

Complaint

IN THE MATTER OF

**CARLYLE PARTNERS IV, L.P.,
PQ CORPORATION,
INEOS GROUP LIMITED,
AND
JAMES RATCLIFFE****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT***Docket C-4233; File No. 071 0203**Complaint, September 18, 2008 – Decision, September 18, 2008*

This consent order addresses the proposed acquisition of the world-wide sodium silicate and silicas business from INEOS Group Limited by Carlyle Partners IV, L.P. Carlyle participates in the sodium silicate market world-wide through PQ Corporation, which it owns. The acquisition may substantially lessen competition in the market for sodium silicate in the Midwest United States. The order requires Carlyle to divest PQ's sodium silicate plant and business, located in Utica, Illinois, to Oak Hill Acquisition Company, LLC, or another Commission-approved buyer. The respondents are required to make available to Oak Hill or other purchaser, at no greater than direct cost, such personnel, assistance, and training as is necessary to enable the purchaser to operate the Utica plant in substantially the same manner as PQ operated the plant, for a period of two years after divestiture. The respondents are also required to enter into an employee services agreement covering certain union employees at the Utica plant to facilitate their continued employment at the plant under the new ownership. The Commission may appoint an Interim Monitor to assure that the respondents expeditiously comply with all of their obligations and responsibilities; the Commission may also appoint a Divestiture Trustee should PQ fail to fully comply with its obligations. The order requires the respondents to submit to the Commission periodic reports until they have fully achieved the divestiture. The respondents are also required to notify the Commission of any change in their corporate structure that may affect compliance obligations arising out of the order.

Complaint

Participants

For the *Commission*: Roberta S. Baruch, Morris Bloom, Linda D. Cunningham, Geary Gessler, Catharine M. Moscatelli, Danica R. Noble, Aaron Siskind, Christopher T. Taylor, Robert Tovsky, Casey Triggs, Steven L. Wilensky, and Christian H. Woolley.

For the *Respondents*: Robin C. Landis, Cravath, Swaine & Moore L.L.P.; and Kyra K. Bromley and Gary W. Kubek, Debevoise & Plimpton L.L.P.

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Carlyle Partners IV, L.P., has entered into an agreement to acquire certain assets of INEOS Group Limited, 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 Carlyle Partners IV, L.P., a limited partnership established under Delaware law, is an investment fund organized and managed by the Carlyle Group, a private investment firm based in the United States which originates, structures, and acts as the lead equity investor in management buyouts, strategic minority equity investments, equity private placements, consolidations and other strategic investments. Carlyle Group has its principal place of business and offices located at 1001 Pennsylvania Avenue, N.W., Washington, D.C., 20004-2505.

Complaint

2. Respondent PQ Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at P.O. Box 840, Valley Forge, Pennsylvania, 19482-0840. Carlyle acquired PQ on July 30, 2007, for approximately \$1.5 billion. PQ manufactures sodium silicate and sodium silicate derivatives worldwide. PQ owns ten sodium silicate manufacturing facilities in the United States.

3. Respondent INEOS Group Limited is a company 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 Hawkslease, Chapel Lane, Lyndhurst, Hampshire, S043 7FG, United Kingdom. INEOS Group Limited is a global manufacturer of specialty and intermediate chemicals. INEOS Silicas, a wholly owned business of INEOS Group Limited, manufactures sodium silicate and sodium silicate derivatives worldwide. INEOS Silicas operates one sodium silicate manufacturing facility in the United States, located at Joliet, Illinois.

4. Respondent James Ratcliffe is an individual, with an office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire, S043 7FG, United Kingdom. James Ratcliffe is the controlling shareholder of INEOS Group Limited.

5. At all times relevant herein, Respondents Carlyle, PQ and INEOS 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 or partnerships 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

6. On October 11, 2007, Carlyle and INEOS entered into an agreement whereby Carlyle will acquire the U.S. silicas assets of

Complaint

INEOS and certain INEOS foreign silicas assets for \$292 million in cash, of which \$60 million will be allocated to the purchase of the U.S. silicas assets. As partial consideration for the sale, Ratcliffe will also acquire 1,928,295 newly-issued shares of Class B common stock of the combined company, valued at \$192.8 million. After the transaction, the new entity will be operated as a joint venture. Carlyle and INEOS will own about 54% and 36% of the combined entity, respectively, with the remaining 10% owned by joint venture management.

C. RELEVANT MARKET

7. The relevant line of commerce in which to analyze the effects of PQ's proposed acquisition of INEOS is the manufacture, marketing and sale of sodium silicate.

8. Sodium silicate is a stable, organic, environmentally friendly compound characterized by large surface area and variable pore sizes. Sodium silicate has a variety of direct uses and is also consumed in the production of downstream silicate derivatives, also referred to as silicas. The two largest direct end uses for sodium silicate are detergents and the pulp and paper industry. Detergents also represent the largest market for downstream sodium silicate derivatives, where sodium silicate is a key raw material in detergent zeolites production.

9. At prevailing relative prices, there is no close substitute for sodium silicate in any of its significant uses. As a result, a small but significant and non-transitory increase in the price of sodium silicate would not lead to a significant reduction in consumption of sodium silicate in any of its significant uses.

10. The relevant geographic market in which to analyze the effects of Carlyle's acquisition of PQ is the Midwest United States. Sodium silicate, which is almost always sold in the United States in aqueous solution form that is about 65% water, exhibits strong regional markets because of high transportation costs relative to the value of the product. The effective shipping radius

Complaint

from any given plant is about 300 miles. There are virtually no shipments of sodium silicate into the Midwest United States from outside of that region.

D. MARKET STRUCTURE

11. The Midwest U.S. market for sodium silicate is highly concentrated, with only four competitors. The competitors are PQ Corporation, Occidental Chemical Corporation, INEOS Group Limited, and W.R. Grace & Company. The acquisition would reduce the number of competitors from four to three, and would combine the largest competitor PQ with the third largest competitor INEOS, with 50% and 12% market shares as measured by plant capacity, respectively. The Herfindahl-Hirschman Index in this market would increase by 1181, to 4674.

12. INEOS has one U.S. sodium silicate plant located in Joliet, Illinois.

13. PQ has four U.S. sodium silicate plants within a 300 mile radius of INEOS' Joliet, Illinois, plant, located respectively in Gurnee, Illinois; St. Louis, Missouri; Utica, Illinois; and Jeffersonville, Indiana.

14. Occidental Chemical Corporation has two sodium silicate plants within a 300 mile radius of INEOS' Joliet, Illinois, plant, located respectively in Cincinnati, Ohio, and Chicago, Illinois.

15. W.R. Grace & Company has one sodium silicate plant within a 300 miles radius of INEOS' Joliet plant, located in East Chicago, Indiana.

E. CONDITIONS OF ENTRY

16. *De novo* entry or fringe expansion into the relevant market would require a substantial sunk investment and a significant

Complaint

period of time, such that new entry would be neither timely, likely, nor sufficient.

17. The minimum viable scale for a sodium silicate production facility using prevailing technology is high relative to market size. Construction of such a facility requires a large expenditure. A facility built to produce sodium silicate has no other potential use, and therefore the substantial expenditure required to build the facility would be lost if the entrant subsequently exited the market. Because of the preceding conditions, entry would be unlikely to deter or defeat anticompetitive behavior. In any case, entry would take longer than two years.

**F. MARKET CHARACTERISTICS THAT
FACILITATE COORDINATED INTERACTION**

18. The characteristics of the market for sodium silicate facilitate coordinated interaction among producers, to the detriment of the purchasers of this product. Among such characteristics are:

- a. The Midwest U.S. market for sodium silicate is highly concentrated;
- b. Sodium silicate is a homogeneous product that is purchased primarily on the basis of price;
- c. Reliable pricing information is available from customers, and from PQ, the market leader, due to PQ's practice of publicly announcing price increases; and
- d. There is a high level of mutual interdependence among producers.

G. EFFECTS OF THE PROPOSED ACQUISITION

19. The effect of the Acquisition may be substantially to lessen competition and to tend to create a monopoly in the

Complaint

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 sodium silicate;
- b. It will significantly enhance the likelihood of coordinated interaction in the relevant market among the competitors in the manufacture and sale of sodium silicate;
- c. It will increase the likelihood that purchasers of sodium silicate in the relevant geographic market will pay higher prices.

H. VIOLATIONS CHARGED

20. The acquisition agreements between Carlyle and INEOS, as described in paragraph 5, violate Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

21. The acquisition of INEOS by Carlyle, 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 eighteenth day of September, 2008, issues its complaint against said Respondents.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Carlyle Partners IV, L.P. (“CPIV”), the parent of Respondent PQ Corporation (“PQ”), of US Silicas and certain foreign silicas assets of INEOS Silicas, a specialty inorganic chemical division of Respondent INEOS Group Ltd., the controlling interest of which is owned by Respondent James Ratcliffe, an individual (“collectively “INEOS”), and Respondents having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and that, 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 a Consent Agreement, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of the 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 its 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

Decision and Order

following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent CPIV is a limited partnership organized, existing and doing business under and by virtue of the laws of Delaware, with its office and principal place of business located at 1001 Pennsylvania Avenue, N.W., Suite 220 South, Washington, DC 20004-2505.

2. Respondent PQ is a corporation organized, existing and doing business under and by virtue of the laws of Pennsylvania, with its office and principal place of business located at 300 Lindenwood Drive, Valleybrooke Corporate Center, Malvern, PA 19355-1740.

3. Respondent INEOS, the controlling interest of which is owned by James Ratcliffe, 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 Hawkslease, Chapel Lane, Lyndhurst, Hampshire SO43 7FG United Kingdom.

4. Respondent James Ratcliffe is an individual with his office and principal place of business located at Hawkslease, Chapel Lane, Lyndhurst, Hampshire SO43 7FG United Kingdom.

5. 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 HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

Decision and Order

- A. “CPIV” means Carlyle Partners IV, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Carlyle Partners IV, L.P., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “PQ” means PQ Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by PQ Corporation and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “INEOS” means INEOS Group Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by INEOS Group Ltd., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Commission” means the Federal Trade Commission.
- E. “Respondents” means CPIV, PQ, and INEOS, and James Ratcliffe individually and collectively.
- F. “Acquisition” means the October 11, 2007, proposed acquisition by CPIV for which a filing was made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act on November 15, 2007, by CPIV.
- G. “Asset Purchase Agreement” means “Asset Purchase Agreement by and Between Oak Hill Acquisition Company, LLC and PQ Corporation” dated as of May 26, 2008, and amendments, exhibits, attachments, agreements, and schedules thereto, related to the Sodium Silicate Assets to be divested, that have been approved by the Commission to accomplish the requirements of this Order.

Decision and Order

The Asset Purchase Agreement is attached to this Order as non-public Appendix I.

- H. “Closing Date” means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets pursuant to this Order.
- I. “Commission-approved Acquirer” means the following:
 - (1) an entity that is specifically identified in this Order to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
 - (2) an entity approved by the Commission to acquire particular assets that the Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- J. “Confidential Business Information” means all information owned by, or in the possession or control of, Respondents that is not in the public domain related to the production, marketing, commercialization, distribution, importation, exportation, cost, pricing, supply, sales, sales support, or use of Product at the Utica Sodium Silicate Plant.
- K. “Day(s)” means the period of time prescribed under this Order as computed pursuant to 16 C.F.R. § 4.3 (a).
- L. “Direct Cost” means the cost of direct labor and direct material used to provide the relevant assistance or service.

Decision and Order

- M. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- N. “Effective Date” means the date on which the Acquisition occurs.
- O. “Governmental Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, governmental agency, or governmental commission, or any judicial or regulatory authority of any government.
- P. “Interim Monitor” means any monitor appointed pursuant to the relevant provisions of this Order or of the related Order to Maintain Assets.
- Q. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Governmental Entity having the effect of law.
- R. “Oak Hill Acquisition Company, LLC “ means Oak Hill Acquisition Company, LLC, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Oak Hill Acquisition Company, LLC and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- S. “Patents” means all patents, patent applications, and statutory invention registrations, in each case existing as of the Effective Date (*except* where this Order specifies a different time), and includes all reissues, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations

Decision and Order

thereto in the world, used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date.

- T. “Product” means sodium silicate.
- U. “Product Licensed Intellectual Property” means the following:
 - 1. Patents;
 - 2. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, that are related to Product and that have been routinely used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date.
- V. “Product Marketing Materials” means all marketing materials related to Product produced at the Utica Sodium Silicate Plant as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, price lists, mailing lists, sales materials (e.g., detailing reports; vendor lists; sales data; reimbursement data), marketing information (e.g., competitor information; research data; market intelligence reports; statistical programs (if any) used for marketing and sales research; customer information, including customer sales information; sales forecasting models; and advertising and display materials; promotional and marketing materials, and other similar materials related to Product produced at the Utica Sodium Silicate Plant; *provided, however*, that “Product Marketing Materials” does not include any such material with a PQ trademark or label.

Decision and Order

- W. “Remedial Agreement” means the following: (1) any agreement between Respondent(s) and a Commission-approved Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final; and/or (2) any agreement between the Respondent(s) and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of this Order.
- X. “Services Agreement” means the Services Agreement attached as Exhibit I to the Asset Purchase Agreement, or an agreement between Respondents and the Commission-approved Acquirer pursuant to which Respondents shall provide Services and Utilities to the Commission-approved Acquirer at the Utica Facility.
- Y. “Services and Utilities” means:
1. maintenance of certain easements, including but not limited to, vehicular and pedestrian access, rail access, Sewers, Etc. easements;
 2. provision of certain services, including but not limited to, utility services, information technology services, and office space; and

Decision and Order

3. provision of certain commodities, including but not limited to steam, potable water, water that is softened by means of water softener equipment, electrical power, natural gas, fuel oil, and water generated as a result of the production activities at the Utica Facility that are not related to the Utica Sodium Silicate Plant.
- Z. “Sewers, Etc.” means all sanitary and/or non-sanitary sewers, conduits, water lines, gas lines, rainfall run-off, or any other utility pipe, line or conduit.
- AA. “Sodium Silicate Assets” means Respondents’ rights, titles, and interests in and to all assets, properties, business and goodwill, tangible or intangible, used in the production of Product at the Utica Sodium Silicate Plant as of the Closing Date, including, but not limited to:
1. a ninety-nine year ground lease on all related real property (together with appurtenances, licenses and permits) owned, leased or otherwise held by Respondents, including, at the option of the Commission-approved Acquirer, an option for additional space for expansion, with the term of such option to be co-terminus with that of the prime lease, and also including, at, the option of the Commission-approved Acquirer, an easement or easements for Sewers, Etc.;
 2. all personal property owned, leased or otherwise held by Respondents CPIV and PQ;
 3. a non-exclusive license to use and practice all Product Licensed Intellectual Property owned by or licensed to Respondents CPIV and PQ, including but not limited to, trademarks, Patents, mask works, copyrights, trade secrets, research materials, technical information, management information systems, software,

Decision and Order

inventions, test data, technological know-how, licenses, registrations, submissions, approvals, technology, specifications, designs, drawings, processes, recipes, protocols, and formulas, such license to be royalty free at the Utica Sodium Silicate Plant and, should the Commission-approved Acquirer determine to produce Product at a location other than the Utica Facility, to be at a reasonable market-based royalty negotiated by the Commission-approved Acquirer and Respondents;

4. all rights of Respondents CPIV and PQ under any contract related to Product entered into with customers (together with associated bid and performance bonds), suppliers, sales representatives, distributors, agents, personal property lessors, personal property lessees, licensors, licensees, consignors and consignees, and joint venture partners;
5. a list of all targeted customers for Product and the planned or proposed pricing of Product for such customers;
6. all Product Marketing Materials;
7. all governmental approvals, consents, licenses, permits, waivers, or other authorizations relating to Product held by Respondents CPIV and PQ;
8. all rights of Respondents CPIV and PQ under any warranty and guarantee, express or implied, relating to Product;
9. all books, records, and files;
10. the Utica Sodium Silicate Plant, including, but not limited to:

Decision and Order

- a. all plant facilities, machinery, equipment, furniture, fixtures, tools, vehicles, transportation and storage facilities, and supplies;
- b. all rights in and to inventories of products, raw materials, supplies and parts, including work-in-process and finished goods;
- c. all customer and vendor lists, catalogs, sales promotion literature, and advertising materials; and

11. Services and Utilities as provided in a Services Agreement;

BB. "Utica Facility" means Respondent PQ's facility containing plants for the production of various products including metasilicate, epsom salts, and Product, situated at 340 East Grove Street, Utica, Illinois 61373-0410.

CC. "Utica Sodium Silicate Plant" means the plant for the production of Product located at the Utica Facility.

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

- A. Not later than five (5) Days after the Effective Date, Respondents shall divest the Sodium Silicate Assets, absolutely and in good faith, to Oak Hill Acquisition Company, LLC ("Oak Hill") pursuant to and in accordance with the Asset Purchase Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Oak Hill or to reduce any obligations of the Respondents under such agreement), and such agreement, if it becomes the Remedial

Decision and Order

Agreement related to the Sodium Silicate Assets, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the Sodium Silicate Assets to Oak Hill within five (5) Days after the Effective Date, the Commission may appoint a Divestiture Trustee to divest the Sodium Silicate Assets;

provided, however, that if Respondents have divested the Sodium Silicate Assets to Oak Hill after the Commission has accepted this Order for public comment but prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Oak Hill is not an acceptable purchaser of the Sodium Silicate Assets, then Respondents shall immediately rescind the transaction with Oak Hill and shall divest the Sodium Silicate Assets within six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission;

provided further that if the Respondents have divested the Sodium Silicate Assets to Oak Hill after the Commission has accepted this Order for public comment but prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies the Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Sodium Silicate Assets to Oak Hill (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Respondents shall comply with all terms of the Remedial Agreement which shall be incorporated by reference and

Decision and Order

made a part of this Order. Failure by Respondents to perform under or comply with the Remedial Agreement shall also constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Remedial Agreement, Respondents shall not, without the prior approval of the Commission, modify any term of the Remedial Agreement or fail to satisfy each condition to the Commission-approved Acquirer's obligation to acquire the Sodium Silicate Assets (whether or not waived). The terms of the Remedial Agreement shall not be construed to vary from or contradict the terms of this Order.

C. Respondents shall:

1. submit to the Commission-approved Acquirer, at Respondents' expense, all Confidential Business Information;
2. deliver such Confidential Business Information as follows: (1) in good faith; (2) as soon as practicable, avoiding any delays in transmission of the respective information; and (3) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the Commission-approved Acquirer, provide the Commission-approved Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files related to Product at the Utica Facility that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;

Decision and Order

4. not use, directly or indirectly, any such Confidential Business Information, other than as necessary to comply with the following: (1) the requirements of this Order; (2) the Respondents' obligations to the Commission-approved Acquirer under the terms of any Remedial Agreement related to the Sodium Silicate Assets; or (3) applicable Law; *provided, however*, that Respondents may use Confidential Business Information which does not relate solely to the Utica Sodium Silicate Plant; and
 5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any person except the Commission-approved Acquirer.
- D. For a period of up to two (2) years from the Closing Date, upon reasonable notice and request by the Commission-approved Acquirer, Respondents shall make available to the Commission-approved Acquirer, at no greater than Direct Cost, such personnel, assistance and training to enable the Commission-approved Acquirer to operate the Sodium Silicate Assets in substantially the same manner as Respondents operated the Sodium Silicate Assets immediately prior to the Closing Date.
- E. Respondents shall, as of the Closing Date, enter into an employee services agreement, which, if the Asset Purchase Agreement is the Remedial Agreement shall be the Employee Services Agreement at Exhibit C thereof, with the Commission-approved Acquirer for the provision of employee services for the job classifications set forth in the collective bargaining agreement between Respondent PQ and employees at the Utica Sodium Silicate Plant ("Utica Sodium Silicate Plant Employees"), and for the services of such other employees and individuals as the Respondents and the Commission-approved Acquirer may agree:

Decision and Order

1. no later than ten (10) days before the Closing Date, Respondents shall (i) provide to the Commission-approved Acquirer a list of all Utica Sodium Silicate Plant Employees, (ii) allow the Commission-approved Acquirer an opportunity to interview any Utica Sodium Silicate Plant Employees, and (iii) allow the Commission-approved Acquirer to inspect the personnel files and other documentation relating to such Utica Sodium Silicate Plant Employees, to the extent permissible under applicable laws;
2. Respondents shall (i) not offer any incentive to any Utica Sodium Silicate Plant Employee to decline providing employee services to the Commission-approved Acquirer, (ii) remove any contractual impediments with Respondents, excluding Respondent PQ's collective bargaining agreement with such Utica Sodium Silicate Plant Employees, that may deter any Utica Sodium Plant Employee from providing employee services to the Commission-approved Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Utica Sodium Silicate Plant Employees to provide employee services to the Commission-approved Acquirer, and (iii) not interfere with any Utica Sodium Silicate Plant Employee providing employee services to the Commission-approved Acquirer;
3. for a period of one year from the date this Order becomes final, Respondents shall not, directly or indirectly, enter into any arrangement, excluding collective bargaining arrangements conducted in the ordinary course of business, for the services of any Utica Sodium Silicate Plant Employee providing employee services to the Commission-approved

Decision and Order

Acquirer, unless the Utica Sodium Silicate Plant Employee's services have been terminated by the Commission-approved Acquirer without the Utica Sodium Silicate Plant Employee's consent; and

4. provide written notification of the restrictions on the use of the Confidential Business Information to all Respondents' employees who are involved in the manufacturing, distribution, sale, or marketing of Product at the Utica Facility or who may have Confidential Business Information ["Designated Employees"]; and Respondents shall require each Designated Employee to execute an acknowledgment of his or her obligation regarding the Confidential Business Information. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records at the Utica Facility regarding the provision of notification to Designated Employees and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with. Respondents shall provide the Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Designated Employees.
- F. At such time that the Commission-approved Acquirer initiates collective bargaining with Utica Sodium Silicate Plant Employees, Respondents shall:
1. not offer any incentive to any Utica Sodium Silicate Plant Employee to decline to enter into a collective bargaining agreement with the Commission-approved Acquirer;
 2. remove any contractual impediments with Respondents that may deter any Utica Sodium Plant Employee from entering into a collective bargaining

Decision and Order

agreement with the Commission-approved Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of the Utica Sodium Silicate Plant Employees to enter into a collective bargaining agreement and to be employed by the Commission-approved Acquirer; and

3. not interfere with the employment by the Commission-approved Acquirer of any Utica Sodium Silicate Plant Employee.

G. Respondents shall include in any Remedial Agreement the following provisions:

1. Respondents shall make representations and warranties to the Commission-approved Acquirer that Respondents shall hold harmless and indemnify the Commission-approved Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to perform its obligations pursuant to the Services Agreement in a timely manner as required by the Remedial Agreement unless the Respondents can demonstrate that their failure was entirely beyond the control of the Respondents and in no part the result of negligence or willful misconduct by Respondents; *provided, however*, if the Asset Purchase Agreement is the Remedial Agreement, then the terms of the Asset Purchase Agreement, including the Services Agreement at Exhibit I thereto shall apply;
2. upon reasonable notice and request from the Commission-approved Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondents to assist the

Decision and Order

Commission-approved Acquirer to defend against, respond to, or otherwise participate in any litigation related to Product Intellectual Property; and

3. Respondents shall covenant to the Commission-approved Acquirer that Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Commission-approved Acquirer under any Patents licensed to the Commission-approved Acquirer pursuant to the Remedial Agreement, if such suit would have the potential to interfere with the Commission-approved Acquirer's freedom to practice in the production, use, import, export, distribution or sale of Product; *provided, however*, if the Asset Purchase Agreement is the Remedial Agreement then the terms of the Asset Purchase Agreement, including the Technology License Agreement at Exhibit K thereto shall apply.
- H. Any Remedial Agreement related to the Sodium Silicate Assets shall be deemed incorporated into this Order, and any failure by Respondents to comply with any term of such Remedial Agreement related to the Sodium Silicate Assets shall constitute a failure to comply with this Order.
- I. Pending divestiture of the Sodium Silicate Assets, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Sodium Silicate Assets, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Sodium Silicate Assets, except for ordinary wear and tear.
- J. The purpose of the divestiture of the Sodium Silicate Assets is to ensure the continued use of the assets in the same business in which the Sodium Silicate Assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition alleged in the Commission's complaint.

Decision and Order

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint one or more Interim Monitors to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and the Remedial Agreement.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) Days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purpose of the Order.
- D. If one or more Interim Monitors are appointed pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of each Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondents' compliance with the

Decision and Order

divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
3. The Interim Monitor shall serve until the completion by Respondents of the divestiture of the Sodium Silicate Assets required to be divested pursuant to the Decision and Order in a manner that fully satisfies the requirements of the Order and notification by the Commission-approved Acquirer to the Interim Monitor that it is fully capable of producing Product pursuant to a Remedial Agreement independently of Respondents; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Order;
4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order;

Decision and Order

5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of the Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor;
7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Commission-approved Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement. Within one (1) month from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; and

Decision and Order

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a Divestiture

Decision and Order

Trustee(s) to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. 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 Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture 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 Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture 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 Divestiture Trustee within ten (10) Days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) Days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the

Decision and Order

Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by the Order.

- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein 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 Divestiture Trustee has submitted a plan of divestiture or believes that the 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 Divestiture Trustee, by the court; *provided, however*, the Commission may extend the divestiture period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or

Decision and Order

other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture 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 Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in the contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture 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 Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further* that Respondents shall select such entity within five (5) Days after receiving notification of the Commission's approval.
5. The Divestiture 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 Divestiture 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

Decision and Order

representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture 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 Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture 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, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. In the event that the Divestiture Trustee determines that he or she is unable to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed in a manner that preserves their marketability, viability and competitiveness and ensures their continued use in the production, distribution, marketing, promotion,

Decision and Order

sale, or after-sales support of the relevant Product, the Divestiture Trustee may assign, grant, license, divest, transfer, deliver or otherwise convey such additional assets of Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by this Order.
 9. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) Days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 10. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

Decision and Order

- G. The Divestiture Trustee appointed pursuant to this Paragraph may be the same person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

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

- A. Within five (5) Days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) Days after the date this Order becomes final, and every sixty (60) Days thereafter until Respondents have fully complied with Paragraph II 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 this Order. Respondents shall submit at the same time a copy of their report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraph II, including a description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.
- C. One (1) year after 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

Decision and Order

the manner and form in which they have complied and are complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondents shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibility for any of Respondent's obligations under Paragraphs II through V of this Order, no later than ten days from the date this Order becomes final.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) Days prior to any proposed (1) dissolution of the Respondents, (2) acquisition, merger, or consolidation of Respondents, or (3) other change in the Respondents that may affect compliance obligations arising out of the order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

VIII.

IT IS FURTHER ORDERED that, for the purpose 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 representative 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 Respondents related to compliance with this Order; and

Decision and Order

- 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.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on September 18, 2018.

By the Commission.

**NON-PUBLIC
APPENDIX I
TO THE DECISION AND ORDER
ASSET PURCHASE AGREEMENT
[Redacted From the Public Record
But Incorporated By Reference]**

Concurring and Dissenting Statement

**STATEMENT OF COMMISSIONER JON LEIBOWITZ
CONCURRING IN PART AND DISSENTING IN PART**

Commission staff has done an excellent job to try to correct the effects of an anticompetitive merger between the largest competitor in this market and the third largest- a deal that would create one firm with over 60 percent of the market and that would reduce the number of competitors from four to three. I concur with nearly all aspects of the Commission's decision to adopt staff's recommendations, and I dissent on only one point: we should require PQ Corporation *to notify* the Commission before it makes any attempt to undo the principal remedial provision of this order - the divestiture of PQ's plant in Utica, Illinois.

Prior to the Commission's 1995 Prior Approval and Prior Notice Provision Policy Statement,¹ Commission orders routinely included such notice requirements. Our orders also often required that we give prior approval to any reacquisition. That changed with the Policy Statement, which made clear that prior notice and approval was no longer necessary under most circumstances in light of the Hart-Scott-Rodino (HSR) Act. However, the Policy Statement also acknowledged that a prior notification provision "may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order engage in an otherwise unreportable anticompetitive merger."² The need for such a provision would depend on a number of factors "such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants and other relevant factors."³

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13, 241.

² *Id.*, at 39746.

³ *Id.*

Concurring and Dissenting Statement

In this case, PQ could reacquire the Utica plant from the Oak Hill Acquisition Company (the buyer of the plant) without triggering the HSR filing requirements, as the acquisition price for the plant is very likely to be below the HSR threshold. The issue is whether there is a “credible risk” that they would do so. Presumably, there is little likelihood that such a deal would occur immediately - otherwise the Commission would not have accepted Oak Hill as the buyer of the plant in the first place. But that doesn’t protect consumers from an anticompetitive reacquisition somewhere down the road.

To my mind, such a “credible risk” clearly exists. Given the ongoing relationships between Oak Hill and PQ even after the divestiture; the benefits to PQ of eliminating a potential maverick in the Midwest sodium silicate market; the apparent lack of competition between PQ and Occidental Chemicals (the only other major merchant producer of sodium silicate); and the fact that Oak Hill is not buying the plant to fit into a larger overall business plan, but rather intends to operate the plant as a stand-alone business, the order ought to ensure that we be notified if the parties consider such a transaction.⁴ Moreover, the requirement would not be onerous to either party since the notice provision would only be triggered if PQ attempted to buy the plant back.

⁴ Of course it is possible that, some time after the transaction, someone may complain about it to the Commission. Unfortunately, given the ability of firms to “scramble the eggs”- that is, to make it difficult for the Commission to break up the previously separate companies after the merger - there is some danger that such a complaint would not happen in time for the Commission to be able to design a remedy that is as effective at restoring competition as preventing the deal in the first place. See, e.g., *Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, Docket No. 9315, Opinion of the Commission (8/6/2007) at 89-91, available at http://www.ftc.gov/os/adipro/d9315/080428commopinionon_remedy.pdf (A lapse between the merger and Commission enforcement “does not preclude the Commission from ordering divestiture, but it would make a divestiture much more difficult, with a greater risk of unforeseen costs and failure.”).

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order from Carlyle Partners IV, L.P. (“Respondent”). The Consent Agreement is intended to resolve anticompetitive effects stemming from Carlyle’s proposed acquisition of the world-wide sodium silicate and silicas business from INEOS Group Limited (“INEOS”). Carlyle participates in the sodium silicate market world-wide through PQ Corporation, which it owns. PQ is the largest producer of sodium silicate in the United States. The Consent Agreement includes a proposed Decision and Order which requires Respondent to divest PQ’s sodium silicate plant and business located in Utica, Illinois. The proposed Decision and Order also requires the licensing of all intellectual property related to the production of sodium silicate at the Utica plant.

The Decision and Order calls for divestiture of PQ’s Utica, Illinois plant to Oak Hill Acquisition Company, LLC (“Oak Hill”), or another Commission-approved buyer in the event that Oak Hill is determined not to be acceptable. The Consent Agreement, if finally accepted by the Commission, would settle charges that the proposed acquisition may substantially lessen competition in the market for sodium silicate in the Midwest United States. The Commission has reason to believe that Respondent’s proposed acquisition 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.

II. The Proposed Complaint

According to the Commission’s proposed complaint, the relevant product market in which to analyze the effects of INEOS’ sale of assets to Carlyle is the market for the sale and manufacture

Analysis to Aid Public Comment

of sodium silicate. Sodium silicate has a variety of direct uses and is also consumed in the production of downstream silicate derivatives, also referred to as silicas. According to the Commission's complaint, sodium silicate does not, in its various end-uses, have close substitutes that constrain its pricing. The relevant geographic market is the Midwest United States. Sodium silicate, which is generally sold in an aqueous solution form that is 65% water, exhibits strong regional markets because of high transportation costs relative to the value of the product.

The proposed complaint alleges that the market for sodium silicate is highly concentrated and that the acquisition reduces the number of competitors in the Midwest United States market from four to three. According to the proposed complaint, the acquisition combines PQ, the largest competitor, with INEOS, the third largest competitor, which hold 50% and 12% market shares as measured by plant capacity, respectively. The HHI in this market would increase by 1181, to 4674.

The proposed complaint alleges that the proposed acquisition would reduce competition by eliminating direct competition between these two companies. The proposed complaint further states that the market for sodium silicate is conducive to coordination due to several structural features, including the facts that sodium silicate is a homogenous product and pricing information is readily available. Furthermore, evidence suggests that competitors behave as if the market were essentially a duopoly in which the top two producers, PQ and Occidental, operate with a high level of mutual interdependence. Based on the level of concentration and the competitive conditions, the Commission's complaint alleges that the acquisition would make coordinated interaction more likely, leading to higher prices for sodium silicate. The proposed complaint further alleges that entry into the relevant market would not be timely, likely, or sufficient to deter or offset the proposed acquisition's adverse competitive effects.

Analysis to Aid Public Comment

III. Terms of the Proposed Order

Under the proposed Decision and Order, Carlyle will divest its Utica, Illinois sodium silicate business to Oak Hill within five (5) days of the INEOS acquisition. Oak Hill is a new entity that has been created for the purpose of acquiring the Utica plant. The principal owner of Oak Hill has been involved in entrepreneurial investments in a number of industries over the past twenty five years, including in the chemicals, software, telecommunications, construction, real estate, and energy industries.

The consent order has several major operative provisions. Section II.A. of the Order requires PQ to divest the Utica plant to an up-front purchaser, Oak Hill Acquisition Company, LLC, in accordance with the provisions of the Asset Purchase Agreement, within five days of consummating the acquisition of INEOS. Section II.A. also gives the Commission the authority to require PQ to divest the Utica plant to another purchaser, should the Commission deem Oak Hill not to be acceptable; and to direct PQ to accept any remedial provisions it may add to the Order after initial acceptance. Section II.D. requires Respondents to make available to Oak Hill or other purchaser, at no greater than direct cost, such personnel, assistance and training as is necessary to enable the purchaser to operate the Utica plant in substantially the same manner as PQ operated plant, for a period of two years after divestiture. Section II.E. requires Respondents to enter into an employee services agreement covering certain union employees at the Utica plant to facilitate their continued employment at that the plant under the new ownership. Section III.A. allows the Commission to appoint an Interim Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities. Section IV.A. allows the Commission to appoint a Divestiture Trustee should PQ fail to fully comply with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey assets required by the Order. Section V.B. requires Respondents to submit to the Commission a verified written report setting forth in detail the manner and form

Analysis to Aid Public Comment

in which they intend to comply, are complying, and have complied with the Order, on a regular basis until Respondents have fully achieved the divestiture. Section VII requires Respondents to notify the Commission of any change in their corporate structure that may affect compliance obligations arising out of the Order. Pursuant to Section IX, the Order has a ten year term.

IV. Opportunity for Public Comment

The proposed Decision and Order has been placed on the public record for thirty (30) days to receive 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 Consent Agreement and comments received and decide whether to withdraw its agreement or make final the Consent Agreement's proposed Order.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.

Complaint

IN THE MATTER OF

NEGOTIATED DATA SOLUTIONS LLCCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4234; FTC File No. 051 0094
Complaint, Sept 22, 2008 – Decision, Sept 22, 2008*

This consent order addresses Negotiated Data Solutions LLC's collection of royalties in connection with a number of patents relating to the Ethernet standard for local area networks. The complaint alleges that N-Data refused to honor the agreements made by Vertical Networks, its predecessor in interest, a company formed by the employees of National Semiconductor. The complaint further alleges that N-Data threatened and opened legal actions against companies that refused its demands for royalties far in excess of those originally agreed upon. The consent order prohibits N-Data from enforcing the relevant patents except insofar as they are licensed in accordance with the terms promised by National Semiconductor in its letter of June 7, 1994, to the IEEE.

Participants

For the *Commission*: Kent E. Cox, Maria DiMoscato, P. Abbott McCartney, and Christopher Renner.

For the *Respondents*: Jerry L. Beane and Scott M. Kline, Andrews Kurth; S. Calvin Capshaw, Brown McCarroll LLP; John M. Clark III; M. Sean Royall and Jon G. Shepherd, Gibson, Dunn & Crutcher LLP; Brad Blanche and Frank Ubell, Greenberg Traurig; David T. Conrad and Mark N. Reiter, Jones Day; Alan Loudermilk, Loudermilk & Associates; Nancy Ludgus; David S. Elkins, Nathan Lane, III, Jose Martin, and Barry A. Pupkin, Squire, Sanders & Dempsey, LLP; Gregory S. Bishop, William J. Bohler and Thomas F. Fitzpatrick, Townsend, Townsend & Crew, LLP; and Andrew J. Ewalt and A. Douglas Melamed, Wilmer Cutler Pickering Hale & Dorr LLP.