

IN THE MATTER OF  
MTH HOLDINGS, INC., ET AL.

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

*Docket C-3266. Complaint, Oct. 6, 1989—Decision, Oct. 6, 1989*

This consent order requires, among other things, MTH, an investment banking firm, to divest grocery stores in Vermont and New York to eliminate antitrust concerns that would be created by its acquisition of GU Acquisition Corporation, a holding company that owns and operates the Grand Union Company grocery store chain. In addition, for ten years, MTH must seek prior FTC approval before acquiring any grocery stores in any of the New York or Vermont counties in which the divestitures must be made.

*Appearances*

For the Commission: *David Conn, Daniel P. Ducore and Ronald B. Rowe.*

For the respondents: *William Pelster, Mohr, Skadden, Arps, Meagher & Flom, Washington, D.C. Mark Leddy, Cleary, Gottlieb, Steen & Hamilton, Washington, D.C. and Kenneth E. Newman, Donovan, Leisure, Newton & Irvine, New York City.*

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 ("Commission"), having reason to believe that the respondents, MTH Holdings, Inc. and GU Acquisition Corporation, corporations subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 8 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement and the actions of the respondents to implement that agreement constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the

public interest, hereby issues its complaint, stating its charges as follows:

#### DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. "*Retail grocery store*" means any retail food store of 10,000 or more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; nonedible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

b. "*P & C*" means P & C Food Markets, Inc., its parents, including The Penn Traffic Company and MTH Holdings, Inc., predecessors, subsidiaries, divisions and groups controlled by P & C and their respective directors, officers, partners, employees, agents and representatives, and their successors and assigns.

c. "*Grand Union*" means The Grand Union Company, an indirect wholly owned subsidiary of GU Acquisition Corporation, through which GU Acquisition Corporation is engaged in the retail grocery business. Grand Union includes its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GU Acquisition Corporation and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

#### MTH HOLDINGS

2. Respondent MTH Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New York with its executive offices located at 331 Madison Avenue, New York, New York.

3. Respondent MTH Holdings is, and at all times relevant herein has been, engaged in the retail sale and distribution of food and grocery items in retail grocery stores. For the year ending December 31, 1988, P & C, a subsidiary of MTH Holdings, Inc., had net sales of \$1.1 billion.

4. Respondent MTH Holdings is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined

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

#### GU ACQUISITION CORPORATION

5. Respondent GU Acquisition Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its executive offices located at 25 Old Kings Highway Road, Darien, Connecticut.

6. Respondent GU Acquisition Corporation is, and at all times relevant herein has been, engaged in the retail sale and distribution of food and grocery items in retail grocery stores. For the year ending December 31, 1988, Grand Union, a subsidiary of GU Acquisition Corporation, had net sales of \$2.5 billion.

7. Respondent GU Acquisition Corporation is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

#### ACQUISITION

8. On or about April 11, 1989, MTH Holdings and Salomon Inc entered into an agreement with GU Acquisition Corporation whereby MTH Holdings and Salomon Inc will purchase the assets and operations of Grand Union. There are 22 cities and towns where both Grand Union and P & C operate retail grocery stores.

#### TRADE AND COMMERCE

##### *A. Relevant Line of Commerce*

9. A relevant line of commerce in which to analyze MTH Holdings' and Salomon Inc's acquisition of GU Acquisition Corporation is the retail sale and distribution of food and grocery items in retail grocery stores.

##### *B. Relevant Sections of the Country*

10. Relevant sections of the country are the following towns and cities:

- a. Cobleskill, New York;
- b. Oneonta, New York;
- c. Ticonderoga, New York;

- d. Barre/Montpelier/Berlin, Vermont;
- e. Bennington, Vermont;
- f. Brattleboro, Vermont;
- g. Burlington, Vermont Metropolitan Statistical Area;
- h. Manchester, Vermont;
- i. Morrisville, Vermont;
- j. Rutland/North Clarendon/West Rutland, Vermont;
- k. Springfield, Vermont; and
- l. Windsor, Vermont.

#### MARKET STRUCTURE

11. The retail sale of food and grocery items in retail grocery stores in the relevant sections of the country is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by two-firm and four-firm concentration ratios.

#### ENTRY CONDITIONS

12. Entry into the retail sale of food and grocery items in retail grocery stores in the relevant sections of the country described in paragraph 10 is difficult.

#### ACTUAL COMPETITION

13. Grand Union and P & C are actual competitors in the relevant line of commerce and sections of the country described in paragraphs 9 and 10.

#### EFFECTS

14. The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. By eliminating direct competition between Grand Union and P & C;
- b. By increasing the likelihood that P & C will unilaterally exercise market power; or
- c. By increasing the likelihood of, or facilitating, collusion

all of which increases the likelihood that firms will increase prices and restrict output of food and groceries both in the near future and for a longer period of time.

## VIOLATIONS CHARGED

15. The proposed acquisition of Grand Union by MTH Holdings and Salomon Inc violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having initiated an investigation of the transaction pursuant to which MTH Holdings, Inc. ("MTH") and Salomon Inc ("Salomon") will acquire the issued and outstanding stock of GU Acquisition Corporation, ("GUAC") and MTH and GUAC (collectively, "Respondents"), having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated Section 5 and Section 7, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent MTH Holdings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of New

York with its executive offices located at 331 Madison Avenue, New York, New York.

2. Respondent GU Acquisition Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Delaware with its executive offices located at 25 Old Kings Highway Road, Darien, Connecticut.

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

#### ORDER

##### I.

As used in this order, the following definitions shall apply:

a. "*Acquisition*" means MTH's acquisition of the issued and outstanding common stock of GUAC.

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

c. "*GND Holdings Corporation*" means the entity formed by MTH and Salomon to acquire GUAC. GND Holdings Corporation includes its successors and assigns.

d. "*The Grand Union Company*" means an indirect wholly owned subsidiary of GUAC, through which GUAC is engaged in the retail grocery business. The Grand Union Company includes its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GUAC and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

e. "*GUAC*" means GU Acquisition Corporation, its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by GUAC and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

f. "*MTH*" means MTH Holdings, Inc., its parents, predecessors, subsidiaries, divisions, groups and affiliates controlled by MTH (including P&C Food Markets, Inc.) and their respective directors, officers, employees, agents, partners, and representatives, and their respective successors and assigns.

g. "*Respondents*" means GUAC and MTH.

h. "*Retail grocery store*" means any retail food store of 10,000 or

more square feet and which sells primarily a variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits) and which often sells delicatessen items, bakery items, fresh fish or other specialty items.

i. "*Schedule A Properties*" means the assets and businesses listed in Schedule A of this order.

j. "*Schedule B Properties*" means the assets and businesses listed in Schedule B of this order.

k. "*Properties*" means the Schedule A Properties and the Schedule B Properties.

## II.

*It is ordered, That:*

(A) Within nine (9) months of the date this order becomes final, the respondents shall divest, absolutely and in good faith (a) the Schedule A Properties, as well as any additional assets and businesses that (i) the respondents may at their discretion include as a part of the assets to be divested and are acceptable to the acquiring entity and the Commission, or (ii) the Commission shall require to be divested to ensure the divestiture of the Schedule A Properties as ongoing, viable enterprises, engaged in the businesses in which the Properties are presently employed. *Provided, however,* the respondents may only divest the stores of P&C Food Markets, Inc. listed in Schedule A if such stores have been operated consistent with past practices and the respondents have in no way acted to reduce the value or competitive viability of such stores. *Provided, further,* the respondents shall have twelve (12) months from the date this order becomes final to divest, absolutely and in good faith the Schedule A property in Bennington, Vermont.

(B) The Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I, shall continue in effect until such time as the respondents have divested either the Schedule A Properties or a trustee has divested the Schedule B Properties or until such other time as the Agreement to Hold Separate provides, and the respondents shall comply with all terms of said Agreement.

(C) Divestiture of the Properties shall be made only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. The purpose of the divestiture of the Properties is to ensure the

continuation of the assets as ongoing, viable retail grocery stores engaged in the same businesses in which the Properties are presently employed and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

(D) The respondents shall take such action as is necessary to maintain the viability and marketability of the Properties and shall not cause or permit the destruction, removal or impairment of any assets or businesses to be divested except in the ordinary course of business and except for ordinary wear and tear.

### III.

*It is further ordered, That:*

(A) If the respondents have not divested, absolutely and in good faith and with the Commission's approval, the Schedule A Properties within the time set out in paragraph II(A), the respondents shall consent to the appointment by the Commission of a trustee to divest the Schedule B Properties. In the event that the Commission brings an action pursuant to 5 (1), of the Federal Trade Commission Act, 15 U.S.C. 45 (1), or any other statute enforced by the Commission, the respondents shall consent to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties or any other relief available to it for any failure by the respondents to comply with this order.

(B) If a trustee is appointed by the Commission or a court pursuant to paragraph III(A) of this order, the respondents shall consent to the following terms and conditions regarding the trustee's duties and responsibilities:

(1) The Commission shall select the trustee, subject to the consent of the respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

(2) The trustee shall have the power and authority to divest the Schedule B Properties.

(3) The trustee shall have eighteen (18) months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a

reasonable time, the divestiture period may be extended by the Commission, or by the court for a court-appointed trustee. *Provided, however,* that the Commission or court may only extend the divestiture period two (2) times.

(4) The trustee shall have full and complete access to the personnel, books, records and facilities related to those assets that the trustee has the duty to divest. The respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. The respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestitures.

(5) Subject to the respondents' absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II(C) of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of the Schedule B Properties. The divestiture shall be made in the manner set out in paragraph II(C); *provided, however,* if the trustee receives bona fide offers from more than one acquiring entity or entities, and if the Commission determines to approve more than one such purchaser, the trustee shall divest to the acquiring entity or entities selected by the respondents from among those approved by the Commission.

(6) The trustee shall serve at the cost and expense of the respondents, on such reasonable and customary terms and conditions as the Commission or a court may set, including the employment of accountants, attorneys or other persons reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule B Properties.

(7) Within sixty (60) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, the respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture.

(8) If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III (A) of this order.

(9) The trustee shall report in writing to the respondents and the Commission every sixty (60) days from the date of appointment concerning the trustee's efforts to accomplish divestiture.

#### IV.

*It is further ordered,* That, within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until the respondents have fully complied with the provisions of paragraphs II and III of this order, the 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 or have complied with those provisions. The respondents shall include in their compliance reports, among other things that are required from time to time, a full description of substantive contacts or negotiations for the divestiture of assets or businesses specified in paragraph II of this order, including the identity of all parties contacted. The respondents also shall include in their compliance reports, copies of all written communications to and from such parties, all internal memoranda, reports and recommendations concerning divestiture, and a description of the status of all regulatory proceedings filed in accordance with this order.

#### V.

*It is further ordered,* That, for a period commencing on the date this order becomes final and continuing for ten (10) years, the respondents shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store or leasehold interest in any retail grocery store, including any facility that has operated as a retail grocery store within six (6) months of the date of the offer of purchase, or any interest in or the stock or share capital of any entity that owns any interest in or operates any retail grocery store or any interest in or the stock or share capital of any entity that owned any interest in or operated any retail grocery store within six (6) months of the date of the offer of purchase in the following counties:

1. Chittenden County, Vermont
2. Windham County, Vermont
3. Rutland County, Vermont
4. Washington County, Vermont
5. Lamoille County, Vermont
6. Windsor County, Vermont
7. Bennington County, Vermont
8. Essex County, New York
9. Schoharie County, New York
10. Otsego County, New York.

(Hereinafter "Retail Grocery Interests"). *Provided, however*, that these prohibitions shall not relate to the construction of new facilities or the leasing of facilities that have not operated as retail grocery stores within six months of the date of the offer to lease. *Provided, further*, that the respondents may acquire, for investment purposes only, an interest of not more than five (5) percent of the stock or share capital of any concern. *Provided, additionally*, only if, the respondents have provided the Commission with thirty (30) days prior notice of the acquisition set out in this proviso, these prohibitions shall not relate to the acquisition of an interest in the stock or capital share of any concern that has no Retail Grocery Interests at the time the respondents announce to the public an intention to acquire an interest in the concern and has no more than 40,000 square feet of Retail Grocery Interests at the time of the acquisition of the stock or capital share of said concern.

One (1) year from the date this order becomes final and annually for nine (9) years thereafter the respondents shall file with the Federal Trade Commission a verified written report of their compliance with this paragraph.

## VI.

*It is further ordered*, That the respondents shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation, dissolution or sale of subsidiaries or any other change that may affect compliance obligations arising out of the order.

### SCHEDULE A

#### Assets, Interests and Businesses

The retail grocery stores presently owned or operated by The Grand Union Company or by P&C Food Markets, Inc. in the following locations:

1. One (1) in Morrisville, Vermont;
2. One (1) in Barre/Montpelier/Berlin, Vermont;
3. One (1) in Windsor, Vermont;
4. One (1) in Springfield, Vermont;
5. One (1) in Brattleboro, Vermont;
6. One (1) in Bennington, Vermont;
7. One (1) in Manchester, Vermont;
8. Two (2) in the Rutland, Vermont area, which area shall include North Clarendon and West Rutland, Vermont;
9. Four (4) in the Burlington, Vermont, Metropolitan Statistical Area;
10. One (1) in Cobleskill, New York;
11. One (1) in Ticonderoga, New York; and
12. One (1) in Oneonta, New York.

The assets to be divested shall include the grocery business operated, all assets, inventory, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

#### SCHEDULE B

##### Assets, Interests and Businesses

All the retail grocery stores presently owned or operated by The Grand Union Company in the following locations:

1. Chittenden County, Vermont
2. Windham County, Vermont
3. Rutland County, Vermont
4. Washington County, Vermont
5. Lamoille County, Vermont
6. Windsor County, Vermont
7. Bennington County, Vermont
8. Ticonderoga, New York
9. Schoharie County, New York
10. Otsego County, New York.

The assets to be divested shall include the grocery business operated, all assets, inventory, leases, properties, business and goodwill, tangible and intangible, utilized in the distribution or sale of groceries at the listed locations.

Complaint

112 F.T.C.

IN THE MATTER OF

ROBERT G. KOSKI, D.O.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9225. Complaint, Feb. 13, 1989—Dismissal Order, Oct. 10, 1989*

The Federal Trade Commission issued a complaint against Dr. Robert G. Koski alleging that he conspired to boycott Marquette General Hospital, to prevent it from opening a clinic. In light of newly discovered evidence, the Commission has decided to dismiss the complaint.

*Appearances*

For the Commission: *David R. Pender* and *Paul J. Nolan*.

For the respondent: *Larry J. Saylor, Miller, Canfield, Paddock & Stone*, Detroit, Mi. and *Richard D. Carr*, Munising, Mi.

## 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 Robert G. Koski, D.O. ("respondent"), has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating in that respect its charges as follows:

PARAGRAPH 1. Respondent is a doctor of osteopathy licensed by the State of Michigan. He specializes in the practice of anesthesia, and practices in the Upper Peninsula of Michigan in Dickinson County. His office address is Dickinson County Memorial Hospital, 400 Woodward Avenue, Iron Mountain, Michigan.

PAR. 2. Respondent has been on the active Medical Staff of Dickinson County Memorial Hospital ("Medical Staff") since at least September, 1986. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Dickinson County Memorial Hospital. The Medical Staff's physician members constitute almost all of the practicing physicians in Dickinson County.

PAR. 3. Respondent has been a member of the Dickinson-Iron County Medical Society since at least September, 1986. The Dickinson-Iron Medical Society is composed of physicians in the private practice of medicine in Dickinson County and in Iron County, in the Upper Peninsula of Michigan. The Dickinson-Iron County Medical Society's physician members constitute almost all of the practicing physicians in Dickinson County, in Iron County, and on the Medical Staff.

PAR. 4. Except to the extent that competition has been restrained as alleged herein, the respondent has been and now is in actual or potential competition with other physicians or health care practitioners in the provision of health care services in or near Dickinson County. The respondent is engaged in the business of providing health care services to patients for a fee.

PAR. 5. The Delta County Medical Society is composed of physicians in the private practice of medicine in Delta County in the Upper Peninsula of Michigan. The Delta County Medical Society's physician members constitute almost all of the practicing physicians in Delta County.

PAR. 6. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Dickinson County Hospitals, a non-profit organization, operates two hospitals in Dickinson County—Dickinson County Memorial Hospital, a 110-bed hospital in the city of Iron Mountain, and Anderson Hospital, a 19-bed hospital in the city of Norway. The Veterans' Administration operates the only other hospital in Dickinson County. Residents of the county receive most of their health care services from physicians and other health care practitioners on the Medical Staff, including respondent Koski, and from Dickinson County Memorial Hospital. For diagnosis and treatment using some complex medical procedures, or by physicians who practice specialties not available in Dickinson County, residents of Dickinson County usually travel to physicians and/or hospitals in Green Bay, Wisconsin (approximately 85 miles south of Dickinson County), Marquette, Michigan (approximately 85 miles north of Dickinson County), or Marshfield, Wisconsin (approximately 140 miles southwest of Dickinson County).

PAR. 8. Marquette General Hospital, which is located in the city and

county of Marquette, in the Upper Peninsula of Michigan, is a tertiary care hospital that provides specialized diagnostic and treatment services not available at smaller hospitals in the Upper Peninsula of Michigan, such as Dickinson County Memorial Hospital and Anderson Hospital. Marquette General Hospital provides tertiary care services in such areas as cardiac care, oncology, neurological services, neonatal services, and nephrology. Many specialty and subspecialty physicians on Marquette General Hospital's Medical Staff receive a significant number of referrals from physicians in other parts of the Upper Peninsula, because they offer diagnostic and treatment techniques not available locally. Marquette General Hospital, in turn, derives a substantial portion of its revenues as a result of tests and hospital admissions of patients who were referred to physicians on its medical staff by physicians in other parts of the Upper Peninsula.

PAR. 9. On September 3, 1986, Marquette General Hospital announced plans to build a multispecialty medical office in Kingsford, Michigan, the second largest city in Dickinson County. Kingsford borders Iron Mountain, the largest city in the county, and is within several miles of the Wisconsin border. Marquette General Hospital planned to staff the new office with three salaried primary care physicians, to have some specialty and subspecialty physicians visit Dickinson County more frequently, and to offer some specialized physician services and diagnostic tests that were not previously available in Dickinson County. Marquette General Hospital officials believed that their new medical office in Kingsford would provide valuable primary care and specialty services to consumers of health care services in the Dickinson County area and consequently would attract a substantial number of patients to, and enhance the revenues of, Marquette General Hospital. Marquette General Hospital officials believed the new medical office would permit it to compete more effectively with hospitals in Green Bay, Wisconsin, and Marshfield, Wisconsin, for patients in the Dickinson County area.

PAR. 10. The respondent, other health care practitioners in the Dickinson County area, and the Medical Staff saw as a competitive threat the prospect of increased competition from both specialty and primary care physicians who would work in Marquette General Hospital's planned office in Dickinson County, including the salaried primary care physicians who would work there. As a result, beginning in September 1986, the respondent and other health care practitioners in the Dickinson County area entered into a combination or conspiracy

to coerce, intimidate, threaten to boycott, or boycott Marquette General Hospital and its physicians in order to prevent the proposed new medical office from offering services to consumers in competition with them. In September 1986, the Medical Staff and the Dickinson-Iron County Medical Society, acting as combinations of their members or in conspiracy with at least some of their members, joined in the conspiracy to suppress competition from Marquette General Hospital's proposed new medical office in Kingsford, Michigan. In November 1986, the Delta County Medical Society, acting as a combination of its members or in conspiracy with at least some of its members, joined in the conspiracy. Throughout the course of the conspiracy, the Dickinson-Iron County Medical Society provided support to, and advised its physician members of, the actions undertaken in furtherance of the combination or conspiracy to suppress competition from the proposed new medical office.

PAR. 11. In furtherance of the aforesaid combination or conspiracy, and as described in paragraphs twelve through twenty below:

A. Respondent Koski, other health care practitioners in the Dickinson County area, the Medical Staff, and the Dickinson-Iron County Medical Society, in response to the Marquette General Hospital's plan to establish a medical office in Dickinson County.

1. Threatened to refuse to refer, or refused to refer, patients to specialist physicians practicing at a Marquette General Hospital medical office in Dickinson County;

2. Agreed to refuse to enter into any contractual relationship with, including possible salaried employment in, Marquette General Hospital's medical office in Dickinson County; and

3. Solicited physicians throughout the Upper Peninsula of Michigan to join in a combination or conspiracy to threaten to cease referring, or to cease referring, patients to physicians practicing at Marquette General Hospital.

B. Respondent Koski, other health care practitioners in the Dickinson County area, the Medical Staff, the Dickinson-Iron County Medical Society, and the Delta County Medical Society threatened to cease referring, or ceased to refer, patients to specialist physicians practicing at Marquette General Hospital.

PAR. 12. On September 4, 1986, the Medical Staff, at an emergency meeting held to discuss the proposed Marquette General Hospital medical office, authorized an Ad-hoc Executive Committee of the

Medical Staff to "actively pursue effective counter measures to this move by Marquette," *i.e.*, its plan to open the clinic. The president of the Dickinson-Iron County Medical Society was named to this committee. This committee met on September 8, 1986, and approved the issuance of a press release which stated in part that: (1) the Medical Staff objected to the establishment of the new medical office in Dickinson County, which was not under "local control," and (2) the new medical office "not only brings in specialists unavailable locally, but also competes directly with services and specialties already present in our hospital." Substantial portions of this press release subsequently appeared in the local newspapers.

PAR. 13. On September 13, 1986, the Medical Staff met and the physicians and other health care practitioners present, including respondent Koski, voted unanimously to approve the following commitment and to seek a written commitment to that effect from each Medical Staff member:

We the Medical Staff of DCH, support the right of the individual practitioner to be non-aligned to any specific institution and, therefore, pledge that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof.

One or more members of the Medical Staff distributed a typed version of this statement to the members of the Medical Staff, and it was signed by many of them. On September 22, 1986, the Medical Staff approved a second statement expressing opposition to the medical office. This second statement, which served the same purpose as the first statement, read as follows: "I am opposed to Marquette General Hospital placing a clinic in Dickinson County." Shortly thereafter, the second statement was distributed to, and signed by, almost every member of the Medical Staff, including respondent Koski.

PAR. 14. On September 29, 1986, three members of the Medical Staff met, on behalf of the Medical Staff and its individual members including respondent Koski, with physician representatives of the Medical Staff of Marquette General Hospital. At this meeting, these three individuals presented the Marquette physicians with a statement, dated September 29, 1986, which (1) expressed the united opposition of the Medical Staff and its individual members to Marquette General Hospital's plan to open the new medical office in Dickinson County, and (2) stated they would use "whatever means necessary" to prevent the new office from offering services to patients in competition with them. The Chief of the Medical Staff, relying on

the statements of opposition referred to in paragraph thirteen above, including that of respondent Koski, signed this letter as "Chief of Staff and Representative of the Forty-two (42) Physicians on the Medical Staff."

PAR. 15. The Tri-County Medical Society and the Delta County Medical Society have physician members who frequently refer patients to physicians on the staff of Marquette General Hospital. A significant number of these patients undergo tests at, or are admitted to, Marquette General Hospital. On or about January, 1986, officers of the Dickinson-Iron County and Delta County Medical Societies discussed "turf protection and it was unanimously voted by all parties concerned that our relationship with Marquette is favorable and we wish to continue this, however all communities absolutely insist on having the freedom to choose a consultant and recent moves by Marquette administration which signify a move towards mandatory consultation will be aggressively opposed by our societies jointly." This action took place because members of the Dickinson-Iron County and Delta County Medical Societies were concerned that physicians who signed such contracts would increase their referrals to specialists at Marquette General Hospital and decrease their referrals to specialists who belonged to the respondent medical societies. On October 7, 1986, respondent Koski and another individual, as representatives of the other individual members of the Medical Staff and of the Medical Staff, solicited the Tri-County Medical Society in Calumet, Michigan, to join the combination or conspiracy described in paragraphs ten through fourteen. On October 21, 1986, four individuals as representatives of the Medical Staff and of the individual members of the Medical Staff including respondent Koski, and one representative of the Dickinson-Iron County Medical Society, solicited the Delta County Medical Society in Escanaba, Michigan, to join the conspiracy described in paragraphs ten through fourteen.

PAR. 16. After respondent Koski and the other individuals solicited the participation of the Tri-County and Delta County Medical Societies as discussed in paragraph fifteen, the Tri-County Medical Society advised its membership to write individual letters personally expressing their opinion to the physicians in Marquette, but took no other action. On November 18, 1986, however, the Delta County medical Society unanimously approved a letter that stated the society's official position. The Delta County Medical Society sent this letter to the Presidents of both the Dickinson-Iron County and Marquette-Alger

Medical Societies. This letter stated that "if the clinic is constructed as proposed, there will be a definite change in the referral patterns of many Delta County physicians and perhaps physicians in other U.P. counties. We feel that this would be unfortunate for all involved." Officials of Marquette General Hospital saw this as a threat to cut referrals to physicians on its medical staff. One purpose of the letter was to put pressure on Marquette General not to open a similar clinic in the Delta County area. The president of the Delta County Medical Society, accompanied by two society members, thereafter spoke at a meeting of the Marquette-Alger Medical Society and told them "they would have to be aware [a number of Delta] physicians would no longer utilize the services of Marquette unless their patient specifically requested it."

PAR. 17. On October 10, 1986, the Medical Staff Ad-hoc Executive Committee, which was empowered to represent and act on behalf of the Medical Staff and the individual members of the Medical Staff including respondent Koski, sent a letter to many members of the Medical Staff and to most, if not all, of the physicians in the Upper Peninsula, including physicians on the Medical Staff of Marquette General Hospital. The letter included the following statements: (1) that the Medical Staff intended to do "everything in our power" to prevent the Kingsford, Michigan, medical office from opening as planned; (2) that Upper Peninsula physicians should "reevaluate our relationship with Marquette"; and (3) that Marquette physicians were not welcome in Dickinson County "as salaried employees whose purpose in our community will be to direct traffic to" Marquette. The ten members of the Ad-hoc Executive Committee signed this letter as the "Ad hoc Executive Committee on behalf of the forty-two physicians of Dickinson County Hospitals." Officials of Marquette General Hospital perceived these statements as a threat to cut referrals to physicians on its Medical Staff.

PAR. 18. On December 10, 1986, the Medical Staff held a special meeting and voted unanimously that they "remain firmly opposed to the Marquette Clinic." The Medical Staff confirmed its opposition in a March 2, 1987, letter from the chief of the Medical Staff and the spokesman for the Medical Staff, to the chief of the Marquette General Hospital Medical Staff.

PAR. 19. As a result of the actions described in paragraphs ten through eighteen, Marquette General Hospital opened a medical office in Kingsford that was smaller than its originally proposed medical

office building. This medical office did not offer primary care services to consumers as had originally been planned by Marquette General Hospital. On May 11, 1987, as a result of the actions of the Medical Staff, respondent Koski and other individual members of the Medical Staff, the Dickinson-Iron County Medical Society, and the Delta County Medical Society, as set forth above, Marquette General Hospital suspended action on its plan to offer primary care services at its Kingsford medical office.

PAR. 20. No health care practitioner in Dickinson County has agreed to work in the Marquette General Hospital medical office, and unless requested to do so by their patients, many of these health care practitioners continue to refuse to refer patients to physicians who provide specialized services at the Kingsford medical office.

PAR. 21. The purposes or effects or the tendency and capacity of the combination or conspiracy and conduct described in paragraphs ten through twenty are and have been to restrain trade unreasonably in the provision of health care services in or near Dickinson County, Michigan, and deprive consumers of the benefits of competition, in the following ways, among others:

A. Hindering competition among physicians and hospitals in the provision of health care services;

B. Depriving consumers of their ability to choose among a variety of alternative types of health care facilities and primary care and specialty physicians competing on the basis of price, service, and quality;

C. Impairing Marquette General Hospital's efforts to increase consumer access to primary care and specialty medical services, including services offered by salaried primary care physicians; and

D. Deterring other hospitals or medical clinics from operating medical facilities in competition with the private practice of physicians.

PAR. 22. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation, or the effects thereof, as herein alleged, is continuing and will continue in the absence of the relief herein requested.

#### ORDER DISMISSING COMPLAINT

On February 13, 1989, the Commission issued a complaint charging

that Dr. Robert G. Koski conspired with other health care practitioners, the Dickinson County Memorial Hospital Medical Staff, and two medical societies to boycott Marquette General Hospital to prevent it from opening a clinic. The complaint charged that on September 13, 1986, members of the Medical Staff, including Dr. Koski, voted to adopt a resolution pledging "that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof."

Complaint counsel have moved that the Commission dismiss the complaint against Dr. Koski, and the Administrative Law Judge has certified the motion to the Commission. Although the minutes of the Medical Staff meeting, of September 13, 1986, indicate that Dr. Koski was present at the meeting, subsequent to the issuance of the complaint the respondent produced evidence establishing that he left the meeting prior to the boycott vote. That evidence included hospital records indicating that Dr. Koski was in surgery at the time of the boycott vote and a corroborating affidavit by a nurse anesthetist. In light of the newly discovered evidence, the Commission has decided to dismiss the complaint.

The complaint is hereby dismissed.

## IN THE MATTER OF

## ARKLA, INC.

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

*Docket C-3265. Complaint, Oct. 10, 1989—Decision, Oct. 10, 1989*

This consent order requires, among other things, a Shreveport, La. corporation to divest the TransArk assets and also requires that the divestiture be made to a Commission-approved acquirer or acquirers. In addition, respondent is also required to obtain prior Commission approval and to apply to the Federal Energy Regulatory Commission for approval under that agency's abandonment procedures.

*Appearances*

For the Commission: *Marc G. Schildkraut, Ronald B. Rowe and David C. Dickey.*

For the respondent: *Ky P. Ewing, Jr., Page I. Austin, and Neil W. Imus, Vinson & Elkins, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Arkla, Inc., a corporation subject to the jurisdiction of the Commission, entered into an agreement to acquire, took actions to implement the agreement to acquire, and did in fact acquire, certain assets from the TransArk Transmission Co. ("TransArk") in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

## I. DEFINITIONS

1. For purposes of this complaint, the following definitions apply:
  - a. "Arkla" means Arkla, Inc., its subsidiaries, divisions and groups

controlled by Arkla, its directors, officers, employees, agents and representatives, and their successors and assigns.

b. The "*Affected Portion of the Arkoma Basin*" means the following counties in Arkansas: Sebastian, Crawford, Logan, Franklin, Johnson, Pope, Scott and Yell.

c. "*Conway-Morrilton-Russellville corridor*" means the area within the state of Arkansas located within 10 miles of the portion of the TransArk pipeline that is west of Conway, Arkansas and east of Russellville, Arkansas. [2]

d. "*The acquisition*" means the transaction described, in whole or in part, in paragraph 8 of this complaint.

e. "*Transportation*" means transportation of natural gas for one's own account as well as for others.

## II. ARKLA

2. Respondent Arkla is a corporation organized and doing business under the laws of the State of Delaware with its principal places of business in Shreveport, Louisiana and Little Rock, Arkansas. Arkla is involved in all sectors of the natural gas industry, including the production, purchase, gathering, storage, transmission, distribution, and sale of natural gas in Arkansas, Missouri, Louisiana, Texas, Mississippi, Tennessee, Oklahoma, and Kansas.

3. Arkla, in conducting its natural gas transmission and distribution business, operates through three divisions: Arkla Energy Resources ("AER"), Arkansas Louisiana Gas Company ("ALG"), and Entex. AER operates gathering systems and an interstate transmission system that extends through portions of Arkansas, Louisiana, Mississippi, Missouri, Kansas, Oklahoma, Tennessee, and Texas. ALG operates local distribution companies in Arkansas, Louisiana, Kansas, Oklahoma, and Texas. Entex operates local distribution companies and intrastate transmission systems in Texas, Louisiana and Mississippi. Arkla also owns Mississippi River Transmission Corporation ("MRT"), which owns an interstate transmission system that extends through Louisiana, Arkansas, Missouri and Illinois.

4. At all times relevant herein, respondent Arkla has been and is now engaged in "commerce" as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

### III. TRANSARK AND ITS OWNERS

5. At the time of the acquisition, TransArk was a general partnership organized and doing business under the laws of the state of Delaware with its principal place of business in Dallas, Texas. The owners of TransArk were subsidiaries of Lear Petroleum Co. ("Lear") and Esco Exploration Co. ("Esco"). Lear owned a 75 percent interest and Esco owned a 25 percent interest in TransArk.

6. Lear is a corporation organized and doing business under the laws of the state of Delaware with its principal place of business in Dallas, Texas. At the time of the acquisition, Lear was involved in the production, purchase, gathering, transmission [3] and sale of gas in several states including Texas, Louisiana, Oklahoma and Arkansas.

7. Esco is a corporation organized and doing business under the laws of the state of Delaware with its principal place of business in Tulsa, Oklahoma. At the time of the acquisition, Esco was involved in the production, purchase, gathering and sale of natural gas in several states including Oklahoma and Arkansas.

### IV. THE ACQUISITION

8. During the spring of 1986, Lear and Esco initiated discussions with Arkla relating to the TransArk pipeline project, including discussions relating to the possible acquisition by Arkla of an interest in TransArk. On or about May 21, 1986, Lear and Esco proposed that Arkla and TransArk commence negotiations for the acquisition by Arkla of a 100 percent interest in the TransArk pipeline. On or about July 29, 1986, Arkla, Lear and Esco executed a definitive agreement for Arkla's acquisition from TransArk of the TransArk pipeline and certain other assets. Arkla created a separate subsidiary of AER, called AER—Arkansas Gas Transit Co., to acquire and own the TransArk pipeline and other assets obtained from TransArk. In September 1986, following expiration of the Hart-Scott-Rodino waiting period, the parties closed the transaction.

### V. RELEVANT MARKETS

9. One relevant line of commerce in which to assess the competitive effects of the acquisition is the transportation of gas out of a gas producing area. For this line of commerce, a relevant section of the country in which to assess the competitive effects of the acquisition is the Affected portion of the Arkoma Basin.

10. Another relevant line of commerce in which to assess the

competitive effects of the acquisition is the transportation of gas into a gas consuming area. For this line of commerce, a relevant section of the country in which to assess the competitive effects of the acquisition is the Conway-Morrilton-Russellville corridor.

#### VI. MARKET STRUCTURE

11. The market for the transportation of gas out of the Affected portion of the Arkoma Basin is highly concentrated.

12. The market for the transportation of gas into the Conway-Morrilton-Russellville corridor is highly concentrated.

13. Entry into the relevant markets is very difficult or unlikely. [4]

#### VII. COMPETITION

14. At the time of the acquisition, Arkla was an actual competitor in each of the relevant markets. At the time of the acquisition, TransArk was an actual potential competitor, an actual competitor and/or a perceived potential competitor in each of the relevant markets.

#### VIII. COUNT ONE

##### *Lessening of Actual Potential Competition*

15. The Commission repeats and realleges the allegations of paragraphs 1 through 14, inclusive, of this complaint, as if fully set forth herein.

16. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant markets in the following ways among others:

- a. By eliminating the most likely potential entrant or one of the most likely potential entrants into the market;
- b. By eliminating actual potential competition between TransArk and Arkla and between TransArk and any other competitors;
- c. By increasing market concentration, thereby facilitating collusion and dominant firm behavior;
- d. By eliminating the potential for substantial market deconcentration as a result of the independent entry of TransArk, thereby facilitating collusion and dominant firm behavior.

17. The acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. Section 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## IX. COUNT TWO

*Lessening of Actual Competition*

18. The Commission repeats and realleges the allegations of paragraphs 1 through 14, inclusive, of this complaint, as if fully set forth herein. [5]

19. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant markets in the following ways among others:

a. By eliminating actual competition between TransArk and Arkla and between TransArk and other competitors;

b. By increasing market concentration, thereby facilitating collusion and dominant firm behavior.

20. The acquisition violates 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 the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## X. COUNT THREE

*Lessening of Perceived Potential Competition.*

21. The Commission repeats and realleges the allegations of paragraphs 1 through 14, inclusive, of this complaint, as if fully set forth herein.

22. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in each of the relevant markets in the following ways among others:

a. By eliminating the most significant or one of the most significant potential entrants into the market;

b. By eliminating the perceived threat of future competition between TransArk and Arkla and between TransArk and other competitors;

c. By increasing market concentration, thereby facilitating collusion and dominant firm behavior.

23. The acquisition violates 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 the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

## DECISION AND ORDER

The Federal Trade Commission ("Commission") having initiated an investigation of Arkla Inc.'s ("Arkla") acquisition of the pipeline and other assets owned by the TransArk Transmission Co. ("TransArk"), and the respondent Arkla having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45 and Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent Arkla, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Arkla of all jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondent has violated Section 5 and Section 7, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having [2] duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Arkla is a corporation organized and existing under the laws of the State of Delaware with its executive offices located at 525 Milam Street, Shreveport, Louisiana.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent Arkla and the proceeding is in the public interest. [3]

## ORDER

## I.

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

(a) "*Acquisition*" means Arkla's acquisition of the assets of TransArk.

(b) "*Arkla*" means Arkla, Inc., its subsidiaries, divisions, groups, and affiliates controlled by Arkla and their respective directors, officers, employees, agents and representatives, and their respective successors and assigns.

(c) "*TransArk*" means TransArk Transmission Company, a partnership of Producer's Gas Company and Omega Pipeline Company.

(d) The "*Affected Portion of the Arkoma Basin*" means the following counties in Arkansas: Sebastian, Crawford, Logan, Franklin, Johnson, Pope, Scott and Yell.

(e) An "*Affected Portion of the Arkoma Basin Pipeline*" means a pipeline facility other than one owned by Arkla that extends from a point within the Affected Portion of the Arkoma Basin to a point outside of such area with the capacity to transport at least twenty-five (25) million cubic feet per day of natural gas through such facilities out of the Affected Portion of the Arkoma Basin.

(f) The "*Russellville-Morrilton-Conway Corridor*" means the area within the State of Arkansas that is within 10 miles in any direction of that portion of the TransArk pipeline that is west of Conway, Arkansas and east of Russellville, Arkansas.

(g) A "*Russellville-Morrilton-Conway Corridor Pipeline*" means a pipeline facility other than one owned by Arkla that extends to a point within the Russellville-Morrilton-Conway Corridor from a point outside of such area with the capacity to deliver through such facilities at least twenty-five (25) million cubic feet per day of natural gas into the Russellville-Morrilton-Conway Corridor.

(h) The "*TransArk assets*" means the assets, including the pipeline and right of way, acquired by Arkla from TransArk pursuant to the Acquisition, except for the 2.45 miles of pipeline and other assets that were sold by Arkla to Arkansas Oklahoma Gas Co., pursuant to that certain Purchase Agreement dated September 7, 1987, as further identified in Schedule A hereof.

(i) The “*TransArk pipeline*” means the pipeline acquired by Arkla from TransArk. [4]

(j) “*Arkla Pipeline Assets*” means an undivided interest, consisting of the capacity to receive and deliver in the aggregate 75 million cubic feet of gas per day, in the portions of Arkla Energy Resources’ gas pipeline transmission system and gas gathering facilities identified in Schedule B hereof.

## II.

*It is further ordered, That:*

(A) Within twelve (12) months of the date this order becomes final, Arkla shall enter into a final agreement to divest (a) the TransArk assets, absolutely and in good faith, conditioned only on Commission approval and other regulatory approvals. *Provided, however*, Arkla may enter into a final agreement to divest, absolutely and in good faith, (b) the Arkla Pipeline Assets, if the Commission, in its sole discretion approves the substitute divestiture of the Arkla Pipeline Assets for the TransArk assets. Within eighteen (18) months of the date this order becomes final, Arkla shall divest, absolutely and in good faith, (a) the TransArk assets or (b) if the Commission in its sole discretion approves the substitute divestiture, the Arkla Pipeline Assets.

(B) Divestiture shall be made only to an acquirer or acquirers that receive the prior approval of the Federal Trade Commission and only in a manner that receives the prior approval of the Federal Trade Commission. The purpose of the divestiture of the TransArk assets or Arkla Pipeline Assets is to remedy the lessening of competition resulting from the acquisition as alleged in the Federal Trade Commission’s complaint.

(C) Following the time that this order becomes final and no later than thirty (30) days after receiving the prior approval of the Federal Trade Commission required by paragraph II(B) hereof, Arkla shall in good faith (1) apply to the Federal Energy Regulatory Commission for abandonment of the TransArk assets or the Arkla Pipeline Assets and (2) apply for and cause the acquirer as part of the agreement to apply for approvals by the Federal Energy Regulatory Commission and any other state or federal agency from which approval must be obtained before Arkla may divest and the acquirer may acquire, own and operate the TransArk assets or acquire and own the Arkla Pipeline