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July 15, 2005

BY EMAIL: comments@amc.gov

Attn: Public Comments
Antitrust Modernization Commission
1120 G Street, N.W., Suite 810
Washington, D.C. 20005

Dear Sir or Madam:

Re: Request for Public Comments

Please find attached the submission of the Commissioner of Competition, Ms. Sheridan Scott, Competition Bureau, in accordance with the procedure outlined in the Antitrust Modernization Commission. For more information, Mr. Douglas Pentland, Senior Competition Law Officer, Competition Policy Branch can be reached at the following address:

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Yours truly,

Gaston Jorré
Acting Commissioner of Competition

Enclosure

Canada

Antitrust Modernization Commission

Request for Public Comments

Evidence

of

The Commissioner of Competition

July 15, 2005

1.0 Introduction

1. The Competition Bureau is pleased to respond to the invitation from the Antitrust Modernization Commission (hereafter AMC), to submit comments on Merger Enforcement - Efficiencies in Merger Analysis as part of its review of antitrust laws.
2. The Commissioner of Competition is responsible for the administration and enforcement of the *Competition Act*. The statutory purpose of the Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, to expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada, to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and to provide consumers with competitive prices and product choices.
3. In its public notice, the AMC has requested comments from the public and enforcement institutions regarding specific questions relating to the issues selected for Commission study. The Competition Bureau's (hereafter the Bureau) comments do not specifically address the questions within the Merger Enforcement - Efficiencies in merger Analysis topic. However, this submission presents a brief overview of the current treatment of efficiencies under the *Competition Act* (Section 2) and a summary of the consultation process undertaken by the Bureau in September 2004 on the role of efficiencies (Section 3).

2.0 Brief overview of the current treatment of efficiencies

4. The notion of competition contributing to the efficiency of the Canadian economy has been a topic of discussion in legal, business and political circles for nearly 40 years, and has been entrenched in Canadian law, in the form of the *Competition Act*, since 1986.
5. The treatment of efficiencies in competition law is highly complex. The drafters of the *Competition Act* adopted a unique approach to efficiencies.
6. The current merger efficiencies defence became part of Canada's competition law when Bill C-91 was enacted as the *Competition Act* in 1986. Section 96 of the Act prohibits the Competition Tribunal from making an order prohibiting a merger when the merger has brought about or is likely to bring about gains in efficiency that "will be greater than, and will offset, the effects of any prevention or lessening of competition" resulting from a merger.

7. Since 1986, the efficiencies defence has only arisen in two litigated cases. In the first, the defence was only discussed briefly. In the second, the merger of two distributors of propane, Superior Propane and ICG Propane, the defence was discussed at length. In Superior, the defence was applied and resulted in the merger being allowed to proceed notwithstanding a finding that the merger would significantly lessen competition and would result in average price increases of 8% or more to customers.
8. In 2002, a report by the Standing Committee on Industry, Science and Technology recommended that the Government of Canada establish an independent task force of experts to study the role that efficiencies should play in all civilly reviewable sections of the Act. Concurrently, a private member's bill, C-249, that would have repealed the efficiencies defence in section 96, was introduced in the House of Commons. Bill C-249 proposed that efficiency gains would become one of a list of factors to be considered in the analysis of whether a merger prevented, or substantially lessened competition. A concept similar to what is used in other jurisdictions. The Bill also contained provisions to ensure that gains in efficiency that benefited consumers, in the form of competitive prices and product choices, would be considered in the competition analysis. Bill C-249 gained multi-party support but died on the Order of Paper with the dissolution of Parliament on May 23, 2004.
9. One recurrent theme among the submissions to the House and Senate committees that studied Bill C-249 was that the role of efficiencies under the *Competition Act* in Canada's evolving economy would benefit from broad public consultation and debate.¹

3.0 Summary of the Consultation process

10. In September 2004, the Competition Bureau launched consultations on the role of efficiencies under the *Competition Act*. The consultations involved three elements.
11. First, the Bureau issued a consultation paper entitled *The Treatment of Efficiencies in the Competition Act*. The paper provides an assessment of the experience under section 96 (the efficiency defence in the review of mergers), the evolving economic context, the international environment and the relative merits of various options. Stakeholders were invited to submit their written comments on the paper. They also had the opportunity to participate at roundtables held in Vancouver, Toronto and Montreal.

¹ The current Bureau approach to the efficiencies defence is set out in Part 8 of our Merger Enforcement Guidelines.

12. Second, in October 2004, the Bureau held a roundtable with participants from competition law enforcement authorities of several other jurisdictions in order to obtain insights on the role of efficiencies in competition policy, specifically the practical issues relating to the consideration of efficiencies in their jurisdictions. Participants at the meeting included representatives from Australia, Canada, the European Union, Mexico, the United Kingdom and the United States. Written submissions were contributed by Germany, Japan, Norway, Sweden and South Africa and were included in the roundtable report.
13. Third, in January 2005, the Commissioner appointed an Advisory Panel of experts with backgrounds in business, economic policy and international trade (hereafter the Panel) to prepare an independent report on related issues. The mandate of the Panel is to assess the role that efficiencies should play in the administration and enforcement of the *Competition Act* in the context of Canada's evolving economy. The Panel will provide the Commissioner of Competition with a written report in the Summer 2005.

4.0 Conclusion

14. Since the current review in Canada of the issues related to efficiencies may be relevant to the AMC review, we provide below links to the web sites where more detailed information may be obtained.

Web links to documents related to the consultation process launched in September 2004

- Treatment of Efficiencies in the *Competition Act* - Consultation Paper (<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1602&lg=e>)
- Submissions received (<http://www.primestrategies.ca/bureau/submissions.htm>)
- Analysis and summary of stakeholders' written comments (<http://www.primestrategies.ca/bureau/documents/SummaryOfComments.pdf>)
- Report of the International Roundtables on Efficiencies – Summary of Consultations with International Competition Authorities (http://www.competitionbureau.gc.ca/PDFs/1305_reportefficiencies.pdf)
- Advisory Panel on efficiencies (<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=200&lg=e>)
- Merger Enforcement Guidelines - Section Dealing with Efficiencies (<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1724&lg=e#part8>)