DIGEST OF BUSINESS REVIEWS

1999

99-1 NSM Purchasing Association 1/13/99

Funeral Homes Group Purchasing

Facts: The NSM Purchasing Association ("NSM") represents approximately 865 privately-owned funeral homes that account for 6.3 percent of funeral home locations in the United States. It seeks to form a joint purchasing entity that would aggregate the casket purchases of its members in order to obtain quantity discounts available to larger corporate providers of funeral services. A reduction in casket purchase costs would allow NSM's members to compete more effectively for price-sensitive customers since casket costs accounted for almost 17 percent of an adult funeral's cost in 1997.

Response: It does not appear that NSM's proposal is likely to have an anticompetitive effect in either the casket or funeral services market. The proposed joint purchasing entity would be operated in a manner designed to reduce competitive risk. It will use a full-time buying agent that is not employed by NSM or any member thereof. No competitively sensitive information will be disseminated by the buying agent to any NSM member. NSM members will be free to purchase caskets independently of the joint purchasing entity, while use of the purchasing entity will be available to any family or privately-owned funeral home in the United States, not just to NSM members. The Constitution and By-Laws of NSM will cap membership to prevent it from exceeding 35 percent of United States casket purchases. The relatively small share of casket purchases accounted for by NSM's members, the ratio of casket costs to funeral service prices, and the prophylactic measures that will be adopted to reduce antitrust risk lead to the conclusion that NSM's proposal should not harm any seller or consumer market. To the extent that the proposed joint purchasing reduces NSM members' costs and such savings are shared with consumers, the proposal could have a procompetitive effect. The Department has no present intention to challenge the proposal.

99-2 Hitachi, Ltd./ 6/10/99
Matsushita Electric Industrial Co., Ltd./
Mitsubishi Electric Corp./
Time Warner, Inc./
Toshiba Corp./
Victor Company of Japan, Ltd.

Video Information Patent Licensing
Computers

Facts: Hitachi, Ltd., Matsushita Electric Industrial Company, Ltd., Mitsubishi Electric Corporation, Time Warner, Inc., Toshiba Corporation, and Victor Company of Japan, Ltd. (collectively, the "Licensors") propose to enter into an arrangement whereby Toshiba will assemble and offer a package license under the Licensors' patents that are "essential" to manufacturing products in compliance with the DVD-ROM and DVD-Video Standard Specifications and will distribute royalty income to the other Licensors. The Specifications, which were established by the Licensors and four other firms to define the Digital Versatile Disc for video and ROM applications, including rules, conditions, and mechanisms for players to read the discs and convert them into images for screen display, implicate the intellectual property rights of a number of firms, including the Licensors. Through the license from Toshiba, makers of discs and players that comply with the Standard Specifications will be able to license the essential patents of all six Licensors in a single transaction. The license will tell potential licensees exactly what patents are in the portfolio and that a license on each portfolio patent is available independently from its owner. The Licensors have retained patent experts to review their patents to ensure that the license conveys rights only to patents that licensees will need in order to comply with the Standard Specifications.

Response: As with any aggregation of patent rights for the purpose of joint package licensing, commonly known as a patent pool, an antitrust analysis of this proposed licensing program must examine both the pool's expected competitive benefits and its potential competitive hazards. In particular, one expects that a patent pool may provide competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation. At the same time, some patent pools can restrict competition, whether among intellectual property rights within the pool, downstream products incorporating the pooled patents, or in innovation among parties to the pool.

First, the patents to be licensed must be assumed to be valid, since a licensing scheme premised on invalid or expired intellectual property rights is highly likely to be anticompetitive. Second, if the Licensors owned patent rights that could be licensed and used in competition with each other, they might have an economic incentive to utilize a patent pool to eliminate competition among them. If, on the other hand, the pool brings together complementary patent rights, it could be an efficient and procompetitive method of disseminating those rights to would-be users. Limiting the pool to patents that are essential to compliance with the Standard Specifications will ensure that the proposed pool will integrate only complementary patent rights since essential patents, by definition, have no substitutes; one needs licenses to each of them in

order to comply with the Specifications. Given the small size of the royalty relative to the total cost of manufacture of DVD discs, decoders, or players, and the fact that the proposed program should enhance rather than limit access to the Licensors' essential patents, it is unlikely that competition, either between the Licensors themselves or with third parties, in downstream markets will be restricted. Nor does there seem to be any facet of the proposed program that would facilitate collusion or dampen competition among the Licensors in the creation of content for software, or raise significant concerns as to innovation competition. The Department has no present intention to challenge the proposal.

99-3 Western Systems Coordinating Council 6/14/99

Electrical Power Standards Program

Facts: Western Systems Coordinating Council ("WSCC")--one of ten electric reliability councils in North America--is a voluntary organization responsible for promoting electrical system reliability and coordinating operating and planning activities for its 107 member systems. WSCC believes that, as a result of deregulation, a voluntary system is no longer adequate to protect system reliability and proposes to establish a mandatory reliability system, including sanctions. The reliability criteria would be set forth in a generic tariff that would be placed on file with the Federal Energy Regulatory Commission ("FERC"). Interested parties who object to the reliability criteria would have an opportunity to petition the FERC. Participating members would enter into standardized contracts committing themselves to adhere to the criteria; however, no transmission operator would be required to participate in the mandatory program and there would be no sanctions on those participating on a voluntary basis. Compliance would be monitored by the WSCC using data supplied by Transmission Operators and interconnected generators. Participants who receive an initial determination of noncompliance could appeal to a WSCC Reliability Compliance Committee. If a party disputed the determination of the Reliability Compliance Committee, it could pursue Alternative Dispute Resolution under criteria on file with the FERC, which permit appeals to the FERC (or the courts in the case of nonjurisdictional parties). WSCC filed a petition with the FERC seeking a regulatory determination that its proposal was fair and reasonable. In response, the FERC asserted jurisdiction over the WSCC proposal and approved its implementation on an experimental basis, finding that WSCC's governance procedures seemed to be "fair" and its ADR procedures for dealing with proposed violations and sanctions seemed to be "just and reasonable."

Response: The processes under which the reliability standards are to be established and enforced appear to be open to all interested parties, provide for representation for all segments of the industry, are not designed to competitively disadvantage any particular party or segment of the industry, and FERC or court review will be available to resolve disputes. Although any standard setting process is susceptible to anticompetitive manipulation or abuse, the processes at issue do not, on their face, appear to raise significant risks to competition. The Department has no present intention to challenge the proposal.

99-4 Preferred Physicians Medical Group 7/23/99

Medical Services
Health Care

Physician Network Joint Venture

Facts: Preferred Physicians Medical Group ("PPMG") is a multispecialty network formed for the primary purpose of contracting on a shared risk basis with multiple payors in the Southside Hampton Roads, Virginia area. PPMG currently has 103 members, 54 of whom are primary care physicians, the reminder of whom practice in several specialty areas. This membership represents less than ten percent of the providers in any given specialty (including general practitioners and family practice physicians) in the coverage area, which is comprised of the cities of Virginia Beach, Cheasapeake, Portsmouth, and Norfolk, Virginia and the surrounding residential areas. PPMG does not anticipate including in the network more than 15 percent of the providers in any specialty, nor more than ten percent of all the physicians in the Southside Hampton Roads area. PPMG will be a limited liability company, owned entirely by its physician members, who will participate in all contracts negotiated by PPMG and will not contract individually with any payer having a contract with PPMG. All of PPMG's revenues will derive from risk contracts, and individual members will share risk based upon the group's overall performance. Contractual risk arrangements will include all-inclusive case rates, capitated rates, payments of a percentage of premium, or a withholding of 15 percent of the compensation due all network participants with distribution based upon the group's attainment of quality and utilization targets.

Response: Assuming that PPMG's membership continues to constitute 20 percent or fewer of the physicians in each physician specialty with active hospital staff privileges who practice in the relevant geographic market, it appears that PPMG would fall within the safety zone for exclusive physician network joint ventures described in Statement 8 of the Statements of Antitrust Enforcement Policy in Health Care, issued by the Department of Justice and the Federal Trade Commission in August 1996. The Department has no present intention to challenge the proposal.

99-5 Securities Industry Association 9/23/99

Securities Information Exchange

Facts: The Securities Industry Association ("SIA") proposed to create an information exchange program designed to resolve equity securities and options trading systems capacity and operational issues posed by the conversion of those systems from a fraction-based to a decimal-based format. The SIA is an association of nearly 800 securities firms--including investment banks, brokers-dealers, and mutual fund companies--active in all markets and all phases of corporate and public finance. In the United States, SIA members collectively account for approximately 90 percent of securities firms' revenues. SIA has developed a comprehensive program to change the trading increments for equity securities and equity stock options from fractions to a decimal-based system. This program will entail the development of a comprehensive plan to establish interim milestones for testing and implementation of the decimalization conversion, as well as the delineation of the technical standards and specifications needed to preserve the efficient working of the various affected markets. To be successful, the conversion project will require extensive sharing of information among securities market participants, including broker-dealers, exchanges, clearing entities, data processors, depositories, and market data vendors. Company- or exchange-specific information will flow from each individual entity to the SIA staff or its independent consultant. Only aggregate information, including survey results and industry-wide proposals based on those results, would be shared among SIA members and others that are part of the decimalization conversion project. No company-specific information about prices, capacity, or future plans will be exchanged directly among SIA members or other participants in the project. No discussion will take place about specific prices of any security or option. Neither the participants nor SIA intend to recommend in favor of, or against, the products or systems of particular vendors. It will be for SIA members to decide, as individual entities, how, or even whether, each will use the information disseminated. Legal counsel will participate in all meetings, and SEC staff are expected to attend frequently.

Response: The Department does not believe that the proposed exchanges will have anticompetitive effects. There will be no transaction-specific price, cost, or marketing information exchanged among rivals; rather, the information will be general in nature and related to capacity and other operational characteristics of the communications systems or processes that will be the infrastructure on which equity securities and options trading will be based. No collective purchasing decisions will be made on the basis of any studies compiled from the information to be exchanged. The proposed information exchanges will be limited to exchanges necessary to effectuate the SIA's decimalization project. The Department has no present intention to challenge the proposal.