

IN THE MATTER OF

TELE-COMMUNICATIONS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3575. Complaint, May 3, 1995--Decision, May 3, 1995*

This consent order permits, among other things, Tele-Communications, Inc. ("TCI") to complete its acquisition of TeleCable, on the condition that it divest either its own Columbus cable TV assets, or those of TeleCable, within twelve months. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete a sale of one of the systems. In addition, TCI, for ten years, is required to obtain Commission approval before acquiring any cable TV system in the Columbus, GA., area.

Appearances

For the Commission: *Ronald B. Rowe and Jill M. Frumin.*

For the respondent: *Joe Sims, Jones, Day, Reavis & Pogue,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Tele-Communications, Inc. ("TCI"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire TeleCable Corporation ("TeleCable") 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 ("FTC Act"), as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the FTC Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. TCI

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

State of Delaware, with its principal executive offices located at 5619 DTC Parkway, Englewood, Colorado.

PAR. 2. Respondent TCI is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

II. TELECABLE

PAR.3. TeleCable is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Virginia, with its principal executive offices located at Dominion Tower, Suite 900, 999 Waterside Drive, Norfolk, Virginia.

PAR. 4. TeleCable is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

III. THE PROPOSED MERGER

PAR. 5. Respondent TCI entered into a merger agreement with TeleCable in which TCI and TeleCable will exchange voting securities and TeleCable shareholders will receive TCI common and preferred stock worth approximately one billion dollars ("the merger").

IV. THE RELEVANT MARKETS

PAR. 6. The relevant line of commerce in which to analyze the effects of the merger is the distribution of multichannel video programming by cable television.

PAR. 7. The relevant geographic area in which to analyze the effects of the merger is the Columbus, Georgia, area.

PAR. 8. The relevant line of commerce is highly concentrated with only three cable television providers in the relevant geographic area. TCI and TeleCable are the two largest cable television providers in the relevant geographic area in terms of the number of subscribers and the number of homes passed.

PAR. 9. Respondent TCI is an actual and potential competitor of TeleCable in the relevant line of commerce in the relevant geographic area.

PAR. 10. Timely and effective entry in the relevant line of commerce in the relevant geographic area is unlikely.

V. EFFECTS OF THE MERGER

PAR. 11. The effects of the merger may be substantially to lessen competition or to tend to create a monopoly in the relevant markets in the following ways, among others:

- a. Actual competition between TCI and TeleCable to serve existing residential neighborhoods, hotels, and apartment complexes will be eliminated;
- b. Actual competition between TCI and TeleCable to serve new residential neighborhoods, hotels, and apartment developments will be eliminated; and
- c. Actual and potential competition between TCI and TeleCable to extend their cable systems throughout the relevant geographic area will be eliminated.

VI. VIOLATIONS CHARGED

PAR. 12. The merger agreement described in paragraph five constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

PAR. 13. The merger described in paragraph five, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of the common stock of TeleCable Corporation by Tele-Communications, Inc., and the proposed merger of TeleCable Corporation into TCI Communications, Inc., an entity within Tele-Communications, Inc., hereinafter sometimes referred to as "respondent," and respondent,

having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violations of the Clayton Act and Federal Trade Commission Act;

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

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

1. Respondent Tele-Communications, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 5619 DTC Parkway, Englewood, Colorado.

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

ORDER

I.

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

A. "*Respondent*" or "*TCI*" means (1) Tele-Communications, Inc. and its predecessors, successors and assigns, subsidiaries, and

divisions, and their respective directors, officers, agents, and representatives; and (2) partnerships, joint ventures, groups and affiliates that Tele-Communications, Inc. controls, directly or indirectly, and their successors and assigns, and their respective directors, officers, agents, and representatives.

B. "*Control*" means (i) the ability or right, contractual or otherwise, to direct the management decisions of an entity, or (ii) an ownership interest of 50% or greater unless a person or entity other than respondent has the right to direct the management decisions of such entity.

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

D. "*Columbus Cable Television System Assets*" means either TCI's Cable Television System or TeleCable's Cable Television System now operating in Muscogee and Harris Counties, Georgia, including all properties, privileges, rights, interests and claims, real and personal, tangible and intangible, of every type and description that are owned, leased, held or used principally in the provision of Cable Television Service in Muscogee and Harris Counties, including the governmental permits, franchises, intangibles, equipment and real property.

E. "*Designated Columbus Cable Television System*" means the Cable Television System chosen by TCI pursuant to paragraph III B. 2. or if TCI fails to designate a Cable Television System pursuant to, and within the time limits of, paragraph III B. 2., the Columbus Cable Television System Assets.

F. "*Cable Television Service*" means the delivery of various video entertainment and informational programming via a cable television system.

G. "*Cable Television System*" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service, which includes video programming and which is provided to multiple subscribers within a community.

H. "*The Relevant Geographic Area*" means the counties of Muscogee and Harris in the State of Georgia.

I. "*Competitiveness, viability and marketability*" of the Columbus Cable Television System Assets means the respondent shall continue the operation of TCI's and TeleCable's Cable Television Systems in the ordinary course of business without material change or alteration that would adversely affect the value or goodwill of such Cable

Television Systems and the Columbus Cable Television System Assets.

II.

It is further ordered, That:

A. Respondent shall divest, absolutely and in good faith, within twelve months of the date this order becomes final, one of the Cable Television Systems constituting the Columbus Cable Television System Assets. Respondent shall also divest such additional ancillary assets and businesses and effect such arrangements as are necessary to assure the competitiveness, viability and marketability of the Columbus Cable Television System Assets. Respondent shall undertake its best efforts to facilitate any governmental approvals required to effect divestiture of the Columbus Cable Television System Assets and their continued use in Cable Television Service in the Relevant Geographic Area. To ensure the availability of programming to the divested Columbus Cable Television System Assets, respondent shall waive any exclusive rights to distribute programming by means of Cable Television Systems in the Relevant Geographic Area.

B. Respondent shall divest the Columbus Cable Television System Assets only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Columbus Cable Television System Assets is to ensure the continued use of the Columbus Cable Television System Assets as an ongoing, viable deliverer of Cable Television Service in the Relevant Geographic Area, and to remedy the lessening of competition resulting from the proposed acquisition of TeleCable Corporation by TCI as alleged in the Commission's complaint.

C. Pending divestiture of the Columbus Cable Television System Assets, respondent shall take such actions as are necessary to maintain the competitiveness, viability and marketability of the Columbus Cable Television System Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Columbus Cable Television System Assets except for ordinary wear and tear.

III.

It is further ordered, That:

A. If TCI has not divested, absolutely and in good faith and with the Commission's prior approval, the Columbus Cable Television System Assets within twelve months of the date this order becomes final, the Commission may appoint a trustee to divest the Columbus Cable Television System Assets, provided, however, that if the Commission has not approved a proposed divestiture within 120 days of the date the application for such divestiture has been put on the public record, the running of the divestiture period shall be tolled until the Commission approves or disapproves the divestiture. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, TCI shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondent to comply with this order.

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

1. The Commission shall select the trustee, subject to the consent of respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures in the cable television industry. If respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to respondent of the identity of any proposed trustee, respondent shall be deemed to have consented to the selection of the proposed trustee.

2. Within ten (10) days after appointment of the trustee, respondent shall (1) execute a trust agreement that, subject to the

prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order; and (2) notify the trustee in writing whether TCI chooses to divest the TCI Columbus Cable Television System or the TeleCable Columbus Cable Television System; provided that if TCI fails to make this designation within the specified time period, the trustee is authorized to divest either the TCI or TeleCable Columbus Cable Television System.

3. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Designated Columbus Cable Television System Assets.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph III B. 2. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.

5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Designated Columbus Cable Television System Assets or to any other relevant information as the trustee may reasonably request. Respondent shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestitures. Any delays in divestiture caused by respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.

6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to respondent's absolute and unconditional obligation to divest at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraph II of this order; provided, however, if the trustee receives *bona fide* offers from more than one acquiring entity, and if the Commission determines to approve more than one

such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondent from among those approved by the Commission.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Designated Columbus Cable Television System Assets.

8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

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

10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Designated Columbus Cable Television System Assets.

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

IV.

It is further ordered, That respondent shall comply with all terms of the Hold Separate Agreement, attached to this order and made a part hereof as Appendix I. The Hold Separate Agreement shall continue in effect until such time as the Columbus Cable Television System Assets shall have been divested as required by this order.

V.

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

A. Acquire any stock, share capital, equity, or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition engaged in Cable Television Service within the Relevant Geographic Area; or

B. Acquire any assets used for or previously used for (and still suitable for use for) Cable Television Service within the Relevant Geographic Area.

Provided, however, that this paragraph V shall not apply to the acquisition of products or services in the ordinary course of business; and provided further, that this paragraph V shall not apply to the acquisition of any interest in a concern that is not at the time of the acquisition engaged in Cable Television Service within the Relevant Geographic Area due to the sale within the preceding two years of all assets used for Cable Television Service within the Relevant Geographic Area to another party who intended to operate said assets for Cable Television Service within the Relevant Geographic Area.

VI.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the provisions of paragraphs II and III of this order,

respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with paragraphs II and III of this order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with paragraphs II and III of the order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

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

VII.

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

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondent, respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or

under the control of respondent relating to any matters contained in this order; and

B. Upon five days' notice to respondent and without restraint or interference from it, to interview officers, directors, or employees of respondent, who may have counsel present, relating to any matters contained in this order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement To Hold Separate ("Agreement") is by and between Tele-Communications, Inc. ("respondent" or "TCI"), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 5619 DTC Parkway, Englewood, Colorado; and the Federal Trade Commission ("Commission"), an independent agency of the United States Government, established under the Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.*

Whereas, respondent entered into an agreement with TeleCable Corporation ("TeleCable"), a Virginia corporation, whereby respondent will acquire the stock of TeleCable and merge TeleCable into TCI Communications, Inc., an entity within TCI (hereinafter the "Acquisition"); and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the Agreement Containing Consent Order ("Consent Agreement"), which would require the divestiture of either the TCI or TeleCable Cable Television System Assets in Columbus, Georgia, the Commission must place the Consent Agreement on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission's Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the TeleCable Columbus Cable Television System Assets during the period prior to the final acceptance and issuance of the Consent Agreement by the Commission (after the 60-day public comment period), divestiture resulting from any proceeding challenging the legality of the

Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission's ability to require the divestiture of the assets described in paragraph II of the Consent Agreement and the Commission's right to have the TeleCable Columbus Cable Television System Assets continue as a viable independent entity; and

Whereas, the purpose of this Agreement and the Consent Agreement is to:

(i) Preserve the TeleCable Columbus Cable Television System Assets as a viable independent cable television system pending possible divestiture, and

(ii) Remedy any anticompetitive effects of the acquisition; and

Whereas, respondent's entering into this agreement shall in no way be construed as an admission by respondent that the acquisition is illegal; and

Whereas, respondent understands that no act or transaction contemplated by this agreement shall be deemed immune or exempt from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent agreement, it will not seek further relief from respondent with respect to the acquisition, except that the Commission may exercise any and all rights to enforce this agreement and the Consent Agreement to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to appoint a trustee to seek divestiture pursuant to the Consent Agreement and to seek civil penalties or a court-appointed trustee or other equitable relief, as follows:

1. Respondent agrees to execute and be bound by the attached Consent Agreement.

2. Respondent agrees that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a -

2.b, it will comply with the provisions of paragraph three of this agreement:

a. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Section 2.34 of the Commission's Rules; or

b. The day after the divestiture required by the Consent Agreement has been completed.

3. To ensure the independence and viability of the TeleCable Columbus Cable Television System Assets and to assure that no competitive information is exchanged between the TeleCable Columbus Cable Television System and the TCI Columbus Cable Television System, TCI shall operate the TeleCable Columbus Cable Television System separate and apart on the following terms and conditions:

a. To the maximum extent possible, TCI will retain current TeleCable Columbus Cable Television System management and employees ("the management team") to manage and maintain the TeleCable Columbus Cable Television System. The individuals on the management team shall manage the TeleCable Columbus Cable Television System independently of the management of TCI's other businesses, including the TCI Columbus Cable Television System. The individuals on the management team shall not be involved in any way in the operation or management of any other TCI Cable Television System. If any member of the management team is unable or unwilling to continue to serve in his or her current position (or becomes unable to do so during the term of this Agreement) that position will be filled by an individual not involved in any way in the operation or management of any other TCI Cable Television System.

b. The management team, in its capacity as such, shall report directly and exclusively to an individual to be designated by TCI who has no direct responsibilities for Cable Television System operations and who is competent to assure the continued viability and competitiveness of the TeleCable Columbus Cable Television System ("TCI Contact").

c. TCI shall not exercise direction or control over, or influence directly or indirectly the management team or any of its activities relating to the operations of the TeleCable Columbus Cable

Television System; provided, however, that TCI may exercise such direction and control over the management team and the TeleCable Columbus Cable Television System Assets as is necessary to ensure compliance with this Agreement and with the Consent Agreement and with all applicable laws.

d. TCI shall maintain the marketability, viability, and competitiveness of the TeleCable Columbus Cable Television System assets and shall not sell, transfer, encumber (other than in the ordinary course of business), or otherwise impair their marketability, viability or competitiveness.

e. Except for the TCI Contact and the management team, TCI shall not permit any other TCI employee, officer, or director to be involved in the management of the TeleCable Columbus Cable Television System; provided, however, that TCI employees involved in engineering, construction, customer service, data processing, training, human resources, finance, legal services, tax, accounting, insurance, internal audit, payroll, programming, purchasing, real estate, risk management, telephony, compliance with FCC regulations, contract administration, and similar services ("support service employees") may provide such services to the TeleCable Columbus Cable Television System.

f. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the acquisition, defending investigations or litigation, or negotiating agreements to divest, TCI, other than the TCI Contact, the management team and support service employees involved in the TeleCable Columbus Cable Television System business, shall not receive or have access to, or the use of any material confidential information about the TeleCable Columbus Cable Television System. ("Material Confidential information," as used herein, means competitively sensitive or proprietary information not otherwise known to TCI from sources other than the TCI Contact, the management team involved in the TeleCable Columbus Cable Television System, or the support service employees.)

g. The management team shall serve at the cost and expense of TCI. TCI shall indemnify the management team against any losses or claims of any kind that might arise out of his or her involvement under this Agreement, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the management team.

h. If any member of the management team ceases to act or fails to act diligently, a substitute member shall be appointed.

4. Should the Federal Trade Commission seek in any proceeding to compel respondent to divest any of the Columbus Cable Television System Assets, as provided in the Consent Agreement, or to seek any other injunctive or equitable relief for any failure to comply with the Consent Agreement or this Agreement, or in any way relating to the Acquisition, as defined in the draft complaint, respondent shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondent also waives all rights to contest the validity of this Agreement.

5. To the extent that this agreement requires respondent to take, or prohibits respondent from taking, certain actions that otherwise may be required or prohibited by contract, respondent shall abide by the terms of this Agreement or the Consent Agreement and shall not assert as a defense such contract requirements in any action brought by the Commission to enforce the terms of this Agreement or Consent Agreement.

6. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privileged, and upon written request with reasonable notice to respondent made to its principal office, respondent shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondent and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondent relating to compliance with this Agreement;

b. Upon five (5) days' notice to respondent, and without restraint or interference from respondent, to interview officers or employees of respondent, who may have counsel present, regarding any such matters.

7. This Agreement shall not be binding until approved by the Commission.