Analysis of the Agreement Containing Consent Order to Aid Public Comment
In the Matter of K+S Aktiengesellschaft,
File No. 091-0086, Docket No. C-

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from K+S Aktiengesellschaft ("K+S"), and its subsidiary, International Salt Company LLC ("ISCO"), that is designed to remedy the anticompetitive effects that would otherwise result from K+S's proposed acquisition of Morton International, Inc. ("Morton"), from The Dow Chemical Company ("Dow"). Under the terms of the proposed Consent Agreement, K+S is required to divest assets related to its bulk de-icing salt business in Maine to an up-front buyer, Eastern Salt Company, Inc. ("Eastern Salt" or "Maine Purchaser"), and to divest assets related to its bulk de-icing salt business in Connecticut to an up-front buyer, Granite State Minerals, Inc. ("Granite State" or "Connecticut Purchaser").

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the Decision and Order ("Order").

Pursuant to a Stock Purchase Agreement dated April 1, 2009 (the "Agreement"), K+S proposes to acquire Morton from Dow for approximately $1.675 billion (the "Acquisition"). The Commission's complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in Maine and Connecticut for the sale and delivery of bulk de-icing road salt.

II. The Parties

K+S is currently one of the world's leading suppliers of salt products. K+S sells salt into the United States through its U.S. subsidiary, ISCO. Morton, headquartered in Chicago, Illinois, and a wholly-owned subsidiary of Dow, is a leading salt vendor in North America. Morton produces consumer salt, industrial salt, and de-icing salt. The acquisition of Morton will make K+S the largest producer and distributor of de-icing road salt for customers in Maine and Connecticut.

III. The Proposed Complaint

According to the Commission's proposed Complaint, the relevant product market in which to assess the competitive effects of the proposed Acquisition is the sale and delivery of bulk de-icing salt. The evidence indicates that there are no practical substitutes for bulk de-icing salt to melt snow and ice. The relevant geographic markets in which to assess the impact of the proposed Acquisition are the states of Maine and Connecticut.

The relevant markets are highly concentrated. ISCO and Morton are the two principal bidders in the states of Maine and Connecticut for the sale and delivery of bulk de-icing salt. Post acquisition, the combined entity will have a market share exceeding 70 percent in both Maine and Connecticut. Post-merger HHIs for Maine and Connecticut are 5,142 and 5,834, and the acquisition will increase HHI levels by 1,914 and 2,642, respectively. These market concentration levels far exceed the thresholds set forth in the *Horizontal Merger Guidelines* and thus create a presumption that the proposed merger will create or enhance market power.

Entry into the relevant markets is difficult because, among other things, there is a lack of acceptable stockpile space along the coasts of Maine and Connecticut. As a result, new entry sufficient to achieve a significant market impact within two years is unlikely.

Finally, the Complaint alleges that the proposed Acquisition will reduce competition in the relevant markets by eliminating direct and substantial competition between ISCO and Morton, and by increasing the likelihood that ISCO would increase prices either unilaterally or through coordinated interaction with the few remaining firms in the relevant markets.

IV. The Consent Agreement

To preserve the competition that otherwise would be eliminated by the Acquisition, the proposed Consent Agreement requires ISCO to divest to Commission-approved buyers, Eastern Salt and Granite State, assets sufficient to enable these buyers to become viable competitors for the de-icing salt business in the relevant markets beginning with the 2010-2011 bidding cycle. ISCO will divest to Eastern Salt the Maine Divestiture Assets, including: 1) stockpile space in the state, 2) all associated handling and trucking contracts, and 3) a book of de-icing salt business for the 2009-2010 winter season. ISCO will divest to Granite State the Connecticut Divestiture Assets, including: 1) stockpile space in the state, 2) all associated handling and trucking contracts, 3) a book of de-icing salt business for the 2009-2010 winter season, and 4) a three-year supply of de-icing salt at a price that is no more than ISCO's costs.

The Commission has preliminarily determined that Eastern Salt is a well-qualified buyer of the Maine Divestiture Assets and is well situated to replace the competition Morton provided in the state. Eastern Salt is a family-owned company that has been a de-icing salt supplier in other geographic markets along the East Coast for roughly 60 years. Eastern Salt is a vertically-integrated supplier with a dependable, high-quality supply of de-icing salt. With the divested assets, Eastern Salt will be well positioned to compete for future business in Maine and to deliver salt to customers in a timely manner.

The Commission has preliminarily determined that Granite State is a well-qualified buyer of the Connecticut Divestiture Assets and is well situated to replace the competition Morton provided in the state. Granite State has experience supplying de-icing salt to customers in a number of states along the East Coast. The Consent Agreement requires ISCO to provide Granite State with a three-year supply of bulk de-icing salt at no more than ISCO's costs. The supply requirement will ensure that Granite State has a supply of salt in Connecticut during the 2010-2011 and 2011-2012 bid cycles while Granite State develops the necessary supply arrangements to serve Connecticut customers in subsequent years. With the divested assets, Granite State will be well positioned to compete for future business in Connecticut and to deliver salt to customers in a timely manner.

The proposed Consent Agreement requires that the divestitures occur no later than twenty (20) days after the Acquisition is consummated. However, if ISCO divests the assets to Eastern Salt or Granite State during the public comment period, and if, at the time the Commission decides to make the Order final, the Commission notifies K+S or ISCO that either purchaser is not an acceptable acquirer or that the asset purchase agreement with the Maine Purchaser or Connecticut Purchaser is not an acceptable manner of divestiture, then ISCO must immediately rescind the transaction in question and divest those assets to another buyer within six (6) months of the date the Order becomes final. At that time, Respondents must divest those assets only to an acquirer and in a manner that receives the prior approval of the Commission. The proposed Consent Agreement also enables the Commission to appoint a trustee to divest any assets identified in the Order that K+S or ISCO has not divested to satisfy the requirements of the Order.

The proposed Consent Agreement further requires K+S and ISCO to maintain the viability and marketability of the Maine Divestiture Assets and the Connecticut Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of those assets prior to divestiture.

In order to ensure that the Commission remains informed about the status of the divestitures, the proposed Consent Agreement requires K+S and ISCO to file reports with the Commission periodically until the divestitures are completed. Written reports describing how K+S and ISCO are complying with the Order must be filed one year after the Order becomes final and annually for the next three (3) years.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.