

IN THE MATTER OF

INTERNATIONAL BUSINESS MACHINES CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF
THE CLAYTON ACT*Docket C-2864. Complaint, Jan. 18, 1977 — Decision, Jan. 18, 1977*

Consent order requiring an Armonk, N.Y., marketer of data communications systems, equipment and services, among other things, to cease seating on its board of directors, individuals who simultaneously serve as directors of New York Telephone Company, American Telephone and Telegraph Company (AT&T), or any other competitive subsidiary of AT&T. Further, respondent is required to adopt and enforce certain prescribed procedures designed to detect and prevent future interlocking directorates.

Appearances

For the Commission: *Brian H. Siegel.*

For the respondent: *John W. Douglas, Covington & Burling,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent International Business Machines Corporation ("IBM") is a corporation organized and existing under and by virtue of the laws of the State of New York, maintaining its principal place of business at Armonk, New York. At all times relevant to this complaint, IBM had capital, surplus, and undivided profits aggregating in excess of \$1,000,000. In 1975, IBM had revenues of approximately \$14.4 billion.

PAR. 2. New York Telephone Company ("New York Telephone") is a corporation organized and existing under and by virtue of the laws of the State of New York, maintaining its principal place of business at New York, New York. At all times relevant to this complaint, New York Telephone had capital, surplus, and undivided profits aggregating in excess of \$1,000,000. In 1974, New York Telephone had revenues of approximately \$3.2 billion. New York Telephone is a 100 percent owned subsidiary of American Telephone & Telegraph Company ("AT&T").

PAR. 3. George L. Hinman is a resident of the State of New York. In 1963, he was elected to the board of directors of IBM. He was a director of IBM from the time of his election until his retirement (at age 70) on or about March 1976. In 1954, he was elected to the board of directors of New York Telephone. He was a director of New York Telephone from that time until his retirement (at age 70) on or about March, 1976. Mr. Hinman's retirement from the boards of directors of IBM and New York Telephone occurred after IBM and New York Telephone were informed that the Federal Trade Commission was conducting an investigation to determine whether the interlocking directorates between IBM and New York Telephone may be in violation of the laws prohibiting interlocks between competitors.

PAR. 4. Amory Houghton, Jr. is a resident of the State of New York. In 1966, he was elected to the board of directors of IBM. He has been a director of IBM from the time of his election up to and including the date of this complaint. In 1961, he was elected to the board of directors of New York Telephone. He was a director of New York Telephone from that time until his resignation on or about March 1976, after IBM and New York Telephone were informed that the Federal Trade Commission was conducting an investigation to determine whether the interlocking directorates between IBM and New York Telephone may be in violation of the laws prohibiting interlocks between competitors.

PAR. 5. (a) IBM is in the business of providing information handling systems, equipment, and services including data processing, data communications, and information management. IBM produces and markets the IBM 3270, a data communications terminal which may be used for information display.

(b) New York Telephone is engaged in the communications business involving a wide range of data communications activities. New York Telephone markets the Dataspeed 40 series, data communications terminals, which may be used for information display.

PAR. 6. IBM and New York Telephone are actual competitors of each other with respect to many products and services, including, but not limited to, data communications terminals which may be used for information display.

PAR. 7. (a) IBM and New York Telephone are by virtue of their business and location of operation, competitors of each other.

(b) The elimination of competition by agreement between IBM and New York Telephone would hinder, foreclose, and restrain competition, or tend to create a monopoly, in or affecting commerce, in the sale or lease of data communications equipment or services pertain-

ing to data communications as a whole or with respect to specific products or services supplied by IBM and New York Telephone.

PAR. 8. (a) The products and services referred to in Paragraph Five are sold and distributed by IBM and New York Telephone in substantial amounts from locations in various States of the United States to customers located in many other States of the United States.

(b) IBM and New York Telephone each engage in commerce as that term is defined in the Clayton Act and in the Federal Trade Commission Act.

PAR. 9. The foregoing acts and practices of respondent, as alleged and set forth, constitute violations of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 8 of the Clayton Act and Section 5(a)(1) 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 respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and now in conformity with the procedure provided by Section 2.34 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent International Business Machines Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at Old Orchard Road, Armonk, New York.

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

ORDER

I

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

"Subsidiary" of a corporation or company means any partnership, firm, association, corporation, or other legal or business entity, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by such corporation or company.

"Sister" corporations or companies means two or more corporations or companies which are "subsidiaries" of a common "parent."

"Product or service manufactured, produced, sold, or leased in competition with IBM" (or words to similar effect) includes, but is not restricted to, any product or service which is classified within the same four-digit category as any IBM product or service, as such four-digit categories ("SIC Codes") are defined in the Codes and Product Descriptions published by the U.S. Bureau of the Census in its latest Numerical List of Manufactured Products. "Product or service * * * leased in competition with any product or service leased by IBM" shall not include any transaction solely designed to create a security interest for a lender, for instance, where a bank, as an incidental part of its normal long-term financing business, buys equipment selected by its customer and then leases such equipment back to the customer on a long-term basis.

II

It is further ordered, That for purposes of this order, a corporation or company, including International Business Machines ("IBM"), and any corporation which shares a common director with IBM, shall be deemed to be engaged in the manufacture, production, sale, or lease, of a product or service, if any parent, subsidiary, or sister of such corporation or company is so engaged.

III

It is further ordered, That IBM, its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of New York Telephone Company ("New York

Telephone"), American Telephone & Telegraph Company ("AT&T"), or any subsidiary of AT&T, so long as IBM and either New York Telephone, AT&T, or any subsidiary of AT&T compete in the manufacture, production, sale, or lease of any product or service by virtue of their businesses and locations of operation.

IV

It is further ordered, That respondent IBM shall adopt and enforce the following compliance program to prevent illegal interlocks:

(a) On October 1st of each year for a period of five years, commencing October 1, 1976 or as soon as reasonably possible after final Commission acceptance of this order (but no later than 45 days after service upon IBM of this order, as finally accepted by the Commission), IBM shall certify in writing to the Commission that no director of IBM, nor any nominee for director of IBM, serves or is then a nominee for a position on the board of directors of a company which manufactures, produces, sells, or leases, any product or service in competition with any product or service manufactured, produced, sold, or leased by IBM where:

(1) That company manufactures, produces, sells, or leases the competitive products and services in an aggregate amount in excess of either one-half of one percent (.5%) of that company's most recent annual gross revenues or \$5,000,000, whichever is the lesser; and

(2) IBM manufactures, produces, sells, or leases such competitive products and services in an aggregate amount in excess of either one-half of one percent (.5%) of IBM's most recent annual gross revenues or \$10,000,000, whichever is the lesser.

(b) Prior to and as the basis for making the certification required in Paragraph IV(a) hereto, IBM shall do the following:

(1) IBM shall require a written certification to IBM from each IBM director and each nominee for director, identifying each other company on which said director or nominee serves or is then a nominee to serve as a member of such other company's board of directors. When requesting such certification IBM shall furnish each director and nominee for director a copy of the complaint and order in this proceeding.

(2) IBM shall determine the products and services manufactured, produced, sold, or leased by each company listed in the certification referred to in Paragraph IV(b)(1), shall identify the four-digit SIC Codes which encompass such products and services to the extent enumerated in Paragraph (i) below, and shall determine whether such products and services are competitive with IBM's products and services, by:

(i) Reviewing Moody's reports, Standard & Poor's reports, and such other standard reference work, report, or periodical concerning the data processing business and other businesses engaged in by IBM, as may be appropriate;

(ii) reviewing the most recent annual report of each company listed by each IBM director or nominee and the most recent 10K report (and any other more recent report) filed with the Securities and Exchange Commission by each such company;

(iii) taking any and all other action necessary to determine with reasonable diligence where the products and services of IBM are in competition with the products and services of such other company, including but not limited to:

(a) Consulting with appropriate personnel in IBM's manufacturing, marketing, and other divisions most knowledgeable regarding the source and nature of products and services in competition with the products and services of IBM and the corporate affiliations of the companies offering such products and services; and

(b) reviewing press releases and trade publications to detect possible areas of competitive overlap between IBM and each company listed by each IBM director or nominee.

(c) In the event that the process of review required by Paragraph IV(b) hereof discloses the existence of any competition between IBM and any other company as defined in Paragraph IV(a) hereof, IBM shall not permit the service on its board of directors of any person who remains a director or nominee for director of that company. IBM shall be allowed a reasonable period of time, but in no event longer than ninety days from the date of such disclosure, within which to take any legal or other steps necessary to secure compliance, including requiring any IBM director serving on such other company's board to resign from IBM's board or such other company's board forthwith or, in the case of a nominee, to forthwith remove his name from nomination. *Provided, however,* that notwithstanding the fact that a product or service of IBM shall be included in the same four-digit SIC Code as any product or service of such other company, the provisions of this Paragraph IV(c) shall not apply if, in its certification pursuant to Paragraph IV(a) hereof, IBM demonstrates that such other company's products or services are not in competition with the products or services of IBM. If IBM fails to so demonstrate after notice and a reasonable opportunity (not to exceed thirty (30) days from the date of such notice) to discuss the matter further with the staff of the Commission, then, upon notification by the staff, IBM shall be allowed a reasonable period of time, but in no event longer than sixty (60) days from the date of such notification within which to

dissolve the interlocking directorate. Notwithstanding the foregoing sentence, IBM shall not be entitled to a formal hearing and decision by the Commission on the question of whether or not such products or services falling within the same four-digit SIC Code are in competition.

(d) IBM's certification to the Commission, which is to be made on an annual basis as described in Paragraph IV(a) hereof, shall contain the written certifications of the individual directors and nominees required by Paragraph IV(b)(1) hereof and a copy of IBM's written request to such directors and nominees, shall set forth in detail the manner and form in which IBM has complied with this order, and shall include a detailed description of actions taken by IBM pursuant to Paragraphs IV(b)(2) and IV(c) hereof.

V

It is further ordered, That the provisions of Paragraph IV hereof shall not apply where:

(a) The other corporation on whose board of directors such nominee or director also serves controls 50 percent or more of the voting stock of IBM ("parent");

(b) IBM controls, directly or indirectly through subsidiaries, 50 percent or more of the voting stock of the other corporation on whose board of directors such nominee or director also serves ("subsidiary"); or

(c) 50 percent or more of the voting stock of the other corporation on whose board of directors such nominee or director also serves is held by a corporation which also holds 50 percent or more of the voting stock of IBM ("sister").

VI

It is further ordered, That nothing in this order shall be construed to exempt IBM from full compliance with the antitrust laws or the Federal Trade Commission Act; that the fact that any activity is not prohibited by this order shall not bar a challenge to it under such statutes; and that the fact that a particular interlock may not be subject to the provisions of Paragraph IV hereof does not immunize that interlock from challenge under such statutes.

VII

It is further ordered, That IBM shall notify the Commission at least thirty days prior to any proposed corporate change, such as dissolution, assignment, sale, or reorganization resulting in the emergence

of a successor corporation, the creation or dissolution of subsidiaries, or any other change which may affect compliance obligations arising out of this order.

IN THE MATTER OF
PARAMEDICAL SERVICES, INC. T/A PACIFIC
INTERNATIONAL, LTD., ET AL.

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

Docket C-2863. Complaint, Jan. 24, 1977 — Decision, Jan. 24, 1977

Consent order requiring a Wayne, Pa., distributor of a treatment method for nocturnal enuresis, and its Menlo Park, Calif., franchisee, among other things, to cease misrepresenting that the mechanical device used in their treatment method is unique. Further, respondents are required, three days before their contracts become binding, to give customers a written disclosure that the device is similar to those sold or rented by others.

Appearances

For the Commission: *Harold G. Sodergren.*

For the respondents: *William J. McLean, Thoits, Lehman, Hanna & Love, Palo Alto, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Paramedical Services, Inc., a corporation doing business as Pacific International, Ltd., and C.R.O., Ltd., a corporation, doing business as Pacific International—CRO, Ltd., and Robert C. Stearns, individually and as an officer of C.R.O., Ltd., hereinafter referred to as "respondents," have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Paramedical Services, Inc. is a Delaware corporation, with its principal office at 224 County Line Road, Wayne, Pennsylvania.

Respondent C.R.O., Ltd. is an Oregon corporation with its principal office at 3210 Alpine Road, Menlo Park, California. It is now, and for some time last past has been a franchisee of respondent Paramedical Services, Inc.

Respondent Robert C. Stearns is an individual and an officer of C.R.O., Ltd. and was formerly general manager of respondent Paramedical Services, Inc. In such positions, respondent Stearns formulated, directed, and controlled the acts and practices of the