

IN THE MATTER OF

DEGUSSA AKTIENGESELLSCHAFT, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3813. Complaint, June 10, 1998--Decision, June 10, 1998*

This consent order allows, among other things, the New Jersey-based subsidiary of Degussa Aktiengesellschaft to acquire E.I. du Pont de Nemours & Co.'s Gibbons Plant in Alberta, Canada, and prohibits the respondents from acquiring more than one percent of the stock, equity or other interest in DuPont's plants in Tennessee and Ontario, Canada, without the Commission's prior approval. In addition, the consent order requires the respondents to limit to one percent their acquisition of the stock, equity or interest in any assets used in the manufacture, distribution or sale of hydrogen peroxide in North America, without prior notification to the Commission.

Appearances

For the Commission: *Robert Tovsky, Joseph Krauss and William Baer.*

For the respondents: *Richard Steuer, Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Degussa Aktiengesellschaft ("Degussa A.G."), through its wholly-owned subsidiary, Degussa Corporation ("Degussa"), entered into a letter of intent to acquire hydrogen peroxide production assets of E. I. du Pont de Nemours & Co. ("DuPont"), and that the acquisition, if consummated, would have resulted in a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 7 of the Clayton Act, 15 U.S.C. 18, 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:

A. THE RESPONDENTS

1. Respondent Degussa A.G. is a corporation organized, existing, and doing business under and by virtue of the laws of

Germany with its principal executive offices located at Weissfrauenstrasse 9, D-60287 Frankfurt am Main, Germany.

2. Degussa A.G. had worldwide sales exceeding \$8.7 billion in 1997. Degussa A.G. engages in the development and manufacture of chemicals, pharmaceutical specialties, and precious metals.

3. Respondent Degussa is a wholly-owned subsidiary of Degussa A.G. with its principal executive offices located at 65 Challenger Road, Ridgefield Park, New Jersey.

4. Degussa has manufacturing and distribution facilities situated throughout the United States, Canada, and Mexico, and produces widely diverse products in the markets for chemicals, pigments, metals, and dental materials. One of its major products is hydrogen peroxide. In 1996, Degussa had sales in excess of \$2.3 billion, to which sales of hydrogen peroxide contributed \$65 million.

5. DuPont is a publicly-traded corporation with reported revenues in 1996 of \$43.8 billion and net income of \$3.6 billion. DuPont is one of the largest chemical companies in the world, operating about 175 manufacturing and processing facilities in approximately 70 countries. DuPont is engaged in diverse businesses including chemicals, fibers, films, polymers, petroleum, agricultural products, biotechnology, and pharmaceuticals. In 1996, DuPont posted sales of hydrogen peroxide of \$156 million in North America.

6. At all times relevant herein, respondents Degussa A.G. and Degussa have been and are now engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12, and are corporations whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

B. THE PROPOSED ACQUISITIONS

7. On July 30, 1997, Degussa A.G., through its wholly-owned subsidiary, Degussa, and DuPont signed a Letter of Intent setting out the principal elements of a proposed transaction, whereby Degussa would acquire the assets of DuPont's worldwide hydrogen peroxide business, including its North American production facilities in Memphis, Tennessee; Maitland, Ontario; and Gibbons, Alberta, in exchange for \$325 million.

8. After being advised by Commission staff of potential competitive issues and concerns in connection with the proposed acquisition of all of DuPont's North American hydrogen peroxide

production, Degussa and DuPont modified their original proposal, to an acquisition by Degussa only of DuPont's Gibbons, Alberta hydrogen peroxide plant, in exchange for approximately \$147 million.

C. RELEVANT MARKET

9. The relevant line of commerce in which to analyze the effects of Degussa's proposed acquisition of DuPont's hydrogen peroxide production assets is the manufacture, marketing and sale of hydrogen peroxide.

10. Hydrogen peroxide is an inorganic chemical that is used in disparate applications as an oxidizing agent to encourage different chemical reactions. The paper and pulp industry is by far the most significant consumer of hydrogen peroxide in North America, where hydrogen peroxide is used in the pulp bleaching process. Other significant users include textile manufacturers, which also use hydrogen peroxide as a bleach; chemical manufacturers, which use hydrogen peroxide to initiate reactions that yield organic peroxides; and mining companies, which use hydrogen peroxide to detoxify waste by-products from mining operations.

11. A small but significant and non-transitory price increase would not affect the current level of consumption in any of the significant end-use applications.

12. The relevant geographic market in which to analyze the effects of Degussa's proposed acquisition of DuPont's hydrogen peroxide production assets is North America. Hydrogen peroxide is a volatile substance that must be transported in an aqueous solution. As a result, between thirty and seventy percent of all volumes shipped are composed of water. Thus, transportation costs make transoceanic shipment commercially impractical and impede imports from rising above a *de minimis* level.

D. MARKET STRUCTURE

13. The North American market for hydrogen peroxide is highly concentrated. Seven manufacturers currently possess all of the North American production capacity. Moreover, the North American manufacturers are also the major hydrogen peroxide manufacturers in the world. The proposed acquisition, as originally proposed, would rest control over approximately eighty-one percent of production capacity with the three largest manufacturers, Degussa, Solvay

Interox and FMC Corporation, and increase the Herfindahl-Hirschmann Index by 575 points, from 1969 to 2544. The proposed acquisition, as modified, would result in virtually no change in market concentration.

14. Degussa has a single hydrogen peroxide manufacturing facility in Mobile, Alabama, and distribution centers located throughout the United States and Canada. Degussa's Mobile facility affords Degussa a North American capacity share in excess of eleven percent.

15. DuPont has one hydrogen peroxide production facility in the United States and two facilities in Canada, in the provinces of Ontario and Alberta, which together constitute nearly twenty-six percent of the North American hydrogen peroxide production capacity.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant period of time, such that new entry would be neither timely, likely, nor sufficient.

17. The minimum viable scale of a hydrogen peroxide production facility, which is necessary to ensure a reasonable rate of return and to deter or counteract potential anticompetitive effects, likely precludes new entry. The prevailing hydrogen peroxide technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- *i.e.*, the production of hydrogen peroxide. It can not economically be shifted toward another use. Therefore, all returns on investment must be derived from hydrogen peroxide sales. Because economic entry would require that a new producer capture a significant market share from existing producers, and because the costs of such entry would be sunk, such entry is inherently risky. Furthermore, current overcapacity, as well as announced expansions by existing producers, serve as additional deterrents to new entry.

18. Small-scale on-site production technology may at some indeterminate time facilitate small-scale production by large consumers of hydrogen peroxide. However, today such technology remains higher cost than large-scale hydrogen peroxide production and commercially suspect. Most consumers, moreover, view hydrogen peroxide production as a business separate and apart from

their own and are resistant to incurring either the risk or the costs associated with on-site production. For these reasons, the price of hydrogen peroxide would need to rise substantially from existing levels before on-site production would become economical. In any event, few customers have sufficient demand to support efficiently even a small-scale on-site production facility. This technology, therefore, fails to provide an adequate deterrent against potential anticompetitive behavior.

F. EFFECTS OF THE PROPOSED ACQUISITION

19. The proposed acquisition, as originally proposed and if consummated, would likely have led to a substantial lessening of competition in the North American hydrogen peroxide market by enabling the firms remaining in the market after the acquisition to engage more successfully and more completely in coordinated interaction, in the following ways, among others:

- a. The original proposed acquisition would increase concentration substantially in a market that already is highly concentrated;
- b. Hydrogen peroxide is a highly homogeneous product that is purchased primarily on the basis of price;
- c. Reliable pricing information is available due to the use of delivered pricing, the practice of advance announcement of price increases, and customer arrangements including meet-or-release clauses;
- d. There is a past history of express collusion among hydrogen peroxide producers in Europe from the early 1960s through the late 1970s, including producers that after the acquisition would be the leading producers in North America;
- e. Industry practices may serve to facilitate interdependence and coordination in a concentrated market, including sales of hydrogen peroxide between producers that may have the effect of avoiding competitive conflict;
- f. Over several years, producers have maintained large differentials in pricing among different end-uses for a product that is essentially indistinguishable in its performance characteristics;
- g. Partly as a result of the originally proposed DuPont acquisition, Degussa would have been unlikely to pursue or proceed as quickly with planned internal expansions; and

- h. Documents project higher hydrogen peroxide prices as a result of the originally proposed acquisition.

G. VIOLATIONS CHARGED

20. The acquisition of DuPont's hydrogen peroxide production assets by Degussa, if consummated as originally proposed, would have violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Degussa Corporation, a wholly-owned subsidiary of Degussa Aktiengesellschaft (collectively "Degussa") of the North American hydrogen peroxide assets of E.I. duPont de Nemours & Co. ("DuPont"), and respondents having been furnished with a copy of a draft of complaint 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 respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that a 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 Degussa Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 65 Challenger Road, Ridgefield Park, New Jersey.

2. Respondent Degussa Aktiengesellschaft is a corporation organized, existing, and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Weissfrauenstrasse 9, D-60287 Frankfurt am Main, Germany.

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

ORDER

I.

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

1. "*Respondents*" or "*Degussa*" means Degussa Corporation and Degussa Aktiengesellschaft, their directors, officers, employees, agents and representatives, predecessors, successors, and assigns; their subsidiaries, divisions, groups and affiliates controlled by Degussa Corporation and Degussa Aktiengesellschaft, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

B. "*DuPont*" means E.I. DuPont de Nemours & Co., a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1007 Market Street, Wilmington, Delaware.

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

D. "*Retained Plants*" means the DuPont hydrogen peroxide plants in Memphis, Tennessee, and Maitland, Ontario, Canada, which Degussa does not propose to acquire from DuPont.

E. "*Gibbons Plant*" means the DuPont Hydrogen Peroxide plant in Gibbons, Alberta, Canada which Degussa proposes to acquire from DuPont.

II.

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

A. Acquire more than 1% of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in the Retained Plants; or

B. Acquire the Retained Plants or any assets of the Retained Plants (excluding the non-exclusive technology licenses that Degussa proposes to acquire in connection with the acquisition of the Gibbons Plant from DuPont).

III.

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

A. Acquire more than 1% (or, for investment purposes, 5%), of the stock, share capital, equity or other interest in any concern, corporate or non-corporate, that owns, controls or otherwise has an interest in any assets used or previously used (and still suitable for use) in the manufacture, distribution or sale of hydrogen peroxide in North America; or

B. Acquire, in any calendar year, assets, valued at over \$15 million, used or previously used (and still suitable for use) in the manufacture, distribution or sale of hydrogen peroxide in North America; provided, however, that nothing herein shall prohibit Degussa, without prior notification to the Commission, from building new or expanding existing hydrogen peroxide manufacturing capacity.

Said prior notification 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 respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty (30) 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, respondents shall not consummate the transaction until twenty (20) 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.

Provided, however, that prior notification shall not be required by paragraph III of this order 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.

IV.

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 other times as the Commission may require, respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with paragraphs II and III of this order.

V.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon written request and reasonable notice, respondents shall permit any duly authorized representative of the Commission:

A. Access, during normal office hours and in the presence of counsel, to inspect any facilities and to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this order; and

B. Upon five (5) days' notice to the respondents, and without restraint or interference, to interview officers, directors, employees,

agents or independent contractors of the respondents, who may have counsel present.

VI.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the respondents 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 respondents that may affect compliance obligations arising out of this order.

VII.

It is further ordered, That this order shall terminate on June 10, 2008.

IN THE MATTER OF

ETHYL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3814. Complaint, June 16, 1998--Decision, June 16, 1998*

This consent order requires, among other things, the Virginia-based manufacturer of lead anti-knock gasoline additives to modify its supply agreement with The Associated Octel Company. In addition, the consent order prohibits the respondent from disclosing to competitors historical, current, or future prices. The consent order also requires the respondent to notify the Commission prior to acquiring the assets of any firm engaged in the distribution of lead anti-knock compounds in the United States, or the manufacturing of lead anti-knock compounds worldwide.

Appearances

For the Commission: *Geoffrey Green, Michael Antalics and William Baer.*

For the respondent: *Jonathan Rich, Morgan, Lewis & Bockius, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Associated Octel Company Ltd., Great Lakes Chemical Corporation, and Ethyl Corporation, corporations, hereinafter sometimes collectively referred to as "respondents," have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. For the purpose of this complaint, "lead antiknock compounds" means gasoline additives that contain tetraethyl or tetramethyl lead, and that increase the octane rating of gasoline. Currently in the United States, lead antiknock compounds are added to aviation gasoline for piston engine aircraft and to certain motor gasoline for racing cars.