

515

Complaint

IN THE MATTER OF

THE BRITISH PETROLEUM COMPANY P.L.C., 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-3868. Complaint, April 19, 1999--Decision, April 19, 1999

This consent order, among other things, requires BP and Amoco to divest, to Williams Energy Ventures, Inc., or an acquirer approved by the Commission, 134 gas stations in eight markets and nine light petroleum products terminals.

Participants

For the Commission: *Dennis Johnson, Arthur Nolan, Anthony Low Joseph, Kirsten Wolfe, Constance Salemi, Richard Liebeskind, Phillip Broyles, Naomi Licker, Daniel Ducore, William Baer, Charlotte Wojcik, and Leslie Farber.*

For the respondents: *Robert Osgood, Sullivan & Cromwell, New York, N.Y. and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, New York, N.Y.*

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 ("FTC" or "Commission"), having reason to believe that respondents The British Petroleum Company p.l.c. ("BP"), a corporation, and Amoco Corporation ("Amoco"), a corporation, have entered into an agreement and plan of merger whereby BP proposes to acquire all of the outstanding common stock of Amoco, that such agreement and plan of merger violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that such agreement and merger, 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, as amended, 15 U.S.C. 45, and BP and Amoco having merged into a corporation ultimately controlled by BP Amoco p.l.c. ("BP Amoco"), 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. RESPONDENTS

A. The British Petroleum Company, p.l.c.

1. Respondent BP is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Britannic House, 1 Finsbury Circus, London EC2M 7BA, England.

2. Respondent BP is, and at all times relevant herein has been, a diversified energy products company engaged in oil and gas exploration; the development, production and transportation of crude oil and natural gas; the refining, marketing, transportation, terminaling and sale of gasoline, diesel fuel, jet fuel and other petroleum products; and the production, marketing and sale of petrochemicals.

3. Respondent BP 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 affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

B. Amoco Corporation

4. Respondent Amoco is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 200 East Randolph Drive, Chicago, Illinois.

5. Respondent Amoco is, and at all times relevant herein has been, an integrated petroleum and chemical products company engaged in the exploration, development, and production of crude oil, natural gas, and natural gas liquids; the marketing of natural gas and natural gas liquids; the refining, marketing, and transportation of petroleum products, including crude oil, gasoline, jet fuel, diesel fuel, heating oil, asphalt, motor oil, lubricants, natural gas liquids, and petrochemical feedstocks; the terminaling and sale of gasoline, diesel fuel, and other petroleum products; and the manufacture and sale of various petroleum-based chemical products.

6. Respondent Amoco 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 affecting commerce as "commerce" is defined

in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

C. BP Amoco p.l.c.

7. Respondent BP Amoco is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Britannic House, 1 Finsbury Circus, London EC2M 7BA, England.

8. Respondent BP Amoco is the successor corporation to respondents BP and Amoco.

9. Respondent BP Amoco 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 affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

II. THE PROPOSED MERGER

10. Pursuant to an agreement and plan of merger dated August 11, 1998, BP intends to acquire all of the outstanding common stock of Amoco in exchange for stock of BP valued at the time of the agreement at approximately \$48.2 billion, with the combined entity to be renamed BP Amoco p.l.c. As a result of the merger, BP's shareholders will hold approximately 60%, and Amoco's shareholders will hold approximately 40%, of the new combined entity.

11. On or about December 31, 1998, respondents BP and Amoco merged into a corporation ultimately controlled by respondent BP Amoco.

III. TRADE AND COMMERCE

A. Terminaling

12. Petroleum terminals are facilities that provide temporary storage of gasoline and other light petroleum products received from a pipeline or marine vessel, and the redelivery of such products from storage tanks into tank trucks or transport trailers for ultimate delivery to retail gasoline stations or other buyers. There are no substitutes for petroleum terminals for providing such terminaling services.

13. The terminaling of gasoline and other light petroleum products is a relevant line of commerce in which to evaluate the effects of this merger.

14. The following metropolitan areas are relevant sections of the country in which to evaluate the effects of this merger on the terminaling of gasoline and other light petroleum products: Cleveland, Ohio; Chattanooga and Knoxville, Tennessee; Jacksonville, Florida; Meridian, Mississippi; Mobile and Montgomery, Alabama; and North Augusta and Spartanburg, South Carolina (hereinafter collectively referred to as the "terminaling markets").

15. The terminaling of gasoline and other light petroleum products in each terminaling market is either moderately concentrated or highly concentrated, and would become significantly more concentrated as a result of the merger. Premerger concentration in the terminaling markets, as measured by the Herfindahl-Hirschmann Index, ranges from more than 1,300 to more than 2,500, and as a result of the merger concentration would increase in each terminal market by more than 100 points to levels ranging from more than 1,500 to more than 3,600.

16. Entry into the terminaling of gasoline and other light petroleum products in each terminaling market is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects that may result from this merger.

B. Wholesale Gasoline

17. Gasoline is a motor fuel used in automobiles and other vehicles. It is manufactured from crude oil at refineries in the United States and throughout the world. There are no substitutes for gasoline as a fuel for automobiles and other vehicles that use gasoline.

18. The wholesale sale of gasoline is the business of selling gasoline to retail dealers, or to intermediaries ("jobbers") that in turn sell gasoline to retail dealers. Firms such as BP and Amoco sell gasoline in wholesale quantities as either branded or unbranded fuels at terminals serving particular local areas. The wholesale sale of gasoline is a relevant line of commerce in which to evaluate the effects of this merger.

19. The following cities and metropolitan areas are relevant sections of the country in which to evaluate the effects of this merger on the wholesale sale of gasoline: Albany, Georgia; Athens, Georgia;

Birmingham, Alabama; Charleston, South Carolina; Charlotte, North Carolina; Charlottesville, Virginia; Clarksville, Tennessee; Cleveland, Ohio; Columbia, South Carolina; Columbus, Georgia; Cumberland, Maryland; Dothan, Alabama; Fayetteville, North Carolina; Florence, Alabama; Goldsboro, North Carolina; Hattiesburg, Mississippi; Hickory, North Carolina; Jackson, Tennessee; Memphis, Tennessee; Meridian, Mississippi; Mobile, Alabama; Myrtle Beach, South Carolina; Pittsburgh, Pennsylvania; Raleigh, North Carolina; Rocky Mount, North Carolina; Savannah, Georgia; Sumter, South Carolina; Tallahassee, Florida; Toledo, Ohio; and Youngstown, Ohio (hereinafter collectively referred to as the "gasoline markets").

20. The wholesale sale of gasoline in each gasoline market would be moderately concentrated or highly concentrated after the merger. In markets that would be moderately concentrated after the merger, postmerger concentration, as measured by the Herfindahl-Hirschmann Index, would increase by more than 100 points to levels between 1,400 and 1,800. In markets that would be highly concentrated after the merger, postmerger concentration, as measured by the Herfindahl-Hirschmann Index, would increase by more than 100 points to levels in excess of 1,800.

21. Entry into the wholesale sale of gasoline in each gasoline market is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects that may result from this merger.

IV. VIOLATIONS CHARGED

First Violation

22. Respondents Amoco and BP each own terminaling facilities that service each terminaling market, and are competitors for terminaling of gasoline and other light petroleum products in each terminaling market.

23. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the terminaling of gasoline and other light petroleum products in the terminaling markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition in the terminaling of gasoline and other light petroleum products between Amoco and BP in each terminaling market;

b. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between providers of terminaling services in each terminaling market;

each of which increases the likelihood that the prices of terminaling services for gasoline and other light petroleum products will increase in the terminaling markets.

Second Violation

24. Respondents Amoco and BP are actual competitors in the wholesale sale of gasoline in each gasoline market.

25. The effect of the proposed merger, if consummated, may be substantially to lessen competition or tend to create a monopoly in the wholesale sale of gasoline in the gasoline markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. By eliminating direct competition in the wholesale sale of gasoline between Amoco and BP in each gasoline market;

b. By increasing the likelihood of, or facilitating, collusion or coordinated interaction between Amoco, BP and other wholesale sellers of gasoline in each gasoline market;

each of which increases the likelihood that the prices of gasoline will increase in the gasoline markets.

V. STATUTES VIOLATED

26. The agreement and plan of merger between Amoco and BP constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

27. The proposed merger, 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 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 merger between The British Petroleum Company p.l.c. ("BP") and Amoco Corporation ("Amoco"), which merger resulted in Amoco becoming a direct, wholly-owned subsidiary of BP Amoco p.l.c. ("BP Amoco") (collectively "respondents"), and respondents 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 respondents with violations of 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 respondents have 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 BP was a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Britannic House, 1 Finsbury Circus, London EC2M 7BA, England. BP was renamed BP Amoco p.l.c.

2. Respondent Amoco was a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 200 East

Randolph Drive, Chicago, Illinois 60601. Amoco was renamed BP Amoco Corporation, which is a wholly-owned subsidiary of BP Amoco.

3. Respondent BP Amoco is a corporation organized, existing and doing business under and by virtue of the laws of England and Wales, with its office and principal place of business located at Britannic House, 1 Finsbury Circus, London EC2M 7BA, England.

4. 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:

A. "*Amoco*" means Amoco Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Amoco Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "*BP*" means The British Petroleum Company p.l.c., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by The British Petroleum Company p.l.c., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

C. "*BP Amoco*" means BP Amoco p.l.c., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by BP Amoco p.l.c., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

D. "*Amoco Branded Seller*" means any person (other than BP or Amoco) that has, by virtue of contract or agreement with Amoco in effect at the time respondents execute the agreement containing consent order, the right to sell gasoline using Amoco's brand name at Retail Sites located in any Branded Seller Metropolitan Area, or to resell gasoline to any such person. "*Amoco Branded Seller*" does not

include Retail Sites leased from Amoco except for sites leased from Amoco by Amoco Two Party Dealers.

E. "*Amoco Retail Divestiture Assets*" means all Retail Assets owned by Amoco or leased by Amoco from another person located in the following Metropolitan Areas: Tallahassee, Florida and Pittsburgh, Pennsylvania. "Amoco Retail Divestiture Assets" do not include Retail Sites leased from Amoco by Amoco Two Party Dealers.

F. "*Amoco Two Party Dealer*" means a person that directly or indirectly owns or leases from a lessor other than Amoco a Retail Site in a Branded Seller Metropolitan Area and that has leased to Amoco and directly or indirectly leased back from Amoco the Retail Site.

G. "*Amoco Two Party Dealer Lease*" means all leases, deeds, contracts, rights and obligations associated with the lease of a Retail Site by any person to Amoco and the lease of that Retail Site back to such person or an affiliate of such person.

H. "*BP Branded Seller*" means any person (other than BP or Amoco) that has, by virtue of contract or agreement with BP in effect at the time respondents execute the agreement containing consent order, the right to sell gasoline using BP's brand name at Retail Sites located in any Branded Seller Metropolitan Area, or to resell gasoline to any such person, except that "BP Branded Seller" does not include Retail Sites leased from BP.

I. "*BP Retail Divestiture Assets*" means all Retail Assets owned by BP or leased by BP from another person located in the following Metropolitan Areas: Charleston, South Carolina; Charlotte, North Carolina; Columbia, South Carolina; Jackson, Tennessee; Memphis, Tennessee; and Savannah, Georgia.

J. "*Branded Fuels*" means motor gasoline purchased by a person for resale under a trade name owned by another person.

K. "*Branded Seller Metropolitan Area*" means (1) each of the following Metropolitan Areas: Albany, Georgia; Athens, Georgia; Birmingham, Alabama; Charleston, South Carolina; Charlotte, North Carolina; Charlottesville, Virginia; Clarksville, Tennessee; Cleveland, Ohio; Columbia, South Carolina; Columbus, Georgia; Cumberland, Maryland; Dothan, Alabama; Fayetteville, North Carolina; Florence, Alabama; Goldsboro, North Carolina; Hattiesburg, Mississippi; Hickory, North Carolina; Jackson, Tennessee; Memphis, Tennessee; Mobile, Alabama; Myrtle Beach, South Carolina; Pittsburgh, Pennsylvania; Raleigh, North Carolina; Rocky Mount, North Carolina; Savannah, Georgia; Sumter, South Carolina; Tallahassee, Florida; Toledo, Ohio;

and Youngstown, Ohio; and (2) the city of Meridian, Mississippi and the counties of Kemper, Lauderdale, and Newton, Mississippi.

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

M. "*Deed Restriction*" means any obligation that would prevent or inhibit the owner of a Retail Site (or the owner's tenant) from selling motor fuels at that Retail Site other than a brand licensed from respondents.

N. "*Existing Supply Agreement*" means each franchise agreement, supply contract, image agreement, jobber outlet incentive program contract, Amoco Two Party Dealer Lease, and all related agreements between respondents and any BP Branded Seller or Amoco Branded Seller relating to such person's right or obligation to sell or resell gasoline using BP's brand name or Amoco's brand name at a Retail Site in a Branded Seller Metropolitan Area.

O. "*Long Term Lease*" means a lease the terms of which allow respondents to divest to the acquirer of Retail Assets a right to occupy those Retail Assets for ten (10) years or longer from the date on which the order becomes final, and where such divestiture is not subject to landlord approval or, if subject to such approval, respondents have obtained the necessary approval prior to the divestiture. "Long Term Lease" does not include a leasehold interest in which any respondent is a lessor.

P. "*Merger*" means the proposed merger of Amoco and BP.

Q. "*Metropolitan Area*" means any Metropolitan Statistical Area or Consolidated Metropolitan Statistical Area as defined by the U.S. Office of Management and Budget as of June 30, 1998.

R. "*Ohio Metropolitan Area*" means each of the following Metropolitan Areas: Toledo, Ohio, and Youngstown, Ohio.

S. "*Ohio Retail Divestiture Assets*" means a package of Retail Assets, to be identified by respondents but approved by the Commission, (i) that includes individual Retail Sites with aggregate sales of 40 million gallons of gasoline in Youngstown, Ohio during 1997, and aggregate sales of 14 million gallons of gasoline in Toledo, Ohio during 1997; (ii) each of which complies with all 1998 and 1999 environmental requirements for underground storage tanks; and (iii) for each of which respondents can convey fee ownership or a Long Term Lease.

T. "*Option Effective Date*" means a date identified by the Amoco Branded Seller or BP Branded Seller that is not later than sixty (60)

days after respondents' receipt of a written notice from an Amoco Branded Seller or BP Branded Seller pursuant to paragraph IV.A.1.

U. "*Option Period*" means, for each BP Branded Seller or Amoco Branded Seller, a sixty (60) day period commencing upon the date on which such person receives the written notification specified in paragraph IV.A of this order; except that, if this order is made final on or after April 20, 1999, the Option Period shall end on June 30, 1999.

V. "*Person*" means any individual, partnership, association, company or corporation.

W. "*Respondents*" means BP Amoco, Amoco and BP, individually and collectively.

X. "*Retail Assets*" means, for each Retail Site, all assets, tangible or intangible, that are used at the Retail Site, including but not limited to all permits and contracts, and all assets relating to all ancillary businesses (such as automobile mechanical service, convenience stores, restaurants, and car washes) located at each Retail Site. Respondents shall make good faith diligent efforts to obtain all third-party approvals necessary to convey all licenses, permits, consents and ancillary businesses with each Retail Site. Retail Assets do not include respondents' proprietary trademarks, trade names, logos, trade dress, identification signs, additized product inventory, petroleum franchise agreements, petroleum product supply agreements, credit card agreements, satellite-based or centralized credit card processing equipment not incorporated in gasoline dispensers, or systemwide software and databases.

Y. "*Retail Divestiture Assets*" means the Amoco Retail Divestiture Assets and the BP Retail Divestiture Assets.

Z. "*Retail Site*" means a business establishment from which gasoline is sold to the general public.

AA. "*Terminaling*" means the services performed by a facility that provides temporary storage of gasoline received from a pipeline or marine vessel, and the redelivery of gasoline from storage tanks into tank trucks or transport trailers.

BB. "*Terminal Assets*" means all assets, tangible and intangible, relating to Terminaling at the Terminaling facilities owned by Amoco (including but not limited to real property, tanks, loading racks, offices, buildings, warehouses, equipment, machinery, fixtures, tools, spare parts, licenses, permits, and other property used for

Terminating) at the following locations: Aurora, Ohio; Chattanooga, Tennessee; Jacksonville, Florida; Knoxville, Tennessee; Meridian, Mississippi; Mobile, Alabama; Montgomery, Alabama; North Augusta, South Carolina; and Spartanburg, South Carolina.

CC. "*Terminated Retail Site*" means a Retail Site as to which an Amoco Branded Seller or BP Branded Seller has exercised the option to cancel an Existing Supply Agreement pursuant to paragraph IV of this order.

II.

It is further ordered, That:

A. Respondents shall divest, absolutely and in good faith, the Terminal Assets to Williams Energy Ventures, Inc., in accordance with the Purchase and Sale Agreement dated October 29, 1998 between Amoco Oil Company and Williams Energy Ventures, Inc., no later than:

(1) Ten (10) days after the date on which the Merger is consummated, or

(2) Thirty (30) days after the date on which respondents sign the agreement containing consent order,

whichever is later. Provided, however, that if respondents have divested the Terminal Assets to Williams Energy Ventures, Inc. prior to the date the order becomes final, and if, at the time the Commission determines to make the order final, the Commission notifies respondents that Williams Energy Ventures, Inc., is not an acceptable buyer of the Terminal Assets or that the manner in which the divestiture was accomplished is not acceptable, then respondents shall immediately rescind the transaction with Williams Energy Ventures, Inc., and shall divest the Terminal Assets within six months from the date the order becomes final, absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

B. Pending divestiture of the Terminal Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of the Terminal Assets and to prevent the destruction, removal, wasting, deterioration or impairment of any of the Terminal

Assets except for ordinary wear and tear that does not affect the viability and marketability of the Terminal Assets.

C. Respondents shall comply with all terms of the Purchase and Sale Agreement dated October 29, 1998, between Amoco Oil Company and Williams Energy Ventures, Inc., for the Terminal Assets, and such agreement is incorporated by reference into this order and made a part hereof as Confidential Appendix B. Any failure by respondents to comply with the requirements of such agreement shall constitute a failure to comply with this order.

D. The purpose of this paragraph II is to ensure the continuation of the Terminal Assets as ongoing, viable enterprises engaged in the Terminaling of gasoline and other petroleum products, and to remedy the lessening of competition resulting from the Merger in Terminaling markets as alleged in the Commission's complaint.

III.

It is further ordered, That:

A. Respondents shall divest, at no minimum price, absolutely and in good faith, within six months from the date respondents execute the agreement containing consent order, the Retail Divestiture Assets.

B. Upon divestiture, respondents shall cancel all existing dealer leases, dealer loans, building incentive agreements, and related dealer agreements between respondents and their lessee dealers applicable to the divested Retail Sites.

C. For each Metropolitan Area identified in paragraphs I.E. and I.I., respondents shall divest the Retail Divestiture Assets in such Metropolitan Area to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

D. Pending divestiture of the Retail Divestiture Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of the assets and to prevent the destruction, removal, wasting, deterioration, or impairment of any of such assets except for ordinary wear and tear. Respondents shall continue at least at their scheduled pace all capital projects involving the assets that were ongoing, planned, or approved as of the date the agreement containing consent order is signed by respondents, and otherwise shall maintain the Retail Divestiture Assets at least at the same standards and on the same schedule as respondents have been

maintaining them until the date of divestiture. Respondents shall not remove or degrade the brand identification at the Retail Divestiture Assets, until the divestiture of the assets is completed.

E. The purpose of this paragraph III is to ensure the continued use of these assets in the same business in which they were engaged at the time of the proposed Merger, and to remedy the lessening of competition in the sale of gasoline in each of the Metropolitan Areas identified in paragraphs I.E. and I.I. resulting from the proposed Merger as alleged in the Commission's complaint.

IV.

It is further ordered, That:

A. Within ten days from the date this order becomes final, respondents shall provide written notification to each BP Branded Seller and each Amoco Branded Seller, giving each such person the option to cancel, without penalty, that portion of any Existing Supply Agreement with BP or Amoco that applies to any Terminated Retail Site, upon the following terms and conditions:

1. Such option to cancel may be exercised by delivering written notice to BP or Amoco during the Option Period. Each such written notice shall identify by address each Retail Site within any Branded Seller Metropolitan Area as to which the BP Branded Seller or Amoco Branded Seller intends to exercise such option, and the Option Effective Date for each such Retail Site. The exercise of such option shall become effective on the Option Effective Date.

2. Respondents shall release each BP Branded Seller or Amoco Branded Seller from all debts, loans, Deed Restrictions, obligations or responsibilities, attributable to Terminated Retail Sites, except for amounts owed for fuels actually received and for the unamortized portion of any debt identified in Confidential Appendix C, on the condition that such BP Branded Seller or Amoco Branded Seller notifies Amoco or BP in writing within the Option Period that such BP Branded Seller or Amoco Branded Seller (a) intends to cease purchasing Branded Fuels from respondents for resale at such Terminated Retail Site, (b) intends to continue to purchase gasoline for resale at such Terminated Retail Site, but (c) will not purchase Branded Fuels for resale as Branded Fuels at such Terminated Retail Site from any person that has a market share of more than 20% in

such Branded Seller Metropolitan Area, as measured by the 1998 annual market share estimates published by NPD Group, Inc.

3. For a period of two years from the Option Effective Date, respondents shall not sell Branded Fuels for resale as Branded Fuels at Terminated Retail Sites. For a period of two years from the date upon which respondents receive the notice specified in paragraph IV.A.1, respondents shall not solicit or engage in any discussions or negotiations to sell Branded Fuels to the Amoco Branded Seller or BP Branded Seller for resale as Branded Fuels at any Terminated Retail Site.

B. The purpose of this paragraph IV is to prevent respondents from enforcing agreements that may deter or impede existing sellers of BP or Amoco gasoline in Branded Seller Metropolitan Areas from switching wholesale suppliers of fuels for resale at Terminated Retail Sites, and to remedy the lessening of competition resulting from the Merger in gasoline markets as alleged in the Commission's complaint.

V.

It is further ordered, That:

A. Unless BP Branded Sellers or Amoco Branded Sellers that in 1998 had total yearly sales of at least 40 million gallons of gasoline in the Youngstown, Ohio Metropolitan Area and 14 million gallons of gasoline in the Toledo, Ohio Metropolitan Area cease purchasing Branded Fuels from respondents by the end of the Option Period or by June 30, 1999, whichever is later, respondents, within twelve (12) months from the date respondents execute the agreement containing consent order, shall divest, at no minimum price, absolutely and in good faith, the Ohio Retail Divestiture Assets.

B. Respondents shall divest the Ohio Retail Divestiture Assets in each Ohio Metropolitan Area to a single acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

C. Pending divestiture of the Ohio Retail Divestiture Assets, respondents shall take such actions as are necessary to maintain the viability and marketability of all Retail Assets that might be included as part of the Ohio Retail Divestiture Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of such assets except for ordinary wear and tear. Respondents shall

continue at least at their scheduled pace all capital projects involving any Retail Assets that might be included as part of the Ohio Retail Divestiture Assets that were ongoing, planned, or approved as of the date the agreement containing consent order is signed by respondents, and otherwise shall maintain such assets at least at the same standards and on the same schedule as respondents have been maintaining them until the date of divestiture. Respondents shall not remove or degrade the brand identification at any Retail Assets that might be included as part of the Ohio Retail Divestiture Assets, until the divestiture of the assets is completed.

D. The purpose of this paragraph V is to ensure the continued use of these assets in the same business in which they were engaged at the time of the proposed Merger, and to remedy the lessening of competition in the sale of gasoline in Toledo and Youngstown, Ohio, resulting from the proposed Merger as alleged in the Commission's complaint.

VI.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith, the Terminal Assets pursuant to paragraph II. of this order, the Retail Divestiture Assets pursuant to paragraph III. of this order, and the Ohio Retail Divestiture Assets pursuant to paragraph V. of this order, the Commission may appoint a trustee or trustees to divest the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets. The trustee shall divest the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets at no minimum price, to an acquirer that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission.

B. 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, respondents shall consent to the appointment of a trustee or trustees 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, including a court-appointed trustee or trustees, pursuant to Section 5(l) of the Federal Trade

Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

C. If any trustee is appointed by the Commission or a court pursuant to the terms of this order, respondents 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 respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures. If respondents have not opposed, in writing, including the reasons for opposing, the selection of the proposed trustee, within ten (10) days after notice by the staff of the Commission to respondents of the identity of the proposed trustee, respondents 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 Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets.

3. Within ten (10) days after appointment of the trustee, respondents 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 divest the Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets.

4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in paragraph IV.C.3. 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 Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets, or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other

information as such trustee may request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in the divestiture caused by respondents 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 respondents' absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in the manner and to the acquirer or acquirers as set out in paragraphs II., III., and V. 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 respondents from among those approved by the Commission, provided further, however, that respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of respondents, 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 respondents, 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 divestitures 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 respondents, 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 Terminal Assets, the Retail Divestiture Assets, or the Ohio Retail Divestiture Assets.

8. Respondents 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 VI.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 divestitures required by this order.

11. Except as otherwise provided in this order, the trustee shall have no obligation or authority to operate or maintain the assets to be divested.

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

VII.

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

A.1. Any stock, share capital, equity, partnership, membership or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such acquisition, in providing Terminaling services and located in any of the counties in Alabama, Florida, Georgia, Mississippi, Ohio, South Carolina or Tennessee, listed on Appendix A hereto, or

2. Any assets used or previously used (and still suitable for use) in providing Terminaling services and located in any of the counties in Alabama, Florida, Georgia, Mississippi, Ohio, South Carolina or Tennessee listed on Appendix A hereto, or

B.1. Any stock, share capital, equity, partnership, membership or other interest in any concern, corporate or non-corporate, engaged, at the time of such acquisition or within the year preceding such

acquisition, in the sale of gasoline in any Branded Seller Metropolitan Area, or

2. Any assets used or previously used (and still suitable for use) in the sale of gasoline in any Branded Seller Metropolitan Area for which the aggregate purchase price exceeds \$10 million.

Said 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 the 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 or documentary material (within the meaning of 16 CFR 803.20), respondents shall not consummate the transaction until twenty (20) days after submitting such additional information or documentary material. 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 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.

VIII.

It is further ordered, That:

A. Within thirty (30) days from the date this order becomes final and every thirty (30) days thereafter until respondents have fully complied with the provisions of paragraphs II, III, IV and V of this order, respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with paragraphs II, III, IV and V of this order. Respondents shall include in their 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, III, IV and V of this order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestitures.

B. 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 each provision of this order.

IX.

It is further ordered, That:

A. Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate 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 corporation that may affect compliance obligations arising out of the order.

B. Upon consummation of the Merger, respondents shall cause the merged entity to be bound by the terms of this order.

X.

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

A. Access, during office hours and in the presence of counsel, to all facilities and access 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 days' notice to respondents and without restraint or interference from it, to interview officers, directors, or employees of respondents.

APPENDIX A

<u>Alabama Counties</u>	<u>Florida Counties</u>	<u>Georgia Counties</u>
Autauga	Baker	Bartow
Baldwin	Bradford	Brantley
Bibb	Clay	Burke
Bullock	Duval	Camden
Butler	Escambia	Catoosa
Cherokee	Nassau	Charlton
Chilton	Putnam	Chattooga
Choctaw	Santa Rosa	Columbia
Clarke	St. Johns	Dade
Coosa	Union	Elbert
Crenshaw		Fannin
Dallas		Floyd
De Kalb		Franklin
Elmore		Gilmer
Escambia		Glascok
Greene		Glynn
Jackson		Gordon
Lee		Habersham
Lowndes		Hart
Macon		Jefferson
Marengo		Jenkins
Mobile		Lincoln
Monroe		Madison
Montgomery		McDuffie
Perry		Murray
Pickens		Oglethorpe
Pike		Pickens
Shelby		Rabun
Sumter		Richmond
Tallapoosa		Screven
Washington		Stephens
Wilcox		Taliaferro
		Walker
		Warren
		Whitfield
		Wilkes

APPENDIX A

<u>Mississippi Counties</u>	<u>Ohio Counties</u>	<u>South Carolina Counties</u>
Clarke	Ashland	Abbeville
George	Ashtabula	Aiken
Greene	Belmont	Allendale
Harrison	Carroll	Anderson
Jackson	Columbiana	Bamberg
Jasper	Coshocton	Barnwell
Jones	Crawford	Cherokee
Kemper	Cuyahoga	Chester
Lauderdale	Erie	Edgefield
Leake	Geauga	Fairfield
Neshoba	Guernsey	Greenville
Newton	Harrison	Greenwood
Noxubee	Holmes	Laurens
Perry	Huron	Lexington
Scott	Jefferson	McCormick
Smith	Knox	Newberry
Stone	Lake	Oconee
Wayne	Lorain	Orangeburg
Winston	Mahoning	Pickens
	Medina	Saluda
	Muskingum	Spartanburg
	Ottawa	Union
	Portage	York
	Richland	
	Sandusky	
	Seneca	
	Stark	
	Summit	
	Trumbull	
	Tuscarawas	
	Wayne	

Statement

127 F.T.C.

APPENDIX A

<u>Tennessee Counties</u>		
Anderson	Greene	Monroe
Bledsoe	Grundy	Morgan
Blount	Hamblen	Polk
Bradley	Hamilton	Rhea
Campbell	Hancock	Roane
Claiborne	Hawkins	Scott
Cocke	Jefferson	Sequatchie
Coffee	Knox	Sevier
Cumberland	Loudon	Union
Fentress	Marion	Van Buren
Franklin	McMinn	Warren
Grainger	Meigs	

APPENDIX B

CONFIDENTIAL

Purchase and Sale Agreement Between Amoco and Williams

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS SHEILA F. ANTHONY AND MOZELLE W. THOMPSON

On December 30, 1998, the Commission published a proposed complaint alleging that this merger would violate Clayton Act Section 7, 15 U.S.C. 18, and FTC Act Section 5, 15 U.S.C. 45, in 30 wholesale gasoline markets and nine light petroleum products terminaling markets in the United States, and accepted a proposed consent order resolving those allegations. The Commission has now accorded final approval to the complaint and consent order.¹ Our colleague, Commissioner Swindle, dissents from that portion of the complaint and consent order that alleges violations and mandates relief in 27 of the wholesale gasoline markets.² We write to clarify our view.

¹ In response to comments received during the comment period, the Commission, with the agreement of BP-Amoco, has made a few modifications to the details of the complaint and order. None of these changes, however, alter the core relief.

² Commissioner Swindle concurs in the complaint and consent order to the extent they allege that the merger of BP and Amoco would violate the antitrust laws in the nine terminal markets and in wholesale gasoline markets in Pittsburgh, Pennsylvania, and Cleveland, Toledo and Youngstown, Ohio.

At the time the consent agreement was accepted for public comment -- before the merger at issue was consummated -- British Petroleum Company p.l.c. ("BP") and Amoco Corporation ("Amoco") were integrated producers, refiners and marketers of petroleum products, including gasoline, in the United States. Although BP's and Amoco's operations did not overlap in many areas,³ both were wholesale marketers of gasoline in the southeastern and midwestern United States, *i.e.*, both BP and Amoco sold gasoline to retail gas stations that they might or might not have owned. In these markets, BP was the only firm that could sell "BP"-branded gasoline to retail dealers, and Amoco was the only firm that could sell "Amoco"-branded gasoline to dealers. Therefore, measuring concentration of retail sales by brand was an adequate proxy for measuring concentration in gasoline wholesaling.⁴

In 25 metropolitan area markets, absent the relief secured by the Commission, the combination of BP and Amoco would have resulted in a highly concentrated wholesale gasoline market, and an increase in concentration in an amount that the *Department of Justice-FTC Merger Guidelines* presume likely to create or enhance market power or facilitate its exercise. *Merger Guidelines* § 1.51(c).⁵ In each of these markets, the top four firms would together have had at least

³ For example, to a large extent, Amoco and BP produced and marketed different petrochemical products in the United States. BP produced acetic acid and acrylonitrile in the U.S., but Amoco did not. Similarly, Amoco produced ethylene, propylene, polypropylene, and styrene in the U.S., but BP did not. In the few petrochemical areas where the parties overlapped in the U.S., concentration did not change significantly as a result of the merger.

⁴ Indeed, brand concentration may understate concentration in the wholesale market, because some branded wholesale sellers also supply unbranded gasoline to unbranded retail stations. The brand concentration statistics used here would not attribute these unbranded sales by branded wholesalers to the branded wholesaler.

⁵ The *Merger Guidelines* presume anticompetitive effects when the post-merger Herfindahl-Hirschman Index ("HHI") is over 1800 and there is an increase of more than 100 points. HHI is a statistical index that measures the degree of concentration in a relevant antitrust market. Those metropolitan areas and the changes in HHI would have been: Albany, Georgia (post-merger HHI 3674, increase of 542); Charleston, South Carolina (1865/362); Charlotte, North Carolina (1909/610); Charlottesville, Virginia (2214/278); Clarksville, Tennessee (1863/492); Cleveland, Ohio (1859/124); Columbia, South Carolina (2257/738); Columbus, Georgia (2194/351); Cumberland, Maryland (2592/161); Dothan, Alabama (2259/235); Fayetteville, North Carolina (2635/795); Florence, Alabama (1959/269); Goldsboro, North Carolina (2133/310); Hattiesburg, Mississippi (2214/281); Jackson, Tennessee (2051/508); Memphis, Tennessee (1948/468); Myrtle Beach, South Carolina (2138/353); Pittsburgh, Pennsylvania (2129/663); Raleigh, North Carolina (2032/535); Rocky Mount, North Carolina (2003/302); Savannah, Georgia (2668/515); Sumter, South Carolina (1920/528); Tallahassee, Florida (2366/794); Toledo, Ohio (2022/351); and Youngstown, Ohio (2540/1043).

70% of wholesale sales; in 15 markets, the top four firms would have had more than 80%.⁶

Market shares and concentration levels of this magnitude raise antitrust concern because they suggest that a small number of firms might, after this merger, be able to raise price without losing significant sales to what could well be an insignificant fringe.⁷ See, e.g., *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1283-84 (7th Cir. 1990). Concerns about collusion or coordination, and consequent price increases to consumers, are more pronounced in markets -- such as gasoline markets -- where (among other factors) the product is homogeneous and prices are generally observable, making it relatively easier for a small number of firms to coordinate and to detect deviation.

Of course, high market concentration is less of a threat to consumers if retailers in the market are likely to switch to new sources of supply in the event of a wholesale price increase. But, we require persuasive evidence that entry would be timely, likely and sufficient to defeat a coordinated price increase. *Merger Guidelines* § 3. Our colleague concludes that such entry could occur, and is likely to occur, "if there are enough branded retail gasoline stations that could switch and become customers of the new wholesale entrant."⁸ We do not disagree with this analysis, but we are unpersuaded by the investigative record here that there is a sufficient likelihood that enough switching would occur to allay our concerns. The history of switching in these markets appears to be more among incumbents than to new entrants, and switching among incumbents (particularly among incumbents with substantial market shares) will not defeat a wholesale price increase by those incumbents. Dealers also would be less likely to switch to fringe suppliers or to new entrants if there are

⁶ In addition, in five areas the HHI would have increased substantially (by more than 100 HHI points): Birmingham, Alabama (post-merger HHI 1778, increasing by 273); Mobile, Alabama (1600/160); Athens, Georgia (1654/251); Meridian, Mississippi (1705/359); and Hickory, North Carolina (1782/354). In each of these "moderately concentrated" markets, the top four firms would together have had at least 70% of wholesale sales, and independent unbranded sellers would have had less than 20%.

⁷ In this case, the Commission examined the gasoline markets in which BP and Amoco competed and alleged antitrust violations in markets with a small number of fringe players, and not in markets where fringe competitors collectively appeared to have significant market presence.

⁸ We all agree that our concerns about concentration among wholesale sellers of gasoline are not obviated by the asserted fact that retailers can set their own prices for retail gasoline sold at their outlets. The wholesale price of gasoline is plainly the most substantial portion of the dealer's cost, and increases in wholesale prices will likely result in increases in retail prices.

significant reasons for dealers to prefer major brands (particularly major brands that are well-established in a given area), such as the benefit of local marketing or of brand credit card programs. Moreover, dealers might not have an incentive to switch to new entrants to defeat a price increase by their suppliers in which they also may profit.

Instead, we believe that the consent order will make jobbers and open dealers able to switch, and by relieving them of financial penalties that might deter switching to new entrants, make it more likely that they will in fact switch, preventing an increase in concentration that otherwise could well give rise to a substantial risk of higher prices for gasoline in the markets alleged in the complaint. As we noted, our disagreement with our colleague is narrow: whether, in the absence of the relief under the consent order, jobbers and open dealers are sufficiently likely to switch in substantial numbers to protect the ultimate consumers from the risks that otherwise would be associated with highly concentrated gasoline markets. In this case, we believe the investigative record regarding dealer switching is insufficiently compelling to demand that ultimate consumers bear the substantial risk of higher prices for gasoline that may result from these highly concentrated markets.

STATEMENT OF COMMISSIONER ORSON SWINDLE
CONCURRING IN PART AND DISSENTING IN PART

The Commission's complaint alleges that the merger of Amoco Corporation ("Amoco") and British Petroleum Company p.l.c. ("BP") is likely to substantially lessen competition or tend to create a monopoly in certain terminaling markets and in certain markets for the wholesale sale of gasoline. I agree that the merger is likely to have anticompetitive effects in terminaling markets and that the divestitures that would be required adequately remedy these antitrust violations. However, because the merger is unlikely to have anticompetitive effects in southeastern United States markets for the wholesale sale of gasoline,¹ I dissent from the allegations and relief related to those markets.

Refined gasoline is transported by pipeline from the refinery to gasoline terminals. Wholesalers sell refined gasoline from terminals

¹ The "southeastern United States markets for the wholesale sale of gasoline" include all of the "gasoline markets" described in Paragraph 19 of the proposed complaint except those located in Ohio and Pittsburgh, Pennsylvania. I support the Commission's action in the Ohio and Pittsburgh wholesaling markets.

to retail gasoline stations. Retail gasoline stations may be either unbranded or branded. Unbranded retail gasoline stations do not display the brand of a wholesaler and do not sell branded gasoline. In contrast, branded retail gasoline stations display the brand of the wholesaler, such as "Amoco" or "Texaco," and sell the wholesaler's brand of gasoline, which is refined gasoline plus proprietary additives.

Among branded retail gasoline stations, there are various types of ownership and operation arrangements. The wholesaler may itself own and operate the retail gasoline station (a "company station"). The wholesaler may own the retail gasoline station but lease the station pursuant to an agreement that requires the operator (a "lessee/dealer") to purchase branded gasoline from the wholesaler. The wholesaler may have franchisees ("open dealers") who sell branded gasoline pursuant to a franchise agreement. Finally, the wholesaler may sell branded gasoline to independent firms known as "jobbers" that distribute the branded gasoline to retail gasoline stations (which are sometimes owned by the jobber).

The complaint alleges, among other things, that the merger of Amoco and BP, both wholesalers of branded gasoline, would have an anticompetitive effect in certain southeastern United States markets for the wholesale sale of gasoline. Each of these markets would be moderately concentrated or highly concentrated after the merger, which would significantly increase the levels of concentration in these markets. The theory is that because these markets would be concentrated following the merger, wholesalers could coordinate the wholesale price of gasoline, which, in turn, would harm consumers by causing higher gasoline prices at the pump.²

Any effort by wholesalers to pass on a collusive price increase would be defeated if enough branded retail gasoline stations switched to other wholesalers rather than pay the higher price. Entry by new wholesalers offering lower prices could defeat a collusive price increase, and such entry is likely if there are enough branded retail gasoline stations that could switch and become customers of the new wholesale entrant.³ Cheating by an existing wholesaler on a collusive price also is likely if enough branded retail gasoline stations would switch to make cheating worthwhile.

² There is no evidence that wholesalers in these markets have already attempted to collude.

³ Because the order should help ensure that gasoline terminaling markets in the southeastern United States remain competitive, a new wholesale entrant would be able to purchase gasoline at terminals to sell to jobbers.

Is such switching likely to occur? I certainly think so.⁴ An evaluation of the southeastern markets reveals that switching is already the reality, not mere speculation or prediction. Unlike company stations and lessee/dealer stations, open dealers and jobbers have the option of responding to their wholesaler's collusive price increase by switching to another wholesaler. Open dealers and jobbers currently (and with some frequency) switch relatively easily and quickly⁵ in response to changes in market conditions, including trying to combat price increases. Open dealers and jobbers have stated that they would in fact switch in response to a price increase attributable to the merger, and they have explained that they would not anticipate significant problems in switching.

Would enough branded retail gasoline stations in the southeastern markets be willing to switch to make possible new wholesale entry or cheating by an existing wholesaler? Again, I certainly think so. In most of these markets, open dealers and jobbers purchase from about 60 percent to about 80 percent of the gasoline that is sold at retail.⁶ Given that open dealers and jobbers account for such a large proportion of retail gasoline sales and that they are likely to switch, enough switching likely would occur to induce entry or cheating sufficient to defeat a collusive price increase by wholesalers.

The majority of the Commission emphasizes that the concentration levels in these markets create a presumption of anticompetitive effects and that history demonstrates that switching to new wholesale entrants is unlikely to prevent these effects. Specifically, the majority believes that open dealers and jobbers will switch primarily to incumbent wholesalers. The majority reasons that switching will be limited primarily to incumbent wholesalers because many of them offer benefits (such as local marketing or brand credit card programs) that would not be offered by a new wholesale entrant.

The investigative record is to the contrary. While there has been significant switching by open dealers and jobbers among incumbent

⁴ None of the public comments supplied analysis or data directly bearing on the issue of whether switching was likely to occur in these markets in the absence of the relief prescribed by the order.

⁵ Switching can occur relatively quickly because, although any individual open dealer or jobber may have to wait for its contract to expire before it can switch, the short-term nature of contracts between Amoco and open dealers and jobbers means that some of those contracts are expiring at any given time. Station switching also can occur relatively inexpensively, especially because new wholesalers often reimburse open dealers and jobbers for the costs incurred in switching.

⁶ By contrast, in other investigations the Commission has determined that sufficient switching would not occur in markets that are dominated by company stations and lessee/dealer stations.

wholesalers, there also has been significant switching away from incumbent wholesalers to new branded wholesalers and new unbranded wholesalers.⁷ Moreover, open dealers and jobbers have stated that they would switch in response to a collusive price increase, but have not stated that their switching would be limited to moving from one incumbent wholesaler to another. Detailed economic analysis has shown that whatever non-price benefits incumbent wholesalers may be able to offer to open dealers and jobbers, they are unlikely to induce open dealers and jobbers to ignore promising opportunities offered by new wholesale entrants.⁸

Because switching is likely to defeat any collusive price increase, the merger of Amoco and BP is unlikely to have anticompetitive effects in the southeastern United States markets for the wholesale sale of gasoline. The Commission nevertheless has extracted from the merging parties a variety of costly concessions designed to facilitate switching and improve the marketplace.⁹ As explained above, because market forces are likely to cause sufficient switching *without government intervention*, these measures are simply unnecessary. The Commission thus should have allowed the merger of Amoco and BP to proceed with antitrust relief limited to terminaling as well as the Ohio and Pittsburgh, Pennsylvania wholesaling situations.¹⁰

I therefore dissent from the aspects of this matter dealing with gasoline wholesaling in the southeastern United States markets identified in Paragraph 19 of the complaint.

⁷ For example, by offering lower prices to induce switching, Citgo has been able to enter Florida and Coastal has expanded in South Carolina. Similarly, by offering lower prices to induce switching, unbranded wholesalers (such as Kwik Trip, Racetrac, Speedway, Smile, Wilco, and Hess) also have been able to enter many of these markets.

⁸ The majority also posits that instead of switching, open dealers and jobbers may decide to accept a collusive price increase, pass it on consumers at the pump, and share in the profit from the price increase. For an open dealer or jobber to share in the profit from a collusive increase, it would have to be confident that increased prices at the pump would not be undercut by other retailers. Given that wholesalers do not control the pricing at most retail gasoline stations in these markets, open dealers and jobbers would have good reason to worry that any collusive price that they sought to impose would be undercut, especially to the extent that there are unbranded retail gasoline stations in these markets.

⁹ Because they distort the usual market incentives of jobbers, the order provisions designed to promote switching also may have unintended and unforeseen consequences in the marketplace.

¹⁰ The majority has revised the order to respond to public comments regarding the provisions designed to promote switching. Assuming for the sake of argument that the types of provisions contained in the proposed order were needed to promote switching, the revisions contained in the final order are reasonable.

545

Complaint

IN THE MATTER OF
SERVICE CORPORATION INTERNATIONAL

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-3869. Complaint, April 22, 1999--Decision, April 22, 1999

This consent order, among other things, permits Service Corporation International, the largest owner of funeral homes and cemeteries in the world, to acquire Equity Corporation International and requires the respondent to divest certain funeral service and cemetery properties to Carriage Services, Inc.

Participants

For the Commission: *Joseph Brownman, Marc Schneider, Barbara Shapiro, Harold Kirtz, James Rohrer, Maridel Freshwater Hoagland, Phillip Broyles, David von Nirschl, Roberta Baruch, William Baer, Louis Silvia, Jeffrey Fischer, and Christopher Garmon.*

For the respondent: *Marcus Watts and Annette Trip, Liddell, Sapp, Zively, Hill & LaBoon, Houston, TX.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act ("FTC Act"), and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Service Corporation International ("SCI"), and Equity Corporation International ("ECI"), a corporation, have entered into an agreement in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that if the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act, 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:

I. RESPONDENT SERVICE CORPORATION INTERNATIONAL

1. Respondent SCI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen