

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

_____)	
In the Matter of)	
)	
K+S Aktiengesellschaft)	
a corporation;)	
)	Docket No. C-
and)	
)	
International Salt Company LLC,)	
a limited liability company.)	
)	
_____)	

DECISION AND ORDER
(Public Record Version)

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Morton International, Inc. (“Morton”), from The Dow Chemical Company (“Dow”), by K+S Aktiengesellschaft (“K+S”), the parent of International Salt Company LLC (“ISCO”), and K+S and ISCO, hereinafter sometimes referred to as “Respondents,” having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and enters the following Decision and Order (“Order”):

1. Respondent K+S is a German stock corporation, organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Bertha-von-Suttner Str. 7, 34131 Kassel, Germany.
2. Respondent International Salt Company LLC is a Delaware limited liability company, existing and doing business under and by virtue of the laws of the United States as a wholly-owned subsidiary of K+S, with its offices and principal place of business located at 655 Northern Boulevard, Clarks Summit, Pennsylvania 18411.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER

I.

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

- A. “Acquisition” means the acquisition of Morton International, Inc., a subsidiary of The Dow Chemical Company, by K+S.
- B. “Commission” means the Federal Trade Commission.
- C. “Commission-approved Acquirer” means each acquirer approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VI.) of this Order. If approved by the Commission, “Commission-approved Acquirer” includes Eastern and Granite State.
- D. “Connecticut Book of Business” means all rights to contracts between Respondent ISCO and the State of Connecticut for delivery of Deicing Salt in the state for the period beginning in the winter season of 2009 through April 30, 2010, to no fewer than five divisions and underlying municipalities, approved by the appropriate governmental entities, with awarded volume of Deicing Salt totaling approximately 75,000 tons of Deicing Salt; *provided, however*, that for purposes of the Granite State Divestiture Agreement that is referenced and

attached to this Order, “Connecticut Book of Business” means the Customer contracts as described in Disclosure Schedule 4.03 of that agreement.

“Connecticut Book of Business” includes all books, records, and other information necessary to allow Granite State (or another Commission-approved Acquirer of the Connecticut Divestiture Assets) to perform under the included contracts but shall not include any of Respondent ISCO’s historical information (bid, cost, or pricing) relating to this or any other contract.

- E. “Connecticut Divestiture Assets” means
 - 1. Connecticut Stockpile Space,
 - 2. Connecticut Book of Business,
 - 3. Other Services, and
 - 4. Connecticut Supply.

- F. “Connecticut Stockpile Space” means access to approximately 80,000 square feet of contiguous stockpile space with a capacity of approximately 70,000 tons located at the New Haven Terminal for a period at least through May 31, 2010.

- G. “Connecticut Supply” means a supply of Deicing Salt, consistent with Paragraph III.C. of this Order.

- H. “Customers” means the Connecticut and Maine governmental entities that acquire Deicing Salt on behalf of the respective states and municipalities as part of the Connecticut Book of Business or the Maine Book of Business.

- I. “Deicing Salt” means salt (sodium chloride) used to melt snow and ice on roads and highways.

- J. “Direct Cost” means the cost of: (1) labor, materials and other costs necessary to mine the Deicing Salt; (2) the transportation of the Deicing Salt from the mine to the loading port; (3) the cost of freight from the loading port to New Haven, CT, via ocean-going vessel; (4) the cargo insurance; and (5) an allocation of SPL’s overhead costs attributable to the Deicing Salt provided to ISCO in the ordinary course of business; *provided however*, that for purposes of the Connecticut Salt Supply Agreement between Respondents and Granite State that is referenced and attached to this Order, “Direct Cost” means the cost of supply as provided in that Agreement.

- K. “Divestiture Agreement” means the agreements, licenses, assignments, and all other agreements entered into between the Commission-approved Acquirers and Respondents and approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VI.) of this Order; if approved by the Commission, “Divestiture Agreement” includes the Eastern Divestiture Agreement, the Granite State Divestiture Agreement, and the Connecticut Salt Supply Agreement.

- L. “Divestiture Assets” means the assets required by this Order to be divested and includes all of the following:
1. Maine Divestiture Assets,
 2. Searsport Stockpile Space, and
 3. Connecticut Divestiture Assets.
- M. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph VI. of this Order.
- N. “Eastern” means Eastern Salt Company, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 134 Middle Street, Suite 210, Lowell, MA 01852.
- O. “Eastern Divestiture Agreement” means the “Asset Purchase Agreement (Maine),” including all exhibits, appendices, and annexes, executed by Eastern and ISCO on September 10, 2009, and attached to this Order as Confidential Appendix A.
- P. “Gateway” means Gateway Terminal, the full service independent terminal operator headquartered in New Haven, Connecticut, which provides space for Deicing Salt and Other Services.
- Q. “Granite State” means Granite State Minerals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire with its office and principal place of business located at 227 Market St., Portsmouth, NH 03801.
- R. “Granite State Divestiture Agreement” means the “Asset Purchase Agreement (Connecticut),” including all exhibits, appendices, and annexes, executed by Granite State and Respondents on September 10, 2009, and attached to this Order as Confidential Appendix B.
- S. “K+S” means K+S Aktiengesellschaft, its directors, officers, employees, agents, representatives, successors, and assigns; its parents, joint ventures, subsidiaries, divisions, groups and affiliates controlled by K+S, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- T. “ISCO” means International Salt Company LLC.
- U. “Maine Book of Business” means all rights to contracts between Respondent ISCO and the State of Maine Department of Transportation Region 1 (“Maine DOT Region 1”) requiring delivery of Deicing Salt, and between Respondent ISCO and Greater Portland Council of Governments (“GPCOG”), requiring

delivery of untreated Deicing Salt, based on awarded volumes totaling approximately 100,000 tons of Deicing Salt in the state of Maine for the period beginning in the winter season of 2009 and ending in the spring of 2010, approved by the appropriate governmental entities in the state; *provided, however*, that for purposes of the Eastern Divestiture Agreement that is referenced and attached to this Order, “Maine Book of Business” means the Customer contracts as described in Disclosure Schedule 4.03(a) of that agreement. “Maine Book of Business” includes all books, records, and other information necessary to allow Eastern (or another Commission-approved Acquirer of the Maine Divestiture Assets) to perform under the included contracts but shall not include any of Respondent ISCO’s historical information (bid, cost, or pricing) relating to this or any other contract.

- V. “Maine Divestiture Assets” means:
 - 1. Maine Stockpile Space,
 - 2. Maine Book of Business, and
 - 3. Other Services.

- W. “Maine Stockpile Space” means access to at least 40,000 square feet of contiguous stockpile space with a capacity of approximately 40,000 tons located at the Portland Terminal for a period at least through April 30, 2012.

- X. “McCabe” means McCabe Bait Co., Inc., a company providing general freight trucking and Other Services, located at 136 North St., Kennebunk, ME 04046.

- Y. “Monitor” means the independent third party appointed by the Commission pursuant to Paragraph V. of this Order.

- Z. “New Haven Terminal” means the terminal located at 400 Waterfront Street, New Haven, CT 06512, owned and operated by Gateway.

- AA. “Other Services” means all services provided in connection with Deicing Salt after the Deicing Salt has been transported by ship to the port, including but not limited to offloading the Deicing Salt from vessels, stevedoring, stockpiling or building the stockpile, transporting Deicing Salt from the vessel to the stockpile and from the stockpile to the ultimate customer, drayage of the product to the stockpile, wharfage, and scaling or weighing trucks.

- BB. “Portland Terminal” means the terminal located at 59 Main Street, South Portland, ME, owned and operated by Sprague.

- CC. “Respondents” means K+S and ISCO, individually and collectively.

- DD. “SPL” means Sociedad Punta de Lobos, a wholly-owned subsidiary of K+S, located at Tajamar 183, Las Condes, Santiago, Chile.
- EE. “Searsport Stockpile Space” means access to approximately 2.75 acres of contiguous stockpile space with a capacity of approximately 90,000 tons located at the Searsport Terminal for a period at least through April 30, 2011.
- FF. “Searsport Terminal” means the terminal located at Mack Point – Trundy Road, Searsport, ME 04974, owned and operated by Sprague.
- GG. “Sprague” means Sprague Energy Corp, headquartered in Portsmouth, New Hampshire, which provides space for Deicing Salt and Other Services.
- HH. “Stockpile” means a pile of salt at a storage terminal.
- II. “Third Party” means an entity other than Respondents or a Commission-approved Acquirer, including but not limited to the Maine Department of Transportation, the Greater Portland Council of Governments, Sprague, Gateway, McCabe, and the Connecticut Department of Transportation.

II.

IT IS FURTHER ORDERED that:

- A. By no later than twenty (20) days after the Acquisition occurs, Respondents shall divest the Maine Divestiture Assets to Eastern pursuant to and in accordance with the Eastern Divestiture Agreement, absolutely and in good faith, and at no minimum price; *provided, however*, that if Respondents have divested the Maine Divestiture Assets to Eastern prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:
1. The Commission determines and notifies Respondents that Eastern is not an acceptable acquirer of the Maine Divestiture Assets, then Respondents shall immediately rescind the transaction with Eastern and shall divest the Maine Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph VI. of this Order, to effect such modifications to the manner of divesting the Maine Divestiture Assets to Eastern (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

- B. If Respondents have divested the Maine Divestiture Assets to Eastern (or another Commission-approved Acquirer) pursuant to the Eastern Divestiture Agreement (or another Divestiture Agreement), and the Commission has approved Eastern (or another Commission-approved Acquirer) and the manner in which the divestiture was accomplished, then solely at the option of Eastern (or another Commission-approved Acquirer), Respondents shall divest the Searsport Stockpile Space to Eastern (or another Commission-approved Acquirer) no later than August 15, 2010, pursuant to the terms applicable to divestiture of the Searsport Stockpile Space as included in the Eastern Divestiture Agreement (or another Divestiture Agreement).
- C. Prior to completing the Acquisition, Respondents shall:
1. Obtain all consents and approvals from all Third Parties and satisfy all other conditions required to transfer all rights and divest all assets as required by Paragraph II.A., including obtaining any consents or waivers of, or making any payments to, Third Parties; and
 2. Provide written notification to all Customers that Deicing Salt provided as part of the Maine Book of Business divested to the Commission-approved Acquirer will be provided by the Commission-approved Acquirer and not by Respondents.
- D. The Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets), and any breach by Respondents of any term of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) shall constitute a violation of this Order. If any term of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order. Any material modification of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) between the date the Commission approves the Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall

constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of five (5) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondents comply with Paragraph II. (and Paragraph VI.) of this Order, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Maine Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Maine Divestiture Assets.
- F. The purpose of the divestiture of the Maine Divestiture Assets, the Searsport Stockpile Space, and the additional requirements in Paragraph II. is to ensure the continued use of the assets in the same business in which the assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition in the sale and delivery of Deicing Salt in Maine resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that

- A. By no later than twenty (20) days after the Acquisition occurs, Respondents shall divest the Connecticut Divestiture Assets to Granite State pursuant to and in accordance with the Granite State Divestiture Agreement, absolutely and in good faith, and at no minimum price; *provided, however*, that if Respondents have divested the Connecticut Divestiture Assets to Granite State prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:
 - 1. The Commission determines and notifies Respondents that Granite State is not an acceptable acquirer of the Connecticut Divestiture Assets, then Respondents shall immediately rescind the transaction with Granite State and shall divest the Connecticut Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 - 2. The Commission determines and notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, pursuant to Paragraph VI. of this Order, to effect such modifications to the manner of

divesting the Connecticut Divestiture Assets to Granite State (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

- B. Prior to completing the Acquisition, Respondents shall:
1. Obtain all consents and approvals from Third Parties and satisfy all other conditions required to transfer all rights and divest all assets as required by Paragraph III., including obtaining any consents or waivers of, or making any payments to, Third Parties;
 2. Provide written notification to all Customers that Deicing Salt provided as part of the Connecticut Book of Business divested to the Commission-approved Acquirer will be provided by the Commission-approved Acquirer and not by Respondents.
- C. To enable the Commission-approved Acquirer of the Connecticut Divestiture Assets to supply customers with Deicing Salt (“Connecticut Supply”) at an identical level, in an identical manner, and of identical quality as Respondents supplies customers with Deicing Salt, Respondents shall, pursuant to an agreement approved by the Commission (“Connecticut Salt Supply Agreement”):
1. Provide to the Commission-approved Acquirer of the Connecticut Divestiture Assets, at the option of the Commission-approved Acquirer
 - a) for a period of up to 36 consecutive months (the 36-month period to be determined by the Commission-approved Acquirer);
 - b) up to 120,000 tons of Deicing Salt per year, such quantity to be determined by the Commission-approved Acquirer of the Connecticut Divestiture Assets; provided, however, if the Connecticut Book of Business requires the Commission-approved Acquirer of the Connecticut Divestiture Assets to supply more than 120,000 tons of Deicing Salt in the (1) 2009-2010 contract year for the Connecticut Book of Business, and (2) the 2010-2011 contract year if the state of Connecticut extends the period of performance for the Connecticut Book of Business, Respondent ISCO shall provide the required Deicing Salt to the Commission-approved Acquirer consistent with this paragraph;
 - c) at no more than Direct Cost.
 2. Use reasonable efforts to minimize its costs in connection with the supply of Deicing Salt to the Commission-approved Acquirer in a manner that is consistent with Respondents’ efforts to provide Deicing Salt to its own New Haven stockpiles; and
 3. Ensure that in the event of any Deicing Salt supply disruption:
 - a) alternative arrangements shall be made for the required Deicing Salt delivery to the Commission-approved Acquirer to commence as soon as possible;

- b) the Commission-approved Acquirer's priority to receive Deicing Salt shall be restored as if the disrupting event had not occurred; and
 - c) the Commission-approved Acquirer will not be prejudiced relative to Respondent's operations in relation to the transport and delivery of Deicing Salt for the Commission-approved Acquirer's own account or on behalf of any of its affiliates.

- D. The Granite State Divestiture Agreement and the Connecticut Supply Agreement (or any other Divestiture Agreements effectuating divestiture of the Connecticut Divestiture Assets) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreements, shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Divestiture Agreements, and any breach by Respondents of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order ("Order Term"), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondent's obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of five (5) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondents comply with Paragraph III. (and Paragraph VI.) of this Order, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Connecticut Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Connecticut Divestiture Assets.

- F. The purpose of the divestiture of the Connecticut Divestiture Assets and the additional requirements in Paragraph III. is to ensure the continued use of the assets in the same business in which the assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the

lessening of competition in the sale and delivery of Deicing Salt in Connecticut resulting from the Acquisition as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that

- A. If the Commission-approved Acquirer is unable to satisfy the terms of the Connecticut Book of Business or the Maine Book of Business, then ISCO shall perform under the terms as requested by the affected Customer as specified by the Customer in its formal consent to transfer its contract from ISCO to the Commission-approved Acquirer.
- B. Respondents shall not interfere with, or in any other way impede, the ability of the Commission-approved Acquirers to extend or enter into agreements with Sprague, Gateway, or other Third Parties, relating to the supply or sale of Deicing Salt in Connecticut and Maine.
- C. If any Customer, or person acting on behalf of any Customer, that would otherwise acquire Deicing Salt as part of the Connecticut Book of Business or the Maine Book of Business contacts Respondents with respect to placing an order, or places an order, for Deicing Salt, Respondents shall:
 - 1. Notify the Customer-designated representative with responsibilities for procurement relating to that Customer, in such a manner that the representative receives the notification within 24 hours of the contact, or the placement of the order; and
 - 2. Maintain an accurate and verifiable record of that contact.

V.

IT IS FURTHER ORDERED that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order.
- B. The Commission shall select the Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor, Respondents shall be deemed to have consented to the selection of the proposed Monitor.

- C. Not later than ten (10) days after the appointment of the Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondents' compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.
- D. If a Monitor is appointed by the Commission pursuant to this Paragraph V, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor the Respondents' compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
 - a) assuring that Respondents expeditiously comply with all of their obligations and perform all their responsibilities as required by the Order to Maintain Assets and the Decision and Order in this matter; and
 - b) monitoring Respondents compliance with the Granite State Supply Agreement.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to the Respondents' compliance with their obligations under the Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Order.
 4. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all monies derived from the divestiture and all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
 5. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting

in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.

6. The Monitor Agreement shall state that within one (1) month from the date the Monitor is appointed pursuant to this Paragraph V., and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance of their obligations under the Order.
 7. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement relating to the Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph V.
- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the monitor appointed pursuant to the Order to Maintain Assets in this matter or the Divestiture Trustee pursuant to the relevant provisions of this Order.

VI.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with their obligations to divest the Maine Divestiture Assets, the Searsport Stockpile Space, or the Connecticut Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest such assets and to effectuate the other provisions of this Order in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a

Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures and satisfy the additional obligations required by Paragraph II. and Paragraph III. of this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures and satisfy the additional obligations required by Paragraphs II. and III. of this Order.
 - 2. The Divestiture Trustee shall have twelve (12) months after the date the Commission approves the trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraphs II. and III., or believes that such can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* the Commission may extend the period only two (2) times.
 - 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other

information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays caused by Respondents shall extend the time under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) Days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestitures of all of the relevant assets that are required to be divested by this Order.
6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

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

VII.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final, every sixty (60) Days thereafter until Respondents have fully complied with Paragraphs II.A. and II.C., III.A. and III.B (or Paragraph VI., as applicable), and every ninety (90) days thereafter until Respondents have complied with all remaining obligations of this Order and the Divestiture Agreement(s), Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in its reports, among other things that are required from time to time:
1. A full description of the efforts being made to comply with the relevant Paragraphs of this Order;
 2. A description of all substantive contacts or negotiations related to the divestitures and the identity of all parties contacted and copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing its obligations pursuant to Paragraph II. and Paragraph III. (or Paragraph VI., as applicable) of this Order.

- B. One year after the Order becomes final, annually for the next three (3) years on the anniversary of the date the Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

VIII.

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

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. Access, during business office hours of the Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondents related to compliance with this Order, which copying services shall be provided by the Respondents at their expense; and
- B. To interview officers, directors, or employees of the Respondents, who may have counsel present, regarding such matters.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED:

Confidential Appendix A

[Redacted from Public Record Version but Incorporated by Reference]

Confidential Appendix B

[Redacted from Public Record Version but Incorporated by Reference]