance of the complaint. *Smith by Smith v. Bowen*, 867 F.2d 731, 735 (2d Cir. 1989).

#### 4. "Active supervision"

During the course of the adjudication of this case, the law at issue was unsettled. After *Southern Motor Carriers*, the law with respect to the "active supervision" prong of the state action defense remained unclear. In *Southern Motor Carriers*, because the government had stipulated that active supervision existed based on the implementation of formal state hearing procedures, the Court expressly refused to resolve the issue of what constitutes "active supervision." In this case, in its supplementary brief to the Commission, the Association itself argued that the Supreme Court "did not set forth any boundaries or definition of 'active supervision'" and that each case involved a "judgement call" because "there is no possible, overall description of what constitutes 'active supervision.'" "Answer To Complaint Counsel's Supplementary Brief On The Impact of *Patrick v. Burget*," at 3-4. In formulating its standard for "active supervision," the Commission noted in its opinion that "neither judicial nor Commission precedent precisely establishes how the [active supervision] requirement should apply to the facts of this case." Slip Opinion at 10.

#### 5. Complaint counsel's position

Complaint counsel prosecuted this price fixing case vigorously but with a consistent and meticulously designed theory.<sup>5</sup> They argued

<sup>4</sup> The Supreme Court granted certiorari before the complaint was issued in this case, 467 U.S. 1240 (June 11, 1984). However, since the Court's opinion on the merits did not resolve the "active supervision" issue, *infra*, this fact is immaterial.

<sup>5</sup> This is not a case where the government argued inconsistent theories in nearly identical cases or where the government action was inconsistent with and contrary to the agency's own rules. *Ramon-Sepulveda v. I.N.S.*, 863 F.2d 1458, 1460-62 (9th Cir. 1988). Complaint counsel's proposed standard was the same standard proposed in the *New England* and *Ticor* cases. *New England Motor Rate Bureau, Inc.*, Docket 9170, Aug. 18, 1989. Slip Opinion, p. 15 n. 14; *Ticor Title Insurance Company*, Docket 9190, Sept. 19, 1989. Slip Opinion, p.

that the Association's collective rate making is not actively supervised unless the state agency acts affirmatively with respect to each proposed rate to ensure that the state has in fact acted to insert its judgment in place of market forces. (Complaint Counsel's Appellate Brief ("CCAB") at 17.) They argued that such active supervision occurred only when the state agency provided notice and an opportunity to be heard to all interested parties, and a written explanation of its decision, in order to provide countervailing information and a reviewable record each time that rates are fixed and filed with the state agency. (CCAB at 21, 24, 26.)

Complaint counsel conceded that, with the exception of the 1983 order, minimum rate orders issued by DPUC for general commodities were the result of active state supervision through notice hearings and reasoned decisions. (CCAB at 39). They argued, however, that similar procedures should have been followed in each joint application for a rate increase above the minimum in general commodities, and in all joint rate filings for household goods, bulk liquids and dump truck tariffs. (CCAB at 37-42.) The Commission commented on this argument (Slip Opinion at p. 13):

In a thoughtful brief, complaint counsel propose that unless the state agency provides public notice of each pending rate proposed and opportunity for interested persons to comment and publishes a reasoned explanation of its decision, active supervision cannot be found.

We conclude that a hearing and a written opinion with respect to every rate proposed are not a necessary precondition for finding active state supervision. . . .

While the Commission in this case chose not to adopt complaint counsel's credible and articulate proposed standard, there was a "genuine dispute" as to the appropriateness of the standard on which reasonable minds could differ.<sup>6</sup> Accordingly, the position was substantially justified.

#### D. Conclusion

The Commission's issuance of the complaint and complaint counsel's prosecution of this case (the "Commission's position" under Rule 3.81(a)), were reasonable. The case involved a difficult issue of law on which the decided cases provided no fixed standard. The standard for

<sup>11</sup> n. 9. Consistency of the government's position is a factor to be considered. *Jean v. Nelson*, 863 F.2d 759, 767 (11th Cir. 1988).

<sup>6</sup> As perhaps evidenced by the several opinions concerning this issue in *New England Motor Rate Bureau, Inc. and Tigor Title Insurance Company*, supra n. 4.

“active supervision” proposed by complaint counsel was a consistently applied standard about which reasonable minds could differ. The action was “substantially justified,” and the Association’s application for attorney’s fees and other expenses under the Equal Access to Justice Act must be denied.

IN THE MATTER OF  
HEILIG-MEYERS COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE  
TRUTH IN LENDING ACT, REGULATION Z AND  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-3269. Complaint, Nov. 20, 1989—Decision, Nov. 20, 1989*

This consent order requires, among other things, a Richmond, Va. corporation to calculate and disclose accurately the annual percentage rates (APRs) that it discloses in connection with future extensions of consumer credit subject to the Truth in Lending Act. The order also requires respondents to make adjustments to the accounts of customers to whom it disclosed APRs that were understated by more than 1/4 of one percentage point, except for accounts where the amount of the adjustment is less than one dollar.

*Appearances*

For the Commission: *Chris M. Couillou.*

For the respondents: *Larry D. Sharp, McGuire, Woods, Battle & Boothe, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Heilig-Meyers Company, Heilig-Meyers Company of Georgia, Heilig-Meyers Company of North Carolina, Heilig-Meyers Company of Tennessee, and Sterchi Brothers Stores, Inc., corporations, ("respondents") have violated Sections 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1606 and 1638, and Sections 226.17, 226.18 and 226.22 of Regulation Z, 12 C.F.R. 226.17, 226.18 and 226.22, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, issues this complaint pursuant to Section 108 of the Truth in Lending Act, 15 U.S.C. 1607, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleges:

PARAGRAPH 1. Heilig-Meyers Company is a Virginia corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 2. Heilig-Meyers Company of Georgia is a Georgia corporation,

with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 3. Heilig-Meyers Company of North Carolina is a North Carolina corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 4. Heilig-Meyers Company of Tennessee is a Tennessee corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 5. Sterchi Brothers Store, Inc., is a Delaware corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 6. Respondents are engaged in the offering for sale and sale of furniture and other home furnishings.

PAR. 7. In the course and conduct of their businesses, respondents regularly extend credit to consumers primarily for personal, family or household purposes (hereinafter referred to as "consumer credit"), which credit is subject to a finance charge or payable by written agreement in more than four installments (not including down payment) and with regard to which consumers are initially obligated to repay respondents by the terms of their written agreements with respondents.

PAR. 8. In the course of extending consumer credit, respondents have disclosed annual percentage rates to consumers in Alabama, Georgia, Kentucky, Tennessee and Florida that were more than 1/8 of 1 percentage point above or below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 C.F.R. 226.22 (hereinafter referred to as "disclosure errors"), in transactions that did not include one or more of the following features: multiple advances, irregular payment periods, or irregular payment amounts (other than an irregular first period or an irregular first or final payment).

PAR. 9. The disclosure errors committed by respondents resulted from a clear and consistent pattern or practice of violations.

PAR. 10. Respondents' acts and practices as herein alleged were in violation of Sections 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1606 and 1638, and Sections 226.17, 226.18 and 226.22 of Regulation Z, 12 C.F.R. 226.17, 226.18 and 226.22.

PAR. 11. Pursuant to Sections 107, 108(c) and 128 of the Truth in Lending Act, 15 U.S.C. 1606, 1607(c) and 1638, respondent's aforesaid failures to comply with Regulation Z constitute violations of that Act and the Federal Trade Commission Act. 15 U.S.C. 41 et seq.

Commissioners Calvani and Strenio dissenting as to the issuance of the Decision and Order accompanying this complaint.

#### 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 Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 107 of the Truth in Lending Act, 15 U.S.C. 1606, and Sections 226.17, 226.18 and 226.22 of Regulation Z, 12 C.F.R. 226.17, 226.18 and 226.22, and the Federal Trade Commission Act, 15 U.S.C. 41 et seq.; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said acts and regulation, 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:

PARAGRAPH 1. Heilig-Meyers Company is a Virginia corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 2. Heilig-Meyers Company of Georgia is a Georgia corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 3. Heilig-Meyers Company of North Carolina is a North

Carolina corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 4. Heilig-Meyers Company of Tennessee is a Tennessee corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 5. Sterchi Brothers Store, Inc., is a Delaware corporation, with its principal place of business at 2235 Staples Mill Road, Richmond, Virginia.

PAR. 6. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

#### ORDER

##### I.

*It is ordered,* That respondents Heilig-Meyers Company, Heilig-Meyers Company of Georgia, Heilig-Meyers Company of North Carolina, Heilig-Meyers Company of Tennessee, and Sterchi Brothers Stores, Inc., their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension to any consumer of credit primarily for personal, family or household purposes, which credit is subject to a finance charge or payable by written agreement in more than four installments (not including down payment) and with regard to which the consumer is initially obligated to make repayment by the terms of a written agreement, do forthwith cease and desist from failing to calculate accurately and disclose clearly, conspicuously and accurately on the face of that written agreement the cost of credit expressed as a yearly rate as required by Sections 226.18(e) and 226.22 of Regulation Z, 12 C.F.R. 226.18(e) and 226.22, and to use the term "annual percentage rate" to describe that rate, as required by Section 226.18(e) of Regulation Z.

##### II.

*It is further ordered,* That within thirty days of the date of service of this order, respondents shall make adjustments to the current or past accounts of each customer in Alabama, Florida, Georgia, Kentucky and Tennessee, who was extended credit after February 28, 1986, and before August 1, 1987, in Alabama, before May 1, 1987, in

Florida, before April 1, 1987, in Georgia, before October 1, 1987, in Kentucky, and before May 1, 1987, in Tennessee, and to whom respondents, in connection with such extension of credit, disclosed an annual percentage rate that was miscalculated by more than 1/4 of 1 percentage point below the annual percentage rate determined in accordance with Section 226.22 of Regulation Z, 12 C.F.R. 226.22, in transactions that did not include one or more of the following features: multiple advances, irregular payment periods, or irregular payment amounts (other than an irregular first period or an irregular first or final payment), to assure that to the extent such customer has already paid or will pay any finance charges under the terms of a written agreement in excess of the dollar equivalent of the annual percentage rate disclosed in that written agreement plus a tolerance of 1/4 of 1 percentage point so that the net result is that such customer is not required to pay any finance charges in excess of the dollar equivalent of the annual percentage rate disclosed in that written agreement, plus a tolerance of 1/4 of 1 percentage point. For purposes of this section, respondents shall not be required to make adjustments to the accounts of customers where the amount of the adjustment is less than one dollar. Adjustment shall be made to the account of each customer under this section by mailing a check in the amount of the adjustment due to the current or last known address of each such customer.

### III.

*It is further ordered,* That respondents shall maintain and upon request make available to the Federal Trade Commission all records that will demonstrate compliance with the requirements of this order.

### IV.

*It is further ordered,* That respondents shall distribute a copy of this order to each of their officers and to the managers of respondents' stores whose customers are due adjustments or refunds under this order.

### V.

*It is further ordered,* That respondents shall notify the Commission at least thirty days prior to any proposed change in corporate form



such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other changes in the corporations of respondents, including the creation or dissolution of subsidiaries, which may affect compliance obligations arising out of the order.

## VI.

*It is further ordered,* That respondents shall, within sixty days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner in which they have complied with this order, including, but not limited to, a full accounting as to the amounts of adjustments and refunds that have been made.

Commissioners Calvani and Strenio dissenting.

### DISSENTING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I have voted against this consent agreement because it contains two major deficiencies. First, the consent allows Heilig-Meyers Co. ("Heilig") to deduct 0.25% from its refunds to consumers who allegedly paid more in interest than the annual percentage rates ("APRs") Heilig specified in its installment contracts.<sup>1</sup> Second, the consent allows Heilig to keep all redress dollars intended for qualified consumers who are not located.

#### The 0.25% Deduction

Section 108(e)(1)(B)(i) of The Truth-in-Lending Act (15 U.S.C. 1607(e)(1)(B)(i)) provides that in determining whether an APR disclosure error has occurred, and in calculating any adjustment, a tolerance not to exceed 0.25% will be applied. It has been argued that this language means the Commission should deduct 0.25% from any consumer redress for an asserted overcharge. However, such an interpretation would allow creditors to keep a portion that may be large in the aggregate of the allegedly ill-gotten gains they have acquired.

In my view, the better interpretation is that Congress intended to "tolerate" differences in actual versus stated APRs of up to 0.25% without requiring restitution. Presumably, this margin for error would

<sup>1</sup> Heilig, to its credit, has sent redress checks that do not subtract the 0.25%. My objection is to the consent agreement which allows Heilig to subtract 0.25% and which could thereby create an ill-advised precedent for the FTC.

reduce the burden of administering redress cases. But, once differences exceed 0.25%, complete restitution should be collected. This reading of the law enhances compliance and makes injured consumers whole.

#### The Retention of Uncollected Refunds

The agreement also requires Heilig to make restitution to consumers by mailing checks to their current or last-known addresses. I believe Heilig will implement this requirement in good faith. Nonetheless, some portion will never be collected by consumers because, for example, they may have moved and no longer qualify to have their mail forwarded. Under the consent agreement, Heilig presumably would be allowed to keep these undelivered amounts.

In my view, however, uncollected redress funds should not be retained by a distributing party. Such a practice weakens deterrence and may provide a disincentive for locating eligible consumers. Instead, any uncollected redress funds should either be paid if possible to some organization that may benefit the class or type of consumers involved here, or into the United States Treasury for general taxpayer relief.

#### Conclusion

Since the consent is flawed in both these respects, I respectfully dissent from the majority's decision to accept it.

Interlocutory Order

112 F.T.C.

IN THE MATTER OF  
OCCIDENTAL PETROLEUM CORPORATION, ET AL.

*Docket 9205. Interlocutory Order, November 22, 1989*

ORDER

Pending appeal from the Initial Decision, complaint counsel and the respondents have jointly moved that the Commission (1) modify the order of the Administrative Law Judge by substituting divestiture of Occidental's Burlington, New Jersey ("Burlington North"), plant for divestiture of Tenneco's Pasadena, Texas, plant and (2) accept the order, as modified, in final disposition of this matter. Various other modifications consistent with the substitute divestiture also are proposed. The motion is denied.

The principal arguments for the substitute divestiture, as presented in the briefs of the parties, are that (1) an immediate settlement and early divestiture will provide some relief from Occidental's allegedly unlawful acquisition of the polyvinyl chloride ("PVC") business of Tenneco in the near future and (2) the Administrative Law Judge's opinion cannot stand on appeal.

A settlement may in some circumstances be acceptable, partly because it will provide relief immediately, as against the uncertainty of any relief after all appeals are exhausted. Given the relative merits of the Burlington North and Pasadena plants, however, the substitute divestiture appears highly unlikely to achieve the remedial purposes envisioned by the Initial Decision. The Pasadena plant is a modern, low cost, large reactor suspension PVC plant, with an annual capacity (before the acquisition) of approximately 750 million pounds. Burlington North is a small, high cost, small reactor mass PVC plant, with an annual capacity of approximately 120 to 140 million pounds. The proposed substitute divestiture proposes a remedy far different from that required by the Administrative Law Judge in his Initial Decision and contemplated by the complaint. If the substitute divestiture were more comparable to the remedy required by the Administrative Law Judge, the prospect of an early settlement might outweigh the interest in obtaining a more substantial remedy. Here, however, the disparity is too great.

Occidental also argues in support of the substitute divestiture that the Administrative Law Judge's conclusion of a violation of law in the

mass and suspension PVC market will not withstand appeal. Occidental bases its argument principally on the decision of the Commission in *B.F. Goodrich*, Docket No. 9159. Complaint counsel do not support this argument and instead maintain that the Initial Decision would be upheld on appeal. An assessment of the relative merits of these assertions would require a full evaluation of the record. Although Occidental may indeed prevail in its appeal to the Commission or to the Court of Appeals, the conclusions of the Administrative Law Judge that conditions in the PVC market have changed since the record closed in *B.F. Goodrich* are facially plausible and require further consideration.

Accordingly, *it is ordered*, That the joint motion of the parties to modify the order of the Administrative Law Judge by substituting divestiture of Burlington North for divestiture of the Pasadena, Texas, plant and to make the order, as modified, the final order of the Commission be and it hereby is denied.

Commissioners Steiger and Owen not participating.