under the Rule estimates the total annual costs of this requirement to be less than $100,000. Since there are two IDSMs operating under the Rule, the total cost imposed by them is an estimated $200,000.[9] This total includes copying costs of roughly $20,000, which is based on estimated copying costs of 5 cents per page and several conservative assumptions or estimates. Staff estimates that the ''average'' dispute-related file is about 25 pages long and that a typical annual audit file is about 200 pages in length. For purposes of estimating copying costs, staff conservatively assumes that every consumer complainant requests a copy of the file relating to his or her dispute. Staff also assumes that, for 1,000 of the estimated 6,500 disputes each year, consumers request copies of warrantors' annual audit reports (although, based on requests for audit reports made directly to the FTC, the indications are that considerably less requests are actually made). Thus, the estimated total annual copying costs for average-sized files would be approximately $8,125 (25 pages/file × .05 × 6,500 requests) and $10,000 for copies of annual audits (200 pages/audit report × .05 × 1,000 requests), rounded to a total of $20,000.

Combined with estimated annual labor cost of $81,000, total estimated annual cost burden is $281,000 ($200,000+$81,000).

John D. Graubert,

Acting General Counsel.

[FR Doc. 99–2174 Filed 1–28–99; 8:45 am]

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[9] The commenter did not break down this estimate by cost item. Staff conservatively included the entire $100,000 in its estimate of capital and other non-labor costs, even though some of this burden is likely already accounted for as labor costs.

FEDERAL TRADE COMMISSION

[File No. 981–0345]

The British Petroleum Co. p.l.c., et al.; Analysis to Aid Public Comment and Commissioner Statements

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement: Publication of Commissioner Statements.

SUMMARY: The consent in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations. This document also contains the Statement of Chairman Pitofsky, Commissioner Anthony, and Commissioner Thompson; and the Statement of Commissioner Swindle, Concurring in Part and dissenting in Part.

DATES: Comments must be received on or before March 8, 1999.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: William Baer or Richard Liebeskind, FTC/H–374, 600 Pennsylvania Avenue, NW, Washington, DC 20580. (202) 326–2932 or 326–2441.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721 15 U.S.C. 46, and § 2.34 of the Commission Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for public comment, until March 8, 1999. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. This document also contains (1) the Statement of Chairman Pitofsky, Commissioner Anthony, and Commissioner Thompson; and (2) the Statement of Commissioner Swindle, Concurring in Part and Dissenting in Part.[1] An electronic copy of the full text of the consent agreement package, including the Commissioner Statements, can be obtained from the FTC Home Page (for December 30, 1998), on the World Wide Web, at ''http://www.ftc.gov/os/actions97.htm.'' A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW, Washington, DC 20580, either in person or by calling (202) 326–3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b)(6)(ii) of the Commission Rules of Practice (16 CFR 4.9(b)(6)(ii)).

[1] The Analysis alone was published in the **Federal Register** on January 6, 1999—before the Statements were made public—and the public comment period began at that point. *See* 64 Fed. Reg. 880 (January 6, 1999).

Analysis of the Proposed Consent Order and Draft Complaint To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted for public comment from The British Petroleum Company p.l.c. (''BP'') and Amoco Corporation (''Amoco'') (collectively ''the proposed Respondents'') an Agreement Containing Consent Order (''the proposed consent order''). The proposed Respondents have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from the merger of BP and Amoco.

II. Description of the Parties and the Proposed Acquisition

BP, headquartered in London, England, is a diversified energy products company engaged in oil and gas exploration; the development, production and transportation of crude oil and natural gas; the refining, marketing, transportation, terminaling and sale of gasoline, diesel fuel, jet fuel and other petroleum products; and the production, marketing and sale of petrochemicals. BP is a major producer of gasoline and other petroleum products in the United States. BP distributes and markets its gasoline under the BP brand name through terminals and retail service stations in a variety of areas, including areas in the southeastern and midwestern United States.

Amoco, headquartered in Chicago, Illinois, is an integrated petroleum and chemical products company engaged in the exploration, development, and production of crude oil, natural gas, and natural gas liquids; the marketing of natural gas and natural gas liquids; the refining, marketing, and transportation of petroleum products, including crude oil, gasoline, jet fuel, diesel fuel, heating oil, asphalt, motor oil, lubricants, natural gas liquids, and petrochemical feedstocks; the terminaling and sale of gasoline, diesel fuel, and other petroleum products; and the manufacture and sale of various petroleum-based chemical products. Like BP, Amoco is a major producer of gasoline and other petroleum products in the United States. Amoco distributes and markets gasoline under the Amoco brand name through terminals and retail service stations in many of the same areas as does BP.

Pursuant to an agreement and plan of merger dated August 11, 1998, BP intends to acquire all of the outstanding

common stock of Amoco in exchange for stock of BP valued at the time of the agreement at approximately $48 billion. The new combined entity is to be renamed BP Amoco p.l.c. As a result of the merger, BP's shareholders will hold approximately 60%, and Amoco's shareholders will hold approximately 40%, of the new combined entity.

The Commission has carefully examined all of the areas in which BP and Amoco's operations might overlap in or affecting the United States. The Commission found that BP's and Amoco's operations do not overlap in many areas. However, the transaction raises competitive concerns in a number of local markets, and the Commission proposes to take action to remedy the potential anticompetitive effects of this merger in these markets.

The Commission considered this transaction in the context of what appears to be a significant trend toward consolidation in the petroleum industry. In recent months, there have been consolidations in this industry involving the refining and marketing operations of Texaco and Shell, Marathon and Ashland, and Tosco and Unocal. Other proposed combinations may occur, including Exxon's announced proposed merger with Mobil and Phillips' proposed combination of its refining and marketing operations with those of Ultramar Diamond Shamrock. The Commission will continue to examine the effect of proposed consolidations through careful analysis of each specific transaction in the context of the trend toward concentration.

III. The Draft Complaint

The draft complaint alleges that the merger of Amoco and BP would lessen competition in two relevant lines of commerce: (1) the terminaling of gasoline and other light petroleum products in nine specified geographic markets, and (2) the wholesale sale of gasoline in thirty cities or metropolitan areas in the eastern United States.

A. Terminaling

The draft complaint alleges that one line of commerce (i.e., product market) in which to analyze the merger is the terminaling of gasoline and other light petroleum products, such as diesel fuel and jet fuel.

Petroleum terminals are facilities that provide temporary storage of gasoline and other petroleum products received from a pipeline or marine vessel, and the redelivery of such products from the terminal's storage tanks into trucks or transport trailers for ultimate delivery to retail gasoline stations or other buyers. Terminals provide an important link in the distribution chain for gasoline between refineries and retail service stations. According to the complaint, there are no substitutes for petroleum terminals for providing terminaling services.

The complaint identifies nine metropolitan areas that are relevant sections of the country (i.e., geographic markets) in which to analyze the effects of the acquisition on terminaling. These metropolitan areas are: Cleveland, Ohio; Chattanooga and Knoxville, Tennessee; Jacksonville, Florida; Meridian, Mississippi; Mobile and Montgomery, Alabama; and North Augusta and Spartanburg, South Carolina. Amoco and BP both operate terminals that supply each of these nine metropolitan areas with gasoline and other light petroleum products.

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

According to the draft complaint, entry into the terminaling of gasoline and other light petroleum products in each of these nine metropolitan areas is difficult and would not be timely, likely, or sufficient to prevent anticompetitive effects that may result from the merger.[2]

[1] The Herfindahl-Hirschman Index, or ''HHI,'' is a measurement of market concentration calculated by summing the squares of the individual market shares of all participants in the market. Under Section 1.51 of the Horizontal Merger Guidelines issued April 2, 1992, by the Federal Trade Commission and the Department of Justice, the Commission considers concentration levels exceeding 1,800 as ''highly concentrated'' and concentration levels between 1,000 and 1,800 to be ''moderately concentrated.''

[2] The Commission has found reason to believe that terminal mergers would be anticompetitive on prior occasions. E.g., Shell Oil Co., C–3803 (1997) (combination of refining and marketing businesses of Shell and Texaco); Texaco Inc., 104 F.T.C. 241 (1984) (Texaco's acquisition of Getty Oil Company); Chevron Corp., 104 F.T.C. 597 (1984) (Chevron's acquisition of Gulf Corporation). Indeed, several of the markets involved in this proceeding are markets in which BP acquired terminals that were divested by Chevron in 1984 pursuant to the Commission's order in Chevron.

B. Wholesale Gasoline

The draft complaint alleges that a second line of commerce in which to analyze the competitive effects of the merger is the wholesale sale of gasoline. Gasoline is a motor fuel used in automobiles and other vehicles. It is manufactured from crude oil at refineries in the United States and throughout the world. There are no substitutes for gasoline as a fuel for automobiles and other vehicles that use gasoline.

According to the draft complaint, there are thirty cities or metropolitan areas in which to evaluate the effects of this merger on the wholesale sale of gasoline: Albany, Georgia; Athens, Georgia; Birmingham, Alabama; Charleston, South Carolina; Charlotte, North Carolina; Charlottesville, Virginia; Clarksville, Tennessee; Cleveland, Ohio; Columbia, South Carolina; Columbus, Georgia; Cumberland, Maryland; Dothan, Alabama; Fayetteville, North Carolina; Florence, Alabama; Goldsboro, North Carolina; Hattiesburg, Mississippi; Hickory, North Carolina; Jackson, Tennessee; Memphis, Tennessee; Meridian, Mississippi; Mobile, Alabama; Myrtle Beach, South Carolina; Pittsburgh, Pennsylvania; Raleigh, North Carolina; Rocky Mount, North Carolina; Savannah, Georgia; Sumter, South Carolina; Tallahassee, Florida; Toledo, Ohio; and Youngstown, Ohio (hereinafter collectively referred to as the ''gasoline markets'').

The wholesale sale of gasoline, as alleged in the complaint, is the business of selling branded gasoline to retail dealers. Both BP and Amoco sell branded gasoline at wholesale in the markets alleged in the complaint. In some cases BP or Amoco, or both, sell gasoline on a wholesale basis to retail gasoline stations owned by BP or Amoco, and operated either by employees of BP or Amoco (''company operated'' or ''owned and operated'' stations) or by persons who lease the station from BP or Amoco (''lessee dealers''). In other cases, BP and Amoco sell gasoline to independently owned stations (''open dealers'') or to intermediaries (''jobbers'') who deliver gasoline to individual gas stations owned by the jobber or by other persons.

Irrespective of the identity of the wholesale customer, wholesale sellers (BP and Amoco, and their branded and unbranded competitors) set the wholesale price of gasoline paid by retail dealers, and that wholesale price affects the price of gasoline charged to motorists. In the gasoline markets alleged in the complaint, the wholesale

sale of gasoline would become significantly more concentrated as a result of the merger, and the relatively small number of remaining wholesalers could tacitly or expressly coordinate price increases. Postmerger concentration, as measured by the Herfindahl-Hirschman Index, would increase by more than 100 points, to levels above 1,400 in five markets and to levels above 1,800 in the remaining markets. In each of the gasoline markets alleged in the complaint, BP and Amoco, and three other firms, would have at least 70% of the wholesale gasoline market.

According to the complaint, entry into the wholesale sale of gasoline in each of these markets is difficult and would not be timely, likely or sufficient to prevent anticompetitive effects that may result from this merger.

IV. Terms of the Agreement Containing Consent Order (''the Proposed Consent Order'')

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under Paragraph II of the proposed consent order, the proposed Respondents must divest the Amoco terminal serving each of the nine relevant terminal markets to Williams Energy Ventures, Inc., a subsidiary of the Williams Companies (''Williams''), or to another acquirer approved by the Commission. Williams is a major energy company with substantial experience in operating terminals.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer must not itself present competitive problems. The Commission believes that Williams is well qualified to operate the divested terminals and that divestiture to Williams will not be anticompetitive in these markets.

The proposed consent order requires that the divestitures occur no later than ten days after the BP/Amoco merger is consummated, or thirty days after the consent agreement is signed, whichever is later. The proposed consent agreement also requires respondents to rescind the transaction with Williams if the Commission, after the comment period, decides to reject Williams as the buyer. If the Williams agreement is rescinded, then respondents are required to divest the terminals within six months from the date the order becomes final, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. If respondents have not divested the terminals pursuant to Paragraph II of the order, then the Commission may appoint a trustee to divest the assets.

The proposed consent order obtains relief with respect to the wholesale sale of gasoline in two ways. First, in eight markets where either Amoco or BP (or both) own retail gasoline stations (Charleston, South Carolina; Charlotte, North Carolina; Columbia, South Carolina; Jackson, Tennessee; Memphis, Tennessee; Pittsburgh, Pennsylvania; Savannah, Georgia; and Tallahassee, Florida), Paragraph III of the proposed order requires respondents to divest gasoline stations belonging to either Amoco or BP (as specified in the proposed order) to an acquirer approved by the Commission. These divestitures must be completed within six months of the date on which the parties signed the agreement containing consent order (December 29, 1998).

Second, in all 30 markets, including markets in which neither Amoco nor BP owns retail gasoline stations, Paragraph IV of the order requires Amoco and BP to give their wholesale customers (both jobbers and open dealers) the option of canceling their franchise and supply agreements with Amoco and BP, freeing them to switch their retail gasoline stations to other brands. In order to provide an incentive for these persons to switch to other brands, the order provides that wholesale customers who take advantage of this provision will be released from all debts, loans, obligations and other responsibilities under their agreements with Amoco and BP (other than for fuels actually delivered and other specific debts scheduled by the respondents), if they agree to stop selling Amoco and BP gasoline in the market and not sell any other brand that has more than 20% of the market. The proposed order requires that BP and Amoco provide notice to their wholesale customers upon the Commission's final acceptance of the proposed order (should the Commission do so after the public comment period), and allows these customers thirty days to exercise this option. Should a wholesale customer choose to terminate its relationship with BP or Amoco under the terms of the proposed order, BP and Amoco will not solicit that customer as a reseller of branded gasoline for two years thereafter.

In addition, Paragraph V of the order requires that unless retail gasoline sellers representing a specified volume of sales in Toledo and Youngstown, Ohio agree to switch to other brands, then respondents must divest retail gasoline stations with an equivalent volume of sales to an acquirer acceptable to the Commission.

For a period of ten years from the date the proposed consent order becomes final, the proposed Respondents are required to provide notice to the Commission prior to acquiring terminal assets or gasoline stations located in the markets at issue.

The proposed Respondents are required to provide to the Commission a report of compliance with the proposed consent order within thirty days following the date on which the order becomes final, every thirty days thereafter until the divestitures are completed, and annually for a period of ten years.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for sixty days for receipt of comments by interested persons, until March 8, 1999. Comments received during this period will become part of the public record. After that date, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order 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 invite public comment on the proposed consent order, including the proposed sale of terminal assets to Williams, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order, nor is it intended to modify the terms of the proposed consent order in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson

On December 30, 1998, the Commission published a proposed complaint alleging that this merger would violate Clayton Act § 7, 15 U.S.C. § 18, and FTC Act § 5, 15 U.S.C. § 45, in 30 wholesale gasoline markets and nine light petroleum products terminating markets in the United States, and accepted a proposed consent order resolving those allegations. Our colleague, Commissioner Swindle, dissents from that portion of the

proposed complaint and consent order that alleges violations and mandates relief in 27 of the wholesale gasoline markets.[1] We write to clarify our view.

British Petroleum Company p.l.c. (''BP'') and Amoco Corporation (''Amoco'') are integrated producers, refiners and marketers of petroleum products, including gasoline, in the United States. Although BP's and Amoco's operations do not overlap in many areas,[2] both are wholesale marketers of gasoline in the southeastern and midwestern United States, i.e., both BP and Amoco sell gasoline to retail gas stations that they may or may not own. In these markets, BP is the only firm that can sell ''BP''-branded gasoline to retail dealers, and Amoco is the only firm that can sell ''Amoco''-branded gasoline to dealers. Therefore, measuring concentration of retail sales by brand is an adequate proxy for measuring concentration in gasoline wholesaling.[3]

In 25 metropolitan area markets, the combination of BP and Amoco would result in a highly concentrated wholesale gasoline market, and an increase in concentration in an amount that the Department of Justice-FTC Merger Guidelines presume likely to create or enhance market power or facilitate its exercise. Merger Guidelines § 1.51(c).[4] In each of these markets, the top four firms will together have at least 70% of wholesale sales; in 15 markets, the top four firms will have more than 80%.[5]

Market shares and concentration levels of this magnitude raise antitrust concern because they suggest that a small number of firms might, after this merger, be able to raise price without losing significant sales to what could well be an insignificant fringe[6] See, e.g., *United States* v. *Rockford Memorial Corp.*, 898 F.2d 1278, 1283–84 (7th Cir. 1990). Concerns about collusion or coordination, and consequent price increases to consumers, are more pronounced in markets—such as gasoline markets—where (among other factors) the product is homogeneous and prices are generally observable, making it relatively easier for a small number of firms to coordinate and to detect deviation.

Of course, high market concentration is less of a threat to consumers if retailers in the market are likely to switch to new sources of supply in the event of a wholesale price increase. But, we required persuasive evidence that entry would be timely, likely and sufficient to defeat a coordinated price increase. Merger Guidelines § 3. Our colleague concludes that such entry could occur, and is likely to occur, ''if there are enough branded retail gasoline stations that could switch and become customers of the new wholesale entrant.''[7] We do not disagree with this analysis, but we are unpersuaded by the investigative record here that there is a sufficient likelihood that switching would occur to allay our concerns. The history of switching in these markets appears to be more among incumbents than to new entrants, and switching among incumbents (particularly among incumbents with substantial market shares) will not defeat a wholesale price increase by those incumbents. Dealers also would be less likely to switch to fringe suppliers or to new entrants if there are significant reasons for dealers to prefer major brands (particularly major brands that are well-established in a given area), such as the benefit of local marketing or of brand credit card programs. Moreover, dealers might not have an incentive to switch to new entrants to defeat a price increase by their suppliers in which they also may profit.

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

[1] Commissioner Swindle concurs in the proposed complaint and consent order to the extent it alleges that the merger of BP and Amoco would violate the antitrust laws in the nine terminal markets and in wholesale gasoline markets in Pittsburgh, Pennsylvania, and Cleveland, Toledo and Youngstown, Ohio.

[2] For example, to a large extent, Amoco and BP produce and market different petrochemical products in the United States. BP produces acetic acid and acrylonitrile in the U.S., but Amoco does not. Similarly, Amoco produces ethylene, propylene, polypropylene, and styrene in the U.S., but BP does not. In the few petrochemical areas where the parties overlap in the U.S., concentration would not change significantly as a result of the merger.

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

[4] The Merger Guidelines presume anticompetitive effects when the post-merger Herfindahl-Hirschman Index (''HHI'') is over 1800 and there is an increase of more than 100 points. HHI is a statistical index that measures the degree of concentration in a relevant antitrust market. Those metropolitan areas and the changes in HHI are: Albany, Georgia (post-merger HHI 3674, increase of 542); Charleston, South Carolina (1865/362); Charlotte, North Carolina (1909/610); Charlottesville, Virginia (2214/278); Clarkesville, Tennessee (1863/492); Cleveland, Ohio (1859/124); Columbia, South Carolina (2257/378); Columbus, Georgia (2194/351); Cumberland, Maryland (2592/161); Dothan, Alabama (2259/235); Fayetteville, North Carolina (2635/795); Florence, Alabama (1959/269); Goldsboro, North Carolina (2133/310); Hattiesburg, Mississippi (2214/281); Jackson, Tennessee (2051/508); Memphis, Tennessee (1948/468); Myrtle Beach, South Carolina (2138/353); Pittsburgh, Pennsylvania (2129/663); Raleigh, North Carolina (2032/535); Rocky Mount, North Carolina (2003/302); Savannah, Georgia (2668/515); Sumter, South Carolina (1920/528); Tallahassee, Florida (2366/794); Toledo, Ohio (2022/351); and Youngstown, Ohio (2540/1043).

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

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

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

Statement of Commissioner Orson Swindle Concurring in Part and Dissenting in Part

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

sale of gasoline,[1] I dissent from the allegations and relief related to those markets.

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

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

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

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

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

Would enough branded retail gasoline stations in the southeastern markets be willing to switch to make possible new wholesale entry or cheating by an existing wholesaler? Again, I certainly think so. In most of these markets, open dealers and jobbers purchase from about 60 percent to about 80 percent of the gasoline that is sold at retail.[5] Given that open dealers and jobbers account for such a large proportion of retail gasoline sales and that they are likely to switch, enough switching could occur to induce entry or cheating sufficient to defeat a collusive price increase by wholesalers.

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

The investigative record is to the contrary. While there has been significant switching by open dealers and jobbers among incumbent wholesalers, there also has been significant switching away from incumbent wholesalers to new branded wholesalers and new unbranded wholesalers.[6] Moreover, open dealers and jobbers have stated that they would switch in response to a collusive price increase, but have not stated that their switching would be limited to moving from one incumbent wholesaler to another. Detailed economic analysis has shown that whatever non-price benefits incumbent wholesalers may be able to offer to open dealers and jobbers, they are unlikely to induce open dealers and jobbers to ignore promising opportunities offered by new wholesale entrants.[7]

Because switching is likely to defeat any collusive price increase, the merger of Amoco and BP would not have anticompetitive effects in the southeastern United States markets for the wholesale sale of gasoline. The Commission nevertheless has extracted from the merging parties a variety of costly concessions designed to facilitate switching and improve the marketplace. As explained above, because market forces are likely to cause sufficient switching without government intervention, these measures are simply

[1] The ''southeastern United States markets for the wholesale sale of gasoline'' include all of the ''gasoline markets'' described in Paragraph 15 of the proposed complaint except those located in Ohio and Pittsburgh, Pennsylvania. I support the Commission's action in the Ohio and Pittsburgh wholesaling markets.

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

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

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

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

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

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

unnecessary. Rather than imposing excessive requirements that will force substantial costs on the parties, the Commission should have allowed the merger of Amoco and BP to proceed with antitrust relief limited to terminaling as well as the Ohio and the Pittsburgh, Pennsylvania wholesaling situation.

I therefore dissent from the aspects of this matter dealing with gasoline wholesaling in the southeastern United States markets identified in Paragraph 15 of the proposed complaint.

[FR Doc. 99–2073 Filed 1–28–99; 8:45 am]
BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Scientific Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has made a final finding of scientific misconduct in the following case:

Ms. Nellie Briggs-Brown, Rush-Presbyterian-St. Luke's Medical Center: Based on the report of an investigation conducted by Rush-Presbyterian-St. Luke's Medical Center dated December 3, 1997, ORI finds that Ms. Briggs Brown, former employee, Department of Neurology, engaged in scientific misconduct in clinical research supported by two National Institute of Neurological Disorders and Stroke (NINDS), National Institutes of Health (NIH) grants.

Specifically, Ms. Briggs-Brown (1) falsified seven monthly screening logs for a NINDS funded study involving stroke victims (Randomized Trial of Org 10172 in Acute Ischemic Stroke Treatment) and submitted the same logs with altered dates on multiple occasions to the University of Iowa Coordinating Center; and (2) falsified several Human Investigation Committee research approval forms.

None of the questioned data has been included in publications.

ORI has implemented the following administrative actions for the three (3) year period beginning January 25, 1999:

(1) Ms. Briggs-Brown is prohibited from serving in any advisory capacity to PHS, including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant; and

(2) Any institution that submits an application for PHS support for a research project on which Ms. Briggs-Brown's participation is proposed or which uses her in any capacity on PHS supported research, or that submits a report of PHS-funded research in which she is involved, must concurrently submit a plan for supervision of her duties to the funding agency for approval. The supervisory plan must be designed to ensure the scientific integrity of Ms. Briggs-Brown's research contribution. The institution also must submit a copy of the supervisory plan to ORI.

FOR FURTHER INFORMATION CONTACT: Acting Director, Division of Research Investigations, Office of Research Integrity, 5515 Security Lane, Suite 700, Rockville, MD 20852, (301) 443–5330.

Chris B. Pascal,
Acting Director, Office of Research Integrity.

[FR Doc. 99–2158 Filed 1–28–99; 8:45 am]
BILLING CODE 4160–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Scientific Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Office of Research Integrity (ORI) has made a final finding of scientific misconduct in the following case:

Robert J. Thackeray, R.N., M.P.H., University of Pittsburgh: Based on an investigation report prepared by the University of Pittsburgh, dated June 24, 1998, and information obtained by ORI during its oversight review, ORI found that Mr. Thackeray, former program coordinator, Multi center AIDS Cohort Study (MACS), Department of Infectious Diseases and Microbiology, Graduate School of Public Health, University of Pittsburgh, engaged in scientific misconduct in research supported by the National Institutes of Health (NIH). The Pitt Men's Study is a component of the MACS funded by a cooperative agreement with the National Institute of Allergy and Infectious Diseases (NIAID), NIH.

Specifically, Mr. Thackeray falsified and/or fabricated research data that he recorded from various tests that he was responsible for conducting on subjects enrolled in the MACS.

Mr. Thackeray falsified and/or fabricated data for five subjects and reported that data on the ''Neurological Assessment Form 10'' and on the ''Instrumental Activities of Daily Living Scale'' questionnaire.

The fabricated and/or falsified research data were not compiled elsewhere and were not included in any publications.

Mr. Thackeray has accepted the ORI finding and has entered into a Voluntary Exclusion Agreement with ORI in which he has voluntarily agreed, for the three (3) year period beginning January 19, 1999:

(1) To exclude himself from serving in any advisory capacity to the Public Health Service (PHS), including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as a consultant; and

(2) That any institution that submits an application for PHS support for a research project on which his participation is proposed or which uses him in any capacity on PHS supported research, or that submits a report of PHS-funded research in which he is involved, must concurrently submit a plan for supervision of his duties to the funding agency for approval. The supervisory plan must be designed to ensure the scientific integrity of Mr. Thackeray's research contribution. The institution also must submit a copy of the supervisory plan to ORI.

FOR FURTHER INFORMATION CONTACT: Acting Director, Division of Research Investigations, Office of Research Integrity, 5515 Security Lane, Suite 700, Rockville, MD 20852, (301) 443–5330.

Chris B. Pascal,
Acting Director, Office of Research Integrity.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Health Care Policy and Research

Notice of Meetings

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C. Appendix 2) announcement is made of the following subcommittees scheduled to meet during the month of February 1999:

Name: Health Care Quality and Effectiveness Research.

Date and Time: February 9, 1999, 8:00 a.m.

Place: Bethesda Hyatt, 1 Bethesda Metro Center, Bethesda, Maryland 20814.

Open February 9, 8:30 a.m. to 8:45 a.m. Closed for remainder of meeting.

Purpose: To review and evaluate grant applications.

Name: Health Systems Research.

Date and Time: February 18, 1999, 9:30 a.m.