

Complaint

IN THE MATTER OF

RHODIA, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT

Docket C-3930; File No. 9910237
Complaint, March 13, 2000--Decision, April 18, 2000

This consent order addresses the acquisition by Respondents Rhodia, of Albright & Wilson PLC, a wholly owned subsidiary of Donau Chemie AG. Respondent is required to divest to Potash Corporation of Saskatchewan A&W's United States pure phosphoric acid business, including A&W's interest in the Joint Venture, as well as joint venture manufacturing assets, including the Aurora pure phosphoric acid plant and the Cincinnati plant. The order also requires Respondents to provide PCS with technology A&W has developed for manufacturing pure phosphoric acid and for using it in certain applications. The order also requires respondents to divest other assets related to A&W's pure phosphoric acid business, including customer lists, contracts, and other intangible assets. The Order to Maintain Assets requires that respondents preserve the A&W assets they are required to divest as a viable and competitive operation until those assets are transferred, and to conduct the A&W pure phosphoric acid business in the ordinary course of business. Furthermore, the Order to Maintain Assets includes an obligation on respondents to build and maintain a sufficient inventory of pure phosphoric acid to ensure there is no shortage of supply during the period that the business is being transferred.

Participants

For the Commission: *Robert S. Tovsky, Randall Conner, Gorav Jindal, Jeanine Balbach, Steven Wilensky, Emily Byers, Morris A. Bloom, John O'Hara Horsley, Richard Liebeskind, Daniel P. Ducore, Thomas R. Isso, Louis Silva, and Gregory Vistnes.*

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For the Respondents: *Michael N. Sohn and Cathy A. Hoffman, Arnold & Porter, Steven C. Sunshine, Shearman & Sterling, George S. Cary, Cleary, Gottlieb, Steen & Hamilton, and Raymond A. Jacobsen and Joel R. Grosberg, McDermott, Will & Emery.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Rhodia has entered into an agreement to acquire Albright & Wilson PLC, a wholly-owned subsidiary of Donau Chemie AG, and that the acquisition, if consummated, would result 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 Rhodia is a corporation organized, existing, and doing business under and by virtue of the laws of France, with its executive offices located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France. Rhodia, among other things, engages in the development, manufacture and sale of pure phosphoric acid and phosphate salts, primarily in Europe and North America.

2. Respondent Donau Chemie AG is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria. In April 1999, Donau acquired Albright & Wilson through a cash tender offer valued at approximately \$720 million.

3. Respondent Albright & Wilson PLC is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of

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business located at 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England. Albright & Wilson, among other things, engages in the worldwide development, manufacture and sale of pure phosphoric acid and phosphate salts.

4. At all times relevant herein, Respondents Rhodia, Donau and Albright & Wilson 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

5. On March 30, 1999, Rhodia and Donau executed two agreements, including a Heads of Agreement and a Call Option Agreement. Pursuant to these agreements, Donau acquired, through a cash tender offer supported by Rhodia, all of the outstanding voting securities of Albright & Wilson, and granted Rhodia an option to acquire from Donau the ownership of the Albright & Wilson voting securities. Rhodia currently intends to exercise its option to acquire Albright & Wilson, for an aggregate exercise price exceeding \$700 million.

C. RELEVANT MARKET

6. The relevant line of commerce in which to analyze the effects of Rhodia’s proposed acquisition of Albright & Wilson is the manufacture, marketing and sale of pure phosphoric acid. There are no economic substitutes for pure phosphoric acid.

7. Pure phosphoric acid is a syrupy tribasic acid that is used in a wide variety of applications. It is used in food applications, such as cola beverages and pet food, and in technical applications, such as cleaning compounds, metal surface treatments, and water

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treatment products. Pure phosphoric acid is sold directly to end users, and also is used as an input to create phosphate salts, such as sodium tripolyphosphate.

8. Pure phosphoric acid is produced in the United States primarily by two different methods. The older method is the thermal process, in which producers add water to elemental phosphorus. The newer method is the solvent extraction process, in which producers use solvents to remove impurities from impure, or "green," phosphoric acid. The solvent extraction process has a cost advantage over the thermal process because it is much less energy-intensive.

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

10. The relevant geographic market in which to analyze the effects of Rhodia's proposed acquisition of Albright & Wilson is the United States. The level of imports of pure phosphoric acid has been small compared to the overall market, and has not been highly responsive to changes in United States prices. In fact, prices in the United States have historically been much higher than prices in other parts of the world.

11. There are several reasons why imports of pure phosphoric acid into the United States have been limited. One reason is that transportation costs account for a significant portion of the delivered cost of phosphoric acid. Another reason is that many of the overseas producers employ the older, higher-cost thermal process to produce pure phosphoric acid. Other reasons why imports have been limited include access to distribution and the cost of terminal storage for product imported from overseas. In addition, agreements between producers in the United States and various overseas producers have had the effect of limiting the level of competition from these overseas producers.

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12. The overseas producers that have been most active in making sales of pure phosphoric acid in the United States have been those that employ the solvent extraction process. Nevertheless, the level of sales by these companies has been low. Moreover, these overseas producers of pure phosphoric acid have faced significant duties that have limited their ability to sell pure phosphoric acid in the United States. These duties have increased costs for the overseas producers, and also have chilled sales by the overseas producers in the United States.

D. MARKET STRUCTURE

13. The United States market for pure phosphoric acid is highly concentrated. Four manufacturers, including Rhodia, Albright & Wilson, FMC and Solutia, currently account for approximately 95% of the local production capacity that can supply United States customers, and 95% of sales of pure phosphoric acid. Albright & Wilson's share of direct sales to customers is close to 28%, and Rhodia's share is approximately 11%. The proposed acquisition would increase the Herfindahl-Hirschman Index for United States sales of pure phosphoric acid by over 630 points, from over 2300 to over 2940.

14. Rhodia produces pure phosphoric acid using the solvent extraction process at a plant in Geismar, Louisiana, which has an annual capacity of approximately 100,000 metric tons. It produces pure phosphoric acid via the thermal process at plants in Nashville, Tennessee and Morrisville, Pennsylvania. The Nashville plant has an annual capacity of over 38,000 metric tons and the Morrisville plant has an annual capacity of over 100,000 metric tons. Rhodia utilizes the production capacity of the Geismar plant at a much higher rate than the two thermal acid plants. Rhodia also produces phosphate salts in several different plants. Rhodia sells purified phosphoric acid directly to end-customers, and also uses it in the manufacture of phosphate salts.

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15. In 1998, Rhodia had total sales to customers in the United States of over 50 million pounds of pure phosphoric acid. Rhodia also consumes large amounts of pure phosphoric acid internally in the manufacture of phosphate salts.

16. Albright & Wilson produces pure phosphoric acid via the solvent extraction process at one plant in the United States, in Aurora, North Carolina, which is part of a joint venture with Potash Corporation of Saskatchewan ("PCS"). The capacity of this plant is approximately 155,000 metric tons per year. It produces pure phosphoric acid via the thermal acid process at a plant in Charleston, South Carolina, which has a capacity of approximately 14,000 metric tons per year. Albright & Wilson also produces pure phosphoric acid at a plant in Mexico, which has a capacity of approximately 180,000 metric tons per year. A&W utilizes the production capacity of the Aurora plant at a higher rate than the capacity of the Charleston thermal acid plant.

17. In 1998, Albright & Wilson had total sales to customers in the United States of over 150 million pounds of pure phosphoric acid. Its North American sales of pure phosphoric acid totaled over 400 million pounds. Albright & Wilson also consumed large amounts of its pure phosphoric acid production internally, to produce a wide range of phosphate salts.

18. Besides Rhodia, Albright & Wilson, FMC and Solutia, two other companies that produce pure phosphoric acid in North America for sale in the United States are Earth Sciences and Simplot. Earth Sciences and Simplot have each been producing pure phosphoric acid for the last two to three years, using processes to manufacture pure phosphoric acid different from the other North American producers. Both of these companies have very limited production capacity and sales compared to the other four producers, and are unlikely to grow their sales substantially in the foreseeable future.

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E. CONDITIONS OF ENTRY

19. *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.

20. The minimum viable scale of a pure phosphoric acid production facility likely precludes new entry. The prevailing pure phosphoric acid technology demands large-scale production, relative to market size, in order to operate efficiently. This technology has but a single use -- the production of pure phosphoric acid. It cannot economically be shifted toward another use. Therefore, all returns on investment must be derived from pure phosphoric acid 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.

F. MARKET CHARACTERISTICS THAT FACILITATE COORDINATED INTERACTION

21. The characteristics of the market for pure phosphoric acid facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

- a. The United States market for pure phosphoric acid is highly concentrated;
- b. Pure phosphoric acid is a highly homogeneous product that is purchased primarily on the basis of price;

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- c. Reliable pricing information is available from customers, and from other producers due to the practice of publicly announcing price increases in advance of their implementation;
- d. There is a strong tendency toward coordination among producers of pure phosphoric acid. Producers recognize the market to be an oligopoly in which competitive rivalry is low; and
- e. Producers tend to refrain from bidding against their competitors at accounts that they recognize to be important to the other producers, and, furthermore, undertake strategic retaliation at specific accounts as a means to discipline and deter future competition.

G. EFFECTS OF THE PROPOSED ACQUISITION

22. The effect of the acquisition may be substantially to lessen competition and to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. It will substantially increase concentration in the market for pure phosphoric acid;
- b. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the manufacture and sale of pure phosphoric acid;
- c. It will increase the likelihood that purchasers of pure phosphoric acid in the relevant geographic market will be forced to pay higher prices. In fact, Rhodia's documents project higher pure phosphoric acid prices as a result of the proposed acquisition of Albright & Wilson.

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H. VIOLATIONS CHARGED

23. The acquisition agreements between Rhodia and Donau, as described in Paragraph 5, violate Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

24. The acquisition of Albright & Wilson by Rhodia, if consummated, would violate 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of March, 2000, issues its complaint against said Respondents.

By the Commission, Commissioner Thompson dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Rhodia of Albright & Wilson PLC, a subsidiary of Donau Chemie AG, hereinafter referred to as "Respondents," and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Agreement Containing Consent Orders and to place such Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Rhodia is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France.
2. Donau is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria.
3. Albright & Wilson is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England.

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

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions shall apply:

- A. "Rhodia" means Rhodia, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Albright & Wilson" means Albright & Wilson PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Albright & Wilson, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Donau" means Donau Chemie AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Donau, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Commission" means the Federal Trade Commission.
- E. "Respondents" means Rhodia, Albright & Wilson, and Donau, respectively and collectively.

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- F. "Acquisition" means the Proposed Acquisition by Rhodia of Albright & Wilson as described in the March 30, 1999 Heads of Agreement and March 30, 1999 Call Option Agreement between Rhodia and Donau.
- G. "PCS" means Potash Corporation of Saskatchewan Inc., its subsidiaries, divisions, groups, and affiliates controlled by PCS, including, but not limited to, PCS Phosphate Company, Inc.
- H. "Purified Acid Joint Venture" or "Joint Venture" means the joint venture between Albright & Wilson and PCS, established pursuant to the July 29, 1988, General Partnership Agreement between Albright & Wilson Americas Inc. and Texasgulf, Inc., as amended.
- I. "Aurora Plant" means the Joint Venture's plant in Aurora, North Carolina which manufactures purified phosphoric acid.
- J. "Cincinnati Plant" means the Joint Venture's manufacturing plant in Cincinnati, Ohio which manufactures phosphate salts and blends of phosphoric acid.
- K. "Joint Venture Phosphoric Acid" means the phosphoric acid that is produced at the Aurora Plant and sold by the Purified Acid Joint Venture, including all grades and types of phosphoric acid that are or have been produced and sold by the Joint Venture.
- L. "Cincinnati Products" means the phosphoric acid blends and phosphate salts produced at the Cincinnati Plant.
- M. "Albright & Wilson Phosphate Salts" means phosphate salts that currently are or have been manufactured and/or sold by Albright & Wilson.
- N. "Joint Venture Products" Means Joint Venture Phosphoric Acid and Cincinnati Products.

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- O. "Albright & Wilson Interest" means the interest in the Purified Acid Joint Venture that is owned or controlled by Albright & Wilson.
- P. "PCS Divestiture Agreement" means the agreements between Rhodia, Albright & Wilson, PCS and the Joint Venture by which Albright & Wilson has agreed to sell and PCS has agreed to acquire the Assets To Be Divested.
- Q. "Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of Joint Venture Products, including, but not limited to, trademarks, patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion literature, advertising materials, quality control data, books, records, and files.
- R. "Assets To Be Divested" means the assets, properties, business and goodwill, tangible and intangible, of the Joint Venture or of Albright & Wilson that relate to Joint Venture Products, including, but not limited to:
 - 1. the Albright & Wilson Interest;
 - 2. the Aurora Plant and the Cincinnati Plant, including all machinery, furniture, fixtures, tools and other tangible personal property;
 - 3. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright &

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Wilson relating to Joint Venture Phosphoric Acid, including, but not limited to:

- a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;
- b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development, manufacture, marketing or sale of Joint Venture Phosphoric Acid;
- c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that, to the extent that any agreements relating to the sale of Joint Venture Phosphoric Acid also relate to the sale of phosphate salts, Respondents are not required to divest those portions of such agreements that relate to the sale of Albright & Wilson Phosphate Salts;
- d. all rights, title and interest in and to permits and approvals relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;

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- e. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Joint Venture Phosphoric Acid;
 - f. all equipment, vehicles and transportation facilities related to Joint Venture Phosphoric Acid, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;
 - g. all storage capacity related to Joint Venture Phosphoric Acid;
 - h. all rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits related to Joint Venture Phosphoric Acid;
 - i. all rights under warranties and guarantees, express or implied, related to Joint Venture Phosphoric Acid;
 - j. all books, records, and files related to Joint Venture Phosphoric Acid; and
 - k. all items of prepaid expense related to Joint Venture Phosphoric Acid;
4. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Cincinnati Products, including, but not limited to:
- a. a royalty-free, non-exclusive license to all rights, titles, and interest in and to Intellectual Property;

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- b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the Acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development or manufacture of Cincinnati Products; provided, however, that Respondents are not required to divest inventories of finished and packaged Albright & Wilson Phosphate Salts;
- c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;
- d. all rights, title and interest in and to permits and approvals relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
- e. all equipment, vehicles and transportation facilities related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
- f. all storage capacity related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;

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- g. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
 - h. all rights under warranties and guarantees, express or implied, related to Cincinnati Products;
 - i. all books, records, and files related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts; and
 - j. all items of prepaid expense related to Cincinnati Products.
- S. "Support Services" means those services provided by Albright & Wilson to the Assets To Be Divested, as requested by the Commission-approved acquirer, including, but not limited to, accounting and administrative Support Services, customer order entry, freight and transportation scheduling, information services, product storage and handling services, and product support.

II.**IT IS FURTHER ORDERED** that:

- A. The purpose of this Order is to: (i) preserve the Assets To Be Divested as a viable, competitive, and ongoing business; (ii) assure that no material confidential information is exchanged between the respective businesses of Rhodia and Albright & Wilson; and (iii) prevent interim harm to competition.

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- B. Respondents shall take such actions as are necessary to maintain the viability, competitiveness, and marketability of the Assets To Be Divested; Respondents shall not sell, transfer, or encumber the Assets To Be Divested or other assets related to the Assets To Be Divested; and Respondents shall not cause or permit the destruction, removal, wasting, or deterioration, or otherwise impair the viability, competitiveness, or marketability of the Assets To Be Divested or other assets related to the Assets To Be Divested, except for ordinary wear and tear.
- C. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use their best efforts to preserve existing relationships with suppliers, customers, employees, and others having business relations with the Assets to Be Divested.
- D. Prior to the transfer of the Assets To Be Divested, Respondents shall ensure that a sufficient inventory of Joint Venture Phosphoric Acid is maintained and built up, consistent with past and/or projected demand, so as to assure that no shortages of such products occur at any time.
- E. Except as required by law, and except to the extent necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, obtaining legal advice, negotiating agreements to divest assets, or complying with the Decision & Order or this Order to Maintain Assets, Rhodia shall not receive or have access to any competitively sensitive or proprietary information that relates to the Assets To Be Divested, including, but not limited to, customer lists, price lists, marketing methods, patents, technologies, processes or other trade secrets, not independently known to Rhodia from sources other than Albright & Wilson.

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III.

IT IS FURTHER ORDERED that Respondents shall maintain facilities and a work force sufficient to provide Support Services to the Assets To Be Divested. Such Support Services shall be equivalent to those currently supplied by Albright & Wilson to the Joint Venture. Respondents shall provide all employees providing Support Services as of January 1, 2000, to the Assets To Be Divested with incentives to continue in their employment positions and shall not terminate them (except for cause) or transfer them to other duties during the period covered by this Order to Maintain Assets. Such incentives shall include, but not be limited to:

- A. continuation of all employee benefits offered by Albright & Wilson until the transfer of functions provided for in the Commission-approved divestiture agreement is completed; and
- B. a bonus, equal to five (5) percent of the employee's annual salary (including any other bonuses except for the portion of any bonus payable solely as a result of Albright & Wilson's guaranteed bonus program) as of the date this Order to Maintain Assets is issued by the Commission to those Albright & Wilson employees identified in Schedule A of this Order to Maintain Assets, hereto attached, that continue their employment with Albright & Wilson until the completion of the transfer of functions provided for in the Commission-approved divestiture agreement described in the Consent Agreement and Decision and Order.

Provided, however, that Respondents' obligations under this Paragraph III shall cease as to any employee or Support Service upon notice from the buyer of the Assets To Be

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Divested that an employee or a Support Service is no longer required.

IV.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not make employment offers to any individual listed in Schedule A to the Decision & Order for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer. Respondents may make employment offers fifteen (15) days after this Order to Maintain Assets has been issued to any individual listed in Schedule A of the Decision & Order who has not accepted an employment offer from the Commission-approved acquirer.
- B. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule A to the Decision & Order; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.
- C. No later than the date on which a divestiture agreement is signed with the proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non-clerical employees of Albright & Wilson who have been or were engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development

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or manufacture of Cincinnati Products, at any time during the period from January 1, 1999, until the date of such divestiture agreement. Such list shall state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with Joint Venture Products.

- D. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with those non clerical employees described in Paragraph IV.C., above, and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in Respondents, such as dissolution, assignment, or 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 this order.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to

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their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. When the Assets To Be Divested have been divested and the transition period provided for in the Commission-approved divestiture agreement has been completed.

By the Commission, Commissioner Thompson dissenting.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by Respondent Rhodia of Albright & Wilson PLC (“Albright & Wilson”) from Donau Chemie AG (“Donau”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent 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, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

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1. Rhodia is a corporation organized, existing and doing business under and by virtue of the laws of France, with its office and principal place of business located at 26, quai Alphonse Le Gallo, 92512 Boulogne-Billancourt Cédex, France.
2. Donau is a corporation organized, existing and doing business under and by virtue of the laws of Austria, with its office and principal place of business located at Am Heumarkt 10, A-1037, Vienna, Austria.
3. Albright & Wilson is a corporation organized, existing and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at 210-222 Hagley Road West, Oldbury, West Midlands, B68 ONN, England.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of 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. "Rhodia" means Rhodia, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Rhodia, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Albright & Wilson" means Albright & Wilson PLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Albright & Wilson, and the

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respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. "Donau" means Donau Chemie AG, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Donau, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. "Commission" means the Federal Trade Commission.
- E. "Respondents" means Rhodia, Albright & Wilson, and Donau, respectively and collectively.
- F. "Acquisition" means the Acquisition by Rhodia of Albright & Wilson as described in the March 30, 1999, Heads of Agreement and March 30, 1999, Call Option Agreement between Rhodia and Donau.
- G. "PCS" means Potash Corporation of Saskatchewan Inc., its subsidiaries, divisions, groups, and affiliates controlled by PCS, including, but not limited to, PCS Phosphate Company, Inc.
- H. "Purified Acid Joint Venture" or "Joint Venture" means the joint venture between Albright & Wilson and PCS, established pursuant to the July 29, 1988, General Partnership Agreement between Albright & Wilson Americas Inc. and Texasgulf, Inc., as amended.
- I. "Aurora Plant" means the Joint Venture's plant in Aurora, North Carolina which manufactures Joint Venture Phosphoric Acid.

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- J. "Cincinnati Plant" means the Joint Venture's manufacturing plant in Cincinnati, Ohio.
- K. "Joint Venture Phosphoric Acid" means the phosphoric acid that is produced at the Aurora Plant and sold by the Purified Acid Joint Venture, including all grades and types of phosphoric acid that are or have been produced and sold by the Joint Venture.
- L. "Cincinnati Products" means the phosphoric acid blends and phosphate salts produced at the Cincinnati Plant.
- M. "Albright & Wilson Phosphate Salts" means phosphate salts that currently are or have been manufactured and/or sold by the Joint Venture or Albright & Wilson.
- N. "Joint Venture Products" means Joint Venture Phosphoric Acid and Cincinnati Products.
- O. "Albright & Wilson Interest" means the interest in the Purified Acid Joint Venture that is owned or controlled by Albright & Wilson.
- P. "PCS Divestiture Agreement" means the agreements between Rhodia, Albright & Wilson, PCS and the Joint Venture by which Albright & Wilson has agreed to sell and PCS has agreed to acquire the Assets To Be Divested.
- Q. "Intellectual Property" means any form of intellectual property relating to the research, development, manufacture or sale of Joint Venture Products, including, but not limited to, trademarks, patents, trade secrets, research materials, technical information, management information systems, software, inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, formulas, customer lists, vendor lists, catalogs, sales promotion

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literature, advertising materials, quality control data, books, records, and files.

- R. "Assets To Be Divested" means the assets, properties, business and goodwill, tangible and intangible, of the Joint Venture or of Albright & Wilson that relate to Joint Venture Products, including, but not limited to:
1. the Albright & Wilson Interest;
 2. the Aurora Plant and the Cincinnati Plant, including all machinery, furniture, fixtures, tools and other tangible personal property;
 3. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Joint Venture Phosphoric Acid, including, but not limited to:
 - a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;
 - b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development, manufacture, marketing or sale of Joint Venture Phosphoric Acid;
 - c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such agreements relate

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exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers; provided that, to the extent that any agreements relating to the sale of Joint Venture Phosphoric Acid also relate to the sale of phosphate salts, Respondents are not required to divest those portions of such agreements that relate to the sale of Albright & Wilson Phosphate Salts;

- d. all rights, title and interest in and to permits and approvals relating to the research, design, development, manufacture, distribution, marketing or sale of Joint Venture Phosphoric Acid, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
- e. all customer and vendor lists, catalogs, sales promotion literature and advertising materials relating to the research, design, development, manufacture, distribution, marketing, or sale of Joint Venture Phosphoric Acid;
- f. all equipment, vehicles and transportation facilities related to Joint Venture Phosphoric Acid, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;
- g. all storage capacity related to Joint Venture Phosphoric Acid;

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- h. all rights, title and interest in and to owned or leased real property, together with appurtenances, licenses and permits related to Joint Venture Phosphoric Acid;
 - i. all rights under warranties and guarantees, express or implied, related to Joint Venture Phosphoric Acid;
 - j. all books, records, and files related to Joint Venture Phosphoric Acid; and
 - k. all items of prepaid expense related to Joint Venture Phosphoric Acid;
2. all other assets, properties, business and goodwill, tangible and intangible, owned, leased or possessed by Albright & Wilson relating to Cincinnati Products, including, but not limited to:
- a. a royalty-free, non-exclusive license to all rights, title, and interest in and to Intellectual Property;
 - b. all rights, title, and interest in and to inventories of products, raw materials (to the extent requested by the acquirer), supplies and parts, including work-in-process and finished goods, relating to the research, design, development or manufacture of Cincinnati Products; provided, however, that Respondents are not required to divest inventories of finished and packaged Albright & Wilson Phosphate Salts;

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- c. all rights, title, and interest in and to agreements, express or implied, relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such agreements relate exclusively to such purposes, including, but not limited to, warranties, guarantees, and contracts with joint venture partners, suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors, consignees, and customers;
- d. all rights, title and interest in and to permits and approvals relating to the research, design, development or manufacture of Cincinnati Products, regardless of whether such permits and approvals relate exclusively to such purposes, to the extent permitted by law;
- e. all equipment, vehicles and transportation facilities related to Cincinnati Products, except to the extent that such assets relate exclusively to the marketing or sale of Albright & Wilson Phosphate Salts;
- f. all storage capacity related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
- g. all rights, titles and interests in and to owned or leased real property, together with appurtenances, licenses and permits related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts;
- h. all rights under warranties and guarantees, express or implied, related to Cincinnati Products;

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- i. all books, records, and files related to Cincinnati Products, except to the extent that such assets are used exclusively in the marketing or sale of Albright & Wilson Phosphate Salts; and
 - j. all items of prepaid expense related to Cincinnati Products.
- S. "Trustee" means a trustee appointed pursuant to Paragraph III.A. of this Order.

II.**IT IS FURTHER ORDERED** that:

- A. Respondents shall divest the Assets To Be Divested to PCS pursuant to the PCS Divestiture Agreement no later than ten (10) days after Rhodia's consummation of the Acquisition. The purpose of the divestiture is to ensure the continued use of the Assets To Be Divested in the same business in which they were engaged at the time of the Acquisition and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint. Failure by Respondents to perform the divestiture agreement shall also constitute a violation of this Order.

Provided, however, that, if at that time the Commission determines to issue the Order, the Commission notifies Respondents that PCS is not an acceptable acquirer or that the PCS Divestiture Agreement is not an acceptable manner of divestiture, the Respondents shall, within one-hundred and twenty (120) days from the date on which this Order is issued by the Commission, divest the Assets To Be Divested to an

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acquirer that is approved by the Commission, and in a manner approved by the Commission.

- B. No later than the date on which a divestiture agreement is signed with the proposed acquirer, Respondents shall provide the proposed acquirer with a complete list of all non-clerical employees of Albright & Wilson who have been or were engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development or manufacture of Cincinnati Products, at any time during the period from January 1, 1999, until the date of such divestiture agreement. Such list shall state each such individual's name, position, address, current or last known business telephone number and a description of the duties and work performed by the individual in connection with Joint Venture Products.
- C. Respondents shall provide the proposed acquirer the opportunity to enter into employment contracts with the non-clerical employees described in Paragraph II.B.
- D. Respondents shall provide the proposed acquirer with an opportunity to inspect the personnel files and other documentation relating to all non-clerical employees who have been engaged in the research, development, manufacture or sale of Joint Venture Phosphoric Acid or the research, development or manufacture of Cincinnati Products, to the extent permissible under applicable laws, at the request of the proposed acquirer no later than the date of the execution of the related divestiture agreement.
- E. Respondents shall provide the individuals identified in Schedule A of this Order, hereto attached, with financial incentives to accept employment with the Commission-approved acquirer at the time of the divestiture. Such incentives shall include, but not be limited to:

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1. a bonus equal to fifteen (15) percent of the employee's annual salary (including any other bonuses except for the portion of any bonus payable solely as a result of Albright & Wilson's guaranteed bonus program) as of the date this Order is issued by the Commission for any individual who agrees to accept an offer of employment from the Commission-approved acquirer, payable by Respondents, as follows: 1) a ten (10) percent bonus upon the beginning of the employee's employment with the Commission-approved acquirer; and 2) a five (5) percent bonus upon the employee's completion of one year of employment with the Commission-approved acquirer; and
 2. the severance payment to which Albright & Wilson employees would be entitled upon termination if, less than twelve (12) months after the date on which such employee commences employment with the Commission-approved acquirer, the Commission-approved acquirer terminates the employment of such employee for reasons other than cause. The amount of such severance payment shall be equal to the payment that such employee would have received had he or she remained in the employ of Albright & Wilson and been terminated at such time, less any severance payment actually paid by the Commission-approved acquirer.
- F. Respondents shall not make employment offers to any individual listed in Schedule A of this Order for a period of one (1) year after this Order has been issued if such individual has accepted an employment offer from the Commission-approved acquirer. Respondents may make employment offers fifteen (15) days after this Order has been issued to any individual listed in Schedule A who has

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not accepted an employment offer from the Commission-approved acquirer.

- G. Respondents shall not interfere with the employment by the Commission-approved acquirer of the individuals listed in Schedule A; shall not offer any incentive to such employees to decline employment with the Commission-approved acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employees from accepting employment with the Commission-approved acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with the Respondents that would affect the ability of those individuals to be employed by the Commission-approved acquirer. Provided, however, that any such waiver is limited to employment with the Commission-approved acquirer.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not divested, absolutely and in good faith and with the Commission's prior approval, the Assets To Be Divested in accordance with Paragraph II.A. of this Order, the Commission may appoint a trustee to divest the Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to § 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 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 § 5(l) of the Federal Trade Commission Act, or any other statute

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enforced by the Commission, for any failure by the Respondents 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, 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 any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any 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 Assets To Be Divested.
 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 effect the divestiture required by this Order.

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4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.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 Assets To Be Divested 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 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 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

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acquiring entity selected by Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) business 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 divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the 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 Assets To Be Divested.
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 losses, claims,

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damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. The trustee shall have no obligation or authority to operate or maintain any assets relating to the research, development, manufacture or sale of Joint Venture Phosphoric Acid, or the research, development or manufacture of Cincinnati Products.
12. The trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

IT IS FURTHER ORDERED that within thirty (30) days of the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II. or III. 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. and III. 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. and III. of this Order, including a description of all substantive contacts or negotiations for divestiture and the identity of all parties

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contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, all reports and recommendations concerning divestiture, and all transition services required to be rendered pursuant to the agreement approved by the Commission.

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, or 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 this Order.

VI.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States offices, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of the Respondents relating to compliance with this Order; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview

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officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate after Respondents have complied with the requirements of Paragraphs II. and III. of this Order.

By the Commission, Commissioner Thompson dissenting.

[Confidential Schedule A Redacted From Public Version]

**DISSENTING STATEMENT OF COMMISSIONER
MOZELLE W. THOMPSON**

The Commission has determined to issue a final consent order in connection with Rhodia's acquisition of Albright & Wilson plc from Donau Chemie AG. The complaint narrowly defines the relevant market for pure phosphoric acid (PPA) as within the boundaries of the United States, and, consequently, the consent order does not require Rhodia to divest a PPA plant located in Mexico. For the following reasons, I disagree.

The North American PPA market has operated in an oligopolistic manner for the past twenty years or more. The major North American competitors have successfully engineered the highest PPA prices in the world through a variety of actions, including signaling prices, retaliating selectively to enforce high prices, controlling imports through agreements with a foreign

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supplier, and eliminating domestic competitors through acquisition. Rhodia, a significant member of the North American oligopoly, now proposes to acquire Albright & Wilson. I believe such an acquisition would allow Rhodia to:

- (1) Reinforce its world-wide dominant position among phosphates producers;
- (2) Protect PPA prices and market share in North America; and
- (3) Position itself to have the capacity to enforce market discipline in the North American market.

Evidence of Rhodia's view of the acquisition's impact on the North American market alone leads me to believe that the geographic scope of the PPA product market extends to all of North America, thus including Albright & Wilson's Mexican plant in the market. Other evidence, however, also demonstrates that North America is the relevant market. Accordingly, the Commission should have fully considered ordering the sale of Albright & Wilson's interests in both of its North American PPA plants to Potash Corporation and/or another purchaser not saddled with the incentives and history Rhodia carries.

Shipment Decisions and the Scope of the Geographic Market

The complaint apparently limits the scope of the geographic market because Albright & Wilson, the owner of a Mexican PPA plant and part owner of a North Carolina plant, does not currently ship Mexican PPA into the United States even though the evidence convinces me that the Mexican capacity could be used to supply customers in the United States. Although this private business decision from a multi-plant supplier creates a shipment

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pattern that superficially supports finding a United States PPA market, one principle of geographic market analysis is that competition among geographically differentiated producers may be linked indirectly by the customers they can economically serve.

Despite the decision not to ship PPA into the United States from the Mexican plant, North American capacity is competitively linked — and North American PPA suppliers compete — because the Mexican plant's PPA is sold to customers in Mexico and Canada that U.S. domestic plants would otherwise supply. Moreover, Albright & Wilson's joint venture plant, as well as other competitors' U.S. plants, undoubtedly serve customers that Albright & Wilson's Mexican plant would otherwise serve, but for Albright & Wilson's decision concerning which of its plants would serve which North American customers.

Divestiture Policy and the Adequacy of the Ordered Relief

As a routine starting point, the Commission's ongoing policy concerns about merger relief generally leads us to consider requiring the complete divestiture of either one of the merging parties' overlapping businesses in the relevant market. This divestiture policy limits the potential adverse market consequences by maintaining the pre-acquisition market structure and by maximizing the potential that the purchaser would be viable and competitive.

I am concerned that we have not adhered to this policy here, where there is significant evidence that the market is acting noncompetitively, as well as compelling evidence supporting a challenge of the proposed acquisition. Rhodia is the dominant phosphates producer in the world, and it will become — even taking into account the majority's relief — the leader in the North American PPA market. Thus, Rhodia, through this acquisition, would gain additional North American capacity that could be used to enforce higher prices.

Dissenting Statement

Although the relief set forth in the consent order — which requires Rhodia to sell the current Albright & Wilson joint venture interest in the North Carolina plant — does limit the potential adverse market impact, I still am concerned that the relief does not go far enough. In looking forward, if we allow Rhodia to acquire the Mexican plant and become the competitor controlling the greatest amount of capacity in North America, it could leverage the Mexican plant's capacity to discipline competitors' pricing. Thus, a settlement that allows Rhodia to become the North American market leader by acquiring Albright & Wilson's interest in either of its two North American plants should be fully and cautiously scrutinized by the Commission to determine whether further relief is warranted. By alleging a United States geographic market here, the majority has unfortunately isolated itself from a full consideration of the appropriate divestiture and, when evaluating future possible PPA plant acquisitions, the Commission would face the additional burden of justifying a market redefinition.

One could argue that Rhodia's ownership of the Mexican plant, while providing it the capacity to attain the leading position in North America, ironically may well slightly improve the market concentration data. But the limited evidence before me suggests that the majority neither fully explored nor evaluated the consequences of this concentration data or the options available to the Commission. These options include ordering the sale of all of the Albright & Wilson assets to Potash, a North American-only competitor, or ordering the sale of the joint venture interest in the North Carolina plant to Potash and the Mexican plant to another independent purchaser. These options — when evaluated with the limited information presented to the Commission — appear no worse than allowing Rhodia to own the Mexican plant, and, in fact, either of these options might prove superior to the majority's relief.

Analysis to Aid Public Comment

Thus, by basing a complaint on a narrow United States market and avoiding direct confrontation of the issue whether Rhodia should be allowed to purchase the Mexican plant, the majority permits Rhodia to acquire additional North American capacity and perhaps ensures that the PPA market will act noncompetitively in the future. In my view, the majority's unwillingness to make a minor correction now could squander a valuable opportunity to protect North American PPA consumers.

Analysis to Aid Public Comment

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from Rhodia, Donau Chemie AG ("Donau"), and Albright & Wilson PLC ("A&W") (collectively "respondents"). The Consent Agreement is intended to resolve anticompetitive effects stemming from Rhodia's proposed acquisition of A&W. The Consent Agreement includes a proposed Decision and Order (the "Order"), that would require Rhodia to divest A&W's pure phosphoric acid business to Potash Corp. of Saskatchewan ("PCS"). For the last several years, A&W and PCS have been partners in a phosphates manufacturing joint venture (the "Joint Venture"), which includes, among other assets, a pure phosphoric acid production facility in Aurora, North Carolina, and a phosphates manufacturing plant in Cincinnati, Ohio. The Consent Agreement also includes an Order to Maintain Assets that requires respondents to preserve the assets they are required to divest as a viable, competitive, and ongoing operation until the divestiture is achieved.

The Order, if finally issued by the Commission, would settle charges that Rhodia's proposed acquisition of A&W may have substantially lessened competition in the United States market for pure phosphoric acid. The Commission has reason to believe that

Analysis to Aid Public Comment

Rhodia's proposed acquisition of A&W would have violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The proposed complaint, described below, relates the basis for this belief.

The proposed Order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and comments received and decide whether to withdraw its acceptance of the Consent Agreement or make final the proposed Order.

According to the Commission's proposed complaint, the relevant line of commerce in which to analyze the effects of Rhodia's proposed acquisition of A&W is pure phosphoric acid, and the relevant geographic market is the United States. Pure phosphoric acid is used as an input into a wide variety of consumer and industrial products, ranging from cola beverages to cleaning compounds and metal treatments. The proposed complaint alleges that the pure phosphoric acid market in the United States already is highly concentrated, and that the proposed acquisition of A&W by Rhodia would increase concentration in that market, as measured by the Herfindahl-Hirschman Index, by over 600 points, to a level close to 3000. The Commission's complaint further notes that Rhodia and A&W currently employ the low-cost solvent extraction process to produce pure phosphoric acid.

The proposed complaint also alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or offset adverse effects of the acquisition on competition. Entry is difficult in this market because of the length of time it would take to build new construction facilities and enter the market; and because of the large minimum efficient scale of new production

Analysis to Aid Public Comment

facilities, which would require a new entrant to sell large volumes of pure phosphoric acid into the North American market, driving down market prices to a level that would render new entry unprofitable. Significant expansion by smaller producers also is unlikely.

The proposed complaint alleges that Rhodia's proposed acquisition of A&W would lessen competition by making coordinated interaction among the remaining producers more likely. The complaint describes how Rhodia's documents project that the combination of Rhodia and Albright & Wilson would lead to higher prices for pure phosphoric acid.

The proposed Order is designed to remedy the anticompetitive effects of the acquisition in the United States market for pure phosphoric acid, as alleged in the complaint, by requiring the divestiture to PCS of A&W's United States pure phosphoric acid business, including A&W's interest in the Joint Venture, as well as joint venture manufacturing assets, including the Aurora pure phosphoric acid plant and the Cincinnati plant. The Order would also require respondents to provide PCS with technology A&W has developed for manufacturing pure phosphoric acid and for using it in certain applications. PCS would be able to use that technology to build pure phosphoric acid plants both within and outside of the United States, and to license the technology to other firms that sought to build pure phosphoric acid plants. The proposed Order would also require respondents to divest other assets related to A&W's pure phosphoric acid business, including customer lists, contracts, and other intangible assets. The proposed divestiture does not require divestiture of A&W's pure phosphoric acid plant in Mexico, which does not export pure phosphoric acid to customers in the United States. A&W's Mexican plant produces pure phosphoric acid used primarily in home laundry detergents in Mexico, an application that no longer exists in the United States.

Analysis to Aid Public Comment

PCS, based in Saskatoon, Saskatchewan, is the world's third-largest producer of phosphoric acid for fertilizer. It also produces other fertilizer materials such as nitrogen and potash. PCS entered the phosphates business in 1995, through its acquisition of Texasgulf. A publicly-traded Canadian company, PCS in 1998 had an operating income of \$446 million and a net income of \$261 million on sales of \$2.3 billion. PCS mines phosphate rock at Aurora, North Carolina, and also produces "green" phosphoric acid at that site. Slightly over 10% of PCS' green acid production at Aurora is used as a feedstock for the manufacture of pure phosphoric acid.

If the Commission, at the time that it accepts the Order for public comment, notifies respondents that it does not approve of the proposed divestiture to PCS, or the manner of the divestiture, the proposed Order provides that respondents would have 120 days to divest the A&W pure phosphoric acid business to a different acquirer. If respondents did not complete the divestiture in that period, a trustee would be appointed.

The proposed Order to Maintain Assets that is also included in the Consent Agreement requires that respondents preserve the A&W assets they are required to divest as a viable and competitive operation until those assets are transferred to the Commission-approved acquirer. It requires the respondents to maintain the viability and competitiveness of the assets, and to conduct the A&W pure phosphoric acid business in the ordinary course of business. Furthermore, the Order to Maintain Assets includes an obligation on respondents to build and maintain a sufficient inventory of pure phosphoric acid to ensure there is no shortage of supply during the period that the business is being transferred to the Commission-approved acquirer. The Order to Maintain Assets also requires respondents to provide necessary support services and maintain an adequate workforce for the A&W pure phosphoric acid business.

Analysis to Aid Public Comment

The Consent Agreement requires respondents to provide the Commission, within thirty (30) days of the date the Agreement is signed, with an initial report setting forth in detail the manner in which respondents will comply with the provisions relating to the divestiture of assets. The proposed Order further requires respondents to provide the Commission with a report of compliance with the Order within thirty (30) days following the date the Order becomes final and every thirty (30) days thereafter until they have complied with the terms of the Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement and the proposed Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement or the proposed Order or in any way to modify the terms of the Consent Agreement or the proposed Order.

Complaint

IN THE MATTER OF
MCCORMICK & COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 7 OF THE CLAYTON ACT AND SECTION 2 OF THE
ROBINSON-PATMAN ACT

Docket C-3939; File No. 9610050
Complaint, April 27, 2000--Decision, April 27, 2000

This consent order requires Respondent McCormick & Company to cease and desist from price discrimination within the meaning of Section 2(a) of the Robinson-Patman Act, by selling its product at a net higher price than it does to any competing purchaser, where the discrimination may cause competitive harm. The order also makes available the statutory defenses provided in the Act and requires that for each instance that Respondent wishes to raise the provided defense, it must contemporaneously document all information that it believes entitles it to the defense.

Participants

For the Commission: *Patrick J. Roach, F. Martin Dajani, David Conn, Dana F. Abrahamsen, Cecelia M. Waldeck, Mark D. Peterson, Ara Jabagchourian, Dennis C. Harketts, Stephanie Langley, Veronica G. Kayne, Daniel P. Ducore, and BE.*

For the Respondents: *Lewis Noonberg and Kenneth Starling, Piper Marbury Rudnick & Wolfe, LLP.*

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 these Acts, the Federal Trade Commission, having reason to believe that McCormick & Company, Incorporated, a corporation (sometimes referred to as "respondent" or "McCormick"), has violated the provisions of these Acts, and it appearing to the