Complaint

IRVING OIL LIMITED AND IRVING OIL TERMINALS INC.

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

Docket No. C-4328; File No. 101 0021
Filed, July 12, 2011 — Decision, July 12, 2011

This consent order addresses allegations relating to the proposed acquisition by Irving and Irving Oil Transportation Company LLC (collectively, "Irving") of certain petroleum products storage and transportation assets located in Maine from ExxonMobil Oil Corporation ("ExxonMobil"). The complaint alleges that the acquisition, if consummated, would substantially lessen competition in the gasoline and distillates terminaling services markets in the South Portland and Bangor/Penobscot Bay areas of Maine, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The consent order requires Irving to divest its acquisition rights to the ExxonMobil Bangor terminal and intrastate pipeline, as well as 50% of ExxonMobil's South Portland terminal, to Buckeye Partners, L.P. and its affiliate Buckeye Pipe Line Holdings, L.P. Irving will form a joint venture that will purchase ExxonMobil's South Portland terminal and Buckeye will manage and operate this terminal on behalf of the Irving-Buckeye joint venture. The consent order also requires that Irving enter into a throughput agreement with Buckeye at each of the petroleum products terminals.

Participants

For the *Commission: Robert E. Friedman, Brian Telpner,* and *Michelle Wyant.*

For the *Respondents: Joel Grosberg, Raymond A. Jacobsen, Jr.,* and *Joseph Winterscheid, McDermott Will & Emery LLP;* and *John S. Upton, Perkins Thompson.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Irving Oil Limited and Irving Oil Terminals Inc. (collectively "Irving") and ExxonMobil Oil Corporation and Mobil Pipe Line Company (collectively "ExxonMobil") have entered into an acquisition agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Federal Trade Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. RESPONDENTS

3. Respondent Irving Oil Limited is a privately-held energy processing, transporting, and marketing company organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 10 Sydney Street, Saint John, New Brunswick, Canada E2L 4K1. Irving Oil Limited is the ultimate parent entity of Irving Oil Terminals Inc.

4. Respondent Irving Oil Terminals Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 190 Commerce Way, Portsmouth, New Hampshire 03801.

5. Respondent Irving Oil Terminals Inc. supplies branded and unbranded petroleum products throughout New England to third-party distributors, retailers, various other re-sellers, and governmental and commercial end-users. Irving, through other subsidiaries, also owns retail travel plazas that sell gasoline and

diesel petroleum products. In Maine, Irving Oil Terminals Inc. owns a petroleum products terminal in Searsport and co-owns a petroleum products terminal with CITGO in South Portland.

II. JURISDICTION

6. Respondents Irving Oil Limited and Irving Oil Terminals Inc. are, and at all relevant times have been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are companies whose businesses are in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. PROPOSED ACQUISITIONS

7. On November 3, 2009, Irving announced it would acquire ExxonMobil's petroleum products terminals located in Bangor and South Portland, Maine and pipeline connecting the two terminals (collectively "Proposed Acquisitions").

IV. TRADE AND COMMERCE

Relevant Product Markets

8. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Proposed Acquisitions are gasoline terminaling services and distillates terminaling services.

9. Terminals generally consist of several storage tanks and loading racks that pump fuels into tanker trucks for further delivery. Terminals are specialized facilities connected to one or more fuel supply sources, have the capacity to store fuel shipments, and must be configured properly to distribute the fuel to customers. Light petroleum products terminals are specialized facilities that receive gasoline, diesel fuel, heating oil, kerosene,

and jet fuel, among other products, by pipeline, by water, by rail, or directly from refinery production. These products are stored or redistributed by pipeline, water, rail, or truck. Terminals are critical to the sale and distribution of transportation fuels.

10. Terminaling services consist of a cluster of services related to the bulk receipt, storage, and throughput of petroleum products. Terminals also perform value-added services, such as handling and injection of motor fuel additives (including ethanol) as petroleum products are redelivered across the truck rack.

11. Only terminals with vapor recovery equipment, internal floating roofs, and specialized environmental and safety permits can store gasoline. However, tanks configured and permitted to store gasoline can always store distillates. Thus terminals that store gasoline compete in both the gasoline terminaling services and distillates terminaling services markets. Terminals that store only distillates compete only in the distillates terminaling services market.

Relevant Geographic Markets

12. For purposes of this complaint, the relevant geographic areas in which to analyze the effects of the Proposed Acquisitions on terminaling services are the Bangor/Penobscot Bay and the South Portland areas of Maine.

13. The Bangor/Penobscot Bay area encompasses the state of Maine north of Waterville, including Bangor, Searsport, and Bucksport.

14. The South Portland area encompasses the state of Maine south of Waterville, including South Portland.

V. AFFECTED MARKETS

Gasoline Terminaling Services in the Bangor/Penobscot Bay Area

15. Irving's terminal in Searsport and ExxonMobil's terminal in Bangor are two of three terminals in the Bangor/Penobscot Bay area capable of independently offering gasoline terminaling services. Only ExxonMobil and Irving independently offer gasoline terminaling services today.

16. If the Proposed Acquisitions are consummated, Irving will control the infrastructure that delivers bulk gasoline to the Bangor/Penobscot Bay area. This control would allow Irving unilaterally to raise the price for or restrict the availability of gasoline terminaling services in the Bangor/Penobscot Bay area and raise gasoline prices to customers served from Bangor/Penobscot Bay area terminals.

Distillates Terminaling Services in the Bangor/Penobscot Bay Area

17. There are five petroleum products terminals in the Bangor/Penobscot Bay area, owned by Irving (Searsport), ExxonMobil (Bangor), Coldbrook (Bangor), Webber (Bucksport), and Sprague (Searsport).

18. Four terminals in the Bangor/Penobscot Bay area independently provide, or could provide, distillates terminaling services. The Proposed Acquisitions reduce the number of independent distillates terminaling services competitors from four to three in the Bangor/Penobscot Bay market.

19. Post-acquisition, without competition from ExxonMobil, the remaining three independent firms would be substantially more likely to coordinate in raising fees or reducing the quality and

availability of distillates terminaling services in the Bangor/Penobscot Bay market.

Gasoline Terminaling Services in the South Portland Area

20. Six firms own five terminals in the South Portland area, with Irving and CITGO sharing ownership of one of these terminals. Only three of these terminals are capable of storing gasoline. These terminals are owned by Irving and CITGO (sharing ownership of one terminal), ExxonMobil, and Gulf Oil LP ("Gulf"). The terminals owned by Sprague Energy Corporation and Global Partners LP terminals in South Portland do not store gasoline.

21. The Proposed Acquisitions reduce the number of participants in the South Portland gasoline terminaling services market from four to three and enhance the ability and incentive of the remaining participants to coordinate to increase gasoline terminaling services fees.

22. Maine receives gasoline virtually exclusively via marine vessels. Importing gasoline from Europe on large cargo vessels is less costly than the alternative of shipping it from domestic ports on smaller barges. Therefore, most Maine gasoline is imported from outside the United States. Post-acquisition, Irving will control sufficient terminal capacity in Maine to constrain the ability of others to import gasoline into South Portland terminals at current prices.

23. Because the Bangor terminals receive gasoline via the ExxonMobil pipeline from South Portland, Irving's control of this pipeline, its Searsport terminal, and the ExxonMobil South Portland terminal gives Irving the unfettered ability to raise the cost of gasoline supplied from Bangor/Penobscot Bay area terminals to retail stations and other consumers.

Distillates Terminaling Services in the
South Portland Area

24. There are five petroleum products terminals in the South Portland area. Each of the five terminals in the South Portland area participates in the distillates terminaling services market. Irving and CITGO share ownership of one of these terminals. ExxonMobil, Global, Gulf, and Sprague each own one of the remaining four terminals.

25. The acquisition reduces the number of participants in the South Portland distillates terminaling services market from six to five. Post-acquisition, without competition from ExxonMobil, the remaining five firms would be substantially more likely to coordinate in raising fees for and reducing the quality and availability of distillates terminaling services in the South Portland area.

VI. ENTRY CONDITIONS

26. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or defeat the anticompetitive effects of the Proposed Acquisitions.

27. Entry into the relevant markets is costly, difficult, and unlikely because of, among other things, the difficulty of obtaining regulatory approvals and the presence of excess terminal capacity in both markets. A new entrant would be unlikely to invest in a new terminal, with substantial sunk costs, in these markets which already have sufficient capacity.

28. A terminal that cannot currently store gasoline is unlikely to reconfigure its tanks to store gasoline in response to an anticompetitive price increase in gasoline terminaling due to the

significant cost and limited ability to attract large customer volumes.

VII. EFFECTS OF THE PROPOSED ACQUISITIONS

29. The effects of the Proposed Acquisitions, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. by eliminating actual, direct, and substantial competition between Respondents and ExxonMobil;

b. by increasing the likelihood that Respondents would unilaterally exercise market power in the relevant markets; and

c. by enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the relevant markets.

IX. VIOLATIONS CHARGED

Count I – Illegal Acquisition

30. The allegations of Paragraphs 1 through 27 above are incorporated by reference as though fully set forth here.

31. The transactions described in Paragraph 5 above, if consummated, would substantially lessen competition in the affected markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

Count II – Illegal Agreement

32. The allegations of Paragraphs 1 through 27 above are incorporated by reference as though fully set forth.

33. Respondent Irving, through the agreements described in Paragraph 5 above, has engaged in unfair methods of competition in or affecting competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twelfth day of July, 2011, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Irving Oil Limited and Irving Oil Terminals Inc. (collectively "Irving" or "Respondent") of ExxonMobil Oil Corporation and Mobil Pipe Line Company' s energy fuel terminal and pipeline assets located in Maine, and Respondent 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 which, if issued by the Commission, would charge Respondent 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), containing: an admission by Respondent 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 Respondent 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 Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Con-sent 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 issues its

Complaint, makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Irving Oil Limited is a Canadian corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of busi-ness located at 10 Sydney Street, Saint John, New Brunswick, Canada E2L 4K1.

2. Respondent Irving Oil Terminals Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Delaware with its office and principal place of business located at 190 Commerce Way, Portsmouth, New Hampshire 03801.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent 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:

A. "Irving" means Irving Oil Limited and Irving Oil Terminals Inc., their directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups and affiliates controlled by Irving and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

B. "Commission" means the Federal Trade Commission.

C. "Buckeye" means Buckeye Pipe Line Holdings, L.P., a limited partnership, and Buckeye Partners, L.P., a publicly-traded master limited partnership, both organized, existing, and doing business under and by virtue of the laws of Delaware, with their offices and principal place of business located at One Greenway Plaza, Suite 600, Houston, Texas 77046.

D. "Buckeye Assignment Agreements" means the (i) Agreement Concerning Assignment of Contracts, dated May 4, 2011, (ii) Assignment And Assumption Agreement For and Amendment To Terminals Sales and Purchase Agreement, dated May 4, 2011, and (iii) Assignment And Assumption Agreement For and Amendment To Pipeline Sale and Purchase Agreement, dated May 4, 2011, including all exhibits, attachments, agree-ments, and schedules attached to each agreement; *provided, however,* that for purposes of Paragraph II.E., the Buckeye Assignment Agreements shall not include Exhibits D or E of the Agreement Concerning Assignment of Contracts.

E. "Financial Statements" means income statements, balance sheets, cash flow statements, cash distribution statements, and capital account statements that contain aggregate information only.

F. "Irving Divestiture Team" means (i) the Irving JV Oversight Team and (ii) one senior manager of Irving appointed by the Irving General Manager, the Irving Executive Team and/or the board of directors of Irving to oversee and manage a divestiture of Irving’s interest in the Portland Terminal Joint Venture and no more than three (3) of his or her direct subordinates.

G. "Irving Executive Team" means Irving's senior-most team of executive managers that is directly subordinate and accountable to the board of directors of Irving.

H. "Irving General Manager" means Irving's senior-most manager that is directly subordinate and accountable to the Irving Executive Team.

I. "Irving JV Oversight Team" means (i) Irving's JV Representative, (ii) Irving's inside legal counsel and their direct administrative subordinates, (iii) Irving's finance director and no more than one of his or her direct administrative subordinates, (iv) the Irving General Manager and no more than one of his or her direct administrative subordinates, (v) the Irving Executive Team, and (vi) Irving's board of directors.

J. "Irving's JV Representative" means the person (and no more than one alternative) appointed by Irving pursuant to the Portland Terminal Agreement and through whom Irving will act as a member of the Portland Terminal Joint Venture.

K. "Irving's Maine Business" means any Irving business relating to the marketing, transportation, or storage of energy products in the State of Maine.

L. "Irving Non-Public Information" means competitively sensitive, proprietary and all other business information of any kind owned by or pertaining to Respondent, other than Portland Terminal JV Non-Public Information (including, but not limited to, product nominations; shipment volumes, scheduling, and customer identification information; receipt, rates, storage, and inventory of products; financial

statements, plans and forecasts; operating plans; price lists and cost information; supplier and vendor contracts; marketing analyses; customer lists and contracts; employee lists, salary and benefits information; and technologies, processes, and other trade secrets), except for any information that Respondent demonstrates (i) was or becomes generally available to the public other than as a result of a disclosure by Respondent or (ii) was available, or becomes available, to Respondent on a non-confidential basis, but only if, to the knowledge of Respondent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

M. "Manager" means the Person who manages the business and affairs of the Portland Terminal Joint Venture pursuant to the Portland Terminal Agreement.

N. "Person" means any individual, partnership, firm, trust, association, corporation, joint venture, unincorporated organization, or other business or governmental entity.

O. "Portland Terminal" means ExxonMobil Oil Corporation’s energy fuels terminal and business located at or about 170 Lincoln Street, South Portland, Maine 04108.

P. "Portland Terminal Agreement" means the Limited Liability Company Agreement of South Portland Terminal LLC, between Buckeye and Irving, dated May __, 2011.

Q. "Portland Terminal Joint Venture" means the joint venture entered into by Irving and Buckeye for the

purpose of acquiring the Portland Terminal pursuant to the Portland Terminal Agreement.

R. "Operator" means the Person who conducts the day-to-day operations of the Portland Terminal Joint Venture pursuant to the Portland Terminal Agreement and under a management, operations, and maintenance agreement.

S. "Terminal & Pipeline Assets" means all of the right, title, and interest in and to all property and assets that Irving agreed to purchase from (i) ExxonMobil Oil Corporation pursuant to a certain Terminals Sale and Purchase Agreement, dated November 2, 2009, and (ii) Mobil Pipe Line Company pursuant to a certain Sale and Purchase Agreement for Portland to Bangor Refined Products Pipeline System, dated November 2, 2009; *provided, however,* that the Terminal & Pipeline Assets shall not include an interest in the Portland Terminal that Irving may acquire through the Portland Terminal Joint Venture pursuant to the Buckeye Assignment Agreements.

T. "Portland Terminal JV Non-Public Information" means competitively sensitive, proprietary and all other business information of any kind owned by or pertaining to the Portland Terminal Joint Venture or Portland Terminal assets (including, but not limited to, product nominations; shipment volumes, scheduling, and customer identification information; receipt, rates, storage, and inventory of products; financial statements, plans and forecasts; operating plans; price lists and cost information; supplier and vendor contracts; marketing analyses; customer lists and contracts; employee lists, salary and benefits information; and technologies, processes, and other

trade secrets), except for any information that Respondent demonstrates (i) was or becomes generally available to the public other than as a result of a disclosure by Respondent or (ii) was available, or becomes available, to Respondent on a non-confidential basis, but only if, to the knowledge of Respondent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

II.

IT IS FURTHER ORDERED that:

A. Respondent shall divest all rights to acquire the Terminal & Pipeline Assets, absolutely and in good faith, to Buckeye pursuant to the Buckeye Assignment Agreements, no later than five (5) days after the Commission accepts the Consent Agreement for public comment; p*rovided, however*, that:

1. If, at the time the Commission determines to make this Order final, the Commission determines that Buckeye is not acceptable as the assignee of Respondent's rights to acquire the Terminal & Pipeline Assets, or that the Buckeye Assignment Agreements are not an acceptable manner of divestiture, and so notifies Respondent, Respondent shall immediately terminate or rescind the Buckeye Assignment Agreements and shall not enter into any other agreement to assign its rights to acquire the Terminal & Pipeline Assets without obtaining the prior approval of the Commission.

2. In the event that the Buckeye Assignment Agreements are rescinded pursuant to Paragraph II.A.1. of this Order, or if Buckeye does not acquire the Terminal & Pipeline Assets for any other reason, Respondent shall not acquire, directly or indirectly, any interest, in whole or in part, in the Terminal & Pipeline Assets without obtaining the prior approval of the Commission.

B. With respect to the organization, structure, and management of the Portland Terminal Joint Venture and the Portland Terminal, Respondent shall not, without obtaining the prior approval of the Commission:

1. Serve as either Manager or Operator, *provided however*, that in the event that Buckeye is unable (or is legally declared to be unable) to serve as Operator, Respondent shall notify the Commission and may serve as Operator, for an interim period of up to sixty (60) days without obtaining the prior approval of the Commission, when reasonably necessary to provide for the continuous operation of the Portland Terminal;

2. Acquire storage or throughput rights in the Portland Terminal that exceed those Respondent will have pursuant to the Buckeye Assignment Agreements; *provided, however*, that Respondent may acquire such additional rights for terms of up to one (1) month without prior approval; or

3. Acquire, directly or indirectly, through subsidiaries or otherwise, any additional ownership interest, or any other interest, in whole or in part, in the Portland Terminal Joint Venture.

C. Respondent shall not invite, enter into, implement, continue, enforce, or attempt to enter into, implement, continue or enforce, any condition, policy, practice, agreement, contract understanding, or any other requirement that discourages or prevents the Operator from offering the same terms and conditions to any other Person that it offers Respondent for the handling and throughput of energy fuels at the Portland Terminal.

D. Irving's JV Representative shall not (i) have any responsibilities (other than as Irving's representative to the Portland Terminal Joint Venture) relating to Irving's Maine Business or (ii) access to Irving Non-Public Information relating to Irving's Maine Business.

E. Respondent shall comply with all terms of the Buckeye Assignment Agreements, and any breach of the Buckeye Assignment Agreements shall constitute a violation of this Order. If any term of the Buckeye Assignment Agreements varies from or contradicts any term of this Order ("Order Term"), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Any modification of the Buckeye Assignment Agreements, without the approval of the Commission, shall constitute a failure to comply with this Order.

F. The purpose of the divestiture of the Terminal & Pipeline Assets and of the related obligations imposed by this Order is to (i) ensure the continued use of the assets in the same businesses in which the Terminal & Pipeline Assets were engaged at the time of

assignment to Buckeye, (ii) ensure that the Portland Terminal is operated independently of, and in competition with, other Maine terminals, and (iii) remedy the lessening of competition resulting from the acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that:

A. Respondent shall not (i) receive any Portland Terminal JV Non-Public Information, (ii) provide, disclose or otherwise make available such information to any Person, or (iii) use such information for any reason or purpose; *provided, however,* that:

1. The Irving JV Representative may receive and use Portland Terminal JV Non-Public Information for the purpose of (i) conducting his or her duties as Irving's JV Representative, (ii) exercising Irving's rights as a member under the Portland Terminal Agreement or applicable law, and (iii) evaluating the Operator's compliance with applicable performance metrics or standards established by the Portland Terminal Joint Venture.

2. The Irving JV Oversight Team may receive and use the following Portland Terminal JV Non-Public Information:

   (a) Monthly, quarterly, and annual Financial Statements relating to the Portland Terminal Joint Venture solely for the purpose of evaluating Irving's participation in the Portland Terminal Joint Venture;

(b) Aggregate financial information (including estimated cash flows, return on investment, and net present value) relating to any proposed new investment in the Portland Terminal Joint Venture solely for the purpose of evaluating such proposal; and

(c) Information describing any capital contribution to the Portland Terminal Joint Venture required by the Portland Terminal Agreement that exceeds $50,000 solely for the purpose of approving disbursement.

3. Respondent may receive, disclose, or use the following Portland Terminal JV Non-Public Information:

(a) Information relating solely to Irving and its own transactions in the course of conducting its business as a (i) throughput customer of the Portland Terminal or (ii) bulk supplier of energy fuels and additives through the Portland Terminal.

(b) Information that Respondent is required to include in its corporate financial, accounting, or tax documents, *provided, however*, that such information shall be disclosed under the direction of Irving's JV Representative and only to those persons who need it to prepare such consolidated documents;

(c) Information that Respondent requires in the course of obtaining legal advice or defending or prosecuting any dispute, claim, or litigation pertaining to the Portland Terminal Joint

Venture, *provided, however,* that such information shall be disclosed under the direction of Irving's JV Representative and only to those persons who need it to provide legal advice or to prosecute or defend any such dispute;

(d) Information that Respondent requires in operating or managing the Portland Terminal on an emergency basis pursuant to Paragraph II.B.1. of this Order, *provided, however,* that such information shall be disclosed under the direction of Irving's JV Representative and only to those persons who need it to operate the Portland Terminal, *provided further,* that Irving's JV Representative may also describe the general circumstances of the emergency to the Irving JV Oversight Team; and

(e) Information that Respondent requires to comply with any legal requirement, *provided, however,* that such information shall be disclosed under the direction of Irving's JV Representative and only to those persons who need it to comply with such legal requirement.

Provided further, that Irving's JV Representative shall require that each Person who may be permitted to receive, use, or disclose any Portland Terminal JV Non-Public Information under this Paragraph III.A.3. to sign a statement in which such Person agrees to maintain the confidentiality of the information.

4. The Irving Divestiture Team may receive and use the following Portland Terminal JV Non-Public

Information solely for the purpose of marketing Irving's interest in the Portland Terminal Joint Venture (should Respondent wish to sell its interest), evaluating offers received, negotiating transaction terms, and executing a sale of Respondent's interest in the Portland Terminal Joint Venture to any Person:

(a) Financial Statements relating to the Portland Terminal Joint Venture, and

(b) Non-financial information and documents pertaining to the Portland Terminal Joint Venture relating to real estate, improvements and personal property; environmental; safety and operations; permits and licenses; human resources; information technology; litigation and disputes; agreements among Irving, the Portland Terminal Joint Venture, the Manager or the Operator; insurance information properly in Irving's possession; and other proprietary or business information not of a competitively sensitive nature in the possession or control of the Manager, Operator or Irving.

5. Respondent may engage outside attorneys, accountants, independent consultants and/or auditors to review on Respondent's behalf Portland Terminal JV Non-Public Information provided that those attorneys, accountants, independent consultants and/or auditors shall not make such information available to Respondent except to the extent Respondent is permitted to receive the information under this Order.
Provided further, that prior to receiving and using any Portland Terminal JV Non-Public Information

under this Paragraph III.A., Irving's JV Representative, the Irving JV Oversight Team, the Irving Divestiture Team, and outside attorneys, accountants independent consultants and/or auditors shall agree in writing to maintain the confidentiality of such information.

B. Respondent shall not provide, disclose or otherwise make available any Irving Non-Public Information to any Person employed by or associated with the Portland Terminal Joint Venture; *provided, however*, that Respondent may provide or disclose such information to:

1. Irving's JV Representative, except for any such information relating to Irving's Maine Business; and

2. The Operator relating solely to Irving and its own transactions in the course of conducting its business as a (i) throughput customer of the Portland Terminal, or (ii) a bulk supplier of energy fuels and additives through the Portland Terminal.

C. Respondent shall within sixty (60) days of the date this Order becomes final, and in consultation with the Monitor appointed pursuant to Paragraph V of this Order, develop and implement procedures to insure compliance with this Paragraph III, including training Respondent's employees.

IV.

IT IS FURTHER ORDERED that:

A. For a period of ten (10) years from the date this Order becomes final, Respondent shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any concern, corporate or non-corporate, or in any assets engaged in the transportation or storage of energy fuels in Maine; *provided, however*, that this Paragraph IV.A. shall not apply to a single asset acquisition (or group of asset acquisitions within any six month period) with a value of less than $5,000,000.

B. The prior notification required by this Paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only by the Respondent and not by any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16

C.F.R. § 803.20), Respondent shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph IV may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that:

A. Kevin Sudy shall serve as Monitor to monitor Respondent's implementation of the confidentiality and nondisclosure requirements of Paragraph III and of this Order.

1. Within three (3) days after this Order becomes final, Respondent shall, pursuant to the Monitor Agreement (attached to this Order as Confidential Appendix B) and this Order, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities pursuant to this Order.

2. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute to serve as Monitor. The Commission shall select a substitute Monitor subject to the consent of Respondent, which consent shall not be unreasonably withheld.

If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor within ten days after notice by the staff of the Commission to Respondent (by delivery receipt acknowledged, to Respondent's counsel of record) of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute. Respondent shall execute the agreement with the substitute Monitor within ten days after the Commission appoints a substitute Monitor. The substitute Monitor shall serve according to the terms and conditions of this Paragraph V.

B. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor Respondent's compliance with Paragraph III of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor pursuant to the terms of this Order and in consultation with the Commission.

2. The Monitor's power and duties under this Paragraph V shall continue until the Monitor reports to the Commission that Respondent has put in place adequate procedures in accordance with Paragraph III.C. of this Order, and Commission staff has notified Respondent that such procedures are acceptable.

3. The Monitor shall have full and complete access to Respondent's books, records, documents,

personnel, facilities and technical information relating to compliance with this Order, or to any other relevant information, as the Monitor may reasonably request. Respondent shall cooperate with any reasonable request of the Monitor. Respondent shall take no action to interfere with or impede the Monitor's ability to monitor Respondent's compliance with this Order.

4. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.

5. Respondent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor'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 the Monitor's gross negligence or wilful misconduct. For purposes of this Paragraph V.B.5., the term "Monitor" shall include all Persons retained by the

Monitor pursuant to Paragraph V.B.4. of this Order.

6. The Monitor shall report in writing to the Commission every thirty (30) days from the date this Order becomes final, and at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order.

7. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however,* such agreement shall not restrict the Monitor from providing any information to the Commission.

C. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

VI.

IT IS FURTHER ORDERED that:

A. If Respondent has not divested all of the Terminal & Pipeline Assets as required by Paragraph II.A. of this Order, the Commission may appoint one or more Persons as Divestiture Trustee to divest the Terminal & Pipeline Assets in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as the monitor pursuant to Paragraph V of this Order.

B. 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, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. 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 the Respondent to comply with this Order.

C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

D. Within ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to

effect the relevant divestiture or transfer required by the Order.

E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondent 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 relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.

2. The Divestiture Trustee shall have twelve (12) months from 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 (12) 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.

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. Respondent shall

develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph VI 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 each contract that is submitted to the Commission, subject to Respondent's 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,* that 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 Respondent from among those approved by the Commission; *provided further, however,* that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the

authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the 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 Respondent, 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. Respondent 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 gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph VI.E.6., the term "Divestiture Trustee" shall include all Persons

retained by the Divestiture Trustee pursuant to Paragraph VI.E.5. of this Order.

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondent or the Commission 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,* that such agreement required by Respondent shall not restrict the Divestiture Trustee from providing any information to the Commission.

F. 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 VI.

G. 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.

VII.

IT IS FURTHER ORDERED that:

A. Sixty (60) days from the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order.

B. One (1) year after the date this Order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may request, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

C. Within thirty (30) days from the date any dispute initiated by a party under the Portland Terminal Agreement becomes subject to arbitration or judicial review under the terms of the Portland Terminal Agreement, Respondent shall submit to the Commission a report setting forth in detail a description of the dispute.

VIII.

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

IX.

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 and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

A. Access, during business office hours of the Respondent 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 Respondent, which copying services shall be provided by the Respondent at its expense; and

B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on July 12, 2021.

By the Commission.

CONFIDENTIAL APPENDIX A

[Redacted From the Public Record Version But Incorporated By Reference]

CONFIDENTIAL APPENDIX B

[Redacted From the Public Record Version But Incorporated By Reference]

ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Irving Oil Terminals Inc. and Irving Oil Limited (collectively "Irving"). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects resulting from Irving and Irving Oil Transportation Company LLC's proposed acquisition of certain petroleum products storage and transportation assets located in Maine from ExxonMobil Oil Corporation ("ExxonMobil"). As originally structured, Irving would have acquired ExxonMobil's petroleum products terminals located in South Portland and Bangor, Maine, as well as ExxonMobil's intrastate pipeline connecting these two terminals.

The Commission's Complaint alleges that this, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the gasoline and distillates terminaling services markets in the South Portland and Bangor/Penobscot Bay areas of Maine. To resolve these competitive concerns raised by the original transaction, Irving will divest its acquisition rights to the ExxonMobil Bangor terminal and intrastate pipeline as well as fifty percent of ExxonMobil's South Portland terminal to Buckeye Partners, L.P. and its affiliate Buckeye Pipe Line Holdings, L.P. (collectively "Buckeye"), retaining only the right to acquire the remaining fifty percent of the South Portland terminal. Buckeye and Irving will form a joint venture that will purchase ExxonMobil's South Portland terminal. Under this proposal, Buckeye alone will manage and operate this terminal on behalf of the Irving-Buckeye joint venture. Buckeye will purchase and

operate ExxonMobil's pipeline and Bangor terminal. Irving will enter into a throughput agreement with Buckeye at each of the petroleum products terminals. The Commission's Consent Agreement is intended to assure that Irving does not control the pipeline and terminals and does not threaten Buckeye's ability to competitively operate the South Portland terminal.

The proposed Consent Agreement, to govern for a period of ten years, prevents Irving from acquiring additional share in, managing, or operating the South Portland terminal absent the Commission's prior approval. The Consent Agreement also requires prior notification should Irving acquire any form of additional ownership interests in petroleum products transportation or storage assets located in Maine. Finally, the proposed Consent Agreement imposes firewall and monitor provisions to prevent Irving from accessing and using confidential customer information. This remedy preserves competition in the gasoline and distillates terminaling services markets in both the Bangor/Penobscot Bay and South Portland areas of Maine.

The proposed Consent Agreement has been placed on the public record for thirty days to allow interested persons to comment. Comments received during this period will become part of the public record. After thirty days, the Commission will review the proposed Consent Agreement and the comments received, and will decide whether to withdraw the proposed Consent Agreement, modify it, or make it final.

II. Parties

Irving is a family-owned business based in St. John, New Brunswick, Canada. Irving owns the largest refinery in Canada and owns, in whole or in part, six terminals in Canada and the northeastern United States. Irving supplies branded and unbranded petroleum products in Canada and throughout New England to third-

party distributors, retailers, various other re-sellers, and governmental and commercial end users. Irving also owns retail travel plazas that sell gasoline and diesel petroleum products. In Maine, Irving owns a terminal in Searsport and co-owns a terminal with CITGO Petroleum Corporation in South Portland.

ExxonMobil is the world's largest publicly traded petroleum and natural gas company worldwide. ExxonMobil produces crude oil and natural gas, refines petroleum products, and transports and sells crude oil, natural gas, and refined petroleum products. ExxonMobil owns terminals located in South Portland and Bangor, Maine, as well as an intrastate pipeline that connects these two terminals.

Buckeye is a publicly traded partnership that owns and operates one of the largest independent refined petroleum products pipeline systems in the United States. Buckeye owns or manages approximately 7,500 miles of pipeline, owns approximately 70 active refined petroleum products terminals, and markets refined petroleum products in some of the geographic areas served by its pipeline and terminal operations. Buckeye is not a party to the original transaction and does not currently market, transport, or store light petroleum products in Maine.

III. The Relevant Markets and their Structure

The Commission's Complaint alleges that the original transaction would pose substantial antitrust concerns in the gasoline and distillates terminaling services markets in the Bangor/Penobscot Bay and South Portland areas of Maine.

Terminals generally consist of a number of storage tanks and loading "racks" that pump fuels into tanker trucks for further delivery. Terminals are specialized facilities connected to one or more fuel supply sources, have the capacity to store fuel shipments, and must be configured properly to distribute the fuel

to customers. Light petroleum products terminals are specialized facilities that receive gasoline, diesel fuel, heating oil, kerosene, and jet fuel, among other products, by pipeline, by water, by rail, or directly from refinery production. These products are stored or redistributed by pipeline, water, rail, or truck. Terminals are critical to the sale and distribution of transportation fuels and perform value-added services, such as handling and injection of motor fuel additives (including ethanol) as petroleum products are redelivered across the truck rack. Terminaling services consist of a cluster of services related to the delivery, storage, and throughput of petroleum products.

The Commission's Complaint alleges that relevant product markets within which to analyze the original transaction are gasoline terminaling services and distillates terminaling services. Terminals that store gasoline compete in both the gasoline terminaling services and distillates terminaling services markets. However, terminals that store only distillates compete only in the distillates terminaling services market**.** Two relevant geographic areas in which to analyze the effects of the original transaction on gasoline and distillates terminaling services are the Bangor/Penobscot Bay and the South Portland areas of Maine. The Bangor/Penobscot Bay area encompasses the state of Maine north of Waterville, including Bangor, Searsport, and Bucksport, Maine. The South Portland area encompasses the state of Maine south of Waterville, including South Portland.

Irving and ExxonMobil are two of three firms that can independently offer gasoline terminaling services in the Bangor/Penobscot Bay area and two of four in the South Portland area. Additionally, these companies are two of four firms independently offering distillates terminaling services in the Bangor/Penobscot Bay area and two of six in the South Portland area. The original acquisition would have substantially increased concentration in each of the above markets.

IV. Effects of the Acquisition

The Commission believes that the original transaction would eliminate the actual, direct, and substantial competition between Irving and ExxonMobil, both: (1) increasing the likelihood that Irving would unilaterally exercise market power in the Bangor/Penobscot Bay area gasoline terminaling services market, and (2) enhancing the likelihood of collusion or coordinated interaction among the remaining firms in the South Portland area gasoline terminaling services market and both the Bangor/Penobscot Bay and South Portland area distillates terminaling services markets.

The ExxonMobil pipeline, which originates in South Portland and whose only access point is the ExxonMobil South Portland terminal, supplies the terminals located in Bangor, Maine. Marine vessels supply the remaining Bangor/Penobscot Bay area terminals as well as the South Portland area terminals. Because importing gasoline from Europe on large cargo vessels is generally less costly than shipping it from domestic ports on smaller barges, most Maine suppliers import gasoline from outside the United States.

Controlling the South Portland terminal would allow Irving to control the price of bulk gasoline deliveries to the Bangor/Penobscot Bay area. Irving would likely be able unilaterally to raise the price for or restrict the availability of gasoline terminaling services in the Bangor/Penobscot Bay area and raise gasoline prices to customers served from this area's terminals. Additionally, the original transaction would provide Irving with sufficient terminal capacity to restrict alternative suppliers' ability to import gasoline into South Portland area terminals at current prices. The ability to restrict these imports would allow Irving to increase the cost of gasoline supplied to retail stations and other consumers from the Bangor/Penobscot Bay area terminals.

Because the ExxonMobil assets carry both gasoline and distillates, the original transaction also would likely enhance the likelihood of coordination to raise fees for and reduce the quality and availability of terminaling services among the remaining firms that could independently provide distillates terminaling services in the Bangor/Penobscot Bay area and provide gasoline or distillates terminaling services in South Portland area.

Entry into the gasoline and distillates terminaling services markets in the Bangor/Penobscot Bay and South Portland areas would not be timely, likely, or sufficient to prevent or defeat the anticompetitive effects of the original transaction. Entering these markets is costly, difficult, and unlikely due to, among other things, the difficulty of obtaining regulatory approvals and the presence of excess terminal capacity in both markets. Facing substantial sunk costs, a new entrant would not likely invest in a new terminal in these markets, all of which presently have sufficient capacity. Further, due to the significant cost and limited ability to attract large customer volumes, a terminal that cannot currently store gasoline would not likely reconfigure its tanks to store gasoline in response to a small but significant price increase in gasoline terminaling services.

V. The Proposed Consent Agreement

For a duration of ten years, the proposed Consent Agreement addresses the competitive risk that Irving may: (1) gain control of the Irving-Buckeye South Portland terminal in the future, allowing it to restrict supply to the Bangor terminals and imports into South Portland, or (2) access and use confidential business information in an anticompetitive manner. By imposing certain prior approval and prior notice provisions on Irving and prohibiting it from taking certain actions, the remedy ensures that the Irving-Buckeye South Portland terminal will continue to operate independently of, and in competition with, other Maine

terminals. Further, by imposing firewall and monitor provisions, the remedy guards against Irving accessing and using confidential information in an anticompetitive manner.

Pursuant to the proposed Consent Agreement, Irving must obtain Commission approval prior to: (1) acting as either manager of the Irving-Buckeye joint venture or operator of the joint venture terminal, with a limited sixty-day exception in the event that Buckeye is unable to serve in either capacity, (2) acquiring additional storage or throughput rights at the joint venture terminal, with a limited one-month exception, or ownership interests in the joint venture, or (3) modifying its assignment agreements with Buckeye. Paragraphs II.B. and II.E. Further, the Consent Agreement requires Irving to notify the Commission prior to acquiring any form of additional ownership interests in petroleum products transportation or storage assets located in Maine. Paragraph IV. Additionally, the Consent Agreement prohibits Irving from taking action that would discourage or prevent Buckeye from offering third parties terms equal to Irving's terms at the South Portland terminal. Paragraph II.C.

The proposed Consent Agreement also prohibits Irving from receiving, sharing, or using any confidential business information with limited exceptions that allow the information to be shared where required and only to those with written agreements to maintain the information's confidentiality. Paragraph III. To this end, the Consent Agreement places an enforcement obligation on Irving and provides for the appointment of a monitor to oversee the implementation of these provisions. Paragraphs III.C. and V. Such a monitor will review Irving' s compliance proposals and assist in evaluating their adequacy. Paragraph V.

The proposed Consent Agreement includes the standard divestiture trustee provision pursuant to which the Commission may appoint a trustee if Irving fails to effectuate the divestiture in

a manner that complies with the Consent Order. Paragraph VI.A. In this case, the trustee will divest the assets, subject to Commission prior approval, within twelve months. Paragraph VI.E.

VI. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the comments received, and decide whether to withdraw from the proposed Consent Agreement, modify it, or make it final. By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to inform and invite public comment on the proposed Consent Agreement, including the proposed remedy, and to aid the Commission in its determination of whether to make the proposed Consent Agreement final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement, nor to modify the terms of the proposed Consent Agreement in any way.

Initial Decision

IN THE MATTER OF

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

INITIAL DECISION AND ORDER

Docket No. D-9343; File No. 081 0133
Filed, June 17, 2010 — Initial Decision, July 14, 2011

The Initial Decision holds that respondent North Carolina Board of Dental Examiners ("Board") illegally thwarted competition by working to bar non-dentist providers of teeth whitening goods and services from selling their products to consumers. The Board is an agency created to regulate the practice of dentistry in North Carolina and licenses any person who wants to practice dentistry in the state. The Board lacks authority over non-dentists but may ask a state court to determine that particular conduct constitutes the unauthorized practice of dentistry and issue an injunction. The Administrative Law Judge held that the Board sought to, and did, exclude non-dentist providers from the market for teeth whitening services, in violation of Section 5 of the Federal Trade Commission Act. Further, the Board's actions led to higher prices and reduced choices for consumers. The Administrative Law Judge found that Board's alleged procompetitive justifications were not valid and held that the Board was liable under the law. The Board's order, in part, prohibits the Board from directing a non-dentist provider to stop providing teeth whitening goods or services or prohibiting, restricting, impeding, or discouraging the provision of teeth whitening goods or services by a non-dentist provider.

Participants

For the *Commission: Michael Bergman, Michael J. Bloom, Richard B. Dagen, William L. Lanning, Steve J. Osnowitz, Tejasvi Srimashnam, Michael Turner,* and *Melissa Westman-Cherry.*

For the *Respondent: Brenner A. Allen, Noel Allen, Carolin Bakewell, Catherine E. Lee, Jackson S. Nichols,* and *M. Jackson Nichols, Allen Pinnix & Nichols, P.A.*