Guidelines[6] is not cited explicitly, the theory here appears to have been drawn from those Guidelines. That analysis focuses on a market in which, but for ease of entry, conditions are favorable to the exercise of market power, and asks whether a vertical merger (or, in the current case, vertical integration through contract) might reduce entry so that market power could be exercised.[7]

Although this effect might occur in some settings, in this case I find the evidence to support invoking this theory tenuous at best. The Commission's complaints apparently rest on the difficulty allegedly experienced by another pump maker in obtaining the patronage of OEMs.[8] An alternative explanation for that firm's failure to achieve a larger market share is that fire departments find its pumps significantly less attractive than those of Hale and Waterous for reasons unrelated to the pump makers' distribution policies. The evidence adduced by the staff is far from sufficient to establish that this firm, or any other actual or potential competitor, was anticompetitively excluded from selling pumps to OEMs.[9]

In addition to the weaknesses in the anticompetitive theories outlined above, a factual problem plagues this case: evidence gathered in the investigation calls into question whether Waterous's and Hale's relationships with their respective OEM customers can even be characterized as ''exclusive.'' Although many OEMs have tended to deal principally with only one pump maker—a fact, I note in passing, that is as consistent with an efficiency rationale for exclusivity as it is with an anticompetitive theory—several larger OEMs affiliated with Waterous and Hale have expressed a willingness to install another manufacturer's pumps at customers' request. Indeed, several OEMs—including at least one of the largest ones affiliated with Hale—have installed another competitor's pumps, and this investigation produced no evidence to suggest that any dealer was terminated for selling that firm's pumps. In any case, however, even if OEM exclusivity could be convincingly demonstrated, it should be clear from the discussion above that a great deal more is required to prove that the exclusive arrangements had anticompetitive effects.[10] The evidence on the competitive effects of existing arrangements between pump makers and OEMs is as consistent with the view that the arrangements induce greater efficiency in the production and marketing of pumps as it is with a market power theory.

I am therefore unpersuaded that respondents' distribution policies have harmed competition in any relevant market. Even had I concluded otherwise, however, I would not endorse the proposed consent orders, which require each respondent to cease and desist from requiring OEM exclusivity as a condition of sale. As I have noted elsewhere,[11] the problems with remedies of this sort are significant.[12] A formal ban on exclusive dealing accomplishes little if respondents have alternative means available to achieve the same end. One readily available method in this case, fully consistent with the terms of the proposed orders, would be to establish a set of quantity discounts providing a customer with substantial financial incentives to procure all of its pumps from a single seller. Moreover, nothing in the orders would prevent a pump manufacturer from unilaterally refusing to sell to an OEM so long as the refusal was not conditioned on a promise of exclusivity. Another possible method would be to give exclusive OEMs better service (e.g., faster delivery times) than their non-exclusive rivals receive.

I cannot endorse an ineffective remedy for a nonexistent harm.

[6] U.S. Department of Justice, Merger Guidelines, § 4.2 (1984), 4 Trade Reg. Rep. (CCH) ¶13,103.

[7] The 1984 Merger Guidelines (§ 4.21) identify three necessary but not sufficient conditions for this problem to exist. First, the market in which power would be exercised (the ''primary'' market) must be sufficiently conducive to anticompetitive behavior that the impact of vertical integration in reducing entry would allow such behavior to occur. Second, the degree of vertical integration subsequent to the merger must be so extensive that an entrant into the primary market would also have to enter the other market (the ''secondary'' market). If substantial unintegrated capacity remains in the secondary market after the vertical merger, it is less likely that the merger will facilitate an anticompetitive outcome. Third, the requirement that a firm enter both the primary and secondary markets—rather than just the primary market—must make entry into the primary market significantly more difficult and therefore less likely to occur. 4 Trade Reg. Rep. (CCH) ¶13,103 at 20,565–66; see also Blair and Kaserman, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 152 (1983).

[8] The evidence supporting the Commission's entry-deterrence theory appears to consist of that producer's experience in trying to erode OEMs' preferences for Waterous and Hale pumps.

[9] The majority's assertion with respect to the entry-deterring effects of the arrangements is simply that—an assertion. All of the evidence gathered in this investigation is easily reconciled with an efficiency rationale for the challenged arrangements between pump makers and OEMs. In this market, as in any other, superior efficiency on the part of incumbents is a powerful entry deterrent. It is not an antitrust violation.

[10] *Cf. Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (plaintiff must demonstrate anticompetitive effects and defendant's market power when challenging vertical restraints).

[11] Dissenting Statement of Commissioner Roscoe B. Starek, III, in Silicon Graphics, Inc., Docket No. C–3626.

[12] For a discussion of why nondiscrimination remedies are problematic, see Brennan, ''Why regulated firms should be kept out of unregulated markets: understanding the divestiture in *United States* v. *AT&T,'' 32 Antitrust Bull.* 741 (1987).

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[File No. 901–0061]

Waterous Company, Inc.; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair or deceptive acts or practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit, among other things, the St. Paul-based manufacturer of fire pumps for fire trucks from entering into, continuing, or enforcing any requirement that fire truck manufacturers refrain from purchasing mid-ship mounted fire pumps from any company, or that they purchase or sell only Waterous's pumps. The consent agreement settles allegations that Waterous and Hale Products, Inc., which together account for 90 percent of the market, sold their pumps on an exclusive basis to fire truck manufacturers and that this arrangement allowed the two companies to allocate the customers each would serve and made it more difficult for other pump makers to enter the market.

DATES: Comments must be received on or before September 30, 1996.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: William Baer, Federal Trade Commission, 6th and Pennsylvania Avenue, NW, H–374, Washington, DC 20850. (202) 326–2932. Mark Whitener, Federal Trade Commission, 6th and Pennsylvania Avenue, NW, H–374, Washington, DC 20850. (202) 326–2845.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is

invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b) (6) (ii) of the Commission's Rules of Practice (16 CFR 4.9(b) (6) (ii)).

Agreement Containing Consent Order To Cease and Desist

The Federal Trade Commission (''Commission'') having initiated an investigation of certain acts and practices of Waterous Company, Inc., (sometimes referred to as ''Proposed Respondent'' or ''Waterous''), and it now appearing that Proposed Respondent is willing to enter into an Agreement containing an Order to Cease and Desist from the use of the acts and practices being investigated,

It is hereby agreed by and between Proposed Respondent, by its duly authorized officers, and their attorneys, and counsel for the Commission that:

1. Proposed Respondent Waterous Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota. Its principal place of business is 300 John E. Carroll Avenue East, South Saint Paul, Minnesota 55075.

2. Proposed Respondent admits all the jurisdictional facts set forth in the draft of complaint.

3. Proposed Respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

(d) Any claim under the Equal Access to Justice Act.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the Proposed Respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. This agreement is for settlement purposes only and does not constitute an admission by Proposed Respondent that the law has been violated as alleged in the draft of complaint, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to Proposed Respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to Proposed Respondent's addresses as stated in this agreement shall constitute service. Proposed Respondent waives any right it may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed Respondent has read the proposed complaint and order contemplated hereby. Proposed Respondent understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Order

I

It Is Ordered that, as used in this Order, the following definitions shall apply:

(a) ''Respondent Waterous'' means (1) Waterous Company, Inc.; (2) its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Waterous Company, Inc., and their successors and assigns; (3) all companies or entities that any parent of Waterous Company, Inc., creates in the future and that engage in the manufacture or sale of Mid-Ship Mounted Fire Pumps, or Waterous' parent if it engages in the manufacture or sale of Mid-Ship Mounted Fire Pumps; (4) the respective directors, officers, employees, agents and representatives of any of the entities described in subparagraphs (1), (2) and (3) above.

(b) ''Mid-Ship Mounted Fire Pumps'' are truck mounted fire pumps that meet the National Fire Protection Association Standard for Pumper Fire Apparatus known as ''NFPA 1901.''

(c) ''Commission'' means the Federal Trade Commission.

(d) ''OEM's'' are original equipment manufacturers who buy and install Mid-Ship Mounted Fire Pumps, as well as many other components, into a final fire truck. OEM's then sell the trucks to fire departments in the United States.

II

It Is Further Ordered that Respondent Waterous, directly or through any corporation, subsidiary, division, or other device, including franchisees or licensees, in connection with the offering for sale or sale of any Mid-Ship Mounted Fire Pump in or affecting commerce, as ''commerce'' is defined in the Federal Trade Commission Act, does forthwith cease and desist from entering into, continuing, or enforcing any condition, agreement or understanding with any OEM that such OEM will refrain from the purchase or sale of Mid-Ship Mounted Fire Pumps of any manufacturer, or will purchase or sell Mid-Ship Mounted Fire Pumps of only Respondent Waterous; provided however, that nothing in this Order shall prohibit any price differentials that make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which Mid-Ship Mounted Fire Pumps are sold or delivered, or that are otherwise lawful under the provisions of the Robinson-Patman Act, 15 U.S.C. § 13.

III

It Is Further Ordered that Respondent Waterous shall provide a copy of this Order with the complaint, and a copy of the notice set out in Appendix A:

(a) within thirty (30) days after the date this Order becomes final, one notice to each OEM to whom it sold a Mid-Ship Mounted Fire Pump at any time during the two (2) years prior to the date this order becomes final; and

(b) for a period of three (3) years after the date this Order becomes final, to each OEM not covered by sub-paragraph (a) above to whom it provides a price

list for or a price quotation on a Mid-Ship Mounted Fire Pump. Such notice shall accompany the price list or price quotation, or in the case of telephone quotations shall be delivered as soon as practical after such quotation, and need only be provided once to each OEM not covered by sub-paragraph (a) above.

IV

It Is Further Ordered that Respondent Waterous shall file with the Commission within sixty (60) days after the date this order becomes final, and annually on the anniversary of the date this order becomes final for each of the three (3) years thereafter, a report, in writing, signed by the Respondent, setting forth in detail the manner and form in which it has complied and is complying with this order.

V

It Is Further Ordered that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this order. Such notification shall be at least thirty (30) days in cases not subject to the notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, and at least ten (10) days in the case of transactions subject to the notification provisions of the Hart-Scott-Rodino Act.

VI

It Is Further Ordered that this order shall terminate twenty (20) years from the date this order becomes final.

Appendix A

[Waterous' Letterhead]

PLEASE READ THIS

Enclosed with this notice is a copy of a Consent Order agreed to between the Federal Trade Commission and Waterous Company, Inc. In the Order, Waterous has agreed that it will not refuse to sell, or refuse to contract to sell, Mid-Ship Mounted Fire Pumps on the grounds that an OEM refuses to sell Waterous pumps exclusively. The Order does not prohibit OEMs from purchasing only Waterous Mid-Ship Mounted Fire Pumps if, in the OEM's sole discretion, it deems it advisable. Moreover, Waterous retains the right to refuse to sell Mid-Ship Mounted Fire Pumps to any OEM for lawful reasons. THE TYPE OF PUMP YOU USE IS YOUR BUSINESS, AND YOU ARE FREE TO OFFER AND INSTALL COMPETING PUMPS AS ALTERNATIVES TO WATEROUS PUMPS.

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order, subject to final approval, from Waterous Company, Inc.

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 decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The Complaint

The complaint prepared for issuance along with the proposed order alleges that the proposed respondent violated Section 5 of the Federal Trade Commission Act by maintaining exclusive dealing arrangements with its customers—manufacturers of municipal fire trucks.

The complaint alleges that respondent Waterous and Hale Products are the two largest manufacturers of mid-ship mounted fire pumps (''fire pumps'') sold in the United States. Together, respondent Waterous and Hale Products account for close to or more than ninety (90) percent of the fire pump market in the United States. Except to the extent that competition has been restrained as alleged in the complaint, respondent Waterous and Hale Products have been and are now in competition among themselves and with other fire pump manufacturers in the United States.

The complaint alleges that, for over fifty (50) years and until approximately 1991, both respondent Waterous and Hale Products maintained exclusive dealing arrangements. Each sold fire pumps to its customers on the condition or understanding that such customers would deal in its pumps exclusively, or that such customers would refrain from buying and selling pumps made by the other. The complaint, and a companion complaint against Hale Products, further allege that both companies believed that continued exclusive dealing by the two companies would tend to exclude competitors from the market, and that continued exclusive dealing, if maintained by both companies, would tend to reduce competition between them over price and over non-price terms, such as quality differences and delivery times. Consequently, both continued to maintain and to enforce exclusive dealing policies.

The complaint alleges that, under these circumstances, respondent's exclusive dealing agreements violated Section 5 of the Federal Trade Commission Act. Specifically, the complaint alleges that exclusive dealing substantially reduced competition in the sale and marketing of fire pumps by facilitating an allocation of customers between respondent Waterous and Hale Products, and by excluding or tending to exclude other actual or potential manufacturers of fire pumps from the market. Facilitating coordinated interaction, and raising entry barriers that exclude competition, are two ways that exclusive dealing restraints can be anticompetitive. *See Beltone Electronics Corp.,* 100 F.T.C. 68, 207 (1982).

The Proposed Consent Order

The proposed consent order would prohibit respondent Waterous from entering into, continuing, or enforcing any condition, agreement, or understanding with any fire truck manufacturer that such manufacturer will refrain from the purchase or sale of any other manufacturer's fire pumps. The proposed order, however, would allow certain lawful discounts such as volume discounts that do not run afoul of the provisions of the Robinson-Patman Act.

The proposed consent order would also require respondent Waterous to notify its customers of the terms of the order. Specifically, the proposed consent would require respondent Waterous to send a copy of the order to each fire truck manufacturer it sold a pump to during the two (2) years prior to the entry of the order; for three (3) years after the order is entered, respondent Waterous must send a copy of the order to each new customer to whom it provides a price list or a price quotation. The order would also requre notification to such customers that respondent will not restrict the brand of pumps they may use.

The proposed consent order would also require respondent Waterous to file with the Commission compliance reports setting forth the manner in which it has complied and is complying with the terms of the order. Such reports are due within sixty (60) days after the order becomes final, and for three (3) years annually on the anniversary of the date the order becomes final. Respondent Waterous must also notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a

successor corporation. In cases subject to the provisions of the Hart-Scott-Rodino Act, however, such prior notification may be made at least ten (10) days prior to the proposed change. Finally, the proposed consent provides that the order will terminate automatically twenty (20) years after the date it becomes final.

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

Donald S. Clark,
Secretary.

Separate Statement of Chairman Pitofsky, and Commissioners Varney and Steiger

In the Matter of Waterous Company, Inc./Hale Products, Inc., File No. 901–0061

We write separately to respond to some of the concerns raised in Commissioner Starek's dissent.

First, we cannot concur with Commissioner Starek's suggestion that, for customer allocation of a component product to work, the participants must be able to allocate the ultimate customers of the finished product (p.1). There will be situations where downstream competition will undermine a customer allocation scheme of a component of a final good. For example, that might be the case where the component is a significant part of the cost of the final product, or where the ultimate consumers have a much stronger preference for the component than the ultimate good.

None of those conditions was present in this case. Fire truck buyers make purchase decisions primarily on the basis of truck brand, the pump price is only a small part of the final purchase price, and pump features are only a small part of the entire truck package. Evidence of relatively high profits at the component level supports this interpretation.

Second, Commissioner Starek suggests that these exclusive dealing arrangements would not increase the likelihood of successful collusion because of the difficulty of detecting cheating. (p.2) We agree that maintaining collusion requires the ability to detect and discipline cheating. But here that methodology was simple: if a fire engine manufacturer used an alternative pump it would be readily identified. Moreover, the fact that the customer allocation through exclusive dealing was maintained over almost five decades suggests that there was an effective method for enforcing the exclusive dealing arrangements.

Third, Commissioner Starek observes that instability at the truck manufacturing stage (i.e., changes in market share) may lead to the demise of any customer allocation agreement with respect to a component. We agree that might be the case where a very large portion of a pump manufacturer's sales were tied to a single truck manufacturer. Here, however, the arrangements were durable; the fact is that instability among truck manufacturers did not deter the effectiveness of these agreements.

Finally, Commissioner Starek suggests that the arrangements did not foreclose new entry because they were not really exclusive. He relies on the fact that some OEMs were willing to install the pumps of a third manufacturer at customers' request. (p. 3) The fact that the exclusive policy was not perfect and that some truck manufacturers may have offered the pumps of a third pump manufacturer, accounting for a very small share of pump sales, did not have a significant effect on competition at the pump level. The key to competition in this market was the competitive positions of Hale and Waterous, which together account for more than 90% of the market. The evidence establishes that Hale and Waterous understood that as long as both firms maintained the exclusive dealing arrangements, competition between them would be diminished, prices would be higher and entry would be more difficult. That is in fact how things worked in this industry for several decades, and those are the anticompetitive effects that the Commission's orders are intended to address.

Dissenting Statement of Commissioner Mary L. Azcuenaga

In the matter of Waterous Company, Inc./Hale Products, Inc. File No. 901–0061.

I generally endorse the views expressed by Commissioner Starek in his dissenting statement. The evidence does not in my view suggest a market in which competition has been unlawfully restrained, and I do not find reason to believe that the law has been violated.

Dissenting Statement of Commissioner Roscoe B. Starek, III

In the matter of Waterous Company, Inc./Hale Products, Inc. File No. 901 0061.

I respectfully dissent from the Commission's decision to accept consent agreements with Waterous Company, Inc., and Hale Products, Inc., two producers of midship-mounted pumps for fire trucks. The proposed complaints claim anticompetitive effects arising from alleged exclusive dealing arrangements between each proposed respondent and its direct customers, the original equipment manufacturers of fire trucks (''OEMs''), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. I am unpersuaded that the arrangements between proposed respondents and their customers can be characterized accurately as ''exclusive.'' More important, however, there is no sound theoretical or empirical basis for believing that these relationships, even if exclusive, harmed competition; in fact, there are good reasons to believe the contrary. In any event, even if one assumes arguendo the validity of the theories of anticompetitive effects, the proposed orders are unlikely to remedy those alleged effects.

The complaints allege, inter alia, that the arrangements between Waterous, Hale, and their OEM customers reduce competition in two ways—by facilitating an allocation of customers between Waterous and Hale, and by creating a barrier to the entry of new pump manufacturers. The first theory posits that Waterous and Hale wish to set the prices of their fire pumps collusively but find themselves unable to reach and maintain a direct agreement on price. Under this hypothesis, in order to achieve collusive pricing without a direct agreement on prices, Waterous and Hale have entered into a de facto agreement to allocate fire truck OEMs between themselves. That agreement, combined with an agreement not to bid for each other's OEM business, makes each pump maker a monopolist with respect to its OEMs. As monopolists, it is argued, the pump manufacturers are able to set supracompetitive prices.

This theory is fatally flawed. For a customer allocation scheme to allow Waterous and Hale to set supracompetitive prices, it necessarily must entail the allocation of the final customers—the fire departments—between the two pump makers. Absent such an allocation, an exclusive dealing contract between a pump maker and one or more OEMs—or even outright vertical integration between the pump producer and one or more OEMs—does not allow the pump producer to raise prices anticompetitively. Under the Commission's theory of competitive harm, Waterous and Hale ''allocate customers'' in lieu of trying to enter into direct pump price agreements that presumably would break down under each party's incentives to undercut the collusive price. In other words, the pump makers'' ''customer allocation''

scheme solves this instability problem. However, unless Waterous and Hale also agree not to compete against one another for the patronage of the fire departments—i.e., unless they collusively allocate fire departments between themselves—each pump maker retains its incentive to take business from its rival through price cuts. Absent allocation of fire department customers, one should expect the same sort of ''cheating,'' with the equivalent competitive result, that the Commission believes frustrated direct collusion between Waterous and Hale.[1]

Thus, it is implausible that ''exclusive dealing'' arrangements between the proposed respondents and their OEMs increase the likelihood of successful collusion between Waterous and Hale. Indeed, there are compelling reasons why such an arrangement might actually reduce this likelihood. Maintaining collusion requires the reasonably accurate identification and punishment of cheating.[2] If Waterous and Hale bid directly and repeatedly for OEM business, cheating might be inferable from one firm's loss of a pump sale to its rival. On the other hand, when Waterous and Hale compete indirectly—*i.e.,* when, as here, their affiliated OEMs submit bids to a fire department incorporating not merely the pump price but rather the prices of all of the truck's components—it will be more difficult for a pump maker to determine whether a loss of business is attributable to price-cutting by the rival pump maker or to reductions in the prices of other components.[3]

The difficulty of maintaining coordination is exacerbated if there is substantial market share volatility among the affiliated customers for reasons unrelated to the pumps. Such volatility makes it difficult for a pump maker to infer whether a sales loss stems from secret pump price concessions or from some other cause. Moreover, if the fortunes of buyers (here, fire truck OEMs) are expected to differ over time—some flagging, others flourishing—the utility of customer allocation as a long-run aid to collusion appears questionable. The pump producer with the misfortune to have affiliated with unsuccessful buyers will have still greater incentives to depart from the collusive scheme. In this regard, the fire truck OEM market witnessed substantial turnover during the period in which the allegedly exclusive agreements were in force.[4] Thus, even if one could overcome the defect in the Commission's collusive theory, these other factors would continue to cast substantial doubt upon this theory's applicability.[5]

The Commission's second theory of harm alleges that exclusive arrangements between pump makers and OEMs have created a barrier to the entry of new pump manufacturers, thereby allowing the incumbent pump sellers to set and maintain supracompetitive prices. Although the vertical section of the 1984 Merger Guidelines[6] is not cited explicitly, the theory here appears to have been drawn from those Guidelines. That analysis focuses on a market in which, but for ease of entry, conditions are favorable to the exercise of market power, and asks whether a vertical merger (or, in the current case, vertical integration through contract) might reduce entry so that market power could be exercised.[7]

Although this effect might occur in some settings, in this case I find the evidence to support invoking this theory tenuous at best. The Commission's complaints apparently rest on the difficulty allegedly experienced by another pump maker in obtaining the patronage of OEMs.[8] An alternative explanation for that firm's failure to achieve a larger market share is that fire departments find its pumps significantly less attractive than those of Hale and Waterous for reasons unrelated to the pump makers' distribution policies. The evidence adduced by the staff is far from sufficient to establish that this firm, or any other actual or potential competitor, was anticompetitively excluded from selling pumps to OEMs.[9]

In addition to the weaknesses in the anticompetitive theories outlined above, a factual problem plagues this case: evidence gathered in the investigation calls into question whether Waterous's and Hale's relationships with their respective OEM customers can even be characterized as ''exclusive.'' Although many OEMs have tended to deal principally with only one pump maker—a fact, I note in passing, that is as consistent with an efficiency rationale for exclusivity as it is with an anticompetitive theory—several larger OEMs affiliated with Waterous and Hale have expressed a willingness to install another manufacturer's pumps at customers' request. Indeed, several OEMs—including at least one of the largest ones affiliated with Hale—have installed another competitor's pumps, and this investigation produced no

[1] The majority's assertion that pump prices and pump brands are relatively unimportant to final consumers (i.e., fire departments) is inconsistent with the events that triggered this investigation—namely, complaints from OEMs that they suffered significant competitive harm from their alleged inability to offer multiple pump brands. It is hard to reconcile those complaints with the majority's claimed end-user indifference to pump brands.

[2] *See, e.g.,* Stigler, ''A Theory of Oligopoly,'' 72 J. Pol. Econ. 44 (1964), *reprinted in* THE ORGANIZATION OF INDUSTRY, ch. 5 (1968).

[3] The majority appears to have misunderstood my point with regard to the detection of cheating. By ''cheating,'' I am not referring to an effort by, say, Hale to sell to Waterous OEMs (or vice-versa). Rather, I refer to Hale's hidden reduction in pump prices to its own customers, which consequently allows those customers to take business from OEMs affiliated with the rival pump brand. This form of cheating is extremely difficult to detect, because an OEM's capture of sales from a rival OEM could be attributable to many reasons other than a reduced pump price.

[4] For example, just since 1990, at least four major OEMs—Grumman, Mack, FMC, and Beck—have exited the market. This period also witnessed entry by such OEMs as Firewolf and Becker. As discussed below, substantial entry into and exit from the OEM market also bear on the applicability of the proposed complaints' second theory of competitive harm (entry deterrence).

[5] With regard to the pump makers' ostensibly high accounting profits, antitrust economists no longer consider accounting profits as a reliable indicator of high economic profits (which can themselves be as consistent with superior efficiency as with collusion). Fisher and McGowan, ''On the Misuse of Accounting Rates of Return to Infer Monopoly Profits,'' 73 Am. Econ. Rev. 82 (1983). Moreover, concerning the longevity of the arrangements between pump makers and OEMs, that factor testifies only to their profitability; it does not distinguish between anticompetitive and procompetitive (or competitively neutral) explanations for their use. Indeed, the asserted instability of OEMs' market shares lends greater credence to an efficiency explanation: one would not expect the parties to an efficient exclusive dealing arrangement to abandon it simply because a customer loses market share, while (as I have explained above) the same cannot be said of an anticompetitive arrangement.

[6] U.S. Department of Justice, Merger Guidelines, § 4.2 (1984), 4 Trade Reg. Rep. (CCH) ¶ 13,103.

[7] The 1984 Merger Guidelines (§ 4.21) identify three necessary but not sufficient conditions for this problem to exist. First, the market in which power would be exercised (the ''primary'' market) must be sufficiently conducive to anticompetitive behavior that the impact of vertical integration in reducing entry would allow such behavior to occur. Second, the degree of vertical integration subsequent to the merger must be so extensive that an entrant into the primary market would also have to enter the other market (the ''secondary'' market). If substantial unintegrated capacity remains in the secondary market after the vertical merger, it is less likely that the merger will facilitate an anticompetitive outcome. Third, the requirement that a firm enter both the primary and secondary markets—rather than just the primary market—must make entry into the primary market significantly more difficult and therefore less likely to occur. 4 Trade Reg. Rep. (CCH) ¶ 13,103 at 20,565–66; see also Blair and Kaserman, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 152 (1983).

[8] The evidence supporting the Commission's entry-deterrence theory appears to consist of that producer's experience in trying to erode OEMs' preferences for Waterous and Hale pumps.

[9] The majority's assertion with respect to the entry-deterring effects of the arrangements is simply that—an assertion. All of the evidence gathered in this investigation is easily reconciled with an efficiency rationale for the challenged arrangements between pump makers and OEMs. In this market, as in any other, superior efficiency on the part of incumbents is a powerful entry deterrent. It is not an antitrust violation.

evidence to suggest that any dealer was terminated for selling that firm's pumps. In any case, however, even if OEM exclusivity could be convincingly demonstrated, it should be clear from the discussion above that a great deal more is required to prove that the exclusive arrangements had anticompetitive effects.[10] The evidence on the competitive effects of existing arrangements between pump makers and OEMs is as consistent with the view that the arrangements induce greater efficiency in the production and marketing of pumps as it is with a market power theory.

I am therefore unpersuaded that respondents' distribution policies have harmed competition in any relevant market. Even had I concluded otherwise, however, I would not endorse the proposed consent orders, which require each respondent to cease and desist from requiring OEM exclusivity as a condition of sale. As I have noted elsewhere,[11] the problems with remedies of this sort are significant.[12] A formal ban on exclusive dealing accomplishes little if respondents have alternative means available to achieve the same end. One readily available method in this case, fully consistent with the terms of the proposed orders, would be to establish a set of quantity discounts providing a customer with substantial financial incentives to procure all of its pumps from a single seller. Moreover, nothing in the orders would prevent a pump manufacturer from unilaterally refusing to sell to an OEM so long as the refusal was not conditioned on a promise of exclusivity. Another possible method would be to give exclusive OEMs better service (e.g., faster delivery times) than their non-exclusive rivals receive.

I cannot endorse an ineffective remedy for a nonexistent harm.

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[10] Cf. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (plaintiff must demonstrate anticompetitive effects and defendant's market power when challenging vertical restraints).

[11] Dissenting Statement of Commissioner Roscoe B. Starek, III, in Silicon Graphics, Inc., Docket No. C–3626.

[12] For a discussion of why nondiscrimination remedies are problematic, see Brennan, ''Why regulated firms should be kept out of unregulated markets: understanding the divestiture in *United States* v. *AT&T*,'' 32 Antitrust Bull. 741 (1987).

GENERAL SERVICES ADMINISTRATION

FAR Secretariat; Stocking Change and Revision of SF 28, Affidavit of Individual Surety

AGENCY: Office of Policy, Planning, and Evaluation, General Services Administration.

ACTION: Notice.

SUMMARY: The General Services Administration/FAR Secretariat is revising the SF 28, Affidavit of Individual Surety to update the burden statement by correcting the GSA address and deleting OMB's address for submitting comments regarding the burden estimate or any other aspect of the collection of information, and changing the stocking requirement. This form is now authorized for local reproduction and will no longer be available through the Federal Supply Service. Since this form is authorized for local reproduction, you can obtain the updated camera copy in two ways:

On the internet. Address: http://www.gsa.gov/forms, or;

From CARM, Attn.: Barbara Williams, (202) 501–0581.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, (202) 501–4755. This contact is for information on completing the form and interpreting the FAR only.

DATES: Effective on or before August 1, 1996.

Dated: July 22, 1996.

Barbara M. Williams,

Deputy Standard and Optional Forms Management Officer.

[FR Doc. 96–19391 Filed 7–31–96; 8:45 am]

BILLING CODE 6820–34–M

Notice of Establishment of Advisory Committee

Establishment of Advisory Committee. This notice is published in accordance with the provisions of Section 9(a)(2) of the Federal Advisory Committee Act (P.L. 92–463) and advises of the establishment of the General Services Administration's Federal Advisory Committee on the National World War II Memorial Design Competition in Washington, D.C. The Administrator of the General Services Administration has determined that establishment of this Committee is in the public interest.

Designation. Federal Advisory Committee on the National World War II Memorial Design Competition, Washington, DC.

Purpose: The purpose of the Committee is to advise and assist GSA and the American Battle Monuments Commission in the review and evaluation of the proposals submitted on the National World War II Memorial Design Competition procurement. This will include, but not be limited to: (1) reviewing and evaluating proposals received; (2) providing the Committee's views regarding specific proposals received, including the bases for the views; and, (3) making recommendations for selection of the Designer and the Architect-Engineer of Record.

Contact for Information. For additional information, contact: Mr. Douglas Nelson, Project Executive, General Services Administration, 7th and D Streets, SW., Washington, DC 20407, Telephone: (202) 708–7623.

Dated: July 26, 1996.

David J. Barram,

Acting Administrator.

[FR Doc. 96–19664 Filed 7–31–96; 8:45 am]

BILLING CODE 6820–34–M

Federal Advisory Committee on the National World War II Memorial Design Competition; Meeting

Notice is hereby given that the General Services Administration's Federal Advisory Committee on the National World War II Memorial Design Competition in Washington, DC, will meet on an as needed basis in August, September, October, and November 1996 (after August 12, 1996). The purpose of the meetings is to review and evaluate the proposals received and make recommendations regarding final selection. The agenda for all meetings will relate to the evaluation of the proposals received.

All meetings will be closed to the public because procurement sensitive matters, including the pre-award evaluation of proposals, will be discussed. The bases for closing the meetings are 5 U.S.C. 552b(c) (3) and (4) (Government in the Sunshine Act).

Questions regarding these meetings should be directed to: Mr. Douglas Nelson, Project Manager, General Services Administration, 7th and D Streets, SW., Washington, DC 20407.

Dated: July 26, 1996.

David J. Barram,

Acting Administrator.

[FR Doc. 96–19665 Filed 7–31–96; 8:45 am]

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