

FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

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VOLUME 129



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April J. Tabor and Robert F. Swenson, Editors

**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2000 TO JUNE 30, 2000**

ROBERT PITOFSKY, *Chairman*

Took oath of office April 12, 1995.

SHEILA F. ANTHONY, *Commissioner*

Took oath of office September 30, 1997.

MOZELLE W. THOMPSON, *Commissioner*

Took oath of office December 17, 1997.

ORSON SWINDLE, *Commissioner*

Took oath of office December 18, 1997.

THOMAS B. LEARY, *Commissioner*

Took oath of office November 17, 1999.

DONALD S. CLARK, *Secretary*

Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 2000, TO JUNE 30, 2000

IN THE MATTER OF

EL PASO ENERGY CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

*Docket C-3915; File No. 991 0178
Complaint, January 6, 2000--Decision, January 6, 2000*

This consent addresses the acquisition by El Paso Energy Corporation of Sonat Inc., an integrated energy company engaged in exploration and production of oil and natural gas, interstate transmission of natural gas and energy services. The complaint alleges that the proposed acquisition would substantially lessen competition in the markets for transmission of natural gas out of producing fields and transmission of natural gas into gas consuming areas. The consent order requires El Paso to divest the East Tennessee Natural Gas Company ("ETNG"), a wholly-owned subsidiary that serves cities in east Tennessee and northern Georgia, and requires Sonat to divest the Sea Robin Pipeline Company ("Sea Robin"). Divestiture of the relevant assets within six months of the date the consent is signed at no minimum price and in a manner approved by the Commission.

Participants

For the Commission: *Roberta S. Baruch, Molly Boast, Phillip L. Broyles, J. Elizabeth Callison, Frank Lipson, Mark Menna, and Gregory Vistnes.*

For the Respondents: *Linda R. Blumkin and Eric H. Queen, Fried, Frank, Harris, Shiver & Jacobson; and Clifford H. Aronson and Joel Mitnick, Skadden, Arps, Slate, Meagher & Flom.*

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent El Paso Energy Corporation has entered into an agreement to acquire all of the outstanding securities of Sonat Inc., all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such 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, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

DEFINITIONS

1. For purposes of this complaint, the following definitions shall apply:
 - a. "Respondent" or "El Paso" means El Paso Energy Corporation, its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which El Paso is a participant.
 - b. "Sonat" means Sonat Inc., its subsidiaries, divisions, groups, affiliate entities, and each of their directors, officers, employees, agents and representatives; and each partnership, joint venture, joint stock company or concession in which Sonat Inc. is a participant.
 - c. "The acquisition" means the transaction described, in whole or in part, in Paragraph 9 of this Complaint.

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EL PASO

2. Respondent El Paso is a corporation organized and doing business under the laws of the State of Delaware with its executive offices at 1001 Louisiana Street, Houston, Texas 77002.
3. Respondent El Paso operates through six business units: Tennessee Gas Pipeline Company, East Tennessee Natural Gas, El Paso Natural Gas Company, El Paso Field Services Company, El Paso Energy Marketing Company, and El Paso Energy International Company. The company owns the nation's only integrated coast-to-coast natural gas pipeline system and has operations in natural gas transmission, gas gathering and processing, energy marketing, power generation and international energy infrastructure development.
4. Respondent's 1998 revenues were over \$5.5 billion and its total assets exceeded \$10 billion.
5. At all times relevant herein, Respondent El Paso has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

SONAT

6. Sonat is a corporation organized and doing business under the laws of the State of Delaware with its headquarters at 1900 Fifth Avenue North, Birmingham, Alabama 35203.
7. Sonat Inc. is an integrated energy company engaged in exploration and production of oil and natural gas, interstate transmission of natural gas, and energy services. Sonat has

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assets of nearly \$4.4 billion. Its 1998 revenue was \$3.7 billion. Through its natural gas transmission segment, Sonat owns interests in more than 14,000 miles of natural gas pipelines. Southern Natural Gas Company is the major pipeline in the Southeast, with customers in seven states, while Sonat's 50 percent-owned Florida Gas Transmission Company is the principal pipeline serving Florida.

8. At all times relevant herein, Sonat has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

THE ACQUISITION

9. Pursuant to the Agreement and Plan of Merger dated March 13, 1999, by and between El Paso and Sonat, El Paso Energy Corporation intends to acquire 100% of the voting securities of Sonat.

COUNT ONE

10. One relevant line of commerce is the transportation of natural gas out of producing fields.
11. One relevant section of the country is the area of the Gulf of Mexico off the coast of the State of Louisiana that contains portions of the areas known as the West Cameron Area, West Cameron South Addition Area, East Cameron Area, East Cameron South Addition Area, Vermillion Area and Vermillion Area South Addition, and the Garden Banks Area.
12. Consumption of natural gas in the relevant section of the country is substantially below production, with the result that most production in each portion of the relevant section of the country is transported by pipelines to consuming areas along

Complaint

the Gulf Coast and elsewhere in the United States. Pipeline capacity for transporting natural gas out of this section of the country is approximately 2900 million cubic feet per day.

13. The business of transporting natural gas by pipeline out of producing fields in the relevant section of the country is highly concentrated. The acquisition would substantially increase concentration in each portion of the relevant section of the country. In the relevant section of the country as a whole, the acquisition would increase the Herfindahl-Hirschman Index (commonly referred to as "HHI") by over 1000 points to over 4400.
14. Respondent El Paso holds a 34.5 percent effective ownership interest in, and is the general partner of, Leviathan Gas Pipeline Partners, L.P., a publicly held Delaware limited partnership. Leviathan Gas Pipeline Partners, L.P. is a 50 percent owner of Stingray Pipeline Company, which owns a large natural gas transmission system extending more than 120 miles into the Gulf of Mexico off the coast of Louisiana. It gathers gas from various areas in the Gulf of Mexico, including the West Cameron and East Cameron areas, and delivers the gas to shore.
15. Sonat owns and operates Sea Robin Pipeline Company, which starts from shore a few miles to the east of Stingray. Sea Robin Pipeline Company gathers gas from various areas in the Gulf of Mexico, including the West Cameron and East Cameron areas, and transports the gas to shore.
16. Respondent El Paso, through its general partnership in Leviathan Gas Pipeline Partners, L.P., and Sonat, through its ownership interests in the Sea Robin Pipeline Company, are direct and substantial competitors in the business of transporting natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 11.

Complaint

17. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 11, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:
- a. the acquisition will eliminate actual and potential competition between El Paso and Sonat;
 - b. the acquisition will eliminate actual and potential competition among competitors generally; and
 - c. the acquisition will increase concentration in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 11, therefore increasing the likelihood of collusion.
18. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country.

COUNT TWO

19. One relevant line of commerce is the transportation of natural gas out of producing fields.
20. One relevant section of the country is the area of the Gulf of Mexico off the coast of the State of Louisiana that contains portions of the areas known as the Main Pass including its additions and extensions, South Pass, South Pass East Addition, Viosca Knoll, and Mississippi Canyon.
21. Consumption of natural gas in the relevant section of the country is substantially below production, with the result that most production in each portion of the relevant section of the

Complaint

country is transported by pipelines to consuming areas along the Gulf Coast and elsewhere in the United States. Pipeline capacity for transporting natural gas out of this section of the country is approximately 3050 million cubic feet per day.

22. The business of transporting natural gas by pipeline out of producing fields in the relevant section of the country is highly concentrated. The acquisition would substantially increase concentration in each portion of the relevant section of the country. In the relevant section of the country as a whole, the acquisition would increase the HHI by over 1000 points to over 4300.
23. Respondent El Paso holds a 34.5 percent effective ownership interest in, and is the general partner of, Leviathan Gas Pipeline Partners, L.P., a publicly held Delaware limited partnership. Leviathan Gas Pipeline Partners, L.P. owns a 99 percent interest in Viosca Knoll Gathering Company, a Delaware Joint Venture ("VKGC"). VKGC operates a large natural gas gathering system extending more than 100 miles into the Gulf of Mexico off the coast of Louisiana. It transports gas primarily from wells in the Mississippi Canyon and Viosca Knoll areas.
24. Destin Pipeline Company, L.L.C. ("Destin") owns a large natural gas gathering system extending approximately 75 miles into the Gulf of Mexico off the coast of Louisiana. Sonat is the owner of a one-third membership interest in Destin and the operator of the pipeline owned by Destin. Destin transports gas primarily from wells in the Mississippi Canyon and Viosca Knoll areas.
25. Respondent El Paso, through its general partnership in Leviathan Gas Pipeline Partners, L.P., and Sonat, through its ownership interests in Destin, and in other ways, are direct and substantial competitors in the business of transporting

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natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 20.

26. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 20, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways among others:
 - a. the acquisition will eliminate actual and potential competition between El Paso and Sonat;
 - b. the acquisition will eliminate actual and potential competition among competitors generally; and
 - c. the acquisition will increase concentration in the transportation of natural gas out of producing fields in the relevant section of the country set out in Complaint Paragraph 20, therefore increasing the likelihood of collusion.
27. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country.

COUNT THREE

28. One relevant line of commerce is the transportation of natural gas into gas consuming areas.
29. One relevant section of the country is eastern Tennessee and northern Georgia and certain portions thereof.
30. Consumption of natural gas in the relevant section of the country is substantially higher than production, with the result that most natural gas consumed in each portion of the relevant section of the country is transported by pipelines from

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producing areas in the Gulf of Mexico and elsewhere in the United States. Customers in the relevant section of the country purchase contracts for the transportation and delivery of over 750 million cubic feet of natural gas per day.

31. The business of transporting natural gas by pipeline into the relevant section of the country is highly concentrated. The acquisition would substantially increase concentration in each portion of the relevant section of the country. In the least concentrated portion of the relevant section of the country, the acquisition would increase the HHI by over 1000 points to over 5700. In certain other portions, the acquisition would increase the HHI by over 4500 points to 10000.
32. Respondent's subsidiary Tennessee Gas Pipeline Company owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico, Texas, and Louisiana through several States in the southern United States, including Tennessee, and on into the northern United States. In the State of Tennessee, Tennessee Gas Pipeline interconnects with, and delivers natural gas to, a pipeline owned and operated by East Tennessee Natural Gas, also an El Paso subsidiary.
33. East Tennessee Natural Gas transports natural gas received from Tennessee Gas Pipeline Company, and from other sources, to many local gas distribution utilities in eastern Tennessee and northern Georgia.
34. Sonat owns Southern Natural Gas Company, which owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico and Louisiana through several States in the southern United States, including Georgia and Tennessee.

Complaint

35. Sonat, either directly, or via interconnection with East Tennessee Natural Gas, transports natural gas to many local gas distribution utilities in eastern Tennessee and northern Georgia.
36. El Paso offered reduced transportation rates to local gas distribution utilities located in eastern Tennessee in response to a threat by Sonat to by-pass East Tennessee Natural Gas by extending its own pipeline.
37. Respondent El Paso and Sonat are direct and substantial competitors in the business of transporting natural gas into the relevant section of the country set out in Complaint Paragraph 29.
38. The effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas into the relevant section of the country set out in Complaint Paragraph 29, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways among others:
 - a. the acquisition will eliminate actual and potential competition between El Paso and Sonat;
 - b. the acquisition will eliminate actual and potential competition among competitors generally; and
 - c. the acquisition will increase concentration in the transportation of natural gas into the relevant section of the country set out in Complaint Paragraph 29, therefore increasing the likelihood of collusion.
39. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant section of the country.

Decision and Order

VIOLATION CHARGED

40. The proposed acquisition of the stock or assets of Sonat by El Paso, as set forth in Complaint Paragraph 9 herein, 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this sixth day of January, 2000, issues its complaint against said respondent.

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of all the outstanding securities of Sonat Inc., by El Paso Energy Corporation and it now appearing that El Paso, hereinafter sometimes referred to as "Respondent," having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the

Decision and Order

signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, and waives and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment received pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent El Paso Energy Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1001 Louisiana Street, Houston, Texas 77002.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**I.**

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

- A. "Respondent" means El Paso Energy Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by El Paso Energy

Decision and Order

Corporation, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. "Acquisition" means the acquisition by El Paso Energy Corporation of 100 percent of the voting securities of Sonat, pursuant to the Agreement and Plan of Merger dated March 13, 1999 by and between El Paso and Sonat.
- C. "Commission" means the Federal Trade Commission.
- D. "Competing Pipeline" means any existing, planned or proposed pipeline owned or operated by anyone other than El Paso or Sonat that transports, or is intended to transport, natural gas produced in the Gulf of Mexico Outer Continental Shelf.
- E. "Connection Agreement" means any agreement between natural gas pipelines that provides for, among other things, (i) the connection of a pipeline and the associated installation of valves, measurement apparatus, flanges and other devices necessary to deliver or receive natural gas and (ii) the measurement, nomination, scheduling, or balancing of the volume of natural gas received or delivered.
- F. "Destin Interest" means Sonat's ownership interest in Destin Pipeline Company, L.L.C. Sonat owns 33 and 1/3 percent of the membership interests of Destin.
- G. "Divestiture Period" means the period of time beginning on August 1, 1999, and ending on the date Respondent divests ETNG.

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- H. “ETNG” means the East Tennessee Natural Gas Company, a wholly-owned subsidiary of El Paso.
- I. “Exhibit A” means the arbitration provisions attached to and made part of this Order.
- J. “Gulf Offshore Area A” means a quadrilateral shaped area of the Gulf of Mexico cornered by and including the following blocks (as those areas and blocks are defined by the Mineral Management Service of the United States Department of Interior): Vermilion Area Block 148, Garden Banks Area Block 122, Garden Banks Area Block 278, and West Cameron West Addition Block 407.
- K. “Gulf Offshore Area B” means a quadrilateral shaped area of the Gulf of Mexico cornered by and including the following blocks (as those areas and blocks are defined by the Mineral Management Service of the United States Department of Interior): Viosca Knoll Area Block 38, Viosca Knoll Area Block 1006, Mississippi Canyon Area Block 441, and Grand Isle Area Block 25.
- L. “Leviathan” means Leviathan Gas Pipeline Partners, L.P., a publicly held Delaware limited partnership, in which El Paso owns a 34.5 percent effective ownership interest and of which El Paso is the General Partner.
- M. “Open and Non-Discriminatory Access Obligations” means the obligations (i) to permit any shipper requesting access to Viosca Knoll to obtain such access, at the shipper's expense if any construction of pipe is required; (ii) to permit any other pipeline to interconnect with Viosca Knoll, at the expense of the pipeline requesting the connection, and (iii) not to engage in discrimination in scheduling, rates and terms and conditions of service on Viosca Knoll.

Decision and Order

- N. "Schedule A Properties" means "ETNG", "Destin Interest", and "Sea Robin," also set forth in Schedule A attached to and made part of this Order.
- O. "Schedule B Agreement" means those transportation and storage agreements listed in Schedule B attached to and made part of this Order.
- P. "Sea Robin" means the Sea Robin Pipeline Co., a wholly-owned subsidiary of Sonat.
- Q. "Sonat" means Sonat Inc. as it was constituted prior to the acquisition, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Sonat Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- R. "TGP" means Tennessee Gas Pipeline Company, a wholly-owned subsidiary of El Paso.
- S. "Viosca Knoll" means the Viosca Knoll Gathering Company, a Delaware joint venture, which is 99 percent owned by Leviathan, or the natural gas gathering system it owns in Gulf Offshore Area B.

II.**IT IS FURTHER ORDERED** that:

- A. Respondent shall divest, absolutely and in good faith, and at no minimum price, within six months from the date Respondent executes the Agreement Containing Consent Order, the Schedule A Properties.

Decision and Order

- B. Respondent shall divest the Schedule A Properties only to an acquirer or acquirers that receive the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.
- C. The purpose of the divestiture of the Schedule A Properties is to ensure the continued use of the Schedule A Properties in the same business in which the Schedule A Properties are engaged at the time of the acquisition, and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.
- D. Pending divestiture of the Schedule A Properties, Respondent shall take such actions as are necessary to maintain the viability and marketability of the Schedule A Properties and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Schedule A Properties except for ordinary wear and tear.

III.**IT IS FURTHER ORDERED** that:

- A. If Respondent has not divested, absolutely and in good faith and with the Commission's prior approval, the Schedule A Properties within the time set forth in Paragraph II, the Commission may appoint a trustee to divest the Schedule A Properties. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking

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civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph III. A. of this Order, Respondent shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures involving natural gas pipelines. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
 2. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest the Schedule A Properties.
 3. Within ten (10) days after appointment of the trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this Order.

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4. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III. B. 3. to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the trustee has submitted a plan of divestiture or believes that divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court; provided, however, the Commission may extend this period only two (2) times.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Schedule A Properties or to any other relevant information, as the trustee may request. Respondent shall develop such financial or other information as such trustee may request and shall cooperate with the trustee. Respondent shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously at no minimum price. The divestiture shall be made in a manner and to an acquirer or acquirers as set out in Paragraph II of this Order; provided,

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however, if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by Respondent from among those approved by the Commission, provided, however, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee's divesting the Schedule A Properties.
8. Respondent shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's

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duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph III. A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
11. In the event that the trustee determines that he or she is unable to divest the Schedule A Properties in a manner consistent with the Commission's purpose as described in Paragraph II, the trustee may divest additional assets of Respondent that are ancillary to the operation of the Schedule A properties, but shall not include additional pipelines, and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The trustee shall have no obligation or authority to operate or maintain the Schedule A Properties.

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13. The trustee shall report in writing to Respondent and the Commission every sixty (60) days concerning the trustee's efforts to accomplish divestiture.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the date this Order becomes final, Respondent shall not, without providing advance written notification to the Commission, directly or indirectly:

- A. Acquire any stock, share capital, equity or other interest in any concern, corporate or non-corporate, engaged in at the time of such acquisition, or within the two years preceding such acquisition, the transportation of natural gas by pipeline in Gulf Offshore Area A or Gulf Offshore Area B, or in the area north of latitude 34 degrees North within the States of Georgia or Alabama.
- B. Acquire any assets used or previously used (and still suitable for use) in the transportation of natural gas by pipeline in Gulf Offshore Area A or Gulf Offshore Area B, or in the area north of latitude 34 degrees North within the States of Georgia or Alabama.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the

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United States Department of Justice, and notification is required only of Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction until twenty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a. Provided, however, nothing in this Order shall require prior notification to the Federal Trade Commission of the acquisition of stocks, assets or other interests if the total consideration does not exceed nine million dollars (\$9,000,000).

V.**IT IS FURTHER ORDERED** that:

- A. Respondent shall cause Viosca Knoll to adhere to the Open and Non-Discriminatory Access Obligations.
- B. Respondent shall cause Viosca Knoll to submit to binding arbitration at the request of any shipper, producer, or pipeline owner who alleges that Respondent is not adhering to the Open and Non-Discriminatory Access Obligations.

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- C. Within thirty (30) days of receipt of a written request from a Competing Pipeline to interconnect with Viosca Knoll, Respondent shall cause Viosca Knoll to enter into a Connection Agreement with such pipeline. Such Connection Agreements shall be on terms that are usual and customary for pipeline connection on the Outer Continental Shelf of the Gulf of Mexico. Provided, that Respondent need not enter into a Connection Agreement that would require Viosca Knoll to receive natural gas from a “natural gas company” or otherwise cause it to become a “natural gas company” as defined by 15 U.S.C. § 717a(6).
- D. If the Respondent and a Competing Pipeline are unable to agree on the terms and conditions of a Connection Agreement under Paragraph V. C., and if the Competing Pipeline elects to cause the issue to be submitted to binding arbitration, Respondent shall cause Viosca Knoll to submit to such arbitration.
- E. Respondent shall cause Leviathan to publish Paragraph V. of the Order and related definitions on Leviathan's electronic website and incorporate Paragraph V into future contracts with shippers and connecting pipelines and shall notify all shippers and connecting pipelines with whom it has existing contracts of this obligation.
- F. Respondent shall immediately notify the Commission of the initiation of any arbitration proceedings under this Paragraph. Arbitration under this Paragraph shall be pursuant to the terms of the alternative dispute resolution procedures of the Federal Energy Regulatory Commission (“FERC”) set forth at 18 C.F.R. § 385.605 (Rule 605), or if the Rule 605 procedures are unavailable (for reasons other than the

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refusal of the other party to the arbitration to agree to a FERC arbitration), in accordance with the procedures in Exhibit A. Failure of Respondent thereafter to abide by the arbitrator's decision shall be a violation of this Order. Provided, however, Viosca Knoll will not be required to abide by an arbitration decision if the decision is vacated by the FERC.

- G. The provisions of Paragraph V. shall be suspended upon a showing by Respondent by means of affidavit that at least one-third of the membership interests in Destin Pipeline Company, L.L.C. is controlled by a person who does not have an interest in wells or leases in the Viosca Knoll, Mississippi Canyon, Destin Dome, or De Soto Canyon areas of the Gulf of Mexico Outer Continental Shelf. The suspension shall be effective for periods of six months each, beginning 30 days following the submission of Respondent's affidavit, unless the Assistant Director of the Compliance Division of the Bureau of Competition determines that the affidavit is incorrect. Arbitrations under Paragraph V. that were begun during the time the provisions of Paragraph V. were in effect, and the validity of arbitration decisions made thereunder, shall not be affected by the suspension permitted by this subparagraph.
- H. The provisions of Paragraph V. shall be terminated upon a showing by Respondent by means of affidavit that (a) Respondent is not the operator of Viosca Knoll, (b) Respondent is not the general partner of Leviathan, and (c) El Paso's effective ownership interest in Viosca Knoll and in Leviathan falls below 15 percent or (d) neither Leviathan nor El Paso owns a majority interest in Viosca Knoll.

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- I. The purpose of this Paragraph is to remedy the anticompetitive effects of the acquisition as alleged in the Complaint, if Sonat's interest in Destin Pipeline Company, L.L.C., is sold to a firm with interests in wells or leases in the area in which VKGC or Destin Pipeline Company, L.L.C., are likely to compete.

VI.**IT IS FURTHER ORDERED** that:

- A. Within ten (10) days from the date that the Commission accepts the Agreement Containing Consent Order in this matter, Respondent shall provide to each customer who has signed a Schedule B Agreement a written notification (i) extending the period during which such customer may give notice of its election to terminate, extend, or roll over such Agreement(s) to 60 days after the date of the divestiture of ETNG, and (ii) extending, at the customer's option, the termination date of the Schedule B Agreement(s). Such termination date may be extended, without penalty, at the customer's option, to either October 31 of the year in which ETNG is divested or October 31 of the year after the year in which ETNG is divested. The customer's option concerning the termination date of the Schedule B Agreement must be exercised at the time the customer provides its notice of election to terminate, extend, or roll over its Schedule B Agreement(s).
- B. Any Schedule B Agreements and the following agreements entered into, or extended, by an ETNG customer during the Divestiture Period may be terminated, without penalty, if the customer gives notice to ETNG and TGP within 60 days after the date

Decision and Order

ETNG is divested: 1) firm transportation agreements on ETNG; 2) firm transportation agreements on TGP for Primary Deliveries into ETNG; or 3) firm storage agreements on TGP that utilize a firm transportation agreement on TGP for Primary Deliveries into ETNG. Termination shall be effective on October 31 of the year the customer gives notice or October 31 of the following year at the customer's option.

- C. Respondent, for at least three years from the date of the ETNG divestiture, shall refrain from taking any action that causes the TGP/ETNG interconnects at Lobelville, Tennessee, and at Ridgetop, Tennessee, to cease having swing capability within the meaning of Section 7.1 of ETNG's FERC Tariff Rate Schedule LMS-MA ("Section 7.1") and, thereafter, until the tenth anniversary of the divestiture of ETNG, to provide at least 60 days' written notice to each TGP customer that receives Primary Deliveries at either Lobelville or Ridgetop of Respondent's change in operation which would cause such interconnect to no longer have swing capability within the meaning of Section 7.1.

VII.**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to

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comply with the Order, including a description of all substantive contacts or negotiations for the divestiture and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture. The final compliance report shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.

- B. One year (1) from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondent that may affect compliance obligations arising out of the Order, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, upon written request, Respondent shall permit any duly authorized representative of the Commission:

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- A. Access, during office hours and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondent relating to any matters contained in this Order; and
- B. Upon five days' notice to Respondent and without restraint or interference from it, to interview officers, directors, employees, agents or independent contractors of Respondent.

X.

IT IS FURTHER ORDERED that this Order will terminate on January 6, 2020.

By the Commission, Commissioner Leary not participating.

**SCHEDULE A
PROPERTIES**

Properties to be divested:

ETNG
Destin Interest
Sea Robin

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**SCHEDULE B
AGREEMENTS**

1. Each TGP firm transportation agreements that has (i) a Primary Delivery Point at an TGP/ETNG interconnect, (ii) an initial term of twelve months or longer, and (iii) a currently effective election deadline in the Divestiture Period:

Designated as TGP FT agreements on the attached spreadsheet.

2. Each ETNG firm transportation or storage agreement with an initial term of twelve months or longer that has a currently effective election deadline in the Divestiture Period:

Designated as ETNG FT or ETNG FS Agreements on the attached spreadsheet.

3. Each TGP storage agreement with an initial term of twelve months or longer that has a currently effective election deadline in the Divestiture Period and was entered into with a person who also has a firm transportation agreement with ETNG:

Designated as TGP FS agreements on the attached spreadsheet.

EXHIBIT A
ARBITRATION PROVISIONS

- (a) A person desiring arbitration under the Order will give at least ten days notice in writing of the subject it wishes to discuss, provide a written statement of the dispute, and designate an officer or other representative of such party with complete power to resolve the dispute to attend the meeting. Within ten days after receipt of such request, the Respondent will provide a responsive written statement and will designate an officer or other representative of such party who will attend the meeting with complete power to resolve the dispute.
- (b) If the meeting fails to resolve the dispute among the officers or other representatives of the parties, the dispute shall be submitted for nonappealable, binding determination through arbitration.
- (c) An officer or other representative with complete authority to resolve the dispute for each party shall attend the arbitration. Three arbitrators shall be chosen from the arbitrators available through the Houston, Texas office, of the American Arbitration Association (“AAA”) (or any successor thereto, or if there is no successor thereto, the Judicial Arbitration and Mediation Services, Inc.).
- (d) The arbitrators shall be appointed by the AAA in accordance with the AAA's rules for selection of arbitrators. Unless otherwise agreed by the parties, the arbitrators shall be individuals with a minimum of ten years experience in the pipeline and energy industry and who are not, and have not previously been, employed by either party (or an affiliate thereof), and do not have a direct or indirect interest in either party (or an affiliate thereof) or the subject matter of the arbitration.

Analysis to Aid Public Comment

- (e) The parties shall make discovery and disclosure of all matters relevant to the dispute to the extent and in the manner provided by AAA. The arbitrators will rule on all requests for discovery and disclosure and discovery shall be completed within 30 days of the date of first notice pursuant to (a) above. The arbitrators may consider any matter relevant to the subject of the dispute and shall follow the statutes and decisions of the substantive law of Texas. The arbitrators shall issue a final ruling within 60 days of the date of the first notice pursuant to (a) above.
- (f) The ruling of the arbitrators shall be in writing and signed and shall be final and binding upon the Parties. The fees and expenses of counsel, witnesses and employees of the Parties and all other costs and expenses incurred in connection with arbitration shall be allocated as determined by the arbitrators. All meetings and arbitration help pursuant to this Section shall take place in Houston, Texas.

**ANALYSIS AND PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT**

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment from El Paso Energy Corporation ("El Paso") an Agreement Containing Consent Order ("the proposed consent order"). El Paso has also reviewed a draft complaint that the Commission contemplates issuing. The proposed consent order is designed to remedy likely anticompetitive effects arising from El

Paso's proposed acquisition of all of the voting securities of Sonat Inc.

II. Description of the Parties and the Proposed Acquisition

El Paso, a Delaware corporation headquartered in Houston, Texas, owns and operates natural gas transmission, gas gathering and processing, energy marketing, power generation and international energy infrastructure development companies. It operates through the following business units: Tennessee Gas Pipeline Company, East Tennessee Natural Gas Company, El Paso Natural Gas Company, El Paso Field Services Company, El Paso Energy Marketing Company, and El Paso Energy International Company.

In addition to its wholly-owned interests, El Paso also controls offshore pipelines through its interest in Leviathan Gas Pipeline Partners, L.P. ("Leviathan"), a publicly held Delaware limited partnership. El Paso holds a 34.5 percent effective ownership interest in, and is the general partner of, Leviathan. Leviathan owns interests in pipelines across the Gulf of Mexico, including Stingray and Viosca Knoll Gathering Company ("VKGC"), the two pipelines relevant to this matter. El Paso operates both of these pipelines.

Sonat, a Delaware corporation headquartered in Birmingham, Alabama, is an integrated energy company engaged in exploration and production of oil and natural gas, interstate transmission of natural gas and energy services. Through its natural gas transmission segment, Sonat owns interests in more than 14,000 miles of natural gas pipelines. Sonat's Southern Natural Gas Company is the major pipeline in the Southeast, with customers in seven states. Sonat's 50 percent-owned Florida Gas Transmission Company is the principal pipeline serving Florida. Sonat's revenues for the year ending 1998 were \$3.7 billion. It has assets of nearly \$4.4 billion.

Analysis to Aid Public Comment

On March 13, 1999, El Paso and Sonat entered into an Agreement and Plan of Merger pursuant to which El Paso intended to acquire 100 percent of the voting securities of Sonat.

III. The Draft Complaint

The draft complaint alleges two relevant lines of commerce: the transportation of natural gas out of producing fields and the transportation of natural gas into gas consuming areas.

A. Transportation of Natural Gas out of the Producing Fields

The draft complaint alleges two relevant sections of the country in which to analyze the acquisition by El Paso of Sonat's natural gas pipelines out of the producing fields. The first is the area of the Gulf of Mexico off the coast of the State of Louisiana that contains portions of the areas known as the West Cameron Area, West Cameron South Addition Area, East Cameron Area, East Cameron South Addition Area, Vermillion Area and Vermillion Area South Addition, and the Garden Banks Area. Pipeline capacity for transporting natural gas out of this section of the country is approximately 2900 million cubic feet per day.

El Paso and Sonat are direct and substantial horizontal competitors in this relevant market. El Paso, through its interests in Leviathan, controls a 50 percent share of Stingray Pipeline Company, which owns a large natural gas transmission system extending more than 100 miles into the Gulf of Mexico off the coast of Louisiana. It gathers gas from these areas and delivers the gas to shore. Sonat owns and operates Sea Robin Pipeline Company which starts from shore a few miles east of Stingray. Sea Robin also gathers gas from these areas and delivers it to shore.

Analysis to Aid Public Comment

The draft complaint alleges that the post-merger market would be highly concentrated and that the acquisition would substantially increase concentration in the market. The acquisition would increase the Herfindahl-Hirschman Index (commonly referred to as "HHI")⁽¹⁾ in the geographic market by over 1000 points to over 4400.

The draft complaint further alleges that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country by eliminating actual and potential competition between El Paso and Sonat; by eliminating actual and potential competition among competitors generally; and by increasing concentration in the transportation of natural gas out of producing fields in the relevant section of the country, therefore increasing the likelihood of collusion.

The draft complaint alleges that entry would not be timely, likely or sufficient to prevent anticompetitive effects in the relevant markets.

The second relevant offshore geographic market consists of portions the offshore Gulf of Mexico areas known as the Main Pass, including its additions and extensions; South Pass; South Pass East Addition; Viosca Knoll; and Mississippi Canyon. Pipeline capacity for transporting natural gas out of this section of the country is approximately 3050 million cubic feet per day.

El Paso, through its control of VKGC, and Sonat, through its ownership interests in Destin Pipeline Company, L.L.C. ("Destin"), and in other ways, are direct and substantial competitors in the business of transporting natural gas out of producing fields in the relevant sections of the country listed above. VKGC operates a large natural gas gathering system extending more than 100 miles into the Gulf of Mexico off the coast of Louisiana. Destin owns a large natural gas gathering system extending more than 100 miles into the Gulf of Mexico off

Analysis to Aid Public Comment

the coast of Louisiana. Sonat owns a one-third membership interest in Destin and operates the pipeline owned by Destin.

The draft complaint alleges that the post-merger market would be highly concentrated, and that the acquisition would substantially increase concentration in the market. The acquisition would increase the HHI in the geographic market by over 1000 points to over 4300.

The draft complaint alleges that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas out of producing fields in the relevant section of the country by eliminating actual and potential competition between El Paso and Sonat; by eliminating actual and potential competition among competitors generally; and by increasing concentration in the transportation of natural gas out of producing fields in the relevant section of the country, therefore increasing the likelihood of collusion.

The draft complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant market.

B. Transportation of Natural Gas into Gas Consuming Areas

The draft complaint alleges that a relevant line of commerce is the transportation of natural gas into gas consuming areas and a relevant section of the country is eastern Tennessee and northern Georgia and submarkets thereof. This region includes the metropolitan areas of Atlanta, Georgia and Chattanooga and Knoxville, Tennessee. Customers in this area of the country purchase contracts for the transportation and delivery of over 750 million cubic feet of natural gas per day.

Analysis to Aid Public Comment

El Paso and Sonat are direct and substantial competitors in the business of transporting natural gas into this section of the country. El Paso's Tennessee Gas Pipeline Company owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico, Texas, and Louisiana through several states in the southern United States, including Tennessee, and on into the northern United States. In the State of Tennessee, Tennessee Gas Pipeline interconnects with, and delivers natural gas to, a pipeline owned and operated by East Tennessee Natural Gas Company ("ETNG"), also an El Paso subsidiary. ETNG transports natural gas received from Tennessee Gas Pipeline Company, and from other sources, to many local gas distribution utilities in eastern Tennessee and northern Georgia. Sonat owns Southern Natural Gas Company, which owns and operates a large natural gas transmission system extending from producing fields in the Gulf of Mexico and Louisiana through several states in the southern United States, including Georgia and Tennessee. Sonat, either directly, or via interconnection with East Tennessee Natural Gas, transports natural gas for many local gas distribution utilities in eastern Tennessee and northern Georgia. El Paso offered reduced transportation rates to local gas distribution utilities located in eastern Tennessee in response to a threat by Sonat to by-pass ETNG by extending its own pipeline.

The draft complaint alleges that the post-merger market would be highly concentrated, and that the acquisition would substantially increase concentration in the market. In the least concentrated submarket of the geographic market, the acquisition would increase the HHI by over 1000 points to over 5700. In certain other submarkets, the acquisition would increase the HHI by over 4500 points to 10000.

The draft complaint alleges that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in the transportation of natural gas into the relevant section of the country by eliminating actual and potential competition between El Paso and Sonat; by eliminating actual and potential competition among competitors generally; and by

Analysis to Aid Public Comment

increasing concentration in the transportation of natural gas into the relevant section of the country, therefore increasing the likelihood of collusion.

The draft complaint further alleges that entry would not be timely, likely or sufficient to prevent anticompetitive effects in the relevant markets.

IV. Terms of the Proposed Consent Order

The proposed consent order is designed to remedy the Commission's competitive concerns about the proposed acquisition. To solve the competitive concerns in the onshore markets, the proposed consent order requires El Paso to divest ETNG, the owner of the El Paso system that serves cities in east Tennessee and northern Georgia. To solve the competitive concerns offshore, the proposed order requires El Paso to divest Sea Robin (a wholly-owned subsidiary of Sonat) and Sonat's 33 percent interest in Destin.

The proposed consent order requires divestiture of the relevant assets within six months of the date on which the consent agreement was signed at no minimum price to a buyer and in a manner that are approved by the Commission. In the event divestiture has not occurred within six months, the proposed order provides that the Commission may appoint a trustee to divest the assets. The proposed order does not require that El Paso present the Commission with a buyer of the assets to be divested before acceptance of the proposed consent agreement for public comment (an "up-front buyer") because El Paso has satisfied the Commission that, in this instance, consumers will not be harmed by a post-order divestiture.

In some cases the Commission has required a respondent to divest "crown jewel" assets in the event the respondent fails to divest a narrower package of assets promptly. Such a crown jewel

Analysis to Aid Public Comment

is unnecessary in this case. El Paso has agreed to divest a package of assets that includes ETNG and Sea Robin in their entirety, which should help ensure that the divestiture will convey a saleable and competitively viable set of assets. This will increase the likelihood of finding a buyer acceptable to the Commission in a timely manner. Therefore, the proposed divestiture should readily suffice to remedy consumer harm.

The proposed order contains ancillary provisions in both the onshore and offshore markets. Many customers on the ETNG system have ETNG and Tennessee Gas Pipeline transportation and/or storage contracts with renewal elections to be made in the midst of the proposed ETNG divestiture process. The proposed order extends the renewal deadline for these contracts until 60 days following the divestiture of ETNG, provides customers the option of extending the expiration dates of these contracts, and allows customers to terminate certain other ETNG and Tennessee Gas Pipeline contracts entered into as the proposed divestiture process is underway. The purpose of these provisions is to permit the customer to know the identity of the acquirer of ETNG before having to commit to new contracts for transportation or storage either on ETNG or, more significantly, on the trunklines that transport the gas from the Gulf of Mexico into ETNG. The Commission anticipates that the acquirer of ETNG will open additional interconnections with trunklines that currently intersect with the ETNG system so as to provide customers with alternative routes for gas supply. The tolling provision will give customers the option of using these new sources if they so choose.

The proposed order also contains ancillary provisions regarding VKGC which are in effect in the event Sonat's Destin interest is sold to a natural gas producer. The sale of Sonat's interest to a producer could result in Destin's being less than fully competitive in certain instances in which the producer elected to serve its own producing interests by reserving one part of the Destin system at the expense of independent producers seeking access to certain other parts of the Destin system. To remedy the potential for the divestiture to have this anticompetitive result, the

Analysis to Aid Public Comment

proposed consent order requires El Paso to cause VKGC to adhere to benchmarks established by competition between VKGC and Destin. Specifically, the proposed order requires El Paso to cause VKGC to allow any shipper to obtain access to VKGC, which would be at the shipper's expense if any construction of pipe is required, and to allow any other pipeline to interconnect with VKGC, at the expense of the pipeline requesting the connection. The proposed consent prohibits El Paso from engaging in discrimination in scheduling, rates and terms and conditions of service on VKGC. The connecting pipeline can elect to submit a dispute regarding the terms and conditions of a connection to binding arbitration. El Paso is required to publish the arbitration clause in the order on Leviathan's electronic web site and to incorporate it into further contracts with shippers and connecting pipelines. El Paso is also required to notify the Commission of arbitration proceedings initiated under the proposed order. The requirement to provide open and non-discriminatory access to VKGC may be suspended upon a showing by El Paso that at least one-third of the membership interest in Destin is controlled by a person who does not have an interest in wells or leases in certain areas of the Gulf of Mexico.

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed

Analysis to Aid Public Comment

consent order in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Endnotes:

1. The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Complaint

IN THE MATTER OF

**NEW ENGLAND TRACTOR TRAILER
TRAINING SCHOOL OF MASSACHUSETTS,
INC.; NEW ENGLAND TRACTOR TRAILER
TRAINING SCHOOL OF CONNECTICUT, INC.;
AND MARK GREENBERG**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3916; File No. 982 3040

Complaint, January 10, 2000--Decision, January 10, 2000

This consent order prohibits respondent New England Tractor Trailer Training School of Massachusetts, Inc. ("NETTTS") from making future misrepresentations concerning the results or benefits of NETTTS's training programs or career services. Respondent is also required to disclose its placement rates if they make any representation about the employment or placement rates of graduates from their program. This disclosure is required in writing before a prospective student is given enrollment papers or forms. Respondent must also disclose their licensing test pass rates if they make any statement about any test passing rates by graduates of their program, or before any prospective student is given any enrollment papers or forms.

Participants

For the Commission: *Heather A. Hipsley, Carol Jennings,*
and *Elaine D. Kolish.*

For the Respondents: *Ann Plaza Collier and Judith Oldham,*
Shannon, Rill & Scott.

COMPLAINT

The Federal Trade Commission, having reason to believe that New England Tractor Trailer Training School of Massachusetts, Inc. and New England Tractor Trailer Training School of

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Connecticut, Inc., corporations, and Mark Greenberg, individually and as an officer and director of the corporations (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent New England Tractor Trailer Training School of Massachusetts, Inc., is a Massachusetts corporation with its principal office or place of business at 1050 Hancock Street, Quincy, Massachusetts 02169.

2. Respondent New England Tractor Trailer Training School of Connecticut, Inc., is a Connecticut corporation with its principal office or place of business at 32 Field Road, Somers, Connecticut 06071.

3. Respondent Mark Greenberg is an officer and director of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations, including the acts or practices alleged in this complaint. His principal office or place of business is the same as that of New England Tractor Trailer Training School of Massachusetts, Inc.

4. Respondents are engaged, and have been engaged, in the sale and offering for sale of vocational training programs to the public, including but not limited to driver training for tractor trailer and heavy straight trucks. Respondents’ truck driver training programs typically last from one to four weeks and cost from \$1700 to \$3600.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

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6. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for their training programs. These advertisements and promotional materials contain the following statements:

- a. "We deliver careers. That means plenty of career opportunities for those with professional training and licensed know-how in heavy truck operation. NETTTS [New England Tractor Trailer Training School] will prepare you to take your state's test for a Commercial Driver's License that can be your start in an independent and rewarding career moving America's goods. With your license, you can put a great career in gear and go."
- b. "The trucking industry needs at least 450,000 drivers this year. . . . You could be one of them."
- c. "Get your Commercial Driver's License and get on the road to a new job."
- d. "You can enter the NETTTS program for tractor trailer drivers or commercial heavy straight truck drivers if you have:
 - A high school diploma, or a GED (high school equivalent certificate), or you pass an approved ability-to-benefit test.
 - A valid driver's license (from any state).
 - Ability to pass a U.S. Department of Transportation physical."
- e. "New England Tractor Trailer Training School has been around for thirty years. Simply put, nobody has the experience we do in preparing people for a career in trucking."

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- f. "Learn to drive the big rigs in just 3 short weeks."
- g. "1 week Commercial Drivers License training."
- h. "When you graduate from a CDL A program, you *will be ready* for a career as a professional tractor trailer driver." (Emphasis in original.)
- i. "We have earned a reputation for training excellence by combining the necessary classroom training with hands-on knowledge and operating practice you need to take and pass your state's Commercial Driver's License (CDL) test."
- j. "Our experienced instructors can help you become a professional driver fully prepared to earn a good living hauling America's products."
- k. "With our comprehensive behind-the-wheel training and career placement assistance we can have you licensed and on the road."
- l. "You will practice on NETTTS' own big rigs. We have over 150 tractors and trailers spread among our five campuses in the northeastern United States."
- m. "NETTTS puts students in touch with trucking companies that reimburse students' tuition."
- n. "And because you live in the Northeast, you won't have to move or give up your home life to earn it."
- o. "84% of All Graduates Requested Placement. 81% Requesting Placement Are Placed. The 16% of our graduates not requesting placement are obtaining their licenses to upgrade their positions with their current employers or have already acquired employment on their own."

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7. During interviews with prospective students, employees of respondents have made the following oral representations to persuade prospective students to enroll in their programs:

- a. Over 85% of our students are hired before they get their CDL licenses.
- b. 95% of NETTTS' graduates pass the CDL test.
- c. NETTTS' placement service places 85% of NETTTS' graduates in truck driving jobs.
- d. NETTTS' placement service places nearly all of NETTTS' graduates in truck driving jobs.
- e. Local jobs are available to NETTTS' graduates.

8. Through the means described in Paragraphs 6 and 7, respondents have represented, expressly or by implication, that:

- a. NETTTS' placement services place a high percentage of NETTTS graduates in jobs as truck drivers.
- b. All or virtually all of NETTTS' graduates obtain employment as truck drivers.
- c. A high percentage of NETTTS' graduates will be able to obtain local truck driving jobs.
- d. Ninety-five percent (95%) of NETTTS' graduates pass the CDL test.
- e. A high percentage of NETTTS' graduates pass the CDL test the first time they take it.

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- f. Students who complete NETTTS' training program will receive adequate instruction, including a sufficient opportunity for practice driving, to enable them to pass the CDL test.
 - g. Many NETTTS' graduates are reimbursed the cost of their tuition by trucking companies that employ them.
 - h. NETTTS admits only students who possess a high school diploma or equivalency or pass an admissions test, and are otherwise qualified to complete the training program and to obtain a Commercial Drivers License (CDL).
9. In truth and in fact:
- a. NETTTS' placement services do not place a high percentage of NETTTS' graduates in jobs as truck drivers.
 - b. Not all of NETTTS' graduates are able to obtain employment as truck drivers.
 - c. A significant percentage of NETTTS' graduates are not able to obtain local truck driving jobs.
 - d. The rate of passing of the CDL test by graduates of the NETTTS' program is substantially less than 95%.
 - e. A significant percentage of NETTTS' graduates do not pass the CDL test the first time they take it.
 - f. In numerous instances, students who complete NETTTS' training program do not receive adequate instruction, including a sufficient opportunity for practice driving, to enable them to pass the CDL test.

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- g. A significant number of NETTTS' graduates are not reimbursed the cost of their tuition by trucking companies that employ them.
- h. NETTTS admitted some students who did not meet its own admissions criteria and were unqualified to complete the training program and to obtain a CDL.

Therefore, the representations set forth in Paragraph 8 were, and are, false or misleading.

10. Through the means described in Paragraphs 6 and 7, respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made.

11. In truth and in fact, respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 8, at the time the representations were made. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this tenth day of January, 2000, has issued this complaint against respondents.

By the Commission, Commissioner Leary not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act, and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondents of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent New England Tractor Trailer Training School of Massachusetts, Inc., is a Massachusetts corporation with its headquarters located at 1050 Hancock Street, Quincey, Massachusetts.

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2. Respondent New England Tractor Trailer Training School of Connecticut, Inc., is a Connecticut corporation with its headquarters located at 32 Field Road, Somers, Connecticut 06071.
3. Respondent Mark Greenberg is an officer and director of the corporate respondents. Individually or in concert with others, he formulates, directs, or controls the policies, acts, or practices of the corporations. His principal office or place of business is the same as that of New England Tractor Trailer Training School of Massachusetts, Inc.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this Order, the following definitions shall apply:

1. "Training program" shall mean any and all training or instructional course or program of whatever type, duration, or medium used.
2. "Clearly and prominently" shall mean as follows:
 - A. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and video

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portions of the advertisement. *Provided, however,* that in any advertisement presented solely through video or audio means, the disclosure may be made through the same means in which the advertisement is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it. In addition to the foregoing, in interactive media the disclosure shall be unavoidable and shall be presented prior to the consumer incurring any financial obligation.

- B. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In multi-page documents, the disclosure shall appear on the cover or first page.
 - C. In oral communications, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.
 - D. In all cases, the disclosure must be in understandable language and syntax, and in the same language as the representation that triggers the disclosure, and nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used.
3. Unless otherwise specified, “respondents” shall mean New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., corporations,

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their successors and assigns and their officers; Mark Greenberg, individually and as an officer and director of the corporations; and each of the above's agents, representatives, and employees.

4. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, or sale, of any training program, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

- A. the job placement rate or record of employment success of graduates of their training programs;
- B. the opportunities for employment, or employment demand, for graduates of their training programs;
- C. the percent, number or portion of graduates of their training programs who pass qualifying tests, including, but not limited to, the CDL test;
- D. the adequacy of their training programs to prepare graduates to pass qualifying tests, including, but not limited to, the CDL test;
- E. the placement assistance that respondents provide to graduates of their training programs;
- F. reimbursement of the cost of tuition by employers of graduates of respondents' training programs;

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- G. the equipment used in their training programs;
- H. the experience and qualifications of their instructors;
- I. the amount of student driving time included in their training programs;
- J. the terms and conditions of admittance to or completion of respondents' training programs; and
- K. any other representation regarding the results or benefits of respondents' training programs or career services;

unless the representation is true and, at the time it is made, respondents possess and rely upon competent and reliable evidence that substantiates the representation.

II.**PLACEMENT RATES DISCLOSURE**

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any training program, in or affecting commerce,

- A. shall not make any representation, in any manner, expressly or by implication, about the number of graduates of respondents' training programs, or similar types of training programs, who obtain employment, or the rate of placement or employment of such graduates, or use any terms (including, but not limited to, *many* or *most*) that purport to quantify the likelihood that such graduates will obtain employment, unless respondents disclose, clearly and prominently, and in close proximity to the representation,

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respondents' "Placement Rates," as calculated pursuant to Appendix A; and

- B. shall provide, during the initial discussion of enrollment with any prospective purchaser of respondents' training programs and prior to the time the enrollment agreement and other enrollment forms are presented to the prospective student, a copy of the Placement Rates Disclosure Statement (to be retained by the prospective purchaser), set forth in Appendix B. The Placement Rates Disclosure Statement shall be set forth in the same format and type size as set forth in Appendix B. The Disclosure Statement shall be set forth in a separate document and shall contain no other information in the same document, except that the Test Pass Rates Disclosure Statement, required by Part III of this Order, may be included in the same document. Respondents shall hand the Disclosure Statement to the prospective purchaser separately from other documents and shall, in immediate proximity thereto, clearly and prominently, make the following oral disclosure, or a substantially similar statement:

Here are the job placement rates for the programs at our school.

If test pass rates are included on the Disclosure Statement, the following oral disclosure, or a substantially similar statement, shall be substituted:

Here are the job placement rates and CDL [or other] test pass rate for the programs at our school.

III.**TEST PASS RATES DISCLOSURE**

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, promotion, offering for sale, or sale of any training program, in or affecting commerce,

- A. shall not make any representation, in any manner, expressly or by implication, about the rate of passing of any test, including but not limited to the CDL test, by graduates of their training programs, or of similar types of training programs, unless respondents disclose, clearly and prominently, and in close proximity to the representation, respondents' "Test Pass Rates," as calculated pursuant to Appendix C; and
- B. shall provide, during the initial discussion of enrollment with any prospective purchaser of respondents' training programs and prior to the time the enrollment agreement and other enrollment forms are presented to the prospective student, a copy of the Test Pass Rates Disclosure Statement (to be retained by the prospective purchaser), set forth in Appendix D. The Test Past Rates Disclosure Statement shall be set forth in a separate document in the same format and type size as set forth in Appendix D, and shall contain no other information in the same document, except that the Placement Rates Disclosure Statement, required by Part II of this Order, may be included in the same document. Respondents shall hand the Disclosure Statement to the prospective purchaser separately from other documents and shall, in immediate proximity thereto, clearly and prominently, make the following oral disclosure, or a substantially similar statement:

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Here is the CDL [or other] test pass rate for the programs at our school.

If placement rates are included on the Disclosure Statement, the following oral disclosure, or a substantially similar statement, shall be substituted:

Here are the job placement rates and CDL [or other] test pass rate for the programs at our school.

IV.**RECORD KEEPING**

IT IS FURTHER ORDERED that respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg shall, for five (5) years after the last date of dissemination of any representation covered by this Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, business records demonstrating their compliance with the terms and provisions of this Order, including but not limited to:

- A. all advertisements and promotional materials, sales or admissions interview scripts or training manuals, catalogs, or other marketing materials;
- B. all materials that were relied upon in disseminating any representation covered by this Order; and
- C. all evidence in their possession or control that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, including complaints, and the responses

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thereto, and other communications with consumers or with governmental or consumer protection organizations.

V.**DISTRIBUTION OF ORDER**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of issuance of this Order, respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg shall:

- A. Provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of same from each officer and director, each individual serving in a management capacity who has any responsibilities with respect to the subject matter of this Order, all personnel involved in responding to consumer complaints or inquiries, and all sales personnel, recruiters, and admissions representatives (whether designated as employees, consultants, independent contractors or otherwise), as follows: (1) to current personnel, within thirty (30) days after the date of service of this Order and (2) to future personnel immediately after the person assumes such position or responsibilities;
- B. Maintain for a period of three (3) years after creation, and upon reasonable notice, make available to representatives of the Commission, the original signed and dated acknowledgments of the receipt of copies of this Order, as required in Paragraph A. of this Part.

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VI.**NOTIFICATION BY CORPORATE RESPONDENTS**

IT IS FURTHER ORDERED that respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporations that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation(s) about which respondents learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.**NOTIFICATION BY INDIVIDUAL RESPONDENT**

IT IS FURTHER ORDERED that respondent Mark Greenberg, for a period of five (5) years from the date of issuance of this Order, shall notify the Commission of each affiliation with a new business or employment the activities of which include the advertising, promotion, sale, or offering for sale of vocational training programs, or of his affiliation with a new business or employment in which his duties and responsibilities involve the

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advertising, promotion, sale, or offering for sale of vocational training programs. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.**MONITORING COMPLIANCE OF SALES PERSONNEL**

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of issuance of this Order, respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg, in connection with any business that provides training programs, shall:

- A. Take reasonable steps sufficient to monitor and ensure that all employees and/or independent contractors engaged in admissions, recruiting, sales or other customer service functions comply with Parts I, II, and III of this Order. Such steps shall include adequate monitoring of admission interviews, recruiting activity, sales presentations or other contacts with prospective purchasers, and shall also include, at a minimum, the following: (1) listening, on a regular basis, to the oral representations made by persons engaged in admissions, recruiting, sales or other customer service functions; (2) establishing a procedure for receiving and responding to consumer complaints; and (3) ascertaining the number and nature of consumer complaints regarding transactions in which each employee or independent contractor is involved; *provided*, that this Paragraph does not authorize or

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require the defendants to take any steps that violate any federal, state or local laws;

- B. Investigate promptly and fully any consumer complaint received by any business to which this Part applies; and
- C. Take corrective action with respect to any admission representative, recruiter, or sales person who is not complying with this Order, which action may include training, disciplining, and/or terminating such person.

IX.**COMPLIANCE REPORT**

IT IS FURTHER ORDERED that respondents New England Tractor Trailer Training School of Massachusetts, Inc., and New England Tractor Trailer Training School of Connecticut, Inc., and their successors and assigns, and respondent Mark Greenberg, shall file with the Commission, according to the following schedule, written reports setting forth in detail the manner and form in which they have complied with this Order:

- A. The first report shall be filed within one hundred and twenty (120) days after the date of service of this Order;
- B. The second report shall be filed within one (1) year after the date of service of this Order; and
- C. Subsequent reports shall be filed at such other times as the Federal Trade Commission may require.

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X.**MONITORING OF COMPLIANCE BY COMMISSION**

IT IS FURTHER ORDERED that the Commission is authorized to use investigators posing as consumers or prospective consumers of respondents, without the necessity of identification or prior notice.

XI.**SUNSET OF ORDER**

This Order will terminate on January 10, 2020, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this Order that terminates in less than twenty (20) years;
- B. This Order's application to any respondent that is not named as a defendant in such complaint; and
- C. This Order if such complaint is filed after the Order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the

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later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Leary not participating.

APPENDIX A**CALCULATION OF PLACEMENT RATES**

“PLACEMENT RATES” shall be expressed as a percentage, calculated by dividing (a) the number of persons who graduated, during the time period, who were employed in jobs for which the program trained them by (b) the number of persons who graduated, during the time period, who were available for placement.

The time period shall be the period disclosed on the form set forth in Appendix B, in the heading “STUDENTS GRADUATING BETWEEN _____ AND _____,” and shall be at least a twelve month period, and no more than a twenty-four month period. Respondents shall use the time period covered by the school’s most recent report to the school’s accrediting agency or the state licensure body. If the school is not accredited or licensed, respondents shall use the time periods specified for any such reports by the appropriate accrediting agency or licensing body.

For purposes of the disclosure required by Part II.A of this Order, the placement rates disclosed shall be for the same program as that referred to in the representation that triggers the disclosure.

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For purposes of the disclosure required by Part II.B of this Order, the placement rates must be disclosed separately for all certificate programs offered by the school at which the disclosure is made.

APPENDIX B**PLACEMENT RATES DISCLOSURE STATEMENT**

<u>PLACEMENT RATES:</u> <u>PERCENTAGE OF GRADUATES WHO OBTAINED</u> <u>EMPLOYMENT</u>	
STUDENTS GRADUATING BETWEEN _____ AND _____	
PROGRAM	PLACEMENT RATE

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APPENDIX C

“TEST PASS RATE” shall be expressed as a percentage, calculated by dividing (a) the number of persons who graduated, during the time period, who passed the test by (b) the number of persons who graduated, during the time period, who took the test.

The time period shall be as defined in Appendix A.

For purposes of the disclosure required by Part III.A of this Order, the test pass rate disclosed shall be for the same program as that referred to in the representation that triggers the disclosure.

For purposes of the disclosure required by Part III.B of this Order, the test pass rates must be disclosed separately for all certificate programs offered by the school at which the disclosure is made.

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APPENDIX D**TEST PASS RATES DISCLOSURE STATEMENT**

<u>TEST PASS RATES*</u>		
STUDENTS GRADUATING BETWEEN _____ AND _____		
TEST	Number Taking Test	Percent Passing Test

* Graduates may have had to take the test more than once before passing.

Analysis to Aid Public Comment

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement to a proposed consent order from respondents New England Tractor Trailer Training School of Massachusetts, Inc., New England Tractor Trailer Training School of Connecticut, Inc., and Mark Greenberg, individually and as president of the corporate respondents.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns practices related to the advertising, promotion, and sale of vocational training programs, including driver training for tractor trailer and heavy straight trucks. The Commission's complaint charges that respondents violated the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, by making numerous representations that were false and for which they lacked a reasonable basis of substantiation. These representations concerned: employment and/or placement rates for graduates of respondents' program; the availability of local truck driving jobs; the rate of passing the CDL test by graduates of respondents' program; the number of graduates of the program who pass the CDL test the first time they take it; the adequacy of training to prepare students for the Commercial Drivers License (CDL) test; the extent to which future employers will reimburse the cost of tuition; and the admissions criteria for respondents' program.

Analysis to Aid Public Comment

Part I of the proposed consent order prohibits future misrepresentations concerning the above, as well as other results or benefits of respondents' training programs or career services.

Part II of the proposed order requires a disclosure of respondents' placement rates. This disclosure is triggered by any representations about the rate of employment or placement of graduates of respondents' program. In addition, this disclosure is required to be given to prospective students, in writing, prior to the time that students are presented with the enrollment agreement and other enrollment forms. Appendices A and B to the proposed order set forth the prescribed manner of calculation of placement rates and the form in which the information will be given to prospective students.

Part III of the proposed order requires disclosure of the licensing test pass rates for graduates of respondents' program. This disclosure is triggered by any representations about the rate of passing any test, including but not limited to the CDL test, by graduates of respondents' program. In addition, this disclosure is required to be given to prospective students, in writing, prior to the time that students are presented with the enrollment agreement and other enrollment forms. Appendices C and D to the proposed order set forth the prescribed manner of calculation of test pass rates and the form in which the information will be given to prospective students.

Part IV of the proposed order is a record keeping provision that requires the respondents to maintain certain records for five (5) years after the last date of dissemination of any representation covered by the consent order. These records include: (1) all advertisements and promotional materials, sales or admissions interview scripts or training manuals, catalogs, and other marketing materials; (2) all materials relied upon in making any representation covered by the order; and (3) all evidence in respondents' possession or control that contradicts, qualifies, or calls into question the representation or the basis relied upon for it.

Analysis to Aid Public Comment

Part V of the proposed order requires distribution of the order, for five (5) years from the date of issuance, to officers and directors of the corporations; managers who have responsibilities with respect to the subject matter of the order; and personnel involved in sales, admissions, recruitment, or responding to consumer complaints and inquiries.

Part VI of the proposed order requires that the Commission be notified of any changes in the corporations that might affect compliance obligations under the order. Part VII of the proposed order requires that, for a period of five (5) years, the individual respondent notify the Commission of any new business affiliation or employment that involves the advertising, promotion, or sale of vocational training programs.

Part VIII of the proposed order requires that for a period of five (5) years, respondents undertake a monitoring program to ensure that all employees or independent contractors engaged in admissions, recruiting, sales, or other customer service, comply with Parts I, II, and III of the order.

Part IX of the proposed order requires the respondents to file compliance reports with the Commission. Part X of the proposed order states that the Commission, without prior notice, may use investigators to pose as prospective consumers of respondents. Finally, Part XI of the proposed order states that, absent certain circumstance, the order will terminate twenty (20) years from the date it is issued.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way.

Analysis to Aid Public Comment

**CONCURRING STATEMENT
OF COMMISSIONER SWINDLE**

When the Commission issued its revised guides for vocational schools, I dissented on the ground that the guides were not needed because these schools were already subject to the standards of and regulation by the United States Department of Education, state licensing boards, and private accreditation bodies. I also explained that these federal and state regulatory bodies should act in the first instance to enforce their standards to address misrepresentations by vocational schools. If their enforcement efforts are unsuccessful, then Commission law enforcement action may be justified. Because the respondents continued to make misrepresentations even after the United States Department of Education terminated their participation in a federal loan program and after state authorities twice issued citations to them, Commission law enforcement action here is warranted.