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INTEREST OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission (FTC or Commission) is an independent federal agency charged with promoting a free and competitive marketplace and protecting the interests of consumers. *See* 15 U.S.C. §§ 41 *et seq*. The Commission has substantial experience with enforcing antitrust law and addressing allegedly unreasonable restraints on competition. Its responsibilities include merger enforcement. A 2001 Decision & Order issued by the Commission sought to remedy alleged violations of the Clayton Act and the Federal Trade Commission Act (FTC Act) arising from The Dow Chemical Company's (Dow) proposed acquisition of the Union Carbide Company (Carbide). *In the Matter of The Dow Chemical Company,* Docket No. C-3999, "Decision & Order" (Mar. 16, 2001).[1] The Decision & Order required Dow to divest its Global Ethanolamines Business to INEOS Group plc. (INEOS Limited is the successor to INEOS Group plc and parent of INEOS Americas LLC and INEOS Oxide Limited, the Plaintiffs-Appellants-Cross-Appellees in this case.) A long-term contract for the supply of ethylene oxide (EO) to INEOS was part of that divestiture and was incorporated into the Decision & Order. It is also the subject of this litigation.

On March 24, 2010, this Court invited the Commission to file a brief as

[1] *Available at* http://www.ftc.gov/os/2001/03/dowdo.pdf.

STATEMENT OF FACTS

On August 4, 1999, Dow and Carbide announced their agreement to merge. *In the Matter of The Dow Chemical Company*, Docket No. C-3999, Complaint (Compl.) ¶ 4 (Feb. 5, 2001).[2] Pursuant to its authority under the FTC Act and the Clayton Act, the Commission investigated the proposed transaction and concluded that the merger would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Compl. Preamble. Accordingly, it issued a complaint alleging that the merger may, if consummated, substantially lessen competition or tend to create a monopoly in the ethanolomines (EOA) market in the United States and Canada. Compl. ¶¶ 40-41, 45. EOA is a family of chemicals, comprising monoethanolamine (MEA), diethanolamine (DEA), and triethanolamine (TEA), which are made by reacting ethylene oxide (EO) and ammonia. Compl. ¶ 40. EOAs are used as chemical intermediates to

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[2] *Available* at http://www.ftc.gov/os/2001/02/dowunioncmp.pdf..

[3] *Available at* http://www.ftc.gov/os/2001/02/dowunionana.pdf.

[4] *Available at* http://www.ftc.gov/os/2001/02/dowunionagree.pdf.

U.S.C. § 53(b).

To address the above-described merger-related harms, the Commission ordered Dow/Carbide to divest Dow's Global Ethanolamines Business to INEOS. Decision & Order ¶ II.A. The Decision & Order stated that the "purpose of the divestiture . . . is to ensure the continued operation of the Dow Global Ethanolamines Business in the same businesses in which the assets and businesses of the Dow Global Ethanolamines Business 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." Decision & Order ¶ III.C. The Decision & Order identified as assets to be divested, among others, Dow's EOA plant in Plaquemine, Louisiana, as well as "other rights in real property at the Plaquemine Site sufficient for the operation of the Dow Global Ethanolamines Business in the manner in which such business has been operated in the past and as such business may be operated in the future in a manner consistent with the purposes of this Order." Decision & Order ¶ I.AB.1., 5.

The Decision & Order did not require Dow to divest to INEOS "production facilities used to manufacture EO," Decision & Order ¶ I.AB.15, including Dow's EO Plant adjacent to the EOA plant and connected to it via pipeline. Instead, it required Dow to offer to INEOS, subject to the Commission's concurrence, an EO

Supply Agreement, Decision & Order ¶ I.AB.2, which Dow and INEOS entered into. The EO Supply Agreement obligates Dow to provide INEOS with EO for a period of 35 years. On two occasions since executing the EO Supply Agreement, Dow and INEOS have modified it "to ensure maximum availability of EO to INEOS and to limit the impact of future EO supply interruptions (if any) at Dow's Plaquemine EO plant." *In the Matter of The Dow Chemical Company*, Docket No. C-3999, "Petition of The Dow Chemical Company for Approval of Certain Amendments to the Huntsman Agreement and the INEOS Agreement," at 5 (Dec. 5, 2001);[5] *see also* "Petition of The Dow Chemical Company for Approval of Certain Amendments to the INEOS Agreement," at 5 (May 13, 2005).[6] Each time, the Commission accepted the modifications. *In the Matter of The Dow Chemical Company*, Docket No. C-3999, "Letter Approving Petition For Approval Of Certain Amendments to the Huntsman and Ineos Agreements, and of Modifications to the Terneuzen Ethyleneamines Supply Agreement, to the Know-How Agreement, and to the Plaquemine Ethylene Oxide Supply Agreement" (Feb. 1, 2002);[7] *In the Matter of The Dow Chemical Company*, Docket No. C-3999, "Letter

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[5] *Available at* http://www.ftc.gov/os/applications/comment/011205dowpetition.pdf.

[6] *Available at* http://www.ftc.gov/os/caselist/c3999/050520petc3999.pdf.

[7] *Available at* http://www.ftc.gov/os/2002/02/dowchemletter.htm.

Approving Petition for Approval of Certain Amendments to the 'INEOS Agreement'" (Aug. 30, 2005).[8]

The EO Supply Agreement also requires Dow to offer INEOS "the opportunity to participate in the cost of financing" any expansion of the EO Plant proposed by Dow after August 12, 2002. EO Supply Agreement Article 5.1(e). In exchange for INEOS's participation in the financing of any expansion, Dow would reserve for supply to INEOS "the additional EO capacity which represents [INEOS's] pro rata share (based upon its share of the financing cost) of such expansion" at a price which represents Dow's cash costs. *Id.* This expansion provision is the subject of the litigation pending in this Court.

The EO Supply Agreement is an integral part of the EOA Divestiture required by the Decision & Order and of the Commission's remedy for the competitive harms that otherwise would have resulted from Dow's acquisition of Carbide. The Commission incorporated the EO Supply Agreement's terms into the Decision & Order and stated that any failure by Dow to comply with the EO Supply Agreement "shall constitute a failure to comply with [the] Order." Decision & Order ¶ III.H.

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[8] *Available at* http://www.ftc.gov/os/caselist/c3999/050830ltrc3999.pdf.

ARGUMENT

I. THE COMMISSION SOUGHT THROUGH THE EOA DIVESTITURE TO RESTORE THE COMPETITION LOST BY

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the Commission's complaint." Decision & Order ¶ III.C. The Decision & Order required Dow to divest the EOA business "as an ongoing business." Decision & Order ¶ III.A. To ensure the divested

[10] *Available at* http://www.ftc.gov/os/2002/05/solvaydo.pdf.

II. INJUNCTIVE RELIEF AFFORDING INEOS THE ABILITY TO PARTICIPATE IN EXPANSIONS OF EO CAPACITY WOULD PROMOTE THE GOALS OF THE COMMISSION'S MERGER REMEDY

The Commission understands the specific performance at issue in this case to be injunctive relief that would require Dow to offer INEOS the opportunity to participate in the financing of any expansion of the EO Plant and to reserve for INEOS a pre EIrqpshare of the expandd capacity to supply INEOS with EO at Dow's cash cost – both as to any future expansion of capacity, and as to any expansion since August 12, 2002, that the Court deems to have been effected in violation of Article 5.1(e) of the EO Supply Agreement. For the reasons described below, such specific performance would serve the Commission's remedial goal of ensuring that INEOS is a viable and dynamic competitor, thus replacing the competition lost to Dow's acquisition of Carbide.[12]

First, the Decision & Order sought to substitute INEOS for Dow as an effective EOA competitor. The essence of an effective competitor is the ability to increase preduct to meet growing consumer demand for goods. Had Dow continued to own the Plaquemine EOA Plant, it could have chosen to allocate a

[12] Nothing in the Decision & Order makes Dow's obligations under Article 5.1(e) contingent on an assessment of whether or not INEOS is a viable competitor.

share of any expansion of the EO Plant to production at the EOA Plant and thus support increased EOA production. Although the Commission did not require Dow to divest the EO Plant outright to INEOS, it did make the long-term EO Supply Agreement part of the merger remedy. Both Dow's obligation to provide INEOS an opportunity to participate in any EO Plant expansion and the cash-cost pricing for the EO associated with the expansion are important, ownership-like features of the merger remedy. They help to ensure that INEOS remains a long-term, viable competitor in the EOA market, able to respond dynamically to the market, even without ownership of the EO Plant itself.

Second, the Commission's acceptance of the long-term EO Supply Agreement and incorporation of it in the Decision & Order emphasize the importance of Article 5.1(e) to preserving competition in the EOA market. As noted above, the Commission generally disfavors ongoing contractual relationships between the buyer and the seller in a divestiture. "It does not fully reestablish competition if after divestiture is complete, the two are natural economic allies as suppliers, customers or competitors." Divestiture Study, *supra*, at 38. Accordingly, in the typical case, the Commission will permit only short-term, transitional supply arrangements until the buyer can establish its own supply sources, either through self-supply or through purchases in merchant markets. *See,* *e.g., In the Matter of BASF SE*

[13] *Available at* http://www.ftc.gov/os/caselist/0810265/090526basfdo.pdf.

[14] *Available at* http://www.lexis.com or http://www.ftc.gov/speeches/other/remedies.shtm.

[15] *Available at* http://www.ftc.gov/os/caselist/0810214/090403dowdo.pdf.

Third, continuing post-divestiture relationships "may increase the vulnerability of buyers of divested assets," even if the relationships are necessary to the buyer's viability. Divestiture Study, *supra*, at 12. In this case, if Dow could freeze INEOS's expansion of the EOA Plant by capping INEOS's supply of EO, while Dow (absent the EOA Divestiture) could have used increased output from an expanded EO Plant to increase output of the EOA Plant, the merger remedy would be frustrated. Not only could Dow impede INEOS as an EOA competitor, but Dow could also harm consumers by forcing a reduction in EOA supplies and an increase in EOA prices. These are harms the Decision & Order specifically sought to prevent. Decision & Order ¶ III.C; Comp. ¶ 45. By giving INEOS the opportunity to share in any EO Plant expansion, specific performance would help to realize the Decision & Order's pro-competitive goals.

Fourth, to the extent INEOS's participation in an expansion of the EO Plant increases the reliability of EO Supplies to INEOS, the company should be a more viable competitor. On two occasions since the divestiture, Dow has sought and received Commission approval for amendments to the EO Supply Agreement. Dow explained:

> The purpose of the proposed amendments is to secure continuing maximum availability of EO to INEOS and to limit the impact of future EO supply interruptions (if any) at Dow's Plaquemine EO

> plant. The proposed amendments should permit INEOS to become an even more reliable supplier of ethanolamines and an even more effective competitor to other ethanolamines producers.

In the Matter of the Dow Chemical Company, Docket No. C-3999, "Petition of The Dow Chemical Company for Approval of Certain Amendments to the INEOS Agreement," at 5 (May 13, 2005); *see also In the Matter of The Dow Chemical Company*, Docket No. C-3999, "Petition of The Dow Chemical Company for Approval of Certain Amendments to the Huntsman Agreement and the INEOS Agreement," at 5 (Dec. 5, 2001). Concerns about reliable supplies likely explain why EOA plants in the United States are supplied by adjacent EO plants. INEOS's ability to receive EO from Dow at Plaquemine helps to address the reliablity concerns, and thus serves to ensure INEOS's competitive viability and the effectiveness of the Decision & Order's merger remedy.

The entirety of the Commission's settlement with Dow, both the Decision & Order itself and the contracts entered between Dow and INEOS that are incorporated into the Commission's Decision & Order, have the stated purpose of restoring the competition in the EOA market that was lost when Dow was able to acquire Carbide. It would be fully consistent with the Commission's stated purpose for INEOS to be able to obtain additional EO, upon Dow's increase in EO production capacity, and at a cost-based price, in order that INEOS may remain a strong competitor in the EOA market, responding to consumer demand and competing for sales.

CONCLUSION

The Commission appreciates the Court's invitation and hopes this brief aids the Court's deliberations.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,578 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in Times New Roman 14 point font.

Respectfully submitted,

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April 6, 2010

CERTIFICATE OF SERVICE