ever initiated a general price-cutting program. (Posey 1651; Gooding 1121–23) Industry members in Orlando, such as independents like Fairway, tend to price off these market leaders. (Posey 1651; Gooding 1121–22; Spearman 800–01)

Albertson's entry into Orlando led to a decrease in prices in that market. (Posey 1649; CX 640–41) Prices are high enough in Orlando to attract other new entrants, but entry must be sufficient to overcome existing entry barriers. (Cheek 1597–98) When Fairway, the largest independent in Orlando, cut prices heavily below the market and increased advertising in 1978, neither Publix, Winn-Dixie nor Albertson's reacted. (Posey 1639)

Mr. Gooding's three large stores in Orlando are not listed on the price-checking service used by Orlando's major competitors. (Posey 1651) Mr. Spearman testified that, in his opinion, entry into Orlando by a major firm like Grand Union would lead to a decrease in prices, and a redistribution of market shares, especially affecting the market leaders. (Spearman 803–04)

Respondents argue that complaint counsel's concentration figures overstate the amount of concentration in **[148]** this SMSA because they fail to account for the influence of the local commissary and of convenience stores in Orlando. (RPF 197–207) According to public records, the Orlando Naval Training Station Commissary had sales in fiscal 1978 (including three months of calendar 1977) of $16.7 million, or $321,000 weekly. In terms of CX 2 and CX 3, the commissary would have been the sixth-ranked competitor in 1977, replacing A & P in that position.

Florida is the state with the highest per capita concentration of convenience stores in the country, and the Orlando SMSA has the highest ratio of convenience store sales to all food store sales in the state. (Curhan 2837–38) Two of the top eight competitors are convenience stores, and there are many other convenience stores which are not within the top eight. (CX 665Z377–Z422; *see* F. 161)

The top competitors in Orlando differ in many aspects. Winn-Dixie, the leader in Orlando, has many smaller stores, primarily in neighborhood strip centers. Winn-Dixie generally appeals to "blue collar" shoppers, emphasizes private label products and is price-competitive more on specials rather than everyday low price. (Gooding 1123) Second-ranked Publix operates two types of stores in Orlando: conventional Publix stores and discount stores under the "Food World" banner. (Roehm 2717) The image of the conventional stores is geared toward middle and upper income areas:

Publix stores are very fine, high-quality stores. they really are geared to customer service. They are the nicest chain store in the area, very find decor, high quality customer service, very fine people.

(Gooding 1123)

Food Fair (Pantry Pride), third ranked, is "strictly a price store." (Gooding 1124) Its market share dropped by almost 50% (from 15.1% to 8.6%) between 1972 and 1977. Albertson's, number four, entered Orlando in 1975, built two stores between 1978 and 1980 and by 1980 had five combination stores. (Posey 1647, 1672–73) Albertson's stores are approximately 55,000 square feet, half of which is devoted to drugs and general merchandise, the balance to food. The stores are geared to all segments of the marketplace, are extremely high volume (Gooding 1124), and attract shoppers from large trading areas. (Posey 1646) Southland, number five, had 65 7–11's in Orlando in 1972 and 83 in 1977. (CX 665Z-Z412) Mr. Gooding, of Goodings, the number six firm in the market, estimated that his four stores have the highest dollar-per-square-foot sales in the area. (Gooding 1117) He described his stores as follows: **[149]**

Well, our type of stores are very high-quality, high customer-service-oriented stores, but we also consider ourselves to be very compet—highly competitive on dry grocery products; and they are the lowest average price in the market, . . .

(Gooding 1121–22)

Samuel Posey, President of Middle Florida Supermarkets, a wholly-owned subsidiary of Malone & Hyde, an independent wholesaler, testified about the seven Fairway Markets he operates in Orlando. Mr. Posey began acquiring the Fairway stores from the previous owners in 1976. Between 1977 and 1978 he, in turn, sold the stores to Malone & Hyde, his wholesaler. (Posey, 1639) Mr. Posey testified that when he acquired control of the stores he lowered overall prices, which he believed were too high, and began advertising in order to build volume. (Posey 1639) He estimated his market share at approximately 5%. (Posey 1634) Fairway's new price structure was lower than his competitors which resulted in a volume gain. (Posey 1644, 1670) Mr. Posey described his strategy for making his stores profitable:

Well, it was losing money and volume at a very rapid pace. I elected to drop prices extremely low; campaign our price program; generate volume in the stores; and as my volume began to pick up—which it did—I began to adjust my prices; and it took me approximately three years to get the volume that I needed in order to reach my projection of break even, and then raise prices to achieve it.

(Posey 1669)

He stated that his prices are as low as they can be while still remaining profitable. (Posey 1668)

Jewel-T entered the Orlando area in 1976 and by 1977 had three stores. (CX 665Z393) Jewel's prices are approximately 5–6% lower than Fairway's prices. (Posey 1635–36) Neither Mr. Posey nor Mr. Gooding has lowered his prices in reaction to Jewel-T's prices. (Posey 1637; Gooding 1131) However, Mr. Gooding testified to other competitive steps he has taken in response to Jewel-T:

> We have looked to try to find some similar products to bring in for mass displaying to meet; but it is not lowering existing product, getting our warehouse to buy some of the same things that they [Jewel-T] are buying on some of the key items.

(Gooding 1131) **[150]**

5. Grand Union as a Perceived Potential Entrant

165. Some competitors viewed Grand Union in 1978 as a likely potential entrant into Orlando. (Posey 1652–53; Gooding 1145–46, 1150; Spearman 801; Stewart 597–98, 661; CX 607 [Rowe] at 42) One reason for expecting Grand Union to enter was that the high-growth Orlando market was much closer in time and distance than the West Coast of Florida market. Mr. Gooding explained:

> A logical place for them to go. Orlando is one of the number one growth areas in the country. In spite of the proposed recession, Orlando is certainly an easier market to serve from their warehouse in Hialeah. They are over on the west coast of Tampa, St. Petersburg. When they are servicing those stores on the west coast, the cost of servicing those—and I know that from being on the board of directors of our co-op warehouse—the highway situation is just atrocious getting into that area. Where they come to Orlando, they can come right up on the turnpike. We used to be supplied from Miami by Associated Grocers. I was on the board of that co-op, too. I understand some of the problems in supplying stores at that distance; much easier in my estimate to supply stores in Orlando than it is to go to St. Petersburg. The traffic, the stop and go has to cost a fortune to run trucks on those highways. There's no major throughway servicing the west coast yet.

(Gooding 1146–47; *see also* Posey 1661.)

The President of Winn-Dixie, the market leader in Orlando, did not perceive Grand Union as likely to enter Orlando or any of the other alleged Florida markets, *de novo.* (B. Thomas 1513)

Similarly, Mr. Roehm, Vice President for Colonial's Orlando stores, did not perceive Grand Union as likely to enter Orlando. (Roehm 2718) Based on his observations of Grand Union's operations in Southern Florida, he thought that rather than enter Orlando, Grand Union "had a lot of filling in to do in the high-growth areas, both on the East

Coast [below West Palm Beach] and West Coast of Florida." (Roehm 2744)

Respondents' review of the testimony of trade witnesses who stated that they perceived Grand Union as a likely entrant into this market led to the following observations: [151]

(a) Despite Mr. Posey's belief that Grand Union would enter Orlando, he believes this SMSA is overstored "too many units for the population." (Posey 1652–53)

(b) Mr. Posey conceded that Grand Union had opportunities to expand its West Coast operations which it would be likely to exploit before entering Orlando. (Posey 1665–66)

(c) Mr. Posey and Mr. Gooding did not provide any evidence that they acted on their perception of Grand Union as a likely entrant. (RPF 237–38)

6. Grand Union as a Potential Entrant

166. Roger Kennedy, Grand Union's Treasurer, did not discount the possibility that Grand Union would edge its way into the Orlando market and Central Florida. (CX 576 [Kennedy] at 129–30) Mr. Goulding also expected that Grand Union would enter Orlando after moving up the East Coast of Florida. (CX 576 [Goulding] at 83) Moreover, Grand Union officials prior to the merger indicated to Colonial's management that they might want to purchase Colonial's Orlando stores at some time in the future. (Stewart 599)

According to respondents, Grand Union had no interest in Orlando in 1978 or in the reasonably foreseeable future because of the company's situation in Florida, particularly the West Coast. (Curhan 2931–34) Respondents' claim that the history of Grand Union's Florida operations demonstrates that the likelihood of its making *de novo* entry into Orlando within any reasonable period of time was extremely small. (RPF 244–261) Respondents argue that, although Grand Union management prior to the Cavenham acquisition had decided to return to the West Coast of Florida for the third time, there was no plan to re-enter Orlando. (RPF 252)

When James Wood became President of Grand Union in 1974, he continued with prior management's West Coast plans. (CX 589 [Wood] at 89) A report designed to project the company's growth in Florida through 1980, prepared in November 1976, entitled "Study Florida West Coast Development Plan, 1976–1980" (CX 71) demonstrates, according to respondents, that Grand Union was not an actual potential entrant into the three Florida SMSAs. (RPF 254) At the time the Study was prepared Grand Union had three existing West Coast stores: Naples, Bradenton and Venice. Nineteen more stores were planned for the West Coast by 1980: North Fort Myers, Port Charlotte, West Bradenton, Tarpon Springs, New Port Richey, Dunedin, Fort Myers, [152] Sarasota (2), St. Petersburg (3), South Naples, Port Richey, Clearwater (2), East Fort Myers, Tampa and Hudson. (CX 71H)[16]

The Business Plan and Budget for 1978/79 described the West Coast competitors as more aggressive than in the East, and stated that although the Naples store produced excellent returns, the remaining West Coast stores "failed to achieve satisfactory market shares in the intensive competitive environment of the northern west coast markets." (CX 6Z-54)

Respondents note that the West Coast stores have not lived up to Grand Union expectations. (RPF 258) Only half the number planned were actually built. (CX 71; CX 589 [Wood] at 94) Grand Union's 1977/78 market share on the West Coast was estimated at 2.9% (CX 6Z120); the five stores opened in 1977 made a negative contribution of 3.6% of sales [representing start up costs] (CX 7Z252), and 1.2 million was forecast for 1978 (CX 6Z50), although they had the highest average weekly sales per store of all Grand Union's divisions. (CX 6Z27) Respondents state that Grand Union still has plans for this area, should it become profitable in the future (RPF 260; Curhan 2931), and it continues to look for sites, although it has no projected number of sites planned. (CX 589 [Wood] at 93-94, 96, 154)

Respondents also claim that Grand Union's closing of [153] all Colonial Orlando stores is evidence that the company had no intention of entering this market. (RPF 261) Grand Union plans, they state, were specifically to expand along the West Coast, but did not include inland areas which were viewed as having a lower growth rate [Orlando had a growth rate of 4.5 times the national average in the 1970's—F. 160]. (RPF 262; CX 589 [Wood] at 97)

Mr. Goulding testified that Grand Union had no plans to operate in Orlando, Gainesville, or Panama City. (CX 574 [Goulding] at 64-65) Mr. Kennedy stated, with regard to Central Florida:

It is a matter of growth potential as opposed to any long-term or any time frame, you

[16] The Five Year Development Plan prepared one year earlier in November 1975 also projected building stores only on both Florida coasts through the plan period. (CX 79Z55-Z56) Even in the category "additional possibilities for new store development" no stores were listed for Central Florida, and the most northeasterly store listed as a possibility, in Stuart (CX 79Z-57), is in excess of 200 miles south of Jacksonville. Similarly, the next Five Year Development Plan for 1976-1981 states:

> *Expansion into New Marketing Areas*
>
> In regard to a new market entry, present plans focus upon the West Coast of Florida, the Baltimore area, and the South Jersey (Trenton) area, as well as such areas as Bucks County, Pennsylvania; Hunterton County, New Jersey; Grafton County, New Hampshire and Steuben County, New York (Central Division).

(CX 80Z21) The 1976-1981 Plan projected the identical West Coast developments and "additional possibilities" as the previous year's Plan. (CX 80Z57-Z58) know, it could be years and years before we would reach that are . . . I said we were on the West Coast, and how we will move from there and what the opportunity is, . . . I don't have the expertise to say that.

(CX 576 [Kennedy] at 132)

Grand Union's 1978/79 Business Plan, prepared prior to the decision to acquire Colonial, made no mention of store construction in any Central Florida area. (6Z266) Grand Union's purchase of eight West Coast stores from Colonial (F. 9), was made because "they needed stores very badly on the West Coast of Florida . . . to try to get near the break-even point at that stage." (CX 589 [Wood] at 37) Colonial also offered to sell Grand Union its Orlando stores. Grand Union had no interest in the Orlando stores. (Stewart 599; CX 607 [Rowe] at 75) The West Coast acquisition gave Grand Union two stores each in Tampa and St. Petersburg, one in Brandon, one in Bradenton and one store in Largo. (CX 82Q) All except Bradenton were within the Tampa/St. Petersburg SMSA. (CX 645B)

The acquisition had involved an eighth store in Clearwater, where Grand Union already had a store. Pursuant to agreement with the FTC, Grand Union never opened that store. (CX 589 [Wood] at 46) Of the seven stores, only two remain open. Even those are not profitable, although Grand Union believes they have the potential to become profitable. (CX 589 [Wood] at 49) In the other stores, although Grand Union was able to increase volume to $50,000 weekly from Colonial's $35,000 volume, it was still inadequate. (Curhan 2930) In the month of April 1979, those stores lost $63,000. (CX 589 [Wood] at 47) The stores remained unprofitable and have since been closed. (Curhan 2930)

Other factors noted by respondents in their argument that Grand Union was unlikely to enter Orlando are: Grand [154] Union's scarcity of stores on the West Coast as compared with its competitors there, which makes filling in that area a priority (Curhan 2933–34); Grand Union's 1979 new store constructions and planned future construction are not in the direction of Orlando (CX 574 [Goulding] at 95; Curhan 2934); and expansion opportunities open to Grand Union on the East Coast in areas like Fort Lauderdale, West Palm Beach, etc. (Curhan 2935)

7. Colonial as a Toehold Acquisition in Orlando

167. Respondents claim that Colonial's market share in Orlando was so small, under 2% in 1977 (F. 161), that it was "barely a toehold acquisition" (RPF 302), and because Grand Union closed Colonial's Orlando stores (RPF 261), Grand Union is as likely, "or as unlikely," a potential entrant today as it was prior to the acquisition.

Mr. Rowe, who was Vice President and Secretary of Colonial at the time of the tender offer, was Vice President for the Orlando area in 1972 when the stores were acquired. (CX 607 [Rowe] at 11) Mr. Rowe testified: "[W]e were never a factor at all in [Orlando]." He referred to the fact that Colonial had too few stores and had problems servicing them from Thomasville, and that, administratively, it took as much time to monitor the two stores as it would have taken to supervise fifty stores. (CX 607 [Rowe] at 30–31)

Mr. Roehm, Colonial Vice President in charge of Orlando in 1978, described the situation in the two stores prior to the tender offer:

> Sales were very low, approximately $50,000 to $60,000 between the two stores. The losses were tremendous. My challenge was to pretty much minimize the losses until we could dispose of and close the stores.

(Roehm 2714–15)

Mr. Gooding concurred with the opinions of Colonial's management. He testified:

> They are not successful stores. Our estimate . . . was they were probably doing $25,000 a week in 20,000 square-foot stores and quite obviously losing substantial amounts of money.

(Gooding 1163)

Colonial's Southern Division Five Year Stores Development Plan for 1979 projected selling or, in the alternative, closing both stores in 1983 when the first of the **[155]** two leases expired. (CX 358Z–4, Z5) By July of 1978, Colonial had even stopped price-checking in Orlando. (Roehm 2717) Mr. Roehm "doubt[ed] it very seriously" that Colonial would still have stores in Orlando even if there had been no acquisition. (Roehm 2717)

8. Expanders and Potential Entrants

168. Respondents cite several companies which, they believe, have evidenced an intention to enter or expand into the Orlando market. Mr. Posey, who now operates seven Fairway Markets, testified that he has committed to his company's corporate parent, Malone & Hyde, that Fairway will build five stores a year within the Orlando area for the next several years. (Posey 1663–64) At the time he testified, one store was under construction, he had a lease on four more and had additional locations under negotiation. However, Fairway has historically been an unprofitable firm. Its market share fell between 1972 and 1978. (Posey 1672–73, 1634, 1639)

Albertson's, a new entrant with five stores in Orlando, has publicly announced plans for 50 or 60 new stores in Florida. (Posey 1673)

Jewel-T is another recent entrant into Orlando (Posey 1635), and may further penetrate that market. Mr. Gooding testified he was interested in expanding in Orlando and had attempted to purchase the Colonial stores. (Gooding 1138) He also detailed the difficulties he had experienced in attempting to expand. (Gooding 1139, 1168)

Mr. Roehm testified: "[w]ith the growth factor in the State of Florida, particularly central and south Florida, anybody could enter at any time." (Roehm 2718–19) Mr. Foy, of Certified Grocers of Florida, testified that he foresees a great deal of new entry into Orlando (Foy 1800–01), although he did not specify any potential entrants. Mr. Cheek testified that he has considered expanding into Orlando. (Cheek 1589). He had a contract to purchase three A & P stores in Orlando, which was subsequently breached by A & P. Mr. Cheek also mentioned advertising costs as being an entry barrier. (Cheek 1596–97) In response to the question: "Mr. Cheek, are you a potential entrant into Orlando at this point," he answered "Yes." (Cheek 1614)

There was testimony regarding the likelihood of entry by Kash 'N Karry (formerly Tampa Wholesale Company), both prior and subsequent to its recent acquisition by Lucky Stores of California. Kash 'N Karry had been a family-run company with a warehouse in Tampa and approximately 50 stores in Tampa and the surrounding areas. In the 1960's, it had stores in Orlando, but withdrew from the area. (Posey 1629) A Grand Union Business Plan and Budget described Kash 'N Karry's shelf pricing as "one of the lowest on the West Coast of Florida." (CX 7Z–203) **[156]** Mr. Roehm perceived Kash 'N Karry as likely to enter Orlando even before it was acquired by Lucky because of its large warehouse relatively nearby and because it had a store in Ocala, only 50 miles from Orlando. (Roehm 2718) Since the acquisition, the trade press has reported that Lucky has announced plans to expand Kash 'N Karry throughout Florida. Therefore, Mr. Roehm still believes Kash 'N Karry is a likely entrant into Orlando. (Roehm 2721)

Mr. Gooding did not perceive Kash 'N Karry as likely to enter Orlando when it was "a family situation" because "they felt that their strong base was on the west coast." (Gooding 1146) Since its acquisition by Lucky, Mr. Gooding perceives Kash 'N Karry as likely to enter Orlando, citing as the basis of his perception an interview in *Supermarket News* with Lucky personnel stating they were looking extensively for sites in Orlando. (Gooding 1144) Similarly, based on Lucky's announcements, Messrs. Posey, Stewart and Goulding all perceived Kash 'N Karry as likely to enter Orlando. (Posey 1659–60; Stewart 661; CX 574 [Goulding] at 105)

Safeway was also identified as a potential entrant into Orlando. Mr. Roehm testified that "there have always been rumors of Safeway wanting to enter the Florida market." (Roehm 2719) When questioned about Safeway as a potential entrant into Orlando, Mr. Posey, however, commented, "I wouldn't think so any time soon. Anything is possible." (Posey 1660)

Thriftway stores are operated by individuals who own one or more stores and are affiliated with Certified Grocers, an independent wholesaler. Thriftway operates under a cooperative advertising program. Mr. Posey thought Thriftway stores might enter Orlando, although he did not expect them to be a big factor. (Posey 1657–58)

B & B Cash Grocery Stores, operating as U-Save Wholesale Supermarkets, was also identified as a potential entrant into Orlando. (Curhan 3153) B & B is headquartered in Tampa and has its own warehouse in Tampa from which it serves 51 stores. (Curhan 3155)

Respondents point out that there are seven companies presently within "striking distance" of Orlando. Food Fair (Pantry Pride) serves its Orlando stores from Jacksonville, 139 miles from Orlando. Three companies which do not serve Orlando from any facility, also have distribution centers in Jacksonville:

Bacon Grocery Co., Inc.
Daylight Grocery Co.
United Food Stores, Inc.

(RX 30Z3) [157]
Malone & Hyde serves Orlando from Miami, 227 miles away. Both Grand Union and Associated Grocers are located in Miami, but neither serves the Orlando area. (RX 30Z3)[17] Affiliated of Florida, Inc., E. J. Keefe Co., Inc. (subsidiary Fleming Co.'s, Inc.), both independent wholesalers, and Publix serve Orlando from distribution centers in Tampa. In addition to these three and Winn-Dixie, which has warehouses in both Tampa and Orlando, the following companies have distribution centers in Tampa but do not serve stores in Orlando:

B & B Cash Grocery Stores (U-Save)
Kash'N Karry (Lucky)[18]

(RX 30Z3)

Although these companies are within striking distance of Orlando, and any one of them could enter, each or all of them could choose not to enter the area. As one trade witness testified:

> I think we are much better off . . . using our assets, both capital and personnel, in the markets that we are now in rather than spreading ourselves thin in a series of one or more new markets. I don't believe it is prudent business to do that.

[17] Food Fair, Publix and Winn-Dixie also have warehouses in Miami. All three serve their Orlando stores from other warehouses in or closer to Orlando.

[18] Kash'N Karry is shown as having stores in the "Orlando Market Area" as defined by *Progressive Grocer.* However, it does not yet have stores in the Orlando SMSA.

(Walters 1436–37)

9. Alternative Means of Entry

169. Grand Union could have entered the Orlando market through shipments from its Hialeah warehouse, closer to Orlando than some of the West Coast stores it presently serves from a distance of 250–305 miles. (Rand McNally; *see* F. 148) Use of distributors and wholesalers are also mentioned by complaint counsel as an alternative means of entry into Orlando by Grand Union. (*See* F. 149.) **[158]**

10. Changes in Colonial's Orlando Operations Since the Acquisition

170. According to Dr. Parker, Grand Union was the most likely potential entrant into Orlando (Parker 2659–60), and would have entered on a significant scale to become a factor in this market. (Parker 2271) Therefore, Grand Union's acquisition of Colonial substantially lessened competition in Orlando, because entry by alternative means would have made Grand Union a factor in this market and would have had a deconcentrating effect. (Parker 2361–69)

L. *The Gainesville, Florida SMSA*

1. Demographics and Location

171. On July 1, 1978, the Gainesville SMSA (F. 41) had a population of 129,700, up 24,900 or 23.8%, from the population of 104,764 of April 1, 1970. This rate of growth was three times higher than the national average. (Bureau of the Census, *Population*)

Gainesville is located in North-Central Florida. The distance between Gainesville and other Florida and Georgia cities are the following:

145 miles from	Thomasville, Georgia
72 miles from	Jacksonville, Georgia
335 miles from	Miami, Florida
37 miles from	Ocala, Florida
148 miles from	St. Petersburg, Florida
183 miles from	Sarasota, Florida
131 miles from	Tampa, Florida

(Rand McNally)

172. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Gainesville in 1972 and 1977 were as follows:

	1972			1977	
Competitor	Food Store Sales (%)	Grocery Store Sales (%)	Competitor	Food Store Sales (%)	Grocery Store Sales (%)
Publix	25.4	26.8	Publix	31.6	33.2
Winn-Dixie	17.9	18.9	Winn-Dixie	14.5	15.2
Food Fair	12.7	13.3	Albertson's	10.8	11.3
Colonial	5.4	5.7	Food Fair	7.7	8.1
Munford	5.3	5.6	Munford	3.2	3.4
A & P	2.5	2.7	Hitchcock's	3.1	3.3
Hitchcock's	2.5	2.7	Colonial	2.6	2.7
Shelton	2.5	2.6	Southland	2.6	2.7

(CX 2G) **[159]**

Between 1972 and 1977, Publix increased its presence from three to five stores (CX 665Z161) and its market share increased substantially. Winn-Dixie closed one of its six stores during that period (CX 665Z179), and its market share decreased. Food Fair (Pantry Pride), which was third ranked in 1972, was replaced by Albertson's in 1977 and dropped to fourth. Albertson's entered Gainesville in approximately 1975 and was third-ranked with one store two years later. Colonial, number four in 1972, was seventh in 1977 and its market share dropped in half. Munford, which runs Majik convenience stores, remained number five. A & P, number six in 1972, was no longer in the top eight by 1977, although its one Gainesville store was still open that year. (CX 665Z161) Hitchcock's Foodway, with two stores (CX 665Z164), rose from number seven to six, replacing A & P. Shelton Thriftway, with one store, was no longer in the top eight in 1977 and was replaced by Southland, which operated nine 7–11's in the county. (CX 665Z171)

Four-firm concentration ratios for grocery stores, (SIC 541), were:

1972	1977
61.8%	65.5%

Four-firm concentration ratios for supermarkets were:

1972	1977
85.4%	91.5%

2. Colonial in the SMSA

173. In 1977, Colonial was ranked sixth in supermarket sales and seventh in grocery store sales in the Gainesville market, with market shares of 3.8% and 2.7%, respectively. (CX 664A; CX 2G; Admissions 37)

Colonial operated only two supermarkets in Gainesville in 1977 (Admissions 38); however, these were price-checked by their Gainesville competitors. (Roehm 2792) Colonial's five-year plan for Gainesville projected two additional stores in this SMSA. (CX 358C) After the acquisition, Grand Union closed Colonial's two Gainesville stores. (Roehm 2722; Spearman 837) Mr. Roehm testified that it "made sense" for Grand Union to re-enter Gainesville at some future time, based on its growth and proximity to Colonial's Thomasville warehouse (145 miles). (Roehm 2793) **[160]**

Respondents dispute complaint counsel's claim that the fact that Colonial's stores were price-checked in Gainesville indicates that these stores were a competitive factor in this market. (RPF 333) Colonial, according to Mr. Rowe, was never a factor in Gainesville. (CX 697 [Rowe] at 31) Colonial's market share of grocery store sales in Gainesville was below 3% in 1977 (CX 2G), and these stores were never profitable for Colonial. According to Colonial's own records, the stores' net losses were as follows:

Year ended Dec. 30 for the 2 Gainesville stores		
1971		$(169,420)
1972		(128,719)
1973		(174,435)
1974		(201,118)
1975		(253,577)
1976		(396,759)
1977		(466,449)
	Total:	$(1,790,477)

(CX 333B, D, F, K, M)

The two stores together did less than $50,000 volume per week prior to the tender offer. (Roehm 2722; Spearman 795; Curhan 2940) Mr. Spearman had recommended that Colonial withdraw from Gainesville prior to the acquisition because its volume was so low (Spearman 794), and because "We didn't have the dedication to the marketplace." (Spearman 795) When Mr. Roehm came to the Thomasville Division prior to the tender offer he was unable to turn these stores around and recommended that Colonial close the stores. (Roehm 2823)

3. Barriers to Entry

174. Dr. Parker testified that, in his opinion, barriers to entry into the Gainesville market are significant. (Parker 2362) Mr. Stewart stated that the minimum effective level of entry into Gainesville is two or three large stores. (Stewart 587–88)

4. Performance of the SMSA

175. Based on an analysis of the structure of the Gainesville market, Dr. Parker testified that it is very likely this market is behaving less than competitively. (Parker 2362) Respondents counter that

there has been significant recent competitive activity in Gainesville (not included on CX 2G), particularly in light of the small size of this SMSA.

A & P closed its one store subsequent to 1977. (Roehm 2725) Albertson's, which has been expanding within the state, entered Gainesville in approximately 1975. By 1977, with only **[161]** one store, it was number three behind Publix and Winn-Dixie, the market leaders. (CX 2G) Jewel began operating Jewel-T box stores in Gainesville in 1979. (Roehm 2724) Food Fair (Pantry Pride), which lost market share between 1972 and 1977, reacted to Jewel's entry by converting one of its two stores to a box store format. (Roehm 2724)

5. Grand Union as a Potential Entrant

176. Complaint counsel posits that Grand Union, once it entered Orlando by building a new warehouse (*see* F. 148), would proceed to Gainesville, which is within "striking distance", to support this warehouse. (CPF 682; Parker 2363; Gooding 1158–59) Dr. Parker testified that Grand Union was a likely potential entrant into Gainesville (Parker 2362), and the "scenario" for this entry would be:

> Yes, I think that the scenario of Grand Union going into Gainesville would be tied up with its going into Jacksonville. And I think that there [are] some toe-holds in Jacksonville. I think, however, that the most likely way it would have gone into both of the markets would have been to either build a warehouse or to use a wholesaler and with the idea of building up numbers of stores to support a warehouse. So, I would say de novo is the most likely way it would go in.

(Parker 2363)

As further support for this theory, complaint counsel notes that the top four firms in Orlando are also the top four firms in Gainesville. (CX 3G,O) Publix has also entered all the markets in north and central Florida by edge expansion. (CX 611A-D; Parker 2245)

Respondents deny that Grand Union would have entered Gainesville in accordance with any of the scenarios offered by complaint counsel. (RPF 329–332) Respondents note that there is no document or testimony that in any way suggests Grand Union was interested in the Gainesville market. In addition, respondents cite Grand Union's closing of Colonial's Gainesville stores (F. 173), as further evidence of Grand Union's lack of interest in Gainesville. (RPF 332)

6. Grand Union as a Perceived Entrant

177. Complaint counsel concede Grand Union was not perceived as a potential entrant into Gainesville. No witness who testified about Gainesville perceived Grand Union as a likely entrant. Mr. Spearman, who perceived Grand Union as an entrant into both Orlando and Jacksonville, did not think Grand Union would enter Gainesville

because of the limited growth and [162] potential of the area. (Spearman 797) Similarly, neither Mr. B. Thomas, the President of Winn-Dixie, nor Mr. Roehm thought Grand Union was likely to enter the area. (B. Thomas 1513; Roehm 2725)

7. Other Potential Expanders

178. Respondents cite several companies as potential expanders or entrants into Gainesville. In 1971, Albertson's had no stores in Florida; by 1977 it had 18 (CX 665Z156), and it continues to expand. Jewel, also a recent entrant, may build additional box stores in the area.

Regarding potential entrants, respondents' marketing and management expert testified:

> I think that the most likely would have been that some independent would have opened a store, perhaps in one of the abandoned stores that these people were pulling out of, Colonial and A & P who were rumored to be on the verge of closing their last store there.
>
> But I don't see [Gainesville] as a market where I would venture a guess as to who would come in there next. I don't think anyone would.

(Curhan 2940–41)

One of Colonial's two former stores remains vacant although it is in an average or better location. (Roehm 2722) Colonial has approached potential food sublessees as well as businesses in other lines. (Roehm 2724–25) It may become the vehicle for new entry.

Mr. Roehm perceived Kash'N Karry as a potential entrant into Gainesville even in 1978 because it already had a store in nearby Ocala. (Roehm 2725) Since its acquisition by Lucky and Lucky's announcement of its expansion plans for Florida, Mr. Roehm is convinced it will build one or more stores in Gainesville. (Roehm 2725) [163]

There are several other companies which are within "striking distance" of Gainesville and which could easily serve stores in the area. Jacksonville is only about 50 miles from Gainesville. The following companies have distribution centers in Jacksonville and do not presently serve stores in Gainesville:

Daylight Grocery Co.
United Food Stores, Inc.
Bacon Grocery Co. Inc.[19]

(RX 30T; CX 665Z155–Z180)

Tampa is approximately 100 miles from Gainesville. In addition to

[19] Located in Alma, Georgia, north of Jacksonville but within the "Jacksonville Market Area" as defined by *Progressive Grocer*. (RX 30S)

Publix and Winn-Dixie, there are the following distribution centers in Tampa which do not serve Gainesville:

Affiliated of Florida, Inc.
B & B Cash Grocery Stores
Lucky Stores
E. J. Keefe Company, Inc. (subsidiary Fleming Cos., Inc.)

(CX 665Z155–Z180)

In addition, Piggly Wiggly Southern, located in Vidalia, Georgia, is only about 120 miles from Gainesville and could be considered a potential entrant. (Curhan 2940)

The North Carolina Markets

M. *The Raleigh/Durham, North Carolina SMSA*

1. Demographics and Location

179. The Raleigh/Durham SMSA (F. 48) was the 77th largest in the United States. Between 1970 and 1978, its population increased from 419,254 to 493, 600, or 17.7%, almost two and one-half times the national average. (Bureau of the Census, *Population*)

Between 1970 and 1978, the population of Wake County (the Raleigh subdivision), which includes the city of Raleigh, **[164]** increased from 229,006 to 278,500, or 21.6%. (Bureau of the Census, *Population*)

Raleigh is located in east central North Carolina:

25 miles from	Durham, North Carolina
153 miles from	Richmond, Virginia
160 miles from	Roanoke, Virginia
169 miles from	Norfolk, Virginia
137 miles from	Charlotte, North Carolina
205 miles from	Spartanburg, South Carolina
236 miles from	Asheville, North Carolina
156 miles from	Wilkesboro, North Carolina
233 miles from	Greenville, South Carolina

(Rand McNally)

Between 1970 and 1978, the Durham subdivision, which consists of Durham and Orange Counties, increased in population from 190,248, to 215,200, or 13.1%. (Bureau of the Census, *Population*)

The city of Durham is also in east central North Carolina:

25 miles from	Raleigh, North Carolina
150 miles from	Richmond, Virginia
135 miles from	Roanoke, Virginia
177 miles from	Norfolk, Virginia
134 miles from	Charlotte, North Carolina

223 miles from	Asheville, North Carolina
202 miles from	Spartanburg, South Carolina
135 miles from	Wilkesboro, North Carolina
230 miles from	Greenville, South Carolina

(Rand McNally)

180. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in (i) the Raleigh/Durham SMSA; (ii) Raleigh; and (iii) Durham in 1972 and 1977 were as follows: [165]

Raleigh/Durham SMA

	1972			1977	
Competitor	Food Store Sales (%)	Grocery Store Sales (%)	Competitor	Food Store Sales (%)	Grocery Store Sales (%)
Winn-Dixie	20.9	21.6	Winn-Dixie	24.1	24.8
A&P	17.9	18.5	A&P	15.9	16.4
Colonial	15.4	15.9	Colonial	15.2	15.6
Kroger	6.6	6.8	Kroger	4.7	4.8
Piggly Wiggly N.C.	2.0	2.0	Food Town	2.9	3.0
Fast Fare	1.7	1.7	Lyon Stores	2.0	2.1
Southland	1.2	1.2	Food World	1.9	2.0
Byrd Food Stores	.7	.8	Fast Fare	1.8	1.9

(CX 2P)

Raleigh (Wake County)

	1972			1977	
Competitor	Food Store Sales (%)	Grocery Store Sales (%)	Competitor	Food Store Sales (%)	Grocery Store Sales (%)
Winn-Dixie	27.5	28.3	Winn-Dixie	27.3	28.0
A&P	16.6	17.1	A&P	15.4	15.8
Colonial	14.3	14.7	Colonial	13.9	14.3
Piggly-Wiggly N.C.	3.6	3.7	Food Town	4.0	4.1
Kroger	2.9	3.0	Food World	3.2	3.3
Fast Fare	2.1	2.2	Piggly Wiggly N.C.	2.8	2.9
Li'l General	.8	.8	Fast Fare	2.6	2.7
Southland	.7	.7	Lyon Stores	1.3	1.3

(CX 2Q) [166]

Durham (Durham and Orange Counties)

1972			1977		
Competitor	Food Store Sales (%)	Grocery Store Sales (%)	Competitor	Food Store Sales (%)	Grocery Store Sales (%)
A & P	19.5	20.3	Winn-Dixie	19.6	20.3
Colonial	16.7	17.4	Colonial	16.9	17.5
Winn-Dixie	12.6	13.1	A & P	16.7	17.2
Kroger	11.1	11.6	Kroger	11.3	11.7
Southland	1.7	1.8	Byrd Food	3.6	3.7
Byrd Food	1.6	1.7	Lyon Stores	3.1	3.2
Fast Fare	1.1	1.2	Harris-Teeter	1.6	1.7
Ken's Quickie Mart	.7	.7	Southland	1.6	1.7

(CX 2R)

Raleigh: Between 1972 and 1977, the top three competitors retained the same rank and approximate market shares, although A & P decreased its representation from 11 to 9 stores and Winn-Dixie dropped from 15 to 13 stores. (CX 665Z–424, Z444, Z470) Piggly Wiggly North Carolina (unrelated to Piggly Wiggly Southern of Vidalia, Ga.), dropped from fourth to sixth ranked in 1977, although it still had four stores. (CX 665Z464) Food Town, with two stores in 1977, had no stores in the area in 1972. (CX 665Z428) Similarly, Food World, also with two stores, number five in 1977, entered subsequent to 1972. (CX 665Z440) Kroger, number five in 1972, dropped out of the market by 1977. (CX 665Z452) Fast Fare, a chain of convenience stores, went from sixth to seventh place and Lil'l General and Southland (7–11), also convenience stores, were no longer in the top eight by 1977. Lyon Stores, with one store, entered the top eight. (CX 665Z460)

Durham: In 1972, A & P, with 14 stores, ranked number one, but by 1977 it had only nine stores, its market share decreased, and it dropped to number three. (CX 665Z444) Winn-Dixie went from third in 1972 to first in 1977. Its market share increased by over one-third and its number of stores from five to six. (CX 665Z470) Colonial remained in second place and Kroger held at number four. (CX 665Z452) Southland was number five in 1972 and eighth in 1977. Byrd Food rose from sixth to fifth. Harris-Teeter opened one store in June of 1977 and became number seven, although its store was open for only half the survey year. (CX 665Z 445)

Four-firm concentration ratios for grocery stores, (SIC 541), were: **[167]**

	1972	1977
Raleigh/Durham SMSA	63.5%	63.6%
Raleigh	63.8%	62.1%
Durham	62.4%	66.8%

Four-firm concentration ratios for supermarkets were:

	1972	1977
Raleigh/Durham SMSA	93.5%	86.8%
Raleigh		89.2%
Durham		86.8%

(F. 52, 53)

2. Colonial in the SMSA

181. In 1977, Raleigh was Colonial's divisional headquarters and the location of a warehouse. Colonial operated 18 supermarkets in the Raleigh/Durham SMSA. (Admissions, 62, 63) In 1977, Colonial had a 15.6% share of all grocery store sales in the Raleigh/Durham SMSA. (CX 2P)

Colonial's five-year development plan for its Raleigh Division indicated that, for the period from 1976–80, Colonial planned to add twenty-two new stores, opening thirty-four new stores and closing twelve old ones. This would have added 710,720 square feet of floor space in this Division, increasing its total floor space from 1.2 to 1.96 million square feet by 1980. (CX 353Z9) In its 1976–1980 store development plan, Colonial projected the opening of three new supermarkets in Wake County. (CX 353V) In 1977, Colonial ranked third in the Raleigh market and second in the Durham market with 14.3% and 17.5% share of grocery sales, respectively. (CX 2Q, R)

3. Barriers to Entry

182. Dr. Parker testified that, in his opinion, barriers to entry in the Raleigh market are substantial and discouraged new entry by operators of small supermarket chains. (Parker, 2321)

In Raleigh, shopping centers and small sites are preferred as locations for new supermarkets, rather than free-standing store sites. (Byrd 1570) Mr. Byrd testified that real estate developers prefer to lease shopping centers and small sites to interstate supermarket chains such as Colonial or Winn-Dixie. Crabtree Mall in Raleigh was used as an example: although the owners of the land had an agreement to lease a site to Byrd Foods in the proposed mall, a developer then acquired the property, built the mall, and leased the site to Colonial. (Byrd 1547–50) **[168]**

Mr. Byrd also testified that advertising costs in the Raleigh *News and Observer* are high and that, as a single store operator, he will be unable to maintain such advertising costs indefinitely. (Byrd 1545) He believes that a minimum of three supermarkets is necessary for a supermarket operator to successfully enter the Raleigh market. (Byrd 1551–52; *see also* Stewart 583)

Dr. Parker testified that, in his opinion, barriers to effective entry into the Durham subdivision are quite high. (Parker 2328–29) Entry into the Durham market, according to complaint counsel, has been through the acquisition of second-use locations, which does not add new shopping locations to the city. Byrd's entry into Durham in 1973 was by taking over a former Kroger store (Addison 2653); and its expansion in 1980 was by acquiring a second-use A & P location. (Addison 2653) Food Town, a recent Durham entrant, entered Chapel Hill by taking over a location that formerly housed Byrd's. (Addison 2654)

4. Performance of the SMSA

183. Dr. Parker testified that, in his opinion, there is a high probability that, from an economic standpoint, the Raleigh subdivision is not performing competitively. (Parker 2322) The Durham submarket, he believes, is substantially likely to be performing poorly. (Parker 2328–29) Durham, despite its moderate-size, is thought by Dr. Parker to be highly concentrated. (Parker 2329)

Respondents dispute the conclusion that the Raleigh and Durham markets are not competitive. Mr. Addison, Colonial's Regional Vice President for the Carolinas, testified about the competitiveness of the area:

> I think currently the Durham market is competitive. It is much like Raleigh. I think going back a few years to 1976 A & P closed a number of stores in Durham because they were unprofitable because of the competitive situation there. The stores were fairly good-sized stores. We have had new entrants in the market in Durham. It is a fairly competitive market. In fact, we have seen our market share erode in the last couple of years, three years, particularly in Chapel Hill. We had a store in Chapel Hill that was doing in excess of $100,000 a week, and we were making the highest profit of any store in the Raleigh Division. Today we are breaking even in that store, doing about $53,000 a week. So we have lost about half of the volume in that store in the last couple of years, and that is attested by the fact we have had Food Town move into that [169] market with extremely low prices, and although we have met a lot of the prices we have not been able to maintain the market because we have had to split the pie that many ways.

(Addison 2659)

Winn-Dixie was ranked first in both Raleigh and Durham in 1977. (CX 2Q, R) It entered these markets in the early 1960's when it acquired Kitner-Milner, which had its headquarters in Raleigh. (B. Thomas 1493–94) The Raleigh division serves 110 Winn-Dixie stores.

(Addison 2646) In 1980, Winn-Dixie was in the process of expanding its Raleigh warehouse; when complete, the dry grocery warehouse will be 350,000 square feet. (B. Thomas 1492–93)

A & P is second ranked in Raleigh (CX 2Q) where it has five large new or recently renovated stores. (Addison 2646) Four of these five stores are believed to average over $100,000 in sales per week. (Addison 2646) In Durham, A & P dropped from first to third place between 1972 and 1977. (Addison 2647)

Food Town entered Raleigh in 1975 and by 1977 was ranked fourth. (CX 2Q) By early 1981, it had four stores open and a fifth under construction. (Addison 2647; Curhan 2980) Mr. Addison testified that Food Town probably had the lowest prices in this area. (Addison 2647)

Food Town also entered Durham within the last five years by acquiring a Byrd store in Chapel Hill. Food Town subsequently built a second store in 1978 and is looking for additional sites. (Addison 2651–52, 2654) The store it built in 1978 is thought to be one of the highest volume stores in Durham. (Addison 2655)

Harris-Teeter entered Raleigh with one store in the suburb of Cary in 1978/79. The store is 25,000 square feet with a bakery/deli and service departments. (Curhan 2977; Addison 2647) Harris-Teeter has a second store under construction and it is reported to be looking for additional sites. (Curhan 2977) Compared to its competitors, Harris-Teeter is not low-priced. (Curhan 2977) Harris-Teeter also has one store in Carrboro (Chapel Hill) in the Durham market. (Addison 2653) That store opened during the summer of 1977 (*see* CX 665Z445), and Harris-Teeter was the seventh-ranked competitor in Durham in 1977. (CX 2R)

Food World, number five in Raleigh in 1977, operates two stores there. It built its first store in early 1975 and its second in 1977/78. (Addison 2649) Mr. Addison described Food World as follows: **[170]**

They are large stores patterned much like the Publix supermarkets in Florida. They do not give stamps. They have everyday low shelf prices. They have service departments in most stores and are larger than most of the stores in the market, being in the 30,000-square-foot range.

(Addison 2647)

Food World has not entered Durham.

Piggly Wiggly North Carolina of Kinston, 70 miles east of Raleigh, operates 42 stores in North Carolina; all except two are independently owned. (CX 665Z464–Z465) It is number six in Raleigh with four fairly small, 10,000–12,000 square feet stores. (Spearman 894) It has no stores in Durham. There are also 11 or 12 Grocery Boy Juniors in Raleigh, although they were not surveyed by complaint counsel. (*See* CX 665Z423–Z474.) Mr. Addison testified:

That's a local chain of superette-type stores, neighborhood stores which have prices slightly higher than the supermarkets but lower than the convenience stores. These stores are locally owned, as I stated, and do quite well in the neighborhood they are located in.

(Addison 2647)
There is one ABC Market in Raleigh. It is affiliated with IGA, a wholesaler. (Addison 2647–48)

Best Food, a single store independent, opened a warehouse store in Raleigh in 1980 in a former chain store location. Best Food advertises its low prices in the local newspaper. (Curhan 2981; Addison 2649) There are also approximately 35 convenience stores in Raleigh. These include 7–11's, Fast Fare and Convenience Marts. (Addison 2657) Fast Fare, which has 10 or 12 stores in Raleigh, has recently begun advertising that its prices on milk and dairy products are no higher than the chains' prices. (Addison 2651) As a result of Fast Fare's price advertising, Colonial is now price-checking Fast Fare weekly rather than the on-a-spot basis it had previously employed in checking those stores. (Addison 2651)

Three companies operate more than one store in Durham but have no stores in Raleigh: Kroger, Byrd Food and Fowler's. Kroger, number four in Durham, has three super stores in Durham and one in Chapel Hill. (Addison 2652) They are 37,000–40,000 square feet and are large conventional stores rather than Kroger's somewhat larger Sav-ons. (Addison 2652) [171]

Byrd Food, which is located only 15 miles from Durham in Burlington (Curhan 2982), has four stores in Durham: one in Carrboro (Chapel Hill) in Orange County, and three in Durham in Durham County. (Byrd 1542) One of the Durham stores is a former Kroger store and one is a former A & P store. (Byrd 1543) Byrd Food was ranked fifth in 1977 with 3.7% of grocery store sales. (CX 2R)

Fowler's operates two stores in Durham/Chapel Hill. Mr. Addison described those stores:

Fowler's Food Store is an old-line independent that caters with service and extended wine departments, gourmet foods, with basically shelf prices a little higher than the chains but a lot of service, and he does quite well in Durham and Chapel Hill.

(Addison 2653)
There are ten Big Star stores in Raleigh, five in Durham and one in Chapel Hill. Mr. Addison stated about the ten Big Star stores in Raleigh:

[T]hey range from a low of a 15,000 foot one to a 30,000 square-foot store in Crabtree Shopping Center. Two have bakeries and delis, Cameron Village and Crabtree. The other stores do not have bakery-delies. We are in the process of installing bakery-delies in two stores in January.

We have, I would say, typical supermarkets for that area. We have a semi-everyday-low-price structure, grocery structure. We feature U.S. choice beef and take a great deal of pride in our personal performance in that area and do quite well in Raleigh.

(Addison 2648)

Mr. Addison also described the Big Star stores in Durham:

Basically we have the same type store that we have in Raleigh. We have one store in Durham in the Northgate Shopping Center with a bakery-deli, a 30,000-square-foot supermarket. The other stores range from 18—17.5, in fact to 25,000 square feet, and they are basically as I described the Raleigh stores, supermarkets. We have the same price structure in Durham as in Raleigh, although occasionally we run different features in the Durham market.

(Addison 2654) [172]

The last Big Star to open in Durham was in 1974. (Addison, 2654) Mr. Addison testified that Colonial has had a difficult time locating sites in the growth areas of Durham, although it has been actively seeking sites in the area. (Addison, 2660) Colonial has signed a lease for a store in Carrboro (Chapel Hill), which is scheduled to open in 1981. (Addison, 2660)

5. Alternative Means of Entry

184. Complaint counsel cites Byrd, Harris-Teeter, Food World and Food Town as toehold acquisitions for Grand Union's entry into Raleigh. (CPF 533)

According to the Southeast Study (CX 32F), the Harris-Teeter division of Reddick Corporation operated 62 stores and had $169 million in sales. Harris-Teeter's warehouse is in Charlotte, North Carolina, 137 miles from Raleigh. (CX 32E; Rand-McNally) In 1977, Harris-Teeter had one store in the Raleigh market and less than .7% of grocery store sales in that market. (CX 2Q; CX 665Z445) Respondents, noting that Harris-Teeter had recently been acquired by Reddick Corporation (Spearman 932–34), deny that Harris-Teeter presented a valid potential toehold acquisition, because there is no evidence that this company was for sale at the time of the tender offer. (RPF 740)

The Southeast Study indicated that Food Town operated 30 stores and had $130 million per year in sales. (CX 32F) The company's warehouse is in Salisbury, North Carolina, approximately 70 miles from Raleigh. (Admission 108) In 1977, Food Town operated two stores in the Raleigh market and had 4.1% of grocery stores sales in that market. (CX 2Q; CX 665Z438) Respondents argue that it is impossible to consider Food Town as an acquisition possibility in 1978, because it had recently been acquired by Del Haize. (Curhan 2965; Addison 2649) When asked about Food Town as an acquisition possibility, Mr. Wood testified: "I haven't seen a Food Town store in the South, nor do I know anyone in Food Town in the South, nor have I had any contact." (CX 589 [Wood] at 186)

The Southeast Study indicated that Food World operated 27 stores and had sales of $93 million. (CX 32F) Food World's warehouse is located in High Point, North Carolina, approximately 84 miles from Raleigh. (CX 32I; Rand McNally) In 1977, Food World had two stores in the Raleigh market and had 3.3% of grocery store sales in that market. (CX 2Q; CX 665Z440)

Complaint counsel also mention Harris-Teeter as a potential toehold for entrance into Durham. This company had **[173]** 1.7% of the grocery store market in Durham in 1977. (CX 2R) Complaint counsel postulates that, although Food Town and Food World had no stores in Durham, Grand Union could have used its resources to enter Durham from Raleigh by acquiring one of these two companies. (CX 665Z423; CPF 538)

Community Cash is cited as a potential toehold into Durham. (Parker 2464) This chain of approximately 35 stores is owned by the Littlejohn Family. It has a warehouse and 16 stores in Spartanburg, South Carolina and six stores in Greenville, which were recently acquired from A & P. (Curhan 2975–76) Respondents' witnesses indicate that this chain's rural image and modest sales ($127 million per year) make it a poor fit into Grand Union's operations (Curhan 2975; Spearman 938), and state that there is no information that Mr. Littlejohn is interested in selling his stores. (Spearman 938–39)

Byrd Food, cited by complaint counsel as a toehold possibility in both Raleigh and Durham, operated 15 supermarkets in 1979: one in Orange County and three in the city of Durham. Byrd also operated one supermarket in Apex (Wake county), North Carolina. (Byrd 1541–42; 1545) Byrd had $50 million in sales in 1979 and was profitable. (Byrd 1563) In 1977, Byrd's share of grocery store sales in the Durham-Chapel Hill market was 3.7% and less than .7% in the Raleigh market. (CX 2R; CX 665Z428) In 1979, Byrd operated a 45,000 square foot dry grocery warehouse in Burlington, North Carolina, which is 57 miles from Raleigh. (Byrd 1544; Rand McNally) In 1980, Byrd was expanding its warehouse capacity by an additional 20,000 square feet. (Byrd 1558) In about 1968, Winn-Dixie approached Byrd Food Stores in regard to determining whether Byrd would sell out to that firm. No agreement was reached. (Byrd 1556–58, 1566)

Complaint counsel also mentioned Bi-Lo, Ingles, and Lowes (CPF 544), which do not operate in either Raleigh or Durham, but have warehouses within shipping distance of the two markets, as toeholds for expansion into this area.

According to the Southeast Study, Bi-Lo operated 85 stores in South Carolina, Southwest North Carolina and East-Central Georgia and had $367 million in sales in 1976. (CX 32F) Bi-Lo's warehouse is in Mauldin, South Carolina, which is 233 miles from Raleigh, North Carolina. (CX 32I; Rand McNally) Bi-Lo's stock was publicly traded on the over-the-counter stock exchange. (CX 32F) Respondents' comments regarding Bi-Lo as a toehold acquisition possibility are detailed at F. 91.

In 1976, Ingles operated 40 stores and had $123 million in sales. (CX 32F) As of September 1979, Ingles operated 69 stores and had sales of $249 million. (RX 18) Ingles' warehouse is near Asheville, North Carolina, and is approximately 236 miles from the Raleigh market and 223 miles [174] from Durham. (CX 32I; Rand McNally) Respondents' comments regarding Ingles as a toehold acquisition possibility are detailed at F. 91.

According to the Southeast Study, Lowe's Food Stores operated 34 stores and had sales of $76 million. Lowe's warehouse is located in Wilkesboro, North Carolina and is approximately 156 miles from Raleigh and 135 miles from Durham. (CX 32F, I; Rand McNally) Dr. Curhan testified about Lowe's as follows:

> Lowe's is another successful company that was started in 1955. Many of these companies have had phenomenal growth, if you consider they were started in the '50s and '60s and now they are making their entrepreneurial owners, I am sure, handsome returns. But Lowe's operates very small stores. They have 63 stores and their sales in '78 are $130 million. That's a scant $2 million a store. That's not Grand Union's kind of store. That's the kind of store they have repeatedly closed and found they cannot make money. Lowe's strength is in the North Carolina areas, as one would expect, in Asheboro, in Greensboro, Winston-Salem, High Point area, where they have 19 stores in the area.
>
> They are serviced partly out of their own warehouse, which serves fast-moving items and deal merchandise, but the substantial portion of their goods are purchased from Merchant's Distributors out of North Carolina. Here we have a situation where they are again so rural and so small, in terms of their independent units and without even a warehouse facility, that I just cannot personally see a fit with Grand Union's style of management or what they would like to represent themselves as in a new territory. I see it as an extremely unlikely situation. I would say also that Lowe's tried to acquire Food Town in the '70s, but the FTC prevented it.

(Curhan 2972–73)

Grand Union's Regional Vice President for the Carolinas' Division testified that, in his opinion, Lowe's would not have been a likely acquisition candidate for Grand Union because Lowe's is such a localized chain and because the small size of many of Lowe's stores would not be compatible with Grand Union's operations. (Addison 2657–58) Colonial at one time had considered acquiring Lowe's but rejected the idea in part because of the size and location of Lowe's stores. (Addison 2658) Mr. Wood testified he was not familiar with Lowe's and **[175]** had not had contact with it in regard to acquisitions. (CX 589 [Wood] at 186–87)

The proposed Grand Union/Dart Drug joint venture (F. 125) provided an additional possibility for Grand Union to enter these markets, according to complaint counsel. (CPF 552–556) Another possibility was a joint venture with Peoples Drug Stores. (CPF 557)

On June 9, 1976, Earl R. Silvers met with Sheldon W. Fantle, Chief Executive Officer of Peoples Drug Stores, to discuss a proposed joint venture which would operate supermarket-drug combination stores in Charlotte, Fayetteville, Greensboro-High Point-Winston-Salem, and Raleigh/Durham, North Carolina. (CX 48A-C) On June 10, 1976, Earl Silvers wrote a memorandum to James Wood, with a carbon copy to Bowman Gray, that a joint venture was proposed with Peoples Drug which was similar to the 1972 Dart Drug joint venture. In his memorandum, Silvers noted that a joint venture would be an approach to Grand Union's future sales growth if Grand Union had difficulty in making a satisfactory acquisition. (CX 48A-C)

According to complaint counsel, stores for a joint venture could be supplied by using an independent wholesaler rather than a Grand Union warehouse. (CPF 559) Grand Union could also have entered this area *de novo* by using a wholesaler and, it is claimed, shipped its private label products from its Landover, Maryland warehouse.

Merchants Distributors, Inc. (M.D.I.) is a wholesale food distributor of food and non-food products to independent and chain supermarkets. M.D.I.'s principal place of business is located in Hickory, North Carolina. (CX 629A) M.D.I.'s distribution center, or warehouse, is located on Highway 321 Bypass in Hickory, North Carolina and is 162 miles from Raleigh, 149 miles from Durham, and 54 miles from Charlotte. From this warehouse the farthest M.D.I. distributes is to stores in Albany, Georgia, approximately 450 miles from Hickory. M.D.I. also distributes southwest to Decatur, Alabama, which is approximately 400 miles from Hickory. M.D.I. distributes east to Fayetteville North Carolina which is approximately 175 miles and north to Beckley, West Virginia, which is approximately 200 miles from Hickory. (CX 629A) M.D.I. operates out of a distribution center with a total size of approximately 433,000 square feet. In addition, M.D.I. currently operates a satellite warehouse of approximately 75,000 square feet of dry grocery storage. (CX 629A)

In 1980, M.D.I. served nine Family Mart combination stores which are operated by a subsidiary of A & P. (CX 629B) M.D.I. supplied these stores in the following categories: produce, dry grocery, fresh meat, dairy, and supplies. M.D.I. provides approximately 90% of the needs of the stores in these [176] categories. (CX 629B) These combination drug and grocery stores are of the same type contemplated in Mr. Silvers' memorandum to Mr. Wood regarding the proposed Peoples Drug joint venture.

Mr. George of M.D.I. believed that his company had the capacity to service ten additional high volume supermarkets in this area (CX 629C), a number complaint counsel believes would be sufficient for effective entry into at least two of the three North Carolina markets. (Stewart 578, 583)

6. Other Expanders and Potential Entrants

185. Respondents cite Colonial (Addison, 2660), Winn-Dixie, and Food Town (Addison 2654) as active factors in these markets that are likely to expand in this area. Recent entrants Harris-Teeter and Food Town are suggested as other possibilities to expand in these markets. (RPF 718–19) Dr. Parker suggested Food World as a potential entrant into Durham because it has stores in Raleigh. (Parker 2332)

Kroger withdrew from Raleigh in 1975 (Addison 2648–49), but has stores in Durham, which it serves from its Salem, Virginia warehouse. (C. Thomas 1307) Kroger plans to build a new warehouse to serve its stores in the Carolinas, somewhere between Charlotte, N.C. and Columbia, S.C. (C. Thomas 1310) Messrs. Stewart and Spearman perceived Kroger as likely to enter Raleigh. (Stewart 664; Spearman 781, 895) Similarly, Dr. Parker perceived Kroger as a likely entrant into Raleigh. (Parker 2327) Kroger is presently actively looking for four new sites in Raleigh. (Curhan 2978; Addison 2650, 2660) Its trucks literally have to go through Raleigh to service stores in Goldsboro and Wilmington. (Addison 2660) Therefore, it is probable that Kroger will re-enter Raleigh in the near future and expand its present position in Durham.

Lowe's, one of Dr. Parker's suggested "toeholds" for entering Raleigh/Durham, is located 134 miles away in North Wilkesboro. Lowe's is presently in the process of constructing its first store in Durham. (Addison 2656; Curhan 2982) Mr. Addison commented that Durham is "the natural move" for Lowe's. (Addison 2657) After it penetrates Durham, it may also build stores in Raleigh, since it is within "striking distance" of both cities.

Byrd has one store in Apex, which is in Wake County, although Mr. Byrd does not consider that store to be in the Raleigh market. (Byrd 1542–43) Mr. Byrd testified that he was a potential entrant into Raleigh. He found a site, but Colonial acquired it. (Byrd 1547–49; Curhan

2978) Mr. Byrd testified he would need a minimum of three stores in Raleigh. (Byrd 1552) [177]

Safeway is another potential entrant; it was perceived as such by Messrs. Stewart (Stewart, 664–65), Rowe (CX 607 [Rowe] at 46–47), Spearman (Spearman 895), and Addison (Addison 2650, 2658). Dr. Parker testified that as of June 1978, Safeway was the most likely entrant into Raleigh and a very likely entrant into Durham. (Parker 2327, 2332) Safeway's warehouse in Richmond is only approximately 150 miles from Raleigh. It has recently begun entering Northeastern North Carolina and has stores as close to Raleigh as Rocky Mount and Goldsboro. (Spearman 781–82; Curhan 2983; CX 607 [Rowe] at 47) It has employed a real estate firm to find locations for stores in Raleigh. (Addison 2650) Mr. Addison testified that "if they go to Raleigh I think it would be logical to come to Durham." (Addison 2658)

Lucky's Memco Division, which has two stores in Richmond, has been looking for sites in Raleigh. (Curhan 2978) Mr. Walters, a director of Richfood, the wholesaler which supplies Lucky's Memco stores in Richmond and the Baltimore-Washington area, testified that Lucky is "just entering into the Raleigh market." (Walters 1419)

Mr. Woodberry testified that Ingles has looked at entering the area, although it has not yet begun specific site selection. (Woodberry 1751; Curhan 2983) Ingles is located about 200 miles from Raleigh directly west along Interstate 40. In addition, there are fifteen other firms within "striking distance" of Raleigh/Durham and these may be considered potential entrants. A & P, Harris-Teeter, Merchants Distributors, Inc., and Food Town all serve the Raleigh/Durham area from the Charlotte Market Area, 134 miles away (which includes Salisbury, where Food Town is located). (RX 30Z5–Z7) The following companies also have distribution centers in the Charlotte Market Area and similarly could serve the area:

Associated Grocers Mutual of the Carolinas
Thomas & Howard Co. (Charlotte)
Thomas & Howard Co. (Newton)

(RX 30Z5–Z7)

Food World serves Raleigh from the Greensboro Market Area, 77 miles away. (RX 30Z5–Z7) The following firms also have distribution centers in the Greensboro Market Area:

Central Carolina Grocers, Inc.
Food Fair of North Carolina, Inc.
Thomas & Howard Co.

(RX 30Z5–Z7) [178]

Kroger serves Durham from its Salem warehouse in the Roanoke/Lynchburg Market Area. (RX 30–Z–5–7) The following companies also have distribution centers in that market area and, according to respondents, could serve Raleigh/Durham:

Acme Markets, Inc.
Deskins Super Markets
Malone & Hyde, Inc.
Mick-or-Mack Stores, Inc.
Piggly Wiggly Mid-Mountain, Inc.
Virginia Foods of Bluefield
Virginia Food, Inc.
J. D. Wyatt & Co., Inc.

(RX 30Z5–Z7)

7. Grand Union as a Perceived Entrant

186. The President of Winn-Dixie did not perceive Grand Union as a likely potential entrant into these markets because Grand Union had no warehouse within 200 miles. (B. Thomas 1512) The Group Vice President of Kroger also did not perceive Grand Union as a potential entrant. (C. Thomas 1374–75) No Colonial management witness perceived Grand Union as a potential entrant into Raleigh/Durham. (Stewart 663; Spearman 894, 896; Addison 2683)

8. Grand Union as a Likely Potential Entrant

187. Dr. Parker testified that Grand Union was one of the three most likely potential entrants into Raleigh as of June 1978 because "[I] think—I think it's an attractive area. I think that they would have wanted to get into that area." (Parker 2322) He testified that Raleigh was too far from Landover, Maryland to be served by Grand Union from that warehouse. (Parker 2322)

In Dr. Parker's opinion, Grand Union was one of the three most likely entrants into Durham (Parker 2329, 2332):

> I think that the Durham area is also an attractive area. I think they would have wanted to go into that city. I suspect they would have gone into it about the time that they went into Raleigh. In other words, I think within five years.

(Parker 2331)

Respondents deny that Grand Union was likely to enter Raleigh/Durham by 1983 by any means, because they consider all the toehold possibilities mentioned by complaint counsel **[179]** (F. 184) to have been unsuitable candidates for acquisition by Grand Union.

9. Changes in Colonial's Operations in the Raleigh/Durham SMSA Since the Acquisition

188. According to Dr. Parker, Grand Union was one of the most likely potential entrants into the Raleigh and Durham markets in 1978 (Parker 2327, 2332) and, but for the merger with Colonial, it is likely that Grand Union would have entered one or both of these markets in five years. (Parker 2323, 2331) Therefore, Grand Union's acquisition of Colonial substantially lessened competition in the Raleigh and Durham markets because Grand Union's entry by an alternative means would have provided a deconcentrating effect. (Parker 2327, 2332–33)

N. *The Charlotte/Gastonia, North Carolina SMSA*

1. Demographics and Location

189. In 1978, the Charlotte/Gastonia SMSA (F. 40) was the 66th largest in the United States. Between 1970 and 1978, the population of this SMSA increased 8.6%, from 557,785 to 605,900. (Bureau of the Census, *Population*)

Charlotte is located in south-central North Carolina:

181 miles from	Roanoke, Virginia
276 miles from	Richmond, Virginia
137 miles from	Raleigh, North Carolina
112 miles from	Asheville, North Carolina
235 miles from	Atlanta, Georgia
77 miles from	Wilkesboro, North Carolina
75 miles from	High Point, North Carolina
68 miles from	Spartanburg, South Carolina

(Rand McNally)

190. According to complaint counsel's survey, the shares of food and grocery store sales of the top eight competitors in Charlotte in 1972 and 1977 were as follows:

	1972			1977	
Competitor	Food Store Sales (%)	Grocery Store Sales (%)	Competitor	Food Store Sales (%)	Grocery Store Sales (%)
A & P	16.4	16.8	Harris-Teeter	19.6	19.9
Harris-Teeter	14.9	15.3	Winn-Dixie	11.8	12.0
Winn-Dixie	8.9	9.1	Food Town	11.7	11.9
Colonial	6.8	7.0	A & P	8.9	9.0 [180]
Park n Shop	5.0	5.1	Colonial	5.0	5.0
Food Town	3.6	3.7	Park n Shop	4.8	4.9
Bi-Lo	2.0	2.0	Bi-Lo	2.7	2.8
Li'l General	1.9	1.9	Li'l General	1.2	1.3

(CX 2E)

A & P, which ranked first in 1972 with 29 stores, dropped to fourth place in 1977 with 14 stores. (CX 665Z101) Harris-Teeter was number one in 1977 and had 22 stores. (CX 665Z104) Winn-Dixie went from third to second place and Colonial from fourth to fifth. Park n Shop was number five with four stores in 1972 and number six with nine stores in 1977. (CX 665Z115) Food Town, number six in 1972 with three stores, had ten stores and was third ranked in 1977. (CX 665Z94) Bi-Lo went from one to four stores, but was still ranked seventh. (CX 665Z90)

Four-firm concentration ratios for grocery stores, (SIC 541), were:

1972	1977
48.6%	54.1%

Four-firm concentration ratios for supermarkets were:

1972	1977
65.5%	75.6%

(F. 52, 53)

2. Colonial in the SMSA

191. In 1977, Colonial operated twelve supermarkets in this SMSA. These store were served by Colonial's Columbia Division warehouse and supervised from Colonial's divisional headquarters in Columbia, South Carolina. (CX 331L; Admissions 32) Colonial ranked fifth in sales in 1977. (CX 664A; CX 2E; Admissions 31) Colonial's five-year store development plan for 1976–1980 for the Columbia Division shows that Colonial planned to open two new stores in Charlotte between 1978 and 1980, and to replace two others. (CX 351Z1–Z3)

3. Barriers to Entry

192. Dr. Parker testified that, in his opinion, barriers to effective entry into Charlotte are significantly high. (Parker 2333–34) According to complaint counsel, high risks of financial failure, and advertising and labor costs have resulted in deterrence of new entry by regional chains and contributed to **[181]** the failure of firms which have attempted to enter the market. (Woodberry 1751–52; Addison 2694)

Mr. Addison testified that when Three Guys warehouse grocery stores entered in Charlotte it built a warehouse, acquired four sites and opened two stores in 1980, established firms in the Charlotte market with higher price structures reacted by lowering their prices.

By December 1980, it was known in the trade that these facilities were for sale. (Addison 2694–95)

4. Performance of the SMSA

193. Dr. Parker testified that, in his opinion, the Charlotte SMSA is moderately concentrated and the market is performing less than competitively. (Parker 2333–34) Respondents dispute this characterization of the SMSA, noting that, as the corporate or divisional headquarters for several of the market leaders, the stores receive intense supervision. (RPF 653)

Harris-Teeter, the market leader, was described by Mr. Isaacs as Colonial's strongest competitor. (Isaacs 2566) This company, according to Mr. Addison, is well-managed with competitive prices. (Addison 2669) Park 'n Shop, a local family-run business, was at one time more of a factor in Charlotte with ten stores, but at present is reduced to two or three. (Stewart 646; Addison 2670; CX 665Z115)

Kroger entered Charlotte in 1978 by opening three of its Sav-On stores. (C. Thomas 1331–32, 1334–35) Mr. Thomas of Kroger stated that three stores were opened that year because that was the number of sites which became available within the time frame. (C. Thomas 1340) It opened a fourth store in 1979 (C. Thomas 1334) and by 1981, there were five stores in Charlotte. (Addison 2669) Kroger serves its Charlotte stores from its warehouse in Salem, Virginia, but expects to build a new warehouse somewhere between Charlotte and Columbia. (C. Thomas 1310)

Respondents cite the Three Guys episode (F. 192) as an indication of the competitiveness of this market. Mr. Gubay, an independent from Europe, built four "warehouse box-type stores" operating as Three Guys in Charlotte in 1980. (Addison 2669) All four are almost adjacent to Kroger Sav-Ons. Mr. Gubay opened only two of the stores and is trying to sell the other two. One of the open stores seems to do fairly well; the other is apparently a loss operation. (Addison 2669–2770) Mr. Addison described Mr. Gubay's experience in Charlotte: [182]

> [Gubay] came into Charlotte and announced publicly in the newspapers that he had made a fortune in the retail food business on two continents and was going to make a fortune on the third, and had selected Charlotte as a target market and had targeted 30 percent of the market, that that was his goal, and he felt confident he would get 30 percent of the market.
>
> Well, a year later he's got less than 2 percent of the market and he came out publicly about a month ago and said he'd made a terrible mistake and misread the market. He came in ostensibly with the lowest prices in the area. He was immediately challenged by Food Town, and a long battle ensued, and I think they finally threw it out of court; nothing was proved. And it has been rumored he's for sale.

> He has a warehouse. He built the warehouse before he opened the store in Salisbury. Now the warehouse is up for sale. I understand Kroger turned it down.
>
> And the stores are very austere, no tile on the floor. They are painted black floors, just painted over concrete—no windows, very little lighting. They have skylights and concrete block.
>
> He does have very low prices in groceries, but he has a very limited line of meat and produce, and both the departments are franchised. He does not run them himself but franchises these departments out. And he's just not compatible with that market and has not been accepted by them.

(Addison 2672–73)

Ingles' failure to enter Charlotte is cited by complaint counsel as evidence of the barriers to entry functioning in this market, but is noted by respondents, but as an illustration of the competitive performance of this market. (Woodberry 1751–53)

Mr. Addison testified that Colonial has considered opening a warehouse store in Charlotte and other areas in the Carolinas. After an analysis, Colonial determined that the gross margins under which Grand Union operates its Basics warehouse stores, which are trimmed down, no frills, low service-level stores, the existing price structure in the Carolinas, [183] particularly Charlotte, was already so low that it would be impossible to operate warehouse stores profitably. (Addison 2673–74)

5. Alternative Means of Entry

194. Bi-Lo is cited by complaint counsel as a potential toe hold acquisition to enable Grand Union to enter this market. (CPF 548–50) Bi-Lo had a 2.8% share of grocery store sales in Charlotte and was ranked seventh. (CX 2E) Its warehouse, located in Mauldin, South Carolina, is approximately 96 miles from Charlotte. (CX 32I; Rand McNally) Ingles, whose warehouse was 112 miles from Charlotte, Byrd, with a warehouse 108 miles from Charlotte, and Community Cash, with a warehouse 96 miles from Charlotte, were also mentioned as possible entry vehicles. (CPF 551) A discussion of these companies as acquisition possibilities for Grand Union are set forth in F. 91 [Ingles and Bi-Lo], F. 184 [Byrd], and F. 91, 110 [Community Cash].

Joint ventures with Peoples Drug or Dart Drug (F. 125, 184), and utilization of a wholesaler (F. 184), were other potential alternative market entrant possibilities for Grand Union cited by complaint counsel.

6. Expanders and Potential Entrants

195. Respondents mention Kroger, which had no stores in this market in 1977 and five by 1981 (F. 193) and Colonial, which is seeking

three new sites (Addison 2672) as likely expanders in Charlotte. (RPF 668)

Messrs. Stewart and Spearman perceived Three Guys as having an expanding role in Charlotte. (Stewart 647–48; Spearman 889–90) Later testimony (Addison 2672–73) indicated Three Guys is in trouble in Charlotte and will not be an expander in the market. (F. 192, 193)

Mr. Spearman also cited Safeway as a potential entrant. (Spearman 778, 889–90) Mr. Gubay's warehouse near Charlotte is apparently for sale (Addison 2673) and could be bought by Safeway or any other interested entrant.

All the "toeholds" given for entry by Grand Union into Charlotte—Ingles, Community Cash, Food World and Food Town—are located between 60 and 100 miles from Charlotte. According to respondents, any of them presumably could enter Charlotte at any time. In addition, there are other companies within "striking distance" of Charlotte which could easily enter if they foresee the opportunity for profitable operations. Colonial serves stores in Charlotte from Columbia, South Carolina, 94 miles away. The Thomas & Howard Co. warehouse in Columbia might do the same thing. (Woodberry 1752–53) **[184]**

Food World of High Point, in the Greensboro Market Area, 90 miles from Charlotte, serves stores in the Charlotte Market Area (but not the SMSA) from its warehouse in High Point. Central Carolina Grocers, Inc., Food Fair of North Carolina, Inc. (not the Food Fair which is in Chapter XI operating as Pantry Pride), and Thomas & Howard Co. also have warehouses in the Greensboro Market Area and could similarly serve stores in the Charlotte Market Area. (Woodberry 1752–53) Bi-Lo of Mauldin, in the Greenville Market Area, 96 miles away, serves stores in the Charlotte SMSA.

7. Grand Union as a Perceived Potential Entrant

196. The President of Winn-Dixie, the number two firm in Charlotte, did not perceive Grand Union as a market entrant. (B. Thomas 1511) The Group Vice President of Kroger, which entered Charlotte in 1978, did not perceive Grand Union as a market entrant. (C. Thomas 1374–75) Messrs. Stewart, Spearman and Isaacs, Colonial management familiar with Charlotte, never perceived Grand Union as a potential entrant. (Stewart 646–47; Spearman 889; Isaacs 2584)

8. Grand Union as a Likely Potential Entrant

197. Dr. Parker testified that Grand Union and Kroger were the only potential entrants into Charlotte and that Grand Union would have entered in about five years. (Parker 2334–35) Grand Union's

interest in Charlotte, he believed, would be its attraction as a growth area. (Parker 2334)

Respondents contend that Grand Union's only demonstrated interest in North Carolina was with respect to the proposed joint venture with Peoples Drug Stores. (F. 184; RPF 681) However, 5 of the 12 firms mentioned in the Southeast Study were headquartered in North Carolina, and 6 operate in North Carolina. Dr. Curhan testified that Grand Union would not have entered Charlotte by any means by 1983. (Curhan 2988)

9. Colonial as a Toehold into the SMSA

198. Respondents' state that Colonial was a toehold acquisition in Charlotte. Although the Charlotte area was growing in terms of population through the 1970's, it was not a growing market for Colonial, which had been losing market share. (Spearman 777–78) According to complaint counsel's survey, Colonial's share of grocery store sales in Charlotte in 1972—7.0%—decreased to 5% in 1977. (CX 2E)

At the time of the tender offer, Colonial had 12 stores in Charlotte of which six, according to respondents, were either old or poorly located, resulting in losses. (Addison 2670) Since the acquisition, Colonial has closed four of the nine **[185]** stores in Charlotte and two of the three in Gastonia. (Spearman 837)

10. Effects of Grand Union's Acquisition of Colonial

199. According to Dr. Parker, Grand Union was one of the most likely potential entrants into Charlotte (Parker 2334) and, but for the acquisition of Colonial, Grand Union would likely have entered this market in five years. (Parker 2335) Therefore, Grand Union's acquisition of Colonial substantially lessened competition in Charlotte, because Grand Union's entry by an alternative means would have had a deconcentrating effect on this market. (Parker 2335)

X. EFFECTS OF MARKET CONCENTRATION IN GROCERY RETAILING

A. *Testimony by the Economic Experts*

200. Complaint counsel's economic experts, Drs. Parker and Marion, gave extensive testimony on the effects of concentration on competition in food retailing. Respondents' expert, Dr. Adelman, also gave testimony on this subject.

Dr. Parker stated that structure determines conduct in the industrial paradigm, and conduct is a major determinant of performance. (Parker 2209) Both economic theory and industrial experience show that when industries become concentrated, firms begin to recognize interdependence of decisionmaking. (Parker 2210) He further stated:

"The level of concentration indicates the level, the extent, the recognition of interdependence and the extent of resulting oligopolistic conduct which, in turn, indicates the level of performance in a market." (Parker 2294)

Dr. Marion testified that market concentration affects market performance, and that high concentration is generally associated with high profit levels. He testified as follows:

> Well, I am concerned about the level and trends in concentration because both industrial organization theory and a large amount of empirical evidence indicates that concentration in markets does have significant impact on performance. And this relationship has particularly been studied in relating concentration and profits and an increasing number of studies now are looking also at—studying concentration price relationships.
>
> We have examined concentration productivity, progressiveness, several [186] areas of performance. But I think that the available evidence argues strongly that the concentration does make a difference. It does have an effect on performance. I suppose the leading scholars in this field in terms of looking at concentration profit relationships is Leonard Weiss, a professor of economics at the University of Wisconsin. He reviewed some 45 studies and looked at concentration profit relationships, and concluded that by and large the hypothesis that the structure of the market, the concentration of a market affects its profits has been upheld, has been verified, both in the United States and in foreign countries where these studies have been done.
>
> So, both on the basis of theory and on the basis of a good bit of empirical evidence, it tells us that the structure of markets, an important element of which is market concentration, does have a significant effect on market performance. (Marion 1917–18)
>
> * * * * * * *
>
> High concentration is generally associated with higher profit levels and from a large number of studies this has been shown. Most industrial organization economists also interpret these results as indicating that there are higher prices in concentrated markets. There are a growing number of studies of prices directly, particularly in the baking industry and to some extent the gasoline retailing and some other areas that indicate that there is a positive relationship between concentration and prices. So, the—a high level of concentration suggests that prices and profits in those markets may be higher than they would be with lower levels of concentration. (Marion 1923–24)
>
> * * * * * * *
>
> . . . As you get few enough actors, few enough firms that control a large enough chunk of the sales, that you do recognize the interdependence, the firms do recognize [187] that their behavior is going to be responded to by their competitors and so it's fairly natural that at some point you say, hey, if I cut prices everybody else is going to cut prices, we are all going to end up losing.
>
> So you have a tendency for a live and let live sort of philosophy to develop in a market as concentration gets fairly high. (Marion 1927)

Dr. Adelman, respondents' economic expert, testified along similar lines:

> There is an extensive body of economic theory to the effect that fewness of sellers makes a considerable difference, that the fewer the sellers, the more they are able to

coordinate their price and production decisions in such a way as to get closer to the monopoly objective, maximizing profits or maximizing present value by restricting output and charging a higher price than would obtain under competition.

They may do this by actual agreement, but as economists try to understand it, interdependence or cooperation, as I have called it, takes in a good deal more than collusion.

It takes in a great deal of what you might call a wink and a nod or just subtle ways of doing things in such a way as to accomplish some of that coordination. (Adelman 3196–97)

Dr. Adelman also stated that this relationship between concentration and competition should hold true for every industry, but that one must consider whether the market has been properly defined, and if there are barriers to entry into the market. He testified:

Well, it depends on what you mean by an industry. It should hold for any market at any given time.

But, a market is not necessarily defined or bounded by some conventional definition or classification and, indeed, one of the constant cares or preoccupations of anybody working in industrial organization is to be [188] able to say, do I really have a market under study or is it just a formless or meaningless slice out of the whole economy?

* * * * * * *

Well, Joe Bain pointed out a long time ago that even if you had a properly bounded market and even if it was a concentrated market, if there were low barriers to entry, the market would behave, the firms in it would behave competitively.

And I think that is correct.

(Adelman 3197–98)

B. *The JEC Report*

201. Complaint counsel introduced in evidence, as Complaint Counsel Physical Exhibit G, a study prepared for the use of the Joint Economic Committee, Congress of the United States, entitled "The Profit and Price Performance of Leading Food Chains, 1970–74" ("JEC Report"). This report was prepared by the members of the University of Wisconsin Food System Research Group, which included one of complaint counsel's economic experts, Dr. Bruce W. Marion, as well as Dr. Willard F. Mueller, a former Director of the FTC's Bureau of Economics. The study concluded that retail food chain prices are significantly higher in markets where few firms compete than in more competitive markets. It also found a strong relationship between food retailing market structure and food chain profits. (JEC Report, Complaint Counsel Phy. Ex. G., p. III)

The authors of the JEC Report later published a book, *The Food Retailing Industry, Market Structure, Profits, and Prices.* This publication draws heavily on the JEC Report; it expands and clarified several sections, and it includes two additional chapters. This publication is sometimes referred to as the "Praeger" book, after its publisher, and has been received in evidence as Respondents' Physical Exhibit C.

The Joint Economic Committee subpoenaed information from 17 retail grocery chains. In 1974, the 17 retail grocery chains all ranked amoung the 20 largest U.S. grocery firms. All 17 chains had 1974 company sales in excess of $700 million and 15 of the firms had sales greater than $1 billion. The average company sales of these chains was $2.6 billion. They operated over 12,700 grocery stores during 1974, which represented about 6% of the total number of grocery stores in the U.S. and about 52% of the total number of chain stores (excluding convenience stores) in operation during the year. Their combined sales were $43.8 billion, which represented 69% of all chain food store sales and 37% of total food store sales. (JEC Reports, p. 31) **[189]**

The quality of data utilized in the JEC Report was superior to that used in other industrial organization studies. Dr. Marion testified:

> The data that was relied upon in the JEC Study came from several sources, but the price data was data that was subpoenaed from the chains and came from price checks. The price checks that they had conducted in the various markets in which they operate. So these were checks that the chains themselves had conducted.
>
> Similarly, the subpoena called for sales and profit data by SMSA, by division for each company for 1970, 71, 72, 73 and for the first three quarters of 74. . . . We supplemented this, then, with secondary data from Census on concentration . . .

(Marion 1943)

* * * * * * *

> . . . I think that those that have reviewed our study would have agreed because we did have data at the relevant market level. So many times in industrial organization you have to look at an area broader than the relevant market. In this case we had price data at the SMSA level. We had some profit data at the SMSA level and so—and the other thing we had going for us is that in calculating firm market shares we had hard sales data from the chains. So we knew what their market share was. It was not an estimate. We had hard census data for concentration or we had census data for concentration so we didn't have to rely on nearly as much in the way of estimates as was often the case in industrial organization studies.

(Marion 1944)

* * * * * * *

> Now, about the only real—one of the real benefits of this sort of analysis was that we don't very often have both price and profit data. Most industrial organization studies have one or the other, but not both. **[190]**
>
> And to be able to examine both prices and profits, across metropolitan areas was important. That was one of the advantages because of the data that we had.

(Marion 1955)

The implications of the JEC Report, according to Dr. Marion, are:

> . . . [T]hat competition, as it is reflected in price levels, tends to weaken as the concentration [in a] market goes up or as the relative dominance of a firm increases.
> And similarly, for profits. That profits tend to go up and—with concentration and with the relative dominance of the firm in the market.

(Marion 1960)

* * * * * * *

> Q. For simplification, would I be correct that profits tend to be higher in more concentrated markets?
> A. That's correct. (Marion 1954; *see also* Marion 1950–51)

Dr. Marion also stated that the JEC Report indicated that prices go up faster than profits in concentrated markets:

> I think that one of the other interesting things that we found was that, in fact, prices go up faster than profits, which is—seems to be suggesting that there are some cost-increasing forms of competition that are used more heavily in concentrated markets. That is, advertising, promotions, perhaps a little less control of costs and labor usage so that you get some knowledge in of some inefficiencies. But that—although we would be careful to—in making that comparison, because the samples are not completely the same, that is the way the results show up is that prices do increase faster than profits.

(Marion 1961) **[191]**

According to Dr. Marion, the findings of the JEC Report are consistent with the findings of the majority of the industrial organization studies that have been done. (Marion 1960)

The JEC Report was subjected to extensive hearings in conjunction with the JEC Report. (Marion 1956) These hearings were published as part of the report and official notice was taken of the hearings. (Tr. 3178) The JEC Report was reviewed by some 26 economists who submitted letters to the Joint Economic Committee, without exception commending the report. (Praeger book, p. v) Dr. Marion testified that their comments "generally are, I think, quite positive." (Marion 1959) Some of these comments are set out by complaint counsel. (Complaint Counsel's Reply Brief, pp. 58–74) There was also criticism of the JEC Report at the hearings, principally by Dr. Timothy M. Hammonds, an economist for the Food Marketing Institute, the members of which are largely food chains. (Praeger book, p. v; Complaint Counsel's Physical Exhibit G, *Hearings,* pp. 77–114; *see also* Marion 1957) Dr. Marion testified that as a result of the criticisms some reanalysis of data was performed. One such reanalysis included the effect of wage rates on prices. The reanalysis did not reveal that wage rates had any significance in the price model. (Marion 1956–57)

Respondents' expert, Dr. Adelman, gave extensive criticism of the

JEC Report during defense hearings. Respondents also contend that cross-examination of Dr. Marion demonstrated that the JEC Report is unreliable. (RPF 141–51)

Respondents point out as a serious defect in the JEC Report the fact that the data sample used for the price study included only dry groceries and excluded prices for meat, produce and baked goods. (RPF 142) Because dry groceries account for only 37% of the merchandise sold in a store, the study did not take into account different marketing philosophies, *e.g.,* one firm may feature lower prices on meats and dairy items. Dr. Marion explained that the selection of items for the price comparison was made on the basis of the best data available, and he pointed out the difficulties of comparing prices on meat and produce: ". . . there is considerable variability in cutting methods, packaging, trim, and so one firm handles a high choice, another one handles a high good beef. One firm packages their produce, another one doesn't. You know, it's different than comparing Campbell Soup and Campbell Soup." (Marion 2164)

Respondents also criticize the use of only one month—October 1974, for the price analysis. In preparing the profit analysis, Dr. Marion used several years' data to take out temporary distortions in the market. (RPF 143; *see* Marion 2115) **[192]** Dr. Marion conceded that because the price analysis used data for only one month it increased the chance that his findings could be wrong if the sample was not representative. (Marion 2117) However, Dr. Marion believed the chances of such an error was extremely small: "In my judgement, finding a significant relationship with one month of data, if anything, adds credence to the results in the sense that the chances of finding relationships when there are none—when you are using only one month of data, are extremely small." (Marion 2117)

Respondents point out an inconsistency between the price analysis which purports to find a strong relationship between prices and concentration in 1974, and the profit analysis which found no relationship between profit and concentration in 1974. (RPF 144; *see* Marion 2055–56, 2116–17) Dr. Marion was "concerned" about this inconsistency. (Marion 2116) This result could be attributed to the inclusion of A & P in the profit analysis. During 1974, A & P was engaged in its' WEO program in which prices and profits were drastically reduced. If A & P is excluded from the analysis, the relationship between concentration and profits in 1974 is statistically significant. (*See* Respondents' Physical Exhibit C [the Praeger book], pp. 88–90) The data suggests that concentration had a negative and insignificant influence on A & P's profits in 1973 and 1974 when the WEO program was in effect. (Respondents' Physical Exhibit C, p. 90)

Respondents also criticize the JEC Report for using a curvilinear four-firm concentration ratio to measure concentration, instead of the traditional four-firm concentration measurement. (RPF 146) Dr. Adelman testified that he had never seen the curvilinear approach used in any other research effort. (Adelman 3285) Dr. Marion admitted that the use of a curvilinear form of concentration ratio is "something that two scholars can disagree on," but that several studies have utilized curvilinear forms. (Marion 1957–58) Dr. Marion explained at the time of the Congressional hearings on the JEC Report that there was nothing inappropriate in the use of the nonlinear form of concentration measurement:

> On the contrary, on *a priori* grounds economic theory suggests that prices and profits would not be linearly related to concentration over the entire range of concentration. Rather, *a priori* reasoning suggests that some critical level of concentration must be reached before firms would have sufficient market power to raise prices above competitive levels. Thereafter, prices would be expected to rise until perfect collusion is reached, after which prices would level off. The functional form we used is a signoid function, which has a lazy S **[193]** shape. The estimated prices using this form are shown in Figure 1. One of the chief purposes of industrial organization research is to identify critical levels of concentration, not merely to identify whether or not a positive relationship exists. We believe our analysis makes a significant contribution to knowledge by helping to identify the critical level in food retailing.
>
> Given the above reasoning, which is based on industrial organization theory, it is not surprising that our nonlinear measure of CR 4 is more significant than the linear form.

(*Hearings,* p. 87)

C. *Respondents' Request for Sanctions*

Respondents seek sanctions pursuant to Section 3.38(b) of the Rules of Practice based on an alleged failure of complaint counsel, through its expert witness Dr. Marion, to produce certain data underlying the JEC Report. (RPF 108–40) One disputed issue in this proceeding is whether there is a relationship between concentration and competition in the food retailing industry. Potential competition theories apply to markets where concentration is high and the markets are not performing competitively. *United States* v. *Marine Bancorporation,* 418 U.S. 602, 630–31 (1974).

Dr. Marion testified with respect to the relationship between concentration and competition and based his opinion, *inter alia,* on his own research represented in part by his co-authorship of the JEC Report and the Praeger book. Respondents sought access to the data underlying the JEC Report and the Praeger book for cross-examination purposes. Respondents contend that all *available* underlying data was never produced and that sanctions are appropriate. Respondents seek a ruling under Section 3.38(b)(2), adverse to complaint counsel, to the effect that there is no relationship between concentration and competition in food retailing.

After being advised that Dr. Marion would testify concerning the JEC Report, respondents sought the underlying data from complaint counsel. Complaint counsel, after talking by telephone with Dr. Marion, turned over to respondents certain drafts of the Praeger book, and advised respondents that all the raw data underlying the JEC Report had been returned to the Joint Economic Committee. Respondents contacted the staff of the Committee and were advised that the documents in question could not be turned over without a subpoena. On January 10, 1980, respondents requested and obtained the issuance of a subpoena duces tecum to Dr. John Albertine, Director of the JEC, **[194]** requesting "[a]ll statistical data underlying the [JEC Study], including, but not limited to all information received in response to JEC subpoena of 17 retail grocery chains." (Specification 1 to Subpoena) This subpoena was stayed by the Commission *sua sponte* on January 30, 1980, and the Commission quashed the subpoena on June 30, 1980 on the grounds of congressional immunity. *Grand Union Co.,* 95 F.T.C. 926 (Interlocutory Order 1980)[20]

After testifying during the case-in-chief and learning of respondents' interest in such data, Dr. Marion later discovered that certain computer printouts of the regression analyses were available in Madison, Wisconsin. The existence of this data was made known to complaint counsel during the evening of January 28, 1981, at the time of Dr. Adelman's defense testimony. Complaint counsel promptly advised respondents of the availability of this data. (Tr. 3222 *et seq.*) The data apparently was located in the files of a co-author of the JEC Report who is no longer associated with the University of Wisconsin. (Tr. 3222–24) Respondents' counsel stated that this material apparently was "exactly the kind of things" needed to replicate the study. (Tr. 3225) It was agreed that the data would be produced to respondents' counsel and that respondents would be given the opportunity to recall both Dr. Marion and Dr. Adelman for further examination. (Tr. 3232, 3496–97, 3500)

By letter of February 5, 1981, Dr. Marion advised respondents' counsel that all data had been furnished. (RX 44) Dr. Adelman and Dr. Marion were subsequently recalled as witnesses. During Dr. Marion's testimony on recall, he acknowledged that there was certain data

[20] By order dated September 12, 1980, a ruling was entered by the Administrative Law Judge to the effect that there was no requirement in the Commission's Rules of Practice, the Federal Rules of Civil Procedure, or the Federal Rules of Evidence that data underlying the JEC Report must be produced for cross-examination purposes. The issue of production of the data was a matter within the discretion of the trier of fact. Further, it was determined that respondents' could adequately cross-examine Dr. Marion without access to the underlying data to the JEC Report, and that the JEC Report was *prima facie* admissible without access to the underlying data. (Order Ruling on Respondents Objections to Admissibility of the Testimony of Dr. Bruce W. Marion and the JEC Report, September 12, 1980)

available to him that he had not furnished respondents. (Marion 3627–28) Dr. Marion testified that this additional data was confidential (pursuant to the JEC rules) and could not be made available to respondents. (Marion 3628) Respondents assert that this claim **[195]** of privilege was made without following formal procedures. (RPF 134)

On April 21, 1981, after all testimony had been completed, Dr. Marion, feeling that his integrity had been attacked, addressed a letter to complaint counsel detailing all his efforts to provide respondents with the materials underlying the JEC Report which were available to him to produce. This letter was subsequently received in evidence. (CX 671A-D) Respondents claim that data has been withheld, if not deliberately, by the "unsystematic and nonchalant response" by both complaint counsel and Dr. Marion. (RPF 137)

It is concluded that there was no clear disregard of the Commission's discovery processes by complaint counsel, or by Dr. Marion. While there was substantial delay in furnishing information to respondents, it apparently was occasioned by misunderstandings concerning the type of data being sought. Once it was made clear to Dr. Marion what was being required, he made every effort to be cooperative and to provide documents, which effort required a diligent search for records at several locations. (CX 671C)

Respondents were provided with all available underlying data. There has been no prejudice to respondents' right of cross-examination. To enter the broad sanction requested by respondents on this controversial issue would be to ignore other substantial evidence of the relationship between concentration and competition.

Conclusions

Summary of Proceedings

A. *Identity of the Parties*

The Grand Union Company is a supermarket chain which, as of April 1978, operated 479 retail food stores, making it the eleventh largest supermarket chain in the country. During the fiscal year ending in March of 1978, Grand Union had sales of $1,649,274,000, $1,574,119,000 of which was garnered from sales by its retail food operations. All of its retail food stores are supermarkets. Grand Union operated supermarkets in the Northeastern United States with a store as far South as Fredericksburg, Virginia. Grand Union also operated supermarkets in Southern Florida on both the East Coast and West Coast of that state. (F. 2, 3, 125, 145–146)

Colonial Stores Incorporated operated a chain of supermarkets which, as of November 18, 1978, numbered 378. In addition, Colonial owned and operated facilities manufacturing [196] or processing bakery goods, dairy products, jams and jellies, mayonnaise, salad dressings, etc., almost all of which were sold to Colonial's retail stores. Colonial had total sales of $1,053,167,343 for the fiscal year ending on December 31, 1977. Colonial's assets at the end of this fiscal year were $189,118,000, and its net earnings were $10,907,000, making it the fifteenth largest supermarket chain in the United States. All of Colonial's retail food outlets were supermarkets. Colonial operated supermarkets as far North as Richmond, Virginia, through the Carolinas, Georgia, Alabama and in Florida as far South as the Tampa/St. Petersburg area. (F. 6, 7, 9, 120)

B. *The Acquisition*

On June 21, 1978, a consent decree of ten years' duration entered into between Grand Union and the Commission expired. This consent decree had required that Grand Union seek and obtain Commission approval before making any acquisition involving five or more grocery stores or more than $5 million in grocery store sales, or where Grand Union's stores and those to be acquired would account for 5% or more of total grocery or food store sales in any city or county. *The Grand Union Company,* Docket 8458, 73 F.T.C. 1049, 1055 (1968).

On June 29, 1978, Grand Union proposed a merger of Grand Union and Colonial, with Grand Union paying $30 per share to Colonial stockholders. This merger offer was rejected by Colonial's Board of Directors on July 6, and various federal and state litigation was commenced by Colonial to prevent a takeover. When Grand Union increased its offer to $35 per share at an August 1, meeting between representatives of both companies, Colonial's Board of Directors voted 7–5 to accept the offer, and the legal actions were terminated. Grand Union acquired 3,471,886 shares of Colonial stock, or approximately 91% of the shares outstanding. (F. 10–12)

On June 30, 1978, Grand Union gave the Commission the 60 days' advance notice of its intention to acquire Colonial required by the 1967 "Commission Enforcement Policy with Respect to Mergers in the Food Distribution Industry." 1 (CCH) Trade Reg. ¶ 4525 at 6905. Commission staff replied in a letter dated July 6, 1978, that "full attention and consideration" would be given to this acquisition, and noted an agreement between Commission staff and respondents' counsel to consider the Colonial acquisition in conjunction with another proposed sale to Grand Union of eight Colonial stores located in the Tampa/St. Petersburg area of Florida. (F. 9, 13)

On August 18, Commission staff and Grand Union entered into a Hold Separate Agreement with regard to Colonial assets of 90 days' duration, an agreement which was extended until December 1, 1978.

In consideration for this, Commission staff [**197**] agreed not to seek a temporary restraining order or temporary injunction. The complaint was issued on November 21, 1978. On November 29, 1978, the Commission and Grand Union entered into a final agreement to preserve trademarks and trade names for the pendency of the proceeding. (F. 13) Colonial was subsequently merged into Grand Union and is operated as a division of Grand Union. As of February 5, 1979, Colonial Stores Incorporated, a Delaware corporation, ceased to exist as a separate entity. (F. 12)

C. *Grand Union's Interest in the Sunbelt*

Grand Union, established in 1872, was a publicly held company until it was acquired by Cavenham Limited, a British corporation, between 1973 and 1976 in a series of transactions. (F. 1, 15) Following Cavenham's acquisition of Grand Union, the company adopted a policy to limit its future expansion and acquisition to supermarket concerns. Other Grand Union divisions, *i.e.,* convenience stores, catalog showrooms, and discount stores, were not financially successful and were later sold. A decision was made to concentrate on supermarket acquisitions, since it was believed by Cavenham executives that Grand Union's strength was in supermarket operations. (F. 68)

Grand Union's Vice President of Corporate Planning was assigned to study potential supermarket acquisitions in the Southeast and he eventually submitted a study enumerating twelve possible acquisition candidates. Colonial was not included in this study. (F. 69) Another study, of the Southwest, was also submitted. (F. 70) The Southeast and Southwest, *i.e.,* the "Sun Belt, "were thought by Grand Union officials to be a promising expansion area because this was a high growth area, both economically and in terms of population growth." (CX F. 71)

As the ten-year Commission ban on Grand Union acquisitions was coming to an end, Grand Union officials granted media interviews in which they expressed a clear interest and intention to expand supermarket operations, emphasizing the role that the extensive financial resources of Cavenham would play. (F. 72)

Up until that time, Grand Union was primarily based in the Northeast, which, because of its competitive nature, lack of population growth, and labor situation, was felt not to be a desirable area. (F. 73, 76) In the Southeast study, the Grand Union official observed that each of the chains in the study is profitable "and as a group they are higher than national averages, indicating a market area which seems to avoid overstoring. With population growth projected to be one of the leading areas of the country, it would seem to insure future potential." (CX 32G) In addition to the opportunities offered by the Southeast, Grand Union officials expressed a perference [**198**] for expansion into this area as it would fill a gap between Grand Union's Northeast and existing Florida operations. (F. 72, 74, 75)

D. *Grand Union's Financial Position*

Grand Union had the financial resources to undertake an extensive program of expansion. Between 1973 and 1977, Grand Union's percentage of pre-tax profits to sales increased by over 60% (from 1.13% to 1.86%), while after tax profits on sales increased by over 80% (from .6% to 1.1%). Grand Union had a capital expenditure budget of $150 million to put into operation expansion and acquisition plans to be financed by funds then available and funds internally generated over a five-year period. This would correspond to a Grand Union development plan which called for the opening of 100 new stores within five years, with financing to be derived from retained profits and by application of anticipated depreciation charges. In 1978, the financial position of Grand Union was described as approximately $100 million in cash and temporary cash investments. (F. 77)

The Grand Union tender offer to Colonial shareholders was for about $135 million, of which $120 million came from cash and temporary cash investments, other internally generated funds and borrowing against certain lines of credit. (F. 78) After the acquisition, Grand Union still had $60 million in a temporary cash investment fund. (F. 79) Grand Union thereafter made a cash tender offer for Weingarten, a supermarket firm with stores located in Texas, Louisiana, and Arkansas, with sales of $575 million in 1979. (F. 79)

E. *Grand Union's Capabilities*

Grand Union has been in the food retailing industry for over 100 years, and substantially all of its revenue in recent years has been drived from supermarket operations. (F. 1–3) Its parent, Cavanham Limited, is engaged in the operation of supermarkets and other retail food outlets in the United Kingdom, and in the manufacture and sale of food and food products in the United Kingdom and elsewhere in Western Europe. (F. 6) Grand Union also had emphasized management training programs in its supermarket operations. (F. 80) The Colonial acquisition represented a geographic market extension, not an entry into a different or even an allied market; Colonial's operation was identical to Grand Union's, and in an adjacent geographical area. It is beyond question that Grand Union had the operational capabilities to expand into this adjacent geographical area either *de novo* or through a toehold acquisition. (F. 80)

F. *The Relevant Markets*

Section 7 of the Clayton Act, 15 U.S.C. 18, prohibits **[199]** mergers which may substantially lessen competition "in any line of commerce in any section of the country." Therefore, determination of the relevant product and geographic market is a necessary predicate to the examination of the legality of a merger under the Clayton Act, *United States* v. *Marine Bancorporation,* 418 U.S. 602, 618 (1974), because measurement of the substantiality of impact may be made only in terms of the market affected. *United States* v. *E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 593 (1957); *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 324 (1962). "[T]he problem of defining a market turns on discovering patterns of trade which are followed in practice." *United States* v. *United Shoe Machinery Co.,* 110 F. Supp. 295, 303 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954)

1. Relevant Product Market

It is complaint counsel's contention that, while grocery store sales is an appropriate product market in which to analyze the effects of this merger, sales by supermarkets best describe the competitive interplay of the firms involved in the merger, and therefore is the most appropriate product market for this proceeding. (CPF at 133–136) According to complaint counsel, supermarkets differ from other retail food and grocery stores on the basis of various factors including store size, variety of products, selling prices, sales volume, and type of customer. (F. 17)

Respondents agree that retail grocery store sales is a relevant product market for this proceeding (Respondents' Reply Brief, p. 120), but argue that "supermarket" is a term too narrow and imprecise to be used as the basis for the fashioning of a relevant market. According to respondents, "[n]o case of complaint analyzing a merger in the retail food industry, other than this one, has utilized a product market or submarket definition more restrictive than that of 'grocery stores.' " (RPF 941)

Confining the relevant market to "supermarkets", rather than retail food stores or grocery stores (the statistical difference between these latter two is so small that for the purposes of this case, use of these terms is interchangeable) would eliminate box and warehouse stores, commissaries, convenience stores, mom-and-pop stores, delicatessens, etc., businesses which respondents argue represent competitive factors in this case. (F. 27, 28)

The outer boundaries of a market are set by the "reasonable interchangeability of use" or "cross-elasticity of demand" between the product and proposed potential substitutes. *Brown Shoe,* 370 U.S. at

325. However, the relevant market cannot include the infinite range of possibilities that may in some aspects be interchangeable, and yet still retain any **[200]** meaning as a concept and provide any guidance in fashioning a rule. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose cross-elasticities of demand are small. (*See Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 612, n. 31.) It is now established that within a broad product market well-defined submarkets may exist which constitute product markets for antitrust purposes. *Brown Shoe* outlines the criteria by which such product markets are to be established. These are:

industry or public recognition of the submarket as a separate economic identity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

370 U.S. at 325–28

In establishing these guidelines, the Court noted that absolute precision in definition of the market is not what is required; the definition of the relevant market must merely reflect the market realities. 370 U.S. at 342, n. 69 In addition, it is not necessary that the market chosen fulfill *all* of the criteria. *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 276–77 (1964); *Reynolds Metals Co.* v. *FTC,* 309 F.2d 223, 227 (D.C. Cir. 1962)

Under the *Brown Shoe* standard, it appears that supermarkets having sales of at least $1.5 million per year and of the 10–56,000 square foot size (F. 18), represent the relevant product market. The indicia of a supermarket product market include:

a. *Price sensitivity:* supermarkets price-check each other for competitive purposes, but rarely price-check non-supermarket food stores. (F. 21) [This also relates to industry recognition of the parameters of the relevant market.] Respondents dispute this, and argue that price sensitivity exists to varying degrees among almost all stores on the retail food store continuum. While the record discloses that occasional price-checking is conducted by large stores with respect to certain products sold in convenience stores, this is only on very select items such as bread and milk, soft drinks and beer. In addition, supermarkets have distinct price structures when compared to other types of stores. The record evidence shows that the gross margins of supermarkets are 15–20% as opposed to 30% for non-supermarket grocery firms such as convenience stores. (F. 21) **[201]**

b. *Industry recognition:* both Colonial and Grand Union operate only supermarkets. (F. 3, 6, 20) Decisions by supermarkets regarding pricing, store locations, and advertising are focused on other supermarket firms. (F. 22) Trade associations and trade journals cater to supermarket owners. (F. 17)

c. *Peculiar characteristics:* the array of products carried by supermarkets distinguish them from other retail food stores, which leads to a distinct type of customer being attracted to supermarkets, the "one-stop shopper." Convenience stores cater to the "quick in-quick out" customer. Supermarkets carry from 8 to 12 thousand products which include fresh meat and produce, groceries, health and beauty aids, and general merchandise. Convenience stores carry a very limited assortment of products, and sales volume is concentrated on items such as milk, bread, cigarettes and beverages. (F. 19, 22) Sales per customer average from $11–15 in supermarkets and $1–3 in convenience stores. (F. 22) Grand Union's and Colonial's supermarkets averaged over $3 million dollars in annual sales per store, while convenience stores averaged from $140 thousand to $325 thousand per store. (F. 20, 22) While all people must have food and other related items and shoppers sometimes patronize various types of stores in any given week, supermarkets' number and variety of products and the sales volume per customer and per store clearly indicate a pattern of trade that is being followed.

d. *Unique production facilities:* supermarkets differ in size and physical plant from other food retailers. Supermarkets range in size from 10,000 to 56,000 square feet per store; convenience stores range from 800 to 3,000 square feet per store. Convenience stores usually have one employee on duty at any given time, whereas supermarkets have many employees in service positions. (F. 18, 22) The number and variety of products and services constitute a unique production facility.

Respondents cite the arbitrary nature of a dollar sales figure, a $1.5 million cutoff, as support for their claim that the product market fashioned by complaint counsel is inappropriate, noting that the Supreme Court rejected such a **[202]** dollar cutoff in *Brown Shoe* in defining the market (370 U.S. at 326), as did a California district court in *United States* v. *Tracinda Investment Corp.,* 477 F.Supp. 1093, 1103 (C.D. Cal. 1979).

In the latter case, the government attempted to narrow the product market to motion pictures grossing over $1 million and to "quality" motion pictures. As the court stated in that case:

> Plaintiffs contention that only motion pictures grossing over one million are in the effective area of competition draws an arbitrary distinction with no basis in fact. Relative success of a particular product is not a factor contained in the *Brown Shoe* analysis.

* * * * * * *

This distinction is not recognized by the public; whether grossing more than one million, or grossing less, each motion picture is manufactured with the same facilities; as a product line, each does not have characteristics peculiar to itself rendering it generally noncompetitive with others; and each is not directed toward a distinct class of customers.

477 F.Supp. at 1103.

Both cited cases were concerned with whether to include certain products within a product grouping, and the courts did not find sufficient factual characteristics to establish separate markets for the products. These cases do not establish a rule that there can be no submarkets based on price levels or ranges. In *Brown Shoe,* the Supreme Court merely concluded that a price/quality distinction with respect to shoes would be "unrealistic" (370 U.S. at 326) in that case, not that such a distinction could never be appropriate.

The two cases cited by respondents relate to the appeal of the seller to consumer preferences; there were not sufficient distinguishing features to demonstrate a separate market. In this case, however, the gross sales of the supermarkets do not relate merely to the success of the seller at his trade, but rather, are tied to his mode of operations. It would be an unrealistic recognition of competition to compare Grand Union and Colonial, with their average per store gross of over $3 million per year (F. 21) to, for example, the 7–11 stores operated in Richmond, Virginia and Orlando, Florida, which had average sales of $325,000 and $290,000 per year, respectively (F. 22). The Majik convenience stores in Macon, Georgia which averaged $140,000 per store annual gross, are **[203]** clearly operating quite differently than Grand Union and Colonial; it is not merely that Grand Union and Colonial were more successful in pursuing the same line of operations. (F. 22) Supermarkets offer different facilities, different prices, more variety of products—a cluster of products and services, and appeal to a different type of customer—the "one-stop shopper."

The record indicates that Grand Union was a supermarket firm, and was interested in pursuing an acquisition of Colonial because it was another supermarket firm and, thus, compatible with Grand Union's operations. Dr. Curhan testified with regard to Lowe's supermarkets, which averaged $2 million per store in gross sales, that these were not Grand Union's type of store, that those are the type of store Grand Union had closed because they were not profitable for Grand Union. (F. 21)

As the Supreme Court stated in *United States* v. *Continental Can Co.,* 378 U.S. 441, 449 (1964), competition must be recognized where it does, in fact, exist. The record in this proceeding demonstrates that supermarkets only compete with other supermarkets. This is the area of substantial competition in grocery retailing, as revealed by the overall volume of sales by supermarkets. Although supermarkets and other food retailers may serve complementary functions, *United States* v. *Hughes Tool Co.,* 415 F.Supp. 637, 641 (C.D. Cal. 1976), for the purpose of defining the relevant market, only companies which compete in offering the same "cluster of services" provided by supermarkets offer significant competition.

In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 356–57 (1963), the Court found that commercial banks represented a line of commerce distinct from other financial institutions that offered some of the same services, but did not compete in the cluster of products and services which characterize commercial banking. Supermarkets, like commercial banks, represent a market "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corp.* v. *FTC,* 296 F.2d 800, 811 (9th Cir. 1961)

Respondents are perturbed by the arbitrary nature of a market which includes markets with $1.5 million in annual sales, but excludes the competition with only $1.499 million.[21] [204] However, the act of fashioning a market by nature involves line-drawing. This is permissible where the distinctions made reflect commercial realities. The record in this case is replete with evidence that supermarkets, by and large, compete with other supermarkets, and that this is the appropriate market in which to judge the effect of Grand Union's acquisition of Colonial.[22]

Respondents argue that the various types of food retailers represent a continuum of product and service offerings (RPF 945) similar to the wine industry, where the Commission refused to find that sweet and dry wines represented two distinct lines of commerce. *Coca-Cola Bottling Company of New York,* 93 F.T.C. 110 (1979) Although the Commission recognized that the sweet wines sold by Mogen David represented one far end of the continuum, it found that, for some consumers, there is interchangeability of use, or cross-elasticity of demand, with products nearer the center. 93 F.T.C. at 204; *see also Heublein, Inc.,* 96 F.T.C. 385, 576 (1980)

In *Coca Cola,* consumer surveys indicated that Mogen David sweet wines did elicit cross-elasticity of demand from purchasers with other, drier, wines. 93 F.T.C. at 202 In this case, unlike those cited above, respondents have offered no evidence which would support the con-

[21] The establishment of $1 million annual sales volume as a definition of "supermarket" in 1972 was a decision reached by the staff of the Commission and the Department of Agriculture. This definition was agreed to in 1974, long prior to this present proceeding. (Parker 3461–62) In adopting this figure, Dr. Parker testified that they were "going with the crowd" (Parker 3462), which included such trade journals as *Progressive Grocer* and *Chain Store Age.* The 1977 supermarket definition of $1.5 million in annual sales volume was an adjustment for inflation, since the Consumer Price Index for food at home had gone up 56% between 1972 and 1977. After consulting with the Department of Agriculture, and checking with *Progressive Grocer* and the Food Marketing Institute, Dr. Parker rounded off the 56% inflation rate to 50% (1.5 million) because Bureau of the Census publishes data in even-numbered figures. (Parker 3463, 3480–82) (*See* Complaint Counsel's Reply Brief, pp. 45–47.)

[22] Concentration ratio data regarding retail grocery sales (F. 52) indicate sufficient concentration in this area that, if this were deemed the relevant market, scrutiny under the Clayton Act would still be warranted.

tention that consumers view, for example, convenience stores and delicatessens as satisfactory substitutes for supermarkets.

As the Supreme Court noted in *United States* v. **[205]** *Phillipsburg National Bank,* 399 U.S. 350, 360–61 (1970):

> *Philadelphia [National] Bank* emphasized that it is the cluster of products and services that full-service banks offer that as a matter of trade reality makes commercial banking a distinct line of commerce. Commercial banks are the only financial institutions in which a wide variety of financial products and services—some unique to commercial banking and other not—are gathered together in one place. The clustering of financial products and services in banks facilitates convenient access to them for all banking customers . . . . In short, the cluster of products and services termed commercial banking has economic significance well beyond the various products and services involved. [footnote omitted]

The wide variety of grocery products, the check cashing, meats and produce, bakery counters, drug items, household items, beauty aids, etc., are significant as a group, despite the fact that each of these is available independently elsewhere. The "cluster of services" offered by supermarkets represent a distinct product market, and, to reflect trade realities, this is a distinct product market for antitrust purposes.

Convenience stores are not generally price-checked by supermarket firm operators. They carry little, if any, produce and meat, and indeed, average only 500–3000 items. (F. 22) Supermarkets stock from 8–12,000 items. (F. 19) Convenience stores generally have only one employee per shift and they average sales of from $1–3 per customer, as compared to the $11–15 average sale for supermarkets. (F. 22) Convenience stores are generally not considered in supermarket expansions and store location studies. (F. 22) Basically, the only competition they offer to supermarkets is in terms of hours of operation. (F. 22)

Mom-and-pop stores are the little corner stores that tend to be family operated. (F. 22) They carry little meat and produce, do not advertise in metropolitan newspapers, and are not usually price-checked by supermarket firm operators. (F. 23)

Limited assortment stores, selling approximately 400–800 items, no meat and produce, require the customer to bring his own box or bag. (F. 24) There is generally no payment by check. (F. 24) Because they rely heavily on "deals" from manufacturers and because they offer little service, their prices are generally lower than those in supermarkets. (F. 24) **[206]**

Fast food outlets, although competition in the sense that they sell food, are clearly not in the relevant market, and are excluded from census figures. (F. 29)

Military commissaries (also excluded from census figures), which are subsidized by the federal government and are not open to the general public, do not advertise, and are not price-checked by supermarket firms, which cannot gain access even for this limited purpose. (F. 31) In the areas where commissaries trade, retailers try to capture military business by offering more variety and quality products and keeping prices on staple items low, but commissaries are not figured in supermarket marketing and advertising strategies. (F. 31)

Although some of these retailers offer some of the same services and facilities as supermarkets, only supermarkets offer all of them. This is where competition, in fact, exists. Therefore, it is concluded that "supermarkets" constitute the relevant product market in this case.

2. Geographic Market

To determine whether a Section 7 violation exists, it is necessary to find the relevant "section of the country" or geographic market, the area in which the goods or services at issue are marketed to a significant degree by the acquired firm. *Philadelphia National Bank,* 374 U.S. at 357–362

Complaint counsel argues the existence of two relevant markets in this case, the Standard Metropolitan Service Area (SMSA) or subdivision thereof, and the Southeastern United States, the region in which Colonial operated prior to the acquisition. The Supreme Court has acknowledged that more than one relevant market may exist in an antitrust case. *Marine Bancorporation,* 418 U.S. at 621; *United States* v. *Pabst Brewing Co.,* 384 U.S. 546, 551–52 (1966)

Respondents deny that either the SMSA or the Southeastern United States is the correct or relevant geographic market. Their position is that, while the SMSA might be the appropriate market from the demand standpoint, and might be relevant if this case involved two competing retailers within an SMSA (RPF 951), the SMSA is too narrow a market. Use of the SMSA as the relevant market, respondents claim, overstates the concentration ratios and distorts the picture of how this market functions. **[207]**

According to respondents,

> [t]he complaint does not allege a lessening of the number of actual participants in any market; it alleges a lessening of the number of possible additional participants. Thus, it is necessary to analyze the geographic market in terms of the universe of possible suppliers to the retail food store in an SMSA (*i.e.,* firms like Grand Union and Colonial) rather than the universe of possible demanders (*i.e.,* the consumers of food in a given area).

(RPF 951) Therefore, because some retail food stores at issue in this case are supplied from warehouses outside the SMSA, at distances up to 200 miles from the SMSA, respondents claim that the SMSA draws the relevant market too narrowly.

Further, the Southeastern region is rejected by respondents as the relevant geographic market because it is not relevant in terms of either consumer demand or in terms of wholesale supply. (RPF 958) Respondents claim, therefore, is that the relevant geographic market is necessarily broader than the SMSA but much narrower than the Southeastern United States. (Respondents' Reply Brief, p. 126–127)

One commentator has defined the relevant market as follows:

> The area of effective competition may be any commercially significant geographic area which can reasonably be said to confine the relevant commercial activities. If sellers within the area are making price and output decisions protected from the need to take account of sellers outside the area, there is a distinct market. If sellers within the market must take account of sellers outside it, either because these sellers are mobile and can easily come into the area to sell, or because buyers are mobile and can easily go outside of the area to buy, the market is being defined too narrowly.

L. Sullivan, *Handbook of the Law of Antitrust* 68 (1977)

The exact size of the market need not be established. *British Oxygen Co. Ltd,* 86 F.T.C. 1241, 1371 (1975), *rev'd sub nom.* on other grounds, *BOC International Limited* v. *FTC,* 557 F.2d 24 (2d Cir. 1977); *Papercraft Corp.,* 78 F.T.C. 1352, 1405–06 (1971), *aff'd,* 472 F.2d 927 (7th Cir. 1973) "[P]recision of detail is less important than the accuracy of **[208]** the broad picture presented." *Brown Shoe,* 370 U.S. at 343, n. 69 The geographic market, like the product market, must correspond to commercial realities and be economically significant. 370 U.S. at 336–337 The physical dimensions of the geographic market need not be set out in metes and bounds, *Pabst Brewing,* 384 U.S. at 549, but must constitute a rough approximation of the relevant market. However, "the Government cannot rely, without more, on Standard Metropolitan Statistical Areas (SMSA's) as defining the geographic markets." *United States* v. *Connecticut National Bank,* 418 U.S. 656, 671 (1974)

In *Philadelphia National Bank,* the Supreme Court stated that the relevant geographic market included those areas where buyers can turn to alternative suppliers when prices rise above competitive levels. Therefore, the markets in retail industries are generally local, because convenience of location is essential to effective service. 374 U.S. at 357–59 Other antitrust cases involving supermarket firms have found the relevant markets essentially to be the local metropolitan areas. *United States* v. *Von's Grocery Co.,* 384 U.S. 270, 461 (1966); *FTC* v. *Food Town Stores, Inc.,* 539 F.2d 1339 1344–45 (4th Cir. 1976)

The issue, therefore, is where the effect of Grand Union's acquisition of Colonial will be direct and immediate, not merely where the parties do business or where they compete. *Philadelphia National*

Bank, 374 U.S. at 357 In this case, the most direct and immediate impact of the acquisition is within each SMSA. As stated by Professor Sullivan, several factors used in determining the relevant geographic market are: industry perception, the tendency of companies outside the market to make sales within it, responsiveness of prices within the market to those outside of it, the extent to which traders from beyond the market area would be disadvantaged by costs in an attempt to trade within it, and the ability of buyers to go outside the area to make purchases. L. Sullivan, *Handbook of the Law of Antitrust* 68.

All the evidence introduced points to the SMSA as the relevant geographic market. No evidence exists that supermarket firm operators looked outside the SMSA in setting prices, in attempting to attract consumers, or in considering their competition. Supermarkets measure market shares, or market penetration, in terms of a local market, normally an SMSA, and trade journals similarly utilize SMSAs in publishing market data. (F. 34) In addition to this, reliance on local media, both written and broadcast, for advertising purposes (F. 35) makes choice of the SMSA as the relevant geographic market a logical conclusion.

According to Professor Sullivan, retail consumers are less likely to range widely in search of better terms that are **[209]** commercial buyers. L. Sullivan, *Handbook of the Law of Antitrust* 69 (1977). There is no evidence whatsoever that consumers can turn to suppliers two hundred miles away to satisfy their weekly grocery needs. Indeed, it is illogical even to postulate such an alternative. It is the local grocery retailers "to which local consumers can practically turn for alternatives." *Marine Bancorporation,* 418 U.S. at 619

The expanded markets that respondents argue are more relevant than the SMSAs are not appropriately used for measuring competition and concentration in food retailing and, indeed, no such data has been proffered. The relevance of these expanded markets are in their demonstration of the existence of potential entrants into the individual SMSAs; they have no relevance whatsoever to grocery retailing. In fact, the supply side market urged by respondents may be resistant to precise determination other than drawing a circle with a 200 mile radius around the center of each SMSA (*see* F. 36).

Complaint counsel posits that the Southeastern region should be considered as a separate geographic market because, while "the Southeast is not an appropriate area in which to measure concentration, it is a proper area in which to consider the effects of this acquisition on the issue of whether Grand Union would have likely entered." (CPF at 138–39) In addition, complaint counsel argues the effects of this acquisition must be examined at a regional level in order to find the cumulative, multi-market effect, which was the Congressional intent behind the passage of laws aimed at thwarting trends in concentration.

Complaint counsel cites four cases in support of the contention that it is proper to consider a region as a whole, despite the existence of local markets. These are: *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 71 (10th Cir. 1972); *FTC* v. *Proctor & Gamble*, 63 F.T.C. 1465, 1537, 1561 (1963), *vacated*, 358 F.2d 74 (6th Cir. 1966), *rev'd*, 386 U.S. 568, 571 (1967); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 574 (1966); and *British Oxygen Co.*, 86 F.T.C. at 1346–47. However, as noted by respondents, these cases are clearly distinguishable. In each case the competitors were nationwide operators whose planning was done on a national scale. Colonial and Grand Union operations were run on a divisional basis and in each local market the number and identity of competitors varied (*see* F. 82, 119, for example). No evidence exists that these competitors looked beyond the local market in establishing any of their prices and other competitive responses. (F. 34)

Even if the entire region were considered as a relevant geographic market, no data has been offered which would allow measurement of the effects of the merger on this market. Complaint counsel's evidence pertained to local markets; there was no evidence of concentration in the region as a whole, or that the merger produced a firm likely to dominate the entire **[210]** region—an entrenchment theory (*see Marine Bancorporation*, 418 U.S. at 623, n. 23). While it is appropriate to look at the entire area where Colonial operated as a region in which to measure the effects of the merger, the effects must be measured in a local market.

G. *Grand Union's Acquisition of Colonial is Unlawful*

1. Potential Competition

Complaint counsel argues that, by its acquisition of Colonial, Grand Union has violated Section 7 of the Clayton Act under the doctrine of potential competition. As explained by Professor Sullivan, potential entrants into the market are those companies with the skill, technology, and resources to enter the market. They derive their importance from the fact that:

> [t]heir existence may reduce market power, that is, may inhibit price increases to excessive levels—in either of two ways. First, their perceived existence in the wings, so to speak, may lead the firms already on the stage to act differently than otherwise they would have acted.
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> * * * * * * *
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> Second, regardless of whether its presence in the wings affects present conduct in the market, any potential entrant may in the future actually enter thus reducing concentration and enhancing the possibility of more competitive market performance at that time. [citations omitted]

L. Sullivan, *Handbook of the Law of Antitrust* 633–34 (1977) In essence, therefore, the significance of a potential entrant into the market is both its present and (anticipated) future procompetitive effects.

2. Actual Potential Competition

In the absence of the Colonial acquisition, complaint counsel contends, Grand Union would have entered the target market, the area in which Colonial operated, through *de novo* entry or by the acquisition of a "toehold" firm, which would be used as a base from which to expand.

A violation of Section 7 under the potential competition or entrant doctrine will be found when:

a. the target market is substantially concentrated; **[211]**

b. the acquiring firm has the characteristics, capabilities, and economic incentive to enter the market in question;

c. the acquiring firm has available feasible alternative means of entry;

d. these alternative means offer substantial likelihood of ultimately producing deconcentration.

This theory, which the Commission has repeatedly found to be viable (*see,* for example, *Brunswick Corp.,* 94 F.T.C. 1174, 1267 n. 25 (1979)), and has been accepted consistently by lower courts, *e.g., United States* v. *Phillips Petroleum Co.,* 367 F.Supp. 1226, 1252 (C.D. Cal. 1973), *aff'd* without opinion, 418 U.S. 906 (1974), has yet to be expressly adopted by the Supreme Court.

Two cases on point have reached the Court, *United States* v. *Falstaff Brewing Corp.,* 410 U.S. 526 (1973), and *United States* v. *Marine Bancorporation,* 418 U.S. 602 (1974), but each was resolved without approval of the doctrine. However, the Court did affirm without opinion the district court's decision in *Phillips Petroleum,* wherein the lower court found a violation based on the actual potential entrant doctrine where evidence existed that the acquiring company had the size, resources, capability, and motivation to enter the target market, which was adjacent to the geographic area in which it already operated, and the product market was one in which the acquirer was already engaged. 367 F.Supp. at 1229 In addition, the market was found to be concentrated and few other likely entrants were found to exist. *Id.* at 1251, 1257.

Respondents dispute the validity of the actual potential entrant doctrine which, they contend, penalizes an elimination of a potential increase in competition rather than proscribing the lessening of competition that is supposed to be the target of Section 7. (RPF 962; *see* *also* J. A. Rahl, "Applicability of the Clayton Act to Potential Competition," 12 *ABA Antitrust Section* 143 (1958))

Respondents cite *United States* v. *Siemens Corp.,* wherein Judge Mansfield, writing for the Second Circuit, hypothesized that the Supreme Court was reluctant to embrace the potential competition doctrine because it:

> rests on speculation about the future conduct and competitive impact of a firm currently outside the market and perhaps intending to remain so. Even if the likelihood of a firm's entry is a probability, as distinguished from an "ephemeral possibility." [citing *United States* v. *Brown Shoe,* 370 U.S. 294, 323], its potential entry does not promote existing competition, since at most it may become a competitor *in futuro.* [212]

621 F.2d 499, 504 (2d Cir. 1980). In *Siemens,* the court refused to grant a preliminary injunction against the acquisition of the assets of a firm producing medical diagnostic equipment by a company engaged in the sale and manufacture of such equipment because the government failed to demonstrate a substantial likelihood that the acquirer would enter the market *de novo* but for the acquisition. 621 F.2d at 507.

Respondents' objections to the viability of the actual potential competition doctrine notwithstanding, because the Commission and lower courts have favorably passed on the applicability of this theory to merger cases, it is appropriate to examine Grand Union's acquisition of Colonial under this doctrine. *Marine Bancorporation,* 418 U.S. at 631. *United States* v. *Black & Decker Mfg. Co.,* 430 F.Supp. 729, 744 (D. Md. 1976), *United States* v. *Aluminum Co of America,* 377 U.S. 271, 278 (1964); *Phillips Petroleum,* 367 F.Supp. at 1252. The Commission most recently, in *Tenneco, Inc.,* Docket No. 9097, Slip Op. at 2, n.3 (September 23, 1981), reaffirmed its belief in the viability of the actual potential competition theory of violation [98 F.T.C. at 576 (1981)].

3. Barriers to Entry/Concentration

The actual potential competition doctrine will be applied only where the target market is an oligopoly, a less than competitive market. Complaint counsel offers the concentration ratios of the SMSAs as evidence of lack of competition. Concentration levels of sufficient magnitude will be considered a *prima facie* showing that the market is not competitive.[23] *Marine Bancorporation,* 418 U.S. at 630. The significance of concentration ratios is that, in a market lacking dominant participants, market factors do not possess the clout to determine price and/or total output of goods or services.

Although the Supreme Court has never set a threshold level of concentration below which the government is deemed to have failed

[23] Economic experts testifying in this proceeding acknowledged that high concentration is generally believed to be associated with a lack of competition. (F. 200)

to establish its *prima facie* case, examination of the levels found sufficient in other cases to shift the burden to respondents (to prove the market is competitive) is instructive. The figures below represent the concentration ratios of the top four firms in the target market: **[213]**

a. *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 73 (10th Cir. 1972), *cert. denied*, 416 U.S. 909 (1974)—29.2%;

b. *Black & Decker*, 430 F.Supp. at 748—77.5%;

c. *Falstaff Brewing*, 410 U.S. at 527–28—61.3%;

d. *Phillips Petroleum*, 367 F.Supp. at 125–52—61% (refining capacity), 58% (gasoline sales);

e. *United States* v. *Wilson Sporting Goods*, 288 F.Supp. 543, 547 (N.D. Ill. 1968)—60%;

f. *Stanley Works* v. *FTC*, 449 F.2d 498 (2d Cir. 1972), *cert. denied*, 412 U.S. 928 (1973)—49–51%.

As the Commission recently stated, four-firm market shares of about 50% are sufficient to cause concern over a loss of potential competition. *Tenneco*, Docket No. 9097, Slip Op. at 11, 12 [98 F.T.C. at 583, 584 (1981)]. Earlier, in *Heublein, Inc.*, the Commission held that a concentration ratio of 47.9% "arguably falls at the edge of a reasonable definition of those markets where the loss through merger of a potential entrant may substantially lessen future competition." 96 F.T.C. 384, 584–585 (1980)

In the instant case, in 1977, the supermarket firm concentration ratios in all the SMSAs were at least 68%, and nine were over 75%. (F. 53) Even utilizing the broader market of grocery store sales, all of the SMSAs have a four-firm concentration ratio of at least 49%, and eight of the SMSAs were over 60%. (F. 52)

In *Kennecott Copper*, the fact that the market, not an oligopoly at the time of the lawsuit, was increasingly becoming concentrated, was found significant by the Commission and the Tenth Circuit. 467 F.2d at 75–76 The food industry, too, has been marked by a trend toward increasing concentration, as is evidenced by the differences between 1972 and 1977 concentration levels in the relevant SMSAs.

In 1972, the average four-firm concentration ratio in the twelve SMSAs and the Greenville subdivision, based on grocery store sales, was 56.2%. By 1977, it had risen to 60.8%. (F. 52) In terms of supermarket concentration, the average four-firm concentration ratio in the twelve SMSAs in 1972 (no data exists for the three subdivisions for that year) **[214]** was 75.63%. By 1977, the average concentration in these twelve SMSAs had reached 77.78%. (F. 53) Of additional significance is the fact that there were greater increases in the SMSAs representing Colonial's area of operations than in the 155 other SMSAs in the country. The 32 SMSAs in the five states constituting the Southeast had four-firm grocery store sales concentration ratios of 56.1% in 1972 and 59.5% in 1977. Excluding these five states, the four-firm levels in the rest of the country were 51.5% in 1972 and 52.6% in 1977. (F. 55)

The food industry, as complaint counsel noted (CPF 147), has been of special concern to the Commission in the past.

> This merger movement led by National Tea portends a drastic restructuring of the national food market as a whole and of the individual markets in which these acquisitions occurred. Nationally, the period 1948–1958 witnessed an enormous shift of sales volume from the "independent" to the "chain" sector of the industry, and from the smaller to the larger "chains."
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> * * * * * * *
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> It was precisely this kind of market arrangement Congress was concerned with in the merger law. That '[c]ompetition is likely to be greatest where there are *many sellers, none of which has any significant market share,*' . . . is common ground among most economists. . . .

National Tea Co., 69 F.T.C. 226, 268–270 (1966)[24]

Respondents argue that the markets are performing competitively and that the concentration ratios are overstated **[215]** because the product and geographic markets are drawn too narrowly. They correctly note that the Supreme Court and lower courts have often stated that statistics regarding concentration are merely the starting point for market analysis (*see United States* v. *First National State Bancorporation,* 499 F.Supp. 793, 804 (D.N.J. 1980)); they are not conclusive. *United States* v. *General Dynamics Corp.,* 415 U.S. 486, 498 (1974)

In addition, respondents argue that even where a market is highly concentrated, it may still be characterized as competitive because of the ease of entry into it. (RPF 969) If a market is concentrated but low entry barriers exist, future potential competition is important; however, the ease of entry signifies that there are a large number of potential entrants and the elimination of one loses significance. *The Budd Co.,* 86 F.T.C. 518, 577 (1975) New firms can enter the market and erode the high price and profit levels characteristic of high levels of concentration.

Respondents also note that the Commission has characterized the food industry as one marked by low entry barriers and ease of entry. *National Tea,* 69 F.T.C. at 278. Complaint counsel, however, differentiates between entry on a small scale, *i.e.,* by a single store operator,

[24] On January 17, 1967, the Commission issued a statement of policy respecting mergers in the food distribution industries entitled "Commission Enforcement Policy With Respect To Mergers In The Food Distribution Industries." 1 CCH Trade Reg. Rep. ¶ 4525, at 6904 This statement sets forth several proceedings which were terminated by orders prohibiting mergers by large grocery chains without Commission approval. It can be assumed that this statement of policy and the consent agreements had some effect in slowing concentration in food retailing. These consent orders have now expired. *See The Food Retailing Industry* (Praeger Book). (Respondents' Phy. Ex. C., pp.

and entry by a supermarket chain on a larger scale. Supermarket chains are usually defined by the industry as firms with ten or more stores. (F. 58)

Complaint counsel argues that only the entry of a supermarket chain has significant effect on concentration in the market. Independent operators usually own one, or at most a small number of stores. Single store operators rarely build *de novo;* they usually acquire second use locations. (F. 57) According to both respondents' and complaint counsel's experts, market entry occurs when a new actor enters the market. Acquisition of a firm already in the market is a transfer of ownership, it does not immediately increase the capacity of the market. (F. 56)

Although a retailer may find it relatively easy to open one or two stores in a market, this "ease of entry" is little guarantee of success. To be considered a factor in the market, a firm must achieve at least a 5% market share (F. 58), and few small operators are ever able to do so, often despite a tenure of many years' duration in a particular market.

Competition against supermarket chains is most possible for other supermarket chains. New entry is often likely to be greeted by pre-emptive actions by in-market firms. Examples of pre-emptive actions are increases in advertising and promotions, remodeling of nearby stores, zone pricing, and building new stores ahead of population. (F. 62) Supermarket chains, like Grand Union, are most likely to be in a financial **[216]** position to withstand these actions. Because chains are likely to enter with multiple stores (F. 62), established firms will be less likely to take a pre-emptive action against the opening of a chain's stores because it will have less effect. Examples of the effect of such pre-emptive actions against a small operator is the experience of the Two Guys operation in Charlotte, North Carolina and that of the Warehouse Groceries operation in Atlanta, Georgia. (F. 62, 84)

The costs of entry are high, estimated at $3–3.5 million per site for leases (F. 59), and, for a 25,000 to 30,000 square foot store, $300,000 to $700,000 to equip and $250,000 to stock. (F. 63) This does not include rent, training employees, or paying management. Grand Union management, in outlining a Florida West Coast Development Program for 1976–1980, anticipated operating their eighteen stores on the West Coast of Florida at a substantial loss for at least five years. (CX 71A–Z116, *especially* 71B, 71Z10) A small operator would find it extremely difficult, if not impossible, to withstand losses over such a substantial period.

Small operators will frequently have difficulty finding store sites because developers prefer large chains as tenants over small chains or independents. (F. 59)

Advertising costs are high, particularly in the larger SMSAs such as Atlanta. (F. 61) Multiple store entry allows a firm to allocate advertising costs across several stores. In addition, carry-over name recognition of established chains may lessen the need for advertising to establish an image and promote a following. (F. 60)

Industry witnesses testified that multiple store entry was the only way to effectively serve and compete in an SMSA. The size of the market indicates how many stores a firm must have for effective entry. One witness estimated that, in this case, the number of stores necessary to compete effectively would range from a low of two in Fayetteville, North Carolina to a high of twelve in Atlanta, Georgia. (F. 59)

Although respondents have produced lists of actors entering these markets, the preponderent number of these have been small companies, often catering to specialized, *e.g.*, ethnic, needs. (F. 57) There has been a paucity of entry by supermarket chains. When supermarket chains have entered, for example as Safeway entered the Newport News/Hampton SMSA, the result has been a decrease in concentration. (F. 133)

The high levels of concentration in the markets at issue here, and indeed, the increases in almost all these markets between 1972 and 1977, are strong indication of the height of entry barriers at work. Although a number of small operators have entered, as mentioned previously, few have become [217] market factors, and they have had little effect in deconcentrating the markets. In some of the markets there has been a change in market share of the market factors,[25] an occasional market entrant or an exit from the market; but overall, the markets have remained concentrated and, in fact, concentration has increased.

Therefore, complaint counsel has established a *prima facie* case that the relevant markets are concentrated, and respondents have failed to introduce persuasive evidence to overcome the presumption that these markets are not performing competitively.[26]

4. Grand Union as a Likely Entrant/Other Likely Potential Entrants

The most likely potential entrant into a market is one which is

[25] For example, A & P's difficulties over the past few years are well-known. *See, The Food Retailing Industry* (Praeger Book). (Respondents' Phy. Ex. C, pp. 31, 47–48, 65, 74, 87–88) Food Fair has filed for reorganization under Chapter XI of the bankruptcy statutes. (CX 665Z232; *Supermarket News*, October 2 and 9, 1978, July 13, 1981.)

[26] Respondents' evidence of competition in the SMSAs consist of general testimony of their officials, and speculation about possible market entrants and the role of possible market expanders. As stated by Commissioner Clanton in his concurring opinion in *Tenneco*, "it is hard to imagine any industry member admitting that his firm did not compete aggressively or that the industry was non-competitive." Concurring Statement of Commissioner Clanton in *Tenneco*, Docket No. 9097, Slip Op. at 9 [98 F.T.C. at 633 (1981)]. Respondents' economic expert, Dr. Adelman, explained that testimony by industry officials should be carefully interpreted: "[P]eople will say this business is competitive and what they mean is there is a great deal of rivalry, heavy expenditures on advertising, some of it very ingenious and costly. And yet, I might not agree with them that it was competitive as an economist would refer to competition." (Adelman 3401–02)

related to that market by product, geographical, distributional or vertical affinities. L. Sullivan, *Handbook of the Law of Antitrust* 634 (1977)

Grand Union had many reasons to expand its supermarket operations geographically and it was financially able to do so. (F. 77–79) Grand Union's management was eager to invest in supermarket operations in more lucrative areas than its present base of operations (F. 73), which was the economically troubled **[218]** Northeast. (F. 71, 73, 76) This eagerness was expressed both in internal planning documents and publicly in interviews given by Grand Union officials to trade publications.

Roger Kennedy, then Vice-President of Corporate Financing, was assigned to make a study of acquisition possibilities in the Southeast, the area from Virginia to Florida. (F. 69) In his report, the Southeast Study, Mr. Kennedy pointed out to his superiors that Winn-Dixie, operating throughout this region, had the best earnings record nationally. (F. 69) In addition, the twelve firms Mr. Kennedy selected to study as a group were more profitable than the national average. (F. 69) He believed that this area had avoided store saturation and, with its projected high population growth, had great potential. (F. 69) In a later study Mr. Kennedy did of the Southwest, he noted that the thirteen chains studied there were less profitable than those in the Southeast. (F. 70)

Having been newly released from an FTC ban on acquisitions of ten years' duration (F. 72), upper echelon management was publicly exultant at the prospect of the possibilities offered by the "Sunbelt." (F. 72–75) The company was growth-oriented and had committed itself to expand its supermarket operations geographically, past product-market diversification not having been profitable. (F. 68)

More than a reasonable probability exists that Grand Union would have entered this market in the near future even without its acquisition of Colonial. The public statements of its upper echelon management beyond any doubt reveal an organization practically "chomping at the bit" to expand and a stated target of this desire was the Southeast. *See BOC International Ltd.,* 557 F.2d 24, 28–29 (2d Cir. 1977). This case differs from others where interest in entry was expressed mainly by junior personnel and management. *United States* v. *Crowell, Collier, and MacMillan,* 361 F.Supp. 983, 1005 (S.D.N.Y. 1973); *Siemens,* 621 F.2d at 508; *Tenneco,* Docket No. 9097, Slip Op. at 32 [98 F.T.C. at 598 (1981)].

Although respondents offer evidence that one or another of the markets were likely to have been of little interest to Grand Union, it is not complaint counsel's burden to conclusively pinpoint exactly where Grand Union would have first entered. As Commissioner Clanton stated in his concurring opinion in *Tenneco,* "in assessing the alleged elimination of potential competition, we are always dealing with probabilities and rarely, if ever, with certainties." Docket No. 9097, Slip Op. at 1 [98 F.T.C. at 624]. However, management's public statements indicate that the Southeast was viewed as a market to conquer, and it is much **[219]** more than likely that Grand Union would enter this region, particularly the large metropolitan areas.[27]

Respondents argue that no persuasive evidence exists which rebuts deposition evidence and statements of Grand Union management that they had no plans to enter this area.[28] (RPF 976) In addition, except for the opening of one unsuccessful store in Orlando in the late 1960's (F. 146), Grand Union had made no attempts to enter these markets. *See United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651, 658–659 (1964; *Brunswick,* 94 F.T.C. at 1269.

Nevertheless, all objective factors indicate that Grand Union would have entered this market. It had the "characteristics, capabilities and economic incentives" to enter and clearly was eager to do so. *Marine Bancorporation,* 418 U.S. at 624–25; *Tenneco,* Docket No. 9097, Slip Op. at 14 [98 F.T.C. at 585 (1981)]. "Where objective considerations so clearly favor probable entry, contrary testimony by company officials as to future intent has little probative force." *British Oxygen Co. Ltd.,* 86 F.T.C. 1241, 359; *see also Falstaff Brewing,* 410 U.S. at 563–69 (Marshall, J., concurring). **[220]**

Grand Union's expertise was clearly in the establishment and running of supermarkets. Its profit margins and success, even in the highly competitive Northeast (F. 80), are a testament to its ability to acquire, operate, and expand a small toehold. *Heublein,* 96 F.T.C. at 587 It is without doubt that Grand Union had and was using the technology needed to enter the Southeast on any basis it chose. In this regard, Grand Union's situation differed from that of the acquiring firm in *Siemens,* which lacked the technology to enter the market *de novo,* a market which was no longer as attractive as it had been in the past. 621 F.2d at 507–08 Grand Union was uniquely capable to enter this market, a market which respondents recognized would become even more attractive over time.

In *BOC International Ltd.,* the Court held that it is insufficient to

[27] Dr. Curhan, respondents' marketing expert, testified that "Grand Union are city folk, for better or for worse." (Curhan 2964)

[28] The persuasive nature of proof of market entry recently was commented upon by recognized authorities:

> We can seldom have much assurance in predicting that a firm would or would not actually enter a particular market. Accordingly, the result will usually depend upon the location of the burden of proof, together with any appropriate rules of thumb.
>
> The plaintiff ordinarily has the burden of showing an antitrust violation, but that general proposition does not say how much proof should satisfy the burden. Although we have criticized some decided cases which have not required much proof, truly satisfying proof cannot be demanded. To insist upon it would be virtually to abandon the effort to preserve potential entrants from elimination by merger. Abandonment, however, would be unwise in those situations where a highly concentrated market needs more competition and where potential entrants are few in number.

P. Areeda & D. Turner, *Antitrust Law,* ¶1121e at 117 (1980) prove "eventual" entry, and that greater specificity was needed regarding the timing of such entry. 557 F.2d at 29. In this case Grand Union, portrayed in one article as being released from the shackles (F. 72) of the Commission's acquisition ban, was industriously studying acquisition possibilities. The obvious inference is that Grand Union planned to expand and to do so very soon.

Respondents argue that, for various reasons, none of the other acquisition possibilities were as attractive as Colonial, and, barring the merger with Colonial, Grand Union would not have entered. It is clear that Grand Union was determined to enter this market. Whether another acquisition would have been as attractive or as profitable as the acquisition of Colonial is of little consequence because "the test in Section 7 cases is not whether anticompetitive conduct is profit maximizing. The very purpose of Section 7 is to direct the profit incentive into channels which are procompetitive." *British Oxygen Co.,* 86 F.T.C. 1325, citing *Falstaff Brewing,* 410 U.S. at 572 (Marshall, J., concurring)

There are no clear-cut statements by Grand Union management that, but for the acquisition of Colonial, Grand Union would not have entered the Southeast;[29] it is only counsel's postulation. On the contrary, it appears Grand Union [221] was interested in smaller chains, if a large chain was not available. During March, 1978, in analyzing possible acquisition candidates, a Grand Union official made the following statement in respect to Bruno's, a growing chain with 55 supermarkets and an annual sales volume of $250 million:

> Very strong chain in the Birmingham, Alabama area. 40 drug stores. Would be worthwhile to follow up further if it appears impossible to make an acquisition with a larger volume. This does have a good growth rate. (Publicly owned.)

CX 44G. This same report acknowledges that Grand Union was interested in Tampa Wholesale (Kash'N Karry), with annual sales volume of $175 million. (CX 44Z49) In discussing "Desirable Characteristics" of an acquisition possibility, this official stated:

> The acquired chain should not be so large as to accentuate FTC problems, and it should be large enough to make a worthwhile contribution to Grand Union. (Perhaps in the $400 million to $800 million annual sales range.) (CX 44Z51)

Complaint counsel need not identify the most satisfactory substitute acquisition candidate, but must merely show that a range of possibilities exist (*see British Oxygen Co.,* 86 F.T.C. at 1357 (1975); *Kennecott Copper Corp.,* 78 F.T.C. at 927 (1971), *aff'd,* 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 94 S.Ct. 1617 (1974)). Roger Kennedy enume-

[29] As the Commission pointed out in *Heublein,* "declarations of an intention to acquire only a market leader, whether drawn from corporate documents or elicited from management at trial, are not highly probative in an actual potential competition case." 96 F.T.C. at 586

rated twelve possibilities on a list that did not include Colonial, which he felt was "too large" (F. 69), and he was familiar with Grand Union's requirements. If none of these candidates suited, Grand Union could have entered *de novo,* using existing warehouses in certain areas, by utilizing wholesalers, or by building a new Florida warehouse. Its eagerness to enter this market was such that it likely would have borne the disadvantages of *de novo* entry. Its financial position, its established procedures for training management, and its long success in the supermarket field made it uniquely capable to do so. *De novo* entry is not unusual in the supermarket industry.

Although other markets remained for Grand Union to enter if no satisfactory manner of entry into the Southeast was found, *e.g.,* the Southwest, this particular market, for reasons discussed above, was particularly attractive (*see Brunswick,* 94 F.T.C. at 1269; *Phillips Petroleum,* 367 F.Supp. at 1240). In addition, Grand Union's subsequent purchase of Weingarten (F. 79), makes it obvious that its interest in the Southeast was unrelated to its interest in the Southwest. The Southeast was Grand Union's primary target. **[222]**

Having decided that Grand Union was a likely potential entrant, it is next necessary to determine whether it was the most likely or one of few likely entrants. As the Supreme Court noted in *FTC* v. *Procter & Gamble Co.,* "the number of potential entrants [must not be] so large that the elimination of one would be insignificant." 386 U.S. 568, 581 (1967); *Heublein,* 96 F.T.C. at 588.

Respondents have produced what they feel is a large number of potential entrants and expanders. (RPF 975) However, "[t]he membership of the group of other potential deconcentrators should be defined by similar criteria and kinds of evidence as are used to find that the firm at issue was likely to enter or expand." *Heublein,* 96 F.T.C. at 590; *see also Kennecott Copper,* 467 F.2d at 77.

Respondents, while offering a plethora of candidates as potential entrants, do nothing beyond drawing up a list.[30] No **[223]** objective

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[30] For example, respondents include Kroger as a potential entrant into the Florida SMSAs. (RPF 220, 323, 367) Kroger operates drug stores in Florida, and its Super-X Drug operation has opened *one experimental* mini-combo grocery store in Melbourne, Florida. (C. Thomas 1370; RX 39) Kroger's nearest grocery warehouse is in Atlanta, Georgia. Kroger's entry into Florida with grocery supermarkets is very speculative at best.

Safeway, identified by respondents as a possible potential entrant into Orlando, Florida, has no grocery warehouse in Florida, Georgia, Alabama, North Carolina or South Carolina. One witness commented about Safeway's possible entry into Orlando that he "wouldn't think so any time soon. Anything is possible." (Posey 1660)

Kroger, with its Salem, Virginia warehouse, is identified by respondents as a potential entrant into Richmond (RPF 414), Newport News and Norfolk (RPF 485). However, Kroger's Salem warehouse is approximately 241 miles from Newport News and even further from Norfolk and thus beyond the optimum shipping range of 200 miles. Charles Thomas, a Kroger Group Vice President, testified that Kroger had no plans to enter Richmond, Newport News, or Norfolk. (C. Thomas 1333)

Respondents suggest Safeway as a potential entrant into Charlotte, North Carolina. (RPF 670) Safeway's nearest warehouse is in Richmond, Virginia, 276 miles from Charlotte.

Respondents named as potential entrants into Atlanta, Georgia, the "local independents," and mentioned a "good possibility" of entry by Safeway and Albertson's "by 1985." (RPF 846, 847) Respondents also indicate Alterman and Food Town are possible entrants into Augusta, Georgia. (RPF 892, 893) It is unlikely that both will enter since Del Haize owns both chains.

evidence is offered of any interest or ability on the part of these candidates to enter these markets. Some are merely wholesalers that operate in adjacent areas and would be able to serve at most one or two stores in nearby SMSAs. (*See* F. 88a–e, for example.) These wholesalers apparently have been in these locations for years without entering the SMSAs, and no evidence was offered to demonstrate an interest in changing past practice. As the Commission stated in *Tenneco:*

> We are persuaded by complaint counsel, however that none of the firms so identified shared Tenneco's special combination of characteristics which established it as a likely potential entrant. Further very few of these firms can be considered to be even potential entrants, and none were as likely as Tenneco to make the attempt.

Tenneco, Docket No. 9097, Slip Op. at 41 [98 F.T.C. at 604 (1981)].

In *Hughes Tool,* loss of one potential competitor out of six was not found to be an injury to competition. 415 F. Supp. at 646. Respondents have not offered acceptable evidence of nearly this number of potential entrants into any of these markets. In addition, the existence of high entry barriers to significant entry into these markets, entry on a scale sufficient to provide meaningful competition, eliminates almost all of the potential entrants suggested by respondents.

Therefore, it is concluded that Grand Union was the most likely potential entrant and one of the only likely potential entrants into these markets.

5. Alternative Means of Entry for Grand Union

Complaint counsel contends that, had Grand Union not acquired Colonial, it would have entered Colonial's area of operations *de novo* or by acquisition of a smaller toehold company. Respondents deny that either of these courses of action would have been chosen had Grand Union not acquired [224] Colonial.[31] "In exploring the feasible means of entry alternative to the challenged acquisition the court must analyze the incentive and capability of the acquiring firm to enter the relevant market *de novo* or by toehold acquisition." [Citations omitted] *Black & Decker,* 430 F.Supp. at 755

A toehold acquisition "may be defined as one which is sufficient to assist the potential entrant over the entry barriers and into the market, but not so large that the entrant merely replaces the acquired company; the acquiring company must have a substantial need to build upon the acquisition." *Phillips Petroleum,* 367 F.Supp. at 1258

As discussed above, Grand Union had the incentive and capability to enter into the market where Colonial operated. Complaint counsel

[31] *But see* Fn. 29, *supra.*

maintains that the list of toehold acquisition possibilities prepared by Grand Union is sufficient to prove that Grand Union had feasible alternative means of entry. Respondents argue that complaint counsel must demonstrate that available and attractive toeholds existed.

In *Missouri Portland Cement Co.* v. *Cargill,* a private antitrust action, the Second Circuit found that the plaintiff:

> completely failed to demonstrate that attractive toe-hold prospects were available in the relevant geographic markets. The plants cited as available means of entry into the defined markets are either already dominant in some other market, or owned by enormous national or international cement companies, or poor prospects for the future.

498 F.2d 851, 864 (2d Cir. 1974) In *Black & Decker,* the court held that it must be proven that the toehold possibilities are available for purchase and are financially attractive. 430 F.Supp. at 766–67 *See also Atlantic Richfield Co.,* 297 F.Supp. 1016, 1069 (S.D.N.Y. 1969). However, the Commission has held that such proof is unnecessary, stating that it would be an unrealistic burden to impose a requirement on complaint counsel for such evidence. *British Oxygen Co.,* 86 F.T.C. at 1357; *Kennecott Copper Corp.,* 78 F.T.C. 744, 927 (1971), *aff'd,* 467 F.2d 67 (10th Cir. 1972), *cert. denied,* 416 U.S. 909 (1974)

Complaint counsel has offered a substantial list of acquisition alternatives and, although respondents have **[225]** characterized them as privately or closely held companies which could not be bought against the will of their owners (Respondents' Reply Brief, p. 140), this is inaccurate. Alterman was acquired by Del Haize, a Belgium company, in 1979 (F. 89), as was Food Town. (F. 184) Harris-Teeter was bought by Reddick Corp. (F. 116, 184) Lucky Stores bought Tampa Wholesale (Kash'N Karry). (F. 158, 168) Bi-Lo was acquired by Ahold, a Dutch company, in 1977. (F. 91) Red Foods was purchased in 1979 by Pramer, a United States subsidiary of a French Company, Promades. (Stewart 468) Food Town and Lowes attempted a merger, which was challenged by the Commission in a successful injunction proceeding. *FTC* v. *Food Town Stores, Inc.,* 539 F.2d 1339 (1976)

The toehold possibilities cited by complaint counsel came from the Southeast Study conducted by Roger Kennedy who, as mentioned above, was aware of his company's specifications. At least one of the toeholds, Bruno's, was offered to Grand Union in 1977 and received consideration. (F. 91) Bi-Lo's was also offered to Grand Union in 1976. (F. 91)[32] Grand Union had preliminary discussions with Alterman in 1975 and 1976. The existence of the Southeast Study is evidence of Grand Union's inclination to enter, and although not conclusive

[32] A Grand Union official wrote, in 1976, that: "Bi-Lo is one of the best small chains in the south and they will have a high price on it. . . . The chain fits GU beautifully." (CX 34G)

proof, it is a strong indication that Grand Union would have made one of the suggested acquisitions if nothing more desirable was available.

Respondents belittle the attractiveness of these toeholds. However, Grand Union's particular resources, financial and managerial, and its experience in supermarket operations, make it more than likely that the company could have used any of the identified companies as a base on which to build. Using the assets of any chosen company, Grand Union could have surmounted entry barriers and entered this market. Even in the absence of an acceptable toehold, Grand Union was fully capable of entering this market *de novo*. Complaint counsel has demonstrated that respondents could have entered the market in Richmond, Newport News/Hampton, and Norfolk/Virginia Beach, Virginia, as well as Orlando, Florida by the use of existing warehouses, or by constructing a new warehouse, especially in Central Florida.

In determining what constitutes a "feasible" alternative entry, it is necessary to consider the objective facts of the acquirer's situation. In this case we have a financially secure company with a large amount of capital to **[226]** invest in expansion, with an often-expressed interest in the geographical area in question, and a strong desire to expand within their present line of operations—supermarkets—in desirable growth areas, as contrasted to their existing locations, described as "saturated." In the past, Grand Union has expanded its operations from its existing warehouses. This is a well-established method of expansion in the supermarket industry, termed "edging out." Grand Union's warehouse in Landover, Maryland, is only 116 miles from Richmond (F. 125), and 183 miles and 200 miles from Newport News and Norfolk, respectively. (F. 135) In the early 1970's Grand Union made extensive surveys of the Richmond and Newport News/Norfolk area for possible market entry from its Landover warehouse, even to the extent of making several tentative site selections. (F. 125, 135) Market entry into the Tidewater area was not pursued at the time, apparently because of Grand Union's preoccupation with edge expansion in the Baltimore area. (F. 135) One method considered by Grand Union at this time as a vehicle for entering Tidewater was a joint venture with Dart Drug Stores, Washington, D.C., which did not prove fruitful.[33]

During 1976, Grand Union considered acquiring Giant Open Air Market, a small chain with stores in Richmond and Tidewater. This possible acquisition was not pursued,[34] although it was acknowledged

[33] Grand Union also discussed a joint venture arrangement with Peoples Drug Stores, Washington, D. C., as a possible means of entry into North Carolina. (F. 184)

[34] One reason advanced for not proceeding with the Giant Open Air acquisition was its "mix" of stores, manufacturing, and wholesaling, and its size. (CX 30)

that "the proposal has appeal because a successful Norfolk operation should fit in with and help our Washington Division." (CX 30)

While Grand Union normally does not utilize wholesalers in its operations, it has been relying on a wholesaler in its Florida operations. (F. 145) Thus, Grand Union could utilize a wholesaler in a new area until such time as it was economical to build or acquire a warehouse.

Complaint counsel postulates that, except for the Colonial acquisition, Grand Union would, in the near future, have built a grocery warehouse in Central Florida, near Orlando, to service its Florida West Coast stores and to expand into Central Florida, including Orlando. Several reasons were advanced as a basis for this contention. First, Grand Union had decided not to expand its Hialeah, Florida, warehouse, [227] necessitating the use of a wholesaler to supply produce, meats and dairy products to Grand Union's Florida stores. (F. 147) Secondly, Grand Union is expanding its West Coast stores; it had 12 stores on the West Coast of Florida as of 1979, and four new stores planned for fiscal 1979. Grand Union purchased eight stores in the Tampa/St. Petersburg area from Colonial in July 1978. (F. 9) The distance from the Hialeah warehouse to these West Coast stores averages over 200 miles, with one store over 300 miles away. This is at or beyond the maximum efficient shipping distance for supplying grocery stores. (F. 148) Further, complaint counsel contends Grand Union will continue to expand on the West Coast of Florida and into the Orlando market (an attractive growth market with a population increase 4.5 times the national average - F. 160), and into other Florida markets such as Jacksonville. Complaint counsel asserts that this latter expansion is needed to support the postulated Orlando warehouse, or subwarehouse.

Respondents dispute this "scenario" as being "without basis" and "pure speculation." (RPF 273) Respondents contend Grand Union has not built a warehouse since its acquisition by Cavanham in 1973; that serving the West Coast stores is economically viable because of the low overhead of the Hialeah warehouse; and that Grand Union's plans for the next few years do not mention a new warehouse, or entering the Orlando, Gainesville, or Jacksonville markets. (F. 149, 156, 166) Grand Union points out that it also closed the two Colonial stores which were located in Orlando, as evidence of a lack of interest in the Orlando market. (F. 166) Respondents also stress the unprofitability of the West Coast stores and the need to fill in the West Coast area with stores before considering expansion into Central Florida. (F. 166)

Section 7 deals in probabilities, seldom certainties. Since Grand Union was expansion-minded, with a substantial operation in Florida, it is more probable than not that Grand Union would expand into Orlando and construct a warehouse to supply the stores and to alleviate the West Coast supply problem which it admittedly had. Prior to establishing a warehouse, the Orlando stores could have been supplied from Hialeah, 220 miles away, under arrangements similar to the West Coast supply arrangement (*see* Gooding 1146–47). It is more probable that Grand Union would have entered Orlando in the near future—5 to 10 years—than to conclude that Grand Union would not have expanded into this attractive market.

Thus, whether Grand Union proceeded by acquiring one or more toeholds, or had proceeded to expand *de novo,* there were feasible methods of market entry available.

6. Likelihood that Alternative Entry Would Have Procompetitive Effects

[228] Grand Union's purchase of Colonial, although in essence the replacement of one firm by another,[35] was injurious because it forever foreclosed the potential future benefit of Grand Union's *de novo* or toehold entry. Justice Marshall recognized this in *Falstaff,* when he stated:

> When a firm enters the market by acquiring a strong company within the market, it merely assumes the position of that company without necessarily increasing competitive pressures. Had such a firm not entered by acquisition, it might at some point have entered *de novo.* An entry [229] *de novo* would increase competitive pressures within the market, and an entry by acquisition eliminates the possibility that such an increase will take place in the future. Thus, even if a firm at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date.

Falstaff Brewing, 410 U.S. at 560–61, (Marshall, J., concurring)

[35] Respondent has offered much testimony by its officials to the effect that Grand Union has improved Colonial's operation and made it more competitive (*see* RPF 177–188). Some of the improvements which have been advanced include selling Colonial's manufacturing operations, closing unprofitable stores (including the complete withdrawal from four of the alleged relevant SMSAs—Gainesville and Orlando, Florida, and Greenville and Spartanburg, South Carolina), an increase in funds available for new store construction and store renovations, a more competitive pricing structure and stepped-up advertising, an increase in general merchandise in the stores, computerized and centralized operations, improved financial controls, raised wages and salary levels of management particularly at the store and co-manager level, modernized the transportation fleet, regionalized and strengthened the division management, and provided for increased supervision at the store level. These alleged improvements were post-acquisition, and it may be that Colonial would have instituted many of these same changes or perhaps made other changes and improvements but for the acquisition. As demonstrated by complaint counsel (Complaint Counsel's Reply Brief, pp. 124–127), Colonial was a well-managed, efficient firm. It historically outperformed Grand Union based on return on sales and return on equity. (CX 326E; CX 11) Colonial's Atlanta and Norfolk Divisions were more profitable in 1978 under Colonial than they were in 1980 under Grand Union. (Roehm 2803–04) Colonial had ample capital, cash and investments, to provide for, and which did provide for, new stores and store renovations. The only logical and appropriate conclusion to make on this record is that the acquisition merely represented a replacement of one competent competitor by another. As stated by Mr. Bert Thomas, the President of Winn-Dixie, "Grand Union merely put themselves in—substituted themselves for Colonial. Both chains, in my opinion, were well financed, had experienced operators, either could do the job." (B. Thomas 1511)

Grand Union's entrance *de novo,* or through the acquisition of one or a combination of the toeholds, could only have benefitted the market. Entrance by a supermarket chain, unlike entry by a small operator, would inevitably deconcentrate this market.[36] The entrance of Safeway into Newport News/Hampton (F. 133) and the subsequent drop in concentration levels in this market, is illustrative of the beneficial effects of entry by a supermarket chain with the capacity of becoming a market factor.

Entry of Grand Union into this market through a toehold acquisition or *de novo* entry could scarcely fail to have significant procompetitive effects. This was recognized [**230**] by the Second Circuit in *BOC International Ltd.,* when it stated that "[t]ypically in an oligopolistic situation the entry of a large firm as a new competitor necessarily has significant procompetitive effects." 557 F.2d at 27, citing *Ford Motor Co.* v. *United States,* 405 U.S. 562, 587 (1972) (Burger, C.J., concurring and dissenting) A *de novo* entry benefits the market because it would enter "at the expense of established competitors rather than by inheriting a substantial market position" enhancing price competition as well as services and quality of product. *Phillips Petroleum,* 367 F.Supp. at 1257

The levels of concentration indicated in the markets at issue here are certainly in the range where courts traditionally find oligopolies exist. The increases in concentration found in almost every market demonstrate that the markets are likely becoming less competitive over time. Acquisition of smaller toeholds into these SMSAs would contribute to deconcentration as Grand Union competed to increase its market share in the SMSAs and/or in the Southeast. *Heublein,* 96 F.T.C. at 588 (1980)

It must not be overlooked that Grand Union and Colonial were at the verge of becoming horizontal competitors in several market areas. Colonial was planning to expand its Richmond, Virginia, operations by building new stores and a subwarehouse, and was actively looking for store sites in Charlottesville and Fredericksburg, Virginia. (F. 120) Grand Union was already in Fredericksburg, and had been exploring expansion possibilities in Charlottesville and Culpepper, Virginia. (F. 125) Absent the Colonial acquisition, there is a strong probability

[36] Grand Union's operations on the West Coast of Florida is an indication of the effect of market entry by an aggressive firm. Grand Union, in its 1978/79 Business Plan and Budget, stated:

> A new low shelf-price marketing program was implemented in the Florida West Division following a short test of the concept in the new Fort Myers store. This program . . . resulted in a turnaround of the Division's previously adverse trend. (CX 6Z116)
>
> The special marketing program implemented in this division during 1977/78 was effective in securing market share growth commensurate with objectives. The posture for 1978/79 in Florida West is continuation of present strategy and further extension of the program as five new stores are opened over the coming year in Fort Myers, Port Charlotte, Sarasota, and Port Richey. Everyday low price and green label pricing programs will be continued. (CX 6Z139)

Grand Union and Colonial would have become competitors in several Virginia markets, including the Tidewater markets.

In the Florida markets, Grand Union and Colonial were both operating in the Tampa/St. Petersburg, Florida, area prior to Grand Union's acquisition of the eight Colonial stores. (F. 9) Colonial had not abandoned these Florida markets, but hoped to re-enter Tampa, St. Petersburg and Orlando with a more competitive operation "five years or so down the road," including a possible subwarehouse in Central Florida. (F. 144) Future expansion by either Grand Union or Colonial would have produced horizontal competition between the two supermarket chains in these Florida markets.

The acquisition of Colonial eliminated the probability that Grand Union and Colonial would have become active competitors in Virginia and Florida.

Respondents argue that some of the toehold firms identified by complaint counsel have substantial market shares in some of the markets, market shares well above the ten percent market share suggested by the Commission as a presumptive limitation for a toehold. *See Budd,* 86 F.T.C. at 582. The Commission's holding in *Budd* was a presumption, not an inviolate **[231]** rule to be applied in very case. The characteristics of a toehold firm has been defined as "any firm whose acquisition would be assumed to invigorate competition more than a larger acquisition would." P. Areeda & D. Turner, *Antitrust Law,* ¶1124c at 145 (1980) Thus, it cannot be said with certainty that small firms with substantial market shares in some markets are not legal "toehold" firms in an antitrust suit challenging the acquisition of a large regional firm.

There is no evidence that respondents made any inquiry of the Commission as to the acceptability of the acquisition of any of the smaller firms.[37] The evidence is clear that respondents were seeking an acquisition of a leading firm with substantial sales ($400 to $800 million—CX 44Z51), and did not avoid toehold firms because of their market share in a particular market.

Respondents further note that in several of the markets at issue, Colonial's share of the market was under the ten percent generally considered the limit for an acquisition to be considered a toehold. However, the procompetitive or neutral effects of this acquisition in some markets, cannot overcome the anticompetitive effects of this acquisition in other markets. *Philadelphia National Bank,* 374 U.S. at 370.

As pointed out by complaint counsel (Complaint Counsel's Reply

[37] Tampa Wholesale Co. (Kash'N Karry) was acquired by Lucky Stores. Tampa Wholesale had 42 stores in the Tampa/St. Petersburg, Florida, area in 1980, with an estimated market share of 15.8%, compared to Publix's estimated market share of 18.2% and Winn-Dixie's 18.5%. *1980 Market Scope* 157. To date there has been no antitrust challenge to this acquisition.

Brief, p. 92–94), in some SMSAs where Colonial's market share was under ten percent, Colonial was improving its market position and gaining market share. For example, in the Macon, Georgia, SMSA, Colonial's market share in 1977 was 12.5% for supermarkets and 9.1% for grocery store sales. (CX 2L; CX 664A; Admissions 49). Colonial was second in the market and had four new stores planned during 1980–83 and anticipated no store closings. (CX 396A–H; CX 397A–H) In Jacksonville, Florida, in 1977 Colonial's market share was 8.4% for supermarket sales and 6.5% for grocery store sales. (CX 664A; CX 2K; Admissions 45) Colonial had 13 supermarkets in Jacksonville, and had plans for one new store each year from 1979 to 1983. In 1980, Colonial's market share had improved and was estimated to be 11%. (CX 252Z70) Similarly, in Richmond, Virginia, Colonial's market share for supermarkets was 8.5% for supermarkets and 6.6% for grocery stores. (CX 664B; CX 2S; **[232]** Admissions 66) In 1977 Colonial had nine supermarkets in the Richmond SMSA, with plans for six new supermarkets. (Admissions 67; Stewart 564) In addition, Colonial was planning for three supermarkets in Charlottesville, Virginia, and was looking for store sites in Fredericksburg, Virginia. Colonial was also contemplating a subwarehouse in the Richmond area for grocery items. (Stewart 562–567)

In the above areas, Colonial had a solid market position with name recognition, and plans to improve and increase its market position. In these markets Colonial clearly had the desire, finances and market skills to increase its market position. In these circumstances, the Colonial acquisition cannot fairly be said to be a toehold in these markets.

7. Perceived Potential Entrant

The perceived potential entrant doctrine had its origin in *El Paso Natural Gas*. In that case the acquisition by a natural gas supplier, the sole out-of-state supplier to California, of the stock and assets of another gas company, one of two major interstate pipelines serving the trans-Rocky Mountain States and which had made efforts toward entering the California market, was a violation of Section 7. The acquired company was eliminated as a potential supplier, a position which had made it a substantial competitive factor in that market. 376 U.S. at 653–55, 659.

The significant factors in *El Paso Natural Gas* were that the two companies were in the same business and operated in adjacent states and that the acquired company had the management and competitive initiative to enter the market. *Id.* at 660–61. It had made one unsuccessful attempt to do so, which was met by strong resistance from the acquiring firm. 376 U.S. at 659. In addition, the nature of this industry gave the acquired firm a unique capacity to enter and there was no other likely potential entrant.

In *Marine Bancorporation,* 418 U.S. at 630–31, the Supreme Court stated that potential competition becomes a factor only where the market is characterized by dominant participants engaging in interdependent or parallel behavior and having the capacity to determine price and total output of goods and services. Where the target market is performing competitively, the market factors will not find it necessary to adjust their behavior to the presence of a perceived potential entrant.

In another case, the Court held that for Ford, the automobile manufacturer, to acquire one of only three spark plug manufacturers would violate Section 7. The extreme degree of concentration in the spark plug market and the unique **[233]** relationship of Ford to the market were stressed. *Ford Motor Co.* v. *United States,* 405 U.S. 562, 567 (1971).

The significance of perceived potential entrants and their present effect on competition is the theory that

> an aggressive well equipped and well-financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be overestimated.

United States v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 174 (1963).

Opinion is divided, however, regarding whether there must be evidence offered of the perception of in-market factors that there was a potential entrant and that the in-market factors reacted to this perception. Some commentators suggest that it is possible that market and attitudinal data need not be produced, but rather, that the courts have been more concerned with whether in-market firms *should have* perceived the defendant as a potential entrant based on the same factors, motivational and situational, that made the defendant a potential entrant initially. T. W. Dunfee and L. W. Stern, "Potential Competition Theory as an Antitrust Tool Under Section 7 of the Clayton Act: A Decision Model," 69 Nw. L. Rev. 828 (1975); I. Horowitz, "The Perceived Potential Competitor: Antitrust Sinner or Saint?", 26 *Antitrust Bulletin* 248 (1981)

In *Phillips Petroleum,* the Court stated that "[s]uch industry recognition may, of course, be shown by direct evidence as well as by inference from the objective economic facts establishing likelihood of market entry." 367 F.Supp. at 1255. In *Falstaff Brewing,* the Supreme Court, in its plurality opinion, suggested that circumstantial evidence of the perception and reaction of in-market firms may be sufficient. 410 U.S. at 534, n.13.

In *British Oxygen Co.,* the testimony of industry witnesses that BOC was viewed as a likely entrant, but that this did nothing to change their behavior, led the Commission to dismiss that part of the Complaint dealing with perceived potential entrance. 86 F.T.C. at 1351, n.8. *See also Marine Bancorporation,* 418 U.S. at 624–25; *Hughes Tool,* 415 F.Supp. at 646; *Siemens,* 621 F.2d at 509.

Actual testimony from present market factors may be self-serving, because if they suggest a perception and reaction [234] to the defendant poised in the wings, they may succeed in overturning a potential merger. This result will often be to the benefit of these companies.

Although objective factors indicate that Grand Union was interested in this market, there was almost no industry perception of this fact.[38] Unlike other cases where objective evidence was sufficient to indicate that current actors in the market should be aware of the acquirer poised on the edge of the market, the nature of the market in this case is significantly different. Because this market is a series of SMSAs, with different factors in each, it is unlikely that these factors would be aware of Grand Union's potential interest in entering specific SMSAs. The other cases discussed above, *e.g., Phillips, Falstaff,* etc., involve markets where potential entrants would be more obvious.

Although in its opinion in *Tenneco,* the Commission indicated that a violation of Section 7 may be found where the perception of firms in the target market are inferred from the objective economic criteria that identify the firm as likely to enter the market, it also gave ample evidence of actual industry perception that Tenneco was likely to enter. Docket No. 9097, Slip Op. at 45–48 [98 F.T.C. at 608–610 (1981)].

Even if objective evidence of Grand Union's likelihood of entry into this market was deemed to substitute for any actual testimony of industry awareness, there would still be no violation of Section 7 based on the potential entrant doctrine. The importance of the potential entrant is the procompetitive effect it had on the market due to the reaction it evoked from target market firms. It is rare to find a direct link between the entrant "on the wings" and the competitive actions taken by companies to discourage entrance. Such immediate causality was found in *Brunswick,* where a domestic outboard motor manufacturer upgraded its product to match the product of its perceived potential competitor, Yamaha. 94 F.T.C. at 1273. In *Tenneco,* the Commission found evidence that the perception of Tenneco at the market's edge was a significant factor stimulating new competition. Docket 9097, Slip Op. at 52 [98 F.T.C. at 612 (1981)]. However, proof under Section 7 requires only a finding of "probability that the acquir-

[38] Complaint counsel is urging the perceived potential entrant theory only in the Virginia and Florida SMSAs, and the Atlanta SMSA. (Complaint Counsel's Reply Brief, pp. 121–122)

ing firm prompted premerger procompetitive effects within the target market." *Marine Bancorporation,* 418 U.S. at 625. **[235]**

In this proceeding there is absolutely no evidence of any possible procompetitive effect of Grand Union's position on the edge of the market and only insubstantial evidence of any perception of Grand Union on the edge of the market. Therefore, complaint counsel has failed to prove a violation of Section 7 under the perceived potential entrant theory.

H. *The Violation Alleged in Count C of The Complaint*

Count C of the complaint charges that "Grand Union through its acquisition of Colonial has selected one of the most anticompetitive methods for entering the Southeastern United States." (Complaint ¶¶ 29 and 30)

Complaint counsel argues that, despite the availability of *de novo* entry or toehold acquisitions, Grand Union merged with Colonial, and by doing so selected the method of entry most injurious to competition in the Southeastern region. "Thus, respondent has eliminated a real probability of market deconcentration in many southeastern markets. One major competitive force in a region merely has been replaced by another." (CPF at 169–70)

On December 15, 1978, Grand Union filed a "Motion to Dismiss the Complaint or in the Alternative for a More Definite Statement." On January 3, 1979, complaint counsel filed a reply indicating that Count C constituted a violation of Section 5 of the Federal Trade Commission Act. (15 U.S.C. 45(b) (1976)) An "Order Denying Respondents' Motion to Dismiss Count C of the Complaint" was issued on April 17, 1979, stating that "complaint counsel will be permitted to make a trial record on the issues presented by Count C and this matter can be thoroughly briefed at the conclusion of the trial herein and respondents' motion can be renewed at that time."

Complaint counsel ground Count C in the Commission's concern about the multi-market effects of this acquisition; *i.e.,* that Grand Union, through the Colonial acquisition, now occupies the entire "gap in its operations" between Virginia and Florida without contributing to deconcentration in this area. (CPF at 169) If the specific relevant market into which Grand Union would have entered cannot be established, the effects of the acquisition of Colonial may be reached through Count C. Count C is justified, complaint counsel argues, because of the nature of the Commission's continued concern about the food retailing industry. Grand Union is uniquely situated to enter the area in a procompetitive manner, and if this merger is approved, it will free all the most likely entrants to enter markets by the acquisition of major factors. (CPF at 172) This will result not only in immediate greater concentration, but will also decrease the opportunities for later deconcentration. **[236]**

Two elements, described as "unique" by complaint counsel, exist that distinguish this case from others: the notion of the Southeast as an area of concern although not a traditional relevant market, and the fact that the toeholds in this case may provide entry as a significant factor in one market and also expansion into nearby markets. "If these unique elements push this acquisition outside the semantic confines of the traditional elements described in other Section 7 cases, they do not eliminate the concerns raised by the acquisition nor the concerns of Section 7 itself." (CPF at 173). These concerns, complaint counsel contends, mandate finding a violation of Section 5 of the FTC Act even if the letter of Section 7 is not breached. *L.G. Balfour Co.* v. *FTC*, 442 F.2d 1, 8–9 (7th Cir. 1971); *FTC* v. *Brown Shoe Co.*, 384 U.S. 316, 321–22 (1966). In the alternative, complaint counsel states that this merger should be reachable as an incipient threat to competition. *FTC* v. *Motion Picture Adv. Service Co.*, 344 U.S. 392, 394–95 (1953).

Respondents reject the idea that Section 5 may be used to reach a merger that does not violate the Clayton Act or Sherman Act. In *Sperry & Hutchinson Co.* v. *FTC*, the Supreme Court held that a violation of Section 5 may be found based on clearly articulated policies and standards, but when an antitrust violation does not arise there must be some rationale of injury to consumer interests independent of possible or actual effects on competition. 405 U.S. 233, 239, 245–248 (1972). No such effects have been articulated, according to respondents.

Complaint counsel's concern that no violation may be found because of an inability to pinpoint Grand Union's initial point of entry into the Southeast is unwarranted. As stated above, Grand Union's interest in this area was distinct and it is unnecessary to pinpoint its precise starting point for entry. However, since complaint counsel apparently has urged Count C as a separate offense distinct from the violation of Section 7 and Section 5 set forth in Count A and Count B of the Complaint, further discussion is necessary.

To establish a violation of Section 7, complaint counsel must prove that "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce in any section of the country. 15 U.S.C. 18. It is well-recognized that Section 7 is itself an incipiency statute designed to cover matters not rising to Sherman Act levels (*see Brown Shoe*, 370 U.S. at 317–**[237]** 318).[39] Further, "Congress used the words '*may be* substantially to

[39] One commentator has noted: "To permit a Section 5 action for an incipient Clayton Act violation would be to permit, in a sense, a theory of 'incipient incipiency.' Such a theory would permit the Commission to reach conduct far removed from the evils that Congress presumably had in mind when it passed the Clayton Act." N. Averitt, "The Meaning Of 'Unfair Methods Of Competition' In Section 5 of the Federal Trade Commission Act," 21 *B.C.L.Rev.* 246 (1980)

lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties." *Brown Shoe,* 370 U.S. at 323. Complaint counsel has now come up with another theory of violation —a merger not violating Section 7, but one that is "one of the most anticompetitive methods for entering the Southeastern United States." Complaint ¶ 30 Thus, under complaint counsel's theory, if the acquisition does not violate Section 7, *i.e.,* may not substantially lessen competition, or tend to create a monopoly, it nevertheless may violate Section 5 because it is a more anticompetitive method of entering a market than some other method that was available. Complaint counsel has provided no standards of proof or methods of analysis separate and distinct from those existing in Section 7 or Section 5 by which to assess this alleged violation. It is clear, however, that complaint counsel seeks a dilution of Section 7 standards and a less rigorous analysis of competitive effect. Without specification of distinct standards to fairly inform respondents of the facts and legal theories upon which the violation is based, respondents are unable to mount a proper defense.

The Commission heretofore has made manifest the proposition that the standards for challenging mergers under Section 5 are coextensive with the standards for challenging mergers under Section 7. *Beatrice Foods Co.,* 67 F.T.C. 473, 724–725 (1965); *Tenneco, Inc.,* Docket No. 9097, Slip Op. at 68 (September 23, 1981) [98 F.T.C. at 623]. To the extent Count C alleges a violation of Section 5, it is duplicative of Counts A and B of the Complaint. To the extent Count C attempts to allege a violation of law separate and apart from Counts A and B, it is dismissed as failing to allege a violation of law upon which relief can be granted.

I. *The Acquisition of Colonial Violates Section 5 of the Federal Trade Commission Act*

An acquisition that constitutes a violation of Section 7 of the Clayton Act is also a violation of Section 5 of the Federal Trade Commission Act. *Beatrice Foods Co.,* 67 **[238]** F.T.C. 473, 724–725 (1965); *Fashion Originators' Guild of America* v. *FTC,* 312 U.S. 457, 463 (1940); *Stanley Works* v. *FTC,* 469 F.2d 498, 499 n.2 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1963); *Tenneco, Inc.,* Docket No. 9097, Slip Op. at 68 (September 23, 1981) [98 F.T.C. at 623].

In the instant case, Grand Union's acquisition of Colonial violated Section 7 because that acquisition eliminated Grand Union as an actual potential entrant into the markets in which Colonial operated, particularly the SMSAs representing major population centers of the Southeast. Therefore, the acquisition of Colonial violated both Section

7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

REMEDY

Respondents are engaged in interstate commerce within the meaning of Section 4 of the Federal Trade Commission Act. (F. 8) Thus, the Commission has authority to enter a remedy appropriate to restore competition to the status in existence prior to Grand Union's acquisition of Colonial in August, 1978.

It is well-settled that the Commission has wide discretion in framing an order deemed adequate to cope with the violation of law found to exist. *FTC* v. *Mandel Bros., Inc.,* 359 U.S. 385, 392–93 (1959); *L. G. Balfour Co.* v. *FTC,* 442 F.2d 1, 23 (7th Cir. 1971). In cases where a violation of Section 7 is found, the most effective remedy to correct the injury to competition is generally held to be divestiture. *Ford Motor Co.* v. *United States,* 405 U.S. 562, 573 (1972); *FTC* v. *Procter & Gamble Co.* 386 U.S. 568 (1967); United *States* v. *E.I. du Pont de Nemours & Co.,* 366 U.S. 316, 328–31 (1961). A ban on future acquisitions is commonly ordered to prevent repeat violations. *Liggett Meyers, Inc.,* 87 F.T.C. 1074 (1976), *aff'd,* 567 F.2d 1273 (4th Cir. 1977).

Complaint counsel urges that complete divestiture of Colonial be ordered to restore Colonial to its former competitive position. (CPF at 175) Piecemeal divestiture would deprive Colonial of its finances, managerial know-how, and resources to continue its own expansion plans, complaint counsel argues. When piecemeal divestiture is ordered, each separate part might not survive as a viable competitor. The result might be "cherry-picking" and absorption of some stores by major market factors, or abandonment of some stores. *United States* v. *Von's Grocery Stores,* 384 U.S. 270 (1966), is cited by complaint counsel as an illustration of the undesirable effects of piecemeal divestiture.

Instead, complaint counsel advocates divestiture by spin-off, a device by which the stock of the acquired firm is conveyed pro-rata to the stockholders of the acquiring firm. **[239]** L. Sullivan, *Handbook Of The Law Of Antitrust* 674 (1977). As contrasted with divestiture by sale, where a purchaser is found for the acquired company, in a divestiture by spin-off the stockholders of the acquiring firm receive the acquired firm as a dividend, but the commonality of ownership is reduced as the stock of each company is bought and sold. Professor Sullivan indicates that a spin-off is frequently the remedy in cases where the acquired company has been operated independently and where the acquiring firm is widely and publicly held. *Ibid.* The latter condition is not met here.

Partial divestiture has been ordered in cases where a merger had procompetitive or neutral effects in several of the relevant markets. The appropriate remedy in each case must be based on the facts peculiar to the situation at hand. *FTC* v. *PepsiCo, Inc.,* 477 F.2d 24, 29 (2d Cir. 1973).

Complaint counsel suggests that, if partial divestiture is ordered, that Grand Union be permitted to retain the Columbia Division of Colonial, which would give Grand Union a presence in the central portion of the Southeast. (CPF at 176) Respondents argue that because the Columbia Division was one of the two least successful Colonial divisions (Respondents' Reply Brief at 289–295), permitting retention only of that Division would be punitive. The Supreme Court, respondents note, has ruled that punitive relief is inappropriate in a civil antitrust proceeding. *E.I. du Pont de Nemours & Co.,* 366 U.S. at 326, *modification denied,* 366 U.S. 956 (1961).

Total divestiture of Colonial and a ban on future acquisitions of ten-years' duration are mandated in this case. Insufficient information has been presented to allow an informed partial divestiture. If such an arrangement can be fashioned, agreeable to both complaint counsel and respondents, this would be acceptable. The Order entered herewith will require a total divestiture by which Colonial will be returned to its pre-merger status as a competitor in the Southeast. This appears to be the most appropriate remedy at this stage of the proceeding. Colonial's trade name and identity has been preserved by agreement of the parties. Named in the Order are The Grand Union Company, Cavenham (USA) Inc., the parent corporation of Grand Union (CX 12D; RPF 7), Cavenham Holdings Inc., the parent corporation of Cavenham (USA) Inc. (RX 2I), and their respective officers and agents. All corporations are domiciled within the United States. (RX 2I)

Conclusions of Law

1. The Commission has jurisdiction of and over the subject matter of this proceeding and of The Grand Union Company, Cavenham (USA) Inc., and Cavenham Holdings Inc. ("respondents"). **[240]**

2. The respondents were, at all times relevant herein, corporations engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, and in the Federal Trade Commission Act, as amended.

3. The appropriate line of commerce within which to evaluate the competitive effects of the acquisition of Colonial stock by the respondents is sales by supermarkets.

4. The proper geographic market within which to determine the competitive effects of the respondents' acquisition of Colonial stock in

the relevant line of commerce is the Standard Metropolitan Statistical Area.

5. The effect of the acquisition of Colonial stock by the respondents has been or may be, substantially to lessen competition, or tend to create a monopoly in the aforesaid product and geographic markets in violation of Section 7 of the Clayton Act, as amended, and in violation of the Federal Trade Commission Act, as amended, by eliminating Grand Union as a significant actual potential entrant into the area of Colonial's operations as a supermarket firm.

6. The Order entered hereinafter is appropriate to remedy the violation of law found to exist.

Order

For the purpose of this Order, "respondents" shall include The Grand Union Company, Cavenham (USA) Inc., and Cavenham Holdings Inc.

I

It is ordered, That respondents, their officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all stock, assets, title, properties, interest, rights and privileges, of [241] whatever nature, tangible and intangible, including without limitation all buildings, equipment, inventory, trade names, trademarks and other property of whatever description acquired by respondents as a result of the acquisition of Colonial Stores Incorporated (hereinafter "Colonial"), together with all additions and improvements to Colonial subsequent to the acquisition. Such divestiture shall be absolute, shall be accomplished no later than one (1) year from the date of service of this Order, and shall be subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That such divestiture shall be accomplished absolutely to an acquirer approved in advance by the Federal Trade Commission so as to transfer Colonial as a going business and a viable, competitive, independent concern.

III

It is further ordered, That pending any divestiture required by this Order, respondents shall not knowingly cause or permit the deterioration of the assets and properties specified in Paragraph I in a manner that impairs the marketability of any such assets and properties. Respondents may but shall not be required to make capital expenditures for the improvement of any such assets and properties. [242]

IV

It is further ordered, That for a period of ten (10) years from the date this Order becomes final, respondents shall cease and desist from acquiring, or acquiring and holding, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, assets, any interest in or any interest of any concern engaged in the business of retail grocery store sales, nor shall respondents for a period of ten (10) years from the date this Order becomes final enter into any agreement, understanding or arrangement with any such concern by which respondents obtain the market share, in whole or in part, of such concern in the above described product lines, without the prior approval of the Federal Trade Commission.

V

It is further ordered, That within sixty (60) days from the effective date of this Order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this Order, respondents shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner [243] and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by respondents to make public its desire to divest Colonial, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

VI

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed changes which may affect compliance obligations arising out of the Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations, and that this Order shall be binding in any such successor.

OPINION OF THE COMMISSION

BY MILLER, *Chairman:*

This antitrust case challenges, under a potential competition theory, the geographic market extension acquisition of a large Southeast retail grocery supermarket chain by a large Northeast-based supermarket chain. The Commission's complaint, issued November 21, 1978, alleges that the acquisition in 1978 of Colonial Stores ("Colonial") by Grand Union Company and its various related corporations (collectively "Grand Union") violated the antitrust laws. Specifically, the challenged acquisition allegedly violated Section 7 of the Clayton Act[1] and Section 5 of the Federal Trade Commission Act[2] under three separate legal theories: actual potential competition, perceived potential [2] competition, and entry into the Southeastern U.S. through "one of the most anticompetitive methods." Following evidentiary hearings, Chief Administrative Law Judge Ernest Barnes found this conglomerate acquisition unlawful under only the actual potential competition count of the complaint. The ALJ ordered Grand Union Company and three of its four co-respondents to divest all stock and assets acquired from Colonial.

Respondents appeal from the ALJ's finding of illegality under the actual potential competition theory. We find no violation of the antitrust laws and dismiss the complaint. [3]

I. BACKGROUND

A. *The Respondents*

1. Grand Union

Respondent Grand Union Company is a Delaware corporation headquartered in Elmwood Park, New Jersey. (IDF 1.)[3] Prior to its acquisition of Colonial, Grand Union operated approximately 474 supermarkets (as well as a small number of general merchandise

[1] 15 U.S.C. 18 (1980).

[2] 15 U.S.C. 45 (1976).

[3] The following abbreviations are used in this opinion:

ID	– Initial Decision Page Number
IDF	– Initial Decision Finding Number
Tr.	– Transcript of Testimony Page Number
CX	– Complaint Counsel's Exhibit Number
RAB	– Respondents' Appeal Brief Page Number
CAB	– Complaint Counsel's Answering Brief Page Number
RPF	– Respondents' Proposed Finding Number
Tr.OA	– Transcript of Oral Argument Page Number

stores and catalog showrooms) in the following states and territories: New [4] Hampshire, Vermont, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Florida, Puerto Rico, and the Virgin Islands. (IDF 2–3.) About the time of the acquisition, Grand Union estimated that, excluding Colonial stores, it was the nation's 11th largest supermarket chain. (IDF 2.) In the fiscal year ending March 31, 1978, Grand Union's total retail food sales were approximately $1,574 million (IDF 3.), approximately 95 percent of the company's total sales. (*Id.*)

Respondent Grand Union Holdings, Inc., was a wholly-owned subsidiary of Grand Union Company. It was incorporated for the sole purpose of making a tender offer and acquiring Colonial shares. (IDF 4.)

2. Colonial

Prior to the challenged acquisition, respondent Colonial was a Virginia Corporation headquartered in East Point, Georgia. (IDF 6.) At about the time of the acquisition, Colonial operated a chain of some 378 supermarkets in seven southeastern states: Virginia, Maryland, North Carolina, South Carolina, Alabama, Georgia, and Florida. (*Id.*) Colonial estimated in 1977 that it was the nation's 15th largest supermarket chain. (IDF 7.) Colonial's total sales for the fiscal year ending December 31, 1977, were approximately $1,053 million. (*Id.*) As of 1978, Colonial operated most of its stores under the "Big Star" name; the remainder did business under the "Colonial" name. (IDF 6; and CX–10F.) Following its acquisition, Colonial was merged into Grand Union and now operates as a division of Grand Union. (IDF 6.)

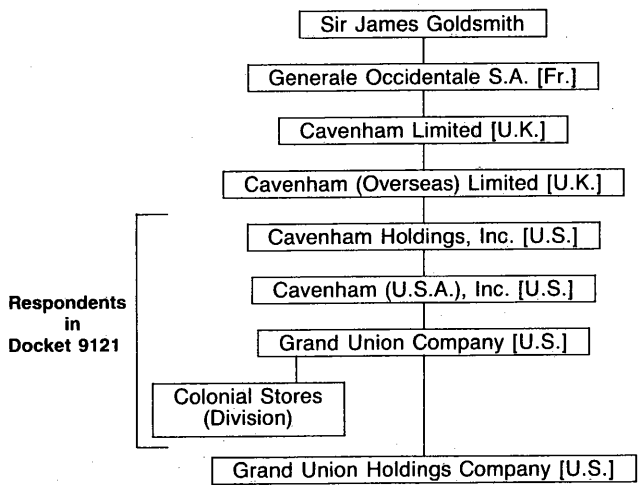
3. Cavenham

The immediate parent of Grand Union Company is respondent Cavenham (U.S.A.), Inc., which was incorporated in 1975 for the purpose of holding Grand Union Company's stock. Cavenham (U.S.A.) is in turn a wholly-owned subsidiary of respondent Cavenham Holdings, Inc., organized to hold the shares of Cavenham (U.S.A.). Both of these respondents are U.S. corporations. (IDF 5.) **[5]**

4. Related Entities

Only the five above-mentioned firms are respondents in this proceeding. However, they are themselves controlled by various overseas entities, whose officials made the ultimate decisions pertaining to the challenged acquisition. Respondent Cavenham Holdings, Inc., is a wholly-owned subsidiary of Cavenham (Overseas) Limited, a British company organized to hold securities of companies located outside the United Kingdom. That company is in turn a wholly-owned subsidiary of another British firm, Cavenham Limited, a multinational food retailing and manufacturing entity that operates in fourteen nations. Its activities include the operation of supermarkets and other retail food outlets in the United Kingdom. All outstanding stock of Cavenham Limited is owned by a French company, Generale Occidentale S.A., which is ultimately controlled by Sir James Goldsmith. (IDF 5.)

These corporate relationships may be illustrated as follows:



B. *The Acquisitions*

In June 1968, the Commission issued a 10-year consent order against Grand Union in a matter unrelated to the present proceeding ("1968 Order").[4] The 1968 Order required Grand Union to obtain Commission approval before acquiring: (1) five or more [6] grocery stores, (2) firms accounting for more than $5 million in grocery store sales, or (3) grocery stores that would give Grand Union a five percent or larger share of all grocery or food store sales in any city or county.[5] The 1968 Order expired on June 21, 1978. (IDF 9.) In addition, Grand Union has at all relevant times been subject to the Commission's 1967 "Enforcement Policy With Respect to Mergers in the Food Distribu-

[4] *Grand Union Co.,* 73 F.T.C. 1050 (1968) (consent order).

[5] *Id.* at 1055.

tion Industries" ("Policy Statement").[6] That Policy Statement requires food retailers and wholesalers having annual sales exceeding $100 million to notify the Commission at least 60 days prior to merging with or acquiring a food retailer or wholesaler.[7]

1. The Florida Stores Acquisition

Following a period of negotiations, Colonial offered in early 1978 to sell to Grand Union 11 of its Florida "Big Star" stores that had previously been closed. (IDF 9.) Pursuant to the Commission's Policy Statement, Grand Union notified the Commission on May 3, 1978 of its intention to acquire eight of the stores, all located on Florida's West Coast. (IDF 9.) Grand Union acquired those eight stores on July 6, 1978, just over two weeks after expiration of the "prior approval" provision in the 1968 Order. (*Id.*) Grand Union renovated seven of the stores and reopened them under the Grand Union name in the fall 1978. (*Id.*) While the allegations in the Commission's complaint are arguably sufficiently broad to include this Colonial *store* acquisition (*compare* Complaint ¶ 17 *with* ¶32), none of the eight acquired stores are within the relevant markets involved in this appeal. In any event, the store acquisition is pertinent to certain issues raised by the complaint's challenge to the *stock* acquisition, described below. **[7]**

2. The Colonial Stock Acquisition

On June 29, 1978—just over a week after the 1968 Order expired—Grand Union proposed a $30 per share cash tender offer to Colonial's management. (IDF 10.) Colonial's board of directors rejected the merger proposal (*Id.*), and commenced (nonantitrust) actions in both state and federal courts to bar the takeover. (IDF 11.) In August 1978, Grand Union proposed an increase in its previous cash tender proposal to $35 per share. (IDF 12.) A divided Colonial board of directors voted to recommend acceptance by Colonial shareholders of the $35 offer, and the legal actions against Grand Union were dismissed or withdrawn. (*Id.*) Following the formal $35 tender offer on August 8, 1978, Grand Union acquired over 90 percent of Colonial's outstanding shares, and Colonial became a wholly-owned Grand Union subsidiary. (IDF 12.) It was later merged into Grand Union, and as of February 1979 was operated as a division of Grand Union. (*Id.*)

C. *The Allegations*

The complaint charges that the effect of the challenged acquisition may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, and further

[6] 2 Trade Reg. Rep. (CCH) ¶ 4525 (Jan. 17, 1967).
[7] *Id.* at 6907.

charges that the acquisition constitutes an "unfair act and practice" or "unfair method of competition" in or affecting commerce, in violation of Section 5 of the FTC Act. (Complaint ¶ 31.) The relevant product market is alleged to be sales by retail food stores, including submarkets thereof such as supermarkets. (Complaint ¶ 19.) The relevant geographic markets are identified as "some of the Standard Metropolitan Statistical Areas [SMSAs], cities or towns in which Colonial operates supermarkets." (Complaint ¶ 20.) [8]

The complaint's three counts set forth the legal theories of the alleged violations:

Count A: But for its acquisition of Colonial, Grand Union is an *actual potential entrant* into some of the relevant Southeast geographic markets, and is one of the few most likely potential entrants into certain of those markets. (Complaint ¶¶ 24–27.)

Count B: Grand Union is a *perceived potential entrant,* being seen by food retail chains in some of Colonial's geographic markets as the most likely (or a leading) potential entrant. (Complaint ¶ 28.)

Count C: Through its acquisition of Colonial, Grand Union has *selected one of the most anticompetitive methods for entering* the Southeastern U.S. (Complaint ¶¶ 29–30.)

The complaint alleges that the effects of the acquisition may include (among others): an increased probability of further concentration and a decreased probability of deconcentration; possible elimination of substantial actual potential competition by internal expansion or toehold acquisition; an increase in already high entry barriers; and encouraged tendencies for mergers by other actual and potential competitors. (Complaint ¶ 31.)

D. *Pre-Trial Agreements*

Prior to issuance of the complaint, Grand Union and Commission staff entered a hold-separate agreement under which Grand Union agreed to hold Colonial's assets as a separate subsidiary until the FTC's investigation closed or until November 17, 1978. (IDF 13.) That agreement was extended until December 1, 1978, when it lapsed. (*Id.*) Grand Union and Commission staff also entered a separate agreement dated November 29, 1978—still in effect, as modified—under which Grand Union agreed to preserve intact Colonial's trade names and trademarks for the pendency of the Commission's proceedings in this matter. (IDF 14.) On September 27, 1982, Grand Union filed a motion to exempt certain Colonial stores in the Richmond, Virginia area from that agreement. The Commission granted that motion on December 17, 1982. [9]

E. *The Initial Decision*

Following administrative hearings, the ALJ closed the evidentiary record on May 1, 1981, and on October 30, 1981, issued his Initial Decision. The ALJ found the appropriate product market to be sales by supermarkets (ID 240.), which he defined as stores having annual sales of $1.5 million or more and being 10,000–56,000 square feet in size. (ID 200.) He found the appropriate geographic market to be the SMSA. (ID 240.) Using those market parameters, the ALJ concluded that Grand Union's acquisition of Colonial was unlawful under the actual potential competition allegation of Count A of the complaint. More specifically, Judge Barnes found that the effect of the acquisition has been or may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act, because it eliminated Grand Union as a significant actual potential entrant into the markets in which Colonial conducted its supermarket operations (particularly those SMSAs representing major Southeastern U.S. population centers). (ID 238 and 240.) With respect to Count A, the ALJ concluded that "Grand Union's purchase of Colonial, although in essence the replacement of one firm by another, was injurious because it forever foreclosed the potential future benefit of Grand Union's *de novo* or toehold entry." (ID 228.)

As to the perceived potential entrant allegation of Count B of the complaint, the ALJ found "absolutely no evidence of any possible procompetitive effect of Grand Union's position on the edge of the market and only insubstantial evidence of any perception of Grand Union on the edge of the market." (ID 235.) He therefore concluded that complaint counsel had failed to establish a violation under that count. (*Id.*)

Concerning Count C—entry by one of the most anticompetitive means—the ALJ concluded that, to the extent it alleges a violation of Section 5 of the FTC Act, Count C is merely duplicative of Counts A and B. (ID 237.) To the extent it attempts to allege a violation separate and apart from Counts A and B, Judge Barnes dismissed Count C as failing to state a claim upon which relief can be granted. (*Id.*) [10]

With the stated intention of restoring Colonial to its pre-merger status as a competitor in the Southeastern U.S. (ID 239.), the ALJ entered an order that would require Grand Union to divest all stock and assets acquired from Colonial. (Order ¶ I at ID 240–41.) The ALJ's order would also require prior Commission approval of any acquirer of the divested stock or assets. (Order ¶ II at ID 241.) Moreover, the order would bar Grand Union from acquiring without prior Commission approval the stock or assets of any retail grocery concern for a 10-year period. (Order ¶ IV at ID 242.) The ALJ's order would expressly bind only three of the five named respondents—Grand Union Company, Cavenham (U.S.A.), Inc., and Cavenham Holdings, Inc. (Order at ID 240.)

Respondents appeal from the ALJ's finding of a violation as to Count A of the complaint, and from the order entered by the ALJ. (RAB 1.) Complaint counsel do not appeal from the ALJ's conclusions as to Counts B and C, and we do not address them on this appeal. Briefs for all parties were supplemented by oral argument before the Commission, held April 19, 1982.

II. THE RELEVANT MARKETS

The Supreme Court has instructed repeatedly that: "Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."[8] Here, complaint counsel urge narrow market definitions, while respondents argue for broader parameters. For the reasons summarized below, we disagree with the ALJ's conclusion that the most appropriate product market is sales by "supermarkets" (as defined in the Initial Decision), but agree with his conclusion that the Standard Metropolitan Statistical Area is an acceptable geographic market approximation for purposes of evaluating this acquisition under Section 7 of the Clayton Act. [11]

Before turning to the specifics of the market definitions, we note some general observations concerning analysis of the competitive consequences of acquisitions involving existing or potential competitors.[9] The traditional approach in Section 7 cases has been to define the relevant arena within which competition takes place by listing products or services that are considered to be in competition with those produced by the merging firms. Items on this list are included within the market defined for the case, and 100 percent of the sales of all of these items is included in calculating firm market shares. Each of the items on this list is assumed to have the same competitive effect as any other item on the list. Products and services not on the list are excluded entirely from market share calculation, and are

[8] *United States v. Marine Bancorporation,* 418 U.S. 602, 618 (1974), *quoting United States v. Du Pont & Co.,* 353 U.S. 586, 593 (1957).

[9] For a general discussion of market definition issues in the context of merger enforcement policy, see "Statement of Federal Trade Commission Concerning Horizontal Mergers," Trade Reg. Report No. 546 (CCH) at pp. 84–85 (June 14, 1982) ("FTC Merger Statement"); and Merger Guidelines of the Department of Justice, 2 Trade Reg. Rep. (CCH) at ¶ 4502 (June 14, 1982) ("DOJ Merger Guidelines").

assumed to exert *no* competitive effect on the merging firms or their competitors.

The unsatisfactory nature of this "all or nothing" approach is readily apparent. It may result in complete exclusion of firms and products that apply *some* competitive pressure upon the acquiring firm's market, while including the entire output of other firms and products applying comparatively little competitive pressure. Moreover, the competitive impact may often differ even among products and producers included in the market definition.

These shortcomings can be reduced considerably when reliable estimates of elasticities of demand and supply are available. The concept of demand price elasticity measures the degree to which the quantity demanded (per unit of time[10]) of a specific good or service is sensitive to a small change in its price, all other factors remaining [12] constant.[11] In the instant matter, the concept of demand elasticity can be used to describe the degree to which consumers purchase less (more) from an area's supermarkets after the latter increase (decrease) prices by a given amount. The closely-related concept of cross-elasticity of demand measures the sensitivity of the quantity of one good or service demanded to a small change in the price of a second good or service.[12] In the context of this appeal, the cross-elasticity of demand of most relevance is that which would describe the effect of a rise or fall in supermarket prices on the quantities of products and services demanded by consumers from grocery, convenience, or warehouse stores. The higher the cross-elasticities of demand among such products and services the more appropriate it is to consider the stores in question to be in the same market for purposes of antitrust analysis; low cross-elasticities would suggest that they should not be so considered.

The concept of supply price elasticity describes the degree to which suppliers of a given product or service will expand (contract) output in response to an incremental increase (decrease) in the price of that

[10] In discussing the concept of quantity demanded or supplied hereafter, we refer to quantity per unit of time.

[11] Formally, the (own) price elasticity of demand of a particular product or service may be defined as the absolute value of the ratio of the percentage change in quantity demanded of that product or service to a small percentage change in its price, with all other factors affecting demand held constant.

Our discussion of elasticities is confined to price elasticities. However, concepts other than price elasticity may also be used to measure product substitutability. *See, e.g.*, D. Needham, *The Economics of Industrial Structure, Conduct, and Performance* 112–14 (St. Martin's Press 1978) (possible alternative for measuring substitutability might be response of quantity of one firm's product demanded to change in level of another firm's advertising outlays, prices remaining constant). Thus, we do not imply by our focus on price elasticities that other dimensions of competition (service, quality, etc.) are not also important. Indeed, this record reflects the importance of non-price competition in the retail grocery store business in the 13 markets alleged here. *See, e.g.*, IDF 22 (citing testimony of industry witnesses that convenience stores compete with supermarkets in hours of operation).

[12] Formally, cross-(price)-elasticity of demand of a particular product or service may be defined as the ratio of the percentage change in quantity demanded of that product or service to a small percentage change in the price of another product or service, with all other factors affecting demand held constant.

product or service, all other factors remaining [13] constant.[13] Everything else equal, the greater the elasticity of supply in a market, the less likely monopoly power is to be created and/or maintained. Cross-elasticity of supply describes the degree of change in the supply of other products or services in response to a change in price for a given product or service.[14] The most relevant application in this proceeding is the degree to which there is an expansion in output by other vendors (for example, warehouse stores) in response to an increase in supermarket prices. The higher the cross-elasticity of supply among specific suppliers, the more one should be inclined to group them in the same market for purposes of antitrust analysis.[15]

In most instances, adjudicators and policymakers do not have very precise estimates of the elasticity and cross-elasticity figures. Often, however, inferences may be drawn. A particularly important factor to be considered in inferring supply elasticities and cross-elasticities is the height of entry barriers. This concept is addressed in the discussion of the number of likely potential entrants in Part III(C) below.

Elasticity figures can be very helpful in analyzing the existence of or potential for market power—generally defined in antitrust cases as the ability of incumbent firms to restrict output or raise prices above competitive levels.[16] Moreover, if the elasticities can be estimated with reasonable accuracy, the exact parameters of the "relevant market" become less critical to the analysis and its conclusions.[17] For example, if a [14] market is defined overly narrowly—resulting in market share figures sufficiently high to suggest the existence of market power where, in fact, none exists—evidence showing high industry demand or supply cross-elasticities in that market would so indicate.[18]

Empirical or even circumstantial evidence of demand and supply elasticities thus provides a more accurate portrayal of the extent of market power and of potential anticompetitive effects than does the "all or nothing" market definition approach. It permits a comparative assessment of the competitive effect that a continuum of products or producers may have on competition in a specific case, without the need to disregard entirely the competitive effects of those products or

[13] Formally, the (own) price elasticity of supply of a particular product or service may be defined as the ratio of the percentage change in quantity supplied of that product or service to a small percentage change in its price, with all other factors affecting supply held constant.

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[15] *See Budd Company,* 86 F.T.C. 518, 572 (1975).

[16] *See, e.g., United States v. E.I: du Pont de Nemours & Co.,* 351 U.S. 377, 389–93 (1956) ("control of price or competition establishes the existence of monopoly power under §2" of Sherman Act).

[17] *See* FTC Merger Statement, note 9 above, at p. 76.

[18] *See, e.g., Budd Company,* 86 F.T.C. 518, 572 (1975) (record evidence of high degree of cross-elasticity of supply, which "can . . . be an important consideration in defining markets," relied on in rejecting separate submarkets for "open-top" and "closed-top" van trailers).

producers which, under the traditional approach, may have been defined as being outside the relevant market.[19]

As is often true in antitrust cases, the record here contains little information on which to develop accurate measures of supply and demand elasticities and cross-elasticities. Hence, we may apply reasoned judgment in estimating or inferring the relative magnitude of the elasticities in order to assess the degree of market power likely to result from Grand Union's acquisition of Colonial. With respect to product market definition, we consider such factors as whether the products and services have sufficiently distinctive uses and characteristics; whether industry firms routinely monitor each other's actions and calculate and adjust their own prices (at least in part) on the basis of other firms' prices; the extent to which consumers consider various categories of sellers (*e.g,* supermarkets and warehouse stores[20]) as substitutes; and whether a sizeable price disparity between the different types of food sellers (*e.g.,* limited assortment or **[15]** "box stores"[21] versus supermarkets) persists over time for equivalent amounts of comparable goods and services.[22]

Concerning geographic market definition, we take into account the following factors: the extent of different price changes and patterns from region to region; the level of barriers to trade flow between regions (including high transportation costs relative to product value); the degree of product shipping from one region to another (*i.e.,* transshipment); and the perceptions of competition from distant firms on the part of industry members.[23]

A. *The Product Market*

Under the legal standards set forth by the Supreme Court, a relevant product market for Section 7 analysis may be defined in terms

[19] *See, e.g.,* F.M. Fisher, "Diagnosing Monopoly," *The Quarterly Review of Economics & Business* 12–17 (Summer 1979); D. Needham, *The Economics of Industrial Structure, Conduct, and Performance* 111–14 (St. Martin's Press 1978).

[20] Throughout this opinion we adopt the ALJ's description of "warehouse store": "A 'warehouse' store is one in which the product is displayed in its own shipping container, without a price label on it. It offers limited service." (IDF 25, *citing* Tr. 367–68.)

[21] We also adopt the ALJ's description of "box stores": "Limited assortment or box stores sell roughly 400 to 800 items, frequently do not carry meat or produce, and require the customer to bring his own bag or box. They rely heavily on manufacturers' allowances and deal merchandise, and do not offer services like bagging and payment by check." (IDF 24, *citing* Tr. 313, 738, 1129–30, and 2848.)

[22] *See, e.g., Budd Company,* 86 F.T.C. 518, 570–72 (1975) (Commission considers ease of production flexibility, existence of identical production and distribution facilities, and "identical marketing ease" in rejecting claim that "open-top" and "closed-top" van trailers each constitute separate, meaningful economic submarket); *United States v. Hughes Tool Co.,* 415 F.Supp. 637, 639–41 (C.D. Cal. 1976) (court rejects each of 16 individual "oil field pipe-handling tools" as separate submarkets; adopts "cluster" of 36 "specialized surface rotary drilling products" used in oil and gas well operations as relevant product market, citing evidence of industry recognition, low cross-elasticity of demand within cluster, as well as high degree of functional complementarity and integration, commonality in technology and manufacturing processes, and similarity of marketing channels and buyer groups for tools within cluster).

[23] For a general discussion of factors considered by the Commission in assessing relevant product and geographic markets in the merger context, *see* FTC Merger Statement, note 9 above, at pp. 84–85.

of the "cross-elasticity of demand" or the "reasonable interchangeability of use" between the product in question and proposed potential substitutes.[24] As noted above, at the time of the challenged [16] acquisition both Grand Union and Colonial were engaged primarily in the retail sale of food and related products through their respective supermarket chains. For present purposes, the numerous types of sellers of food at the retail level may be viewed along a continuum. These include the relatively large supermarkets operated by Grand Union and Colonial, smaller supermarkets and retail grocery stores, limited assortment stores (box stores and warehouse stores); "mom-and-pop" stores, convenience stores, military commissaries, delicatessens, fast-food outlets, and others.

The Commission's complaint in this matter alleges a lessening of competition in the product market consisting of retail food store sales and submarkets thereof, including the submarket of sales by supermarkets. (Complaint ¶ 19.) As noted above, the ALJ found that supermarkets represented the most appropriate relevant product market. (ID 205.) He defined "supermarkets" for this purpose as being only those stores with annual sales of $1.5 million or more, and with a size from 10,000–56,000 square feet. (ID 200.) The ALJ found that supermarkets "only compete with other supermarkets," reasoning that only companies that offer the same "cluster of services" provided by supermarkets offer significant competition. (ID 203.) The ALJ further concluded that competition against supermarket *chains*—which he defined as firms with 10 or more stores (IDF 58.)—is "most possible for other supermarket chains." (ID 215.)

Complaint counsel maintain that the ALJ correctly identified the most appropriate product market as being sales by supermarkets. (CAB 16.). Both of complaint counsel's expert witnesses (Dr. Marion and Dr. Parker) testified-in support of that proposed definition (IDF 16; and Tr. 1881 and 2220.), as did a number of complaint counsel's industry witnesses. (*E.g.*, Tr. 1115, 1470 and 1536.) In contrast, respondents argue that the "supermarket" concept is too narrow and imprecise to form the basis of a relevant product market, and describe as "arbitrary" the $1.5 million annual sales cut-off [17] adopted by the ALJ in defining supermarkets. (RAB 12–13.)[25] Respondents also contend that no other antitrust case involving the retail food industry has

[24] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95, 400–01, 404 (1956). *See also United States v. Continental Can Co.*, 378 U.S. 441, 447–58 (1964) (Court cites evidence of "large area of effective [interindustry] competition" between metal can producers and glass container manufacturers—including each industry's consideration of pricing policies of firms in other industry—in finding both in same product market).

[25] The Commission's complaint uses a somewhat broader definition of the term "supermarket" than did the ALJ. Paragraph I(2) of the complaint defines "supermarket" as "a retail establishment primarily engaged in selling a wide variety of canned and frozen food, dry groceries (either packaged or in bulk), other processed food and nonedible grocery items, fresh meat and prepared meat products, fresh fish and poultry, fresh fruits and vegetables, and dairy products, for home preparation and consumption and having a minimum of *six thousand (6,000) square feet* of floor space and at least *one million dollars ($1,000,000) in annual sales*." (Emphasis added.)

identified a supermarket submarket, and suggest inclusion in the product market of limited assortment, box and warehouse stores; "mom and pop" stores; convenience stores; and military commissaries. (RAB 12–13.)

We agree with respondents that the definition of supermarket advanced by complaint counsel and adopted by the ALJ is overly-restrictive. Both expert and industry witnesses testified that a $1 million or $1.5 million annual sales cut-off was "admittedly arbitrary." (IDF 28.) We agree, and further find the minimum 10,000 square foot size to be similarly arbitrary.[26]

It is undoubtedly true that the $1.5 million annual sales and 30,000 square feet minimum size thresholds facilitate collection of industry data for statistical purposes. Moreover, such bright-line cut-off points often facilitate adjudication of complex antitrust cases. However, the effect of using such arbitrary limits in defining the product market is to exclude *completely* from the competitive analysis all competitors whose annual sales or store size fall below the arbitrary thresholds. Hence, great care must be taken to assure such lines are appropriate. We find that the thresholds adopted by the ALJ exclude an unacceptably large portion of traders from the market analysis needed to assess the legality of the challenged acquisition, and thus do not provide a [18] sound economic framework for that analysis. We find insufficient basis in the record for excluding altogether the competitive impact of traders whose sales or store size (or both) happen to fall below these levels that are conceded by all to be arbitrary, and conclude that a broader product market definition is needed.

The ALJ accepted a number of complaint counsel's arguments advanced in support of their contention that supermarkets differ from other retail food stores in various ways, including store size, product variety, selling price, sales volume, and type of customer. (IDF 17.) However, testimony as to which categories of food retailers should be included in the product market differs considerably, even among witnesses for the same party. The ALJ's "supermarket" product market definition appears to be based in large measure upon his acceptance of various characteristics of supermarkets which complaint counsel argue are sufficient to distinguish supermarkets from all other food retailers. For the reasons summarized below, we do not believe these characteristics—which we assume to be accurate for purposes of our analysis—furnish persuasive justification for excluding all non-supermarket retail food sales from the analysis in this case.

First, we reject the argument that, because supermarkets common-

[26] *See FTC v. National Tea Co.*, 603 F.2d 694, 699 (8th Cir. 1979) (in Section 7 merger challenge, retail grocery chain with stores averaging 13,751 sq. ft. viewed as horizontal competitor of stores ranging from 20,000 to 92,000 sq. ft., even though historical increase in number of items stocked made it "difficult to compete effectively"), *consent order issued, National Tea Co., et. al.*, 96 F.T.C. 42 (1980).

ly offer a wider range of products (8,000–10,000 items) than other food retailers, *none* of the items sold by other retailers should be deemed to be sold in competition with supermarkets carrying the same item. Under the analysis advanced by complaint counsel and adopted by the ALJ, retail grocery stores carrying several thousand items *identical* to those found in supermarkets would be deemed to exert *no* competitive pressure upon supermarkets selling those items. We believe that the record demonstrates that a considerable degree of competition exists between supermarkets and retail grocery stores selling a significant number of the same items. We therefore reject the ALJ's conclusion, which effectively **[19]** excludes consideration of that competition in analyzing this acquisition under Section 7.[27]

Second, we agree with the ALJ that supermarkets offer a "cluster of services," and that the "one-stop shopping" made possible by this characteristic is preferred by many consumers. (ID 201 and 205.) Nevertheless, while we have found no direct discussion of the point in the record, it would seem logical that there exists some substantial segment of consumers that, even if disinclined to make multiple shopping trips, may nevertheless purchase the more durable food products from, say, box or warehouse stores in one week, and follow the next week patronizing a supermarket with the full "cluster" of services. Thus, over time, consumers might both take advantage of the full "cluster of services," while continuing to patronize those "limited assortment" firms offering lower prices, longer hours, or other advantages. Indeed, the very existence and survival of box and warehouse stores—as documented by this record—assures that at least some consumers act in this fashion.

Generally, the case for identifying a "cluster of services" as a distinct product market seems stronger where services are in fact involved. This is especially true where the services are complex, interrelated, and interdependent, such as in the "commercial banking services" market defined by the Supreme Court in *Philadelphia National Bank* and subsequent cases.[28] It would seem logical that for many consumers the services **[20]** offered by supermarkets, smaller grocery stores, and other food retailers, play a secondary and comple-

[27] *Cf. Heublein, Inc.*, 96 F.T.C. 385, 575–76 (1980) ("all wine" product market—consisting of sparkling, still, dessert and refreshment wines—found appropriate in light of "some significant competitive confrontation among even the most disparate wines"; question of possible submarkets not reached on facts of case); *see also SKF Industries, Inc., et al.*, 94 F.T.C. 6, 84–86 (1979) (broad overall "ball bearings" market embracing "continuous spectrum of quality"—including both commercial grade and precision bearings—found appropriate, citing "overlap or potential interchangeability of use" of bearings near middle of quality range, and noting complaint counsel's argument that bearing makers monitored sales of firms at opposite end of precision spectrum).

[28] *United States v. Philadelphia National Bank*, 374 U.S. 321, 356–57 (1963); *United States v. Phillipsburg National Bank*, 399 U.S. 350, 359–62 (1970); *United States v. Marine Bancorporation*, 418 U.S. 602, 618–19 (1974). *Cf. Brunswick Corp., et al.*, 94 F.T.C. 1174, 1259 (while outboard motor market involves "cluster" aspect from retailer's point of view, "no single consumer has an economic incentive to purchase a number of outboard motors under a single roof rather than shopping around"), *modified as to relief*, 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982).

mentary role to the principal item sold: food and related products. Moreover, in support of its market definition, the Supreme Court noted in *Phillipsburg National Bank* that some commercial banking services are unique to commercial banking.[29] In contrast, the ALJ expressly found that each service or product offered by "supermarkets" is available independently elsewhere. (ID 205.) In short, while we find some merit in this argument, we do not believe it supports exclusion of all grocery stores offering less than the "full cluster" from the market definition.

Complaint counsel also advance as distinguishing supermarket "characteristics" evidence that supermarkets focus principally upon other supermarkets in making expansion, store location, pricing, and advertising decisions, and in conducting price-checking activities. (IDF 22.) It may well be the case in many local markets that, as the ALJ found, the *strongest* competition faced by supermarket chain stores comes from other supermarket chain stores in the same locale. (IDF 34.) To the extent this is true, it would go far in explaining why supermarket chains direct most of their planning and market-monitoring resources at those perceived to be their *strongest* competitors. (*See, e.g.,* IDF 17, 21–23, and 27.) Moreover, in terms of price-checking and other monitoring of competitors' behavior, it seems to us entirely expected for a large supermarket to pay closest attention to those competitors who face similar scale economies, overhead, union contracts, and the like, and to adjust their marketing practices and gauge their own success accordingly. Nevertheless, evidence of such behavior on the part of supermarket chains—while certainly relevant to product market definition—does not, in our view, preclude the existence of competition between supermarkets and other smaller food retailers. **[21]**

Despite the ALJ's conclusion that "supermarkets only compete with other supermarkets" (ID 203.), record evidence as well as other findings in the Initial Decision refute that assertion. For example, there is evidence in the record that supermarkets sometimes price-check convenience and mom-and-pop stores on items such as bread, milk, beer, and soft drinks. (IDF 27 and 183; and Tr. 1546, 1731 and 2651.) The ALJ also found that convenience stores compete with supermarkets in terms of hours of operation. (ID 205.) Moreover, one of complaint counsel's expert economists testified that warehouse stores are direct competitors of supermarkets. (IDF 25; and Tr. 2223.) This conclusion is supported by testimony that Atlanta area supermarket chains (including Colonial) adopted an allegedly exclusionary "single-

[29] *United States v. Phillipsburg National Bank,* 399 U.S. 350, 360–61 (1970). It may well be that, as other financial institutions are granted authority to offer many of the same services that were once restricted to commercial banks, the Supreme Court will expand this product market to include those now-competing institutions.

store price zone" as a competitive response to entry by the very type of warehouse stores that complaint counsel urge be excluded from the product market because they purportedly do not compete with supermarkets. (IDF 84; and Tr. 330–36.)

The ALJ found that prices in limited assortment stores are generally lower than those in supermarkets. (ID 205; and IDF 24.) Because such stores typically offer far fewer products and services than do supermarkets, the lower price is entirely consistent with a theory that such stores offer a different price/service/quantity mix than do supermarkets. Also, several industry witnesses testified that even fast-food operations compete with supermarkets, and that supermarkets responded to that competition by developing delicatessens, bakeries, and other fast-food operations within their stores. (IDF 30; and Tr. 1702–04, 1372–73, 1448, and 2578–79.) Respondents' expert witnesses were in disagreement on this issue, with one including, and one excluding, fast-food outlets in the relevant product market. (Tr. 2863–64 and 3252–53.) In light of this evidence of competition faced by supermarkets from other food retailers, we find unpersuasive the factors relied upon by the ALJ (*e.g.*, average sale per customer, size of gross margins, existence of supermarket trade associations and trade journals, more intensive use of labor, etc.) in identifying a purported supermarket "line of commerce" [22] for purposes of Section 7 analysis.

On the basis of the record evidence, we think it clear that the appropriate product market approximation must incorporate at least some of the competitive effects exerted by non-supermarket food retailers in addition to those competitive effects attributable to supermarkets. Unfortunately, the record does not furnish a sufficient basis to weight with any precision the various competitive effects of such retailers. Nevertheless, the evidence is sufficient to justify inclusion of all retail grocery stores (excluding military commissaries and fast-food outlets) within the appropriate product market. This is similar to the product market definition adopted by the Commission in its 1968 Order against this same respondent,[30] and is consistent with the product market adopted in other retail food merger cases challenged by the Commission in recent years.[31] While this product market line

[30] *Grand Union Co.*, 73 F.T.C. 1050, 1053 (1968) ("sale of grocery and related products through food or grocery stores").

[31] *See, e.g., Albertson's Inc.*, 97 F.T.C. 343, 343–45 (1981) (complaint issued with consent order alleges relevant line of commerce to be "retail sales by retail grocery stores"; such stores defined as "retail food stores currently classified under Bureau of Census Industry Classification No. 541, including supermarkets, convenience stores and delicatessens, which primarily sell [specified categories of food and grocery items]"); *Godfrey Co.*, 97 F.T.C. 456, 456–58 (1981) (same); *National Tea Co., et al.*, 96 F.T.C. 42, 43–44 (1980) (same, absent reference to Bureau of Census classification), *prelim. injunction denied, FTC v National Tea Co.*, 603 F.2d 694 (8th Cir. 1979) ("retail grocery store" product market adopted without discussion); *Food Town Stores, Inc.*, 88 F.T.C. 435 (1976) (complaint alleges "relevant product market is retail food store sales"; such stores defined as "retail food establishments primarily engaged in selling food for home preparation and consumption"), *temporary injunction granted by single-judge*

(footnote cont'd)

is admittedly somewhat arbitrary in determining which non-supermarket food retailers to include and which to exclude, it is clearly superior to excluding all non-supermarket competitors. As explained in Parts III and IV below, on the basis of a product market so defined we conclude that a Section 7 violation premised on an actual potential competition theory has not been established. **[23]**

B. *The Geographic Market*

The Supreme Court held in *United States v. Marine Bancorporation* that in a Section 7 potential competition case the relevant geographic market is "the area in which the acquired firm is an actual, direct competitor."[32] In economic terms, this may be described as the area within which sellers of the product(s) sold by the merged firm place a significant constraint on the merged firm's ability to raise prices (and/or diminish service quality). The complaint in this matter alleges that area to be "some of the [SMSAs], cities or towns in which Colonial operates supermarkets." (Complaint ¶ 20.) However, Count C of the complaint would seem to depart from that definition by alleging that Grand Union's acquisition of Colonial constitutes "one of the most anticompetitive methods for entering the southeastern United States." (Complaint ¶ 30.) As noted above, complaint counsel do not appeal from the ALJ's dismissal of this count, and we do not address it on this appeal. We agree with the ALJ's general conclusion that the Southeastern U.S. is not an appropriate, separate geographic market for purposes of Section 7 analysis. (ID 209–10.) Notwithstanding his resolution of this issue, we note that the ALJ appears to have woven the broader regional market concept into portions of his potential competition analysis. We discuss briefly in Part III, below, the important effect this improper "regional approach" has on the validity of many of the ALJ's legal conclusions.

Complaint counsel argued at trial that two relevant geographic markets are appropriate in this case: the individual SMSA (or SMSA subdivision), and the Southeastern U.S. (IDF 32.) Concerning the first category, complaint counsel presented evidence only for 13 SMSAs (and further divided two of the 13 into two subdivisions each), which they identified as local relevant geographic markets. (CAB 6; IDF 42 and 48; and Tr. 2340, 1893–94, 2991, 2320–21 and 2398.) For purposes of the actual potential competition allegation of Count A of the complaint, complaint counsel subsequently eliminated two **[24]** (the Fayetteville, North Carolina SMSA, and the Spartanburg, South Carolina SMSA subdivision) of the 15 alleged markets and submar-

panel pending appeal, FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1346 (4th Cir. 1976) ("retail grocery business" apparently adopted).

[32] *United States v. Marine Bancorporation*, 418 U.S. 602, 622 (1974).

kets. (IDF 37.) Complaint counsel do not concede the remaining 13 areas to be the only Colonial markets in which the challenged acquisition lessened competition substantially. (CAB 6.) However, because only the legal theory of Count A remains on this appeal, and because we must rely solely upon record evidence, we consider only the following 13 SMSA (or SMSA subdivision+) relevant markets alleged by complaint counsel on this appeal:

Georgia:	(i) Atlanta, (ii) Augusta, and (iii) Macon.
North Carolina:	(i) Raleigh+, (ii) Durham+, and (iii) Charlotte/Gastonia.
South Carolina:	(i) Greenville+.
Virginia:	(i) Newport News/Hampton, (ii) Norfolk/Virgina Beach, and (iii) Richmond.
Florida:	(i) Jacksonville, (ii) Orlando, and (iii) Gainesville.

Respondents assert that the most appropriate geographic market is broader than the SMSA, but narrower than the Southeastern U.S. (RAB 13–15.) Respondents concede that, from the demand (consumer) perspective, "SMSAs, in general, are fairly good approximations of local markets." (RAB 13.) However, they urge that because this case challenges a potential lessening of a *new* source of competition rather than elimination of *existing* competition, the appropriate geographic market focus is from the perspective of retail food *suppliers*. Respondents urge adoption of those "market areas" as defined by a trade journal, *Progressive Grocer*. (IDF 36.) That publication breaks down the original 15 (now 13) local markets alleged in this case into only eight market areas, each larger than the encompassed SMSAs. (IDF 36; and RAB 14 and n.*.)

It is true, as respondents' expert testified, that the supply of retail food items may originate from warehouses located outside the SMSA in which they are ultimately sold to [25] consumers. (Tr. 3213–14.) Moreover, the ALJ found that "Because more than one SMSA can often be reached from any particular warehouse, market conditions in one SMSA are not entirely independent of those in other nearby SMSAs." (IDF 36, *citing* Tr. 1890 and 3214.) Nevertheless, we do not find sufficient basis in this record to identify the larger-than-SMSA "market areas" urged by respondents in a way that is both supported by the evidence and of sufficient practical utility to assess the competitive consequences of the challenged acquisition. (Indeed, respondents' expert testified that it would not be possible to determine the boundaries of the "market areas" urged by respondents. (Tr. 3199.)) Although we decline to accept respondents' contentions in the context of market definition, we have nevertheless considered them to the extent they are relevant to such other issues as the number and identity of likely potential entrants into the individual SMSA markets, discussed in Part IV below.

Although precise empirical measures of demand and supply elasticities and cross-elasticities are lacking in this record, there is ample evidence to satisfy us that the SMSA provides an adequate approximation of the area in which Colonial was an "actual, direct competitor." Testimony from expert witnesses for both sides supports the ALJ's conclusion that SMSAs are generally good approximations of local markets. (IDF 35.) Even Dr. Adelman, upon whose testimony respondents principally rely for their broader geographic market contention, concedes that consumers in one SMSA are unlikely to be affected by offerings of stores in the next SMSA. (IDF 35; and Tr. 3213.) Moreover, for at least four of the 13 SMSAs alleged by complaint counsel, officials of Grand Union or Colonial (or both) testified, in essence, that SMSAs were fair approximations of the geographic market. (IDF 40–41, 43 and 51; and Tr. 776, 2693, 793, 2790, 2783–85 and 363–64.) Further, in several instances, planning officials of Grand Union and Colonial used SMSAs (or close approximations) as the basis for long-range store planning. (*E.g.,* IDF 49.)

The ALJ found no evidence that any competitors of Grand Union or Colonial looked beyond the local market area in setting prices or adopting other competitive **[26]** responses. (IDF 34; and ID 209.) While we find it less persuasive, we also note the testimonial evidence cited by the ALJ indicating that SMSAs are the basis for collection of data by industry publications and for industry members' collection of market share data, and that SMSAs generally reflect the coverage area of local advertising media. (IDF 34–35.) Finally, we note that the relevant geographic market approximation we adopt (like our product market) is consistent with that employed in other recent Commission challenges to retail grocery store mergers.[33] **[27]**

III. THE ACTUAL POTENTIAL COMPETITION THEORY

As articulated by the Commission and the courts, the actual potential competition (or actual potential entrant) theory maintains that a

[33] *See, e.g., Albertson's, Inc.,* 97 F.T.C. 343, 345 (1981) (complaint issued with consent order alleges "The relevant . . . geographic market is Los Angeles County and Orange County, California"); *Godfrey Co.,* 97 F.T.C. 456, 458 (1981) (complaint issued with consent order alleges "A relevant section of the country is the Milwaukee, Wisconsin SMSA"); *National Tea Co., et al.,* 96 F.T.C. 42, 44 (1980) (complaint issued with consent order alleges "A relevant section of the country is Metropolitan Minneapolis/St. Paul" defined to mean five contiguous counties), *prelim. injunction denied, FTC v. National Tea Co.,* 603 F.2d 694 (8th Cir. 1979) (court adopts Commission's alleged geographic market without discussion); *Food Town Stores, Inc.,* 88 F.T.C. 435 (1976) (complaint alleges "The relevant geographic markets . . . are cities or town(s) in North Carolina and their trading areas in which [the merging firms] both operate retail food stores", including six specified locales), *temporary injunction granted by single-judge panel pending appeal, FTC v. Food Town Stores, Inc.,* 539 F.2d 1339 (4th Cir. 1976) (market share data compiled on basis of cities and counties sufficient for preliminary injunction analysis).

potential entrant's acquisition of a leading firm in a concentrated target market may violate Section 7 of the Clayton Act if it is likely that, but for the acquisition, the acquiring firm would have entered the target market independently, or through a "toehold" acquisition of a firm lacking a significant share of that market.[34] The Commission stated in its 1980 *Heublein* decision that under such circumstances the challenged acquisition may lessen competition by eliminating the procompetitive benefits likely to result from the presence of a new, or a newly reinvigorated competitor in the market.[35] Challenges to conglomerate acquisitions under this theory have involved situations where, as in the instant case, the acquiring and acquired firms were not actual competitors at the time of the acquisition.[36] Thus, the theory is premised on the anticipated lessening of *future* competition that would likely have occurred but for the challenged acquisition, rather than upon any lessening of *existing* competition.[37] This contrasts with the perceived potential competition theory, [28] which the ALJ held unsupported by the record and which we do not address on this appeal. That theory is concerned with the loss of a *present* procompetitive effect currently exerted by an outside firm perceived by competitors as "waiting in the wings" and likely to enter.[38]

While expressly accepting the perceived potential entrant theory,[39] the Supreme Court has twice reserved approval of the actual potential entrant theory.[40] However, the Court has delineated certain essential preconditions that must exist before it can be determined whether in a specific case the actual potential entrant theory might establish a violation of Section 7. In contrast, the Commission in past cases has

[34] *See United States v. Marine Bancorporation,* 418 U.S. 602, 625 (1974); *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 537 (1973); *Heublein, Inc.,* 96 F.T.C. 385, 583 (1980); *Tenneco, Inc. v. FTC,* 689 F.2d 346, 352 (2d Cir. 1982); *Yamaha Motor Corp., Ltd. v. FTC,* 657 F.2d 971, 977 (8th Cir. 1981), *cert. denied,* 452 U.S. 915 (1982); *United States v. Siemens Corp.,* 621 F.2d 499, 504 (2d Cir. 1980); *BOC International Ltd. v. FTC,* 557 F.2d 24, 25 (2d Cir. 1977).

[35] *Heublein, Inc.,* 96 F.T.C. 385, 583 (1980).

[36] *United States v. Marine Bancorporation,* 418 U.S. 602, 605, 623–24 n. 24, 627 (1974); *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 532 (1973); *United States v. Siemens Corp.,* 621 F.2d 499 (2d Cir. 1980); *Tenneco, Inc.,* 98 F.T.C. 464 (1981), *rev'd, Tenneco, Inc. v. FTC,* 689 F.2d 346 (2d Cir. 1982); *Mercantile Texas Corp. v. Bd. of Governors,* 638 F.2d 1255, 1259–60 (5th Cir. 1981) (actual potential competition standards held incorporated into Bank Holding Company Act).

[37] *United States v. Siemens Corp.,* 621 F.2d 499, 504, 507 (2d Cir. 1980); *BOC International, Ltd. v. FTC,* 557 F.2d 24, 26 (2d Cir. 1977); *Tenneco, Inc.,* 98 F.T.C. 464, 577 (1981), *rev'd on other grounds, Tenneco, Inc. v. FTC,* 689 F.2d 346 (2d Cir. 1982); *Heublein, Inc.,* 96 F.T.C. 385, 585 (1980); *Mercantile Texas Corp. v. Bd. of Governors,* 638 F.2d 1255, 1264–65 (5th Cir. 1981).

[38] *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 531–33 (1973); *Tenneco, Inc. v. FTC,* 689 F.2d 346, 351–52, 355 (2d Cir. 1982); *Mercantile Texas Corp. v. Bd. of Governors,* 638 F.2d 1255, 1264 (5th Cir. 1981).

[39] *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 531–34 (1973).

[40] *United States v. Marine Bancorporation,* 418 U.S. 602, 625, 639 (1974); *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 537–38 (1973). Some commentators have been critical of the theory. *See, e.g.,* R. Posner, *Antitrust Law: An Economic Perspective* 122–23 (University of Chicago Press 1976) ("The essential problem is the impossibility of developing workable rules of illegality" in potential competition area; Supreme Court should abandon this "unsatisfactory" doctrine); and J.R. Carter, "Actual Potential Entry Under Section 7 of the Clayton Act", 66 Va. L. Rev. 1485 (1980) (actual potential competition theory should be rejected as basis for Section 7 violation; unlikely theory would or could be applied correctly, and prospective economic benefits outweigh costs of its application).

recognized the actual potential entrant theory.[41] As interpreted by the courts and the Commission, all of the following legal elements must exist before a violation of Section 7 under the actual potential competition theory can be established: (1) The target market must be highly concentrated; (2) the acquiring firm must have had the capabilities, economic **[29]** incentives, and interest to enter the target market; (3) the acquiring firm must have been one of only a few likely entrants so situated; (4) the acquiring firm must have had available to it feasible means for entering the target market in the near future —either *de novo* or by "toehold" acquisition—other than through the challenged acquisition; and (5) entry through those alternative means must have offered a substantial likelihood of deconcentration or beneficial procompetitive effects in the target market.[42]

Clearly, in a potential competition case such as this in which multiple markets are alleged, these elements must be established as to a specific market in order to find a Section 7 violation in that relevant market. In multiple market cases, this may result in all elements being proven as to all alleged markets, as to some markets but not others, or as to none of the alleged markets. A case falling in the second category may entail more narrow relief (*e.g.,* partial rather than complete divestiture) than a case in the first category. Cases falling in the third category obviously involve no Section 7 violation under this theory.

As noted above, the ALJ's finding of illegality under the actual potential competition theory of Count A of the complaint was premised upon his finding that the relevant product market was supermarket sales. (ID 240.) Hence, the ALJ's analysis of the above elements of an actual potential competition violation was likewise premised on that erroneous conclusion. Given our determination that the appropriate arena of **[30]** competition is broader than supermarket sales, our analysis and application of these elements necessarily differ from the ALJ's.

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[41] *See, e.g., Tenneco, Inc.,* 98 F.T.C. 464 (1981), *rev'd on other grounds,* 689 F.2d 346, 355 (2d Cir. 1982) (because Commission finding of liability was unsupported by substantial record evidence, court of appeals "need not reach" validity of actual potential competition doctrine); *Heublein, Inc.,* 96 F.T.C. 385 (1980); *Brunswick Corp., et al.,* 94 F.T.C. 1174 (1979), *modified as to relief,* 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC,* 657 F.2d 971 (8th Cir. 1981), *cert. denied,* 452 U.S. 915 (1982); *British Oxygen Co. Ltd.,* 86 F.T.C. 1241 (1975), *rev'd and remanded on other grounds sub nom., BOC International, Ltd. v. FTC,* 557 F.2d 24 (2d Cir. 1977).

[42] *United States v. Marine Bancorporation,* 418 U.S. 602, 623 n. 22, 624–26, 630, 633, 638–39, 642 (1974); *Tenneco, Inc.,* 98 F.T.C. 464, 577, 604, 616 (1981), *rev'd on other grounds, Tenneco, Inc. v. FTC,* 689 F.2d 346, 352 (2d Cir. 1982); *Heublein, Inc.,* 96 F.T.C. 385, 583–84 (1980); *United States v. Siemens Corp.,* 621 F.2d 499, 504–05 (2d Cir. 1980); *BOC International, Ltd. v. FTC,* 557 F.2d 24, 26–27, 29 (2d Cir. 1977); *Brunswick Corp., et al.,* 94 F.T.C. 1174, 1269, *modified as to relief,* 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC,* 657 F.2d 971, 977–78 (8th Cir. 1981), *cert. denied,* 452 U.S. 915 (1982); *Mercantile Texas Corp. v. Bd. of Governors,* 638 F.2d 1255, 1266–72 (5th Cir. 1981) (actual potential competition standards applied to merger of two bank holding companies under Bank Holding Company Act); *Republic of Texas Corp. v. Bd. of Governors,* 649 F.2d 1026, 1044–47 (5th Cir. 1981) (same as to bank holding company's acquisition of bank). *See also United States v. Penn Olin Chemical Co.,* 378 U.S. 158, 174–76 (1964). *See generally* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 Harv. L. Rev. 1313 (1965).

Further, while the ALJ rejected the Southeast in favor of the SMSA as the proper geographic market (ID 208–10 and 240.), his analysis of several of the actual potential entrant elements appears to have been based in important respects upon a Southeast regional market. For example, having determined the Southeast region was not the appropriate geographic market, the ALJ returned to it repeatedly in concluding that Grand Union was a likely entrant into that region by some means other than acquiring Colonial. (*E.g.,* ID 218–21, 225, 229 and 231.) The ALJ found that "it is not complaint counsel's burden to conclusively pinpoint exactly where Grand Union would have first entered." (ID 218.) Assuming this to be true as among the 13 SMSA target markets, it does not follow that this reasoning may be extrapolated to embrace Grand Union's entry *anywhere* in the Southeast (including entry outside the 13 SMSA markets).

It is true that evidence of an overall intent to enter a region may in some cases be relevant to the question of whether Grand Union might enter a specific SMSA. However, the ALJ went beyond this rather obvious proposition, concluding in effect that an intent to enter a region was tantamount to an intent to enter any and every SMSA in the region. The government cannot have it both ways in prosecuting an actual potential entrant case: having pinpointed small, discrete markets, it cannot satisfy its legal burden by showing only that entry was likely *somewhere* in a much larger, encompassing region. Yet that appears to be an integral part of complaint counsel's argument on appeal. (*See, e.g.,* Tr. OA 30–31, 47–48, 50.) The conclusion is inescapable that, having once pronounced the Southeast region as the tainted "well", we may not return repeatedly to drink from it.[43] [31]

In summary, the ALJ did not expressly find that each of the above actual potential entrant elements were present in any of the 13 alleged target SMSAs. For the reasons summarized below, the Commission finds that in *none* of the 13 alleged target SMSAs have complaint counsel proven *all* legal elements the courts have held must be present in order to establish a Section 7 violation under an actual potential competition theory. We proceed with a general analysis of certain of these elements before applying them in Part IV to the 13 individual geographic markets.

A. *Concentration*

As the Supreme Court explained in its 1974 decision in *United States v. Marine Bancorporation,* the actual potential competition theory may be invoked only in cases where the target market is

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[43] *Cf. United States v. Marine Bancorporation,* 418 U.S. 602, 620–23 (1974) (Supreme Court rejects as "too speculative" and unsupported by precedent government's alternative Section 7 claims that entire state is relevant "section of the country" and that challenged acquisition of bank operating in only one city may trigger other geographic market extension mergers, resulting in eventual statewide linkage of local, oligopolistic banking

substantially concentrated.[44] There the Court stated: "[T]he doctrine comes into play only where there are dominant participants in the target market engaging in interdependent or parallel behavior and with the capacity effectively to determine price and total output of goods and services."[45]

The complaint in this matter alleges that the retail food store business in each relevant geographic market is dominated by a few large retail food chains (Complaint ¶ 21.); that some or all of the relevant markets are highly concentrated and, as a result of the acquisition of Colonial, have become or are likely to become increasingly so (Complaint ¶ 31.); that the acquisition may increase the probability of further concentration and decrease the probability of deconcentration in some or all of the relevant markets (Complaint ¶ 31.); and that in some or all of the relevant markets this **[32]** concentration may increase Grand Union's post-acquisition economic power, and may dampen competition among retail food chains. (Complaint ¶ 31.)

The Supreme Court in *Marine Bancorporation,* and the Commission and courts of appeals in subsequent cases, have developed a rebuttable evidentiary presumption for use in actual potential competition cases. By introducing evidence that concentration levels—usually evinced by two-firm (C_2), three-firm (C_3), or four-firm (C_4) concentration ratios—in the target market are sufficiently high, a *prima facie* case is made that the target market is sufficiently concentrated as a legal matter to invoke the potential competition theory.[46]

In recent years, antitrust analysts have become more sophisticated about the relevance and measures of concentration, and have come to rely increasingly upon the so-called "Herfindahl-Hirschman Index" ("HHI") as a means preferable to concentration ratios for analyzing market structure. A primary advantage of this index over the more traditional C_4 ratio is that the HHI "reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms."[47] We believe in many cases the HHI can serve as a useful tool in interpreting market structure evidence. Therefore, where appropriate in future potential competition cases—as well as in other proper cases under the Clayton and FTC

[44] *United States v. Marine Bancorporation,* 418 U.S. 602, 630 (1974). *See also Heublein, Inc.,* 96 F.T.C. 385, 584 (1980); *United States v. Hughes Tool Co.,* 415 F. Supp. 637, 645 (having held relevant market "is not highly concentrated and is freely competitive," court declines to apply either actual or perceived potential competition theories). *See generally* Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 Harv. L. Rev. 1313, 1386 (1965) (theory appropriate only where target market is "tight oligopoly").

[45] *United States v. Marine Bancorporation,* 418 U.S. 602, 630 (1974).

[46] *United States v. Marine Bancorporation,* 418 U.S. 602, 631 (1974); *Tenneco, Inc.,* 98 F.T.C. 464, 583–85 (1981), *rev'd on other grounds, Tenneco, Inc. v. FTC,* 689 F.2d 346, 352–53 (2d Cir. 1982); *Heublein, Inc.,* 96 F.T.C. 385, 584 (1980); *United States v. Siemens Corp.,* 621 F.2d 499, 506 (2d Cir. 1980).

[47] DOJ Merger Guidelines, note 9 above, at ¶4503.10. Basically, the HHI incorporates the number of firms and their size distribution in one statistic. Specifically,

$$HHI = \sum_{i=1}^{n} x_i^2, \text{ where } x_i \text{ is the market share of the ith firm in the industry.}$$

Acts—we will consider reliable evidence of HHI values in assessing the likely competitive effects of challenged practices. However, because the record in this case has not been compiled with a view toward calculating and analyzing reasonably complete HHI values for all the various geographic markets alleged here, we pursue the approach taken by the parties and the ALJ and focus upon the more traditional C_4 ratios in our disposition of this case. We [33] anticipate, however, that the evidentiary records in future Section 7 proceedings will enable us to use the HHI measure in assessing market structure.

When evidence of concentration levels establishes a *prima facie* case that the market is a possible candidate for the potential competition theory, the burden then shifts to the party defending the merger to rebut this legal presumption by showing that concentration ratios, "which can be unreliable indicators of actual market behavior, [do] not accurately depict the economic characteristics" of the target market.[48] While the Supreme Court has established no definitive point at which the presumption arises, the Commission has in the past indicated its view that "Four-firm market shares in the range of 50 percent are sufficient to raise concern over the loss of potential competition."[49] [34] This rebuttable presumption notwithstanding, the Commission has cautioned that "High levels of concentration, of course, are not to be analyzed in a rigid, mechanical fashion, causing an inevitable conclusion of poor competitive performance," adding that this presumption "may be rebutted by proof of competitive market

[48] *United States v. Marine Bancorporation,* 418 U.S. 602, 631 (1974) (citation omitted). *See also United States v. Siemens Corp.,* 621 F.2d 499, 506 (2d Cir. 1980); *Republic of Texas Corp. v. Bd. of Governors,* 649 F.2d 1026, 1046 (5th Cir 1981); *Tenneco, Inc. v. FTC,* 689 F.2d 346, 353 (2d Cir. 1982). *See generally United States v. General Dynamics Corp.,* 415 U.S. 486, 498 (1974); *Kaiser Aluminum & Chemical Corp. v. FTC,* 652 F.2d 1324, 1332–41 (7th Cir. 1981) (persuasive economic evidence can rebut *prima facie* Section 7 case bottomed on market share and concentration statistics).

[49] *Tenneco, Inc.,* 98 F.T.C. 464, 584 (1981), *rev'd on other grounds, Tenneco, Inc. v. FTC,* 689 F. 2d 346, 352 (2d Cir. 1982) (court of appeals finds C_4 ratio over 90 percent and C_2 ratio over 77 percent alone establishes *prima facie* case that replacement shock absorber market is candidate for potential competition doctrine). *See also, United States v. Marine Bancorporation,* 418 U.S. 602, 609, 631 (1974) (C_3 ratio of 92 percent in six-firm market sufficient to make *prima facie* case of concentrated market); *Brunswick Corp. et al.,* 94 F.T.C. 1174, 1256, 1271 (1979), *modified as to relief,* 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC,* 657 F.2d 971, 974, 979 (8th Cir. 1981), *cert. denied,* 452 U.S. 915 (1982) (theory applies to joint venture where in U.S. market C_4 ratio equals 94.9 percent (units) or 98.6 percent (dollar volume), and C_2 equals 72.9 percent (units) or 85.0 percent (dollar volume) in overall "outboard-motor" market); *Heublein, Inc.,* 96 F.T.C. 385, 584–85 (1980) (while C_4 ratio of 47.9 percent "arguably falls at the edge" of reasonable definition of cases in which actual potential entrant theory applies, C_2 ratio of 41.9 percent sufficient to warrant application of the theory); *United States v. Siemens Corp.,* 621 F.2d 499, 502, 506 (2d Cir. 1980) (C_4 ratio of 77 percent, coupled with evidence of high entry barriers, "clearly" makes *prima facie* case of "oligopolistic" market); *British Oxygen Co., Ltd.,* 86 F.T.C. 1241, 1363–64 (1975) (C_3 of 60 percent, C_4 of 70 percent, and C_8 exceeding 85 percent "clearly" makes *prima facie* case that target market experiencing recent "upswing" in concentration is candidate for potential competition doctrine), *rev'd and remanded on other grounds sub nom., BOC International, Ltd. v. FTC,* 557 F.2d 24 (2d Cir. 1977). *See also Mercantile Texas Corp. v. Bd. of Governors,* 638 F.2d 1255, 1267 (5th Cir. 1981) (in Bank Holding Company Act case, C_4 of 86.1 percent in one geographic market and 73.8 percent in another establish *prima facie* case of concentrated market); *Republic of Texas Corp. v. Bd. of Governors,* 649 F.2d 1026, 1045–46 (5th Cir. 1981) (same result where C_4 = 72.4 percent). *Cf. United States v. Hughes Tool Co.,* 415 F.Supp. 637, 643, 645 (theory inapplicable where C_4 = 34 percent and C_8 = 58 percent).

performance."[50]

Because the analytical soundness of this evidentiary presumption is obviously weaker in cases in which C_4 falls in the 50 percent range[51] (or HHI falls below 1000, for example) than in cases in which C_3 or C_4 exceeds 90 percent (or HHI exceeds, for example, 2500),[52] flexibility is needed in determining the strength of any presumption raised. In general, the higher the concentration levels (in terms of both traditional concentration ratios and the HHI) the stronger the evidentiary presumption that potential **[35]** competition analysis is appropriate, and the greater the evidence the Commission will require to rebut the *prima facie* showing. Thus, the Commission will require less evidence to overcome this presumption when only moderate concentration—C_4 levels between 50–70 percent and HHI between 1000 and 1800—is found.[53] In contrast, more persuasive rebuttal evidence will generally be required to rebut the presumption that C_4 levels of 80 or 90 percent and above, coupled with an HHI value exceeding 1800, warrant concern over a loss of potential competition.[54]

Complaint counsel offered separate, alternative market share and four-firm concentration ratios for the 13 target SMSAs using their proposed "supermarket" product market, as well as for a market consisting of retail grocery store sales. As noted in Part II above, we find the latter to be the more appropriate line of commerce for Section 7 analysis. Complaint counsel's market share and C_4 figures for a grocery store sales market in the 13 target SMSAs, are summarized

[50] *Tenneco, Inc.*, 98 F.T.C. 464, 585 (1981), *rev'd on other grounds, Tenneco, Inc. v. FTC*, 689 F. 2d 346 (2d Cir. 1982). *See also United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974); *United States v. Siemens Corp.*, 621 F.2d 499, 506, 509 (2d Cir. 1980); *Budd Company*, 86 F.T.C. 518, 579 (1975) (despite degree of concentration evidenced by market shares, market may have performed in manner yielding prices and profits at competitive or near-competitive level); *Republic of Texas Corp. v. Bd. of Governors*, 649 F.2d 1026, 1044 n.32 (5th Cir. 1981) (no automatic, direct relationship between a particular concentration ratio and competitive performance in any particular [banking] market; must study actual performance of market participants to determine market's competitiveness), *citing United States v. First National State Bancorporation*, 499 F.Supp. 793, 805 (D.N.J. 1980). For a discussion of non-market-share factors considered by the Commission in evaluating the likely competitive effects of mergers, *see* FTC Merger Statement, note 9 above, at pp. 76–81.

[51] *See, e.g., United States v. Falstaff Brewing Corp.*, 383 F.Supp. 1020, 1022–23 (D.R.I. 1974) (on remand from Supreme Court, C_4 of 61.3 percent insufficient absent showing that one or another firm had control over prices or other "competitive indicia"); *United States v. Phillips Petroleum Co.*, 367 F.Supp. 1226, 1251–53 (C.D. Cal. 1973), *aff'd*, 418 U.S. 906 (1974) (C_4 of 58 percent sufficient). *See generally* Vol. I P. Areeda & D. Turner, *Antitrust Law* ¶ 1119b at 80 (1980) (55–60 percent "ambiguous"; must consider information about remaining firms and "other structural characteristics").

[52] *See, e.g., United States v. Marine Bancorporation*, 418 U.S. 602, 609, 631 (1974) (despite absence in record of "any significant study" of relevant market, C_3 ratio of 92 percent in six-firm market establishes *prima facie* case that market is candidate for potential competition doctrine); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (C_4 ratio over 90 percent and C_2 ratio over 77 percent alone establishes *prima facie* case that relevant market is potential-competition doctrine candidate).

[53] *Cf. Heublein, Inc.*, 96 F.T.C. 385, 577 (1980) (as to minor *horizontal* aspects of otherwise conglomerate merger, C_4 ratio of 47.9 percent assumed to be "sufficiently concentrated to warrant careful scrutiny of further increases but not so highly concentrated that an extremely stringent anti-merger policy is required").

[54] *See generally* DOJ Merger Guidelines, note 9 above, at ¶¶4503.30, 4504.103 (absent factors indicating effective collusion is "particularly likely", Justice Department unlikely to challenge potential competition merger unless overall HHI in acquired firm's market exceeds 1800; likelihood of challenge increases as HHI exceeds 1800); FTC Merger Statement, note 9 above, at p. 73 (Commission will give "considerable weight" to DOJ Merger Guidelines in evaluating horizontal mergers). *See also* Vol. I, P. Areeda & D. Turner, *Antitrust Law* ¶ 1119b at 78–80 (1980).

in TABLE 1, below. Because we determine that, for reasons other than the level of concentration and Colonial's market share in the 13 local SMSAs, the record fails to establish a Section 7 violation in any of those markets, we may rely upon complaint counsel's calculations as presented in TABLE 1. In cases where market share or concentration figures are or may be decisive on an issue, a respondent's evidence contradicting complaint counsel's figures will be more carefully assessed by the Commission. As TABLE 1 shows, C_4 figures for 1977 in the 13 SMSAs for the grocery store sales market range from a low of approximately 49 percent **[36]** to a high of just over 72 percent. The C_4 figure exceeds 60 percent in eight of the 13 target SMSAs.

In the instant case, the ALJ found that the concentration levels established a *prima facie* case that the relevant markets were concentrated and not competitive. (ID 217.) He further concluded that respondents had failed to introduce persuasive evidence to overcome that presumption (*Id.*), thereby satisfying the first element of the actual potential entrant theory. **[37]**

TABLE 1

SMSA (OR SUB-DIVISION— "+")	NUMBER OF COLONIAL STORES IN SMSA (AS OF 1977, UNLESS NOTED)*	COLONIAL'S MARKET SHARE AND RANKING (AS % OF ALL GROCERY STORE SALES)**		FOUR-FIRM CONCENTRATION RATIOS (AS % OF ALL GROCERY STORE SALES)***	
		1972	1977	1972	1977
Atlanta, GA	62 (1978)	17.8 (#1)	20.6 (#1)	54.6	62.9
Augusta, GA	12 (1978)	13.6 (#2)	12.8 (#2)	47.2	55.2
Macon, GA	5	6.1 (#3)	9.1 (#2)	50.3	67.4
+ Raleigh/	18	14.7 (#3)	14.3 (#3)	63.8	62.1
+ Durham, NC		17.4 (#2)	17.5 (#2)	62.4	66.8
Charlotte/ Gastonia, NC	12	7.0 (#4)	5.0 (#5)	48.6	54.9
+ Greenville, SC	5	3.6 (#5)	2.3 (#6)	68.3	72.3
Newport News/ Hampton, VA	15	16.1 (#1)	16.0 (#1)	56.7	49.1
Norfolk/ Virginia Beach, VA	31	15.7 (#1)	17.8 (#1)	48.7	53.1
Richmond, VA	9	7.7 (#3)	6.5 (#4)	45.2	53.2
Jacksonville, FLA	13	5.8 (#5)	6.4 (#4)	56.2	64.8
Orlando, FLA	2	Under 2 (Not among top 8 firms)	Under 2	65.7	60.1
Gainesville, FLA	2	5.7 (#4)	2.7 (#7)	61.8	65.5

* SOURCE: IDF 82, 96, 107, 181, 191, 108, 131, 139, 120, 152, 162, 173.
** SOURCE: IDF 82, 96, 104, 180, 190, 106, 130, 138, 119, 151, 161, 172.
*** SOURCE: IDF 52 (based on Bureau of the Census, *Retail Trade*).

[38] As TABLE 1 indicates, a number of the C_4 ratios for the 13 relevant SMSAs (especially those in Virginia) fall at the lower end of the "50 percent or more" category previously described by the Commission as raising potential competition concerns.[55] Nevertheless, for purposes of this decision we assume that all of the C_4 ratios advanced by complaint counsel and listed in TABLE 1 are of sufficient magnitude to trigger the remainder of the actual potential competition analysis, and to shift to respondents the burden of showing these ratios do not depict accurately the economic characteristics in any or all of the 13 target markets here alleged. We note, however, that the C_4 ratios in all of the 13 markets—save only Greenville, South Carolina at 72.3 percent—are below those in other recent cases in which the Commission found a Section 7 violation premised on the actual potential competition theory.[56]

As explained in Part IV's analysis of individual markets, we find that in most (if not all) of the 13 markets respondents have successfully rebutted complaint counsel's *prima facie* showing that potential competition analysis is appropriate. In a number of the markets alleged here, respondents introduced significant evidence of competitive behavior in the pricing and providing of the relevant products and services.[57] We also find in those instances that the remaining evidence offered by complaint counsel is insufficient to establish noncompetitive performance in the target markets. [39]

B. *Capabilities, Incentives, and Interest*

As noted, a prerequisite to a finding of Section 7 liability under the actual potential entrant theory is the establishment of a reasonable probability that the acquiring firm had the ability to enter the target market by alternative means, and would likely have done so but for the challenged acquisition.[58] In assessing this likelihood, the Commission and the courts have generally inquired into whether the acquiring firm had the capabilities, incentive, and interest to enter the target market through a means other than the challenged acquisition.[59] We believe the record evidence supports the ALJ's findings

[55] *Tenneco, Inc.*, 98 F.T.C. 464, 584 (1981), *rev'd on other grounds, Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982).

[56] *Tenneco, Inc.*, 98 F.T.C. 464, 583 (1981) (C_4 of 92.9 percent), *rev'd on other grounds, Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982); *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1256, 1271 (1979), *modified as to relief*, 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 974, 979 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982) (C_4 of 94.9 percent (units) and 98.6 percent (dollars)); *British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1363–64 (1975) (C_4 of 70 percent), *rev'd and remanded on other grounds sub nom., BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977).

[57] *See United States v. Marine Bancorporation*, 418 U.S. 602, 631–32 (1974).

[58] *United States v. Marine Bancorporation*, 418 U.S. 602, 633, 642 (1974); *United States v. Siemens Corp.*, 621 F.2d 499, 506–07 (2d Cir. 1980).

[59] *Brunswick Corp., et al.*, 94 F.T.C. 1174, 1269–71, *modified as to relief*, 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 978–79 (8th Cir. 1981), *cert. denied*, 452 U.S. 915 (1982); *Heublein, Inc.*, 96 F.T.C. 385, 564–66 (1980); *Tenneco, Inc.*, 98 F.T.C. 464, 586–603 (1981), *rev'd on other grounds,*

(footnote cont'd)

that this prerequisite is met in this case. (IDF 68–80.)

1. Capabilities

We believe the record amply supports the conclusion that Grand Union possessed the financial and managerial capabilities to enter any or all of the 13 alleged markets through independent entry, or by acquiring an alternative firm in each market. (IDF 77–78.) Grand Union had developed a five year plan (fiscal years 1977–1981) calling for the opening of 100 new stores *in addition* to the acquisition of supermarket chains. (IDF 77.) To accomplish this objective, Grand Union established a capital expenditures budget of some $150 million. (*Id.*) Indeed, Grand Union's cash tender offer for Colonial itself amounted to approximately $135 million. (IDF 78.) Similarly, the record documents the considerable expertise in supermarket formation and operation that existed both within Grand Union Company in the U.S., and within its parent corporations abroad. (IDF 80.) We therefore find that Grand Union possessed sufficient operational capabilities to **[40]** expand into each of Colonial's operating areas, either as a *de novo* entrant or by means of alternative acquisition(s).

2. Incentives

We believe the record also supports the ALJ's conclusion that Grand Union had the financial incentives to expand by entering the Southeast region. (IDF 79.) Prior to its acquisition of Colonial, Grand Union operated primarily in the northeastern U.S. Because of its competitive nature, lack of population growth, and labor situation, this was viewed by Grand Union as no longer the most desirable area of operations. (IDF 73 and 76.) Thus, it seems fairly clear from the record that Grand Union was eager to add to its economically-troubled Northeast base of operations by investing in supermarket operations located in areas—especially the "Sunbelt" region—that were potentially more lucrative than the Northeast. (ID 217–18.)

It is equally clear that financial considerations motivated this decision. Grand Union's five-year plan (1977–1981) stated: "An acquisition at the right price and at the right time could well double Grand Union's earnings." (CX–81N.) Grand Union's acquisition interests focused on the Sunbelt, in both the Southeast and Southwest regions. A Grand Union planning official assigned to study acquisition possibilities in those two regions reported that the 12 firms studied in the Southeast were more profitable than the national average, while 13 Southwest chains were less profitable than those in the Southeast. (ID 218.) The same official believed the Southeast had "avoided store

Tenneco, Inc. v. FTC, 689 F.2d 346, 353 (2d Cir. 1982); *United States v. Siemens Corp.*, 621 F.2d 499, 507–08 (2d Cir. 1980).

saturation and, with its projected high population growth, had great potential." (*Id.*) Another Grand Union official summarized the firm's requirements for a Southeast acquisition: "the acquired chain should not be so large as to accentuate FTC problems, and it should be large enough to make a worthwhile contribution to Grand Union. (Perhaps in the $400 million to $800 million annual sales range.)" (ID 221; and CX-44Z-51.) [41]

In sum, we agree with the ALJ's conclusion that one of the main reasons for Grand Union's interest in expanding into the Southeast was that region's potential for both economic and population growth. (ID 71.)[60] This leaves the question whether this financial incentive properly may be viewed as sufficient proof of an incentive to enter *each* of the 13 alleged SMSA markets. The financial incentive for entry was almost certainly weaker for some of the 13 markets than others, as indicated by differing growth and profitability rates, and by Grand Union's post-acquisition closing of all Colonial stores in four of the target SMSAs. (ID 228 n. 35.) Nevertheless, in light of our finding that Grand Union had a strong financial incentive to enter the Southeast region in general, and because we conclude that other prerequisites to an actual potential competition offense are clearly lacking, we assume without deciding that complaint counsel have established the requisite economic incentive to enter each of the 13 alleged target markets. We note, however, that were this element determinative of respondents' liability, closer scrutiny might have led us to conclude that the evidence here falls short in some of the 13 markets.

3. Interest

Respondents' own documents demonstrate that Grand Union had a strong, publicly-announced intention to enter the Southeast region by acquiring existing supermarkets there. As the Commission found to be the case in *Heublein,* respondents here were actively seeking acquisitions in the target market.[61] Grand Union's five-year plan for 1977-1981 noted that acquisitions of supermarket chains "will be given top priority consideration." (CX-81N; and IDF 68.) In the mid-1970s, Grand Union's president [42] instructed his administrative vice president to concentrate exclusively on supermarket acquisitions. (CX-580 [Silvers] at 46-47.) He in turn assigned a Mr. Kennedy, Grand Union's vice president for corporate planning, to "review from available sources all supermarkets that had operations in the south-

[60] *See Brunswick Corp., et al.,* 94 F.T.C. 1174, 1262, 1269, *modified as to relief,* 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC,* 657 F.2d 971, 978 (8th Cir. 1981), *cert. denied,* 452 U.S. 915 (1982) (foreign outboard-motor producer found likely potential entrant into expanding U.S. market—world's largest, most sophisticated, and only developed market in which the foreign producer did not sell substantial numbers of outboard-motors).

[61] *Heublein, Inc.,* 96 F.T.C. 385, 584 (1980).

east, . . . defined to be from the Virginia area right down through Florida." (CX-576 [Kennedy] at 46.) Mr. Kennedy prepared a report analyzing 12 southeastern supermarket firms which Kennedy considered acquisition candidates. (CX-32C, E-M.) Colonial was not ranked among the 12 because, as the 10th or 11th largest national chain, Mr. Kennedy felt it was too large. (CX-576 [Kennedy] at 55.) (Mr. Kennedy completed a similar study of Southwest supermarket chains, which indicated that their performance as a group had been much more irregular and less profitable than those in the Southeast. (CX-33C, D.)) Finally, we note that a June 1978 trade periodical article of stipulated accuracy (CX-613.) states: "This month acquisitions for Grand Union are just a matter of how soon and where." The same article quotes Grand Union's president as saying, "Ideally, we would try to fill in our territory between [New Jersey] and Washington, Washington and Florida." (CX-504B.)

We believe that this and other record evidence establishes that Grand Union had a corporate interest in expanding its supermarket operations into the Southeast region *through acquisition.* (IDF 68; and ID 218.) However, we disagree with the ALJ's conclusion that this evidence supports an interest in *de novo entry.* (ID 221.) Grand Union's actions in waiting until the Commission's 1968 Order expired[62] before acquiring Colonial is consistent with an interest in entering the relevant markets only through acquisition. The 1968 Order imposed a prior approval requirement only on *acquisitions* by Grand Union within the 10-year effective period. Nothing in that order in any way restricted Grand Union from entering *de novo* into any market or region—including SMSAs in the Southeast. Respondents' own documents make clear that Grand Union [43] purposefully awaited expiration of the 1968 Order before entering the Southeast. (IDF 72.) Indeed, both Grand Union's acquisition of Colonial's stock and its separate acquisition of eight Colonial stores on Florida's west coast occurred within weeks of the expiration of the 1968 Order.[63]

For these reasons, we reject as unsupported by the record the ALJ's conclusion that Grand Union's eagerness to enter the Southeast region was such that (barring entry by acquisition) it likely would have entered the region on a *de novo* basis. (ID 221.) We find on this record that Grand Union's interest in entering SMSAs in the Southeast was strong, but was confined to entry through acquisition.[64] For the same

[62] *See* Part I(B), above.

[63] *See* Part I(B), above. Without more, this is of course entirely lawful. Except insofar as it sheds light on such issues as interest or intent, a respondent's haste in resuming conduct barred by an expired FTC order is not probative of the legality of the post-order conduct.

[64] *Cf. United States v. Siemens Corp.*, 621 F.2d 499, 507-08 (2d Cir. 1980) (acquiring firm having interest and financial capabilities and incentives found unlikely to enter *de novo* into new *product* market, given lack of existing technical competence, limited profit prospects and ebbing state of target market, and acquiring firm's denial of interest in *de novo* entry); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 354 (2d Cir. 1982) (court of appeals rejects as

(footnote cont'd)

reasons that we applied to the "incentive" factor discussed in the preceding section, we assume without deciding that this interest extended to each of the 13 alleged markets.

C. *Number of Potential Entrants—Entry Barriers*

As noted above, the courts and the Commission have made clear that the actual potential competition theory may not be applied unless a small number of firms are likely potential entrants into, or expanders in, the target market. The Commission stated in *Heublein:*

> Section 7 is concerned with the probability of a substantial lessening of competition, and the elimination of a potential entrant or expander leads to a substantial anticompetitive effect only when there is a limited number of other firms reasonably likely to enter or expand in the relevant market.[65] [44]

This element is closely related to the height of barriers to entering the target market. It is therefore not surprising that the Commission and the courts have frequently analyzed entry barriers in assessing the legality of acquisitions under the actual potential entrant theory.[66]

Although we discuss entry barriers in the context of the number of potential entrants into the target SMSAs, such barriers also relate to other aspects of the actual potential competition theory. For example, the existence of feasible, alternative means of entering the target market other than merging with the acquired firm may indicate ease of entry. Conversely, the existence of high entry barriers may be a primary cause of high concentration in a market. The ALJ inverted this inference, however, and found that high concentration levels were a "strong indication of the height of entry barriers at work." (ID 216.) This inference is unwarranted because high concentration can occur with high, moderate, or low entry barriers.[67] The ALJ also inferred high entry barriers from evidence that concentration increased between 1972 and 1977. (ID 216.) This inference is also unwarranted since increasing concentration may simply reflect such factors as efficiencies associated with increased size.[68] Besides, when the more appropriate product market definition is used, TABLE 1 demon-

"unsupported speculation" conclusion that acquiring firm would have entered target market *de novo* with aid of license, but for challenged acquisition).

[65] *Heublein, Inc.,* 96 F.T.C. 385, 588 (1980). *See also Mercantile Texas Corp. v. Bd. of Governors,* 638 F.2d 1255, 1267 (5th Cir. 1981) (where numerous potential competitors are "waiting in the wings", elimination of one potential entrant is insignificant).

[66] *See, e.g., United States v. Marine Bancorporation,* 418 U.S. 602, 605–06, 626–30, 632, 641–42 (1974); *Brunswick Corp., et al.,* 94 F.T.C. 1174, 1256–57, 1271 (1979), *modified as to relief,* 96 F.T.C. 151 (1980), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC,* 657 F.2d 971, 974 (8th Cir. 1981), *cert. denied,* 452 U.S. 915 (1982); *Tenneco, Inc.,* 98 F.T.C. 464, 584–85 (1981), *rev'd on other grounds,* 689 F.2d 346, 350, 353 (2d Cir. 1982); *FTC v. Atlantic Richfield,* 549 F.2d 289, 295–96 (4th Cir. 1977).

[67] *See generally* G. Stigler, "A Theory of Oligopoly", 72 J. Pol. Econ. 44 (1964); H. Demsetz, "Industry Structure, Market Rivalry, and Public Policy," 16 J. Law and Econ. 1 (1973); W. Baumol, J. Panzar, R. Willig, *Contestable Markets and the Theory of Industry Structure* (Harcourt, Brace, Jovanovich 1982).

[68] *See* note 67 above.

strates that, while the degree of concentration increased in a number of the 13 alleged markets, it *decreased* in **[45]** three markets. This mixed picture provides little help in inferring the size of barriers to entry across all 13 SMSAs.

Notwithstanding these other relationships, we believe it is perhaps most appropriate to view the height of entry barriers in the context of actual potential competition analysis as relevant in assessing the number of firms capable of entering the target market(s). All other things equal (including the competitive vigor of each potential entrant), the lower the entry barriers, the greater the likelihood of a larger pool of potential entrants. As the ALJ recognized, elimination of one member of a large pool through conglomerate acquisition of an existing competitor in the target market is unlikely to lessen competition in that market substantially, since in that case numerous other "outside" firms would retain the ability to enter. (ID 215.)[69]

In general, the lower the barriers to entry the higher the cross-elasticity of supply, and the less likely that an acquisition will create market power.[70] Thus, the lower the entry barriers the less likely it will be that, as a consequence of an acquisition, remaining firms in the target market can successfully raise prices by restricting output, whether by unilateral action, interdependent coordination, or express collusion.[71] In other words, without barriers to entry, mergers and acquisitions are unable to create market power. Put in terms of the elements of the actual potential entrant theory, evidence of low entry barriers: may assist in rebutting a concentration—based legal presumption that potential competition analysis is appropriate; will generally indicate **[46]** the existence of a number of potential entrants; and will make it less likely that the acquiring firm's alternative *de novo* or toehold entry would create substantial procompetitive benefits over and above those existing in the target market at the time of the challenged acquisition.[72]

The converse also applies. High entry barriers suggest low supply cross-elasticities, which increase the probability that market power will result from an acquisition. Hence, where barriers to entering the target market are high, a merger or acquisition may create a poten-

[69] *See Heublein, Inc.,* 96 F.T.C. 385, 589 (1980) (elimination of one potential entrant into all wine market competitively "insignificant" given "unusually large number of strong companies" making, or willing and able to make, toehold acquisitions in target market); *Budd Company,* 86 F.T.C. 518, 577 (1975).

[70] *See, e.g., United States v. Hughes Tool Co.,* 415 F.Supp. 637, 644 (C.D. Cal. 1976) ("substantial entry and exit rates in firms and products [indicates] that entrance is relatively easy and that healthy competition is present" within relevant market).

[71] *Heublein, Inc.,* 96 F.T.C. 385, 588–89 (1980). *See* FTC Merger Statement, note 9 above, at p. 77.

[72] An anomaly of the potential competition theory is that, in some cases, *high* entry barriers can also militate *against* application of the theory. *See, e.g., United States v. Marine Bancorporation,* 418 U.S. 602, 629–30, 632 (1974) (by reducing likelihood that acquiring firm is source of future competitive benefits through *de novo* or toehold entry, regulatory entry barriers render it difficult to hold geographic market extension merger by commercial bank unlawful under potential competition doctrine).

tial for significant market power that is unlikely to be tempered by the threat that future entry will prevent or frustrate anticompetitive output and pricing decisions by firms in the target market.

Evidence of low entry barriers includes recent entry into the target market,[73] or recent capacity expansion by existing competitors in that market.[74] (Of course, the reverse is not true: a lack of recent entry does not necessarily imply high entry barriers or low supply elasticity, since other factors—including rising costs or shrinking demand—might also explain this condition.) In addition, such entry barriers as high transportation costs relative to product value and governmentally-imposed restrictions[75] may also impede entry into some target markets by outside firms. [47]

While complaint counsel bear the ultimate burden of persuasion on the issue of the number of potential entrants, the Commission explained in *Heublein:*

> [W]e place upon the party defending the merger the initial responsibility of coming forward with evidence that a group of plausibly qualified potential deconcentrators exists. That burden is not discharged simply by naming a long list of companies who might have entered and then leaving it to the plaintiff to disprove the likelihood of entry with respect to each. Rather, the party defending the merger must be able to point to objective factors indicating that the designated firms will likely be willing and able to enter or expand if the [target] market becomes less competitive.[76]

Grand Union offered such a list of potential entrant candidates, but the ALJ found that respondents failed to offer objective evidence of any specific interest or ability of any of these candidates to enter the "southeast markets." (ID 222–23.) Rather, the ALJ found that the existence of high barriers to significant entry on a scale sufficient to provide meaningful competition eliminated almost all of the potential entrants suggested by Grand Union. (ID 223.) We disagree. We conclude that the evidence of the growth and financial attractiveness of many of the SMSAs in question, coupled with the relatively low barriers to entering the individual SMSAs, is adequate to satisfy respondents' burden of coming forward. We believe these "objective factors" indicate that a number of the suggested firms would likely be willing and able to enter or expand should the target SMSAs become less competitive following Grand Union's acquisition of Colonial.

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[73] *See* FTC Merger Statement, note 9 above, at p. 77 (evidence of actual entry, especially recent and frequent new entry, is highly probative in merger analysis).

[74] *Ibid.* (effective competition might depend upon firm's achieving certain scale of operation; evidence of substantial expansion by existing industry members—especially non-dominant firms—may persuasively indicate barriers to larger scale are not high).

[75] *See, e.g., United States v. Marine Bancorporation,* 418 U.S. 602, 627 (1974) (application of potential competition doctrine to commercial banking "must take into account the unique federal and state regulatory restraints on entry").

[76] *Heublein, Inc.,* 96 F.T.C. 385, 589 (1980).

The ALJ found there has been a "paucity of entry by supermarket chains" into the 13 target SMSAs. (ID 216.) However, he also asserted that "*de novo* entry is not unusual in the supermarket industry." (ID 221.) While it may be difficult to reconcile these two conclusions, both are based on what we found in Part II to be the ALJ's inappropriately narrow focus on "supermarkets" and "supermarket chains." When that focus is broadened, a different image emerges. As we discuss in Part IV, the record shows what appear to be considerable opportunities for entry into the target SMSAs by both independent grocers **[48]** and grocery store and supermarket chains.

Complaint counsel urge (CAB 23 and Tr.OA 58.)—and the ALJ found (IDF 58.)—that "effective entry" into many of the target SMSAs entails multiple-store entry. Complaint counsel conceded at oral argument that, "There has been some effective entry by chains." (Tr.OA 36.) The ALJ found that the larger an area's population, the greater the number of stores necessary for effective entry. (IDF 59.) Several industry witnesses testified that multiple store entry was the only way effectively to serve and compete in an SMSA. (IDF 216.) (For example, one witness estimated that 12 new stores would be necessary for a new entrant in the Atlanta SMSA to compete effectively. (IDF 59; and ID 216.)) Respondents disagree, and argue that single-store entry is feasible and has been accomplished successfully (with later expansion) in numerous instances. (IDF 66; and RAB 16.)

We agree with respondents that the single-store entry "success stories" reflected in the record belie any conclusion that entry can be accomplished only by entering an SMSA with numerous stores. In this regard, we note the ALJ's finding that in *each* of the 13 SMSA markets, the services of a retail food wholesaler "generally seeking for more outlets to sell their [sic] grocery products" were available to new entrants and expanding firms. (IDF 57.) In addition, it appears that joint or cooperative advertising programs—such as those recently utilized in the Atlanta SMSA (IDF 89; and Tr. 2542–43.)—could assist independents in overcoming high advertising costs, which the ALJ found gave large supermarket chains a relative cost advantage. (IDF 61.) As we summarize in Part IV, below, the record shows numerous cases of successful entry with one or two stores, with subsequent expansion from that base in many instances.

It is unnecessary here to conduct a detailed analysis of the numerous factors that may affect entry into the retail grocery business. There is clear evidence in this record (summarized in Part IV, below) that substantial new entry and expansion have recently **[49]** occurred in virtually all of the 13 target markets alleged here.[77] This was true

[77] *See FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 300 (4th Cir. 1977) (*de novo* entry into uranium production by seven firms in past 10 years, combined with other factors, makes it unlikely that even if acquiring firm were (footnote cont'd)

for various categories of actors in the markets, including supermarket chains and independents, as well as such "innovators" as box and warehouse stores.[78] For all of the 13 target SMSAs in this case, the height of entry barriers is lower—and the degree of actual recent entry and expansion considerably greater—than that found by the Commission in other recent cases in which it has found a Section 7 violation on the basis of the actual potential entrant theory.[79] Indeed, this consistent pattern of recent entry and expansion in these numerous markets may indicate that barriers to entering the retail grocery industry *in general* are relatively low, at least throughout much of the Southeast. As respondents note (RAB 15 and Tr.OA 9.), such a conclusion would be **[50]** consistent with the past position of this Commission.[80] We therefore find that, as to all 13 target SMSA markets, complaint counsel have failed to carry their burden of persuading that the universe of potential entrants and expanders consists of only a limited number of firms.[81] While the Commission has declined to define "the minimum number of other potential entrants that makes the loss of one an insignificant lessening of competition,"[82] we are confident that the relatively low entry barriers in these markets assure that number is exceeded here.[83]

On the basis of this conclusion about the height of entry barriers across all of the relevant markets, it seems unlikely that the elements of a Section 7 violation under an actual potential competition theory

potential entrant its loss through merger would have significant anticompetitive effect); *United States v. Hughes Tool Co.,* 415 F.Supp. 637, 644 (C.D.Cal. 1976) ("substantial exit and entry rates in firms and products [indicates] that entrance is relatively easy and that healthy competition is present" within relevant market); *cf. British Oxygen Co., Ltd.,* 86 F.T.C. 1241, 1350–51 (no significant recent entry into a U.S. "industrial gases" market characterized by "substantial" entry barriers), *rev'd and remanded on other grounds sub nom., BOC International, Ltd. v. FTC,* 557 F.2d 24 (2d Cir. 1977).

[78] *See United States v. Hughes Tool Co.,* 415 F.Supp. 637, 644 (C.D. Cal. 1976) (rapid pace of technological progress and product innovation further demonstrates competitiveness of relevant market).

[79] *Tenneco, Inc.,* 98 F.T.C. 464, 583–85, 617 (1981) ("Very substantial barriers to entry"; no new entry in at least 19 years prior to challenged acquisition), *rev'd on other grounds, Tenneco, Inc. v. FTC,* 689 F.2d 346, 353 (2d Cir. 1982) ("Substantial barriers to entry severely limit" number of firms likely to provide additional competition); *Brunswick Corp., et al.,* 94 F.T.C. 1174 (1979), *modified as to relief,* 96 F.T.C. 151 (1980) (barriers to entry remained significant over time; "some entry" occurred into low-horsepower end of outboard-motor market, but was "insignificant to the market leaders" whose shares remained constant), *aff'd as modified sub nom., Yamaha Motor Co., Ltd. v. FTC,* 657 F.2d 971 (8th Cir. 1981), *cert. denied,* 452 U.S. 915 (1982); *British Oxygen Co., Ltd.,* 86 F.T.C. 1241, 1350–51 (1975) ("substantial barriers for entry" and "no significant entry" in recent years), *rev'd and remanded on other grounds sub nom., BOC International, Ltd., v. FTC,* 557 F.2d 24 (2d Cir. 1977).

[80] *National Tea Co.,* 69 F.T.C. 226, 278 (1966) ("relative ease of entry" into retail grocery store market cited particularly as one of industry's "dynamic features" that may assist in dissipating restraints on competition).

[81] *Heublein, Inc.,* 96 F.T.C. 385, 589 (1980).

[82] *Heublein, Inc.,* 96 F.T.C. 385, 591 (1980).

[83] *See* DOJ Merger Guidelines, note 9 above, at ¶4504 (absent "particularly strong" evidence of "likely actual entry," Justice Department unlikely to challenge potential competition merger if entry advantage ascribed to acquiring firm is also possessed by three or more other firms; Department also unlikely to challenge potential competition merger where entry can be accomplished by firms without any specific entry advantages so easily "that existing competitors could not succeed in raising price for any significant period of time"). *See also United States v. Hughes Tool Company,* 415 F.Supp. 637, 646 (C.D. Cal. 1976) (in rejecting perceived potential competition allegation, court notes "at least six" potential entrants possessing all basic capabilities for entry, with three others having several basic entry prerequisites). *See generally,* Vol. V, P. Areeda & D. Turner, *Antitrust Law* ¶ 1123 at 123–24 (1980) ("universe exceeding three similarly well-qualified potential entrants should be presumptively sufficient to obviate concern" and "universe of six entrants removes any plausible basis").

could be established in any of the markets here alleged. Nevertheless, our discussion in Part IV of the individual target SMSAs considers and applies certain of the other actual potential entrant elements in addition to the number of likely potential entrants. **[51]**

IV. THE INDIVIDUAL MARKETS

In this part we apply the elements of the actual potential competition theory to each of the 13 alleged geographic markets at issue in this appeal. We summarize our resulting conclusions in Part IV (F), below.

A. *The Georgia Markets*

1. Atlanta

Perhaps the strongest argument by complaint counsel that Grand Union's acquisition of Colonial violated Section 7 is that advanced for the Atlanta, Georgia SMSA. At the time of the acquisition, Colonial was the largest grocery retailer in the Atlanta SMSA (IDF 82.), operating over 60 stores and accounting for approximately 20.6 percent of all grocery store sales. (TABLE 1.) The 1977 four-firm concentration ratio of almost 63 percent (*Id.*) is, as we noted in Part III, sufficient to raise a (rebuttable) legal presumption that this market was an appropriate candidate for potential competition analysis. Complaint counsel's two experts testified that, from an economic perspective, there was a high probability that Atlanta was performing as a less-than-competitive market. (IDF 90; and Tr. 1976–78 and 2348.) One such witness, Dr. Parker, testified that barriers to "effective entry" were very high in this SMSA. (Tr. 2347.) We disagree with this economic assessment of the state of competition in the Atlanta SMSA, and conclude also that the requisite elements of a Section 7 violation based on an actual potential competition theory are not met in this market.

The record shows that the Atlanta market includes a significant number of competitors. The ALJ found there were "many additional competitors" who were not among the top eight firms in the SMSA. (IDF 82.) Moreover, the structure of the Atlanta market has not been static during the 1970s, as one would expect if it were a non-competitive market. Perhaps the most dramatic characteristic of this market was the decline of A & P from third to fifth place from 1972 to 1977, and the concomitant ascendancy of Kroger from fifth to third place over the same period. (IDF 82.) The **[52]** impact of Kroger as a competitive factor in the Atlanta market is indicated by the near doubling of its market share from 7.2 percent in 1972 to 13.6 percent in 1977.

(*Id.*)[84] A competing independent Atlanta grocer testified that Kroger was becoming an aggressive price competitor throughout the Atlanta SMSA. (IDF 89; and Tr. 385.) In addition, a Colonial/Grand Union official testified that "As a result of [Kroger's implementation of its 'Everyday Low Price' campaign[85]], every chain in the [Atlanta] market without exception has lowered their [sic] everyday shelf prices." (Tr. 875.) While this latter testimony from respondents' official is self-serving, it is consistent with other record evidence of Kroger's recent competitive aggressiveness in terms of pricing policies, store expansion, and remodeling. (IDF 89; and Tr. 338–39, 385, 640, 873–75 and 2997–98.)[86]

This evidence of Kroger's competitive significance might itself be sufficient to rebut the relatively weak legal presumption of a non-competitive market raised by the 62.9 percent C_4 figure. In any event, additional evidence of recent entry and expansion by other grocery stores in the Atlanta SMSA clearly tilts the balance against the legal presumption raised by concentration levels alone. The record shows entry in 1978 of "box stores" operated by Jewel T, which by year-end 1980 had opened a dozen such stores in the Atlanta SMSA. (IDF 89.) There was also recent entry by several independent firms, some of which used former Colonial stores or were operated by former Colonial store managers. (IDF 89.) Further, Bi-Lo entered with one store in 1978, and a second in 1979. (*Id.*) **[53]**

There was also expansion by existing competitors. Winn-Dixie, the SMSA's fourth largest chain in 1977 (IDF 82.), added five new (albeit smaller) supermarket stores in 1979. (IDF 89; and Tr. 2999.) Ogletree —the seventh largest competitor and the major independent in the SMSA—expanded within the Atlanta SMSA in 1979. (IDF 89.) We find this evidence of recent entry and expansion inconsistent with the conclusions of complaint counsel's experts. Contrary to their conclusions, we find it indicative of relatively low entry barriers, a correspondingly higher number of likely potential entrants, and a competitive SMSA market.

In addition, we note there is a question as to whether any feasible alternative toehold acquisitions existed for Grand Union in this SMSA. A number of the toehold acquisition candidates advanced by complaint counsel seem to have been either unacceptable to Grand Union, unwilling to sell, or located entirely outside the Atlanta

[84] *Cf.* FTC Merger Statement, note 9 above, at 80 (stability of market shares over time cited as one of several market characteristics that may facilitate interfirm coordination).

[85] For a more detailed discussion of Kroger's implementation of its "Everyday Low Price" policy in Atlanta and other areas, *see The Kroger Company*, 98 F.T.C. 639, 722–32 (1981).

[86] *See Tenneco, Inc. v. FTC*, 689 F.2d 346, 356–58 (2d Cir. 1982) (as to *perceived* potential competition count, doubling (and possible quadrupling) of leading firm's market share following "aggressive campaign" to improve its declining position cited as evincing competitive pressure from existing firms).

SMSA.[87] (IDF 91.) As to the last category, we reject complaint counsel's argument that the list of available toehold possibilities must be deemed to include firms not operating in the target market but which could expand there from an existing base of operations. (CAB 36.) We believe this "peripheral toehold" theory stretches too far the concept of toehold entry, and would place upon acquiring firms an unreasonable burden of speculating which acquisitions in the target market would likely be viewed by government enforcement authorities as "potential toehold expanders" into the target market. In this and the other SMSA markets alleged by complaint counsel, we decline to **[54]** impose that burden on respondents.[88]

Finally, we note indications in the record that Colonial may have been a more effective competitor in the Atlanta SMSA following its acquisition by Grand Union. A competitor testified that following its acquisition Colonial has been "more vigorous in their [sic] advertising," has adopted lower advertised prices, and may have conducted "more vigorous . . . store operations." (Tr. 378.) The ALJ also cited testimony by respondents' officials (again, self-serving) that since the acquisition Grand Union has: increased Colonial's Atlanta store expansion program; designed new stores to compete more effectively against Kroger; closed unprofitable stores; increased the number of "price zones" from two to 10 (which has been described as a sign of greater competition (Tr. 1025–26.)); lowered gross profit margins on some items; instituted more aggressive shelf pricing; increased the variety of products offered; and improved the quality of store management through increased wage scales. (IDF 94.) In theory, some of Grand Union's post-acquisition competitive aggressiveness may have been designed to stave off adverse Commission action. However, in light of the non-transitory nature of certain of respondents' actions, we believe this to be an unlikely explanation.

It is true, as the ALJ notes (IDF 91.), that in 1975 a Grand Union official concluded—on the basis of a one-day price study in Atlanta—that "competition [in the Atlanta market] is not as aggressive as in most of our operating areas," adding that there did not appear to be the type of "over-storing" that Grand Union faced in certain other areas. (CX–38Z–58.) However, we note that this rather cursory review occurred *prior* to the recent entry and expansion cited above, and before much of the recent aggressive Kroger competition and expansion documented in the record. (IDF 82, 89, and 94.) **[55]** Hence, we

[87] *See Tenneco, Inc. v. FTC,* 689 F.2d 346, 354–55 (2d Cir. 1982) (unsuccessful acquisition negotiations and other factors cited as "strong evidence" that small European producers were "not reasonably available" as potential toehold acquisitions in U.S. market; same result as to "weak and deteriorating" U.S. firm with "poorly accepted product and run-down equipment").

[88] *Cf. Tenneco, Inc.,* 98 F.T.C. 464, 603, 606–07, 618–22 (1981) (European shock absorber makers with only "modest shares"—about 1 percent—of U.S. replacement shock absorber market seen as possible toehold acquisitions), *rev'd, Tenneco, Inc. v. FTC,* 689 F. 2d 346, 354 (2d Cir. 1982) (European firms "not reasonably available" on facts of case).

conclude that respondents have successfully rebutted the legal presumption of a less-than-competitive Atlanta market, and that complaint counsel have in addition failed to establish certain other of the prerequisites of the actual potential competition theory.

2. Augusta

The Augusta SMSA is similar to the Atlanta market in at least two respects: first, Kroger has emerged as an increasingly competitive factor; and second, in recent years there has been both new entry and expansion by existing firms. At the time of Colonial's acquisition in August 1978, it was the number two firm in this market. (IDF 96.) Its 1977 share of 12.8 percent of grocery store sales reflected a drop of almost one percentage point since 1972 (*Id.*), indicating Colonial may not have been a dynamic factor in this market. As in Atlanta, A & P was clearly a declining factor, with its market share falling from 8.7 percent in 1972 to 4.4 percent in 1977. (*Id.*) In contrast, Kroger was again becoming a stronger competitive factor in this market, with its share increasing from 3.5 percent in 1972 to 8.4 percent in 1977. (*Id.*) Kroger's competitive impact was noted by a Colonial official who testified that Colonial had recently lowered profit margins "due to the growth of Kroger and their strength in that [Augusta] market." (Tr. 2676–77.) The ALJ found that, as a result of Kroger's competition, Colonial reduced its margins on dry groceries by one and one-quarter percent in September 1980 to compete more effectively with Kroger. (IDF 98; and Tr. 2685–87.)

The record also contains evidence of recent entry into Augusta. (IDF 97.) Although complaint counsel's expert, Dr. Parker, testified that barriers to effective entry into Augusta were "moderate" (Tr. 2356.), recent market performance indicates relatively low barriers. For example, Bi-Lo, the SMSA's third largest firm with almost 12 percent of the market (IDF 96.), entered the city of Augusta sometime after 1975, expanding from its earlier suburban Augusta operations. (IDF 97.) In 1977, Harris-Teetor entered the SMSA with three stores. (IDF 96.) There has also been considerable **[56]** expansion in this SMSA. Kroger opened six new large "super stores" between 1974 and 1979 (IDF 98.), with three more planned. (IDF 100.) The area's largest chain, Winn-Dixie, opened two new stores since 1979 (IDF 100.), and Colonial has opened two new stores since its acquisition by Grand Union. (IDF 102.) In addition, complaint counsel's expert identified two firms as potential entrants, and one of respondents' witnesses identified a third. (IDF 100.)

We conclude that the competitive impact of Kroger, the relatively low entry barriers, and the apparent availability of other potential entrants, combine to rebut the rather weak legal presumption of a non-competitive market raised by the 55.2 percent C_4 levels in this market (TABLE 1.), and to negate a finding of any likely substantial lessening of competition in the Augusta SMSA under the actual potential entrant theory.

3. Macon

Expert testimony characterized the Macon SMSA as a "slow-growth" market. (IDF 111; and Tr. 2352 and 3002.) The SMSA was moderately concentrated as of 1977, with a C_4 ratio of 67.4 percent. (TABLE 1.) Complaint counsel's expert testified there were substantial barriers to effective entry. (Tr. 2352.)

At the time of the challenged acquisition, Colonial was the second largest firm in the Macon SMSA. (IDF 104.) Its share of the grocery store sales market had grown from 6.1 percent in 1972 to 9.1 percent in 1977 (TABLE 1.), though it had apparently fallen somewhat by the time of trial. (IDF 117.) Colonial had been the leading firm in this market in the mid-1960's but its sales deteriorated over time (*Id.*), a trend which a Colonial official attributed to "poor operations, poor merchandising, and a failure to upgrade facilities."[89] (Tr. 2739.) By 1977, Piggly Wiggly was clearly the leading firm **[57]** with almost 35 percent of the Macon market. (IDF 104.)

However, the record indicates a more dynamic, competitive market than appears in the "structural" picture painted by complaint counsel's expert. Here again, Kroger appears to be an aggressive, competitive factor. This is reflected in Kroger's gain in market share from 3.3 percent in 1972 to 7.3 percent in 1977, (IDF 104.) The ALJ found that Kroger has become "extremely aggressive in Macon" and continues to gain market share. (IDF 111.) We need not decide whether Kroger's recent track record would itself suffice to rebut the legal presumption of a non-competitive market raised by the 67.4 percent C_4 ratio, for evidence of recent entry and expansion by other firms tilts the balance against that presumption. Jewel entered Macon in December 1979 with one of its "Jewel-T" box stores. (*Id.*) A & P, after closing its older stores post 1975, recently re-entered the SMSA with one of its Family Mart "super stores." (*Id.*) While Alterman closed one of its two Macon stores in 1979, that store was subsequently operated by a local independent, and at the time of trial Alterman had another store under construction. (IDF 112.) Finally, we note that all three of Kroger's present stores were constructed since 1973. (IDF 111.)

We believe this evidence of recent entry and expansion indicates relatively low entry barriers, thereby increasing the number of likely

[89] *Cf. FTC v. National Tea Co.*, 603 F.2d 694, 699, 701 (8th Cir. 1979) (in preliminary injunction suit challenging horizontal merger of retail grocery store chains, appropriate under §7 to consider *acquiring* chain's "extremely poor image among [local] consumers" and its status as "weak competitor" in relevant market), *consent order issued, National Tea Co., et. al.*, 96 F.T.C. 42 (1980).

potential entrants, and decreasing the likelihood that Grand Union's entry through an alternative means would have generated significant procompetitive benefits in this target market. Moreover, we find that these low barriers, coupled with evidence of Kroger's competitive aggressiveness in this market, successfully rebut the legal presumption of a non-competitive market raised by the C_4 ratio. Finally, given Colonial's decline and the disparity in market shares between Piggly Wiggly and the remainder of the competitors in this SMSA, we note the possibility that Colonial's replacement by Grand Union may have actually served to enhance competition in the Macon area. [58]

It is a closer question as to whether Commission and judicial precedent would support characterization of Colonial as a lawful "toehold" acquisition in the Macon SMSA. The Commission's general approach to toehold acquisition candidates was expressed in its 1975 decision in *Budd Company:*

> We believe it to be desirable to observe a general rule in potential competition cases that firms possessing no more than 10 percent in a target market (where . . . the 4-firm concentration is approximately 60 percent or more) should ordinarily be presumed to be toehold or foothold firms. This presumption is by no means conclusive and the inference of lack of anticompetitive effects flowing from acquisition of such a firm can be rebutted in particular cases.[90]

While Colonial's 9.1 share in this market in which C_4 equals 67.4 percent falls within this standard, its number two ranking and post-1972 growth (*see* TABLE 1.) arguably make it less appropriate to invoke the 10 percent presumption here. However, we need not resolve this question for the Macon SMSA, since the other factors discussed above clearly place the Macon SMSA beyond the reach of liability under the actual potential competition theory.

B. *The North Carolina Markets*

Two North Carolina SMSAs are at issue in this appeal—the Raleigh/Durham SMSA and the Charlotte/Gastonia SMSA. Complaint counsel urge that, for purposes of [59] Section 7 analysis, the Raleigh/Durham SMSA may properly be divided into two relevant geographic

[90] *Budd Company,* 86 F.T.C. 518, 582 (1975). *See also Beatrice Foods Co.,* 86 F.T.C. 1, 62 n.66 (1975) (citing previous cases in which Commission considered firms with shares below 10 percent as toehold firms whose acquisition would have been procompetitive), *aff'd as modified, Beatrice Foods Co. v. FTC,* 540 F.2d 303 (7th Cir. 1976); *Bendix Corp.,* 77 F.T.C. 818 (1970) (4th ranking firm with 9.5 percent share intimated to be permissible toehold acquisition candidate), *vacated and remanded on other grounds,* 450 F.2d 534 (6th Cir. 1971); *FTC v. Atlantic Richfield Co.,* 549 F.2d 289, 293 n.4 (4th Cir. 1977), and *United States v. Black and Decker Mfg. Co.,* 430 F.Supp. 729, 767–68 (D.Md. 1976) (both referring to Commission's 10 percent demarcation in *Budd*). *But cf. Missouri Portland Cement Co. v. Cargill, Inc.,* 498 F.2d 851, 865 n.29 (2d Cir.), *cert. denied,* 419 U.S. 883 (1974) (firm with 10 percent share "probably too substantial to be considered a true toehold candidate"); and *British Oxygen Co. Ltd., et al.,* 86 F.T.C. 1241, 1348, 1357 n.18 (firm with 10 percent share of national market not toehold; same for rapidly expanding firm with 5.63 percent share and financial backing to become national producer), *rev'd on other grounds, BOC International, Ltd. v. FTC,* 557 F.2d 24, 27 n.3 (2d Cir. 1977) ("most unlikely" 3rd largest firm with 16 percent share of market in which C_2=44 percent could be toehold).

markets: the Raleigh subdivision and the Durham subdivision. (IDF 48.) The ALJ adopted this suggestion. (*See* IDF 179–188.) In support of this approach, complaint counsel and the ALJ cite the fact that at least three companies operate more than one store in the Durham subdivision, but none in the Raleigh subdivision (IDF 183.), and that the stores within each subdivision generally advertise only in the newspaper published within their respective subdivision. (IDF 49.) It is not clear that either or both of these factors are sufficient to establish separate markets. However, the lack of evidence of supply and demand elasticities noted above renders it difficult to disprove this contention. We note, however, that Colonial appears to have the same price structure in both of these subdivisions. (IDF 183; and Tr. 2654.)

In any event, it is unnecessary to decide this question here. The evidence of market structure (including concentration ratios and market shares) and of market performance (including the degree of recent entry and expansion) is similar in both subdivisions, although the identities of competitors differ somewhat in the two areas. We therefore assume without deciding that each subdivision properly may be viewed as a separate geographic market for purposes of analyzing the legality under Section 7 of Grand Union's acquisition of Colonial.

1. Raleigh

As of 1977, Colonial was a leading firm in the Raleigh subdivision. It held the number three position with a 14.3 percent market share, down only slightly from its 1972 level of 14.7 percent (also third). (IDF 180.) Winn-Dixie remained the market leader over this five-year period, with a fairly constant market share of approximately 28 percent. (*Id.*) The top three firms are significantly larger than the remaining firms in this market, although the market shares of other top-eight firms rose slightly between 1972 and 1977. (*Id.*) The C_4 measure in this market was 62.1 in 1977, down slightly from its 63.8 level in 1972 (TABLE 1.), sufficient to raise at most a moderate evidentiary **[60]** presumption that this subdivision was not competitive.

Complaint counsel's expert testified that entry barriers in this subdivision were substantial and discouraged new entry by small supermarket chains. (Tr. 2321.) Also, the record indicates capacity reduction on the part of some firms. Kroger, the number five firm in 1972, had withdrawn from this subdivision by 1977. (IDF 180.) Winn-Dixie reduced the number of its stores from 15 to 13 from 1972 to 1977, though it remained the market leader. (*Id.*) A & P also reduced its stores from 11 to nine over this period (*Id.*), although as of trial it had five new or recently-renovated stores in Raleigh. (IDF 183.)

We believe this evidence is clearly outweighed by other record evidence of substantial recent entry, as well as by the large number of potential entrants. Food World entered this subdivision with its first store in 1975 and a second in 1977–78; by 1977 it had become the area's fifth largest firm with a 3.3 percent market share. (IDF 180 and 183.) Food Town entered in 1975 with two stores, and by 1977 was the fourth largest firm with just over 4 percent of the market. (*Id.*) By early 1981, Food Town had four stores and a fifth under construction. (IDF 183.) Harris-Teetor entered with one store in 1978–79, and at the time of trial had a second store under construction and was looking for additional sites. (*Id.*) Best Food (an independent) opened a warehouse store in 1980, advertising its low prices in a local newspaper. (*Id.*) At trial, Lucky was described as being in the "process of entering" the Raleigh subdivision. (IDF 136 and 185.) This amount of recent entry is clearly substantial.[91]

In addition, there appears to be a significant number of potential entrants, with major chains among some of the most likely entrants. Complaint counsel's expert testified that Kroger was likely to reenter. (Tr. 2327.) The ALJ found that Kroger was actively seeking four sites in this subdivision and would probably re-enter. (IDF 185.) **[61]** The ALJ, citing the testimony of numerous industry officials, also found Safeway to be a potential entrant. (*Id.*) Complaint counsel's expert went further, describing Safeway as the most likely entrant into Raleigh. (Tr. 2327 and 2332.) Also, the head of the independent Byrd firm testified that his company was a potential entrant into Raleigh. (Tr. 1547.) However, since Byrd already had one store within the subdivision it may technically be a "potential expander," notwithstanding that Byrd did not consider its existing store to be in the Raleigh market. (IDF 185.) Further, an official of the Ingles chain testified that his firm has considered entering the Raleigh market, although no site selection work was yet undertaken. (Tr. 1751.) Finally, the ALJ found there were some 15 other firms within "striking distance" of the Raleigh/Durham SMSA that "may be considered potential entrants." (IDF 185.)

(While it is unnecessary to our conclusion, we note also the testimony of a Colonial official that, as a result of recent advertising by a Raleigh area convenience chain that its milk and dairy prices were no higher than those of supermarket chains, Colonial increased its price-checking of that convenience chain to a weekly (rather than the previous spot) basis. (Tr. 2651; and IDF 183.) Although self-serving, this testimony is consistent with other record evidence, cited above,

[91] *See United States v. Hughes Tool Co.*, 415 F.Supp. 637, 644 (C.D. Cal. 1976) (survival of new entrants in pre-acquisition period "shows that neither [acquired firm] nor others in the market possess any power to exclude competitors").

of competitive performance in this subdivision, and with our product market approximation.)

While the position of the three leading firms (including Colonial) has remained fairly stable, the entry of numerous other firms into the Raleigh subdivision is sufficient to establish a market characterized by relatively low entry barriers. We conclude that the record evidence of substantial recent entry and expansion clearly suffices to overcome the moderate C_4-based evidentiary presumption of a less-than-competitive market. In addition, the number of potential entrants is itself sufficiently high to preclude application of the actual potential competition theory in this alleged market. Given these factors, we conclude that complaint counsel have failed to show that Grand Union's entry through alternative means offered a reasonable likelihood of **[62]** increased deconcentration or procompetitive effects in this market.[92]

2. Durham

Colonial was in a virtual tie with A & P for second place in this subdivision as of 1977, with two firms having market shares of 17.5 and 17.2 percent, respectively. (IDF 180.) Colonial's 1977 position remained unchanged since 1972, while A & P had fallen from its 1972 first-place position (then over 20 percent of the market). (*Id.*) Winn-Dixie showed rapid growth over the same five-year period, rising from third position (13.1 percent share) to first place (20.3 percent share). (*Id.*) Kroger retained its fourth position during this period with its market share holding constant at about 11.7 percent. (*Id.*) The C_4 measure for this subdivision increased from its 1972 level of 62.4 to 66.8 in 1977, raising a moderate legal presumption that this subdivision was a candidate for potential competition analysis.

In addition to the exchange of market positions between A & P and Winn-Dixie and the latter's rapid growth over the 1972–1977 period, other evidence refutes any argument that this subdivision was performing in a non-competitive fashion. Despite testimony of complaint counsel's expert that barriers to "effective" entry into Durham were "quite high" (Tr. 2328–29.), substantial recent entry did in fact take place. The independent Byrd entered in 1973 (taking over a former Kroger store). (IDF 182.) Food Town entered within the five years prior to trial, built a second store in 1978, and as of trial was searching for additional sites. (IDF 183.) Harris-Teetor entered in 1977 and quickly moved into seventh place in the Durham subdivision. (IDF 180 and 183.) Finally, at the time of trial Lowes was entering with its

[92] *See FTC v. Atlantic Richfield Co.*, 549 F.2d, 289, 300 (4th Cir. 1977) (*de novo* entry by seven firms in past 10 years, combined with other factors, makes it unlikely that even if acquiring firm were potential entrant its loss through merger would have significant anticompetitive effect).

first store. (IDF 185.) The record also reflects recent expansion by Winn-Dixie and Byrd (IDF 182.), and the ALJ found that Kroger was also likely to expand. (IDF 185.) In contrast, while Colonial was still one of the leading **[63]** firms in Durham, it had not opened a new store there since 1974 (IDF 183.), despite preacquisition corporate plans to do so. (IDF 181.) Finally, as noted above, the ALJ identified a number of potential entrants into the Raleigh/Durham SMSA. (IDF 185.)

We find that the repositioning among two of the top four firms, together with the evidence of substantial recent entry and expansion, is again sufficient to rebut the legal presumption raised by the C_4 figure that Durham is a less-than-competitive market. We also conclude that the relatively low barriers evidenced by this recent entry, coupled with the ALJ's identification of numerous potential entrants, precludes finding a sufficiently small number of likely potential entrants on which to base a Section 7 potential competition violation.

3. Charlotte/Gastonia

Colonial was not among the leading firms in this SMSA as of 1977. (*See* IDF 190.) Its market share had fallen from 7 percent in 1972 to only 5 percent in 1977, moving it from fourth to fifth place in this market. (TABLE 1.) Over this same five-year period there was considerable repositioning among the top four firms. A & P dropped from first position (at 16.8 percent) to fourth place (9 percent). (IDF 190.) Harris-Teetor went from second place (15.3 percent) to become the number one firm in the market (almost 20 percent). (*Id.*) Winn-Dixie moved from third position (9.1 percent) to second position (12 percent). (*Id.*) By 1977, Colonial had slipped from among the top four firms. It was replaced by the SMSA's fastest-growing competitor, Food Town, which rose from sixth place (3.7 percent) to third place (nearly 12 percent), more than tripling its market share in only five years. (*Id.*) The positions of the remaining firms in the top eight were fairly stable over this time period (*Id.*), although the local family-owned Park n' Shop chain (number five in 1972 and number six in 1977) apparently reduced the number of its stores from 10 to two or three during this period. (IDF 193.)

Complaint counsel's expert testified that the Charlotte/Gastonia market was moderately concentrated. (Tr. 2333–34.) Its C_4 ratio in 1977 was 54.9, up from the 48.6 **[64]** level in 1972. (TABLE 1.) We find that this degree of concentration, despite its recent increase, raises only a relatively weak evidentiary presumption that this market was not performing in competitive fashion.

The same expert witness testified that barriers to effective entry into this market are "significantly high." (Tr. 2333–34.) Nevertheless, the record once again discloses recent entry. Perhaps most significant, Kroger entered in 1978 with three of its "Sav-On" opened a fourth in 1979, and by 1981 operated a total of five stores. (IDF 193.) (It is unclear from the record what Kroger's market share was, or what impact its entry had on the 1977 market structure discussed above.) The second major entrant during the recent past was "Three Guys," an independent firm which constructed a warehouse and four "warehouse box-type stores" in 1980. All four of these stores were almost adjacent to the new Kroger stores, and it appears that only two of the Three Guys stores were actually opened. (The remaining two stores and the warehouse were apparently up for sale at the time of trial.) (IDF 192–93.) According to a Colonial witness, Three Guys offered "very low prices in groceries" (Tr. 2672–73; and IDF 193.), and established firms with higher price structures reacted to its entry by lowering their prices. (Tr. 2694–95.) It is difficult to assess what weight to accord this arguably self-serving testimony, since both complaint counsel and respondents each cite portions of it as supportive of their respective contentions. (*See* IDF 192–93.) At a minimum, it is evidence that a second firm entered this SMSA in the very recent past, and we note as well the ALJ's finding that one of the two stores opened by Three Guys "seems to do fairly well." (IDF 193.) Finally, we observe that there was recent expansion in this SMSA by Bi-Lo, the number seven firm, which increased the number of its stores from one to four over the 1972–1977 period. (IDF 190.)

We conclude that the recent significant repositioning among the leading firms, the recent multiple-store entry by two firms (of which one—Kroger—was a very strong competitor in other markets), and the very rapid recent growth of Food Town, **[65]** are sufficient to rebut the relatively weak presumption of a non-competitive market raised by the low C_4 ratio of 54.9 percent.

We also find that Grand Union's acquisition of the number five firm having a declining, five percent share of a mildly-concentrated market into which there has been recent entry is itself a lawful toehold acquisition.[93]

C. The South Carolina Market—Greenville

Greenville, South Carolina is a subdivision of the Greenville/Spartanburg SMSA. (IDF 105.) As noted above, complaint counsel eliminated the Spartanburg subdivision from their actual potential competition allegations. (IDF 36.) Because we determine that no Section 7 violation would exist as to the Greenville subdivision, we do not reach the question whether this SMSA subdivision itself constitutes an appropriate relevant geographic market.

As TABLE 1 shows, the Greenville subdivision is relatively concen-

[93] *See* note 90 above, and accompanying text.

trated, with a C_4 of 72.3 percent. However, while Colonial was the sixth largest firm (IDF 106.), it was a very small and declining factor in the Greenville area. Its market share had fallen from 3.6 percent in 1972 to 2.3 percent in 1977 (TABLE 1.), and was probably even lower in 1978. (IDF 117.) As the Commission found in *Heublein,* "[A]pproximately 2% of the market . . . [is] clearly a sufficiently small share to qualify as a toehold acquisition."[94] Hence, we conclude that in the Greenville subdivision Grand Union's acquisition of Colonial was itself a lawful toehold acquisition.

This conclusion is of course sufficient to preclude a Section 7 violation in this alleged market. However, despite the testimony of complaint counsel's expert to the contrary (Tr. 2340.), we note also that recent entry into Greenville is once again **[66]** consistent with low entry barriers in this subdivision. Ingles entered Greenville in the early 1970's and by 1977 was the third largest firm with almost 11 percent of the market. (IDF 106.) It had established 10 stores by 1980. (IDF 110 and 116.) Community Cash entered after 1976 by acquiring A & P's stores when the latter withdrew from the market; A & P later re-entered by building two successful Family Mart stores. (IDF 110.) Also, while Grand Union closed all six Colonial stores in Greenville after the acquisition, it apparently planned to re-enter within the next five years. (IDF 108.) Finally, we note that there appear to be several additional potential entrants, including Harris-Teetor, Kroger, and Food Town. (IDF 113.)

D. *The Virginia Markets*

1. Newport News/Hampton

As of 1977, one year prior to its acquisition by Grand Union, Colonial accounted for approximately 16 percent of this market, about the same share as in 1972. (IDF 130.) While this made Colonial the leading firm during this period, at 16 percent it could hardly be described as a "dominant" factor in this SMSA. Aside from Colonial's position, very little about this market has remained stable in recent years. Firms holding second, third, and fourth positions in 1972 each lost approximately four percentage points in market share by 1977. (*Id.*) One of the most significant aspects of this market has been the rise of Farm Fresh from the eighth position in 1972 at 3.6 percent of the market, to third position at 10.8 percent in 1977. (*Id.*) At least as remarkable has been the role of Safeway, entering after 1972 and obtaining an 8.2 percent market share by 1977. (IDF 130 and 133.) The effect of these market changes is reflected in the concentration meas-

[94] *Heublein, Inc.*, 96 F.T.C. 385, 587 (1980); *see also SKF Industries, Inc., et al.*, 94 F.T.C. 6, 84 (1979) (potential entrant's acquisition of firm with 2 percent market share "clearly constituted a legitimate toehold acquisition"); and note 90 above, and accompanying text.

ures for this SMSA. Between 1972 and 1977, the C_4 measure dropped over seven percentage points from 56.7 to 49.1. (TABLE 1; and IDF 130.) Clearly, under such circumstances the 1977 C_4 ratio of 49.1 can be viewed as raising only the weakest of presumptions that this is a less-than-competitive market, requiring only slight evidence for rebuttal. This is especially true where, as here, the evidence establishes a recent **[67]** trend toward deconcentration.[95] We agree with the ALJ's finding that "Farm Fresh's growth and Safeway's market entry had the effect of deconcentrating the market." (IDF 130.) We also find the recent, aggressive market performance of Safeway and Farm Fresh more than sufficient to rebut the very weak presumption of a less-than-competitive market raised by the low C_4 ratio.

Complaint counsel's expert described this SMSA as having moderately high entry barriers. (Tr. 2309.) It is true that this market has experienced less recent entry than almost any of the other 13 markets alleged here. Winn-Dixie entered in the early 1970's. Safeway was apparently the last new entrant, coming into this SMSA with several stores sometime after 1972. (IDF 132.) We do not believe this lower level of entry negates the probative significance of the deconcentration caused in large measure by the aggressiveness of Farm Fresh and Safeway. Moreover, other factors support a conclusion that complaint counsel have failed to prove that this SMSA is non-competitive and is an appropriate candidate for the actual potential entrant theory. First, there appears to be an unusually large number of independent firms in this market. Complaint counsel's survey revealed at least six independents in addition to those in the top eight firms.[96] (IDF 133.) In addition to expansion by Safeway and Farm Fresh, the independent "Lou Smith" firm recently expanded by building a second store (*Id.*) and likely future expanders include Farm Fresh. (IDF 136.) Also, Lucky (and perhaps Giant) appears to be a likely potential entrant. (*Id.*) **[68]**

Finally, we are compelled to comment on the ALJ's assertion that Farm Fresh would have been a less anticompetitive acquisition for Grand Union. (IDF 137.) We are not at all certain that this would be the case. While Colonial was the market leader, its recent position had been static. In contrast, Farm Fresh was a dynamic, growing firm, which Colonial officials described as a very aggressive competitor. (Tr. 659 and 2552.) While this testimony is self-serving, it is consistent with the objective evidence of Farm Fresh's rapid recent growth. The

[95] *See United States v. Hughes Tool Co.*, 415 F.Supp. 637, 643, 645 (C.D. Cal. 1976) ("significant deconcentration trend" cited as one factor making application of actual or perceived potential competition theories inappropriate).

[96] *See FTC v. National Tea Co.*, 603 F.2d, 694, 701 (8th Cir. 1979) (in declining to enjoin merger between competing retail grocery chains, court of appeals finds relevant market to be "marked by an active second tier of [independent] competitors," citing testimony that the independents' viability and strength is "very unique"), *consent order issued, National Tea Co., et al.*, 96 F.T.C. 42 (1980).

elimination of such an aggressive "rising star" may in some cases be more significant in competitive terms than acquisition of a static market leader.[97]

In sum, we find this SMSA—currently experiencing a trend toward deconcentration—sufficiently competitive to rebut the weak C_4 evidentiary presumption. We further conclude that the record is insufficient to support a finding that Grand Union's entry through alternative means would have offered a substantial likelihood of deconcentration or procompetitive effects over and above those already occurring there.

2. Norfolk/Virginia Beach

Here again, Colonial was the leading but not dominant firm in this SMSA, with a 1977 market share of 17.8 percent, up from 15.7 percent in 1972. (TABLE 1.) The 1977 C_4 ratio of 53.1 raises only a relatively weak evidentiary presumption of a noncompetitive market, although that ratio increased by almost four and one-half percentage points over the 1972–1977 period. (TABLE 1.) (We note that use of market shares from complaint counsel's survey yields a more modest rise in the C_4 level in this [**69**] SMSA from 50.9 to 51.5 over the 1972–1977 period. (IDF 138.)) In addition to Colonial, A & P also gained in market share over this period (*Id.*), indicating it is perhaps a more significant factor in this market than in some of the other 13 SMSAs in which it operates. Two of the top-four firms suffered a slight loss in market share from 1972 to 1977. (*Id.*) The major story in this market—as for the Newport News/Hampton SMSA—is the ascension of Farm Fresh and Safeway. Farm Fresh, the SMSA's fastest growing competitor, was not among the top eight firms in 1972. (IDF 133 and 138.) By 1977 it was the number five firm with 10 percent of the market, and by 1980 was estimated to have a 13 percent market share. (IDF 133.) Safeway entered this SMSA in the early 1970's, and by 1977 was the number eight firm with 5.1 percent of the market. (IDF 138 and 141.) Winn-Dixie entered sometime after Safeway (though it is unclear from the record what its market position in this SMSA was at the time of the acquisition). (IDF 140.) In addition, the ALJ found there had been recent expansion by A & P, Farm Fresh, and Food Fair. (IDF 138.) Thus, despite the opinion of complaint counsel's expert that barriers to entering this SMSA were "moderate to high" (Tr. 2317.), the extent of recent entry and expansion indicates the contrary.

We find that, as in the Newport News/Hampton market, the recent

[97] *See British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1348, 1357 n. 18 (1975) (rapidly growing firm with 5.6 percent target market share and financial backing to become national producer not regarded as permissible toehold), *rev'd and remanded on other grounds sub nom., BOC International, Ltd. v. FTC*, 557 F.2d 24 (2d Cir. 1977). *Cf.* FTC Merger Statement, note 9 above, at p. 79 (relevant factor in horizontal merger analysis is whether acquired firm is "disruptive force" in industry, though this factor has greater weight in highly concentrated markets).

market performance of Farm Fresh and Safeway in this SMSA is sufficient to rebut the weak legal presumption of non-competitiveness raised by the relatively low concentration level. We further find that this same evidence refutes any conclusion that Grand Union's entry through alternative means would create a substantial likelihood of deconcentration or increased procompetitive effects beyond those likely to flow from the recent performance of Safeway and Farm Fresh in this SMSA.

3. Richmond

As of 1977, Colonial was the fourth largest firm in the Richmond SMSA, with a 6.5 percent share of the market, down from its 1972 share of 7.7 percent. (IDF 119; and TABLE 1.) In addition to this falling market share, there are other indications that **[70]** Colonial was a declining factor in this market. A Colonial official testified that in the 1970's Richmond was not a profitable area for Colonial, that it had failed to modernize and renovate existing stores, and that some of its older stores operated in less desirable locations. (Tr. 2555; and IDF 127.) Moreover, Colonial had not opened a store in Richmond since 1972. (IDF 127.) On the basis of this record evidence, we find that Colonial was a lawful toehold acquisition for Grand Union.[98]

Complaint counsel suggest several alternative acquisitions that would be permissible toeholds for Grand Union in Richmond. We are puzzled as to why this list does *not* include Colonial, the number four (and declining) firm with 6.5 percent of the market, when it *does* include the independent Ukrops, the third largest (and rapidly growing) firm with almost 12 percent of the market. (IDF 126.) The exact opposite conclusion seems more logical.[99]

In addition, other evidence of the Richmond SMSA's economic performance establishes it to be a fairly competitive market in which invocation of the actual potential entrant theory would be inappropriate. First, we note that the 1977 C_4 ratio of 53.2—while up from the 1972 level of 45.2 (TABLE 1.)—raises only a weak presumption of poor economic performance. Despite this increase in the C_4 measure, there has been a significant change in positions among the top four firms. While the market leader, Safeway, remained at approximately 22 percent over the 1972–1977 period, the number two firm (A & P) gained three percentage points, and Colonial dropped from third to fourth position. The most significant change, however, was the rapid growth of Ukrops, a local independent. The number five firm at 6 percent in 1972, Ukrops almost doubled its share to 11.9 percent in 1977, moving into third position in the market. (IDF 119; and TABLE

[98] *See* note 90 above, and accompanying text.
[99] *See* note 97 above, and accompanying text.

1.) Food Fair dropped out of the top four altogether. (IDF 119.) In addition to [71] this repositioning among the top firms, we also find it significant that the ALJ identified a total of 16 different competitors in this one SMSA alone. (*Id.*)

The shift in positions among the top four firms was also accompanied by a significant amount of recent entry. Winn-Dixie entered this SMSA with one store in the early 1970's and operated three stores by 1980. (IDF 123.) Kings (Lynchburg, Virginia) entered in the 1970's with two stores, although only one remains. (IDF 122.) Lucky Stores of California entered in 1973 with its "Gemco" discount stores by acquiring two stores from Farm Fresh. (*Id.*) Farm Fresh not only remained in the market following those sales (IDF 119.), but at trial viewed itself as likely to expand there in the future. (IDF 123). While the ALJ found some indications that Giant (at 4.5 percent of the market in 1977) may withdraw from this SMSA (IDF 122.), complaint counsel's expert identified Kroger—an aggressive competitor in other markets[100]—as a likely potential entrant into Richmond. (Tr. 2306; and IDF 123.)

We also note that there is evidence calling into question whether Grand Union even had a present *interest* in entering this specific market, a precondition to application of the actual potential entrant theory.[101] Prior to its own acquisition by Cavenham in 1975, Grand Union Company considered expansion into Richmond (as well as into Newport News and other Colonial markets in Virginia) via joint venture. (IDF 125.) This plan proved unsuccessful. (*Id.*) Other evidence of interest in entering Richmond is mixed, with several proposed entry plans *cancelled* by the new Cavenham management. (IDF 125.) Internal Grand Union documents prepared subsequent to the Cavenham acquisition (but prior to the decision to acquire Colonial) do *not* include Richmond—or any other Virginia market—as a target for new entry. (*Id.*; and CX–143A, CX–126A, CX–131A, and CX–80Z–21,55.) Thus, while the "interest" prerequisite to a potential [72] competition violation in the Richmond market may have been present *before* Grand Union Company was acquired by Cavenham, the result thereafter is far from certain.

We conclude once again that, even had Colonial not been a lawful toehold, the performance of the Richmond SMSA—including evidence of substantial entry and repositioning—has been sufficiently competitive to rebut the weak "non-competitive" evidentiary presumption raised by the C_4 measure. We also find that the evidence of recent entry and expansion calls into serious question whether the

[100] *See* Part IV(A) above.
[101] *See* Part III(B), above.

number of likely potential entrants is sufficiently limited to satisfy the preconditions of the actual potential entrant theory.

E. *The Florida Markets*

1. Jacksonville

As of 1977, Colonial was the number four firm in the Jacksonville SMSA, with a market share of 6.4 percent, up from 5.8 percent in 1972. (IDF 151; and TABLE 1.) Despite this number four position, Colonial was clearly not a leading firm. Its market share was about one-fourth that of the largest firm, Winn-Dixie. (IDF 151.) Moreover, the ALJ found that Colonial had sustained losses in the Jacksonville SMSA virtually every year from 1960 to 1977. (IDF 152.)[102] On the basis of a market share well below our 10 percent threshold and Colonial's competitive weakness, we find no reason to reject the presumption that Colonial was a lawful toehold acquisition.[103]

In addition to Colonial's modest rise from number five to number four position between 1972 and 1977, there was considerable movement among most of the other top eight firms in this SMSA. Although market leader Winn-Dixie remained number one with **[73]** a stable market share of about 25 percent, Publix grew rapidly. Its share more than doubled from 6.6 percent to 15.4 percent, moving from fourth to third place. (IDF 151.) Food Fair and A & P sustained losses in market share of 4.6 and 2.8 percent, respectively, over this period. (*Id.*)

The 1977 C_4 ratio of 64.8 percent raises a moderate legal presumption of a noncompetitive market. (TABLE 1.) Also, complaint counsel's expert testified that entry barriers in this SMSA were high. (Tr. 2366.) Despite this, the record shows that at least three significant firms entered Jacksonville within the last 10 years. (Two entered within three years prior to the challenged acquisition.) First, Albertson's entered with two stores in about 1975, expanded with two more stores in 1978, and claimed an estimated seven percent market share by 1980. (IDF 154.) Second, Jewel opened its first two Jewel T box stores in 1977, and by the end of 1979 had established 15 stores. (*Id.*) (It is significant that the ALJ found that Colonial reacted to this Jewel T entry by adding generic products to enable it to compete with Jewel T's prices on staple items. (*Id.*) This finding provides further support for our inclusion of box stores in the same product market as supermarkets.)

We also note the evidence cited by the ALJ as indicating that

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[102] *Cf. FTC v. National Tea Co.*, 603 F.2d 694, 699, 701 (8th Cir. 1979) (in preliminary injunction suit challenging horizontal merger between retail grocery store chains, appropriate to consider *acquiring* firm's status as weak competitor in relevant market, including its failure to operate profitably), *consent order issued, National Tea Co., et al.*, 96 F.T.C. 42 (1980).

[103] *See* note 90 above, and accompanying text.

Colonial may be a more aggressive price competitor in general than before its acquisition by Grand Union. (IDF 159.) Much of this evidence is post-acquisition and consists of testimony by respondents' officials. It is therefore not entitled to great weight. However, some aspects of this testimony are supported by independent evidence (*see, e.g.*, CX-611-D.), and we weigh its credibility accordingly.

Third, Publix re-entered this market within the 10 years prior to trial, by 1977 had captured 15.4 percent of the market, and was found by the ALJ to be likely to expand further. (IDF 157-58.) In addition to this significant entry by three substantial chains, the ALJ also identified Great Scott of Florida as a potential entrant (IDF 158.), cited testimony of several industry officials who viewed Kroger as a likely potential entrant, **[74]** and identified numerous other firms who "may be considered potential entrants." (*Id.*)

Finally, we note that some evidence casts doubt on whether Grand Union had either the financial incentive or the interest to enter the Jacksonville market. Jacksonville was not a prosperous area (*Id.*) and, as previously noted, Colonial had lost money there consistently. (IDF 152.) Also, Grand Union's "Florida West Coast Development Plan, 1976-1980" does not mention Jacksonville (or Orlando or Gainesville) among the areas where new stores were planned. (CX-71.)

In addition to finding that Colonial was a toehold in Jacksonville, we conclude on the basis of the rapid growth of several of the top eight firms, the repositioning among them, the significant degree of entry and expansion, and the competitive reaction of Colonial to Jewel T's entry, that respondents have successfully rebutted the *prima facie* case of a less-than competitive market. We find also that more than a few likely potential entrants existed, and that complaint counsel failed to show Grand Union's economic incentive and interest in entering this SMSA.

2. Orlando

Little discussion is merited for complaint counsel's assertion, and the ALJ's finding, that Grand Union's acquisition of Colonial operations in this market violated Section 7. In both 1972 and 1977, Colonial possessed less than two percent of the market. (TABLE 1; and IDF 161.) As the Commission noted in *Heublein*, this is itself sufficient to establish Colonial as a lawful toehold acquisition for Grand Union.[104] In addition, Colonial had suffered substantial recent losses (IDF 162 and 167.), and in neither 1972 nor 1977 was Colonial even among the top eight firms in this SMSA. (IDF 161.) We note also the recent entry by Albertson's (which the ALJ found led to a decrease in prices in the

[104] *Heublein, Inc.*, 96 F.T.C. 385, 587 (1980). *See also Budd Company*, 86 F.T.C. 518, 582 (1975); and note 90 above, and accompanying text.

market) and Jewel T (whose prices were lower than those of even two discounter-independents). (IDF 161 and 164.) This combines with other **[75]** evidence to make a Section 7 violation in this SMSA doubtful even had Colonial not been a lawful toehold.

3. Gainesville

Both the underlying evidence and our conclusion are similar for this SMSA to those for Orlando. Colonial was clearly a small, declining firm in this SMSA. By 1977 it was the number seven firm with only a 2.7 percent market share, down from its 1972 share of 5.7 percent, when it was the fourth largest firm. (IDF 172.) As in Jacksonville and Orlando, Colonial consistently sustained losses in this market prior to the acquisition. (IDF 173.) We conclude that Colonial was a lawful toehold acquisition for Grand Union in this alleged market.[105] Once again, we note that such factors as recent entry by Albertson's and Jewel T make it questionable whether a Section 7 violation could be established in this SMSA in any event.

F. *Summary of Findings in the Individual Markets*

Here we recap briefly our findings in applying the elements of the actual potential competition theory to the 13 alleged markets. As noted in Part III(A), above, we assume that the four-firm concentration ratios contained in TABLE 1 raise a rebuttable evidentiary presumption that each of the 13 SMSAs is an appropriate candidate for application of the actual potential competition theory. However, we note that in at least five of those alleged markets[106] it is a close question as to whether such a presumption should be recognized. We find that in these and at least three other SMSAs[107] the C_4 ratios raise at best only a relatively weak legal presumption of less-than-competitive **[76]** performance. We find also that in three[108] of the eight SMSA markets in these two categories, the level of concentration actually declined during the 1972–1977 period upon which the record evidence focused.

We conclude that as to each alleged market, the record contains sufficient evidence to rebut successfully the C_4-based evidentiary presumption. Although Colonial appears to have been among the leading firms in seven of the markets,[109] it was a declining factor in at least

[105] *See* note 90 above, and accompanying text.

[106] Augusta (C_4 = 55.2 percent), Charlotte/Gastonia (54.9 percent), Newport News/Hampton (49.1 percent), Norfolk/Virginia Beach (53.1 percent), and Richmond (53.2 percent).

[107] Atlanta (C_4 = 62.9 percent), Raleigh (62.1 percent), and Orlando (60.1 percent).

[108] Raleigh (C_4 down 1.7 percentage points), Newport News/Hampton (down 7.6 points), and Orlando (down 5.6 points).

[109] Atlanta, Augusta, Macon, Raleigh, Durham, Newport News/Hampton, and Norfolk/Virginia Beach.

five markets[110] and was in fact a lawful toehold acquisition in at least six markets[111] and perhaps in a seventh SMSA as well.[112] Moreover, we find that the record evidence demonstrates relatively aggressive jockeying for market share in at least seven of the markets at issue.[113] In six of the 13 SMSAs the record establishes the presence of one or more existing competitors (other than the acquired firm) of special competitive significance.[114] Moreover, in at least one market[115] we find it possible that respondents' acquisition of Colonial may have actually enhanced competition. **[77]**

In addition, the record establishes substantial recent entry in at least 10[116] of the 13 markets. With at most three exceptions,[117] we find this degree of actual recent entry is itself sufficient to establish that barriers to entering these 10 markets are sufficiently low to preclude liability under the potential competition theory. We also find that in several of the SMSA markets[118] the record reflects significant recent expansion by existing competitors. Moreover, we specifically find that the number of potential entrants is itself sufficient to preclude Section 7 liability under the actual potential competition theory in at least four SMSAs,[119] and we note that this number is arguably sufficient in one other SMSA.[120] Finally, we find that in at least three SMSAs[121] and possibly a fourth[122] it is probable that Grand Union lacked sufficient economic interest in entering the target market to support a finding of Section 7 liability.

It is clear from these findings that—even assuming all of the markets at issue are sufficiently concentrated to invoke the potential competition theory—complaint counsel have failed to establish all of the theory's requisite elements in any of the 13 alleged SMSA markets. Accordingly, we must dismiss the complaint. **[78]**

V. PROCEDURAL ISSUES—SANCTIONS

Respondents assign as error the ALJ's failure to impose sanctions under Rule 3.38 of the Commission's Rules of Practice and Procedure for complaint counsel's alleged withholding of relevant information

110 Macon, Charlotte/Gastonia, Greenville, Richmond, and Gainesville.

111 Charlotte/Gastonia, Greenville, Richmond, Jacksonville, Orlando, and Gainesville.

112 Macon.

113 Atlanta, Augusta, Durham, Charlotte/Gastonia, Newport News/Hampton, Richmond, and Jacksonville.

114 Atlanta (Kroger), Augusta (Kroger), Macon (Kroger), Charlotte/Gastonia (Three Guys and Food Town), Newport News/Hampton (Farm Fresh and Safeway), and Norfolk/Virginia Beach (Farm Fresh and Safeway).

115 Macon.

116 Atlanta, Augusta, Macon, Raleigh, Durham, Greenville, Richmond, Jacksonville, Orlando, and Gainesville.

117 Augusta, Orlando, and Gainesville.

118 For example, Augusta, Norfolk/Virginia Beach, and Jacksonville.

119 Raleigh (four other potential entrants plus 15 other firms within "striking distance"), Durham (three other potential entrants; 15 others within striking distance), Jacksonville (five potential entrants; at least five others within striking distance), and Greenville (three potential entrants; others within striking distance).

120 Augusta (three firms perceived as potential entrants).

121 Jacksonville, Orlando, and Gainesville.

122 Richmond.

requested by respondents. (RAB 54–59.) Given our decision on the merits, this procedural question is moot, but we nevertheless address the subject of sanctions for purposes of guidance. Under Rule 3.38, unjustified failure to comply with a subpoena or an order may subject a party to an array of sanctions, including an order that matters sought to be discovered will be taken as inferred or established, a preclusion order, the striking of the pleadings, the right to introduce secondary evidence without objection, and such other orders as are just.[123] **[79]**

Respondents moved under Rule 3.38(b)(2) for an adverse finding that there is no relationship between concentration and competition in the food retailing industry, a finding that would undermine complaint counsel's evidence on a key element of the alleged offense.[124] They based this motion on a claim that documents were withheld "if not deliberately [then] by the 'unsystematic and nonchalant response' of both complaint counsel and their expert witnesses." (ID 195; and RPF 137.)

Complaint counsel argued below that the factual grounds for respondents' request were unfounded, and that all data not subject to a specific congressional command prohibiting disclosure were supplied. (IDF 201.) The ALJ denied the request for sanctions and ruled there was no clear disregard for the Commission's discovery processes by either complaint counsel or the witnesses. (*Id.*) The ALJ recognized there was "substantial delay in furnishing information to respondents, [but that it] was occasioned by misunderstandings concerning the type of data sought." (*Id.*)

We agree with the ALJ's finding. The documents at issue consist of data used in a study conducted in 1977 by one of complaint counsel's

[123] Commission Rule of Practice 3.38(b) provides:

If a party or an officer or agent of a party fails to comply with a subpoena or with an order including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions; or an order of the Administrative Law Judge or the Commission issued as, or in accordance with, a ruling upon a motion concerning such an order or subpoena or upon an appeal from such a ruling, the Administrative Law Judge or the Commission, or both, for the purpose of permitting resolution of relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(1) Infer that the admission, testimony, documents or other evidence would have been adverse to the party;

(2) Rule that for the purpose of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

16 C.F.R. 3.38(b) (1976).

[124] *See* Part III(A), above.

expert witnesses, Dr. Marion, and others for the Joint Economic Committee of Congress ("JEC"). (*Id.*) During discovery, complaint counsel informed respondents that their expert would testify concerning the research underlying the "JEC Report" that was co-authored by Dr. Marion. Respondents received a copy of the JEC Report and certain drafts of a book updating the Report (the "Praeger book"). (Respondents' Physical Exhibit C.) When respondents requested the underlying raw data, complaint counsel—based on Dr. Marion's assertions—informed them that the data were confidential pursuant to an agreement of confidentiality Dr. Marion signed with the JEC, and that in any event Dr. Marion had returned all the [80] requested data to the JEC. At respondents' request, the ALJ issued a subpoena *duces tecum* to the JEC's Director to compel production of the data. That subpoena was stayed by the Commission *sua sponte,* and was subsequently quashed by the Commission on grounds of congressional immunity.[125]

After testifying, Dr. Marion discovered that he had custody of additional data used in the JEC Report. This discovery was relayed to complaint counsel and respondents, and shortly thereafter these data, in the form of regression runs, were turned over to respondents. (IDF 201; and Tr. 3484.) At the same time, Dr. Marion learned that the confidential raw data from the JEC Report were also obtainable through the computer at the university with which he was affiliated. He did not reveal this discovery to either complaint counsel or respondents until recalled to the witness stand. When asked by respondents to produce these raw data he declined on the basis of his confidentiality agreement with JEC. (Tr. 3627.)

On this appeal, complaint counsel also argue that a Rule 3.38 order would be inappropriate because there was no outstanding subpoena or discovery order to disobey. (CAB 65–67.) The only subpoena relating to the JEC Report materials was quashed. Furthermore, it was not directed to complaint counsel or Dr. Marion. Arguably, Judge Barnes' "direction" to Dr. Marion instructing the witness to "make the documents available" (Tr. 3500.) could be characterized as an "order" for purposes of Rule 3.38. However, because Dr. Marion promptly provided the responsive material, Rule 3.38 sanctions would have been inappropriate as to that directive. We find the language of Rule 3.38 clear and unambiguous, and hold that before Rule 3.38 sanctions may be imposed, production of the requested material must first be mandated by a subpoena or a specific discovery order issued by the ALJ or the Commission and directed at the party (or its officer or agent) from whom the material is sought. [81]

Even if Dr. Marion had failed to comply with the ALJ's directive,

[125] *Grand Union Co.,* 95 F.T.C. 926 (Interlocutory Order 1980).

sanctions should not be invoked against complaint counsel. The language of Rule 3.38 makes clear that sanctions may be imposed only upon a party, or an officer or agent of a party. In most cases a witness is not an agent or officer of a party. Where the circumstances of a witness' failure to provide material suggest conclusion between the witness and a party, they should be treated as one entity and sanctions may be properly imposed. Here, the record indicates no impropriety whatever on the part of complaint counsel. To the contrary, it shows they made a good faith effort to disclose to respondents all requested data as they became aware of it.

Assuming that a party fails to produce evidence in response to a subpoena or specific discovery order, the explanation for such failure is crucial in determining whether to invoke the sanctions. Rule 3.38 is designed both to prohibit a party from resting on its own concealment and to maintain the integrity of the administrative process.[126] Therefore, sanctions are appropriate only where the party's failure to comply is unjustified.[127] In those Commission cases where sanctions were imposed, the refusal to comply with a subpoena or order was deemed to be willful[128] or the explanation was inadequate.[129] The record here reveals no willful withholding of [82] evidence and complaint counsel's explanation is satisfactory.

Where sanctions are appropriate, the ALJ should seek to ensure that the sanction imposed is reasonable in light of the material withheld and the purposes of Rule 3.38(b). Had sanctions been warranted in the context of this case, the adverse ruling requested by respondents would have overcompensated for the unavailability of the data. An adverse ruling is a severe sanction to be imposed only in extraordi-

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[126] *Market Development Co.,* 95 F.T.C. 100, 226 (1980).

[127] *Evis Manufacturing Co. v. FTC,* 287 F.2d 831, 847 (9th Cir.), *cert. denied,* 386 U.S. 824 (1961).

[128] *Verrazzano Trading Co.,* F.T.C. Dkt. No. 9038 (sanctions imposed after unexplained and deliberate failure to produce documents in response to subpoena *duces tecum*) (Application for Sanctions Under Rule 3.38 for Failure of Respondents to Make Discovery As Ordered) (November 23, 1976); *Western Novelty Co.,* F.T.C. Dkt. No. 8967 (after deliberate and unexplained failure to comply with order for subpoena return, ALJ invoked Rule 3.38(b)(2) adverse rulings sanction) (Order Ruling on Complaint Counsel's Motion for Either (1) A Decision of the Proceeding; (2) Adverse Rulings and Summary Decision; or (3) Adverse Rulings and Partial Decision) (April 28, 1975).

[129] *E.g., Market Development Co.,* 95 F.T.C. 100 (1980) (sanctions of adverse findings, preclusion of testimony and documents responsive to subpoena at trial, imposed on respondent refusing to be deposed and failing to appear in response to subpoena *ad testificandum;* that proffered testimony might be used in later criminal proceedings did not justify failure to comply because respondent could have relied on Fifth Amendment privilege against self-incrimination); and *Amrep Corp.,* F.T.C. Dkt. No. 9018 (respondents' assertion that subpoenaed material had to be manually retrieved from 50,000 files found by ALJ to be inadequate explanation for not producing subpoenaed material; ALJ ordered inference that withheld evidence would have been adverse to respondents) (Ruling Re Alleged Deficiencies in Respondent's Compliance with Complaint Counsel's Subpoena *Duces Tecum*) (April 21, 1976).

In *American Medical Ass'n,* 94 F.T.C. 701 (1979), *aff'd, American Medical Ass'n v. FTC,* 638 F.2d 443 (2d Cir. 1980), *aff'd per curiam without opinion,* 455 U.S. 676 (1982), *reh. denied,* 456 U.S. 966 (1982), respondents failed to comply with a subpoena *duces tecum* based on their contemplated challenge of the jurisdictional basis of the subpoena. The Commission found that success of the challenge was unlikely and that respondents had complied with all other subpoenas save the one directed at their principal defense. 94 F.T.C. at 1028. More likely, the Commission found, "the evidence sought would have been unfavorable to its case." *Ibid.* The Commission therefore affirmed the adverse inference sanction imposed by the ALJ.

nary circumstances. A more appropriate sanction would likely have been an order to strike all or part of Dr. Marion's testimony, or an order precluding admission of the Praeger book. For further guidance in assessing the proper type of sanction, the ALJ may look to precedent under Federal Rule of Civil Procedure 37(b)(2), which is substantially similar in both purpose and language to Rule 3.38(b).[130]

Finally, concerning an unrelated procedural issue, because of the Commission's disposition of this matter, Grand Union is hereby released from the provisions of its November 29, 1978 hold separate agreement with Commission staff, as modified.

CONCURRING STATEMENT OF COMMISSIONER PERTSCHUK

I concur with the decision to dismiss the complaint in this matter, but I disagree with some of the reasoning in the Commission's opinion. In my view, the opinion overstates the case in asserting that retail food markets in the metropolitan areas at issue are in vigorous competitive health even though their four firm concentration ratios significantly exceed 50% in almost all the cities examined.[1] The opinion would sedate us by saying, in effect, that only a modicum of evidence is necessary to rebut the presumption that a market is not structured competitively when it is moderately concentrated. It then proceeds to find such evidence based on entry in the last few years, typically on limited scale, and on some change in market shares among the top five or six firms. The opinion takes comfort in concluding that entry barriers to retail food markets are low, not only in the metropolitan areas under examination, but perhaps "in general." (p. 49)

I do not believe that many of the metropolitan markets that Grand Union entered through its acquisition of Colonial are models of competitive vigor. Nor do I view entry into supermarket retailing—particularly on a significant scale—[2] to be so barrier free that concentration through merger is benign, a proposition that the opinion comes just short of endorsing. Single-store entry "success stories" (p. 48) and expansion by one or more firms already in the market do not insure the overall competitive performance of supermarket retailing in particular metropolitan areas. Finally, I do not agree that the product market in retail food mergers must include "all retail grocery stores" as does the Commission's opinion. The ALJ had found a market, at least a submarket, based on supermarkets above a certain size. Although there is a certain arbitrariness in any cutoff point, the ALJ

[130] *See generally* 4A J. Moore, Federal Practice ¶37.03 (2d ed. 1948).

[1] *See* table 1, p. 37. Four firm concentration ratios range from 49% to just over 72%, even with the "all grocery store sales" market adopted by the majority.

made a reasonable one and I would accept it. The record, as well as common sense, tells us that effective competition for weekly food purchases occurs among large supermarkets and it can be assessed separately from convenience stores.

The real problem with this case is not the dubious claim that all the markets at issue were competitively healthy, but that the evidence of alternative, feasible entry that Grand Union would likely have pursued, absent the acquisition, is quite ambiguous.[2] The record clearly suggests that Grand Union was interested in acquiring a chain that operated in several southeastern markets. Some candidates were smaller than Colonial, but presented the same possible antitrust problems that [3] Colonial raised because they were market leaders or near-leaders in some southeastern SMSA's. On the other hand, Colonial was a legitimate toehold candidate in some of the cities which were the focus of complaint counsel's case. In short, we would have to assume that there were likely alternatives for Grand Union but which could not be subject to the same type of challenge raised here. While it is certainly conceivable that such alternative means of entry could exist in the case of multi-market acquisition, the record is too weak on that score to condemn the merger.[3]

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondents from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain respondents' appeal. Accordingly,

It is ordered, That the complaint is dismissed.

[2] The only count of the complaint that remains on appeal is the allegation that Grand Union is an actual potential entrant into some of the relevant metropolitan markets. The complaint's allegation that Grand Union chose the most anticompetitive means of entering the *entire region* was dropped on appeal.

[3] For example, while complaint counsel do make an argument that *de novo* entry was likely, this scenario, which includes construction of warehouses as well as new construction of stores, seems fairly speculative.