

IN THE MATTER OF
THE GRAND UNION COMPANY, ET AL.

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

Docket 9121. Complaint, Nov. 21, 1978—Final Order, July 18, 1983

Finding no violation of antitrust law, the Commission has ordered that the complaint challenging The Grand Union Company's 1978 acquisition of Colonial Stores, Inc. be dismissed.

Appearances

For the Commission: *James T. Rohrer, Katherine B. Alphin, Douglas B. Brown, David R. Flowerree and Linda Earley Chastang.*

For the respondents: *William C. Pelster, Joan M. Secofsky, Barbara Z. Blumenthal and Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Grand Union Company; Grand Union Holdings Inc.; Cavenham (USA), Inc.; and Cavenham Holdings, Inc., corporations subject to the jurisdiction of the Commission, have acquired the stock of Colonial Stores, Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act [15 U.S.C. 45(b)] and states its charges as follows:

I. DEFINITIONS

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

1. *Retail food stores* are retail establishments primarily engaged in selling food for home preparation and consumption.
2. *Supermarket* is a retail establishment primarily engaged in selling a wide variety of canned and frozen food, dry groceries (either

packaged or in bulk), other processed food and non-edible grocery items, fresh meat and prepared [2] meat products, fresh fish and poultry, fresh fruits and vegetables, and dairy products, for home preparation and consumption and having a minimum of six thousand (6,000) square feet of floor space and at least one million dollars (\$1,000,000) in annual sales.

II. GRAND UNION COMPANY

3. Respondent, Grand Union Company (hereinafter "Grand Union"), is a Delaware corporation with its principal office located at 100 Broadway, Elmwood Park, New Jersey.

4. Grand Union Holdings Inc. is a wholly-owned subsidiary of The Grand Union Company with its principal office at 115 East Putnam Avenue, Greenwich, Connecticut.

5. Grand Union is a wholly-owned subsidiary of Cavenham (USA), Inc., a Delaware corporation, with its principal office at 115 East Putnam Avenue, Greenwich, Connecticut.

6. Cavenham (USA), Inc., is a wholly-owned subsidiary of Cavenham Holdings, Inc., a Delaware corporation, with its office at 115 East Putnam Avenue, Greenwich, Connecticut.

7. As of April, 1978, Grand Union operated a chain of approximately 474 food retail stores in the States or Territories of New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Florida, Puerto Rico and the Virgin Islands. Grand Union also operates fourteen (14) Grand Way Stores, selling general merchandise, and nine (9) catalog showrooms.

8. For its fiscal year ending March 31, 1978, Grand Union had total sales of \$1,649,274,000; sales from its food retail operations totaled \$1,574,119,000. Grand Union is the eleventh largest food retailer chain in the United States.

9. At all times relevant herein, Grand Union was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. COLONIAL STORES

10. Colonial Stores, Inc. (hereinafter "Colonial"), is a Virginia corporation with its principal office at 2251 North Sylvan Road, East Point, Georgia. [3]

11. Colonial operates a chain of approximately 378 food retail stores in the States of Virginia, North Carolina, South Carolina, Maryland,

Alabama, Georgia and Florida. Colonial owns and operates several facilities which manufacture or process various products, including bakery items, dairy products, jams and jellies, mayonnaise, salad dressings and other items, as well as store fixtures. Substantially all such products are sold to Colonial retail food stores.

12. For its fiscal year ending December 31, 1977, Colonial had total sales of \$1,053,167,343. Colonial is the eighteenth largest food retail chain in the United States. Colonial's assets for fiscal year 1977 were \$189,118,000 and net earnings for that year were \$10,907,000.

13. At all times relevant herein, Colonial was engaged in the purchase or sale of products in interstate commerce and was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and was a corporation whose business was in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

14. On June 29, 1978, Grand Union made a cash tender offer of \$30 per share for all outstanding shares of Colonial stock.

15. On July 7, 1978, Colonial's Board of Directors rejected the offer. Grand Union then made a tender offer directly to Colonial shareholders. Colonial responded by filing suit in Federal District Court in Atlanta to enjoin the hostile tender offer.

16. Grand Union revised its tender offer to \$35 per share. On August 1, 1978, Colonial's Board of Directors voted 7 to 5 to recommend the revised offer to its shareholders and to dismiss all pending litigation. By October 13, 1978, Grand Union had purchased over 90 percent of Colonial's shares.

17. Previous to the tender offer for Colonial shares, Grand Union purchased eight Colonial stores in the Tampa-St. Petersburg, Florida, area. This transaction was closed on July 6, 1978.

18. On August 18, 1978, Grand Union and staff of the Federal Trade Commission entered into a Hold Separate Agreement for the Colonial operations. The initial term of this agreement is for 90 days and runs out on November 17, 1978. [4]

V. TRADE AND COMMERCE

A. *Product Market*

19. The relevant product market is the retail sales by retail food stores, and submarkets thereof, including the submarket of sales by supermarkets.

B. *Geographic Market*

20. The relevant geographic markets are some of the Standard Metropolitan Statistical Areas (S.M.S.A.s), cities or towns in which Colonial operates supermarkets.

21. The retail food store business in each of the relevant geographic markets is dominated by a few large retail food chains. The prospects for increased competition in these markets depends heavily upon potential competition from perceived or actual potential entrants.

22. In many of the relevant geographic markets Colonial is a dominant or leading competitor.

C. *Barriers to Entry*

23. Barriers to entry into the relevant markets are high. The increased economic power of a Grand Union-Colonial combination is likely to further inhibit competition in these markets.

VI. THE COUNTS

A. *Grand Union—Actual Potential Competition*

24. Grand Union has the capability and motivation to enter some of the relevant geographic markets within the southeast region in which Colonial operates.

25. Grand Union can enter some relevant geographic markets of Colonial from its current distribution centers. It is also feasible for Grand Union to make a *de novo* entry into other relevant geographic markets in which Colonial operates. In the alternative, Grand Union could enter one or more of those markets through one or more toehold acquisitions.

26. Grand Union is likely to enter some of the relevant geographic markets by means other than the acquisition of Colonial if it were deprived of the Colonial acquisition. Grand Union is extremely interested in expanding its operations beyond its current marketing area. It is especially motivated to enter the southeast region containing relevant geographic markets of Colonial. Grand Union has seriously explored acquisitions throughout this region and has been interested [5] in filling in the gap between its Florida and northern Virginia operations.

27. Grand Union is an actual potential entrant into some of the relevant geographic markets in the southeast region, but for the Colonial acquisition. Grand Union is one of the few most likely potential entrants into certain of the relevant markets.

B. Grand Union—Perceived Potential Competition

28. Grand Union is perceived as the most likely or a leading potential entrant by food retail chains in some of the relevant geographic markets of Colonial. Its presence on the fringe of those geographic markets has had a beneficial effect on competition at all times relevant herein.

C. Grand Union—Entry Through One of the Most Anticompetitive Options

29. Paragraphs 24 through 26 are incorporated herein.

30. Grand Union, through its acquisition of Colonial, has selected one of the most anticompetitive methods for entering the Southeastern United States.

VII. EFFECTS

31. The effects of the acquisition of Colonial by Grand Union may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, and constitute an unfair act and practice or unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways, among others:

a. Some or all of the relevant geographic markets are highly concentrated and have become or are likely to become increasingly concentrated in the product market alleged above. Grand Union's acquisition of Colonial may increase the probability of further concentration and decrease the probability of deconcentration in some or all of those markets;

b. Substantial actual potential competition through internal expansion or toehold acquisition may be eliminated;

c. Concentration in the retail food business in some or all of the relevant geographic markets in the southeast region may increase the economic power of the Grand Union Company after the acquisition, and may dampen competition among retail food chains in some or all of the relevant geographic markets; [6]

d. Already high barriers to entry of new competition may be heightened and increased;

e. It may eliminate the procompetitive effects of perceived potential competition in certain relevant geographic markets;

f. The effect of the merger may be to encourage tendencies for combination and merger by other actual and potential competitors in relevant geographic markets; and

g. Members of the purchasing public may be denied the benefits of free and open competition.

VIII. VIOLATIONS

32. The acquisition of Colonial common stock by Grand Union and the merger between Grand Union and Colonial constitute violations of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

OCTOBER 30, 1981

PRELIMINARY STATEMENT

The Federal Trade Commission issued its Complaint in this matter on November 21, 1978, charging that The Grand Union Company, by its acquisition of over 90% of the stock of Colonial Stores Incorporated, violated Section 7 of the Clayton Act [15 U.S.C. 18, as amended], and Section 5 of the Federal Trade Commission Act [15 U.S.C. 45, as amended].

Grand Union, on July 14, 1978, announced its intention to acquire Colonial through a cash tender offer and on August 8, 1978, made an offer to purchase any and all shares of Colonial stock. Grand Union purchased 91% of this stock by the expiration date of its offer, September 1, 1978. [2]

On August 18, 1978, Grand Union and the Commission staff entered into an agreement whereby the staff would not seek to enjoin or otherwise delay the consummation of the sale, and Grand Union would keep Colonial's assets as a separate subsidiary. This agreement expired on December 1, 1978.

On November 20, 1978, Grand Union acquired the outstanding shares of Colonial stock and the Commission's Complaint was issued the next day. An agreement between the Commission and Grand Union to preserve Colonial's trade names and trademarks was entered into on November 29, 1978. This agreement, subsequently modified, remains in effect currently.

The Complaint alleges that Grand Union's acquisition of Colonial may have the effect of substantially lessening competition or tending to create a monopoly in violation of Section 7 of the Clayton Act; or may constitute an unfair act and practice or unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The product market was alleged to be sales by retail food stores, including the submarket of sales by supermar-

kets. The relevant geographic markets were alleged to be some of the Standard Metropolitan Statistical Areas, cities or towns in which Colonial operated supermarkets.

The Complaint listed three counts constituting theories of the alleged violations:

Count A: Grand Union was eliminated as an *actual potential entrant* into the markets constituting Colonial's operating area.

Count B: Grand Union was eliminated as a *perceived potential entrant* into the markets constituting Colonial's operating area.

Count C: Grand Union's acquisition of Colonial constituted entry into the Southeastern United States through one of the most anticompetitive methods.

Specifically, the Complaint alleges that Grand Union's acquisition of Colonial had the following effects:

a. Some or all of the relevant geographic markets are highly concentrated and have become or are likely to become increasingly concentrated. Grand Union's acquisition of Colonial may increase the probability of further concentration and decrease the probability of deconcentration in some or all of those markets;

b. Substantial actual potential competition through internal expansion or toehold acquisition may be eliminated; [3]

c. Concentration in the retail food business in some or all of the relevant geographic markets in the southeast region may increase the economic power of Grand Union after the acquisition, and may dampen competition among retail food chains in some or all of the relevant geographic markets;

d. Already high barriers to entry of new competition may be heightened and increased;

e. It may eliminate the procompetitive effects of perceived potential competition in certain relevant geographic markets;

f. The effect of the merger may be to encourage tendencies for combination and merger by other actual and potential competitors in relevant geographic markets; and

g. Members of the purchasing public may be denied the benefits of free and open competition.

(Complaint ¶ 31)

On December 15, 1978, Grand Union filed its "Motion to Dismiss the Complaint or in the Alternative for a More Definite Statement." Pursuant to an Order of January 5, 1979, respondents' motion to dismiss was denied, but the motion for a more definite statement was granted. Complaint counsel was ordered to make a more definite statement regarding relevant product submarkets and geographic

markets, and to consider whether Count C was necessary to the Complaint or whether it should be stricken as redundant.

On January 18, 1979, complaint counsel filed a statement supporting the Complaint, alleging an additional product submarket of "grocery stores" as defined by the Bureau of the Census, and identified thirteen relevant local geographic submarkets in addition to designation of Colonial's entire area of operation as a relevant geographic market. These submarkets are:

Atlanta, Georgia
Augusta, Georgia
Charlotte/Gastonia, North Carolina
Fayetteville, North Carolina
Gainesville, Florida
Greenville/Spartanburg, South Carolina
Jacksonville, Florida
Macon, Georgia
Newport News/Hampton, Virginia
Norfolk/Virginia Beach, Virginia
Orlando, Florida
Raleigh/Durham, North Carolina
Richmond, Virginia [4]

Complaint counsel also reserved the right to allege further submarkets constituting several distinct markets within one or more of the submarkets listed.

On February 5, 1979, respondents filed their Answer, and requested expedited procedure pursuant to Section 3.21(b) of the Rules of Practice. In addition, respondents filed a Reply Memorandum in support of their motion to dismiss Count C of the Complaint. On February 14 the parties were ordered to file non-binding statements setting forth the issues to be tried and the theories of defense. Complaint counsel filed their statement on February 28 and respondents on March 12, 1979.

A prehearing conference was held in Atlanta, Georgia on March 19 and oral arguments were heard regarding Count C. On April 17, 1979, respondents' motion to dismiss Count C was denied.

A second prehearing conference was held on October 3, 1979.

Presentation of complaint counsel's case-in-chief began on December 11, 1979, in Atlanta and continued through January 17, 1980. Hearings were stayed on January 30, pending review by the Commission, pursuant to Rule 3.23, of a subpoena issued to Dr. John Albertine, Director, Joint Economic Committee, United States Congress. On June 30, 1980, the Commission quashed the subpoena,¹ and hear-

¹ The Commission held that the broad subpoena power of Section 9 of the Federal Trade Commission Act does not authorize the Commission to subpoena documents that are part of the legislative process of the Congress.

ings were resumed on September 23, 1980. Presentation of respondents' defense began December 16, 1980 in Washington, D.C. and concluded on January 30, 1981. On April 7, 1981, respondents presented supplemental direct testimony of their expert witness and complaint counsel presented one of their expert witnesses in rebuttal to that testimony. The record was closed on May 1, 1981.

Approximately 540 exhibits were accepted into evidence and the following witnesses were called:

<u>Witness</u>	<u>Title</u>	<u>Called By</u>
Henry S. Addison, Jr.	Carolinas Regional Vice President, Colonial Division of Grand Union	Respondents [5]
M.A. Adelman	Professor, Massachusetts Institute of Technology	Respondents
Cosby R. Byrd, Jr.	Chief Executive Byrd Food Stores Burlington, North Carolina	Complaint Counsel
Carrol W. Cheek	Chairman of Board OWC Companies (Great Scott of Florida) Clearwater, Florida	Complaint Counsel
Thomas A. Connell	Director of Merchandising, Richmond Division of A & P Richmond, Virginia	Complaint Counsel
Ronald C. Curhan	Professor, Boston University	Respondents
Joseph Foy, Sr.	President, Certified Grocers of Florida Ocala, Florida	Complaint Counsel
James E. Gooding	President, Gooding's Markets Maitland, Florida	Complaint Counsel
Peter V. Gregerson, Sr.	Chairman of Board Warehouse Groceries Management, Gadsden, Alabama	Complaint Counsel
Joseph E. Isaacs	Vice President Colonial Atlanta Division of Grand Union	Respondents

<u>Witness</u>	<u>Title</u>	<u>Called By</u>
Bruce W. Marion	Agricultural Economist, Dept. of Agriculture Madison, Wisconsin	Complaint Counsel
Russell C. Parker	Economist, FTC	Complaint Counsel
Samuel H. Posey	President, Middle Florida Supermarkets, subsidiary of Malone & Hyde (Fairway Markets) Orlando, Florida	Complaint Counsel [6]
Edward B. Roehm	Vice President, Colonial Thomasville Division of Grand Union	Respondents
Albert N. Solomon	President, Albert N. Solomon Co. (So-Lo Foods) Atlanta, Georgia	Complaint Counsel
William G. Spearman	Atlanta Regional Vice President, Colonial Division of Grand Union	Complaint Counsel
William F. Stewart	Former President, Colonial and Senior Vice President Colonial Division of Grand Union	Complaint Counsel
Bert L. Thomas	President, Winn-Dixie Stores, Inc. Jacksonville, Fla.	Complaint Counsel
Charles L. Thomas	Group Vice President, The Kroger Company Cincinnati, Ohio	Complaint Counsel
Eugene Walters	President, Commonwealth Foods (Farm Fresh Supermarkets) Norfolk, Virginia	Complaint Counsel
Ronald S. Woodberry	Vice President and General Manager Ingles Markets Asheville, N.C.	Complaint Counsel

In addition, complaint counsel introduced the testimony of nine employees of respondents taken during depositions in this matter and/or in the private litigation between Grand Union and Colonial arising out of Colonial's court challenge of Grand Union's tender offer. The deponent witnesses were:

<u>Name</u>	<u>Title</u>	<u>Date</u>	<u>Exhibit No.</u>
Roland Franklin	Director, Cavenham	7/18/78*	CX 570
Sir James M. Goldsmith	Chairman, Cavenham	7/31/78*	CX 572 [7]
Alan C. Goulding	Executive Vice President Grand Union	11/6/79	CX 574
Roger W. Kennedy	Treasurer, Grand Union	10/17/79	CX 576
John L. Laska	Assistant Comptroller, Colonial	11/13/79	CX 608
James W. Rowe	Executive Vice President, Grand Union	11/11/79	CX 607
Earl R. Silvers, Jr.	Vice President and Secretary Grand Union	8/1/78* 9/10/79	CX 579 CX 580
Stuart S. Tarrant	Executive Vice President, Grand Union	9/11/79	CX 586
James Wood	President	7/25-26/78* ²	
	Grand Union	10/1/79 10/14/79	CX 588 CX 589

Stipulated testimony of the following witnesses was also introduced in evidence:

Murray Aboff	Managing Editor <i>Supermarket News</i>	Stipulated Testimony
Joe Blanton	President Publix Supermarkets, Inc.	Stipulated Testimony
Antoinette Machiaverna	Field Editor <i>Chain Store Age</i> and <i>Supermarkets</i>	Stipulated Testimony [8]

² All depositions taken in 1978, (those names followed by asterisks), were taken by Colonial in the private litigation brought by Colonial alleging violations of the federal securities laws, captioned "Colonial Stores, Incorporated and Ernest F. Boyce v. The Grand Union Company," United States District Court, Northern District of Georgia (Atlanta Division), Civil Action Nos. C78-1132A and C78-1148A.

Boyd L. George	President Merchants Distributors, Inc. Hickory, North Carolina	Stipulated Testimony
Dale C. Higgins	Vice President Super Food Services, Inc. Orlando, Florida	Stipulated Testimony

FINDINGS OF FACT

I. IDENTITY AND BUSINESS OF RESPONDENTS

A. *The Grand Union Companies*

1. The Grand Union Company ["Grand Union"] is a Delaware corporation founded in 1872, with its principal office located at 100 Broadway, Elmwood Park, New Jersey. (Complaint ¶ 3; Answer ¶ 2; CX 10F)

Since 1974, Grand Union has been a wholly-owned subsidiary of respondent Cavenham (USA) Inc. which, in turn, is a wholly-owned subsidiary of respondent Cavenham Holdings Inc. Cavenham Holdings Inc. is a wholly-owned subsidiary of respondent Cavenham (Overseas) Limited. Cavenham (Overseas) Limited is a wholly-owned subsidiary of Cavenham Limited. (RX 1H) Cavanham Limited is an indirect wholly-owned subsidiary of Generale Occidentale, S.A., a French company. Generale Occidentale, S.A. is a holding company, the principal assets of which, in addition to Cavenham Limited, include, *inter alia*, interests in companies engaged in food manufacturing, banking and the insurance brokerage business. (RX 1H-I)³ [9]

2. As of April 1978, prior to its acquisition of Colonial Stores Incorporated ("Colonial"), Grand Union operated a chain of approximately 479 retail food stores located in the states or territories of New Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Florida, Puerto Rico and the Virgin Islands. (Complaint ¶ 7; Answer ¶ 4; RX 2I, 1P) Grand Union also operated 14 Grand Way stores selling general merchandise, and nine catalog showrooms. (Complaint ¶ 7; Answer ¶ 4) Excluding its acquisition of Colonial, at the end of its 1978-79 fiscal

³ References to the record and other material are given in parenthesis, and the following abbreviations are used:

F. - Findings of this Initial Decision followed by the finding number being referenced. Reference to the transcript of record is designated by the name of the witness and the page being referenced.
 CX - Commission Exhibit followed by the number of the exhibit being referenced.
 RX - Respondents' Exhibit followed by number of the exhibit being referenced.
 CPF - Complaint counsel's proposed findings, followed by the number of proposed finding being referenced.
 RPF - Respondents' proposed findings, followed by the number of proposed finding being referenced.

year, company officials projected that Grand Union would be the eleventh largest supermarket chain in the United States. (CX 6Z11)

Grand Union's stores were divided into three regions comprising eleven operating divisions. The New York region included the Metropolitan, Long Island, Suburban and Jersey Divisions; the Northern Region included the Empire North and South and Central Divisions; and the Southern Region included the Washington, Florida East Coast, Florida West Coast and Caribbean Divisions. (CX 6Z11-Z31)

Nine company-owned distribution centers served the stores. The New York region was served by warehouses in Mt. Kisco, New York and Carlstadt, New Jersey; the distribution centers serving the Northern Region were located in Waterford, Waverly, Cortland, and Binghamton, New York; and the Southern Region was serviced by warehouses in Landover, Maryland and Miami (Hialeah), Florida. An additional warehouse in South Hackensack, New Jersey serviced the New York and Northern Regions and the Washington Division with general merchandise. (CX 6Z13)

3. All of Grand Union's retail food stores are supermarkets. (RX 1-P; CX 10-D; F. 20) Prior to the merger with Colonial in 1978, more than 95% of Grand Union's sales came from its Supermarket Division. (CX 11C) In the fiscal year ending March 31, 1978, Grand Union had \$1,649,274,000 in total sales and \$1,574,119,000 in retail food sales. (CX 10-I; Complaint ¶ 8; Answer ¶ 4) At the time of its acquisition of Colonial, Grand Union's sales were approximately 1% of national retail food sales. (Respondents' 3.21 Statement of March 12, 1979, at 4)

4. Respondent Grand Union Holdings Inc. was a Delaware Corporation and a wholly-owned subsidiary of Grand Union [10] (RX 2C), with its principal executive offices at 115 East Putnam Avenue, Greenwich, Connecticut. It was incorporated on June 30, 1978, for the purpose of making a tender offer and acquiring any and all shares of Colonial. (RX 1-G, 2 H-I) Other than the acquisition and holding of Colonial stock, it conducted no business. (RX 2I)

B. Cavenham Respondents

5. Respondent Cavenham (U.S.A.) Inc. is a wholly-owned subsidiary of respondent Cavenham Holdings Inc. and the parent of Grand Union. (RX 1H) It was incorporated in 1975 for the purpose of holding Grand Union's common stock. (RX 2I) It is a Delaware corporation and has its principal office at 115 East Putnam Avenue, Greenwich, Connecticut. (Complaint ¶ 6; Answer ¶ 4)

Cavenham Holdings Inc. was organized for the purpose of holding shares of Cavenham (U.S.A.) Inc. Cavenham (Overseas) Limited and Cavenham Limited are English companies with their principal execu-

tive offices at Cavenham House, Millington Road, Hayes, Middlesex, UB 34AY, England. (RX 2I) Cavenham (Overseas) Limited was organized for the purpose of holding securities of companies located outside of the United Kingdom. (RX 2I) Cavenham Limited is engaged primarily in the operation of supermarkets and other retail food outlets in the United Kingdom and in the manufacture and sale of food and food products in the United Kingdom and elsewhere in Western Europe. (RX 2I). In 1973, Cavenham Limited initially purchased 51% of Grand Union's outstanding common stock. (CX 15D) Cavenham Limited is a multi-national food retailing and manufacturing organization with operations in fourteen nations. (CX 13H)

Generale Occidentale S.A., a French company, owns all the outstanding stock of Cavenham Limited. Generale Occidentale S.A. is ultimately controlled by Sir James Goldsmith. Generale Occidentale S.A., and Sir James Goldsmith may be deemed to be the parents of Grand Union, Grand Union Holdings Inc., Cavenham (USA) Inc., Cavenham Holdings Inc. (RX 2A, 2I-J)

C. Respondent Colonial

6. In 1901, the David Pender Grocery Company was incorporated in Norfolk, Virginia. When the Pender Company merged with the Southern Grocery Company in 1940, the resulting corporation was called Colonial. (CX 10F, 313B) Colonial was a Virginia corporation with its principal executive offices located at 2251 North Sylvan Road, East Point, Georgia. (RX 2U) Colonial no longer exists as a separate corporate entity. It was merged into Grand Union on February 3, 1979, and is operated as a division of Grand Union. (Answer ¶ 5; RX 2C)

As of November, 1978, Colonial operated a chain of approximately 378 retail food stores in the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama and Maryland. (Complaint ¶ 11; Answer ¶ 6; CX 313J) Colonial [11] owned and operated several facilities which manufactured or processed various products, including bakery items, dairy products, jams and jellies, mayonnaise, salad dressings and other items, as well as store fixtures. Substantially all such products were sold to Colonial retail food stores. (Complaint ¶ 11; Answer ¶ 6) In 1978, most of Colonial's stores operated under the name "Big Star." A few were still called Colonial. (Isaacs 2529; Stewart 476) All Colonial's retail food stores were supermarkets. (CX 10D, 10F, 313A, 314L; RX 1P; F. 20)

The company [Colonial] is engaged primarily in the operation of a chain of self-service, cash-and-carry retail food stores (supermarkets), in seven southeastern states, offering a full line of packaged grocery products, meat, poultry, fish, fruits and vegetables,

bakery and dairy products, and other items of the type customarily sold in supermarkets, such as health and beauty aids and household items.

(CX 313J)

7. In the fiscal year ending December 31, 1977, Colonial had total sales of \$1,053,167,343. (Complaint ¶ 12; Answer ¶ 6; CX 313C) Colonial's assets for fiscal year 1977 were \$189,118,000 and net earnings were \$10,907,000. (Complaint ¶ 12; Answer ¶ 6) In its 1977 Annual Report, Colonial stated that "[b]ased upon available published sales figures for 1976, the company believes it is the fifteenth largest supermarket chain in the United States." (CX 313J)

At the time of the acquisition, Colonial accounted for approximately 0.6% of national retail food sales. When combined, Grand Union and Colonial had a total share of national retail food sales of about 1.6%. (Respondents' 3.21 Statement of March 12, 1979, at 4) Colonial's stock was traded on the New York Stock Exchange. Between the first quarter of 1976 and the first quarter of 1978 [the last full quarter prior to the tender offer], Colonial's stock ranged from a high of \$25 per share in the first quarter of 1976 to a low of \$18 per share in the first quarter of 1978. (RX 1D)

D. Interstate Commerce

8. At all material times herein, respondents were engaged in commerce within the meaning of the Clayton Act and the Federal Trade Commission Act. (Complaint ¶¶ 9, 13; Answer ¶¶ 4, 6)

II. THE EIGHT STORE ACQUISITION

9. Commencing in late 1976 or early 1977, discussions were held between Colonial and Grand Union concerning the [12] possible disposition by Colonial of a Big Star store located on the West Coast of Florida. In early 1978, Colonial offered to sell its leasehold interest in 11 Big Star stores on the West Coast and in Central Florida to Grand Union. (RX 1L) Negotiations for the acquisition of eight of those stores occurred prior to the acquisition of Colonial stock.

Pursuant to the "FTC Enforcement Policy With Respect to Mergers in the Food Distribution Industries", 1 Trade Reg. Rep. (CCH) ¶ 4525, issued January 17, 1967 (CX 5), Grand Union notified the FTC on May 3, 1978 of its intention to acquire the eight stores from Colonial. (RX 1P; CX 654A) Thereafter, on July 6, 1978, Grand Union acquired the eight Big Star stores. One store was located in Manatee County, three were located in Hillsborough County, and four were located in Pinellas County (Tampa and St. Petersburg), all in the State of Florida. (RX 1L; CX 112B; CX 154B; CX 155B; CX 156B; CX 157B; CX 158B; CX 159B; CX 160B) Grand Union paid an aggregate consideration of

approximately \$1.45 million for the eight stores (RX 1L) Grand Union did not choose to acquire any of the Colonial stores in Central Florida. The acquired stores had been closed by Colonial prior to their acquisition by Grand Union. (CX 588 [Wood] at 189) Subsequently, seven stores were renovated by Grand Union and reopened in the fall of 1978 under the Grand Union name. (*Id.*) At the time of its notice to the Commission of its proposed acquisition of the eight supermarkets, Grand Union operated seven supermarkets on the west coast of Florida, including one in Pinellas County, Florida. (Complaint Counsel Phy. Ex C)

On June 21, 1978, the Commission's Consent Decree with Grand Union expired; it had required Grand Union for a ten-year period to seek prior Commission approval in the event of any proposed acquisition involving five or more grocery stores, or annual grocery store sales in excess of \$5,000,000, or where Grand Union's stores and the grocery stores to be acquired would account for grocery store sales of 5% or more of total grocery or food store sales in any city or county. (CX 62Z163; RX 1Q) The purchase of the eight Big Star supermarkets by Grand Union was closed on July 6, 1978, fifteen days after the expiration of the Consent Decree. (Complaint ¶ 17; Answer ¶ 8, CPF 36)

III. THE ACQUISITION OF COLONIAL

A. *The Acquisition*

10. At a meeting in London on May 7, 1978, James Wood, at that time the President and Chief Executive Officer of Grand Union, and Roland Franklin, a director of Cavenham, discussed specific acquisition possibilities. Roger Kennedy, Grand Union's Treasurer, had prepared at Mr. Wood's request, a document entitled "Acquisition Possibilities" which mentioned 45 retail food chains, including Colonial. (CX 44) According to Mr. Wood in his deposition, this was when Grand Union first considered Colonial as an acquisition possibility. (CX 589 [Wood] at 53-58) After the [13] meeting, Mr. Franklin discussed Grand Union's interest in Colonial with Sir James Goldsmith and this topic was covered by Mr. Wood at the regularly scheduled monthly Cavenham Board meeting. (CX 588 [Wood] at 114-15, 195-98) Sir James approved the acquisition. (CX 588 [Wood] at 115-16, 202)

At a meeting later that week at Grand Union's New Jersey headquarters, Messrs. Wood, Franklin, Tarrant (Grand Union's Executive Vice Presidents), and Silvers (Grand Union Vice-President and Secretary) discussed the possible acquisition of Colonial. Other companies, including A & P and Weingarten, were also discussed at that meeting.

(CX 586 [Tarrant] at 56-57) Following the meeting, Mr. Tarrant prepared a financial appraisal entitled "Company Profile, Colonial Stores Inc." (CX 63) for the purpose of analyzing Colonial as an investment, and to accompany any recommendation to the Cavenham Board that Grand Union attempt to acquire Colonial. (CX 588 [Wood] at 126)

During the week of May 8, 1978, after the initial meeting in London, Mr. Wood telephoned Ernest F. Boyce, Chairman and Chief Executive Officer of Colonial, to suggest a meeting. Mr. Boyce and Mr. Wood met at Colonial's headquarters on June 1, 1978. Following that meeting, Mr. Wood sent a letter to Mr. Boyce dated June 2, 1978 to confirm Grand Union's interest in exploring the possible association of Grand Union and Colonial. (RX 1L) On June 29, 1978, Grand Union wrote a letter to Mr. Boyce proposing a merger between Grand Union and Colonial offering \$30 per share, in cash, to Colonial stockholders. (RX 1L, 2D) On July 6, 1978, Colonial's Board of Directors rejected Grand Union's merger proposal. (RX 1L, 2D)

11. On July 6, 1978, Colonial and Mr. Boyce commenced an action against Grand Union in the United States District Court for the Northern District of Georgia, Atlanta Division, seeking, *inter alia*, injunctive relief, divestiture of any Colonial shares owned by Grand Union, and costs. (RX 1L) On July 7, 1978, Colonial and Mr. Boyce instituted an action against Grand Union in the Superior Court of Fulton County, Georgia, seeking, under the Georgia state takeover law and the Georgia Securities Act of 1973, substantially the same relief sought in the abovementioned federal action. (RX 1L-M) On July 7, 1978, Colonial and Mr. Boyce petitioned the State Corporation Commission of Virginia to enjoin Grand Union from an alleged violation of the Virginia Take-Over Bid Disclosure Act and seeking relief similar to that sought in the federal action. On July 26, the State Corporation Commission dismissed the petition filed by Colonial, finding that the Commission had no jurisdiction to entertain private actions for injunctive relief. (RX 1M) None of these actions alleged a violation of the antitrust laws. (RX 1L-M)

On July 14, 1978, Grand Union delivered to Colonial, pursuant to Georgia and Virginia takeover laws, a proposed form of Offer to Purchase and announced its intention to make, as soon as it had satisfied all applicable legal requirements, a [14] cash tender offer for any and all outstanding Colonial shares at \$30 per share. (RX 1M)

On July 24, 1978, Colonial filed a request for a hearing with the Virginia State Corporation Commission pursuant to the provisions of the Virginia Take-Over Bid Disclosure Act. On July 31, 1978, the State Corporation Commission determined that no cause for a hearing existed. (RX 1M)

12. At a meeting on August 1, 1978, between representatives of Grand Union and Colonial, Grand Union indicated that if a majority of Colonial's Board of Directors, including Russell B. Stearns, a director who was a major stockholder of Colonial, were receptive, Grand Union would consider increasing the price of its previously announced cash tender offer to \$35 per share. Later that day, Colonial's Board of Directors, by a vote of seven to five (Mr. Stearns voting affirmative), recommended acceptance by Colonial's stockholders of an offer at \$35 per share if it were made, and Grand Union agreed to make such an offer. (RX 2D-E) Following the recommendation of the offer by a majority of Colonial's Board, the legal actions instituted against Grand Union were dismissed or otherwise withdrawn. (RX 2E)

On August 8, 1978, Grand Union Holdings Inc. made an offer to purchase any and all shares of Colonial common stock at \$35 per share. When the offer expired on September 1, 1978, Holdings had acquired 3,471,886, or approximately 91%, of Colonial's shares then outstanding. (RX 2E) Commencing on November 17, 1978, in a series of three mergers pursuant to Virginia state corporate law, Colonial became a wholly-owned subsidiary of Grand Union. (RX 2C, E) Colonial was subsequently merged into Grand Union. (Answer ¶ 5) As of February 5, 1979, Colonial Stores Incorporated, a Delaware corporation, had ceased to exist as a separate corporate entity and was being operated as a division of Grand Union. (Answer ¶ 5; CX 10D)

B. The Hold Separate Agreement

13. On June 30, 1978, in accordance with the "FTC Enforcement Policy with Respect to Mergers in the Food Distribution Industry," Grand Union gave the Commission 60 days advance notice of its intention to acquire Colonial. FTC staff then began an investigation of the proposed merger. (Answer ¶ 18) In a letter to counsel for Grand Union dated July 6, 1978, FTC staff stated that it would give "full attention and consideration" to this acquisition and that: [15]

The eight Florida supermarkets Grand Union has recently acquired from Colonial [the Big Star acquisition, discussed F. 9] will be considered as part of what is now a much larger proposed transaction—that transaction will be analyzed as though the eight stores were still Colonial's.

(Affidavit in Support of Respondents' Motion to Dismiss the Complaint or in the Alternative for a More Definite Statement, at 6) The staff also indicated that the proposed acquisition was "the type of merger that the [FTC Guidelines] indicates raises serious questions under the statutes administered by the [FTC]." (RX 1Q)

On August 18, 1978, Grand Union and the Commission staff

reached an agreement pursuant to which the staff agreed not to recommend that the Commission seek to enjoin or otherwise delay the acquisition, and Grand Union agreed to hold Colonial's assets as a separate subsidiary until the FTC's investigation was closed or until November 17, 1978. (Hold Separate Agreement, at 3) The Hold Separate Agreement was extended until December 1, 1978 (Agreement to Extend the Hold Separate Agreement), at which point it lapsed.

*C. The Filing Of The Complaint And The Agreement
To Preserve Trade Names*

14. On November 21, 1978, the Complaint in this action was filed. On November 29, 1978, in consideration for the Commission not seeking a temporary restraining order or preliminary injunction, the staff and Grand Union entered into an "Agreement to Preserve Names and Trademarks Used By Colonial Stores, Inc." That agreement, subject to certain modifications, is currently in force.

IV. THE PRODUCT MARKET

A. In General

15. The Complaint alleges that the effect of the acquisition of Colonial by Grand Union may be to substantially lessen competition in the product market of "retail sales by retail food stores, and submarkets thereof, including the submarket of sales by supermarkets." (Complaint ¶ 19) Complaint counsel, on January 19, 1979, filed a statement alleging an additional submarket of grocery stores, as defined by the Bureau of the Census. Complaint counsel offered three alternative market share calculations based upon three definitions of relevant product market: retail food stores (CX 2), grocery stores (CX 3), and supermarkets. (CX 664) [16]

16. The product market, "food stores", is defined by the Bureau of the Census, *Census of Retail Trade*, as:

Food Stores (SIC Group 54)—The major group includes retail stores primarily engaged in selling food for home preparation and consumption. Establishments primarily engaged in selling prepared foods and drinks for consumption on the premises are classified in major group 58, and stores primarily engaged in selling packaged beers and liquors are classified in SIC 5921.

The product market, "grocery stores", is defined by the Bureau of the Census, *Census of Retail Trade*, as:

Grocery Stores (SIC 541)—Establishments primarily selling (1) a wide variety of canned or frozen foods such as vegetables, fruits, and soups; (2) packaged or bulk dry groceries, such as tea, coffee, cocoa, dried fruits, spices, sugar, flour, and crackers; and (3) other processed foods and nonedible grocery items. These establishments often also sell

smoked and prepared meats, fresh fish and poultry, fresh vegetables and fruits, and fresh or frozen meats. Establishments commonly known as supermarkets, food stores, and delicatessens are included if receipts from sales of groceries and food items for off-premise preparation and consumption are 50 percent or more of total sales.

17. Complaint counsel define the most relevant product market in this case as sales by supermarkets. This definition is supported by Dr. Marion, one of complaint counsel's economic experts (Marion 1881), and also by Dr. Parker, another economic witness for complaint counsel:

[B]oth Colonial and Grand Union are supermarket-operating firms, . . . the firms they compete with are supermarket-operating firms, . . . they compete indirectly with other grocery retailers, but . . . the competition for supermarket sales are sufficiently distinct that I would call it a separate market.

(Parker 2220)

Dr. Marion identified three factors which are distinctive of supermarkets: (1) variety of products, volume of business, average amount of each consumer transaction, and the stores' gross margins; (2) the consumers' view that the [17] supermarket can fill all major food shopping needs; and (3) the supermarket owners' view that other supermarkets are their competitors. Dr. Marion also stated that there are trade associations and trade journals that cater to supermarkets. (Marion 1881-84)

18. Trade witnesses ascribe various definitions to the term "supermarket":

[O]rdinarily, you think of supermarketing as a way to market foods at a low price.

(Gregerson 309)

Well, to me a supermarket would be a store perhaps in this day and age at least 10,000 square feet doing a minimum of \$1 million a year in sales.

(Gooding 1115)

It would be the selling or distributing to consumers the products from the farm, from the packers through the sale of this merchandise in the stores. It would encompass not just food, but like say, non-food items, household items, things of this nature.

(Connell 1221)

A supermarket, my own personal opinion, is any store that provides a wide variety of grocery, produce, and meat items. That offers a degree of service to the customers.

(C. Thomas 1303)

Well, a supermarket, as I said—as I envision them—is big enough to sell a full line of food, health and beauty aids, some housewares, products to be consumed in the kitchen and the home, in the bathroom, on a turnover basis. A lady should not have to go elsewhere to get food in my definition of a supermarket.

(B. Thomas 1470)

It would mean to me and to you, probably, a different thing. I don't think a supermarket could be called a supermarket if it is less than 14, 15,000 square feet and bigger.

(Byrd 1536) [18]

Industry witnesses testified that 10,000 to 56,000 square feet constitute the size range of supermarkets. (Gooding 1115; Stewart 523; Connell 1220-21; Byrd 1536; Posey 1633; C. Thomas 1296; CX 611B) In 1978, the average size of Colonial's supermarkets was 20,500 square feet. (CX 63A)

19. Another defining characteristic of a supermarket versus other food stores is the array of items it offers. Industry members described supermarkets as selling fresh meat and produce, groceries, health and beauty aids, and general merchandise (B. Thomas 1470; C. Thomas 1303; Walters 14501-02), and carrying from 8,000 to 12,000 products. (Thomas 1470; Spearman 736; Stewart 523; Gooding 1116) An aspect of supermarket merchandising is that it offers "one-stop shopping." (B. Thomas 1470; Connell 1239; Posey 1638; Roehm 2779; CX 92E)

20. Sales volume may be used to differentiate supermarkets from other food stores. (Marion 1877) In the early to mid-1970's, sales volume for supermarkets was described as a minimum of \$1 million per year. (Walters 1402; Gooding 1115) Currently due to inflation, the cut-off of \$1.5 million has been advanced by complaint counsel's economic experts. (Marion 1877-78; Parker 3462-63) In 1977, Colonial operated 376 supermarkets, and Grand Union operated 484 supermarkets. These supermarkets averaged in excess of \$3 million dollars in sales per year. (See CX 313C, F; CX 252Z39; CX 11K.) Dr. Curhan, respondents' marketing expert, in testifying that a small regional chain was unsuitable for acquisition by Grand Union, stated: "But Lowe's operates very small stores. They have 63 stores and their sales in '78 are \$130 million. That's a scant \$2 million a store. That's not Grand Union's kind of stores." (Curhan 2972)

21. Supermarket operators generally price-check only other supermarkets, because only supermarkets have similar competitive pricing structures. (CX 589 [Wood] at 123; Roehm 2772; Connell 1230; Gregerson 318-19; Walters 1404-05; Marion 1884) Gross margins in supermarkets average 20% whereas in other grocery stores, *i.e.*, convenience stores, margins average 30%. (Marion 1881-82, 1884; Parker 2220) Former Colonial officials now employed by Grand Union

stated that they price-checked main competitors only, and these were other supermarkets. (Isaacs 2624, 2626; Addison 2691-92; Roehm 2772) Colonial price-checking documents generally list only other supermarkets. (CX 493A-Z11; CX 497A-Z14; CX 498 I; CX 501A-Z15; CX 502A-Z23) Pre-acquisition Grand Union price-check documents in evidence only list other supermarkets. (CX 302A-H; CX 303A-L)

B. Convenience, Mom-and-Pop, and Limited Assortment Stores

22. Convenience stores are seldom price-checked by supermarket operators. (C. Thomas 1300; Posey 1637-38; Connell 1239) Trade witnesses testified that only checking of bread [19] and milk prices in convenience stores was done (CX 607 [Rowe] at 60; B. Thomas 1490), and the prices of these items are generally higher in convenience stores. (Stewart 529; Curhan 3038)

Convenience stores range in size from 800 to 3000 square feet (Parker 2221; Stewart 523-24, 528; Posey 1637; Gooding 1124), and have a limited assortment of items, about 500 to 3,000. These are dominated by high volume, fast turnover items such as beverages, bread, cigarettes, and milk. (B. Thomas 1471; Stewart 523-24; Parker 2222; Posey 1637) They carry little, if any, produce and a limited assortment of meats. (Gregerson 313; Spearman 732) In Macon, Georgia, 26 Majik convenience stores averaged approximately \$140,000 in sales per store in 1977. (CX 665Z293) In Richmond, Virginia, 87 7-11 convenience stores averaged approximately \$325,000 in sales per store in 1977. (CX 665Z506-Z507) In Orlando, Florida, 83 7-11 convenience stores averaged approximately \$290,000 in sales per store in 1977. (CX 2Q; CX 665Z412)

Convenience stores generally have one employee per shift (Stewart 524), and have higher price structures and margins than supermarkets. (Stewart 523; Gooding 1124; Posey 1638; Spearman 734-35; Parker 2222; Marion 1882) Sales per customer average \$11.00 to \$15.00 in supermarkets and \$1.00 to \$3.00 in convenience stores. (Parker 2223; Spearman 736; Marion 1882; Gooding 1125) "They are very high priced, quick in, quick out." (Gooding 1124)

While several supermarket operators considered convenience stores as competitors on the items the convenience stores sell (Spearman 842; B. Thomas 1490; Byrd 1367-68; Woodberry 1731), other trade witnesses indicated that the main competition convenience stores offer is in their hours of operation. (C. Thomas 1372; Curhan 2840) Convenience stores are not generally considered in supermarket expansion plans and store location studies. (CX 92A-C through CX 169; CX 391A-G through CX 399; see CX 95B; CX 1-B; CX 106C)

23. Mom-and-pop stores have been defined as "little corner stores generally operated by mom and pop that had a little produce, a little

meat, limited line of groceries, kept varying hours." (B. Thomas 1471) Mom-and-pop stores generally do not advertise in major metropolitan newspapers. (Roehm 2775) They offer different services than those provided by supermarkets. (Parker 2225) Supermarkets do not generally price-check mom-and-pop stores. (Spearman 738)

24. Limited assortment or box stores sell roughly 400 to 800 items, frequently do not carry meat or produce, and require the customer to bring his own bag or box. (Gregerson [20] 313; Spearman 738; Gooding 1129; Curhan 2848) They rely heavily on manufacturers' allowances and deal merchandise (Gooding 1129-30), and do not offer services like bagging and payment by check. (Gooding 1129) Prices are generally lower than supermarket prices. (Posey 1635-36; Spearman 740) However, opinion is divided regarding what effect this has had on supermarket prices. (Posey 1637; Parker 2224; Gooding 1130; Spearman 924; Byrd 1568)

One industry member, in commenting that a limited assortment store was directly across the street from his supermarket, said that he had not reacted to the limited assortment store because it cannot supply a housewife's total food needs. Because the limited assortment store does not carry perishables, the housewife must make another stop in her shopping if she goes to a limited assortment store. (Posey 1637; Parker 2224) Another supermarket operator, acknowledging that there were two limited assortment stores within a mile or two of his supermarkets, indicated that he had seen no appreciable effect on his stores' volume after the opening of the limited assortment stores. (Gooding 1130) A third industry member stated he had not made any response to the opening of a Jewel-T limited-assortment box store because he did not believe it would affect his business and, in fact, it did not. (Gregerson 314; *see also* C. Thomas 1358; Spearman 739-40)

However, these stores require small capital investments and are easily located. (Gooding 1133) They are "very competitive with price." (Spearman 924; Byrd 1568; Curhan 2849) Several "conventional" supermarket operators are applying box store principals to their stores (Walters 1445-46), or are opening box stores. (Curhan 2851)

So-Lo Food Stores operates a "case-stack" store which did a little over \$3 million in sales in 1979. (Solomon 1017-18) It was described as a "cross-section of business," part "warehouse type" operation and part "total shopping." (Solomon 1018) Unlike some box stores, it carries fresh meat and produce. (Solomon 1019-20) Mr. Solomon considers his store to be a supermarket. (Solomon 1023)

25. A "warehouse" store is one in which the product is displayed in its own shipping container, without a price label on it. It offers limited service. (Gregerson 367-68) Mr. Gregerson of Warehouse Groceries Management, Inc. ("Warehouse Groceries"), was one of the innova-

tors of this type of store about ten years ago (Gregerson 365), and now others, including Grand Union, have opened similar stores. (Gregerson 366) One of complaint counsel's experts testified that warehouse stores are direct competitors with conventional supermarkets. (Parker 2223)

26. Charles Thomas, Group Vice President of Kroger, described the variety of food stores operated by his company: [21]

Kroger has a variety of retail stores. We have what we call the older type—we refer to it as a conventional store. That is a store that is under 25,000 square feet, built prior to 1972. We then have what we refer to internally as a super store. This is a store that was built after 1972 and exceeds 25,000 square feet.

We have combination stores, which is [sic] basically in the 56,000 square-foot range and is [sic] a combination of food, drug, and pharmacy.

We have family center stores. These are basically in the southwest, in Houston and Dallas, which are in the 50,000 square-foot range. These are similar to the combination store, except they have a wider variety of general merchandise.

We have a few experimental units that would be classified as box stores which are small, limited-item discount stores.

We also have a limited number of very large warehouse-type stores under the name of Barney.

(C. Thomas 1295-96)

C. Supermarkets Versus Other Grocery Stores

27. Respondents note (RPF 58) that although the retail food stores described (F. 22 to F. 26) may not be considered as competitors by supermarket operators, "supermarkets are keenly concerned with the continued encroachment of convenience stores taking away business." (Curhan 2843) Respondents also discount (RPF 59) the importance of supermarket operators' general failure to price-check convenience and mom-and-pop stores. (F. 23) Respondents argue that supermarkets are interested in the prices charged by convenience and mom-and-pop stores (Posey 1668), and that supermarkets do price-check items such as bread, milk, soft drinks and beer in such stores. (Byrd 1546; Addison 2651; Woodberry 1731)

Respondents' expert economic witness, Dr. Adelman, testified that the sporadic nature of price-checks of convenience and mom-and-pop stores does not warrant their exclusion from the market (Adelman 3260), because firms price-check to obtain information about the market and, because of the expense of such information, they are initially interested in their largest competitors. (Adelman 3260) Price-checking [22] convenience and mom-and-pop stores would merely confirm the obvious, *i.e.*, that their prices are, in general, higher than those charged by supermarkets. (B. Thomas 1490)

28. Respondents also point out (RPF 60) that Dr. Marion conceded

that "supermarket is a somewhat imprecisely used term" (Marion 1876) and that "the most difficult choice here is really between whether you choose to go with all grocery stores or all supermarkets." (Marion 1881) A cut-off of \$1.5 million in determining relevant market is "admittedly arbitrary." (Marion 1877; *see also* Adelman 3253, 3451-52) In 1980, *Progressive Grocers*, an industry trade publication, used a \$1 million cut-off to define a supermarket. (Parker 3841) Some industry witnesses placed the cut-off at \$1 million. (Gooding 1115; Walters 1402)

D. Other Food Retailers

29. There are two other operations, the sales of which are not included in the Bureau of the Census, *Census of Retail Trade*, which respondents contend have an influence on competition in food retailing: fast-food outlets, and military commissaries. (RPF 69)

1. Fast-Food Outlets

30. Grand Union's 1977/78 Business Plan and Budget, considered the vendors of prepared food in light of the competition such vendors offered to supermarket operators:

Eating out, an increasingly important form of supermarket competition, continued to show substantial growth, particularly limited menu fast food operations, which accounted for 32.3 percent of all foods eaten out. Dollar sales of both total restaurant, and of fast-food outlets, have grown considerably faster than food store sales, total food sales, and the food price index. The impact of changing food lifestyles is reflected in growth rates from 1968 through 1976. During this eight-year period, growth for all eating out was 208.9 percent, versus the growth in food from food stores of 156.9 percent. The fast foods gain in share of total foods from 1975 to 1976 was 0.5 percent. Translated on the basis of no inflation, no gain in consumption, this would represent a loss of approximately a billion dollars in sales for food stores.

(CX 7Z-84)

Similarly, a Colonial document written prior to the Grand Union acquisition notes: "Competition, like Colonial, [23] recognizes that supermarket tonnage is on a plateau and is being eroded by eat-out establishments." (CX 251Z39)

When asked whether he competed with fast-food operators, Mr. Posey, President of Fairway Markets, said, "Well I would say it's probably our best competition, or worst, I should say." (Posey 1702) An exhibit introduced by complaint counsel during Mr. Posey's testimony, an advertisement for pizza and hamburgers, shows how supermarkets attempt to compete with fast-food operations. (CX 640F, G) Mr. Posey explained:

I think the biggest thing they are trying to accomplish, and so are we, is to let the

public know they can buy hot foods, plate lunches, and take them home. I do not have sit-down [restaurants], nor do most of the grocers; but we sell them a complete meal to carry out to, again, try to be competitive against fast-food houses.

(Posey 1703-04)

Mr. Charles L. Thomas, Group Vice President of Kroger, also agreed that fast-food stores competed with Kroger operations (C. Thomas 1372), and testified that Kroger reacted to such competition with delicatessens and bakeries and, in Kroger's larger stores, with "snack bars and/or restaurants." (C. Thomas at 1373)

Mr. Walters, President of Farm Fresh, noted that fast-food operations had affected his business and that he had responded to that competition:

Yes. We feel that we are in the total food business, and our major thrust and our image is to serve the customers with whatever they want in food needs and other products that are regularly used in supermarkets. So we have developed fast-food operations within our stores: fried chicken, service delis, party trays, little cafeterias, all the things that go with it, as many other people have done throughout the country.

(Walters 1448; *see also* Isaacs 2578-79)

Despite this and similar testimony, one of respondents' economists would not include fast-food outlets within the food retailing market. Dr. Adelman testified:

... [I] would say that the two products are sufficiently different in appearance, in use, and in the costs that go into their production to where, although there may be competition in the sense of one industry competing with another and there is [24] competition enough to damage the food-retailing industry substantially, that, I think, is a somewhat different concept that we are addressing.

(Adelman 3252-53)

On the other hand, respondents' other expert witness, Dr. Curhan, while acknowledging differences, would put fast-food operators in the food retailing market:

... I can see some reason for differentiating between conventional food retailers ... and to contrast them to McDonald's. I can understand where one may want to analyze them in many respects as separate industries. But I would not retreat one inch from the fact that they are competitors in what is a fuzzy market for food for people who are satisfying their daily needs.

(Curhan 2863-64)

2. Commissaries

31. Bureau of the Census, *Census of Retail Trade*, excludes commissaries from its grocery store statistics.

The competition to supermarket operators offered by commissaries is limited because only active or retired military personnel and their dependents are granted access. (Curhan 2855) Supermarket operators cannot gain access for price-checking purposes. (Connell 1242; Walters 1405)

Industry witnesses testified that they could not afford to match the generally lower price structure of commissaries (Curhan 2857; Addison 2662; Walters 1406), which are subsidized by the federal government. (Walters 1406; B. Thomas 1509) In addition, commissaries do not charge state sales tax on any items (Stewart 526, 650; Walters 1406; Curhan 2857), whereas supermarkets in Virginia, for example, charge 4% on all purchases, including food. (Walters 1406)

In a number of the alleged relevant markets, sales through military commissaries constitute a significant portion of retail food sales. This is particularly true in the Newport News/Hampton area, Norfolk, Fayetteville, and Jacksonville (Curhan 2854-55), and it also applies to a lesser extent to Orlando, Augusta, Macon and Atlanta. Colonial documents written prior to the Grand Union acquisition listed commissaries as "competition" in certain areas. (See CX 251Z-24.)

Where commissaries are important market factors, food retailers try to capture the business which would otherwise go to commissaries by offering more variety and better quality [25] products (Addison 2662-63; Curhan 2857), and by offering lower prices on bread, milk, beer and other staple items. (Addison 2662; Roehm 2732) However, supermarkets do not include commissaries in their marketing or advertising strategies. (Connell 1242) Commissaries do not advertise. (Roehm 2773)

V. THE GEOGRAPHIC MARKETS

A. *The SMSA As A Relevant Geographic Market*

32. The Complaint alleged that "the relevant geographic markets are some of the Standard Metropolitan Statistical Areas (SMSAs), cities or towns in which Colonial operates supermarkets." (Complaint ¶ 20) At the time of Grand Union's acquisition of Colonial, the latter operated in 25 SMSAs and in over 200 cities and towns. (Affidavit In Support of Respondents' Motion To Dismiss, December 15, 1980, at 4)

On January 18, 1979, complaint counsel identified the following SMSAs as alleged relevant geographic markets:

- Atlanta, Georgia
- Augusta, Georgia
- Charlotte/Gastonia, North Carolina
- Fayetteville, North Carolina
- Gainesville, Florida
- Greenville/Spartanburg, South Carolina

Jacksonville, Florida
Macon, Georgia
Newport News/Hampton, Virginia
Norfolk/Virginia Beach, Virginia
Orlando, Florida
Raleigh/Durham, North Carolina
Richmond, Virginia

Complaint counsel reserved the right to allege submarkets within one or more of these SMSAs.

33. An SMSA is a group of political subdivisions defined by the Office of Statistical Policy, Department of Commerce. Each of these political subdivisions includes a core [26] city of 50,000 people, or an urbanized area of 100,000 people. An SMSA is determined by the political subdivisions (normally counties) where at least 15% of the labor force commutes to the central core city or town. (Parker 2213) As of July 1, 1978, 73.4% of the population of the United States lived in the country's 268 SMSAs. (Bureau of the Census, *Population*)

34. Industry publications such as *Metro Market Studies*, *Progressive Grocer*, and the *Food Chain Directory* collect and publish data in terms of SMSAs. (Parker 2216; Marion 1890) These publications are read and used by industry members. (CX 576 [Kennedy] at 73, 89; Spearman 750) Supermarket companies, including Grand Union and Colonial, acquire most of their market share information in terms of SMSAs. (C. Thomas 1303-04; Roehm 2769; CX 580 [Silvers] at 74, 125-26; CX 597; Commission Physical Exhibit B) Companies gauge their success as competitors in terms of relative market position and gains and losses in SMSAs. (Stewart 623-33; Walters 1429-31) Pricing policies are generally made on an SMSA basis. (Parker 2216-17) Supermarket companies are very concerned with the advertising and pricing strategies of their supermarket competitors in an SMSA market area and tend to observe and analyze these competitors when setting their own prices. (Walters 1403; Stewart 512-13; Connell 1230-31)

35. An SMSA generally reflects the major coverage area of the local media, a major criteria used by supermarket companies in delineating markets. (Stewart 505-06; Connell 1221-22; CX 574 [Goulding] at 25-26) "Advertising is for the SMSA, not for separate trading areas. Occasionally you may have handbills for a particular store, but that is unusual, not the usual thing. Other types of promotional program[s], image-building and so forth, [are] for the whole SMSA, not for a particular trading area." (Parker 2217) Experts testifying in this case agree that SMSAs are generally good approximations of local markets (Marion 1891; Parker 2214-15; Adelman 3213), and that consumers in one SMSA are not likely to be affected by the offerings of stores in the next SMSA. (Adelman 3213)

B. *Progressive Grocer's Market Areas*

36. Geographic markets may differ on the demand and the supply side. (Adelman 3246) The supply for all retail food stores within an SMSA does not originate entirely within that SMSA. It may originate from warehouses which may be located within a nearby SMSA. (Adelman 3213) Because more than one SMSA can often be reached from any particular warehouse, market conditions in one SMSA are not entirely independent of those in other nearby SMSAs. (Adelman 3214; Marion 1890)

The boundaries of the geographic market from the supply side may resist precise determination. Respondents' expert, [27] Dr. M. A. Adelman, provided an exhibit (RX 30A-Z14) which was based on "market areas" defined by *Progressive Grocer* in its 1981 *Marketing Guidebook*. This exhibit includes 14 of the 15 "market areas" at issue in this case (all but Augusta) into eight "market areas." In each instance, these "market areas" are larger than SMSAs. "In establishing the boundaries of individual market areas, *Progressive Grocer* gave first consideration to the pattern of distribution to stores from typical grocery warehouse operation." (RX 30Z-13)

Each of the eight *Marketing Guidebook* "market areas" is served by some six to ten distribution centers located outside of the "market area" and other distribution centers within the "market area." (RX 30F, K, O, S, W, Z-1, Z-5, and Z-10) There are also a number of additional firms with distribution centers as close or sometimes closer to each of the "market areas" as those already serving the area. (RX 30-G, L, P, T, X, Z-3, Z-7 and Z-11) Dr. Adelman testified that it would not be possible to draw the boundaries for these market areas, but that the relevant geographic area is larger than the SMSA and that, therefore, concentration ratios based on SMSA figures are overstated. (Adelman 3199)

Complaint counsel points out that *Progressive Grocer* also publishes annually *Market Scope*, which utilizes Metro Areas "measured by the official designation of the U.S. Office of Management and Budget as Standard Metropolitan Statistical Areas (SMSAs), except in the few instances where counties are split." (*Market Scope* 1980, p. 12.)

C. *The SMSAs Designated As Relevant Geographic Markets*

37. Complaint counsel designated thirteen SMSAs as relevant geographic markets (F. 32), in addition to the entire area in which Colonial operated which was designated as a relevant market for Count C of the Complaint. (Statement of Counsel Supporting the Complaint in Response to Order of January 5, 1979, at 6) On October 6, 1980, complaint counsel eliminated the Spartanburg, South Carolina sub-

division and Fayetteville, North Carolina, as geographic markets in which it is alleged Grand Union was an actual potential entrant. (Complaint Counsel's Response To The Request Made By The Administrative Law Judge On September 26, 1980)

1. Atlanta, Georgia SMSA

38. The Atlanta SMSA consists of 15 counties: Butts, Cherokee, Clayton, Cobb, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Rockdale, and Walton. (Bureau of the Census, *Retail Trade*) [28]

The current Vice President of Operations for the Atlanta Division of Colonial/Grand Union, and the former President of Colonial, both defined the Atlanta market as the fifteen counties. (Isaacs 2525-26; Stewart 506-10; *see also* CX 597) In discussing a purchase of Alterman Foods, Grand Union documents assessed Colonial's and Alterman's market shares in terms of the 15-county area, and assessed the competitive situation in Atlanta on the basis of the population of the 15-county metropolitan area. (CX 29C)

Respondents concede that from the demand, *i.e.*, consumer standpoint, the Atlanta SMSA may be a relevant geographic market, but contend that from a supply standpoint the SMSA is too small. (RPF 839-840; *see* F. 36) Respondents point out that *Progressive Grocer*, a major trade publication, includes the Atlanta SMSA and the Macon, Georgia SMSA, and also some 61 counties within its "Atlanta Market Area." (RX 30E)

Within the Atlanta SMSA there are six food distribution centers: Alterman, Associated Grocers, A & P, Colonial, Kroger, and Winn-Dixie. (RX 30E-J; Stewart 534) Retail food stores in Atlanta are also served by distribution centers in Greenville, South Carolina; Knoxville, Tennessee; Athens, Georgia; and Anniston, Alabama. (RX 30E-H; Solomon 1060-61; Gregerson 320; Stewart 534) In addition, suppliers located in Rockmart, Georgia; Montgomery, Alabama; and Columbus, Georgia, serve independents in the "Atlanta Market Area." (RX 30F-G; Isaacs 2534-35)

2. Augusta, Georgia SMSA

39. The Augusta, Georgia SMSA consists of Columbia and Richmond Counties in Georgia and Aiken County in South Carolina. (Bureau of the Census, *Retail Trade*) Columbia, Richmond and Aiken Counties are considered parts of the same market, District # 6, for Colonial's planning and operating purposes. (CX 351Q)

Dr. Parker testified that the Augusta SMSA is an appropriate geographic market for grocery stores and supermarkets. (Parker 2356) Colonial officials testified that the Augusta market included the cities

of Augusta and Martinez, Georgia, and North Augusta, Clearwater and Aiken, South Carolina, all of which are in the SMSA. (Stewart 585; Spearman 764; Addison 2675; *see also* Rand McNally)

Respondents concede that from the demand, *i.e.*, consumer standpoint, the Augusta SMSA may be a relevant geographic market, but contend that from a supply standpoint, the warehouses which either presently do or could supply Augusta from existing locations, the SMSA is too small. Augusta is not included within any *Progressive Grocer* "Market Area." (See RX 30.) The retail food stores in Augusta are served by distribution centers located as follows: [29]

<u>Supplier</u>	<u>Location</u>
Winn-Dixie	Spartanburg, S.C.
Colonial	Columbia, S.C.
Bi-Lo	Maulden, S.C.
Piggly Wiggly Southern	Vidalia, Ga.
Kroger	Atlanta, Ga.
A & P	Atlanta, Ga.
Harris-Teeter	Charlotte, N.C.

(Addison 2677-78)

3. Charlotte/Gastonia, North Carolina SMSA

40. The Charlotte/Gastonia SMSA consists of Gaston, Mecklenburg, and Union Counties. (Bureau of the Census, *Retail Trade*) Colonial/Grand Union officials agreed with this market delineation. (Addison 2693; Spearman 776) Dr. Parker cited this as the most appropriate geographic market for grocery stores and supermarkets in that area. (Parker 2333)

Respondents believe that from the standpoint of the consumer, the Charlotte SMSA may be a relevant geographic market, but that from the standpoint of those warehouses which either supply Charlotte at present or which could do so from existing locations, the SMSA is clearly too small. Use of the SMSA to describe the market results in a dramatic overstatement of concentration. (RPF 664)

Progressive Grocer includes the Charlotte SMSA in the "Charlotte Market Area," which is the counties of Alexander, Anson, Ashe, Avery, Burke, Cabarrus, Caldwell, Catawba, Chester, Chesterfield, Cleveland, Gaston, Iredell, Lancaster, Lincoln, Mecklenburg, Mitchell, Richmond, Rowan, Stanly, Union, Watauga, Wilkes and York. (RX 30J) There are eight distribution centers in the Charlotte Market Area as defined by *Progressive Grocer*: Associated Grocers Mutual of the Carolinas, A & P, Harris-Teeter, Thomas & Howard Co. and Winn-Dixie, all in Charlotte proper, and Food Town in Salisbury, Merchants Distributors, Inc. in Hickory, and another Thomas & Howard Co. in

Newton.⁴ Some retail food stores in the "Charlotte Market Area" are served by suppliers located in Greenville, South Carolina; Columbia, South Carolina; Spartanburg, South Carolina; [30] Charleston, South Carolina; High Point, North Carolina; Black Mountain, North Carolina; and Salem, Virginia. (RX 30K)

4. Gainesville, Florida SMSA

41. The Gainesville, Florida, SMSA consists of Alachua County. (Bureau of the Census, *Retail Trade*) Colonial documents treated Gainesville separately for purposes of profits and sales. (CX 333A-O; see also CX 358Z17, Z18)

Dr. Parker testified, as did a Grand Union official, that the Gainesville SMSA is an appropriate delineation of the Gainesville geographic market for grocery stores and supermarkets. (Spearman, 793; Parker 2361A) The current Vice President of the Thomasville Division for Colonial/Grand Union found Alachua county to be a fair approximation of the Gainesville geographic market. (Roehm 2790)

Respondents contend (RPF 316) that from the standpoint of the consumer, the Gainesville SMSA may be a relevant geographic market, but from the standpoint of those firms with warehouses which either could or presently do supply Gainesville from existing locations, the SMSA is too small and this results in a dramatic overstatement of concentration. (Adelman 3212-14)

Progressive Grocer includes Gainesville in the 22 county "Jacksonville Market Area." (See F.43.) There is no distribution center in the Gainesville SMSA. Retail food stores located in Gainesville are served by warehouses located as follows:

<u>Firm</u>	<u>Warehouse Locations</u>
Publix	Tampa
Winn-Dixie	Jacksonville or Tampa
Super Foods Service, Inc.	Orlando
Food Fair (Pantry Pride)	Jacksonville
Munford	Unknown
Hitchcock's	Unknown
Southland	Orlando

(RX30S,T; CX 643B)

5. Greenville, South Carolina Subdivision

42. The Greenville/Spartanburg SMSA consists of three counties: Greenville, Pickens, and Spartanburg. (Bureau of the Census, *Retail Trade*)

⁴ *Progressive Grocer* also lists Kroger Sav-On Stores in Charlotte (RX 30K), but this is an error. Although Kroger has plans for a warehouse in the Carolinas, it does not have one yet. (C. Thomas 1310)

Complaint counsel alleges that the Greenville/Spartanburg SMSA consists of two approximate, but separate geographic markets for grocery stores and supermarkets: Greenville and Pickens Counties are one geographic market; [31] Spartanburg County is the other. (Parker 2340; Marion 1893-94; Curhan 2991) The Greenville newspaper generally serves Greenville and Pickens Counties while the Spartanburg newspaper generally serves Spartanburg County. (Marion 1893; Stewart 623) Some industry members agree that the Greenville and Spartanburg markets are separate and distinct. (Woodberry 1730-31; Spearman 766; Stewart 586) Firms have historically entered one market at a time, either Greenville or Spartanburg. (Stewart 652; Spearman 938-39) According to the former President of Colonial, because the markets are different, if he were to enter Greenville and Spartanburg, he would "isolate them and enter them one at a time." (Stewart 586)

Respondents' position is that from the demand standpoint, *i.e.*, the perspective of the consumer, the Greenville/Spartanburg SMSA may be a relevant market. Conceivably, Greenville and Spartanburg may even be two separate relevant markets from the demand standpoint. From the supply standpoint, *i.e.*, those warehouses which either supply Greenville/Spartanburg at present or which could do so from existing locations, they argue that the SMSA is clearly too small. Use of the SMSA to describe the geographic market results in an overstatement of concentration. (Adelman 3212; RPF 782)

Progressive Grocer describes the "Greenville Market Area" as including the following 28 South Carolina counties:

Abbeville	Macon
Anderson	Madison
Buncombe	Newberry
Cherokee	Oconee
Elbert	Pickens
Franklin	Polk
Greenville	Rabun
Greenwood	Rutherford
Hart	Spartanburg
Haywood	Stephens
Henderson	Swain
Jackson	Transylvania
Laurens	Union
McDowell	Yancey

(RX 30N)

There are five food distribution centers in the SMSA: Associated Grocers Inc. of South Carolina, Bi-Lo (Mauldin), Community Cash Stores, Kash & Karry Super-Super Market, and Winn-Dixie. There

are three more within the "Greenville Market Area": Dexter Grocery Co. in Anderson, Ingles in Black Mountain (Asheville), North Carolina; and Thomas & Howard Co. in East Startex. (RX30N-P) Retail food stores in the [32] Greenville Market Area are also served by warehouses located as follows:⁵

<u>Supplier</u>	<u>Location</u>
Associated Grocers Co-op	Atlanta (College Park), Ga.
Fox Industries (Division Webb-Crawford)	Athens, Ga.
Piggly Wiggly Carolina Co.	Charleston, S.C.
A & P	Charlotte, N.C.
Food Town	Charlotte (Salisbury), N.C.
Harris-Teeter	Charlotte, N.C.
Merchants Distributors, Inc.	Hickory, N.C.
Thomas & Howard Co.	Newton, N.C.
Thomas & Howard Co.	Columbia, S.C.
Winn-Dixie Charlotte	Charlotte, N.C.
Colonial	Columbia, S.C.
K.M.C. Co. Inc.	Knoxville, Tenn.

(CX30N-P; *see also* Stewart 532-33)

6. Jacksonville, Florida SMSA

43. The Jacksonville SMSA consists of five counties: Baker, Clay, Duval, Nassau, and St. Johns. (Bureau of the Census, *Retail Trade*) Complaint counsel's expert, Dr. Parker, believed that this was an appropriate geographic market for grocery stores and supermarkets. (Parker 2361A)

Colonial documents regarding sales and profit analysis and marketing strategy reference the Jacksonville metropolitan area. (CX358E-G; CX333A-O) Colonial/Grand Union pricing strategy is based on this SMSA. (Roehm 2786) Colonial/Grand Union officials analyze competitors and their own market shares in terms of the Jacksonville SMSA. (Roehm 2783-85)

Respondents contend (RPF 354) that, while this may be a relevant geographic market from the consumer standpoint, from the demand standpoint, the warehouses which supply Jacksonville at present or could do so from existing locations, the SMSA is too small. Use of the SMSA to describe the geographic market, therefore, results in an overstatement of concentration. [33]

Progressive Grocer describes the "Jacksonville Market Area" to include eight counties in Georgia and 14 counties in Florida, to wit:

⁵ Although Super Food Services, Inc. of Orlando is listed by *Progressive Grocer* as serving the Greenville Market Area, the distance between Orlando and Greenville is almost 500 miles. Therefore, it must be assumed either that the situation is idiosyncratic or that *Progressive Grocer* is wrong. (See Adelman 3239-41.)

Bacon, Brantley, Camden, Charlton, Clinch, Glynn, Pierce and Ware, Georgia; and Alachua, Baker, Bradford, Clay, Columbia, Duval, Gilchrist, Hamilton, Levy, Nassau, Putnam, St. Johns, Suwannee and Union, Florida. (RX30R)

There are five food distribution centers in the Jacksonville SMSA: Daylight Grocery Co.; Pantry Pride (Food Fair); Publix; United Food Stores, Inc., an independent wholesaler; and Winn-Dixie. (RX 30S; Stewart 535) Retail food stores in Jacksonville are also served by warehouses located as follows:

<u>Firm</u>	<u>Warehouse Locations</u>
Publix	Lakeland, Fla. ⁶
Colonial	Thomasville, Ga.
A & P	Orlando, Fla.
Albertson's	Orlando, Fla.

(RX 30T; CX 643A-B; CX 611B [Stipulated testimony of J. Blanton, President of Publix])

7. Macon, Georgia SMSA

44. The Macon SMSA consists of four counties: Bibb, Houston, Jones and Twiggs. (Bureau of the Census, *Retail Trade*) According to Dr. Parker, the Macon SMSA is an appropriate geographic market for grocery stores and supermarkets. (Parker 2351)

According to Colonial/Grand Union officials, the Macon market consists of Macon, Warner Robbins and other suburbs; all are in the four SMSA counties. (Stewart 535, 589; Spearman 761-62; Roehm 2741) For Colonial's operating purposes, because of the common media coverage and the types of programs the competition runs in the area, the Colonial stores in the Macon SMSA share a sales and marketing program. (Stewart 505; *see also* Complaint Counsel Phy. Ex. B) Colonial documents also reflect price-checks for a market area which corresponds to the Macon SMSA. (CX 502A-Z23) [34]

Respondents argue that from the standpoint of the consumer, the Macon SMSA may be a relevant geographic market, but from the supply standpoint, the SMSA is clearly too small. (RPF 919) Therefore, market shares based on the SMSA significantly overstate concentration. (Adelman 3212-14)

Progressive Grocer includes Macon in the 61-county "Atlanta Market Area." (F. 38) There is only one distribution center in Macon: Timberlake Grocery Company, an independent wholesaler. (RX 30E,

⁶ Publix also has a warehouse in Jacksonville. (Stewart 535) It uses both warehouses to supply its Jacksonville stores. (CX 611B [Stipulated testimony of J. Blanton])

F) Retail food stores located in Macon are served by distribution centers located as follows:

<u>Supplier</u>	<u>Location</u>
Piggly Wiggly	Vidalia, Ga.
Winn-Dixie	Atlanta, Ga.
Colonial	Thomasville, Ga. ⁷
Kroger	Atlanta, Ga.
Alterman	Atlanta, Ga.
Munford	Atlanta, Ga.

(RX30E, F)

8. Newport News/Hampton, Virginia SMSA

45. The Newport News/Hampton SMSA consists of three independent cities and three counties: Hampton, Newport News and Williamsburg cities; Gloucester, James City and York Counties. (Bureau of the Census, *Retail Trade*) Dr. Parker testified that this is a relevant geographic market. (Parker 2309)

Colonial referred to this area as "the Peninsula" and maintained specific market share information for the SMSA. (Stewart 656; CX 350B, D, F, I, M, O, V; Complaint Counsel Phy. Exh. B; CX 597)

Newport News has its own newspaper, the *Daily Press/Times Herald*. (Connell 1223, 1227) Colonial advertised in the *Daily Press/Times Herald* and allocated the costs for that advertising only to stores in the Newport News/Hampton SMSA. (CX 267A-B; *see also* Isaacs 2609) Some supermarket chains operating in the Newport News/Hampton SMSA do not operate in the Norfolk SMSA, which is across Hampton Roads Bay. (Curhan 3173) [35]

Respondents contend that this geographic market may be relevant from a demand standpoint, but, even when combined with the Norfolk SMSA, is too small from a supply standpoint. (RPF 476) Use of this SMSA, their argument goes, results in a "dramatic" overstatement of concentration. (Adelman 3212-14)

Progressive Grocer describes the "Norfolk Market Area" as including the Norfolk SMSA, the Newport News/Hampton SMSA and several other counties in Virginia and North Carolina. The "Norfolk Market Area" includes the following counties:

⁷ Colonial supplies its Macon stores out of the Thomasville warehouse but supervises the stores out of the Atlanta Division. (Isaacs 2620)

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<u>Virginia</u>	<u>North Carolina</u>
Gloucester	Camden
Isle of Wight	Chowan
James City	Currituck
Mathews	Gates
Nansemond	Hertford
Southampton	Northhampton
Surry	Pasquotank
York	Perquimans

(RX 30V)

There are no distribution centers located within the Newport News/Hampton SMSA. (RX 30W) There are three distribution centers within the Norfolk SMSA—Bisese & Console Inc. (corporate name of Giant Open Air), Camellia Food Stores Inc. (Economy Stores),⁸ and Colonial. (*Id.*)⁹ The other retail food stores located in Tidewater are served by distribution centers located as follows:

<u>Supplier</u>	<u>Location</u>
Food Fair	Baltimore, Md.
Richfood	Richmond, Va.
A & P	Richmond, Va.
Southland	Fredericksburg, Va.
Safeway	Richmond, Va.
Winn-Dixie	Raleigh, N.C.

(RX 30) [36]

9. Norfolk/Virginia Beach, Virginia SMSA

46. The Norfolk/Virginia Beach SMSA consists of five independent cities and one county: Chesapeake, Norfolk, Portsmouth, Suffolk (including the former Nansemond County), and Virginia Beach, Virginia; and Currituck County, North Carolina. (Bureau of the Census, *Retail Trade*) Dr. Parker found this SMSA to be a relevant geographic market. (Parker 2317)

In support of this position, complaint counsel notes that Norfolk has its own morning and afternoon newspapers, the *Virginia Ledger-Star* and the *Virginian Pilot*. (Connell 1223) Colonial allocated advertising costs for the *Ledger-Star* and its companion, the *Pilot*, only to stores in the Norfolk SMSA. (CX 267A-D; *see also* Isaacs 2609) In addition, supermarket companies such as Valu Fair and Earles only operate in the Norfolk/Virginia Beach SMSA, and not across the bay in the Newport News/Hampton SMSA. (Isaacs 2608-10; Curhan 3173)

Colonial referred to this area as Tidewater or Norfolk Metro, and

⁸ Economy Stores supplies Be-Lo, Valu Fair and Earles, among others. (Isaacs 2551)

⁹ The military also has a distribution center in Norfolk. (RX 30W)

maintained separate market share statistics for the SMSA. (Stewart 658; Complaint Counsel Phys. Exh. B, CX 597; CX 350B, D, F, G, H, M, N, V)

Respondents argue (RPF 476) that this SMSA should include the Newport News/Hampton SMSA. (F. 45)

10. Orlando, Florida SMSA

47. The Orlando SMSA consists of three counties: Orange, Osceola, and Seminole. (Bureau of the Census, *Retail Trade*) Dr. Parker testified that the Orlando SMSA is a relevant geographic market. (Parker 2358)

Competitors in the Orlando market identify the Orlando metropolitan area as a market. (Posey 1632; Gooding 1119; Spearman 798) Colonial documents report profits, sales and return on investment on a city-wide basis that corresponds to the SMSA delineation. (CX 333A-O; CX 358Z-5)

Respondents concede that, from a demand standpoint, the Orlando SMSA may be a relevant geographic market, but argue that from a supply standpoint, those warehouses that either could or presently do supply Orlando from existing locations, the SMSA is too narrowly drawn. (RPF 208) Accordingly, they argue that use of this SMSA as a relevant geographic market results in an overstatement of concentration. (Adelman 3212-14)

Progressive Grocer describes the "Orlando Market Area" as including the following ten counties: Flagler, Marion, Volusia, Citrus, Sumter, Lake, Seminole, Orange, Osceola, and Brevard. [37]

There are only three food distribution centers in the Orlando SMSA: Southland, serving 7-11's, Super Food Services, Inc., serving independents and chains, and Winn-Dixie. (RX 30Z-2) Retail food stores in Orlando are also served by warehouses located as follows:

<u>Supplier</u>	<u>Location</u>
Affiliated of Florida Inc.	Tampa
Kash 'N Karry Discount Centers	Tampa
E.J. Keefe Co.	Lakeland
Malone & Hyde Co.	Miami
Pantry Pride Supermarket	Jacksonville
Publix Super Markets	Lakeland

(RX 30Z-2; Gooding 1151, 1182)

11. Raleigh/Durham, North Carolina SMSA

48. The Raleigh/Durham SMSA consists of three counties: Wake, Durham, and Orange. (Bureau of the Census, *Retail Trade*)

Complaint counsel contends that the Raleigh/Durham SMSA con-

sists of two geographic markets for grocery stores and supermarkets. Wake County, containing the city of Raleigh, is one market; and Durham and Orange Counties, containing the cities of Durham and Chapel Hill, constitute a separate market. (Marion 1894; Parker 2320-21, 2328)

Based on his analysis of the ABC Audit Reports for newspapers, Dr. Marion testified that Raleigh newspapers circulate largely to Wake County residents, while the Durham newspaper was circulated largely in Durham and Orange Counties. (Marion 1894; *see also* Parker 2320-21) Dr. Curhan, respondents' marketing and management expert, also analyzed these markets separately. (Curhan 2977-84)

a. Raleigh, North Carolina Subdivision

49. Colonial's five-year store development plan for 1976-1980 defined the towns of Raleigh, Cary and Garner, North Carolina as a single "primary market" for Colonial's long-range store planning purposes; all are in Wake County. (CX 353H; Rand McNally) The Raleigh market (as represented by Wake County) is seen by supermarket competitors as separate and distinct from the Durham/Chapel Hill market (as represented by Durham and Orange Counties). (Spearman 779; Byrd 1546-47; CX 353H)

The *Raleigh News and Observer* is the dominant newspaper in Wake County. (Stewart 519) Colonial and most of its supermarket competitors advertise their stores in Wake County in [38] the *News and Observer*. (Stewart 520; Byrd 1545) Only the Colonial and Big Star supermarkets located within Wake County are allocated advertising costs for the *News and Observer*. (CX 268A-C)

In 1977, Kroger and Harris-Teeter were operating supermarkets in the Durham-Chapel Hill market but not in the Raleigh market. (Byrd 1546; CX 2Q, R)

b. Durham, North Carolina Subdivision

50. Chapel Hill is situated in Orange County, and Durham in Durham County, North Carolina. Messrs. Byrd and Addison considered these to equal "the Durham Market," (Byrd 1547; Addison 2651, 2693), separate from the Raleigh market. (Addison 2646)

Durham is approximately 25 miles west of Raleigh. (Rand McNally) Supermarket operators in Durham and Orange Counties use the *Durham Herald* to advertise in that market. (Byrd 1546-47; CX 268A-C) Moreover, Colonial's five-year store development and marketing plan for 1976-1980 identified Durham and Chapel Hill as a single market, and as one of Colonial's primary markets in North Carolina. (CX 353H, R, Z-8)

Respondents argue that from the perspective of the consumer, the

Raleigh/Durham SMSA may be a relevant market, and that conceivably, Raleigh and Durham may even be two separate relevant markets from the demand standpoint. (RPF 710) Respondents point out that Colonial's newspaper advertisements are the same in Raleigh, Durham, and Chapel Hill, although instore features may be different, depending on local competition. (Stewart 520, 522) Mr. Spearman, a Grand Union official, viewed Raleigh and Durham as "two distinct marketing areas." (Spearman 779)

From the supply standpoint, *i.e.*, those warehouses which either supply Raleigh/Durham at present or which could supply the area from existing locations, respondents insist the SMSA is too small. Use of the SMSA to describe the geographic markets results in a dramatic overstatement of concentration. (Adelman 3212-14)

Progressive Grocer describes the "Raleigh Market Area" as including the Raleigh/Durham SMSA and the Fayetteville SMSA, as well as several other counties in North Carolina. The "Raleigh Market Area" includes the following 15 counties:

Chatham	Johnston
Cumberland	Lee
Durham	Orange
Franklin	Person
Granville	Sampson [39]
Harnett	Vance
Hoke	Wake
	Warren

(RX 30Z-5)

There are only two food distribution centers within the Raleigh/Durham SMSA: Colonial and Winn-Dixie. (RX 30Z6) There are two more within the "Raleigh Market Area": J.T. Davenport & Son Inc. in Sanford, and Thomas & Howard Co. in Fayetteville. (RX 30Z6) Retail food stores in Raleigh/Durham (a much smaller area than the "Raleigh Market Area"), are also served by warehouses located as follows:

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<u>Supplier</u>	<u>Location</u>
A & P	Charlotte, N.C.
Kroger	Salem, Va.
Food Town	Salisbury, N.C.
Food World	High Point, N.C.
Harris-Teeter	Charlotte, N.C.
Piggly Wiggly N.C.	Kinston, N.C.
Byrd Food	Burlington, N.C.
Merchants Dis- tributors, Inc.	Hickory, N.C.
Richfood	Richmond, Va.

(RX 30Z-6; Walters 1418; Byrd 1543-44)

Quinn Co. Inc. in Warsaw, N.C., and Thomas & Howard of Rocky Mount, N.C. serve the "Raleigh Market Area" (RX30Z-6), and may also serve stores within the SMSA.

12. Richmond, Virginia SMSA

51. The Richmond SMSA consists of two independent cities and five counties: the cities of Richmond and Charles City; and Chesterfield, Goochland, Hanover, Henrico and Powhatan Counties. (Bureau of the Census, *Retail Trade*) Dr. Parker testified that the Richmond SMSA is an appropriate geographic market for grocery stores and supermarkets. (Parker 2294) Colonial recognized the Richmond SMSA as a separate marketing area. (CX 332A-X; CX 392A-I; 350D, F, I, Q, W; CX 607 [Rowe] at 37; Stewart 363-64; CX 392A-I)

Many competitors in the Richmond SMSA are unique and separate from competitors in other nearby metropolitan areas. For example, Ukrop's, Lukhard's, Siegels, Edward's Foodtown, Farm Fresh, Giant Food, and Giant Open Air do not have stores in the Petersburg/Colonial Heights SMSA, which is contiguous to the Richmond SMSA on the south. (Connell 1229-30) Ukrop's, a major independent and thus potentially a factor to consider in [40] developing marketing strategies, only operates in the Richmond SMSA. (Stewart 525; Connell 1228; Walters 1410; CX 2S; CX 3S)

Although the Richmond newspaper does have a certain amount of coverage in the Petersburg/Colonial Heights SMSA, most supermarket chains which do serve both SMSAs, including Colonial, advertise in both the Richmond newspaper and the Petersburg paper. (CX 267C; Connell 1225) "[In] Petersburg, the penetration of the Richmond newspaper sort of dwindles when it gets down into that area. There is some penetration, but the penetration in the area by the Petersburg paper is much greater." (Connell 1225)

In testifying as to a combined Richmond/Petersburg SMSA, a Colonial/Grand Union Vice President admitted that the Colonial su-

permarkets in Richmond and Petersburg only paid for the advertising in their respective papers (Isaacs 2604), a fact which is confirmed by CX 267A-D. He also admitted that six or seven competitors found in Richmond have no stores in Petersburg. (Isaacs 2606-07)

Respondents claim that complaint counsel failed to introduce substantial evidence that the Richmond SMSA is a relevant geographic market. (RPF 404) A & P includes Hopewell and Petersburg, which are outside the SMSA, within the Richmond market area. (Connell 1224) A & P runs the same advertising in the Richmond and Petersburg papers, although it compresses the weekend Petersburg advertisement from two pages to one. (Connell 1226) Colonial's three Petersburg stores are managed as part of its Richmond district and are included within the Richmond market. (Isaacs 2555)

Respondents reason that from the demand standpoint, *i.e.*, that of the consumer, the Richmond SMSA plus Petersburg may be a relevant geographic market. From the supply standpoint, *i.e.*, those warehouses which either supply Richmond at present or which could do so from existing locations, the SMSA is too small. Use of the SMSA to describe the Richmond geographic market results in overstating concentration. (Adelman 3212-14)

Progressive Grocer includes Richmond in the "Richmond Market Area," which includes the following Virginia counties:

Albermarle	Greensville	North Umberland
Amelia	Hanover	Nottoway
Augusta	Henrico	Orange
Brunswick	King and Queen	Petersburg
Caroline	King William	Powhatan
Charles City	Lancaster	Prince Edward
Chesterfield	Louisa	Prince George
Essex	Lunenburg	Richmond
Fluvanna	Middlesex	Sussex [41]
Goochland	Madison	
Greene	New Kent	

(RX 30Z-9-11)

There are only four distribution centers within the Richmond SMSA—A & P, Richfood, Safeway and Blue Ridge Grocery Co. (Division of Fleming Co.'s, Inc.). (RX 30Z-10) The other retail food stores located in Richmond are serviced by distribution centers located as follows:

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<u>Supplier</u>	<u>Location</u>
Biese & Console (Giant Open Air)	Norfolk, Va.
Camellia Food Stores (Economy Stores)	Norfolk, Va.
Colonial	Norfolk, Va.
Food Fair	Baltimore, Md.
Giant Food	Landover, Md.
Kroger	Salem, Va.
Malone & Hyde	Salem, Va.
Southland	Fredericksburg, Va.
Winn-Dixie	Raleigh, N.C.

(RX 30Z10; *see also* Stewart 524-35)

VI. CONCENTRATION

A. Grocery Store Concentration Ratios

52. The four-firm concentration ratios for *grocery stores*, (SIC 541), as provided by Bureau of the Census, *Retail Trade*, for the individual SMSAs are the following:

	<u>1972</u>	<u>1977</u>
Atlanta	54.6%	62.9%
Augusta	47.2%	55.2%
Charlotte/Gastonia	48.6%	54.9%
Gainesville	61.8%	65.5%
Greenville/Spartanburg	63.4%	69.8%
Jacksonville	56.2%	64.8%
Macon	50.3%	67.4%
Newport News/Hampton	56.7%	49.1%
Norfolk/Virginia Beach	48.7%	51.3%
Orlando	65.7%	60.1%
Raleigh/Durham	63.5%	63.6%
Richmond	45.2%	53.2%

(CX 4A, CX 664C) [42]

The four-firm concentration ratios for grocery stores, (SIC 541), for SMSA *subdivisions* are derived from complaint counsel's survey of sales of firms in the market and from data published in the 1972 and 1977 Census of Retail Trade:

	<u>1972</u>	<u>1977</u>
Greenville (Greenville & Pickens County)	68.3%	72.3%
Raleigh (Wake County)	63.8%	62.1%
Durham (Durham & Orange Counties)	62.4%	66.8%

(CX 3A)

B. Supermarket Concentration Ratios

53. The four-firm concentration ratios for *supermarkets* in 1972 and 1977 in the individual SMSAs are the following:

	<u>1972</u>	<u>1977</u>
Atlanta	74.5%	78.7%
Augusta	68.4%	73.7%
Charlotte/Gastonia	65.5%	75.6% ^{*10}
Gainesville	85.4%	91.5%*
Greenville/Spartanburg	85.9%	86.6%
Jacksonville	82.5%	82.1%
Macon	79.1%	81.8%*
Newport News/Hampton	70.8%	65.6%
Norfolk/Virginia Beach	60.5%	62.8%
Orlando	83.5%	79.5%*
Raleigh/Durham	93.5%	86.8%
Richmond	58.0%	68.7%*

(CX 4A; CX 664C) [43]

The Bureau of the Census did not provide concentration data for units smaller than SMSAs. No concentration ratios were available for 1972 SMSA subdivisions. Dr. Marion estimated supermarket four-firm concentration for those subdivisions for 1977 as follows:

	<u>1977</u>
Greenville (Greenville & Pickins Counties)	94.3%
Raleigh (Wake County)	89.2%
Durham (Durham and Orange County)	86.8%

(CX 4A)

C. Sources of Supermarket Concentration Ratios Data

54. The four-firm concentration ratios for supermarket sales for relevant SMSAs or subdivisions thereof are found in both CX 4A-B and CX 664A-C. CX 4A-B contains reported 1972 supermarket concentration ratios from Census data. It also contains estimated 1977 supermarket concentration ratios for subdivisions of Greenville, South Carolina, and Raleigh and Durham, North Carolina. (Marion 1898-909)

At the time of preparation of CX 4A-B, the sales of the top four supermarket firms for 1977 in each SMSA had been discovered by

¹⁰ Bureau of the Census, for confidentiality reasons, would not give a "four largest firm" supermarket total for 1977. Totals followed by an asterisk come from either the sales of the top four firms in 1977 as shown in CX 2B-S, or the "4 largest firms all establishments" figures of CX 664A-B. As the total sales of the top four firms in each SMSA were not identical in CX 2B-S and CX 664A-B, the smaller totals were utilized in each respective numerator in order to give the lower concentration ratios. Denominators for the respective SMSAs are provided in CX 664A-B as the 1977 universe of all large establishments within SIC Code 541, grocery stores.

confidential returns from the firms as part of complaint counsel's market survey. The denominators used in determining the 1977 supermarket concentration ratios in CX 4A-B were obtained by estimating the total supermarket sales in each SMSA (or subdivision thereof), using \$1,500,000 in annual sales as the present definition for a supermarket. (Marion 1899-1900)

CX 4A-B was prepared by complaint counsel's expert, Dr. Marion, based on the available Bureau of the Census figures for supermarket and grocery store sales, as well as CX 3A. His supermarket concentration estimates for 1977 were derived by the two methods explained in CX 4B and further explained in his testimony. (Marion 1900-05)

CX 664A-B, entitled "Special Tabulation of Data from the 1977 Census of Retail Trade: Grocery Stores (SIC 541)," is a tabulation run by the Bureau of the Census for the 13 SMSAs. It reports the sales of all grocery stores and the top four grocery stores as well as sales for all large establishments with sales over \$1,500,000 (supermarkets) and the top four largest establishments. Census refused to release data in the "four largest establishments" category for the following SMSAs: Charlotte/Gastonia, North Carolina; Gainesville, Florida; Macon, Georgia; Orlando, Florida; and Richmond, Virginia. Census [44] feared breach of confidentiality in that individual company data might be determinable for each of those SMSAs. (See Tr. 3454-59; Parker 3460-83.)

For those markets for which Census did not release information concerning the four largest establishments, an approximation of the data can be obtained from CX 2B-S and CX 3B-S. The underlying data is also available in CX 665A-Z529.

In regard to CX 2A-S, CX 3A-S and CX 4A-B, respondents' economic expert did not believe these concentration ratios to be in error or biased in analyzing the demand side of the markets and further described them as "reasonably good proxies." (Adelman 3398)

D. Concentration Trends

55. According to Dr. Marion, concentration is greater and increasing more rapidly in complaint counsel's alleged relevant markets (CX 4A) and in the southeastern states in which Colonial operated prior to the merger, than in the 155 SMSAs representing the remainder of this country. (Marion 1915) "For the 15 southeastern markets listed in Exhibit CX 4A, the average unweighted grocery store concentration is 57.3% in 1972, 60.2% in 1977. For 32 SMSAs in a five-state area, southeastern states' concentration was 56.1% in 1972, 59.5% in 1977. For 155 SMSAs in the rest of this country, excluding those five states, the concentration was 51.5% in '72, 52.6% in '77." (Marion 1916) [These figures refer to four-firm concentration levels.]

The market share of single (grocery) store operators in the United

States has declined from 59% in 1948 to 32% in 1972 and to 27% in 1977. (Respondents' Physical Exhibit C at 6; Marion 1936) The market share of independent grocery operators (operating one to ten stores) has declined from 65% of all grocery sales in 1948, to 43% in 1972, to approximately 40% in 1977. (Respondents' Physical Exhibit C at 6; Marion 1937) The twenty largest grocery chains have increased their share from 26.9% of sales in 1948 to 37% in 1972. The figure for 1977 remains at approximately 37%. (Respondents' Physical Exhibit C at 7; Marion 1938)

In 1954, 32% of SMSAs had a four-firm concentration level of below 40% for grocery store sales. By 1972, only 11% of SMSAs had four-firm concentration levels below 40%. SMSAs with a concentration of over 60% increased from 5% in 1954 to 25% in 1972. (Respondents' Physical Exhibit C at 18; Marion 1940) The average four-firm concentration ratio of all SMSAs nationwide (in terms of grocery store sales) increased [45] from 45.5% in 1954 to 52.4% in 1972. (Respondents' Physical Exhibit C at 16, Marion 1941)

VII. BARRIERS TO ENTRY

A. *Market Entry*

56. Complaint counsel's expert, Dr. Marion, testified that "... if a market has low entry barriers, it means that the firms that are in that market recognize that if they get out of line, price wise, or if they have sloppy operations or are not competitive, that they stand a definite threat of firms on the outside moving into that market." (Marion 1896) Respondents' expert, Dr. Adelman, agreed, stating that:

Because the purpose of concentration would be, as I indicated earlier, to raise prices and profits above the competitive level. If entry is easy, then new firms will come to the scene to take advantage of this condition and will compete away those excess profits rapidly.

(Adelman 3200)

Market entry occurs when a new actor enters a market. (Parker 2227) Acquisition of a firm already in the market constitutes a transfer of ownership (Parker 2259); it does not increase immediately the capacity of the market. (Curhan 3140)

B. *Entry By Independent Operators*

57. Entry by an independent, single-store operator is usually a transfer of ownership because such operators rarely build stores *de novo*. Their method of operation is generally to acquire second-use locations, *i.e.*, those previously occupied by supermarket chains. (Curhan 3055) Dr. Curhan was unable to recall an instance where a single store operator built a new store. (Curhan 3055) Independent store

operators opening in a single location often cater to specialized, e.g., "ethnic," interests (Parker 2232-33; Solomon 1018-19), which has the disadvantage of offering a finite market. (Parker 2232-33; Solomon 1020-22)

Entry into the food retailing market at the local level has been described by respondents as "relatively unrestricted" for independent entrepreneurs who operate one or two stores and are affiliated with a viable or cooperative wholesaler. (Respondents' Physical Exhibit C at 26; Adelman 3203); (see also *National Tea Co.*, 69 F.T.C. 265, 278 (1966)) The existence of voluntary and cooperative wholesalers to provide financial assistance and other aid to potential entrants facilitates the entry of independents into the market. (Curhan [46] 2881-83) However, ease of market entry is no indication of successful operation, as acknowledged by Dr. Curhan, respondents' marketing expert, who explained his lack of success in two attempts to operate an independent grocery outlet. (Curhan 3049-52)

Mr. Walters, President of Farm Fresh and past Chairman of the National Association of Retail Grocers, testified about the advantage of a good wholesaler:

The advantages—I think without—in the case of an independent, I do not believe that they could successfully compete without the services that are provided by a good wholesaler, and the services that are—from store engineering to mass buying to sales planning to merchandising to consulting on retail operations and make it all up. I think that is one of the things that's transposed—has transpired in the country over the past 10, 15 years. There's been dramatic—it's been dramatic in the success of independents; voluntaries and cooperatives have given independents the help, the expertise, so that they can do a good job; and without it, I think that they would fail.

(Walters 1421)

For example, Certified Grocers in Ocala, Florida (70 miles north of Orlando), has "probably the most complete warehouse facilities in the southeast, more so in one central place than any of the chains" (Gooding 1153), and has "far more variety available on [their] order book than a chain warehouse would have." (Gooding 1155) The products are available to independent operators at a cost which is competitive with the wholesaling cost of major chains. (Gooding 1157; see also Spearman 869-70; Curhan 2884-86)

Malone & Hyde is one of the larger wholesale food distributors in the country. (Posey 1631) Samuel Posey, President of Fairway Markets, a Malone & Hyde subsidiary (Posey 1631), testified in detail about the many services provided to independent retailers by Malone & Hyde. (Posey 1675-88) Wholesalers can purchase products as cheaply as major chains (Gooding 1156), and independents can purchase at a cost which is competitive with the wholesaling cost of major chains. (Posey 1157)

In each of the alleged relevant markets in this case someone wanting to open a new store has available to him a voluntary or a cooperative wholesaler such as Malone & Hyde or Certified who are generally seeking for more outlets to sell their grocery products. (Parker 2425; Stewart 579-82, 587-90; Curhan 2883) Wholesalers, of course, are looking for [47] responsible independents who have a reasonable chance of operating a successful grocery operation. (Parker 2425; Adelman 3409) These voluntary or cooperative wholesalers assist their members with advertising, purchase of equipment, and site selection. (Curhan 2881-83; Parker 2233)

C. Entry by a Market Factor

58. Supermarket chains are usually defined by the industry as those firms with at least ten or more stores. (Marion 1937; Walters 1392-93) Most supermarket chains enter a new market on a multi-store basis. (Marion 1965; Walters 1431; C. Thomas 1333-34; B. Thomas 1485) Successful multi-store entry will make a supermarket firm a "factor" in a market (Walters 1388, 1431; Connell 1246; Gooding 1161), a "factor" being defined as a firm to which other firms respond. (Parker 2234) Firms that achieve effective multi-store entry, or firms already firmly entrenched in a marketing area, are "factors" in that market. (Connell 1246; Posey 1652; Walters 1429-31)

A factor may be a company with a market share of over 5% (Connell 1246; Walter 1430), or a major chain that is entering the market:

Anybody the size of Winn Dixie that wants to come into a market, if you do not think that they are a factor in the market, you are making a crucial mistake. They have the assets and they have the resources the same as any other substantial company to come in. You better consider them, because they are not coming in there for one store.

(Walters 1431; *see also* Connell 1246)

Supermarket companies in a market area generally price-check either market leaders or aggressive firms attempting to gain in market share. (Connell 1234, 1236; Walters 1404-05; C. Thomas 1299; Spearman 728; Stewart 632-33; F. 21) Supermarket companies adjust their prices in accordance with the results of their price-checks. (CX 589 [Wood] at 118-22; Connell 1230-31, 1234, 1236-37; C. Thomas 1298, 1325; Stewart 632-33) Thus, it is these firms that influence pricing policies in a market area.

D. Barriers to Multi-Store Entry by a New Market Factor

59. The size of the SMSA will determine the number of stores a supermarket company must operate in order to gain effective entry (C. Thomas 1305-06), the larger the population, the greater the number of stores necessary for effective entry. William Stewart, a former president of Colonial and former vice president of Grand Union, es-

timated the number of supermarkets necessary for successful *de novo* entry into each of the original [48] thirteen SMSAs designated by complaint counsel. His estimates ranged from a low of two in Fayetteville, North Carolina, to a high of twelve in Atlanta, Georgia, where he indicated he was talking only of entry into a three-county base of Atlanta, not the entire 15-county SMSA. (Stewart 577, 584-85)

Supermarket firms incur an obligation of approximately \$3 million to \$3.5 million per site for leases on new store sites. (Roehm 2763) James Wood, Chief Executive Officer of Grand Union, stated in his deposition that a company must have a seventy percent success rate in site selection to have efficient company performance. (CX 589 [Wood] at 50-51)

Supermarket companies carefully analyze potential new store sites. (Walters 1399; C. Thomas 1304-06; B. Thomas 1495) Major chains usually have separate real estate departments which have the responsibility of locating new stores. (Spearman 732-33; Connell 1249) In many companies, including Grand Union and Colonial, final site selections must be approved by senior company officials. (B. Thomas 1495-97; Connell 1249-50; CX 589 [Wood] at 75; CX 576 [Kennedy] at 23; *see generally* CX 92A-E through CX 169; CX 391A-G through CX 399; CX 633A-E through CX 639A-D) Factors considered in the selection of sites include: present population growth; accessibility to customers, *e.g.*, parking, entrance, exits and traffic patterns; and competitors. (Walters 1399-1400; C. Thomas 1301; B. Thomas 1495-96; *see generally* CX 92A-E through CX 169; CX 391A-G through CX 399; CX 633A-E through CX 639A-D)

A supermarket company attempting to enter a new market must compete with the established market factors for the best new store sites. (Marion 1964) Often a newcomer is at a disadvantage in acquisition of new sites because developers prefer to lease to established market leaders. (Posey 1642-43; Spearman 746, 847-50; Byrd 1574-50) "Developers are anxious to get proven traffic achievers and that is usually established firms in the market, particularly those with large market shares." (Parker 2231; *see also* Posey 1643; Stewart 629; Spearman 744-45) Among the established supermarkets in an SMSA, the larger supermarket companies such as Winn-Dixie, Colonial, and Safeway are preferred tenants over local independents or smaller chains. (Walters 1425-27; Gooding 1138-41; Woodberry 1771; Byrd 1547-50; B. Thomas 1516-17) Other tenants, *e.g.*, drugstores, may not accept leases in a strip shopping center which does not have a major supermarket chain as a tenant. (Gooding 1140)

Established supermarket factors will often build a new store in an area of anticipated population growth before there is enough population to make the store profitable, for the purpose of foreclosing the

entry of new competition. (Stewart 671-73; Spearman 855-57; Posey 1643-45) In order to build ahead of sales, a company must be able to withstand losses [49] until the population grows. A company the size of Grand Union can afford to give a store three years in which to become profitable. (CX 589 [Wood] at 49-52; C. Thomas 1363-66; CX 102; CX 106B) Smaller supermarket companies need stores in areas of sufficient population to make stores profitable at the time they are opened or shortly thereafter. (Walters 1399)

60. To effectively enter a new SMSA, a supermarket company must advertise to establish an image and achieve name recognition in the marketing area. (B. Thomas 1482) Dr. Parker stated:

When a firm goes into a new market, the first thing it has to do is to persuade customers to come into their store. This means changing shopping habits, so you are disadvantaged relative to the firm that already has the customers coming into their store.

So you have to go out and sell your image, promote yourself.

(Parker 2229; *see also* Posey 1641; Cheek 1590; Stewart 559; Roehm 2786-87, 2810; Isaacs 2569-70)

A major supermarket chain entering a new SMSA may have some carry-over name recognition from people moving from one area of the country to another. (CX 589 [Wood] at 252-53) Similarly, a large chain in a nearby marketing area may also have gained some name recognition in a new SMSA due to the wider geographic coverage provided by television or by a major metropolitan newspaper in the nearby market. (B. Thomas 1483) Small supermarket companies frequently are not known beyond their local markets and would have little name recognition when attempting to enter a new SMSA. (Byrd 1552-53, 1560-61)

61. The major advertising media used by supermarkets include newspapers, radio, and television. (Stewart 504-06; B. Thomas 1481-84) Major chains, such as Colonial, Winn-Dixie and A & P, often utilize all these media. (Stewart 504-06; B. Thomas 1481-84; Connell 1222-24) Smaller firms, particularly local independents, tend to select either the print medium or the broadcast. (Connell 1231-36; Cheek 1588-89; Gooding 1134-37)

Advertising costs are higher in large marketing areas and are a significant barrier to entry into a large SMSA. (CX 586 [Tarrant] at 62-62; CX 589 [Wood] at 69-70; B. Thomas 1481; Gooding 1135-36; Connell 1264; Spearman 761; CX 574 [Goulding] at 115-116) Multi-store entry spreads advertising costs over several stores. (Parker 2229-30; C. Thomas 1331-34, 1341; Walters 1424-25; Cheek 1588-89; CX 574 [Goulding] at 116; [50] CX 586 [Tarrant] at 61-62; RPF 444) Small supermarket companies often cannot afford to match the larger

chains in terms of amount or types of advertising. (Connell 1231-36; Cheek 1588-89; Gooding 1136) The advertising costs associated with entry into a new marketing area may be one reason a small regional chain will not attempt to enter a major metropolitan area. (Woodberry 1733; *see also* Spearman 761, 877)

Heavy advertising to establish an image in a new SMSA requires a substantial outlay of capital. (Walters 1424-25) Advertising costs comprise a higher percentage of sales when a firm enters a new marketing area (C. Thomas 1343), and a supermarket firm may need as much money to advertise a few stores as to advertise many stores. (CX 588 [Wood] at 68; RPF 444) James Wood, Chief Executive Officer of Grand Union, admitted that advertising costs in Grand Union's expansion areas of Baltimore and the West Coast of Florida were 4% of sales compared to 1.5% of sales in Grand Union's established trading areas. (CX 589 [Wood] at 80-82; *see also* Connell 1264)

62. A supermarket chain has greater profits in markets where it is a market leader. (Stewart 631-32; F. 82; CX 252Z39) Therefore, established firms, concerned about the entry into the market of new competitors, take steps to protect their positions against encroachment by new entrants. (Spearman 758, 803-04; Walters 1388) Once a new competitor has selected a store site, the established supermarket firms will analyze their own stores which are closest to the new entrant's site to determine what action should be taken to maintain their established position. (Stewart 644) They will also analyze the operating style and services expected of the new entrant. (Spearman 803-04; Posey 1650) The established firms might choose to remodel or expand their old stores, or start building replacement stores sooner than otherwise planned. (Stewart 671-73; Posey 1647-49; C. Thomas 1349-50; Parker 2235)

Another technique used by supermarket competitors before a new store opens is to build up the business of their nearby stores by increased advertising and special promotions. (C. Thomas 1349; B. Thomas 1488; Spearman 755, 791; Stewart 642-44; Parker 2240-41) These activities may begin shortly after construction of the new store begins (B. Thomas 1488), or as late as six to eight weeks before a new store's opening. (Spearman 878; C. Thomas 1350)

The opening of new stores by a new entrant can lead to a general lowering of prices within the marketing area as well as price specials. (Gooding 1161; Posey 1647-49; Spearman 803-04; Parker 2240) Either the new entrant (C. Thomas 1349; Posey 1649; Cheek 1576) or the established firms (Gregerson 331-32; CX 586 [Tarrant] at 62) may lower their prices. [51]

An established market leader had the ability to cross-subsidize by using sales and profits from other stores to fight aggressively by zone

pricing in areas where the new entrant is opening a store. (Marion 1965-66; Parker 2241-42; *see also* Gregerson 331-32; C. Thomas 1327; Solomon 1024-26; B. Thomas 1489-99; Gooding 1141-44; Stewart 643) These special price zones will be found only near the new competitor's store and will offer lower prices than those found in the market leader's other stores within the SMSA. (Gregerson 331-32; Gooding 1141-44) If the new competitor is an independent with only one store in the area, it may not be able to operate profitably in the face of zone pricing. (Gregerson 331; Gooding 1142)

A large chain is more likely to enter a new SMSA by planning to open several stores within a relatively short period of time. For example, Winn-Dixie opened three stores within two years in Norfolk. (Walters 1437; Connell 1246; CX 630A-L) If the new entrant is a national chain, it has the resources to cross-subsidize its new stores with profits from other marketing areas. (Parker 2243; Marion 1965-66; Stewart 676) Thus, it may not be economically feasible, even for established market leaders, to defend by price zoning against a large supermarket chain which enters the market with several stores and strong financial backing.

63. To open a new 25,000 to 30,000 square foot supermarket in 1979 and 1980, a company would expect to spend a minimum of \$300,000 to equip the store (a maximum of \$700,000 was quoted) and a minimum of \$250,000 to stock the store. (Spearman 746; B. Thomas 1481; Walters 1435; Connell 1250; CX 348) The minimum quoted for equipment costs is unlikely to include such recent technical innovations as price-scanning equipment, which costs approximately \$100,000 to \$120,000 for eight check-out stands. (Walters 1435) Rental costs for the store are not included in the costs of equipment or fixturing. (Walters 1435-36)

Other expenses for opening a new store include training new employees and supplying additional management supervision. (B. Thomas 1487; CX 589 [Wood] at 71) Managerial problems and expenses may be greater when a company is entering a new area, because this requires that management personnel be transferred to the new area. (Walters 1425) For example, in fiscal 1976-77, Grand Union spent \$289,097 for employee moving expenses. (CX 7Z562)

Finding sufficient management personnel to permit expansion may be particularly difficult for the small, independent operator, because in these businesses the owners themselves often comprise management. (Walters 1409-10) Grand Union has its own corporate management training program. (CX 7Z560-Z566) Grand Union's training costs for 1976-1977 was \$157,000. (CX 7Z562) [52]

64. Another factor in entry into a new market is trucking and warehouse costs. (Parker 2231-32; CX 589 [Wood] at 71). Most major

supermarket companies, including Grand Union and Colonial, have their own centralized warehouses and distribution centers. Entry into market areas is limited by the effective shipping distance for maximizing profitable shipping of goods. Multi-store entry may be advantageous to support transportation and delivery costs. (B. Thomas 1485)

65. Mr. Kennedy, the author of the Southeast and Southwest Studies for Grand Union, was asked his opinion on the acquisition of a regional "toehold" outside Atlanta as an entry vehicle into Atlanta. He testified:

I would say there would be a very extensive investment and very long pull before there would be a return that would be satisfactory.

I think the negatives associated with entering the Atlanta market, without any base whatsoever, in finding locations and establishing a nucleus, would be very debilitating as far as the bottom line. It would require extensive investment and reinvestment to support any growth of scale that would be material.

(CX 576 [Kennedy] at 63)

66. Respondents disagree with complaint counsel's differentiation between single-store and multi-store entry. (RPF 160) Their expert, Dr. Curhan, testified that it would be no more difficult to enter a given area with six or ten stores than with one. (Curhan 2888) Kroger, Albertson's and Winn-Dixie, among others, have recently entered on a multi-store basis in areas of the Southeast. (CX 2G, K, Q; C. Thomas 1316, 1333-40; B. Thomas 1474-75)

Warehouse Groceries opened its first store in approximately 1970 and by December 1979 operated 13 stores. (Gregerson 303-08) Bi-Lo, started by Frank Outlaw, who was formerly with Winn-Dixie, began with two stores in the early 1960's and had roughly 100 stores by December 1979. (Spearman 760, 930) Mr. Ogletree started with one store in Atlanta, had five by 1979 and was the seventh-ranked competitor in the Atlanta SMSA by 1977. (Spearment 868, 916) Robert Ingle left Colonial in the early 1960's to operate his father's store and now has 70 stores. (Spearman 936; Woodberry 1725) He opened his first store in 1963, his second in 1965, a third in 1967, and 13 stores in 1979. (Woodberry 1717-18)

Mr. Gooding testified that he began in 1960 by purchasing three small stores and now has four large stores with total sales in excess of \$40 million (Gooding 1115), and has [53] the highest "dollar-per-square foot" sales in Orlando. (Gooding 1117) Another witness, testifying about Ukrop's, which is the third-ranking firm in Richmond, said: "I think they started out with one or two stores and grew from there." (Connell 1229) Farm Fresh, which had three stores in 1966, operated 17 stores in January of 1980. (Walters 1396-97; *see also* Byrd 1539-43)

One independent, Carroll W. Cheek of Great Scott of Florida, entered Florida by opening six stores in 1979. (Cheek 1585).

67. Respondents question whether multi-store entry is either necessary or desirable to insure a competitive market and whether only firms that are "factors" in the market are recognized by their competitors. (RPF 166) They note that, in each major city in the Southeast, including all of the alleged relevant markets except Atlanta, at least one and usually more than one of the "leading" firms in the market are those operating only one or two stores. (RX 32) According to respondents' economic expert:

[E]ntry to the point where you are large enough at least to be remarked and noted, but not, I hasten to say, where you can necessarily have any market power, that you can do this with one or two stores in a given market or what's called a market unless it is as big as Atlanta

(Adelman 3209)

Entry with a single store can have an impact on competition even in a large city such as Atlanta. When Warehouse Groceries opened in Atlanta "[t]hat triggered a response out of all proportion to anything we have experienced anywhere else." (Gregerson 352; *see also* Solomon 1026) The response was limited to the area surrounding the single Warehouse Groceries store. (F. 84)

Dr. Curhan testified that:

We can't tell whether six independents would be keener competitors because of their personal managerial savvy or whether the chain would be better. It could be the reverse.

(Curhan 2891-92)

VIII. GRAND UNION'S INTERESTS AND INCENTIVES IN THE ACQUISITION OF COLONIAL

A. *Objective Evidence of Grand Union's Interest and Incentives*

[54] 68. By 1974, the "Cavenham people, [*i.e.*, James Wood] felt very strongly that Grand Union's real talent was in operating supermarkets, and they felt that the various diversification moves [Grand Union] had made were not paying off. They adopted a fairly firm policy of no further investments into diversified companies." (CX 580 [Silvers] at 47; *see also* CX 586 [Tarrant] at 43) Earl Silvers, then Administrative Vice President of Grand Union, received instructions from Mr. Wood [Grand Union President] that he should concentrate exclusively on supermarket acquisitions (CX 580 [Silvers] at 46-7), and that he should work toward disposing of Grand Union's non-supermarket operations (CX 580 [Silver] at 48; *see also* CX 576

[Kennedy] at 53, stating that the convenience stores were sold). Grand Union's other operations, including its convenience stores, had been financially unsuccessful, and the convenience store division, catalog showrooms, and, eventually, the Grand Way discount stores, were sold. (CX 81E; CX 576 [Kennedy] at 53)

This resulted in a basic change in Grand Union management policy. (CX 81E) The Supermarket Division became the focal point for all management efforts to build sales and earnings. These management efforts included both retail property developments (new developments and renovations) and acquisitions. (CX 81E, L.) Grand Union's five year plan—1977 through 1981, states:

With the company committed to concentrate its expansion efforts in the supermarket area only, it is expected that acquisitions of food chains will be given top priority consideration. An acquisition at the right price and at the right time could well double Grand Union's earnings.

(CX 81N)

69. In 1976, Mr. Silvers assigned Roger Kennedy, then Vice President of Corporate Planning, to "review from available sources all supermarkets that had operations in the southeast, and the southeast is defined to be from the Virginia area right down through Florida." (CX 576 [Kennedy] at 45, 48) The purpose of this review was to identify supermarket chains in those areas, with an eye toward acquisition possibilities. (CX 576 [Kennedy] at 45, 52-53; CX 480 [Silvers] at 75) Mr. Kennedy was instructed to disregard privately-owned corporations that operated only a few stores and was told that the top ten or fifteen chains in the country also would present different circumstances in terms of acquisition. (CX 576 [Kennedy] at 46)

Mr. Kennedy submitted his analysis of 12 Southeastern companies which he considered acquisition possibilities, [55] to Mr. Silvers on August 18, 1976 who, in turn, forwarded it to Bowman Gray and James Wood. (CX 32C, E, F) The 12 firms included were:

1. Bi-Lo, Inc., Mauldin, South Carolina
2. Alterman Foods, Atlanta, Georgia
3. Piggly-Wiggly Southern, Vidalia, Georgia
4. Harris-Teeter, Division of Ruddick Corporation, Charlotte, North Carolina
5. Bruno's, Birmingham, Alabama
6. Food Town Stores, Salisbury, North Carolina
7. Jitney Jungle, Jackson, Mississippi
8. Ingles, Asheville, North Carolina
9. Food World, High Point, North Carolina
10. Community Cash Stores, Spartanburg, South Carolina

11. Red Food Stores, Knoxville, Tennessee
12. Lowe's Food Stores, Wilkesboro, North Carolina

(CX 32F-M)

Bowman Gray, although not a Grand Union employee, was President of Generale Occidentale, and was viewed as Sir James Goldsmith's personal representative in the United States. Sir James and Mr. Gray worked closely with Grand Union's top management. (CX 580 [Silvers] at 68-69) Mr. Silvers was reporting directly to Mr. Gray and Mr. Wood. (CX 580 [Silvers] at 67)

In his report ("Southeast Study"), Mr. Kennedy stated about the region:

Winn-Dixie operates in this entire area and has the best earnings record nationally. Each of these chains is profitable and as a group they are higher than national averages, indicating a market area which has seemed to avoid over-storing. With population growth projected to be one of the leading areas of the country it would seem to insure further potential.

(CX 32G)

Mr. Kennedy concluded that large chains had been profitable in the Southeast. (CX 576 [Kennedy] at 59) Colonial was not included in the Southeast Study because Mr. Kennedy felt it was too large, in his opinion, ranked tenth or eleventh nationally. (CX 576 [Kennedy] at 55) Mr. Silvers' cover letter to Mr. Wood and Mr. Gray concerning the Southeast Study indicated that he planned to follow up on Alterman, one of the acquisition possibilities mentioned, as soon as Isadore Alterman returned from vacation. (CX 32C) [56]

70. Also during 1976, Mr. Kennedy completed a similar study of supermarket chains in the Southwest. He did not prepare reports on any other sections of the country, although California periodically came into consideration. (CX 576 [Kennedy] at 48-49)

Mr. Kennedy's study of the Southwestern United States discussed the following thirteen acquisition possibilities:

1. Cullum Cos.
2. H.E. Butt
3. Weingarten
4. Furr's Inc.
5. Shop Rite
6. Schwegmann
7. Handy-Andy
8. A.J. Bayless
9. Brookshire Food Strs.
10. Piggly-Wiggly (Red River Inc.)
11. Rice Food

12. Minyard

13. Lewis & Coker

(CX 33C) This study indicated that:

Evaluating the thirteen chains as a group indicates that performance has been much more irregular and less profitable than the South-East, U.S.A. group. There is also a much broader geographic area involved but within it more potential growth as population expands in this desirable part of the country.

* * * * *

Considering the foothold that would be established and opportunities for expansion, there are two profiles of chains in the group. One group would appear to be very limited in present geography while the other would appear to have the coverage desired. However, the latter group is also involved in more diverse retailing operations as well as wholesaling which would have to be considered.

(CX 33D)

71. In his deposition, Mr. Kennedy indicated that, as Director of Plans, it was his responsibility to put together the plans to enable the company to grow in areas where it did not exist. He had discussed with Mr. Silvers the desire to move into the Southeast and Southwest areas of the country because they had the greatest potential for growth in terms of both [57] population and economic growth. (CX 576 [Kennedy] at 49-50, 102) These areas, comprising the "Sun Belt," "got quite a bit of publicity a few years ago in many publications, particularly as the northeast began to feel the impact of industry moving out, population decrease, the decay of the cities." (CX 576 [Kennedy] at 50) Grand Union made no acquisition studies of the Northwest or Midwest (CX 580 [Silvers] at 76-77), although Grand Union did accumulate information about grocery chains in several areas. (See CX 29; and CX 44A-Z52; and RPF 567-579). Visits were also made to various grocery chains throughout the country by Grand Union officials (*Id.*).

72. At the Strategy Committee meeting of Cavenham Limited on April 13, 1978, Sir James Goldsmith, questioning the advisability of purchasing a chain of supermarkets located mostly in Michigan, stated that in his opinion the most profitable area of expansion for Grand Union was in the South. (CX 615A-B)

In the April 3, 1978, issue of *Supermarket News*, a report based on an interview with James Wood stated:

In about three months the shackles will be removed, and Grand Union expects to be able to move more freely down the acquisition trail, according to James Wood, President.

* * * * *

Grand Union is looking for two basic types of acquisitions. The first and top priority will be in areas adjacent to or near Grand Union operations, where it could consolidate

or strengthen existing market share and solidify the company's position.

* * * * *

The other type of acquisition would be a self contained chain removed from the present Grand Union trading area such as a Kimbell.

(CX 503A-B; *see also* CX 612, which is a stipulation of the testimony of the author of the article, stating that "The Article, including the quotations, is a substantially accurate reflection of Mr. Aboff's interview with James Wood in all respects.")

Based on an April 10, 1978, interview with James Wood, the June, 1978 issue of *Chain Store Age* stated:

The 10-year-old ban on acquisitions by the Grand Union Company becomes a ghost of government-[58]regulations-past this month. The chain is now free to move. And with a vibrant cash flow thanks to Cavenham Ltd.'s control, it has the power to do what it has been itching to do.

* * * * *

This month acquisitions for Grand Union are just a matter of how soon and where. "The most exciting thing that can happen to Grand Union this year would be substantial growth to our sales base if we are successful in consummating acquisitions," informs chief operating officer Patrick Deo. "We are looking within our own trading area, where it would be most profitable. And, with the consent decree expiring this month, the possibility looms so much larger than ever."

Grand Union's trading area is vast, covering much of the Eastern Seaboard. But president James Wood narrowed down the possibilities: "Basically, what we would like to do is take what is in our good areas, like we did in Florida and to some extent in Washington. Ideally, we would try to fill in our territory between here [New Jersey] and Washington, Washington and Florida."

Any acquisition Grand Union makes would be in what Deo terms "growth" areas, defined as relatively suburban areas.

(CX 504B; *see also* CX 613, which is a stipulation of the testimony of the author of the article, stating that "The Article including the quotations, is a substantially accurate reflection of Mr. Machiavenna's interview with James Wood and Patrick Deo in all respects.")

73. Mr. Wood, in discussing a Grand Union/Colonial merger with Ernest F. Boyce, Colonial's Chief Executive Officer, mentioned Grand Union's reliance on the New York market for its profits, which was undesirable, due to the competitive nature of that market. (CX 588 [Wood] at 350) Mr. Wood stated at that meeting that New York had not been without a price war for twenty years and that geographic diversification would permit Grand Union to survive such problems more effectively. (CX 588 [Wood] at 418, 421)

74. Roland Franklin, a director of Cavenham Limited and Generale Orientale, whose duties included monitoring and promoting acquisitions for Grand Union and who first proposed the acquisition of Colonial to Sir James Goldsmith, acknowledged that one of the rea-

sons for the selection of Colonial was its [59] "geographic fit" between Grand Union's existing areas. (CX 570 [Franklin] at 120, 138-39; *see also* CX 588 [Wood] at 114-15, 322-23, 362; CX 589 [Wood] at 33-34; CX 572 [Goldsmith] at 120-21) He reported the "geographical attractions," among other factors, to Sir James. (CX 570 [Franklin] at 170)

A document called "Company Profile: Colonial Stores, Inc.," prepared for Grand Union under the direction of Stuart Tarrant, Executive Vice President for Finance and Administration, discussed the attractiveness of Colonial's geographic position:

Headquartered in Atlanta, Georgia and trading mainly under the Colonial and Big Star names, the operations are comprised of 378 supermarkets located in seven southeast states forming part of the attractive and growth-oriented sunbelt area of the United States. The map on Exhibit 1 demonstrates the perfect fit that Colonial would make a Grand Union's sphere of operations; the combined chain would stretch down the east coast from the Canadian border to Florida without significant break.

(CX 63A-1; *see also* CX 588 [Wood] at 96-97, 100)

75. Colonial also was selected by Grand Union because of its strong market position in the Sun Belt:

Q. * * * I realize you said it filled up the map, but is it the fact that it was in the southeast U. S., the so-called Sun Belt, a growing region. Did that make it more desirable than some other alternative?

A. Yes, I am sure the—it was not in one of the difficult areas. Yes.

Q. You regarded it as a growth area, potential [growth] area, in the country?

A. Yes.

Q. And was the fact that in many parts of that area Colonial had a strong share of the market, was that an important consideration?

A. One of the factors that we looked at, certainly.

(CX 570 [Franklin] at 240-41) [60]

76. Prior to its acquisition of Colonial, Grand Union's principal existing markets were located along the North Atlantic seaboard. (CX 6Z11-Z13) According to Grand Union's 1977/1978 Business Plan and Budget, "although improved employment in 1976 was recorded for most states, unemployment rates ran higher than the national average of 7.7 percent in all states [where Grand Union operates] except New Hampshire, Maryland and West Virginia." (CX 7Z27, CX 19Z8) The 1978-1979 version of Grand Union's business plan reports that in 1977 unemployment rates in the New York metropolitan area, New Jersey and Puerto Rico remained higher than the national average. (CX 6J)

The financial difficulties and/or takeovers of several supermarket chains, including Bohack's bankruptcy, Food Fair's acquisition of Hill's Markets, and Pic N' Pay's (a Cleveland-based chain) merger

with First National Stores (after First National sold its 15 New Jersey stores to Foodtown-Mayfair) demonstrated the intensity of competition in the Northeast. (CX 6Z50) Grand Union's top management viewed parts of the Northeast market as having reached a saturation point with regard to Grand Union stores:

Any new store added is immediately profitable due to the company's high market penetration with advantages in advertising and minimal incremental support costs. . . . Overflooding the area with stores . . . results in creaming-off the profits in existing units and, therefore, the emphasis in this instance is on the work to existing facilities. *** Out of the 28 stores planned for the Empire Division in the next five years, 19 are replacement stores.

(CX 45C)

In comparing this situation to the potential presented in Atlanta, Mr. Silvers stated: "There does not appear to be the type of 'over-storing' condition we face in parts of Long Island, Bergen County and Connecticut for example." (CX 38Z58)

James Wood reported to Sir James Goldsmith, with respect to Grand Union's five-year development plan, that:

In total, the development plan endeavors to find a balance of achieving additional market penetration outside economic [sic] sensitive areas, especially into those areas of known population growth, to offset the potentially stagnant sections within the existing operations of the Northeast.

(CX 45C) [61]

B. Grand Union's Financial Position

77. Between 1973 and 1977, prior to Grand Union's acquisition of Colonial, Grand Union's percentage of pre-tax profits to sales increased by over 60% from 1.13% to 1.86%, while after-tax profits on sales increased by over 80%, from .6% to 1.1%. (CX 81D) Provisions for losses in connection with Grand Union's retrenchment of its diversified operations amounted to over \$19 million from 1973-77. (CX 81E)

Grand Union developed a five-year plan for the fiscal years 1977-1981, which called for the opening of 100 new stores within five years, as well as contemplating food chain acquisitions. (CX 81L, N) To finance these expansion and acquisition plans, a capital expenditures budget of \$150 million was established. This budget was to be financed by funds then available, funds which would be generated internally over the five-year period, and by application of anticipated depreciation charges of approximately \$20 to \$25 million per year. (CX 62Z190)

In 1979, Mr. Silvers, as Vice President and Secretary of the Grand

Union Company, stated that the firm's cash position as of April 11, 1978, was approximately \$100 million in temporary cash investments. He believed the firm's 1976 cash position to have been about \$60 million. (CX 580 [Silvers] at 92)

According to Sir James Goldsmith:

On the previous occasion when I was in America in March, I was told that Grand Union had \$122 million in cash. Whether it was right or wrong—that is what I seem to remember—so when the people were talking about a hundred-million-dollar acquisition, I didn't worry where the money was going to come from. We could sign the check, as far as I was concerned.

(CX 572 [Goldsmith] at 134)

78. Grand Union's tender offer to Colonial was for cash, and cost Grand Union approximately \$135 million. (RX 1-I; CX 67) Of this amount, \$120 million came from "current cash balances, temporary cash investments, other internally generated funds and borrowings" pursuant to certain lines of credit. (RX I) Grand Union had approximately \$32 million available in lines of credit, from which it did not plan to borrow more than \$15 million for the acquisition. Grand Union also borrowed \$15 million from its parent Cavenham (USA), which ultimately obtained its funds from Banque Occidentale pour l'industrie et le commerce, a subsidiary of Generale Occidentale. (RX 1-I, J) [62]

79. An acquisition cost of \$135 million was not the maximum considered by Grand Union. In July of 1978, an internally generated report evaluating The Great Atlantic and Pacific Tea Company, Inc., ("A & P"), as a potential acquisition, contemplated a purchase price of \$160 million to be financed by \$99.8 million from available cash, \$50 million from additional debt, and \$10 million from additional capital contribution. (CX 35J-K)

Grand Union's cash reserves were not depleted by the acquisition of Colonial. On October 17, 1979, almost a year after the acquisition of Colonial, Roger W. Kennedy, then Treasurer of Grand Union, testified in a deposition that Grand Union presently had a Temporary Cash Investment fund of between \$60,000,000 and \$70,000,000. (CX 576 [Kennedy] at 96-97) Soon thereafter, Grand Union made a cash tender offer for Weingarten, a supermarket chain with stores located in Texas, Louisiana and Arkansas. Weingarten's annual sales in 1979 were \$575 million. (Tr. 117, 124; Curhan 3096-98; *see also* CX 44D, R-S)

C. Grand Union's Management Potential

80. Roger Kennedy stated that, in the supermarket business, a company is dependent upon people living in a marketing area to comprise local management. When an acquisition is made, the acquir-

ing company must consider what expertise is on the scene, and what management is needed to supplement them. To protect the company's interests, it would place key people in a major acquisition. (CX 576 [Kennedy] at 107) When Grand Union was acquired by Cavenham, Cavenham relocated key personnel from Great Britain to the United States, including James Wood as Grand Union's Chief Executive Officer and Stuart Tarrant as Grand Union's financial Vice President. (CX 589 [Wood] at 4-5; CX 586 [Tarrant] at 10, 17)

Grand Union emphasizes management training programs. (CX 12G) The 1978-79 Business Plan and Budget reports on Grand Union's Four Stage Management Training Program:

It permits us to bring into the company trainees with high long-range potential who might otherwise not pursue a career in retailing. In addition to training people for store, general and department manager positions, the program helps to create and develop a pool of field supervisory and middle management candidates for internal development. This program has helped reduce unnecessary turnover.

(CX6Z341) [63]

At the time that report was written, 53% of Grand Union's store managers and over 62% of its grocery department managers were former management trainees. In 1977, 32 general managers, 99 grocery managers, 19 meat managers, and 32 produce managers, for a total of 182 persons received management training. (CX 6Z341) Dr. Curhan, respondents' marketing and management expert, also described the available management pool within Grand Union which it was able to draw upon for its takeover of Colonial. (Curhan 3014-15)

IX. THE THIRTEEN MARKETS

A. *The Atlanta, Georgia SMSA*

1. Demographics and Location

81. In 1978, the Atlanta SMSA (see F. 38) was the eighteenth largest in the country, with an estimated population of 1,851,500. Atlanta is the largest SMSA in Georgia and one of the fastest growing SMSAs in the country. Between 1970 and 1978, its population grew from 1,595,517 to 1,851,500 approximately 16.0 percent, or 2.3 times the national average. (Bureau of the Census, *Population*)

The distances between the city of Atlanta, the heart of the SMSA, and other cities are as follows:

80 miles from	Macon, Georgia
150 miles from	Augusta, Georgia
114 miles from	Chattanooga, Tennessee
150 miles from	Birmingham, Alabama
250 miles from	Salisbury, North Carolina

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235 miles from	Charlotte, North Carolina
197 miles from	Asheville, North Carolina
169 miles from	Spartanburg, South Carolina
142 miles from	Greenville, South Carolina
180 miles from	Vidalia, Georgia (approximate)

(Rand McNally)

2. Colonial in the SMSA

82. According to complaint counsel's survey, the share of food and grocery store sales of the top eight competitors in Atlanta in 1972 and 1977 were as follows: [64]

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Colonial	17.2	17.8	Colonial	19.8	20.6
Alterman	16.7	17.2	Alterman	18.0	18.7
A & P	10.7	11.0	Kroger	13.1	13.6
Winn-Dixie	10.2	10.6	Winn-Dixie	11.5	12.0
Kroger	6.9	7.2	A & P	8.3	8.6
Munford	3.2	3.3	Munford	2.2	2.3
Tenneco	1.1	1.1	Ogletrees	1.2	1.2
National Conv. "Stop n' Go"	.7	.7	Tenneco	.9	.9

(CX 2B)

The four-firm concentration ratio for *grocery stores*, (SIC 541), as provided by Bureau of the Census, *Retail Trade*, for the Atlanta SMSA were:

<u>1972</u>	<u>1977</u>
54.6%	62.9%

The four-firm concentration ratios for supermarkets in the Atlanta SMSA were:

<u>1972</u>	<u>1977</u>
74.5%	78.7%

(F. 52, 53)

In 1978, Colonial had 62 stores in metropolitan Atlanta and 96 in the entire Atlanta Division. (CX 252Z64, Z39) A report prepared by Colonial/Grand Union management entitled "Colonial Stores Marketing Plan Fiscal 1979/80," indicated that the Atlanta Division pro-

vided a net profit of \$13,287,000, or 58% of the net profits earned by Colonial, although the Division operated only 26% of Colonial's stores. (CX 252Z39) This report also indicated that the following competitors, all of whom are supermarket firms, had the following market shares in 1978: [65]

	<u>No. of Stores</u>	<u>% Share</u>
Colonial	62	24.2
Alterman	51	23.9
Kroger	36	12.4
A & P	25	12.3
Winn-Dixie	47	11.8
Others		15.4

(CX 252Z64)

Between 1972 and 1977, Colonial and Alterman maintained the same respective ranks and almost equal market shares. Each nearly doubled its dollar sales over the period (CX 2B), reflecting both the growth of the marketplace and inflation. A & P, which decreased its presence from 46 to 24 stores (CX 665Z27-Z29), dropped from third to fifth rank. It was replaced by Kroger, which jumped from fifth place, more than doubling its dollar sales. (CX 2B) Munford and Tenneco, two convenience store chains, remained in the top eight. Ogletrees, a local independent, became number seven in 1977. There are many additional competitors who were not among the top eight. (CX 665A-Z63)

Colonial's five year plan (to operate from 1976 to 1980) indicated that Colonial planned to open 51 new stores and to close 14, a net increase of 37 stores in the Atlanta Division. Colonial also planned to enlarge nine stores in the Division during that period. (CX 349N)

3. Barriers To Entry

83. Dr. Parker testified that barriers to effective entry into the Atlanta market are very high. (Parker 2347) William Stewart, the former President of Colonial, testified that to enter into Atlanta on a *de novo* basis, he would seek 12, thirty-thousand square foot supermarket sites, located in the three central counties of the SMSA—Fulton, DeKalb and Cobb. (Stewart 577-78; *see also* Spearman 918)

Industry witnesses testified about the effect on supermarket entry of high advertising rates in Atlanta. (Gregerson 327; Solomon 1031) According to complaint counsel (CPF 318), assuming "normal" advertising costs of slightly over 1% of sales, it would take \$16 million in annual sales to purchase one page weekly of the \$3200 per page cost of the *Atlanta Journal/Constitution*. (CX 263) In 1977, Colonial's At-

lanta Division spent \$1.55 million on newspaper advertising and \$895,000 on television and radio advertising. (CX 465E)

Mr. Gregerson of Warehouse Groceries indicated that he would need at the minimum four stores similar to the one he [66] operated, to advertise in the *Atlanta Journal-Constitution*. (Gregerson 328) Another independent operator described his newspaper advertising as being "dwarfed" by that of the supermarket chains (Solomon 1031), which also use television, radio and direct mail advertising. (C. Thomas 1319) Bi-Lo, a major regional supermarket, has not entered "in the boundary lines where they have to advertise in the [Atlanta] *Journal-Constitution*." (Spearman 877) Mr. Woodberry of Ingles, a major regional firm headquartered in Asheville, North Carolina, would be interested in entering into Atlanta but has not considered doing so because of high rent and advertising costs, and competition for labor, and because his chain is not well-known in Atlanta. He indicated that his present Asheville warehouse could supply 50 additional stores. (Woodberry 1717, 1733)

84. Complaint counsel also cites the prevailing practice by chains of establishing single-store price zones as an inhibiting factor to expansion of independents and successful new entry in the Atlanta market. (CPF 324; see F. 62; Gregerson 330-332; Solomon 1025-26; C. Thomas 325-28) Supermarket chains with a number of stores in the market are in a position to put one or two stores near a new entrant in a special lower price zone while maintaining the rest of the chains' Atlanta stores at the original, higher price level. (Gregerson 331-32) These firms "can afford to lose money in one store and make it up by their profits in other stores." (Gregerson 336-37; see also F. 62) Mr. Gregerson of Warehouse Groceries testified that, had he foreseen the "special price zone" reaction to his entry, he would not have entered the Atlanta market "under any circumstances." (Gregerson 333-34) He stated, and a vice president of Kroger confirmed, that when Warehouse Groceries entered Atlanta, Kroger initiated a special low-price zone in two stores near his new store. (Gregerson 331-32, 336; C. Thomas 1325-28), and the Colonial store nearest his store also adjusted its prices. (Gregerson 336) According to Mr. Gregerson, in smaller towns where his store competes in a one-on-one basis, the chains do not use a special price zone—"... they want their store to make money in that town. ...". (Gregerson 336)

85. As previously noted (F. 57), an independent, single store often appeals to a small segment of the population, e.g., a particular ethnic group. The owner of So-Lo Foods explained: "As an independent grocery, you have to go with your strengths. You certainly can't compete with the chains on their level. You try to go with what you can do. ...". (Solomon 1018-19) So-Lo features a line of Jewish, Italian, and

Spanish foods. (Solomon 1018) Since So-Lo opened its first store in Atlanta in 1972, its two attempts to branch out with more conventional stores have been unsuccessful. (Solomon 1017, 1020, 1063-64) [67]

86. Respondents note different factors which, they contend, make the Atlanta market attractive and easy for entry. "[I]n a market the size of Atlanta, anything can pop up." (Curhan 3001)

Mr. Solomon testified that:

[W]e don't have mountains to climb to get to groceries here. There are no rivers, no trade barriers. We don't have to float the goods here. This is a major distribution center in the country.

The taxes are as low or lower than the Boston market on real estate. The union scale is certainly lower.

(Solomon 1046)

87. In Dr. Curhan's opinion, the most likely new entrants in Atlanta would be local independents. (Curhan 3001) Mr. Isaacs, Vice President of Grand Union's [Colonial] Atlanta Division, testified that if he were to open five stores anywhere in the southeast, the Atlanta SMSA would be the most attractive place to enter, particularly DeKalb, Gwinnett and Clayton Counties. (Isaacs 2613-15) Mr. Isaacs noted several factors which contribute to Atlanta's attractiveness: it is a "good steady growth area" (Isaacs 2543); its excellent transportation; and its good population mix. (Isaacs 2621-13) He referred to the "good possibility" of entry by Safeway and Albertson's by 1985. He based his opinion on what he has heard and read about the companies, including the fact that Safeway commissioned a survey of the Atlanta market. (Isaacs 2544-46, 2618-19; Curhan 3001-02)

In 1978, Mr. Stewart perceived "[w]hichever company [that] was successful in negotiating for the purchase of all the Alterman Brothers" as the most likely entrant into Atlanta. (Stewart 600) Similarly, Mr. Spearman testified that in 1978, it had been announced that Oppenheimer was negotiating to purchase Alterman; so he perceived Oppenheimer as likely to enter Atlanta. (Spearman 758) He had heard rumors that Safeway and Lucky were also interested in entering Atlanta by acquiring Alterman. (Spearman at 759)

88. Respondents also cite the following companies as potential entrants into Atlanta (RPF 849-854):

(a) Hudson-Thompson, Inc., an independent wholesaler, serves the Atlanta market area from Montgomery, Alabama, 166 [68] miles away. Therefore, Stewart, King & McKenzie, also located in Montgomery, could similarly serve stores in the area. (RX 30E-G)

(b) Three of the distribution centers in Birmingham, Alabama, 150 miles from Atlanta, serve stores in the Atlanta market area: Piggly

Wiggly Alabama Distribution Co., Inc., Ragland Brothers Co., and Super-Value Stores, Inc. Therefore, three other distribution centers in Birmingham which do not presently serve Atlanta from any warehouse could also serve stores in the area: Bruno's Food Stores, Inc., Mitchell Grocery Corp., and Harvey Ragland Co., Inc. (RX 30E-G)

(c) Of the eight distribution centers in Greenville, South Carolina, 142 miles away, only Bi-Lo serves stores in the Atlanta SMSA. Excluding Associated Grocers and Winn-Dixie, which serve Atlanta from other locations, the following five companies with warehouses in Greenville may be considered potential entrants into Atlanta based upon relative proximity: Community Cash Stores, Dexter Grocery Co., Ingles, Kash & Karry Super-Super Market, and Thomas & Howard Co. (RX 30E-G)

(d) Dixie Saving Stores, Inc. Chattanooga, Tennessee, serves in Atlanta, 114 miles away. On that basis, Red Food Stores, Inc., which also has a warehouse in Chattanooga (RX 30E-G), may be considered a potential entrant into Atlanta. Red Foods, the market leader in Chattanooga, has never attempted to enter Atlanta. However, since 1980 it has had a new President, William Stewart, the former President of Colonial. If Mr. Stewart sees an opportunity for growth into Atlanta, an area with which he is intimately familiar, he may take advantage of it.

(e) K.M.C. Co., an independent wholesaler in Knoxville, Tennessee, serves stores in Atlanta, 193 miles away. Therefore, the seven other warehouses in Knoxville may also be considered potential entrants into Atlanta: Giant Food Markets, Inc., Giant Wholesale Grocery Co., H. T. Hackney Co., Oakwood Markets, Pay Cash Grocery Co., Inc. (subsidiary Scrivner, Inc.), Quality Foods, Inc., and The White Stores, Inc. (RX 30E-G)

4. Performance of the SMSA

89. Opinion is divided regarding the state of competition in the Atlanta SMSA. Respondents note the development of the SMSA and cite examples of new competition entering, whereas complaint counsel note the failure of many of these operations to achieve more than marginal success.

In the late 1960's Colonial began opening some new stores and converting some older stores to Big Star "discount" [69] stores. These were lower-priced than Colonial's traditional, service-intensive stores, and did not give trading stamps. In 1970, there were still only a few Big Star stores in Atlanta. In addition to the Colonials and the Big Stars, there were two Richway Foods "discount" food stores in 1970, which Colonial operated in conjunction with Richway Discount Department Stores, a subsidiary of Rich's of Atlanta. (Isaacs 2523-25)

Alterman, owned by the Alterman family, had traditionally operated under the name "Big Apple." In about 1970, it introduced Food Giant, a discount operation. (Isaacs 2527) A & P, Winn-Dixie, and Kroger were also in the Atlanta market in 1970. (*Id.*) In addition, there were four Treasure Island food stores, affiliated with Treasure Island "discount" Department stores, and three GEX stores, which were franchised membership stores operated by Hudson-Thompson, a wholesaler in Montgomery, Alabama. These were the first "every day low price" stores when they opened in Atlanta in the 1960's. In 1970, each Treasure Island and GEX store was doing approximately three to four times the volume of each Colonial store. (Isaacs 2526-28, 2532-33)

By 1977, all the Treasure Island and GEX stores were closed. Mr. Isaacs attributed their failure to their inability to maintain high volume once the novelty of the discount format wore off and new competitive stores began locating near them. (Isaacs 2532-33) During the 1970's Colonial continued converting most of its older stores to Big Star stores. Presently, there is only one remaining Colonial store in the Atlanta SMSA. It also built additional Richway stores, although by 1980 these were all operated as Big Stars. (Isaacs 2529-30)

Although Alterman was successful financially during this period (CX 2B), it was known in the industry that the elderly Alterman brothers were attempting to find a purchaser for their company. (Stewart 600) Alterman was acquired by Del Haize, a Belgian company, in 1979. (Spearman 927) Messrs. Stewart and Spearman expected that the acquisition would make Alterman more aggressive. (Stewart 599-600, 610; Spearman 957-58) Alterman has recently become more aggressive in their merchandising and their weekly feature pricing, according to one Grand Union official. (Isaacs 2622)

Kroger has had stores in the Atlanta area since the 1920's. (C. Thomas 1335) It embarked on a major building program in the mid-1970's and replaced many of its older, smaller stores with large, high-volume stores. Kroger was able to increase its sales and market share substantially. (F. 82; Isaacs 2531) Kroger has continued its expansion since 1977 in terms of both new store construction and competitive pricing. (Stewart 640; Gregerson 338-39) In the last three years, Kroger has built several new "super stores" replacing older stores, all with departments such as delis, bakeries and [70] prescription drugs. Many are in the suburbs of Atlanta, where Kroger previously had no stores. (Spearman 873-74; Curhan 2997) Kroger stores are open 24 hours a day. It is a low-price leader and has high volume throughout its stores. (Curhan 2998) Mr. Spearman testified regarding industry reaction to Kroger in Atlanta.

Everyone in the marketplace has reacted to their EDLP. That means Every Day Low Prices in the marketplace; because that's the posture that they have elected to take or stand for as they developed these stores. That means that they have less weekly features, bonus buys, roll-in items that are effective from, say, Thursday, Wednesday, until the following Wednesday. As a result of that, every chain in the market, without exception, has lowered their every-day shelf prices.

(Spearman 875; *see also* Gregerson 385)

Winn-Dixie, which has remained number four in the market, has had stores in Atlanta since the late 1950's and a warehouse in Atlanta since 1969. (B. Thomas 1474, 1478) Previously its Atlanta stores were serviced from a Winn-Dixie warehouse in Greenville, South Carolina, and later some were served from another warehouse in Montgomery, Alabama. (B. Thomas 1477) Today Winn-Dixie has 48 stores in the area, five of which were built in 1979. (Curhan 2999) Its stores, even the newer ones, are smaller than many of its competitors' stores. (Curhan 2999)

A & P, number five in the market, has undergone a substantial change in Atlanta in the last ten years. It closed 33 older stores while at the same time opening large 41,000 square foot stores. These stores have similar departments to, and are competitive with, Kroger. A & P lost market share over the decade. (F. 82) The stores' average volume is \$70,000 weekly and several do as much business as \$240,000 weekly. (Curhan 2998-99)

Ogletree's, the seventh-ranked competitor, with five stores in northeast Atlanta, is the major independent in the area. Mr. Ogletree began by acquiring a former Colonial store. (Spearman 868, 915) His most recent store was built in late 1979. The stores are extremely labor-intensive and give more customer service than any other store in Atlanta. (Spearman 914-15) Mr. Spearman attributed Ogletree's ability to do so economically to the fact that, unlike the chains, it is non-unionized and has lower labor rates. (Spearman 914-15) [71] Kroger's Group Vice President testified that Kroger reacted to a new Ogletree's store while the store was under construction; Kroger remodeled its nearby store, putting in special departments and increasing the service level. (C. Thomas 1350)

There are several Matthews Markets, which are supplied by Associated Grocers, in Atlanta. (Stewart 534) One of the Matthews Markets is located in a former Colonial store. (Stewart 639)

Mr. Solomon, an independent operator, testified that he opened So-Lo Foods, which he described as a "case-stack" or warehouse store, in a former Colonial store in late 1972. (Solomon 1017-1054) So-Lo carries basic grocery items, although not the complete variety of a chain store, meat and produce, as well as a heavy concentration of ethnic lines, including Jewish and Spanish foods. (Solomon 1018-19)

From 1974-75, Mr. Solomon also operated in a former A & P location in Marietta, which is within the Atlanta SMSA, and in 1977 and 1978, he operated a store in Doraville at a former Winn-Dixie location. As a result of problems with his wholesaler, strikes near the Marietta and Doraville stores, and the competition in the area, Mr. Solomon went into Chapter XI bankruptcy and closed those two stores. (Solomon 1020-23, 1058-63; RX 5) Since he came out of bankruptcy, he has been pleased with the volume in his remaining store. (Solomon 1080) In addition, he also wholesales foods items for several other retailers. (Solomon 1080-81)

Heathman's began as a partnership between Mr. Heathman and Fred Yardley, a Colonial real estate manager. They opened one store in the Stone Mountain area. The store, like Ogletree's, was heavily service and customer oriented and was very successful. Mr. Heathman bought out his partner and opened a second, similar store at the opposite end of town. Mr. Spearman testified that this was the wrong type of store for that neighborhood. When the store opened, it was picketed by the union and it suffered operating problems. As a result of these difficulties, one store dragged the other store down, Mr. Heathman over-extended himself and went into bankruptcy. (Spearman 916-18; Curhan 3000) His two stores are now operated by Byerly's of Minnesota. (Isaacs 2542)

Several independent companies, some operated by former Colonial store managers or which are located in former Colonial stores, have recently entered the area. For example, Way-Lo recently opened a "semi-box store" in an old Colonial location. (Spearman 868; Curhan 2999) Several one-and-two-store owners have recently banded together under the Big Buy/Thriftown name and advertise together as a group. (Isaacs 2542-43) There are now 32 Big Buy/Thriftown stores in the area. (Curhan 2999) As a group, they would be among the top eight competitors in the [72] Atlanta market. (See CX 665S-Z63.) They are supplied by Associated Grocers. (Isaacs 2542; Curhan 2999)

Mr. Gregerson testified that he began opening warehouse stores in Alabama in 1968, at a time when that type of store was almost unknown. He opened a warehouse store in Marietta within the Atlanta SMSA, in 1979. That year, he had 13 stores in Alabama and Georgia. (Gregerson 305-08, 360-64) When it first opened, the Marietta store did \$400,000 in weekly sales. (Gregerson 348) The store is believed to have the largest volume of any single store in the SMSA. (Isaacs 2536) Mr. Gregerson claims to have the lowest prices in the state. (Gregerson 370)

Jewel-T box stores began operating in 1978. By the end of 1980, there was approximately 12 in the SMSA and others in the surrounding area. (Isaacs 2536)

In late 1980, Alterman began converting some of its traditional stores to warehouse stores. Colonial reacted to the conversion of the first Alterman store in its two nearby stores as it would react to any new entrant or other competitive activity. (Isaacs 2537-40)

Produce markets, which carry fresh meat and fish and other items in addition to produce, have recently become popular in Atlanta. Metro Produce, one of the new produce markets, is owned by a former Winn-Dixie district manager. He has two stores, one a former Colonial and the other a former A & P, and is building a third. (Isaacs 2536-37)

There have been several other new entrants. In 1978, Bi-Lo of Mauldin, South Carolina, opened its first store within the Atlanta SMSA in Snellville. (Isaacs 2540) A year later, Bi-Lo opened its second store in the SMSA. (Isaacs 2541) Ingles of Asheville, North Carolina, has opened three stores on the fringes of the SMSA. They are located in Winder, Calhoun, and Cornelia. (Isaacs 2541)

90. In contrast, complaint counsel, while noting the entry of Way-Lo, Jewel-T (box stores), Bi-Lo and Ingles into the Atlanta area, discount the importance of this as a market factor (CPF 333), because the large supermarket chains in Atlanta have not lowered their prices in response to these new actors in the market. (C. Thomas 1358) In addition, Bi-Lo and Ingles do not advertise in the Atlanta *Constitution/Journal*, and are not considered as operating in the Atlanta market, but, rather, are seen as being on its fringe. (Spearman 877; Woodberry 1733, 1750) The current Vice President of Colonial/Grand Union for the Atlanta Region estimates that none of the new entrants have achieved even a two percent market [73] share, despite the fact that some of them have been in operation for five years. (Isaacs 2596-99)

Complaint counsel's experts testified that, from an economic perspective, there exists a high probability that Atlanta is performing as less than a competitive market. (Parker 2348; Marion 1976-78) Mr. Gregerson described the Marietta section of Atlanta as "a creampuff" (Gregerson 520), and guessed that the firms in that market had "... a gentleman's agreement. I don't know why these prices would be higher than they were in other places, because the people represented had lower prices out in the country." (Gregerson 524) He noted that prior to his entry, his area in Atlanta had a higher gross margin level than that he experienced in the development of his stores in other areas, which were mostly in Alabama. (Gregerson 325) Mr. Thomas, Kroger's Vice President, testified that his Carrollton store (nearby Atlanta), was in a lower price zone than Kroger's Atlanta stores. (C. Thomas 1327-28)

Mr. Solomon concurred that prices in Atlanta were unusually high and that this was because in Atlanta:

[Y]ou have a major distribution center in the country, a major market, that has five dominant chains controlling its volume; and then you take those five and bring it down to three, you have got Colonial Stores, with approximately 24 percent of the volume; Alterman with approximately 24 percent of the volume; and Kroger who now has 20 percent, or in that area, 18 to 20 percent; and if they—those three or five chains can sell X item for \$1.09 and have nobody compete with them, why not sell it for \$1.09? Why go to \$1.08?

* * * * *

Here it is easy for them to take and stay at the \$1.09, run their loss leaders, use other items to make up those losses, whether it be nonfood items or another item to do it; but why destroy that bubble that protects them at a level for them to make a good profit?

The taxes are as low or lower than the Boston market on real estate. The union scale is certainly lower. Why are these prices so high? It's only because there's nobody to make them go lower.

(Solomon 1044-46) [74]

5. Grand Union as a Potential Entrant

91. In 1975, Earl Silvers did a preliminary study of Alterman in Atlanta (F. 69), spending a day in that city and conducting a price study of that market. (CX 580 [Silver] at 63, 78) On August 21, 1975, he wrote a memorandum to Mr. Wood, describing his impressions of the Atlanta market:

My impression of the Atlanta market, based on a one day inspection trip August 19, is that competition is not as aggressive as in most of our operating areas:

1. There does not appear to be the type of 'over-storing' condition we face in parts of Long Island, Bergen County and Connecticut for example.
2. I saw no unusually strong operations such as Giant, Shop-Rite or Pathmark. In comparison with Phoenix and Southern California with Alpha Beta, Lucky, Ralphs, and Fazio, the Atlanta supermarkets appear quite average.

I obtained a representative list of retail prices which I have compared with Grand Union.

(CX 38Z58)

In a separate cover memorandum to Bowman Gray, Mr. Silvers reported that "competition is not as aggressive in the Atlanta area as in most of the areas where we operate." (CX 36Z80) Mr. Silvers returned to Atlanta again in 1976 at James Wood's request, for additional studies and negotiations for Alterman. (CX 580 [Silver] at 100; CX 37I)

Grand Union considered other regional chains as entry vehicles

into Atlanta. In the Southeast Study, Mr. Kennedy recommended the acquisition of both Bruno's and Ingles:

Two that are most impressive in my judgment considering performance, management expertise including age, location, possible availability and potential are Bruno's and Ingles. The latter has been developed within the last 12 years. With Bruno's located in northern Alabama and Ingles in North Carolina there exists a gap between their operating area, consisting of all of northern Georgia (Atlanta market). There are expansion possibilities in all other directions for Bruno's and similarly for Ingles. (CX 32G) [75]

Mr. Kennedy explained in his deposition that these two chains were impressive candidates for acquisition:

In this particular case, the two chains referred to, Bruno's and Ingles, which had limited geographic coverage, fit a pattern that in the middle but contiguous to both was this Atlanta market area, which certainly in the southeast has to be considered as probably the predominant growth area, considering the metropolitan aspects, the hub of the south, and certainly that should be a viable area to be located in. (CX 576 [Kennedy] at 60-61)

Bruno's is headquartered in Birmingham, Alabama. Joseph Bruno, its President, began with a "typical 'corner' grocery store" in 1936. The company went public in 1971, although the Bruno family owns approximately 70% of the stock. (CX 29Z100) Bruno's is non-unionized and operates three contiguous warehouses. (Curhan 2973-74) "[T]hey are a very attractive, very successful family-owned, aggressive, expansion-minded company." (Curhan 2973) Bruno's also operates a chain of drug stores. As of 1977, Bruno's had 50 grocery stores of which 27 were in Birmingham, making it one of the top four grocery store firms in Birmingham. (CX 29Z100-Z101) In 1977, Bruno's had grocery stores in Gadsden, Huntsville, Anniston, Mobile, Montgomery and Tuscaloosa, Alabama, and Chattanooga, Tennessee. Its closest store to Atlanta was in Chattanooga. (Spearman 935)

Commerce Union Bank of Nashville attempted to interest Grand Union in acquiring Bruno's in 1977. (CX 29Z89-Z90)¹¹ In a September 1977 memorandum analyzing Bruno's, Roger Kennedy, the Treasurer of Grand Union, made the following observations:

1. The size of the operation and area of concentration does not in itself offer significant additional growth possibilities. Movement into marketing areas bordering on Alabama appear to present more competitive problems and the additional costs of [76] distribution and supervision; all of which will have a negative effect on earnings.
2. Expansion into the large 42,000 plus square foot stores and related investment requires a critical evaluation.

¹¹ Mr. Wood, however, testified that he was unaware of any contact with Bruno's or anyone representing Bruno's. (CX 589 [Wood] at 190-91)

3. Present management concentrated in the Bruno family and their ages must be considered.

(CX 29Z99)

When asked whether Bruno's would have made a suitable acquisition candidate, Mr. Tarrant testified:

[T]here was nothing particularly attractive about it. I believe the price being asked was rather high.

(CX 586 [Tarrant] at 92)

One factor that made Bruno's unattractive to Mr. Tarrant was its small size. (CX 586 [Tarrant] at 113)

Bowman Gray, a director of Grand Union and Vice President of Cavenham, wrote to William J. Tyne, Jr., Vice President of Commerce Union Bank, later in September 1977 stating:

At the present time, we feel that Bruno's is too small for the major acquisition that Grand Union is looking for and, therefore, would not be interested. However, should they in turn make an acquisition which might enhance their attractiveness to us, please let me know and we will consider.

(CX 29Z87)

As late as March 1978, Bruno's was still considered as an acquisition possibility if a larger volume candidate was not available. (CX 44G)

Ingles began as a single store independent when Robert Ingle, a former Colonial employee, opened his first store in Asheville, North Carolina in 1963. He opened his second store in 1965 and his third in 1967. (Woodberry 1716-17) Thereafter, he acquired six Colonial stores in the Asheville area. (Woodberry 1717, 1745) Except for taking over some A & P stores, the balance of Ingles' growth has been through building or leasing new stores. In 1979, Ingles opened 13 stores (Woodberry 1717-18), making a total of 69 Ingles stores, with [77] net sales of \$249 million, or an average of \$30,000 in weekly sales per store. (RX 17) Ingles stores range in size from 13,000 square feet to 33,000 square feet. (Woodberry 1724-25) Ingles operates non-union stores and warehouse. (Woodberry 1722)

Ingles' dry grocery warehouse, which was built in 1977, is located at its headquarters near Asheville. (Woodberry 1725) Once Ingles completes the ongoing expansion of its warehouse, it will be able to handle 50 additional stores. (Woodberry 1727) It also uses Merchants Distributors to supply it with all perishables and one-quarter of its dry grocery requirements. (Woodberry 1726-27) Ingles has six stores in Northeast Georgia. (CX 642A-G; Woodberry 1719; F. 89)

Each time Mr. Ingle has been approached to sell the company, he

has refused. (Woodberry 1757) Ingles now has an employee stock bonus plan funded by Ingles' stock. (Woodberry 1759) Many of Ingles' employees also own stock in the company as a result of an earlier private stock offering. (Woodberry 1759) Altogether, 1582 Ingles' employees are stockholders. (RX 17)

While he was employed by Colonial, Mr. Ingle reported to Mr. Spearman. When asked about the likelihood of Grand Union acquiring Ingles, Mr. Spearman testified:

So Bob has been very successful. Bob has got great ambitions. There's a story been written on him—and I believe he intends to do it, if he lives long enough—that he was quoted that one day he will have 1,000 stores in his chain.

You know, knowing Bob Ingle as I know Bob Ingle, I don't believe Bob Ingle is going to sell to anyone until his [sic] gets near that objective. I may be right or wrong. That's a personal feeling. I know Bob well.

(Spearman 936-37)

Mr. Wood testified he was unfamiliar with Ingles and had never had any contact with the company with regard to acquisition. (CX 589 [Wood] at 186) Mr. Kennedy, the author of the Southeast and Southwest Studies, was asked his opinion on the acquisition of Ingles or Bruno's as a "toehold" into Atlanta:

I would say there would be a very extensive investment and very long pull before there would be a return that would be satisfactory. [78]

I think the negatives associated with entering the Atlanta market, without any base whatsoever, in finding locations and establishing a nucleus, would be very debilitating as far as the bottom line.

It would require extensive investment and reinvestment to support any growth of scale that would be material.

(CX 576 [Kennedy] at 63)

Bi-Lo is another company mentioned by complaint counsel as a potential acquisition in Atlanta. (CPF 355-356; Parker 2491, 2494) Bi-Lo was founded in 1961 by Frank Outlaw, a former Winn-Dixie employee, who began by acquiring two Winn-Dixie stores in Greenville. At the time of his death he had opened almost 100 stores and built a warehouse in Mauldin, South Carolina. (Spearman 760-71; Curhan 2968-69)

After Mr. Outlaw's death, Grand Union, among many other companies, was offered the opportunity in 1976 to acquire Bi-Lo through a broker. Mr. Silvers testified: "We never got in touch with them or did any more than look at the figures, and the people from the Netherlands took them." (CX 580 [Silvers] at 127) Mr. Wood testified, "I personally never examined [Bi-Lo] nor contacted anyone there. At

that stage, I wasn't particularly interested." (CX 589 [Wood] at 187) Bi-Lo was acquired by Ahold, a Dutch company, in 1977. (Curhan 2968)

In 1976, Bi-Lo, Inc., operated sixty-three supermarkets located primarily in South Carolina, North Carolina and Georgia. Bi-Lo's warehouse is located near Greenville, South Carolina in Mauldin. (CX 609S) In 1976, Bi-Lo's total sales were \$367 million. In 1977, Bi-Lo operated six supermarkets in north Georgia, including one located in Snellville, Georgia, in the Atlanta SMSA. (Spearman 877) Bi-Lo had less than 1% of grocery sales in Atlanta in 1977. (CX 2C; CX 665V; *see also* F. 110)

According to complaint counsel, in 1978 Grand Union could have entered the Atlanta SMSA by acquiring the individual Atlanta stores of either A & P, Ogletree's, Heathman's, Bi-Lo, or some combination thereof. (Parker 2348; *see also* Spearman 877, 945; Stewart 534, 639) Also, Grand Union could have acquired a regional chain headquartered outside of Atlanta, as identified in its Southeast Study, and then entered Atlanta *de novo* from its location. (Parker 2349-50; *see also* CX 32G; CX 576 [Kennedy] at 62)

With regard to A & P, Dr. Curhan testified: [79]

Well, in the absence of more specific knowledge, I can't comment with a great deal of conviction. But if by that it was meant to acquire some of the smaller A & P stores then I can't imagine that relationship.

Why they would want to sell [the] 41,000 foot stores doing 180 to \$240,000 apiece, I can't imagine that, either. I doubt that A & P could have made an arrangement with Grand Union to enter that market.

(Curhan 3000-01)

Grand Union in its Southeast Study identified 12 southeastern regional firms of which six have warehouses within shipping distance of Atlanta. Grand Union presently ships over 250 miles to its Florida West Coast supermarkets from its Hialeah warehouse. (CX 574 [Goulding] at 53; CX 589 [Wood] at 66, 108; RPF 274, 275) These chains are:

Bruno's	Birmingham, Alabama	150 miles
Red Foods	Chattanooga, Tennessee	114 miles
Harris-Teeter	Charlotte, North Carolina	235 miles
Ingles	Asheville, North Carolina	197 miles
Bi-Lo	Greenville, South Carolina	142 miles
Piggly Wiggly Southern	Vidalia, Georgia	180 miles

(CX 32A-S; Rand McNally)

Red Foods is located 114 miles from Atlanta. While it would also be feasible to reach Atlanta from its warehouse in Chattanooga, there is

no evidence that Grand Union would have caused it to expand to Atlanta. As Dr. Curhan testified:

So I can't see that Grand Union, even if by a stretch of the imagination they had decided to buy Red Food for Chattanooga's sake, whether they then would have used that to go into Atlanta, I think that's the scary part of that. I can't see that part of it.

(Curhan 2970)

Piggly Wiggly and Community Cash are similar small chains. Piggly Wiggly (unrelated to Piggly Wiggly of North Carolina) operates sixty-five stores from its headquarters in Vidalia, Georgia. (*Progressive Grocer's Marketing Guidebook*, p. 208 In 1977, it had six stores in Augusta and thirteen in Macon. (CX 2D, L, CX 665Z82-Z83, Z295) The rest of its stores [80] are in more rural locations. Dr. Curhan described this company as a mismatch for Grand Union. (Curhan 2972) A discussion of Community Cash is contained at (F. 184, *infra*).

92. A precedent of *de novo* entry into Atlanta by a supermarket chain building new stores from an established warehouse base is that of Winn-Dixie. Winn-Dixie operated warehouses in Greenville, South Carolina and Montgomery, Alabama. (B. Thomas 1477) Greenville and Montgomery are respectively 142 and 166 miles from Atlanta. (Rand McNally) In the 1960's, Winn-Dixie built stores out of its Greenville and Montgomery warehouses toward and into Atlanta, until in 1969 Winn-Dixie build a warehouse in Atlanta. (B. Thomas 1478) When the Atlanta warehouse was opened, it assumed the supply functions of a number of stores previously supplied by the Greenville and Montgomery warehouses. (B. Thomas 1479)

6. Grand Union as a Perceived Potential Entrant

93. Charles Thomas, Kroger's Group Vice President, testified that prior to June 1978, he did not perceive Grand Union as likely to enter Atlanta. (C. Thomas 1374, 1375) When asked whether in 1978 he perceived Grand Union as likely to enter Atlanta, Bert Thomas, the President of Winn-Dixie, answered "no way." (B. Thomas 1513)

None of the Colonial management who testified perceived Grand Union as likely to enter Atlanta. Mr. Stewart, the former President of Colonial, Mr. Isaacs, Vice President for the Atlanta Division, and Mr. Spearman, Regional Vice President, never perceived Grand Union as likely to enter Atlanta *de novo*. Stewart 640-41; Isaacs 2583; Spearman 875-76) Mr. Spearman had once heard rumors that Grand Union was interested in acquiring Alterman (Spearman at 759), but he never perceived Grand Union as likely to enter Atlanta in any way other than if it had acquired Alterman. (Spearman 876)

7. Changes in Colonial's Atlanta Operations Since The Acquisition

94. Grand Union officials testified about changes in Colonial's Atlanta operations, and some "basic improvements" which have been made. (RPF 869) Since the acquisition, additional capital is now available for new stores as well as older store remodelings (Isaacs 2586), and Grand Union has increased Colonial's new store expansion program in Atlanta. (Isaacs 2601) All new stores will have departments which will assist Colonial in competing against Kroger, in particular. (Spearman 872) Grand Union has also allowed the Atlanta Division to close unprofitable stores, something prior management had been unwilling to do. (Isaacs 2587) [81]

Formerly there were only two price zones for the entire Atlanta Division—one for all the Big Stars and one for the remaining Colonial stores. Since the acquisition, and Grand Union's introduction of pricing departments throughout Colonial, there are now ten price zones for the area. (Spearman 870-71) Mr. Spearman testified that the price zones have allowed Colonial to be more price competitive, particularly as against Kroger. (Spearman 811) Mr. Solomon testified that a large number of price zones in a given area is an indication that the marketplace is competitive. (Solomon 1025-26)

Grand Union has lowered gross profit margins on dry groceries, meat and produce because it has "[gone] after more sales [and become] more aggressive in gaining additional sales in existing stores." (Isaacs 2589) It has instituted more aggressive shelf prices and lower-priced advertised features (Isaacs 2587-88); increased the variety of products offered in the stores in reaction to the variety Kroger now offers (Spearman 872-73); and more than doubled the volume of general merchandise to over 6% of total store sales. (Spearman 872-73; Isaacs 2588, 2621) Increasing the emphasis on general merchandise, which carries a higher gross profit margin than groceries, allowed Grand Union to lower grocery prices while remaining profitable, and is popular with shoppers. (Isaacs 2588)

Grand Union has increased the wage scale of management in the Atlanta Division, particularly at the level of store managers and co-managers, who under Colonial were not compensated commensurate with managers of competing stores. Through improved compensation, Grand Union has been able to improve the quality of management, particularly at the store level. (Isaacs 2586)

Mr. Gregerson testified about the changes he has noticed in Colonial's Big Star stores in Atlanta since the acquisition:

A. I believe them to be more vigorous in their advertising and maybe in their store operations.

Q. What do you mean by "more vigorous in their operation"?

A. I think their ad items are probably hotter priced . . . They'd have a little lower prices in their ads than we would have had before.

Q. What do you mean by store operations? [82]

A. More exciting.

(Gregerson 378)

Atlanta was Colonial's most profitable division prior to its acquisition by Grand Union. (F. 82)

B. *The Augusta, Georgia SMSA*

1. Demographics and Location

95. In 1978, the Augusta SMSA (see F. 39) was the 127th largest in the country. Between 1970 and 1978, the population of the SMSA grew from 275,789 to 290,900, an increase of 5.5%. (Bureau of the Census, *Population*)

Augusta is within trucking distance of the following cities:

150 miles from	Atlanta, Georgia
169 miles from	Asheville, North Carolina
229 miles from	High Point, North Carolina
154 miles from	Charlotte, North Carolina
114 miles from	Spartanburg, South Carolina
210 miles from	Salisbury, North Carolina

(Rand McNally)

2. Colonial in the SMSA

96. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Augusta in 1972 and 1977 were as follows:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Winn-Dixie	15.0	15.2	Winn-Dixie	14.7	15.0
Colonial	13.3	13.6	Colonial	12.6	12.8
Bi-Lo	10.1	10.3	Bi-Lo	11.7	11.9
Piggly Wiggly			Piggly Wiggly		
Southern	8.9	9.0	Southern	11.4	11.6
A & P	8.5	8.7	Kroger	8.2	8.4
Food Fair	4.0	4.0	A & P	4.4	4.4
Kroger	3.4	3.5	Southland	2.4	2.5
Southland	2.4	2.4	Food Fair	1.5	1.5

(CX 2D) [83]

The four-firm concentration ratios for grocery stores, (SIC 541), as provided by the Bureau of the Census, *Retail Trade*, are as follows:

<u>1972</u>	<u>1977</u>
47.2%	55.2%

The four-firm concentration ratios for supermarkets, as provided by Bureau of the Census, *Retail Trade*, are as follows:

<u>1972</u>	<u>1977</u>
68.4%	73.7%

(F. 52, 53)

Colonial operated twelve supermarkets in the Augusta SMSA at the time of the acquisition. (Admissions 28; CX 260L) Bi-Lo, which increased from two to five stores, and Piggly Wiggly, which went from four to six stores, increased their market shares. (CX 665Z65, Z82, Z83) In 1978 Piggly Wiggly reported opening a seventh store. (CX 665Z83) A & P went from nine to three stores (CX 665Z71); its market share was halved. Kroger increased its market share. In 1977, there were also three Harris-Teeter stores which opened in November and December of that year. (CX 665Z73)

Mr. Addison, current Vice President of the Carolina Region said of Colonial in Augusta:

... We had good locations and kept our facilities up in that particular market. We had little change in store management and we have done quite well in that particular area But over the years we have been more aggressive with our programming and storekeeping and keeping our facilities up in that market. It has been a good market for us.

(Addison 2676-77)

In its 1977 report on the six major markets in the Columbia Division, Colonial announced that "In view of existing [84] comparatively strong image and share of the market, priority should be given to protecting the Augusta market." (CX 447B)

Colonial's 1979 new store development program, prepared before the acquisition, targeted the August SMSA for the opening of five new stores in the period between 1979 and 1983. (CX 359D) Two of these new supermarkets were to open in late 1979, and were each expected to have sales in excess of \$110,000 per week. (CX 359A)

3. Barriers to Entry

97. Mr. Stewart, former President of Colonial and a Colonial/Grand Union Vice President, testified that it would take six 30,000 square

foot supermarkets to effectively enter the Augusta SMSA. (Stewart 586)

Dr. Parker testified that, in his opinion, there are moderate barriers to effective entry into the Augusta market (Parker 2356), and that, based on an analysis of the market structure, it is very likely that this market is performing less than competitively. (Parker 2387; *see also* Marion 1976A-78) However, there have been new entrants into the Augusta market in recent years. Bi-Lo, which has had stores in the Augusta suburbs since at least 1972, did not enter the City of Augusta until after 1975. (Stewart 641; CX 66Z65) Harris-Teeter opened its first three Augusta stores in late 1977. (CX 665Z73)

4. Performance of the SMSA

98. Mr. Addison, Colonial Regional Vice President for Augusta, described the marketplace:

Augusta is a little different from the rest of South Carolina due to the influence of the Atlanta-based Kroger stores and the A & Ps out of Atlanta. The wage rates paid in the Augusta market are higher than they are in the rest of South Carolina, which over the years apparently has led to a little bit higher margin in that area. Those margins until recently—back in September we lowered our margins due to the growth of Kroger and their strength in that market. We lowered our margins there so they are about equal to the rest of the Division, but we were carrying [85] a little higher margins in that area, primarily due to the labor contracts out of the Atlanta market. We are influenced by it.

(Addison 2676-77)

There have been several changes in the list of competitors in the Augusta market in recent years. At one time A & P and Colonial were the only chain stores in Augusta. (Spearman 764-65) A & P, which had decreased its presence to only three stores by 1977 (CX 665Z71), had only one store left in 1979. (Spearman 765) Food Fair (Pantry Pride) had been in Augusta for many years. It had dropped to eighth-ranked competitor in 1977, and has since withdrawn from Augusta entirely. (Spearman 885)

Kroger has been in Augusta for a long time, but it recently upgraded its stores to large, new "super stores." (Addison 2687) It constructed six new stores between 1974 and 1979. (C. Thomas 1339; Spearman 764) Kroger serves and supervises its Augusta stores from Atlanta. Since 1979, Kroger has become more aggressive in its pricing (Addison 2687), and its market share in Augusta is increasing. (Spearman 764; Addison 2676, 2686; F. 96) As a result of Kroger's competition, Colonial reduced its margins on dry groceries 1-1/4% in September 1980 to better compete with Kroger. (Addison 2685-87)

Mr. Spearman, describing the market in Augusta, testified that:

To say the least, even if it was a settled market, with the approaches that Kroger is taking, which is part of the Atlanta merchandising concept in Augusta. . . . It is a very competitive market. You have Piggly Wiggly Southern in the Augusta market; and that's probably one of the first areas that they have reached outside of these little sleepy Georgia towns, because of some 285,000 population in Augusta today. So it is very competitive.

(Spearman 886; see Stewart 645; Isaacs 2562-64)

In response to the question whether he considered Augusta a competitive market, Mr. Addison testified: [86]

Extremely so. As I mentioned, we just lowered our margins there and we have gained a little market share since that time in volume, but we are actually making less money now than we were before due to that lower structure, and I think it's getting more competitive almost on a weekly basis.

(Addison 2680)

5. Grand Union as a Potential Entrant

99. Complaint counsel considers each of the twelve acquisition candidates listed in the Southeast Study (F. 69) as a potential means of entry into any market within 250 miles of its warehouse. (CPF 397) Grand Union presently serves expansion stores on the West Coast of Florida from its Hialeah warehouse at distances of over 250 miles. (CX 574 [Goulding] at 53; CX 589 [Wood] at 66, 108; RPF 274, 275) Seven of the 12 firms identified in the Southeast Study have warehouses within 250 miles of Augusta. They are Harris-Teeter, Bi-Lo, Alterman, Food World, Food Town, Community Cash and Piggly Wiggly Southern. (CX 32E; Rand McNally)

Complaint counsel contend that although small regional chains may not be able to expand from their warehouse bases into other markets, Grand Union, with its greater financial resources (CX 576 [Kennedy] at 61; Woodberry 1751), would be in a better position to do so if it made this sort of acquisition.

Respondents state that, except for Alterman, they had no interest in acquiring any of the companies listed by complaint counsel as possible toeholds. (RPF 900-904) Dr. Curhan testified that Ingles and Alterman could enter the Augusta market without the aid of Grand Union. (Curhan 3007) Alterman had stores in Augusta until it withdrew from the market in the 1960's. (Curhan 3007)

6. Other Potential Entrants

100. Kroger, which has five new stores in Augusta, has three additional stores planned. (Addison 2679) Winn-Dixie, which opened two new stores since 1979, continues to look for store sites. (Addison 2679) As Mr. Addison testified: "We are expanding, so I think everybody is.

It's a growing market. Industry is high in that area, so I think it will continue to expand." (Addison 2679) Similarly, Dr. Curhan testified: "[T]he most important factors in Augusta would have been the [87] expansion of the new entrants, namely Bi-Lo, Harris-Teeter and also the expansion of Kroger. . . ." (Curhan 3007-08)

Dr. Parker perceived of Ingles and Alterman as potential entrants. (Parker 2357) Mr. Addison perceived Food Town as likely to enter Augusta. He based his opinion on the fact that Food Town has stores in a number of cities in South Carolina, including Columbia, which is approximately 60 miles from Augusta. (Addison 2679)

7. Grand Union as a Perceived Potential Entrant

101. Neither Bert Thomas, President of Winn-Dixie, nor Charles Thomas, Group Vice President of Kroger, perceived Grand Union as a potential entrant. (B. Thomas 1513; C. Thomas 1374-75) Mr. Spearman, a native of Augusta, never perceived Grand Union as likely to enter the area. (Spearman 885-86) Neither Mr. Stewart, Colonial's former President, nor Mr. Isaacs, Colonial's Vice-President for Augusta from 1973-76, ever perceived Grand Union as an entrant into Augusta. (Stewart 645; Isaacs 2584)

8. Changes in Colonial's Augusta Operations Since the Acquisition

102. Mr. Isaacs, Colonial's Vice President for Augusta from 1973-76, testified that at that time Augusta had the highest sales and profits of any area in Colonial's Columbia Division. During his tenure, however, Colonial's market share declined as a result of expansions by Kroger, Piggly Wiggly, Bi-Lo and new entrants. (Isaacs 2562; *see also* F. 96) "Augusta at the time was known to be a fairly good growth area, so everyone was expanding with new stores or replacement stores." (Isaacs 2652) Mr. Addison, Colonial's Regional Vice-President for Augusta, also testified about the Colonial stores in the area:

Basically those stores over the years have been better maintained than the other stores in the Columbia Division. . . . We had good [88] locations and kept our facilities up in that particular market. We had little change in store management and we have done quite well in that particular area.

* * * * *

But over the years we have been more aggressive with our programming and storekeeping and keeping our facilities up in that market. It has been a good market for us.

(Addison 2676, 77)

Mr. Addison described the changes in Augusta since Grand Union's acquisition:

We have recently, within the last 18 months, redone every store, merchandised, up-

graded, and painted all the stores in that market, with the exception of one in Clearwater which we plan to do in 1981. We also opened two stores this year, one in North Augusta in February and one this past September. So we have opened two new stores there. These are large stores with bakery-delis. . . . [B]oth of them are 28,000 [square feet].

(Addison 2677)

C. The Macon, Georgia SMSA and the Greenville, South Carolina Subdivision

1. Demographics and Location

(a) *Macon, Georgia*

103. In 1978, the Macon SMSA (see F. 44) was the 148th largest SMSA in the country. Between 1970 and 1978, its population grew from 226,782 to 243,100, or 7.2%. (Bureau of the Census *Population*)

Macon is located in central Georgia:

80 miles from	Atlanta, Georgia
241 miles from	Asheville, North Carolina
221 miles from	Birmingham, Alabama [89]
183 miles from	Greenville, South Carolina
100 miles from	Vidalia, Georgia

(Rand McNally)

104. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Macon in 1972 and 1977 were as follows:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Piggly Wiggly	24.7	25.4	Piggly Wiggly	33.6	34.7
Winn-Dixie	12.0	12.3	Colonial	8.9	9.1
Colonial	5.9	6.1	Winn-Dixie	8.6	8.9
A & P	3.5	3.6	Kroger	7.1	7.3
Munford	3.4	3.5	Alterman	3.1	3.2
Alterman	3.4	3.5	Munford	2.1	2.2
Kroger	3.2	3.3	Giant Discount	1.4	1.5
Bateman	3.0	3.1	Bateman	1.2	1.3

(CX 2L)

Piggly Wiggly is clearly the market leader in Macon. In 1972 it had nine stores which accounted for one-quarter of all food sales. By 1977 it had thirteen stores and a market share of one-third. Colonial be-

tween 1972 and 1977 had a three percent increase in market share; Kroger, which had two stores in 1972 and was ranked seventh, built a third store, increased its sales four-fold and more than doubled its market share. A & P, with five stores in 1972, had withdrawn from the area entirely by 1977. (CX 665Z287) Munford, which runs 26 Majik convenience stores (CX 665Z293), remained in the top eight along with Bateman, a local independent. There are seven Southland (7-11) and seven Tenneco Oil convenience stores in Macon. (CX 665Z297,Z299)

The four-firm concentration ratios for grocery stores, (SIC 541), as provided by Bureau of the Census, *Retail Trade*, were as follows:

<u>1972</u>	<u>1977</u>
50.3%	67.4%

(F. 52)

The four-firm concentration ratios for supermarkets, as provided by Bureau of the Census, *Retail Trade*, were as follows: [90]

<u>1972</u>	<u>1977</u>
79.1%	81.8%

(F. 52, 53)

(b) *Greenville, South Carolina Subdivision*

105. Complaint counsel has divided the Greenville/Spartanburg SMSA into a Greenville subdivision and a Spartanburg subdivision. (F. 42) The Greenville, subdivision consists of Greenville and Pickens Counties. Between 1970 and 1978, the population of the Greenville subdivision increased from 299,730 to 344,300, or 14.9%, twice the national average. (Bureau of the Census, *Population*)

The city of Greenville is located in northwest South Carolina:

131 miles from	Wilkesboro, North Carolina
142 miles from	Atlanta, Georgia
216 miles from	Chattanooga, Tennessee
96 miles from	Charlotte, North Carolina
170 miles from	High Point, North Carolina
140 miles from	Salisbury, North Carolina
58 miles from	Asheville, North Carolina

106. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Greenville in 1972 and 1977 were as follows:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Winn-Dixie	26.8	27.5	Bi-Lo	32.2	32.6
Bi-Lo	26.0	26.7	Winn-Dixie	23.4	23.7
Kash & Karry	8.8	9.1	Ingles	10.6	10.8
A & P	4.9	5.0	Community Cash	5.2	5.3
Colonial	3.5	3.6	Kash & Karry	4.3	4.3
Community Cash	1.8	1.8	Colonial	2.3	2.3
Food Fair	1.7	1.7	Southland	.9	1.0
Munford	1.0	1.1	Duckworth Foods	.5	.5

(CX 2J)

Winn-Dixie was number one in 1972 and had 21 stores. By 1977, it had opened one more store, but had dropped into second place behind Bi-Lo, which had 20 stores in 1977, five more than it had in 1972. (CX 665Z217, Z182) Between them, Bi-[91]Lo and Winn-Dixie accounted for over fifty percent of all food store sales. Kash & Karry, a single store independent, lost market share between 1972 and 1977. In 1977, Ingles, which entered the market in 1972, was number three with ten stores. (CX 665Z199) Community Cash opened five more stores (CX 665Z184), and more than doubled its market share between 1972 and 1977. A & P, number four in 1972, had no stores left in the market in 1977. (CX 665Z195) Colonial's market share dropped from 3.5 in 1972 to 2.3 in 1977. Food Fair, with one store in 1972, withdrew from the market by 1977. (CX 665Z188)

The four-firm concentration ratios for grocery stores, (SIC 541), are as follows:

<u>1972</u>	<u>1977</u>
68.3%	72.3%

The four-firm concentration ratios for supermarkets are:

<u>1972</u>	<u>1977</u>
(Not available)	94.3%

(F. 52, 53)

2. Colonial in the Macon SMSA and the Greenville Subdivision

(a) Macon, Georgia SMSA

107. In 1977, Colonial had five supermarkets in the Macon SMSA

(Admissions 50), and was ranked second in market share for both supermarkets and grocery store sales. (CX 2L; CX 664A; Admissions 49) Colonial increased its market share by one-third between 1972 and 1977. (F. 104)

Mr. Spearman testified that in 1978 Colonial was committed to the Macon market and was considering additional locations there. (Spearman 763-64) Of the ten stores Colonial considered closing as part of its 1979/80 program for the Southern division, none were in this SMSA. Four new Colonial stores were planned for Macon during the period from 1980-83, none of which was to replace an existing store. (CX 358C)

(b) *Greenville, South Carolina Subdivision*

108. In 1977, Colonial operated four stores in Greenville County and one in Pickens County (CX 331K), and was scheduled to open one new store in 1978 and another in 1979. (CX 351Z1-Z2) One new store with a bakery and deli did open in 1978. Mr. Spearman called it a "complete supermarket". (Spearman 771- [92]72) In 1977 Colonial was the sixth largest competitor in this market, with a market share of 2.3%. (F. 105)

Subsequent to the purchase of Colonial by Grand Union, new management closed all Colonial operations in the Greenville subdivision. However, the vice president of the Carolina Region said that they would be looking at the Greenville market "to go back in and re-enter at some point in time, I would say within the next five years." (Addison 2665-67)

3. Barriers to Entry

109. Mr. Stewart testified that serving Macon would require three stores. (Stewart 586) To enter the Greenville/Spartanburg SMSA *de novo*, he would go to Greenville first because it has a separate newspaper. Serving Greenville, in his opinion, would take four stores. (Stewart 586)

Dr. Parker testified that there are substantial barriers to effective entry into the Macon SMSA and the Greenville subdivision. (Parker 2352, 2340) Respondents note (RPF 774) Dr. Parker's testimony that Ingles' entry into Spartanburg might indicate entry barriers are not as high as he would expect based on the concentration ratio. (Parker 2345) Since Ingles entered Greenville at the same time (Woodberry 1732, 1746), and Greenville has an even higher concentration ratio than Spartanburg, respondents believe that this testimony may be equally applicable to the Greenville market.

4. Performance of the Macon SMSA and the Greenville Subdivision

(a) *Greenville*

110. Based on his analysis of the structure of the Greenville market, Dr. Parker testified that it is very likely it is performing less than competitively. (Parker 2340)

Ingles entered Greenville and Spartanburg in 1971/1972. By 1980, Ingles had ten stores in Greenville and four in Spartanburg. (Woodberry 1732, 1746) In 1977, Ingles was ranked third in Greenville. (F. 105)

Bi-Lo, number one in the Greenville-Spartanburg SMSA and in Greenville (CX 2H, J), but number two in Spartanburg (CX 2I), is headquartered in Mauldin, eight miles outside of Greenville. Mr. Isaacs described its growth:

[I]t started in Greenville, buying some older stores and getting started. And then as they did well, they had a very low-price image, as they made money, they [93] opened up bigger, newer stores. So they had quite a spectrum from a very small, very old store, to some new modern stores.

Bi-Lo was, of course, like Winn-Dixie, nonunion. Bi-Lo had something that I felt was an inducement to many people in that area to trade with them, and that was the service meat department. At that time they were opening nothing except stores where they had the butchers behind the counter serving, no self-service meats. Everything was on a service basis. In later years, they are opening some stores with self-service now, but at that time everything was service. It was quite an asset to them, in my opinion.

(Isaacs 2570-71)

When Food Fair withdrew from Greenville subsequent to 1975, Bi-Lo acquired the store and it is operated as a Bi-Lo today. (Spearman 898-99; Curhan 2993)

Winn-Dixie, number two in the SMSA and in Greenville, has had stores in the area since 1955, when it acquired Dixie Home stores of Greenville. (B. Thomas 1493) It has a warehouse and a division headquarters in Greenville. (Isaacs 2570)

Although Community Cash was listed as having one store in Greenville County in 1972 (see CX 665Z184), it really entered the Greenville area subsequent to 1976, by acquiring five A & P stores when A & P withdrew its conventional stores in Greenville. (Woodberry 1746-47; Curhan 2992) Notwithstanding its success in Spartanburg (Spearman 900), Community Cash is not doing as well in Greenville. (Curhan 2992)

Kash & Karry is a successful local one-store independent in Greenville. In 1960, the one store was doing \$200,000 in weekly sales. (Spearman 768) Kash & Karry has lost market share since Ingles and Community Cash entered the area in the 1970's. (CX 2J)

A & P formerly had traditional stores in Greenville which were closed around 1976. (Isaacs 2572; Spearman 897-98) In their place the first two A & P Family Marts in the country were built in Greenville (Woodberry 1746), where they are a major factor. (Woodberry 1746; Curhan 2992) In response a [94] question about whether the two stores seem to be doing well, Mr. Woodberry testified: "One of their Greenville stores is doing a tremendous business. Both of them are doing well, apparently. They certainly have put a crimp in our business when they are open." (Woodberry 1749; *see* Curhan 2992)

(b) *Macon*

111. According to the Bureau of the Census, Macon had a population increase of only 9,100 people between 1972 and 1977. Dr. Parker testified that "Macon is not that attractive. It's a slow-growth market." (Parker 2334; Curhan 3002) Mr. Stewart and Mr. Spearman described it as a competitive area for retail food stores. (Stewart 645; Spearman 887) Respondents cite the local commissary as a major factor increasing the competitiveness of this market (RPF 916) because this commissary did almost the same volume of business as Colonial and Winn-Dixie in this market. (Curhan 3006) Respondents also contend that, despite the increasing margin by which Piggly Wiggly has led this market (CX 2L), there have been many changes in the Macon SMSA.

A & P has closed all its older stores in the area since 1975 and recently re-entered with one Family Mart "super store" in the Macon suburb of Warner Robins, 10 miles from Macon proper in Houston County, which is within the Macon SMSA. (Spearman 887) By 1978, the Family Mart had an estimated market share of 5%. (Spearman 762) Kroger, which serves and supervises Macon out of its Atlanta Division, has become extremely aggressive in Macon as it has in Atlanta (Spearman 762-63), and continues to gain market share. (*See* CX 2L; F. 104) Its three Macon stores have all been built since 1973. (C. Thomas 1339) Jewel entered Macon with one of its Jewel-T box stores in December 1979. (Curhan 3002)

5. Potential Entrants into the Macon SMSA
and the Greenville Subdivision

(a) *Macon*

112. Respondents cite several firms with potential to enter or expand into the Macon SMSA. (RPF 922-929) The Kroger stores in Macon are part of the Atlanta Division of that company and respondents expect that Kroger's aggressive policies implemented in Atlanta

(F. 89), in terms of building of new stores and pricing (Spearman 763), will be further implemented in Macon.

Respondents' posit that A & P, which closed all seven of its traditional stores in Macon by 1977, will open some of the Family Mart "super stores" of the type it opened in Warner Robins. (Spearman 887) Alterman closed one of its two Macon stores in September of 1979, but has another store under [95] construction in Macon. (RX 40) Jewel-T opened its first store in Macon in 1979 (Curhan 3002), and respondents contend that its pattern of growth in other areas of the Southeast make it likely that it will open additional stores in Macon. The store that Alterman closed in 1979 is now run by a local independent. (RX 40) Timberlake Grocery Company, a wholesaler serving independents, is located in Macon. (RX 30F)

Bi-Lo has been moving in the direction of Macon and has stores within 30 miles. (Curhan 3004) Mr. Roehm considered Bi-Lo a potential entrant. (Roehm 2741-42) Since Bi-Lo's warehouse is 184 miles from Macon and it already has stores fairly close to Macon, it has the capability to serve the area and could enter if it believed that there were opportunities for it there. (Curhan 3004-05)

Any distribution center in Atlanta not already serving Macon would be able to do so. (Adelman 3241-46) This would include Associated Grocers, Fox Industries, J. L. Lester & Sons Wholesale Grocers, Inc., and Southland Grocery Co. (RX 30G) Other distribution centers in Alabama, Tennessee and South Carolina are also within "striking" distance of Macon. (RX 30G)

(b) *Greenville*

113. Food Town was perceived as a potential entrant into Greenville by Messrs. Woodberry and Stewart. (Woodberry 1747; Stewart 652) Mr. Stewart perceived Food Town as a likely entrant into Greenville because it is expanding in Spartanburg and has moved into Columbia and other areas in that direction, "so that seems to fit into the pattern." (Stewart 652)

Dr. Curhan agreed with Dr. Parker (Parker 2342-43, 2346) that Harris-Teeter is a potential entrant into Greenville. Industry witnesses also perceived Harris-Teeter as an entrant into Greenville. (Stewart 652; Spearman 899, 902). It is an expansion-oriented firm and has its warehouse in Charlotte, only 92 miles away. (Curhan 2995)

A & P may expand in Greenville, based on its success with its two Family Marts. (F. 110)

Respondents cite Kroger as a "logical potential entrant into this area" (RPF 791), although Mr. Thomas of Kroger refused to answer questions on this point. (C. Thomas 1334) Kroger is a recent entrant into several cities in the Carolinas (C. Thomas 1334-38), and has plans

to build a new warehouse between Charlotte and Columbia to serve these stores. (C. Thomas 1310) Kroger has a warehouse in Atlanta (C. Thomas 1308), 142 miles away. (F. 105) Dr. Parker perceived Kroger as a potential entrant (Parker 2342, 2346), as did Dr. Curhan. (Curhan 2995) Mr. Spearman and Mr. Woodberry concurred. (Spearman 899, 902; Woodberry 1747, 1748-49) [96]

Respondents also note that there are a number of companies within "striking distance" of the area which may be considered potential entrants. Associated Grocers and Fox Industries serve the Greenville Market Area from Atlanta, 142 miles away. In addition to Kroger, the following companies with warehouses located in the Atlanta Market Area as defined by *Progressive Grocer*, do not already serve stores in Greenville/Spartanburg but could presumably serve stores in this area:

Alterman
J.L. Lester & Sons Wholesale Grocers, Inc.
Southland Grocery Co. (Division Fleming Co.'s, Inc.)
Timberlake Grocery Co.

(RX 30N-P)

Piggly Wiggly Carolina Co. in Charleston serves the Greenville Market Area. Therefore, Wetterau Food Services, which also has a distribution center in Charleston, could serve the area. (RX 30N-P)

K.M.C. Co. serves stores in the area from Knoxville, Tennessee, 174 miles away. There are seven other food distribution centers in Knoxville which could similarly serve Greenville/Spartanburg. These are:

Giant Food Markets, Inc.
Giant Wholesale Grocery Co.
The H.T. Hackney Co.
Oakwood Markets
Pay Cash Grocery Co., Inc.
Quality Foods, Inc.
The White Stores, Inc.

(RX 30N-P)

6. Grand Union as a Perceived Potential Entrant

(a) *Macon*

114. The President of Winn-Dixie and the Group Vice President of Kroger both testified that they did not perceive Grand Union as likely to enter Macon. (B. Thomas 1513; C. Thomas 1374-75) Mr. Stewart did not perceive Grand Union as likely to enter Macon by building or leasing new stores or by acquisition, unless Grand Union had ac-

quired Alterman, which operated in Macon. (Stewart 645-46) Similarly, Mr. Spearman testified that only by buying Alterman would any company enter Macon by acquisition and he did not perceive Grand Union as likely to enter Macon. (Spearman 887, 926-27) [97]

(b) *Greenville*

115. No trade witness perceived Grand Union as likely to enter the SMSA. (B. Thomas 1512; Woodberry 1747-48) None of the Colonial witnesses perceived Grand Union as a likely entrant. (Stewart 652-53; Isaacs 2584; Spearman 899, 902)

7. Grand Union as a Potential Entrant

116. Complaint counsel contend that any of the twelve acquisition candidates listed in the Southeast Study may have served as a potential means of entry into any market within 250 miles of its warehouse. (CPF 397) As discussed in connection with the Atlanta SMSA (F. 91), Grand Union's Mr. Kennedy viewed Bruno's and Ingles as possible means of entry into North Georgia including Atlanta. According to the Southeast Study, the two "merger possibilities which were 'most impressive' were Bruno's and Ingles. With Bruno's located in Northern Alabama and Ingles in North Carolina, there exists a gap in their operating area consisting of all of North Georgia. There are expansion possibilities in all other directions for Bruno's and similarly for Ingles." (CX 32G) Both markets, Macon and Greenville, are within shipping distance of either Asheville, North Carolina or Birmingham, Alabama, making the acquisition of Ingles and Bruno's a possible means of entry into these markets. [Ingles entered the Greenville market in 1971 and by 1980 had ten stores in Greenville. (Woodberry 1732, 1746) Bruno's is not within shipping distance of Greenville—Birmingham, Alabama is almost 290 miles from Greenville. (RX 30G; Rand McNally) Ingles in Asheville is 241 miles from Macon. (Rand McNally)]

Eight of the twelve firms identified in the Southeast Study have warehouses within shipping distance of Macon. They are Harris-Teeter, Ingles, Bi-Lo, Community Cash, Bruno's, Piggly Wiggly Southern, Red Foods, and Alterman. (CX 32E; Rand McNally) Of these chains, Harris-Teeter, Ingles, Bi-Lo, Community Cash, Bruno's and Red Foods have no supermarkets in the Macon SMSA. (CX 665Z278-Z303) Alterman has a small market share in Macon. (CX 2L)

Nine of these companies have warehouses within shipping distance of Greenville. They are Lowes, Harris-Teeter, Alterman, Red Foods, Food Town, Food World, Community Cash, Bi-Lo and Ingles. (CX 32E; Rand McNally) Lowes, Harris-Teeter, Alterman, Red Foods and Food World do not operate in Greenville. (CX 665Z181-Z220)

Other major supermarket chains pursue a policy of acquisition and expansion. B.L. Thomas, President of Winn-Dixie, explained that company's expansion throughout the southeast as the "acquisition of a nucleus and then new store [98] expansion." (B. Thomas 1493) Grand Union has expanded by the acquisition of warehouses and supporting stores and then locating stores in new marketing areas served from that warehouse. This is illustrated in Grand Union's Florida operations. (CX 580 [Silvers] at 24-63; F. 150; F. 145-149)

Respondents argue that:

The record in this case is devoid of *any* evidence that Grand Union would have ever entered Macon by any means. Given the testimony that Macon was not an attractive area, an opinion with which complaint counsel's expert was in total agreement (Parker 2354), and the recent new entries and expansions in the area, there is no reason to think there will be any new entrants into Macon in the reasonably foreseeable [sic] future, let alone Grand Union.

(RPF 932; respondents' emphasis)

Respondents disclaim complaint counsel's contention that Grand Union would make a toehold acquisition of Alterman, Bi-Lo or Red Food and would have expanded into Macon between 1983 and 1988. (Parker 2354-55, 2494) Respondents claim that these companies were not considered for this purpose (*see* F. 91, where these companies are discussed in connection with the Atlanta market). [Alterman had a small market share in Macon in 1972 and 1977. (CX 2L)]

Dr. Parker predicted that Grand Union would have entered Greenville within five to ten years (Parker 2341) by acquiring Food Town or Alterman. (Parker 2465) Food Town was acquired by Del Haize, a Belgium company, in 1977, and thus may have been unavailable for acquisition in 1978. (Curhan 2965-66; Addison 2649)

8. Colonial Acquisition as a Toehold

117. Respondents argue that Colonial's market shares in Macon and Greenville SMSAs were so small that Grand Union's acquisition of Colonial must be considered a legal toehold. (RPF 436-38; 802-09)

As of 1974, Colonial had four stores in Greenville, one store in the suburb of Easley and two in Spartanburg. It closed the two Spartanburg stores that year. (Isaacs 2568) Prior to the tender offer, the four Greenville and one Easley stores were still open, as well as a new store in Spartanburg, [99] which had opened in 1978. There were no plans to build any additional stores in the area at the time. (Spearman 771) A 1977 Colonial document noted: "Have never really penetrated this big market. Need to find 'handle' before spending more on additional facilities." (CX 447B) Grand Union has closed all six stores and withdrawn from the area. (Spearman 836)

Mr. Isaacs was Colonial's Vice President for the area from 1973-1976. He testified that the four Greenville stores had been good stores at one time. However, by the early 1970's, they were in need of remodeling and updating. Although he had recommended that the stores undergo major renovations, top management never authorized this plan. (Isaacs 2568-69) By 1977, Colonial's market share had dropped to only 2.3%. (CX 2J) Its market share in 1978 was probably even lower. (Stewart 651) Dr. Parker agreed that Colonial was not a strong factor in Greenville. (Parker 2343).

Colonial opened a new store in Easley, eight or nine miles outside of Greenville, shortly after Mr. Isaacs became vice president in 1973. From the day it opened until it was closed in 1979 by Grand Union, the store was never profitable. Mr. Isaacs testified:

The Easley store was located in a new shopping center directly across the street from a very good volume Bi-Lo store in a shopping center. Also in that same shopping center was a good volume Winn-Dixie store. . . . It never did get off the ground saleswise. As a result, it did nothing but lose money for us.

* * * * *

We had the two stores, our immediate competition directly across the street, were very good. And there was really no reason, I guess, for a customer to change their shopping habits.

(Isaacs 2569, 2570)

Although Mr. Isaacs suggested that Colonial either spend the money necessary to gain sales or close the store, prior management failed to follow either course. (Isaacs 2569-70)

Colonial's sales in Macon have deteriorated over time, from being number one in the mid-1960s to its position today. Mr. Roehm, Colonial Vice President, testified as to why Colonial's market share eroded: [100]

I think it would be a combination of poor operations, poor merchandising, and a failure to upgrade facilities. And when I relinquished the responsibility for Macon in July 1979, we only had one modern supermarket out of the five in the Macon-Warner Robins market.

* * * * *

The four stores we had in Macon were almost in a cluster. We did not have stores on the east side of Macon, which was a growth area, nor did we have any in the northwest quadrant of Macon, which is the residential growth area of Macon.

(Roehm 2739-40)

According to complaint counsel's survey, Colonial's share of food and grocery sales was below 10% in 1972 and 1977. Its market share today is lower than it was in 1977. (Spearman 762) At the time of the acquisition, all five Colonial stores were losing money. Grand Union

has closed three of the four older stores. It has kept the newer store open and remodeled one of the older stores which serves a small local neighborhood. (Roehm 2741; Curhan 3003)

The Virginia Markets

D. *The Richmond, Virginia SMSA*

1. Demographics and Location

118. In 1978, the Richmond SMSA (F. 51) was the 64th largest SMSA in the country, and the second largest SMSA in Virginia. Between 1970 and 1978 the population of the Richmond SMSA increased from 547,542 to 611,700, or 11.7%. (Bureau of the Census, *Population*)

The city of Richmond is located in the center of the state:

105 miles from	Washington, D.C.
75 miles from	Newport News, Virginia
93 miles from	Norfolk, Virginia
142 miles from	Baltimore, Maryland
151 miles from	Raleigh, North Carolina [101]
166 miles from	Roanoke, Virginia
190 miles from	Greensboro, North Carolina

(Rand McNally)

2. Colonial in the SMSA

119. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Richmond in 1972 and 1977 were as follows:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Safeway	21.2	21.9	Safeway	21.1	21.7
A & P	9.4	9.7	A & P	.7	13.0
Colonial	7.5	7.7	Ukrop's	11.6	11.9
Food Fair	6.4	6.6	Colonial	6.4	6.5
Ukrop's	5.8	6.0	Southland	6.3	6.5
Rosso & Mastracco	5.3	5.5	Food Fair	4.6	4.7
Southland	4.2	4.3	Giant Food	4.3	4.5
Giant Food	4.1	4.2	Rosso & Mastracco	3.0	3.1

(EX 2S)

Between 1972 and 1977, Safeway and A & P remained first and second ranked, respectively. A & P increased its share by more than 25%. while Colonial's market share decreased. Ukrop's, a local inde-

pendent, doubled its market share during the five-year period. Southland, which operated 87 stores (7-11s) in 1977 (CX 665Z506), rose from seventh to fifth position, and its market share was virtually identical to Colonial's.

Other factors in this market not counted in the top eight Richmond competitors include:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Number of Stores</u>	<u>Food Store Sales \$000s</u>	<u>Competitor</u>	<u>Number of Stores</u>	<u>Food Store Sales \$000s</u>
Farm Fresh	3	10,319	Siegel's	5	11,748
Siegel's	4	7,479	Memco (Lucky's)	2	8,904
Luchard's	5	4,484	Farm Fresh	2	8,418
Food Town	3	4,369	Chuck's	3	8,189 [102]
Chuck's	3	3,399	Luckhard's	5	7,558
Harvey's	1	2,200	Food Town	3	7,326
			Winn-Dixie*	2	3,567
			Harvey's	1	2,850

* 1978.

(CX 665Z475-Z528)

The four-firm concentration ratios for grocery stores, (SIC 541), were:

<u>1972</u>	<u>1977</u>
45.2%	53.2%

The four-firm concentration ratios for supermarkets were:

<u>1972</u>	<u>1977</u>
58.0	68.7

120. In 1977, Colonial had nine supermarkets in the Richmond SMSA. (Admissions 67) Its future plan was to increase its market share in Richmond and move north to the Fredericksburg metropolitan area. (Stewart 563-67) Colonial had approved the hiring of a Richmond-based real estate agent to locate sites in Richmond and in Charlottesville, Virginia. (Stewart 563-64; CX 356F) By the time Mr. Stewart left Colonial's Richmond organization, four new sites were "tied down and underway" with two more "signed," a total of six new stores for the Richmond area. (Stewart 564) Colonial was also planning to remodel an existing store and establish two new stores in Charlottesville, and was working with a Charlottesville developer

who was also working in Fredericksburg and was aware of Colonial's interest in Fredericksburg. (Stewart 564-65)

In addition, Colonial's management hoped to open a subwarehouse in the Richmond area in the five years following 1978. (Stewart 562-67) This sub-warehouse would contain direct-shipped, fast-moving grocery-type items (Stewart 562), and would "... put [Colonial] in an excellent position not only to serve the Richmond market, but to serve the Charlottesville, Fredericksburg, any other development that we developed in the area that the Judge so rightfully calls Northern Virginia." (Stewart 566; *see also* CX 374A-Z67)

3. Barriers to Entry

121. Mr. Stewart indicated that six 30,000 square foot stores would be necessary to profitably enter the Richmond market (Stewart 576-79), and he stated that these six stores [103] should be in Richmond, Henrico, and Chesterfield counties. (Stewart 579) Other industry members operating in the Richmond area estimated that a new store of 30,000 square feet would cost \$700,000 to \$800,000 to equip. Inventory would cost between \$300,000 and \$1 million. (Connell 1250; Walters 1435)

Most of the major chains in the Richmond area place a full page advertisement on Sundays and two full pages on Wednesday evenings and Thursday mornings. (Connell 1226) Radio and television advertising costs increase the cost of entry into metropolitan areas such as the Richmond SMSA. (Connell 1263-64) Advertising costs are normally allocated to the stores served by the particular medium. (CX 267A-D; Connell 1264)

4. Performance of the SMSA

122. Giant Food was ranked seventh in Richmond in 1977. It formerly had four stores in Richmond serviced out of its Landover, Maryland warehouse. It has closed one of these stores, described as a "show place." (Isaacs 2558) Mr. Isaacs testified that it is rumored in the trade that Giant continues to do poorly in Richmond and is interested in selling its remaining three stores and withdrawing from the market. (Isaacs 2558; Curhan 2910) Giant Open Air, an independent, had two large stores in Richmond but recently closed one of them. (Connell 1251; Curhan 2910) Kings of Lynchburg, Virginia, which operates primarily stores in rural areas, entered the Richmond market with two stores in the 1970s but only has one store remaining. (Connell 1250-51) Lucky Stores of California entered in 1973 with its Memco discount operation by acquiring two stores from Farm Fresh. (Connell 1251; Curhan 291) Richfood supplies Lucky's stores in Richmond and in the Baltimore-Washington area. (Walters 1419) Lucky has not ex-

panded beyond its original two locations. (Connell 1251) Winn-Dixie entered Richmond from its distribution center in Raleigh and had three stores in the Richmond SMSA by 1980. (Connell 1232, 1250; B. Thomas 1474-75; Stewart 525; CX 630G-J)

5. Potential Entrants and Expanders

123. Winn-Dixie entered Richmond with one store in approximately 1971 (B. Thomas 1474-75), and had three stores by 1980. (F 122) Trade witnesses and respondents look to Winn-Dixie as an increasing factor in this market. (Connell 1232; Curhan 2918; RPF 409)

A Farm Fresh executive testified that he considers Richmond a good growth area for that company and predicts that this growth will occur once Farm Fresh completes its expansion program in Tidewater. (Walters 1442-43) Farm Fresh had three stores in the SMSA in 1972 but only two stores in 1977, and suffered a sales decline during the period. (F. 119) [104]

Respondents postulate that one of several independent operators or chains may acquire Giant's Richmond stores which are rumored to be for sale (F. 122), and use them to enter this market. (RPF 412) This would be aided by the existence of Richfood, the local cooperative wholesaler. (Walters 1417-21)

Kroger has a warehouse in Roanoke, Virginia, 166 miles from Richmond, and has expanded from Roanoke as far as Charlottesville, 65 miles from Richmond. (Curhan 2916; C. Thomas 1332-40) It has some possible name recognition in this market by virtue of the fact that it operates in contiguous areas. (Curhan 2917) Dr. Parker identified Kroger as a likely potential entrant into this area. (Parker 2306)

Respondents cite fifteen companies presently situated within a 200 mile "striking distance" of Richmond. (RPF 415) Malone & Hyde serves stores in the Richmond Market Area (as defined by *Progressive Grocer*) from a distribution center in Salem, in the Roanoke/Lynchburg area. (RX 30Z-11) In addition to Malone & Hyde and Kroger, the following chain store warehouses and independent wholesalers are also located in the Roanoke/Lynchburg area, but are not presently serving Richmond:

Deskins Supermarkets
Mick-or-Mack Stores, Inc.
Piggly Wiggly Mid-Mountain, Inc.
Virginia Foods of Bluefield
Virginia Foods, Inc.
J.D. Wyatt & Co., Inc.

(RX30Z11)

Similarly, Winn-Dixie serves Richmond out of Raleigh, 151 miles

away. Richfood does the reverse, and serves stores in Raleigh from Richmond. (Walters 1418) There are two other distribution centers in Raleigh which do not presently serve Richmond:

J.T. Davenport & Son, Inc.
Thomas & Howard Co.

(RX 30Z-11)

Giant Food and Pantry Pride (Food Fair) serve Richmond from the Baltimore Market Area as defined by *Progressive Grocer*. Giant's warehouse is in Landover; Pantry Pride's in Baltimore. (RX 30Z10)

6. Grand Union as a Perceived Potential Entrant

124. Thomas Connell, who has been with A & P in Richmond for 11 years and is Director of Merchandising for its [105] Richmond division, testified that he did not perceive Grand Union, or any other company, as likely to enter Richmond. (Connell 1271, 1277) Similarly, Eugene Walters, President of Farm Fresh, did not perceive Grand Union, or any other specific company, as likely to enter Richmond, although he testified that "nothing really surprises me" in the area of potential entrants. (Walters 1452-53)

James Rowe, Colonial's Vice President and Secretary at the time of the acquisition, has been in the industry since 1946. (CX 607 [Rowe] at 5) As to companies he thought were likely to enter Richmond, Mr. Rowe stated: "I think most of them [are] there that I'm aware of." (CX 607 [Rowe] at 41) Mr. Rowe further stated he did not expect Grand Union to enter Richmond. (CX 607 [Rowe] at 42) Henry Addison, presently Colonial/Grand Union's Regional Vice President for the Carolinas, was the Area Manager of Stores Operations in Richmond from late 1970 through early 1972. (Addison 2638) He had not perceived Grand Union as likely to enter Richmond. (Addison 2683) Joseph Isaacs, a Grand Union official and formerly Vice President of Colonial's Norfolk Division (which includes Richmond) from 1976-77, never perceived Grand Union as likely to enter Richmond. (Isaacs 2584)

William Stewart testified that he did perceive Grand Union as a potential entrant into Richmond (Stewart 594) based on Grand Union's existing locations to the north of Richmond; his knowledge of Grand Union's desire to expand into Charlottesville and Grand Union's plans for expansion, as elaborated by James Wood. (Stewart 593)

7. Grand Union as a Potential Entrant

125. Complaint counsel argue that Grand Union "has had an historical interest in and incentives to enter the Richmond, Newport News/Hampton and Norfolk/Virginia Beach SMSAs, and by 1978 it had the financial and managerial capabilities to do so." (CPF 463) Complaint counsel finds the location of Grand Union's Landover warehouse, 116 miles from Richmond (Rand McNally), a significant factor in the contention that Grand Union's natural expansion would have brought the company into Richmond by 1983, and probably by 1981. (Parker 2304) Giant Food serves its Richmond stores from a Landover, Maryland warehouse. (F. 123)

Prior to the acquisition of Grand Union by Cavenham, Grand Union had considered expansion into Richmond, Norfolk, Newport News and cities and towns where Colonial had stores. (Complaint Counsel Phys. Ex. A; CX 580 [Silvers] 49-55; CX 143A-B) These expansions were originally contemplated as part of a joint venture with Dart Drugs to open Super Darts, a combination drug and grocery store. (CX 580 [Silvers] 49-55) Negotiations with Dart Drug were eventually unsuccessful, although not before a site study of Richmond had been performed. (CX 312A-M; [106] *see also* CX 89) Grand Union management was committed at this time in Baltimore. (CX 84W)

In 1976, Grand Union considered entering the three Virginia SMSAs, including Richmond, by acquiring Giant Open Air Markets, a chain headquartered in Norfolk, Virginia. (CX 2M, N, S) However, Mr. Silver did not recommend this acquisition to Mr. Wood because of potential FTC objections and because of its "mix" of stores, manufacturing, and wholesaling, and its size. (CX 30)

Respondents deny that Grand Union's proximity to the Richmond SMSA made it a likely entrant and cite several factors which, they allege, made entrance into Richmond within any reasonable or measurable period of time unlikely. One factor was the failure of the Washington Division of Grand Union to produce a satisfactory rate of return compared to Grand Union's other divisions. (CX 580 [Silvers] at 104) In addition, there are still many sections of the metropolitan Washington area where there is either no Grand Union store or only a one-store entry. Respondents argue that "common sense" dictates that Grand Union would complete its penetration of the affluent Washington market, so very close to its Landover warehouse, before it expands 100 miles to the south to Richmond. (RPF 430)

Another factor cited by respondents is the failure of Grand Union to follow through on expansion plans regarding Charlottesville and Culpepper, Virginia. In January 1974, Grand Union reviewed a store site in Charlottesville, 65 miles northwest of Richmond, which had

been approved by prior management. The unequivocal decision was: "Turn down. Area cannot support present distribution and supervision." (CX 143A) In 1974 and again in 1975, Grand Union also reviewed a site for a large family center Grand Union in Culpepper, 35 miles southwest of its southernmost Virginia store in Fredericksburg and 75 miles northwest of Richmond. The site also had been approved in 1972 by prior management. During both reconsiderations, Grand Union's Real Estate Committee recommended cancelling plans "due to limited potential." (CX 126A, CX 131A)

The Grand Union Five Year Development Plan for 1976-81 specifically set forth the Company's expansion plans: "In regard to a new market entry, present plans focus upon the West Coast of Florida, the Baltimore area, and the South Jersey (Trenton) area, as well as such areas as Bucks County, Pennsylvania; Hunterton County, New Jersey; Grafton County, New Hampshire and Steuben County, New York (Central Division)." (CX 80Z21)

The Washington Division's five-year development plan for 1975-1979 listed 13 stores to open in Maryland during the plan period. (CX 80Z55) No stores were planned for anywhere in [107] Virginia. Another category of "additional possibilities for new store development" was also given. None of the 11 stores on that list was any closer to Richmond and Tidewater than were Grand Union's existing stores.

Grand Union's Business Plan for 1978/79 states: "The Budget for 1978/79 had been developed on the basis that there will be no change in the existing operations. Sales growth will be concentrated within the Supermarket Divisions, particularly in the State of Florida; moderate growth is planned in other supermarket areas." (CX 6N)

A third factor cited by respondents is Grand Union's commitment to the Baltimore market. Baltimore, along with Trenton and the West Coast of Florida, was one of the three expansion areas planned by Grand Union management prior to the Cavenham acquisition and continued under Cavenham. Grand Union entered the Baltimore area from the Landover warehouse in 1973/74 with stores in Timonium, Glen Burnie and Pasadena. (CX 8Z53, CX 592N) This area is approximately 25 miles from Landover. At the time of the Colonial acquisition a fourth store in Overlea was under construction. (CX 595M) This number was substantially below plan.

In 1975, when Grand Union had three stores open in Baltimore, it had anticipated an opening total of 13 stores by 1980—two in 1976/77, three in 1977/78, two in 1978/79, one in 1979/80 and two in 1980/81. (CX 80Z27) One reason development was slower than anticipated was state restrictions on construction because of inadequate sewage facilities. (CX 79Z-114) A Grand Union Development Plan commented: "Nevertheless this state has always been among the top 10 growth

areas in the country and as such it is still remains a most favorable target for us as a natural expansion of the Washington Division." (CX 79Z114)

Expansion into Baltimore did not proceed as anticipated for Grand Union. (CX 589 [Wood] at 65-66) In 1976, Grand Union estimated its share of the Baltimore market at 0.8% (CX 301A), compared to 22% for A & P, 18% for Pantry Pride and 15% for Giant. (CX 6Z55) Therefore, respondents contend (RPF 441), managerial resources of the Landover Division were occupied with trying to make the Baltimore stores profitable. Under these circumstances, an entirely new, simultaneous expansion within the Washington Division to Richmond, 150 miles away in the opposite direction from Baltimore, would have been extremely unlikely. (See Curhan 2907-08.)

Advertising costs were another factor respondents argue made expansion to Richmond unlikely. Grand Union advertised regularly in both major Washington newspapers, which are among the most expensive in the country. The newspapers provide advertising coverage for a large area which includes many [108] communities. Grand Union is paying empty advertising dollars since, in many areas under the umbrella of those newspapers, Grand Union does not have stores. As reflected in its business plans, Grand Union would plan to exploit those opportunities for expansion and filling in before looking afar for "opportunities." (Curhan 2913-14; CX 6Z35, Z266-Z267; CX 7Z50, Z501, Z513-Z514; CX 8Z208-Z214, Z517, Z523)

A final factor cited by respondents is that the labor force in Grand Union's stores served by the Landover warehouse is unionized. In 1977, Grand Union's average hourly pay rate for the Landover Division was \$1.50 per hour *greater* than in its second most expensive division, the Jersey Division. The difference between them was expected to increase in 1978 with Washington projected at \$8.22 per hour compared to \$6.65 for Jersey. (CX 6Z63) Many of the grocery stores in Richmond are non-union, *e.g.*, Ukrop's, Farm Fresh, Food Town, Giant Open Air, Pantry Pride, Siegel's and Chuck's. (Connell 1272) Winn-Dixie, Richmond's most recent entrant, is not unionized. (B. Thomas 510) Grand Union would have suffered a 2%-3% disadvantage in operating costs compared to them. In addition to lower costs, not being unionized gives a company greater flexibility in utilization of its labor force. (Connell 1273-74) Mr. Connell of A & P, which is unionized, commented that the cost saving could, among other things, "be used for additional profit" or be "a merchandising tool to maintain lower prices." (Connell 1274)

Union wage rates in the Washington, D.C. area are higher than the prevailing rates for union contracts originating in Richmond. (Curhan 2911-12) Dr. Curhan speculated that this may, in part, explain

the inability of Giant of Washington to achieve success in Richmond. (Curhan 2912; see F. 122)

However, the three largest competitors in the Richmond SMSA are unionized—Safeway, A & P, and Colonial. Also, A & P has a different union contrast for its Washington, D.C. and Richmond operations. (Connell 1258-59, 1272; CX 2S)

8. Alternative Means of Entry

126. Complaint counsel suggests that the greater growth rate of the Richmond and other Virginia SMSAs, as compared to that of Baltimore, made it likely that, barring the acquisition of Colonial, Grand Union would have sought to enter these lucrative markets in the near future. (Parker 2298, 2304, 2311-12, 2317-18; CPF 481) Grand Union could have expanded out from its Washington base of operations as did Giant, Safeway and Food Fair. (Parker 2310-11; Stewart 527) Of the six largest Washington, D.C. supermarket firms, only Grand Union did not operate in Richmond. (Parker 2298) Prior to the Colonial acquisition, Grand Union sought store sites in Fredericksburg (CX 220, 221, 222) and Warrenton, Virginia (CX 206A-B, 208, 209) which are not part of the Washington metropolitan area. [109]

Complaint counsel lists several other chains which would have been acquisition possibilities had Grand Union not wanted to enter this market *de novo*. (CPF 484 and 485) Giant Open Air, which operated in all three Virginia SMSAs was one possibility. This company had a 3.0% market share in Richmond in 1977. (CX 2S) Complaint counsel contends Giant Open Air's manufacturing and wholesaling operations could have been sold, as was done in the case of Colonial's non-retailing facilities. (Stewart 495-502, 612) Ukrop's had an 11.9% market share in Richmond in 1977. (CX 2S) Complaint counsel state that with Grand Union's financial resources, it could have expanded from the base provided by either of these chains. (CPF 484, 485)

9. Changes in Colonial's Richmond Operations Since the Acquisition

127. Dr. Parker testified that, in his opinion, Grand Union's *de novo* entrance into this market would have helped to deconcentrate the market. (Parker 2304-05, 2311-14, 2318-20) He stated that the acquisition of Colonial did not lessen competition in the market at that instant, however:

[T]he way an economist would look at the problem, they would say did it effect the likely present value of the future noncompetitive higher prices or poor performance measured in terms of profit. And I think the answer is clearly that it did increase the present value of future noncompetitive returns at that point in time.

(Parker 2308-09)

Colonial's former Vice President for Richmond testified that through the 1970's Colonial did poorly in Richmond. Although it had once been a profitable area for Colonial, management had failed to invest in Richmond by building new stores or modernizing and renovating existing stores. Mr. Isaacs, who served as manager of the Norfolk Division [including Richmond] in 1976-77 testified: "[W]e were not competitive from the standpoint of store facilities, good locations. Most of our stores were pretty much up in age from 10 to 15 years old and really not competitive facility-wise, or prime location-wise with many of our competitors." (Isaacs 2555; *see also*, Addison 268)

Mr. Isaacs and the real estate manager spent considerable time looking for new sites, but Colonial corporate management did not authorize new stores for Richmond. Other [110] than emergency equipment, Colonial made no renovations, enlargements or improvements to the Richmond stores. (Isaacs 2556-57) The last Colonial store to open in the Richmond SMSA was in 1972; a replacement store opened in Petersburg in 1974. (CX 330C) From 1976 through 1978, all but two of the Richmond stores (including Petersburg) made a negative contribution each year. (CX 253C-D) The Colonial stores remained at a physical disadvantage compared with other stores serving Richmond. (Curhan 2915) However, as Mr. Stewart testified (Stewart 563-64), Colonial had "very optimistic plans for Richmond, and in 1978, had sites and plans for six new stores."

Respondents point to the following changes made to Colonial's Richmond operations which they view as beneficial to that market: (i) the regionalization of the Richmond stores and the Norfolk Division with Grand Union's Landover Division, which will provide better management supervision of the stores; (ii) closing several of the old, money-losing stores which had no profit potential (Curhan 2915); and (iii) the addition of a real estate person located in Richmond who works exclusively in the area to find sites for new stores. (Stewart 563-64; RPF 452)

10. Colonial as a Toehold Acquisition

128. Respondents argue that under Commission precedent, an acquisition of a firm with less than 10% market share by a potential entrant into that market is a "toehold" acquisition which is legal under the antitrust laws and which may, in fact, result in procompetitive effects. Colonial's market share and rank in Richmond dropped between 1972 and 1977; its share of grocery stores sales was only 6.5% in 1977. (F. 119)

E. The Newport News/Hampton, Virginia SMSA

1. Demographics and Location

129. In 1978, the Newport News/Hampton SMSA (F. 45) was the 105th largest in the country. Between 1970 and 1978, the population of this SMSA grew from 333,140 to 361,400, or approximately 8.5%. (Bureau of the Census, *Population*)

The city of Newport News, the heart of the SMSA, is located on a peninsula surrounded by the James River, Hampton Roads Bay, and the Chesapeake Bay:

22 miles from	Norfolk, Virginia
75 miles from	Richmond, Virginia
172 miles from	Washington, D.C.
241 miles from	Roanoke, Virginia
209 miles from	Baltimore, Maryland
234 miles from	Greensboro, North Carolina
175 miles from	Raleigh, North Carolina

(Rand McNally) [111]

130. Market shares for the top firms in the SMSA, as revealed by complaint counsel's market survey, were:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Colonial	15.1	16.1	Colonial	15.3	16.0
Food Fair	14.3	15.3	Food Fair	10.9	11.5
A & P	13.2	14.1	Farm Fresh	10.3	10.8
Rich's	9.7	10.4	A & P	9.8	10.3
Southland	7.8	8.3	Southland	9.2	9.7
Rosso &			Safeway	7.8	8.2
Mastracco	5.8	6.1	Rich's	5.0	5.2
Bonnie Be Lo	3.4	3.6	Rosso &		
Farm Fresh	3.3	3.6	Mastracco	4.7	4.9

(CX2M)

Between 1972 and 1977, concentration ratios of the top four firms decreased approximately 7 percent. Colonial and Food Fair (Pantry Pride) remained numbers one and two, respectively, between 1972 and 1977. Food Fair's market share dropped by approximately one-third, although it still had six stores. (CX 665Z324) By 1977, Farm Fresh, which had been eighth in 1972, was third. A & P, number three in 1972 with 11 stores in the SMSA, had four fewer stores in 1977 (CX 665Z326), and had dropped to fourth. Rich's, number four in 1972 with

13 stores, dropped to seventh with one fewer store. (CX 665Z334) Although Southland's rank as number five stayed the same, its absolute share of market increased. Southland had 47 stores (7-11's) in the SMSA in 1972 and 63 in 1977. (CX 665Z340) Safeway, which did not have stores in the area in 1972, was sixth in 1977. Farm Fresh's growth and Safeway's market entry had the effect of deconcentrating the market.

Four-firm concentration ratios for grocery stores, (SIC 541), were:

<u>1972</u>	<u>1977</u>
56.7%	49.1%

Four-firm concentration ratios for supermarkets were:

<u>1972</u>	<u>1977</u>
70.8%	65.6%

(F. 562, 53) [112]

2. Colonial in the SMSA

131. In 1977, Colonial, operating 15 supermarkets (Admissions 54), was ranked first in both supermarket and grocery store sales in the Newport News/Hampton SMSA with 22.4% and 16.0% market shares, respectively. (CX 664A; CX 2M; Admissions 53) The Colonial Norfolk Division Capital Expenditures Status Report of August 1978 indicated that Colonial planned two new supermarkets for this SMSA (CX 343B), one of which was a replacement store. (CX 356D) Two new supermarkets and one replacement store were planned for 1979. (CX 356F)

3. Barriers to Entry

132. Mr. Stewart testified that profitable entry into this SMSA would require six stores of 30,000 square feet each. (Stewart 576, 582)

Newport News is served by the *Daily Press* and *Times Herald* newspapers. Most Newport News competitors advertise on Sunday and Wednesday evenings and Thursday mornings. (Connell, 1226-27, 1233)

Winn-Dixie entered the SMSA about 1970 or 1971. (Connell 1254; CX 630I) Safeway is the only other competitor to have entered in the past ten years, having entered with several stores. (Connell 1254-55; Stewart 658) Dr. Parker testified that this market has moderately high barriers to entry. (Parker 2309)

4. Performance of the SMSA.

133. Complaint counsel attribute the drop in concentration in this SMSA between 1972 and 1977 to the drop in market share for Rich's, from 10.4% of grocery store sales to 5.2% (CX 2M), due in part, to the death of its founder. (Walters 1409-09) In addition, concentration was decreased by the entrance of Safeway into this market, which had accrued an 8.2% market share by 1977. (F. 130)

Dr. Parker testified that this SMSA is concentrated and is performing less than competitively. (Parker 2309; *see also* Marion 1976-78)

There are three commissaries in the Newport News area. According to public records, in fiscal 1978 (including three months of calendar 1977), the commissaries did the following annual sales volume: [113]

<u>Commissary</u>	<u>Sales Volume (\$Million)</u>
Fort Eustis	\$ 14.1
Fort Monroe	6.6
Langley Air Force Base	20.9
Total	\$ 41.6

The commissary sales of \$41.6 million was approximately 15% of food sales in the Newport News market as defined by complaint counsel. Respondents argue that failure to consider the commissaries in the Newport News area distorts the true market picture in this SMSA. (RPF 458)¹²

Industry witnesses testified that the commissaries were a major factor in Tidewater. Mr. Isaacs, Colonial's former Vice President for Tidewater, described the competition provided by the commissaries:

Because of the large amount of business that the commissaries did, large amount of military personnel, it was necessary that we compete with them. And maybe we couldn't compete right down the line as far as price, but we could as far as location of our stores, convenience, better variety than the commissaries could carry, service in our stores. The commissaries really didn't have that much in the service aspect. We competed many ways. Store hours. Commissaries were very limited in their store hours. So we attempted to go after as much of the commissary business as we could get.

(Isaacs 2553)

Mr. Stewart also testified about the commissaries in Tidewater: [114]

We tried to [compete with the commissary]. We certainly had to compete with them for volume. There was no way we could compete with them on price; but certainly

¹² The relationship of commissary share of market to other food store sales remains stable when commissary sales are adjusted by (i) deflating sales volume by 5% to account for inflation in the nine months of 1978 included in the military fiscal year, (ii) inflating sales to account for the lower commissary price structure (the numerator), and then (iii) aggregating commissary sales with the sales of the other competitors (the denominator). (See Curhan 3026-30, 3166-69.)

grocery items or produce items or meat items that were bought at the commissary took the potential away from us or any other competitor selling that item.

(Stewart 526)

He also noted that Colonial had run price-checks on commissaries. (Stewart 650) Similarly, Mr. Walters testified that Farm Fresh "certainly look[s] at the commissaries as a competitor. . . ." (Walters 1405)

Respondents cite the growth of Farm Fresh as an important factor in perceiving the true state of the market in this SMSA. (RPF 462-468) Eugene Walters, President of Farm Fresh (corporate name Commonwealth Foods), testified that Farm Fresh began doing business in 1957. It had three stores in 1966 when he joined the firm, one each in Norfolk, Newport News and Richmond. (Walters 1396) Today Farm Fresh has 17 stores. Two of the stores are in Richmond, five in Newport News and ten are in Norfolk. (Walters 1397-1400)

Farm Fresh is the fastest growing competitor in both Norfolk and Newport News. (Stewart 659) It was not in the top eight in Norfolk in 1972. By 1977, it ranked fifth with a 10% market share. (CX 2N) In 1980, Mr. Walters estimated Farm Fresh's market share in Norfolk at 13%. (Walters 1428) In Newport News, it went from eighth to third ranked between 1972 and 1977. Mr. Stewart described Farm Fresh as "very aggressive, well managed, non union, highly competitive." (Stewart 659) Mr. Isaacs, Colonial's Vice President for Tidewater in 1976/77 also described Farm Fresh as:

probably the most aggressive [competitor] from the standpoint of new store development, remodeled existing stores, probably much more aggressive from a merchandising-advertising standpoint. (Isaacs 2552)

In addition to Farm Fresh, there are other independents in the top eight in Newport News. Rich's [unrelated to the wholesaler Richfood], number seven in 1977, had 12 stores in the Newport News/Hampton SMSA counties of York, Hampton City, Newport News City and Gloucester. (Walters 1407-08; CX 665Z344) It was founded by Mr. Rich after World War II and was successful. After Mr. Rich's death, the company was sold to Rosso & Mastracco (Giant Open Air). (Walters 1408-09; Connell 1255-56) Rocco & Mastracco, which is headquartered in Norfolk, [115] has had one large Giant Open Air store in Newport News since the early 1970's. (CX 665Z338) It was number three in Norfolk and number eight in Newport News in 1977. (CX 2M, N)

Bonnie Be-Lo Markets is a regional chain served by Richfood. (Stewart 527) It had 33 stores in 1972 and 37 in 1977, of which three were in Newport News. (CX 665Z305) Although it was in the top eight in Norfolk in 1977 and in Newport News in 1972 (*see* CX 2M, N), by 1977,

with the growth of Farm Fresh and Safeway, it was no longer in the top eight in Newport News.

Lou Smith, another independent operator, had one store in Gloucester in a former Colonial location, which is within the Newport News SMSA, since before 1972. (CX 665Z328; Stewart 656) A second store was recently built in Newport News. (Connell 1255) Lou Smith is served by Richfood. (Stewart 527)

Complaint counsel's survey discloses the presence of other independents in Newport News. These include Rip's Food Stores with two stores (CX 665Z307); Nick's Discount Markets with five stores (CX 665Z309); and Bon Supermarkets, Burnetts Supermarket and Camco Supermarket, with one store each. (CX 665Z313, Z317, Z319)

In 1980, Winn-Dixie had three stores open in the Newport News/Williamsburg/Suffolk area. (Walters 1422-23)

5. Grand Union as a Perceived Potential Tidewater Entrant

134. None of the trade witnesses who testified in this case perceived Grand Union as a likely potential entrant into the "Tidewater" region *i.e.*, the Newport News/Hampton SMSA and the Norfolk/Virginia Beach SMSA. (Connell 1271; Isaacs 2584; Stewart 656) Mr. Walters did not perceive Grand Union as a likely Tidewater entrant but did note that nothing surprises him in that area. (Walters 1453)

6. Grand Union as a Likely Potential Tidewater Entrant

135. Complaint counsel stresses the proximity of this region to Grand Union's Washington Division operations as an indication that Grand Union was a likely potential entrant. (CPF 464-467)

In August of 1978, Grand Union operated a supermarket in Harrisonburg and one in Fredericksburg, Virginia, and one in Glen Burnie, Maryland. (Complaint Counsel Phys. Exh. B) At the same time Colonial operated stores in Charlottesville, Virginia (52 miles from Harrisonburg), Richmond, Virginia (57 miles from Fredericksburg), and Cambridge, Maryland (67 miles from Glen Burnie). (Complaint Counsel Phys. Exh. B; Rand McNally) In [116] 1978, all Grand Union stores in Maryland and Virginia were served by Grand Union's warehouse in Landover, Maryland. (Admissions 83) Landover is 150 miles from Harrisonburg and 59 miles from Fredericksburg (Admissions 85); Newport News is 124 miles from Fredericksburg and 183 miles from Landover (Rand McNally); Norfolk is 141 miles from Fredericksburg and 200 miles from Landover. (Admissions 85; Rand McNally)

The joint venture considered with Dart Drugs was primarily concerned with opening stores in Tidewater. (CX 89) On July 21, 1972, Floyd Dean, Grand Union's real estate manager, filed a report regarding his inspection trip of Norfolk and Newport News with a Dart Drug

official. Two sites in Newport News and three in Norfolk were recommended for consideration. (CX 87A-E; *see also* CX 148-152; CX 53) This report set a goal of twelve to fifteen stores. (CX 87D) After negotiations with Dart proved not to be fruitful (CX 580 [Silvers] at 51-52), Mr. Dean continued to recommend that Grand Union open stores in the Tidewater area, and he filed a report on October 10, 1972, outlining seven other potential sites for Grand Union stores. (CX 83A-D; CX 90A-B)

Thereafter, Grand Union corresponded with developers in shopping centers in Norfolk and Newport News discussing in detail particular sites, plans and lease requirements. (CX 227A-B; CX 229A-B; CX 230A-B; *see also* CX 88) These site investigations culminated in a document entitled "Grand Union Company Proposed Expansion Program Tidewater, Virginia" dated December 18, 1972, which analyzed sites, competition (including Colonial stores), and demographic information. (CX 84A-V) Attached to this document is a memorandum to Mr. Dean stating:

I do not believe we should go into the Tidewater market at this time. With the commitment we have in Baltimore there is not sufficient manpower to handle two new areas at the same time since both would be multiple store operations.

* * * * *

The survey work was well performed and with updating, will still be useful in the future.

It may be that we are missing a current surge of new commercial and good site availability but considering the moves we are making in Baltimore and the distance involved, it is my opinion that we should not enter into leases in Tidewater at this time. (CX 84W)

Mr. Dean forwarded this Proposed Expansion Program, with attachments on certain sites, to Mr. O'Connell, Grand Union's real estate vice president, on January 25, 1973. (CX 86; CX 148A-B; CX 149; CX 150A-B; CX 151; CX 152A-B; CX 153) [117]

In 1976, Grand Union considered the acquisition of Giant Open Air Markets, a chain which had stores in all three Virginia SMSAs. Earl Silvers recommended that this not be pursued despite the fact that "the proposal has appeal because a successful Norfolk operation should fit in with and help our Washington Division." (CX 30) The reasons for not pursuing the acquisition were stated to be the "mix" of stores, manufacturing, and wholesaling, and its size. (CX 30)

Respondents contend that the reasons applicable to their argument about why Grand Union was unlikely to enter the Richmond SMSA are even truer with respect to the possibility of Grand Union's entering Tidewater. The fact that this area is yet 50 miles further away from Landover, puts entry here "at the very fringes of 'striking dis-

tance'." (RPF 498) In addition, the fact that Grand Union's Landover operations are unionized was another factor that weighed against Grand Union entering these SMSAs where only Colonial, A & P, and Safeway are unionized. (Curhan 2883) Boulevard, Earles, Farm Fresh, Giant Open Air, Lou Smith, Pantry Pride, Value Fair, and Winn-Dixie (Connell 1272-73) are not unionized, which results in a 2-3% labor cost advantage. (Curhan 2853) Colonial, A & P, and Safeway are successful operators in this market.

Dr. Curhan testified that Winn-Dixie's recent entry into Tidewater made it less likely that Grand Union would follow, because this "preempt[ed] opportunities that Grand Union otherwise would have had." (Curhan 2925-26) However, in 1978 Grand Union would have had the same opportunity for store sites as did Winn-Dixie.

7. Other Expanders and Potential Entrants into Tidewater

136. Respondents cite Winn-Dixie as the most obvious expander into Newport News. (RPF 480)

Mr. Walters testified that Farm Fresh will be opening at least two to three new stores per year for the next five years. (Walters 1442) When asked whether he perceived any new entrants entering his operating area within the next five years, Mr. Walters testified:

I would say that any major east or southeast operator would evaluate our market and decide whether or not they wanted to come in. So that's not quite all inclusive, but progressive growth companies would certainly be something wrong with them if they weren't studying, evaluating our market and deciding whether they want to come in.

(Walters 1454-55) [118]

Dr. Curhan mentioned Kroger as a potential entrant into the Tidewater market (Curhan 2926), although Kroger's Group Vice President testified Kroger had no plans to enter Tidewater. (C. Thomas 1333) Dr. Parker conceded that Lucky might be a potential entrant "but not as likely as Grand Union." (Parker 2312-13) Dr. Curhan agreed. (Curhan 2926) Lucky, with two stores in Richmond (Curhan 2926), is in the process of entering the Raleigh market. (Walters 1419)

Dr. Parker testified that Giant was a potential entrant into Newport News:

Giant had been in that market—yes, it had been in that market. I think that this would have facilitated its re-entry. I think that Giant had been expanding to Baltimore, and I think that like Grand Union, it would have, that the slowdown in growth of that market could have drawn its attention to expanding in a more growth—higher-growth area. I think it was already in Richmond, I think, it would have soon attempted to enter Newport News.

(Parker 2312)

Dr. Curhan disagreed, because of the problems Giant was experiencing in Richmond. (Curhan 2926; F. 122)

In addition to these companies, there are two independent wholesalers in Raleigh, North Carolina, which is less than 200 miles from Tidewater, which could serve the area as Winn-Dixie does from Raleigh. They are J.T. Davenport & Son, Inc., and Thomas & Howard Co. (RX 30X) Both are within the Raleigh Market Area as defined by *Progressive Grocer*, although Thomas & Howard is in Rocky Mount, approximately 45 miles closer to Tidewater, and J.T. Davenport is in Sanford, 30 miles farther south. Pantry Pride (Food Fair) serves Tidewater from the Baltimore Market Area as defined by *Progressive Grocer*, which is 219 miles from Tidewater (RX 30W), somewhat in excess of typical "striking distance."

8. Alternative Means of Entry into Tidewater

137. Complaint counsel alleges that, although Grand Union passed up the opportunity to enter Tidewater because of the company's commitment to its Baltimore operations, the attractiveness of the Tidewater growth rate as compared with that of Baltimore would probably have led to the entry of Grand Union into these markets in the near future. (Parker 2298, 2304, 2311-12, 2286; CX 564) In addition to *de novo* entry, [119] purchase of a smaller chain, e.g., Giant Open Air, Ukrop's, or Farm Fresh, would have afforded Grand Union a less anticompetitive way to enter the market.

F. The Norfolk/Virginia Beach, Virginia SMSA

1. Demographics and Location

138. In 1978, the Norfolk/Virginia Beach SMSA (F. 46) was the 48th largest SMSA in the country. Excluding the cities and towns in northern Virginia which are part of the Washington, D.C. SMSA, the Norfolk/Virginia Beach SMSA is the largest in the state. Population of the SMSA increased from 732,600 in 1970 to 800,100 in 1978, an increase of 9.2%. (Bureau of the Census, *Population*)

The Norfolk/Virginia Beach SMSA is bordered on the east and north by the Atlantic Ocean, the Chesapeake Bay, and the Hampton Roads Bay:

22 miles from
93 miles from
246 miles from
189 miles from
225 miles from
169 miles from
228 miles from

Newport News, Virginia
Richmond, Virginia
Roanoke, Virginia
Washington, D.C.
Baltimore, Maryland
Raleigh, North Carolina
Greensboro, North Carolina

(Rand McNally)

According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in the SMSA area in 1972 and 1977 were as follows:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Colonial	15.0	15.7	Colonial	17.2	17.8
Rosso & Mastracco	12.7	13.3	A & P	11.2	11.6
Bonnie Be-Lo	10.8	11.3	Rosso & Mastracco	11.0	11.4
A & P	10.1	10.6	Bonnie Be-Lo	10.3	10.7
Southland	7.2	7.6	Farm Fresh	9.7	10.1
Food Fair	6.5	6.8	Southland	8.8	9.1
Valu Fair	5.0	5.2	Food Fair	5.7	5.9
Great Bridge "Earles"	4.3	4.5	Safeway	5.0	5.1

(CX 2N) [120]

Colonial remained first ranked in 1972 and 1977, and increased its market share by 2%. A & P with 14 stores in 1972, increased its presence by one store (CX 665Z357), and rose from fourth to second rank. Bonnie Be-Lo, number three in 1972 with 28 stores (CX 665Z345), had approximately the same market share in 1977. Southland dropped from fifth to sixth ranked and was replaced by Farm Fresh with eight stores. Farm Fresh had five stores in 1972 (CX 665Z347), but was not among the top eight in that year. Food Fair, although it increased its presence from seven to nine stores (CX 665Z353), dropped in market share. Safeway, which was not in the area in 1972, was number eight in 1977.

Four-firm concentration ratios for grocery stores, (SIC 541), were:

<u>1972</u>	<u>1977</u>
48.7%	53.1%

Four-firm concentration ratios for supermarkets were:

<u>1972</u>	<u>1977</u>
60.5%	62.8%

(F. 52, 53)

2. Colonial in the SMSA

139. In 1977, Colonial was ranked first in both supermarket and grocery store sales in the SMSA, with 23.1% and 17.8% market shares, respectively. (CX 664B, CX 2N; Admissions 57) Colonial operated 31 supermarkets in the SMSA in 1977 (Admissions 58), and the Norfolk Division Headquarters of Colonial is located in the SMSA. (Stewart 490) According to a Colonial/Grand Union report, the Norfolk Division operated 61 stores, or 16.7% of Colonial's total of supermarkets as of March 31, 1979, but supplied 29.9% of the company's profits. (CX 252Z39)

Colonial's Capital Expenditures Status Report, dated August 12, 1978, indicated that during 1978, expenditures were made for six new stores, three enlargements, and one remodeling for the Norfolk/Virginia Beach SMSA. (CX 343C) The 1979 Norfolk Division Capital Budget projected four new supermarkets and three remodelings for this SMSA during that year. (CX 356F-G)

3. Barriers to Entry

140. Mr. Stewart testified that in order to profitably enter the Norfolk/Virginia Beach SMSA *de novo*, he would advise [121] opening six supermarkets of 30,000 square feet each. (Stewart 576, 582) Mr. B. Thomas of Winn-Dixie, the SMSA's most recent entrant, testified that a multiple entry of three stores is necessary to support the daily delivery cost of perishables to these stores from the Winn-Dixie warehouse in Raleigh. (B. Thomas 1475, 1485)

Grand Union's report on this area for the purpose of its joint venture with Dart Drug concluded that initial entry into Norfolk would be with five stores, with a goal of expansion from that base. (CX 87D) After negotiations with Dart Drug were ended and Grand Union considered entering this SMSA alone, the Proposed Expansion Program indicated that five stores would be opened within 18-24 months. (CX 90A-B; CX 84C; CX 148A, CX 150A, CX 87C) In 1972, Grand Union contemplated 33,000 square foot stores in the SMSA. (CX 90A) Presently, a 30,000 square foot store in this area would cost between \$700-800,000 to equip; inventory costs would be between \$300,000 and \$1 million. (Connell 1250; Walters 1435)

Most of the major competitors in the SMSA buy one-page newspaper advertisements on Sunday and two-page ads in the Wednesday, Thursday combination papers. (Connell 1226, 1234-35)

Dr. Parker testified that this SMSA had moderate to high entry barriers. (Parker 2317)

4. Performance of the SMSA

141. In the last ten years, Safeway and Winn-Dixie have entered this SMSA. (Stewart 658-59; Connell 1254) Each of these companies opened several stores within a short period of time. (Connell 1254) Safeway, which entered the Norfolk area in approximately 1971, had 5.1% share of the grocery market in 1977. (CX 2N; F. 138)

Complaint counsel's expert witness, Dr. Parker, testified that, in his opinion, this market remains moderately concentrated and is likely performing less than competitively. (Parker 2317)

Respondents argue that the concentration figures fail to take into account the commissaries which respondents cite as a competitive factor in this market. (RPF 516) According to public records, in fiscal 1978 (including three months of calendar 1977), the four Norfolk commissaries did the following sales volume:

<u>Commissary</u>	<u>Sales Volume (\$Millions)</u>
Portsmouth Naval Shipyard	\$ 10.6
Norfolk Naval Base	16.6 [122]
Oceana Naval Station	14.1
Little Creek Naval Amphibian	26.1
Total	\$ 67.7

The Norfolk commissaries ranked second in the Norfolk SMSA 1977 in terms of dollar sales. (See CX 2N.)

In addition to the top eight competitors, Be-Lo, Earles, and Valu Fair are independents operating in the market. (Connell 1238)

5. Alternative Means of Entry

142. It is complaint counsel's contention that, had Grand Union not acquired Colonial, Grand Union would still have sought to enter this SMSA and the other two Virginia SMSAs in the near future. (See F. 135.) Giant Open Air Market, with an 11.4% grocery market share in Norfolk in 1977, is a chain that Grand Union might have purchased, according to complaint counsel. (See F. 135.) In addition, Ukrop's and Farm Fresh were acquisition possibilities. Complaint counsel contends Grand Union could have acquired Ukrop's in Richmond, and expanded it into the Tidewater area. Grand Union, according to complaint counsel, could have acquired Farm Fresh and expanded its Richmond operation, as well as used it as a vehicle to expand into the Raleigh and Durham markets. (CPF 485)

Possible expanders and potential entrants in the Norfolk/Virginia Beach SMSA, Grand Union as a perceived potential entrant, and Grand Union as a likely potential entrant, are discussed at F. 134-137.

The Florida Markets

G. *The Florida Markets in General*

143. As of July 1, 1978, Florida had a population of approximately 8,594,000, an increase of 1,803,000 or 26.5% from the state's population in April, 1970. Only four states had a population percentage growth rate higher than Florida: Nevada, Alaska, Arizona, and Wyoming. In terms of absolute growth, only California and Texas had larger increases, although the percentage growth rate of each was smaller than that of Florida. (Bureau of the Census, *Population*)

H. *Colonial in the Florida Markets*

144. Prior to 1972, Colonial rented warehouse space in Thomasville, Georgia to serve eleven Colonial stores in Jacksonville, three in Tallahassee, two in Gainesville, and one [123] each in Lake City and Ocala. In addition, the Jacksonville Division (now called the Southern Division) served three stores in Alabama and thirty-five stores in southern Georgia. (CX 33H)

In the fall of 1973, a new Thomasville warehouse was completed, with substantial excess capacity built to accommodate growth planned in north and central Florida. (CX 619C; CX 317B; CX 607 [Rowe] at 13-14) By June 1978, this new warehouse was serving 65-70 stores and could serve twice its capacity without significant additional capital investment. (Stewart 494) At the time of the merger, the Thomasville warehouse was the newest and most up-to-date and probably Colonial's most efficient operation. (CX 574 [Goulding] at 52)

In 1972, Colonial acquired eight K-Mart supermarkets on the West Coast of Florida in the Tampa-St. Petersburg area as a toehold into central Florida (CX 318C), but Colonial found that some of these facilities were not suitable. (Stewart 556-57) Colonial decided to sell those stores to Grand Union (*see* F. 9), and re-enter the West Coast of Florida with a "far more competitive complete store." (Stewart 556-57) Colonial hoped to act on this re-entry plan "five years or so down the road." (Stewart 558; *see also* Spearman 815-16) Colonial planned to expand throughout Florida in a line across the state at approximately Sarasota, including areas to the north; *e.g.*, Tampa, St. Petersburg, and Orlando. (Spearman 815; Stewart 559-61; Complaint Counsel Phys. Ex. A) After re-entering Florida, Colonial planned to build a subwarehouse in central Florida, in or near Orlando (Stewart 561-62), having utilized such subwarehouses in the past. (Stewart 565)

Colonial's interest in this area was due to the fact that Orlando was the most rapid growing area in Florida. (Spearman 816; CX 416) Colonial operated two stores in Orlando. (Admissions 61) Colonial took steps to prepare for expansion into Central Florida and the West

Coast of Florida by improving its market share in Jacksonville and Tallahassee while simultaneously planning new stores toward central Florida. (CX 393A-I; CX 394A; CX 395-AH; CX 400A-F; CX 427-29; CX 438-44; CX 2K; *see also* Stewart 554-55) Colonial's five-year plan for the Southern Division included the following new stores in Florida: Panama City, Tallahassee (2), Jacksonville (1979); Green Cove Springs,¹³ Tallahassee (1980); Jacksonville, Tallahassee (1981); Jacksonville, Ft. Walton (2), Panama City, Live Oak, Perry, Gainesville (1982); Jacksonville, Ocala, Gainesville (1983). (CX 358C) Colonial eventually built two [124] stores in the Orange Park section of Jacksonville, rather than the one planned. (CX 349T, X, V, CX 330Q) Two store closings in Jacksonville, one in Tallahassee, two in Orlando, and one in Daytona Beach were planned from the period between 1979 and 1983. These were all of older facilities. (CX 358C)

Colonial had determined that the lack of success of the K-Mart acquisition was due to lack of penetration, and the company's new policy was that even smaller areas have at least two stores. (Roehm 2727; *see also* Spearman 806-08) Therefore, future expansion in Florida called for Colonial to penetrate a market with a number of stores. (CX 358C; Admissions 38, 46, 61; CX 394A)

Colonial was also planning to expand its market share in the Daytona Beach area and was reviewing potential site locations. (CX 437-439; CX 443) St. Augustine was another city located between Jacksonville and Orlando, selected as a site for Colonial expansion. (Spearman 817-18; Complaint Counsel Phys. Ex. A) Mr. Stewart stressed the importance of re-entering the Tampa-St. Petersburg area of Florida with large stores offering full-service, and the necessity of six to eight prime locations. (Stewart 560-61) Discussions of this re-entry program among top Colonial management continued while Colonial was in the process of selling the eight Big Star Stores to Grand Union. (Stewart 558; *see* F. 9)

I. Grand Union in Florida

1. Florida East Coast Stores

145. In 1957, Grand Union entered the Miami market as a supermarket operator by acquiring B. Thrifty, a small local competitor. It increased its market share by *de novo* expansion, and by the acquisition of two independent firms, Tanner and Stevens, around 1960. These acquisitions included at least one warehouse. (CX 580 [Silvers] at 29-31; CX 574 [Goulding] at 107-08) Mr. Silvers explained Grand Union's motivation behind its entry into Florida as its desire to expand into a high-growth area from its traditional base of operations.

¹³ Green Cove Springs is in the Jacksonville SMSA. (Roehm 2782)

(CX 580 [Silvers] at 153) Grand Union has operated stores on the lower East Coast of Florida in the Miami area since the 1950's. (CX 580 [Silvers] at 145) Grand Union has also been building stores on Florida's East Coast as far north as Vero Beach, Florida. (CX 246Z248)

In 1978, there were 45 Grand Union Stores on the East Coast. Grand Union estimated its share of sales for the counties served by the Florida East Coast Division at 7.2% in 1977/78. (CX 6Z120) Grand Union's Business Plan and Budget for 1978/79 described the competition on the East Coast: [125]

Grand Union contends directly with three major chains in the Florida East market, all of whom maintain consistent pricing awareness and discipline, adept sales programming and promotion, and maintain relatively high standards of store operation. Foremost are Publix and Winn Dixie, who, while radically different in approach, hold approximately equal market shares of 26 percent, and 27 percent respectively The third competitor, Pantry Pride, with seventy-three stores, holds approximately eighteen percent market share During the past year [1977], Publix opened four new stores . . . Winn Dixie also opened four . . . Pantry Pride opened one . . . during the same period the Florida East Coast Division opened three new stores and renovated eight.

(CX 595Z53Z54)

As a group, the East Coast stores have not achieved consistent profitability. In fiscal 1977, they produced a small profit contribution, but failed to achieve by 10% the sales which had been budgeted. The shortfall was attributed to:

. . . the area's continued depressed economic condition and aggressive competitive activity. . . . The [East Coast stores'] inability to generate and sustain an acceptable sales base, the continually competitive pressure on margin, the need for expanded media usage, and no significant offsetting variances in expenses, has caused the less than budgeted contribution.

(CX 7Z65)

They had been budgeted to contribute \$1.5 million in fiscal 1978. Because of a sales shortfall of \$10 million, they made a negative contribution instead. (CX 6Z50, Z54) Grand Union attributed its disappointing sales "to the continued dominance and leadership of the two major market factors, Publix and Winn-Dixie." (CX 6Z54) For fiscal 1979, Grand Union projected another negative contribution from the East Coast stores. (CX 6Z131)

2. Florida West Coast Stores

146. Shortly after its entrance into Miami, Grand Union opened its first stores on the West Coast of Florida via Eastern Shopping Centers ("Eastern"), a company owned one-third by Grand Union and two-

thirds by Grand Union stockholders. (CX 580 [Silvers] at 146) It was planned that Eastern would build shopping centers on both coasts. Grand Union would open a store in each center, and Eastern would rent the remaining space to [126] third parties. By 1959, there was one shopping center in Bradenton, five in the Fort Lauderdale/Palm Beach area, and several others under construction. Due to large losses from the project, Grand Union sold to Publix in 1959 all stores and leases other than those in Miami. (CX 580 [Silvers] at 147)

In the early 1960's, Grand Union attempted to re-enter the West Coast with "Grand Way" stores. There was one Grand Way in Orlando. Other Grand Way stores were on the West Coast of Florida. (CX 589 [Wood] at 88-89) This venture was also unsuccessful and all the Grand Ways were closed by the early 1970's. (CX 580 [Silvers] at 148; CX 574 [Goulding] at 108-09; CX 14E; CX 17F) In 1976, Grand Union reorganized its Florida operations and formed a West Coast Division with a separate real estate department to accelerate its expansion in that area. (CX 12F-G) In 1976, Grand Union began its expansion up the West Coast of Florida by opening three new stores and adding to two existing stores in Naples and Bradenton. (CX 71K) Since then much of Grand Union's internal expansion has been in its Florida market, particularly the West Coast of Florida. For instance, in its fiscal year 1977, Grand Union planned to build 20 new stores for its entire operations, including replacement stores. Of those 20 stores, two were planned for the East Coast of Florida and six for the West Coast of Florida. (CX 6Z26) Grand Union's 1978/79 business plan summarized its expansion program as follows: "Sales growth will be concentrated within the Supermarket Divisions, particularly in the State of Florida; moderate growth is planned in other supermarket areas." (CX 6N)

On July 6, 1978, Grand Union acquired eight Big Star stores on the West Coast of Florida from Colonial. (F. 9) These were the K-Mart stores that Colonial had bought from Allied in 1972. (Roehm 2711-12; RX 1L; CX 318C) Grand Union bought these stores because they "needed stores very badly in the west coast of Florida" to reduce their cost structure. (CX 589 [Wood] at 37) The company was simultaneously seeking additional sites. (CX 92-95) After it acquired the eight Big Star stores, Grand Union had 19 stores on the West Coast of Florida. (CX 589 [Wood] at 94-95) Grand Union's original five-year expansion plan for the West Coast had envisioned 20 stores in five years. (CX 589 [Wood] at 94; CX 71)

As a result of its expansion efforts, Grand Union had 12 modern 28,000 square foot stores on the West Coast of Florida by 1979. (CX 580 [Silvers] at 149; CX 246X; CX 246Z2; CX 574 [Goulding] at 61) These stores averaged \$100,000 in sales per week. (CX 589 [Wood] 110,

41-42) Grand Union planned to open four new stores in fiscal year 1979 on the West Coast of Florida. (CX 574 [Goulding] at 95)

147. Grand Union's warehouses in use today are the main Hialeah warehouse, which has been occupied by Grand Union since 1960, and is 160,000 square feet, and the annex, occupied since [127] 1964, which is 61,000 square feet. Grand Union built a perishables warehouse and a frozen foods warehouse which opened in 1973, prior to the Cavanham acquisition. (CX 9Z366; CX 589 [Wood] at 100-01) It was planned at the time the warehouse was opened in 1973 that the store development in Florida would justify its size. Because Grand Union never achieved the volume originally anticipated, the perishables warehouse was losing money, operating at one-fourth of capacity and was a drain on the profitability of the East Coast stores. (CX 589 [Wood] at 100-01)

Malone & Hyde entered Florida in approximately 1975 by acquiring Hill Brothers' warehouse facilities in Miami. It began planning a new distribution center and acquired an option on land adjacent to Grand Union's perishables warehouse. (CX 574 [Goulding] at 130) Grand Union had held, but later relinquished, its option on that property. (CX 589 [Wood] at 103, 104-05)

In November 1978, Grand Union sold the perishables warehouse to Malone & Hyde and negotiated an arrangement with Malone & Hyde for the supply of perishables. (CX 574 [Goulding] at 130-31)¹⁴ Grand Union's warehouse and the perishables warehouse are literally neighbors. Malone & Hyde stocks Grand Union's private label produce, meats and dairy products. (CX 280B) Malone & Hyde acts as a drayer for the purchase of Grand Union's meat and produce requirements, i.e., someone who performs the function of operating a warehouse and transporting the goods to the stores for a fee. Grand Union buyers continue to select the products and negotiate prices. In the case of dairy products, however, Malone & Hyde acts as a typical wholesaler and performs the entire purchasing function. Respondents state that Grand Union is dissatisfied with Malone & Hyde's performance as a dairy products wholesaler. (Curhan 2946-47; CX 574 [Goulding] at 84; CX 280)

148. The West Coast stores were all supplied out of Grand Union's warehouse located in Hialeah, approximately 220 miles from the city of Orlando and 305 miles from New Port Richey (the location of Grand Union's most distant store on the West Coast). In 1978 Grand Union operated 11 stores on the West Coast of Florida that were between 208 and 305 miles from its Hialeah warehouse. Grand Union's West Coast stores average more than 209 miles away from its Hialeah warehouse,

¹⁴ Malone & Hyde has since built a dry grocery warehouse adjacent to the perishables warehouse. Malone & Hyde supplies many independents throughout Florida. (See CX 574 [Goulding] at 54.)

further than the [128] distance between stores and warehouses in other Grand Union divisions. (CX 574 [Goulding] at 53) Industry witnesses consider this further than the maximum efficient shipping distance. (B. Thomas 1473; Spearman 862; Stewart 554; *see also* Adelman 3393)

The cost of servicing stores between 200 and 300 miles away and the service levels at those stores are not very satisfactory. (CX 589 [Wood] at 116; CX 574 [Goulding] at 89) The cost of serving the West Coast stores was projected to be twice as high as that of serving the East Coast stores, and this gap was expected to increase. (CX 71Z13, Z61) Complaint counsel cites Grand Union's commitment to expansion on the West Coast of Florida, the distance from Hialeah, and the fact that the Hialeah warehouse is near capacity and cannot be expanded (CX 574 [Goulding] at 59-60; CX 586 [Tarrant] at 32), as factors which militate Grand Union's building of a new Florida warehouse or turning to a wholesaler. (CPF 666-67)

Grand Union's 1978/79 budget and business plan noted that "with as much of the growth in Florida being on the west coast, we decided against a consolidation of the two grocery warehouses as had been planned." (CX 6Z288) When Grand Union decided not to expand its Hialeah warehouse, it gave up an option on land adjacent to that facility. (CX 589 [Wood] at 102-06; CX 574 [Goulding] at 130) The energy crisis of 1973 was one reason behind that decision. Because of the probable future cost of trucking, supplying West Coast operations from Hialeah would be too expensive. (CX 589 [Wood] at 103-04) Mr. Goulding expected a warehouse to be built in the Orlando area. (CX 574 [Goulding] at 70) Mr. Posey estimated that Grand Union could support a warehouse with 20-30 stores of the type Grand Union was building in Tampa-St. Petersburg. (Posey 1663) Grand Union officials believed that 35-40 stores would be needed to support a warehouse. (CX 574 [Goulding] at 62; CX 586 [Tarrant] at 153-54) Using Publix as an example (CX 611A-D), complaint counsel speculates that Grand Union would have built a subwarehouse for fast-moving items or dry groceries before that time. (CPF 673; CX 586 [Tarrant] at 156; Parker 2361A)

Respondents dispute complaint counsel's assertion that Grand Union would have built a warehouse in central Florida to serve its existing West Coast stores and to allow entry into the Florida SMSAs of Jacksonville, Orlando and Gainesville, labeling this assertion "without basis" and "pure speculation." (RPF 273) Grand Union has not built a warehouse since it was acquired by Cavenham in 1973. (CX 589 [Wood] at 107) Dr. Curhan testified that, although the practical range for serving stores from a warehouse is generally about 200 miles (Spearman 862; B. Thomas 1473; Curhan 2939; Stewart 554),

companies will serve stores 100 miles beyond that distance because this may be cheaper and, therefore, more profitable, than making a large capital investment in a new warehouse. [129] (Curhan 3172-73) According to respondents, less than ten of Grand Union's West Coast stores are even beyond a 200 mile radius from Hialeah. (RPF 275) Mr. Wood testified that it is as economical to serve the stores on the lower West Coast up as far as Naples or Venice as it is to serve the East Coast stores. (CX 589 [Wood] at 66, 84-86) He also testified that the Hialeah warehouse remains viable when shipping over longer distances because of its low overhead and high tonnage. (CX 589 [Wood] at 108)

Mr. Goulding explained that distribution to even the northern parts of the West Coast from Hialeah is profitable because:

The perishable products at present are supplied by a wholesaler who has other distribution, I presume, in the area, so we are shipping just grocery products. We have given up some of the luxury of distribution . . .

We also have a fairly—an economical outside lease arrangement for our trucking fleet out of Hialeah, and we have a relatively, compared to the balance of the country, low-average hourly rate for drivers at the warehouse—the drivers primarily—and trip rates, which is you pay X-number of dollars per trip as opposed to an hourly rate.

We are also using on the Northern most distribution areas—Port Richey, Saint Petersburg—piggyback, which is putting the truck on a rail car and shipping it by train and then picking it up with a tractor and shuttling it to the store. So we have, you know, forced ourselves into the necessary economy to make it work.

(CX 574 [Goulding] at 54)

Mr. Tarrant described the warehouse as "a nice cheap little facility, old, cheap. Supermarket chains make money out of cheap facilities like that." (CX 586 [Tarrant] at 158)

Respondents claim that Grand Union management has considered the options of leasing or subleasing more space in Hialeah, building more warehouse space in Hialeah, locating a warehouse elsewhere in Florida, and using a wholesaler. Only the option of building more warehouse space in Hialeah has received serious attention. (RPF 278, 279; CX 79Z30; CX 80Z94)

Respondents point out that Grand Union's option on land near its Hialeah warehouse was eventually released. No other [130] sites in central Florida or on the West Coast of Florida were considered. (CX 589 [Wood] at 103, 104-05; CX 9Z371) Mr. Tarrant testified that, even with the addition of the Colonial stores in Jacksonville and Tallahassee:

We are unlikely to build a major new warehouse. It's very, very unlikely. It's a big

resource. It's been the death knell of so many chains already, and I can't see a major development in that direction Definitely not in the next couple of years.

(CX 586 [Tarrant] at 158)

149. Grand Union also considered using a wholesaler to service its West Coast stores. (CX 574 [Goulding] at 55-58) Despite the potential problems involved in such a move (cost, variety of products, ability to carry chain's private brands—CX 589 [Wood] at 110-111), Grand Union has been in contact with virtually every wholesaler in central Florida. (CX 574 [Goulding] at 55-58; Foy 1796-97) One wholesaler did serve Grand Union's West Coast stores when the Hialeah warehouse was unavailable. (Foy 1793-94)

Respondents deny that Grand Union would have used a wholesaler to enter the three Florida SMSAs. (RPF 283-299) In Grand Union's entire corporate history, the only time it ever used a non-captive wholesaler for dry groceries involved the acquisition of four or five stores in New Hampshire. (CX 580 [Silvers] at 32-34)

The President of Winn-Dixie testified that, with one exception involving serving one outlying store for a short period after the sale of a Winn-Dixie warehouse and stores in Albuquerque, New Mexico, his company has never used a wholesaler, has no intention of using one, and would not enter a new area beyond reach of an existing Winn-Dixie warehouse. (B. Thomas 1514-15)

Some chains regularly use wholesalers, but according to Dr. Curhan, in these cases the chain is generally "married" to the wholesaler, and the warehouse is "dedicated" to the chain. Grand Union's reliance on a broad selection of private label products (CX 10H) would necessitate a wholesaler's dedication of a "slot," *i.e.*, a position within reach of a "selector" where all the given items are stocked, for each size of each Grand Union item. This would require the services of a wholesaler with significant excess capacity. (Curhan 2945-49; RPF 287)

Although Mr. Foy of Certified Grocers, a wholesaler in Ocala mentioned by Dr. Parker as a possibility for Grand Union [131] (Parker, 2360), testified that his company could serve Grand Union stores (Foy 1790), he did express some reservations about the detrimental effects which might be suffered by the independents already served by Certified. (Foy 1917-19) Certified would probably be unwilling to serve Grand Union on a short term basis, *e.g.*, one to two years. (Foy 1820-21)

Grand Union's 1976 study compared the costs of servicing the 22 planned stores, by department, from Grand Union's warehouses with three independent wholesalers: Certified, Affiliated, and Keefe. For groceries it concluded that Grand Union's warehouse was the most

economical alternative (CX 71Z46), and referred to the following disadvantages of using a wholesaler:

- Private label merchandise would have to be shipped either on the perishable trucks or by distribution every two to three weeks.
- The sales programming would be complicated in that additional time would be needed because of review of outside suppliers' allowances and deals. These could be different than our deals and costs.
- It would entail the maintenance of another price zone separate from the present system where all zones are together on one print-out.
- Promotional allowances would be off invoice rather than separate.

* * * * *

- Unless our volume was sufficient, they would not carry private label. This could be handled by shipping a trailer load between stores every one - two or three weeks, depending on volume.
- Programming would be separate based on offers available through the wholesaler.
- Loss of cash discount (1½ on grocery sales)
- Promotion allowances would be about 10% less than presently earned.
- In-stock position would be controlled by the wholesaler.
- If we shipped dairy and frozen food from the wholesaler, the cost of shipping other perishables from our warehouse would increase [132]
- Bakery would be only national brands or can be shipped with meat or produce.

(CX 71Z-46, 48)

Grand Union's study, described above, was made in 1976. Grand Union had contacts with wholesalers in 1977 and 1978, indicating that the studies did not rule out use of wholesalers. (CX 590; CX643C; Foy 1796)

Respondents acknowledge that Grand Union management has had conversations with wholesalers regarding servicing its existing stores in Florida, but according to Mr. Wood, "frankly we couldn't get the sort of service that we needed in terms of the production." (CX 589 [Wood] at 110) Grand Union approached Certified in late 1977, but Certified was unable to serve Grand Union at the time. A year later, Mr. Foy made an overture to Grand Union, but Grand Union had no interest then. (Foy 1795-96) Grand Union also contacted Super Foods of Orlando. Mr. Twyman, Chairman and Chief Executive Officer of Super Foods, responded that Super Foods was not then equipped to handle even the limited number of Grand Union stores on the West Coast. If, in the future, Grand Union were interested in using Super Foods for all its Florida stores, Super Foods would have to enlarge its facilities to Grand Union's specifications, and Grand Union would be required to make a long-term commitment to Super Foods. (CX 574 [Goulding] at 84-86)

Certified Grocers served Grand Union's stores for a short period of time when Grand Union's Hialeah warehouse was having problems. Grand Union's store managers were happy with the service, which

was superior to that provided by Grand Union. (Foy 1790-94) The record also indicates that wholesalers can provide suitable variety. (Foy 1790; CX 71Z49) Albertson's which operates large supermarkets, is supplied by a wholesaler. (CX 643A)

J. The Jacksonville, Florida SMSA

1. Demographics and Location

150. The Jacksonville SMSA (F. 43) was the fourth largest in the state and the 56th largest in the country. As of July 1, 1978, the Jacksonville SMSA had an approximate population of 701,500, an increase of 79,600, or 12.8% over that of April 1, 1970, nearly twice the national average. (Bureau of the Census, Population)

Jacksonville is located in Northeast Florida on the St. Johns River and is the following distance from other Florida and Georgia cities:
[133]

167 miles from	Thomasville, Georgia
72 miles from	Gainesville, Florida
348 miles from	Miami, Florida
100 miles from	Ocala, Florida
139 miles from	Orlando, Florida
360 miles from	Pensacola, Florida
264 miles from	Panama City, Florida
166 miles from	Tallahassee, Florida
194 miles from	Tampa, Florida
281 miles from	West Palm Beach, Florida

(Rand McNally)

151. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Jacksonville in 1972 and 1977 were as follows:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Winn-Dixie	23.3	25.0	Winn-Dixie	23.2	24.7
Food Fair	20.2	21.6	Food Fair	15.9	17.0
A & P	6.7	7.1	Publix	14.4	15.4
Publix	6.1	6.6	Colonial	6.0	6.4
Colonial	5.4	5.8	A & P	4.1	4.3
Daylight			Albertson's	3.7	4.0
Grocery	4.1	4.4	Daylight		
Munford	3.1	3.4	Grocery	3.1	3.3
Southland	2.9	3.1	Huntley		
			Jiffy	2.9	3.1

(CX 2K)

Winn-Dixie, operating over thirty stores (CX 665Z271-Z277), maintained a share of approximately one-quarter of food sales in Jacksonville. Food Fair retained its second place spot, despite a drop in market share of five percentage points. A & P with 17 stores and ranked number three in 1972, had eight stores and was ranked fifth in 1977. (CX 665Z236) Publix rose to number three from number four and more than doubled its market share over the five-year period. Colonial was number five in 1972 and number four in 1977, gaining a small increase in market share. Daylight Grocery, number six in 1972 was number seven in 1977, replaced in the higher position by Albertson's. Munford and Southland, both convenience store chains, dropped from the top eight in 1977. Huntley Jiffy, with 65 convenience stores in this SMSA (CX 665Z238), became number eight in 1977. [134]

Four-firm concentration ratios for grocery stores, (SIC 541), were:

<u>1972</u>	<u>1977</u>
56.2%	64.8%

Four-firm concentration ratios for supermarkets were:

<u>1972</u>	<u>1977</u>
82.5%	82.1%

(F. 52, 53)

Convenience stores, both chain and independent, independent supermarkets, warehouse, and box stores not listed in CX 2K, but operating in Jacksonville, are as follows:

	<u>1972</u>		<u>1977</u>
	<u>Number of</u>	<u>Volume</u>	<u>Number of</u>
	<u>Stores</u>	<u>(\$000's)</u>	<u>Stores</u>
Southland	59	8,654	53
Lil' Champ	13	1,293	61
Munford	84	9,489	78
Pic n' Save	3	4,517	3
Zippy Mart	13	2,321	25
Premier Meats	2	2,208	1
Banner Food	1	693	1
Store (Sunrise Enterprises)			
			1,070

(CX 665Z221-Z277)

2. Colonial in the SMSA

152. In 1977, Colonial was ranked fourth in both supermarket and grocery store sales in the Jacksonville market with shares of 8.4% and 6.4%, respectively. (CX 664; CX 2K; Admission 45) Colonial operated 13 supermarkets in this SMSA in that year. (Admission 46) The 1979 five-year plan developed for Jacksonville by Colonial management included plans for one new store in this SMSA every year from 1979-1983. (CX 358C) As of December, 1979, Colonial's market share in Jacksonville had increased to approximately 9-11%. (Spearman, 904-05)

In a 1980 report prepared by Colonial/Grand Union management, the market shares and major competitors (all supermarket companies) for Jacksonville were identified as follows: [135]

<u>Competitor</u>	<u>No. Stores</u>	<u>Market Share (%)</u>
Colonial	13	11
A & P	6	7
Pantry Pride	17	22
Publix	11	14
Winn-Dixie	33	24

(CX 252Z70)

It is respondents' contention that, according to complaint counsel's survey, Colonial's share of grocery store sales in 1977, at 6.4%, was so small that the acquisition by Grand Union of Colonial's Jacksonville stores represented a legal toehold. (RPF 379-388)

Colonial began its operations in Jacksonville in 1957 with its acquisition of Jack's Meats (Roehm 2726) and, according to respondents, Colonial management had never been able to derive a profit from the Jacksonville stores. (Roehm 2726) Colonial's internal records show the Jacksonville stores' net profits (losses) for the years 1971-77 as follows:

<u>Year Ending Dec. 30</u>	<u>Number of Stores</u>	<u>Losses</u>
1971	13	(418,994)
1972	11	(353,246)
1973	11	(98,295)
1974	11	(126,018)
1975	11	(708,730)
1976	11	(383,719)
1977	11	(846,076)
	Total	<u>\$(2,935,078)</u>

(CX 333B, D., F, M)

Similarly, internal records show that the Jacksonville stores had

losses each year from 1960–1969 inclusive, aggregating \$1,140,209. (CX 364D)

Dr. Curhan testified that the stores were not modernized and the merchandise was not priced competitively. (Curhan 2953) Mr. Roehm stated that, but for the acquisition, Colonial management would likely have been forced to retrench or withdraw from Jacksonville. (Roehm 2727–28)

A Colonial document of 1970 described the eleven stores Colonial operated in this SMSA at that time as “hardly a factor in the market.” (CX 364H) It stated that [136] Colonial “operate[s] relatively small stores with low sales per square foot and all the inherent problems that go with low volume.” (CX 364H) This document further stated:

To sum up, Colonial certainly has a third-class position in the Jacksonville market. Its history is certainly undistinguished. But, Jacksonville is not what you would call a tough market, in the larger sense. With a program of store development, good merchandising plan and stronger operations, Colonial Stores can grow into a major factor in this market. Not only are Winn-Dixie and A & P very vulnerable, there is at least 10 to 12 percent share of market now going to independent operators that should go to chain stores. This along [sic] is worth over \$300,000 a week.

(CX 364I)

The report concluded that Colonial should convert all its stores to Big Star stores, as well as other merchandising measures, to improve sales. (CX 364L–N) Later that year, Mr. Spearman went to Jacksonville on a special assignment to implement the merchandising plan which had been developed to improve store sales. (Spearman 720) The program was not a success. (Spearman 904)

3. Barriers to Entry into Florida and the Jacksonville SMSA

153. Throughout much of Florida, Winn-Dixie and Publix are the dominant supermarket chains. This is true in the three Florida SMSAs at issue in this case. (CX 2G, K, O) Florida developers generally look to these firms first, because it is felt that they draw more people to a shopping center. (Posey 1642–43; Spearman 744–766)

Some independents have experienced difficulty expanding into adjacent Florida markets. For example, Tampa Wholesale was unable to effectively break into nearby Orlando from its strong market position in Tampa. (Posey 1629, 1656, 1659; Foy 1799) U-Save a major firm in Tampa, has not been able to enter adjoining Pinellas County (St. Petersburg). (Posey 1656)

Dr. Parker testified that, in his opinion, barriers to entry are high in the Jacksonville SMSA. (Parker 2366)

Mr. Stewart stated that, to enter Jacksonville and become a factor, a firm would need four to six stores of 30,000 square feet each. (Stew-

art 589) Publix and Albertson's entered the Jacksonville market with four large stores over several years. (CX 343C, 611A-B) [137]

Carol Cheek, a successful independent operator, considered entering the Jacksonville market by acquiring three A & P stores, but decided against this. One reason for this decision was that Mr. Cheek believed seven stores were necessary to afford the required amount of advertising. (Cheek 1590, 1596)

Mr. Stewart testified that even established Florida firms with existing name recognition must enter Jacksonville with four large stores to afford effective advertising. He cited Publix as a firm that entered with two stores and had difficulty serving Jacksonville, despite the fact that this company is a household name in Florida. (Stewart 589)

4. Performance of the Florida Market and the Jacksonville SMSA

154. Dr. Parker testified that, in his opinion, the three Florida markets are performing less than competitively. (Parker 2359, 2362, 2366; *see also* Marion, 1976A-78) The market leaders, in this case Publix and Winn-Dixie, set price policies and the other firms follow. (Stewart 632-33; Spearman 728-29, 800-01)

Mr. Foy of Certified Grocers, Inc., described the pricing structure in Florida, stating that when he "... first came to Florida and started to look around, that there was unquestionably in my mind the idea brought out very firmly that Publix and Winn-Dixie were holding a price umbrella over all food prices. Everybody else was living within that umbrella. Up to it in most instances, I was quite surprised." (Foy 1800)

Winn-Dixie has been Jacksonville's dominant firm (Roehm 2785; CX 364H), and it has had higher prices than all of the other leading supermarket firms. (Roehm 2785-86) Winn-Dixie has not initiated a broad lowering of prices in Jacksonville. It offers lower service level and has smaller and less efficient stores. (Roehm 2786-87, 2809-10; CX 364H-I)

There are few independents in all of Florida. (Cheek 1585; Foy 1826; CX 436A) Independent grocery store firms have had difficulty growing in Jacksonville. (Spearman 955-56; Foy 1826-27)

Mr. Gooding stated that non-market leaders do not initiate broad price cuts because they fear retaliation by Winn-Dixie and Publix. (Gooding 1122-23) He testified that he was coerced into raising the price of milk by an employee unidentified of a supermarket chain. (Gooding 1162-63)

Complaint counsel cites evidence that Winn-Dixie built stores in areas which could not provide the business, merely to pre-empt competitors. (CPF 645; Posey 1643-45; Stewart 671-73; [138] CX 638B)

This is a strategy that may be used by a dominant firm to preserve its market share. (Posey 1643; CX 643B)

Respondents argue that CX 2K overstates the concentration ratios in this market because it fails to take into account the commissaries serving Jacksonville and understates the significance of convenience stores. (RPF 341) Sales of the three commissaries operating in Jacksonville during fiscal 1978 (which included three months of calendar 1977) were as follows:

Name	Amount (\$Millions)
Cecil Field Naval Air Station	4.5
Jacksonville Naval Air Station	14.6
Mayport Naval Station	6.9

(See Curhan 2943, 3006.)

The combined sales of \$26 million would rank commissaries fifth in 1977 in terms of sales in Jacksonville, replacing A & P. Mr. Roehm testified that, in order to compete with Jacksonville commissaries, Colonial keeps its prices on bread, milk, and other staples competitive and tries to offer a higher level of service. (Roehm 2732)

Mr. Roehm also testified that Jacksonville was the most competitive area within the Thomasville Division (Roehm 2736), and that when he came to the Division in 1978, food prices were lower in Jacksonville than in Orlando (Roehm 2728), a situation he attributed to the fact that Publix, a market leader in both cities, was unable to give away S&H Green Stamps in Jacksonville because Winn-Dixie had the franchise. Therefore, Publix competed in Jacksonville by decreasing prices. (Roehm 2729)

In regard to Winn-Dixie's success in Jacksonville, Mr. Roehm testified:

It's sheer numbers. They have 35 stores in that SMSA, more than twice as many as any other competitor. It is a convenience factor, if nothing else. Just like convenience stores take a substantial portion of food dollars away from us and other operators, Winn-Dixie does the same thing. They are glorified convenience stores in those cases. . . . There are some people who just aren't price-conscious consumers. Our research has indicated that for a long time. There's a lot of people who just shop purely for convenience or other reasons. We conducted a survey recently in Jacksonville and happened to get some Winn-Dixie customers and got the responses "My mother always shopped at Winn-Dixie, and I have always shopped [139] at Winn-Dixie." So they have never been any place else.

(Roehm 2809-10)

Pantry Pride, number two market factor, has been the low-price leader in Jacksonville since the 1960's when Food Fair converted its Jacksonville stores to its discount Pantry Pride format. (Roehm 2730-

31) Although the stores are in generally poor condition as a result of Food Fair's financial difficulties, the Jacksonville division remains a good one for Food Fair. (Curhan 2942-43)

Publix, which is now ranked third, first attempted to enter Jacksonville simultaneously with entry into Miami in the late 1950's. It did not have sufficient manpower or money to enter both markets at the same time, and it decided to concentrate on Miami and withdraw from Jacksonville. (CX 611A; [Stipulated testimony of J. Blanton, President of Publix]) Publix began re-entering Jacksonville in 1971. It has eight 34,600 square foot stores in Duval County. (CX 611 [Blanton] A-B) Its share of food store sales has increased since 1977. (Roehm 2784) It is Publix's policy to carry an unusually large variety of grocery items, more than any of its major competitors, including Grand Union. (CX 611D) [Stipulated testimony of J. Blanton, President of Publix])

Albertson's entered Jacksonville with two stores in approximately 1975. (Roehm 2730) It opened two more stores in 1978. (Roehm 2730) Mr. Roehm estimated its market share had increased to 6 or 7% by 1980. (Roehm 2785)

A & P has closed its Jacksonville warehouse and many of its Jacksonville stores. It has not withdrawn from the area entirely and still has five stores in Jacksonville. (Spearman 904; Roehm 2733)

Jewel opened its first two Jewel T box stores in Jacksonville during 1977. (CX 665Z242) By the end of 1979 it had 15 box stores operating in the area. (Curhan 2954) Colonial has reacted to these stores by adding generic products to enable it to compete price-wise on staple items. (Roehm 2731)

Jacksonville also has several multi-store independents which operate conventional supermarkets: Daylight Stores, Banner Food Stores, C&C Markets and Big Ten.¹⁵ Daylight, [140] which is in the top eight, does very well in certain areas. (Roehm 2731) It operates four supermarkets and 19 convenience stores. (CX 665Z228; CX 665Z223) Banner Foods operates one store and has leased one of the smaller Colonial stores which Grand Union has closed. (Spearman 956; CX 665Z224) There are also Pic n' Save stores in Jacksonville. Two of the Pic n' Save stores are complete supermarkets with standard departments. The others, which are part of drug/general merchandise stores, carry a modified line of dry grocery items as part of their standard merchandising program. (Roehm 2731-32)

Respondents contend that Jacksonville has an extremely high ratio of convenience store sales to all other grocery store sales. (RPF 353; Curhan 2837-38), which, they argue, makes it "obvious that many

¹⁵ Apparently neither C&C Markets nor Big Ten was surveyed by complaint counsel. C&C operates "superettes." (See CX 665Z221-227; Spearman 785)

consumers in Jacksonville regularly choose convenience over price.” (RPF 353; *see also* Roehm 2809–10)

5. Grand Union as a Perceived Potential Entrant

155. Bert Thomas, President of Winn-Dixie, which has both its corporate headquarters and a division headquarters in Jacksonville, never perceived Grand Union as a likely entrant into Jacksonville. (B. Thomas 1513) Mr. Roehm, a Grand Union official, concurred. (Roehm 2743–44)

Mr. Stewart testified that in June 1978, he perceived A & P Family Mart as the most likely potential entrant into Jacksonville because, he said, A & P had withdrawn some of its conventional stores from Jacksonville and had begun opening Family Marts in Northern Florida. (Stewart 598) He also testified that he perceived “possibly Grand Union [but] I think A & P would have been a quicker likely entry into the market.” (Stewart 5988)

Mr. Spearman testified that in 1978 he perceived Grand Union and Albertson’s as likely entrants into Jacksonville. (Spearman 788) However, he testified that the only basis for his perception regarding Grand Union was “because at that particular time, their entry into the West Coast and they were moving up the West Coast of Florida.” (Spearman 788) He knew that Albertson’s was looking for sites in Jacksonville at the time (Spearman 788), but had never heard any rumors or had any basis to believe that Grand Union had looked for sites there. (Spearman 907–08) In fact, Albertson’s was already in the [141] marketplace in 1978. (CX 2K) Mr. Spearman testified that Colonial never took any competitive action based on his perceptions regarding Grand Union. (Spearman 907) No Colonial document prepared prior to the tender offer suggests that Grand Union was perceived by Colonial as a potential competitor.

6. Grand Union as a Potential Entrant

156. Complaint counsel points out that, because Grand Union might be expected to build a warehouse in central Florida within the next five years (F. 148), Grand Union would have strong incentive to expand rapidly in the three Florida SMSAs, including Jacksonville. (CPF 676) Grand Union is the only major factor in the Miami market which is not operating in Jacksonville. (Parker 2367)

Respondents dispute the idea that Grand Union was a likely potential entrant into Jacksonville. They find it “inconceivable” that Grand Union would attempt to enter three new areas in Florida (the three Florida SMSAs) within the five-year time span predicted by Dr. Parker. (Parker 2368; Curhan 2931–32; F. 145, 146) Respondents contend this is especially true because of Grand Union’s difficulties in the

West Coast of Florida and its unprofitable East Coast operations. (CX 6Z50-Z54, Z136; CX 7Z252) In addition, they argue, respondents' supervision of the stores would create serious problems because of the remoteness of Jacksonville from Grand Union's existing operations. (Curhan 2950-51) Grand Union prepared a "Study, Florida West Coast Development Plan, 1976-1980." (CX 71) This study mentions stores to be opened on the West Coast of Florida; there is no mention of Orlando, Gainesville, or Jacksonville. Business plans prepared in 1978 make no mention of stores to be opened in these SMSAs. (CX 6Z133-Z134, Z266)

The fact that Grand Union is unionized is another suggested reason that it would have been unlikely to enter Jacksonville. Only A & P, Food Fair (Pantry Pride) and Colonial are unionized in Jacksonville. (Roehm 2732) None of the three did particularly well in the 1970's vis-a-vis their nonunionized competitors. (CX 2K) Were Grand Union to have opened stores in Jacksonville, they would probably have been unionized, and would suffer a cost disadvantage of 2-3%. (Curhan 2944)

Respondents are skeptical of the suggestion that Grand Union would enter this area by purchasing A & P stores, because these are similar to the older type of Colonial stores that Grand Union has been closing. (RPF 378; Curhan 3138-39)

7. Alternative Means of Entry

157. Complaint counsel contends Grand Union could have built a warehouse as an alternative means of entry into Jacksonville. (F. 148) Grand Union has been utilizing a [142] wholesaler, Malone & Hyde, to supply its Florida stores with perishables; *i.e.*, produce, meats and dairy products. (F. 147) In addition, several wholesalers Grand Union has contacted now service stores in Jacksonville. (Foy 1781; F. 149) Super Food Services Albertson's and A & P stores in Jacksonville. (CX 643A-C) Publix and Albertson's have entered Jacksonville by *de novo* expansion in the last ten years. (CX 611A-D; CX 643A-C; CX 665Z222-Z223; Parker 2245-46; Roehm 2730) Three A & P Stores and a warehouse were available in Jacksonville in 1978. (CX 432; CX 643A; Cheek 1589-90, 1619) Respondents dispute the contention that A & P is a realistic entry alternative. (See F. 156.)

8. Other Potential Expanders and Potential Entrants

158. Publix re-entered the Jacksonville area within the last ten years. (CX 611 [Stipulated testimony of J. Blanton, President of Publix]) It began opening stores in Duval County, within which the City of Jacksonville is located, in 1971 and had eight stores by 1978. (*Id.* at B) Publix has done well in terms of market share in the short period

since its re-entry (15.4% of grocery store sales in 1977). (See CX 2K.) It is expanding its Jacksonville warehouse (CX 611C [Stipulated testimony of J. Blanton]) and is likely also to expand its number of stores.

Jewel, a 1977 entrant into Jacksonville, had 15 box stores by 1979. (Curhan 2954) Dr. Curhan testified that Jewel can be expected to expand. (Curhan 2954)

Albertson's, a recent entrant into Florida—about 1975, now has four combination stores in Jacksonville. (CX 665Z222-Z223; Roehm 2730) Respondents note that Jacksonville, unlike Orlando and other parts of Florida, is not a particularly prosperous area. (RPF 364) It is a "blue collar," working-class town with a lower average income than other areas of the state. (Roehm 2733; Curhan 2943; see also F. 154) In 1970, a Colonial document described Jacksonville as follows:

[A] "cheap" market. Low-end merchandise moves well. The average wage is lower than many major cities. . . . They are not nearly so brand conscious as they are penny conscious.

(CX 364I)

Chain food store operators generally prefer to open stores in affluent areas (Curhan 2914), which is an indication that Jacksonville may experience less chain store entry than other parts of Florida. Nevertheless, when asked whom he perceived as likely to enter Jacksonville, Mr. Roehm testified: [143]

Well, of course, in a market the size of Jacksonville anybody could have entered it at any given time if they'd had the commitment with one or more stores. The possibility always existed again, you know, that anybody could have entered. A lot of people would like to be in the Sun Belt, particularly in a growth state like Florida.

(Roehm 2733)

Great Scott of Florida is cited by respondents as a potential entrant into Jacksonville. Mr. Cheek, President of Great Scott, testified that he has considered entering Jacksonville as well as Orlando. He prepared a written market survey of Jacksonville in the Fall of 1978, did an aerial survey and considered purchasing three A & P stores. (Cheek 1589-90, 1619) However, he believed that he required six or seven stores in Jacksonville for his type of advertising program. (Cheek 1596) He remains a potential entrant. Messrs. Stewart and Roehm perceive Lucky as a potential entrant into Jacksonville through Kash'N Karry. The basis of both their perceptions was the article regarding Lucky's expansion plans which appeared in *Supermarket News*. (Stewart 655; Roehm 2734) Mr. Stewart also thinks A & P Family Mart is a potential entrant. (Stewart 598) Mr. Roehm

named Kroger as likely to enter Jacksonville. (Roehm 2734) Kroger has long been rumored to be interested in Florida. (Curhan 2954) Since the date of Mr. Roehm's testimony, Kroger has opened an experimental mini-combo drug/supermarket in Melbourne, Florida. (RX 39)

Respondents contend Piggly Wiggly Southern of Vidalia, Georgia, which already serves stores in the Georgia portion of the Jacksonville Market Area as defined by *Progressive Grocer* (see Curhan 3162-63; RX 30R-T), is within "striking distance" of the Jacksonville SMSA and may be considered a potential entrant. (Curhan 2953) T. J. Morris of Savannah, Georgia, serves stores in the Jacksonville Market Area, 147 miles away. (RX 30R-T) Similarly, David's Market, Food Town Super Markets, Inc. and M & M Super Markets, Inc., all with warehouses in Savannah, are within "striking distance" of Jacksonville. (RX 30T) Therefore, in addition to Lucky's, Kash'N Karry, B & B Cash Grocery Stores and E. J. Keefe Co., Inc., both of which have warehouses in Tampa, may be considered potential entrants into Jacksonville. (RX 30T)

9. Changes in Colonial's Jacksonville Operations Since the Acquisition

159. Dr. Parker testified that Grand Union would likely have entered the Jacksonville market on a scale significant enough to become a factor in this market (Parker 2271), and, therefore, Grand Union's acquisition of Colonial substantially lessened competition in Jacksonville because entry by [144] alternative means would have made Grand Union a new factor in the market and would have had a deconcentrating effect. (Parker 2368-69)

Respondents view Grand Union's acquisition of Colonial's Jacksonville operations as beneficial to that market. (RPF 383-88) When Mr. Roehm joined the Thomasville Division prior to the tender offer, Jacksonville was the only significant metropolitan market in which the Division had stores. Although the attitude of the Division was that in order to continue operating, it would have to increase sales and decrease losses in Jacksonville, Colonial had developed no plan for doing so. (Roehm 2728) At the time, Colonial had 12 stores in Jacksonville, of which only two were in the middle income, growth areas. (Roehm 2730) Except for two stores in Orange Park and one in Fernandina Beach, the other nine were all older stores which had never been renovated. (Roehm 2726) Although the stores were in generally average locations, they were not physically as attractive as those of the competition and did not offer the amenities which many consumers demand today such as delis, bakeries and expanded lines of general merchandise. (Roehm 2728)

The two stores in Orange Park were three miles apart and, according to Mr. Roehm, too close together, in an area too small for two stores. (Roehm 2727; Spearman 906) Grand Union has since closed one store, and the remaining Orange Park store is doing well. (Roehm 2727; Spearman 906) Since the acquisition by Grand Union the Jacksonville stores have shown an increase in sales volume, although they have still not achieved profitability. Mr. Spearman attributed the improvement in volume to increased advertising, particularly use of television, the aggressiveness of new management, and management's willingness to invest today for growth tomorrow. (Spearman 905-07)

Four of the twelve Colonial stores in this SMSA have been closed (Roehm 2735), and Grand Union is seeking new sites in Jacksonville. (Roehm 2736) The stores are receiving increased supervision because Grand Union has created a new position of a superintendent of stores resident in Jacksonville, as well as having two Jacksonville district managers. (Spearman 906)

In 1980, Grand Union completely renovated and reopened two stores, and installed deli/bakeries, at a cost in excess of \$2 million. (Roehm 2734) Grand Union ceased giving trading stamps in 1980. The stores are now more price competitive. Grand Union has lowered margins to enable them to be competitive with Publix and Pantry Pride. (Roehm 2735) The stores now carry a greatly expanded general merchandise section. (Roehm 2736) In addition to helping the stores compete in terms of product variety, particularly as against Publix (see CX 611D [145] [stipulated testimony of J. Blanton, President of Publix]), it allows Colonial to be more price competitive than before on grocery items. (Roehm 2736)

K. *The Orlando, Florida SMSA*

1. Demographics and Locations

160. As of July 1, 1978, the Orlando SMSA (F. 47) had an estimated population of 609,900, up from 453,270, or 34.6%, from April 1, 1970, an increase 4.5 times the national average. Orlando was the 65th largest SMSA in the country and the fifth largest in Florida. (Bureau of the Census, *Population*)

Orlando is located in central Florida. The center of the Orlando SMSA is located approximately 228 miles from Miami, connected by interstate highway. (Rand McNally) The distances from Orlando to other Florida and Georgia cities are:

72 miles from
139 miles from
245 miles from

Ocala, Florida
Jacksonville, Florida
Tallahassee, Florida

Initial Decision

102 F.T.C.

82 miles from	Tampa, Florida
109 miles from	Gainesville, Florida
104 miles from	St. Petersburg, Florida
164 miles from	West Palm Beach, Florida
250 miles from	Thomasville, Georgia

(Rand McNally)

161. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Orlando in 1972 and 1977 were as follows:

<u>Competitor</u>	<u>1972</u>		<u>Competitor</u>	<u>1977</u>	
	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>		<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Winn-Dixie	22.9	24.3	Winn-Dixie	21.1	22.2
Publix	20.0	21.2	Publix	20.3	21.4
Food Fair	14.2	15.1	Food Fair	8.2	8.6
Fairway			Albertson's	8.2	8.6
Markets	7.1	7.5	Southland	4.9	5.1
Southland	5.5	5.9	A & P	2.9	3.0
A & P	3.2	3.4	Goodings	2.6	2.8
Goodings	2.1	2.2	Shop n' Go	1.7	1.8
Munford	1.6	1.7			

(CX 2-0) [146]

The four-firm concentration ratio, in terms of grocery stores sales, declined by approximately 8 percent between 1972 and 1977. (CX 20) Colonial was not among the top eight firms in either of these years. (CX 665Z337-Z422) Winn-Dixie had 27 stores in 1977. (CX 665Z416) Publix went from 14 to 20 stores during the five-year period. (CX 665Z407) Food Fair's market share declined by almost 50% between 1972 and 1977. Its 1977 market share was only a fraction of a percent higher than fourth ranked Albertson's, which entered Orlando in 1975. A & P remained sixth-ranked, although its absolute share declined. Goodings, a local independent, remained the seventh-ranked competitor. There are two convenience store chains in the top eight—Southland and Shop n' Go. (CX 665Z391, Z409) The following convenience stores were also in business in Orlando in 1977:

<u>Name</u>	<u>Number of Stores</u>
Majik Market	31
il Champs	20
enneco Oil	18
'l General	11
arm Store Foods	1

(X 665Z395, Z397, Z402, Z405, Z414)

Four-firm concentration ratios for grocery stores, (SIC 541), were:

<u>1972</u>	<u>1977</u>
65.7%	60.1%

Four-firm concentration ratios for supermarkets were:

<u>1972</u>	<u>1977</u>
83.5%	79.5%

(F. 52, 53)

2. Colonial in the SMSA

162. In 1977, Colonial had a small market share in Orlando and operated only two stores. (Admissions 61) Despite losses in Orlando, Mr. Boyce, Colonial's Chairman and Chief Executive Officer, was committed to this market. (Spearman 799, 807; *see also* F. 144) Some of Colonial's competitors believed that Colonial maintained these two Orlando stores until it started an expansion program. (Gooding 1163-64) Orlando's status as a high-growth area made it a prime expansion target [147] due to the potential availability of sites. (CX 589 [Wood] at 93-94; Roehm 2795) Colonial planned to close its old Orlando stores in 1983, if the stores could not be sold before that date. (CX 358C)

3. Barriers to Entry

163. Dr. Parker testified that, in his opinion, barriers to effective entry into Orlando are significant. (Parker 2358-59) To maximize advertising expenditures and other advantages that correspond to size, a supermarket firm would seek to enter with four to twelve locations to effectively compete. (Spearman 802-03; Stewart 588; CX 607 [Rowe] at 30-31; Posey 1652; Gooding 1149-50; Roehm 2717) Development preference for Publix and Winn-Dixie makes acquisition of good store sites more difficult, particularly for independent operators. (Gooding 1139) This may result in an independent's need to purchase land and hold it until an area can support a store (Gooding 1139; Cheek 1584), which limits an independent's ability to expand. (Posey 1656-57)

4. Performance of the SMSA

164. Dr. Parker testified that, based on his analysis of the structure of this market, it is very likely that it is performing less than competitively. (Parker 2359)

Some Orlando competitors stated that the Orlando market is characterized by price leadership and that neither Publix nor Winn-Dixie

ever initiated a general price-cutting program. (Posey 1651; Gooding 1121-23) Industry members in Orlando, such as independents like Fairway, tend to price off these market leaders. (Posey 1651; Gooding 1121-22; Spearman 800-01)

Albertson's entry into Orlando led to a decrease in prices in that market. (Posey 1649; CX 640-41) Prices are high enough in Orlando to attract other new entrants, but entry must be sufficient to overcome existing entry barriers. (Cheek 1597-98) When Fairway, the largest independent in Orlando, cut prices heavily below the market and increased advertising in 1978, neither Publix, Winn-Dixie nor Albertson's reacted. (Posey 1639)

Mr. Gooding's three large stores in Orlando are not listed on the price-checking service used by Orlando's major competitors. (Posey 1651) Mr. Spearman testified that, in his opinion, entry into Orlando by a major firm like Grand Union would lead to a decrease in prices, and a redistribution of market shares, especially affecting the market leaders. (Spearman 803-04)

Respondents argue that complaint counsel's concentration figures overstate the amount of concentration in [148] this SMSA because they fail to account for the influence of the local commissary and of convenience stores in Orlando. (RPF 197-207) According to public records, the Orlando Naval Training Station Commissary had sales in fiscal 1978 (including three months of calendar 1977) of \$16.7 million, or \$321,000 weekly. In terms of CX 2 and CX 3, the commissary would have been the sixth-ranked competitor in 1977, replacing A & P in that position.

Florida is the state with the highest per capita concentration of convenience stores in the country, and the Orlando SMSA has the highest ratio of convenience store sales to all food store sales in the state. (Curhan 2837-38) Two of the top eight competitors are convenience stores, and there are many other convenience stores which are not within the top eight. (CX 665Z377-Z422; *see* F. 161)

The top competitors in Orlando differ in many aspects. Winn-Dixie, the leader in Orlando, has many smaller stores, primarily in neighborhood strip centers. Winn-Dixie generally appeals to "blue collar" shoppers, emphasizes private label products and is price-competitive more on specials rather than everyday low price. (Gooding 1123) Second-ranked Publix operates two types of stores in Orlando: conventional Publix stores and discount stores under the "Food World" banner. (Roehm 2717) The image of the conventional stores is geared toward middle and upper income areas:

Publix stores are very fine, high-quality stores. they really are geared to customer

service. They are the nicest chain store in the area, very fine decor, high quality customer service, very fine people.

(Gooding 1123)

Food Fair (Pantry Pride), third ranked, is "strictly a price store." (Gooding 1124) Its market share dropped by almost 50% (from 15.1% to 8.6%) between 1972 and 1977. Albertson's, number four, entered Orlando in 1975, built two stores between 1978 and 1980 and by 1980 had five combination stores. (Posey 1647, 1672-73) Albertson's stores are approximately 55,000 square feet, half of which is devoted to drugs and general merchandise, the balance to food. The stores are geared to all segments of the marketplace, are extremely high volume (Gooding 1124), and attract shoppers from large trading areas. (Posey 1646) Southland, number five, had 65 7-11's in Orlando in 1972 and 83 in 1977. (CX 665Z-Z412) Mr. Gooding, of Goodings, the number six firm in the market, estimated that his four stores have the highest dollar-per-square-foot sales in the area. (Gooding 1117) He described his stores as follows: [149]

Well, our type of stores are very high-quality, high customer-service-oriented stores, but we also consider ourselves to be very competent—highly competitive on dry grocery products; and they are the lowest average price in the market, . . .

(Gooding 1121-22)

Samuel Posey, President of Middle Florida Supermarkets, a wholly-owned subsidiary of Malone & Hyde, an independent wholesaler, testified about the seven Fairway Markets he operates in Orlando. Mr. Posey began acquiring the Fairway stores from the previous owners in 1976. Between 1977 and 1978 he, in turn, sold the stores to Malone & Hyde, his wholesaler. (Posey, 1639) Mr. Posey testified that when he acquired control of the stores he lowered overall prices, which he believed were too high, and began advertising in order to build volume. (Posey 1639) He estimated his market share at approximately 5%. (Posey 1634) Fairway's new price structure was lower than his competitors which resulted in a volume gain. (Posey 1644, 1670) Mr. Posey described his strategy for making his stores profitable:

Well, it was losing money and volume at a very rapid pace. I elected to drop prices extremely low; campaign our price program; generate volume in the stores; and as my volume began to pick up—which it did—I began to adjust my prices; and it took me approximately three years to get the volume that I needed in order to reach my projection of break even, and then raise prices to achieve it.

(Posey 1669)

He stated that his prices are as low as they can be while still remaining profitable. (Posey 1668)

Jewel-T entered the Orlando area in 1976 and by 1977 had three stores. (CX 665Z393) Jewel's prices are approximately 5-6% lower than Fairway's prices. (Posey 1635-36) Neither Mr. Posey nor Mr. Gooding has lowered his prices in reaction to Jewel-T's prices. (Posey 1637; Gooding 1131) However, Mr. Gooding testified to other competitive steps he has taken in response to Jewel-T:

We have looked to try to find some similar products to bring in for mass displaying to meet; but it is not lowering existing product, getting our warehouse to buy some of the same things that they [Jewel-T] are buying on some of the key items.

(Gooding 1131) [150]

5. Grand Union as a Perceived Potential Entrant

165. Some competitors viewed Grand Union in 1978 as a likely potential entrant into Orlando. (Posey 1652-53; Gooding 1145-46, 1150; Spearman 801; Stewart 597-98, 661; CX 607 [Rowe] at 42) One reason for expecting Grand Union to enter was that the high-growth Orlando market was much closer in time and distance than the West Coast of Florida market. Mr. Gooding explained:

A logical place for them to go. Orlando is one of the number one growth areas in the country. In spite of the proposed recession, Orlando is certainly an easier market to serve from their warehouse in Hialeah. They are over on the west coast of Tampa, St. Petersburg. When they are servicing those stores on the west coast, the cost of servicing those—and I know that from being on the board of directors of our co-op warehouse—the highway situation is just atrocious getting into that area. Where they come to Orlando, they can come right up on the turnpike. We used to be supplied from Miami by Associated Grocers. I was on the board of that co-op, too. I understand some of the problems in supplying stores at that distance; much easier in my estimate to supply stores in Orlando than it is to go to St. Petersburg. The traffic, the stop and go has to cost a fortune to run trucks on those highways. There's no major throughway servicing the west coast yet.

(Gooding 1146-47; *see also* Posey 1661.)

The President of Winn-Dixie, the market leader in Orlando, did not perceive Grand Union as likely to enter Orlando or any of the other alleged Florida markets, *de novo*. (B. Thomas 1513)

Similarly, Mr. Roehm, Vice President for Colonial's Orlando stores, did not perceive Grand Union as likely to enter Orlando. (Roehm 2718) Based on his observations of Grand Union's operations in Southern Florida, he thought that rather than enter Orlando, Grand Union "had a lot of filling in to do in the high-growth areas, both on the East

Coast [below West Palm Beach] and West Coast of Florida." (Roehm 2744)

Respondents' review of the testimony of trade witnesses who stated that they perceived Grand Union as a likely entrant into this market led to the following observations: [151]

(a) Despite Mr. Posey's belief that Grand Union would enter Orlando, he believes this SMSA is overstored "too many units for the population." (Posey 1652-53)

(b) Mr. Posey conceded that Grand Union had opportunities to expand its West Coast operations which it would be likely to exploit before entering Orlando. (Posey 1665-66)

(c) Mr. Posey and Mr. Gooding did not provide any evidence that they acted on their perception of Grand Union as a likely entrant. (RPF 237-38)

6. Grand Union as a Potential Entrant

166. Roger Kennedy, Grand Union's Treasurer, did not discount the possibility that Grand Union would edge its way into the Orlando market and Central Florida. (CX 576 [Kennedy] at 129-30) Mr. Goulding also expected that Grand Union would enter Orlando after moving up the East Coast of Florida. (CX 576 [Goulding] at 83) Moreover, Grand Union officials prior to the merger indicated to Colonial's management that they might want to purchase Colonial's Orlando stores at some time in the future. (Stewart 599)

According to respondents, Grand Union had no interest in Orlando in 1978 or in the reasonably foreseeable future because of the company's situation in Florida, particularly the West Coast. (Curhan 2931-34) Respondents' claim that the history of Grand Union's Florida operations demonstrates that the likelihood of its making *de novo* entry into Orlando within any reasonable period of time was extremely small. (RPF 244-261) Respondents argue that, although Grand Union management prior to the Cavenham acquisition had decided to return to the West Coast of Florida for the third time, there was no plan to re-enter Orlando. (RPF 252)

When James Wood became President of Grand Union in 1974, he continued with prior management's West Coast plans. (CX 589 [Wood] at 89) A report designed to project the company's growth in Florida through 1980, prepared in November 1976, entitled "Study Florida West Coast Development Plan, 1976-1980" (CX 71) demonstrates, according to respondents, that Grand Union was not an actual potential entrant into the three Florida SMSAs. (RPF 254) At the time the Study was prepared Grand Union had three existing West Coast stores: Naples, Bradenton and Venice. Nineteen more stores were

planned for the West Coast by 1980: North Fort Myers, Port Charlotte, West Bradenton, Tarpon Springs, New Port Richey, Dunedin, Fort Myers, [152] Sarasota (2), St. Petersburg (3), South Naples, Port Richey, Clearwater (2), East Fort Myers, Tampa and Hudson. (CX 71H)¹⁶

The Business Plan and Budget for 1978/79 described the West Coast competitors as more aggressive than in the East, and stated that although the Naples store produced excellent returns, the remaining West Coast stores "failed to achieve satisfactory market shares in the intensive competitive environment of the northern west coast markets." (CX 6Z-54)

Respondents note that the West Coast stores have not lived up to Grand Union expectations. (RPF 258) Only half the number planned were actually built. (CX 71; CX 589 [Wood] at 94) Grand Union's 1977/78 market share on the West Coast was estimated at 2.9% (CX 6Z120); the five stores opened in 1977 made a negative contribution of 3.6% of sales [representing start up costs] (CX 7Z252), and 1.2 million was forecast for 1978 (CX 6Z50), although they had the highest average weekly sales per store of all Grand Union's divisions. (CX 6Z27) Respondents state that Grand Union still has plans for this area, should it become profitable in the future (RPF 260; Curhan 2931), and it continues to look for sites, although it has no projected number of sites planned. (CX 589 [Wood] at 93-94, 96, 154)

Respondents also claim that Grand Union's closing of [153] all Colonial Orlando stores is evidence that the company had no intention of entering this market. (RPF 261) Grand Union plans, they state, were specifically to expand along the West Coast, but did not include inland areas which were viewed as having a lower growth rate [Orlando had a growth rate of 4.5 times the national average in the 1970's—F. 160]. (RPF 262; CX 589 [Wood] at 97)

Mr. Goulding testified that Grand Union had no plans to operate in Orlando, Gainesville, or Panama City. (CX 574 [Goulding] at 64-65) Mr. Kennedy stated, with regard to Central Florida:

It is a matter of growth potential as opposed to any long-term or any time frame, you

¹⁶ The Five Year Development Plan prepared one year earlier in November 1975 also projected building stores only on both Florida coasts through the plan period. (CX 79Z55-Z56) Even in the category "additional possibilities for new store development" no stores were listed for Central Florida, and the most northeasterly store listed as a possibility, in Stuart (CX 79Z-57), is in excess of 200 miles south of Jacksonville. Similarly, the next Five Year Development Plan for 1976-1981 states:

Expansion into New Marketing Areas

In regard to a new market entry, present plans focus upon the West Coast of Florida, the Baltimore area, and the South Jersey (Trenton) area, as well as such areas as Bucks County, Pennsylvania; Hunterdon County, New Jersey; Grafton County, New Hampshire and Steuben County, New York (Central Division).

(CX 80Z21) The 1976-1981 Plan projected the identical West Coast developments and "additional possibilities" as the previous year's Plan. (CX 80Z57-Z58)

know, it could be years and years before we would reach that are . . . I said we were on the West Coast, and how we will move from there and what the opportunity is, . . . I don't have the expertise to say that.

(CX 576 [Kennedy] at 132)

Grand Union's 1978/79 Business Plan, prepared prior to the decision to acquire Colonial, made no mention of store construction in any Central Florida area. (6Z266) Grand Union's purchase of eight West Coast stores from Colonial (F. 9), was made because "they needed stores very badly on the West Coast of Florida . . . to try to get near the break-even point at that stage." (CX 589 [Wood] at 37) Colonial also offered to sell Grand Union its Orlando stores. Grand Union had no interest in the Orlando stores. (Stewart 599; CX 607 [Rowe] at 75) The West Coast acquisition gave Grand Union two stores each in Tampa and St. Petersburg, one in Brandon, one in Bradenton and one store in Largo. (CX 82Q) All except Bradenton were within the Tampa/St. Petersburg SMSA. (CX 645B)

The acquisition had involved an eighth store in Clearwater, where Grand Union already had a store. Pursuant to agreement with the FTC, Grand Union never opened that store. (CX 589 [Wood] at 46) Of the seven stores, only two remain open. Even those are not profitable, although Grand Union believes they have the potential to become profitable. (CX 589 [Wood] at 49) In the other stores, although Grand Union was able to increase volume to \$50,000 weekly from Colonial's \$35,000 volume, it was still inadequate. (Curhan 2930) In the month of April 1979, those stores lost \$63,000. (CX 589 [Wood] at 47) The stores remained unprofitable and have since been closed. (Curhan 2930)

Other factors noted by respondents in their argument that Grand Union was unlikely to enter Orlando are: Grand [154] Union's scarcity of stores on the West Coast as compared with its competitors there, which makes filling in that area a priority (Curhan 2933-34); Grand Union's 1979 new store constructions and planned future construction are not in the direction of Orlando (CX 574 [Goulding] at 95; Curhan 2934); and expansion opportunities open to Grand Union on the East Coast in areas like Fort Lauderdale, West Palm Beach, etc. (Curhan 2935)

7. Colonial as a Toehold Acquisition in Orlando

167. Respondents claim that Colonial's market share in Orlando was so small, under 2% in 1977 (F. 161), that it was "barely a toehold acquisition" (RPF 302), and because Grand Union closed Colonial's Orlando stores (RPF 261), Grand Union is as likely, "or as unlikely," a potential entrant today as it was prior to the acquisition.

Mr. Rowe, who was Vice President and Secretary of Colonial at the time of the tender offer, was Vice President for the Orlando area in 1972 when the stores were acquired. (CX 607 [Rowe] at 11) Mr. Rowe testified: "[W]e were never a factor at all in [Orlando]." He referred to the fact that Colonial had too few stores and had problems servicing them from Thomasville, and that, administratively, it took as much time to monitor the two stores as it would have taken to supervise fifty stores. (CX 607 [Rowe] at 30-31)

Mr. Roehm, Colonial Vice President in charge of Orlando in 1978, described the situation in the two stores prior to the tender offer:

Sales were very low, approximately \$50,000 to \$60,000 between the two stores. The losses were tremendous. My challenge was to pretty much minimize the losses until we could dispose of and close the stores.

(Roehm 2714-15)

Mr. Gooding concurred with the opinions of Colonial's management. He testified:

They are not successful stores. Our estimate . . . was they were probably doing \$25,000 a week in 20,000 square-foot stores and quite obviously losing substantial amounts of money.

(Gooding 1163)

Colonial's Southern Division Five Year Stores Development Plan for 1979 projected selling or, in the alternative, closing both stores in 1983 when the first of the [155] two leases expired. (CX 358Z-4, Z5) By July of 1978, Colonial had even stopped price-checking in Orlando. (Roehm 2717) Mr. Roehm "doubt[ed] it very seriously" that Colonial would still have stores in Orlando even if there had been no acquisition. (Roehm 2717)

8. Expanders and Potential Entrants

168. Respondents cite several companies which, they believe, have evidenced an intention to enter or expand into the Orlando market. Mr. Posey, who now operates seven Fairway Markets, testified that he has committed to his company's corporate parent, Malone & Hyde, that Fairway will build five stores a year within the Orlando area for the next several years. (Posey 1663-64) At the time he testified, one store was under construction, he had a lease on four more and had additional locations under negotiation. However, Fairway has historically been an unprofitable firm. Its market share fell between 1972 and 1978. (Posey 1672-73, 1634, 1639)

Albertson's, a new entrant with five stores in Orlando, has publicly announced plans for 50 or 60 new stores in Florida. (Posey 1673)

Jewel-T is another recent entrant into Orlando (Posey 1635), and may further penetrate that market. Mr. Gooding testified he was interested in expanding in Orlando and had attempted to purchase the Colonial stores. (Gooding 1138) He also detailed the difficulties he had experienced in attempting to expand. (Gooding 1139, 1168)

Mr. Roehm testified: "[w]ith the growth factor in the State of Florida, particularly central and south Florida, anybody could enter at any time." (Roehm 2718-19) Mr. Foy, of Certified Grocers of Florida, testified that he foresees a great deal of new entry into Orlando (Foy 1800-01), although he did not specify any potential entrants. Mr. Cheek testified that he has considered expanding into Orlando. (Cheek 1589). He had a contract to purchase three A & P stores in Orlando, which was subsequently breached by A & P. Mr. Cheek also mentioned advertising costs as being an entry barrier. (Cheek 1596-97) In response to the question: "Mr. Cheek, are you a potential entrant into Orlando at this point," he answered "Yes." (Cheek 1614)

There was testimony regarding the likelihood of entry by Kash 'N Karry (formerly Tampa Wholesale Company), both prior and subsequent to its recent acquisition by Lucky Stores of California. Kash 'N Karry had been a family-run company with a warehouse in Tampa and approximately 50 stores in Tampa and the surrounding areas. In the 1960's, it had stores in Orlando, but withdrew from the area. (Posey 1629) A Grand Union Business Plan and Budget described Kash 'N Karry's shelf pricing as "one of the lowest on the West Coast of Florida." (CX 7Z-203) [156] Mr. Roehm perceived Kash 'N Karry as likely to enter Orlando even before it was acquired by Lucky because of its large warehouse relatively nearby and because it had a store in Ocala, only 50 miles from Orlando. (Roehm 2718) Since the acquisition, the trade press has reported that Lucky has announced plans to expand Kash 'N Karry throughout Florida. Therefore, Mr. Roehm still believes Kash 'N Karry is a likely entrant into Orlando. (Roehm 2721)

Mr. Gooding did not perceive Kash 'N Karry as likely to enter Orlando when it was "a family situation" because "they felt that their strong base was on the west coast." (Gooding 1146) Since its acquisition by Lucky, Mr. Gooding perceives Kash 'N Karry as likely to enter Orlando, citing as the basis of his perception an interview in *Supermarket News* with Lucky personnel stating they were looking extensively for sites in Orlando. (Gooding 1144) Similarly, based on Lucky's announcements, Messrs. Posey, Stewart and Goulding all perceived Kash 'N Karry as likely to enter Orlando. (Posey 1659-60; Stewart 661; CX 574 [Goulding] at 105)

Safeway was also identified as a potential entrant into Orlando. Mr. Roehm testified that "there have always been rumors of Safeway

wanting to enter the Florida market." (Roehm 2719) When questioned about Safeway as a potential entrant into Orlando, Mr. Posey, however, commented, "I wouldn't think so any time soon. Anything is possible." (Posey 1660)

Thriftway stores are operated by individuals who own one or more stores and are affiliated with Certified Grocers, an independent wholesaler. Thriftway operates under a cooperative advertising program. Mr. Posey thought Thriftway stores might enter Orlando, although he did not expect them to be a big factor. (Posey 1657-58)

B & B Cash Grocery Stores, operating as U-Save Wholesale Supermarkets, was also identified as a potential entrant into Orlando. (Curhan 3153) B & B is headquartered in Tampa and has its own warehouse in Tampa from which it serves 51 stores. (Curhan 3155)

Respondents point out that there are seven companies presently within "striking distance" of Orlando. Food Fair (Pantry Pride) serves its Orlando stores from Jacksonville, 139 miles from Orlando. Three companies which do not serve Orlando from any facility, also have distribution centers in Jacksonville:

Bacon Grocery Co., Inc.
Daylight Grocery Co.
United Food Stores, Inc.

(RX 30Z3) [157]

Malone & Hyde serves Orlando from Miami, 227 miles away. Both Grand Union and Associated Grocers are located in Miami, but neither serves the Orlando area. (RX 30Z3)¹⁷ Affiliated of Florida, Inc., E. J. Keefe Co., Inc. (subsidiary Fleming Co.'s, Inc.), both independent wholesalers, and Publix serve Orlando from distribution centers in Tampa. In addition to these three and Winn-Dixie, which has warehouses in both Tampa and Orlando, the following companies have distribution centers in Tampa but do not serve stores in Orlando:

B & B Cash Grocery Stores (U-Save)
Kash'N Karry (Lucky)¹⁸

(RX 30Z3)

Although these companies are within striking distance of Orlando, and any one of them could enter, each or all of them could choose not to enter the area. As one trade witness testified:

I think we are much better off . . . using our assets, both capital and personnel, in the markets that we are now in rather than spreading ourselves thin in a series of one or more new markets. I don't believe it is prudent business to do that.

¹⁷ Food Fair, Publix and Winn-Dixie also have warehouses in Miami. All three serve their Orlando stores from other warehouses in or closer to Orlando.

¹⁸ Kash'N Karry is shown as having stores in the "Orlando Market Area" as defined by *Progressive Grocer*. However, it does not yet have stores in the Orlando SMSA.

(Walters 1436-37)

9. Alternative Means of Entry

169. Grand Union could have entered the Orlando market through shipments from its Hialeah warehouse, closer to Orlando than some of the West Coast stores it presently serves from a distance of 250-305 miles. (Rand McNally; *see* F. 148) Use of distributors and wholesalers are also mentioned by complaint counsel as an alternative means of entry into Orlando by Grand Union. (*See* F. 149.) [158]

10. Changes in Colonial's Orlando Operations Since the Acquisition

170. According to Dr. Parker, Grand Union was the most likely potential entrant into Orlando (Parker 2659-60), and would have entered on a significant scale to become a factor in this market. (Parker 2271) Therefore, Grand Union's acquisition of Colonial substantially lessened competition in Orlando, because entry by alternative means would have made Grand Union a factor in this market and would have had a deconcentrating effect. (Parker 2361-69)

L. *The Gainesville, Florida SMSA*

1. Demographics and Location

171. On July 1, 1978, the Gainesville SMSA (F. 41) had a population of 129,700, up 24,900 or 23.8%, from the population of 104,764 of April 1, 1970. This rate of growth was three times higher than the national average. (Bureau of the Census, *Population*)

Gainesville is located in North-Central Florida. The distance between Gainesville and other Florida and Georgia cities are the following:

145 miles from	Thomasville, Georgia
72 miles from	Jacksonville, Georgia
335 miles from	Miami, Florida
37 miles from	Ocala, Florida
148 miles from	St. Petersburg, Florida
183 miles from	Sarasota, Florida
131 miles from	Tampa, Florida

(Rand McNally)

172. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Gainesville in 1972 and 1977 were as follows:

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<u>Competitor</u>	<u>1972</u>		<u>Competitor</u>	<u>1977</u>	
	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>		<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Publix	25.4	26.8	Publix	31.6	33.2
Winn-Dixie	17.9	18.9	Winn-Dixie	14.5	15.2
Food Fair	12.7	13.3	Albertson's	10.8	11.3
Colonial	5.4	5.7	Food Fair	7.7	8.1
Munford	5.3	5.6	Munford	3.2	3.4
A & P	2.5	2.7	Hitchcock's	3.1	3.3
Hitchcock's	2.5	2.7	Colonial	2.6	2.7
Shelton	2.5	2.6	Southland	2.6	2.7

(CX 2G) [159]

Between 1972 and 1977, Publix increased its presence from three to five stores (CX 665Z161) and its market share increased substantially. Winn-Dixie closed one of its six stores during that period (CX 665Z179), and its market share decreased. Food Fair (Pantry Pride), which was third ranked in 1972, was replaced by Albertson's in 1977 and dropped to fourth. Albertson's entered Gainesville in approximately 1975 and was third-ranked with one store two years later. Colonial, number four in 1972, was seventh in 1977 and its market share dropped in half. Munford, which runs Majik convenience stores, remained number five. A & P, number six in 1972, was no longer in the top eight by 1977, although its one Gainesville store was still open that year. (CX 665Z161) Hitchcock's Foodway, with two stores (CX 665Z164), rose from number seven to six, replacing A & P. Shelton Thriftway, with one store, was no longer in the top eight in 1977 and was replaced by Southland, which operated nine 7-11's in the county. (CX 665Z171)

Four-firm concentration ratios for grocery stores, (SIC 541), were:

<u>1972</u>	<u>1977</u>
61.8%	65.5%

Four-firm concentration ratios for supermarkets were:

<u>1972</u>	<u>1977</u>
85.4%	91.5%

2. Colonial in the SMSA

173. In 1977, Colonial was ranked sixth in supermarket sales and seventh in grocery store sales in the Gainesville market, with market shares of 3.8% and 2.7%, respectively. (CX 664A; CX 2G; Admissions 37)

Colonial operated only two supermarkets in Gainesville in 1977 (Admissions 38); however, these were price-checked by their Gaines-

ville competitors. (Roehm 2792) Colonial's five-year plan for Gainesville projected two additional stores in this SMSA. (CX 358C) After the acquisition, Grand Union closed Colonial's two Gainesville stores. (Roehm 2722; Spearman 837) Mr. Roehm testified that it "made sense" for Grand Union to re-enter Gainesville at some future time, based on its growth and proximity to Colonial's Thomasville warehouse (145 miles). (Roehm 2793) [160]

Respondents dispute complaint counsel's claim that the fact that Colonial's stores were price-checked in Gainesville indicates that these stores were a competitive factor in this market. (RPF 333) Colonial, according to Mr. Rowe, was never a factor in Gainesville. (CX 697 [Rowe] at 31) Colonial's market share of grocery store sales in Gainesville was below 3% in 1977 (CX 2G), and these stores were never profitable for Colonial. According to Colonial's own records, the stores' net losses were as follows:

Year ended Dec. 30 for the 2 Gainesville stores

1971	\$(169,420)
1972	(128,719)
1973	(174,435)
1974	(201,118)
1975	(253,577)
1976	(396,759)
1977	(466,449)
Total:	<u>\$(1,790,477)</u>

(CX 333B, D, F, K, M)

The two stores together did less than \$50,000 volume per week prior to the tender offer. (Roehm 2722; Spearman 795; Curhan 2940) Mr. Spearman had recommended that Colonial withdraw from Gainesville prior to the acquisition because its volume was so low (Spearman 794), and because "We didn't have the dedication to the marketplace." (Spearman 795) When Mr. Roehm came to the Thomasville Division prior to the tender offer he was unable to turn these stores around and recommended that Colonial close the stores. (Roehm 2823)

3. Barriers to Entry

174. Dr. Parker testified that, in his opinion, barriers to entry into the Gainesville market are significant. (Parker 2362) Mr. Stewart stated that the minimum effective level of entry into Gainesville is two or three large stores. (Stewart 587-88)

4. Performance of the SMSA

175. Based on an analysis of the structure of the Gainesville market, Dr. Parker testified that it is very likely this market is behaving less than competitively. (Parker 2362) Respondents counter that

there has been significant recent competitive activity in Gainesville (not included on CX 2G), particularly in light of the small size of this SMSA.

A & P closed its one store subsequent to 1977. (Roehm 2725) Albertson's, which has been expanding within the state, entered Gainesville in approximately 1975. By 1977, with only [161] one store, it was number three behind Publix and Winn-Dixie, the market leaders. (CX 2G) Jewel began operating Jewel-T box stores in Gainesville in 1979. (Roehm 2724) Food Fair (Pantry Pride), which lost market share between 1972 and 1977, reacted to Jewel's entry by converting one of its two stores to a box store format. (Roehm 2724)

5. Grand Union as a Potential Entrant

176. Complaint counsel posits that Grand Union, once it entered Orlando by building a new warehouse (*see* F. 148), would proceed to Gainesville, which is within "striking distance", to support this warehouse. (CPF 682; Parker 2363; Gooding 1158-59) Dr. Parker testified that Grand Union was a likely potential entrant into Gainesville (Parker 2362), and the "scenario" for this entry would be:

Yes, I think that the scenario of Grand Union going into Gainesville would be tied up with its going into Jacksonville. And I think that there [are] some toe-holds in Jacksonville. I think, however, that the most likely way it would have gone into both of the markets would have been to either build a warehouse or to use a wholesaler and with the idea of building up numbers of stores to support a warehouse. So, I would say *de novo* is the most likely way it would go in.

(Parker 2363)

As further support for this theory, complaint counsel notes that the top four firms in Orlando are also the top four firms in Gainesville. (CX 3G,O) Publix has also entered all the markets in north and central Florida by edge expansion. (CX 611A-D; Parker 2245)

Respondents deny that Grand Union would have entered Gainesville in accordance with any of the scenarios offered by complaint counsel. (RPF 329-332) Respondents note that there is no document or testimony that in any way suggests Grand Union was interested in the Gainesville market. In addition, respondents cite Grand Union's closing of Colonial's Gainesville stores (F. 173), as further evidence of Grand Union's lack of interest in Gainesville. (RPF 332)

6. Grand Union as a Perceived Entrant

177. Complaint counsel concede Grand Union was not perceived as a potential entrant into Gainesville. No witness who testified about Gainesville perceived Grand Union as a likely entrant. Mr. Spearman, who perceived Grand Union as an entrant into both Orlando and Jacksonville, did not think Grand Union would enter Gainesville

because of the limited growth and [162] potential of the area. (Spearman 797) Similarly, neither Mr. B. Thomas, the President of Winn-Dixie, nor Mr. Roehm thought Grand Union was likely to enter the area. (B. Thomas 1513; Roehm 2725)

7. Other Potential Expanders

178. Respondents cite several companies as potential expanders or entrants into Gainesville. In 1971, Albertson's had no stores in Florida; by 1977 it had 18 (CX 665Z156), and it continues to expand. Jewel, also a recent entrant, may build additional box stores in the area.

Regarding potential entrants, respondents' marketing and management expert testified:

I think that the most likely would have been that some independent would have opened a store, perhaps in one of the abandoned stores that these people were pulling out of, Colonial and A & P who were rumored to be on the verge of closing their last store there.

But I don't see [Gainesville] as a market where I would venture a guess as to who would come in there next. I don't think anyone would.

(Curhan 2940-41)

One of Colonial's two former stores remains vacant although it is in an average or better location. (Roehm 2722) Colonial has approached potential food sublessees as well as businesses in other lines. (Roehm 2724-25) It may become the vehicle for new entry.

Mr. Roehm perceived Kash'N Karry as a potential entrant into Gainesville even in 1978 because it already had a store in nearby Ocala. (Roehm 2725) Since its acquisition by Lucky and Lucky's announcement of its expansion plans for Florida, Mr. Roehm is convinced it will build one or more stores in Gainesville. (Roehm 2725) [163]

There are several other companies which are within "striking distance" of Gainesville and which could easily serve stores in the area. Jacksonville is only about 50 miles from Gainesville. The following companies have distribution centers in Jacksonville and do not presently serve stores in Gainesville:

Daylight Grocery Co.
United Food Stores, Inc.
Bacon Grocery Co. Inc.¹⁹

(RX 30T; CX 665Z155-Z180)

Tampa is approximately 100 miles from Gainesville. In addition to

¹⁹ Located in Alma, Georgia, north of Jacksonville but within the "Jacksonville Market Area" as defined by *Progressive Grocer*. (RX 30S)

Publix and Winn-Dixie, there are the following distribution centers in Tampa which do not serve Gainesville:

Affiliated of Florida, Inc.
 B & B Cash Grocery Stores
 Lucky Stores
 E. J. Keefe Company, Inc. (subsidiary Fleming Cos., Inc.)

(CX 665Z155-Z180)

In addition, Piggly Wiggly Southern, located in Vidalia, Georgia, is only about 120 miles from Gainesville and could be considered a potential entrant. (Curhan 2940)

The North Carolina Markets

M. *The Raleigh/Durham, North Carolina SMSA*

1. Demographics and Location

179. The Raleigh/Durham SMSA (F. 48) was the 77th largest in the United States. Between 1970 and 1978, its population increased from 419,254 to 493,600, or 17.7%, almost two and one-half times the national average. (Bureau of the Census, *Population*)

Between 1970 and 1978, the population of Wake County (the Raleigh subdivision), which includes the city of Raleigh, [164] increased from 229,006 to 278,500, or 21.6%. (Bureau of the Census, *Population*)

Raleigh is located in east central North Carolina:

25 miles from	Durham, North Carolina
153 miles from	Richmond, Virginia
160 miles from	Roanoke, Virginia
169 miles from	Norfolk, Virginia
137 miles from	Charlotte, North Carolina
205 miles from	Spartanburg, South Carolina
236 miles from	Asheville, North Carolina
156 miles from	Wilkesboro, North Carolina
233 miles from	Greenville, South Carolina

(Rand McNally)

Between 1970 and 1978, the Durham subdivision, which consists of Durham and Orange Counties, increased in population from 190,248, to 215,200, or 13.1%. (Bureau of the Census, *Population*)

The city of Durham is also in east central North Carolina:

25 miles from	Raleigh, North Carolina
150 miles from	Richmond, Virginia
135 miles from	Roanoke, Virginia
177 miles from	Norfolk, Virginia
134 miles from	Charlotte, North Carolina

223 miles from	Asheville, North Carolina
202 miles from	Spartanburg, South Carolina
135 miles from	Wilkesboro, North Carolina
230 miles from	Greenville, South Carolina

(Rand McNally)

180. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in (i) the Raleigh/Durham SMSA; (ii) Raleigh; and (iii) Durham in 1972 and 1977 were as follows: [165]

Raleigh/Durham SMA

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Winn-Dixie	20.9	21.6	Winn-Dixie	24.1	24.8
A & P	17.9	18.5	A & P	15.9	16.4
Colonial	15.4	15.9	Colonial	15.2	15.6
Kroger	6.6	6.8	Kroger	4.7	4.8
Piggly Wiggly N.C.	2.0	2.0	Food Town	2.9	3.0
Fast Fare	1.7	1.7	Lyon Stores	2.0	2.1
Southland	1.2	1.2	Food World	1.9	2.0
Byrd Food Stores	.7	.8	Fast Fare	1.8	1.9

(CX 2P)

Raleigh (Wake County)

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
Winn-Dixie	27.5	28.3	Winn-Dixie	27.3	28.0
A & P	16.6	17.1	A & P	15.4	15.8
Colonial	14.3	14.7	Colonial	13.9	14.3
Piggly-Wiggly N.C.	3.6	3.7	Food Town	4.0	4.1
Kroger	2.9	3.0	Food World	3.2	3.3
Fast Fare	2.1	2.2	Piggly Wiggly N.C.	2.8	2.9
Li'l General	.8	.8	Fast Fare	2.6	2.7
Southland	.7	.7	Lyon Stores	1.3	1.3

(CX 2Q) [166]

Durham (Durham and Orange Counties)

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
A & P	19.5	20.3	Winn-Dixie	19.6	20.3
Colonial	16.7	17.4	Colonial	16.9	17.5
Winn-Dixie	12.6	13.1	A & P	16.7	17.2
Kroger	11.1	11.6	Kroger	11.3	11.7
Southland	1.7	1.8	Byrd Food	3.6	3.7
Byrd Food	1.6	1.7	Lyon Stores	3.1	3.2
Fast Fare	1.1	1.2	Harris-Teeter	1.6	1.7
Ken's Quickie Mart	.7	.7	Southland	1.6	1.7

(CX 2R)

Raleigh: Between 1972 and 1977, the top three competitors retained the same rank and approximate market shares, although A & P decreased its representation from 11 to 9 stores and Winn-Dixie dropped from 15 to 13 stores. (CX 665Z-424, Z444, Z470) Piggly Wiggly North Carolina (unrelated to Piggly Wiggly Southern of Vidalia, Ga.), dropped from fourth to sixth ranked in 1977, although it still had four stores. (CX 665Z464) Food Town, with two stores in 1977, had no stores in the area in 1972. (CX 665Z428) Similarly, Food World, also with two stores, number five in 1977, entered subsequent to 1972. (CX 665Z440) Kroger, number five in 1972, dropped out of the market by 1977. (CX 665Z452) Fast Fare, a chain of convenience stores, went from sixth to seventh place and Lil'l General and Southland (7-11), also convenience stores, were no longer in the top eight by 1977. Lyon Stores, with one store, entered the top eight. (CX 665Z460)

Durham: In 1972, A & P, with 14 stores, ranked number one, but by 1977 it had only nine stores, its market share decreased, and it dropped to number three. (CX 665Z444) Winn-Dixie went from third in 1972 to first in 1977. Its market share increased by over one-third and its number of stores from five to six. (CX 665Z470) Colonial remained in second place and Kroger held at number four. (CX 665Z452) Southland was number five in 1972 and eighth in 1977. Byrd Food rose from sixth to fifth. Harris-Teeter opened one store in June of 1977 and became number seven, although its store was open for only half the survey year. (CX 665Z 445)

Four-firm concentration ratios for grocery stores, (SIC 541), were: [167]

	<u>1972</u>	<u>1977</u>
Raleigh/Durham SMSA	63.5%	63.6%
Raleigh	63.8%	62.1%
Durham	62.4%	66.8%

Four-firm concentration ratios for supermarkets were:

	<u>1972</u>	<u>1977</u>
Raleigh/Durham SMSA	93.5%	86.8%
Raleigh		89.2%
Durham		86.8%

(F. 52, 53)

2. Colonial in the SMSA

181. In 1977, Raleigh was Colonial's divisional headquarters and the location of a warehouse. Colonial operated 18 supermarkets in the Raleigh/Durham SMSA. (Admissions, 62, 63) In 1977, Colonial had a 15.6% share of all grocery store sales in the Raleigh/Durham SMSA. (CX 2P)

Colonial's five-year development plan for its Raleigh Division indicated that, for the period from 1976-80, Colonial planned to add twenty-two new stores, opening thirty-four new stores and closing twelve old ones. This would have added 710,720 square feet of floor space in this Division, increasing its total floor space from 1.2 to 1.96 million square feet by 1980. (CX 353Z9) In its 1976-1980 store development plan, Colonial projected the opening of three new supermarkets in Wake County. (CX 353V) In 1977, Colonial ranked third in the Raleigh market and second in the Durham market with 14.3% and 17.5% share of grocery sales, respectively. (CX 2Q, R)

3. Barriers to Entry

182. Dr. Parker testified that, in his opinion, barriers to entry in the Raleigh market are substantial and discouraged new entry by operators of small supermarket chains. (Parker, 2321)

In Raleigh, shopping centers and small sites are preferred as locations for new supermarkets, rather than free-standing store sites. (Byrd 1570) Mr. Byrd testified that real estate developers prefer to lease shopping centers and small sites to interstate supermarket chains such as Colonial or Winn-Dixie. Crabtree Mall in Raleigh was used as an example: although the owners of the land had an agreement to lease a site to Byrd Foods in the proposed mall, a developer then acquired the property, built the mall, and leased the site to Colonial. (Byrd 1547-50) [168]

Mr. Byrd also testified that advertising costs in the *Raleigh News and Observer* are high and that, as a single store operator, he will be

unable to maintain such advertising costs indefinitely. (Byrd 1545) He believes that a minimum of three supermarkets is necessary for a supermarket operator to successfully enter the Raleigh market. (Byrd 1551-52; *see also* Stewart 583)

Dr. Parker testified that, in his opinion, barriers to effective entry into the Durham subdivision are quite high. (Parker 2328-29) Entry into the Durham market, according to complaint counsel, has been through the acquisition of second-use locations, which does not add new shopping locations to the city. Byrd's entry into Durham in 1973 was by taking over a former Kroger store (Addison 2653); and its expansion in 1980 was by acquiring a second-use A & P location. (Addison 2653) Food Town, a recent Durham entrant, entered Chapel Hill by taking over a location that formerly housed Byrd's. (Addison 2654)

4. Performance of the SMSA

183. Dr. Parker testified that, in his opinion, there is a high probability that, from an economic standpoint, the Raleigh subdivision is not performing competitively. (Parker 2322) The Durham submarket, he believes, is substantially likely to be performing poorly. (Parker 2328-29) Durham, despite its moderate-size, is thought by Dr. Parker to be highly concentrated. (Parker 2329)

Respondents dispute the conclusion that the Raleigh and Durham markets are not competitive. Mr. Addison, Colonial's Regional Vice President for the Carolinas, testified about the competitiveness of the area:

I think currently the Durham market is competitive. It is much like Raleigh. I think going back a few years to 1976 A & P closed a number of stores in Durham because they were unprofitable because of the competitive situation there. The stores were fairly good-sized stores. We have had new entrants in the market in Durham. It is a fairly competitive market. In fact, we have seen our market share erode in the last couple of years, three years, particularly in Chapel Hill. We had a store in Chapel Hill that was doing in excess of \$100,000 a week, and we were making the highest profit of any store in the Raleigh Division. Today we are breaking even in that store, doing about \$53,000 a week. So we have lost about half of the volume in that store in the last couple of years, and that is attested by the fact we have had Food Town move into that [169] market with extremely low prices, and although we have met a lot of the prices we have not been able to maintain the market because we have had to split the pie that many ways.

(Addison 2659)

Winn-Dixie was ranked first in both Raleigh and Durham in 1977. (CX 2Q, R) It entered these markets in the early 1960's when it acquired Kitner-Milner, which had its headquarters in Raleigh. (B. Thomas 1493-94) The Raleigh division serves 110 Winn-Dixie stores.

(Addison 2646) In 1980, Winn-Dixie was in the process of expanding its Raleigh warehouse; when complete, the dry grocery warehouse will be 350,000 square feet. (B. Thomas 1492-93)

A & P is second ranked in Raleigh (CX 2Q) where it has five large new or recently renovated stores. (Addison 2646) Four of these five stores are believed to average over \$100,000 in sales per week. (Addison 2646) In Durham, A & P dropped from first to third place between 1972 and 1977. (Addison 2647)

Food Town entered Raleigh in 1975 and by 1977 was ranked fourth. (CX 2Q) By early 1981, it had four stores open and a fifth under construction. (Addison 2647; Curhan 2980) Mr. Addison testified that Food Town probably had the lowest prices in this area. (Addison 2647)

Food Town also entered Durham within the last five years by acquiring a Byrd store in Chapel Hill. Food Town subsequently built a second store in 1978 and is looking for additional sites. (Addison 2651-52, 2654) The store it built in 1978 is thought to be one of the highest volume stores in Durham. (Addison 2655)

Harris-Teeter entered Raleigh with one store in the suburb of Cary in 1978/79. The store is 25,000 square feet with a bakery/deli and service departments. (Curhan 2977; Addison 2647) Harris-Teeter has a second store under construction and it is reported to be looking for additional sites. (Curhan 2977) Compared to its competitors, Harris-Teeter is not low-priced. (Curhan 2977) Harris-Teeter also has one store in Carrboro (Chapel Hill) in the Durham market. (Addison 2653) That store opened during the summer of 1977 (see CX 665Z445), and Harris-Teeter was the seventh-ranked competitor in Durham in 1977. (CX 2R)

Food World, number five in Raleigh in 1977, operates two stores there. It built its first store in early 1975 and its second in 1977/78. (Addison 2649) Mr. Addison described Food World as follows: [170]

They are large stores patterned much like the Publix supermarkets in Florida. They do not give stamps. They have everyday low shelf prices. They have service departments in most stores and are larger than most of the stores in the market, being in the 30,000-square-foot range.

(Addison 2647)

Food World has not entered Durham.

Piggly Wiggly North Carolina of Kinston, 70 miles east of Raleigh, operates 42 stores in North Carolina; all except two are independently owned. (CX 665Z464-Z465) It is number six in Raleigh with four fairly small, 10,000-12,000 square feet stores. (Spearman 894) It has no stores in Durham. There are also 11 or 12 Grocery Boy Juniors in Raleigh, although they were not surveyed by complaint counsel. (See CX 665Z423-Z474.) Mr. Addison testified:

That's a local chain of superette-type stores, neighborhood stores which have prices slightly higher than the supermarkets but lower than the convenience stores. These stores are locally owned, as I stated, and do quite well in the neighborhood they are located in.

(Addison 2647)

There is one ABC Market in Raleigh. It is affiliated with IGA, a wholesaler. (Addison 2647-48)

Best Food, a single store independent, opened a warehouse store in Raleigh in 1980 in a former chain store location. Best Food advertises its low prices in the local newspaper. (Curhan 2981; Addison 2649) There are also approximately 35 convenience stores in Raleigh. These include 7-11's, Fast Fare and Convenience Marts. (Addison 2657) Fast Fare, which has 10 or 12 stores in Raleigh, has recently begun advertising that its prices on milk and dairy products are no higher than the chains' prices. (Addison 2651) As a result of Fast Fare's price advertising, Colonial is now price-checking Fast Fare weekly rather than the on-a-spot basis it had previously employed in checking those stores. (Addison 2651)

Three companies operate more than one store in Durham but have no stores in Raleigh: Kroger, Byrd Food and Fowler's. Kroger, number four in Durham, has three super stores in Durham and one in Chapel Hill. (Addison 2652) They are 37,000-40,000 square feet and are large conventional stores rather than Kroger's somewhat larger Sav-ons. (Addison 2652) [171]

Byrd Food, which is located only 15 miles from Durham in Burlington (Curhan 2982), has four stores in Durham: one in Carrboro (Chapel Hill) in Orange County, and three in Durham in Durham County. (Byrd 1542) One of the Durham stores is a former Kroger store and one is a former A & P store. (Byrd 1543) Byrd Food was ranked fifth in 1977 with 3.7% of grocery store sales. (CX 2R)

Fowler's operates two stores in Durham/Chapel Hill. Mr. Addison described those stores:

Fowler's Food Store is an old-line independent that caters with service and extended wine departments, gourmet foods, with basically shelf prices a little higher than the chains but a lot of service, and he does quite well in Durham and Chapel Hill.

(Addison 2653)

There are ten Big Star stores in Raleigh, five in Durham and one in Chapel Hill. Mr. Addison stated about the ten Big Star stores in Raleigh:

[T]hey range from a low of a 15,000 foot one to a 30,000 square-foot store in Crabtree Shopping Center. Two have bakeries and delis, Cameron Village and Crabtree. The

other stores do not have bakery-delies. We are in the process of installing bakery-delies in two stores in January.

We have, I would say, typical supermarkets for that area. We have a semi-everyday-low-price structure, grocery structure. We feature U.S. choice beef and take a great deal of pride in our personal performance in that area and do quite well in Raleigh.

(Addison 2648)

Mr. Addison also described the Big Star stores in Durham:

Basically we have the same type store that we have in Raleigh. We have one store in Durham in the Northgate Shopping Center with a bakery-deli, a 30,000-square-foot supermarket. The other stores range from 18—17.5, in fact to 25,000 square feet, and they are basically as I described the Raleigh stores, supermarkets. We have the same price structure in Durham as in Raleigh, although occasionally we run different features in the Durham market.

(Addison 2654) [172]

The last Big Star to open in Durham was in 1974. (Addison, 2654) Mr. Addison testified that Colonial has had a difficult time locating sites in the growth areas of Durham, although it has been actively seeking sites in the area. (Addison, 2660) Colonial has signed a lease for a store in Carrboro (Chapel Hill), which is scheduled to open in 1981. (Addison, 2660)

5. Alternative Means of Entry

184. Complaint counsel cites Byrd, Harris-Teeter, Food World and Food Town as toehold acquisitions for Grand Union's entry into Raleigh. (CPF 533)

According to the Southeast Study (CX 32F), the Harris-Teeter division of Reddick Corporation operated 62 stores and had \$169 million in sales. Harris-Teeter's warehouse is in Charlotte, North Carolina, 137 miles from Raleigh. (CX 32E; Rand-McNally) In 1977, Harris-Teeter had one store in the Raleigh market and less than .7% of grocery store sales in that market. (CX 2Q; CX 665Z445) Respondents, noting that Harris-Teeter had recently been acquired by Reddick Corporation (Spearman 932-34), deny that Harris-Teeter presented a valid potential toehold acquisition, because there is no evidence that this company was for sale at the time of the tender offer. (RPF 740)

The Southeast Study indicated that Food Town operated 30 stores and had \$130 million per year in sales. (CX 32F) The company's warehouse is in Salisbury, North Carolina, approximately 70 miles from Raleigh. (Admission 108) In 1977, Food Town operated two stores in the Raleigh market and had 4.1% of grocery stores sales in that market. (CX 2Q; CX 665Z438) Respondents argue that it is impossible to consider Food Town as an acquisition possibility in 1978, because

it had recently been acquired by Del Haize. (Curhan 2965; Addison 2649) When asked about Food Town as an acquisition possibility, Mr. Wood testified: "I haven't seen a Food Town store in the South, nor do I know anyone in Food Town in the South, nor have I had any contact." (CX 589 [Wood] at 186)

The Southeast Study indicated that Food World operated 27 stores and had sales of \$93 million. (CX 32F) Food World's warehouse is located in High Point, North Carolina, approximately 84 miles from Raleigh. (CX 32I; Rand McNally) In 1977, Food World had two stores in the Raleigh market and had 3.3% of grocery store sales in that market. (CX 2Q; CX 665Z440)

Complaint counsel also mention Harris-Teeter as a potential toehold for entrance into Durham. This company had [173] 1.7% of the grocery store market in Durham in 1977. (CX 2R) Complaint counsel postulates that, although Food Town and Food World had no stores in Durham, Grand Union could have used its resources to enter Durham from Raleigh by acquiring one of these two companies. (CX 665Z423; CPF 538)

Community Cash is cited as a potential toehold into Durham. (Parker 2464) This chain of approximately 35 stores is owned by the Littlejohn Family. It has a warehouse and 16 stores in Spartanburg, South Carolina and six stores in Greenville, which were recently acquired from A & P. (Curhan 2975-76) Respondents' witnesses indicate that this chain's rural image and modest sales (\$127 million per year) make it a poor fit into Grand Union's operations (Curhan 2975; Spearman 938), and state that there is no information that Mr. Littlejohn is interested in selling his stores. (Spearman 938-39)

Byrd Food, cited by complaint counsel as a toehold possibility in both Raleigh and Durham, operated 15 supermarkets in 1979: one in Orange County and three in the city of Durham. Byrd also operated one supermarket in Apex (Wake county), North Carolina. (Byrd 1541-42; 1545) Byrd had \$50 million in sales in 1979 and was profitable. (Byrd 1563) In 1977, Byrd's share of grocery store sales in the Durham-Chapel Hill market was 3.7% and less than .7% in the Raleigh market. (CX 2R; CX 665Z428) In 1979, Byrd operated a 45,000 square foot dry grocery warehouse in Burlington, North Carolina, which is 57 miles from Raleigh. (Byrd 1544; Rand McNally) In 1980, Byrd was expanding its warehouse capacity by an additional 20,000 square feet. (Byrd 1558) In about 1968, Winn-Dixie approached Byrd Food Stores in regard to determining whether Byrd would sell out to that firm. No agreement was reached. (Byrd 1556-58, 1566)

Complaint counsel also mentioned Bi-Lo, Ingles, and Lowes (CPF 544), which do not operate in either Raleigh or Durham, but have

warehouses within shipping distance of the two markets, as toeholds for expansion into this area.

According to the Southeast Study, Bi-Lo operated 85 stores in South Carolina, Southwest North Carolina and East-Central Georgia and had \$367 million in sales in 1976. (CX 32F) Bi-Lo's warehouse is in Mauldin, South Carolina, which is 233 miles from Raleigh, North Carolina. (CX 32I; Rand McNally) Bi-Lo's stock was publicly traded on the over-the-counter stock exchange. (CX 32F) Respondents' comments regarding Bi-Lo as a toehold acquisition possibility are detailed at F. 91.

In 1976, Ingles operated 40 stores and had \$123 million in sales. (CX 32F) As of September 1979, Ingles operated 69 stores and had sales of \$249 million. (RX 18) Ingles' warehouse is near Asheville, North Carolina, and is approximately 236 miles from the Raleigh market and 223 miles [174] from Durham. (CX 32I; Rand McNally) Respondents' comments regarding Ingles as a toehold acquisition possibility are detailed at F. 91.

According to the Southeast Study, Lowe's Food Stores operated 34 stores and had sales of \$76 million. Lowe's warehouse is located in Wilkesboro, North Carolina and is approximately 156 miles from Raleigh and 135 miles from Durham. (CX 32F, I; Rand McNally) Dr. Curhan testified about Lowe's as follows:

Lowe's is another successful company that was started in 1955. Many of these companies have had phenomenal growth, if you consider they were started in the '50s and '60s and now they are making their entrepreneurial owners, I am sure, handsome returns. But Lowe's operates very small stores. They have 63 stores and their sales in '78 are \$130 million. That's a scant \$2 million a store. That's not Grand Union's kind of store. That's the kind of store they have repeatedly closed and found they cannot make money. Lowe's strength is in the North Carolina areas, as one would expect, in Asheville, in Greensboro, Winston-Salem, High Point area, where they have 19 stores in the area.

They are serviced partly out of their own warehouse, which serves fast-moving items and deal merchandise, but the substantial portion of their goods are purchased from Merchant's Distributors out of North Carolina. Here we have a situation where they are again so rural and so small, in terms of their independent units and without even a warehouse facility, that I just cannot personally see a fit with Grand Union's style of management or what they would like to represent themselves as in a new territory. I see it as an extremely unlikely situation. I would say also that Lowe's tried to acquire Food Town in the '70s, but the FTC prevented it.

(Curhan 2972-73)

Grand Union's Regional Vice President for the Carolinas' Division testified that, in his opinion, Lowe's would not have been a likely acquisition candidate for Grand Union because Lowe's is such a localized chain and because the small size of many of Lowe's stores would

not be compatible with Grand Union's operations. (Addison 2657-58) Colonial at one time had considered acquiring Lowe's but rejected the idea in part because of the size and location of Lowe's stores. (Addison 2658) Mr. Wood testified he was not familiar with Lowe's and [175] had not had contact with it in regard to acquisitions. (CX 589 [Wood] at 186-87)

The proposed Grand Union/Dart Drug joint venture (F. 125) provided an additional possibility for Grand Union to enter these markets, according to complaint counsel. (CPF 552-556) Another possibility was a joint venture with Peoples Drug Stores. (CPF 557)

On June 9, 1976, Earl R. Silvers met with Sheldon W. Fantle, Chief Executive Officer of Peoples Drug Stores, to discuss a proposed joint venture which would operate supermarket-drug combination stores in Charlotte, Fayetteville, Greensboro-High Point-Winston-Salem, and Raleigh/Durham, North Carolina. (CX 48A-C) On June 10, 1976, Earl Silvers wrote a memorandum to James Wood, with a carbon copy to Bowman Gray, that a joint venture was proposed with Peoples Drug which was similar to the 1972 Dart Drug joint venture. In his memorandum, Silvers noted that a joint venture would be an approach to Grand Union's future sales growth if Grand Union had difficulty in making a satisfactory acquisition. (CX 48A-C)

According to complaint counsel, stores for a joint venture could be supplied by using an independent wholesaler rather than a Grand Union warehouse. (CPF 559) Grand Union could also have entered this area *de novo* by using a wholesaler and, it is claimed, shipped its private label products from its Landover, Maryland warehouse.

Merchants Distributors, Inc. (M.D.I.) is a wholesale food distributor of food and non-food products to independent and chain supermarkets. M.D.I.'s principal place of business is located in Hickory, North Carolina. (CX 629A) M.D.I.'s distribution center, or warehouse, is located on Highway 321 Bypass in Hickory, North Carolina and is 162 miles from Raleigh, 149 miles from Durham, and 54 miles from Charlotte. From this warehouse the farthest M.D.I. distributes is to stores in Albany, Georgia, approximately 450 miles from Hickory. M.D.I. also distributes southwest to Decatur, Alabama, which is approximately 400 miles from Hickory. M.D.I. distributes east to Fayetteville North Carolina which is approximately 175 miles and north to Beckley, West Virginia, which is approximately 200 miles from Hickory. (CX 629A) M.D.I. operates out of a distribution center with a total size of approximately 433,000 square feet. In addition, M.D.I. currently operates a satellite warehouse of approximately 75,000 square feet of dry grocery storage. (CX 629A)

In 1980, M.D.I. served nine Family Mart combination stores which are operated by a subsidiary of A & P. (CX 629B) M.D.I. supplied these

stores in the following categories: produce, dry grocery, fresh meat, dairy, and supplies. M.D.I. provides approximately 90% of the needs of the stores in these [176] categories. (CX 629B) These combination drug and grocery stores are of the same type contemplated in Mr. Silvers' memorandum to Mr. Wood regarding the proposed Peoples Drug joint venture.

Mr. George of M.D.I. believed that his company had the capacity to service ten additional high volume supermarkets in this area (CX 629C), a number complaint counsel believes would be sufficient for effective entry into at least two of the three North Carolina markets. (Stewart 578, 583)

6. Other Expanders and Potential Entrants

185. Respondents cite Colonial (Addison, 2660), Winn-Dixie, and Food Town (Addison 2654) as active factors in these markets that are likely to expand in this area. Recent entrants Harris-Teeter and Food Town are suggested as other possibilities to expand in these markets. (RPF 718-19) Dr. Parker suggested Food World as a potential entrant into Durham because it has stores in Raleigh. (Parker 2332)

Kroger withdrew from Raleigh in 1975 (Addison 2648-49), but has stores in Durham, which it serves from its Salem, Virginia warehouse. (C. Thomas 1307) Kroger plans to build a new warehouse to serve its stores in the Carolinas, somewhere between Charlotte, N.C. and Columbia, S.C. (C. Thomas 1310) Messrs. Stewart and Spearman perceived Kroger as likely to enter Raleigh. (Stewart 664; Spearman 781, 895) Similarly, Dr. Parker perceived Kroger as a likely entrant into Raleigh. (Parker 2327) Kroger is presently actively looking for four new sites in Raleigh. (Curhan 2978; Addison 2650, 2660) Its trucks literally have to go through Raleigh to service stores in Goldsboro and Wilmington. (Addison 2660) Therefore, it is probable that Kroger will re-enter Raleigh in the near future and expand its present position in Durham.

Lowe's, one of Dr. Parker's suggested "toeholds" for entering Raleigh/Durham, is located 134 miles away in North Wilkesboro. Lowe's is presently in the process of constructing its first store in Durham. (Addison 2656; Curhan 2982) Mr. Addison commented that Durham is "the natural move" for Lowe's. (Addison 2657) After it penetrates Durham, it may also build stores in Raleigh, since it is within "striking distance" of both cities.

Byrd has one store in Apex, which is in Wake County, although Mr. Byrd does not consider that store to be in the Raleigh market. (Byrd 1542-43) Mr. Byrd testified that he was a potential entrant into Raleigh. He found a site, but Colonial acquired it. (Byrd 1547-49; Curhan

2978) Mr. Byrd testified he would need a minimum of three stores in Raleigh. (Byrd 1552) [177]

Safeway is another potential entrant; it was perceived as such by Messrs. Stewart (Stewart, 664-65), Rowe (CX 607 [Rowe] at 46-47), Spearman (Spearman 895), and Addison (Addison 2650, 2658). Dr. Parker testified that as of June 1978, Safeway was the most likely entrant into Raleigh and a very likely entrant into Durham. (Parker 2327, 2332) Safeway's warehouse in Richmond is only approximately 150 miles from Raleigh. It has recently begun entering Northeastern North Carolina and has stores as close to Raleigh as Rocky Mount and Goldsboro. (Spearman 781-82; Curhan 2983; CX 607 [Rowe] at 47) It has employed a real estate firm to find locations for stores in Raleigh. (Addison 2650) Mr. Addison testified that "if they go to Raleigh I think it would be logical to come to Durham." (Addison 2658)

Lucky's Memco Division, which has two stores in Richmond, has been looking for sites in Raleigh. (Curhan 2978) Mr. Walters, a director of Richfood, the wholesaler which supplies Lucky's Memco stores in Richmond and the Baltimore-Washington area, testified that Lucky is "just entering into the Raleigh market." (Walters 1419)

Mr. Woodberry testified that Ingles has looked at entering the area, although it has not yet begun specific site selection. (Woodberry 1751; Curhan 2983) Ingles is located about 200 miles from Raleigh directly west along Interstate 40. In addition, there are fifteen other firms within "striking distance" of Raleigh/Durham and these may be considered potential entrants. A & P, Harris-Teeter, Merchants Distributors, Inc., and Food Town all serve the Raleigh/Durham area from the Charlotte Market Area, 134 miles away (which includes Salisbury, where Food Town is located). (RX 30Z5-Z7) The following companies also have distribution centers in the Charlotte Market Area and similarly could serve the area:

- Associated Grocers Mutual of the Carolinas
- Thomas & Howard Co. (Charlotte)
- Thomas & Howard Co. (Newton)

(RX 30Z5-Z7)

Food World serves Raleigh from the Greensboro Market Area, 77 miles away. (RX 30Z5-Z7) The following firms also have distribution centers in the Greensboro Market Area:

- Central Carolina Grocers, Inc.
- Food Fair of North Carolina, Inc.
- Thomas & Howard Co.

(RX 30Z5-Z7) [178]

Kroger serves Durham from its Salem warehouse in the Roanoke/Lynchburg Market Area. (RX 30-Z-5-7) The following companies also

have distribution centers in that market area and, according to respondents, could serve Raleigh/Durham:

Acme Markets, Inc.
Deskins Super Markets
Malone & Hyde, Inc.
Mick-or-Mack Stores, Inc.
Piggly Wiggly Mid-Mountain, Inc.
Virginia Foods of Bluefield
Virginia Food, Inc.
J. D. Wyatt & Co., Inc.

(RX 30Z5-Z7)

7. Grand Union as a Perceived Entrant

186. The President of Winn-Dixie did not perceive Grand Union as a likely potential entrant into these markets because Grand Union had no warehouse within 200 miles. (B. Thomas 1512) The Group Vice President of Kroger also did not perceive Grand Union as a potential entrant. (C. Thomas 1374-75) No Colonial management witness perceived Grand Union as a potential entrant into Raleigh/Durham. (Stewart 663; Spearman 894, 896; Addison 2683)

8. Grand Union as a Likely Potential Entrant

187. Dr. Parker testified that Grand Union was one of the three most likely potential entrants into Raleigh as of June 1978 because "[I] think—I think it's an attractive area. I think that they would have wanted to get into that area." (Parker 2322) He testified that Raleigh was too far from Landover, Maryland to be served by Grand Union from that warehouse. (Parker 2322)

In Dr. Parker's opinion, Grand Union was one of the three most likely entrants into Durham (Parker 2329, 2332):

I think that the Durham area is also an attractive area. I think they would have wanted to go into that city. I suspect they would have gone into it about the time that they went into Raleigh. In other words, I think within five years.

(Parker 2331)

Respondents deny that Grand Union was likely to enter Raleigh/Durham by 1983 by any means, because they consider all the toehold possibilities mentioned by complaint counsel [179] (F. 184) to have been unsuitable candidates for acquisition by Grand Union.

9. Changes in Colonial's Operations in the Raleigh/Durham SMSA Since the Acquisition

188. According to Dr. Parker, Grand Union was one of the most likely potential entrants into the Raleigh and Durham markets in 1978 (Parker 2327, 2332) and, but for the merger with Colonial, it is likely that Grand Union would have entered one or both of these markets in five years. (Parker 2323, 2331) Therefore, Grand Union's acquisition of Colonial substantially lessened competition in the Raleigh and Durham markets because Grand Union's entry by an alternative means would have provided a deconcentrating effect. (Parker 2327, 2332-33)

N. The Charlotte/Gastonia, North Carolina SMSA

1. Demographics and Location

189. In 1978, the Charlotte/Gastonia SMSA (F. 40) was the 66th largest in the United States. Between 1970 and 1978, the population of this SMSA increased 8.6%, from 557,785 to 605,900. (Bureau of the Census, *Population*)

Charlotte is located in south-central North Carolina:

181 miles from	Roanoke, Virginia
276 miles from	Richmond, Virginia
137 miles from	Raleigh, North Carolina
112 miles from	Asheville, North Carolina
235 miles from	Atlanta, Georgia
77 miles from	Wilkesboro, North Carolina
75 miles from	High Point, North Carolina
68 miles from	Spartanburg, South Carolina

(Rand McNally)

190. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Charlotte in 1972 and 1977 were as follows:

<u>1972</u>			<u>1977</u>		
<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>	<u>Competitor</u>	<u>Food Store Sales (%)</u>	<u>Grocery Store Sales (%)</u>
A & P	16.4	16.8	Harris-Teeter	19.6	19.9
Harris-Teeter	14.9	15.3	Winn-Dixie	11.8	12.0
Winn-Dixie	8.9	9.1	Food Town	11.7	11.9
Colonial	6.8	7.0	A & P	8.9	9.0 [180]
Park n Shop	5.0	5.1	Colonial	5.0	5.0
Food Town	3.6	3.7	Park n Shop	4.8	4.9
Bi-Lo	2.0	2.0	Bi-Lo	2.7	2.8
Li'l General	1.9	1.9	Li'l General	1.2	1.3

(CX 2E)

A & P, which ranked first in 1972 with 29 stores, dropped to fourth place in 1977 with 14 stores. (CX 665Z101) Harris-Teeter was number one in 1977 and had 22 stores. (CX 665Z104) Winn-Dixie went from third to second place and Colonial from fourth to fifth. Park n Shop was number five with four stores in 1972 and number six with nine stores in 1977. (CX 665Z115) Food Town, number six in 1972 with three stores, had ten stores and was third ranked in 1977. (CX 665Z94) Bi-Lo went from one to four stores, but was still ranked seventh. (CX 665Z90)

Four-firm concentration ratios for grocery stores, (SIC 541), were:

<u>1972</u>	<u>1977</u>
48.6%	54.1%

Four-firm concentration ratios for supermarkets were:

<u>1972</u>	<u>1977</u>
65.5%	75.6%

(F. 52, 53)

2. Colonial in the SMSA

191. In 1977, Colonial operated twelve supermarkets in this SMSA. These store were served by Colonial's Columbia Division warehouse and supervised from Colonial's divisional headquarters in Columbia, South Carolina. (CX 331L; Admissions 32) Colonial ranked fifth in sales in 1977. (CX 664A; CX 2E; Admissions 31) Colonial's five-year store development plan for 1976-1980 for the Columbia Division shows that Colonial planned to open two new stores in Charlotte between 1978 and 1980, and to replace two others. (CX 351Z1-Z3)

3. Barriers to Entry

192. Dr. Parker testified that, in his opinion, barriers to effective entry into Charlotte are significantly high. (Parker 2333-34) According to complaint counsel, high risks of financial failure, and advertising and labor costs have resulted in deterrence of new entry by regional chains and contributed to [181] the failure of firms which have attempted to enter the market. (Woodberry 1751-52; Addison 2694)

Mr. Addison testified that when Three Guys warehouse grocery stores entered in Charlotte it built a warehouse, acquired four sites and opened two stores in 1980, established firms in the Charlotte market with higher price structures reacted by lowering their prices.

By December 1980, it was known in the trade that these facilities were for sale. (Addison 2694-95)

4. Performance of the SMSA

193. Dr. Parker testified that, in his opinion, the Charlotte SMSA is moderately concentrated and the market is performing less than competitively. (Parker 2333-34) Respondents dispute this characterization of the SMSA, noting that, as the corporate or divisional headquarters for several of the market leaders, the stores receive intense supervision. (RPF 653)

Harris-Teeter, the market leader, was described by Mr. Isaacs as Colonial's strongest competitor. (Isaacs 2566) This company, according to Mr. Addison, is well-managed with competitive prices. (Addison 2669) Park 'n Shop, a local family-run business, was at one time more of a factor in Charlotte with ten stores, but at present is reduced to two or three. (Stewart 646; Addison 2670; CX 665Z115)

Kroger entered Charlotte in 1978 by opening three of its Sav-On stores. (C. Thomas 1331-32, 1334-35) Mr. Thomas of Kroger stated that three stores were opened that year because that was the number of sites which became available within the time frame. (C. Thomas 1340) It opened a fourth store in 1979 (C. Thomas 1334) and by 1981, there were five stores in Charlotte. (Addison 2669) Kroger serves its Charlotte stores from its warehouse in Salem, Virginia, but expects to build a new warehouse somewhere between Charlotte and Columbia. (C. Thomas 1310)

Respondents cite the Three Guys episode (F. 192) as an indication of the competitiveness of this market. Mr. Gubay, an independent from Europe, built four "warehouse box-type stores" operating as Three Guys in Charlotte in 1980. (Addison 2669) All four are almost adjacent to Kroger Sav-Ons. Mr. Gubay opened only two of the stores and is trying to sell the other two. One of the open stores seems to do fairly well; the other is apparently a loss operation. (Addison 2669-2770) Mr. Addison described Mr. Gubay's experience in Charlotte: [182]

[Gubay] came into Charlotte and announced publicly in the newspapers that he had made a fortune in the retail food business on two continents and was going to make a fortune on the third, and had selected Charlotte as a target market and had targeted 30 percent of the market, that that was his goal, and he felt confident he would get 30 percent of the market.

Well, a year later he's got less than 2 percent of the market and he came out publicly about a month ago and said he'd made a terrible mistake and misread the market. He came in ostensibly with the lowest prices in the area. He was immediately challenged by Food Town, and a long battle ensued, and I think they finally threw it out of court; nothing was proved. And it has been rumored he's for sale.

He has a warehouse. He built the warehouse before he opened the store in Salisbury. Now the warehouse is up for sale. I understand Kroger turned it down.

And the stores are very austere, no tile on the floor. They are painted black floors, just painted over concrete—no windows, very little lighting. They have skylights and concrete block.

He does have very low prices in groceries, but he has a very limited line of meat and produce, and both the departments are franchised. He does not run them himself but franchises these departments out. And he's just not compatible with that market and has not been accepted by them.

(Addison 2672-73)

Ingles' failure to enter Charlotte is cited by complaint counsel as evidence of the barriers to entry functioning in this market, but is noted by respondents, but as an illustration of the competitive performance of this market. (Woodberry 1751-53)

Mr. Addison testified that Colonial has considered opening a warehouse store in Charlotte and other areas in the Carolinas. After an analysis, Colonial determined that the gross margins under which Grand Union operates its Basics warehouse stores, which are trimmed down, no frills, low service-level stores, the existing price structure in the Carolinas, [183] particularly Charlotte, was already so low that it would be impossible to operate warehouse stores profitably. (Addison 2673-74)

5. Alternative Means of Entry

194. Bi-Lo is cited by complaint counsel as a potential toe hold acquisition to enable Grand Union to enter this market. (CPF 548-50) Bi-Lo had a 2.8% share of grocery store sales in Charlotte and was ranked seventh. (CX 2E) Its warehouse, located in Mauldin, South Carolina, is approximately 96 miles from Charlotte. (CX 32I; Rand McNally) Ingles, whose warehouse was 112 miles from Charlotte, Byrd, with a warehouse 108 miles from Charlotte, and Community Cash, with a warehouse 96 miles from Charlotte, were also mentioned as possible entry vehicles. (CPF 551) A discussion of these companies as acquisition possibilities for Grand Union are set forth in F. 91 [Ingles and Bi-Lo], F. 184 [Byrd], and F. 91, 110 [Community Cash].

Joint ventures with Peoples Drug or Dart Drug (F. 125, 184), and utilization of a wholesaler (F. 184), were other potential alternative market entrant possibilities for Grand Union cited by complaint counsel.

6. Expanders and Potential Entrants

195. Respondents mention Kroger, which had no stores in this market in 1977 and five by 1981 (F. 193) and Colonial, which is seeking

three new sites (Addison 2672) as likely expanders in Charlotte. (RPF 668)

Messrs. Stewart and Spearman perceived Three Guys as having an expanding role in Charlotte. (Stewart 647-48; Spearman 889-90) Later testimony (Addison 2672-73) indicated Three Guys is in trouble in Charlotte and will not be an expander in the market. (F. 192, 193)

Mr. Spearman also cited Safeway as a potential entrant. (Spearman 778, 889-90) Mr. Gubay's warehouse near Charlotte is apparently for sale (Addison 2673) and could be bought by Safeway or any other interested entrant.

All the "toeholds" given for entry by Grand Union into Charlotte—Ingles, Community Cash, Food World and Food Town—are located between 60 and 100 miles from Charlotte. According to respondents, any of them presumably could enter Charlotte at any time. In addition, there are other companies within "striking distance" of Charlotte which could easily enter if they foresee the opportunity for profitable operations. Colonial serves stores in Charlotte from Columbia, South Carolina, 94 miles away. The Thomas & Howard Co. warehouse in Columbia might do the same thing. (Woodberry 1752-53) [184]

Food World of High Point, in the Greensboro Market Area, 90 miles from Charlotte, serves stores in the Charlotte Market Area (but not the SMSA) from its warehouse in High Point. Central Carolina Grocers, Inc., Food Fair of North Carolina, Inc. (not the Food Fair which is in Chapter XI operating as Pantry Pride), and Thomas & Howard Co. also have warehouses in the Greensboro Market Area and could similarly serve stores in the Charlotte Market Area. (Woodberry 1752-53) Bi-Lo of Mauldin, in the Greenville Market Area, 96 miles away, serves stores in the Charlotte SMSA.

7. Grand Union as a Perceived Potential Entrant

196. The President of Winn-Dixie, the number two firm in Charlotte, did not perceive Grand Union as a market entrant. (B. Thomas 1511) The Group Vice President of Kroger, which entered Charlotte in 1978, did not perceive Grand Union as a market entrant. (C. Thomas 1374-75) Messrs. Stewart, Spearman and Isaacs, Colonial management familiar with Charlotte, never perceived Grand Union as a potential entrant. (Stewart 646-47; Spearman 889; Isaacs 2584)

8. Grand Union as a Likely Potential Entrant

197. Dr. Parker testified that Grand Union and Kroger were the only potential entrants into Charlotte and that Grand Union would have entered in about five years. (Parker 2334-35) Grand Union's

interest in Charlotte, he believed, would be its attraction as a growth area. (Parker 2334)

Respondents contend that Grand Union's only demonstrated interest in North Carolina was with respect to the proposed joint venture with Peoples Drug Stores. (F. 184; RPF 681) However, 5 of the 12 firms mentioned in the Southeast Study were headquartered in North Carolina, and 6 operate in North Carolina. Dr. Curhan testified that Grand Union would not have entered Charlotte by any means by 1983. (Curhan 2988)

9. Colonial as a Toehold into the SMSA

198. Respondents' state that Colonial was a toehold acquisition in Charlotte. Although the Charlotte area was growing in terms of population through the 1970's, it was not a growing market for Colonial, which had been losing market share. (Spearman 777-78) According to complaint counsel's survey, Colonial's share of grocery store sales in Charlotte in 1972—7.0%—decreased to 5% in 1977. (CX 2E)

At the time of the tender offer, Colonial had 12 stores in Charlotte of which six, according to respondents, were either old or poorly located, resulting in losses. (Addison 2670) Since the acquisition, Colonial has closed four of the nine [185] stores in Charlotte and two of the three in Gastonia. (Spearman 837)

10. Effects of Grand Union's Acquisition of Colonial

199. According to Dr. Parker, Grand Union was one of the most likely potential entrants into Charlotte (Parker 2334) and, but for the acquisition of Colonial, Grand Union would likely have entered this market in five years. (Parker 2335) Therefore, Grand Union's acquisition of Colonial substantially lessened competition in Charlotte, because Grand Union's entry by an alternative means would have had a deconcentrating effect on this market. (Parker 2335)

X. EFFECTS OF MARKET CONCENTRATION IN GROCERY RETAILING

A. *Testimony by the Economic Experts*

200. Complaint counsel's economic experts, Drs. Parker and Marion, gave extensive testimony on the effects of concentration on competition in food retailing. Respondents' expert, Dr. Adelman, also gave testimony on this subject.

Dr. Parker stated that structure determines conduct in the industrial paradigm, and conduct is a major determinant of performance. (Parker 2209) Both economic theory and industrial experience show that when industries become concentrated, firms begin to recognize interdependence of decisionmaking. (Parker 2210) He further stated:

"The level of concentration indicates the level, the extent, the recognition of interdependence and the extent of resulting oligopolistic conduct which, in turn, indicates the level of performance in a market." (Parker 2294)

Dr. Marion testified that market concentration affects market performance, and that high concentration is generally associated with high profit levels. He testified as follows:

Well, I am concerned about the level and trends in concentration because both industrial organization theory and a large amount of empirical evidence indicates that concentration in markets does have significant impact on performance. And this relationship has particularly been studied in relating concentration and profits and an increasing number of studies now are looking also at—studying concentration price relationships.

We have examined concentration productivity, progressiveness, several [186] areas of performance. But I think that the available evidence argues strongly that the concentration does make a difference. It does have an effect on performance. I suppose the leading scholars in this field in terms of looking at concentration profit relationships is Leonard Weiss, a professor of economics at the University of Wisconsin. He reviewed some 45 studies and looked at concentration profit relationships, and concluded that by and large the hypothesis that the structure of the market, the concentration of a market affects its profits has been upheld, has been verified, both in the United States and in foreign countries where these studies have been done.

So, both on the basis of theory and on the basis of a good bit of empirical evidence, it tells us that the structure of markets, an important element of which is market concentration, does have a significant effect on market performance. (Marion 1917-18)

* * * * *

High concentration is generally associated with higher profit levels and from a large number of studies this has been shown. Most industrial organization economists also interpret these results as indicating that there are higher prices in concentrated markets. There are a growing number of studies of prices directly, particularly in the baking industry and to some extent the gasoline retailing and some other areas that indicate that there is a positive relationship between concentration and prices. So, the—a high level of concentration suggests that prices and profits in those markets may be higher than they would be with lower levels of concentration. (Marion 1923-24)

* * * * *

... As you get few enough actors, few enough firms that control a large enough chunk of the sales, that you do recognize the interdependence, the firms do recognize [187] that their behavior is going to be responded to by their competitors and so it's fairly natural that at some point you say, hey, if I cut prices everybody else is going to cut prices, we are all going to end up losing.

So you have a tendency for a live and let live sort of philosophy to develop in a market as concentration gets fairly high. (Marion 1927)

Dr. Adelman, respondents' economic expert, testified along similar lines:

There is an extensive body of economic theory to the effect that fewness of sellers makes a considerable difference, that the fewer the sellers, the more they are able to

coordinate their price and production decisions in such a way as to get closer to the monopoly objective, maximizing profits or maximizing present value by restricting output and charging a higher price than would obtain under competition.

They may do this by actual agreement, but as economists try to understand it, interdependence or cooperation, as I have called it, takes in a good deal more than collusion.

It takes in a great deal of what you might call a wink and a nod or just subtle ways of doing things in such a way as to accomplish some of that coordination. (Adelman 3196-97)

Dr. Adelman also stated that this relationship between concentration and competition should hold true for every industry, but that one must consider whether the market has been properly defined, and if there are barriers to entry into the market. He testified:

Well, it depends on what you mean by an industry. It should hold for any market at any given time.

But, a market is not necessarily defined or bounded by some conventional definition or classification and, indeed, one of the constant cares or preoccupations of anybody working in industrial organization is to be [188] able to say, do I really have a market under study or is it just a formless or meaningless slice out of the whole economy?

* * * * *

Well, Joe Bain pointed out a long time ago that even if you had a properly bounded market and even if it was a concentrated market, if there were low barriers to entry, the market would behave, the firms in it would behave competitively.

And I think that is correct.

(Adelman 3197-98)

B. *The JEC Report*

201. Complaint counsel introduced in evidence, as Complaint Counsel Physical Exhibit G, a study prepared for the use of the Joint Economic Committee, Congress of the United States, entitled "The Profit and Price Performance of Leading Food Chains, 1970-74" ("JEC Report"). This report was prepared by the members of the University of Wisconsin Food System Research Group, which included one of complaint counsel's economic experts, Dr. Bruce W. Marion, as well as Dr. Willard F. Mueller, a former Director of the FTC's Bureau of Economics. The study concluded that retail food chain prices are significantly higher in markets where few firms compete than in more competitive markets. It also found a strong relationship between food retailing market structure and food chain profits. (JEC Report, Complaint Counsel Phy. Ex. G., p. III)

The authors of the JEC Report later published a book, *The Food Retailing Industry, Market Structure, Profits, and Prices*. This publication draws heavily on the JEC Report; it expands and clarified several sections, and it includes two additional chapters. This publica-

tion is sometimes referred to as the "Praeger" book, after its publisher, and has been received in evidence as Respondents' Physical Exhibit C.

The Joint Economic Committee subpoenaed information from 17 retail grocery chains. In 1974, the 17 retail grocery chains all ranked among the 20 largest U.S. grocery firms. All 17 chains had 1974 company sales in excess of \$700 million and 15 of the firms had sales greater than \$1 billion. The average company sales of these chains was \$2.6 billion. They operated over 12,700 grocery stores during 1974, which represented about 6% of the total number of grocery stores in the U.S. and about 52% of the total number of chain stores (excluding convenience stores) in operation during the year. Their combined sales were \$43.8 billion, which represented 69% of all chain food store sales and 37% of total food store sales. (JEC Reports, p. 31) [189]

The quality of data utilized in the JEC Report was superior to that used in other industrial organization studies. Dr. Marion testified:

The data that was relied upon in the JEC Study came from several sources, but the price data was data that was subpoenaed from the chains and came from price checks. The price checks that they had conducted in the various markets in which they operate. So these were checks that the chains themselves had conducted.

Similarly, the subpoena called for sales and profit data by SMSA, by division for each company for 1970, 71, 72, 73 and for the first three quarters of 74. . . . We supplemented this, then, with secondary data from Census on concentration . . .

(Marion 1943)

* * * * *

. . . I think that those that have reviewed our study would have agreed because we did have data at the relevant market level. So many times in industrial organization you have to look at an area broader than the relevant market. In this case we had price data at the SMSA level. We had some profit data at the SMSA level and so—and the other thing we had going for us is that in calculating firm market shares we had hard sales data from the chains. So we knew what their market share was. It was not an estimate. We had hard census data for concentration or we had census data for concentration so we didn't have to rely on nearly as much in the way of estimates as was often the case in industrial organization studies.

(Marion 1944)

* * * * *

Now, about the only real—one of the real benefits of this sort of analysis was that we don't very often have both price and profit data. Most industrial organization studies have one or the other, but not both. [190]

And to be able to examine both prices and profits, across metropolitan areas was important. That was one of the advantages because of the data that we had.

(Marion 1955)

The implications of the JEC Report, according to Dr. Marion, are:

... [T]hat competition, as it is reflected in price levels, tends to weaken as the concentration [in a] market goes up or as the relative dominance of a firm increases.

And similarly, for profits. That profits tend to go up and—with concentration and with the relative dominance of the firm in the market.

(Marion 1960)

* * * * *

Q. For simplification, would I be correct that profits tend to be higher in more concentrated markets?

A. That's correct. (Marion 1954; *see also* Marion 1950–51)

Dr. Marion also stated that the JEC Report indicated that prices go up faster than profits in concentrated markets:

I think that one of the other interesting things that we found was that, in fact, prices go up faster than profits, which is—seems to be suggesting that there are some cost-increasing forms of competition that are used more heavily in concentrated markets. That is, advertising, promotions, perhaps a little less control of costs and labor usage so that you get some knowledge in of some inefficiencies. But that—although we would be careful to—in making that comparison, because the samples are not completely the same, that is the way the results show up is that prices do increase faster than profits.

(Marion 1961) [191]

According to Dr. Marion, the findings of the JEC Report are consistent with the findings of the majority of the industrial organization studies that have been done. (Marion 1960)

The JEC Report was subjected to extensive hearings in conjunction with the JEC Report. (Marion 1956) These hearings were published as part of the report and official notice was taken of the hearings. (Tr. 3178) The JEC Report was reviewed by some 26 economists who submitted letters to the Joint Economic Committee, without exception commending the report. (Praeger book, p. v) Dr. Marion testified that their comments “generally are, I think, quite positive.” (Marion 1959) Some of these comments are set out by complaint counsel. (Complaint Counsel’s Reply Brief, pp. 58–74) There was also criticism of the JEC Report at the hearings, principally by Dr. Timothy M. Hammonds, an economist for the Food Marketing Institute, the members of which are largely food chains. (Praeger book, p. v; Complaint Counsel’s Physical Exhibit G, *Hearings*, pp. 77–114; *see also* Marion 1957) Dr. Marion testified that as a result of the criticisms some reanalysis of data was performed. One such reanalysis included the effect of wage rates on prices. The reanalysis did not reveal that wage rates had any significance in the price model. (Marion 1956–57)

Respondents’ expert, Dr. Adelman, gave extensive criticism of the

JEC Report during defense hearings. Respondents also contend that cross-examination of Dr. Marion demonstrated that the JEC Report is unreliable. (RPF 141-51)

Respondents point out as a serious defect in the JEC Report the fact that the data sample used for the price study included only dry groceries and excluded prices for meat, produce and baked goods. (RPF 142) Because dry groceries account for only 37% of the merchandise sold in a store, the study did not take into account different marketing philosophies, *e.g.*, one firm may feature lower prices on meats and dairy items. Dr. Marion explained that the selection of items for the price comparison was made on the basis of the best data available, and he pointed out the difficulties of comparing prices on meat and produce: "... there is considerable variability in cutting methods, packaging, trim, and so one firm handles a high choice, another one handles a high good beef. One firm packages their produce, another one doesn't. You know, it's different than comparing Campbell Soup and Campbell Soup." (Marion 2164)

Respondents also criticize the use of only one month—October 1974, for the price analysis. In preparing the profit analysis, Dr. Marion used several years' data to take out temporary distortions in the market. (RPF 143; *see* Marion 2115) [192] Dr. Marion conceded that because the price analysis used data for only one month it increased the chance that his findings could be wrong if the sample was not representative. (Marion 2117) However, Dr. Marion believed the chances of such an error was extremely small: "In my judgement, finding a significant relationship with one month of data, if anything, adds credence to the results in the sense that the chances of finding relationships when there are none—when you are using only one month of data, are extremely small." (Marion 2117)

Respondents point out an inconsistency between the price analysis which purports to find a strong relationship between prices and concentration in 1974, and the profit analysis which found no relationship between profit and concentration in 1974. (RPF 144; *see* Marion 2055-56, 2116-17) Dr. Marion was "concerned" about this inconsistency. (Marion 2116) This result could be attributed to the inclusion of A & P in the profit analysis. During 1974, A & P was engaged in its' WEO program in which prices and profits were drastically reduced. If A & P is excluded from the analysis, the relationship between concentration and profits in 1974 is statistically significant. (*See* Respondents' Physical Exhibit C [the Praeger book], pp. 88-90) The data suggests that concentration had a negative and insignificant influence on A & P's profits in 1973 and 1974 when the WEO program was in effect. (Respondents' Physical Exhibit C, p. 90)

Respondents also criticize the JEC Report for using a curvilinear

four-firm concentration ratio to measure concentration, instead of the traditional four-firm concentration measurement. (RPF 146) Dr. Adelman testified that he had never seen the curvilinear approach used in any other research effort. (Adelman 3285) Dr. Marion admitted that the use of a curvilinear form of concentration ratio is "something that two scholars can disagree on," but that several studies have utilized curvilinear forms. (Marion 1957-58) Dr. Marion explained at the time of the Congressional hearings on the JEC Report that there was nothing inappropriate in the use of the nonlinear form of concentration measurement:

On the contrary, on *a priori* grounds economic theory suggests that prices and profits would not be linearly related to concentration over the entire range of concentration. Rather, *a priori* reasoning suggests that some critical level of concentration must be reached before firms would have sufficient market power to raise prices above competitive levels. Thereafter, prices would be expected to rise until perfect collusion is reached, after which prices would level off. The functional form we used is a sigmoid function, which has a lazy S [193] shape. The estimated prices using this form are shown in Figure 1. One of the chief purposes of industrial organization research is to identify critical levels of concentration, not merely to identify whether or not a positive relationship exists. We believe our analysis makes a significant contribution to knowledge by helping to identify the critical level in food retailing.

Given the above reasoning, which is based on industrial organization theory, it is not surprising that our nonlinear measure of CR 4 is more significant than the linear form.

(*Hearings*, p. 87)

C. Respondents' Request for Sanctions

Respondents seek sanctions pursuant to Section 3.38(b) of the Rules of Practice based on an alleged failure of complaint counsel, through its expert witness Dr. Marion, to produce certain data underlying the JEC Report. (RPF 108-40) One disputed issue in this proceeding is whether there is a relationship between concentration and competition in the food retailing industry. Potential competition theories apply to markets where concentration is high and the markets are not performing competitively. *United States v. Marine Bancorporation*, 418 U.S. 602, 630-31 (1974).

Dr. Marion testified with respect to the relationship between concentration and competition and based his opinion, *inter alia*, on his own research represented in part by his co-authorship of the JEC Report and the Praeger book. Respondents sought access to the data underlying the JEC Report and the Praeger book for cross-examination purposes. Respondents contend that all *available* underlying data was never produced and that sanctions are appropriate. Respondents seek a ruling under Section 3.38(b)(2), adverse to complaint

counsel, to the effect that there is no relationship between concentration and competition in food retailing.

After being advised that Dr. Marion would testify concerning the JEC Report, respondents sought the underlying data from complaint counsel. Complaint counsel, after talking by telephone with Dr. Marion, turned over to respondents certain drafts of the Praeger book, and advised respondents that all the raw data underlying the JEC Report had been returned to the Joint Economic Committee. Respondents contacted the staff of the Committee and were advised that the documents in question could not be turned over without a subpoena. On January 10, 1980, respondents requested and obtained the issuance of a subpoena duces tecum to Dr. John Albertine, Director of the JEC, [194] requesting "[a]ll statistical data underlying the [JEC Study], including, but not limited to all information received in response to JEC subpoena of 17 retail grocery chains." (Specification 1 to Subpoena) This subpoena was stayed by the Commission *sua sponte* on January 30, 1980, and the Commission quashed the subpoena on June 30, 1980 on the grounds of congressional immunity. *Grand Union Co.*, 95 F.T.C. 926 (Interlocutory Order 1980)²⁰

After testifying during the case-in-chief and learning of respondents' interest in such data, Dr. Marion later discovered that certain computer printouts of the regression analyses were available in Madison, Wisconsin. The existence of this data was made known to complaint counsel during the evening of January 28, 1981, at the time of Dr. Adelman's defense testimony. Complaint counsel promptly advised respondents of the availability of this data. (Tr. 3222 *et seq.*) The data apparently was located in the files of a co-author of the JEC Report who is no longer associated with the University of Wisconsin. (Tr. 3222-24) Respondents' counsel stated that this material apparently was "exactly the kind of things" needed to replicate the study. (Tr. 3225) It was agreed that the data would be produced to respondents' counsel and that respondents would be given the opportunity to recall both Dr. Marion and Dr. Adelman for further examination. (Tr. 3232, 3496-97, 3500)

By letter of February 5, 1981, Dr. Marion advised respondents' counsel that all data had been furnished. (RX 44) Dr. Adelman and Dr. Marion were subsequently recalled as witnesses. During Dr. Marion's testimony on recall, he acknowledged that there was certain data

²⁰ By order dated September 12, 1980, a ruling was entered by the Administrative Law Judge to the effect that there was no requirement in the Commission's Rules of Practice, the Federal Rules of Civil Procedure, or the Federal Rules of Evidence that data underlying the JEC Report must be produced for cross-examination purposes. The issue of production of the data was a matter within the discretion of the trier of fact. Further, it was determined that respondents' could adequately cross-examine Dr. Marion without access to the underlying data to the JEC Report, and that the JEC Report was *prima facie* admissible without access to the underlying data. (Order Ruling on Respondents' Objections to Admissibility of the Testimony of Dr. Bruce W. Marion and the JEC Report, September 12, 1980)

available to him that he had not furnished respondents. (Marion 3627-28) Dr. Marion testified that this additional data was confidential (pursuant to the JEC rules) and could not be made available to respondents. (Marion 3628) Respondents assert that this claim [195] of privilege was made without following formal procedures. (RPF 134)

On April 21, 1981, after all testimony had been completed, Dr. Marion, feeling that his integrity had been attacked, addressed a letter to complaint counsel detailing all his efforts to provide respondents with the materials underlying the JEC Report which were available to him to produce. This letter was subsequently received in evidence. (CX 671A-D) Respondents claim that data has been withheld, if not deliberately, by the "unsystematic and nonchalant response" by both complaint counsel and Dr. Marion. (RPF 137)

It is concluded that there was no clear disregard of the Commission's discovery processes by complaint counsel, or by Dr. Marion. While there was substantial delay in furnishing information to respondents, it apparently was occasioned by misunderstandings concerning the type of data being sought. Once it was made clear to Dr. Marion what was being required, he made every effort to be cooperative and to provide documents, which effort required a diligent search for records at several locations. (CX 671C)

Respondents were provided with all available underlying data. There has been no prejudice to respondents' right of cross-examination. To enter the broad sanction requested by respondents on this controversial issue would be to ignore other substantial evidence of the relationship between concentration and competition.

CONCLUSIONS

SUMMARY OF PROCEEDINGS

A. Identity of the Parties

The Grand Union Company is a supermarket chain which, as of April 1978, operated 479 retail food stores, making it the eleventh largest supermarket chain in the country. During the fiscal year ending in March of 1978, Grand Union had sales of \$1,649,274,000, \$1,574,119,000 of which was garnered from sales by its retail food operations. All of its retail food stores are supermarkets. Grand Union operated supermarkets in the Northeastern United States with a store as far South as Fredericksburg, Virginia. Grand Union also operated supermarkets in Southern Florida on both the East Coast and West Coast of that state. (F. 2, 3, 125, 145-146)

Colonial Stores Incorporated operated a chain of supermarkets which, as of November 18, 1978, numbered 378. In addition, Colonial

owned and operated facilities manufacturing [196] or processing bakery goods, dairy products, jams and jellies, mayonnaise, salad dressings, etc., almost all of which were sold to Colonial's retail stores. Colonial had total sales of \$1,053,167,343 for the fiscal year ending on December 31, 1977. Colonial's assets at the end of this fiscal year were \$189,118,000, and its net earnings were \$10,907,000, making it the fifteenth largest supermarket chain in the United States. All of Colonial's retail food outlets were supermarkets. Colonial operated supermarkets as far North as Richmond, Virginia, through the Carolinas, Georgia, Alabama and in Florida as far South as the Tampa/St. Petersburg area. (F. 6, 7, 9, 120)

B. *The Acquisition*

On June 21, 1978, a consent decree of ten years' duration entered into between Grand Union and the Commission expired. This consent decree had required that Grand Union seek and obtain Commission approval before making any acquisition involving five or more grocery stores or more than \$5 million in grocery store sales, or where Grand Union's stores and those to be acquired would account for 5% or more of total grocery or food store sales in any city or county. *The Grand Union Company*, Docket 8458, 73 F.T.C. 1049, 1055 (1968).

On June 29, 1978, Grand Union proposed a merger of Grand Union and Colonial, with Grand Union paying \$30 per share to Colonial stockholders. This merger offer was rejected by Colonial's Board of Directors on July 6, and various federal and state litigation was commenced by Colonial to prevent a takeover. When Grand Union increased its offer to \$35 per share at an August 1, meeting between representatives of both companies, Colonial's Board of Directors voted 7-5 to accept the offer, and the legal actions were terminated. Grand Union acquired 3,471,886 shares of Colonial stock, or approximately 91% of the shares outstanding. (F. 10-12)

On June 30, 1978, Grand Union gave the Commission the 60 days' advance notice of its intention to acquire Colonial required by the 1967 "Commission Enforcement Policy with Respect to Mergers in the Food Distribution Industry." 1 (CCH) Trade Reg. ¶ 4525 at 6905. Commission staff replied in a letter dated July 6, 1978, that "full attention and consideration" would be given to this acquisition, and noted an agreement between Commission staff and respondents' counsel to consider the Colonial acquisition in conjunction with another proposed sale to Grand Union of eight Colonial stores located in the Tampa/St. Petersburg area of Florida. (F. 9, 13)

On August 18, Commission staff and Grand Union entered into a Hold Separate Agreement with regard to Colonial assets of 90 days' duration, an agreement which was extended until December 1, 1978.

In consideration for this, Commission staff [197] agreed not to seek a temporary restraining order or temporary injunction. The complaint was issued on November 21, 1978. On November 29, 1978, the Commission and Grand Union entered into a final agreement to preserve trademarks and trade names for the pendency of the proceeding. (F. 13) Colonial was subsequently merged into Grand Union and is operated as a division of Grand Union. As of February 5, 1979, Colonial Stores Incorporated, a Delaware corporation, ceased to exist as a separate entity. (F. 12)

C. Grand Union's Interest in the Sunbelt

Grand Union, established in 1872, was a publicly held company until it was acquired by Cavenham Limited, a British corporation, between 1973 and 1976 in a series of transactions. (F. 1, 15) Following Cavenham's acquisition of Grand Union, the company adopted a policy to limit its future expansion and acquisition to supermarket concerns. Other Grand Union divisions, *i.e.*, convenience stores, catalog showrooms, and discount stores, were not financially successful and were later sold. A decision was made to concentrate on supermarket acquisitions, since it was believed by Cavenham executives that Grand Union's strength was in supermarket operations. (F. 68)

Grand Union's Vice President of Corporate Planning was assigned to study potential supermarket acquisitions in the Southeast and he eventually submitted a study enumerating twelve possible acquisition candidates. Colonial was not included in this study. (F. 69) Another study, of the Southwest, was also submitted. (F. 70) The Southeast and Southwest, *i.e.*, the "Sun Belt," were thought by Grand Union officials to be a promising expansion area because this was a high growth area, both economically and in terms of population growth." (CX F. 71)

As the ten-year Commission ban on Grand Union acquisitions was coming to an end, Grand Union officials granted media interviews in which they expressed a clear interest and intention to expand supermarket operations, emphasizing the role that the extensive financial resources of Cavenham would play. (F. 72)

Up until that time, Grand Union was primarily based in the Northeast, which, because of its competitive nature, lack of population growth, and labor situation, was felt not to be a desirable area. (F. 73, 76) In the Southeast study, the Grand Union official observed that each of the chains in the study is profitable "and as a group they are higher than national averages, indicating a market area which seems to avoid overstocking. With population growth projected to be one of the leading areas of the country, it would seem to insure future potential." (CX 32G) In addition to the opportunities offered by the Southeast, Grand Union officials expressed a preference [198] for

expansion into this area as it would fill a gap between Grand Union's Northeast and existing Florida operations. (F. 72, 74, 75)

D. Grand Union's Financial Position

Grand Union had the financial resources to undertake an extensive program of expansion. Between 1973 and 1977, Grand Union's percentage of pre-tax profits to sales increased by over 60% (from 1.13% to 1.86%), while after tax profits on sales increased by over 80% (from .6% to 1.1%). Grand Union had a capital expenditure budget of \$150 million to put into operation expansion and acquisition plans to be financed by funds then available and funds internally generated over a five-year period. This would correspond to a Grand Union development plan which called for the opening of 100 new stores within five years, with financing to be derived from retained profits and by application of anticipated depreciation charges. In 1978, the financial position of Grand Union was described as approximately \$100 million in cash and temporary cash investments. (F. 77)

The Grand Union tender offer to Colonial shareholders was for about \$135 million, of which \$120 million came from cash and temporary cash investments, other internally generated funds and borrowing against certain lines of credit. (F. 78) After the acquisition, Grand Union still had \$60 million in a temporary cash investment fund. (F. 79) Grand Union thereafter made a cash tender offer for Weingarten, a supermarket firm with stores located in Texas, Louisiana, and Arkansas, with sales of \$575 million in 1979. (F. 79)

E. Grand Union's Capabilities

Grand Union has been in the food retailing industry for over 100 years, and substantially all of its revenue in recent years has been driven from supermarket operations. (F. 1-3) Its parent, Cavanham Limited, is engaged in the operation of supermarkets and other retail food outlets in the United Kingdom, and in the manufacture and sale of food and food products in the United Kingdom and elsewhere in Western Europe. (F. 6) Grand Union also had emphasized management training programs in its supermarket operations. (F. 80) The Colonial acquisition represented a geographic market extension, not an entry into a different or even an allied market; Colonial's operation was identical to Grand Union's, and in an adjacent geographical area. It is beyond question that Grand Union had the operational capabilities to expand into this adjacent geographical area either *de novo* or through a toehold acquisition. (F. 80)

F. *The Relevant Markets*

Section 7 of the Clayton Act, 15 U.S.C. 18, prohibits [199] mergers which may substantially lessen competition "in any line of commerce in any section of the country." Therefore, determination of the relevant product and geographic market is a necessary predicate to the examination of the legality of a merger under the Clayton Act, *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974), because measurement of the substantiality of impact may be made only in terms of the market affected. *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). "[T]he problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States v. United Shoe Machinery Co.*, 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954)

1. Relevant Product Market

It is complaint counsel's contention that, while grocery store sales is an appropriate product market in which to analyze the effects of this merger, sales by supermarkets best describe the competitive interplay of the firms involved in the merger, and therefore is the most appropriate product market for this proceeding. (CPF at 133-136) According to complaint counsel, supermarkets differ from other retail food and grocery stores on the basis of various factors including store size, variety of products, selling prices, sales volume, and type of customer. (F. 17)

Respondents agree that retail grocery store sales is a relevant product market for this proceeding (Respondents' Reply Brief, p. 120), but argue that "supermarket" is a term too narrow and imprecise to be used as the basis for the fashioning of a relevant market. According to respondents, "[n]o case of complaint analyzing a merger in the retail food industry, other than this one, has utilized a product market or submarket definition more restrictive than that of 'grocery stores.'" (RPF 941)

Confining the relevant market to "supermarkets", rather than retail food stores or grocery stores (the statistical difference between these latter two is so small that for the purposes of this case, use of these terms is interchangeable) would eliminate box and warehouse stores, commissaries, convenience stores, mom-and-pop stores, delicatessens, etc., businesses which respondents argue represent competitive factors in this case. (F. 27, 28)

The outer boundaries of a market are set by the "reasonable interchangeability of use" or "cross-elasticity of demand" between the product and proposed potential substitutes. *Brown Shoe*, 370 U.S. at

325. However, the relevant market cannot include the infinite range of possibilities that may in some aspects be interchangeable, and yet still retain any [200] meaning as a concept and provide any guidance in fashioning a rule. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose cross-elasticities of demand are small. (*See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612, n. 31.) It is now established that within a broad product market well-defined submarkets may exist which constitute product markets for antitrust purposes. *Brown Shoe* outlines the criteria by which such product markets are to be established. These are:

industry or public recognition of the submarket as a separate economic identity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325-28

In establishing these guidelines, the Court noted that absolute precision in definition of the market is not what is required; the definition of the relevant market must merely reflect the market realities. 370 U.S. at 342, n. 69 In addition, it is not necessary that the market chosen fulfill *all* of the criteria. *United States v. Aluminum Co. of America*, 377 U.S. 271, 276-77 (1964); *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 227 (D.C. Cir. 1962)

Under the *Brown Shoe* standard, it appears that supermarkets having sales of at least \$1.5 million per year and of the 10-56,000 square foot size (F. 18), represent the relevant product market. The indicia of a supermarket product market include:

a. *Price sensitivity*: supermarkets price-check each other for competitive purposes, but rarely price-check non-supermarket food stores. (F. 21) [This also relates to industry recognition of the parameters of the relevant market:] Respondents dispute this, and argue that price sensitivity exists to varying degrees among almost all stores on the retail food store continuum. While the record discloses that occasional price-checking is conducted by large stores with respect to certain products sold in convenience stores, this is only on very select items such as bread and milk, soft drinks and beer. In addition, supermarkets have distinct price structures when compared to other types of stores. The record evidence shows that the gross margins of supermarkets are 15-20% as opposed to 30% for non-supermarket grocery firms such as convenience stores. (F. 21) [201]

b. *Industry recognition*: both Colonial and Grand Union operate only supermarkets. (F. 3, 6, 20) Decisions by supermarkets regarding

pricing, store locations, and advertising are focused on other supermarket firms. (F. 22) Trade associations and trade journals cater to supermarket owners. (F. 17)

c. *Peculiar characteristics*: the array of products carried by supermarkets distinguish them from other retail food stores, which leads to a distinct type of customer being attracted to supermarkets, the "one-stop shopper." Convenience stores cater to the "quick in-quick out" customer. Supermarkets carry from 8 to 12 thousand products which include fresh meat and produce, groceries, health and beauty aids, and general merchandise. Convenience stores carry a very limited assortment of products, and sales volume is concentrated on items such as milk, bread, cigarettes and beverages. (F. 19, 22) Sales per customer average from \$11-15 in supermarkets and \$1-3 in convenience stores. (F. 22) Grand Union's and Colonial's supermarkets averaged over \$3 million dollars in annual sales per store, while convenience stores averaged from \$140 thousand to \$325 thousand per store. (F. 20, 22) While all people must have food and other related items and shoppers sometimes patronize various types of stores in any given week, supermarkets' number and variety of products and the sales volume per customer and per store clearly indicate a pattern of trade that is being followed.

d. *Unique production facilities*: supermarkets differ in size and physical plant from other food retailers. Supermarkets range in size from 10,000 to 56,000 square feet per store; convenience stores range from 800 to 3,000 square feet per store. Convenience stores usually have one employee on duty at any given time, whereas supermarkets have many employees in service positions. (F. 18, 22) The number and variety of products and services constitute a unique production facility.

Respondents cite the arbitrary nature of a dollar sales figure, a \$1.5 million cutoff, as support for their claim that the product market fashioned by complaint counsel is inappropriate, noting that the Supreme Court rejected such a [202] dollar cutoff in *Brown Shoe* in defining the market (370 U.S. at 326), as did a California district court in *United States v. Tracinda Investment Corp.*, 477 F.Supp. 1093, 1103 (C.D. Cal. 1979).

In the latter case, the government attempted to narrow the product market to motion pictures grossing over \$1 million and to "quality" motion pictures. As the court stated in that case:

Plaintiffs contention that only motion pictures grossing over one million are in the effective area of competition draws an arbitrary distinction with no basis in fact. Relative success of a particular product is not a factor contained in the *Brown Shoe* analysis.

* * * * *

This distinction is not recognized by the public; whether grossing more than one million, or grossing less, each motion picture is manufactured with the same facilities; as a product line, each does not have characteristics peculiar to itself rendering it generally noncompetitive with others; and each is not directed toward a distinct class of customers.

477 F.Supp. at 1103.

Both cited cases were concerned with whether to include certain products within a product grouping, and the courts did not find sufficient factual characteristics to establish separate markets for the products. These cases do not establish a rule that there can be no submarkets based on price levels or ranges. In *Brown Shoe*, the Supreme Court merely concluded that a price/quality distinction with respect to shoes would be "unrealistic" (370 U.S. at 326) in that case, not that such a distinction could never be appropriate.

The two cases cited by respondents relate to the appeal of the seller to consumer preferences; there were not sufficient distinguishing features to demonstrate a separate market. In this case, however, the gross sales of the supermarkets do not relate merely to the success of the seller at his trade, but rather, are tied to his mode of operations. It would be an unrealistic recognition of competition to compare Grand Union and Colonial, with their average per store gross of over \$3 million per year (F. 21) to, for example, the 7-11 stores operated in Richmond, Virginia and Orlando, Florida, which had average sales of \$325,000 and \$290,000 per year, respectively (F. 22). The Majik convenience stores in Macon, Georgia which averaged \$140,000 per store annual gross, are [203] clearly operating quite differently than Grand Union and Colonial; it is not merely that Grand Union and Colonial were more successful in pursuing the same line of operations. (F. 22) Supermarkets offer different facilities, different prices, more variety of products—a cluster of products and services, and appeal to a different type of customer—the "one-stop shopper."

The record indicates that Grand Union was a supermarket firm, and was interested in pursuing an acquisition of Colonial because it was another supermarket firm and, thus, compatible with Grand Union's operations. Dr. Curhan testified with regard to Lowe's supermarkets, which averaged \$2 million per store in gross sales, that these were not Grand Union's type of store, that those are the type of store Grand Union had closed because they were not profitable for Grand Union. (F. 21)

As the Supreme Court stated in *United States v. Continental Can Co.*, 378 U.S. 441, 449 (1964), competition must be recognized where it does, in fact, exist. The record in this proceeding demonstrates that supermarkets only compete with other supermarkets. This is the area of substantial competition in grocery retailing, as revealed by the

overall volume of sales by supermarkets. Although supermarkets and other food retailers may serve complementary functions, *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 641 (C.D. Cal. 1976), for the purpose of defining the relevant market, only companies which compete in offering the same "cluster of services" provided by supermarkets offer significant competition.

In *United States v. Philadelphia National Bank*, 374 U.S. 321, 356-57 (1963), the Court found that commercial banks represented a line of commerce distinct from other financial institutions that offered some of the same services, but did not compete in the cluster of products and services which characterize commercial banking. Supermarkets, like commercial banks, represent a market "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 811 (9th Cir. 1961)

Respondents are perturbed by the arbitrary nature of a market which includes markets with \$1.5 million in annual sales, but excludes the competition with only \$1.499 million.²¹ [204] However, the act of fashioning a market by nature involves line-drawing. This is permissible where the distinctions made reflect commercial realities. The record in this case is replete with evidence that supermarkets, by and large, compete with other supermarkets, and that this is the appropriate market in which to judge the effect of Grand Union's acquisition of Colonial.²²

Respondents argue that the various types of food retailers represent a continuum of product and service offerings (RPF 945) similar to the wine industry, where the Commission refused to find that sweet and dry wines represented two distinct lines of commerce. *Coca-Cola Bottling Company of New York*, 93 F.T.C. 110 (1979) Although the Commission recognized that the sweet wines sold by Mogen David represented one far end of the continuum, it found that, for some consumers, there is interchangeability of use, or cross-elasticity of demand, with products nearer the center. 93 F.T.C. at 204; see also *Heublein, Inc.*, 96 F.T.C. 385, 576 (1980)

In *Coca Cola*, consumer surveys indicated that Mogen David sweet wines did elicit cross-elasticity of demand from purchasers with other, drier, wines. 93 F.T.C. at 202 In this case, unlike those cited above, respondents have offered no evidence which would support the con-

²¹ The establishment of \$1 million annual sales volume as a definition of "supermarket" in 1972 was a decision reached by the staff of the Commission and the Department of Agriculture. This definition was agreed to in 1974, long prior to this present proceeding. (Parker 3461-62) In adopting this figure, Dr. Parker testified that they were "going with the crowd" (Parker 3462), which included such trade journals as *Progressive Grocer* and *Chain Store Age*. The 1977 supermarket definition of \$1.5 million in annual sales volume was an adjustment for inflation, since the Consumer Price Index for food at home had gone up 56% between 1972 and 1977. After consulting with the Department of Agriculture, and checking with *Progressive Grocer* and the Food Marketing Institute, Dr. Parker rounded off the 56% inflation rate to 50% (1.5 million) because Bureau of the Census publishes data in even-numbered figures. (Parker 3463, 3480-82) (See Complaint Counsel's Reply Brief, pp. 45-47.)

²² Concentration ratio data regarding retail grocery sales (F. 52) indicate sufficient concentration in this area that, if this were deemed the relevant market, scrutiny under the Clayton Act would still be warranted.

tention that consumers view, for example, convenience stores and delicatessens as satisfactory substitutes for supermarkets.

As the Supreme Court noted in *United States v. [205] Phillipsburg National Bank*, 399 U.S. 350, 360-61 (1970):

Philadelphia [National] Bank emphasized that it is the cluster of products and services that full-service banks offer that as a matter of trade reality makes commercial banking a distinct line of commerce. Commercial banks are the only financial institutions in which a wide variety of financial products and services—some unique to commercial banking and other not—are gathered together in one place. The clustering of financial products and services in banks facilitates convenient access to them for all banking customers In short, the cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved. [footnote omitted]

The wide variety of grocery products, the check cashing, meats and produce, bakery counters, drug items, household items, beauty aids, etc., are significant as a group, despite the fact that each of these is available independently elsewhere. The "cluster of services" offered by supermarkets represent a distinct product market, and, to reflect trade realities, this is a distinct product market for antitrust purposes.

Convenience stores are not generally price-checked by supermarket firm operators. They carry little, if any, produce and meat, and indeed, average only 500-3000 items. (F. 22) Supermarkets stock from 8-12,000 items. (F. 19) Convenience stores generally have only one employee per shift and they average sales of from \$1-3 per customer, as compared to the \$11-15 average sale for supermarkets. (F. 22) Convenience stores are generally not considered in supermarket expansions and store location studies. (F. 22) Basically, the only competition they offer to supermarkets is in terms of hours of operation. (F. 22)

Mom-and-pop stores are the little corner stores that tend to be family operated. (F. 22) They carry little meat and produce, do not advertise in metropolitan newspapers, and are not usually price-checked by supermarket firm operators. (F. 23)

Limited assortment stores, selling approximately 400-800 items, no meat and produce, require the customer to bring his own box or bag. (F. 24) There is generally no payment by check. (F. 24) Because they rely heavily on "deals" from manufacturers and because they offer little service, their prices are generally lower than those in supermarkets. (F. 24) [206]

Fast food outlets, although competition in the sense that they sell food, are clearly not in the relevant market, and are excluded from census figures. (F. 29)

Military commissaries (also excluded from census figures), which are subsidized by the federal government and are not open to the general public, do not advertise, and are not price-checked by supermarket firms, which cannot gain access even for this limited purpose. (F. 31) In the areas where commissaries trade, retailers try to capture military business by offering more variety and quality products and keeping prices on staple items low, but commissaries are not figured in supermarket marketing and advertising strategies. (F. 31)

Although some of these retailers offer some of the same services and facilities as supermarkets, only supermarkets offer all of them. This is where competition, in fact, exists. Therefore, it is concluded that "supermarkets" constitute the relevant product market in this case.

2. Geographic Market

To determine whether a Section 7 violation exists, it is necessary to find the relevant "section of the country" or geographic market, the area in which the goods or services at issue are marketed to a significant degree by the acquired firm. *Philadelphia National Bank*, 374 U.S. at 357-362

Complaint counsel argues the existence of two relevant markets in this case, the Standard Metropolitan Service Area (SMSA) or subdivision thereof, and the Southeastern United States, the region in which Colonial operated prior to the acquisition. The Supreme Court has acknowledged that more than one relevant market may exist in an antitrust case. *Marine Bancorporation*, 418 U.S. at 621; *United States v. Pabst Brewing Co.*, 384 U.S. 546, 551-52 (1966)

Respondents deny that either the SMSA or the Southeastern United States is the correct or relevant geographic market. Their position is that, while the SMSA might be the appropriate market from the demand standpoint, and might be relevant if this case involved two competing retailers within an SMSA (RPF 951), the SMSA is too narrow a market. Use of the SMSA as the relevant market, respondents claim, overstates the concentration ratios and distorts the picture of how this market functions. [207]

According to respondents,

[t]he complaint does not allege a lessening of the number of actual participants in any market; it alleges a lessening of the number of possible additional participants. Thus, it is necessary to analyze the geographic market in terms of the universe of possible suppliers to the retail food store in an SMSA (*i.e.*, firms like Grand Union and Colonial) rather than the universe of possible demanders (*i.e.*, the consumers of food in a given area).

(RPF 951) Therefore, because some retail food stores at issue in this case are supplied from warehouses outside the SMSA, at distances up

to 200 miles from the SMSA, respondents claim that the SMSA draws the relevant market too narrowly.

Further, the Southeastern region is rejected by respondents as the relevant geographic market because it is not relevant in terms of either consumer demand or in terms of wholesale supply. (RPF 958) Respondents claim, therefore, is that the relevant geographic market is necessarily broader than the SMSA but much narrower than the Southeastern United States. (Respondents' Reply Brief, p. 126-127)

One commentator has defined the relevant market as follows:

The area of effective competition may be any commercially significant geographic area which can reasonably be said to confine the relevant commercial activities. If sellers within the area are making price and output decisions protected from the need to take account of sellers outside the area, there is a distinct market. If sellers within the market must take account of sellers outside it, either because these sellers are mobile and can easily come into the area to sell, or because buyers are mobile and can easily go outside of the area to buy, the market is being defined too narrowly.

L. Sullivan, *Handbook of the Law of Antitrust* 68 (1977)

The exact size of the market need not be established. *British Oxygen Co. Ltd.*, 86 F.T.C. 1241, 1371 (1975), *rev'd sub nom.* on other grounds, *BOC International Limited v. FTC*, 557 F.2d 24 (2d Cir. 1977); *Paper-craft Corp.*, 78 F.T.C. 1352, 1405-06 (1971), *aff'd*, 472 F.2d 927 (7th Cir. 1973) "[P]recision of detail is less important than the accuracy of [208] the broad picture presented." *Brown Shoe*, 370 U.S. at 343, n. 69 The geographic market, like the product market, must correspond to commercial realities and be economically significant. 370 U.S. at 336-337 The physical dimensions of the geographic market need not be set out in metes and bounds, *Pabst Brewing*, 384 U.S. at 549, but must constitute a rough approximation of the relevant market. However, "the Government cannot rely, without more, on Standard Metropolitan Statistical Areas (SMSA's) as defining the geographic markets." *United States v. Connecticut National Bank*, 418 U.S. 656, 671 (1974)

In *Philadelphia National Bank*, the Supreme Court stated that the relevant geographic market included those areas where buyers can turn to alternative suppliers when prices rise above competitive levels. Therefore, the markets in retail industries are generally local, because convenience of location is essential to effective service. 374 U.S. at 357-59 Other antitrust cases involving supermarket firms have found the relevant markets essentially to be the local metropolitan areas. *United States v. Von's Grocery Co.*, 384 U.S. 270, 461 (1966); *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339 1344-45 (4th Cir. 1976)

The issue, therefore, is where the effect of Grand Union's acquisition of Colonial will be direct and immediate, not merely where the parties do business or where they compete. *Philadelphia National*

Bank, 374 U.S. at 357 In this case, the most direct and immediate impact of the acquisition is within each SMSA. As stated by Professor Sullivan, several factors used in determining the relevant geographic market are: industry perception, the tendency of companies outside the market to make sales within it, responsiveness of prices within the market to those outside of it, the extent to which traders from beyond the market area would be disadvantaged by costs in an attempt to trade within it, and the ability of buyers to go outside the area to make purchases. L. Sullivan, *Handbook of the Law of Antitrust* 68.

All the evidence introduced points to the SMSA as the relevant geographic market. No evidence exists that supermarket firm operators looked outside the SMSA in setting prices, in attempting to attract consumers, or in considering their competition. Supermarkets measure market shares, or market penetration, in terms of a local market, normally an SMSA, and trade journals similarly utilize SMSAs in publishing market data. (F. 34) In addition to this, reliance on local media, both written and broadcast, for advertising purposes (F. 35) makes choice of the SMSA as the relevant geographic market a logical conclusion.

According to Professor Sullivan, retail consumers are less likely to range widely in search of better terms than are [209] commercial buyers. L. Sullivan, *Handbook of the Law of Antitrust* 69 (1977). There is no evidence whatsoever that consumers can turn to suppliers two hundred miles away to satisfy their weekly grocery needs. Indeed, it is illogical even to postulate such an alternative. It is the local grocery retailers "to which local consumers can practically turn for alternatives." *Marine Bancorporation*, 418 U.S. at 619

The expanded markets that respondents argue are more relevant than the SMSAs are not appropriately used for measuring competition and concentration in food retailing and, indeed, no such data has been proffered. The relevance of these expanded markets are in their demonstration of the existence of potential entrants into the individual SMSAs; they have no relevance whatsoever to grocery retailing. In fact, the supply side market urged by respondents may be resistant to precise determination other than drawing a circle with a 200 mile radius around the center of each SMSA (see F. 36).

Complaint counsel posits that the Southeastern region should be considered as a separate geographic market because, while "the Southeast is not an appropriate area in which to measure concentration, it is a proper area in which to consider the effects of this acquisition on the issue of whether Grand Union would have likely entered." (CPF at 138-39) In addition, complaint counsel argues the effects of this acquisition must be examined at a regional level in order to find

the cumulative, multi-market effect, which was the Congressional intent behind the passage of laws aimed at thwarting trends in concentration.

Complaint counsel cites four cases in support of the contention that it is proper to consider a region as a whole, despite the existence of local markets. These are: *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 71 (10th Cir. 1972); *FTC v. Proctor & Gamble*, 63 F.T.C. 1465, 1537, 1561 (1963), *vacated*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568, 571 (1967); *United States v. Grinnell Corp.*, 384 U.S. 563, 574 (1966); and *British Oxygen Co.*, 86 F.T.C. at 1346-47. However, as noted by respondents, these cases are clearly distinguishable. In each case the competitors were nationwide operators whose planning was done on a national scale. Colonial and Grand Union operations were run on a divisional basis and in each local market the number and identity of competitors varied (*see* F. 82, 119, for example). No evidence exists that these competitors looked beyond the local market in establishing any of their prices and other competitive responses. (F. 34)

Even if the entire region were considered as a relevant geographic market, no data has been offered which would allow measurement of the effects of the merger on this market. Complaint counsel's evidence pertained to local markets; there was no evidence of concentration in the region as a whole, or that the merger produced a firm likely to dominate the entire [210] region—an entrenchment theory (*see Marine Bancorporation*, 418 U.S. at 623, n. 23). While it is appropriate to look at the entire area where Colonial operated as a region in which to measure the effects of the merger, the effects must be measured in a local market.

G. *Grand Union's Acquisition of Colonial is Unlawful*

1. Potential Competition

Complaint counsel argues that, by its acquisition of Colonial, Grand Union has violated Section 7 of the Clayton Act under the doctrine of potential competition. As explained by Professor Sullivan, potential entrants into the market are those companies with the skill, technology, and resources to enter the market. They derive their importance from the fact that:

[t]heir existence may reduce market power, that is, may inhibit price increases to excessive levels—in either of two ways. First, their perceived existence in the wings, so to speak, may lead the firms already on the stage to act differently than otherwise they would have acted.

* * * * *

Second, regardless of whether its presence in the wings affects present conduct in the market, any potential entrant may in the future actually enter thus reducing concentration and enhancing the possibility of more competitive market performance at that time. [citations omitted]

L. Sullivan, *Handbook of the Law of Antitrust* 633-34 (1977) In essence, therefore, the significance of a potential entrant into the market is both its present and (anticipated) future procompetitive effects.

2. Actual Potential Competition

In the absence of the Colonial acquisition, complaint counsel contends, Grand Union would have entered the target market, the area in which Colonial operated, through *de novo* entry or by the acquisition of a "toehold" firm, which would be used as a base from which to expand.

A violation of Section 7 under the potential competition or entrant doctrine will be found when:

- a. the target market is substantially concentrated; [211]
- b. the acquiring firm has the characteristics, capabilities, and economic incentive to enter the market in question;
- c. the acquiring firm has available feasible alternative means of entry;
- d. these alternative means offer substantial likelihood of ultimately producing deconcentration.

This theory, which the Commission has repeatedly found to be viable (see, for example, *Brunswick Corp.*, 94 F.T.C. 1174, 1267 n. 25 (1979)), and has been accepted consistently by lower courts, e.g., *United States v. Phillips Petroleum Co.*, 367 F.Supp. 1226, 1252 (C.D. Cal. 1973), *aff'd* without opinion, 418 U.S. 906 (1974), has yet to be expressly adopted by the Supreme Court.

Two cases on point have reached the Court, *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973), and *United States v. Marine Bancorporation*, 418 U.S. 602 (1974), but each was resolved without approval of the doctrine. However, the Court did affirm without opinion the district court's decision in *Phillips Petroleum*, wherein the lower court found a violation based on the actual potential entrant doctrine where evidence existed that the acquiring company had the size, resources, capability, and motivation to enter the target market, which was adjacent to the geographic area in which it already operated, and the product market was one in which the acquirer was already engaged. 367 F.Supp. at 1229 In addition, the market was found to be concentrated and few other likely entrants were found to exist. *Id.* at 1251, 1257.

Respondents dispute the validity of the actual potential entrant doctrine which, they contend, penalizes an elimination of a potential increase in competition rather than proscribing the lessening of competition that is supposed to be the target of Section 7. (RPF 962; see

also J. A. Rahl, "Applicability of the Clayton Act to Potential Competition," 12 *ABA Antitrust Section* 143 (1958))

Respondents cite *United States v. Siemens Corp.*, wherein Judge Mansfield, writing for the Second Circuit, hypothesized that the Supreme Court was reluctant to embrace the potential competition doctrine because it:

rests on speculation about the future conduct and competitive impact of a firm currently outside the market and perhaps intending to remain so. Even if the likelihood of a firm's entry is a probability, as distinguished from an "ephemeral possibility." [citing *United States v. Brown Shoe*, 370 U.S. 294, 323], its potential entry does not promote existing competition, since at most it may become a competitor *in futuro*. [212]

621 F.2d 499, 504 (2d Cir. 1980). In *Siemens*, the court refused to grant a preliminary injunction against the acquisition of the assets of a firm producing medical diagnostic equipment by a company engaged in the sale and manufacture of such equipment because the government failed to demonstrate a substantial likelihood that the acquirer would enter the market *de novo* but for the acquisition. 621 F.2d at 507.

Respondents' objections to the viability of the actual potential competition doctrine notwithstanding, because the Commission and lower courts have favorably passed on the applicability of this theory to merger cases, it is appropriate to examine Grand Union's acquisition of Colonial under this doctrine. *Marine Bancorporation*, 418 U.S. at 631. *United States v. Black & Decker Mfg. Co.*, 430 F.Supp. 729, 744 (D. Md. 1976), *United States v. Aluminum Co of America*, 377 U.S. 271, 278 (1964); *Phillips Petroleum*, 367 F.Supp. at 1252. The Commission most recently, in *Tenneco, Inc.*, Docket No. 9097, Slip Op. at 2, n.3 (September 23, 1981), reaffirmed its belief in the viability of the actual potential competition theory of violation [98 F.T.C. at 576 (1981)].

3. Barriers to Entry/Concentration

The actual potential competition doctrine will be applied only where the target market is an oligopoly, a less than competitive market. Complaint counsel offers the concentration ratios of the SMSAs as evidence of lack of competition. Concentration levels of sufficient magnitude will be considered a *prima facie* showing that the market is not competitive.²³ *Marine Bancorporation*, 418 U.S. at 630. The significance of concentration ratios is that, in a market lacking dominant participants, market factors do not possess the clout to determine price and/or total output of goods or services.

Although the Supreme Court has never set a threshold level of concentration below which the government is deemed to have failed

²³ Economic experts testifying in this proceeding acknowledged that high concentration is generally believed to be associated with a lack of competition. (F. 200)

to establish its *prima facie* case, examination of the levels found sufficient in other cases to shift the burden to respondents (to prove the market is competitive) is instructive. The figures below represent the concentration ratios of the top four firms in the target market: [213]

- a. *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 73 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974)—29.2%;
- b. *Black & Decker*, 430 F.Supp. at 748—77.5%;
- c. *Falstaff Brewing*, 410 U.S. at 527—28—61.3%;
- d. *Phillips Petroleum*, 367 F.Supp. at 125—52—61% (refining capacity), 58% (gasoline sales);
- e. *United States v. Wilson Sporting Goods*, 288 F.Supp. 543, 547 (N.D. Ill. 1968)—60%;
- f. *Stanley Works v. FTC*, 449 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973)—49—51%.

As the Commission recently stated, four-firm market shares of about 50% are sufficient to cause concern over a loss of potential competition. *Tenneco*, Docket No. 9097, Slip Op. at 11, 12 [98 F.T.C. at 583, 584 (1981)]. Earlier, in *Heublein, Inc.*, the Commission held that a concentration ratio of 47.9% "arguably falls at the edge of a reasonable definition of those markets where the loss through merger of a potential entrant may substantially lessen future competition." 96 F.T.C. 384, 584—585 (1980)

In the instant case, in 1977, the supermarket firm concentration ratios in all the SMSAs were at least 68%, and nine were over 75%. (F. 53) Even utilizing the broader market of grocery store sales, all of the SMSAs have a four-firm concentration ratio of at least 49%, and eight of the SMSAs were over 60%. (F. 52)

In *Kennecott Copper*, the fact that the market, not an oligopoly at the time of the lawsuit, was increasingly becoming concentrated, was found significant by the Commission and the Tenth Circuit. 467 F.2d at 75—76 The food industry, too, has been marked by a trend toward increasing concentration, as is evidenced by the differences between 1972 and 1977 concentration levels in the relevant SMSAs.

In 1972, the average four-firm concentration ratio in the twelve SMSAs and the Greenville subdivision, based on grocery store sales, was 56.2%. By 1977, it had risen to 60.8%. (F. 52) In terms of supermarket concentration, the average four-firm concentration ratio in the twelve SMSAs in 1972 (no data exists for the three subdivisions for that year) [214] was 75.63%. By 1977, the average concentration in these twelve SMSAs had reached 77.78%. (F. 53) Of additional significance is the fact that there were greater increases in the SMSAs representing Colonial's area of operations than in the 155

other SMSAs in the country. The 32 SMSAs in the five states constituting the Southeast had four-firm grocery store sales concentration ratios of 56.1% in 1972 and 59.5% in 1977. Excluding these five states, the four-firm levels in the rest of the country were 51.5% in 1972 and 52.6% in 1977. (F. 55)

The food industry, as complaint counsel noted (CPF 147), has been of special concern to the Commission in the past.

This merger movement led by National Tea portends a drastic restructuring of the national food market as a whole and of the individual markets in which these acquisitions occurred. Nationally, the period 1948-1958 witnessed an enormous shift of sales volume from the "independent" to the "chain" sector of the industry, and from the smaller to the larger "chains."

* * * * *

It was precisely this kind of market arrangement Congress was concerned with in the merger law. That '[c]ompetition is likely to be greatest where there are *many sellers, none of which has any significant market share*,' . . . is common ground among most economists. . . .

National Tea Co., 69 F.T.C. 226, 268-270 (1966)²⁴

Respondents argue that the markets are performing competitively and that the concentration ratios are overstated [215] because the product and geographic markets are drawn too narrowly. They correctly note that the Supreme Court and lower courts have often stated that statistics regarding concentration are merely the starting point for market analysis (*see United States v. First National State Bancorporation*, 499 F.Supp. 793, 804 (D.N.J. 1980)); they are not conclusive. *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974)

In addition, respondents argue that even where a market is highly concentrated, it may still be characterized as competitive because of the ease of entry into it. (RPF 969) If a market is concentrated but low entry barriers exist, future potential competition is important; however, the ease of entry signifies that there are a large number of potential entrants and the elimination of one loses significance. *The Budd Co.*, 86 F.T.C. 518, 577 (1975) New firms can enter the market and erode the high price and profit levels characteristic of high levels of concentration.

Respondents also note that the Commission has characterized the food industry as one marked by low entry barriers and ease of entry. *National Tea*, 69 F.T.C. at 278. Complaint counsel, however, differentiates between entry on a small scale, *i.e.*, by a single store operator,

²⁴ On January 17, 1967, the Commission issued a statement of policy respecting mergers in the food distribution industries entitled "Commission Enforcement Policy With Respect To Mergers In The Food Distribution Industries." 1 CCH Trade Reg. Rep. ¶ 4525, at 6904 This statement sets forth several proceedings which were terminated by orders prohibiting mergers by large grocery chains without Commission approval. It can be assumed that this statement of policy and the consent agreements had some effect in slowing concentration in food retailing. These consent orders have now expired. *See The Food Retailing Industry* (Praeger Book). (Respondents' Phy. Ex. C., pp.

and entry by a supermarket chain on a larger scale. Supermarket chains are usually defined by the industry as firms with ten or more stores. (F. 58)

Complaint counsel argues that only the entry of a supermarket chain has significant effect on concentration in the market. Independent operators usually own one, or at most a small number of stores. Single store operators rarely build *de novo*; they usually acquire second use locations. (F. 57) According to both respondents' and complaint counsel's experts, market entry occurs when a new actor enters the market. Acquisition of a firm already in the market is a transfer of ownership, it does not immediately increase the capacity of the market. (F. 56)

Although a retailer may find it relatively easy to open one or two stores in a market, this "ease of entry" is little guarantee of success. To be considered a factor in the market, a firm must achieve at least a 5% market share (F. 58), and few small operators are ever able to do so, often despite a tenure of many years' duration in a particular market.

Competition against supermarket chains is most possible for other supermarket chains. New entry is often likely to be greeted by pre-emptive actions by in-market firms. Examples of pre-emptive actions are increases in advertising and promotions, remodeling of nearby stores, zone pricing, and building new stores ahead of population. (F. 62) Supermarket chains, like Grand Union, are most likely to be in a financial [216] position to withstand these actions. Because chains are likely to enter with multiple stores (F. 62), established firms will be less likely to take a pre-emptive action against the opening of a chain's stores because it will have less effect. Examples of the effect of such pre-emptive actions against a small operator is the experience of the Two Guys operation in Charlotte, North Carolina and that of the Warehouse Groceries operation in Atlanta, Georgia. (F. 62, 84)

The costs of entry are high, estimated at \$3-3.5 million per site for leases (F. 59), and, for a 25,000 to 30,000 square foot store, \$300,000 to \$700,000 to equip and \$250,000 to stock. (F. 63) This does not include rent, training employees, or paying management. Grand Union management, in outlining a Florida West Coast Development Program for 1976-1980, anticipated operating their eighteen stores on the West Coast of Florida at a substantial loss for at least five years. (CX 71A-Z116, *especially* 71B, 71Z10) A small operator would find it extremely difficult, if not impossible, to withstand losses over such a substantial period.

Small operators will frequently have difficulty finding store sites because developers prefer large chains as tenants over small chains or independents. (F. 59)

Advertising costs are high, particularly in the larger SMSAs such

as Atlanta. (F. 61) Multiple store entry allows a firm to allocate advertising costs across several stores. In addition, carry-over name recognition of established chains may lessen the need for advertising to establish an image and promote a following. (F. 60)

Industry witnesses testified that multiple store entry was the only way to effectively serve and compete in an SMSA. The size of the market indicates how many stores a firm must have for effective entry. One witness estimated that, in this case, the number of stores necessary to compete effectively would range from a low of two in Fayetteville, North Carolina to a high of twelve in Atlanta, Georgia. (F. 59)

Although respondents have produced lists of actors entering these markets, the preponderant number of these have been small companies, often catering to specialized, *e.g.*, ethnic, needs. (F. 57) There has been a paucity of entry by supermarket chains. When supermarket chains have entered, for example as Safeway entered the Newport News/Hampton SMSA, the result has been a decrease in concentration. (F. 133)

The high levels of concentration in the markets at issue here, and indeed, the increases in almost all these markets between 1972 and 1977, are strong indication of the height of entry barriers at work. Although a number of small operators have entered, as mentioned previously, few have become [217] market factors, and they have had little effect in deconcentrating the markets. In some of the markets there has been a change in market share of the market factors,²⁵ an occasional market entrant or an exit from the market; but overall, the markets have remained concentrated and, in fact, concentration has increased.

Therefore, complaint counsel has established a *prima facie* case that the relevant markets are concentrated, and respondents have failed to introduce persuasive evidence to overcome the presumption that these markets are not performing competitively.²⁶

4. Grand Union as a Likely Entrant/Other Likely Potential Entrants

The most likely potential entrant into a market is one which is

²⁵ For example, A & P's difficulties over the past few years are well-known. See, *The Food Retailing Industry* (Praeger Book). (Respondents' Phy. Ex. C, pp. 31, 47-48, 65, 74, 87-88) Food Fair has filed for reorganization under Chapter XI of the bankruptcy statutes. (CX 665Z232; *Supermarket News*, October 2 and 9, 1978, July 13, 1981.)

²⁶ Respondents' evidence of competition in the SMSAs consist of general testimony of their officials, and speculation about possible market entrants and the role of possible market expanders. As stated by Commissioner Clanton in his concurring opinion in *Tenneco*, "it is hard to imagine any industry member admitting that his firm did not compete aggressively or that the industry was non-competitive." Concurring Statement of Commissioner Clanton in *Tenneco*, Docket No. 9097, Slip Op. at 9 [98 F.T.C. at 633 (1981)]. Respondents' economic expert, Dr. Adelman, explained that testimony by industry officials should be carefully interpreted: "[P]eople will say this business is competitive and what they mean is there is a great deal of rivalry, heavy expenditures on advertising, some of it very ingenious and costly. And yet, I might not agree with them that it was competitive as an economist would refer to competition." (Adelman 3401-02)

related to that market by product, geographical, distributional or vertical affinities. L. Sullivan, *Handbook of the Law of Antitrust* 634 (1977)

Grand Union had many reasons to expand its supermarket operations geographically and it was financially able to do so. (F. 77-79) Grand Union's management was eager to invest in supermarket operations in more lucrative areas than its present base of operations (F. 73), which was the economically troubled [218] Northeast. (F. 71, 73, 76) This eagerness was expressed both in internal planning documents and publicly in interviews given by Grand Union officials to trade publications.

Roger Kennedy, then Vice-President of Corporate Financing, was assigned to make a study of acquisition possibilities in the Southeast, the area from Virginia to Florida. (F. 69) In his report, the Southeast Study, Mr. Kennedy pointed out to his superiors that Winn-Dixie, operating throughout this region, had the best earnings record nationally. (F. 69) In addition, the twelve firms Mr. Kennedy selected to study as a group were more profitable than the national average. (F. 69) He believed that this area had avoided store saturation and, with its projected high population growth, had great potential. (F. 69) In a later study Mr. Kennedy did of the Southwest, he noted that the thirteen chains studied there were less profitable than those in the Southeast. (F. 70)

Having been newly released from an FTC ban on acquisitions of ten years' duration (F. 72), upper echelon management was publicly exultant at the prospect of the possibilities offered by the "Sunbelt." (F. 72-75) The company was growth-oriented and had committed itself to expand its supermarket operations geographically, past product-market diversification not having been profitable. (F. 68)

More than a reasonable probability exists that Grand Union would have entered this market in the near future even without its acquisition of Colonial. The public statements of its upper echelon management beyond any doubt reveal an organization practically "chomping at the bit" to expand and a stated target of this desire was the Southeast. See *BOC International Ltd.*, 557 F.2d 24, 28-29 (2d Cir. 1977). This case differs from others where interest in entry was expressed mainly by junior personnel and management. *United States v. Crowell, Collier, and MacMillan*, 361 F.Supp. 983, 1005 (S.D.N.Y. 1973); *Siemens*, 621 F.2d at 508; *Tenneco*, Docket No. 9097, Slip Op. at 32 [98 F.T.C. at 598 (1981)].

Although respondents offer evidence that one or another of the markets were likely to have been of little interest to Grand Union, it is not complaint counsel's burden to conclusively pinpoint exactly where Grand Union would have first entered. As Commissioner Clanton stated in his concurring opinion in *Tenneco*, "in assessing the

alleged elimination of potential competition, we are always dealing with probabilities and rarely, if ever, with certainties." Docket No. 9097, Slip Op. at 1 [98 F.T.C. at 624]. However, management's public statements indicate that the Southeast was viewed as a market to conquer, and it is much [219] more than likely that Grand Union would enter this region, particularly the large metropolitan areas.²⁷

Respondents argue that no persuasive evidence exists which rebuts deposition evidence and statements of Grand Union management that they had no plans to enter this area.²⁸ (RPF 976) In addition, except for the opening of one unsuccessful store in Orlando in the late 1960's (F. 146), Grand Union had made no attempts to enter these markets. See *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 658-659 (1964; *Brunswick*, 94 F.T.C. at 1269.

Nevertheless, all objective factors indicate that Grand Union would have entered this market. It had the "characteristics, capabilities and economic incentives" to enter and clearly was eager to do so. *Marine Bancorporation*, 418 U.S. at 624-25; *Tenneco*, Docket No. 9097, Slip Op. at 14 [98 F.T.C. at 585 (1981)]. "Where objective considerations so clearly favor probable entry, contrary testimony by company officials as to future intent has little probative force." *British Oxygen Co. Ltd.*, 86 F.T.C. 1241, 359; see also *Falstaff Brewing*, 410 U.S. at 563-69 (Marshall, J., concurring). [220]

Grand Union's expertise was clearly in the establishment and running of supermarkets. Its profit margins and success, even in the highly competitive Northeast (F. 80), are a testament to its ability to acquire, operate, and expand a small toehold. *Heublein*, 96 F.T.C. at 587 It is without doubt that Grand Union had and was using the technology needed to enter the Southeast on any basis it chose. In this regard, Grand Union's situation differed from that of the acquiring firm in *Siemens*, which lacked the technology to enter the market *de novo*, a market which was no longer as attractive as it had been in the past. 621 F.2d at 507-08 Grand Union was uniquely capable to enter this market, a market which respondents recognized would become even more attractive over time.

In *BOC International Ltd.*, the Court held that it is insufficient to

²⁷ Dr. Curhan, respondents' marketing expert, testified that "Grand Union are city folk, for better or for worse." (Curhan 2964)

²⁸ The persuasive nature of proof of market entry recently was commented upon by recognized authorities:

We can seldom have much assurance in predicting that a firm would or would not actually enter a particular market. Accordingly, the result will usually depend upon the location of the burden of proof, together with any appropriate rules of thumb.

The plaintiff ordinarily has the burden of showing an antitrust violation, but that general proposition does not say how much proof should satisfy the burden. Although we have criticized some decided cases which have not required much proof, truly satisfying proof cannot be demanded. To insist upon it would be virtually to abandon the effort to preserve potential entrants from elimination by merger. Abandonment, however, would be unwise in those situations where a highly concentrated market needs more competition and where potential entrants are few in number.

P. Areeda & D. Turner, *Antitrust Law*, ¶1121e at 117 (1980)

prove "eventual" entry, and that greater specificity was needed regarding the timing of such entry. 557 F.2d at 29. In this case Grand Union, portrayed in one article as being released from the shackles (F. 72) of the Commission's acquisition ban, was industriously studying acquisition possibilities. The obvious inference is that Grand Union planned to expand and to do so very soon.

Respondents argue that, for various reasons, none of the other acquisition possibilities were as attractive as Colonial, and, barring the merger with Colonial, Grand Union would not have entered. It is clear that Grand Union was determined to enter this market. Whether another acquisition would have been as attractive or as profitable as the acquisition of Colonial is of little consequence because "the test in Section 7 cases is not whether anticompetitive conduct is profit maximizing. The very purpose of Section 7 is to direct the profit incentive into channels which are procompetitive." *British Oxygen Co.*, 86 F.T.C. 1325, citing *Falstaff Brewing*, 410 U.S. at 572 (Marshall, J., concurring)

There are no clear-cut statements by Grand Union management that, but for the acquisition of Colonial, Grand Union would not have entered the Southeast;²⁹ it is only counsel's postulation. On the contrary, it appears Grand Union [221] was interested in smaller chains, if a large chain was not available. During March, 1978, in analyzing possible acquisition candidates, a Grand Union official made the following statement in respect to Bruno's, a growing chain with 55 supermarkets and an annual sales volume of \$250 million:

Very strong chain in the Birmingham, Alabama area. 40 drug stores. Would be worthwhile to follow up further if it appears impossible to make an acquisition with a larger volume. This does have a good growth rate. (Publicly owned.)

CX 44G. This same report acknowledges that Grand Union was interested in Tampa Wholesale (Kash'N Karry), with annual sales volume of \$175 million. (CX 44Z49) In discussing "Desirable Characteristics" of an acquisition possibility, this official stated:

The acquired chain should not be so large as to accentuate FTC problems, and it should be large enough to make a worthwhile contribution to Grand Union. (Perhaps in the \$400 million to \$800 million annual sales range.) (CX 44Z51)

Complaint counsel need not identify the most satisfactory substitute acquisition candidate, but must merely show that a range of possibilities exist (see *British Oxygen Co.*, 86 F.T.C. at 1357 (1975); *Kennecott Copper Corp.*, 78 F.T.C. at 927 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S.Ct. 1617 (1974)). Roger Kennedy enume-

²⁹ As the Commission pointed out in *Heublein*, "declarations of an intention to acquire only a market leader, whether drawn from corporate documents or elicited from management at trial, are not highly probative in an actual potential competition case." 96 F.T.C. at 586

rated twelve possibilities on a list that did not include Colonial, which he felt was "too large" (F. 69), and he was familiar with Grand Union's requirements. If none of these candidates suited, Grand Union could have entered *de novo*, using existing warehouses in certain areas, by utilizing wholesalers, or by building a new Florida warehouse. Its eagerness to enter this market was such that it likely would have borne the disadvantages of *de novo* entry. Its financial position, its established procedures for training management, and its long success in the supermarket field made it uniquely capable to do so. *De novo* entry is not unusual in the supermarket industry.

Although other markets remained for Grand Union to enter in a satisfactory manner of entry into the Southeast was found, *e.g.*, the Southwest, this particular market, for reasons discussed above, was particularly attractive (*see Brunswick*, 94 F.T.C. at 1269; *Phillips Petroleum*, 367 F.Supp. at 1240). In addition, Grand Union's subsequent purchase of Weingarten (F. 79), makes it obvious that its interest in the Southeast was unrelated to its interest in the Southwest. The Southeast was Grand Union's primary target. [222]

Having decided that Grand Union was a likely potential entrant, it is next necessary to determine whether it was the most likely or one of few likely entrants. As the Supreme Court noted in *FTC v. Procter & Gamble Co.*, "the number of potential entrants [must not be] so large that the elimination of one would be insignificant." 386 U.S. 568, 581 (1967); *Heublein*, 96 F.T.C. at 588.

Respondents have produced what they feel is a large number of potential entrants and expanders. (RPF 975) However, "[t]he membership of the group of other potential deconcentrators should be defined by similar criteria and kinds of evidence as are used to find that the firm at issue was likely to enter or expand." *Heublein*, 96 F.T.C. at 590; *see also Kennecott Copper*, 467 F.2d at 77.

Respondents, while offering a plethora of candidates as potential entrants, do nothing beyond drawing up a list.³⁰ No [223] objective

³⁰ For example, respondents include Kroger as a potential entrant into the Florida SMSAs. (RPF 220, 323, 367) Kroger operates drug stores in Florida, and its Super-X Drug operation has opened *one experimental* mini-combo grocery store in Melbourne, Florida. (C. Thomas 1370; RX 39) Kroger's nearest grocery warehouse is in Atlanta, Georgia. Kroger's entry into Florida with grocery supermarkets is very speculative at best.

Safeway, identified by respondents as a possible potential entrant into Orlando, Florida, has no grocery warehouse in Florida, Georgia, Alabama, North Carolina or South Carolina. One witness commented about Safeway's possible entry into Orlando that he "wouldn't think so any time soon. Anything is possible." (Posey 1660)

Kroger, with its Salem, Virginia warehouse, is identified by respondents as a potential entrant into Richmond (RPF 414), Newport News and Norfolk (RPF 485). However, Kroger's Salem warehouse is approximately 241 miles from Newport News and even further from Norfolk and thus beyond the optimum shipping range of 200 miles. Charles Thomas, a Kroger Group Vice President, testified that Kroger had no plans to enter Richmond, Newport News, or Norfolk. (C. Thomas 1333)

Respondents suggest Safeway as a potential entrant into Charlotte, North Carolina. (RPF 670) Safeway's nearest warehouse is in Richmond, Virginia, 276 miles from Charlotte.

Respondents named as potential entrants into Atlanta, Georgia, the "local independents," and mentioned a "good possibility" of entry by Safeway and Albertson's "by 1985." (RPF 846, 847) Respondents also indicate Alterman and Food Town are possible entrants into Augusta, Georgia. (RPF 892, 893) It is unlikely that both will enter since Del Haize owns both chains.

evidence is offered of any interest or ability on the part of these candidates to enter these markets. Some are merely wholesalers that operate in adjacent areas and would be able to serve at most one or two stores in nearby SMSAs. (See F. 88a-e, for example.) These wholesalers apparently have been in these locations for years without entering the SMSAs, and no evidence was offered to demonstrate an interest in changing past practice. As the Commission stated in *Tenneco*:

We are persuaded by complaint counsel, however that none of the firms so identified shared Tenneco's special combination of characteristics which established it as a likely potential entrant. Further very few of these firms can be considered to be even potential entrants, and none were as likely as Tenneco to make the attempt.

Tenneco, Docket No. 9097, Slip Op. at 41 [98 F.T.C. at 604 (1981)].

In *Hughes Tool*, loss of one potential competitor out of six was not found to be an injury to competition. 415 F. Supp. at 646. Respondents have not offered acceptable evidence of nearly this number of potential entrants into any of these markets. In addition, the existence of high entry barriers to significant entry into these markets, entry on a scale sufficient to provide meaningful competition, eliminates almost all of the potential entrants suggested by respondents.

Therefore, it is concluded that Grand Union was the most likely potential entrant and one of the only likely potential entrants into these markets.

5. Alternative Means of Entry for Grand Union

Complaint counsel contends that, had Grand Union not acquired Colonial, it would have entered Colonial's area of operations *de novo* or by acquisition of a smaller toehold company. Respondents deny that either of these courses of action would have been chosen had Grand Union not acquired [224] Colonial.³¹ "In exploring the feasible means of entry alternative to the challenged acquisition the court must analyze the incentive and capability of the acquiring firm to enter the relevant market *de novo* or by toehold acquisition." [Citations omitted] *Black & Decker*, 430 F.Supp. at 755

A toehold acquisition "may be defined as one which is sufficient to assist the potential entrant over the entry barriers and into the market, but not so large that the entrant merely replaces the acquired company; the acquiring company must have a substantial need to build upon the acquisition." *Phillips Petroleum*, 367 F.Supp. at 1258

As discussed above, Grand Union had the incentive and capability to enter into the market where Colonial operated. Complaint counsel

³¹ But see Fn. 29, *supra*.

maintains that the list of toehold acquisition possibilities prepared by Grand Union is sufficient to prove that Grand Union had feasible alternative means of entry. Respondents argue that complaint counsel must demonstrate that available and attractive toeholds existed.

In *Missouri Portland Cement Co. v. Cargill*, a private antitrust action, the Second Circuit found that the plaintiff:

completely failed to demonstrate that attractive toe-hold prospects were available in the relevant geographic markets. The plants cited as available means of entry into the defined markets are either already dominant in some other market, or owned by enormous national or international cement companies, or poor prospects for the future.

498 F.2d 851, 864 (2d Cir. 1974) In *Black & Decker*, the court held that it must be proven that the toehold possibilities are available for purchase and are financially attractive. 430 F.Supp. at 766-67 See also *Atlantic Richfield Co.*, 297 F.Supp. 1016, 1069 (S.D.N.Y. 1969). However, the Commission has held that such proof is unnecessary, stating that it would be an unrealistic burden to impose a requirement on complaint counsel for such evidence. *British Oxygen Co.*, 86 F.T.C. at 1357; *Kennecott Copper Corp.*, 78 F.T.C. 744, 927 (1971), *aff'd*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974)

Complaint counsel has offered a substantial list of acquisition alternatives and, although respondents have [225] characterized them as privately or closely held companies which could not be bought against the will of their owners (Respondents' Reply Brief, p. 140), this is inaccurate. Alterman was acquired by Del Haize, a Belgium company, in 1979 (F. 89), as was Food Town. (F. 184) Harris-Teeter was bought by Reddick Corp. (F. 116, 184) Lucky Stores bought Tampa Wholesale (Kash'N Karry). (F. 158, 168) Bi-Lo was acquired by Ahold, a Dutch company, in 1977. (F. 91) Red Foods was purchased in 1979 by Pramer, a United States subsidiary of a French Company, Promades. (Stewart 468) Food Town and Lowes attempted a merger, which was challenged by the Commission in a successful injunction proceeding. *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339 (1976)

The toehold possibilities cited by complaint counsel came from the Southeast Study conducted by Roger Kennedy who, as mentioned above, was aware of his company's specifications. At least one of the toeholds, Bruno's, was offered to Grand Union in 1977 and received consideration. (F. 91) Bi-Lo's was also offered to Grand Union in 1976. (F. 91)³² Grand Union had preliminary discussions with Alterman in 1975 and 1976. The existence of the Southeast Study is evidence of Grand Union's inclination to enter, and although not conclusive

³² A Grand Union official wrote, in 1976, that: "Bi-Lo is one of the best small chains in the south and they will have a high price on it. . . . The chain fits GU beautifully." (CX 34G)

proof, it is a strong indication that Grand Union would have made one of the suggested acquisitions if nothing more desirable was available.

Respondents belittle the attractiveness of these toeholds. However, Grand Union's particular resources, financial and managerial, and its experience in supermarket operations, make it more than likely that the company could have used any of the identified companies as a base on which to build. Using the assets of any chosen company, Grand Union could have surmounted entry barriers and entered this market. Even in the absence of an acceptable toehold, Grand Union was fully capable of entering this market *de novo*. Complaint counsel has demonstrated that respondents could have entered the market in Richmond, Newport News/Hampton, and Norfolk/Virginia Beach, Virginia, as well as Orlando, Florida by the use of existing warehouses, or by constructing a new warehouse, especially in Central Florida.

In determining what constitutes a "feasible" alternative entry, it is necessary to consider the objective facts of the acquirer's situation. In this case we have a financially secure company with a large amount of capital to [226] invest in expansion, with an often-expressed interest in the geographical area in question, and a strong desire to expand within their present line of operations—supermarkets—in desirable growth areas, as contrasted to their existing locations, described as "saturated." In the past, Grand Union has expanded its operations from its existing warehouses. This is a well-established method of expansion in the supermarket industry, termed "edging out." Grand Union's warehouse in Landover, Maryland, is only 116 miles from Richmond (F. 125), and 183 miles and 200 miles from Newport News and Norfolk, respectively. (F. 135) In the early 1970's Grand Union made extensive surveys of the Richmond and Newport News/Norfolk area for possible market entry from its Landover warehouse, even to the extent of making several tentative site selections. (F. 125, 135) Market entry into the Tidewater area was not pursued at the time, apparently because of Grand Union's preoccupation with edge expansion in the Baltimore area. (F. 135) One method considered by Grand Union at this time as a vehicle for entering Tidewater was a joint venture with Dart Drug Stores, Washington, D.C., which did not prove fruitful.³³

During 1976, Grand Union considered acquiring Giant Open Air Market, a small chain with stores in Richmond and Tidewater. This possible acquisition was not pursued,³⁴ although it was acknowledged

³³ Grand Union also discussed a joint venture arrangement with Peoples Drug Stores, Washington, D. C., as a possible means of entry into North Carolina. (F. 184)

³⁴ One reason advanced for not proceeding with the Giant Open Air acquisition was its "mix" of stores, manufacturing, and wholesaling, and its size. (CX 30)

that "the proposal has appeal because a successful Norfolk operation should fit in with and help our Washington Division." (CX 30)

While Grand Union normally does not utilize wholesalers in its operations, it has been relying on a wholesaler in its Florida operations. (F. 145) Thus, Grand Union could utilize a wholesaler in a new area until such time as it was economical to build or acquire a warehouse.

Complaint counsel postulates that, except for the Colonial acquisition, Grand Union would, in the near future, have built a grocery warehouse in Central Florida, near Orlando, to service its Florida West Coast stores and to expand into Central Florida, including Orlando. Several reasons were advanced as a basis for this contention. First, Grand Union had decided not to expand its Hialeah, Florida, warehouse, [227] necessitating the use of a wholesaler to supply produce, meats and dairy products to Grand Union's Florida stores. (F. 147) Secondly, Grand Union is expanding its West Coast stores; it had 12 stores on the West Coast of Florida as of 1979, and four new stores planned for fiscal 1979. Grand Union purchased eight stores in the Tampa/St. Petersburg area from Colonial in July 1978. (F. 9) The distance from the Hialeah warehouse to these West Coast stores averages over 200 miles, with one store over 300 miles away. This is at or beyond the maximum efficient shipping distance for supplying grocery stores. (F. 148) Further, complaint counsel contends Grand Union will continue to expand on the West Coast of Florida and into the Orlando market (an attractive growth market with a population increase 4.5 times the national average - F. 160), and into other Florida markets such as Jacksonville. Complaint counsel asserts that this latter expansion is needed to support the postulated Orlando warehouse, or subwarehouse.

Respondents dispute this "scenario" as being "without basis" and "pure speculation." (RPF 273) Respondents contend Grand Union has not built a warehouse since its acquisition by Cavanham in 1973; that serving the West Coast stores is economically viable because of the low overhead of the Hialeah warehouse; and that Grand Union's plans for the next few years do not mention a new warehouse, or entering the Orlando, Gainesville, or Jacksonville markets. (F. 149, 156, 166) Grand Union points out that it also closed the two Colonial stores which were located in Orlando, as evidence of a lack of interest in the Orlando market. (F. 166) Respondents also stress the unprofitability of the West Coast stores and the need to fill in the West Coast area with stores before considering expansion into Central Florida. (F. 166)

Section 7 deals in probabilities, seldom certainties. Since Grand Union was expansion-minded, with a substantial operation in Florida,

it is more probable than not that Grand Union would expand into Orlando and construct a warehouse to supply the stores and to alleviate the West Coast supply problem which it admittedly had. Prior to establishing a warehouse, the Orlando stores could have been supplied from Hialeah, 220 miles away, under arrangements similar to the West Coast supply arrangement (*see* Gooding 1146-47). It is more probable that Grand Union would have entered Orlando in the near future—5 to 10 years—than to conclude that Grand Union would not have expanded into this attractive market.

Thus, whether Grand Union proceeded by acquiring one or more toeholds, or had proceeded to expand *de novo*, there were feasible methods of market entry available.

6. Likelihood that Alternative Entry Would Have Procompetitive Effects

[228] Grand Union's purchase of Colonial, although in essence the replacement of one firm by another,³⁵ was injurious because it forever foreclosed the potential future benefit of Grand Union's *de novo* or toehold entry. Justice Marshall recognized this in *Falstaff*, when he stated:

When a firm enters the market by acquiring a strong company within the market, it merely assumes the position of that company without necessarily increasing competitive pressures. Had such a firm not entered by acquisition, it might at some point have entered *de novo*. An entry [229] *de novo* would increase competitive pressures within the market, and an entry by acquisition eliminates the possibility that such an increase will take place in the future. Thus, even if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date.

Falstaff Brewing, 410 U.S. at 560-61, (Marshall, J., concurring)

³⁵ Respondent has offered much testimony by its officials to the effect that Grand Union has improved Colonial's operation and made it more competitive (*see* RPF 177-188). Some of the improvements which have been advanced include selling Colonial's manufacturing operations, closing unprofitable stores (including the complete withdrawal from four of the alleged relevant SMSAs—Gainesville and Orlando, Florida, and Greenville and Spartanburg, South Carolina), an increase in funds available for new store construction and store renovations, a more competitive pricing structure and stepped-up advertising, an increase in general merchandise in the stores, computerized and centralized operations, improved financial controls, raised wages and salary levels of management particularly at the store and co-manager level, modernized the transportation fleet, regionalized and strengthened the division management, and provided for increased supervision at the store level. These alleged improvements were post-acquisition, and it may be that Colonial would have instituted many of these same changes or perhaps made other changes and improvements but for the acquisition. As demonstrated by complaint counsel (Complaint Counsel's Reply Brief, pp. 124-127), Colonial was a well-managed, efficient firm. It historically outperformed Grand Union based on return on sales and return on equity. (CX 326E; CX 11) Colonial's Atlanta and Norfolk Divisions were more profitable in 1978 under Colonial than they were in 1980 under Grand Union. (Roehm 2803-04) Colonial had ample capital, cash and investments, to provide for, and which did provide for, new stores and store renovations. The only logical and appropriate conclusion to make on this record is that the acquisition merely represented a replacement of one competent competitor by another. As stated by Mr. Bert Thomas, the President of Winn-Dixie, "Grand Union merely put themselves in—substituted themselves for Colonial. Both chains, in my opinion, were well financed, had experienced operators, either could do the job." (B. Thomas 1511)

Grand Union's entrance *de novo*, or through the acquisition of one or a combination of the toeholds, could only have benefitted the market. Entrance by a supermarket chain, unlike entry by a small operator, would inevitably deconcentrate this market.³⁶ The entrance of Safeway into Newport News/Hampton (F. 133) and the subsequent drop in concentration levels in this market, is illustrative of the beneficial effects of entry by a supermarket chain with the capacity of becoming a market factor.

Entry of Grand Union into this market through a toehold acquisition or *de novo* entry could scarcely fail to have significant procompetitive effects. This was recognized [230] by the Second Circuit in *BOC International Ltd.*, when it stated that "[t]ypically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant procompetitive effects." 557 F.2d at 27, citing *Ford Motor Co. v. United States*, 405 U.S. 562, 587 (1972) (Burger, C.J., concurring and dissenting) A *de novo* entry benefits the market because it would enter "at the expense of established competitors rather than by inheriting a substantial market position" enhancing price competition as well as services and quality of product. *Phillips Petroleum*, 367 F.Supp. at 1257

The levels of concentration indicated in the markets at issue here are certainly in the range where courts traditionally find oligopolies exist. The increases in concentration found in almost every market demonstrate that the markets are likely becoming less competitive over time. Acquisition of smaller toeholds into these SMSAs would contribute to deconcentration as Grand Union competed to increase its market share in the SMSAs and/or in the Southeast. *Heublein*, 96 F.T.C. at 588 (1980)

It must not be overlooked that Grand Union and Colonial were at the verge of becoming horizontal competitors in several market areas. Colonial was planning to expand its Richmond, Virginia, operations by building new stores and a subwarehouse, and was actively looking for store sites in Charlottesville and Fredericksburg, Virginia. (F. 120) Grand Union was already in Fredericksburg, and had been exploring expansion possibilities in Charlottesville and Culpepper, Virginia. (F. 125) Absent the Colonial acquisition, there is a strong probability

³⁶ Grand Union's operations on the West Coast of Florida is an indication of the effect of market entry by an aggressive firm. Grand Union, in its 1978/79 Business Plan and Budget, stated:

A new low shelf-price marketing program was implemented in the Florida West Division following a short test of the concept in the new Fort Myers store. This program . . . resulted in a turnaround of the Division's previously adverse trend. (CX 6Z116)

The special marketing program implemented in this division during 1977/78 was effective in securing market share growth commensurate with objectives. The posture for 1978/79 in Florida West is continuation of present strategy and further extension of the program as five new stores are opened over the coming year in Fort Myers, Port Charlotte, Sarasota, and Port Richey. Everyday low price and green label pricing programs will be continued. (CX 6Z139)

Grand Union and Colonial would have become competitors in several Virginia markets, including the Tidewater markets.

In the Florida markets, Grand Union and Colonial were both operating in the Tampa/St. Petersburg, Florida, area prior to Grand Union's acquisition of the eight Colonial stores. (F. 9) Colonial had not abandoned these Florida markets, but hoped to re-enter Tampa, St. Petersburg and Orlando with a more competitive operation "five years or so down the road," including a possible subwarehouse in Central Florida. (F. 144) Future expansion by either Grand Union or Colonial would have produced horizontal competition between the two supermarket chains in these Florida markets.

The acquisition of Colonial eliminated the probability that Grand Union and Colonial would have become active competitors in Virginia and Florida.

Respondents argue that some of the toehold firms identified by complaint counsel have substantial market shares in some of the markets, market shares well above the ten percent market share suggested by the Commission as a presumptive limitation for a toehold. *See Budd*, 86 F.T.C. at 582. The Commission's holding in *Budd* was a presumption, not an inviolate [231] rule to be applied in every case. The characteristics of a toehold firm has been defined as "any firm whose acquisition would be assumed to invigorate competition more than a larger acquisition would." P. Areeda & D. Turner, *Antitrust Law*, ¶1124c at 145 (1980) Thus, it cannot be said with certainty that small firms with substantial market shares in some markets are not legal "toehold" firms in an antitrust suit challenging the acquisition of a large regional firm.

There is no evidence that respondents made any inquiry of the Commission as to the acceptability of the acquisition of any of the smaller firms.³⁷ The evidence is clear that respondents were seeking an acquisition of a leading firm with substantial sales (\$400 to \$800 million—CX 44Z51), and did not avoid toehold firms because of their market share in a particular market.

Respondents further note that in several of the markets at issue, Colonial's share of the market was under the ten percent generally considered the limit for an acquisition to be considered a toehold. However, the procompetitive or neutral effects of this acquisition in some markets, cannot overcome the anticompetitive effects of this acquisition in other markets. *Philadelphia National Bank*, 374 U.S. at 370.

As pointed out by complaint counsel (Complaint Counsel's Reply

³⁷ Tampa Wholesale Co. (Kash'N Karry) was acquired by Lucky Stores. Tampa Wholesale had 42 stores in the Tampa/St. Petersburg, Florida, area in 1980, with an estimated market share of 15.8%, compared to Publix's estimated market share of 18.2% and Winn-Dixie's 18.5%. 1980 *Market Scope* 157. To date there has been no antitrust challenge to this acquisition.

Brief, p. 92-94), in some SMSAs where Colonial's market share was under ten percent, Colonial was improving its market position and gaining market share. For example, in the Macon, Georgia, SMSA, Colonial's market share in 1977 was 12.5% for supermarkets and 9.1% for grocery store sales. (CX 2L; CX 664A; Admissions 49). Colonial was second in the market and had four new stores planned during 1980-83 and anticipated no store closings. (CX 396A-H; CX 397A-H) In Jacksonville, Florida, in 1977 Colonial's market share was 8.4% for supermarket sales and 6.5% for grocery store sales. (CX 664A; CX 2K; Admissions 45) Colonial had 13 supermarkets in Jacksonville, and had plans for one new store each year from 1979 to 1983. In 1980, Colonial's market share had improved and was estimated to be 11%. (CX 252Z70) Similarly, in Richmond, Virginia, Colonial's market share for supermarkets was 8.5% for supermarkets and 6.6% for grocery stores. (CX 664B; CX 2S; [232] Admissions 66) In 1977 Colonial had nine supermarkets in the Richmond SMSA, with plans for six new supermarkets. (Admissions 67; Stewart 564) In addition, Colonial was planning for three supermarkets in Charlottesville, Virginia, and was looking for store sites in Fredericksburg, Virginia. Colonial was also contemplating a subwarehouse in the Richmond area for grocery items. (Stewart 562-567)

In the above areas, Colonial had a solid market position with name recognition, and plans to improve and increase its market position. In these markets Colonial clearly had the desire, finances and market skills to increase its market position. In these circumstances, the Colonial acquisition cannot fairly be said to be a toehold in these markets.

7. Perceived Potential Entrant

The perceived potential entrant doctrine had its origin in *El Paso Natural Gas*. In that case the acquisition by a natural gas supplier, the sole out-of-state supplier to California, of the stock and assets of another gas company, one of two major interstate pipelines serving the trans-Rocky Mountain States and which had made efforts toward entering the California market, was a violation of Section 7. The acquired company was eliminated as a potential supplier, a position which had made it a substantial competitive factor in that market. 376 U.S. at 653-55, 659.

The significant factors in *El Paso Natural Gas* were that the two companies were in the same business and operated in adjacent states and that the acquired company had the management and competitive initiative to enter the market. *Id.* at 660-61. It had made one unsuccessful attempt to do so, which was met by strong resistance from the acquiring firm. 376 U.S. at 659. In addition, the nature of this industry

gave the acquired firm a unique capacity to enter and there was no other likely potential entrant.

In *Marine Bancorporation*, 418 U.S. at 630-31, the Supreme Court stated that potential competition becomes a factor only where the market is characterized by dominant participants engaging in interdependent or parallel behavior and having the capacity to determine price and total output of goods and services. Where the target market is performing competitively, the market factors will not find it necessary to adjust their behavior to the presence of a perceived potential entrant.

In another case, the Court held that for Ford, the automobile manufacturer, to acquire one of only three spark plug manufacturers would violate Section 7. The extreme degree of concentration in the spark plug market and the unique [233] relationship of Ford to the market were stressed. *Ford Motor Co. v. United States*, 405 U.S. 562, 567 (1971).

The significance of perceived potential entrants and their present effect on competition is the theory that

an aggressive well equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be overestimated.

United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1963).

Opinion is divided, however, regarding whether there must be evidence offered of the perception of in-market factors that there was a potential entrant and that the in-market factors reacted to this perception. Some commentators suggest that it is possible that market and attitudinal data need not be produced, but rather, that the courts have been more concerned with whether in-market firms *should have* perceived the defendant as a potential entrant based on the same factors, motivational and situational, that made the defendant a potential entrant initially. T. W. Dunfee and L. W. Stern, "Potential Competition Theory as an Antitrust Tool Under Section 7 of the Clayton Act: A Decision Model," 69 Nw. L. Rev. 828 (1975); I. Horowitz, "The Perceived Potential Competitor: Antitrust Sinner or Saint?", 26 *Antitrust Bulletin* 248 (1981)

In *Phillips Petroleum*, the Court stated that "[s]uch industry recognition may, of course, be shown by direct evidence as well as by inference from the objective economic facts establishing likelihood of market entry." 367 F.Supp. at 1255. In *Falstaff Brewing*, the Supreme Court, in its plurality opinion, suggested that circumstantial evidence of the perception and reaction of in-market firms may be sufficient. 410 U.S. at 534, n.13.

In *British Oxygen Co.*, the testimony of industry witnesses that BOC was viewed as a likely entrant, but that this did nothing to change their behavior, led the Commission to dismiss that part of the Complaint dealing with perceived potential entrance. 86 F.T.C. at 1351, n.8. See also *Marine Bancorporation*, 418 U.S. at 624-25; *Hughes Tool*, 415 F.Supp. at 646; *Siemens*, 621 F.2d at 509.

Actual testimony from present market factors may be self-serving, because if they suggest a perception and reaction [234] to the defendant poised in the wings, they may succeed in overturning a potential merger. This result will often be to the benefit of these companies.

Although objective factors indicate that Grand Union was interested in this market, there was almost no industry perception of this fact.³⁸ Unlike other cases where objective evidence was sufficient to indicate that current actors in the market should be aware of the acquirer poised on the edge of the market, the nature of the market in this case is significantly different. Because this market is a series of SMSAs, with different factors in each, it is unlikely that these factors would be aware of Grand Union's potential interest in entering specific SMSAs. The other cases discussed above, e.g., *Phillips*, *Falstaff*, etc., involve markets where potential entrants would be more obvious.

Although in its opinion in *Tenneco*, the Commission indicated that a violation of Section 7 may be found where the perception of firms in the target market are inferred from the objective economic criteria that identify the firm as likely to enter the market, it also gave ample evidence of actual industry perception that Tenneco was likely to enter. Docket No. 9097, Slip Op. at 45-48 [98 F.T.C. at 608-610 (1981)].

Even if objective evidence of Grand Union's likelihood of entry into this market was deemed to substitute for any actual testimony of industry awareness, there would still be no violation of Section 7 based on the potential entrant doctrine. The importance of the potential entrant is the procompetitive effect it had on the market due to the reaction it evoked from target market firms. It is rare to find a direct link between the entrant "on the wings" and the competitive actions taken by companies to discourage entrance. Such immediate causality was found in *Brunswick*, where a domestic outboard motor manufacturer upgraded its product to match the product of its perceived potential competitor, Yamaha. 94 F.T.C. at 1273. In *Tenneco*, the Commission found evidence that the perception of Tenneco at the market's edge was a significant factor stimulating new competition. Docket 9097, Slip Op. at 52 [98 F.T.C. at 612 (1981)]. However, proof under Section 7 requires only a finding of "probability that the acquir-

³⁸ Complaint counsel is urging the perceived potential entrant theory only in the Virginia and Florida SMSAs, and the Atlanta SMSA. (Complaint Counsel's Reply Brief, pp. 121-122)

ing firm prompted premerger procompetitive effects within the target market." *Marine Bancorporation*, 418 U.S. at 625. [235]

In this proceeding there is absolutely no evidence of any possible procompetitive effect of Grand Union's position on the edge of the market and only insubstantial evidence of any perception of Grand Union on the edge of the market. Therefore, complaint counsel has failed to prove a violation of Section 7 under the perceived potential entrant theory.

H. *The Violation Alleged in Count C of The Complaint*

Count C of the complaint charges that "Grand Union through its acquisition of Colonial has selected one of the most anticompetitive methods for entering the Southeastern United States." (Complaint ¶¶ 29 and 30)

Complaint counsel argues that, despite the availability of *de novo* entry or toehold acquisitions, Grand Union merged with Colonial, and by doing so selected the method of entry most injurious to competition in the Southeastern region. "Thus, respondent has eliminated a real probability of market deconcentration in many southeastern markets. One major competitive force in a region merely has been replaced by another." (CPF at 169-70)

On December 15, 1978, Grand Union filed a "Motion to Dismiss the Complaint or in the Alternative for a More Definite Statement." On January 3, 1979, complaint counsel filed a reply indicating that Count C constituted a violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C. 45(b) (1976)) An "Order Denying Respondents' Motion to Dismiss Count C of the Complaint" was issued on April 17, 1979, stating that "complaint counsel will be permitted to make a trial record on the issues presented by Count C and this matter can be thoroughly briefed at the conclusion of the trial herein and respondents' motion can be renewed at that time."

Complaint counsel ground Count C in the Commission's concern about the multi-market effects of this acquisition; *i.e.*, that Grand Union, through the Colonial acquisition, now occupies the entire "gap in its operations" between Virginia and Florida without contributing to deconcentration in this area. (CPF at 169) If the specific relevant market into which Grand Union would have entered cannot be established, the effects of the acquisition of Colonial may be reached through Count C. Count C is justified, complaint counsel argues, because of the nature of the Commission's continued concern about the food retailing industry. Grand Union is uniquely situated to enter the area in a procompetitive manner, and if this merger is approved, it will free all the most likely entrants to enter markets by the acquisition of major factors. (CPF at 172) This will result not only in immedi-

ate greater concentration, but will also decrease the opportunities for later deconcentration. [236]

Two elements, described as "unique" by complaint counsel, exist that distinguish this case from others: the notion of the Southeast as an area of concern although not a traditional relevant market, and the fact that the toeholds in this case may provide entry as a significant factor in one market and also expansion into nearby markets. "If these unique elements push this acquisition outside the semantic confines of the traditional elements described in other Section 7 cases, they do not eliminate the concerns raised by the acquisition nor the concerns of Section 7 itself." (CPF at 173). These concerns, complaint counsel contends, mandate finding a violation of Section 5 of the FTC Act even if the letter of Section 7 is not breached. *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 8-9 (7th Cir. 1971); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-22 (1966). In the alternative, complaint counsel states that this merger should be reachable as an incipient threat to competition. *FTC v. Motion Picture Adv. Service Co.*, 344 U.S. 392, 394-95 (1953).

Respondents reject the idea that Section 5 may be used to reach a merger that does not violate the Clayton Act or Sherman Act. In *Sperry & Hutchinson Co. v. FTC*, the Supreme Court held that a violation of Section 5 may be found based on clearly articulated policies and standards, but when an antitrust violation does not arise there must be some rationale of injury to consumer interests independent of possible or actual effects on competition. 405 U.S. 233, 239, 245-248 (1972). No such effects have been articulated, according to respondents.

Complaint counsel's concern that no violation may be found because of an inability to pinpoint Grand Union's initial point of entry into the Southeast is unwarranted. As stated above, Grand Union's interest in this area was distinct and it is unnecessary to pinpoint its precise starting point for entry. However, since complaint counsel apparently has urged Count C as a separate offense distinct from the violation of Section 7 and Section 5 set forth in Count A and Count B of the Complaint, further discussion is necessary.

To establish a violation of Section 7, complaint counsel must prove that "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce in any section of the country. 15 U.S.C. 18. It is well-recognized that Section 7 is itself an incipency statute designed to cover matters not rising to Sherman Act levels (see *Brown Shoe*, 370 U.S. at 317-[237] 318).³⁹ Further, "Congress used the words 'may be substantially to

³⁹ One commentator has noted: "To permit a Section 5 action for an incipient Clayton Act violation would be to permit, in a sense, a theory of 'incipient incipency.' Such a theory would permit the Commission to reach conduct far removed from the evils that Congress presumably had in mind when it passed the Clayton Act." N. Averitt, "The Meaning Of 'Unfair Methods Of Competition' In Section 5 of the Federal Trade Commission Act," 21 *B.C.L.Rev.* 246 (1980).

lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties." *Brown Shoe*, 370 U.S. at 323. Complaint counsel has now come up with another theory of violation—a merger not violating Section 7, but one that is "one of the most anticompetitive methods for entering the Southeastern United States." Complaint ¶ 30 Thus, under complaint counsel's theory, if the acquisition does not violate Section 7, *i.e.*, may not substantially lessen competition, or tend to create a monopoly, it nevertheless may violate Section 5 because it is a more anticompetitive method of entering a market than some other method that was available. Complaint counsel has provided no standards of proof or methods of analysis separate and distinct from those existing in Section 7 or Section 5 by which to assess this alleged violation. It is clear, however, that complaint counsel seeks a dilution of Section 7 standards and a less rigorous analysis of competitive effect. Without specification of distinct standards to fairly inform respondents of the facts and legal theories upon which the violation is based, respondents are unable to mount a proper defense.

The Commission heretofore has made manifest the proposition that the standards for challenging mergers under Section 5 are coextensive with the standards for challenging mergers under Section 7. *Beatrice Foods Co.*, 67 F.T.C. 473, 724–725 (1965); *Tenneco, Inc.*, Docket No. 9097, Slip Op. at 68 (September 23, 1981) [98 F.T.C. at 623]. To the extent Count C alleges a violation of Section 5, it is duplicative of Counts A and B of the Complaint. To the extent Count C attempts to allege a violation of law separate and apart from Counts A and B, it is dismissed as failing to allege a violation of law upon which relief can be granted.

I. The Acquisition of Colonial Violates Section 5 of the Federal Trade Commission Act

An acquisition that constitutes a violation of Section 7 of the Clayton Act is also a violation of Section 5 of the Federal Trade Commission Act. *Beatrice Foods Co.*, 67 [238] F.T.C. 473, 724–725 (1965); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 463 (1940); *Stanley Works v. FTC*, 469 F.2d 498, 499 n.2 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1963); *Tenneco, Inc.*, Docket No. 9097, Slip Op. at 68 (September 23, 1981) [98 F.T.C. at 623].

In the instant case, Grand Union's acquisition of Colonial violated Section 7 because that acquisition eliminated Grand Union as an actual potential entrant into the markets in which Colonial operated, particularly the SMSAs representing major population centers of the Southeast. Therefore, the acquisition of Colonial violated both Section

7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

REMEDY

Respondents are engaged in interstate commerce within the meaning of Section 4 of the Federal Trade Commission Act. (F. 8) Thus, the Commission has authority to enter a remedy appropriate to restore competition to the status in existence prior to Grand Union's acquisition of Colonial in August, 1978.

It is well-settled that the Commission has wide discretion in framing an order deemed adequate to cope with the violation of law found to exist. *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392-93 (1959); *L. G. Balfour Co. v. FTC*, 442 F.2d 1, 23 (7th Cir. 1971). In cases where a violation of Section 7 is found, the most effective remedy to correct the injury to competition is generally held to be divestiture. *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *FTC v. Procter & Gamble Co.* 386 U.S. 568 (1967); *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 328-31 (1961). A ban on future acquisitions is commonly ordered to prevent repeat violations. *Liggett Meyers, Inc.*, 87 F.T.C. 1074 (1976), *aff'd*, 567 F.2d 1273 (4th Cir. 1977).

Complaint counsel urges that complete divestiture of Colonial be ordered to restore Colonial to its former competitive position. (CPF at 175) Piecemeal divestiture would deprive Colonial of its finances, managerial know-how, and resources to continue its own expansion plans, complaint counsel argues. When piecemeal divestiture is ordered, each separate part might not survive as a viable competitor. The result might be "cherry-picking" and absorption of some stores by major market factors, or abandonment of some stores. *United States v. Von's Grocery Stores*, 384 U.S. 270 (1966), is cited by complaint counsel as an illustration of the undesirable effects of piecemeal divestiture.

Instead, complaint counsel advocates divestiture by spin-off, a device by which the stock of the acquired firm is conveyed pro-rata to the stockholders of the acquiring firm. [239] L. Sullivan, *Handbook Of The Law Of Antitrust* 674 (1977). As contrasted with divestiture by sale, where a purchaser is found for the acquired company, in a divestiture by spin-off the stockholders of the acquiring firm receive the acquired firm as a dividend, but the commonality of ownership is reduced as the stock of each company is bought and sold. Professor Sullivan indicates that a spin-off is frequently the remedy in cases where the acquired company has been operated independently and where the acquiring firm is widely and publicly held. *Ibid.* The latter condition is not met here.

Partial divestiture has been ordered in cases where a merger had

procompetitive or neutral effects in several of the relevant markets. The appropriate remedy in each case must be based on the facts peculiar to the situation at hand. *FTC v. PepsiCo, Inc.*, 477 F.2d 24, 29 (2d Cir. 1973).

Complaint counsel suggests that, if partial divestiture is ordered, that Grand Union be permitted to retain the Columbia Division of Colonial, which would give Grand Union a presence in the central portion of the Southeast. (CPF at 176) Respondents argue that because the Columbia Division was one of the two least successful Colonial divisions (Respondents' Reply Brief at 289-295), permitting retention only of that Division would be punitive. The Supreme Court, respondents note, has ruled that punitive relief is inappropriate in a civil antitrust proceeding. *E.I. du Pont de Nemours & Co.*, 366 U.S. at 326, *modification denied*, 366 U.S. 956 (1961).

Total divestiture of Colonial and a ban on future acquisitions of ten-years' duration are mandated in this case. Insufficient information has been presented to allow an informed partial divestiture. If such an arrangement can be fashioned, agreeable to both complaint counsel and respondents, this would be acceptable. The Order entered herewith will require a total divestiture by which Colonial will be returned to its pre-merger status as a competitor in the Southeast. This appears to be the most appropriate remedy at this stage of the proceeding. Colonial's trade name and identity has been preserved by agreement of the parties. Named in the Order are The Grand Union Company, Cavenham (USA) Inc., the parent corporation of Grand Union (CX 12D; RPF 7), Cavenham Holdings Inc., the parent corporation of Cavenham (USA) Inc. (RX 2I), and their respective officers and agents. All corporations are domiciled within the United States. (RX 2I)

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of and over the subject matter of this proceeding and of The Grand Union Company, Cavenham (USA) Inc., and Cavenham Holdings Inc. ("respondents"). [240]

2. The respondents were, at all times relevant herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and in the Federal Trade Commission Act, as amended.

3. The appropriate line of commerce within which to evaluate the competitive effects of the acquisition of Colonial stock by the respondents is sales by supermarkets.

4. The proper geographic market within which to determine the competitive effects of the respondents' acquisition of Colonial stock in

the relevant line of commerce is the Standard Metropolitan Statistical Area.

5. The effect of the acquisition of Colonial stock by the respondents has been or may be, substantially to lessen competition, or tend to create a monopoly in the aforesaid product and geographic markets in violation of Section 7 of the Clayton Act, as amended, and in violation of the Federal Trade Commission Act, as amended, by eliminating Grand Union as a significant actual potential entrant into the area of Colonial's operations as a supermarket firm.

6. The Order entered hereinafter is appropriate to remedy the violation of law found to exist.

ORDER

For the purpose of this Order, "respondents" shall include The Grand Union Company, Cavenham (USA) Inc., and Cavenham Holdings Inc.

I

It is ordered, That respondents, their officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all stock, assets, title, properties, interest, rights and privileges, of [241] whatever nature, tangible and intangible, including without limitation all buildings, equipment, inventory, trade names, trademarks and other property of whatever description acquired by respondents as a result of the acquisition of Colonial Stores Incorporated (hereinafter "Colonial"), together with all additions and improvements to Colonial subsequent to the acquisition. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the date of service of this Order, and shall be subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That such divestiture shall be accomplished absolutely to an acquirer approved in advance by the Federal Trade Commission so as to transfer Colonial as a going business and a viable, competitive, independent concern.

III

It is further ordered, That pending any divestiture required by this Order, respondents shall not knowingly cause or permit the deteriora-

tion of the assets and properties specified in Paragraph I in a manner that impairs the marketability of any such assets and properties. Respondents may but shall not be required to make capital expenditures for the improvement of any such assets and properties. [242]

IV

It is further ordered, That for a period of ten (10) years from the date this Order becomes final, respondents shall cease and desist from acquiring, or acquiring and holding, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of any concern engaged in the business of retail grocery store sales, nor shall respondents for a period of ten (10) years from the date this Order becomes final enter into any agreement, understanding or arrangement with any such concern by which respondents obtain the market share, in whole or in part, of such concern in the above described product lines, without the prior approval of the Federal Trade Commission.

V

It is further ordered, That within sixty (60) days from the effective date of this Order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this Order, respondents shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner [243] and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by respondents to make public its desire to divest Colonial, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

VI

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of the Order, such as dissolu-

tion, assignment or sale resulting in the emergence of successor corporations, and that this Order shall be binding in any such successor.

OPINION OF THE COMMISSION

BY MILLER, *Chairman*:

This antitrust case challenges, under a potential competition theory, the geographic market extension acquisition of a large Southeast retail grocery supermarket chain by a large Northeast-based supermarket chain. The Commission's complaint, issued November 21, 1978, alleges that the acquisition in 1978 of Colonial Stores ("Colonial") by Grand Union Company and its various related corporations (collectively "Grand Union") violated the antitrust laws. Specifically, the challenged acquisition allegedly violated Section 7 of the Clayton Act¹ and Section 5 of the Federal Trade Commission Act² under three separate legal theories: actual potential competition, perceived potential [2] competition, and entry into the Southeastern U.S. through "one of the most anticompetitive methods." Following evidentiary hearings, Chief Administrative Law Judge Ernest Barnes found this conglomerate acquisition unlawful under only the actual potential competition count of the complaint. The ALJ ordered Grand Union Company and three of its four co-respondents to divest all stock and assets acquired from Colonial.

Respondents appeal from the ALJ's finding of illegality under the actual potential competition theory. We find no violation of the antitrust laws and dismiss the complaint. [3]

I. BACKGROUND

A. *The Respondents*

1. Grand Union

Respondent Grand Union Company is a Delaware corporation headquartered in Elmwood Park, New Jersey. (IDF 1.)³ Prior to its acquisition of Colonial, Grand Union operated approximately 474 supermarkets (as well as a small number of general merchandise

¹ 15 U.S.C. 18 (1980).

² 15 U.S.C. 45 (1976).

³ The following abbreviations are used in this opinion:

ID	- Initial Decision Page Number
IDF	- Initial Decision Finding Number
Tr.	- Transcript of Testimony Page Number
CX	- Complaint Counsel's Exhibit Number
RAB	- Respondents' Appeal Brief Page Number
CAB	- Complaint Counsel's Answering Brief Page Number
RPF	- Respondents' Proposed Finding Number
Tr.OA	- Transcript of Oral Argument Page Number

stores and catalog showrooms) in the following states and territories: New [4] Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Florida, Puerto Rico, and the Virgin Islands. (IDF 2-3.) About the time of the acquisition, Grand Union estimated that, excluding Colonial stores, it was the nation's 11th largest supermarket chain. (IDF 2.) In the fiscal year ending March 31, 1978, Grand Union's total retail food sales were approximately \$1,574 million (IDF 3.), approximately 95 percent of the company's total sales. (*Id.*)

Respondent Grand Union Holdings, Inc., was a wholly-owned subsidiary of Grand Union Company. It was incorporated for the sole purpose of making a tender offer and acquiring Colonial shares. (IDF 4.)

2. Colonial

Prior to the challenged acquisition, respondent Colonial was a Virginia Corporation headquartered in East Point, Georgia. (IDF 6.) At about the time of the acquisition, Colonial operated a chain of some 378 supermarkets in seven southeastern states: Virginia, Maryland, North Carolina, South Carolina, Alabama, Georgia, and Florida. (*Id.*) Colonial estimated in 1977 that it was the nation's 15th largest supermarket chain. (IDF 7.) Colonial's total sales for the fiscal year ending December 31, 1977, were approximately \$1,053 million. (*Id.*) As of 1978, Colonial operated most of its stores under the "Big Star" name; the remainder did business under the "Colonial" name. (IDF 6; and CX-10F.) Following its acquisition, Colonial was merged into Grand Union and now operates as a division of Grand Union. (IDF 6.)

3. Cavenham

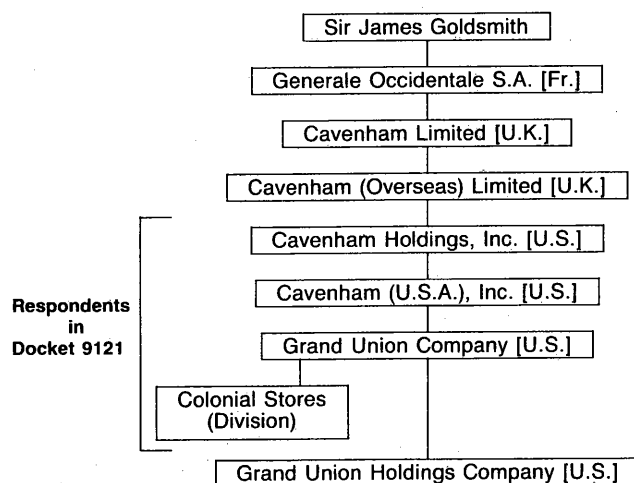
The immediate parent of Grand Union Company is respondent Cavenham (U.S.A.), Inc., which was incorporated in 1975 for the purpose of holding Grand Union Company's stock. Cavenham (U.S.A.) is in turn a wholly-owned subsidiary of respondent Cavenham Holdings, Inc., organized to hold the shares of Cavenham (U.S.A.). Both of these respondents are U.S. corporations. (IDF 5.) [5]

4. Related Entities

Only the five above-mentioned firms are respondents in this proceeding. However, they are themselves controlled by various overseas entities, whose officials made the ultimate decisions pertaining to the challenged acquisition. Respondent Cavenham Holdings, Inc., is a wholly-owned subsidiary of Cavenham (Overseas) Limited, a British company organized to hold securities of companies located outside the United Kingdom. That company is in turn a wholly-owned subsidiary

of another British firm, Cavenham Limited, a multinational food retailing and manufacturing entity that operates in fourteen nations. Its activities include the operation of supermarkets and other retail food outlets in the United Kingdom. All outstanding stock of Cavenham Limited is owned by a French company, Generale Occidentale S.A., which is ultimately controlled by Sir James Goldsmith. (IDF 5.)

These corporate relationships may be illustrated as follows:



B. The Acquisitions

In June 1968, the Commission issued a 10-year consent order against Grand Union in a matter unrelated to the present proceeding ("1968 Order").⁴ The 1968 Order required Grand Union to obtain Commission approval before acquiring: (1) five or more [6] grocery stores, (2) firms accounting for more than \$5 million in grocery store sales, or (3) grocery stores that would give Grand Union a five percent or larger share of all grocery or food store sales in any city or county.⁵ The 1968 Order expired on June 21, 1978. (IDF 9.) In addition, Grand Union has at all relevant times been subject to the Commission's 1967 "Enforcement Policy With Respect to Mergers in the Food Distribu-

⁴ *Grand Union Co.*, 73 F.T.C. 1050 (1968) (consent order).

⁵ *Id.* at 1055.

tion Industries" ("Policy Statement").⁶ That Policy Statement requires food retailers and wholesalers having annual sales exceeding \$100 million to notify the Commission at least 60 days prior to merging with or acquiring a food retailer or wholesaler.⁷

1. The Florida Stores Acquisition

Following a period of negotiations, Colonial offered in early 1978 to sell to Grand Union 11 of its Florida "Big Star" stores that had previously been closed. (IDF 9.) Pursuant to the Commission's Policy Statement, Grand Union notified the Commission on May 3, 1978 of its intention to acquire eight of the stores, all located on Florida's West Coast. (IDF 9.) Grand Union acquired those eight stores on July 6, 1978, just over two weeks after expiration of the "prior approval" provision in the 1968 Order. (*Id.*) Grand Union renovated seven of the stores and reopened them under the Grand Union name in the fall 1978. (*Id.*) While the allegations in the Commission's complaint are arguably sufficiently broad to include this Colonial store acquisition (*compare* Complaint ¶ 17 with ¶32), none of the eight acquired stores are within the relevant markets involved in this appeal. In any event, the store acquisition is pertinent to certain issues raised by the complaint's challenge to the stock acquisition, described below. [7]

2. The Colonial Stock Acquisition

On June 29, 1978—just over a week after the 1968 Order expired—Grand Union proposed a \$30 per share cash tender offer to Colonial's management. (IDF 10.) Colonial's board of directors rejected the merger proposal (*Id.*), and commenced (nonantitrust) actions in both state and federal courts to bar the takeover. (IDF 11.) In August 1978, Grand Union proposed an increase in its previous cash tender proposal to \$35 per share. (IDF 12.) A divided Colonial board of directors voted to recommend acceptance by Colonial shareholders of the \$35 offer, and the legal actions against Grand Union were dismissed or withdrawn. (*Id.*) Following the formal \$35 tender offer on August 8, 1978, Grand Union acquired over 90 percent of Colonial's outstanding shares, and Colonial became a wholly-owned Grand Union subsidiary. (IDF 12.) It was later merged into Grand Union, and as of February 1979 was operated as a division of Grand Union. (*Id.*)

C. The Allegations

The complaint charges that the effect of the challenged acquisition may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, and further

⁶ 2 Trade Reg. Rep. (CCH) ¶ 4525 (Jan. 17, 1967).

⁷ *Id.* at 6907.

charges that the acquisition constitutes an "unfair act and practice" or "unfair method of competition" in or affecting commerce, in violation of Section 5 of the FTC Act. (Complaint ¶ 31.) The relevant product market is alleged to be sales by retail food stores, including submarkets thereof such as supermarkets. (Complaint ¶ 19.) The relevant geographic markets are identified as "some of the Standard Metropolitan Statistical Areas [SMSAs], cities or towns in which Colonial operates supermarkets." (Complaint ¶ 20.) [8]

The complaint's three counts set forth the legal theories of the alleged violations:

- Count A: But for its acquisition of Colonial, Grand Union is an *actual potential entrant* into some of the relevant Southeast geographic markets, and is one of the few most likely potential entrants into certain of those markets. (Complaint ¶¶ 24-27.)
- Count B: Grand Union is a *perceived potential entrant*, being seen by food retail chains in some of Colonial's geographic markets as the most likely (or a leading) potential entrant. (Complaint ¶ 28.)
- Count C: Through its acquisition of Colonial, Grand Union has *selected one of the most anticompetitive methods for entering* the Southeastern U.S. (Complaint ¶¶ 29-30.)

The complaint alleges that the effects of the acquisition may include (among others): an increased probability of further concentration and a decreased probability of deconcentration; possible elimination of substantial actual potential competition by internal expansion or toehold acquisition; an increase in already high entry barriers; and encouraged tendencies for mergers by other actual and potential competitors. (Complaint ¶ 31.)

D. Pre-Trial Agreements

Prior to issuance of the complaint, Grand Union and Commission staff entered a hold-separate agreement under which Grand Union agreed to hold Colonial's assets as a separate subsidiary until the FTC's investigation closed or until November 17, 1978. (IDF 13.) That agreement was extended until December 1, 1978, when it lapsed. (*Id.*) Grand Union and Commission staff also entered a separate agreement dated November 29, 1978—still in effect, as modified—under which Grand Union agreed to preserve intact Colonial's trade names and trademarks for the pendency of the Commission's proceedings in this matter. (IDF 14.) On September 27, 1982, Grand Union filed a motion to exempt certain Colonial stores in the Richmond, Virginia

area from that agreement. The Commission granted that motion on December 17, 1982. [9]

E. *The Initial Decision*

Following administrative hearings, the ALJ closed the evidentiary record on May 1, 1981, and on October 30, 1981, issued his Initial Decision. The ALJ found the appropriate product market to be sales by supermarkets (ID 240.), which he defined as stores having annual sales of \$1.5 million or more and being 10,000–56,000 square feet in size. (ID 200.) He found the appropriate geographic market to be the SMSA. (ID 240.) Using those market parameters, the ALJ concluded that Grand Union's acquisition of Colonial was unlawful under the actual potential competition allegation of Count A of the complaint. More specifically, Judge Barnes found that the effect of the acquisition has been or may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act, because it eliminated Grand Union as a significant actual potential entrant into the markets in which Colonial conducted its supermarket operations (particularly those SMSAs representing major Southeastern U.S. population centers). (ID 238 and 240.) With respect to Count A, the ALJ concluded that "Grand Union's purchase of Colonial, although in essence the replacement of one firm by another, was injurious because it forever foreclosed the potential future benefit of Grand Union's *de novo* or toehold entry." (ID 228.)

As to the perceived potential entrant allegation of Count B of the complaint, the ALJ found "absolutely no evidence of any possible procompetitive effect of Grand Union's position on the edge of the market and only insubstantial evidence of any perception of Grand Union on the edge of the market." (ID 235.) He therefore concluded that complaint counsel had failed to establish a violation under that count. (*Id.*)

Concerning Count C—entry by one of the most anticompetitive means—the ALJ concluded that, to the extent it alleges a violation of Section 5 of the FTC Act, Count C is merely duplicative of Counts A and B. (ID 237.) To the extent it attempts to allege a violation separate and apart from Counts A and B, Judge Barnes dismissed Count C as failing to state a claim upon which relief can be granted. (*Id.*) [10]

With the stated intention of restoring Colonial to its pre-merger status as a competitor in the Southeastern U.S. (ID 239.), the ALJ entered an order that would require Grand Union to divest all stock and assets acquired from Colonial. (Order ¶ I at ID 240–41.) The ALJ's order would also require prior Commission approval of any acquirer

of the divested stock or assets. (Order ¶ II at ID 241.) Moreover, the order would bar Grand Union from acquiring without prior Commission approval the stock or assets of any retail grocery concern for a 10-year period. (Order ¶ IV at ID 242.) The ALJ's order would expressly bind only three of the five named respondents—Grand Union Company, Cavenham (U.S.A.), Inc., and Cavenham Holdings, Inc. (Order at ID 240.)

Respondents appeal from the ALJ's finding of a violation as to Count A of the complaint, and from the order entered by the ALJ. (RAB 1.) Complaint counsel do not appeal from the ALJ's conclusions as to Counts B and C, and we do not address them on this appeal. Briefs for all parties were supplemented by oral argument before the Commission, held April 19, 1982.

II. THE RELEVANT MARKETS

The Supreme Court has instructed repeatedly that: "Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."⁸ Here, complaint counsel urge narrow market definitions, while respondents argue for broader parameters. For the reasons summarized below, we disagree with the ALJ's conclusion that the most appropriate product market is sales by "supermarkets" (as defined in the Initial Decision), but agree with his conclusion that the Standard Metropolitan Statistical Area is an acceptable geographic market approximation for purposes of evaluating this acquisition under Section 7 of the Clayton Act. [11]

Before turning to the specifics of the market definitions, we note some general observations concerning analysis of the competitive consequences of acquisitions involving existing or potential competitors.⁹ The traditional approach in Section 7 cases has been to define the relevant arena within which competition takes place by listing products or services that are considered to be in competition with those produced by the merging firms. Items on this list are included within the market defined for the case, and 100 percent of the sales of all of these items is included in calculating firm market shares. Each of the items on this list is assumed to have the same competitive effect as any other item on the list. Products and services not on the list are excluded entirely from market share calculation, and are

⁸ *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974), quoting *United States v. Du Pont & Co.*, 353 U.S. 586, 593 (1957).

⁹ For a general discussion of market definition issues in the context of merger enforcement policy, see "Statement of Federal Trade Commission Concerning Horizontal Mergers," Trade Reg. Report No. 546 (CCH) at pp. 84-85 (June 14, 1982) ("FTC Merger Statement"); and Merger Guidelines of the Department of Justice, 2 Trade Reg. Rep. (CCH) at ¶ 4502 (June 14, 1982) ("DOJ Merger Guidelines").

assumed to exert *no* competitive effect on the merging firms or their competitors.

The unsatisfactory nature of this "all or nothing" approach is readily apparent. It may result in complete exclusion of firms and products that apply *some* competitive pressure upon the acquiring firm's market, while including the entire output of other firms and products applying comparatively little competitive pressure. Moreover, the competitive impact may often differ even among products and producers included in the market definition.

These shortcomings can be reduced considerably when reliable estimates of elasticities of demand and supply are available. The concept of demand price elasticity measures the degree to which the quantity demanded (per unit of time¹⁰) of a specific good or service is sensitive to a small change in its price, all other factors remaining [12] constant.¹¹ In the instant matter, the concept of demand elasticity can be used to describe the degree to which consumers purchase less (more) from an area's supermarkets after the latter increase (decrease) prices by a given amount. The closely-related concept of cross-elasticity of demand measures the sensitivity of the quantity of one good or service demanded to a small change in the price of a second good or service.¹² In the context of this appeal, the cross-elasticity of demand of most relevance is that which would describe the effect of a rise or fall in supermarket prices on the quantities of products and services demanded by consumers from grocery, convenience, or warehouse stores. The higher the cross-elasticities of demand among such products and services the more appropriate it is to consider the stores in question to be in the same market for purposes of antitrust analysis; low cross-elasticities would suggest that they should not be so considered.

The concept of supply price elasticity describes the degree to which suppliers of a given product or service will expand (contract) output in response to an incremental increase (decrease) in the price of that

¹⁰ In discussing the concept of quantity demanded or supplied hereafter, we refer to quantity per unit of time.

¹¹ Formally, the (own) price elasticity of demand of a particular product or service may be defined as the absolute value of the ratio of the percentage change in quantity demanded of that product or service to a small percentage change in its price, with all other factors affecting demand held constant.

Our discussion of elasticities is confined to price elasticities. However, concepts other than price elasticity may also be used to measure product substitutability. See, e.g., D. Needham, *The Economics of Industrial Structure, Conduct, and Performance* 112-14 (St. Martin's Press 1978) (possible alternative for measuring substitutability might be response of quantity of one firm's product demanded to change in level of another firm's advertising outlays, prices remaining constant). Thus, we do not imply by our focus on price elasticities that other dimensions of competition (service, quality, etc.) are not also important. Indeed, this record reflects the importance of non-price competition in the retail grocery store business in the 13 markets alleged here. See, e.g., IDF 22 (citing testimony of industry witnesses that convenience stores compete with supermarkets in hours of operation).

¹² Formally, cross-(price)-elasticity of demand of a particular product or service may be defined as the ratio of the percentage change in quantity demanded of that product or service to a small percentage change in the price of another product or service, with all other factors affecting demand held constant.

product or service, all other factors remaining [13] constant.¹³ Everything else equal, the greater the elasticity of supply in a market, the less likely monopoly power is to be created and/or maintained. Cross-elasticity of supply describes the degree of change in the supply of other products or services in response to a change in price for a given product or service.¹⁴ The most relevant application in this proceeding is the degree to which there is an expansion in output by other vendors (for example, warehouse stores) in response to an increase in supermarket prices. The higher the cross-elasticity of supply among specific suppliers, the more one should be inclined to group them in the same market for purposes of antitrust analysis.¹⁵

In most instances, adjudicators and policymakers do not have very precise estimates of the elasticity and cross-elasticity figures. Often, however, inferences may be drawn. A particularly important factor to be considered in inferring supply elasticities and cross-elasticities is the height of entry barriers. This concept is addressed in the discussion of the number of likely potential entrants in Part III(C) below.

Elasticity figures can be very helpful in analyzing the existence of or potential for market power—generally defined in antitrust cases as the ability of incumbent firms to restrict output or raise prices above competitive levels.¹⁶ Moreover, if the elasticities can be estimated with reasonable accuracy, the exact parameters of the “relevant market” become less critical to the analysis and its conclusions.¹⁷ For example, if a [14] market is defined overly narrowly—resulting in market share figures sufficiently high to suggest the existence of market power where, in fact, none exists—evidence showing high industry demand or supply cross-elasticities in that market would so indicate.¹⁸

Empirical or even circumstantial evidence of demand and supply elasticities thus provides a more accurate portrayal of the extent of market power and of potential anticompetitive effects than does the “all or nothing” market definition approach. It permits a comparative assessment of the competitive effect that a continuum of products or producers may have on competition in a specific case, without the need to disregard entirely the competitive effects of those products or

¹³ Formally, the (own) price elasticity of supply of a particular product or service may be defined as the ratio of the percentage change in quantity supplied of that product or service to a small percentage change in its price, with all other factors affecting supply held constant.

¹⁴ Formally, cross-(price)-elasticity of supply of a particular product or service may be defined as the ratio of the percentage change in quantity supplied of that product or service to a small percentage change in the price of another product or service, with all other factors affecting supply held constant.

¹⁵ See *Budd Company*, 86 F.T.C. 518, 572 (1975).

¹⁶ See, e.g., *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 389-93 (1956) (“control of price or competition establishes the existence of monopoly power under §2” of Sherman Act).

¹⁷ See FTC Merger Statement, note 9 above, at p. 76.

¹⁸ See, e.g., *Budd Company*, 86 F.T.C. 518, 572 (1975) (record evidence of high degree of cross-elasticity of supply, which “can . . . be an important consideration in defining markets,” relied on in rejecting separate submarkets for “open-top” and “closed-top” van trailers).

producers which, under the traditional approach, may have been defined as being outside the relevant market.¹⁹

As is often true in antitrust cases, the record here contains little information on which to develop accurate measures of supply and demand elasticities and cross-elasticities. Hence, we may apply reasoned judgment in estimating or inferring the relative magnitude of the elasticities in order to assess the degree of market power likely to result from Grand Union's acquisition of Colonial. With respect to product market definition, we consider such factors as whether the products and services have sufficiently distinctive uses and characteristics; whether industry firms routinely monitor each other's actions and calculate and adjust their own prices (at least in part) on the basis of other firms' prices; the extent to which consumers consider various categories of sellers (*e.g.*, supermarkets and warehouse stores²⁰) as substitutes; and whether a sizeable price disparity between the different types of food sellers (*e.g.*, limited assortment or [15] "box stores"²¹ versus supermarkets) persists over time for equivalent amounts of comparable goods and services.²²

Concerning geographic market definition, we take into account the following factors: the extent of different price changes and patterns from region to region; the level of barriers to trade flow between regions (including high transportation costs relative to product value); the degree of product shipping from one region to another (*i.e.*, transshipment); and the perceptions of competition from distant firms on the part of industry members.²³

A. The Product Market

Under the legal standards set forth by the Supreme Court, a relevant product market for Section 7 analysis may be defined in terms

¹⁹ See, *e.g.*, F.M. Fisher, "Diagnosing Monopoly," *The Quarterly Review of Economics & Business* 12-17 (Summer 1979); D. Needham, *The Economics of Industrial Structure, Conduct, and Performance* 111-14 (St. Martin's Press 1978).

²⁰ Throughout this opinion we adopt the ALJ's description of "warehouse store": "A 'warehouse' store is one in which the product is displayed in its own shipping container, without a price label on it. It offers limited service." (IDF 25, *citing* Tr. 367-68.)

²¹ We also adopt the ALJ's description of "box stores": "Limited assortment or box stores sell roughly 400 to 800 items, frequently do not carry meat or produce, and require the customer to bring his own bag or box. They rely heavily on manufacturers' allowances and deal merchandise, and do not offer services like bagging and payment by check." (IDF 24, *citing* Tr. 313, 738, 1129-30, and 2848.)

²² See, *e.g.*, *Budd Company*, 86 F.T.C. 518, 570-72 (1975) (Commission considers ease of production flexibility, existence of identical production and distribution facilities, and "identical marketing ease" in rejecting claim that "open-top" and "closed-top" van trailers each constitute separate, meaningful economic submarket); *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 639-41 (C.D. Cal. 1976) (court rejects each of 16 individual "oil field pipe-handling tools" as separate submarkets; adopts "cluster" of 36 "specialized surface rotary drilling products" used in oil and gas well operations as relevant product market, citing evidence of industry recognition, low cross-elasticity of demand within cluster, as well as high degree of functional complementarity and integration, commonality in technology and manufacturing processes, and similarity of marketing channels and buyer groups for tools within cluster).

²³ For a general discussion of factors considered by the Commission in assessing relevant product and geographic markets in the merger context, see FTC Merger Statement, note 9 above, at pp. 84-85.

of the "cross-elasticity of demand" or the "reasonable interchangeability of use" between the product in question and proposed potential substitutes.²⁴ As noted above, at the time of the challenged [16] acquisition both Grand Union and Colonial were engaged primarily in the retail sale of food and related products through their respective supermarket chains. For present purposes, the numerous types of sellers of food at the retail level may be viewed along a continuum. These include the relatively large supermarkets operated by Grand Union and Colonial, smaller supermarkets and retail grocery stores, limited assortment stores (box stores and warehouse stores); "mom-and-pop" stores, convenience stores, military commissaries, delicatessens, fast-food outlets, and others.

The Commission's complaint in this matter alleges a lessening of competition in the product market consisting of retail food store sales and submarkets thereof, including the submarket of sales by supermarkets. (Complaint ¶ 19.) As noted above, the ALJ found that supermarkets represented the most appropriate relevant product market. (ID 205.) He defined "supermarkets" for this purpose as being only those stores with annual sales of \$1.5 million or more, and with a size from 10,000–56,000 square feet. (ID 200.) The ALJ found that supermarkets "only compete with other supermarkets," reasoning that only companies that offer the same "cluster of services" provided by supermarkets offer significant competition. (ID 203.) The ALJ further concluded that competition against supermarket *chains*—which he defined as firms with 10 or more stores (IDF 58.)—is "most possible for other supermarket chains." (ID 215.)

Complaint counsel maintain that the ALJ correctly identified the most appropriate product market as being sales by supermarkets. (CAB 16.) Both of complaint counsel's expert witnesses (Dr. Marion and Dr. Parker) testified in support of that proposed definition (IDF 16; and Tr. 1881 and 2220.), as did a number of complaint counsel's industry witnesses. (E.g., Tr. 1115, 1470 and 1536.) In contrast, respondents argue that the "supermarket" concept is too narrow and imprecise to form the basis of a relevant product market, and describe as "arbitrary" the \$1.5 million annual sales cut-off [17] adopted by the ALJ in defining supermarkets. (RAB 12–13.)²⁵ Respondents also contend that no other antitrust case involving the retail food industry has

²⁴ *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95, 400–01, 404 (1956). See also *United States v. Continental Can Co.*, 378 U.S. 441, 447–58 (1964) (Court cites evidence of "large area of effective [interindustry] competition" between metal can producers and glass container manufacturers—including each industry's consideration of pricing policies of firms in other industry—in finding both in same product market).

²⁵ The Commission's complaint uses a somewhat broader definition of the term "supermarket" than did the ALJ. Paragraph I(2) of the complaint defines "supermarket" as "a retail establishment primarily engaged in selling a wide variety of canned and frozen food, dry groceries (either packaged or in bulk), other processed food and nonedible grocery items, fresh meat and prepared meat products, fresh fish and poultry, fresh fruits and vegetables, and dairy products, for home preparation and consumption and having a minimum of six thousand (6,000) square feet of floor space and at least one million dollars (\$1,000,000) in annual sales." (Emphasis added.)

identified a supermarket submarket, and suggest inclusion in the product market of limited assortment, box and warehouse stores; "mom and pop" stores; convenience stores; and military commissaries. (RAB 12-13.)

We agree with respondents that the definition of supermarket advanced by complaint counsel and adopted by the ALJ is overly-restrictive. Both expert and industry witnesses testified that a \$1 million or \$1.5 million annual sales cut-off was "admittedly arbitrary." (IDF 28.) We agree, and further find the minimum 10,000 square foot size to be similarly arbitrary.²⁶

It is undoubtedly true that the \$1.5 million annual sales and 30,000 square feet minimum size thresholds facilitate collection of industry data for statistical purposes. Moreover, such bright-line cut-off points often facilitate adjudication of complex antitrust cases. However, the effect of using such arbitrary limits in defining the product market is to exclude *completely* from the competitive analysis all competitors whose annual sales or store size fall below the arbitrary thresholds. Hence, great care must be taken to assure such lines are appropriate. We find that the thresholds adopted by the ALJ exclude an unacceptably large portion of traders from the market analysis needed to assess the legality of the challenged acquisition, and thus do not provide a [18] sound economic framework for that analysis. We find insufficient basis in the record for excluding altogether the competitive impact of traders whose sales or store size (or both) happen to fall below these levels that are conceded by all to be arbitrary, and conclude that a broader product market definition is needed.

The ALJ accepted a number of complaint counsel's arguments advanced in support of their contention that supermarkets differ from other retail food stores in various ways, including store size, product variety, selling price, sales volume, and type of customer. (IDF 17.) However, testimony as to which categories of food retailers should be included in the product market differs considerably, even among witnesses for the same party. The ALJ's "supermarket" product market definition appears to be based in large measure upon his acceptance of various characteristics of supermarkets which complaint counsel argue are sufficient to distinguish supermarkets from all other food retailers. For the reasons summarized below, we do not believe these characteristics—which we assume to be accurate for purposes of our analysis—furnish persuasive justification for excluding all non-supermarket retail food sales from the analysis in this case.

First, we reject the argument that, because supermarkets common-

²⁶ See *FTC v. National Tea Co.*, 603 F.2d 694, 699 (8th Cir. 1979) (in Section 7 merger challenge, retail grocery chain with stores averaging 13,751 sq. ft. viewed as horizontal competitor of stores ranging from 20,000 to 92,000 sq. ft., even though historical increase in number of items stocked made it "difficult to compete effectively"), *consent order issued, National Tea Co., et. al.*, 96 F.T.C. 42 (1980).

ly offer a wider range of products (8,000–10,000 items) than other food retailers, *none* of the items sold by other retailers should be deemed to be sold in competition with supermarkets carrying the same item. Under the analysis advanced by complaint counsel and adopted by the ALJ, retail grocery stores carrying several thousand items *identical* to those found in supermarkets would be deemed to exert *no* competitive pressure upon supermarkets selling those items. We believe that the record demonstrates that a considerable degree of competition exists between supermarkets and retail grocery stores selling a significant number of the same items. We therefore reject the ALJ's conclusion, which effectively [19] excludes consideration of that competition in analyzing this acquisition under Section 7.²⁷

Second, we agree with the ALJ that supermarkets offer a "cluster of services," and that the "one-stop shopping" made possible by this characteristic is preferred by many consumers. (ID 201 and 205.) Nevertheless, while we have found no direct discussion of the point in the record, it would seem logical that there exists some substantial segment of consumers that, even if disinclined to make multiple shopping trips, may nevertheless purchase the more durable food products from, say, box or warehouse stores in one week, and follow the next week patronizing a supermarket with the full "cluster" of services. Thus, over time, consumers might both take advantage of the full "cluster of services," while continuing to patronize those "limited assortment" firms offering lower prices, longer hours, or other advantages. Indeed, the very existence and survival of box and warehouse stores—as documented by this record—assures that at least some consumers act in this fashion.

Generally, the case for identifying a "cluster of services" as a distinct product market seems stronger where services are in fact involved. This is especially true where the services are complex, interrelated, and interdependent, such as in the "commercial banking services" market defined by the Supreme Court in *Philadelphia National Bank* and subsequent cases.²⁸ It would seem logical that for many consumers the services [20] offered by supermarkets, smaller grocery stores, and other food retailers, play a secondary and comple-

²⁷ Cf. *Heublein, Inc.*, 96 F.T.C. 385, 575–76 (1980) ("all wine" product market—consisting of sparkling, still, dessert and refreshment wines—found appropriate in light of "some significant competitive confrontation among even the most disparate wines"; question of possible submarkets not reached on facts of case); see also *SKF Industries, Inc., et al.*, 94 F.T.C. 6, 84–86 (1979) (broad overall "ball bearings" market embracing "continuous spectrum of quality"—including both commercial grade and precision bearings—found appropriate, citing "overlap or potential interchangeability of use" of bearings near middle of quality range, and noting complaint counsel's argument that bearing makers monitored sales of firms at opposite end of precision spectrum).

²⁸ *United States v. Philadelphia National Bank*, 374 U.S. 321, 356–57 (1963); *United States v. Phillipsburg National Bank*, 399 U.S. 350, 359–62 (1970); *United States v. Marine Bancorporation*, 418 U.S. 602, 618–19 (1974). Cf. *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1259 (while outboard motor market involves "cluster" aspect from retailer's point of view, "no single consumer has an economic incentive to purchase a number of outboard motors under a single roof rather than shopping around"), *modified as to relief*, 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982).

mentary role to the principal item sold: food and related products. Moreover, in support of its market definition, the Supreme Court noted in *Phillipsburg National Bank* that some commercial banking services are unique to commercial banking.²⁹ In contrast, the ALJ expressly found that each service or product offered by “supermarkets” is available independently elsewhere. (ID 205.) In short, while we find some merit in this argument, we do not believe it supports exclusion of all grocery stores offering less than the “full cluster” from the market definition.

Complaint counsel also advance as distinguishing supermarket “characteristics” evidence that supermarkets focus principally upon other supermarkets in making expansion, store location, pricing, and advertising decisions, and in conducting price-checking activities. (IDF 22.) It may well be the case in many local markets that, as the ALJ found, the *strongest* competition faced by supermarket chain stores comes from other supermarket chain stores in the same locale. (IDF 34.) To the extent this is true, it would go far in explaining why supermarket chains direct most of their planning and market-monitoring resources at those perceived to be their *strongest* competitors. (See, e.g., IDF 17, 21–23, and 27.) Moreover, in terms of price-checking and other monitoring of competitors’ behavior, it seems to us entirely expected for a large supermarket to pay closest attention to those competitors who face similar scale economies, overhead, union contracts, and the like, and to adjust their marketing practices and gauge their own success accordingly. Nevertheless, evidence of such behavior on the part of supermarket chains—while certainly relevant to product market definition—does not, in our view, preclude the existence of competition between supermarkets and other smaller food retailers. [21]

Despite the ALJ’s conclusion that “supermarkets only compete with other supermarkets” (ID 203.), record evidence as well as other findings in the Initial Decision refute that assertion. For example, there is evidence in the record that supermarkets sometimes price-check convenience and mom-and-pop stores on items such as bread, milk, beer, and soft drinks. (IDF 27 and 183; and Tr. 1546, 1731 and 2651.) The ALJ also found that convenience stores compete with supermarkets in terms of hours of operation. (ID 205.) Moreover, one of complaint counsel’s expert economists testified that warehouse stores are direct competitors of supermarkets. (IDF 25; and Tr. 2223.) This conclusion is supported by testimony that Atlanta area supermarket chains (including Colonial) adopted an allegedly exclusionary “single-

²⁹ *United States v. Phillipsburg National Bank*, 399 U.S. 350, 360–61 (1970). It may well be that, as other financial institutions are granted authority to offer many of the same services that were once restricted to commercial banks, the Supreme Court will expand this product market to include those now-competing institutions.

store price zone" as a competitive response to entry by the very type of warehouse stores that complaint counsel urge be excluded from the product market because they purportedly do not compete with supermarkets. (IDF 84; and Tr. 330-36.)

The ALJ found that prices in limited assortment stores are generally lower than those in supermarkets. (ID 205; and IDF 24.) Because such stores typically offer far fewer products and services than do supermarkets, the lower price is entirely consistent with a theory that such stores offer a different price/service/quantity mix than do supermarkets. Also, several industry witnesses testified that even fast-food operations compete with supermarkets, and that supermarkets responded to that competition by developing delicatessens, bakeries, and other fast-food operations within their stores. (IDF 30; and Tr. 1702-04, 1372-73, 1448, and 2578-79.) Respondents' expert witnesses were in disagreement on this issue, with one including, and one excluding, fast-food outlets in the relevant product market. (Tr. 2863-64 and 3252-53.) In light of this evidence of competition faced by supermarkets from other food retailers, we find unpersuasive the factors relied upon by the ALJ (*e.g.*, average sale per customer, size of gross margins, existence of supermarket trade associations and trade journals, more intensive use of labor, etc.) in identifying a purported supermarket "line of commerce" [22] for purposes of Section 7 analysis.

On the basis of the record evidence, we think it clear that the appropriate product market approximation must incorporate at least some of the competitive effects exerted by non-supermarket food retailers in addition to those competitive effects attributable to supermarkets. Unfortunately, the record does not furnish a sufficient basis to weight with any precision the various competitive effects of such retailers. Nevertheless, the evidence is sufficient to justify inclusion of all retail grocery stores (excluding military commissaries and fast-food outlets) within the appropriate product market. This is similar to the product market definition adopted by the Commission in its 1968 Order against this same respondent,³⁰ and is consistent with the product market adopted in other retail food merger cases challenged by the Commission in recent years.³¹ While this product market line

³⁰ *Grand Union Co.*, 73 F.T.C. 1050, 1053 (1968) ("sale of grocery and related products through food or grocery stores").

³¹ See, *e.g.*, *Albertson's Inc.*, 97 F.T.C. 343, 343-45 (1981) (complaint issued with consent order alleges relevant line of commerce to be "retail sales by retail grocery stores"; such stores defined as "retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell [specified categories of food and grocery items]"); *Godfrey Co.*, 97 F.T.C. 456, 456-58 (1981) (same); *National Tea Co., et al.*, 96 F.T.C. 42, 43-44 (1980) (same, absent reference to Bureau of Census classification), *prelim. injunction denied*, *FTC v National Tea Co.*, 603 F.2d 694 (8th Cir. 1979) ("retail grocery store" product market adopted without discussion); *Food Town Stores, Inc.*, 88 F.T.C. 435 (1976) (complaint alleges "relevant product market is retail food store sales"; such stores defined as "retail food establishments primarily engaged in selling food for home preparation and consumption"), *temporary injunction granted by single-judge* (footnote cont'd)

is admittedly somewhat arbitrary in determining which non-supermarket food retailers to include and which to exclude, it is clearly superior to excluding all non-supermarket competitors. As explained in Parts III and IV below, on the basis of a product market so defined we conclude that a Section 7 violation premised on an actual potential competition theory has not been established. [23]

B. *The Geographic Market*

The Supreme Court held in *United States v. Marine Bancorporation* that in a Section 7 potential competition case the relevant geographic market is "the area in which the acquired firm is an actual, direct competitor."³² In economic terms, this may be described as the area within which sellers of the product(s) sold by the merged firm place a significant constraint on the merged firm's ability to raise prices (and/or diminish service quality). The complaint in this matter alleges that area to be "some of the [SMSAs], cities or towns in which Colonial operates supermarkets." (Complaint ¶ 20.) However, Count C of the complaint would seem to depart from that definition by alleging that Grand Union's acquisition of Colonial constitutes "one of the most anticompetitive methods for entering the southeastern United States." (Complaint ¶ 30.) As noted above, complaint counsel do not appeal from the ALJ's dismissal of this count, and we do not address it on this appeal. We agree with the ALJ's general conclusion that the Southeastern U.S. is not an appropriate, separate geographic market for purposes of Section 7 analysis. (ID 209-10.) Notwithstanding his resolution of this issue, we note that the ALJ appears to have woven the broader regional market concept into portions of his potential competition analysis. We discuss briefly in Part III, below, the important effect this improper "regional approach" has on the validity of many of the ALJ's legal conclusions.

Complaint counsel argued at trial that two relevant geographic markets are appropriate in this case: the individual SMSA (or SMSA subdivision), and the Southeastern U.S. (IDF 32.) Concerning the first category, complaint counsel presented evidence only for 13 SMSAs (and further divided two of the 13 into two subdivisions each), which they identified as local relevant geographic markets. (CAB 6; IDF 42 and 48; and Tr. 2340, 1893-94, 2991, 2320-21 and 2398.) For purposes of the actual potential competition allegation of Count A of the complaint, complaint counsel subsequently eliminated two [24] (the Fayetteville, North Carolina SMSA, and the Spartanburg, South Carolina SMSA subdivision) of the 15 alleged markets and submar-

panel pending appeal, *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339, 1346 (4th Cir. 1976) ("retail grocery business" apparently adopted).

³² *United States v. Marine Bancorporation*, 418 U.S. 602, 622 (1974).

kets. (IDF 37.) Complaint counsel do not concede the remaining 13 areas to be the only Colonial markets in which the challenged acquisition lessened competition substantially. (CAB 6.) However, because only the legal theory of Count A remains on this appeal, and because we must rely solely upon record evidence, we consider only the following 13 SMSA (or SMSA subdivision+) relevant markets alleged by complaint counsel on this appeal:

- Georgia: (i) Atlanta, (ii) Augusta, and
(iii) Macon.
- North Carolina: (i) Raleigh⁺, (ii) Durham⁺, and
(iii) Charlotte/Gastonia.
- South Carolina: (i) Greenville⁺.
- Virginia: (i) Newport News/Hampton,
(ii) Norfolk/Virginia Beach, and
(iii) Richmond.
- Florida: (i) Jacksonville, (ii) Orlando, and
(iii) Gainesville.

Respondents assert that the most appropriate geographic market is broader than the SMSA, but narrower than the Southeastern U.S. (RAB 13-15.) Respondents concede that, from the demand (consumer) perspective, "SMSAs, in general, are fairly good approximations of local markets." (RAB 13.) However, they urge that because this case challenges a potential lessening of a *new* source of competition rather than elimination of *existing* competition, the appropriate geographic market focus is from the perspective of retail food *suppliers*. Respondents urge adoption of those "market areas" as defined by a trade journal, *Progressive Grocer*. (IDF 36.) That publication breaks down the original 15 (now 13) local markets alleged in this case into only eight market areas, each larger than the encompassed SMSAs. (IDF 36; and RAB 14 and n.*.)

It is true, as respondents' expert testified, that the supply of retail food items may originate from warehouses located outside the SMSA in which they are ultimately sold to [25] consumers. (Tr. 3213-14.) Moreover, the ALJ found that "Because more than one SMSA can often be reached from any particular warehouse, market conditions in one SMSA are not entirely independent of those in other nearby SMSAs." (IDF 36, *citing* Tr. 1890 and 3214.) Nevertheless, we do not find sufficient basis in this record to identify the larger-than-SMSA "market areas" urged by respondents in a way that is both supported by the evidence and of sufficient practical utility to assess the competitive consequences of the challenged acquisition. (Indeed, respondents' expert testified that it would not be possible to determine the boundaries of the "market areas" urged by respondents. (Tr. 3199.)) Although we decline to accept respondents' contentions in the context

of market definition, we have nevertheless considered them to the extent they are relevant to such other issues as the number and identity of likely potential entrants into the individual SMSA markets, discussed in Part IV below.

Although precise empirical measures of demand and supply elasticities and cross-elasticities are lacking in this record, there is ample evidence to satisfy us that the SMSA provides an adequate approximation of the area in which Colonial was an "actual, direct competitor." Testimony from expert witnesses for both sides supports the ALJ's conclusion that SMSAs are generally good approximations of local markets. (IDF 35.) Even Dr. Adelman, upon whose testimony respondents principally rely for their broader geographic market contention, concedes that consumers in one SMSA are unlikely to be affected by offerings of stores in the next SMSA. (IDF 35; and Tr. 3213.) Moreover, for at least four of the 13 SMSAs alleged by complaint counsel, officials of Grand Union or Colonial (or both) testified, in essence, that SMSAs were fair approximations of the geographic market. (IDF 40-41, 43 and 51; and Tr. 776, 2693, 793, 2790, 2783-85 and 363-64.) Further, in several instances, planning officials of Grand Union and Colonial used SMSAs (or close approximations) as the basis for long-range store planning. (*E.g.*, IDF 49.)

The ALJ found no evidence that any competitors of Grand Union or Colonial looked beyond the local market area in setting prices or adopting other competitive [26] responses. (IDF 34; and ID 209.) While we find it less persuasive, we also note the testimonial evidence cited by the ALJ indicating that SMSAs are the basis for collection of data by industry publications and for industry members' collection of market share data, and that SMSAs generally reflect the coverage area of local advertising media. (IDF 34-35.) Finally, we note that the relevant geographic market approximation we adopt (like our product market) is consistent with that employed in other recent Commission challenges to retail grocery store mergers.³³ [27]

III. THE ACTUAL POTENTIAL COMPETITION THEORY

As articulated by the Commission and the courts, the actual potential competition (or actual potential entrant) theory maintains that a

³³ See, e.g., *Albertson's, Inc.*, 97 F.T.C. 343, 345 (1981) (complaint issued with consent order alleges "The relevant . . . geographic market is Los Angeles County and Orange County, California"); *Godfrey Co.*, 97 F.T.C. 456, 458 (1981) (complaint issued with consent order alleges "A relevant section of the country is the Milwaukee, Wisconsin SMSA"); *National Tea Co., et al.*, 96 F.T.C. 42, 44 (1980) (complaint issued with consent order alleges "A relevant section of the country is Metropolitan Minneapolis/St. Paul" defined to mean five contiguous counties), *prelim. injunction denied*, *FTC v. National Tea Co.*, 603 F.2d 694 (8th Cir. 1979) (court adopts Commission's alleged geographic market without discussion); *Food Town Stores, Inc.*, 88 F.T.C. 435 (1976) (complaint alleges "The relevant geographic markets . . . are cities or town(s) in North Carolina and their trading areas in which [the merging firms] both operate retail food stores", including six specified locales), *temporary injunction granted by single-judge panel pending appeal*, *FTC v. Food Town Stores, Inc.*, 539 F.2d 1339 (4th Cir. 1976) (market share data compiled on basis of cities and counties sufficient for preliminary injunction analysis).

potential entrant's acquisition of a leading firm in a concentrated target market may violate Section 7 of the Clayton Act if it is likely that, but for the acquisition, the acquiring firm would have entered the target market independently, or through a "toehold" acquisition of a firm lacking a significant share of that market.³⁴ The Commission stated in its 1980 *Heublein* decision that under such circumstances the challenged acquisition may lessen competition by eliminating the procompetitive benefits likely to result from the presence of a new, or a newly reinvigorated competitor in the market.³⁵ Challenges to conglomerate acquisitions under this theory have involved situations where, as in the instant case, the acquiring and acquired firms were not actual competitors at the time of the acquisition.³⁶ Thus, the theory is premised on the anticipated lessening of *future* competition that would likely have occurred but for the challenged acquisition, rather than upon any lessening of *existing* competition.³⁷ This contrasts with the perceived potential competition theory, [28] which the ALJ held unsupported by the record and which we do not address on this appeal. That theory is concerned with the loss of a *present* procompetitive effect currently exerted by an outside firm perceived by competitors as "waiting in the wings" and likely to enter.³⁸

While expressly accepting the perceived potential entrant theory,³⁹ the Supreme Court has twice reserved approval of the actual potential entrant theory.⁴⁰ However, the Court has delineated certain essential preconditions that must exist before it can be determined whether in a specific case the actual potential entrant theory might establish a violation of Section 7. In contrast, the Commission in past cases has

³⁴ See *United States v. Marine Bancorporation*, 418 U.S. 602, 625 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973); *Heublein, Inc.*, 96 F.T.C. 385, 583 (1980); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982); *Yamaha Motor Corp., Ltd. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981), cert. denied, 452 U.S. 915 (1982); *United States v. Siemens Corp.*, 621 F.2d 499, 504 (2d Cir. 1980); *BOC International Ltd. v. FTC*, 557 F.2d 24, 25 (2d Cir. 1977).

³⁵ *Heublein, Inc.*, 96 F.T.C. 385, 583 (1980).

³⁶ *United States v. Marine Bancorporation*, 418 U.S. 602, 605, 623-24 n. 24, 627 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973); *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980); *Tenneco, Inc.*, 98 F.T.C. 464 (1981), rev'd, *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982); *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1259-60 (5th Cir. 1981) (actual potential competition standards held incorporated into Bank Holding Company Act).

³⁷ *United States v. Siemens Corp.*, 621 F.2d 499, 504, 507 (2d Cir. 1980); *BOC International, Ltd. v. FTC*, 557 F.2d 24, 26 (2d Cir. 1977); *Tenneco, Inc.*, 98 F.T.C. 464, 577 (1981), rev'd on other grounds, *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982); *Heublein, Inc.*, 96 F.T.C. 385, 585 (1980); *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1264-65 (5th Cir. 1981).

³⁸ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-33 (1973); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 351-52, 355 (2d Cir. 1982); *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1264 (5th Cir. 1981).

³⁹ *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 531-34 (1973).

⁴⁰ *United States v. Marine Bancorporation*, 418 U.S. 602, 625, 639 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537-38 (1973). Some commentators have been critical of the theory. See, e.g., R. Posner, *Antitrust Law: An Economic Perspective* 122-23 (University of Chicago Press 1976) ("The essential problem is the impossibility of developing workable rules of illegality" in potential competition area; Supreme Court should abandon this "unsatisfactory" doctrine); and J.R. Carter, "Actual Potential Entry Under Section 7 of the Clayton Act", 66 Va. L. Rev. 1485 (1980) (actual potential competition theory should be rejected as basis for Section 7 violation; unlikely theory would or could be applied correctly, and prospective economic benefits outweigh costs of its application).

recognized the actual potential entrant theory.⁴¹ As interpreted by the courts and the Commission, all of the following legal elements must exist before a violation of Section 7 under the actual potential competition theory can be established: (1) The target market must be highly concentrated; (2) the acquiring firm must have had the capabilities, economic [29] incentives, and interest to enter the target market; (3) the acquiring firm must have been one of only a few likely entrants so situated; (4) the acquiring firm must have had available to it feasible means for entering the target market in the near future—either *de novo* or by “toehold” acquisition—other than through the challenged acquisition; and (5) entry through those alternative means must have offered a substantial likelihood of deconcentration or beneficial procompetitive effects in the target market.⁴²

Clearly, in a potential competition case such as this in which multiple markets are alleged, these elements must be established as to a specific market in order to find a Section 7 violation in that relevant market. In multiple market cases, this may result in all elements being proven as to all alleged markets, as to some markets but not others, or as to none of the alleged markets. A case falling in the second category may entail more narrow relief (*e.g.*, partial rather than complete divestiture) than a case in the first category. Cases falling in the third category obviously involve no Section 7 violation under this theory.

As noted above, the ALJ’s finding of illegality under the actual potential competition theory of Count A of the complaint was premised upon his finding that the relevant product market was super-market sales. (ID 240.) Hence, the ALJ’s analysis of the above elements of an actual potential competition violation was likewise premised on that erroneous conclusion. Given our determination that the appropriate arena of [30] competition is broader than supermarket sales, our analysis and application of these elements necessarily differ from the ALJ’s.

⁴¹ See, *e.g.*, *Tenneco, Inc.*, 98 F.T.C. 464 (1981), *rev’d on other grounds*, 689 F.2d 346, 355 (2d Cir. 1982) (because Commission finding of liability was unsupported by substantial record evidence, court of appeals “need not reach” validity of actual potential competition doctrine); *Heublein, Inc.*, 96 F.T.C. 385 (1980); *Brunswick Corp., et al.*, 94 F.T.C. 1174 (1979), *modified as to relief*, 96 F.T.C. 151 (1980), *aff’d as modified sub nom.*, *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982); *British Oxygen Co. Ltd.*, 86 F.T.C. 1241 (1975), *rev’d and remanded on other grounds sub nom.*, *BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977).

⁴² *United States v. Marine Bancorporation*, 418 U.S. 602, 623 n. 22, 624–26, 630, 633, 638–39, 642 (1974); *Tenneco, Inc.*, 98 F.T.C. 464, 577, 604, 616 (1981), *rev’d on other grounds*, *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982); *Heublein, Inc.*, 96 F.T.C. 385, 583–84 (1980); *United States v. Siemens Corp.*, 621 F.2d 499, 504–05 (2d Cir. 1980); *BOC International, Ltd. v. FTC*, 557 F.2d 24, 26–27, 29 (2d Cir. 1977); *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1269, *modified as to relief*, 96 F.T.C. 151 (1980), *aff’d as modified sub nom.*, *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 977–78 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982); *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1266–72 (5th Cir. 1981) (actual potential competition standards applied to merger of two bank holding companies under Bank Holding Company Act); *Republic of Texas Corp. v. Bd. of Governors*, 649 F.2d 1026, 1044–47 (5th Cir. 1981) (same as to bank holding company’s acquisition of bank). See also *United States v. Penn Olin Chemical Co.*, 378 U.S. 158, 174–76 (1964). See generally Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313 (1965).

Further, while the ALJ rejected the Southeast in favor of the SMSA as the proper geographic market (ID 208-10 and 240.), his analysis of several of the actual potential entrant elements appears to have been based in important respects upon a Southeast regional market. For example, having determined the Southeast region was not the appropriate geographic market, the ALJ returned to it repeatedly in concluding that Grand Union was a likely entrant into that region by some means other than acquiring Colonial. (*E.g.*, ID 218-21, 225, 229 and 231.) The ALJ found that "it is not complaint counsel's burden to conclusively pinpoint exactly where Grand Union would have first entered." (ID 218.) Assuming this to be true as among the 13 SMSA target markets, it does not follow that this reasoning may be extrapolated to embrace Grand Union's entry *anywhere* in the Southeast (including entry outside the 13 SMSA markets).

It is true that evidence of an overall intent to enter a region may in some cases be relevant to the question of whether Grand Union might enter a specific SMSA. However, the ALJ went beyond this rather obvious proposition, concluding in effect that an intent to enter a region was tantamount to an intent to enter any and every SMSA in the region. The government cannot have it both ways in prosecuting an actual potential entrant case: having pinpointed small, discrete markets, it cannot satisfy its legal burden by showing only that entry was likely *somewhere* in a much larger, encompassing region. Yet that appears to be an integral part of complaint counsel's argument on appeal. (*See, e.g.*, Tr. OA 30-31, 47-48, 50.) The conclusion is inescapable that, having once pronounced the Southeast region as the tainted "well", we may not return repeatedly to drink from it.⁴³ [31]

In summary, the ALJ did not expressly find that each of the above actual potential entrant elements were present in any of the 13 alleged target SMSAs. For the reasons summarized below, the Commission finds that in *none* of the 13 alleged target SMSAs have complaint counsel proven *all* legal elements the courts have held must be present in order to establish a Section 7 violation under an actual potential competition theory. We proceed with a general analysis of certain of these elements before applying them in Part IV to the 13 individual geographic markets.

A. Concentration

As the Supreme Court explained in its 1974 decision in *United States v. Marine Bancorporation*, the actual potential competition theory may be invoked only in cases where the target market is

⁴³ Cf. *United States v. Marine Bancorporation*, 418 U.S. 602, 620-23 (1974) (Supreme Court rejects as "too speculative" and unsupported by precedent government's alternative Section 7 claims that entire state is relevant "section of the country" and that challenged acquisition of bank operating in only one city may trigger other geographic market extension mergers, resulting in eventual statewide linkage of local, oligopolistic banking

substantially concentrated.⁴⁴ There the Court stated: "[T]he doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods and services."⁴⁵

The complaint in this matter alleges that the retail food store business in each relevant geographic market is dominated by a few large retail food chains (Complaint ¶ 21.); that some or all of the relevant markets are highly concentrated and, as a result of the acquisition of Colonial, have become or are likely to become increasingly so (Complaint ¶ 31.); that the acquisition may increase the probability of further concentration and decrease the probability of deconcentration in some or all of the relevant markets (Complaint ¶ 31.); and that in some or all of the relevant markets this [32] concentration may increase Grand Union's post-acquisition economic power, and may dampen competition among retail food chains. (Complaint ¶ 31.)

The Supreme Court in *Marine Bancorporation*, and the Commission and courts of appeals in subsequent cases, have developed a rebuttable evidentiary presumption for use in actual potential competition cases. By introducing evidence that concentration levels—usually evinced by two-firm (C_2), three-firm (C_3), or four-firm (C_4) concentration ratios—in the target market are sufficiently high, a *prima facie* case is made that the target market is sufficiently concentrated as a legal matter to invoke the potential competition theory.⁴⁶

In recent years, antitrust analysts have become more sophisticated about the relevance and measures of concentration, and have come to rely increasingly upon the so-called "Herfindahl-Hirschman Index" ("HHI") as a means preferable to concentration ratios for analyzing market structure. A primary advantage of this index over the more traditional C_4 ratio is that the HHI "reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms."⁴⁷ We believe in many cases the HHI can serve as a useful tool in interpreting market structure evidence. Therefore, where appropriate in future potential competition cases—as well as in other proper cases under the Clayton and FTC

⁴⁴ *United States v. Marine Bancorporation*, 418 U.S. 602, 630 (1974). See also *Heublein, Inc.*, 96 F.T.C. 385, 584 (1980); *United States v. Hughes Tool Co.*, 415 F. Supp. 637, 645 (having held relevant market "is not highly concentrated and is freely competitive," court declines to apply either actual or perceived potential competition theories). See generally Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1386 (1965) (theory appropriate only where target market is "tight oligopoly").

⁴⁵ *United States v. Marine Bancorporation*, 418 U.S. 602, 630 (1974).

⁴⁶ *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974); *Tenneco, Inc.*, 98 F.T.C. 464, 583-85 (1981), *rev'd on other grounds*, *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352-53 (2d Cir. 1982); *Heublein, Inc.*, 96 F.T.C. 385, 584 (1980); *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980).

⁴⁷ DOJ Merger Guidelines, note 9 above, at ¶4503.10. Basically, the HHI incorporates the number of firms and their size distribution in one statistic. Specifically,

$$HHI = \sum_{i=1}^n x_i^2, \text{ where } x_i \text{ is the market share of the } i\text{th firm in the industry.}$$

Acts—we will consider reliable evidence of HHI values in assessing the likely competitive effects of challenged practices. However, because the record in this case has not been compiled with a view toward calculating and analyzing reasonably complete HHI values for all the various geographic markets alleged here, we pursue the approach taken by the parties and the ALJ and focus upon the more traditional C_4 ratios in our disposition of this case. We [33] anticipate, however, that the evidentiary records in future Section 7 proceedings will enable us to use the HHI measure in assessing market structure.

When evidence of concentration levels establishes a *prima facie* case that the market is a possible candidate for the potential competition theory, the burden then shifts to the party defending the merger to rebut this legal presumption by showing that concentration ratios, “which can be unreliable indicators of actual market behavior, [do] not accurately depict the economic characteristics” of the target market.⁴⁸ While the Supreme Court has established no definitive point at which the presumption arises, the Commission has in the past indicated its view that “Four-firm market shares in the range of 50 percent are sufficient to raise concern over the loss of potential competition.”⁴⁹ [34] This rebuttable presumption notwithstanding, the Commission has cautioned that “High levels of concentration, of course, are not to be analyzed in a rigid, mechanical fashion, causing an inevitable conclusion of poor competitive performance,” adding that this presumption “may be rebutted by proof of competitive market

⁴⁸ *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974) (citation omitted). See also *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980); *Republic of Texas Corp. v. Bd. of Governors*, 649 F.2d 1026, 1046 (5th Cir. 1981); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 353 (2d Cir. 1982). See generally *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974); *Kaiser Aluminum & Chemical Corp. v. FTC*, 652 F.2d 1324, 1332-41 (7th Cir. 1981) (persuasive economic evidence can rebut *prima facie* Section 7 case bottomed on market share and concentration statistics).

⁴⁹ *Tenneco, Inc.*, 98 F.T.C. 464, 584 (1981), *rev'd on other grounds*, *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (court of appeals finds C_4 ratio over 90 percent and C_2 ratio over 77 percent alone establishes *prima facie* case that replacement shock absorber market is candidate for potential competition doctrine). See also, *United States v. Marine Bancorporation*, 418 U.S. 602, 609, 631 (1974) (C_3 ratio of 92 percent in six-firm market sufficient to make *prima facie* case of concentrated market); *Brunswick Corp. et al.*, 94 F.T.C. 1174, 1256, 1271 (1979), *modified as to relief*, 96 F.T.C. 151 (1980), *aff'd as modified sub nom.*, *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 974, 979 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982) (theory applies to joint venture where in U.S. market C_4 ratio equals 94.9 percent (units) or 98.6 percent (dollar volume), and C_2 equals 72.9 percent (units) or 85.0 percent (dollar volume) in overall “outboard-motor” market); *Heublein, Inc.*, 96 F.T.C. 385, 584-85 (1980) (while C_4 ratio of 47.9 percent “arguably falls at the edge” of reasonable definition of cases in which actual potential entrant theory applies, C_2 ratio of 41.9 percent sufficient to warrant application of the theory); *United States v. Siemens Corp.*, 621 F.2d 499, 502, 506 (2d Cir. 1980) (C_4 ratio of 77 percent, coupled with evidence of high entry barriers, “clearly” makes *prima facie* case of “oligopolistic” market); *British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1363-64 (1975) (C_3 of 60 percent, C_4 of 70 percent, and C_8 exceeding 85 percent “clearly” makes *prima facie* case that target market experiencing recent “upswing” in concentration is candidate for potential competition doctrine), *rev'd and remanded on other grounds sub nom.*, *BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977). See also *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1267 (5th Cir. 1981) (in Bank Holding Company Act case, C_4 of 86.1 percent in one geographic market and 73.8 percent in another establish *prima facie* case of concentrated market); *Republic of Texas Corp. v. Bd. of Governors*, 649 F.2d 1026, 1045-46 (5th Cir. 1981) (same result where C_4 = 72.4 percent). Cf. *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 643, 645 (theory inapplicable where C_4 = 34 percent and C_8 = 58 percent).

performance.”⁵⁰

Because the analytical soundness of this evidentiary presumption is obviously weaker in cases in which C_4 falls in the 50 percent range⁵¹ (or HHI falls below 1000, for example) than in cases in which C_3 or C_4 exceeds 90 percent (or HHI exceeds, for example, 2500),⁵² flexibility is needed in determining the strength of any presumption raised. In general, the higher the concentration levels (in terms of both traditional concentration ratios and the HHI) the stronger the evidentiary presumption that potential [35] competition analysis is appropriate, and the greater the evidence the Commission will require to rebut the *prima facie* showing. Thus, the Commission will require less evidence to overcome this presumption when only moderate concentration— C_4 levels between 50–70 percent and HHI between 1000 and 1800—is found.⁵³ In contrast, more persuasive rebuttal evidence will generally be required to rebut the presumption that C_4 levels of 80 or 90 percent and above, coupled with an HHI value exceeding 1800, warrant concern over a loss of potential competition.⁵⁴

Complaint counsel offered separate, alternative market share and four-firm concentration ratios for the 13 target SMSAs using their proposed “supermarket” product market, as well as for a market consisting of retail grocery store sales. As noted in Part II above, we find the latter to be the more appropriate line of commerce for Section 7 analysis. Complaint counsel’s market share and C_4 figures for a grocery store sales market in the 13 target SMSAs, are summarized

⁵⁰ *Tenneco, Inc.*, 98 F.T.C. 464, 585 (1981), *rev’d on other grounds*, *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982). See also *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974); *United States v. Siemens Corp.*, 621 F.2d 499, 506, 509 (2d Cir. 1980); *Budd Company*, 86 F.T.C. 518, 579 (1975) (despite degree of concentration evidenced by market shares, market may have performed in manner yielding prices and profits at competitive or near-competitive level); *Republic of Texas Corp. v. Bd. of Governors*, 649 F.2d 1026, 1044 n.32 (5th Cir. 1981) (no automatic, direct relationship between a particular concentration ratio and competitive performance in any particular [banking] market; must study actual performance of market participants to determine market’s competitiveness), citing *United States v. First National State Bancorporation*, 499 F.Supp. 793, 805 (D.N.J. 1980). For a discussion of non-market-share factors considered by the Commission in evaluating the likely competitive effects of mergers, see FTC Merger Statement, note 9 above, at pp. 76–81.

⁵¹ See, e.g., *United States v. Falstaff Brewing Corp.*, 383 F.Supp. 1020, 1022–23 (D.R.I. 1974) (on remand from Supreme Court, C_4 of 61.3 percent insufficient absent showing that one or another firm had control over prices or other “competitive indicia”); *United States v. Phillips Petroleum Co.*, 367 F.Supp. 1226, 1251–53 (C.D. Cal. 1973), *aff’d*, 418 U.S. 906 (1974) (C_4 of 58 percent sufficient). See generally Vol. I P. Areeda & D. Turner, *Antitrust Law* ¶ 1119b at 80 (1980) (55–60 percent “ambiguous”; must consider information about remaining firms and “other structural characteristics”).

⁵² See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 609, 631 (1974) (despite absence in record of “any significant study” of relevant market, C_3 ratio of 92 percent in six-firm market establishes *prima facie* case that market is candidate for potential competition doctrine); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (C_4 ratio over 90 percent and C_2 ratio over 77 percent alone establishes *prima facie* case that relevant market is potential-competition doctrine candidate).

⁵³ Cf. *Heublein, Inc.*, 96 F.T.C. 385, 577 (1980) (as to minor *horizontal* aspects of otherwise conglomerate merger, C_4 ratio of 47.9 percent assumed to be “sufficiently concentrated to warrant careful scrutiny of further increases but not so highly concentrated that an extremely stringent anti-merger policy is required”).

⁵⁴ See generally DOJ Merger Guidelines, note 9 above, at ¶¶4503.30, 4504.103 (absent factors indicating effective collusion is “particularly likely”, Justice Department unlikely to challenge potential competition merger unless overall HHI in acquired firm’s market exceeds 1800; likelihood of challenge increases as HHI exceeds 1800); FTC Merger Statement, note 9 above, at p. 73 (Commission will give “considerable weight” to DOJ Merger Guidelines in evaluating horizontal mergers). See also Vol. I, P. Areeda & D. Turner, *Antitrust Law* ¶ 1119b at 78–80 (1980).

in TABLE 1, below. Because we determine that, for reasons other than the level of concentration and Colonial's market share in the 13 local SMSAs, the record fails to establish a Section 7 violation in any of those markets, we may rely upon complaint counsel's calculations as presented in TABLE 1. In cases where market share or concentration figures are or may be decisive on an issue, a respondent's evidence contradicting complaint counsel's figures will be more carefully assessed by the Commission. As TABLE 1 shows, C_4 figures for 1977 in the 13 SMSAs for the grocery store sales market range from a low of approximately 49 percent [36] to a high of just over 72 percent. The C_4 figure exceeds 60 percent in eight of the 13 target SMSAs.

In the instant case, the ALJ found that the concentration levels established a *prima facie* case that the relevant markets were concentrated and not competitive. (ID 217.) He further concluded that respondents had failed to introduce persuasive evidence to overcome that presumption (*Id.*), thereby satisfying the first element of the actual potential entrant theory. [37]

TABLE 1

SMSA (OR SUB- DIVISION— "+")	NUMBER OF COLONIAL STORES IN SMSA (AS OF 1977, UNLESS NOTED)*	COLONIAL'S MARKET SHARE AND RANKING (AS % OF ALL GROCERY STORE SALES)**		FOUR-FIRM CONCENTRATION RATIOS (AS % OF ALL GROCERY STORE SALES)***	
		1972	1977	1972	1977
Atlanta, GA	62 (1978)	17.8 (#1)	20.6 (#1)	54.6	62.9
Augusta, GA	12 (1978)	13.6 (#2)	12.8 (#2)	47.2	55.2
Macon, GA	5	6.1 (#3)	9.1 (#2)	50.3	67.4
+ Raleigh/ + Durham, NC	18	14.7 (#3)	14.3 (#3)	63.8	62.1
Charlotte/ Gastonia, NC	12	17.4 (#2)	17.5 (#2)	62.4	66.8
+ Greenville, SC	5	7.0 (#4)	5.0 (#5)	48.6	54.9
Newport News/ Hampton, VA	15	3.6 (#5)	2.3 (#6)	68.3	72.3
Norfolk/ Virginia Beach, VA	31	16.1 (#1)	16.0 (#1)	56.7	49.1
Richmond, VA	9	15.7 (#1)	17.8 (#1)	48.7	53.1
Jacksonville, FLA	13	7.7 (#3)	6.5 (#4)	45.2	53.2
Orlando, FLA	2	5.8 (#5)	6.4 (#4)	56.2	64.8
Gainesville, FLA	2	Under 2 (Not among top 8 firms)	Under 2 (Not among top 8 firms)	65.7	60.1
		5.7 (#4)	2.7 (#7)	61.8	65.5

* SOURCE: IDF 82, 96, 107, 181, 191, 108, 131, 139, 120, 152, 162, 173.

** SOURCE: IDF 82, 96, 104, 180, 190, 106, 130, 138, 119, 151, 161, 172.

*** SOURCE: IDF 52 (based on Bureau of the Census, *Retail Trade*).

[38] AS TABLE 1 indicates, a number of the C_4 ratios for the 13 relevant SMSAs (especially those in Virginia) fall at the lower end of the "50 percent or more" category previously described by the Commission as raising potential competition concerns.⁵⁵ Nevertheless, for purposes of this decision we assume that all of the C_4 ratios advanced by complaint counsel and listed in TABLE 1 are of sufficient magnitude to trigger the remainder of the actual potential competition analysis, and to shift to respondents the burden of showing these ratios do not depict accurately the economic characteristics in any or all of the 13 target markets here alleged. We note, however, that the C_4 ratios in all of the 13 markets—save only Greenville, South Carolina at 72.3 percent—are below those in other recent cases in which the Commission found a Section 7 violation premised on the actual potential competition theory.⁵⁶

As explained in Part IV's analysis of individual markets, we find that in most (if not all) of the 13 markets respondents have successfully rebutted complaint counsel's *prima facie* showing that potential competition analysis is appropriate. In a number of the markets alleged here, respondents introduced significant evidence of competitive behavior in the pricing and providing of the relevant products and services.⁵⁷ We also find in those instances that the remaining evidence offered by complaint counsel is insufficient to establish non-competitive performance in the target markets. [39]

B. Capabilities, Incentives, and Interest

As noted, a prerequisite to a finding of Section 7 liability under the actual potential entrant theory is the establishment of a reasonable probability that the acquiring firm had the ability to enter the target market by alternative means, and would likely have done so but for the challenged acquisition.⁵⁸ In assessing this likelihood, the Commission and the courts have generally inquired into whether the acquiring firm had the capabilities, incentive, and interest to enter the target market through a means other than the challenged acquisition.⁵⁹ We believe the record evidence supports the ALJ's findings

⁵⁵ *Tenneco, Inc.*, 98 F.T.C. 464, 584 (1981), *rev'd on other grounds*, *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982).

⁵⁶ *Tenneco, Inc.*, 98 F.T.C. 464, 583 (1981) (C_4 of 92.9 percent), *rev'd on other grounds*, *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982); *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1256, 1271 (1979), *modified as to relief*, 96 F.T.C. 151 (1980), *aff'd as modified sub nom.*, *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 974, 979 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982) (C_4 of 94.9 percent (units) and 98.6 percent (dollars)); *British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1363-64 (1975) (C_4 of 70 percent), *rev'd and remanded on other grounds sub nom.*, *BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977).

⁵⁷ See *United States v. Marine Bancorporation*, 418 U.S. 602, 631-32 (1974).

⁵⁸ *United States v. Marine Bancorporation*, 418 U.S. 602, 633, 642 (1974); *United States v. Siemens Corp.*, 621 F.2d 499, 506-07 (2d Cir. 1980).

⁵⁹ *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1269-71, *modified as to relief*, 96 F.T.C. 151 (1980), *aff'd as modified sub nom.*, *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 978-79 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982); *Heublein, Inc.*, 96 F.T.C. 385, 564-66 (1980); *Tenneco, Inc.*, 98 F.T.C. 464, 586-603 (1981), *rev'd on other grounds*, (footnote cont'd)

that this prerequisite is met in this case. (IDF 68-80.)

1. Capabilities

We believe the record amply supports the conclusion that Grand Union possessed the financial and managerial capabilities to enter any or all of the 13 alleged markets through independent entry, or by acquiring an alternative firm in each market. (IDF 77-78.) Grand Union had developed a five year plan (fiscal years 1977-1981) calling for the opening of 100 new stores *in addition* to the acquisition of supermarket chains. (IDF 77.) To accomplish this objective, Grand Union established a capital expenditures budget of some \$150 million. (*Id.*) Indeed, Grand Union's cash tender offer for Colonial itself amounted to approximately \$135 million. (IDF 78.) Similarly, the record documents the considerable expertise in supermarket formation and operation that existed both within Grand Union Company in the U.S., and within its parent corporations abroad. (IDF 80.) We therefore find that Grand Union possessed sufficient operational capabilities to [40] expand into each of Colonial's operating areas, either as a *de novo* entrant or by means of alternative acquisition(s).

2. Incentives

We believe the record also supports the ALJ's conclusion that Grand Union had the financial incentives to expand by entering the Southeast region. (IDF 79.) Prior to its acquisition of Colonial, Grand Union operated primarily in the northeastern U.S. Because of its competitive nature, lack of population growth, and labor situation, this was viewed by Grand Union as no longer the most desirable area of operations. (IDF 73 and 76.) Thus, it seems fairly clear from the record that Grand Union was eager to add to its economically-troubled Northeast base of operations by investing in supermarket operations located in areas—especially the "Sunbelt" region—that were potentially more lucrative than the Northeast. (ID 217-18.)

It is equally clear that financial considerations motivated this decision. Grand Union's five-year plan (1977-1981) stated: "An acquisition at the right price and at the right time could well double Grand Union's earnings." (CX-81N.) Grand Union's acquisition interests focused on the Sunbelt, in both the Southeast and Southwest regions. A Grand Union planning official assigned to study acquisition possibilities in those two regions reported that the 12 firms studied in the Southeast were more profitable than the national average, while 13 Southwest chains were less profitable than those in the Southeast. (ID 218.) The same official believed the Southeast had "avoided store

Tenneco, Inc. v. FTC, 689 F.2d 346, 353 (2d Cir. 1982); *United States v. Siemens Corp.*, 621 F.2d 499, 507-08 (2d Cir. 1980).

saturation and, with its projected high population growth, had great potential.” (*Id.*) Another Grand Union official summarized the firm’s requirements for a Southeast acquisition: “the acquired chain should not be so large as to accentuate FTC problems, and it should be large enough to make a worthwhile contribution to Grand Union. (Perhaps in the \$400 million to \$800 million annual sales range.)” (ID 221; and CX-44Z-51.) [41]

In sum, we agree with the ALJ’s conclusion that one of the main reasons for Grand Union’s interest in expanding into the Southeast was that region’s potential for both economic and population growth. (ID 71.)⁶⁰ This leaves the question whether this financial incentive properly may be viewed as sufficient proof of an incentive to enter *each* of the 13 alleged SMSA markets. The financial incentive for entry was almost certainly weaker for some of the 13 markets than others, as indicated by differing growth and profitability rates, and by Grand Union’s post-acquisition closing of all Colonial stores in four of the target SMSAs. (ID 228 n. 35.) Nevertheless, in light of our finding that Grand Union had a strong financial incentive to enter the Southeast region in general, and because we conclude that other prerequisites to an actual potential competition offense are clearly lacking, we assume without deciding that complaint counsel have established the requisite economic incentive to enter each of the 13 alleged target markets. We note, however, that were this element determinative of respondents’ liability, closer scrutiny might have led us to conclude that the evidence here falls short in some of the 13 markets.

3. Interest

Respondents’ own documents demonstrate that Grand Union had a strong, publicly-announced intention to enter the Southeast region by acquiring existing supermarkets there. As the Commission found to be the case in *Heublein*, respondents here were actively seeking acquisitions in the target market.⁶¹ Grand Union’s five-year plan for 1977–1981 noted that acquisitions of supermarket chains “will be given top priority consideration.” (CX-81N; and IDF 68.) In the mid-1970s, Grand Union’s president [42] instructed his administrative vice president to concentrate exclusively on supermarket acquisitions. (CX-580 [Silvers] at 46–47.) He in turn assigned a Mr. Kennedy, Grand Union’s vice president for corporate planning, to “review from available sources all supermarkets that had operations in the south-

⁶⁰ See *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1262, 1269, modified as to relief, 96 F.T.C. 151 (1980), *aff’d as modified sub nom., Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 978 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982) (foreign outboard-motor producer found likely potential entrant into expanding U.S. market—world’s largest, most sophisticated, and only developed market in which the foreign producer did not sell substantial numbers of outboard-motors).

⁶¹ *Heublein, Inc.*, 96 F.T.C. 385, 584 (1980).

east, . . . defined to be from the Virginia area right down through Florida.” (CX-576 [Kennedy] at 46.) Mr. Kennedy prepared a report analyzing 12 southeastern supermarket firms which Kennedy considered acquisition candidates. (CX-32C, E-M.) Colonial was not ranked among the 12 because, as the 10th or 11th largest national chain, Mr. Kennedy felt it was too large. (CX-576 [Kennedy] at 55.) (Mr. Kennedy completed a similar study of Southwest supermarket chains, which indicated that their performance as a group had been much more irregular and less profitable than those in the Southeast. (CX-33C, D.)) Finally, we note that a June 1978 trade periodical article of stipulated accuracy (CX-613.) states: “This month acquisitions for Grand Union are just a matter of how soon and where.” The same article quotes Grand Union’s president as saying, “Ideally, we would try to fill in our territory between [New Jersey] and Washington, Washington and Florida.” (CX-504B.)

We believe that this and other record evidence establishes that Grand Union had a corporate interest in expanding its supermarket operations into the Southeast region *through acquisition*. (IDF 68; and ID 218.) However, we disagree with the ALJ’s conclusion that this evidence supports an interest in *de novo entry*. (ID 221.) Grand Union’s actions in waiting until the Commission’s 1968 Order expired⁶² before acquiring Colonial is consistent with an interest in entering the relevant markets only through acquisition. The 1968 Order imposed a prior approval requirement only on *acquisitions* by Grand Union within the 10-year effective period. Nothing in that order in any way restricted Grand Union from entering *de novo* into any market or region—including SMSAs in the Southeast. Respondents’ own documents make clear that Grand Union [43] purposefully awaited expiration of the 1968 Order before entering the Southeast. (IDF 72.) Indeed, both Grand Union’s acquisition of Colonial’s stock and its separate acquisition of eight Colonial stores on Florida’s west coast occurred within weeks of the expiration of the 1968 Order.⁶³

For these reasons, we reject as unsupported by the record the ALJ’s conclusion that Grand Union’s eagerness to enter the Southeast region was such that (barring entry by acquisition) it likely would have entered the region on a *de novo* basis. (ID 221.) We find on this record that Grand Union’s interest in entering SMSAs in the Southeast was strong, but was confined to entry through acquisition.⁶⁴ For the same

⁶² See Part I(B), above.

⁶³ See Part I(B), above. Without more, this is of course entirely lawful. Except insofar as it sheds light on such issues as interest or intent, a respondent’s haste in resuming conduct barred by an expired FTC order is not probative of the legality of the post-order conduct.

⁶⁴ Cf. *United States v. Siemens Corp.*, 621 F.2d 499, 507–08 (2d Cir. 1980) (acquiring firm having interest and financial capabilities and incentives found unlikely to enter *de novo* into new product market, given lack of existing technical competence, limited profit prospects and ebbing state of target market, and acquiring firm’s denial of interest in *de novo* entry); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 354 (2d Cir. 1982) (court of appeals rejects as (footnote cont’d)

reasons that we applied to the "incentive" factor discussed in the preceding section, we assume without deciding that this interest extended to each of the 13 alleged markets.

C. Number of Potential Entrants—Entry Barriers

As noted above, the courts and the Commission have made clear that the actual potential competition theory may not be applied unless a small number of firms are likely potential entrants into, or expanders in, the target market. The Commission stated in *Heublein*:

Section 7 is concerned with the probability of a substantial lessening of competition, and the elimination of a potential entrant or expander leads to a substantial anticompetitive effect only when there is a limited number of other firms reasonably likely to enter or expand in the relevant market.⁶⁵ [44]

This element is closely related to the height of barriers to entering the target market. It is therefore not surprising that the Commission and the courts have frequently analyzed entry barriers in assessing the legality of acquisitions under the actual potential entrant theory.⁶⁶

Although we discuss entry barriers in the context of the number of potential entrants into the target SMSAs, such barriers also relate to other aspects of the actual potential competition theory. For example, the existence of feasible, alternative means of entering the target market other than merging with the acquired firm may indicate ease of entry. Conversely, the existence of high entry barriers may be a primary cause of high concentration in a market. The ALJ inverted this inference, however, and found that high concentration levels were a "strong indication of the height of entry barriers at work." (ID 216.) This inference is unwarranted because high concentration can occur with high, moderate, or low entry barriers.⁶⁷ The ALJ also inferred high entry barriers from evidence that concentration increased between 1972 and 1977. (ID 216.) This inference is also unwarranted since increasing concentration may simply reflect such factors as efficiencies associated with increased size.⁶⁸ Besides, when the more appropriate product market definition is used, TABLE 1 demon-

"unsupported speculation" conclusion that acquiring firm would have entered target market *de novo* with aid of license, but for challenged acquisition).

⁶⁵ *Heublein, Inc.*, 96 F.T.C. 385, 588 (1980). See also *Mercantile Texas Corp. v. Bd. of Governors*, 638 F.2d 1255, 1267 (5th Cir. 1981) (where numerous potential competitors are "waiting in the wings", elimination of one potential entrant is insignificant).

⁶⁶ See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 605-06, 626-30, 632, 641-42 (1974); *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1256-57, 1271 (1979), modified as to relief, 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 974 (8th Cir. 1981), cert. denied, 452 U.S. 915 (1982); *Tenneco, Inc.*, 98 F.T.C. 464, 584-85 (1981), *rev'd on other grounds*, 689 F.2d 346, 350, 353 (2d Cir. 1982); *FTC v. Atlantic Richfield*, 549 F.2d 289, 295-96 (4th Cir. 1977).

⁶⁷ See generally G. Stigler, "A Theory of Oligopoly", 72 J. Pol. Econ. 44 (1964); H. Demsetz, "Industry Structure, Market Rivalry, and Public Policy," 16 J. Law and Econ. 1 (1973); W. Baumol, J. Panzar, R. Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt, Brace, Jovanovich 1982).

⁶⁸ See note 67 above.

strates that, while the degree of concentration increased in a number of the 13 alleged markets, it *decreased* in [45] three markets. This mixed picture provides little help in inferring the size of barriers to entry across all 13 SMSAs.

Notwithstanding these other relationships, we believe it is perhaps most appropriate to view the height of entry barriers in the context of actual potential competition analysis as relevant in assessing the number of firms capable of entering the target market(s). All other things equal (including the competitive vigor of each potential entrant), the lower the entry barriers, the greater the likelihood of a larger pool of potential entrants. As the ALJ recognized, elimination of one member of a large pool through conglomerate acquisition of an existing competitor in the target market is unlikely to lessen competition in that market substantially, since in that case numerous other "outside" firms would retain the ability to enter. (ID 215).⁶⁹

In general, the lower the barriers to entry the higher the cross-elasticity of supply, and the less likely that an acquisition will create market power.⁷⁰ Thus, the lower the entry barriers the less likely it will be that, as a consequence of an acquisition, remaining firms in the target market can successfully raise prices by restricting output, whether by unilateral action, interdependent coordination, or express collusion.⁷¹ In other words, without barriers to entry, mergers and acquisitions are unable to create market power. Put in terms of the elements of the actual potential entrant theory, evidence of low entry barriers: may assist in rebutting a concentration—based legal presumption that potential competition analysis is appropriate; will generally indicate [46] the existence of a number of potential entrants; and will make it less likely that the acquiring firm's alternative *de novo* or toehold entry would create substantial procompetitive benefits over and above those existing in the target market at the time of the challenged acquisition.⁷²

The converse also applies. High entry barriers suggest low supply cross-elasticities, which increase the probability that market power will result from an acquisition. Hence, where barriers to entering the target market are high, a merger or acquisition may create a poten-

⁶⁹ See *Heublein, Inc.*, 96 F.T.C. 385, 589 (1980) (elimination of one potential entrant into all wine market competitively "insignificant" given "unusually large number of strong companies" making, or willing and able to make, toehold acquisitions in target market); *Budd Company*, 86 F.T.C. 518, 577 (1975).

⁷⁰ See, e.g., *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 644 (C.D. Cal. 1976) ("substantial entry and exit rates in firms and products [indicates] that entrance is relatively easy and that healthy competition is present" within relevant market).

⁷¹ *Heublein, Inc.*, 96 F.T.C. 385, 588-89 (1980). See FTC Merger Statement, note 9 above, at p. 77.

⁷² An anomaly of the potential competition theory is that, in some cases, *high* entry barriers can also militate against application of the theory. See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 629-30, 632 (1974) (by reducing likelihood that acquiring firm is source of future competitive benefits through *de novo* or toehold entry, regulatory entry barriers render it difficult to hold geographic market extension merger by commercial bank unlawful under potential competition doctrine).

tial for significant market power that is unlikely to be tempered by the threat that future entry will prevent or frustrate anticompetitive output and pricing decisions by firms in the target market.

Evidence of low entry barriers includes recent entry into the target market,⁷³ or recent capacity expansion by existing competitors in that market.⁷⁴ (Of course, the reverse is not true: a lack of recent entry does not necessarily imply high entry barriers or low supply elasticity, since other factors—including rising costs or shrinking demand—might also explain this condition.) In addition, such entry barriers as high transportation costs relative to product value and governmentally-imposed restrictions⁷⁵ may also impede entry into some target markets by outside firms. [47]

While complaint counsel bear the ultimate burden of persuasion on the issue of the number of potential entrants, the Commission explained in *Heublein*:

[W]e place upon the party defending the merger the initial responsibility of coming forward with evidence that a group of plausibly qualified potential deconcentrators exists. That burden is not discharged simply by naming a long list of companies who might have entered and then leaving it to the plaintiff to disprove the likelihood of entry with respect to each. Rather, the party defending the merger must be able to point to objective factors indicating that the designated firms will likely be willing and able to enter or expand if the [target] market becomes less competitive.⁷⁶

Grand Union offered such a list of potential entrant candidates, but the ALJ found that respondents failed to offer objective evidence of any specific interest or ability of any of these candidates to enter the "southeast markets." (ID 222-23.) Rather, the ALJ found that the existence of high barriers to significant entry on a scale sufficient to provide meaningful competition eliminated almost all of the potential entrants suggested by Grand Union. (ID 223.) We disagree. We conclude that the evidence of the growth and financial attractiveness of many of the SMSAs in question, coupled with the relatively low barriers to entering the individual SMSAs, is adequate to satisfy respondents' burden of coming forward. We believe these "objective factors" indicate that a number of the suggested firms would likely be willing and able to enter or expand should the target SMSAs become less competitive following Grand Union's acquisition of Colonial.

⁷³ See FTC Merger Statement, note 9 above, at p. 77 (evidence of actual entry, especially recent and frequent new entry, is highly probative in merger analysis).

⁷⁴ *Ibid.* (effective competition might depend upon firm's achieving certain scale of operation; evidence of substantial expansion by existing industry members—especially non-dominant firms—may persuasively indicate barriers to larger scale are not high).

⁷⁵ See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602, 627 (1974) (application of potential competition doctrine to commercial banking "must take into account the unique federal and state regulatory restraints on entry").

⁷⁶ *Heublein, Inc.*, 96 F.T.C. 385, 589 (1980).

The ALJ found there has been a “paucity of entry by supermarket chains” into the 13 target SMSAs. (ID 216.) However, he also asserted that “*de novo* entry is not unusual in the supermarket industry.” (ID 221.) While it may be difficult to reconcile these two conclusions, both are based on what we found in Part II to be the ALJ’s inappropriately narrow focus on “supermarkets” and “supermarket chains.” When that focus is broadened, a different image emerges. As we discuss in Part IV, the record shows what appear to be considerable opportunities for entry into the target SMSAs by both independent grocers [48] and grocery store and supermarket chains.

Complaint counsel urge (CAB 23 and Tr.OA 58.)—and the ALJ found (IDF 58.)—that “effective entry” into many of the target SMSAs entails multiple-store entry. Complaint counsel conceded at oral argument that, “There has been some effective entry by chains.” (Tr.OA 36.) The ALJ found that the larger an area’s population, the greater the number of stores necessary for effective entry. (IDF 59.) Several industry witnesses testified that multiple store entry was the only way effectively to serve and compete in an SMSA. (IDF 216.) (For example, one witness estimated that 12 new stores would be necessary for a new entrant in the Atlanta SMSA to compete effectively. (IDF 59; and ID 216.)) Respondents disagree, and argue that single-store entry is feasible and has been accomplished successfully (with later expansion) in numerous instances. (IDF 66; and RAB 16.)

We agree with respondents that the single-store entry “success stories” reflected in the record belie any conclusion that entry can be accomplished only by entering an SMSA with numerous stores. In this regard, we note the ALJ’s finding that in *each* of the 13 SMSA markets, the services of a retail food wholesaler “generally seeking for more outlets to sell their [sic] grocery products” were available to new entrants and expanding firms. (IDF 57.) In addition, it appears that joint or cooperative advertising programs—such as those recently utilized in the Atlanta SMSA (IDF 89; and Tr. 2542–43.)—could assist independents in overcoming high advertising costs, which the ALJ found gave large supermarket chains a relative cost advantage. (IDF 61.) As we summarize in Part IV, below, the record shows numerous cases of successful entry with one or two stores, with subsequent expansion from that base in many instances.

It is unnecessary here to conduct a detailed analysis of the numerous factors that may affect entry into the retail grocery business. There is clear evidence in this record (summarized in Part IV, below) that substantial new entry and expansion have recently [49] occurred in virtually all of the 13 target markets alleged here.⁷⁷ This was true

⁷⁷ See *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 300 (4th Cir. 1977) (*de novo* entry into uranium production by seven firms in past 10 years, combined with other factors, makes it unlikely that even if acquiring firm were

(footnote cont’d)

for various categories of actors in the markets, including supermarket chains and independents, as well as such "innovators" as box and warehouse stores.⁷⁸ For all of the 13 target SMSAs in this case, the height of entry barriers is lower—and the degree of actual recent entry and expansion considerably greater—than that found by the Commission in other recent cases in which it has found a Section 7 violation on the basis of the actual potential entrant theory.⁷⁹ Indeed, this consistent pattern of recent entry and expansion in these numerous markets may indicate that barriers to entering the retail grocery industry *in general* are relatively low, at least throughout much of the Southeast. As respondents note (RAB 15 and Tr.OA 9.), such a conclusion would be [50] consistent with the past position of this Commission.⁸⁰ We therefore find that, as to all 13 target SMSA markets, complaint counsel have failed to carry their burden of persuading that the universe of potential entrants and expanders consists of only a limited number of firms.⁸¹ While the Commission has declined to define "the minimum number of other potential entrants that makes the loss of one an insignificant lessening of competition,"⁸² we are confident that the relatively low entry barriers in these markets assure that number is exceeded here.⁸³

On the basis of this conclusion about the height of entry barriers across all of the relevant markets, it seems unlikely that the elements of a Section 7 violation under an actual potential competition theory

potential entrant its loss through merger would have significant anticompetitive effect); *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 644 (C.D. Cal. 1976) ("substantial exit and entry rates in firms and products [indicates] that entrance is relatively easy and that healthy competition is present" within relevant market); cf. *British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1350-51 (no significant recent entry into a U.S. "industrial gases" market characterized by "substantial" entry barriers), *rev'd and remanded on other grounds sub nom., BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977).

⁷⁸ See *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 644 (C.D. Cal. 1976) (rapid pace of technological progress and product innovation further demonstrates competitiveness of relevant market).

⁷⁹ *Tenneco, Inc.*, 98 F.T.C. 464, 583-85, 617 (1981) ("Very substantial barriers to entry"; no new entry in at least 19 years prior to challenged acquisition), *rev'd on other grounds, Tenneco, Inc. v. FTC*, 689 F.2d 346, 353 (2d Cir. 1982) ("Substantial barriers to entry severely limit" number of firms likely to provide additional competition); *Brunswick Corp., et al.*, 94 F.T.C. 1174 (1979), *modified as to relief*, 96 F.T.C. 151 (1980) (barriers to entry remained significant over time; "some entry" occurred into low-horsepower end of outboard-motor market, but was "insignificant to the market leaders" whose shares remained constant), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982); *British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1350-51 (1975) ("substantial barriers for entry" and "no significant entry" in recent years), *rev'd and remanded on other grounds sub nom., BOC International, Ltd., v. FTC*, 557 F.2d 24 (2d Cir. 1977).

⁸⁰ *National Tea Co.*, 69 F.T.C. 226, 278 (1966) ("relative ease of entry" into retail grocery store market cited particularly as one of industry's "dynamic features" that may assist in dissipating restraints on competition).

⁸¹ *Heublein, Inc.*, 96 F.T.C. 385, 589 (1980).

⁸² *Heublein, Inc.*, 96 F.T.C. 385, 591 (1980).

⁸³ See DOJ Merger Guidelines, note 9 above, at ¶4504 (absent "particularly strong" evidence of "likely actual entry," Justice Department unlikely to challenge potential competition merger if entry advantage ascribed to acquiring firm is also possessed by three or more other firms; Department also unlikely to challenge potential competition merger where entry can be accomplished by firms without any specific entry advantages so easily "that existing competitors could not succeed in raising price for any significant period of time"). See also *United States v. Hughes Tool Company*, 415 F.Supp. 637, 646 (C.D. Cal. 1976) (in rejecting perceived potential competition allegation, court notes "at least six" potential entrants possessing all basic capabilities for entry, with three others having several basic entry prerequisites). See generally, Vol. V, P. Areeda & D. Turner, *Antitrust Law* ¶ 1123 at 123-24 (1980) ("universe exceeding three similarly well-qualified potential entrants should be presumptively sufficient to obviate concern" and "universe of six entrants removes any plausible basis").

could be established in any of the markets here alleged. Nevertheless, our discussion in Part IV of the individual target SMSAs considers and applies certain of the other actual potential entrant elements in addition to the number of likely potential entrants. [51]

IV. THE INDIVIDUAL MARKETS

In this part we apply the elements of the actual potential competition theory to each of the 13 alleged geographic markets at issue in this appeal. We summarize our resulting conclusions in Part IV (F), below.

A. *The Georgia Markets*

1. Atlanta

Perhaps the strongest argument by complaint counsel that Grand Union's acquisition of Colonial violated Section 7 is that advanced for the Atlanta, Georgia SMSA. At the time of the acquisition, Colonial was the largest grocery retailer in the Atlanta SMSA (IDF 82.), operating over 60 stores and accounting for approximately 20.6 percent of all grocery store sales. (TABLE 1.) The 1977 four-firm concentration ratio of almost 63 percent (*Id.*) is, as we noted in Part III, sufficient to raise a (rebuttable) legal presumption that this market was an appropriate candidate for potential competition analysis. Complaint counsel's two experts testified that, from an economic perspective, there was a high probability that Atlanta was performing as a less-than-competitive market. (IDF 90; and Tr. 1976-78 and 2348.) One such witness, Dr. Parker, testified that barriers to "effective entry" were very high in this SMSA. (Tr. 2347.) We disagree with this economic assessment of the state of competition in the Atlanta SMSA, and conclude also that the requisite elements of a Section 7 violation based on an actual potential competition theory are not met in this market.

The record shows that the Atlanta market includes a significant number of competitors. The ALJ found there were "many additional competitors" who were not among the top eight firms in the SMSA. (IDF 82.) Moreover, the structure of the Atlanta market has not been static during the 1970s, as one would expect if it were a non-competitive market. Perhaps the most dramatic characteristic of this market was the decline of A & P from third to fifth place from 1972 to 1977, and the concomitant ascendancy of Kroger from fifth to third place over the same period. (IDF 82.) The [52] impact of Kroger as a competitive factor in the Atlanta market is indicated by the near doubling of its market share from 7.2 percent in 1972 to 13.6 percent in 1977.

(*Id.*)⁸⁴ A competing independent Atlanta grocer testified that Kroger was becoming an aggressive price competitor throughout the Atlanta SMSA. (IDF 89; and Tr. 385.) In addition, a Colonial/Grand Union official testified that "As a result of [Kroger's implementation of its 'Everyday Low Price' campaign⁸⁵], every chain in the [Atlanta] market without exception has lowered their [sic] everyday shelf prices." (Tr. 875.) While this latter testimony from respondents' official is self-serving, it is consistent with other record evidence of Kroger's recent competitive aggressiveness in terms of pricing policies, store expansion, and remodeling. (IDF 89; and Tr. 338-39, 385, 640, 873-75 and 2997-98.)⁸⁶

This evidence of Kroger's competitive significance might itself be sufficient to rebut the relatively weak legal presumption of a non-competitive market raised by the 62.9 percent C₄ figure. In any event, additional evidence of recent entry and expansion by other grocery stores in the Atlanta SMSA clearly tilts the balance against the legal presumption raised by concentration levels alone. The record shows entry in 1978 of "box stores" operated by Jewel T, which by year-end 1980 had opened a dozen such stores in the Atlanta SMSA. (IDF 89.) There was also recent entry by several independent firms, some of which used former Colonial stores or were operated by former Colonial store managers. (IDF 89.) Further, Bi-Lo entered with one store in 1978, and a second in 1979. (*Id.*) [53]

There was also expansion by existing competitors. Winn-Dixie, the SMSA's fourth largest chain in 1977 (IDF 82.), added five new (albeit smaller) supermarket stores in 1979. (IDF 89; and Tr. 2999.) Ogletree—the seventh largest competitor and the major independent in the SMSA—expanded within the Atlanta SMSA in 1979. (IDF 89.) We find this evidence of recent entry and expansion inconsistent with the conclusions of complaint counsel's experts. Contrary to their conclusions, we find it indicative of relatively low entry barriers, a correspondingly higher number of likely potential entrants, and a competitive SMSA market.

In addition, we note there is a question as to whether any feasible alternative toehold acquisitions existed for Grand Union in this SMSA. A number of the toehold acquisition candidates advanced by complaint counsel seem to have been either unacceptable to Grand Union, unwilling to sell, or located entirely outside the Atlanta

⁸⁴ Cf. FTC Merger Statement, note 9 above, at 80 (stability of market shares over time cited as one of several market characteristics that may facilitate interfirm coordination).

⁸⁵ For a more detailed discussion of Kroger's implementation of its "Everyday Low Price" policy in Atlanta and other areas, see *The Kroger Company*, 98 F.T.C. 639, 722-32 (1981).

⁸⁶ See *Tenneco, Inc. v. FTC*, 689 F.2d 346, 356-58 (2d Cir. 1982) (as to perceived potential competition count, doubling (and possible quadrupling) of leading firm's market share following "aggressive campaign" to improve its declining position cited as evincing competitive pressure from existing firms).

SMSA.⁸⁷ (IDF 91.) As to the last category, we reject complaint counsel's argument that the list of available toehold possibilities must be deemed to include firms not operating in the target market but which could expand there from an existing base of operations. (CAB 36.) We believe this "peripheral toehold" theory stretches too far the concept of toehold entry, and would place upon acquiring firms an unreasonable burden of speculating which acquisitions in the target market would likely be viewed by government enforcement authorities as "potential toehold expanders" into the target market. In this and the other SMSA markets alleged by complaint counsel, we decline to [54] impose that burden on respondents.⁸⁸

Finally, we note indications in the record that Colonial may have been a more effective competitor in the Atlanta SMSA following its acquisition by Grand Union. A competitor testified that following its acquisition Colonial has been "more vigorous in their [sic] advertising," has adopted lower advertised prices, and may have conducted "more vigorous . . . store operations." (Tr. 378.) The ALJ also cited testimony by respondents' officials (again, self-serving) that since the acquisition Grand Union has: increased Colonial's Atlanta store expansion program; designed new stores to compete more effectively against Kroger; closed unprofitable stores; increased the number of "price zones" from two to 10 (which has been described as a sign of greater competition (Tr. 1025-26.)); lowered gross profit margins on some items; instituted more aggressive shelf pricing; increased the variety of products offered; and improved the quality of store management through increased wage scales. (IDF 94.) In theory, some of Grand Union's post-acquisition competitive aggressiveness may have been designed to stave off adverse Commission action. However, in light of the non-transitory nature of certain of respondents' actions, we believe this to be an unlikely explanation.

It is true, as the ALJ notes (IDF 91.), that in 1975 a Grand Union official concluded—on the basis of a one-day price study in Atlanta—that "competition [in the Atlanta market] is not as aggressive as in most of our operating areas," adding that there did not appear to be the type of "over-storing" that Grand Union faced in certain other areas. (CX-38Z-58.) However, we note that this rather cursory review occurred *prior* to the recent entry and expansion cited above, and before much of the recent aggressive Kroger competition and expansion documented in the record. (IDF 82, 89, and 94.) [55] Hence, we

⁸⁷ See *Tenneco, Inc. v. FTC*, 689 F.2d 346, 354-55 (2d Cir. 1982) (unsuccessful acquisition negotiations and other factors cited as "strong evidence" that small European producers were "not reasonably available" as potential toehold acquisitions in U.S. market; same result as to "weak and deteriorating" U.S. firm with "poorly accepted product and run-down equipment").

⁸⁸ Cf. *Tenneco, Inc.*, 98 F.T.C. 464, 603, 606-07, 618-22 (1981) (European shock absorber makers with only "modest shares"—about 1 percent—of U.S. replacement shock absorber market seen as possible toehold acquisitions), *rev'd*, *Tenneco, Inc. v. FTC*, 689 F.2d 346, 354 (2d Cir. 1982) (European firms "not reasonably available" on facts of case).

conclude that respondents have successfully rebutted the legal presumption of a less-than-competitive Atlanta market, and that complaint counsel have in addition failed to establish certain other of the prerequisites of the actual potential competition theory.

2. Augusta

The Augusta SMSA is similar to the Atlanta market in at least two respects: first, Kroger has emerged as an increasingly competitive factor; and second, in recent years there has been both new entry and expansion by existing firms. At the time of Colonial's acquisition in August 1978, it was the number two firm in this market. (IDF 96.) Its 1977 share of 12.8 percent of grocery store sales reflected a drop of almost one percentage point since 1972 (*Id.*), indicating Colonial may not have been a dynamic factor in this market. As in Atlanta, A & P was clearly a declining factor, with its market share falling from 8.7 percent in 1972 to 4.4 percent in 1977. (*Id.*) In contrast, Kroger was again becoming a stronger competitive factor in this market, with its share increasing from 3.5 percent in 1972 to 8.4 percent in 1977. (*Id.*) Kroger's competitive impact was noted by a Colonial official who testified that Colonial had recently lowered profit margins "due to the growth of Kroger and their strength in that [Augusta] market." (Tr. 2676-77.) The ALJ found that, as a result of Kroger's competition, Colonial reduced its margins on dry groceries by one and one-quarter percent in September 1980 to compete more effectively with Kroger. (IDF 98; and Tr. 2685-87.)

The record also contains evidence of recent entry into Augusta. (IDF 97.) Although complaint counsel's expert, Dr. Parker, testified that barriers to effective entry into Augusta were "moderate" (Tr. 2356.), recent market performance indicates relatively low barriers. For example, Bi-Lo, the SMSA's third largest firm with almost 12 percent of the market (IDF 96.), entered the city of Augusta sometime after 1975, expanding from its earlier suburban Augusta operations. (IDF 97.) In 1977, Harris-Teetor entered the SMSA with three stores. (IDF 96.) There has also been considerable [56] expansion in this SMSA. Kroger opened six new large "super stores" between 1974 and 1979 (IDF 98.), with three more planned. (IDF 100.) The area's largest chain, Winn-Dixie, opened two new stores since 1979 (IDF 100.), and Colonial has opened two new stores since its acquisition by Grand Union. (IDF 102.) In addition, complaint counsel's expert identified two firms as potential entrants, and one of respondents' witnesses identified a third. (IDF 100.)

We conclude that the competitive impact of Kroger, the relatively low entry barriers, and the apparent availability of other potential entrants, combine to rebut the rather weak legal presumption of a

non-competitive market raised by the 55.2 percent C_4 levels in this market (TABLE 1.), and to negate a finding of any likely substantial lessening of competition in the Augusta SMSA under the actual potential entrant theory.

3. Macon

Expert testimony characterized the Macon SMSA as a "slow-growth" market. (IDF 111; and Tr. 2352 and 3002.) The SMSA was moderately concentrated as of 1977, with a C_4 ratio of 67.4 percent. (TABLE 1.) Complaint counsel's expert testified there were substantial barriers to effective entry. (Tr. 2352.)

At the time of the challenged acquisition, Colonial was the second largest firm in the Macon SMSA. (IDF 104.) Its share of the grocery store sales market had grown from 6.1 percent in 1972 to 9.1 percent in 1977 (TABLE 1.), though it had apparently fallen somewhat by the time of trial. (IDF 117.) Colonial had been the leading firm in this market in the mid-1960's but its sales deteriorated over time (*Id.*), a trend which a Colonial official attributed to "poor operations, poor merchandising, and a failure to upgrade facilities."⁸⁹ (Tr. 2739.) By 1977, Piggly Wiggly was clearly the leading firm [57] with almost 35 percent of the Macon market. (IDF 104.)

However, the record indicates a more dynamic, competitive market than appears in the "structural" picture painted by complaint counsel's expert. Here again, Kroger appears to be an aggressive, competitive factor. This is reflected in Kroger's gain in market share from 3.3 percent in 1972 to 7.3 percent in 1977, (IDF 104.) The ALJ found that Kroger has become "extremely aggressive in Macon" and continues to gain market share. (IDF 111.) We need not decide whether Kroger's recent track record would itself suffice to rebut the legal presumption of a non-competitive market raised by the 67.4 percent C_4 ratio, for evidence of recent entry and expansion by other firms tilts the balance against that presumption. Jewel entered Macon in December 1979 with one of its "Jewel-T" box stores. (*Id.*) A & P, after closing its older stores post 1975, recently re-entered the SMSA with one of its Family Mart "super stores." (*Id.*) While Alterman closed one of its two Macon stores in 1979, that store was subsequently operated by a local independent, and at the time of trial Alterman had another store under construction. (IDF 112.) Finally, we note that all three of Kroger's present stores were constructed since 1973. (IDF 111.)

We believe this evidence of recent entry and expansion indicates relatively low entry barriers, thereby increasing the number of likely

⁸⁹ Cf. *FTC v. National Tea Co.*, 603 F.2d 694, 699, 701 (8th Cir. 1979) (in preliminary injunction suit challenging horizontal merger of retail grocery store chains, appropriate under §7 to consider acquiring chain's "extremely poor image among [local] consumers" and its status as "weak competitor" in relevant market), *consent order issued*, *National Tea Co., et. al.*, 96 F.T.C. 42 (1980).

potential entrants, and decreasing the likelihood that Grand Union's entry through an alternative means would have generated significant procompetitive benefits in this target market. Moreover, we find that these low barriers, coupled with evidence of Kroger's competitive aggressiveness in this market, successfully rebut the legal presumption of a non-competitive market raised by the C_4 ratio. Finally, given Colonial's decline and the disparity in market shares between Piggly Wiggly and the remainder of the competitors in this SMSA, we note the possibility that Colonial's replacement by Grand Union may have actually served to enhance competition in the Macon area. [58]

It is a closer question as to whether Commission and judicial precedent would support characterization of Colonial as a lawful "toehold" acquisition in the Macon SMSA. The Commission's general approach to toehold acquisition candidates was expressed in its 1975 decision in *Budd Company*:

We believe it to be desirable to observe a general rule in potential competition cases that firms possessing no more than 10 percent in a target market (where . . . the 4-firm concentration is approximately 60 percent or more) should ordinarily be presumed to be toehold or foothold firms. This presumption is by no means conclusive and the inference of lack of anticompetitive effects flowing from acquisition of such a firm can be rebutted in particular cases.⁹⁰

While Colonial's 9.1 share in this market in which C_4 equals 67.4 percent falls within this standard, its number two ranking and post-1972 growth (see TABLE 1.) arguably make it less appropriate to invoke the 10 percent presumption here. However, we need not resolve this question for the Macon SMSA, since the other factors discussed above clearly place the Macon SMSA beyond the reach of liability under the actual potential competition theory.

B. The North Carolina Markets

Two North Carolina SMSAs are at issue in this appeal—the Raleigh/Durham SMSA and the Charlotte/Gastonia SMSA. Complaint counsel urge that, for purposes of [59] Section 7 analysis, the Raleigh/Durham SMSA may properly be divided into two relevant geographic

⁹⁰ *Budd Company*, 86 F.T.C. 518, 582 (1975). See also *Beatrice Foods Co.*, 86 F.T.C. 1, 62 n.66 (1975) (citing previous cases in which Commission considered firms with shares below 10 percent as toehold firms whose acquisition would have been procompetitive), *aff'd as modified*, *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976); *Bendix Corp.*, 77 F.T.C. 818 (1970) (4th ranking firm with 9.5 percent share intimated to be permissible toehold acquisition candidate), *vacated and remanded on other grounds*, 450 F.2d 534 (6th Cir. 1971); *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 293 n.4 (4th Cir. 1977), and *United States v. Black and Decker Mfg. Co.*, 430 F.Supp. 729, 767-68 (D.Md. 1976) (both referring to Commission's 10 percent demarcation in *Budd*). But cf. *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 n.29 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974) (firm with 10 percent share "probably too substantial to be considered a true toehold candidate"); and *British Oxygen Co. Ltd., et al.*, 86 F.T.C. 1241, 1348, 1357 n.18 (firm with 10 percent share of national market not toehold; same for rapidly expanding firm with 5.63 percent share and financial backing to become national producer), *rev'd on other grounds*, *BOC International, Ltd. v. FTC*, 557 F.2d 24, 27 n.3 (2d Cir. 1977) ("most unlikely" 3rd largest firm with 16 percent share of market in which $C_2=44$ percent could be toehold).

markets: the Raleigh subdivision and the Durham subdivision. (IDF 48.) The ALJ adopted this suggestion. (See IDF 179-188.) In support of this approach, complaint counsel and the ALJ cite the fact that at least three companies operate more than one store in the Durham subdivision, but none in the Raleigh subdivision (IDF 183.), and that the stores within each subdivision generally advertise only in the newspaper published within their respective subdivision. (IDF 49.) It is not clear that either or both of these factors are sufficient to establish separate markets. However, the lack of evidence of supply and demand elasticities noted above renders it difficult to disprove this contention. We note, however, that Colonial appears to have the same price structure in both of these subdivisions. (IDF 183; and Tr. 2654.)

In any event, it is unnecessary to decide this question here. The evidence of market structure (including concentration ratios and market shares) and of market performance (including the degree of recent entry and expansion) is similar in both subdivisions, although the identities of competitors differ somewhat in the two areas. We therefore assume without deciding that each subdivision properly may be viewed as a separate geographic market for purposes of analyzing the legality under Section 7 of Grand Union's acquisition of Colonial.

1. Raleigh

As of 1977, Colonial was a leading firm in the Raleigh subdivision. It held the number three position with a 14.3 percent market share, down only slightly from its 1972 level of 14.7 percent (also third). (IDF 180.) Winn-Dixie remained the market leader over this five-year period, with a fairly constant market share of approximately 28 percent. (*Id.*) The top three firms are significantly larger than the remaining firms in this market, although the market shares of other top-eight firms rose slightly between 1972 and 1977. (*Id.*) The C_4 measure in this market was 62.1 in 1977, down slightly from its 63.8 level in 1972 (TABLE 1.), sufficient to raise at most a moderate evidentiary [60] presumption that this subdivision was not competitive.

Complaint counsel's expert testified that entry barriers in this subdivision were substantial and discouraged new entry by small supermarket chains. (Tr. 2321.) Also, the record indicates capacity reduction on the part of some firms. Kroger, the number five firm in 1972, had withdrawn from this subdivision by 1977. (IDF 180.) Winn-Dixie reduced the number of its stores from 15 to 13 from 1972 to 1977, though it remained the market leader. (*Id.*) A & P also reduced its stores from 11 to nine over this period (*Id.*), although as of trial it had five new or recently-renovated stores in Raleigh. (IDF 183.)

We believe this evidence is clearly outweighed by other record evi-

dence of substantial recent entry, as well as by the large number of potential entrants. Food World entered this subdivision with its first store in 1975 and a second in 1977-78; by 1977 it had become the area's fifth largest firm with a 3.3 percent market share. (IDF 180 and 183.) Food Town entered in 1975 with two stores, and by 1977 was the fourth largest firm with just over 4 percent of the market. (*Id.*) By early 1981, Food Town had four stores and a fifth under construction. (IDF 183.) Harris-Teetor entered with one store in 1978-79, and at the time of trial had a second store under construction and was looking for additional sites. (*Id.*) Best Food (an independent) opened a warehouse store in 1980, advertising its low prices in a local newspaper. (*Id.*) At trial, Lucky was described as being in the "process of entering" the Raleigh subdivision. (IDF 136 and 185.) This amount of recent entry is clearly substantial.⁹¹

In addition, there appears to be a significant number of potential entrants, with major chains among some of the most likely entrants. Complaint counsel's expert testified that Kroger was likely to re-enter. (Tr. 2327.) The ALJ found that Kroger was actively seeking four sites in this subdivision and would probably re-enter. (IDF 185.) [61] The ALJ, citing the testimony of numerous industry officials, also found Safeway to be a potential entrant. (*Id.*) Complaint counsel's expert went further, describing Safeway as the most likely entrant into Raleigh. (Tr. 2327 and 2332.) Also, the head of the independent Byrd firm testified that his company was a potential entrant into Raleigh. (Tr. 1547.) However, since Byrd already had one store within the subdivision it may technically be a "potential expander," notwithstanding that Byrd did not consider its existing store to be in the Raleigh market. (IDF 185.) Further, an official of the Ingles chain testified that his firm has considered entering the Raleigh market, although no site selection work was yet undertaken. (Tr. 1751.) Finally, the ALJ found there were some 15 other firms within "striking distance" of the Raleigh/Durham SMSA that "may be considered potential entrants." (IDF 185.)

(While it is unnecessary to our conclusion, we note also the testimony of a Colonial official that, as a result of recent advertising by a Raleigh area convenience chain that its milk and dairy prices were no higher than those of supermarket chains, Colonial increased its price-checking of that convenience chain to a weekly (rather than the previous spot) basis. (Tr. 2651; and IDF 183.) Although self-serving, this testimony is consistent with other record evidence, cited above,

⁹¹ See *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 644 (C.D. Cal. 1976) (survival of new entrants in pre-acquisition period "shows that neither [acquired firm] nor others in the market possess any power to exclude competitors").

of competitive performance in this subdivision, and with our product market approximation.)

While the position of the three leading firms (including Colonial) has remained fairly stable, the entry of numerous other firms into the Raleigh subdivision is sufficient to establish a market characterized by relatively low entry barriers. We conclude that the record evidence of substantial recent entry and expansion clearly suffices to overcome the moderate C₄-based evidentiary presumption of a less-than-competitive market. In addition, the number of potential entrants is itself sufficiently high to preclude application of the actual potential competition theory in this alleged market. Given these factors, we conclude that complaint counsel have failed to show that Grand Union's entry through alternative means offered a reasonable likelihood of [62] increased deconcentration or procompetitive effects in this market.⁹²

2. Durham

Colonial was in a virtual tie with A & P for second place in this subdivision as of 1977, with two firms having market shares of 17.5 and 17.2 percent, respectively. (IDF 180.) Colonial's 1977 position remained unchanged since 1972, while A & P had fallen from its 1972 first-place position (then over 20 percent of the market). (*Id.*) Winn-Dixie showed rapid growth over the same five-year period, rising from third position (13.1 percent share) to first place (20.3 percent share). (*Id.*) Kroger retained its fourth position during this period with its market share holding constant at about 11.7 percent. (*Id.*) The C₄ measure for this subdivision increased from its 1972 level of 62.4 to 66.8 in 1977, raising a moderate legal presumption that this subdivision was a candidate for potential competition analysis.

In addition to the exchange of market positions between A & P and Winn-Dixie and the latter's rapid growth over the 1972-1977 period, other evidence refutes any argument that this subdivision was performing in a non-competitive fashion. Despite testimony of complaint counsel's expert that barriers to "effective" entry into Durham were "quite high" (Tr. 2328-29.), substantial recent entry did in fact take place. The independent Byrd entered in 1973 (taking over a former Kroger store). (IDF 182.) Food Town entered within the five years prior to trial, built a second store in 1978, and as of trial was searching for additional sites. (IDF 183.) Harris-Teetor entered in 1977 and quickly moved into seventh place in the Durham subdivision. (IDF 180 and 183.) Finally, at the time of trial Lowes was entering with its

⁹² See *FTC v. Atlantic Richfield Co.*, 549 F.2d, 289, 300 (4th Cir. 1977) (*de novo* entry by seven firms in past 10 years, combined with other factors, makes it unlikely that even if acquiring firm were potential entrant its loss through merger would have significant anticompetitive effect).

first store. (IDF 185.) The record also reflects recent expansion by Winn-Dixie and Byrd (IDF 182.), and the ALJ found that Kroger was also likely to expand. (IDF 185.) In contrast, while Colonial was still one of the leading [63] firms in Durham, it had not opened a new store there since 1974 (IDF 183.), despite preacquisition corporate plans to do so. (IDF 181.) Finally, as noted above, the ALJ identified a number of potential entrants into the Raleigh/Durham SMSA. (IDF 185.)

We find that the repositioning among two of the top four firms, together with the evidence of substantial recent entry and expansion, is again sufficient to rebut the legal presumption raised by the C_4 figure that Durham is a less-than-competitive market. We also conclude that the relatively low barriers evidenced by this recent entry, coupled with the ALJ's identification of numerous potential entrants, precludes finding a sufficiently small number of likely potential entrants on which to base a Section 7 potential competition violation.

3. Charlotte/Gastonia

Colonial was not among the leading firms in this SMSA as of 1977. (See IDF 190.) Its market share had fallen from 7 percent in 1972 to only 5 percent in 1977, moving it from fourth to fifth place in this market. (TABLE 1.) Over this same five-year period there was considerable repositioning among the top four firms. A & P dropped from first position (at 16.8 percent) to fourth place (9 percent). (IDF 190.) Harris-Teetor went from second place (15.3 percent) to become the number one firm in the market (almost 20 percent). (*Id.*) Winn-Dixie moved from third position (9.1 percent) to second position (12 percent). (*Id.*) By 1977, Colonial had slipped from among the top four firms. It was replaced by the SMSA's fastest-growing competitor, Food Town, which rose from sixth place (3.7 percent) to third place (nearly 12 percent), more than tripling its market share in only five years. (*Id.*) The positions of the remaining firms in the top eight were fairly stable over this time period (*Id.*), although the local family-owned Park n' Shop chain (number five in 1972 and number six in 1977) apparently reduced the number of its stores from 10 to two or three during this period. (IDF 193.)

Complaint counsel's expert testified that the Charlotte/Gastonia market was moderately concentrated. (Tr. 2333-34.) Its C_4 ratio in 1977 was 54.9, up from the 48.6 [64] level in 1972. (TABLE 1.) We find that this degree of concentration, despite its recent increase, raises only a relatively weak evidentiary presumption that this market was not performing in competitive fashion.

The same expert witness testified that barriers to effective entry into this market are "significantly high." (Tr. 2333-34.) Nevertheless, the record once again discloses recent entry. Perhaps most signifi-

cant, Kroger entered in 1978 with three of its "Sav-On" opened a fourth in 1979, and by 1981 operated a total of five stores. (IDF 193.) (It is unclear from the record what Kroger's market share was, or what impact its entry had on the 1977 market structure discussed above.) The second major entrant during the recent past was "Three Guys," an independent firm which constructed a warehouse and four "warehouse box-type stores" in 1980. All four of these stores were almost adjacent to the new Kroger stores, and it appears that only two of the Three Guys stores were actually opened. (The remaining two stores and the warehouse were apparently up for sale at the time of trial.) (IDF 192-93.) According to a Colonial witness, Three Guys offered "very low prices in groceries" (Tr. 2672-73; and IDF 193.), and established firms with higher price structures reacted to its entry by lowering their prices. (Tr. 2694-95.) It is difficult to assess what weight to accord this arguably self-serving testimony, since both complaint counsel and respondents each cite portions of it as supportive of their respective contentions. (See IDF 192-93.) At a minimum, it is evidence that a second firm entered this SMSA in the very recent past, and we note as well the ALJ's finding that one of the two stores opened by Three Guys "seems to do fairly well." (IDF 193.) Finally, we observe that there was recent expansion in this SMSA by Bi-Lo, the number seven firm, which increased the number of its stores from one to four over the 1972-1977 period. (IDF 190.)

We conclude that the recent significant repositioning among the leading firms, the recent multiple-store entry by two firms (of which one—Kroger—was a very strong competitor in other markets), and the very rapid recent growth of Food Town, [65] are sufficient to rebut the relatively weak presumption of a non-competitive market raised by the low C_4 ratio of 54.9 percent.

We also find that Grand Union's acquisition of the number five firm having a declining, five percent share of a mildly-concentrated market into which there has been recent entry is itself a lawful toehold acquisition.⁹³

C. The South Carolina Market—Greenville

Greenville, South Carolina is a subdivision of the Greenville/Spartanburg SMSA. (IDF 105.) As noted above, complaint counsel eliminated the Spartanburg subdivision from their actual potential competition allegations. (IDF 36.) Because we determine that no Section 7 violation would exist as to the Greenville subdivision, we do not reach the question whether this SMSA subdivision itself constitutes an appropriate relevant geographic market.

As TABLE 1 shows, the Greenville subdivision is relatively concen-

⁹³ See note 90 above, and accompanying text.

trated, with a C_4 of 72.3 percent. However, while Colonial was the sixth largest firm (IDF 106.), it was a very small and declining factor in the Greenville area. Its market share had fallen from 3.6 percent in 1972 to 2.3 percent in 1977 (TABLE 1.), and was probably even lower in 1978. (IDF 117.) As the Commission found in *Heublein*, "[A]pproximately 2% of the market . . . [is] clearly a sufficiently small share to qualify as a toehold acquisition."⁹⁴ Hence, we conclude that in the Greenville subdivision Grand Union's acquisition of Colonial was itself a lawful toehold acquisition.

This conclusion is of course sufficient to preclude a Section 7 violation in this alleged market. However, despite the testimony of complaint counsel's expert to the contrary (Tr. 2340.), we note also that recent entry into Greenville is once again [66] consistent with low entry barriers in this subdivision. Ingles entered Greenville in the early 1970's and by 1977 was the third largest firm with almost 11 percent of the market. (IDF 106.) It had established 10 stores by 1980. (IDF 110 and 116.) Community Cash entered after 1976 by acquiring A & P's stores when the latter withdrew from the market; A & P later re-entered by building two successful Family Mart stores. (IDF 110.) Also, while Grand Union closed all six Colonial stores in Greenville after the acquisition, it apparently planned to re-enter within the next five years. (IDF 108.) Finally, we note that there appear to be several additional potential entrants, including Harris-Teetor, Kroger, and Food Town. (IDF 113.)

D. *The Virginia Markets*

1. Newport News/Hampton

As of 1977, one year prior to its acquisition by Grand Union, Colonial accounted for approximately 16 percent of this market, about the same share as in 1972. (IDF 130.) While this made Colonial the leading firm during this period, at 16 percent it could hardly be described as a "dominant" factor in this SMSA. Aside from Colonial's position, very little about this market has remained stable in recent years. Firms holding second, third, and fourth positions in 1972 each lost approximately four percentage points in market share by 1977. (*Id.*) One of the most significant aspects of this market has been the rise of Farm Fresh from the eighth position in 1972 at 3.6 percent of the market, to third position at 10.8 percent in 1977. (*Id.*) At least as remarkable has been the role of Safeway, entering after 1972 and obtaining an 8.2 percent market share by 1977. (IDF 130 and 133.) The effect of these market changes is reflected in the concentration meas-

⁹⁴ *Heublein, Inc.*, 96 F.T.C. 385, 587 (1980); see also *SKF Industries, Inc., et al.*, 94 F.T.C. 6, 84 (1979) (potential entrant's acquisition of firm with 2 percent market share "clearly constituted a legitimate toehold acquisition"); and note 90 above, and accompanying text.

ures for this SMSA. Between 1972 and 1977, the C_4 measure dropped over seven percentage points from 56.7 to 49.1. (TABLE 1; and IDF 130.) Clearly, under such circumstances the 1977 C_4 ratio of 49.1 can be viewed as raising only the weakest of presumptions that this is a less-than-competitive market, requiring only slight evidence for rebuttal. This is especially true where, as here, the evidence establishes a recent [67] trend toward deconcentration.⁹⁵ We agree with the ALJ's finding that "Farm Fresh's growth and Safeway's market entry had the effect of deconcentrating the market." (IDF 130.) We also find the recent, aggressive market performance of Safeway and Farm Fresh more than sufficient to rebut the very weak presumption of a less-than-competitive market raised by the low C_4 ratio.

Complaint counsel's expert described this SMSA as having moderately high entry barriers. (Tr. 2309.) It is true that this market has experienced less recent entry than almost any of the other 13 markets alleged here. Winn-Dixie entered in the early 1970's. Safeway was apparently the last new entrant, coming into this SMSA with several stores sometime after 1972. (IDF 132.) We do not believe this lower level of entry negates the probative significance of the deconcentration caused in large measure by the aggressiveness of Farm Fresh and Safeway. Moreover, other factors support a conclusion that complaint counsel have failed to prove that this SMSA is non-competitive and is an appropriate candidate for the actual potential entrant theory. First, there appears to be an unusually large number of independent firms in this market. Complaint counsel's survey revealed at least six independents in addition to those in the top eight firms.⁹⁶ (IDF 133.) In addition to expansion by Safeway and Farm Fresh, the independent "Lou Smith" firm recently expanded by building a second store (*Id.*) and likely future expanders include Farm Fresh. (IDF 136.) Also, Lucky (and perhaps Giant) appears to be a likely potential entrant. (*Id.*) [68]

Finally, we are compelled to comment on the ALJ's assertion that Farm Fresh would have been a less anticompetitive acquisition for Grand Union. (IDF 137.) We are not at all certain that this would be the case. While Colonial was the market leader, its recent position had been static. In contrast, Farm Fresh was a dynamic, growing firm, which Colonial officials described as a very aggressive competitor. (Tr. 659 and 2552.) While this testimony is self-serving, it is consistent with the objective evidence of Farm Fresh's rapid recent growth. The

⁹⁵ See *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 643, 645 (C.D. Cal. 1976) ("significant deconcentration trend" cited as one factor making application of actual or perceived potential competition theories inappropriate).

⁹⁶ See *FTC v. National Tea Co.*, 603 F.2d 694, 701 (8th Cir. 1979) (in declining to enjoin merger between competing retail grocery chains, court of appeals finds relevant market to be "marked by an active second tier of [independent] competitors," citing testimony that the independents' viability and strength is "very unique"), *consent order issued*, *National Tea Co., et al.*, 96 F.T.C. 42 (1980).

elimination of such an aggressive "rising star" may in some cases be more significant in competitive terms than acquisition of a static market leader.⁹⁷

In sum, we find this SMSA—currently experiencing a trend toward deconcentration—sufficiently competitive to rebut the weak C_4 evidentiary presumption. We further conclude that the record is insufficient to support a finding that Grand Union's entry through alternative means would have offered a substantial likelihood of deconcentration or procompetitive effects over and above those already occurring there.

2. Norfolk/Virginia Beach

Here again, Colonial was the leading but not dominant firm in this SMSA, with a 1977 market share of 17.8 percent, up from 15.7 percent in 1972. (TABLE 1.) The 1977 C_4 ratio of 53.1 raises only a relatively weak evidentiary presumption of a noncompetitive market, although that ratio increased by almost four and one-half percentage points over the 1972–1977 period. (TABLE 1.) (We note that use of market shares from complaint counsel's survey yields a more modest rise in the C_4 level in this [69] SMSA from 50.9 to 51.5 over the 1972–1977 period. (IDF 138.)) In addition to Colonial, A & P also gained in market share over this period (*Id.*), indicating it is perhaps a more significant factor in this market than in some of the other 13 SMSAs in which it operates. Two of the top-four firms suffered a slight loss in market share from 1972 to 1977. (*Id.*) The major story in this market—as for the Newport News/Hampton SMSA—is the ascension of Farm Fresh and Safeway. Farm Fresh, the SMSA's fastest growing competitor, was not among the top eight firms in 1972. (IDF 133 and 138.) By 1977 it was the number five firm with 10 percent of the market, and by 1980 was estimated to have a 13 percent market share. (IDF 133.) Safeway entered this SMSA in the early 1970's, and by 1977 was the number eight firm with 5.1 percent of the market. (IDF 138 and 141.) Winn-Dixie entered sometime after Safeway (though it is unclear from the record what its market position in this SMSA was at the time of the acquisition). (IDF 140.) In addition, the ALJ found there had been recent expansion by A & P, Farm Fresh, and Food Fair. (IDF 138.) Thus, despite the opinion of complaint counsel's expert that barriers to entering this SMSA were "moderate to high" (Tr. 2317.), the extent of recent entry and expansion indicates the contrary.

We find that, as in the Newport News/Hampton market, the recent

⁹⁷ See *British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1348, 1357 n. 18 (1975) (rapidly growing firm with 5.6 percent target market share and financial backing to become national producer not regarded as permissible toehold), *rev'd and remanded on other grounds sub nom., BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977). Cf. FTC Merger Statement, note 9 above, at p. 79 (relevant factor in horizontal merger analysis is whether acquired firm is "disruptive force" in industry, though this factor has greater weight in highly concentrated markets).

market performance of Farm Fresh and Safeway in this SMSA is sufficient to rebut the weak legal presumption of non-competitiveness raised by the relatively low concentration level. We further find that this same evidence refutes any conclusion that Grand Union's entry through alternative means would create a substantial likelihood of deconcentration or increased procompetitive effects beyond those likely to flow from the recent performance of Safeway and Farm Fresh in this SMSA.

3. Richmond

As of 1977, Colonial was the fourth largest firm in the Richmond SMSA, with a 6.5 percent share of the market, down from its 1972 share of 7.7 percent. (IDF 119; and TABLE 1.) In addition to this falling market share, there are other indications that [70] Colonial was a declining factor in this market. A Colonial official testified that in the 1970's Richmond was not a profitable area for Colonial, that it had failed to modernize and renovate existing stores, and that some of its older stores operated in less desirable locations. (Tr. 2555; and IDF 127.) Moreover, Colonial had not opened a store in Richmond since 1972. (IDF 127.) On the basis of this record evidence, we find that Colonial was a lawful toehold acquisition for Grand Union.⁹⁸

Complaint counsel suggest several alternative acquisitions that would be permissible toeholds for Grand Union in Richmond. We are puzzled as to why this list does *not* include Colonial, the number four (and declining) firm with 6.5 percent of the market, when it *does* include the independent Ukrops, the third largest (and rapidly growing) firm with almost 12 percent of the market. (IDF 126.) The exact opposite conclusion seems more logical.⁹⁹

In addition, other evidence of the Richmond SMSA's economic performance establishes it to be a fairly competitive market in which invocation of the actual potential entrant theory would be inappropriate. First, we note that the 1977 C₄ ratio of 53.2—while up from the 1972 level of 45.2 (TABLE 1.)—raises only a weak presumption of poor economic performance. Despite this increase in the C₄ measure, there has been a significant change in positions among the top four firms. While the market leader, Safeway, remained at approximately 22 percent over the 1972–1977 period, the number two firm (A & P) gained three percentage points, and Colonial dropped from third to fourth position. The most significant change, however, was the rapid growth of Ukrops, a local independent. The number five firm at 6 percent in 1972, Ukrops almost doubled its share to 11.9 percent in 1977, moving into third position in the market. (IDF 119; and TABLE

⁹⁸ See note 90 above, and accompanying text.

⁹⁹ See note 97 above, and accompanying text.

1.) Food Fair dropped out of the top four altogether. (IDF 119.) In addition to [71] this repositioning among the top firms, we also find it significant that the ALJ identified a total of 16 different competitors in this one SMSA alone. (*Id.*)

The shift in positions among the top four firms was also accompanied by a significant amount of recent entry. Winn-Dixie entered this SMSA with one store in the early 1970's and operated three stores by 1980. (IDF 123.) Kings (Lynchburg, Virginia) entered in the 1970's with two stores, although only one remains. (IDF 122.) Lucky Stores of California entered in 1973 with its "Gemco" discount stores by acquiring two stores from Farm Fresh. (*Id.*) Farm Fresh not only remained in the market following those sales (IDF 119.), but at trial viewed itself as likely to expand there in the future. (IDF 123.) While the ALJ found some indications that Giant (at 4.5 percent of the market in 1977) may withdraw from this SMSA (IDF 122.), complaint counsel's expert identified Kroger—an aggressive competitor in other markets¹⁰⁰—as a likely potential entrant into Richmond. (Tr. 2306; and IDF 123.)

We also note that there is evidence calling into question whether Grand Union even had a present *interest* in entering this specific market, a precondition to application of the actual potential entrant theory.¹⁰¹ Prior to its own acquisition by Cavenham in 1975, Grand Union Company considered expansion into Richmond (as well as into Newport News and other Colonial markets in Virginia) via joint venture. (IDF 125.) This plan proved unsuccessful. (*Id.*) Other evidence of interest in entering Richmond is mixed, with several proposed entry plans *cancelled* by the new Cavenham management. (IDF 125.) Internal Grand Union documents prepared subsequent to the Cavenham acquisition (but prior to the decision to acquire Colonial) do *not* include Richmond—or any other Virginia market—as a target for new entry. (*Id.*; and CX-143A, CX-126A, CX-131A, and CX-80Z-21,55.) Thus, while the "interest" prerequisite to a potential [72] competition violation in the Richmond market may have been present *before* Grand Union Company was acquired by Cavenham, the result thereafter is far from certain.

We conclude once again that, even had Colonial not been a lawful toehold, the performance of the Richmond SMSA—including evidence of substantial entry and repositioning—has been sufficiently competitive to rebut the weak "non-competitive" evidentiary presumption raised by the C₄ measure. We also find that the evidence of recent entry and expansion calls into serious question whether the

¹⁰⁰ See Part IV(A) above.

¹⁰¹ See Part III(B), above.

number of likely potential entrants is sufficiently limited to satisfy the preconditions of the actual potential entrant theory.

E. *The Florida Markets*

1. Jacksonville

As of 1977, Colonial was the number four firm in the Jacksonville SMSA, with a market share of 6.4 percent, up from 5.8 percent in 1972. (IDF 151; and TABLE 1.) Despite this number four position, Colonial was clearly not a leading firm. Its market share was about one-fourth that of the largest firm, Winn-Dixie. (IDF 151.) Moreover, the ALJ found that Colonial had sustained losses in the Jacksonville SMSA virtually every year from 1960 to 1977. (IDF 152.)¹⁰² On the basis of a market share well below our 10 percent threshold and Colonial's competitive weakness, we find no reason to reject the presumption that Colonial was a lawful toehold acquisition.¹⁰³

In addition to Colonial's modest rise from number five to number four position between 1972 and 1977, there was considerable movement among most of the other top eight firms in this SMSA. Although market leader Winn-Dixie remained number one with [73] a stable market share of about 25 percent, Publix grew rapidly. Its share more than doubled from 6.6 percent to 15.4 percent, moving from fourth to third place. (IDF 151.) Food Fair and A & P sustained losses in market share of 4.6 and 2.8 percent, respectively, over this period. (*Id.*)

The 1977 C₄ ratio of 64.8 percent raises a moderate legal presumption of a noncompetitive market. (TABLE 1.) Also, complaint counsel's expert testified that entry barriers in this SMSA were high. (Tr. 2366.) Despite this, the record shows that at least three significant firms entered Jacksonville within the last 10 years. (Two entered within three years prior to the challenged acquisition.) First, Albertson's entered with two stores in about 1975, expanded with two more stores in 1978, and claimed an estimated seven percent market share by 1980. (IDF 154.) Second, Jewel opened its first two Jewel T box stores in 1977, and by the end of 1979 had established 15 stores. (*Id.*) (It is significant that the ALJ found that Colonial reacted to this Jewel T entry by adding generic products to enable it to compete with Jewel T's prices on staple items. (*Id.*) This finding provides further support for our inclusion of box stores in the same product market as super-markets.)

We also note the evidence cited by the ALJ as indicating that

¹⁰² Cf. *FTC v. National Tea Co.*, 603 F.2d 694, 699, 701 (8th Cir. 1979) (in preliminary injunction suit challenging horizontal merger between retail grocery store chains, appropriate to consider acquiring firm's status as weak competitor in relevant market, including its failure to operate profitably), *consent order issued, National Tea Co., et al.*, 96 F.T.C. 42 (1980).

¹⁰³ See note 90 above, and accompanying text.

Colonial may be a more aggressive price competitor in general than before its acquisition by Grand Union. (IDF 159.) Much of this evidence is post-acquisition and consists of testimony by respondents' officials. It is therefore not entitled to great weight. However, some aspects of this testimony are supported by independent evidence (see, e.g., CX-611-D.), and we weigh its credibility accordingly.

Third, Publix re-entered this market within the 10 years prior to trial, by 1977 had captured 15.4 percent of the market, and was found by the ALJ to be likely to expand further. (IDF 157-58.) In addition to this significant entry by three substantial chains, the ALJ also identified Great Scott of Florida as a potential entrant (IDF 158.), cited testimony of several industry officials who viewed Kroger as a likely potential entrant, [74] and identified numerous other firms who "may be considered potential entrants." (*Id.*)

Finally, we note that some evidence casts doubt on whether Grand Union had either the financial incentive or the interest to enter the Jacksonville market. Jacksonville was not a prosperous area (*Id.*) and, as previously noted, Colonial had lost money there consistently. (IDF 152.) Also, Grand Union's "Florida West Coast Development Plan, 1976-1980" does not mention Jacksonville (or Orlando or Gainesville) among the areas where new stores were planned. (CX-71.)

In addition to finding that Colonial was a toehold in Jacksonville, we conclude on the basis of the rapid growth of several of the top eight firms, the repositioning among them, the significant degree of entry and expansion, and the competitive reaction of Colonial to Jewel T's entry, that respondents have successfully rebutted the *prima facie* case of a less-than competitive market. We find also that more than a few likely potential entrants existed, and that complaint counsel failed to show Grand Union's economic incentive and interest in entering this SMSA.

2. Orlando

Little discussion is merited for complaint counsel's assertion, and the ALJ's finding, that Grand Union's acquisition of Colonial operations in this market violated Section 7. In both 1972 and 1977, Colonial possessed less than two percent of the market. (TABLE 1; and IDF 161.) As the Commission noted in *Heublein*, this is itself sufficient to establish Colonial as a lawful toehold acquisition for Grand Union.¹⁰⁴ In addition, Colonial had suffered substantial recent losses (IDF 162 and 167.), and in neither 1972 nor 1977 was Colonial even among the top eight firms in this SMSA. (IDF 161.) We note also the recent entry by Albertson's (which the ALJ found led to a decrease in prices in the

¹⁰⁴ *Heublein, Inc.*, 96 F.T.C. 385, 587 (1980). See also *Budd Company*, 86 F.T.C. 518, 582 (1975); and note 90 above, and accompanying text.

market) and Jewel T (whose prices were lower than those of even two discounter-independents). (IDF 161 and 164.) This combines with other [75] evidence to make a Section 7 violation in this SMSA doubtful even had Colonial not been a lawful toehold.

3. Gainesville

Both the underlying evidence and our conclusion are similar for this SMSA to those for Orlando. Colonial was clearly a small, declining firm in this SMSA. By 1977 it was the number seven firm with only a 2.7 percent market share, down from its 1972 share of 5.7 percent, when it was the fourth largest firm. (IDF 172.) As in Jacksonville and Orlando, Colonial consistently sustained losses in this market prior to the acquisition. (IDF 173.) We conclude that Colonial was a lawful toehold acquisition for Grand Union in this alleged market.¹⁰⁵ Once again, we note that such factors as recent entry by Albertson's and Jewel T make it questionable whether a Section 7 violation could be established in this SMSA in any event.

F. Summary of Findings in the Individual Markets

Here we recap briefly our findings in applying the elements of the actual potential competition theory to the 13 alleged markets. As noted in Part III(A), above, we assume that the four-firm concentration ratios contained in TABLE 1 raise a rebuttable evidentiary presumption that each of the 13 SMSAs is an appropriate candidate for application of the actual potential competition theory. However, we note that in at least five of those alleged markets¹⁰⁶ it is a close question as to whether such a presumption should be recognized. We find that in these and at least three other SMSAs¹⁰⁷ the C_4 ratios raise at best only a relatively weak legal presumption of less-than-competitive [76] performance. We find also that in three¹⁰⁸ of the eight SMSA markets in these two categories, the level of concentration actually declined during the 1972-1977 period upon which the record evidence focused.

We conclude that as to each alleged market, the record contains sufficient evidence to rebut successfully the C_4 -based evidentiary presumption. Although Colonial appears to have been among the leading firms in seven of the markets,¹⁰⁹ it was a declining factor in at least

¹⁰⁵ See note 90 above, and accompanying text.

¹⁰⁶ Augusta (C_4 = 55.2 percent), Charlotte/Gastonia (54.9 percent), Newport News/Hampton (49.1 percent), Norfolk/Virginia Beach (53.1 percent), and Richmond (53.2 percent).

¹⁰⁷ Atlanta (C_4 = 62.9 percent), Raleigh (62.1 percent), and Orlando (60.1 percent).

¹⁰⁸ Raleigh (C_4 down 1.7 percentage points), Newport News/Hampton (down 7.6 points), and Orlando (down 5.6 points).

¹⁰⁹ Atlanta, Augusta, Macon, Raleigh, Durham, Newport News/Hampton, and Norfolk/Virginia Beach.

five markets¹¹⁰ and was in fact a lawful toehold acquisition in at least six markets¹¹¹ and perhaps in a seventh SMSA as well.¹¹² Moreover, we find that the record evidence demonstrates relatively aggressive jockeying for market share in at least seven of the markets at issue.¹¹³ In six of the 13 SMSAs the record establishes the presence of one or more existing competitors (other than the acquired firm) of special competitive significance.¹¹⁴ Moreover, in at least one market¹¹⁵ we find it possible that respondents' acquisition of Colonial may have actually enhanced competition. [77]

In addition, the record establishes substantial recent entry in at least 10¹¹⁶ of the 13 markets. With at most three exceptions,¹¹⁷ we find this degree of actual recent entry is itself sufficient to establish that barriers to entering these 10 markets are sufficiently low to preclude liability under the potential competition theory. We also find that in several of the SMSA markets¹¹⁸ the record reflects significant recent expansion by existing competitors. Moreover, we specifically find that the number of potential entrants is itself sufficient to preclude Section 7 liability under the actual potential competition theory in at least four SMSAs,¹¹⁹ and we note that this number is arguably sufficient in one other SMSA.¹²⁰ Finally, we find that in at least three SMSAs¹²¹ and possibly a fourth¹²² it is probable that Grand Union lacked sufficient economic interest in entering the target market to support a finding of Section 7 liability.

It is clear from these findings that—even assuming all of the markets at issue are sufficiently concentrated to invoke the potential competition theory—complaint counsel have failed to establish all of the theory's requisite elements in any of the 13 alleged SMSA markets. Accordingly, we must dismiss the complaint. [78]

V. PROCEDURAL ISSUES—SANCTIONS

Respondents assign as error the ALJ's failure to impose sanctions under Rule 3.38 of the Commission's Rules of Practice and Procedure for complaint counsel's alleged withholding of relevant information

¹¹⁰ Macon, Charlotte/Gastonia, Greenville, Richmond, and Gainesville.

¹¹¹ Charlotte/Gastonia, Greenville, Richmond, Jacksonville, Orlando, and Gainesville.

¹¹² Macon.

¹¹³ Atlanta, Augusta, Durham, Charlotte/Gastonia, Newport News/Hampton, Richmond, and Jacksonville.

¹¹⁴ Atlanta (Kroger), Augusta (Kroger), Macon (Kroger), Charlotte/Gastonia (Three Guys and Food Town), Newport News/Hampton (Farm Fresh and Safeway), and Norfolk/Virginia Beach (Farm Fresh and Safeway).

¹¹⁵ Macon.

¹¹⁶ Atlanta, Augusta, Macon, Raleigh, Durham, Greenville, Richmond, Jacksonville, Orlando, and Gainesville.

¹¹⁷ Augusta, Orlando, and Gainesville.

¹¹⁸ For example, Augusta, Norfolk/Virginia Beach, and Jacksonville.

¹¹⁹ Raleigh (four other potential entrants plus 15 other firms within "striking distance"), Durham (three other potential entrants; 15 others within striking distance), Jacksonville (five potential entrants; at least five others within striking distance), and Greenville (three potential entrants; others within striking distance).

¹²⁰ Augusta (three firms perceived as potential entrants).

¹²¹ Jacksonville, Orlando, and Gainesville.

¹²² Richmond.

requested by respondents. (RAB 54–59.) Given our decision on the merits, this procedural question is moot, but we nevertheless address the subject of sanctions for purposes of guidance. Under Rule 3.38, unjustified failure to comply with a subpoena or an order may subject a party to an array of sanctions, including an order that matters sought to be discovered will be taken as inferred or established, a preclusion order, the striking of the pleadings, the right to introduce secondary evidence without objection, and such other orders as are just.¹²³ [79]

Respondents moved under Rule 3.38(b)(2) for an adverse finding that there is no relationship between concentration and competition in the food retailing industry, a finding that would undermine complaint counsel's evidence on a key element of the alleged offense.¹²⁴ They based this motion on a claim that documents were withheld "if not deliberately [then] by the 'unsystematic and nonchalant response' of both complaint counsel and their expert witnesses." (ID 195; and RPF 137.)

Complaint counsel argued below that the factual grounds for respondents' request were unfounded, and that all data not subject to a specific congressional command prohibiting disclosure were supplied. (IDF 201.) The ALJ denied the request for sanctions and ruled there was no clear disregard for the Commission's discovery processes by either complaint counsel or the witnesses. (*Id.*) The ALJ recognized there was "substantial delay in furnishing information to respondents, [but that it] was occasioned by misunderstandings concerning the type of data sought." (*Id.*)

We agree with the ALJ's finding. The documents at issue consist of data used in a study conducted in 1977 by one of complaint counsel's

¹²³ Commission Rule of Practice 3.38(b) provides:

If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions; or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

- (1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;
- (2) Rule that for the purpose of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
- (3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;
- (4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;
- (5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

¹²⁴ 16 C.F.R. 3.38(b) (1976).

¹²⁴ See Part III(A), above.

expert witnesses, Dr. Marion, and others for the Joint Economic Committee of Congress ("JEC"). (*Id.*) During discovery, complaint counsel informed respondents that their expert would testify concerning the research underlying the "JEC Report" that was co-authored by Dr. Marion. Respondents received a copy of the JEC Report and certain drafts of a book updating the Report (the "Praeger book"). (Respondents' Physical Exhibit C.) When respondents requested the underlying raw data, complaint counsel—based on Dr. Marion's assertions—informed them that the data were confidential pursuant to an agreement of confidentiality Dr. Marion signed with the JEC, and that in any event Dr. Marion had returned all the [80] requested data to the JEC. At respondents' request, the ALJ issued a subpoena *duces tecum* to the JEC's Director to compel production of the data. That subpoena was stayed by the Commission *sua sponte*, and was subsequently quashed by the Commission on grounds of congressional immunity.¹²⁵

After testifying, Dr. Marion discovered that he had custody of additional data used in the JEC Report. This discovery was relayed to complaint counsel and respondents, and shortly thereafter these data, in the form of regression runs, were turned over to respondents. (IDF 201; and Tr. 3484.) At the same time, Dr. Marion learned that the confidential raw data from the JEC Report were also obtainable through the computer at the university with which he was affiliated. He did not reveal this discovery to either complaint counsel or respondents until recalled to the witness stand. When asked by respondents to produce these raw data he declined on the basis of his confidentiality agreement with JEC. (Tr. 3627.)

On this appeal, complaint counsel also argue that a Rule 3.38 order would be inappropriate because there was no outstanding subpoena or discovery order to disobey. (CAB 65–67.) The only subpoena relating to the JEC Report materials was quashed. Furthermore, it was not directed to complaint counsel or Dr. Marion. Arguably, Judge Barnes' "direction" to Dr. Marion instructing the witness to "make the documents available" (Tr. 3500.) could be characterized as an "order" for purposes of Rule 3.38. However, because Dr. Marion promptly provided the responsive material, Rule 3.38 sanctions would have been inappropriate as to that directive. We find the language of Rule 3.38 clear and unambiguous, and hold that before Rule 3.38 sanctions may be imposed, production of the requested material must first be mandated by a subpoena or a specific discovery order issued by the ALJ or the Commission and directed at the party (or its officer or agent) from whom the material is sought. [81]

Even if Dr. Marion had failed to comply with the ALJ's directive,

¹²⁵ *Grand Union Co.*, 95 F.T.C. 926 (Interlocutory Order 1980).

sanctions should not be invoked against complaint counsel. The language of Rule 3.38 makes clear that sanctions may be imposed only upon a party, or an officer or agent of a party. In most cases a witness is not an agent or officer of a party. Where the circumstances of a witness' failure to provide material suggest conclusion between the witness and a party, they should be treated as one entity and sanctions may be properly imposed. Here, the record indicates no impropriety whatever on the part of complaint counsel. To the contrary, it shows they made a good faith effort to disclose to respondents all requested data as they became aware of it.

Assuming that a party fails to produce evidence in response to a subpoena or specific discovery order, the explanation for such failure is crucial in determining whether to invoke the sanctions. Rule 3.38 is designed both to prohibit a party from resting on its own concealment and to maintain the integrity of the administrative process.¹²⁶ Therefore, sanctions are appropriate only where the party's failure to comply is unjustified.¹²⁷ In those Commission cases where sanctions were imposed, the refusal to comply with a subpoena or order was deemed to be willful¹²⁸ or the explanation was inadequate.¹²⁹ The record here reveals no willful withholding of [82] evidence and complaint counsel's explanation is satisfactory.

Where sanctions are appropriate, the ALJ should seek to ensure that the sanction imposed is reasonable in light of the material withheld and the purposes of Rule 3.38(b). Had sanctions been warranted in the context of this case, the adverse ruling requested by respondents would have overcompensated for the unavailability of the data. An adverse ruling is a severe sanction to be imposed only in extraordi-

¹²⁶ *Market Development Co.*, 95 F.T.C. 100, 226 (1980).

¹²⁷ *Evis Manufacturing Co. v. FTC*, 287 F.2d 831, 847 (9th Cir.), cert. denied, 386 U.S. 824 (1961).

¹²⁸ *Verrazzano Trading Co.*, F.T.C. Dkt. No. 9038 (sanctions imposed after unexplained and deliberate failure to produce documents in response to subpoena *duces tecum*) (Application for Sanctions Under Rule 3.38 for Failure of Respondents to Make Discovery As Ordered) (November 23, 1976); *Western Novelty Co.*, F.T.C. Dkt. No. 8967 (after deliberate and unexplained failure to comply with order for subpoena return, ALJ invoked Rule 3.38(b)(2) adverse rulings sanction) (Order Ruling on Complaint Counsel's Motion for Either (1) A Decision of the Proceeding; (2) Adverse Rulings and Summary Decision; or (3) Adverse Rulings and Partial Decision) (April 28, 1975).

¹²⁹ *E.g.*, *Market Development Co.*, 95 F.T.C. 100 (1980) (sanctions of adverse findings, preclusion of testimony and documents responsive to subpoena at trial, imposed on respondent refusing to be deposed and failing to appear in response to subpoena *ad testificandum*; that proffered testimony might be used in later criminal proceedings did not justify failure to comply because respondent could have relied on Fifth Amendment privilege against self-incrimination); and *Amrep Corp.*, F.T.C. Dkt. No. 9018 (respondents' assertion that subpoenaed material had to be manually retrieved from 50,000 files found by ALJ to be inadequate explanation for not producing subpoenaed material; ALJ ordered inference that withheld evidence would have been adverse to respondents) (Ruling Re Alleged Deficiencies in Respondent's Compliance with Complaint Counsel's Subpoena *Duces Tecum*) (April 21, 1976).

In *American Medical Ass'n*, 94 F.T.C. 701 (1979), *aff'd*, *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam without opinion*, 455 U.S. 676 (1982), *reh. denied*, 456 U.S. 966 (1982), respondents failed to comply with a subpoena *duces tecum* based on their contemplated challenge of the jurisdictional basis of the subpoena. The Commission found that success of the challenge was unlikely and that respondents had complied with all other subpoenas save the one directed at their principal defense. 94 F.T.C. at 1028. More likely, the Commission found, "the evidence sought would have been unfavorable to its case." *Ibid*. The Commission therefore affirmed the adverse inference sanction imposed by the ALJ.

nary circumstances. A more appropriate sanction would likely have been an order to strike all or part of Dr. Marion's testimony, or an order precluding admission of the Praeger book. For further guidance in assessing the proper type of sanction, the ALJ may look to precedent under Federal Rule of Civil Procedure 37(b)(2), which is substantially similar in both purpose and language to Rule 3.38(b).¹³⁰

Finally, concerning an unrelated procedural issue, because of the Commission's disposition of this matter, Grand Union is hereby released from the provisions of its November 29, 1978 hold separate agreement with Commission staff, as modified.

CONCURRING STATEMENT OF COMMISSIONER PERTSCHUK

I concur with the decision to dismiss the complaint in this matter, but I disagree with some of the reasoning in the Commission's opinion. In my view, the opinion overstates the case in asserting that retail food markets in the metropolitan areas at issue are in vigorous competitive health even though their four firm concentration ratios significantly exceed 50% in almost all the cities examined.¹ The opinion would sedate us by saying, in effect, that only a modicum of evidence is necessary to rebut the presumption that a market is not structured competitively when it is moderately concentrated. It then proceeds to find such evidence based on entry in the last few years, typically on limited scale, and on some change in market shares among the top five or six firms. The opinion takes comfort in concluding that entry barriers to retail food markets are low, not only in the metropolitan areas under examination, but perhaps "in general." (p. 49)

I do not believe that many of the metropolitan markets that Grand Union entered through its acquisition of Colonial are models of competitive vigor. Nor do I view entry into supermarket retailing—particularly on a significant scale—[2] to be so barrier free that concentration through merger is benign, a proposition that the opinion comes just short of endorsing. Single-store entry "success stories" (p. 48) and expansion by one or more firms already in the market do not insure the overall competitive performance of supermarket retailing in particular metropolitan areas. Finally, I do not agree that the product market in retail food mergers must include "all retail grocery stores" as does the Commission's opinion. The ALJ had found a market, at least a submarket, based on supermarkets above a certain size. Although there is a certain arbitrariness in any cutoff point, the ALJ

¹³⁰ See generally 4A J. Moore, Federal Practice ¶37.03 (2d ed. 1948).

¹ See table 1, p. 37. Four firm concentration ratios range from 49% to just over 72%, even with the "all grocery store sales" market adopted by the majority.

made a reasonable one and I would accept it. The record, as well as common sense, tells us that effective competition for weekly food purchases occurs among large supermarkets and it can be assessed separately from convenience stores.

The real problem with this case is not the dubious claim that all the markets at issue were competitively healthy, but that the evidence of alternative, feasible entry that Grand Union would likely have pursued, absent the acquisition, is quite ambiguous.² The record clearly suggests that Grand Union was interested in acquiring a chain that operated in several southeastern markets. Some candidates were smaller than Colonial, but presented the same possible antitrust problems that [3] Colonial raised because they were market leaders or near-leaders in some southeastern SMSA's. On the other hand, Colonial was a legitimate toehold candidate in some of the cities which were the focus of complaint counsel's case. In short, we would have to assume that there were likely alternatives for Grand Union but which could not be subject to the same type of challenge raised here. While it is certainly conceivable that such alternative means of entry could exist in the case of multi-market acquisition, the record is too weak on that score to condemn the merger.³

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondents from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain respondents' appeal. Accordingly,

It is ordered, That the complaint is dismissed.

² The only count of the complaint that remains on appeal is the allegation that Grand Union is an actual potential entrant into some of the relevant metropolitan markets. The complaint's allegation that Grand Union chose the most anticompetitive means of entering the *entire region* was dropped on appeal.

³ For example, while complaint counsel do make an argument that *de novo* entry was likely, this scenario, which includes construction of warehouses as well as new construction of stores, seems fairly speculative.

IN THE MATTER OF

MICHIGAN ASSOCIATION OF OSTEOPATHIC PHYSICIANS &
SURGEONS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-3112. Complaint, July 26, 1983—Decision, July 26, 1983

This consent order requires a Michigan professional association, among other things, to cease inhibiting competition by restricting or advising member physicians against the truthful advertising of fees and services, and by declaring such activities unethical. The association must timely repeal any provision of its Code of Ethics and policy statements which are inconsistent with the prohibitions contained in the order, and publish revised versions of these documents. However, the order does not prohibit the association from enforcing reasonable guidelines governing advertising or solicitation which it reasonably believes to be false or deceptive. The order further requires the association to mail to all present and future members a letter notifying them of the consent agreement and its provisions, and send to each of its component and affiliate societies a copy of the order.

Appearances

For the Commission: *Cynthia E. Smith* and *Eric L. Prahl*.

For the respondent: *Robert L. Weyhing, III, Clark, Klein & Beaumont*, Detroit, Mich.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, *as amended* (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Michigan Association of Osteopathic Physicians & Surgeons, Inc. ("MAOP&S") is a corporation formed pursuant to the laws of the State of Michigan, with its mailing address at 33100 Freedom Road, Farmington, Michigan.

PAR. 2. Respondent is a professional association formed to represent the interests of osteopathic physicians and surgeons who practice in Michigan. Respondent has approximately two thousand, one hundred