



Office of the Secretary

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

June 30, 2011

Re: *In the Matter of Tops Markets LLC, Morgan Stanley Capital Partners V U.S. Holdco LLC, and The Penn Traffic Company,*  
Docket No. C-4295, File No. 101-0074

The Federal Trade Commission (“FTC”) has received public comments regarding the proposed Decision and Order (“Order”) accepted by the FTC in the above-captioned matter. Some comments indicate opposition to the proposed Order based on the mistaken belief that the Order would require Tops Markets LLC (“Tops”) to sell or close supermarkets in the affected areas. Other commentators oppose the proposed Order because they believe that the Commission did not give appropriate weight to the presence of limited assortment grocery stores, neighborhood convenience stores, and the entry of new supermarket competitors in the affected areas. Finally, some commentators oppose the proposed Order because they believe the acquisition would not harm consumers, and thus Commission intervention is unnecessary, as purportedly evidenced by the fact that supermarkets in the affected areas currently have well-stocked shelves and competitive pricing. The Commission has reviewed the comments in connection with its decision concerning whether to accord final approval to the Order and would like to thank each commentator. The Commission also has placed these comments on the public record.

As background, Tops acquired substantially all of the assets of The Penn Traffic Company (“Penn Traffic”), including its 79 supermarkets (the “Acquisition”), through an expedited bankruptcy proceeding. Because the only remaining bidder for the supermarkets was a liquidator, the Acquisition represented the only opportunity to avoid the mass closing of 79 Penn Traffic supermarkets in more than 50 metropolitan areas. Due to the extremely tight deadlines inherent in the bankruptcy proceeding, and in an effort to prevent the mass liquidation of these Penn Traffic supermarkets, Commission staff crafted a remedy that would permit timely consummation of the Acquisition while preserving the Commission’s ability to obtain full relief to cure the anticompetitive harm that the Acquisition would otherwise cause. In light of this extraordinary set of circumstances, the Commission determined that this unique remedy would best serve the interests of consumers.

The Commission’s Order in this matter is designed to ensure that the acquisition of Penn Traffic’s assets by Tops does not result in a substantial lessening of price or non-price competition in the retail sale of food and other grocery products in supermarkets. We recognize that such competition has significant benefits for local communities. To that end, the Order requires the divestiture of seven Penn Traffic supermarkets, together with their related assets, to a Commission-approved buyer. As stated in the Complaint, absent the relief set forth in the

Commission's Order, the ultimate effect of the Acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

With respect to the first point raised by commentators, please understand that the Commission has *not* required or encouraged Tops to close *any* supermarkets. In fact, the Order requires Tops to divest certain supermarkets to a Commission-approved acquirer with the express purpose of ensuring the continued operation of competitive supermarkets at these locations. On May 4, 2011, Tops filed an application to divest three of the seven supermarkets to Hometown Markets, a company owned and operated by Greg Young, the former CEO of Penn Traffic. The Commission's Order, as now modified, places the remaining four stores to be divested in the hands of a Divestiture Trustee, The Food Partners, LLC ("Food Partners"). If Food Partners is unable to find an appropriate acquirer for any of these stores within the time periods set forth in the Order, Tops will be free to continue to operate each of the unsold stores. Furthermore, the Commission will evaluate any proposed acquirer to assess its intentions and overall capabilities to operate a competitive supermarket at that location well into the future. The Order, which is consistent with prior Commission supermarket orders, is designed to ensure that consumers in the five relevant geographic areas will continue to have convenient access to full-line supermarkets and competitive pricing. Any action by Tops, past or present, to close any stores is not by direction of the Commission.

Second, with regard to the belief that the Commission's investigation has not adequately considered the competitive significance of limited assortment stores or smaller, neighborhood convenience stores, please understand that the Commission does *not* take the view that such stores are irrelevant to the competitive analysis, or that such stores do not provide *some* competition to full-line supermarkets. Rather, consistent with the *U.S. Department of Justice and the Federal Trade Commission's Horizontal Merger Guidelines*, the Commission has determined that the presence of such alternative food and grocery retailers does not provide *sufficient* competition to full-line supermarkets to prevent the anticompetitive harm the evidence indicates likely would result from the Acquisition. As stated in the Complaint, supermarkets compete primarily with other supermarkets and base their food and grocery prices principally on the price of competing products sold at other supermarkets. Non-supermarket retailers that sell food and grocery products, such as neighborhood "mom & pop" grocery stores, convenience stores, and limited assortment stores, do not effectively constrain supermarket prices because they are typically smaller than supermarkets and do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. These conclusions are consistent with previous findings by the Commission in supermarket investigations.

Third, many commentators express concern that the Commission did not consider adequately the future entry of new supermarket competitors in its determination that the transaction would lessen competition in the affected areas. Prior to accepting the proposed Order for public comment, the Commission was aware of the pending entry of certain food and grocery retailers in the relevant markets. After a detailed analysis of the likely effects of such entry on competition in the relevant markets, the Commission determined that such entry – although potentially significant – was insufficient to deter or counteract the competitive harm

likely to result from the Acquisition. This determination was based on a wide array of evidence, and remains supported by more recent market developments. Thus, please be assured that the Commission is, and was, well aware of this important issue.

Finally, some commentators believe that Commission intervention is unnecessary because the Acquisition would not harm consumers, as evidenced by apparent competitive pricing and well-stocked shelves at supermarkets in the affected areas today. In this regard, please note that the Commission's Order to Maintain Assets has been in force for months, and *requires* Tops to maintain the viability, competitiveness, and marketability of the supermarket in the affected areas until all of the supermarkets are divested. In fact, the Commission has appointed a person to serve as "monitor" to ensure that prices and quality at the affected supermarkets are maintained at competitive levels until the requirements of the Commission's Order are carried-out. For these reasons, we are comforted to hear that these stores remain competitive and viable, as such facts tend to suggest that the Commission's Order – rather than being unnecessary – will indeed have the intended effect on competition.

For these reasons, the Commission has determined that the public interest would best be served by issuing the Order, as now modified, in final form. A copy of the final Order and other relevant material are available from the Commission's website at <http://www.ftc.gov>.

It helps the Commission's analysis to hear from a variety of sources in its work on antitrust and consumer protection issues, and we appreciate the public's interest in this matter.

By direction of the Commission.

Donald S. Clark  
Secretary