

IN THE MATTER OF

THE SCOTTS COMPANY

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-3613. Complaint, Sept. 8, 1995--Decision, Sept. 8, 1995

This consent order requires, among other things, Scotts, an Ohio-based corporation, to divest its Peters Consumer Water Soluble Fertilizer Business and related assets to Alljack & Company or another Commission-approved buyer by no later than December 31, 1995. If the divestiture is not completed on time, the consent order permits the Commission to appoint a trustee to complete the transaction. In addition, the Commission substituted a 10-year prior-notice provision for the 10-year prior-approval provision contained in the proposed consent agreement as it was published for public comment.

Appearances

For the Commission: *Howard Morse, Robert Cook and William Baer.*

For the respondent: *Jack Schafer, Covington & Burling,*
Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Scotts Company ("Scotts") has entered into an agreement and plan of merger with Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), whereby Scotts will acquire all of the outstanding voting securities of Miracle-Gro in exchange for voting securities of Scotts, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. THE RESPONDENT

1. Respondent Scotts is a corporation organized and existing under the laws of Ohio, with its principal place of business at 14111 Scottslawn Road, Marysville, Ohio. Scotts is a leading producer and marketer of consumer lawn care products. Its total revenues exceeded \$600 million in its fiscal year ended October 31, 1994.

2. At all times relevant herein, the respondent has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44; and at all times relevant herein, the respondent has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

II. THE PROPOSED MERGER

3. Miracle-Gro is a privately-held corporation organized and existing under the laws of New Jersey. Miracle-Gro is the leading marketer of water soluble fertilizer in the United States. Miracle-Gro earned profits of approximately \$30 million on sales in excess of \$100 million in 1994.

4. On or about January 26, 1995, Scotts and Miracle-Gro executed an Agreement and Plan of Merger, wherein Scotts and Miracle-Gro agreed that Scotts would acquire the voting securities of Miracle-Gro in exchange for voting securities of Scotts (the "Proposed Merger"). The transaction is valued at approximately \$200 million.

III. THE RELEVANT MARKET

5. Water soluble fertilizer for consumer use ("consumer water soluble fertilizer") is one relevant line of commerce within which to analyze the effect of the Proposed Merger on competition. Water soluble fertilizer is a crystalline powder, easily dissolved in water, which is composed principally of nitrogen, phosphorous, and potash. Water soluble fertilizer for consumer use is typically sold in packages of less than 20 pounds; the five pound package is the most popular size. Water soluble fertilizer is typically applied to houseplants, gardens, shrubs, and flowers using a watering can or a hose-end

sprayer. Water soluble fertilizer produces noticeable effects on plants within a few days but lasts only a few weeks.

6. Consumer water soluble fertilizer is highly differentiated through branding. Scotts markets consumer water soluble fertilizer under the Peters brand name. Miracle-Gro markets consumer water soluble fertilizer under the Miracle-Gro brand name.

7. Fertilizer is also sold in granular form. Granular fertilizer is typically applied by dropping it onto the soil or, in some cases, mixing it with the soil. It takes several weeks for granular fertilizer to produce noticeable effects on plants; however, granular fertilizer does not have to be reapplied for two months to a year after application.

8. Consumers are not likely to switch from water soluble fertilizer to granular fertilizer in response to price changes because of differences between the two types of product in terms of convenience, method of application, and performance characteristics. Meaningful price comparisons between the various types of fertilizer are difficult to make.

9. Specialty fertilizers (such as liquid fertilizers, plant spikes, and organic fertilizers) also differ in characteristics and uses from water soluble fertilizer. Consumers are not likely to switch from water soluble fertilizer to those products in response to a price increase.

10. Water soluble fertilizers sold for agricultural and commercial use are sold in substantially larger packages than consumer water soluble fertilizer and are not alternatives for consumers.

11. The United States is one relevant geographic area within which to analyze the likely effect of the Proposed Merger on competition. The ability of domestic marketers of consumer water soluble fertilizer to engage in anticompetitive behavior is not significantly affected by the possible diversion of product produced overseas into the United States.

IV. CONCENTRATION

12. Miracle-Gro is by far the best selling consumer water soluble fertilizer in the United States. Scotts' Peters product is the third best selling consumer water soluble fertilizer in the United States. Miracle-Gro accounts for more than 70 percent and Scotts' Peters brand accounts for approximately six to seven percent of consumer water soluble fertilizer sales in the United States.

13. The United States consumer water soluble fertilizer market is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The Proposed Merger would increase the HHI by approximately 900 points, from approximately 5,500 to approximately 6,400.

14. Even if the relevant market is expanded to include other types of consumer garden fertilizer, or even consumer fertilizers generally, the market is highly concentrated with Scotts and Miracle-Gro having a combined market share of more than 35 percent of sales.

V. ENTRY CONDITIONS

15. Entry into the United States consumer water soluble fertilizer market would not be timely, likely, or sufficient to deter or offset the possible adverse effects of the Proposed Merger on competition.

16. Consumers typically purchase water soluble fertilizer on the basis of brand name and do so, in part, because the misapplication or overapplication of fertilizer can destroy the plants that the fertilizer is to benefit. The brand name is a signal that the product will consistently perform as it is expected to perform.

17. Consumers who purchase water soluble fertilizer on the basis of brand name are reluctant to try an unknown brand, even in response to a price change. That reluctance is, in part, based on the possibility of killing plants if the fertilizer does not perform as it is expected to perform. The price of the fertilizer is small relative to the replacement cost of the plants to which it is applied.

18. To achieve sufficient scale to affect competition in the United States consumer water soluble fertilizer market, and to do so in a timely manner, an entrant would have to employ a "pull" marketing strategy. A pull marketing strategy uses advertising to create a brand reputation to generate a high level of consumer demand to pull the product through retail distribution.

19. A pull marketing strategy involves a substantial sunk investment in advertising. In addition, a pull marketing strategy also involves a high degree of risk, because there is no guarantee that the marketing effort will succeed. The high sunk cost and high degree of risk would discourage the use of a pull marketing strategy by potential entrants or potential fringe expanders. Miracle-Gro spends approximately \$25 million annually on national advertising. The cost

of entry to new entrants or fringe expanders is likely to be even greater than the cost of entry originally borne by existing competitors.

20. Entry using a "push" marketing strategy involves the use of point of purchase promotions to attract customers in the store, as well as the use of retailer incentives to encourage retailers to recommend the product to customers in the store. Entry using a push marketing strategy would not involve the high sunk cost or high degree of risk that is associated with a pull marketing strategy. However, entry using a push marketing strategy would require many years to achieve sufficient sales to significantly impact competition.

21. Even entry using a pull marketing strategy may require considerable time. Lawn and garden retailing, including fertilizer retailing, is a highly seasonal business in which most sales are made to consumers during the spring growing season. Products to be sold during the spring growing season typically must be presented to retailers during the preceding summer; orders for such products typically are taken during the fall; and delivery of such products typically is made during early winter. An entrant or fringe expander that fails to make significant sales during one year must wait until the next year to gain sales.

VI. EFFECT OF THE PROPOSED MERGER ON COMPETITION

22. Miracle-Gro already exercises market power in the consumer water soluble fertilizer market. Miracle-Gro refuses to negotiate its prices with retailers and earns substantial profits.

23. Miracle-Gro is the closest substitute for Scotts' Peters brand in the United States consumer water soluble fertilizer market. Consumers who purchase Scotts' Peters brand are more likely to switch to Miracle-Gro than to any other brand.

24. Scotts' marketing strategy for Peters included competing more aggressively with Miracle-Gro during 1995. That strategy included technical improvements to the Peters product, a reduction of the price of the Peters product, and the production of television commercials directly comparing Peters to Miracle-Gro.

25. The merger of Scotts and Miracle-Gro may substantially lessen competition or tend to create a monopoly in the United States consumer water soluble fertilizer market, because, among other things:

- a. It will increase concentration substantially in a highly concentrated market;
- b. It will eliminate actual, direct, substantial, and potentially increased competition between Scotts' Peters brand and Miracle-Gro;
- c. It will facilitate coordinated interaction among sellers of water soluble fertilizer for United States consumer use;
- d. It will facilitate the unilateral exercise of market power by the merged firm;
- e. It will eliminate competition between the two closest substitutes among differentiated products in the consumer water soluble fertilizer market;
- f. It will likely result in increased prices for consumer water soluble fertilizer; and
- g. It will allow the merged firm to reduce innovation by delaying or reducing product development.

VII. VIOLATIONS CHARGED

26. The Agreement and Plan of Merger between Scotts and Miracle-Gro, described in paragraph three, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

27. The Proposed Merger would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by proposed respondent, the Scotts Company ("Scotts") of Stern's Miracle-Gro Products, Inc. ("Miracle-Gro"), and having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

The proposed respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the proposed 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, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Scotts is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 14111 Scottslawn Road, Marysville, Ohio.

ORDER

I.

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

A. "*Respondent*" or "*Scotts*" means the Scotts Company, its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by the Scotts Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each.

B. "*Miracle-Gro*" means Stern's Miracle-Gro Products, Inc., its predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by Stern's Miracle-Gro Products, Inc.

C. "*Alljack*" means Alljack & Company and Celex Corporation, their predecessors, successors and assigns, subsidiaries, divisions, groups, and affiliates.

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

E. The term "*water soluble fertilizer*" means fertilizer that is sold as a powder, composed principally of nitrogen, phosphorous and potash, to be dissolved in water prior to application for use principally on houseplants, gardens, shrubs and flowers.

F. The term "*consumer water soluble fertilizer*" means water soluble fertilizer packaged for sale in containers of less than 20 pounds.

G. The term "*Peters Consumer Water Soluble Fertilizer*" means consumer water soluble fertilizer sold under the Peters brand name.

H. The term "*Peters Consumer Water Soluble Fertilizer Business*" means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of Peters Consumer Water Soluble Fertilizer in the United States, including, without limitation, the following:

1. All Peters trademarks;
2. Inventory;
3. The right to use the same packaging and trade dress that Peters has used for consumer water soluble fertilizer, provided that the right to use the Scotts trademark is limited to the right to sell existing inventory;
4. All customer lists, distribution agreements, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, inventions, trade secrets, intellectual property, patents, technology, know-how (including, but not limited to manufacturing know-how), specifications, designs, drawings, processes, quality control data, and formulas;
5. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
6. All rights under warranties and guarantees, express or implied;
7. All books, records, and files; and
8. All items of prepaid expense.

The term "Peters Consumer Water Soluble Fertilizer Business" does not include accounts receivable, the Peters production facilities located at Allentown, Pennsylvania, the use of intangible assets (including the use of the Peters trademarks on water soluble fertilizer in containers of 20 pounds or more) for the production or sale of agricultural or commercial products, or the use of the Peters trademarks on potting soil, perlite, or vermiculite.

I. The term "*Peters Business*" means all assets, properties, business and goodwill, tangible and intangible, relating to the manufacture or sale of all products that Scotts has sold under the Peters trademarks during the five (5) years preceding the date on which this agreement is accepted by the Commission, including, without limitation, the Allentown, Pennsylvania plant where Peters products are manufactured and including, without limitation, the following:

1. The Peters Consumer Water Soluble Fertilizer Business;
2. All machinery, fixtures, equipment, vehicles, transportation facilities, furniture, tools and other tangible personal property;
3. All customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, research materials, technical information, management information systems, software, inventions, trade secrets, intellectual property, patents, technology, know-how, specifications, designs, drawings, processes, quality control data, and assets relating to research and development;
4. Inventory and storage capacity;
5. All rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits;
6. All rights, titles and interests in and to the contracts entered into in the ordinary course of business with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees;
7. All rights under warranties and guarantees, express or implied;
8. All books, records, and files; and
9. All items of prepaid expense.

II.

It is further ordered, That:

A. Scotts shall divest, through sale or exclusive perpetual license, absolutely and in good faith, no later than December 31, 1995, the Peters Consumer Water Soluble Fertilizer Business as an ongoing business and shall also, at the time of such divestiture, divest such additional ancillary assets and ancillary businesses and effect such arrangements as are necessary to assure the marketability and the viability and competitiveness of the Peters Consumer Water Soluble Fertilizer Business.

B. The divestiture shall be made either

1. No later than ten (10) days from the date this order becomes final, to Alljack, pursuant to the agreements between Scotts and Alljack, which are Confidential Appendices II and III, or

2. To an acquirer that receives 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 Peters Consumer Water Soluble Fertilizer Business is to ensure that the Peters Consumer Water Soluble Fertilizer Business continues to operate as an ongoing business in the same business in which it is engaged at the time this Agreement is accepted by the Commission and to remedy the lessening of competition resulting from the acquisition, as alleged in the Commission's complaint.

C. Pending divestiture of the Peters Consumer Water Soluble Fertilizer Business, respondent shall take such actions as are necessary to maintain the viability and marketability of the Peters Consumer Water Soluble Fertilizer Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any part of the Peters Consumer Water Soluble Fertilizer Business.

D. Unless the acquirer has its own source of supply, the divestiture shall include an agreement by Scotts (the "Supply Agreement") to supply water soluble fertilizer for a period of two (2) years from the date of the divestiture required by this paragraph II. The water soluble fertilizer supplied pursuant to the Supply Agreement shall, at the option of the acquirer, be of the same

chemical composition as, and of a quality equal to or greater than, the water soluble fertilizer marketed by the Peters Consumer Water Soluble Fertilizer Business at the time this agreement is accepted by the Commission for comment. The Supply Agreement shall obligate Scotts to supply such water soluble fertilizer at a price equal to direct cash cost of raw materials, packaging, and labor (based on expenses during the previous fiscal year), plus ten (10) percent. The Supply Agreement shall obligate Scotts to supply annually, at a minimum, at the option of the acquirer, an amount of water soluble fertilizer, in containers ready for sale or in bulk, equal to the greatest unit amount of Peters Consumer Water Soluble Fertilizer produced by or on behalf of the Peters Consumer Water Soluble Fertilizer Business during

1. The twelve (12) months prior to the divestiture required by this paragraph II, and
2. Each of the five (5) calendar years preceding the divestiture required by this paragraph II.

E. The divestiture shall include a non-exclusive perpetual license, with no continuing royalty, to manufacture Peters Consumer Water Soluble Fertilizer for sale in the United States as it has been manufactured at any time during the twelve (12) months preceding the date on which this agreement containing consent order is accepted by the Commission for public comment, as well as a royalty-free license for all improvements to Peters' Water Soluble Fertilizer technology that have been made up to the time of the divestiture required by this paragraph II. Such license shall give the acquirer the right to make any improvements to the licensed technology; provided, however, that such license need not give the acquirer rights in Scotts intellectual property that Scotts has not used in connection with Peters Consumer Water Soluble Fertilizer.

F. Respondent shall not offer consumer water soluble fertilizer (including, but not limited to, consumer water soluble fertilizer bearing the Miracle-Gro trademark) for sale using the Scotts trademark for a period of two (2) years following the divestiture required by this paragraph II; provided, however, during that two (2) year period, Scotts may continue to sell the following products using the Scotts trademark:

1. Scotts Water-Soluble Plant Food Powder, All Purpose Formula (8 ounce and 16 ounce sizes);
2. Scotts Water-Soluble Plant Food Powder, Houseplant/Foliage Formula (8 ounce and 16 ounce sizes); and
3. Scotts Water-Soluble Plant Food Powder, African Violet/Flowering Formula (8 ounce size).

G. At the time of the execution of a divestiture agreement between Scotts and a proposed acquirer of the Peters Consumer Water Soluble Fertilizer Business, Scotts shall provide the acquirer with a complete list of all Scotts employees who have spent the majority of their time on the development, distribution, marketing, or sale of Peters Consumer Water Soluble Fertilizer during the twelve (12) months prior to the date on which this agreement is accepted by the Commission. Such list shall state each such individual's name, position, address, telephone number, and a description of the duties of and work performed by the individual in connection with the Peters Consumer Water Soluble Fertilizer Business.

H. Scotts shall provide the individuals identified pursuant to paragraph II.G. of this order with financial incentives to continue in their employment positions during the period covered by the Hold Separate Agreement, hereto attached, and to accept employment with the Commission-approved acquirer, if such employment is offered, at the time of the divestiture. Such incentives shall include:

1. Continuation of all employee benefits offered by Scotts until the date of the divestiture; and
2. A bonus equal to 25 percent of the total annual compensation of any employee who agrees to employment with the Commission-approved acquirer, payable upon the beginning of such employee's employment by the Commission-approved acquirer.

I. The divestiture agreement may protect Scott's interest in the Scotts trademark on inventory acquired by the acquirer of the Peters Consumer Water Soluble Fertilizer Business and may provide for the continued use by Scotts of the Peters trademarks for agricultural and commercial products and consumer soil products.

J. Respondent shall comply with all terms of the Agreement to Hold Separate, attached to this order and made a part hereof as Appendix I. The Agreement to Hold Separate shall continue in effect

until such time as respondent has made the divestiture required by this order.

III.

It is further ordered, That:

A. If Scotts has not divested, absolutely and in good faith and with the Commission's prior approval, the Peters Consumer Water Soluble Fertilizer Business by December 31, 1995, the Commission may appoint a trustee to divest the Peters Consumer Water Soluble Fertilizer Business. If the trustee has not divested the Peters Consumer Water Soluble Fertilizer Business within six (6) months after the trustee's appointment, then the trustee may divest either the Peters Consumer Water Soluble Fertilizer Business or the Peters Business. In the event the Commission or the Attorney General brings an action pursuant to Section 5(1) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, Scotts 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(1) 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. 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. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

3. Within ten (10) days after appointment of the trustee, respondent shall 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 of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business required by this order.

4. The trustee shall have six (6) months from the date the Commission approves the trust agreement described in paragraph III.B.3. to accomplish the divestiture of the Peters Consumer Water Soluble Fertilizer Business, which shall be subject to the prior approval of the Commission. If no acquirer of the Peters Consumer Water Soluble Fertilizer Business is approved by the Commission by the end of the six (6) month period (or at the end of any extensions to that period pursuant to this paragraph III.B.4.), then the trustee shall have twelve (12) additional months to accomplish the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) 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 Peters Consumer Water Soluble Fertilizer Business or the Peters Business, or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by the respondent shall extend the time for divestiture under this paragraph in an amount equal to the delay, as determined by the Commission, or, in the case of 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 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 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 (based on sales price) contingent on the trustee's divesting the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

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 of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business required by this order.

11. The trustee shall have no obligation or authority to operate or maintain the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

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

IV.

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

A. Acquire any stock, share capital, equity, or other interest in any person engaged in the sale of consumer water soluble fertilizer in the United States within the year preceding such acquisition; provided, however, that an acquisition of securities will be exempt from the requirements of this paragraph if, after such acquisition of securities, Scotts will hold cumulatively no more than two (2) percent of the outstanding shares of any class of securities of such person; or

B. Enter into any agreement or other arrangement to transfer direct or indirect ownership, management, or control of any assets used for or previously used for (and still suitable for use for) the sale of consumer water soluble fertilizer in the United States; provided, however, that prior notice shall not be necessary for the acquisition of assets used to manufacture consumer water soluble fertilizer, the acquisition of assets in the ordinary course of business, or the acquisition of assets valued at less than \$100,000 from the same person within any twelve (12) month period.

The prior notifications required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification,

notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Scotts and not of any other party to the transaction. Scotts shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Scotts shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Notwithstanding, prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

V.

It is further ordered, That within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondent has fully complied with the divestiture 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; provided, however, that respondent is not obligated to produce copies of documents subject to any legally recognized privilege.

VI.

It is further ordered, That one (1) year 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 such 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 paragraphs II and IV of 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 corporate 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 in the corporation 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 request, respondent shall permit any duly authorized representatives 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 (5) days notice to respondent, with respondent's counsel present, and without restraint or interference, to interview officers, employees, or agents of respondent.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate ("Hold Separate") is by and between the Scotts Company ("Scotts"), a corporation organized, existing, and doing business under and by virtue of the laws of Ohio, with its office and principal place of business at 14111 Scottslawn Road, Marysville, Ohio and the Federal Trade Commission ("the 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.* (collectively the "Parties").

PREMISES

Whereas, on January 26, 1995, Scotts entered into an Agreement and Plan of Merger with Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") to acquire all of the voting securities of Miracle-Gro in exchange for voting securities of Scotts (hereinafter the "Acquisition");

Whereas, Scotts is a leading producer and marketer of consumer lawn care products, including consumer water soluble fertilizer under the Peters brand name;

Whereas, Miracle-Gro, with its principal office and place of business located at 800 Port Washington Blvd., Port Washington, New York is the leading marketer of water soluble fertilizer in the United States;

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

Whereas, if the Commission accepts the Agreement Containing Consent Order ("consent order"), the Commission must place it 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;

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the Peters Consumer Water Soluble Fertilizer Business (as defined in paragraph I of the consent order) and Miracle-Gro during the period prior to the final acceptance of the consent order 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;

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 Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and the Commission's right to have the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro continue as viable competitors;

Whereas, the Commission is concerned that the exchange of competitively sensitive information between persons operating and managing Miracle-Gro, the Peters Business, and the Peters Consumer Water Soluble Fertilizer Business may lessen the competitive viability of any divestiture if the Commission accepts the proposed consent order and makes it final;

Whereas, the purposes of the Hold Separate and the consent order are:

1. To preserve the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro as viable, independent businesses pending the Commission's final approval of the consent order and the divestiture of a viable and ongoing enterprise,
2. To remedy any anticompetitive effects of the Acquisition,
3. To preserve the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, and Miracle-Gro as, ongoing and competitive entities engaged in the same business in which they are presently employed until the Commission gives final approval to the consent order and the divestiture is achieved, and
4. To protect the competitive viability of Miracle-Gro, the Peters Business, and the Peters Consumer Water Soluble Fertilizer Business by preventing the exchange of competitively sensitive information among persons managing or operating those businesses;

Whereas, Scotts' entering into this Hold Separate shall in no way be construed as an admission by Scotts that the Acquisition is illegal;

Whereas, Scotts understands that no act or transaction contemplated by this Hold Separate 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 Hold Separate:

Now, therefore, the parties agree, upon the understanding that the Commission has not yet determined whether the acquisition will be challenged, and in consideration of the Commission's agreement that it will not seek further relief from Scotts with respect to the Acquisition if the consent order is made final, except that the Commission may exercise any and all rights to enforce this Hold Separate, the consent order to which it is annexed and made a part thereof and the order, once it becomes final and in the event that the required divestiture is not accomplished, to appoint a trustee to seek divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business pursuant to the consent order, as follows:

1. Scotts agrees to execute and be bound by the consent order.
2. To ensure the complete independence and viability of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business and Miracle-Gro and to assure that no competitive information is exchanged between Miracle-Gro and either the Peters Consumer Water Soluble Fertilizer Business or the Peters Business, Scotts shall hold Miracle-Gro separate and apart as it is presently constituted, from the date this Hold Separate is accepted until the earlier of the completion of the divestiture obligations required by the consent order or three (3) days after the Commission withdraws its acceptance of the consent order pursuant to Section 2.34 of the Commission's Rules, on the following terms and conditions:

- a. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Scotts (including, but not limited to, any officer, director, employee, or agent of Scotts) shall not receive or have access to, or the use of, any material confidential information of Miracle-Gro or the activities of the board of directors of Miracle-Gro (the "Miracle-Gro Board") not in the public domain that relates to water soluble fertilizer, nor shall Miracle-Gro (including, but not limited to any officer, director, employee or agent of Miracle-Gro) receive or have access to, or the use of, any material confidential information of Scotts or the activities of the board of directors of Scotts (the "Scotts Board") not in the public domain that relates to

water soluble fertilizer; provided, however, after the consent order is made final, Scotts and Miracle-Gro may exchange information concerning water soluble fertilizer sold outside the United States. Scotts may receive on a regular basis from Miracle-Gro aggregate financial and other information necessary to allow Scotts to file financial reports, tax returns, personnel reports, and reports with the Securities and Exchange Commission. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to Scotts from sources other than Miracle-Gro or the Miracle-Gro Board and includes but is not limited to customer lists, price lists, prices, marketing methods, advertising plans, patents, technologies, processes, or other trade secrets.)

b. Except as expressly provided in this Hold Separate, all manufacturing, sales, licensing, and other business relationships relating to water soluble fertilizer between Scotts and Miracle-Gro shall be conducted at arm's length and on commercial terms available to other persons. Furthermore, Scotts and Miracle-Gro may not integrate or coordinate the marketing of the products of Scotts and Miracle-Gro.

c. Scotts shall circulate a notice of this Hold Separate and consent order, in the form attached hereto as Attachment A, to the management employees (including, but not limited to, officers) of Scotts and Miracle-Gro (including, but not limited to, members of the board of directors of Scotts (the "Scotts Board") and members of board of directors of Miracle-Gro (the "Miracle-Gro Board")), as well as to any employees or agents of Scotts or Miracle-Gro who participate directly or indirectly in managing or operating any business affected by this Hold Separate or the consent order. Scotts shall also appropriately display a notice of this Hold Separate and consent order in the form attached hereto as Attachment A.

d. Scotts shall report in writing to the Commission every sixty (60) days concerning Scott's efforts to accomplish the purposes of this Hold Separate.

e. Scotts shall maintain the marketability, viability, and competitiveness of the Peters Consumer Water Soluble Fertilizer Business and the Peters Business, and shall not cause or permit the destruction removal, wasting, deterioration, or impairment of any

assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and Scotts shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

f. Scotts shall continue to provide to the Peters Business and the Peters Consumer Water Soluble Fertilizer Business such support services as it provided during the twelve (12) months and the calendar year prior to the acceptance of the consent order by the Commission. The Peters Business and the Peters Consumer Water Soluble Fertilizer Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business, which employees shall be the employees of the Peters Business or the Peters Consumer Water Soluble Fertilizer Business that have managed and operated the Peters Business and the Peters Consumer Water Soluble Fertilizer Business during the twelve (12) months prior to the Commission's acceptance of consent order by the Commission and may also be hired from sources other than the Peters Business or the Peters Consumer Water Soluble Fertilizer Business. The compensation of the management employees of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business shall be based in significant part on the sales of the Peters Business or the Peters Consumer Water Soluble Fertilizer Business, as applicable. Scotts shall facilitate the efforts of the Peters Business and the Peters Consumer Water Soluble Fertilizer Business to promote Peters products (including, but not limited to Peters Consumer Water Soluble Fertilizer products) to retailers, both at trade shows and otherwise, pending the divestiture required by the consent order. Scotts' obligation to facilitate those efforts shall include, without limitation, permitting the Peters Business and the Peters Consumer Water Soluble Fertilizer Business to participate either with Scotts or independently in all industry trade shows. Scotts shall provide the Peters Business and the Peters Consumer Water Soluble Fertilizer Business with any funds to accomplish the foregoing.

g. Scotts shall cause the Peters Consumer Water Soluble Fertilizer Business to expend in 1995 at an annual rate at least equal to the funds expended for 1993 or 1994 (whichever is greater) for advertising and promotion of Peters Consumer Water Soluble

Fertilizer during 1995 and shall cause the Peters Consumer Water Soluble Fertilizer Business to increase such spending as reasonably necessary in light of competitive conditions. If the Peters Consumer Water Soluble Fertilizer Business is not divested by December 31, 1995, then Scotts shall thereafter cause the Peters Consumer Water Soluble Fertilizer Business to expend for advertising and promotion of Peters Consumer Water Soluble Fertilizer at an annual rate of no less than 200 percent of the amount expended for 1995 for that purpose until such time as divestiture has been accomplished.

h. The Peters Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Peters Business, which employees shall be the employees of the Peters Business that have managed and operated the Peters Business during the twelve (12) months prior to the Commission's acceptance of Agreement by the Commission and may also be hired from sources other than the Peters Business. Each Peters Business management employee shall execute a confidentiality agreement prohibiting the disclosure of any confidential information of the Peters Business.

3. Scotts agrees that it will comply with the provisions of this paragraph three of this Hold Separate, in addition to the terms and conditions in paragraph two, from the date this Hold Separate is accepted until the earlier of the Commission's final approval of the consent order or three (3) days after the Commission withdraws its acceptance of the consent order pursuant to Section 2.34 of the Commission's Rules:

a. All earnings and profits of Miracle-Gro shall be retained separately by Miracle-Gro. Miracle-Gro shall be held separate and apart and shall be operated independently of Scotts except to the extent that Scotts must exercise direction and control over Miracle-Gro to assure compliance with this Agreement or the consent order. Except as expressly provided in this Hold Separate, all manufacturing, sales, licensing, and other business relationships between Scotts and Miracle-Gro shall be conducted at arm's length and on commercial terms available to other persons.

b. Except as required by law, and except to the extent that necessary information is exchanged in defending investigations or litigation, obtaining legal advice, or complying with this Hold Separate or the consent order, Scotts (including, but not limited to,

any officer, director, employee, or agent of Scotts) shall not receive or have access to, or the use of, any material confidential information of Miracle-Gro or the activities of the Miracle-Gro Board not in the public domain, nor shall Miracle-Gro (including, but not limited to, any officer, director, employee or agent of Miracle-Gro) receive or have access to, or the use of, any material confidential information about the Peters Consumer Water Soluble Fertilizer Business or the Peters Business not in the public domain. Scotts may receive on a regular basis from Miracle-Gro aggregate financial and other information necessary to allow Scotts to file financial reports, tax returns, personnel reports, and reports with the Securities and Exchange Commission. Any such information that is obtained pursuant to this subparagraph shall be used only for the purpose set forth in this subparagraph.

c. Scotts shall not change the composition of the Miracle-Gro Board and, except as expressly provided in this Hold Separate, Scotts shall not change the composition of the management of Miracle-Gro (except that the Miracle-Gro Board shall have the power to remove management employees for cause) and members of the Miracle-Gro Board shall not serve as officers, directors, employees, or agents of Scotts. Scotts shall not exercise direction or control over, or influence directly or indirectly, Miracle-Gro or the Miracle-Gro Board; provided, however, Scotts may exercise only such direction and control as is necessary to assure compliance with this Hold Separate the order and with all applicable laws. Meetings of the Scotts Board and meetings of the Miracle-Gro Board shall be audio recorded and the recording retained for two (2) years after the termination of the Hold Separate. Notwithstanding, in order to maintain Miracle-Gro's value, Scotts may direct the management of Miracle-Gro with regard to the following matters: investment decisions relating to Miracle-Gro's cash, decisions relating to the handling of claims and litigation, proposed acquisitions and divestitures outside of the ordinary course of business, and changes in Miracle-Gro's corporate structure.

d. The Chairman of the Miracle-Gro Board shall have the power to remove members of the Miracle-Gro Board for cause and to require Scotts to appoint replacement members to the Miracle-Gro Board who are not officers, directors, employees, or agents of Scotts. If the Chairman of the Miracle-Gro Board ceases to act or fails to act

diligently, a substitute chairman shall be appointed from among the members of the Miracle-Gro Board.

e. If necessary, Scotts shall provide Miracle-Gro with sufficient working capital to maintain the same level of sales as during the twelve (12) months preceding the date of the Hold Separate.

f. All material transactions of Miracle-Gro, out of the ordinary course of business and not precluded by this Hold Separate, shall be subject to a majority vote of the Miracle-Gro Board. The Miracle-Gro Board shall serve at the cost and expense of Scotts. Scotts shall indemnify the Miracle-Gro Board against any losses or claims of any kind that might arise out of its involvement under this Hold Separate, except to the extent that such losses or claims result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Miracle-Gro Board directors.

g. Scotts shall take all reasonable steps, consistent with the other provisions of this Hold Separate, to maintain the marketability, viability, and competitiveness of Miracle-Gro, and not to cause or permit the destruction, removal, wasting, deterioration, or impairment of any assets or business it may have to divest except in the ordinary course of business and except for ordinary wear and tear, and Scotts shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair the marketability, viability or competitiveness of Miracle-Gro.

4. Should the Federal Trade Commission seek in any proceeding to compel Scotts to divest itself of the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, Miracle-Gro, or any additional assets, or to seek any other equitable relief, Scotts shall not raise any objection based on the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Scotts also shall waive all rights to contest the validity of this Hold Separate.

5. For the purpose of determining or securing compliance with this Hold Separate, subject to any legally recognized privilege, and upon written request with reasonable notice to Scotts made to its General Counsel, Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business and Miracle-Gro shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro 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 Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro relating to compliance with this Hold Separate;

b. Upon five (5) days notice to Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro and without restraint or interference from it, to interview officers or employees of Scotts, the Peters Consumer Water Soluble Fertilizer Business, the Peters Business, or Miracle-Gro, which officers or employees may have counsel present, regarding any such matters.

6. This Hold Separate shall not be binding until approved by the Commission.

ATTACHMENT A

NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY

The Scotts Company ("Scotts") has entered into an Agreement Containing Consent Order ("consent order") and an Agreement to Hold Separate with the Federal Trade Commission ("Commission") relating to the divestiture of the Peters Consumer Water Soluble Fertilizer Business or the Peters Business. Until after the Commission's order becomes final and the Peters Consumer Water Soluble Fertilizer Business or the Peters Business is divested, Stern's Miracle-Gro Products, Inc. ("Miracle-Gro") must be managed and maintained as a separate, ongoing business, independent of all other Scotts businesses. All competitive information relating to Miracle-Gro must be retained and maintained on a confidential basis by the persons involved in Miracle-Gro, and such persons are prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person whose employment involves any other Scotts business, including the Peters Consumer Water Soluble Fertilizer Business or the Peters Business.

Any violation of the Agreement Containing Consent Order or the Agreement to Hold Separate, incorporated by reference as part of the

Concurring Statement

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Agreement Containing Consent Order, may subject Scotts to civil penalties and other relief as provided by law.

APPENDIX II

[CONFIDENTIAL]

APPENDIX III

[CONFIDENTIAL]

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

The Commission has adopted a policy not to include prior approval requirements in its orders in merger cases. *See* Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 60 Fed. Reg. 39,745 (Aug. 3, 1995), Commissioner Azcuenaga dissenting (60 Fed. Reg. at 39,476). This is the first new order to be issued since the policy was adopted. Although I dissented from the decision of the Commission to change its policy, the order is consistent with the new policy, and I have voted to issue it.

IN THE MATTER OF

FOOD SERVICE EQUIPMENT INDUSTRY INC., ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 4433. Consent Order, Oct. 15, 1941--Set Aside Order, Sept. 21, 1995.*

This order reopens a 1941 consent order--which prohibited the Food Service from selling certain equipment through anyone other than recognized dealers, and from selling equipment directly to buyers--and sets aside the consent order, as to respondent Food Service Equipment Distributors Association, pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On June 30, 1995, the Foodservice Equipment Distributors Association, formerly known as Food Service Equipment Industry, Inc. ("FEDA") filed its Petition To Reopen and Set Aside Consent Order ("Petition") in this matter. FEDA requests that the Commission set aside the 1941 order pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, FEDA affirmatively states that it has not engaged in any conduct violating the terms of the order. The Petition was placed on the public record, and the thirty-day comment period expired on August 18, 1995. No comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's order in Docket No. 4433 was issued on October 15, 1941, and has been in

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45, 289.