IN THE MATTER OF

THE COCA-COLA COMPANY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9207. Complaint, July 15, 1986--Final Order, June 13, 1994

This final order requires Coca-Cola, for ten years, to obtain Commission approval before acquiring any part of the stock or interest in any company that manufactures or sells branded concentrate, syrup, or carbonated soft drinks in the United States.

Appearances

For the Commission: *Joseph S. Brownman, Ronald Rowe, Mary Lou Steptoe* and *Steven J. Rurka.*

For the respondent: *Gordon Spivack* and *Wendy Addiss, Coudert Brothers*, New York, N.Y.

INITIAL DECISION

BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE
NOVEMBER 30, 1990

I. INTRODUCTION

The Commission's complaint in this case issued on July 15, 1986 and it charged that The Coca-Cola Company ("Coca-Cola") had entered into an agreement to purchase 100 percent of the issued and outstanding shares of the capital stock of DP Holdings, Inc. ("DP Holdings") which, in turn, owned all of the shares of capital stock of Dr Pepper Company ("Dr Pepper").

The complaint alleged that Coca-Cola and Dr Pepper were direct competitors in the carbonated soft drink industry and that the effect of the acquisition, if consummated, may be substantially to lessen competition in relevant product markets in relevant sections of the country 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.

The complaint also alleged that the acquisition agreement itself violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

After extensive pretrial motions and discovery, trial was held in the Spring of 1990. The parties filed their proposed findings of fact,

conclusions of law and proposed orders on August 6, 1990. Answers thereto were filed on September 10, 1990. The record was closed on October 17, 1990, after I ruled on extensive requests by Coca-Cola and third parties for in camera treatment of documents which were received in evidence.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, the proposed findings of fact and conclusions of law and answers thereto filed by the parties. I have adopted several of the proposed findings verbatim. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. FINDINGS OF FACT

A. *The Parties*

1. Coca-Cola is a Delaware corporation with its headquarters located at One Coca-Cola Plaza, N.W., Atlanta, Georgia (Cplt. paragraph 2).[1] It had net operating revenues of $7.904 billion in the year ending December 31, 1985 (Ans. paragraph 2; CX 11-D). Through its Coca-Cola USA division, Coca-Cola manufactures and sells syrups and concentrates used to produce carbonated soft drinks (Tr. 181, 2332). Coca-Cola USA does not manufacture or sell finished carbonated soft drinks. Coca-Cola USA's bottler operations department sells syrups and concentrates to bottlers and canners of soft drinks. Coca-Cola USA, through its fountain sales department, also sells fountain syrup and concentrate to fountain wholesalers, to bottlers who are fountain wholesalers, and to chain retail customers (Tr. 487-88, 2394-95, 3079-80, 3681; RX 631-Z-68; RX 644-H-K).

2. Coca-Cola holds equity investment interests in several bottling companies, including Coca-Cola Enterprises Inc. ("CCE"), Coca-Cola Bottling Co. Consolidated, Johnston Coca-Cola Bottling Group,

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[1] The following abbreviations are used in this decision:

Cplt.:	Complaint
Ans.:	Answer
Tr.:	Transcript of Testimony
CX:	Commission Exhibit
RX:	Respondent's Exhibit
F.:	Finding of Fact
CPF:	Complaint Counsel's Proposed Findings
RPF:	Respondent's Proposed Findings

Inc., Brucephil Inc., Coca-Cola Bottling Co. of Chicago, Coca-Cola Bottling Co. of Arkansas, and Coca-Cola Bottling Co. of New York, Inc. (Tr. 2335, 3261). Although it owns majority interests in the latter two bottling companies, Coca-Cola does not control their day-to-day operations (Tr. 3261-62, 3981-82; RX 639-Z-18, Z-42-43).[2]

3. In 1986, Coca-Cola manufactured the concentrate and syrup for the following brands of carbonated soft drinks in the United States for the following flavor categories:

Coca-Cola	Sugared cola
Coca-Cola classic	Sugared cola
caffeine-free Coca-Cola	Sugared cola
cherry Coca-Cola	Sugared cola
diet cherry Coca-Cola	Diet cola
diet Coke	Diet cola
TaB	Diet cola
caffeine-free diet Coke	Diet cola
Sprite	Lemon-lime
Minute Maid lemon-lime	Lemon-lime (juice added)
diet Sprite	Diet lemon-lime
diet Minute Maid (lemon lime)	Diet lemon-lime
Minute Maid Orange	Flavor (juice added)
diet Minute Maid Orange	Diet flavor (juice added)
Fanta	Flavor line
Ramblin'	Root Beer
Mello Yello	Citrus
Mr. PiBB	Spicy pepper
diet Mr. PiBB	Diet spicy pepper
Fresca	Diet grapefruit

4. Coca-Cola sells syrup and concentrate to over one hundred bottlers located throughout the United States which are licensed to manufacture and sell specified trademarked soft drinks in bottles and cans ("bottle/can" or "packaged" soft drinks) in a designated exclusive territory perpetually, so long as the bottler lives up to the terms of the contract *(e.g.*, RX 51-A, B, C; RX 53-F, X). Not all Coca-Cola bottlers manufacture and distribute all Coca-Cola products in their territories. Moreover, bottlers of Coca-Cola's products also sell soft drinks made from concentrates purchased from other manufacturers (F. 38).

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[2] Since the hearings, Coca-Cola sold its interest in Coca-Cola Bottling Co. of Arkansas to CCE.

5. DP Holdings, Inc., a Delaware corporation, was a holding company created as a vehicle for the leveraged buy out of Dr Pepper Company. DP Holdings, Inc. owned 100 percent of the shares of Dr Pepper Company (Cplt. paragraph 4; RX 2-A). Dr Pepper, a Colorado corporation headquartered in Dallas, Texas, manufactures soft drink concentrate and syrup which it sells to bottlers and fountain syrup wholesalers (RX 2-A). Dr Pepper owns all of the shares of Premier Beverages, Inc. ("Premier") which also manufactures concentrate and syrup (Tr. 2108, 2151).

6. Dr Pepper has manufactured concentrates and syrups for the following brands of carbonated soft drinks in the United States for the following flavor categories:

Dr Pepper	Spicy pepper
Pepper Free	Spicy pepper
Sugar Free Dr Pepper	Diet spicy pepper
Sugar Free Pepper Free	Diet spicy pepper

Dr Pepper's 1988 revenues from sales in the United States of concentrate and syrup exceeded [blank] million (CX 781-K).

B. *The Challenged Transaction*

7. On January 24, 1986, PepsiCo, Inc. ("PepsiCo") announced that it had reached an agreement in principle to acquire the domestic and international operations of Seven Up Company ("Seven Up") from Philip Morris, Inc., for $380 million (RX 235-Z-248; RX 572-A).

8. On February 20, 1986, Coca-Cola was authorized by its board of directors to acquire all of the capital stock or assets of DP Holdings, Inc., for consideration of approximately $295 million plus the repayment of $180 million in debt, totaling $475 million(CX 2-A, B).

9. On February 21, 1986, the stockholders of DP Holdings, Inc. agreed to sell all of the company's outstanding shares to Coca-Cola for approximately $470,000,000 (including the assumption of approximately $170,000,000 in debt) (Cplt. paragraphs 6, 7; Tr. 2358; RX 2-A). The purchase agreement gave both Coca-Cola and the shareholders of DP Holdings, Inc. a unilateral right to terminate the agreement if the closing did not occur on or before August 29, 1986 (RX 2-Z). The purchase agreement also obligated Coca-Cola

to use its best efforts to obtain governmental approval for the transaction and relieved Coca-Cola of any obligation to proceed with the acquisition in the event that a court issued an order precluding consummation of the proposed deal (RX 2-U, Z-2). Dr Pepper had few assets; the acquisition of its trademark was the goal of the proposed transaction (CX 65; CX 368-G).

10. The Coca-Cola-Dr Pepper proposal was a defensive move to effect a blockage of the PepsiCo-Seven Up transaction (CX 81-D-E; CX 84-B-C; CX 88; CX 237), or if that transaction were allowed, to acquire Dr Pepper (CX 88-I).

11. Following a four month investigation of the proposed transaction, the Commission brought suit on June 24, 1986 against Coca-Cola in the United States District Court for the District of Columbia for a preliminary injunction enjoining consummation of the acquisition pending the result of an administrative proceeding to consider the acquisition. On July 15, 1986, the Commission issued the administrative complaint which began this proceeding on July 31, 1986, the District Court issued the requested injunction. *FTC v. The Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot and remanded*, 829 F.2d 191 (D.C. Cir. 1987). Thereafter, Coca-Cola sought an expedited appeal. The Commission opposed Coca-Cola's request.

12. On August 5, 1986, the shareholders of DP Holdings, Inc. announced that they were terminating the purchase agreement whereby Coca-Cola would acquire DP Holdings, Inc. and its subsidiary, Dr Pepper (RX 572-E). Dr Pepper was thereafter sold to Hicks & Haas, a partnership (Tr. 1292-93, 2206, 2225). Despite the abandonment of the transaction and the sale of Dr Pepper to another entity, the Commission refused to dismiss the administrative complaint (Order Denying Respondent's Motion for Dismissal of the Complaint (Aug. 9, 1988)).

C. *Commerce*

13. Coca-Cola company is, and at all times relevant to this complaint has been, engaged in commerce as the term "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 the term "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44 (Ans. paragraph 3).

14. Coca-Cola produces concentrate for its non-cola sugared products in Atlanta, most of the concentrate for its non-cola diet products in Puerto Rico, and cola concentrate and syrup in 16 locations throughout the United States (CX 176-Z; CX 194-P).

15. Coca-Cola and Dr Pepper Company in June 1986 were, and they currently are, competitors in the manufacture and sale of carbonated soft drink concentrate and syrup (Ans. paragraphs 4, 9).

D. *The Concentrate Industry*

1.The Manufacture Of Concentrates and Syrup and Its Profitability

16. Carbonated soft drinks are produced by mixing "concentrate" with a sweetener and carbonated water. The term "concentrate" is commonly used in the soft drink industry to include flavors, extracts, and essences used to produce soft drinks (Tr. 3303, 3371-72, 4080).

17. In concentrate used to produce diet carbonated soft drinks, the sweetener is artificial, and it is part of the concentrate; in concentrate used to produce regular carbonated soft drinks, the sweetener is corn syrup or sugar, and it is generally added by the bottler (Tr. 22; CX 795).

18. "Syrup" is concentrate with sweetener and extra water added, generally for fountain use (CX 176-B). At the fountain, carbonated water is added to produce carbonated soft drinks (Tr. 22). This is sometimes called "post mix" (Tr. 582).

19. Unlike syrup, concentrates contain very little water and generally do not contain sweetener. This results in lower transportation costs and a more efficient means of producing soft drinks in bottling and canning plants (CX 12-P).

20. There is no use for concentrate other than in the production of carbonated soft drinks (Tr. 21), and the demand for concentrate is therefore derived from the demand for carbonated soft drinks (Tr. 2545, 2744). Concentrate can be produced in-house, or some 25-30 so-called "flavor houses" may be hired to produce it (Tr. 445, 3373, 3376-77).

21. Concentrate companies typically raise prices annually, usually in the first quarter of the year (Tr. 1449, 2123).

22. For the period 1979-85, the percentage increases for the prices of concentrate for the following companies were:

1979 - 1985 Percentage Increase in Concentrate

Brand	% Increase
Coke	64%
Pepsi	85%
Dr Pepper	89%
Sprite	84%
Mt Dew	90%

(Source: Derived from CX 395-B; CX 396-C, D).

23. For the period 1979 through 1988, Coca-Cola's "net concentrate price" for bottle/can concentrate for the brands indicated, on a 288 ounce case basis, was as follows: (Net concentrate price includes a five cents per gallon deduction that Coca-Cola puts in a special fund that bottlers can draw upon to purchase point of sale items.)

Year	Coke Classic	Annual Increase	Diet	Annual Increase	Inflation Rate
1979	0.315	4%	0.709	6%	
1980	0.388	23%	0.753	6%	
1981	0.427	10%	0.824	9%	
1982	0.495	16%	0.936	14%	
1983	0.534	8%	0.955	2%	3.2%
1984	0.551	3%	1.045	9%	4.3%
1985	0.575	4%	1.121	7%	3.6%
1986	0.595	8%	1.152	3%	1.9%
1987	0.613	3%	1.357	18%	3.7%
1988	0.633	3%	1.381	2%	4.0%

(Source: CX 19-Z-20; CX 798-D-E, Z-24).

24. Coca-Cola's per case operating profit in actual dollars (not adjusted for inflation) declined during the ten year period prior to the proposed acquisition (Tr. 2686-87; RX 646-Z-5-26). Coca-Cola USA's overall operating profits from the sale of concentrates and syrups have increased over the past several years because of increasing volume (Tr. 2415-16, 3391; RX 238-Q). PepsiCo's and Dr Pepper's profits have also increased (Tr. 1448-49, 2455-56).

2. Advertising And Promotion By Concentrate Firms

25. Network and spot television advertising expenditures of carbonated soft drinks by concentrate firms, was as follows for the years indicated:

Television Advertising Expenditures - 1986 - 1987

1986	share	1987	share
Coca-Cola			
PepsiCo			
Industry			

(Source: CX 27-Z-137).

26. Coca-Cola's total advertising expenditures for 1986 were as follows:

Coca-Cola's Marketing and Advertising - 1986

television advertising	(CX 27-Z-137).
total advertising	(CX 781-C).
total marketing	(CX 14-H, I).

27. Coca-Cola USA's direct marketing expenditures totaled [ ] million in 1987 (CX 19-Q, Z-6,Z-33), or [ ] net revenues (derived from CX Z-6). Coca-Cola's marketing expenditures per case were:

Coca-Cola's Marketing Per Case

year	case sales	total marketing	mrk/case
1985	2,531,600,000		
1986	2,682,572,000		
1987			

(Source: CX 19-Z-34; CX 781-A, C).

28. Coca-Cola's marketing expenditures per case in 1986 were about [ ] of its sales (CX 19-Z-34; CX 781-A, C-E; CX 798-K, L, Z-32).

3. National v. Spot Television Advertising

29. National advertising is a more efficient method of advertising carbonated soft drinks than is local ("spot") advertising (Tr. 278-279, 2384; CX 219-M; CX 280-D-L; CX 372-Z-3; CX 481-U; CX 748 T).

4. The Major Carbonated Soft Drinks Flavors

30. The industry's mainstream carbonated soft drink flavors are cola, lemon-lime, pepper, orange and root beer (CX 6-T; CX 6-Z-21;

CX 18-N; CX 379-L; CX 562-D; CX 141-Y) and they account for over 90% of all sales (CX 6-Z-21; CX 132-E; CX 165-D). Other flavors which have a more limited mass appeal are ginger ale, cream soda, and fruit flavor soft drinks (Tr. 2067, 3309, CX 249-G; CX 532-"O").

31. Cola is the most important flavor, with approximately 65% of all carbonated soft drink sales (Tr. 184, 269, 1526-27, 2116; CX 6-Z-21; CX 18-N; CX 141-Y; CX 721-E), and carrying a cola drink is important to a bottler (Tr. 269-70, 850; CX 742-F, G; CX 720-I; RX 353). The largest selling cola brands include Coca-Cola classic, Pepsi-Cola, and Royal Crown Cola (CX 781-E, H, Q).

32. For private label or warehouse-delivered carbonated soft drinks, the cola flavor represents about 30% of sales (CX 268-Z-13; CX 697-A).

E. *Finished Carbonated Soft Drinks*

33. Price competition in the concentrate industry is not as intense as in the finished carbonated soft drink industry because competitive conditions in the latter can change weekly (Tr. 381, 1369-70; CX 753-Z-2-3); they are essentially two different industries which are interrelated (Tr. 381, 546, 1369-70, 1472-73).

34. Over the last 20 years, average per capita consumption of carbonated soft drinks has more than doubled.

Per Capita Soft Drink Consumption

year	Gallons per capita
1967	19.9
1972	25.3
1977	30.8
1982	35.6
1987	44.1

(Source: CX 798-Z-23).

35. In recent years, there have been substantial cost savings associated with the manufacture and distribution of carbonated soft drinks because of higher sales volume (Tr. 1485-88, 2381), the switch from sucrose as a sweetener to high fructose corn syrup (Tr. 3018-19; CX 7-I, K; CX 10-N; CX 237-G; CX 413-E; CX 795-A;

CX 807-B; RX 235, pp. 70-72; RX 584-Z-32-33), the use of less expensive packaging (Tr. 3233) and increased efficiencies from the decrease of bottlers through consolidation (almost 50% between 1980 and 1989) (Tr. 2110, 2140; RX 409-E; CX 7-I; CX 10-F; CX 10-M; CX 11-N; CX 22-Z-17-22; CX 170-K; CX 176-K; CX 226-D-E; CX 284-A-Z-12; CX 284-C-G, "O"; CX 286-C; CX 287-B-D).

36. Efficiencies from consolidation have resulted in lower prices to consumers than would have otherwise been the case (Tr. 192-93, 2381; CX 12).

F. *The Franchisor-Bottler Relationship*

37. Carbonated soft drinks are produced by franchised "bottlers" that may be independent franchisees or parent company-owned. These bottlers purchase concentrate from the franchiser and then produce, package and distribute finished carbonated soft drinks (Tr. 180-182, 341, 2061-62). Not all franchisees are bottlers; some purchase soft drinks from a neighboring bottler for resale (Tr. 29, 31, 3104).

38. Bottlers normally produce and distribute the brands of more than one company (Tr. 35, 580, 808, 1007, 1082, 1174, 1239, 1444-45, 2344), a practice which is referred to in the industry as "cross franchising" (Tr. 195-96; CX 56-Z-176; CX 59-Z-89). Smaller brands use cross-franchising to gain more effective distribution through the bottler network of a larger, more popular brand ("piggybacking") (CX 149; CX 156; CX 160; CX 224). Many bottlers have enjoyed substantial profits in the last few years (Tr. 1454-55, 2375-76; CX 14-R; CX 65-C-D; CX 288; CX 294-E; CX 368-E-F; RX 235, p. 8; RX 235, p. 70; RX 391-Z-48).

39. Both Coca-Cola and PepsiCo have a network of bottlers that covers the United States. Coca-Cola's bottler network is referred to as the "Coke system" and PepsiCo's is referred to as the "Pepsi system." The Coke and Pepsi systems include independent bottlers as well as parent-owned bottlers (Tr. 55, 423-24, 2066-67; CX 294-A-B; RX 353-J).

40. In most geographic areas there is a bottler in addition to the Coke and Pepsi bottler. These bottlers are referred to by industry members as "third bottlers." These third bottlers carry combinations of franchised products, but not the products of Coca-Cola or PepsiCo. The third bottlers as a group are referred to in this decision as the

"third bottler network" (Tr. 55-57, 313, 430-31, 676-77, 1297, 3133; CX 313; CX 696-B; RX 353-I; RX 409-C).

41. Concentrate firms grant bottlers exclusive rights to produce and distribute their products within specified territories (CX 198-E, Section 2.1; CX 199-A, Section 1; CX 209-A, Section 1.0; CX 724-A-B, Sections 3-4; CX 779-A; RX 387-A, C, Section 1.1). These rights are considered by franchisor and bottler as perpetual; they may be terminated by the franchisor only for cause (CX 198-E, Section 2.3; CX 199-A, Section 1; CX 209-B, Section 2.0; CX 724-D, Sections I, J; CX 779-C, Section 11; RX 387-G, Section 7).

42. Franchisor contracts with bottlers provide that when the latter sells its business, the franchisor may refuse to transfer or reissue the franchise to the new owner (Tr. 2378-79; CX 199-C, Section 18; CX 209-H. Section 14; CX 724-D, Section J(1); CX 779-C, Section 11(b); RX 387-G, Section 6.3).

43. Franchisors prohibit their bottlers from shipping concentrate purchased from the franchisor and carbonated soft drinks produced by the bottler outside of the territory for which they are licensed. This prohibition is strictly enforced (Tr. 1530-32, 1663, 2084-85, 2111-12, 2366; CX 192-B; CX 209-A; CX 451-A-C; CX 570-C; CX 692-A-D; CX 724, Section 13; CX 779-A).

44. Coca-Cola imposes fines of up to three times the gross margin of a bottler engaging in transshipping, or it may appoint an agent to acquire the transshipped product and return it to the offending bottler, which must pay all expenses involved in the acquisition and return (CX 72-B).

45. Bottlers are required by their franchisors to use only the concentrate produced by the latter; they may not substitute products acquired from any other source (CX 198-B, Section 4(d); CX 199-B, Section 6b; CX 209-B, Section 3.1; CX 724-A, Section E; CX 779-B, Section 7; RX 38-A, Section 1.3).

46. Coca-Cola and other concentrate manufacturers prohibit franchisees from producing and distributing another product in the same flavor category as the franchisor's product. These restrictions are often, but not always, enforced (Tr. 199-200, 273-75, 425-26, 644, 646, 690, 1114, 1397, 1526, 2073, 2096, 2111, 2345; CX 175-A; CX 195-V; CX 197-D, CX 198-B, F; CX 199-R, Section 10(a); CX 228-B; CX 724-C, Section 10; CX 779-A, Section 2; RX 387-D, Section 2.8).

G. *Bottler Price Fixing*

47. Over the past several years there have been several convictions for price fixing by carbonated soft drink bottlers. The areas in which these activities occurred were Ft. Lauderdale-Palm Beach, Florida (CX 318-A-E; CX 319-A-F); Athens, Georgia (CX 320-A-J); Akron, Ohio (CX 321-A-E); twelve counties in Tennessee (CX 322-A-B); Greenville County, South Carolina (CX 323-A-G); Norfolk, Richmond and Roanoke, Virginia (CX 325-A-C; CX 327-A-H); Baltimore, Maryland (*U.S. v. Allegheny Bottling Co.*, (4th Cir. 1989)); West Virginia (CX 328-A-F; CX 326-A-K); and the District of Columbia (CX 799-A-G).

48. There is no evidence in the record that persons other than bottlers of direct-store-door-delivered brands of carbonated soft drinks were implicated in these price fixing conspiracies (CX 318-28; CX 799).

H. *The Relevant Product Market*

1. Competition Between Carbonated Soft Drinks And Other Beverages

a. *Share Of Stomach*

49. Average per capita soft drink consumption has grown steadily since 1976 from an annual average of 28.6 gallons in that year to 45.9 gallons in 1988 (Tr. 159, 563, 2030-31, 3049; CX 798-D; RX 55-A; RX 238-L; RX 471-"O"; RX 645-Z-22). It is generally accepted that this growth in consumption adversely affected the market share of other beverages (Tr. 1580-86, 1624-28, 2030-31, 2400, 2402-05, 3049-50, 3216-17, 3222-33), especially milk, coffee, water and juices (Tr. 536, 2031-32, 3222; RX 99-L; RX 112-S; RX 115-R; RX 471-"O").

50. The human stomach can consume only a finite amount in any given period of time (Tr. 562-63, 1069, 1580-81, 1631-34, 2135, 3272, 3275, 4111, 4154-55; RX 538-B), and the sales growth of any beverage is affected by this fact, known as "share of stomach" (Tr. 158-59, 1009, 4154-55; CX 352-D). For example, Mr. Thomas Pirko, an expert on beverage marketing, testified that he was preparing to address the National Coffee Association on how coffee

had lost share of stomach to soft drinks (Tr. 4155-56). He concluded that "the great growth of soft drinks . . . has very much come through competition with other beverage products" (Tr. 4155).

51. Mr. William Atchison of Coca-Cola views "our competitors rather broadly, as all commercial beverages and beyond that, as tap water, anything that competes for share of stomach" (RX 643-R). Other record evidence reveals industry belief that carbonated soft drinks compete for consumer dollars with other beverages (Tr. 2134-35, 3088, 4011-12; CX 52-Z-4; CX 53-U-X; CX 748-K-L; RX 28-A-B; RX 236-G).

b. *New Beverages*

52. New categories of beverage products, such as flavored seltzers, all-natural carbonated soft drinks, bottled waters, coolers and adult juices have emerged as competitors of Coca-Cola's and PepsiCo's products (Tr. 3220; RX 204-C; RX 509-B; RX 113-A-C; RX 231-H). Coca-Cola has, in turn, targeted non-carbonated beverages as a source of increased sales volume; its fountain sales department, for example, is particularly interested in expanding Coca-Cola's share of beverages in the morning to take sales from coffee and tea (RX 19; RX 20-E-F; RX 30-Z-24; RX 32-M; RX 32-Z-22; RX 644-Z-18). Accounts serving alcohol are also "a major local market opportunity" (RX 32-Z-12).

c. *Expansion Of Product Lines*

53. Evidence of the competitive interaction between carbonated soft drinks and other beverages can be seen in the decision of carbonated soft drink bottlers to offer their customers non-carbonated drinks such as lemonade, Hawaiian Punch, iced tea, Delaware Punch and so forth (Tr. 107, 580, 672-73, 736-37, 809, 913-15, 937, 1008, 1015, 1033, 1278-79, 1455-56, 2112, 3095-96, 3117-20, 3263, 3341; RX 642-Z-124).

54. Conversely, distributors of other beverages, particularly beer, also sell carbonated soft drinks (Tr. 3236-37) in order to maintain their volume (Tr. 1424, 1427-28, 3811-12, 3853-56, 3834, 4098).

55. Dr. Lynk, Coca-Cola's economic expert, testified that manufacturers of other beverages should be included in the relevant

product market because they could rapidly enter the carbonated soft drink business if an incumbent attempted to raise prices (Tr. 2084).

d. *Sales Monitor*

56. Coca-Cola and other national soft drink companies monitor the sales and per capita consumption of other beverages (Tr. 3055-56; CX 17-Z-3; CX 20-Z-5; CX 21-Y-Z; CX 22-Z-145; CX 24-G-J; CX 58-M; CX 60-Z-9; CX 249-F; CX 331-D).

57. Each year Coca-Cola receives from A.C. Nielsen a 10-year trend report on food store sales in a dozen beverage categories (RX 74-A) and conducts analyses to determine how to compete more effectively with other beverages (RX 17-B-Z-38).

58. PepsiCo monitors coffee, milk, juice, and tea sales through Nielsen and SAMI, a market research study of warehouse deliveries (RX 187-Z-30, Z-32-35; RX 630-Z-123-124) and it monitors beverage consumption trends through internal and independent studies (RX 167-A-S; RX 168-A-R; RX 169-A-O; RX 170-A-Z-40; RX 171-A-Z-70; RX 204-A-H). Seven Up and Dr Pepper also monitor consumption of other beverages (RX 108-A-Z-3; RX 127-B-Z-19; RX 346-A-Z-5).

e. *Price, Promotions And Advertising*

59. There is some price sensitivity between carbonated soft drinks and other beverages. On occasion, the Pepsi Bottling Group has lowered its prices because major grocery chains were engaged in a price war on milk and Pepsi hoped to get them to promote Pepsi (Tr. 1585-86, 3272-73). The Pepsi Bottling Group has also studied and reacted to beer pricing. For example, on a number of occasions in the mid-1980's, it adjusted its prices in reaction to a price promotion on Budweiser beer, which was priced below Pepsi (Tr. 1584, 1621, 1630-31). One witness explained that under existing conditions, prices of other beverages are relatively higher than soft drink prices and are not carefully monitored for that reason (CX 754-F-G). Nevertheless, Kalil Bottling monitors the feature activity of bottled waters such as Vittel, Arrowhead, and Evian (CX 816-K, M, N), and Mr. Craig Weatherup, president of PepsiCo, testified that his company looks at beer prices and promotions (Tr. 1620-24, 1630).

60. Mr. Pirko testified that there is some competition between beverage categories (Tr. 4183), but he also agreed that the retail prices of different beverages move in different directions at the same time, that factors that affect the price of beer, milk, and juices do not affect the price of carbonated soft drinks, and that factors that affect the price of carbonated soft drinks do not affect the prices of other beverages (Tr. 4216-17).

61. Coca-Cola cites, as an example of the interaction between soft drinks and other beverages, the fact that Heileman Brewing initially targeted its flavored water products at Perrier but that their prices eventually "drifted down to the soft drink level" (Tr. 3815-16). However, this evidence does not detract from Dr. Hilke's conclusion, from admittedly "crude analyses" (Tr. 2566-67), that there is a lack of price relationship between various beverage categories (Tr. 2561-71; CX 785-A-B; CX 786-A-B; CX 787-A-B; CX 788-A-B; CX 789-A-B; CX 790-A-B; CX 791-A-B; CX 792-A-B; CX 793-A-C).

62. Coca-Cola has, at times, aimed promotions at other beverage categories (Tr. 3088-89; RX 19-B-M; RX 20-B-U; RX 644-Z-18) and Safeway has run promotions on other beverages and decided not to run them on soft drinks at the same time (Tr. 3725-26). When it has run promotions on both products simultaneously sales of one category have been affected (Tr. 2728, 3726-29).

63. Coffee, milk, tea, and orange juice ads have portrayed those products as ones that can be consumed at any time of the day so as to compete more directly with soft drinks (Tr. 160-61, 3057-58, 3821; RX 584-Z-92) and soft drink companies have tried to convince consumers to switch to their products from alcoholic beverages (Tr. 4160; RX 158-A).

f. *Packaging*

64. Producers of other beverages have begun to imitate the packaging of carbonated soft drinks (Tr. 4162). IBC root beer, for example, is sold in a brown long necked bottle, like beer bottles (Tr. 687). Juice, milk, fruit drinks and Gatorade have adopted convenient aseptic packaging to compete with soft drinks (Tr. 4166-70, 4189; RX 204-C; RX 231-H; RX 242-U), and tea, coffee and powdered drink firms have adopted the traditional 12-ounce soft drink can (Tr. 2033, 4162-63, 4178-79, 4189-90; RX 231-H). Water companies have begun modifying their packages in order to compete more

effectively with carbonated soft drinks (Tr. 4162, 4182-83). The packaging for Heileman's flavored waters is "almost identical" to Coca-Cola's and Pepsi-Cola's packaging. "Essentially it's the same package, bottles, cans, six packs, twelve packs" (Tr. 3818-19).

g. *Expert Testimony*

65. Dr. Lynk, Coca-Cola's expert economist, testified that the relevant product market in this case is the manufacture and sale of all potable liquids because, although all beverages do not substitute for one another on an ounce for ounce basis, the significant demand-side and supply-side linkages between soft drinks and other beverages warrant their inclusion in the same product market (Tr. 2734-35, 2923-28; RX 584-J-K).

66. However, other testimony of Dr. Lynk casts substantial doubt on his conclusion regarding the utility of using an "all potables" concept to define the relevant product market in this case, for he posited a vague, unquantifiable relevant market somewhere in between carbonated soft drink concentrate and all beverages (Tr. 2923-24). As to particular products, however, he testified:

a. As to beer:

Q. You have no basis today to testify that beer is in the same product market as carbonated soft drinks, do you?

A. In the same product market in the sense that I defined it earlier this morning, I would say no, not on a one-for-one or gallon-for-gallon basis.

Q. And did you at any time since February of 1986 have the expert opinion and were prepared to testify that beer was in the product market comprised of carbonated soft drinks?

A. I think there is a sense in which it might have been considered to be a part of the product market relevant for carbonated soft drinks. I just don't think it is -- I just don't think the evidence points in the direction that it is so tightly joined that you would say all beer and all carbonated soft drinks ought to be poured together in some sense to form a product market in which the assessment of shares of that pair of beverages should be assessed.

b. As to coffee:

Q. I am going to ask you to turn to page 88 of your deposition transcript, Dr. Lynk. I am going to ask you whether you gave the following testimony on February 8th, 1990.

"Question: I am asking whether you are prepared to testify whether the substitution between roasted coffee and Pepsi A.M. is direct enough and/or strong

enough to allow you to say that in your expert opinion those two products are in the same antitrust product market?

"Answer: Antitrust product market is not a term I am terribly adept with.

"Question: Product market of analyzing this transaction.

"Answer: But I would say -- I believe the answer to your question is no, from what I am aware of, I don't think that warrants a conclusion of that sort."

Q. Was that your testimony?

A. Yes.

(Tr. 2924-27).

c. As to bottled water:

Dr. Lynk never considered the possibility that carbonated soft drinks were in a market that comprised bottled water.

(Tr. 2911-13).

2. All Concentrate Used In The Sale Of All Carbonated Soft Drinks

67. Although complaint counsel propose that the most appropriate product market for purposes of antitrust analysis in this case is branded concentrate used to produce branded carbonated soft drinks, they also recognize that another market may exist -- all concentrate used in the sale of all carbonated soft drinks (Complaint Counsel's Brief in Support of Proposed Findings, pp. 24-25, 47-48). Coca-Cola agrees, concluding in its proposed findings that the relevant product market includes at least all carbonated soft drinks (RPF 110-160). The parties disagree on the narrower branded concentrate market proposed by complaint counsel (RPF 161).

3. Branded Concentrate Used To Produce Branded Carbonated Soft Drinks

a. *The Distribution Of Carbonated Soft Drinks*

(1) Channels Of Distribution

(a) *In General*

68. Soft drinks are sold through two channels of distribution: (a) the grocery store (or take-home) channel and (b) the cold drink channel which includes vending and fountain sales, and single drink sales made by convenience stores and "mom & pop" outlets (Tr. 202-05; CX 27-Z-52-Z-62; CX 55-F; CX 696-A).

(b) *The Cold Drink Channel*

69. Sales in all three segments of the cold drink channel accounted for approximately [ ] of 1988 soft drink sales (CX 27-G).

70. Vending sales, *i.e.*, on-premise consumption of carbonated soft drinks purchased from a vending machine (Tr. 25), account for about 10-12% of total carbonated soft drink consumption. Bottlers often provide full service vending in which they stock and service the vending machines (Tr. 750, 1200-01). Vending machine drinks are generally sold at full price (Tr. 611, 1693, 1895; CX 55-Z-23; CX 516-G; CX 697-F; CX 774-A-F; RX 237-M; RX 409-G).

71. Sales through fountain outlets accounted for approximately 21% of all carbonated soft drink sales in 1988 (CX 27-G; CX 447-K).

72. Coca-Cola estimated that the manual cold drink channel accounted for about [ ] of all carbonated soft drink sales in 1988 (CX 27-G).

(c) *The Take-Home Channel*

73. The take-home channel, which is primarily composed of chain supermarkets and independent grocery stores (Tr. 827-28, 1475), accounted for approximately [ ] of all carbonated soft drink sales in 1988 (CX 27-G).

(2) Methods Of Distribution

(a) *Direct-Store-Door Delivery*

74. Under the direct-store-door delivery system, a route driver delivers carbonated soft drinks directly to retail outlets such as supermarkets, convenience stores, and mom & pop stores (Tr. 27, 423, 530, 834, 3185-87).

75. The route driver services retail outlets on a set schedule which may be altered as necessary to service his accounts (Tr. 28). Depending on the needs of a particular retail outlet, the route driver may service a store every day, or several times a week. Large supermarket chain stores may be serviced more than once a day (Tr. 695, 1020).

76. In a supermarket, the route driver restocks shelves (Tr. 504, 834), sets up displays and point of purchase materials (Tr. 27, 355,

504, 505, 672, 1661), rotates the stock (Tr. 672), cleans the shelves (RX 369-D-E) and picks up returnable bottles in mandatory deposit states (RX 369-H).

77. All of the major carbonated soft drink brands are distributed by direct-store-door distribution, using soft drink bottlers or soft drink distributors (Tr. 181, 1518-19, 1661, 2111, 2238). Some very small firms use beer distributors rather than soft drink bottlers or soft drink distributors for direct-store-door delivery (Tr. 3449, 3487, 3539, 4096).

78. The two largest direct-store-door delivery systems are the Coca-Cola and PepsiCo bottler systems (Tr. 929, 2066, 2128, 2496; CX 742-H-I). In addition to these systems, there is normally one other direct-store-door delivery bottler (or "third bottler") in a given area (Tr. 550, 924-25; CX 696-B).

(b) *Warehouse Delivery*

79. In a warehouse delivery system, finished carbonated soft drink products are delivered from the bottler directly to the loading dock of a retailer's central warehouse (Tr. 529, 3190-91). Warehouse delivered products are available almost exclusively in chain supermarkets (Tr. 355, 530, 834, 3192).

80. Warehouse delivery is used by one national branded concentrate firm, Shasta (Tr. 3167, 3187), a small number of regional branded concentrate firms, including Faygo and C&C Cola (Tr. 3163-64, 3998), and by private label firms (Tr. 183, 3587, 3997-98).

b. *Firms In The Concentrate Industry*

(1) National Direct-Store-Door Delivery Firms

(a) *Coca-Cola*

81. Coca-Cola is the largest concentrate firm in the nation; its 1988 market share was approximately [ ] (CX 781-B). Its soft drink products are distributed entirely by franchised bottlers through direct-store-door delivery. No warehouse delivery is used (Tr. 181; CX 13-A).

(b) *PepsiCo*

82. PepsiCo is the second largest concentrate firm in the nation; its 1988 market share was [ ] (CX 781-B). Pepsi-Cola Company is the domestic beverage division of PepsiCo (Tr. 1437).

83. Pepsi-Cola Company-owned bottling operations are referred to as "COBO"; Pepsi-Cola Company franchise-owned bottling operations are referred to as "FOBO" (Tr. 1436, 1456). The COBO operations account for approximately 50% of Pepsi-Cola Company sales volume. The COBO and FOBO operations bottle for other concentrate firms as well as for the Pepsi-Cola Company (Tr. 1454-57).

84. PepsiCo brands include Pepsi, Diet Pepsi, Pepsi-Free, Mountain Dew, Mug Root Beer, Teem, the Patio flavor line, and the Slice flavor line (Tr. 1519-21; CX 781-H).

85. Pepsi-Cola Company is committed to the direct-store-door delivery system for its products in the United States; it has not attempted warehouse delivery or alternative methods of distribution for brands that do not have national distribution in this country, although it does use warehouses in Canada (Tr. 1523-24).

(c) *Dr Pepper*

86. Dr Pepper is the third largest concentrate firm in the nation. Its market share in 1988 was [ ] (CX 781-B).

87. Dr. Pepper products are sold through direct-store-door delivery (Tr. 2153, 2163, 2232). No Dr Pepper Company products are merchandised by warehouse delivery (Tr. 2163, 2167-68).

88. Approximately 40% of Dr Pepper products are distributed through the Coke bottler system and approximately 40% are distributed through the Pepsi system. Of the 20% volume not in the Coke or Pepsi system, about 10-11% is distributed by bottlers that also carry Royal Crown or Seven Up (Tr. 2178-79).

89. Dr Pepper is the leading soft drink in the "pepper" or "spicy cherry" category, regularly accounting for more than 90% of total pepper volume (Tr. 2238; CX 6-C).

90. Dr Pepper produces Dr Pepper, Diet Dr Pepper, CF regular and CF diet Dr Pepper, IBC Root Beer, and Welch's flavors (Tr. 2441; CX 781-K). Dr Pepper markets the Welch's Line through its Premier Beverages, Inc., subsidiary (CX 6-"O").

(d) *Seven Up*

91. The market share of Seven Up products was approximately [ ] in 1988 (CX 781-B). Its products are mostly sold through a bottler direct-store-door-delivery system (Tr. 2111, 2153).

92. Approximately 8-10% of Seven Up's volume is through the Coca-Cola bottler system and approximately 20% is through the Pepsi bottler system (Tr. 2113, 2178).

93. Seven Up brands include Seven Up, diet 7-Up, cherry 7-Up, diet cherry 7-Up, 7-Up gold and the Howdy line flavors (Tr. 2110, 2164-65).

94. Seven Up and Dr Pepper merged in November, 1986, when Hicks and Haas acquired Seven Up from Philip Morris, Inc. (Tr. 2109). The combined entity, Dr Pepper/7 Up Companies, had a market share of [ ] in 1988.

(e) *Royal Crown Company*

95. Royal Crown Company ("Royal Crown") distributes its products primarily through the direct-store-door delivery system (Tr. 600-61, 1657). Some products are sold through warehouse delivery and beer distributors (Tr. 1662-64, 1668). Its market share in 1988 was approximately [ ] (CX 781-B).

96. Royal Crown brands include Royal Crown Cola, Diet Rite, RC 100, and Nehi, its flavor line (Tr. 1657-58).

(f) *A&W Brands, Inc. ("A&W")*

97. A&W products are distributed primarily through franchised bottlers using direct-store-door delivery (Tr. 2066). Its market share in 1988 was approximately [ ] (CX 781-B).

98. Approximately 30% of A&W's products are sold through the Coca-Cola bottler system, and 30% is sold through the Pepsi bottler system (Tr. 2066-67).

99. A&W brands include Squirt, Vernor's and Rochester, a private label concentrate (Tr. 2076), and A&W root beer and cream soda (Tr. 2070).

(g) *Cadbury Schweppes*

100. Cadbury Schweppes' market share in 1988 was approximately [ ] (CX 781-B). Its products are delivered primarily through direct-store-door delivery (Tr. 1891-93).

101. Cadbury Schweppes soft drink brands include Schweppes, Canada Dry, Sunkist, Barrel Head Root Beer, Wink, Crush, Hires, Cactus Cooler, and Sundrop (Tr. 1886; CX 781-T).

102. Cadbury Schweppes products are distributed almost exclusively through franchised bottlers. Approximately 85% of brand Schweppes products and 30% of brand Canada Dry products are distributed through the Coke and Pepsi systems. The company's two largest bottlers are COBO and CCE (Tr. 1891).

(2) Regional Direct-Store-Door Delivery Firms

103. Firms which sell their carbonated soft drinks in regions of the United States primarily through direct-store-door delivery include Double Cola USA ("Double Cola") (Tr. 34-35); Barq's Inc. ("Barq's") (Tr. 417, 422-23); Monarch & Dad's (Tr. 1390-91); Carolina Beverage Company-Cheerwine (Tr. 384); Big Red (RX 462-D-E); A.J. Canfield (outside of Chicago, warehouse delivery and beer distributors are used) (Tr. 1786); and Frank's Beverages (Triple Cola brand is warehouse-delivered) (Tr. 3312-13, 3315)

(3) Shasta Beverages ("Shasta")

104. Shasta manufactures its own concentrate in Hayward, California which is then shipped to eleven bottling and canning plants located throughout the United States (Tr. 3166).

105. Shasta products are distributed exclusively through a warehouse delivery system (Tr. 3167, 3187).

(4) Local And Regional Warehouse-Delivered Brands

106. Firms which sell their carbonated soft drinks locally and regionally primarily through warehouse delivery systems include: Faygo (Tr. 3163, 3183); Vess (Tr. 1098, 3184); C&C Cola (Tr. 3319, 3589, 3998); Triple Cola (Tr. 3314-15, 3358).

(5) Private Label Products

107. Private label soft drinks include those manufactured by Safeway (Cragmont) (Tr. 3717, 3756-58) and Waldbaum's (Tr. 3996).

(6) Boutique Firms And Firms With Niche Products

108. So-called "boutique" firms and firms producing "niche" products include original New York Seltzer (Tr. 3440-41); Jolt (Tr. 3465); Soho (Tr. 4066); Snapple (Tr. 3527-28); and Orangina (Tr. 496, 506). These products appeal to a limited population. For example, Jolt contains twice the caffeine of Coca-Cola and Pepsi-Cola (Tr. 3465).

c. *Industry Perceptions Of Competition Between Branded, Private Label And Warehouse Firms And Beverages Other Than Carbonated Soft Drinks*

(1) Concentrate Companies

(a) *Coca-Cola*

109. An outline entitled "Competitive Characteristics" was prepared by Coca-Cola when it considered an acquisition entry into the mid-premium (warehouse) brands tier of the carbonated soft drink industry. The competitive characteristics of the three tiers of the carbonated soft drink industry were described as follows:

COMPETITIVE CHARACTERISTICS
* NATIONAL BRANDS
  * HEAVY ADVERTISING CONSUMER PROMOTION
  * PRICE AT OR NEAR TOP OF SPECTRUM
  * PRICE IS BASIS-POINT FOR OTHER BRANDS/SYSTEMS
  * BROAD NATIONAL PENETRATION
  * FRANCHISED, BOTTLER DISTRIBUTION
* TARGETS
  MID-PREMIUM BRANDS
  * MODERATE, GENERALLY SEASONAL, ADVERTISING & CONSUMER PROMOTION
  * PRICED BETWEEN NATIONAL & PRICE BRANDS
  * WIDE PRODUCT LINE - I.E., MULTIPLE FLAVORS
  * WAREHOUSE DISTRIBUTION, LIMITED AVAILABILITY
  * CHARACTERIZED BY SHASTA/FAYGO
* PRICE BRANDS

* LITTLE OR NO ADVERTISING, CONSUMER PROMOTION
* PRICE, WIDE PRODUCT (FLAVOR) SELECTION SOLE MARKETING EFFORT
* GENERALLY RESTRICTED AVAILABILITY
* CHARACTERIZED BY PRIVATE, CONTROLLED LABELS

(CX 267-E; RX 69-E). The "National Brands" were identified in this document as including only Coke, Pepsi, 7-Up, RC and Dr Pepper (CX 267-P; RX 69-F).

110. Mr. John D. Carew, Jr., vice president of planning for CCE, recommended in 1987 that Coca-Cola introduce a Fanta Cola so that it would have a brand which competed with the Shasta and Faygo brands. Because of the price difference between Shasta and Faygo colas and Coca-Cola classic, he was not concerned that the colas would take business from Coca-Cola except at the fringes (Tr. 243-45; CX 221-F).

111. A Coca-Cola document entitled "Cherry Coke Fountain Orientation" contains a competitive classification chart which appears to place brands and flavors that are closest to its "Coca-Cola" brand near it, and the brands and flavors that are unlike "Coca-Cola" away from it. Dr Pepper is next to cherry Coca-Cola, Pepsi and Coke -- with the "sugar cola," noting that they are "mainstream" and "major advertised brands." "Store brands," the "specialty" items and "sugar flavors" are at the other end of the scale:

COMPETITIVE CLASSIFICATION

C	P	C	D	7	S	G	M	M	S	R	B	G
o	e	h	r		p	i	o	e	u	o	l	r
k	p	e		U	r	n	u	l	n	o	a	a
e	s	r	P	p	i	g	n	l	k	t	c	p
.	i	r	e	.	t	e	t	o	i		k	e
.	.	y	p	.	e	r	a		s	B		.
.	.		p	.	.		i	Y	t	e	C	.
.	.	C	e	.	.	A	n	e	.	e	h	.
.	.	o	r	.	.	l		l	.	r	e	.
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.	.	.	.	.	.	.	.	.	.	.	.	.

Sugar colas
Major advertised brands
Mainstream

Sugar flavors
Store brands
Specialty

Despite the competitive spectrum which this document reveals, its author concluded that cherry Coca-Cola "has potential to attract users from all other soft drink segments" (CX 124-P).

112. Coca-Cola does not consider the prices of other beverages such as coffee, tea, milk, bottled water or powdered drinks when it establishes its concentrate and syrup prices (CX 751-F; CX 754-E-F).

113. Documents in the record establish that when it prices its concentrate and syrup, Coca-Cola looks mainly to the prices of branded products produced by PepsiCo, Dr Pepper, Seven Up, Crush, and Sunkist (CX 76; CX 79; CX 91; CX 92; CX 93; CX 98-C-E; CX 98-J-K; CX 100; CX 101-J-M; CX 102; CX 249-Z-1). However, there are areas of the country where regional brands, warehouse brands, and private label brands are important (Tr. 715-18, 1049-50, 2653-54). In fact, one Coca-Cola document notes that "control labels are a factor in every market" (CX 263-F).

114. Although Coca-Cola also markets Minute Maid juices, Hi-C fruit drinks, and Five Alive juices in its Foods Division, there is no communication or business relationship between the two groups (CX 749-C, D).

(b) *Cadbury Schweppes*

115. Stephen R. Wilson, former president of Cadbury Schweppes, testified that when its prices for carbonated soft drinks were established, the concentrate companies he was concerned about were those which sold branded soft drinks. As to other beverages, he testified:

> You know, I think once in awhile, like every two or three years, we might ask ourselves, what is the cost of a soft drink versus or the price of a soft drink to the consumer as compared to a cup of coffee or a glass of juice. Really on a real tactical pricing basis we looked at other soft drink concentrates. That's all that really mattered

(Tr. 1910-11).

(c) *Dr Pepper*

116. Dr Pepper does not monitor the prices of products other than carbonated soft drinks (Tr. 2469) and as to these products, it

compares its concentrate prices with those of other companies producing branded products, *i.e.*, Coca-Cola, PepsiCo, Seven Up, Royal Crown, Cadbury Schweppes and A&W (CX 391-99; CX 404-07; CX 410-12; CX 414-16; CX 418; CX 420; CX 429; CX 430).

(d) *PepsiCo*

117. When PepsiCo sets its concentrate prices, it looks primarily at the branded concentrate prices of Coca-Cola, Dr Pepper, Seven Up, A&W, and Cadbury Schweppes. It also monitors the retail prices of finished products produced by these companies (Tr. 1480-81; 1504-07).

118. Mr. Weatherup, PepsiCo's president, testified at the hearing that he monitored numerous private label companies (Tr. 1508-15). However, he also testified at his deposition:

"Question: Do you look at private label in local markets as much as you look at the national brands in local markets?

"Answer: Again, it would depend on what is taking place in that market.

"Question: Does PepsiCo normally look at the retail prices of the national brand products in local markets throughout the country?

"Answer: Yes.

"Question: What about private label, to what extent does it also, I'm trying to get a sense, do you also look at private label in every market or only where there is a particular need?

"Answer: In some markets you have huge private label businesses. In other markets you have small private label businesses. Where they are small you don't waste your time and energy looking at them unless some special circumstances arises; whereas you normally would be inclined to look at the national players consistently because they are always there.

"Question: What do you mean by small, what would be a small, what would be sort of small?

"Answer: Private label share?

"Question: Yes.

"Answer: Less than 4, 5 percent.

"Question: This would be for an individual private label company in its local market?

"Answer: Right"

(Tr. 1513-14).

(e) *Seven Up*

119. Seven Up does not track the prices of any beverage other than carbonated soft drinks (Tr. 2124) and when it was owned by Philip Morris, did not look at the prices of warehouse or private label companies in setting its concentrate prices (Tr. 292-93). Today, it looks at private label prices "generally," and not a great deal at Shasta's prices. It does not purchase Scantrak data for private label or warehouse brands (Tr. 2125, 2137).

(f) *Procter & Gamble - Crush*

120. When Procter & Gamble owned Crush, it did not look at the prices of private label or warehouse brands, including Shasta and Faygo, when setting the price at which the Crush concentrate would be sold (Tr. 382-83), and it did not get routine reports or do financial analyses of other beverages with respect to its sale of Crush concentrate. Although Procter & Gamble manufactured and distributed Folgers coffee and Citrus Hill Juice, Crush employees did not consult with Procter & Gamble people involved with Folgers or Citrus Hill when establishing the prices at which the Crush concentrate would be sold (Tr. 382-83).

(g) *Barq's*

121. Barq's can charge more for its branded concentrate than non-branded concentrate. John Koerner III, its president, explained:

> Q. What enables Barq's to charge 92 cents per case and these other manufacturers to charge a dime a case?
>
> A. Barq's sells at the retail level. A non-branded thing, there is no inducement for a consumer to buy it except price. People that choose Barq's generally choose to pay a higher price for a product that they feel comfortable with, that they can hold in their hand and won't feel like a jerk, that tastes good, that is properly marketed, that given (sic) them a thirst-quenching, ego-boosting experience.

(Tr. 450).

(2) Bottlers

122. At his 1986 deposition, Richard Hiller, then a Coca-Cola employee, testified that its company-owned bottlers did not price carbonated soft drinks in response to beverages such as coffee, tea, fruit juice or powdered drinks (CX 751-N-P).

123. Employees of other bottlers gave similar testimony (Tr. 593, 705-06, 759, 923, 926, 1023-24, 1061, 1105-06, 1130, 1186, 1246-47, 3233).

124. CCBME, when it was owned by Procter & Gamble, looked at private label prices only semi-annually, and even then, the private label pricing did not have the same importance as the prices of Coke, Pepsi, and RC (Tr. 385).

> Whether or not the private label increased their volume in the short term wasn't too terribly important to us and if it continued over time, we began to feel we were losing share, it would become important, but if a private label were going to increase its volume because of a weekend sale and it didn't significantly cut into our volume, then that wasn't going to be a major point of concern.

(Tr. 387).

125. Bottlers consider and react mainly to prices of the Coke and Pepsi bottlers in their areas when setting the prices of their branded carbonated soft drinks (Tr. 704, 758, 856, 1022, 1104-05, 1186, 1246).

126. Bottlers do not consider the prices of non-carbonated soft drink beverages, or of private label and warehouse-delivered carbonated soft drinks, when setting the prices of their branded carbonated soft drinks (Tr. 593, 705-06, 759, 923, 926, 1023-24, 1061, 1105-06, 1130, 1186, 1246-47).

127. When it owned bottlers, Dr Pepper did not regularly monitor private label, and noted private label prices only if they dropped excessively and remained low for a couple of months (Tr. 1311-12, 1316-17). The prices of private label pepper-type drinks do not affect the prices of Dr Pepper (Tr. 1317).

128. Bart Brodkin, who distributes some carbonated soft drinks through his Avalon warehouse and branded carbonated soft drinks through direct-store-door delivery in Southern California, testified:

> Q. Now, what companies or what products do you look at in helping you to determine what your own prices should be for carbonated soft drink products?
>
> A. For the majority of my trademarks, which are carbonated products, I really look at only two companies to determine my strategy, that being the Pepsi-Cola bottler and the Coca-Cola bottler.
>
> Q. Do you look at beverages other than carbonated soft drink products to determine what your pricing strategy or prices should be?
>
> A. As pertains to carbonated products, I do not.
>
> Q. And as pertains to carbonated soft drink products, do you look at private label products to determine what your prices or pricing strategy should be?

A. I do not.

Q. Are you familiar with the company Shasta?

A. Yes.

Q. Is that a warehouse-delivered product?

A. Yes.

Q. Do you look at Shasta to determine what your pricing, prices or pricing strategy should be?

A. I do not.

Q. To what extent do you look at the prices of other beverages and for what purpose?

A. All beverages obviously to some extent compete against each other in terms of the consumer's purchase, but those products outside of the products of the Coca-Cola bottler and of the Pepsi-Cola bottler tend to be an insignificant impact as pertains to pricing of the majority of our products in our portfolio.

(Tr. 856-59).

129. Mr. Trebilcock, president of Mid Continent Bottlers, Inc., and Mr. Stanford Frank, president of Frank's Beverage, echoed Mr. Brodkin's testimony (Tr. 1103-06, 3341-42).

d. *The Prices Of Branded, Warehouse-Delivered, And Private Label Carbonated Soft Drinks*

130. Carbonated soft drinks are priced according to their method of distribution. Most expensive are the direct-store-door delivered brands. Warehouse-delivered brands are less expensive and private label products are the cheapest (Tr. 92-93, 831-32, 1107, 2167; CX 267-E).

131. Witnesses familiar with the industry testified that the price gap between direct-store-door delivered brands and private label brands is generally 10 to 40% (Tr. 831-32, 1165 (35%), 89, 694 (.99 - 1.09 for Pepsi two liter and .39 to .69-.79 for store brand), 1021 (branded 6-pack on promotion: 1.39 to 1.49 and 2-liter: .99; private label everyday --cheaper when on promotion --: 6-pack is .99 and 2-liter is .69), 3356 (2-liter Coke: 1.39 to 1.49, on promotion: .49 to .99, Triple lists at .79 and is promoted at .59 to .69). 924 (branded 2 liter is .99; private label 2-liter is .69 to .89), 610 (promoted 2 liter is .99 to 1.19 and promoted six pack is 1.29 to 1.39; Shasta 2 liter would be 20 to 30 cents lower; 6-pack would be about 40 cents lower), 590, 4002 (even if Coke is on promotion and private label is not), 1317 (10 to 20 cents per unit for flavors).

132. In 1984 Coca-Cola found that, on average, private and control labels pegged their net prices to those of the national brands

an average of 29% lower, while Shasta/Faygo net prices were about 20% below the national brands (CX 267-A).

133. For the period 1981 to 1983, Coca-Cola measured differences in the price between national brands (defined as Coke, Pepsi, 7-Up, RC and Dr Pepper) with Shasta/Faygo and private/control for 6 pack cans and 2-liter sizes.

Price Gap - 1981 to 1983

6-pack	1981 Price	Gap	1982 Price	Gap	1983 Price	Gap
National	1.59		1.59		1.57	
Shasta	1.29	.30	1.23	.35	1.19	.38
Private Label	1.10	.49	1.05	.53	1.03	.54

2-liter	1981 Price	Gap	1982 Price	Gap	1983 Price	Gap
National	1.08		1.08		1.04	
Shasta	0.90	.18	0.87	.21	0.86	.18
Private Label	0.84	.24	0.78	.30	0.74	.30

(Source: CX 267-P).

134. For the period 1981 to 1983, the percentage in the gap variance, viewed as a discount from the national brands, was as follows:

Price Gap as a Percentage: 1981-1983

6-pack	1981 Gap%	1982 Gap%	1983 Gap%
National Brands	--	--	--
Shasta/Faygo	19%	22%	24%
Private Label	31%	34%	34%

2-liter	1981 Gap%	1982 Gap%	1983 Gap%
National Brands	--	--	--
Shasta/Faygo	17%	19%	17%
Private Label	22%	28%	29%

(Source: CX 267-P).

135. An analysis of the average case price differences for several bottler groups was performed in 1988, comparing Fanta, Shasta, Faygo, controlled label and Coca-Cola classic in 34 geographic areas (CX 263-S-Y). The average case price difference between Classic and the highest priced control label products was [ ]. Branded flavor lines were priced above control labels at an average price difference of [ ] a case (CX 263-F).

136. If private label carbonated soft drinks are promoted at a substantial discount from branded soft drinks, they begin to have an effect on the latter's pricing. When a "monster promotion" (Tr. 3588) was held by Kroger in Cincinnati, a Pepsi bottler in that city testified that when Kroger priced its 2-liter Big K brand at 39 cents:

they jumped to about a 15, 17 share for a period of time. They ran that promotion for almost a year.

Q. So that's a jump of about 10 Nielsen share points?

A. In that store.

(Tr. 3229).

137. Waldbaum's, a grocery chain located in metropolitan New York (Tr. 3995), prices private label carbonated soft drinks during a hot promotion at a 40% discount from branded soft drinks (Tr. 4052-54).

138. Faygo, a warehouse-delivered brand, has been given away on occasion (Tr. 638-39), and aggressive deals such as this by warehouse and private label brand do create problems for Coca-Cola, as Mr. Edward Hiller, its senior vice president for development, testified:

Q. Do you worry about Royal Crown?

A. Yes, we do.

Q. Do you worry about Shasta?

A. Yes, we do.

Q. Do you put Shasta in the same category as Pepsi and Royal Crown?

A. Some of that mid-pricing area, regional brands, private label, Faygo, you know, people like that, they maneuver around in that mid-price area. And we don't like to get too far afield of them, either. And they give us problems from time to time with dealing and with our capacity problems and that sort of thing. And from time to time they can get very aggressive with deals, so we have to be mindful of that.

(CX 751-L-M).

139. Canfield, which distributes branded carbonated soft drinks in Chicago, finds that it competes on occasion with private label products, but not on a long-term basis (Tr. 1799).

140. If branded products were not promoted for a period of six months, industry witnesses agreed that a shift to private label products would occur (Tr. 1133, 1255, 2301, 2399-2400, 3549-50, 3719, 3729).

141. Mr. Edwin Epstein, Coca-Cola's retailing expert, testified:

Q. In your opinion, Mr. Epstein, do warehouse-delivered soft drink brands constrain the prices of store-door-delivered brands, soft drink brands?

A. Constrain? I would say so, yes.

(Tr. 3611).

142. On the other hand:

Q. You testified in response to a question by counsel at the very end of the direct examination that you believe that private label constrained the prices of branded carbonated soft drink products. Do you recall that subject being discussed?

A. Yes.

(Tr. 3636).

Q. And my question is whether you gave the following testimony on March 12th, 1990:

Question: What is the cross-price elasticity of demand between warehouse-delivered soft drink products and national brands of soft drink products?

Answer: You will have to ask the research director that one. That's a little bit out of my expertise.

Question: As you have used the term "competition" you don't really know what the cross-price elasticity of demand is between warehouse-delivered soft drinks and national brands?

Answer: Whether it is one percent-one percent or one percent-ten percent switch, I have no way of knowing.

Q. Was that your testimony, Mr. Epstein?

A. Yes.

(Tr. 3642-43).

e. *Differences Between Branded, Private Label, And Warehouse-Delivered Carbonated Soft Drinks*

143. Consumers believe that there is a quality difference between national brand and private label carbonated soft drinks and because of that belief, branded soft drinks have a much greater consumer appeal than do private label soft drinks (Tr. 3633-36). A PepsiCo study showed that:

> The people who bought private label tended to circulate in that universe and not trade up to branded products and the people who bought branded soft drinks tended not to move down to private label. They just circulated in those two universes and didn't cross over much, which is one reason I think why private label has stayed relatively constant. It hasn't grown.

Thus, brand switching by consumers is generally limited to branded products (Tr. 1911-12).

144. Mr. Tom Tyler, president of Tyler Beverages, testified about his indifference to the pricing of private label and warehouse brands:

> Q. Do you look at the sales and prices of Shasta and Faygo?
> A. No.
> Q. Why not?
> A. I don't consider it a direct competitor.
> Q. Why is it not a direct competitor?
> A. Because it is my belief that when the shopper goes to the market that they have a preset idea in their mind, the woman shopper or the male shopper, that they have it preset that they are going to buy a major brand, and they may buy a private label brand, but I don't think they can substitute a private label brand for a major brand soft drink.
> Q. Do you consider Shasta and Faygo to be in the same grouping as private labels?
> A. I consider it a private label brand.

(Tr. 1185-87).

145. The perceived differences in quality apparently account for the fact that branded carbonated soft drinks have brand loyalty (Tr. 205). This phenomenon has decreased recently, and consumers readily switch between national brands if prices differ significantly; however, there is little evidence of such switching between branded and private label products (Tr. 1021-22, 1911-12, 1940-41), at least until the price differences are very large.

146. Since consumers perceive differences between branded and private label soft drinks, retailers offer both (Tr. 3758, 4019), although private label products may be sold in a different area of the supermarket than branded ones (Tr. 858-59, 3187-89).

147. In some cases, concentrate firms that have flavor restrictions are unconcerned about warehouse delivered or private label products produced by their bottlers (Tr. 1857-58).

f. *The Pricing of Carbonated Soft Drinks*

(1) The Price Elasticity of Demand

148. Dr. Hilke, complaint counsel's expert economist, testified that the test for determining the correct product market is whether a collusive arrangement could profitably raise prices by a small but significant amount for an extended period of time (Justice Department Merger Guidelines ("DOJ Guidelines"), Sections 2.0 and 2.11) (Tr. 2529-48).

149. The ideal price evidence in a product market test is cross price elasticity (Tr. 2548) and the general approach in this test is to determine whether a 5% increase in the price of the product sold by the merging parties may be constrained by other products. If they are, the other products belong in the product market along with the products of merging firms (DOJ Guidelines, Section 2.11).

150. Because of the concept of derived demand, Dr. Hilke testified that a 5% increase in the price of concentrate, which is an input product for carbonated soft drinks, if fully passed on, translates to an increase of 0.5% at the carbonated soft drink level:

Q. Are you familiar with the concept of derived demand?

A. Yes. Derived demand refers to the notion that in any particular industry, its products may not be directly sold to consumers, but may rather pass through another stage of processing before they actually get to the consumer level, so in the instance of soft drink concentrates, those concentrates go through additional stages of processing and distribution, marketing and so forth before they get to consumers. So the demand for concentrate is essentially derived from the consumer demand of carbonated soft drinks.

Q. How would you apply the 5 percent Guidelines test in the carbonated soft drink industry in which the proposed acquisition is at the concentrate level but that consumers are purchasing finished product at the carbonated soft drink level?

A. Well, to undertake that type of exercise, one would have to make an inquiry as to the relationship between the price of concentrate and the price that consumers

pay for the downstream product. The evidence that I have seen to date suggests that the price of the concentrate constitutes roughly 10 percent of the ultimate consumer price of carbonated soft drinks, so, therefore, to translate a 5 percent test at the concentrate level into a price test you would be looking at a half of a percent price change in the ultimate consumer product, assuming that the entire concentrate price were passed on to consumers.

Q. If the Guidelines product market test were being applied at the carbonated soft drink level, are you saying that a half of 1 percent price test would be the test rather than a 5 percent test?

A. That would be the translation between the two. If you were doing a case at a different level, there would be basically a different industry which you would be looking at.

(Tr. 2545-46).

Dr. Lynk agreed with Dr. Hilke:

Q. Do you have any information as to what a 5 percent price increase at the concentrate level would translate into at the consumer level?

A. Only the rough estimates that I had heard earlier. To the extent that the net price of concentrate constitutes something on the order of 10 percent or so of what's been referred to as the floor cost of carbonated soft drinks, just working through the simple numbers, anyway, 5 percent increase there at the concentrate level would be something along the order of a half a percentage point difference at the finished product level.

(Tr. 2740).

(2) Price Interaction Between Direct-Store-Door-Delivered Carbonated Soft Drinks And Private Label Or Warehouse-Delivered Soft Drinks

151. There is little price interaction between direct-store-door-delivered carbonated soft drinks and private label or warehouse-delivered soft drinks.

152. Mr. Michael Skinner of Shasta testified that increasing the price difference between his warehouse-delivered brands and direct-store-door delivered brands was not profitable (Tr. 3198-3201), that he saw little response by Pepsi or Coca-Cola to Shasta's prices (Tr. 3201), and that he experiences price pressure from private label brands only in certain areas of the country.

153. The president of Double-Cola believes that private label products compete primarily with warehouse brands (Tr. 93).

154. When Procter & Gamble owned Coke-Mideast Bottling Company, it did an elasticity analysis, comparing warehouse-delivered brands and Coca-Cola products. It found that an acceptable spread between Coke products and Big K's private label products was between 80 and 100%:

> [W]e had found that there was a spread, 2-liter was a sensitive size to this and there was a spread between Coca-Cola 2-liter and, say, Big K 2-liter and that we shouldn't get too far above. If we got too far above that, the consumer's normal preference for Coca-Cola would begin to diminish.
>
> If you take it to the ridiculous level and say if we were selling a bottle of 2-liter for $5 and Big K was selling it for 50 cents, consumers would tend to opt for the 50 cents even though they may have preferred Coke.
>
> On the other hand, if the Coke was for sale for 99 cents and Big K was for sale for 95 cents, Big K didn't sell almost at all because the spread was so small, consumers would virtually all opt for Coca-Cola.

(Tr. 386-87).

155. Mr. Edwin Epstein, Coca-Cola's expert on retailing, testified that when he was with Hills Foods, lowering the price of its private label carbonated soft drinks did not generate a profit (Tr. 3636-38) and he recalled that Kroger's promotional pricing on its private label soft drinks at half their normal price was not profitable (Tr. 3638-42).

156. According to Mr. Aaron Malinsky, formerly of Waldbaum's, the retail price of Coca-Cola could be increased successfully by 10% without being constrained by private label brands (Tr. 4060-63) and some bottlers suggested that a 10% increase in the price of their brands of carbonated soft drinks would be profitable if the Coke, Pepsi, and third bottler all raised their prices, and nothing else changed (Tr. 708, 759, 860, 927, 1025, 1108, 1803, 1318). Other bottlers concluded that the prices of all of the national branded carbonated soft drinks could increase by as much as 20 to 30% before sales of private label, warehouse-delivered, or other beverages might make the increase unprofitable (Tr. 708, 759, 860, 1071-72, 1108, 1318, 1803-04).

157. Bottlers who market both direct-store-door delivered and warehouse-delivered carbonated soft drinks experience limited price interaction between these products (Tr. 819-20, 860, 1100, 1107-08, 3345, 3347, 1801-04).

158. In the areas where carbonated soft drink bottlers have been convicted of fixing prices, warehouse-delivered and private label firms which, as far as this record shows, were not involved in the conspiracies, did not expand during the period when the conspiracies were in effect (Tr. 3181-82, 3756-57). The Nielsen share of all private label brands in the Baltimore-Washington area for the period 1981-1985 dropped from 13.7 to 9.7, a decrease of 29% (RX 91-A (R)). The price fixing conviction involving General Cinema Beverages, a Pepsi bottler, was for the period October 1984 through July 1985 (CX 799-A-G).

(3) Boutique Soft Drink Firms

159. So-called "boutique" firms such as Jolt, Original New York Seltzer, Soho, Sundance and Snapple have had no effect on the prices of branded concentrate or branded carbonated soft drinks (Tr. 99, 169, 320, 408, 679-80, 685, 768, 878, 928, 1111-12, 1244, 1325, 3993).

(4) Other Beverages

160. Factors that affect the price of beer, milk, and juices do not affect the price of carbonated soft drinks and factors that affect the price of carbonated soft drinks do not affect the prices of other beverages (Tr. 4216-17). The retail prices of different beverages can move in different directions at the same time (Tr. 2561-71, 4057, 4216; CX 785-A-B; CX 786-A-B; CX 787-A-B; CX 788-A-B; CX 789-A-B; CX 790-A-B; CX 791-A-B; CX 792-A-B; CX 793-A-C).

g. *Expert Testimony*

161. After reviewing the record and considering the Justice Department's Merger Guidelines ("DOJ Guidelines"), Dr. Hilke testified that the relevant product market in this case is national branded, direct-store-door delivered carbonated soft drinks, produced by so-called "tier one" firms. The industry also includes two other levels of competition: "tier two," firms, which sell warehouse brands which are not private label, and "tier three" firms which sell private label soft drinks. A separate category is so-called "niche products" which appeal to a limited number of consumers (Tr. 2549-51).

162. Dr. Hilke's conclusion is supported by:

a. Mr. Carew's testimony and that of other industry members that warehouse and private label brands have little competitive interaction with or impact on their business.

b. Testimony that tier one firms could probably profitably raise prices.

c. The limited access of private label firms to vending machines and fountains.

d. The limited access to chains by private label firms which are tied to particular chain warehouse brands and are not direct-store-door delivered.

e. The significant price gap between tier one and private label and warehouse soft drinks which suggests that a five percent price increase in tier one brands could not be undermined or defeated by firms in the other tiers (Tr. 2552-57).

I. *The Relevant Geographic Market*

1. Concentrate

163. The parties agree that one relevant geographic market is the nation taken as a whole (CPF 1320; RPF 184) but Coca-Cola disagrees with complaint counsel's argument that local metropolitan areas that are aligned with advertising areas of dominant influence ("ADIs") and supermarket buying areas are also relevant geographic markets (CPF 1327).

164. All of the manufacturers of concentrate for nationally advertised brands sell it nationwide (Tr. 2627-28; RX 43-D; RX 103-C). Coca-Cola, PepsiCo, Seven Up, Dr Pepper, Royal Crown, A&W, Barq's and Cadbury Schweppes, (CX 781-B; RX 86-A), sell it to their bottlers at a uniform price including freight (Tr. 480-81, 1302-03, 1472-73, 1562-63, 1929, 2088, 3051; RX 630-Z-91-93; RX 638-Z-55-57; RX 643-Z-13, Z-16).

165. No legal or regulatory barriers prohibit concentrate from being shipped nationwide, and transportation costs as a percentage of value of concentrate sales are less than one percent (Tr. 2628, 2753). Thus, concentrate is, with some exceptions, generally shipped nationwide from a single plant (Tr. 22, 123, 393-94, 480, 1562, 1929,

2015, 2088, 2138-39, 2199-2200, 3051, 3162-66, 3375-76; CX 176-Y; RX 54-D).

166. While manufacturers prohibit transshipping of concentrate, bottlers with multiple plants transfer concentrate between plants (CX 175-A). Furthermore, Coca-Cola sells its fountain syrup, which accounts for [ ] of its sales, through wholesalers who do not have exclusive territories (Tr. 3079-81; RX 644-M-N; CX 781-C). Also, Dr Pepper does not franchise its fountain sales and sells syrup wherever it pleases (Tr. 2451).

2. The Finished Product

167. Concentrate firms give marketing support, which may be referred to as investment spending, promotional support, discretionary support, marketing funds, or cooperation funds, to bottlers (Tr. 78-79, 104, 840, 1229, 2085, 2129, 2346, 2456; CX 749-F-G; CX 752-G, H; 776-Z-7).

168. Concentrate firms often make marketing support available in local areas (Tr. 467, 1093, 2079, 2129-30, 2455, 2477-79; CX 22-Z-112-114, Z-128; CX 749-F-G; CX 752-G-H; CX 776-G; CX 776-V; CX 776-Z-1; CX 776-Z-3; CX 776-Z-7-Z-8, Z-10).

169. Concentrate firms provide different levels of support by area on a per case basis over time.

a. Coca-Cola regularly provides support for bottlers through advertising cooperation agreements in which it reimburses or grants credits to bottlers that advertise and promote its brands, and it has procedures in place to provide this support for individual areas (CX 41-A-1; CX 42-A-K; CX 45-A-C). Coca-Cola supports bottlers at a higher rate per gallon in territories where the likelihood of return is greatest. Factors that influence the greater likelihood of a return on the investment dollars spent include bottler abilities; the economic environment in which the funds will be spent; and the number and strength of competitors (CX 753-G, H).

b. A&W negotiates marketing support with each bottler, and its level of support varies from region to region and bottler to bottler. The variation of support on a per case basis varied as much as $0.14 between Dallas and Houston in 1986. During this time, A&W sold its concentrate at [ ] cents per case equivalent (Source: CX 781-U).

c. Dr Pepper determines the level of its promotional support to bottlers market by market (Tr. 2456, 2478-79) and it normally provided more funds on a per case basis to bottlers in more highly developed markets, unless it was trying to develop its brand in a less developed area (Tr. 1300, 1307-08).

d. PepsiCo's marketing programs change from time to time and from bottler to bottler (RX 630, pp. 122-123), and a study it conducted with respect to variations in funding support to bottlers found a range of difference of 3 cents per case over a multi-year period (Tr. 1939-40).

e. Seven Up Company gives bottlers brand development funds based on opportunities in the market and the potential for growing the brand. Funds allocated to its bottlers may be different from one market to another and from one bottler to another (Tr. 2129-30). The variance in funding support ranges from 8 to 10 cents per case from the highest to the lowest (Tr. 2131). Its average per case concentrate price in 1988 was [ ] per case (Source: CX 781).

f. Cadbury Schweppes bottlers receive different funding on a per case basis in a given year (Tr. 1939).

170. One reason for the variation in marketing support for bottlers may be that some do not take advantage of, or fully participate in, programs which offer cooperative advertising and require the recipients to contribute funds to the program (Tr. 1301, 2477).

171. Programs which are offered on a non-cooperative basis may take into account the difference in cost for the services which are rendered by the bottler (Tr. 2130, 2478; CX 753-G-H; RX 643-Z-134), including reducing wholesale prices, introducing a new package, converting fountain accounts equipment, or buying a feature ad or shelf space from a retailer, etc. (Tr. 3060-61, 3271; RX 630-Z-95; RX 645-Z-45-51).

172. Bottlers that have operations throughout the United States allocate the funds received from parent companies to different areas depending on local competitive conditions (Tr. 1443-44, 2351-52) and local bottlers set their prices after considering competitive conditions in their area (Tr. 1295-96, 1442-43, 1497, 3968; CX 690-B-H). Consequently, bottlers' wholesale prices vary in different areas of the country (source: CX 263-S-Y), as do retail prices (Tr. 950, 1295-96, 1496-97, 4020-22; CX 777-A-K).

173. Preferences for particular carbonated soft drinks vary from region to region. For example Dr Pepper's "heartland" is the

Southwest (Tr. 1307-08, 2160); cream soda is more popular in the northeast than in other sections of the country (Tr. 2067). Market shares for different flavors and different types of soda and different packaging differ by area (RX 101-I; CX 24-Z-6, Z-8; CX 466-A).

174. Concentrate firms with small national market shares have high market shares in local areas (Tr. 49, 51-52, 6321,1098, 1374, 1787, 1795-96, 1953-54, 3361).

3. Expert Testimony

175. Dr. Hilke testified that industrial organization standards and the DOJ Guidelines recognize that local relevant geographic markets may exist in the same industry along with a national relevant geographic market (Tr. 2576-77) and he found that in this case there are a number of documents which reveal:

> possibilities and incentives for a potential collusive group to charge . . . different prices within different areas of the United States even within the context of a national geographic market.

(Tr. 2578).

176. The evidence which led him to assume the existence of local markets includes:

a. Legal restrictions imposed by tier 1 firms through exclusive franchise agreements which prevent arbitrage from one territory to another (Tr. 2579).

b. Area specific discounts offered by concentrate firms that make arbitrage of discounts difficult (Tr. 2580).

c. Testimony of Mr. Turner, chairman of Dr Pepper Bottling Co. of Texas, disclosing that the level of promotions provided by Dr Pepper differed substantially in different areas of the country (Tr. 2582-83).

d. Differences in bottler profitability (Tr. 2583).

e. Different promotional programs offered by concentrate companies in different areas on a per case basis (Tr. 2583-84).

177. Dr. Hilke concluded that:

> the evidence I have seen is consistent with the possibility of having local markets [which may be] an important adjustment factor in some sense for a national

collusive group because the structure of the concentrate market is not the same in all areas

(Tr. 2587).

178. The boundaries of the local relevant geographic markets, according to Dr. Hilke, are co-extensive with ADIs, or areas served by a common set of television stations.

179. Dr. Hilke's conclusion is not supported by convincing record evidence; in fact, he stated only that the evidence "suggests" that the areas he chose are "potentially separable" geographic markets (Tr. 2581).

180. Dr. Lynk agreed that the market for finished beverages might be regional or even local (Tr. 2755-57) but concluded that variations in concentrate companies' participation in marketing aids at the wholesale level do not suggest that there are local markets for concentrate (Tr. 2578-79, 2582, 2631, 2755-56).

181. Applying the Elzinga-Hogarty test *(see Elzinga-Hogarty, The Problem of Geographic Market Delineation in AntiMerger Suits*, 18 Antitrust Bull. 45 (1973)), which looks at the proportion of consumption of a product within an area that is made up of production that originated in that area and which also determines the amount of product produced in the area that is sent outside the area, Dr. Lynk concluded that the relevant geographic market for concentrate is nationwide. In his deposition in this case, Dr. Hilke agreed that an Elzinga-Hogarty analysis would lead to the conclusion that the appropriate geographic market for concentrate was national (Tr. 2758-59).

182. Assuming that Coca-Cola decided to raise its concentrate prices in San Antonio, Dr. Lynk testified that:

The Coca-Cola bottler, if we were defining [sic] it simply to that, I assume would be unable to get any concentrate with the same flavors certainly that it was getting from Coca-Cola. . . . The other bottlers, of course, serving San Antonio would be unimplicated by any of those Coca-Cola contracts and they, of course, would have the opportunity to search for other sources of concentrate. And those sources, of course, are beyond the perimeter of San Antonio

(Tr. 2760).

183. Although concentrate can be used only to produce finished carbonated soft drinks, the area of concern raised by the proposed acquisition is the increased concentration at the concentrate, not the

bottling, level, and analysis of the relevant geographic market must take this into account.

184. Doing so, I must agree with Dr. Lynk that the relevant geographic market is nationwide, for this is the area to which bottlers may turn for their concentrate purchases.

185. Thus, if some concentrate firms raised prices in local geographic areas, other firms could not be prevented from shipping concentrate or finished product into those areas. For example, Iowa Beverage, a contract packer for Canfield, ships as far as 500 miles and Canfield itself has shipped finished product from Chicago nationwide (Tr. 1804-05, 1824, 1826-27, 1849).

186. Even if I were to accept the theory that local geographic markets for concentrate exist, the record made by complaint counsel does not support the conclusion that the areas chosen by them (local metropolitan areas that are aligned with ADIs and supermarket buying areas) are, in fact, local markets, for there is no evidence that the boundaries of the ADIs (or buying areas) coincide with areas where concentrate prices are uniform, or that there are significant concentrate price differences between each of the ADIs or buying areas. Furthermore, complaint counsel have not done an Elzinga-Hogarty analysis of the concentrate shipping patterns within the ADIs or buying areas. Therefore, I have adopted no proposed findings regarding concentration in local geographic areas.

J. *Industry Structure, Performance And Concentration*

1. Competition Between Coca-Cola And Dr Pepper

187. Many industry witnesses testified that Dr Pepper is a unique carbonated soft drink (Tr. 166, 992, 1214, 3353, 1925, 2029-39, 2200, 2229-30, 2241, 2439-40, 2494, 3073-74, 3117, 3244, 3268), that it is not a cola (Tr. 255, 721, 794, 1054, 1165, 1353, 1705, 2029-30, 2200, 2250, 2299, 2494, 3073, 3117), that it has a narrow, but loyal, customer base (Tr. 3074, 3244; RX 631-Z-101; RX 640-J-K, Z-68) and that it is a niche product (Tr. 992, 1926, 2029-30, 2251, 3117, 3244; RX-643-Z-44).

188. Analysis of list concentrate prices shows that those for Dr Pepper were higher than Coca-Cola's and Pepsi Cola's and, on occasion, were increased by amounts greater than 5 percent more than concentrate price increases by Coca-Cola and PepsiCo (RX 150-N).

189. An analysis by Coca-Cola of Dr Pepper's business strategy reported: [ ] (RX 115-Z-3; *see also* RX 150-N).

190. Mr. True Knowles, executive vice president of Dr Pepper, testified that its soft drinks are sold at higher retail prices than Coca-Cola (Tr. 2495-96). On the other hand, Mr. Trebilcock, a Dr Pepper bottler, claimed that he must offer Dr Pepper at the same promoted prices as his other brands (Tr. 1166) and Mr. Turner, a Dr Pepper bottler, said that Dr Pepper is competitively priced at or below Coke and Pepsi in Dallas and Houston (Tr. 1310-11).

191. Mr. Clements, CEO of Dr Pepper, testified that Coca-Cola was not a direct competitor; instead, the acquisition of Dr Pepper would amount to "an extension and broadening of Coca-Cola's base" (Tr. 2258, 2263); however, Coca-Cola's answer admitted that it competed with Dr Pepper (Ans. paragraph 9) and Mr. Clements testified in a prior proceeding that Coca-Cola and Dr Pepper were competitors:

> Q. Did you in 1975 give the following testimony in connection with the bottler cases before the Federal Trade Commission?
>
> . . . "Question: Just while it is fresh in His Honor's mind, because he is talking about competitive products, does Dr Pepper compete with Coca-Cola?
>
> "Answer: You bet.
>
> "Question: Compete with Pepsi-Cola?
>
> "Answer: Yes, Sir.
>
> "Question: Compete with Royal Crown?
>
> "Answer: Yes, Sir."
>
> [Q.] You did give that testimony?
>
> A. Yes, and I went on to say it competes with everything.
>
> Q. I understand, but you did give that testimony?
>
> A. Yes, and I still say that.

(Tr. 2263-64).

192. Coca-Cola documents also support the conclusion that it competes with Dr Pepper:

a. In Coca-Cola's 1985 annual business plan, its competition was described as:

> Pepsi USA
> Philip Morris
> Procter & Gamble
> Dr Pepper
> Royal Crown

(CX 16-Z-22).

b. In Coca-Cola's 1988 operational business plan, the only carbonated soft drink firms referred to were Pepsi-Cola USA, Seven Up Company, Royal Crown Company, Dr Pepper Company, Procter & Gamble and R.J. Reynolds (CX 21-A-Z-49).

c. In a 1986 document, Coca-Cola listed four brands, including Dr Pepper, that it believed were capable of growing (CX 58-I), and in a 1983 "strategic analysis," observed that pricing pressure in the United States cola market would require increased market funding by Dr Pepper (CX 237-K).

d. In a January, 1988, memo regarding an anticipated fountain price increase, questions were raised only about the reactions of PepsiCo and Dr Pepper (CX 107-A-B).

193. Consumers may choose between Dr Pepper and Coca-Cola in 23% of the fountain outlets which carry both products (CX 79-I) and Coca-Cola's actions regarding Dr Pepper sales in fountains carrying Coca-Cola reveal that they do compete, for Coca-Cola has given fountains incentives to deny Dr Pepper access because:

> our standard lease provides the dealer with the option of dispensing one non-cola product from competitive soft drink companies.
> Dr Pepper has used this to their advantage in gaining outlet availability without incurring capital costs. As a result, our revenue is negatively impacted at the outlet level.

(Coca-Cola's "Attack Business Plan," CX 137-F; *see also* CX 137-I, M, P).

194. Coca-Cola views Dr Pepper as a significant competitor in the Coca-Cola "heartland," the South and Southwest, (CX 28-Z-95-96). For example, Coca-Cola's consumer research department situation review stated:

> a. "Dr Pepper is a strong competitor in Coke but not Pepsi heartland" (CX 28-Z-99); and
> b. "Dr Pepper is a greater threat in Coke heartland than Pepsi heartland" (CX 28-D).

195. Jim Turner, the nation's largest independent Dr Pepper bottler, doing business in Dallas, Fort Worth, Waco and Houston, Texas, testified:

Q. With respect to Dallas-Fort Worth, can you compare the level of or intensity of competition between RC on the one hand and Coke and Pepsi versus, on the other hand, Dr Pepper and Coke and Pepsi?

A. The -- I would say that the level of competition is greater between Dr Pepper and Coke and Pepsi than it is [between] Royal Crown and [Coke and Pepsi in] that market.

Q. Why do you have that opinion?

A. Because Royal Crown is such a low share brand and Dr Pepper is a higher share brand and we're all three competing for a lot of the same consumers.

Q. . . . How are your prices determined?

A. To a large degree on what Coca-Cola pricing is and to a large degree on what we think the pricing has to be to drive the kind of sales volume that we need to have.

Q. What brands or flavors or companies' products do you look at to determine or help you determine what your own product prices should be?

A. Coca-Cola and Pepsi-Cola, for Dr Pepper

(Tr. 1308-11).

196. Carlos Ippolito, a Dr Pepper distributor in Galveston, Texas, and Tom Tyler, president of Tyler Beverages in Tyler, Texas, agreed that Coca-Cola and Dr Pepper are competitors in their areas (Tr. 1193, 3111-12).

197. Over the years, Coca-Cola has, unsuccessfully, attempted to introduce a pepper flavor soft drink to compete with Dr Pepper (Tr. 217-18, 2202, 2258, 3244; CX 368-E). It also introduced cherry Coca-Cola (CX 219-D), which Dr Pepper viewed as a competitive threat:

Coca-Cola is using the introduction of cherry Coke to compete directly against Dr Pepper in the fountain segment of the soft drink industry

(CX 544-A-B) (*see also* CX 524-A, C, D, H).

198. Other industry members believed that cherry Coca-Cola might affect Dr Pepper (CX 720-C; CX 722-A; 778-A-F, G-P).

199. Coca-Cola's introduction of diet Coke in July 1982 (Tr.211), according to a Dr Pepper memorandum "can hit Dr Pepper in a number of vulnerable areas" (CX 389-A), and, in fact, Sugar Free Dr Pepper was affected by Diet Coke (CX 353-M, N).

200. Coca-Cola and Dr Pepper monitor each other's activities (CX 16-Z-22; CX 23-F; CX 58-I; CX 202-A-12; CX 131-B-D; CX 336-A; CX 345-P-Q; CX 364-J-N; CX 372-Q, S; CX 384-G-H; CX 464-A-G; CX 458-A-B), and Dr Pepper's pricing strategy "is to be competitive with Coca-Cola" (Mr. True Knowles, chief operating

officer of Dr Pepper, speaking at a 1984 meeting of its marketing committee (CX 450-Z-43)).

201. Competitive interaction analyses, which show the extent to which households switch between brands of carbonated soft drinks, show that Coca-Cola interacts with Dr Pepper (CX 274-E, "O," U, Y, Z-7, Z-23).

202. Finally, Mr. John Carew, vice president of planning for Coca-Cola Enterprises ("CCE"), testified in a December 8, 1989 deposition that he called Dr Pepper "parasitic" in a memorandum he wrote when he was with Coca-Cola USA because it took business away from Coca-Cola (Tr. 241-43).

2. Coca-Cola's And PepsiCo's Bottler Operations

203. Over half of Coca-Cola's sales are generated by bottlers in which it has an ownership interest (Tr. 2339). Some of the bottlers in which respondent has an ownership interest are:

a. The Coca-Cola Bottling Company of New York ("Coke - New York"), in which respondent has a 53% ownership interest (Tr. 3261). Five of the six Coke - New York directors are employed directly by respondent; the sixth director is the president and CEO of Coke - New York (Tr. 3262).

b. CCE, in which respondent has a 49% ownership interest (Tr. 2335).

c. Others are listed at CX 12, page 19; CX 22-Z-20; and Respondent's In Camera Pre-Hearing Memorandum, page 7.

204. Coca-Cola created CCE in November 1986 (Tr. 2330, 2334-35). Donald Keough is currently chairman and chief executive officer of Coca-Cola as well as chairman of the board of CCE (Tr. 2332, 2340). Brian Dyson, the president of Coca-Cola USA in 1986, became president and chief executive officer of CCE in October 1986, before it went public (Tr. 2330). Other persons that are officers or directors of Coca-Cola are also on the CCE board (Tr. 2340-41). The current chief operating officer of CCE is Jim Stevens (Tr. 2334).

205. CCE has the franchise to bottle and sell Coca-Cola's products in approximately 45% of the United States (Tr. 2338; CX 12-T). CCE also holds the franchise for other soft drinks. Brands of

carbonated soft drinks licensed to CCE for production and sale include Dr Pepper, Canada Dry, Schweppes, A&W, Barq's and Squirt (Tr. 2344). CCE does not produce and sell brands of Royal Crown Cola Company, PepsiCo or Seven Up Company (Tr. 2345). CCE's sales, at wholesale, are approximately $4 billion. Approximately 90% of CCE's sales are of Coca-Cola's products (Tr. 2338, 2398).

206. Approximately 50% of all of PepsiCo products are bottled and distributed by PepsiCo's company-owned bottling operations (Tr. 1454). These are referred to as COBO, for company-owned bottling operations (Tr. 1436). Through its COBO division, PepsiCo bottles and distributes for Dr Pepper, A&W, Cadbury Schweppes, Seven Up, Sunkist, Barq's and others (Tr. 1455-56). Approximately 92% to 94% of COBO sales are products of PepsiCo (Tr. 1456-57).

207. Many industry members believe that parent companies have an incentive to promote their own brands in company-owned bottlers (Tr. 873, 1336-37, 2174-76) and there is some evidence that this has occurred or might occur (Tr. 241-43; CX 56-Z-176; CX 227-F; CX 262-B; CX 294-B; CX 350-J; RX 353-F).

3. The Vigor Of Competition In The Industry

208. Many witnesses in this proceeding agreed that price and other forms of competition in the soft drink business were intense in 1986, that competition had increased in the decade prior to 1986, and that competition increased from 1986 to 1990 (Tr. 111, 246, 292-93, 387-88, 546-47, 692, 711, 768-69, 947-50, 1059-60, 1064-65, 1125, 1206-09, 1249, 1340-41, 1369-70, 1383, 1396, 1559-60, 1700, 1810, 1872-73, 1918-19, 1966-67, 2086-87, 2132-34, 2199, 2313-14, 2387-88, 2416, 2488, 3048-49, 3077, 3109, 3130-31, 3141, 3172-73, 3218, 3268-69, 3390, 3550, 3691, 3956, 4001, 4010, 4113, 4194-95, 4205; RX 631-Z-35).

209. Driven by Coca-Cola and PepsiCo, price competition is fierce and increasing (Tr. 111, 246, 294, 546-47, 769,945-50, 1060, 1125, 1206-08, 1340-41, 1559-60, 1918-19, 2087, 2132-34, 2387, 2416, 2488, 3048-51, 3077, 3109, 3173, 3218, 3390, 3691, 4113, 4194-95, 4205; RX 199-Z-6-Z-7; RX 471-P-Q; RX 631-Z-29-Z-30, Z-35, Z-40-Z-41) particularly at the wholesale level (Tr. 111-12, 387-88, 546-47, 652-53, 880, 950-51, 956, 1249-50, 3129, 3141-42). Price competition at the concentrate level is not as intense (F. 33).

210. The net revenue for Coca-Cola concentrate dropped 37% in real terms from 1976 to 1986 (RX 62-A; CX 798-F-G) and price increases by other concentrate producers during the past five years failed to keep pace with inflation (Tr. 1560, 2488, 2495; RX 630-I). Wholesale fountain syrup prices have also declined in real terms (RX 61-A; RX 590-C, G-H; RX 646-Z-25; CX 296-Z-24-26; CX 297-B; CX 798-E-F). Prices have declined dramatically at the retail level as well (Tr. 111, 171, 294, 628, 711, 879, 958-59, 961 (*in camera*), 1060, 1126, 1485, 1492-93, 1560, 1810-11, 1967-68, 2087, 2132-33, 2300, 2388, 3049, 3110, 3177, 3217, 3269, 3343-44, 3999-4000; RX 236-D; RX 630; RX 639-Z-46-47; RX 646-Z-26-27).

211. According to A.C. Nielsen, on a national basis the average retail price per case for all soft drinks (adjusted for inflation) declined 33% between 1975 and 1988. From 1975 to 1985, the decline was 24.4% (RX 83-A; CX 798-"O"-P; *see also* CX 108-B). Similarly, MRCA Diary Panel data show that average retail prices (adjusted for inflation) declined nation-wide by 19.5% between 1978 and 1985 (RX 584-Z-21). Nielsen data also show that average retail prices (adjusted for inflation) for all products of each of the major companies declined substantially in the years prior to the proposed acquisition. From 1978 to 1985, Coca-Cola prices declined 14.6%, PepsiCo prices dropped 15.9% and 7-Up prices fell 16.8% (RX 81-A; CX 798-N). During the same period, average retail prices for Dr Pepper products declined 11.1%. *(Id.)*.

212. The overall decline in average retail prices for the products of Coca-Cola, PepsiCo, Dr Pepper and Seven Up has continued in the years following the abandonment of the proposed transaction. By 1988, the average retail price for Coca-Cola products on an inflation-adjusted basis, had dropped 24.9% from 1978 levels; PepsiCo products' retail prices had fallen 25.6%; and 7-Up retail prices had declined 26.2%. From 1978 to 1988, the decline in inflation-adjusted retail prices for, Dr Pepper products was 23.5% (RX 81-A; CX 798-N; *see also* CX 802-A, G; CX 803-J).

213. Most packaged soft drinks are sold to consumers at a discount (Tr. 80-82, 467-68, 609, 629-30, 710, 958, 1065, 1106-07, 1263, 1560, 1618-19, 3049, 3178, 3355, 4000; RX 631-Z-32, Z-137; RX 646-Z-27-28), and ad feature activity for all carbonated soft drinks increased [ ] from 1982 to 1985 (RX 92-B; CX 798-RS; *see also* CX 108-B); from 1982 to 1987 ad feature activity increased by [ ] (RX 92-B; CX 798-R-S).

214. Many new carbonated soft drinks have been introduced in the past ten years (Tr. 1136, 1195, 1968-73, 3234-35, 4187-89; RX 199-Z-7; RX 589-Z-27-33). During this period, Coca-Cola introduced diet Coke (Tr. 211-12), Coca-Cola classic, cherry Coca-Cola (RX 5-Z-45), regular and diet Minute Maid soft drinks, diet cherry Coca-Cola, reformulated versions of Tab and Fresca (RX 584-Z-24-25), caffeine free Coca-Cola, Tab, and nutrasweet versions of diet Coke and diet Sprite (Tr. 211-12, 215, 246; RX 584-Z-24-25; RX 644-Z-22-23).

215. In the past ten years, PepsiCo has introduced Pepsi Free, Slice and diet Slice, regular and diet Mandarin orange Slice, Apple Slice, Cherry Cola Slice, cherry Pepsi, and Mug root beer (Tr. 1552; RX 630-Z-142, Z-147).

216. Other soft drink firms have introduced new products in the past several years: Royal Crown (Tr. 270, 1657-58); Seven Up (Tr. 3063-64); A&W (Tr.2069-70); Cadbury Schweppes (Tr. 1915); New Era (Tr. 3417-18).

217. Competition in the industry also occurs in packaging (Tr. 466, 475-76, 479-80, 687, 1685-86, 2135; RX 29-D; RX 469-S; CX 348-L; CX 350-E; CX 439-A), and industry members compete aggressively to achieve maximum availability of their product in all possible outlets (Tr. 251-52, 563, 565-66, 613, 763, 773, 1200-02, 3058-59, 3276-78, 3688, 3700-01, 4011, 4106; RX 638-Z-97).

218. The retail grocery trade is extremely competitive (Tr. 3336; RX 193-B; RX 220-A), and space in a chain store's advertising supplement is limited; chains must decide which products in general, and which soft drink brands in particular, will best suit their own competitive purposes (Tr. 287, 740-41, 1585-86, 3723, 3725-29, 3748-49, 3753-54; RX 193-B; RX 220-A; RX 227-K-L).

219. Soft drink firms at the concentrate level, or the bottler level, or both, continuously compete for feature advertisements in chain supermarket newspaper ads (Tr. 609, 655-60, 788-93, 974-75, 1228, 1511-13, 1564, 1682, 1856-57, 2077-79, 3061, 3178, 3240-41, 3590, 3951; RX 562; RX 569; RX 592-610; CX 780).

220. Media expenditures for advertising reflect the increasing competition among soft drink firms. Total media spending by soft drink companies increased from $269.9 million in 1979 to $451.6 million in 1984, an increase of 67.3% (RX 584-Z-31). Measured in Gross Rating Points ("GRPs"), television advertising for all soft drinks increased modestly from 84,159 GRPs in 1981 to 84,477

GRPs in 1985, but Coca-Cola's GRPs during this period increased 42.0%, from 23,316 GRPs to 33,101 GRPs (RX 584-Z-31-Z-32). Within the same time, PepsiCo's GRPs increased 27.5%, from 20,309 GRPs to 25,902 GRPS. (*Id.*).

4. Sales Breakdown By Channel Of Distribution

221. Coca-Cola estimates the sales breakdown of total soft drink sales, by channel of distribution, as follows:

1. Bottle/Can
   Take Home
   Vending
   Manual
   Total Bottle/Can
2. Cup/Fountain
   Total Cup/Fountain

(Source: CX 27-G (1988)).

5. National Concentration Resulting From Proposed Acquisition - All Channels

a. *Tier 1 HHIs*

222. Had the proposed acquisition by Coca-Cola of Dr Pepper taken place, tier 1 concentration and concentration increases, as measured by the Herfindahl-Hirschmann Index ("HHI") would have been for the year 1986:

Pre-acquisition	HHI:	3128.5
Post-acquisition	HHI:	3572.2
HHI increase:		443.7

(CX 784-A).

b. *All Concentrate HHIs*

223. Had the proposed acquisition by respondent of Dr Pepper Company taken place, concentration and concentration increases, as measured by the HHI for all concentrate would have been for the year 1986:

Pre-acquisition HHI: 2565.6
Post-acquisition HHI: 2929.2
HHI increase: 363.6

(CX 784-A).

6. National Concentration Resulting From Proposed Acquisition Plus PepsiCo's Proposed Acquisition Of Seven Up - All Channels

a. *Tier 1 HHIs*

224. Had the proposed acquisitions by (a) Coca-Cola of Dr Pepper and (b) PepsiCo of Seven Up taken place, tier 1 concentration and concentration increases, as measured by the HHI would have been for the year 1986:

Pre-acquisition HHI - 3128.5
Post-acquisition HHI - 3986.5
HHI increase - 858.0

(CX 784-B).

b. *All Concentrate HHIs*

225. Had the proposed acquisition by (a) Coca-Cola of Dr Pepper and (b) PepsiCo, Inc. of Seven Up taken place, concentration and concentration increases, as measured by the HHI would have been for the year 1986:

Pre-acquisition HHI - 2565.6
Post-acquisition HHI - 3242.1
HHI increase - 676.6

(CX 784-B).

226. For the calendar years 1983 through 1988, market shares of the leading firms in the carbonated soft drink industry, as a percentage of sales of all carbonated soft drinks were as follows:

Share of all concentrate market by firm - 1983-1988

year	4-firm	Coke	Pepsi	Dr P	7 Up	RC	C-S	A&W
1983	78.4%	36.4	28.5	6.4	7.1	3.6	0.6	0.9
1984	78.5	37.8	29.2	4.7	6.8	3.1	0.6	0.9
1985	79.7	38.9	30.1	4.8	5.9	3.1	0.5	0.8
1986	79.7	39.6	30.4	4.6	5.1	3.3	2.5	0.7
1987								
1988								

(NOTE: Dr Pepper and Seven Up merged in late 1986. Computations assume single firm for 1987 and 1988. For 1983, Dr Pepper share includes Canada Dry.)

(Source: CX 781-A-B).

227. Coca-Cola's estimates of the industry's concentration, done in 1986, are virtually identical to the estimates computed by complaint counsel.

Coca-Cola's February - 1986 estimates		4-firm
Coke	38.3	78.2%
Pepsi	29.3	
Dr Pepper	4.5	
Seven Up	6.1	
RJ Reynolds	5.0	
Royal Crown	3.4	
All other	13.4	

(Source: CX 86-N).

7. Shares Of Warehouse-Delivered And Private Label Products

228. For 1986, the following are the shares of total concentrate sales of firms whose carbonated soft drinks are warehouse-delivered or private label:

Share of Warehouse/Private Label Firms - 1986

year 1986:	National share
Shasta	1.1
Faygo	0.6
C&C Cola	0.2
Winn Dixie	0.2
Safeway	0.2
Kroger	0.2
Cotton Club	0.1
A&P	0.0

(Source: CX 781-B. Shasta market share derived from company supplied data; all others are Maxwell share estimates.)

229. The following is a comparison of the Nielsen share with the overall share for Shasta, for the period 1983 through 1988:

Comparison of Nielsen share and overall share:
For Shasta

year	overall share	Nielsen share	Nielsen overstatement
1983	1.1	2.0	82%
1984	0.9	1.8	100%
1985	0.8	1.6	100%
1986	1.1	1.5	36%
1987		1.3	
1988		1.2	

(Source: CX 781-A-B; CX 798-Z-56).

230. The following is a comparison of the aggregate Nielsen share with the aggregate overall share for private label brands, for the period 1983 through 1988.

Aggregate Private Label Estimates

year	Nielsen share	Nielsen overstatement	est overall
1983		82%	
1984		100%	
1985		100%	
1986		36%	
1987			
1988			

(Sources: CX 798-Z-51; CX 781-A-B; CX 798-Z-56).

8. National Concentration - Vending Channel

231. Only estimates are available for shares in the vending channel of distribution. Sales through vending flow from the bottle/can segments, and cannot be separately measured by concentrate companies (*see* CX 162-M).

232. Coca-Cola's estimates of the 1982 share in the vending channel, for all carbonated soft drinks, are:

Vending Channel-Respondent's 1982 Estimates

Coke	45%
Pepsi	32%
All other	23%

(CX 55-X, Y, Z-1).

233. PepsiCo estimates of the 1986 share in the vending channel, for all carbonated soft drinks, are:

Vending Channel - PepsiCo 1986 Estimates

Coke -
Pepsi -
All other -

The "all other" category includes RC, Dr Pepper And Seven Up. These three firms are estimated by PepsiCo, Inc. to have a combined share of 7% (RX 237-V, Z-25).

9. National Concentration - Fountain Channel

234. Coca-Cola's estimates of the shares in the fountain channel, for all carbonated soft drinks made in February 1986, are:

Fountain Channel - Respondent's 1986 Estimates

Coca-Cola USA	57.6%	4-firm
Pepsi USA	25.0	92.9%
Dr Pepper Co.	6.3	
Seven Up Co.	4.0	
Sunkist	0.7	
Royal Crown	0.7	

(CX 86-"O").

235. Coca-Cola's estimates of the share in the fountain channel for the period 1980 to 1987, for all carbonated soft drinks, are:

Fountain Channel - Respondent's Estimates

year	CCUSA	PCUSA	Dr P	7 Up	All other	2-firm
1980						
1981						
1962						
1983	56.3	23.5				79.8
1984	56.4	24.6				81.0
1985	57.5	25.1	6.3	4.0	7.1	82.6
1986	58.9	26.1				85.0
1987	59.4	27.8				87.2

(Source: CX 22-J; CX 26-U. "All other" derived. Dr Pepper 1985 figure taken from the February 1986 estimates contained in CX 86-"O").

236. Another version of Coca-Cola's estimates of the fountain channel shares for all carbonated soft drinks appears in the record at RX 584-Z-159:

Fountain Channel - Coca-Cola's Estimates

year	CCUSA	PCUSA	7UP	DR P	RC	4-firm
1976	59.1%	17.4%	8.3%	5.2%	1.2%	90.0%
1977	59.5	17.1	7.7	5.6	1.2	89.9
1978	59.0	18.1	7.2	5.7	1.3	90.0
1979	57.6	19.6	6.2	6.9	1.7	90.3
1980	57.5	20.6	5.6	5.7	1.5	89.4
1981	57.7	21.2	5.0	5.4	1.1	89.3
1982	56.9	21.9	4.7	5.3	1.0	88.8
1983	56.3	21.8	4.6	5.3	0.8	87.4
1984	55.5	24.2	4.5	5.3	0.7	89.5
1985	56.8	24.4	4.0	5.9	0.7	91.0

(Source: RX 584-Z-159).

237. Dr Pepper estimates the fountain channel shares, as a percentage of all carbonated soft drink sales, for 1989, as follows:

Fountain Channel - Dr Pepper Estimates - 1989

Coke	-	60%	4-firm
Pepsi	-	20%	94%
Dr Pepper	-	10%	
Seven Up	-	4%	

(Source: Tr. 2444-45).

238. Coca-Cola's 1990 estimates for the fountain channel shares, as a percentage of the sales of all carbonated soft drinks, for respondent and PepsiCo are:

Fountain Channel - Coca-Cola's Estimates - 1990

Coca-Cola	58 - 60%
PepsiCo	28%

(Source: Tr. 3078-79).

10. National Concentration - Nielsen Channel

239. A.C. Nielsen Company ("Nielsen") market research data ("Nielsen data") report the share of sales of brands of packaged, finished carbonated soft drinks made by the retail trade monitored by Nielsen in the areas being audited by Nielsen ("Nielsen audit areas") for concentrate companies that license their brands of carbonated soft drinks or sell carbonated soft drinks (CX 798-A). In some cases, Nielsen data also report the share of sales, in the aggregate, for

companies with controlled brands of carbonated soft drinks. Nielsen share data are computed on the basis of a universe consisting of the aggregate of all packaged, carbonated soft drink brands sold by the retail trade monitored by Nielsen in the particular Nielsen audit area (CX 798-A).

240. The volume distribution of carbonated soft drinks in stores measured by Nielsen is as follows:

Supermarkets over $2 million in sales	77.2%
Independents under $2 million in sales	14.9%
Chains under $2 million in sales	7.9%

(Source: CX 27-L).

241. The following table reflects the average annual share of total packaged carbonated soft drinks sold in retail outlets in the United States accounted for by packaged carbonated soft drinks for the firms listed. The data, measured by A.C. Nielsen Company, reflect sales in the take-home channel only (CX 798-A, Z-57).

National Nielsen Shares

	firms					concentration	
year	Coke	Pepsi	7 Up	Dr P	RC	4-firm	2-firm
1956							
1957							
1958							
1959							
1960							
1961							
1962							
1963							
1964							
1965							
1966							
1967							
1968							
1969							
1970							
1971							
1972							
1973							
1974							
1975							
1976							
1977							
1978							
1979							
1980							
1981							
1982							
1983							
1984							
1985							
1986							
1987							
1988							

(NOTE: Dr Pepper figures exclude brands sold under the Canada Dry label.)

(Source: CX 798-Q, Z-57. *See* CX 169-B).

242. Nielsen shares understate the shares of firms like Coca-Cola and Dr Pepper that have significant sales in the take-home and cold drink channels of distribution (Tr. 1463-64). This is because Coca-Cola and Dr Pepper are each significant in the cold drink channel. PepsiCo's share in Nielsen slightly overstates its actual share, because it is not as significant in the cold drink channel as Coke and Dr Pepper relative to their take-home shares.

Nielsen Share v. Actual Share

Respondent	Actual	Nielsen	Understatement
1983	36.4%		
1984	37.8		
1985	38.9		
1986	39.6		
1987			
1988			

Dr Pepper	Actual	Nielsen	Understatement
1983			
1984	4.7%		
1985	4.8		
1986	4.6		
1987			
1988			

PepsiCo	Actual	Nielsen	Overstatement
1983	28.5%		
1984	29.2		
1985	30.1		
1986	30.4		
1987			
1988			

(Source: CX 798-Z-57; CX 781-A-B. *See* CX 58-Z-39).

K. *Entry Conditions*

1. Concentrate Production

243. Soft drink concentrate and the ingredients to make it are available from "flavor houses," *i.e.*, companies that specialize in flavoring and producing concentrate (Tr. 128, 458, 1420, 3371-72, 3378, 3383-85). Dozens of flavor houses can formulate and manufacture concentrates, syrups and flavor extracts for carbonated soft drinks on a contract basis (Tr. 449-50, 3303-06, 3373-74, 3397-98,

3439-40, 3469-71, 3533; CX 177-Z-44-Z-47) and soft drink firms can develop their own concentrate (Tr. 1420, 4071).

244. Several soft drink firms rely on flavor houses for concentrate: Frank's (Tr. 3303-05); Sunkist (General Cinema) (Tr. 128-29, 907, 1927-28); Snapple (Tr. 3532); Sundance (Tr. 3397-98); Jolt Cola (Tr. 3470-71); Original New York Seltzer (Tr. 3439-41); Soho (Tr. 4081-82); Royal Island (Westinghouse Beverage) (Tr. 889).

245. Using flavor houses to develop and manufacture concentrate requires no capital investment (Tr. 3445, 3531-32, 3470-71).

246. Supermarket chains can obtain concentrate for their private label brands from contract packers such as Shasta (Tr. 3168), or Iowa Beverage Manufacturers (Tr. 1783-84, 1818-19, 1854) or flavor houses (Tr. 3068-69, 3388-90, 3469-70).

247. Existing concentrate firms can also provide concentrate to other firms: Dr Pepper/Seven Up (Tr. 1928-29, 1930, 3068), Barq's, Shasta, and Cheerwine (Tr. 481, 2015, 3167).

248. Production and packaging of concentrate is neither difficult nor capital intensive (Tr. 123, 445, 1821). Barq's paid $800,000 to purchase and renovate its concentrate manufacturing and warehouse facility (Tr. 443, 481). In 1986, Original New York Seltzer, with sales of 8,472,041 cases, purchased a 46% interest in a concentrate manufacturing facility for several hundred thousand dollars (Tr. 3445-47), and the capital cost for a new concentrate plant designed to produce 1,000,000 gallons of concentrate annually was about $1.2 million in 1986 (CX 177-Z-87-Z-95).

249. There is excess capacity to manufacture concentrate, and production can be, and often is, performed on a contract basis (Tr. 394-95, 481, 1783-84, 1847-49, 2076-77, 2088-89, 3167, 3380, 3384, 3440, 3472-73; RX 631-Z-3-Z-4). Sundance, Original New York Seltzer, Snapple, Jolt, and Soho all obtained concentrate to enter into the soft drink business without any initial investment (Tr. 3397-98, 3440, 3445-46, 3469-71, 3530-31, 4082-83). Flavor houses also have the capacity to expand concentrate manufacture easily (Tr. 3376-78).

2. Fountain Syrup Production

250. Since fountain syrup is manufactured by adding water and sweetener to concentrate (Tr. 21-22), companies that make bottle/can concentrate can make concentrate for fountain syrup (Tr. 3084).

251. A facility in New Jersey produces fountain syrup for Dr Pepper Company on a contract basis (RX 588-K, R), and Coca-Cola uses a bottler in St. Paul, Minnesota to manufacture fountain syrup on a contract basis (CX 194-Q). The best selling orange fountain soft drink in 1986 was McDonald's private label orange (CX 177-Z-39). Today, its fountain syrup is manufactured by Quaker Oats. In the past, McDonald's used private label flavor houses (Tr. 3083).

252. Packaging of fountain syrup is not expensive. In 1982, Coca-Cola introduced bag-in-the-box or "BIB," a plastic bag housed in a corrugated box (CX 174-E). A large scale 4,000,000 gallon BIB line in 1986 would cost only approximately $100,000 (CX 177-Z-103).

3. Bottled And Canned Soft Drink Production

253. Many franchised bottlers, contract packers, packaging cooperatives, and breweries across the nation are involved in contract packing either as packers, customers or both (Tr. 40-41, 126-27, 551, 810-11, 938-41, 1058-59, 1087, 1133, 1280, 1983-84; RX 448-A-Q; RX 489-B-D; RX 525-A-C; RX 611-E; RX 631-X; RX 642-Z-120-Z-121).

254. Bottles and cans are frequently shipped several hundred miles (Tr. 125, 551, 811, 939-41, 1849, 1854, 3104-05, 3402-03, 3416-17, 3442-45, 3448-49, 3534-35, 4093-94; RX 645-Z-19): Iowa Beverage, Canfield's contract packing company, ships its product as far as 500 miles (Tr. 1849). In fact, after Canfield's diet chocolate fudge soft drink was praised in a national newspaper and retailers nationwide clamored for it, Canfield shipped it from Chicago to as far away as Texas, Florida and Washington State (Tr. 1804-05, 1824, 1826-27).

255. Significant excess packaging capacity exists in the industry (Tr. 896, 1133-34, 3332; RX 236-G; RX 638-Z-77) and new entrants have taken advantage of this fact by relying on contract canners (Tr. 2089, 3473-74, 3476-78, 3534-35, 4086-94; RX 467-C-D; RX 489-A-B).

256. Breweries are also available to manufacture soft drinks (Tr. 551, 3400-01, 4085-87; RX 467-C-D; RX 509-C).

4. Distribution

257. The major concentrate firms do not use warehouse distribution to deliver their mainstream products to bottlers (Tr. 277-78, 1523-24, 1662-65, 2057, 2061-65, 2143, 2245, 2370).

258. Mr. Bart Brodkin, who store-door delivers for Seven Up and Royal Crown, explained the advantages and disadvantages of direct-store-door v. warehouse delivery:

> A. Probably the two shouldn't even be considered in the same discussion. There is really no comparability. Direct-store-door is without doubt a far more superior method of distribution. As a bottler, the only reason to be in warehouse distribution is the potential for some level of incremental earnings because there are clear-cut efficiencies and weaknesses in products moving through that system as compared to the direct-store-door.
>
> Q. What are the benefits of having, as far as the products are concerned, of having it moved through a direct-store-door system?
>
> A. Soft drinks are clearly a major impulse purchase. The area of total availability is a critical aspect of the success of any soft drink trademark. Via direct-store-door distribution in the major supermarket category we have the opportunity to meet anywhere from three to five times a week with our major customers. We are delivering product to those customers directly to their individual stores anywhere from three to five times a week, and we are in the store merchandising both the shelf and the displays up to seven days a week, sometimes as many as twice per day, and that is just the food store sector of the business.
>
> Warehouse delivery traditionally only can compete in that sector that I have just mentioned because it is only the supermarket chains that have their own systems in place that can take product from a central warehouse and deliver to their own individual stores

(Tr. 833).

259. One of the drawbacks of warehouse distribution is that it does not give access to the vending and fountain channels (Tr. 435, 834, 1187, 1663, 1959, 2063, 3185, 3187, 3190, 3759; RX 352-Z-50).

260. Firms using warehouse distribution in retail chains face problems which do not exist when direct-store-door delivery is used. These include: difficulty in selling a full product line (Tr. 1666); disinclination of food brokers who are associated with warehouse delivery to promote brands (Tr. 28, 434, 505, 842, 1671, 1905, 2064, 2065); problems with in-store promotions (Tr. 65, 836, 1671, 2064-65); and, difficulty in responding to in-store price promotions of direct-store-door delivered brands (Tr. 389).

261. Firms that use both methods of delivery recognize the inadequacy of warehouse delivery. Double Cola used warehouse delivery in Memphis a few years ago but found it unsatisfactory (Tr.

63-66). Barq's tried using food brokers in warehouse distribution but lost so much money that it abandoned this method of distribution (Tr. 434-35). Cheerwine would consider using warehouse distribution only as a last resort (Tr. 1959-60).

262. Beer distributors offer no adequate substitute for direct-store-door delivery. In many states, legal restrictions prevent beer distributors from marketing soft drinks effectively (Tr. 61-62, 432-33, 1414-15, 1668, 1794-95, 4056; RX 522-Q). In some states they are prohibited from selling beer on credit and they are unfamiliar with the credit practices in the soft drink industry (Tr. 59, 433, 1414-15). Beer distributors do not usually service accounts that sell carbonated soft drinks (Tr. 58, 3513-14), do not have ready access to vending and fountain accounts (Tr. 61-62, 433, 756, 1794, 1895, 3459, 3506, 3513; RX 352-Z-48) and lack knowledge of promotional practices used in the carbonated soft drink industry (Tr. 1415-16). Finally, beer distributors tend to focus their efforts on beer, which is more profitable than soft drinks (Tr. 589, 1012, 1414).

263. Several brewers who have developed carbonated soft drinks have had unsatisfactory experiences with, or have not used beer distributors to deliver their products: Anheuser-Busch (Tr. 1410-11, 1413); Stroh (Tr. 3403-04, 3408); and Miller (Tr. 27677).

264. Even though Mr. Alan Miller of Original New York Seltzer uses beer distributors, he recognizes their limitations:

> Q. Is there any limitation on the outlets that these beer distributors can get to if they are properly motivated, properly compensated and properly educated as to the importance of widespread availability?
>
> A. Should they have a limitation? No, they should not have a limitation.
>
> Q. Is your major problem in dealing with these people motivating them and teaching them the widespread availability is the key to success?
>
> A. It is more than that. It is more than that. It is not just motivation. It is economics also. For a beer wholesaler to drop off a few cases of New York Seltzer at a place where they are not dropping off beer is expensive for them. If you want to use Coca-Cola as an example, when Coca-Cola makes a delivery, it is delivering enough Coca-Cola to pay for that delivery; whereas if a beer wholesaler were to stop at a mom-and-pop store with fives cases of New York Seltzer and no beer, then it wouldn't pay for the delivery.
>
> So, on the one hand we tell the beer wholesalers that it is still in their best interest to make the small stops, to help promote the product. The availability is very important, but the battle is they don't want to make those small stops. So it is a problem right now. It is a limitation. They don't want to make those small stops.

(Tr. 3453-54). *See also* Tr. 3459 with respect to fountain accounts other small firms which use or have used them have found beer distributors not wholly satisfactory (Tr. 57-63, 433, 1961, 1792-93, 3506, 3513-14, 3555-56).

265. The larger firms that use beer distributors do not rely on them for the bulk of their distribution (Tr. 753, 1101, 1644, 1668-71, 2067).

266. As is evident from the above discussion, distribution is the key ingredient in obtaining entry into the carbonated soft drink industry. As Mr. Shanks, president of Double Cola, testified:

> This is not a production ball game. It is a marketing and distribution-driven industry. And that is where the difficulty lies. It is easy to get one's product produced, but it is very difficult to get it distributed.

(Tr. 29-30, 54).

5. Flavor Restrictions

267. Concentrate companies prohibit their bottlers through "flavor restrictions" from producing and distributing the same flavor on behalf of other concentrate companies (Tr. 41). These flavor restrictions are often enforced (F. 46). Consequently, concentrate firms that rely on Coca-Cola and PepsiCo bottlers to carry their products could not introduce a new cola product through these systems (Tr. 1396-97, 1898, 2073), and a concentrate firm needs a cola if it is to have a meaningful chance at effective entry (Tr. 286-87, 850, 1095-96). For example, when Procter & Gamble considered options for entry into soft drinks, it realized that if it was going to be a serious contender of Coca-Cola and PepsiCo it must introduce a cola:

> An important focus of new product development is inventing a cola which reflects consumers, desire for a product which has a lighter taste and is less syrupy sweet -- the key negatives consumers associate with current colas. While we can succeed without a cola, long-term, we want to compete in the cola subcategory to maximize our volume. Coke/Pepsi offer virtually identical products, so there is an opportunity for segmentation. A smaller (2 - 5% share brand), targeted entry could compete for a specific cola occasion.

(RX 409-E).

268. Philip Morris also recognized the importance of a cola:

Since the acquisition of The Seven Up Company, our assignment objective has been to build the Soft Drink business of the Company into a viable third competitor with COKE and PEPSI.

Without a viable cola brand it is doubtful that most 'third bottlers,' in a market can build long-term volume and profits against COKE and PEPSI competitive pressure.

(RX 353-B).

269. Small concentrate firms have experienced difficulties because of flavor restrictions. Double Cola cannot get distribution through bottlers that market a cola (Tr. 41-48). Barq's, a seller of root beer concentrate, has had increasing difficulty in getting distribution through Coca-Cola and PepsiCo bottlers (Tr. 425-28), and Monarch is unable to market a cola under its own label because it cannot distribute it through bottlers that carry Coke or Pepsi (Tr. 1376, 1396-97). It has also had problems in expanding its distribution of Dad's Root Beer because of flavor restrictions (Tr. 1383-84). Mr. Greenberg of Snapple testified:

Q. You mentioned that you don't use any soft drink bottlers. Is that simply because they're unavailable?

A. They're unavailable, correct. We'd love to use them.

Q. Is that because of flavor restriction clauses?

A. It's because they have competitive flavors in their contracts with whoever they've got contracts with.

(Tr. 3556).

270. Even the major concentrate firms have been blocked by flavor restrictions: Coca-Cola (Tr. 199-200; CX 56-Z-210; CX 154-K; CX 176-Z-5-6; CX 226-X; CX 262-B; CX 279-B); PepsiCo. (Tr. 198-99; CX 176-Z-5; CX 224-H; CX 281-N; CX 774; CX 775); Philip Morris-Seven Up (Tr. 237, 1113-22, 1248, 2182-83, 2198; RX 353-Q); Dr Pepper (prior to 1962, when Coca-Cola and PepsiCo bottlers were prohibited from carrying Dr Pepper) (Tr. 2242-43; CX 60) (*see also* Tr. 2441, 2460-61; CX 489-A; CX 490-C); Cadbury Schweppes (Tr. 1896-99); A&W (Tr. 2073-75).

271. After Philip Morris acquired Seven Up and introduced Like Cola, Coca-Cola saw the cola flavor restrictions that it faced as seriously hampering Philip Morris' entry effort:

The 7-Up bottler system, because of cola exclusive cross franchising with Pepsi and RC bottlers, restricts availability for Like. Seven Up has tried to alter this

restriction by breaking into the RC system. . . . The legal effort was lost. . . . But this was only the first attempt. Seven Up says it will continue "legal tilts" to find a way to distribute Like where cola exclusives now limit it. . . . If "legal tilts" fail to achieve national distribution for Like, Seven Up will try the merger option. . . . RC is the obvious solution. . . . If Seven Up succeeds in setting aside or changing the principal of one cola brand per bottler, it will be a major threat to us.

(CX 220-B; CX 228-B).

6. Entry Using Existing Bottlers

272. Both Procter & Gamble and Philip Morris realized the difficulty of entering the carbonated soft drink industry through existing bottlers:

Procter & Gamble's Crush Products Strategic Plan concluded:
Nothing else we do will succeed unless we are able to design, field and expand a distribution system for our products. The bottler system is not a viable alternative. Bottlers singlemindedly focus on their flagship brands, which limits the success of other items and blocks the introduction of new products. If we do not develop a new distribution system, we will be forced out of the soft drink category.

(RX 409-C).

. . . The growing domination of Coke and Pepsi supports our decision to exit the bottler system and pursue the development of an alternate delivery system.

(RX 409-F).

Philip Morris saw no opportunity by way of the bottler system for new flavor entry, or expansion:
7UP's third bottler network, lacks the brand lineup, organizational capability, and financial strength to compete with COKE and PEPSI. This not only limits our ability to develop into a viable third major franchise force in the industry, it also endangers the long-term success/life of 7UP and Diet 7UP.

(RX 353-E, K).
The 7UP Company's ability to launch major, profitable new brands through 7Up bottlers is questionable. . . .

(Tr. 289; Rx 353-Q).

273. Starting a bottler system of their own is not a realistic alternative for firms that do not have adequate distribution (Tr. 67, 1119-20, 1678, 1796-97).

7. Retail Advertising

274. Most carbonated soft drinks are sold at a discount in retail stores and are often advertised at that price (Tr. 82, 467, 880, 915, 609, 1684) on "best food day," the day on which shoppers patronize stores in the greatest number (Tr. 744, 4355; CX 813-A-Z-44).

275. Carbonated soft drinks are often a primary feature in ads which retail stores place in newspapers in the same location each week. The soft drinks are usually placed in special displays in a prominent location when they are advertised (Tr. 86, 741, 916-18, 4346-48). The best display location is at the end of an aisle (Tr. 4005, 4052).

276. Access to the feature cycle is often obtained through the use of calendar marketing agreements, or CMAs. A CMA is an agreement by a retail store to advertise and promote soft drinks throughout a designated period on specific weeks (Tr. 3631-32, 3721, 3724). The store decides the period of time and the type of feature activity provided (Tr. 3241, 3742; RX 641-Z-87-88).

277. While CMAs may be available to any bottler which seeks one (Tr. 3723, 3746), they must be paid for, and bottlers which can better afford such payments, which may consist of cash, discounts at the time of delivery or volume rebates (Tr. 84, 287-88, 3721), have greater access to the feature cycle.

278. For example, a Seven Up memorandum discussed the cost of access to a feature cycle and concluded:

> The cost to us on a cents-per-case basis of a flat ad payment (*i.e.*, $10m/feature is prohibitive against the number of cases we sell (8% share) vs. Coke and Pepsi lineup (30% share)

(RX 353-H).

279. Coca-Cola negotiates CMAs directly with supermarket chains on behalf of several bottlers when the supermarkets have stores in the territories of more than one bottler. Because these CRAs commit the stores to feature Coca-Cola products, they necessarily limit other bottlers, availability to the feature cycle (CX 187-C-D; CX 188-A, F; CX 189-D; CX 190-A, F, L; CX 191-A; CX 192-C, H, L, "O", R).

280. Nothing prevents smaller bottlers from entering into CMAs with chain retailers but Coca-Cola's and PepsiCo's share of market means that their bottler's products will enjoy more feature activity

(Tr. 84, 287, 601, 697, 746, 1096, 1674, 1683). For example, Mr. Malinsky, of Waidbaum's, a regional New York chain retailer, testified:

Q. And Coca-Cola is typically being featured how many time a year in your stores, Mr. Malinsky?
A. I would say a Coca-Cola brand is probably on feature every other week.
Q. And what about Pepsi-Cola products?
A. Every other week.
Q. So you have either Coca-Cola or Pepsi-Cola product on feature?
A. As a main feature.
Q. Every time as a main feature?
A. Yes.

(Tr. 4036-37).

281. Waldbaum's features the products of the Coke bottler and the Pepsi bottler as often as it does because the Coke and Pepsi bottlers pay for it:

Q. And in 1989 on a monthly basis, did Waldbaum's, in fact, have some sort of incentive program with almost every carbonated soft drink supplier?
A. Pretty much so, yes.
Q. And did you control the volumes and the shelf space and the display space of the feature ads at Waldbaum's in response to those incentive programs?
A. We controlled them with the vendor based on the program we prepared.
Q. In general, were you getting more incentive, more allowances from the Coca-Cola bottler and the Pepsi-Cola bottler than the other brands?
A. Absolutely.

(Tr. 4007-08).

282. Concentrate firms whose bottlers do not enjoy large market shares may have difficulty obtaining access to feature ads (Double Cola, Tr. 82, 86); (Mid Continent, Tr. 1119-20); (Seven Up):

The grocery trade will generally not run 7Up/Diet 7Up solo features (8% share) when they have the choice of running Coke and Pepsi full line features.

(RX 353-H).

283. Even concentrate firms whose products are distributed by Coke bottlers do not necessarily have their products in the feature cycle. The president of Barq's, whose products are bottled in substantial degree by Coke bottlers, explained:

Q. You mentioned that Barq's is distributed by Coke bottlers. When such bottlers run a feature, is Barq's included on those features?

A. Usually not.

Q. How does that affect Barq's sales?

A. Dramatically. If you are not part of, in this day and age, if you are not part of the promotional activity, most of the sales in supermarkets are now sold on promotion, so if you are not part of that promotion, you are basically not participating in the sales.

(Tr. 467).

8. Introduction Of New Products

284. Coca-Cola and PepsiCo have, on occasion, introduced imitative products to deter new entry (Tr. 289, 372, 1395-97, 1899-1900; CX 700-B).

285. After Philip Morris introduced Like (caffeine-free cola) in April 1982 (CX 57-H) both Coca-Cola and PepsiCo introduced caffeine-free colas (Tr. 215; CX 57-I).

286. The president of Cadbury-Schweppes testified that Like cola failed. PepsiCo and Coca-Cola:

quickly developed their own caffeine-free versions and had those to offer consumers in the event the caffeine-free caught on, which apparently it did. But they also met them at the price line, and wherever Like was rolling, was being introduced and Philip Morris was enticing with lower prices to get people to buy the product, Coke and Pepsi met them at the price at the lower price level.

(Tr. 1899-1900).

287. Coca-Cola's and PepsiCo's response to Like was not ignored by industry members and consultants. Mr. Armstrong, of Monarch, testified:

Q. Have you ever considered distributing a cola?

A. No.

Q. Why not?

A. Well, I like my life. It is too difficult. It is really not practical. You can ask Philip Morris. It is a very, very competitive market.

Q. If you decided to distribute a cola, would you be able to distribute it through your Pepsi, and Coke bottlers?

A. No.

(Tr. 1395-97).

288. An internal Seven Up document stated:

COKE and PEPSI WILL TAKE WHATEVER ACTIONS ARE NECESSARY TO LIMIT OUR SUCCESS -- No question that each of them are out to beat the other -- and grow by picking up volume from independent franchise companies like 7UP. Also, they will react aggressively to any new competitor. Three examples are:

A. Response to LIKE introduction... (CX 742-D; RX 353-F.)
While it is always possible, introduction of a new product/flavor with an unknown trademark seems unlikely to be successful - advertising just does not play a big enough role in the industry vs. price to motivate our bottlers and the consumer to buy and try the brand long-term. This, coupled with the demonstrated capability of COKE and PEPSI to respond to successful new product concepts, raises serious all new product launch risks.

(RX 353-Z-4; CX 742) (*See also* RX 555).

9. Other Factors

289. Other factors which may have an effect on entry are the significant amount of money which is required for successful entry (Tr. 283-84; CX 57-J), the time it takes to achieve national distribution even for a company such as Coca-Cola (Tr. 210-12) or Dr Pepper (Tr. 2244, 2463; CX 108-S), the importance of trademark equity (Tr. 231-32, 2070; CX 227-E; CX 721-K), and the limited opportunities in the vending and fountain segments (Tr. 69-72, 474, 1395, 1696; CX 312-N, "O"; RX 237-T-U).

10. Unsuccessful Entry Attempts

290. In addition to the facts discussed above, the history of entry attempts into the carbonated soft drink industry establishes that, despite the relative ease of obtaining a toehold in the market, entry of a concentrate company or companies with an eventual market share equal to that of Dr Pepper would be unlikely.

a. *Philip Morris/7 Up - Like*

291. Philip Morris introduced Like Cola, a caffeine-free cola, in 1982. The only other caffeine-free, sugared cola at that time was Royal Crown's RC 100 (Tr. 270).

292. Like was introduced through Philip Morris' Seven Up Bottlers which did not have a cola, and did well in test marketing and initial rollouts (Tr. 271).

293. Shortly after Like's introduction, Coca-Cola and PepsiCo introduced caffeine-free colas (Tr. 281, 1117-18; CX 228-C).

294. Although it spent a great deal of money to introduce Like (Tr. 282, 825-26, 1114-15), Philip Morris achieved distribution only to 50% of the United States' population (Tr. 272, 2143). Like failed (Tr. 281).

295. Philip Morris blamed the failure of Like Cola in large measure on the rapid response to its introduction by PepsiCo and respondent:

> Like Cola when it was introduced had a unique selling proposition and that was that it was a caffeine-free cola. When Coke and Pepsi launched caffeine-free products of their own, they, in essence, usurped the unique selling proposition of Like and with the strong acceptance of their trademarks eliminated a need for the consumer to go from Coke and Pepsi to a new trademark. . . .

(Tr. 281).

b. *Procter & Gamble - Crush*

296. Procter & Gamble ("P&G") acquired Crush International in late 1982 to attempt a serious and substantial entry into the carbonated soft drink industry (Tr. 324-26, 327, 340, 348). Crush International had the Crush and Hires Root Beer brands. In 1983 Crush's Nielsen share was approximately 1.3% (Tr. 342, CX 781-A). P&G was experienced in warehouse delivery through its grocery and food business (Tr. 333-34). In July 1983, it acquired a Coca-Cola bottler to learn about direct-store-door delivery (Tr. 326, 327).

297. Flavor exclusivity clauses prevented P&G from introducing a new flavor which it had developed through the bottler system (Tr. 377-78) and its attempt to obtain distribution for Crush and Hires through vending machines in Alabama failed, as did its attempts to achieve effective distribution outside metropolitan areas even when they were served by a warehouse (Tr. 354-55). P&G's success in obtaining distribution in Los Angeles was limited (Tr. 360).

298. Crush and Hires declined under P&G's warehouse delivery system. Crush International's share of all carbonated soft drinks was 1.4% in 1986; it dropped to [ ] in 1988 (CX 781-B). Procter &

Gamble never realized a profit on its Crush and Hires business (Tr. 368, 1888) and it sold Crush and Hires to Cadbury Schweppes, Inc., in 1989 (Tr. 1888).

c. *General Cinema/R.J. Reynolds/ Cadbury Schweppes - Sunkist*

299. Sunkist orange soda was created in 1978 by General Cinema Corporation, a large PepsiCo bottler. Sunkist was sold to R.J. Reynolds in October 1984 which sold it to Cadbury Schweppes in 1986 (Tr. 1886; CX 177-H).

300. General Cinema established distribution through either Coke or Pepsi bottlers, depending on which was strongest in a particular market. After Coca-Cola and PepsiCo introduced orange sodas, many of their bottlers dropped Sunkist (Tr. 1902).

301. Sunkist was forced into much weaker bottlers, and, in some cases, was unable to find a replacement bottler (Tr. 1902). In those cases where Sunkist could not find another bottler, it often used distributors which were unable to obtain access to vending and all retail outlets. The results were, in the words of Stephen Wilson, former president of Cadbury Schweppes, "disastrous." In Houston, Sunkist lost 98% of its sales in the first year after moving from Lupton Coke to a distributor (Tr. 1905).

302. When Cadbury Schweppes acquired Sunkist, it offered coexistence with Minute Maid and Slice to arrest the decline of Sunkist (Tr. 1906). As of November, 1989, Cadbury had been unable to refranchise any of the bottlers that had dropped Sunkist (Tr. 1874, 1878-79, 1904). Sunkist's share of the carbonated soft drink market was 1% for the period 1986-1988. Its case sales declined during this period (CX 781-B, R-T).

d. *General Cinema - Trim*

303. General Cinema Corporation developed and introduced Trim, a carbonated soft drink that was test marketed in 1984 (CX 177-H). Trim, a product which was intended to be perceived by consumers as a cola, was distributed through food brokers and warehouse distributors because General Cinema concluded that it could not be distributed through the bottling system. Trim failed (CX 230-A, I; CX 232-D, F, G; Respondent's Answers and Objections to

Complaint Counsel's Request For Admissions - Second Set, filed January 18, 1990).

e. *Quaker Oats - Refresh*

304. In 1987, Quaker Oats considered entering the carbonated soft drink industry with a 25% juice-added product called Refresh (CX 707-A-E).

305. Refresh was introduced into three test markets in 1987 and was distributed to retail outlets using food brokers (CX 717-N; CX 718-B). Consumers expected Refresh to taste like a soft drink and were disappointed by its taste (CX 718-A, C). Only 160,100 cases of Refresh were sold between July 1, 1987 and June 30, 1988. It was taken off the market in 1988 (RX 508-B).

f. *Orangina*

306. Orangina USA is a subsidiary of Pernod Ricard, S.A. of Paris, France, and sells "Orangina," an orange juice based natural carbonated soft drink (Tr. 506; CX 177-P). Orangina had been the leading soft drink in France, and is the number two selling soft drink behind Coca-Cola in that country (Tr. 496).

307. To increase sales and become a national brand with national distribution, Orangina undertook a repositioning of the product in 1986 (Tr. 497, 509-10). The company changed its packaging, lowered its price and attempted to have the product distributed through direct-store-door soft drink bottlers whenever possible (Tr. 510-11).

308. Orangina's goal was to obtain a 1% share of market, but, because of limited distribution, the attempt was unsuccessful (Tr. 535). Orangina could not gain access to bottlers (Tr. 524-27). Mr. O'Donnell, former president of Orangina, testified that: "We had a great product and couldn't get it to the system" (Tr. 528).

g. *Anheuser-Busch - Zeltzer-Seltzer*

309. Anheuser-Busch, the largest brewer in the United States, has 960 beer distributors (Tr. 1418). In 1985, it formed the Beverage Group to provide diversification for Anheuser-Busch and its beer distributors (Tr. 1406, 1419).

310. In January 1987, Anheuser-Busch introduced Zeltzer-Seltzer, a flavored soda, and at one time, used 400 to 500 beer distributors to sell it (Tr. 1406, 1409-10, 1422).

311. Because beer distributors were less interested in nonbeer products, lacked expertise in their marketing, and were hampered, in some cases, by state regulation, Anheuser-Busch encountered serious problems with the distribution of Zeltzer-Seltzer (Tr. 1413-17). The Beverage Group was disbanded and Zeltzer-Seltzer was sold in July, 1988 (Tr. 1410, 1413).

h. *Dr Pepper - Seven Up Gold*

312. In the late 1970's, Dr Pepper Company initiated Project Y in an effort to develop a clear, non-colored, cola (Tr. 2459). Initial tests of Product Y generated high levels of consumer acceptance (CX 495-B). Product Y was designed to avoid the appearance of being a cola or a lemon-lime so that it could be distributed through the bottler system (CX 493-C).

313. By May 1984, Dr Pepper put Project Y on indefinite hold. One of the reasons was: "The cost of entry into the soft drink industry is extremely high" (CX 497-A-B; *see also* Tr. 2460).

314. After the 1986 merger of Seven Up Company and Dr Pepper Company, Project Y in 1988 was introduced by Seven Up Company under the name Seven Up Gold (Tr. 2459-61). In March 1988, Ira Herbert, president of Coca-Cola USA, described the introduction of Seven Up Gold as:

> a calculated move on the part of 7Up to introduce a cola into the market without running into the problems of contract exclusivity on the part of both Coca-Cola and Pepsi bottlers. . . . I suggest that we keep a very close watch on what happens in the market. I would also see if there is any way we can convince our bottlers, who are also 7Up bottlers, that this product could have a negative impact on Coca-Cola. [Emphasis in original.]

(CX 229-A).

315. Seven Up Gold failed and it is being phased out (Tr. 2164, 2461).

i. *Dr Pepper*

316. In its early days, many bottlers believed that brand Dr Pepper was more like a cola than the unique drink the company said it was. Coca-Cola and PepsiCo took the position that it was a cola and told their bottlers that they could not accept a franchise for its production. This made it more difficult to obtain distribution through Coca-Cola and PepsiCo bottlers (Tr. 2234).

317. Because it could not obtain distribution through bottlers, Dr Pepper "in desperation," tried warehouse distribution (Tr. 2234). This attempt failed (Tr. 2235-38) and Mr. Clements, former president of Dr Pepper, learned that:

> if you want to develop a consumer franchise and if you want to develop an equity in that market, that we could not do it anyway except the store-door delivery.

(Tr. 2238).

318. In the 1960's, two things happened that enabled Dr Pepper Company to expand its distribution through bottlers with direct-store-door delivery. The first involved a proposed FDA rule defining a cola that would include brand Dr Pepper. Although the president and the chairman of Dr Pepper Company thought it was a good idea, Mr. Clements disagreed and got the FDA to define cola so that Dr Pepper would be excluded from the definition (Tr. 2239-41).

319. Second, in a trademark infringement case brought by PepsiCo against Dr Pepper, Dr Pepper countered and claimed that PepsiCo was keeping brand Dr Pepper out of its distribution system. The court ruled that Dr Pepper was not a cola (Tr. 2242-43; CX 365-A-L; CX 366-A-H).

320. The suit opened up PepsiCo and Coca-Cola bottlers to Dr Pepper and its sales rose immediately (Tr. 2243).

11. Recent New Entrants

321. Coca-Cola points to the recent entry of several companies or products within the carbonated soft drink business as proof of ease of entry. These include Sunkist, American Natural Beverage, Stroh, Original New York Seltzer, cherry Seven Up, cherry Coke, Fresca, and A&W cream soda (RPF 550-58).

322. Some of the new products probably achieved success because they capitalized on existing brand identification (*e.g.*, cherry Coca-Cola), but the difficulty of significant new entry is evident. A 1987 Dr Pepper document noted that:

of the 130 soft drink brands introduced since 1970, only one has achieved the market share of Dr Pepper. . . . The other 129 soft drink brands . . . represent an average market share of only 0.3% each.

(RX 112-L).

12. Expert Testimony

323. The above description of entry barriers and entry attempts in the carbonated soft drink industry amply supports Dr. Hilke's testimony that barriers, lags and risk factors in the carbonated soft drink industry are high. The most significant is probably franchise exclusivity which bars new tier 1 entrants from use of the bottler system to distribute their products. Fast follower responses (use of imitative products to bar entry) and first mover advantages (the difficulty of convincing consumers to switch from existing to new products), also deter entry (Tr. 2800-02).

324. Other deterrents include sunk (nonrecoverable) costs for advertising and distribution and long development time for a new product which may exceed two years (Tr. 2602-03). Dr. Hilke pointed to record evidence which documents these entry barriers: Dr Pepper's unsuccessful attempt to obtain distribution through warehouses and its eventual success only after it obtained distribution through bottlers (Tr. 2604), P&G's failure to develop the Crush and Hires brands, and Philip Morris' failure with Like (Tr. 2605-06).

325. Dr. Hilke concluded:

So that the whole combination of these things makes it seem unlikely that someone outside through entry would be able to constrain the type of price increase we are talking about within the relevant time period.

Q. What about the possibility that incumbent firms may be able to expand and thereby defeat a price increase?

A. That is certainly a possibility. What we are trying to come to grips with here is a collusive group that includes the firms in tier 1. So firms may have an incentive to cheat but that is something which has to be dealt with under the

collusive agreement. So incumbent firms in the product market definition and in our entry concern are already part of the collusive group to begin with.

Q. Should we be concerned about the ability of firms not in the relevant product market such as those in tiers 2 and tiers 3 to expand and possibly defeat a price increase of the firms in tier 1?

A. Well, that's a fundamental part of the inquiry that we are involved in. And the evidence, both in testimony and in the documents, indicates that if the tier 1 firms collectively increase their prices by 5 percent on concentrate, that it is unlikely that price increase would prove to be unprofitable within the relevant time period. That's basically the nature of the inquiry and the test which should be applied.

(Tr. 2607-08).

L. *Likely Effects Of The Proposed Transaction*

1. Elimination Of Dr Pepper As An Independent Competitor

326. The proposed transaction, if consummated, would have eliminated Dr Pepper as a significant competitor of Coca-Cola.

2. Collusion

a. *Coca-Cola's And PepsiCo's Interest In Obtaining Higher Prices For Their Concentrate*

327. Concentrate firms generally announce their proposed price increases at about the same time each year, usually in the first quarter. The trade press, including Jesse Meyer's Green Sheets, is a source of information concerning concentrate prices, and industry members read and rely on the Green Sheets (Tr. 91, 461-62, 2121-22, 2466-68; CX 241-A-B; CX 242-A-B; RX 639-Z-6).

328. Coca-Cola and PepsiCo are particularly concerned about each other's probable responses to price changes initiated by one of them, and signal each other about prices, as revealed in a Coca-Cola memorandum concerning 1987 price plans:

John Farrell and I discussed your request that we consider CCUSA options and contingency plans should PCUSA not follow a pricing move. Attached are three possible scenarios and some suggested ways to respond.

In going through the exercise, I came to the following conclusions:

1. There is a real risk that PCUSA won't follow ALL of our proposed increase. A number of factors make this more likely than in the past:

[Emphasis in original.]

. . . new management in key positions in PC Foodservice add a degree of uncertainty.

In short, at this time a PCUSA decision may be as heavily influenced by emotional factors as by financial considerations.

(CX 105-A).

329. In another memorandum discussing a Coca-Cola price increase, the question was asked:

Do you think P.C. will follow? P.C. has the same cost pressures. Historically, they always have.

(CX 107-A).

The same question was posed regarding Dr Pepper's reaction (CX 107-B).

330. In another memorandum, Mr. Carew discussed PepsiCo's increasing deals and feature advertising in the take-home segment and suggested that Coca-Cola: [ ](CX 108-T).

331. Coca-Cola executives have analyzed public statements by their PepsiCo counterparts in an attempt to divine its future price policy. For example, after PepsiCo's chairman made a speech, a Coca-Cola memorandum reported:

Calloway states that for soft drinks, pricing will not be a major factor in 1988 since the competition [referring to Coca-Cola] does not seem to want a price increase.

(CX 106-A).

332. In 1989, Coca-Cola suggested that it would like to see carbonated soft drink prices increase. Ira Herbert, president of Coca-Cola USA, in October 1989, told an interviewer in a statement published in Beverage World that:

I think relief is coming. I don't know how significant that relief will be, but the fact of the matter is that margins have eroded and at some point in time these margins are going to have to be restored.

(CX 110-D).

333. Two months later, in December 1989, at an industrywide meeting attended by Mr. Herbert (RX 941-A-E), Roger Enrico of PepsiCo argued that the "mindless pursuit of market share" was not a profitable strategy, and stated that PepsiCo preferred to focus on profits:

Slower overall industry growth, mixed results on the profit line -- all of this in an industry that doubled itself in the '50s and '60s. Redoubled in the '70s. And re-redoubled in the '80s.

It's enough to make us all wonder. And it raises an 8-billion case question: What's thrown the industry off the strong trendline we've climbed for so many years?

* * * *

Success in our business hinges on a delicate managerial balancing act -- a fine orchestrating of marketing, sales, pricing, purchasing, distribution, manufacturing and merchandising to deliver both volume and profit growth. What's thrown our engine of success out of tune is that something has finally moved the pendulum far enough to knock the delicate managerial balance out of whack.

And that 'something' -- the thing that caused the imbalance -- is the mindless pursuit of market share to the exclusion of all else. . . .

But when you filter the whole of business reality solely through the mesh of market share, you don't get a true picture of the balance that drives success, the balance between volume, share and profit.

(RX 391-Z-45-Z-46).

334. Mr. Dyson, president of CCE, testified:

Q. Have you personally announced to the public that CCE is interested in increasing the prices of its carbonated soft drink products? And have you made such an announcement in 1989?

A. Yes. I think the specific statement that I would have made will have said that we will seek a greater price realization and more specifically said that we would seek appropriate price increases on a market by market basis, where we believed it was reasonable to do so.

(Tr. 2385).

b. *Concentrate Firms' Use Of Bottlers To Obtain Information About Competitive Activities*

335. Concentrate companies conduct regular periodic reviews of their bottlers' activities, including sales performance, promotional activity, potential new product introductions, marketing support, and other competitive activities (Tr. 74, 1538-43, 1916-18, 2077-78, 2126-29, 2483).

336. During these discussions, bottlers may learn of their franchisors, anticipated marketing, advertising, and promotional programs (Tr. 75-79, 476, 748, 845-47, 1092, 1605-06, 1917, 2484; CX 428-A) and franchisors may obtain information from their bottlers about the marketing, advertising, and promotional programs

of other concentrate companies (Tr. 76-79, 749-51, 844-48, 1092-93, 1918, 2084, 2127-28, 2484-86; CX 520-A).

337. Coca-Cola negotiates CMA's on behalf of its bottlers in areas where supermarkets have outlet locations covering the territories of more than one bottler. Where Coca-Cola bottlers carry brands of other concentrate firms, Coca-Cola negotiates CMA's for the brands of its competitors, such as Dr Pepper. In the process, it may obtain access to sensitive information about its competitors' market activities (CX 189-B; CX 190-N, S).

338. When P&G acquired Coca-Cola Bottling Company of the Mid-East, Coca-Cola sued to block the transaction. Mr. Currie of P&G testified that:

> the real philosophical objection Coke had was they objected to a competitor which had the potential of being a significant competitor having what in their view was undue access to sensitive information about their business, promotion plans, techniques, technologies and that was certainly a significant part of their objection.

(Tr. 330).

339. The case was settled when Procter & Gamble agreed to respect the confidentiality of Coca-Cola's business by building a "Chinese Wall" around the bottler's officers, prohibiting them from having contact or exchange of documents with Crush management. Mr. Currie explained:

> It was kind of interesting because at that time the president of Crush would go around actually calling on bottlers and making major selling presentations, but he wasn't allowed to call on me. It was handy.
>
> * * *
>
> Q. Do you have an understanding as to why the Chinese wall, I believe you called it, had to be erected?
>
> A. Well, I mean, Coke certainly had these concerns about the protection of reasonable trade secrets and sensitive information regarding their business. I think Procter & Gamble viewed that as not an unreasonable concern. We would have had a similar concern in a similar situation. And it was frankly at that point our intention to be a very good Coca-Cola bottler.

(Tr. 330-31).

340. Since CCE officials and PepsiCo's COBO officials meet with officials of other firms whose concentrate they bottle, the possibility of the transfer of competitive information to Coca-Cola and PepsiCo is real. CCE and COBO bottle concentrate for Barq's,

Dr Pepper, A&W, Cadbury Schweppes, Seven Up, and others (Tr. 1538-42, 1891, 1916, 2190-93, 2385-87).

341. COBO bottles Dr Pepper products, and Mr. Craig Weatherup, president of PepsiCo, has met with True Knowles and other Dr Pepper officials (Tr. 1435-36, 1539, 2191-92). While PepsiCo and Coca-Cola officials have not up to now discussed business with each other (Tr. 1542-43), if the proposed acquisition had been consummated, PepsiCo -- through COBO as a Dr Pepper bottler -- would have common business interests with Coca-Cola, for, although Mr. Weatherup testified that if the acquisition had been consummated PepsiCo and Coca-Cola officials would not deal with each other regarding Dr Pepper, he conceded:

> Q. Well, if the Coca-Cola Company owns the Dr Pepper Company, would not people in the organization of the Dr Pepper Company be connected with the Coca-Cola Company?
>
> A. Certainly, yes, they would.
>
> Q. Would the Coca-Cola Company's acquisition of Dr Pepper have led to performance agreements between the Coca-Cola Company and PepsiCo in connection with Pepsi Company's bottling of the Dr Pepper brands?
>
> A. I would assume so.

(Tr. 1543-44).

c. *Constraints On Concentrate And Finished Soft Drink Price Increases*

342. Competition in the carbonated soft drink industry is intense (F. 208-220) and is due, in part, to the power which retailers exercise over bottlers. For example, a 1985 Coca-Cola review of the Cincinnati area noted that the "major chains seem to be in the driver's seat in promoting soft drinks -- that is, they have succeeded in getting the major soft drink suppliers to discount vigorously. . . ." (RX 27-C). [ ] (RX 471-Q). Moreover, testimony in this case revealed that retailers decide which soft drinks are sold in their stores (Tr. 654, 2147, 3573), and which brands are featured (Tr. 161, 655, 846, 2146 (*in camera*); RX 198-A; RX 645-Z-65) and displayed (Tr. 161, 654-55, 2146 (*in camera*), 3573; RX 276-A; RX 528-A; RX 645-Z-19). Retailers also decide how much shelf space to allocate to different brands (Tr. 161, 855, 3572-73; RX 642-Z-167; RX 645-Z-27), and what price to charge for carbonated soft drinks (Tr. 161, 2147, 3573).

343. The power of retailers over their suppliers is recognized in the industry. Mr. Edwin Epstein, president of Retailing Insights, Inc., a chain retailing consultant, testified as to retailing in general;

> The power of the retailer today is very substantial. It's one of the issues that is talked about all the time. The transfer of power from the manufacturer to the retailer is a subject on which I've spoke many times

(Tr. 3574). (*See also* Tr. 1103, 1166; RX 276-A).

344. An internal PepsiCo report discussing the trade environment in 1989 observed: [ ] (RX 220-A).

345. Retailers can discipline carbonated soft drink suppliers by cutting back on, or giving less desirable shelf space to, a bottler's products (Tr. 3575-78, 4007-10; RX 331-A), or by refusing to feature a bottler's product (RX 163-Y; RX 331-A). Dominick's, the second largest supermarket chain in Chicago, locked Coca-Cola out of all feature activity for no less than five consecutive weeks (RX 161-M), and a supermarket chain in Pittsburgh refused to feature PepsiCo products due to noncompetitive pricing (RX 190-C). Major chains in the Indianapolis area terminated ads for PepsiCo products in response to announced price increases (RX 207-A, "O"). A New Mexico convenience store chain shut PepsiCo out of its 1988 ad schedule because of non-competitive offers by the chain's Pepsi supplier (RX 263-A). Winn-Dixie has refused to run any Pepsi ads in the state of Kentucky because a local bottler sought to impose a deposit requirement for the cases it used (RX 294-B). A supermarket chain in New Mexico dropped an ad for Coca-Cola products and substituted one for PepsiCo products due to service problems with the local Coca-Cola bottler (RX 311-A). And, Farm Fresh, a major supermarket chain in the Norfolk, Virginia, area showed its dissatisfaction with the promotional pricing activities of its Coca-Cola and Pepsi suppliers by canceling all Coca-Cola and Pepsi feature ads early in 1987 (RX 198-A).

346. Concentrate suppliers want good relations with their bottlers and prefer to avoid action which their bottlers oppose (RX 236-D; RX 630-Z-7-8). PepsiCo has, on occasion, rescinded or delayed concentrate price increases to assuage the concern of its bottlers (RX 235, pp 69-71, 74-75; RX 630-Z-5-6). Generally, however, concentrate firms increase their prices without regard to specific bottler complaints (RX 630-Z-6; RX 643-Z-15; CX 753-K-L).

d. *Expert Testimony*

347. Dr. Lynk testified that, based upon a series of regression analyses of industry concentration (as measured by the HHI) and output (as measured by the Maxwell Reports) for the period 1966 to 1988, output of finished soft drinks has increased as concentration at the concentrate level of the soft drink industry has increased (Tr. 2770-71, 2772-73; RX 576-A, B, C). As estimated by Maxwell, total soft drink output increased from 3302 million cases in 1966 to 7072 million cases in 1985 -- an increase of 114.2% in 20 years (RX 578). During the same period, per capita consumption increased from 19.1 gallons per year to 40.8 gallons -- an increase of 113.6% (RX 55-B; CX 798-D). From 1976 to 1985 alone, total output increased 44.6% (RX 78; RX 646-Z-28). In the same period, Coca-Cola's output increased 54.5%. *(Id.)* By 1988, total output had grown 53.1% over 1976 levels, and 126.8% over production levels in 1966. *(Id.)*

348. Dr. Lynk also concluded that there is no statistically significant correlation between increasing concentration in the industry as a whole (as measured by the HHI), and the price of finished carbonated soft drinks (as recorded by A.C. Nielsen) (Tr. 2765-69, 2771-73; RX 576-A, B, C). Similarly, increased concentration at the local level has not adversely affected prices for finished soft drinks (Tr. 2789-2803; RX 582-A). Although complaint counsel have run regression analyses of the factors affecting price and output in the carbonated soft drink industry, they did not offer them into the record (Tr. 4316-18). Dr. Hilke's conclusion from the charts he did present was that something fairly complex was going on in the carbonated soft drink industry that could not be explained solely by reference to HHI indices (Tr. 4258-60).

349. Finally, Dr. Lynk argued that the profitability of the leading soft drink firms, as reflected in their stock values, implies that the chances of collusion or the exercise of market power (which, if defined as the ability to raise prices or reduce output, Coca-Cola does not enjoy in any event (Tr. 2756-57, 2759-60, 2774-82, 2859-60)) have not improved over time with the increase in concentration in the soft drink industry (Tr. 2773-82; RX 583-C-H).

350. Despite Dr. Lynk's skepticism about the link between concentration and the prices or output of bottled soft drinks, Dr. Hilke testified that opportunities for collusion exist in the carbonated soft drink industry because a hypothetical leader of a collusive group

would look to information in the trade press such as price surveys, which he believes are used by concentrate companies to set their prices.

351. The proposed acquisition would also, Dr. Hilke believes, set up linkages for the exchange or monitoring of price information that did not previously exist, including a linkage between the two largest incumbent firms, PepsiCo and Coca-Cola (Tr. 2605-10).

3. The Third Bottler Network

352. The use of the phrase "third bottler network," whose existence Coca-Cola denies (RPF 373-82), is used in this decision as a convenient reference to bottlers which do not bottle Coca-Cola or PepsiCo soft drinks. It does not imply that a formal network of such bottlers exists.

353. The number of local bottling operations either owned by Coke or Pepsi, or in which they have a substantial equity interest, has been increasing:

a. For PepsiCo approximately 50% of the sales of all its products are bottled and distributed by the COBO operation. PepsiCo's acquisition of its bottlers has been increasing over the years (Tr. 1454).

b. Approximately 43% of the sales of Coca-Cola's bottle/can products are through CCE, and there are additional sales through other bottlers in which it has an ownership interest. The proportion of the United States population served by a Coke bottler in which Coca-Cola USA has an equity interest is now well over 50% (Tr. 2338-40).

354. Since the 1960's it has been Dr Pepper's policy to award franchises to the best bottler in a particular area (Tr. 151-52, 606, 2172, 2249-50; RX 117-A). As a result of this policy, 40% of Dr Pepper is bottled by Coca-Cola bottlers, 40% by PepsiCo bottlers, 10% by RC bottlers and 10% by other bottlers (Tr. 2178-79).

355. The Dr Pepper bottling contract provides that upon a change in ownership of only 10% of a bottling company, the franchisor (Dr Pepper) must approve the reissuance of the franchise license to the new ownership group (Tr. 2186-87, 2380; CX 199-C). Ownership changes at the bottler level of 10% or greater may occur for a variety of reasons. Even a simple refinancing triggers the transfer approval clause, because it is considered an ownership change (Tr. 1141,

1145-46, 1160). Coca-Cola considers Dr Pepper's ownership change clause as equivalent to a right of first refusal (Tr. 2380).

356. Coca-Cola recognizes that bottlers continually change hands and has a policy of "channeling" new and aggressive bottlers into its system (CX 294-D-E). Consolidation in the Coke system through transfers of ownership were:

year	franchises	population	gallons
1980	13	5.2%	6.6%
1981	30	21.5%	15.4
1982	44	21.2	16.5
1983	36	7.1	7.1
1984	18	3.3	3.4

(CX 16-S).

357. The 10% clause in the Dr Pepper bottler contract, which Coca-Cola would have inherited, would have allowed Coca-Cola to refuse the Dr Pepper franchise to a non-Coke bottler (Tr. 2186, 2380; CX 199-C). Coca-Cola planning documents reveal that it was considering integrating Dr Pepper franchisees into its system, and estimated that if it did so, the percentage of Dr Pepper volume in the PepsiCo system would be reduced by 5%, and that the "All other" [third bottler network] volume would be reduced from 32% to 26%. Coca-Cola's share would go from 38% to 45% (CX 81-F-H; CX 86-G, H; CX 87-Z-2-Z-23).

358. In the last 5 years, Dr Pepper has approved at least 20 Dr Pepper franchisees that were neither Coke nor Pepsi bottlers; these included independent Dr Pepper bottlers, with Dr Pepper as their lead brand, and Royal Crown bottlers (Tr. 2181, 2183-85).

359. Mr. Trebilcock of Mid Continent testified that he could not imagine Coca-Cola, if it owned Dr Pepper, allowing the transfer of a Dr Pepper franchise to a competitor of CCE (Tr. 1145-46) and P&G, as a Coca-Cola bottler, anticipated that the proposed acquisition of Dr Pepper would mean that P&G might also receive a Dr Pepper franchise (Tr. 32).

360. Third network bottlers testified that if the proposed acquisition of Dr Pepper had been consummated and if Coca-Cola transferred Dr Pepper franchises from them to the Coca-Cola system, such a transfer would have affected their business adversely because of the importance of the Dr Pepper franchise:

a. Tom Tyler, president of Tyler Beverages, is a Dr Pepper bottler in Tyler, Texas who also carries 7Up, RC Cola, Big Red, A&W, Canada Dry, Sunkist and Squirt (Tr. 1174, 1209). Most of his sales are Dr Pepper and without that brand he would find it difficult to survive (Tr. 1180-81, 1192-93) because the market shares of Seven Up and Royal Crown would not make up the loss from Dr Pepper (Tr. 1192-93, 1226).

b. William Sutton, president of Seven Up Bottling Company of Topeka, Kansas, testified it would be very difficult to survive if he lost Dr Pepper because it accounts for one third of his company's business (Tr. 1240-41).

c. Jim Turner, chairman and president of Dr Pepper Bottling Company of Texas, has the Dr Pepper franchise in Dallas, Fort Worth, and Houston (Tr. 1278-80). He carries 12% of all Dr Pepper products, and when he was asked to suppose he did not have Dr Pepper, he testified: "I don't want to think about Dr Pepper not being there. . . ." (Tr. 1283, 1355).

M. *The Proposed Order*

1. Complaint Counsel's Proposed Order

361. Complaint counsel's proposed order includes the following provision:

It is ordered, That respondent The Coca-Cola Company, for a period of ten (10) years from the date this order becomes final, shall not acquire, directly or indirectly, without the prior approval of the Commission:

A. The whole or any part of the stock, share capital or equity interest of any company or firm:

1. Engaged in the manufacture and sale of branded concentrate or syrup;

2. Engaged in the franchising or licensing of any brand, name or trademark used in connection with the production, marketing or sale of branded concentrate, syrup or carbonated soft drinks; or

3. Holding an exclusive franchise or license of any branded concentrate company other than a company or firm that holds exclusive franchises or licenses solely of respondent.

B. Any franchise, license, brand, label, name or trademark associated with the production, sale or distribution of concentrate, syrup or carbonated soft drinks.

362. Complaint counsel seek this prior approval order even though the proposed acquisition was not consummated and even though the Commission's Bureau of Competition concluded in its Memorandum in Support of Complaint Counsel's Response to Respondent's Motion to Dismiss, p. 11 (April 21, 1987):

> A prior approval order is not appropriate in this matter and the reporting procedures already available under the Hart-Scott-Rodino Antitrust Improvements Act will provide the Commission with adequate notice of most potentially anticompetitive acquisitions proposed by respondent. * * * The goal of divestiture to a viable, independent competitor has effectively been accomplished through abandonment of the challenged acquisition of Dr Pepper and its subsequent sale to the investment group headed by Hicks & Haas. The adequacy of the Hart-Scott-Rodino reporting and waiting requirements, as well as recent developments in the soft drink and concentrate industries, render prior approval an unnecessary remedy.

The memorandum also stated with respect to vertical acquisitions:

> The imposition of a prior approval requirement would deter potential efficiency-enhancing acquisitions and is thus not in the public interest.

Id. at 10.

363. Complaint counsel's proposed order does not contain a *de minimis* clause. Staff Bulletin 88-01, which establishes policy on prior approval clauses in Section 7 orders states that a prior approval clause in a proposed order may contain a *de minimis* exception (CX 574-A).

2. The Effects of Complaint Counsel's Proposed Order

364. PepsiCo, Coca-Cola's leading competitor, has a history of growth by acquisition. At various times, PepsiCo has acquired Mountain Dew, Mug Root Beer and Flavette, attempted to acquire Seven Up (and succeeded with respect to Seven Up outside the United States) and considered acquiring Sunkist, Canada Dry, Cadbury Schweppes, Crush International, Dr Pepper and Vernors (Tr. 1589-90; RX 630-Z-70-Z-71, Z-78-Z-79; Z-150). Mr. Frederick Meils, formerly executive vice president of the Pepsi-Cola Company and currently executive vice president of Pepsi International, stated that PepsiCo intends to keep all of its options open with respect to future acquisitions of concentrate companies (RX 630-Z-76). Mr.

Weatherup, president of the PepsiCola Company, testified PepsiCo would be interested in acquiring Seven Up if the economics were right (Tr. 1465). Acquisitions of concentrate companies or bottlers may create efficiencies (F. 35). Requiring Coca-Cola to seek the Commission's prior approval of any future acquisitions of any concentrate company or bottler might impede Coca-Cola's capacity to compete effectively with PepsiCo and might embolden PepsiCo to aggressively seek other concentrate companies to exploit Coca-Cola's inability to respond.

365. When soft drink concentrate companies are sold, they are typically sold through a bid process. Thomas Pirko, who has been involved in many purchases and sales of concentrate businesses including among others the purchase of Hansens, the potential purchase of Snapple, and an attempted purchase of Crush and Hires (Tr. 4197-98), testified that these transactions "involved a company that was represented by an investment banker that has worked very hard to create an auction situation" (Tr. 4198-99), and he would recommend to any client looking to sell a concentrate company to use a bid or auction procedure because that would achieve the highest sales price (Tr. 4199).

366. When Dr Pepper was put up for sale, there was a "bidding process," and there were other bids submitted along with Coca-Cola's (Tr. 2222-23). Dr Pepper's owners hired Goldman Sachs to sell off Dr Pepper and develop offers for the company (Tr. 2223-24). Procter & Gamble hired Goldman Sachs to seek bids on Crush International (Tr. 1945).

367. Mr. Stephen R. Wilson, former president of Cadbury Schweppes, testified that the existence of a requirement to get prior approval for an acquisition from the Federal Trade Commission would make a seller "skittish" about a bid from a prospective purchaser burdened by such a requirement (Tr. 1946). In Mr. Wilson's opinion, had Cadbury Schweppes had to obtain prior approval to acquire Crush, Procter & Gamble would have discontinued its bid (*id.*). If Mr. Pirko received a bid that was subject to Commission "prior approval," Mr. Pirko testified: "[I] would run to my attorney, find out what that meant, since I'm not real certain.... I would ask him if it would interfere with our getting the highest price and getting it quickly and whether or not it really meant any complications. . . ." (Tr. 4200). If he were told that there was no guarantee

of Federal Trade Commission approval and that the average time to get approval was four or five months, Mr. Pirko replied:

> I would call up buyer number 2 and use buyer number l's price as a stocking [sic] horse, use it as a lead price and try to convince buyer number 2 of the fact that I've got a hot prospect who has evaluated the company at this price and you better take your shot now, but I would [eventually] go to the second buyer

(Tr. 4201).

368. Obtaining prior approval from the Commission to complete an acquisition covered by a consent decree might take three and a half months (Tr. 3764-65; RX 573-A-B, F-H).

369. Mr. Dyson testified that Coca-Cola needs to be free to make acquisitions of interests in concentrate companies to protect the integrity of its bottling system in the United States. It undertook the acquisition of Dr Pepper in part because Dr Pepper was important to the welfare of many Coca-Cola bottlers and Coca-Cola feared what might happen to those bottlers if Dr Pepper were acquired by undesirable purchasers who would harm the brand, and derivatively, the Coca-Cola bottlers (RX 638-Z-26-Z-28). For example, CCE was formed because two very large bottlers came up for sale and Coca-Cola felt compelled to purchase them to keep them from falling into the hands of an undesirable purchaser (Tr. 190-91, 2335; RX 638-Z-102-Z-105).

370. Between 1985 and 1990, at least 23 bottlers were acquired by concentrate manufacturers. The Commission challenged one, PepsiCo's acquisition of General Cinema's bottling operations (RX 629-I-Z-43).

371. After the Commission filed the administrative complaint in this proceeding, Hicks & Haas, which controlled A&W, led investment groups which acquired both Dr Pepper and Seven Up and subsequently merged Seven Up into Dr Pepper. The investment group which acquired Dr Pepper included Schweppes, which continued to hold an interest in the merged Dr Pepper/Seven Up Company. In addition, after the Commission filed the instant administrative complaint, Cadbury Schweppes acquired the carbonated soft drink business of R.J. Reynolds, (Canada Dry and Sunkist) and the carbonated soft drink business of Procter & Gamble (Crush, Hires, and Sundrop) and A&W acquired Squirt and Vernors. The Commission did not investigate any of these acquisitions beyond receiving the initial Hart-Scott-Rodino filings and the Commission

did not file any administrative complaint as to any of these acquisitions (Tr. 2071; RX 629-A-G).

3. The Commission's Treatment Of The Proposed PepsiCo-Seven Up Acquisition

372. On January 24, 1986, PepsiCo announced that it had reached an agreement in principle to acquire Seven Up from Philip Morris, Inc. Four days later each of these companies filed premerger notification and report forms in compliance with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("H-S-R") and the Commission initiated an investigation of the proposed acquisition (RX 572-A). At that point in time, PepsiCo and 7-Up had respective market shares of 26.9% and 5.3% as the Commission then viewed the market involved (RX 626-I).

373. On February 21, 1986, Coca-Cola announced that it had reached an agreement in principle with the shareholders of DP Holdings, Inc. to acquire all the outstanding capital stock of DP Holdings, an entity which then owned all the outstanding capital stock of Dr Pepper. Coca-Cola and DP Holdings then filed premerger notification and report forms as required by H-S-R on February 25, 1986, and February 26, 1986, respectively, and the Commission commenced an investigation of the proposed acquisition. The respective market shares then controlled by Coca-Cola and Dr Pepper were approximately 34.8% and 4.2% as the Commission then viewed the market involved (RX 626-I).

374. On June 20, 1986, the Commission authorized the Bureau of Competition to seek preliminary injunctive relief that would prevent the consummation of the proposed mergers and to file administrative complaints against Coca-Cola and PepsiCo (RX 572-D). On June 23, 1986, prior to the commencement of any of the actions authorized by the Commission, Philip Morris announced its decision to terminate the agreement that it had with PepsiCo to sell PepsiCo the Seven Up Company (RX 572-E; RX 630-Z-31-Z-32).

375. The following day the Commission filed suit against Coca-Cola in the United States District Court for the District of Columbia to preliminarily enjoin Coca-Cola from consummating its proposed acquisition of Dr Pepper pending the result of an administrative proceeding concerning the same (RX 572-E). The administrative complaint that is the subject of the present proceeding was subse-

quently issued on July 15, 1986 (RX 572-E). The Commission did not initiate any proceeding with respect to Pepsi's contemporaneous attempt to acquire the Seven Up Company (RX 572-E). On July 31, 1986, the District Court issued the injunction requested by the Commission. *FTC v. The Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987). Five days later the shareholders of DP Holdings announced that with Coca-Cola's consent they had elected to terminate their agreement to sell Coca-Cola's all of DP Holdings' outstanding capital stock (RX 572-E). Immediately thereafter, DP Holdings sold Dr Pepper to Hicks & Haas, an independent third party (RX 376-A). These developments eliminated any reasonable possibility that Coca-Cola would acquire Dr Pepper, but the Commission refused on August 9, 1988 to dismiss the administrative complaint pending against Coca-Cola. Order Denying Respondent's Motion for Dismissal of the Complaint, The Coca-Cola Co., Docket No. 9207 (Aug. 9, 1988).

376. Since 1981 the Commission has authorized the Bureau of Competition to seek preliminary injunctive relief enjoining the consummation of proposed acquisitions in 41 matters (RX 575-B). Administrative complaints, however, were ultimately issued in only 18 of these matters (RX 575-B). In each of the remaining 23 matters the contested transaction was abandoned prior to the commencement of the relevant preliminary injunction hearing and such hearing was never held (RX 575-B). Conversely, the Commission issued an administrative complaint against at least one party in each of the 8 matters where the contested transaction was not terminated until subsequent to the taking of testimony in the relevant preliminary injunction hearing. In the remaining ten matters where administrative complaints were issued, the transactions were not abandoned (RX 575-B, D).

III. CONCLUSIONS OF LAW

A. *The Relevant Product Market*

The parties agree that one relevant product market in this case is all concentrate used in the sale of all carbonated soft drinks. Coca-Cola disagrees with the narrower market proposed by complaint counsel -- branded concentrate used to produce branded carbonated soft drinks (F. 67), and complaint counsel dispute the much broader

market proposed by Coca-Cola -- the manufacture and sale of all potable liquids (F. 65).

There is some competitive interaction between carbonated soft drinks and other beverages, and it cannot be ignored, for there appears to be a generally shared industry perception that the long-term growth in per capita soft drink consumption has been at the expense of other beverages (F. 49).

Other indications of some interaction in Coca-Cola's broader proposed market is the occasional monitoring of other beverages by soft drink firms (F. 56-58) and the limited price sensitivity between soft drinks and other beverages (F. 59-63).

Despite these considerations, the all potables market is not one which can be looked to with any confidence in an analysis of the probable competitive consequences of the proposed acquisition, for despite the long term impact of carbonated soft drinks on other beverages, this record reveals that products which are not soft drinks have little impact on the day-to-day competitive activities of a firm like Coca-Cola which does not consider the prices of other beverages when it sets its concentrate prices or, when acting as a bottler, its finished product prices (F. 112, 122). Other concentrate firms and bottlers take the same approach to pricing (F. 115, 116, 119, 120, 128).

Dr. Lynk's testimony is consistent with my conclusion for, although he proposed an all potables market, he could not testify that particular products such as beer, coffee, and bottled water were in the same market as carbonated soft drinks (F. 66); in fact, consideration of the reasonable interchangeability of use or the cross-elasticity of demand between branded concentrate and other possible substitutes for it such as other beverages or unbranded concentrate, leads to the conclusion that complaint counsel's narrow market should be used to analyze the proposed acquisition.

The Department of Justice's Merger Guidelines, 4 CCH Trade Reg. Rep. paragraph 13,103 (June 14, 1984) ("DOJ Guidelines"), explain how cross-elasticity of demand, which "measures the sensitivity of the demand for one product to a small change in the price of a second product," Olin Corp., FTC Dkt. 9196, slip opinion at 4 (June 13, 1990), may be used to define a product market or markets:

> [T]he Department will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed a 'small but significant and non-transitory' increase in price.

If the price increase would cause so many buyers to shift to other products that a hypothetical monopolist would not find it profitable to impose such an increase in price, then the Department will add to the product group the product that is the next-best substitute for the merging firm's product and ask the same question again. This process will continue until a group of products is identified for which a hypothetical monopolist could profitably impose a 'small but significant and non-transitory' increase in price. The Department generally will consider the relevant product market to be the smallest group of products that satisfies this test.

DOJ Guidelines, Section 2.11.

Complaint counsel's proposed relevant product market consists of so-called "tier one" firms which sell branded carbonated soft drinks nationwide through direct-store-door delivery. The major firms in this tier include Coca-Cola, Dr Pepper, PepsiCo, Seven Up, Royal Crown, Cadbury Schweppes and A&W (F. 81-102). Other branded concentrated firms in this tier include those which sell their products regionally, including Double Cola, Barq's, Cheerwine, Big Red, Frank's and Canfield (F. 103).

Tier two firms are those, such as Shasta, which do not franchise their brands, but sell carbonated soft drinks through warehouse distribution (F. 104-06). Tier three firms include retail grocery chains that sell private label carbonated soft drinks under their own label or a control label (F. 107). "Boutique" firms, which do not clearly fit in any of these categories, produce "niche" products appealing to a limited population (F. 108).

If the producers of branded concentrate could collusively and profitably raise prices by a small but significant amount over an extended period of time it would tend to show that branded concentrate is a product market because:

If readily available alternatives [such as unbranded concentrate] were, in the aggregate sufficiently attractive to enough buyers, an attempt to raise prices would not prove profitable, and the tentatively identified product group would prove to be too narrow.

DOJ Guidelines, Section 2.11.

The "small but significant and nontransitory" price used in the DOJ Guidelines is 5% (F. 149).

The demand for branded concentrate is derived from the demand for finished carbonated soft drinks. Since the cost of concentrate represents approximately 10% of the grocery store promoted price of the finished product, a 5% concentrate price increase, if fully passed

on to the consumer, would result in a 0.5% price increase for the finished product (F. 150).

Several industry participants testified that retailers of branded carbonated soft drinks could profitably sustain a price increase much greater than 10% (which translates to 100% at the concentrate level) (F. 156). Coca-Cola complains that such anecdotal evidence does not constitute rigorous proof of the cross-price elasticity of demand between branded and unbranded concentrate or other beverages, but I find that it offers some insight into the price interaction of these products.

A more serious challenge to the cross-price elasticity test is posed by evidence that between 1984 and 1985, Coca-Cola increased its concentrate prices by [ ] while Dr Pepper increased its concentrate prices [ ] (F. 188-189), which, if one accepts the 5% test, tends to support the claim that Dr Pepper and Coca-Cola are not in the same relevant product market.

Complaint counsels explanation of why the 5% test should not apply to Dr Pepper's pricing is not wholly convincing (Reply to Respondent's Proposed Findings, p. 41), but the fact is that Dr Pepper and Coca-Cola are direct competitors (F. 187-202); indeed, Coca-Cola's claim that these soft drinks do not compete is inconsistent with its argument that beverages such as milk and coffee compete with soft drinks (RPF 39, 101).

Furthermore, failure to present direct evidence of cross-price elasticity is not a fatal defect, for the Commission and the Department of Justice recognize that circumstantial evidence of pricing relationships may be relied upon as a proxy for direct proof of cross-price elasticity. The DOJ Guidelines, Section 2.12, state that "Although direct evidence of the likely effect of a future price increase may sometimes be available, it usually will be necessary for the Department to infer the likely effect of a price increase. . . ." Inferences of product substitutability can be derived from:

[1] Evidence of buyers' perceptions that the products are or are not substitutes . . . .

[2] Differences in the price movements of the products or similarities in price movements over a period of years . . . .

[3] Similarities or differences between the products in customary usage, design, physical composition, and other technical characteristics; and

[4] Evidence of sellers' perceptions that the products are or are not substitutes . . . .

[*Id.*]

The Commission agrees that industry and consumer perceptions and experience should be considered in any product market analysis:

> [T]he existence of separate product markets may be evidenced by: the persistence of sizeable price disparities for equivalent amounts of different products; the presence of sufficiently distinctive characteristics which render a product suitable only for a specialized use; the preference of a number of purchasers who traditionally use only a particular kind of product for a distinct use; or the judgment of purchasers or sellers as to whether products are in fact competitive. In addition, where firms routinely study the business decisions of other firms, including their pricing decisions, such evidence may reflect a single product market.

Federal Trade Commission Statement Concerning Horizontal Mergers, 2 CCH Trade Reg. Rep. paragraph 13,200, at 20,905 (June 14, 1982) ("FTC Merger Statement"). *See also* Olin, at 5:

> The identification of a product market, however, does not necessarily hinge on numerical calculation and proof of demand elasticity, the search for which is often fruitless because of the difficulty of measuring elasticities.

Circumstantial, and convincing, evidence of the low cross-price elasticity of demand between branded concentrate and unbranded concentrate, and between branded concentrate and other beverages includes:

1. The persistent and varying price gap (up to 40%) between branded and unbranded products (F. 131-35). *See B.F. Goodrich Co.*, 110 FTC at 207, 290 (1988) ("persistent price differences" a "surrogate" for direct evidence of elasticity); *Grand Union Co.*, 102 FTC 812, 1041 (1983) (whether price disparity between products persists over time relevant to market definition); FTC Merger Statement at 20,905; DOJ Guidelines Section 2.12; *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

2. The judgment of purchasers and sellers that branded and unbranded carbonated soft drinks do not compete in any meaningful sense (F. 109-129). *See* FTC Merger Statement (the existence of separate product markets may be inferred from "the judgment of purchasers or sellers as to whether products are in fact competitive");

B.F. Goodrich Co., 110 FTC at 290 ("industry firm perceptions" are "surrogates" for direct evidence of elasticity); *Grand Union Co.*, 102 FTC at 1041 ("the extent to which consumers consider various categories of sellers . . . as substitutes").

The major industry players recognize the significant differences between branded product and unbranded and warehouse distributed products: Coca-Cola (F. 109-114); Cadbury Schweppes (F. 115); Dr Pepper (F. 116); PepsiCo (F. 117-118); Seven Up (F. 119). Less significant producers and bottlers share this view of industry competition (F. 120-129).

3. The perception of consumers that branded and unbranded soft drinks have different attributes (F. 143-146). *See Columbia Metal Culvert v. Kaiser Aluminum*, 579 F.2d 20, 30 (3rd. Cir.), *cert. denied*, 439 U.S. 876 (1978) ("perceptions . . . of consumers . . . are most salient in the determination of market boundaries.")

Coca-Cola's claim that unbranded product and other beverages compete with branded product is based on the argument; that, at some unspecified but extreme difference in price or if advertising ceased for an extended period of time (F. 136, 138, 140), consumers might switch from one product category to another, but this does not establish the existence of an all potables market. *Times Picayune Pub. Co. v. United States*, 345 U.S. 594, 612 n.31 (1953):

> For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small.

In *Pillsbury Co.*, 93 FTC 966 (1979), the Commission stated:

> Respondent argues that such broad price sensitivity between pizza and other foods exists. . . . As support, it cites the testimony of a grocer that when meat prices rose in 1973 and 1974, sales of meat went down and sales of frozen pizza rose correspondingly. We are not sure what the import of this information is since we do not understand Respondent to argue that "meat" and frozen prepared pizza are in the same market. In any event, this testimony tells us little since it does not specify the amount of increase in meat prices, or the extent of responding increases in pizza sales.

Id. at 1031, n.9.

Finally, Coca-Cola argues that since complaint counsel propose a branded concentrate market, they cannot rely on evidence relating

to the finished product (Reply Memorandum, pp. 26-27). I disagree, for the demand for concentrate is derived from the demand for the finished product (F. 150).

In conclusion, the most appropriate market for analyzing the probable consequences of the proposed acquisition is branded concentrate used to produce branded carbonated soft drinks.

B. *The Relevant Geographic Market*

In antitrust cases, the area within which the effects of challenged activities are analyzed is the "area in which the seller operates and to which buyers can practicably turn for supplies." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *FTC v. Foodtown Stores*, 539 F.2d 1339, 1344 (4th Cir. 1976); *Midcon Corp.*, 5 CCH Trade Reg. Rep. paragraph 22,708 at 22,380 (FTC, July 20, 1989).

Because transportation costs are so small, concentrate can be, and is, shipped nationwide from one concentrate plant (F. 165). Thus, the area within which purchasers of concentrate can turn for supplies is nationwide.

Concentrate firms often make marketing support available to bottlers in one area which is not available in other areas (F. 168-169). Whether this practice results in consistent and significant discrimination in the price of concentrate between areas of the industry, as complaint counsel contend, *see General Foods Corp.*, 103 FTC 204, 351 (1984), is not clear, for bottlers may refuse to participate in cooperative advertising programs (F.170), and bottlers which do participate in such programs may have to render services before they can obtain marketing support (F. 171).

The existence of exclusive territories does not dictate the conclusion that the market for concentrate is less than national, for these restrictions do not prohibit the shipment of other concentrate to competing bottlers (F. 182). Furthermore, bottlers with multiple plants transfer concentrate between plants, and there are no exclusive territories for fountain syrup, which accounts for, in the case of Coca-Cola, almost [ ] of its sales (F. 166).

Even at the bottler level, purchasers of the finished product may be able to range far afield for competing product. For example, Iowa Beverage, Canfield's contract packer, ships its soft drinks as far as 500-miles from its plant, and Canfield has actually shipped its soft drinks nationwide from its Chicago plant (F. 254).

This evidence establishes that the relevant geographic market for concentrate is nationwide. *See Pillsbury, Inc.*, 93 FTC 966, 1030 (1979):

> The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. Here the record is clear that frozen pizza manufacturers could sell virtually throughout the United States from a single plant with no significant cost disadvantage. Thus, the power of any given group of sellers serving a city or region at a given time to raise prices is limited by the capacity of virtually all other domestic manufacturers to compete on practically an even footing in that city or region -- an economic situation which requires a finding of a national market. . . .

See also General Foods Corp., 103 FTC 204, 348-51 (1984); *United States v. Hammermill Paper Co.*, 429 F. Supp. 1271, 1278-79 (W.D. Pa. 1977).

Even if I were to accept complaint counsel's argument that there are local markets for concentrate, they have not produced the kind of evidence which is necessary to determine the boundaries of those markets with any certainty. A widely accepted method of defining those boundaries is the Elzinga-Hogarty test, which has been described as one of the few constructive analytical procedures that has been advanced for determining relevant geographic markets. Under this test, "a particular area qualifies as a relevant geographic market if two conditions are met: (1) very little of the total production in that area is exported; and (2) consumers in that area are consuming goods primarily produced there." *General Foods*, 103 FTC at 232-33.

If the Elzinga-Hogarty test were applied at the bottler level, one would undoubtedly conclude that there are local or regional markets for the finished product (F. 180) because most soft drinks are probably produced and consumed in small areas of the country. This concession, however, does not aid complaint counsel, for (1) concentrate, the product with which this case is concerned, is shipped nationwide and (2) there is no evidence in this record of any Elzinga-Hogarty or other economically rational analysis which establishes that the local areas chosen by complaint counsel (F. 186) actually are areas that encompass the primary demand and supply forces which determine price. *General Foods,* 103 FTC at 216; *see also Consul Ltd. v. Transco Energy Co.*, 1986-2 CCH Trade Cas. paragraph 67,347 at 61,797:

while the [relevant geographic] market may not be measurable in "metes and bounds," *see Times-Picayune Publishing,* 345 U.S. at 611, it should be demonstrable in other than purely hypothetical terms.

C. The Likely Effects Of The Proposed Acquisition

If the proposed acquisition of Dr Pepper by Coca-Cola had been consummated, the result would have been the elimination of a significant, successful competitor (F. 187-202, 360, 369) and a post-merger HHI in the branded concentrate market of 3572, or an increase of 443 (F. 222). In the all concentrate market, the HHI would have increased by 363, to an HHI of 2929 (F. 223). According to the DOJ Guidelines, Section 3.11(c):

Post-Merger HHI Above 1800. Markets in this region generally are considered to be highly concentrated. Additional concentration resulting from mergers is a matter of significant competitive concern. The Department is unlikely, however, to challenge mergers producing an increase in the HHI of less than 50 points. The Department is likely to challenge mergers in this region that produce an increase in the HHI of more than 50 points, unless the Department concludes, on the basis of the post-merger HHI, the increase in the HHI, and the presence or absence of the factors discussed in Sections 3.2, 3.3, 3.4, and 3.5 that the merger is not likely substantially to lessen competition. However, if the increase in the HHI exceeds 100 and the post-merger HHI substantially exceeds 1800, only in extraordinary cases will such factors establish that the merger is not likely substantially to lessen competition.

The FTC Merger Statement, 4 CCH paragraph 13,200 at 20,901, recognizes that the courts and the enforcement agencies "have traditionally looked to market share data and derivative concentration ratios as the principal indication of market power," but it concludes that recent research and a decade of practical experience "justifies some revision of market share benchmarks and greater consideration of evidence beyond mere market share when such evidence is available and in a reliable form."

Nevertheless, the FTC Merger Statement concedes the overriding importance of market shares:

Where all of the non-market share evidence consistently points in the same direction, its value will be high. Such evidence will be of even greater significance where the market shares are in the low to moderate range. On the other hand, if the anti-competitive potential of a merger is large, as predicted by the combined market

shares of the merging parties, other non-market share factors may appropriately be given less weight. . . .

Id. at 20903.

The importance of market share in predicting the consequences of a merger cannot be overemphasized. Judge Posner of the Seventh Circuit believes that the strict approach of the Supreme Court in the 1960s should not be forsaken despite such cases as *United States v. General Dynamics*, 415 U.S. 486 (1974) and *United States v. Citizens Southern Nat'l Bank*, 422 U.S. 86 (1975).

According to him, these cases:

show that market share figures are not always decisive in a Section 7 case, but it can be argued that the cases themselves carve only limited exceptions to the broad holdings of some of the merger decisions of the 1960s.

Hospital Corp. of America v. FTC, 807 F.2d 1381, 1385-86 (7th Cir. 1986).

Concentration figures answer the ultimate question in a Section 7 case, that is:

whether the challenged acquisition is likely to facilitate collusion. In this perspective the acquisition of a competitor has no economic significance of itself; the worry is that it may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors or reducing or limiting output, thereby pushing up the market price.

Hospital Corp., 807 F.2d at 1386.

The HHI in the relevant market or in the broader all concentrate market prior to the proposed acquisition was extremely high. The proposed acquisition would have increased the HHI significantly; such an increase creates a presumption of illegality. *See B.F. Goodrich*, 110 FTC 207 (1988), where the relevant market was only moderately concentrated according to the DOJ Guidelines. *Id.* at 313, 314. Nevertheless, according to the Commission, the concentration data:

are well above those that created a presumption of illegality in *United States v. General Dynamics* and *Weyerhaeuser*. In short, the concentration data create a relatively strong presumption of anticompetitive effects . . . and relatively strong evidence from other factors is needed to rebut that presumption.

Id. at 314.

The high concentration in the branded concentrate market suggests that collusion would have been relatively easy pre-acquisition and the proposed acquisition would have increased the ability of the firms in the market to agree on tactics for increasing prices or reducing pressure on prices.

The incentive to increase the price of concentrate is high and the market leaders, Coca-Cola and PepsiCo, recognize their mutual interdependence and have signaled each other about their pricing concerns (F. 328-334). Their concerns are, of course, with the low margins in the industry. Coca-Cola's president stated in Beverage World that:

> I think relief is coming. I don't know how significant that relief will be, but the fact of the matter is that margins have eroded and at some point in time these margins are going to have to be restored

(F. 332).

Thus, this is an industry where firms recognize that collusion would be profitable and the proposed acquisition, by increasing concentration in the sale of a product whose demand is relatively inelastic (F. 151-62), would have increased the opportunities for collusion. *See FTC v. Elders Grain, Inc.*, 868 F.2d 901 (7th Cir. 1989).

> The supply of industrial dry corn was already highly concentrated before the acquisition, with only six firms of any significance. The acquisition has reduced that number to five. This will make it easier for leading members of the industry to collude on price and output without committing a detectable violation of Section 1 of the Sherman Act or Section 5 of the FTC Act, both of which forbid price fixing.

Id. at 905.

The incentive to collude is evident, and the opportunity for collusion is provided by information which is available from the Green Sheets (F. 327) and from bottlers which are often owned by concentrate firms (F. 335-41). Coca-Cola denies that bottler information would enhance collusive behavior, but its attempt to block the acquisitionof a Coca-Cola bottler belies its claim (F.338). Another effect of the proposed acquisition might be the transfer of Dr Pepper franchises from third bottlers (F. 352-59) and the consequent

reduction of the competitive viability of some of those bottlers (F. 360).

Coca-Cola suggests that the high concentration in the relevant markets does not reflect a true picture of an industry which is highly price and promotional-competitive (F. 208-20) and which cannot dictate the price of the finished product to purchasers (F. 342-46). It cannot be denied that the output of finished soft drinks has increased as concentration at the concentrate level has increased (F. 347), and there seems to be no statistically significant correlation between increasing concentration in the industry as a whole and the price of finished carbonated soft drinks (F. 348). However, the price of concentrate, with which this proceeding is concerned, has increased over the past several years at a greater rate than the increase in inflation (F. 23) and overall profits of the major firms have increased (F. 24).

These facts suggest that there will be a great incentive in the future to mitigate the effects of such competition as exists, and I cannot accept past competitive activity as a prediction of future industry conduct.

Finally, I reject as speculative Coca-Cola's claim that the proposed acquisition would have increased efficiency and overall industry competition (RPF 570-90).

D. *Entry Conditions*

The high concentration in the relevant markets prior to the proposed acquisition and the significant increase in concentration which would have resulted from the acquisition would be of no concern if there were no barriers to entry into these markets, for the sustained exercise of market power would not have been possible. *See B.F. Goodrich*, 110 FTC at 296, n.63.

Absolute barriers to entry are rare, and a standard has developed which analyzes entry in terms of the time it might take "for a motivated outsider to effect entry." Olin Corp., at 23. The DOJ Guidelines, Section 3.3, employ a two year standard.

Barriers to entry are generally considered to be additional long run costs that are incurred by an entrant but that were not incurred by incumbent firms. *Echlin Mfg. Co.*, 105 FTC 410, 485 (1985). As a practical matter, however, the courts and the Commission define barriers as any market condition which increases "the length of time

required for new entry to take place, by making the production process a complex one which requires substantial time to organize efficiently." R. Posner, Antitrust Law: An Economic Perspective 56 (1976).

Entry into most markets is not impossible. That is true with respect to carbonated soft drink concentrate; however, entry analysis looks not at whether some entry has occurred, but whether meaningful entry has been, and can be, successful. *Coca-Cola Bottling Co. of New York*, 93 FTC 110, 210, n.13 (1979):

> While it may be that anyone with an acre of land, a bathtub, and clean feet can make wine, profitable entry on a scale sufficient to provide meaningful competition for the industry leaders appears to be a considerably more difficult proposition, the dimensions of which are not entirely clear from the record. It is entry of the latter sort with which we must be principally concerned in evaluating the state of competition in an industry.

Entry into carbonated soft drink concentrate production and into the production of finished soft drinks is not difficult (F. 243-56), and there have been several new products developed by incumbents as well as several new entrants into the industry in the past few years (F. 321). Additionally, some so-called "boutique" firms have entered, and may capture some share of the carbonated soft drink market (F. 108).

However, these entrants provide no potential price restraining competition to the leaders in the most significant relevant market -- branded concentrate. In this market, there are substantial barriers or impediments to entry. These include the need for direct-store-door delivery, for which warehouse distribution is no substitute (F. 257-66), flavor restrictions which effectively prohibit bottlers from accepting franchises from new entrants (F. 267-73), the success of the major concentrate companies in capturing the majority of feature ads (F. 274-83), the introduction of new products by entrenched firms (F. 284-88), the time and money required to attain adequate penetration of the market, the importance of trademark equity, and the limited opportunities in the vending and fountain segments of the industry (F. 289).

The existence of these barriers and impediments is amply illustrated by the failure of highly-motivated, well-financed firms to attain successful entry into the branded concentrate market. These firms include Philip Morris-7 Up (F. 291-95); P&G (F. 296-98);

General Cinema (F. 299-303); Quaker Oats (F. 304-05); Orangina (F. 306-08); Anheuser-Busch (F. 309-11); and Dr Pepper (F. 312-20).

The evidence of entry barriers and failed entry attempts supports Dr. Hilke's conclusion that no firm could, through entry into the branded concentrate market, constrain the potential price increases which might result from the enhanced opportunity for collusion which would have been caused by the proposed acquisition. Since incumbent firms would be part of any collusive arrangement regarding price or production, they would not, by definition, defeat that arrangement by increasing production (F. 325).

E. *The Proposed Order*

Once the Commission finds that a respondent has violated a law which it administers, it has wide discretion to fashion a remedy which will prevent future violations. *Jacobs Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946): one such remedy in merger cases is the imposition of a prior approval requirement. *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 984-85 (8th Cir. 1981), *cert. denied*, 456 U.S. 915, 985-86 (1982); *Abex Corp v. FTC*, 420 F.2d 928 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970); *Hospital Corp. of America*, 106 FTC 361, 513-14 (1985); *Ekco Products Co.*, 65 FTC 1163, 1216, 1222 (1964).

Coca-Cola does not dispute the Commission's right to impose a prior approval clause in appropriate circumstances, but it argues here that the clause sought in complaint counsel's proposed order goes beyond the remedy sought in the complaint, that its entry would place it at a competitive disadvantage vis-a-vis its competitors, and that it is being proposed to punish Coca-Cola for exercising its statutory right to judicial review of the Commission's opposition to the proposed acquisition.

As to the last argument, Coca-Cola contrasts the Commission's approach in this case with its failure to proceed against PepsiCo for its proposed acquisition of Seven Up (F. 372-75), and it appears, for there is no other explanation for its action, that the Commission's inconsistent treatment of the Coca-Cola and PepsiCo proposed acquisitions was intended to punish Coca-Cola for forcing the Commission to seek judicial relief (F. 376).

I do not reject the proposed order for this reason, but for a much more convincing reason: the Bureau of Competition's concurrence

with Coca-Cola's motion to dismiss because of the lack of public interest in obtaining a prior approval order (F. 362).

Complaint counsel recognize in their findings the efficiencies which have been realized in the past several years by the reduction in the number of bottlers (CPF 196-212), and the Commission has challenged only one of twenty-three bottler acquisitions which have occurred in the past five years. Concentrate firm acquisitions have also been ignored (F. 370-71).

Given these facts, I cannot justify entry of the remedy sought for:

> it is industry market structure and market conditions, not whether a "knowing and deliberate violation" or a "likelihood of repeated unlawful conduct" has been shown as AMI asserts, that determines the appropriateness of imposing a prior approval requirement in a particular case.

American Medical International, Inc., 104 FTC 1, 224 (1984).

In conclusion, complaint counsel assume, contrary to the evidence, that all acquisitions in the concentrate and bottling industry would be anticompetitive, *AMI,* 104 FTC at 225. My analysis of the record and the Bureau's own position before trial was held ("recent developments in the soft drink and concentrate industries, render prior approval an unnecessary remedy") (F. 362) support the conclusion that it would not be in the public interest to saddle Coca-Cola with an unnecessary and potentially disruptive prior approval order which might place it on an "unequal footing with its principal competitors" *AMI,* 104 FTC at 226.

Since a prior approval order is the only remedy proposed by complaint counsel, I will enter no order despite my conclusion that the proposed acquisition would have violated Section 7 of the Clayton Act and Section 5 of the FTC Act if it had been consummated.

F. *Summary*

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over Coca-Cola.

2. This proceeding is in the public interest.

3. At all times relevant herein, Coca-Cola has been, and is, engaged in commerce as commerce is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and its business is in or

affects commerce as commerce is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. 44.

4. The most appropriate relevant market in which the effects of the proposed acquisition should be assessed is the manufacture and sale of branded concentrate and syrup used in the production of branded carbonated soft drinks; another is the manufacture and sale of all concentrate and syrup used to produce carbonated soft drinks.

5. The section of the country in which it is appropriate to assess the effects of the proposed acquisition is the nation as a whole.

6. The relevant markets are highly concentrated and the proposed acquisition would have significantly increased concentration in those markets.

7. Entry into the relevant markets is difficult, risky, and time consuming.

8. Expansion by fringe firms in the relevant markets is extremely unlikely.

9. The effect of the proposed acquisition, if consummated, may be substantially to lessen competition in the relevant markets, 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:

(a) Elimination of Dr Pepper Company as a substantial, independent competitive force in the relevant markets;

(b) Increasing the likelihood of, or facilitating, collusion;

(c) Increasing the difficulty of entry; and

(d) Raising the costs and reducing the competitiveness of other firms in the relevant markets.

10. All of the above increase the likelihood that firms will increase prices and restrict the output of carbonated soft drinks both in the near future and in the longer run.

11. The agreement between Coca-Cola and DP Holdings, Inc. to acquire the Dr Pepper Company was in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 5. *See Rhinechem Corp.*, 93 FTC 233 (1979).

12. An order requiring Coca-Cola to obtain the prior approval of the Commission before acquiring any other concentrate or bottling company is not in the public interest. Since the Commission seeks no other remedy, no cease and desist order will be entered.