

Competition Tribunal Tribunal de la concurrence	
FILED / PRODUIT July 22, 2009 CT-2009-011	
Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 0002

**PUBLIC VERSION**

**CT-**

**COMPETITION TRIBUNAL**

**IN THE MATTER** of the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/94-290;

**AND IN THE MATTER** of an inquiry under subparagraph 10(1)(b)(ii) of the *Competition Act* relating to the amalgamation of Suncor Energy Inc. and Petro-Canada;

**AND IN THE MATTER** of filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*.

**B E T W E E N :**

**THE COMMISSIONER OF COMPETITION**

Applicant

– and –

**SUNCOR ENERGY INC. and PETRO-CANADA**

Respondents

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**CONSENT AGREEMENT IN RELATION TO THE AMALGAMATION OF SUNCOR ENERGY INC. AND PETRO-CANADA TO CONTINUE AS SUNCOR ENERGY INC.**

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**WHEREAS** under an Arrangement Agreement dated March 22, 2009, Suncor Energy Inc. (“**Suncor**”) and Petro-Canada agreed to amalgamate and continue as “Suncor Energy Inc.” pursuant to a plan of arrangement and in compliance with the provisions of the *Canada Business Corporations Act*;

**AND WHEREAS** the existing shareholders of Suncor are to receive one share of the entity formed upon the amalgamation of Suncor and Petro-Canada (“**Amalco**”) for each share of Suncor and the existing shareholders of Petro-Canada are to receive 1.28 shares of Amalco for each share of Petro-Canada, resulting in Suncor’s existing shareholders receiving approximately 60% of the shares of Amalco and Petro-Canada’s existing shareholders receiving approximately 40% of the shares of Amalco (the “**Transaction**”);

**AND WHEREAS** this Consent Agreement (the “**Agreement**”) shall apply to Amalco following the implementation of the Transaction;

**AND WHEREAS** the Commissioner of Competition (the “**Commissioner**”) has concluded that the Transaction is likely to prevent or lessen competition substantially in respect of the retail marketing of gasoline in certain geographic areas in Ontario and in respect of the wholesale supply of gasoline in the Greater Toronto Area and the Respondents do not admit but will not contest the Commissioner’s conclusion for the purposes of the enforcement of any provision of this Agreement, or in any subsequent proceeding, including in any proceedings under section 106 of the *Competition Act*, in relation to this Agreement;

**AND WHEREAS** the Commissioner is satisfied that the implementation of this Agreement will be sufficient to ensure that a likely substantial lessening or prevention of competition will not result from the completion of the Transaction;

**AND WHEREAS** the Applicant and the Respondents agree to the immediate registration of this Agreement with the Competition Tribunal by the Commissioner;

**NOW THEREFORE** Suncor, Petro-Canada and the Commissioner agree as follows:

## I. DEFINITIONS

[1] For the purposes of this Agreement, unless something in the subject matter or context is inconsistent therewith, the following capitalized terms have the following meanings:

- (a) “**Act**” means the *Competition Act*, R.S.C., 1985, c. C-34, as amended;
- (b) “**Affiliate**” means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the Act;
- (c) “**Agreement**” means this Consent Agreement entered into between Suncor, Petro-Canada and the Commissioner pursuant to section 105 of the Act, including the schedules hereto;
- (d) “**Amalco**” means the entity formed upon the amalgamation of Suncor and Petro-Canada in accordance with the terms and conditions set forth in the Arrangement Agreement and its Affiliates and “Amalco” shall include the Respondents, their respective Affiliates and any successors or assigns of a Respondent or any of its Affiliates;
- (e) “**Ancillary Product Suppliers**” means Persons who supply products and services to the ancillary businesses operated at the Divested Stations;
- (f) “**Arrangement Agreement**” means the Arrangement Agreement between Suncor and Petro-Canada dated March 22, 2009;
- (g) “**Business Day**” means a day other than a Saturday, Sunday or statutory holiday in the Province of Ontario;
- (h) “**Closing Date**” means the date on which the Transaction is completed;
- (i) “**Commissioner**” means the Commissioner of Competition appointed pursuant to section 7 of the Act or any Person designated by the Commissioner to act on her behalf;
- (j) “**Competitively Sensitive Information**” means confidential or proprietary

information belonging to, relating to or otherwise concerning any Pioneer Entity (which for the purposes of this definition only shall include any Person in respect of which a Pioneer Entity owns, directly or indirectly, voting securities) that is not generally available to the public, including but not limited to pricing information and policies, sales or marketing plans, profit margins or cost information on a specific product or service basis, strategic plans, budgeting, supply arrangements (other than any supply arrangements entered into with Amalco or any discussions or negotiations between Amalco and a Pioneer Entity regarding any such future supply arrangements), and location and expansion plans;

- (k) “**Confidential Information**” means confidential or proprietary information belonging to, relating to or otherwise concerning the Divested Retail Business or the Terminalling Services that is not generally available to the public, including, but not limited to, any customer and supplier lists, price lists, and marketing methods or other trade secrets;
- (l) “**CPL**” means cents-per-litre (expressed in Canadian currency);
- (m) “**Divested Retail Business**” means the business of marketing and supplying, at the Divested Stations, gasoline, diesel and, where offered by Amalco as at the date of the Arrangement Agreement, ancillary products and services at the Divested Stations;
- (n) “**Divested Retail Business Assets**” means, other than Excluded Assets, all of Amalco’s right, title and interests in the Divested Retail Business and all of Amalco’s assets of the Divested Retail Business of every kind and description wheresoever situate, including but not limited to, the following:
  - (i) the Divested Stations;
  - (ii) all applicable site-specific licences, permits, contracts, agreements and authorizations, to which Amalco is a party or a beneficiary, used in the operation of each Divested Station;
  - (iii) the Intellectual Property;

- (iv) all tangible assets and equipment used at each Divested Station;
- (v) all Divested Station Agreements;
- (vi) all petroleum products and other inventories at each Divested Station;
- (vii) all books, records and files specific to the Divested Retail Business (for greater certainty, to the extent that there are any books, records or files which are common to the Divested Retail Business and to Amalco's ongoing business, Amalco shall provide copies of such books, records and files to the Purchaser); and
- (viii) any assets used in any ancillary businesses operated at the Divested Stations, including, but not limited to, any automobile mechanical service, convenience store, restaurant or car wash, operated in connection with each Divested Station, including, but not limited to, all permits, contracts, agreements and authorizations, to which Amalco is a party or a beneficiary, used in the operation of the ancillary businesses.

Notwithstanding the foregoing and for greater clarity, nothing in this Agreement shall require Amalco to include within or as part of the Divested Retail Business Assets: (a) the back office, transactional/credit/debit and loyalty systems and services and assets used in connection with Amalco's other businesses (including all software and equipment); (b) point of sale software and related equipment; (c) any brands (including without limitation brand elements such as signs and facia) used in association with the Divested Stations; (d) any marketing or promotional program materials and equipment, including without limitation, any loyalty programs, branded bank machines and back wall advertising screen software; (e) agreements for the supply of products or services to all or part of Amalco's retail network and which include retail gas stations that are not part of the Divested Retail Business; (f) any contracts, agreements, permits, licences, or authorizations which are not specific to a particular retail gas station or the Divested Stations as a group but, rather, are proprietary to, and/or used by, Amalco in the operation of its retail network and any

related equipment or software (including but not limited to *Glide Carwash*); and (g) any agreements with Divested Station Retail Associates, (the assets described in the immediately preceding (a) to (g) being, collectively, the “**Excluded Assets**”). With respect to equipment described in (f) that is used in connection with car washes, Amalco will, at its expense, promptly remove the network-related equipment and reinstall site level activation equipment to ensure that the car wash is operational;

- (o) “**Divested Station Agreements**” means all agreements entered into by Amalco relating to the ownership and/or operation of the Divested Stations including, without limitation, real property leases;
- (p) “**Divested Station Retail Associates**” means independent contractors who operate Divested Stations whether as franchisees, consignees or commission agents;
- (q) “**Divested Stations**” means the 104 retail gas stations located in Ontario set out in **Schedule “B”** and **Schedule “B.1”** to this Agreement and, if applicable pursuant to **paragraphs 30** or **31** of this Agreement, the alternate retail gas stations set out in **Confidential Schedule “B.2”** (provided that any retail gas station set out in **Schedule “B”** and **Schedule “B.1”** that is replaced by an alternate retail gas station listed on **Confidential Schedule “B.2”** shall immediately cease to be a Divested Station and such alternate retail gas station shall thereafter be a Divested Station);
- (r) “**Divestiture**” means the sale, transfer, assignment, public offering, or other conveyance of the Divestiture Assets such that Amalco will have no further direct or indirect interest in the Divestiture Assets, except as permitted herein or upon the consent of the Commissioner;
- (s) “**Divestiture Agreement**” means a binding and definitive agreement between Amalco and a Purchaser or, if necessary, between the Divestiture Trustee and a Purchaser, in each case to effect the Divestiture contemplated by this Agreement;
- (t) “**Divestiture Assets**” means the Divested Retail Business Assets, as modified, where applicable, by **Confidential Schedule “E”**, either as a whole or individually where

all of the Divested Retail Business Assets are not sold to a single Purchaser;

- (u) “**Divestiture Monitor**” means the Person appointed pursuant to **paragraph 4** of this Agreement and any employees, agents or other Persons acting for or on behalf of the Divestiture Monitor;
- (v) “**Divestiture Trustee**” means a Person appointed pursuant to **paragraph 41** of this Agreement and any employees, agents or other Persons acting for or on behalf of the Divestiture Trustee;
- (w) “**Divestiture Trustee Sale**” means a Divestiture to be conducted by the Divestiture Trustee pursuant to **Part VII** of this Agreement;
- (x) “**Excluded Assets**” has the meaning set out in the definition of Divested Retail Business Assets;
- (y) “**Independent Industry Expert Seller**” means a Person appointed pursuant to **paragraph 77** of this Agreement, and any employees, agents or other Persons acting for or on behalf of the Independent Industry Expert Seller;
- (z) “**Independent Marketer**” means a purchaser of unbranded gasoline for purposes of resale or supply to a retail gas station or for its own sale at a retail gas station and who is not, nor is an Affiliate of, a Person that operates a refinery in the Province of Ontario or Québec, and also shall not include, for the purposes of this Agreement, UPI Energy LP, any Pioneer Entity or any other Person in which Amalco holds any interest, direct or indirect, for so long as Amalco holds any interest, direct or indirect, in UPI Energy LP, any Pioneer Entity or such other Person as applicable;
- (aa) “**Initial Sale Period**” means the period set out in **Confidential Schedule “C”** to this Agreement;
- (bb) “**Intellectual Property**” means intellectual property of any nature and kind used in connection with or related to any of the Divested Stations, including, but not limited to:

- (i) patents;
- (ii) copyrights;
- (iii) software;
- (iv) trademarks;
- (v) trade secrets, know-how, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
- (vi) rights to obtain and file for patents and registrations thereof; and
- (vii) rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

Notwithstanding the foregoing, Intellectual Property does not include any intellectual property used primarily in connection with the Excluded Assets;

- (cc) “**Kent Area**” means each of the geographic areas as defined by Kent Marketing Services Limited for the purposes of compiling retail gasoline price statistics;
- (dd) “**Metro Depot**” means Amalco’s terminal depot located at 1138 Finch Avenue West, Toronto, Ontario, M3J 2E2;
- (ee) “**ML**” means Million Litres;
- (ff) “**Montreal Facility**” means Amalco’s refinery at Montreal or such other installation in the Montreal area as may be agreed upon between Amalco and a Throughput Party;
- (gg) “**Oakville Terminal**” means Amalco’s terminal located at 3275 Rebecca Street, Oakville, Ontario, L6L 6N5;



- (hh) “**Permitted Persons**” means any Person employed by or on behalf of Amalco to provide accounting, legal, business valuation or investment banking services (which shall include the process of selling the Divestiture Assets), including any external provider of such services;
- (ii) “**Person**” means any individual, partnership, limited partnership, firm, corporation, association, trust, unincorporated organization or other entity, whether acting alone or in concert with another Person;
- (jj) “**Petro-Canada**” means Petro-Canada and its Affiliates;
- (kk) “**Pioneer Entity**” means any of PPHI, PPMI, Pioneer Operating Partnership, Pioneer Holding Partnership or any Affiliate of any such Person, other than an Affiliate of PPHI, PPMI, Pioneer Operating Partnership, or Pioneer Holding Partnership in respect of which Amalco has no direct or indirect interest;
- (ll) “**Pioneer Holding Partnership**” means Pioneer Petroleums Holding Limited Partnership;
- (mm) “**Pioneer Operating Partnership**” means Pioneer Petroleums Limited Partnership;
- (nn) “**PPHI**” means Pioneer Petroleums Holding Inc.;
- (oo) “**PPMI**” means Pioneer Petroleums Management Inc.;
- (pp) “**Purchaser**” means the Person that acquires the Divestiture Assets pursuant to this Agreement or the Persons that acquire the Divestiture Assets where the Divestiture Assets are sold to more than a single Person. None of Shell Canada Limited, Imperial Oil Limited, or any Related Party of the foregoing, shall constitute a Purchaser for the purposes of this Agreement. None of UPI Energy LP, any Pioneer Entity or any other Person in which Amalco holds any interest, direct or indirect, shall constitute a Purchaser for the purposes of this Agreement for so long as Amalco holds any interest, direct or indirect, in UPI Energy LP, any Pioneer Entity, or other such Person, as applicable;

- (qq) “**Related Party**” has the meaning ascribed thereto in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* in effect on the date hereof;
- (rr) “**Residual Assets**” means those Divested Retail Business Assets, as modified, where applicable, by **Confidential Schedule “E”**, which are not subject to a Divestiture Agreement that has been entered into with a Purchaser and approved by the Commissioner in accordance with this Agreement prior to the expiration of the Initial Sale Period;
- (ss) “**Suncor**” means Suncor Energy Inc. and its Affiliates;
- (tt) “**Suncor Sub**” means 1044287 Ontario Inc., being a subsidiary of Suncor, which holds one common share in the capital of PPMI;
- (uu) “**Take or Pay**” means a flat monthly fee which is calculated and charged on the basis of the total annual volume required under the applicable terminalling agreement divided by twelve (12) months and multiplied by the terminalling fee which shall be expressed in CPL of throughput;
- (vv) “**Terminalling Fee**” means the fee to be paid in CPL for the Terminalling Services set out at **paragraphs 67(a) and 67(b)** of this Agreement;
- (ww) “**Terminalling Services**” at the Metro Depot Terminal, means pipeline receipt, storage and rack delivery services for fungible gasoline and diesel products, and at the Oakville Terminal, means pipeline and marine receipt, storage and rack delivery services for fungible gasoline and diesel products;
- (xx) “**Throughput Party**” means any Person who is not a Related Party to Amalco that enters into Terminalling Services obligations with Amalco pursuant to, or as contemplated by, **paragraph 67(a) or (b)** of this Agreement (and “**Throughput Parties**” means, where more than one Throughput Party enters into Terminalling Services obligations with Amalco, those Persons that enter into Terminalling Services obligations with Amalco). Neither Shell Canada Limited nor Imperial Oil

Limited, nor any Related Party of the foregoing, shall constitute a Throughput Party for the purposes of this Agreement. None of UPI Energy LP, any Pioneer Entity or any other Person in which Amalco holds any interest, indirect or direct, shall constitute a Throughput Party for the purposes of this Agreement for so long as Amalco holds any interest, direct or indirect, in UPI Energy LP, any Pioneer Entity, or such other Person, as applicable;

- (yy) “**TNPI**” means Trans-Northern Pipeline, Inc. (and its heirs, legal representatives, successors and assigns) and the pipeline operated by Trans-Northern Pipeline, Inc.;
- (zz) “**Transaction**” means the transaction as described in the recitals;
- (aaa) “**Tribunal**” means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c.19 (2<sup>nd</sup> Supp.), as amended;
- (bbb) “**Trustee Sale Period**” means the period following the expiration of the Initial Sale Period set out in **Confidential Schedule “C”**, within which the Divestiture Trustee is empowered to sell the Residual Assets or such longer period as directed by the Commissioner; and
- (ccc) “**Wholesale Supply Year**” means each successive twelve (12) month period commencing on the Closing Date.

All other terms defined in this Agreement have the meanings established elsewhere in this Agreement.

## II. APPLICATION

[2] The provisions of this Agreement shall apply to:

- (a) Amalco, and Amalco shall cause each of its Affiliates and the Respondents will cause each of their Affiliates to carry out their respective obligations under this Agreement;
- (b) each officer, employee, consultant, agent or other Person acting for or on behalf of

Amalco;

- (c) all other Persons acting in concert or participating with one or more of those listed in (a) or (b);
- (d) the Commissioner;
- (e) the Divestiture Monitor;
- (f) the Divestiture Trustee;
- (g) each Throughput Party and its heirs, legal representatives, successors and assigns;
- (h) the Independent Industry Expert Seller; and
- (i) each Purchaser and its heirs, legal representatives, successors and assigns.

[3] **Parts V, VI, VII, VIII, IX, X, XI, XII and XIII** of this Agreement shall come into effect immediately following the Closing Date. The remaining Parts of this Agreement shall immediately come into effect upon registration of this Agreement with the Tribunal.

### **III. DIVESTITURE MONITOR**

[4] The Commissioner shall appoint a Divestiture Monitor responsible for monitoring Amalco's compliance with **Parts IV, V, VI and VII** of this Agreement. The Divestiture Monitor's obligations and powers shall not expire under this Agreement until the Divestiture is effected. For greater certainty, Amalco's obligation in **paragraph 24** shall not constitute a Divestiture for the purposes of this Agreement.

[5] The selection of the Divestiture Monitor by the Commissioner shall be subject to the consent of Amalco, which consent shall not be unreasonably withheld. If Amalco has not opposed, in writing, including the reasons for opposing, the selection of the Divestiture Monitor within five (5) Business Days after notice by the Commissioner to Amalco of the identity of the Divestiture Monitor, Amalco shall be deemed to have consented to the selection of the proposed Divestiture Monitor.

[6] Within five (5) Business Days of the date of the selection of the Divestiture Monitor, the Divestiture Monitor and Amalco shall execute an agreement that, subject to the approval of the Commissioner, confers on the Divestiture Monitor all of the rights and powers necessary to permit the Divestiture Monitor to monitor Amalco's compliance with the terms of this Agreement in a manner consistent with this Agreement. The Divestiture Monitor shall sign a confidentiality agreement in a form determined by the Commissioner. The Divestiture Monitor shall:

- (a) have the power and authority to monitor Amalco's compliance with **Parts IV, V, VI and VII** of this Agreement and shall exercise such power and authority and carry out his, her or its duties and responsibilities pursuant to the terms of this Agreement and in a manner consistent with the purposes of this Agreement;
- (b) serve at the cost and expense of Amalco, and have the authority to engage, at reasonable cost and expense to be borne by Amalco, such consultants, accountants, lawyers, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Divestiture Monitor's duties and responsibilities;
- (c) provide Amalco and the Commissioner with a detailed account of all time and expenses incurred by the Divestiture Monitor (the Divestiture Monitor may redact from Amalco's account confidential information or references to legal advice to the Divestiture Monitor). For greater certainty, the Divestiture Monitor shall be reimbursed for only reasonable costs and expenses incurred as outlined in the detailed account;
- (d) to the extent that it is within Amalco's control, have full access to all personnel, records and facilities of the Divestiture Assets or any other relevant information, including Confidential Information, that the Divestiture Monitor requests;
- (e) provide a report to the Commissioner every thirty (30) days concerning compliance with **Parts IV, V, VI and VII** of this Agreement and, additionally, forthwith upon the Commissioner's request; and

- (f) notify the Commissioner immediately if and when the Divestiture Monitor considers Amalco to be in default of any of its obligations pursuant to **Parts IV, V, VI or VII** of this Agreement.

[7] Amalco shall provide all assistance as may be reasonably requested by the Divestiture Monitor, and shall not interfere with the Divestiture Monitor's execution of its obligations under this Agreement.

[8] Amalco shall not attempt to influence, direct or control the Divestiture Monitor.

[9] If the Divestiture Monitor ceases to act or fails to act diligently and in a manner consistent with the purposes of this Agreement, the Commissioner may appoint a substitute Divestiture Monitor consistent with the terms of this **Part III**, subject to the consent of Amalco, which consent shall not be unreasonably withheld. If Amalco has not opposed, in writing, including the reasons for opposing, the selection of the substitute Divestiture Monitor within five (5) Business Days after notice by the Commissioner to Amalco of the identity of any substitute Divestiture Monitor, Amalco shall be deemed to have consented to the selection of the proposed substitute Divestiture Monitor. Amalco and the substitute Divestiture Monitor shall execute an agreement that, subject to the approval of the Commissioner, confers on the substitute Divestiture Monitor all of the rights and powers necessary to permit the substitute Divestiture Monitor to monitor Amalco's compliance with the terms of this Agreement in a manner consistent with this Agreement. The substitute Divestiture Monitor shall sign a confidentiality agreement in a form determined by the Commissioner. The provisions of this Agreement shall apply, *mutatis mutandis*, to any substitute Divestiture Monitor appointed pursuant to this paragraph.

[10] Amalco shall indemnify the Divestiture Monitor and hold the Divestiture Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Monitor's duties, including, but not limited to, all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence of, any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from malfeasance, gross negligence, wilful misconduct or bad faith on the part of the Divestiture Monitor.

#### IV. PRESERVATION OF THE DIVESTITURE ASSETS

[11] Pending the Divestiture, Amalco shall:

- (a) ensure that the management and operation of the Divested Retail Business Assets continue in a manner that is reasonably consistent in nature, scope and magnitude with the past practices of Amalco relating to the Divested Retail Business; and
- (b) use commercially reasonable efforts to provide resources for the operational support of the Divested Retail Business to maintain sales, marketing and business plans existing at the date of the Arrangement Agreement in a manner that is reasonably consistent in nature, scope and magnitude with the past practices of Amalco relating to the Divested Retail Business.

[12] Amalco shall (except as permitted or required by a Divestiture Agreement approved by the Commissioner) use commercially reasonable efforts until the completion of the Divestiture, to do or cause to be done, the following:

- (a) operate the Divested Retail Business in the ordinary course of business;
- (b) operate in compliance with all applicable laws;
- (c) maintain all material licences, permits, contracts, agreements and authorizations necessary for its operation (including, for greater certainty, taking steps to monitor and enforce the performance by Divested Station Retail Associates of their obligations under contracts with Amalco related to the Divested Stations);
- (d) maintain its competitiveness and its customer base, and, in particular, to continue to solicit business;
- (e) maintain the Divestiture Assets in good condition and repair, normal wear and tear excepted, and to standards at least equal to those maintained prior to the date of the Arrangement Agreement;
- (f) establish all prices, deductions, credit and allowances in accordance with policies

which are consistent with Amalco's retail gas station business in Ontario that is not part of the Divested Retail Business;

- (g) maintain quality and service standards for its customers; and
- (h) maintain all material contracts without alteration except as such alteration may be required in the ordinary course of business.

**[13]** Until the completion of the Divestiture, Amalco shall not (except as permitted or required by a Divestiture Agreement approved by the Commissioner):

- (a) take or allow to be taken any action that adversely affects the competitiveness, operations or financial status of the Divested Retail Business;
- (b) exclude the Divested Retail Business from any marketing, sales, promotional or other activities that are followed in respect of Amalco's retail gas station business in Ontario that is not part of the Divested Retail Business;
- (c) mortgage, pledge, grant a security interest in or otherwise create a lien on any of the Divested Retail Business Assets, except in the ordinary course of business and in amounts which, individually and in the aggregate, are not material to the financial condition or the operation of any Divested Station;
- (d) enter into any lease or other contract or any other transaction relating to the Divested Retail Business that is not in the ordinary course of business;
- (e) dispose of or revalue any of the Divested Retail Business Assets, except for sales of inventory in the ordinary course of business as contemplated by this Agreement; or
- (f) with the exception of termination notices for individual Divested Stations or agreements with Divested Station Retail Associates and Ancillary Product Suppliers (to be effective as at the date of Divestiture), terminate, cancel, modify or amend in any material respect or take or fail to take any action that would entitle any party to any material contract to terminate, cancel, modify or amend any material contract.



[14] Without limiting the generality of the foregoing, Amalco shall make all reasonable efforts to cause the Divested Retail Business to operate in a manner that is consistent in nature, scope and magnitude with the past practices of the Respondents in relation to the Divested Retail Business and in the ordinary course of the normal day-to-day operations of the Divested Retail Business (subject to disruptions reasonably necessary for the Divestiture process generally and Amalco's compliance with obligations under this Agreement) in compliance with all applicable laws and the terms and conditions of all material contracts and in accordance with past custom and practice.

[15] In addition to the foregoing, Amalco shall provide sufficient financial resources in accordance with its practices as at the date of the Arrangement Agreement to:

- (a) operate the Divested Retail Business at least at current rates of operation; and
- (b) perform all reasonable maintenance to the Divestiture Assets as required.

[16] Amalco represents and warrants that the Divested Retail Business Assets (other than the Excluded Assets) represent all of the assets, rights and interests reasonably necessary for a Purchaser to conduct the Divested Retail Business as a retail gas station, provided that the Purchaser installs its own point of sale equipment and related software, has made arrangements for transaction/credit/debit services and obtains all permits and licenses that are personal to the Purchaser or the Purchaser's operator.

[17] Amalco shall report in writing to the Commissioner concerning Amalco's compliance with this Agreement: (i) no later than thirty (30) days after the Closing Date and every thirty (30) days thereafter until the Divestiture is completed, (ii) no later than thirty (30) days from the date that all obligations in this Agreement are satisfied, and (iii) no later than five (5) Business Days following a request by the Commissioner for supplemental information.

[18] The obligations of this **Part IV** shall apply with respect to the Divested Stations and the alternate retail gas stations listed in **Confidential Schedule "B.2"**.

## **V. DIVESTITURE PROCEDURE**

[19] Amalco shall offer the Divestiture Assets for sale by way of a sale, assignment, conveyance, transfer, auction, public tender, public offering, or any other procedure approved by the

Commissioner that allows a fair opportunity for one or more *bona fide* prospective Purchasers to offer to acquire the Divestiture Assets pursuant to this Agreement.

[20] Any Person making a *bona fide* inquiry of Amalco or the Divestiture Trustee, as the case may be, regarding the possible purchase by that Person or its principal of the Divestiture Assets pursuant to this Agreement shall be notified that the sale is being made pursuant to this Agreement and shall be provided with a copy of this Agreement, with the exception of the provisions that are confidential at that time.

[21] Any prospective Purchaser with a *bona fide* interest (the final determination of which is for the Commissioner alone) shall (together with such Purchaser's representatives):

- (a) be furnished with all pertinent information regarding the Divestiture Assets;
- (b) be permitted to make such reasonable inspection of the Divestiture Assets and of all financial, operational or other non-privileged documents and information, including, but not limited to, Confidential Information, which may be relevant to the Divestiture, except for any documents which at the time of request for the inspection of such documents the Commissioner has agreed need not be disclosed; and
- (c) be provided with full and complete access as is reasonable in the circumstances to Amalco's management responsible for the Divested Retail Business.

Any prospective Purchaser's access to the information specified in this paragraph shall be conditional upon the execution of a confidentiality agreement in a form approved by the Commissioner.

[22] The Divestiture shall be completed on the following general terms:

- (a) by sale, assignment, conveyance, transfer, auction, public tender, public offering or other disposition necessary to ensure that, by completion of the Divestiture, Amalco has, directly or indirectly, no remaining title, right or interest in the Divestiture Assets, except as otherwise permitted by the Commissioner;
- (b) by way of disposition to a Purchaser or Purchasers that covenant in the Divestiture

Agreement to conduct the Divested Retail Business Assets as a retail gas station and who can satisfy the Commissioner that he, she or it meets the conditions set out in **paragraph 22(d)(i)** and **(ii)** of the Agreement;

- (c) to a Purchaser or Purchasers approved by the Commissioner; and
- (d) to a Purchaser or Purchasers at arm's length from Amalco and who can satisfy the Commissioner that they:
  - (i) are committed to carrying on the business of the Divested Retail Business in the markets in which the Divested Stations are located;
  - (ii) have the managerial, operational and financial capability to compete effectively in the retail gasoline business in markets in which the Divested Stations are located; and
  - (iii) will enter into a Divestiture Agreement prior to the expiry of the Initial Sale Period and complete the Divestiture either prior to the expiry of the Initial Sale Period or within a reasonable period of time thereafter as approved in advance by the Commissioner, which date of completion may, but need not, be specifically set forth in the Divestiture Agreement.

The determination of whether a Purchaser satisfies the above conditions is at the sole discretion of the Commissioner. In exercising her discretion to approve a Divestiture to a Purchaser, the Commissioner may take into account, *inter alia*, the likely impact of the Divestiture on competition. The decision of the Commissioner as to whether to approve the Divestiture shall be in writing.

[23] Amalco shall provide reasonable and customary commercial covenants, representations, warranties and, subject to **paragraph 12** of **Confidential Schedule "A"**, indemnities to a Purchaser, including representations, warranties and indemnities relating to environmental matters consistent with those typically included in retail gasoline station sales; however, nothing in this paragraph nor in this Agreement shall require Amalco to covenant or otherwise agree not to compete with the Divested Retail Business for any period of time.

[24] For a period of five (5) years from the date of Divestiture to a Purchaser, Amalco shall offer to such Purchaser of a Divested Station the option to purchase from Amalco unbranded gasoline and unbranded diesel in quantities requested by the Purchaser for use at the Divested Station, at prices and terms that are no less favourable than those extended by Amalco for the supply of unbranded gasoline and unbranded diesel of the same type, respectively, to any gas station of similar size (by throughput volume over the past twelve (12) month period) in the same or similar region. Notwithstanding the foregoing, at the option of the Purchaser, Amalco and a Purchaser can negotiate an alternative supply arrangement on different prices and terms than those noted in this paragraph. For greater certainty, as indicated at **paragraph 4**, the supply obligation in this paragraph does not constitute a Divestiture for the purposes of this Agreement.

[25] Amalco shall not disclose Confidential Information except to a Person who requires such information for the purposes permitted under this Agreement. Notwithstanding anything in this paragraph, nothing in this Agreement shall preclude Amalco from retaining and using any Confidential Information that is also used by Amalco in its ongoing business and operations and nothing in this Agreement shall preclude Amalco from making Confidential Information available to Permitted Persons for the purposes of complying with this Agreement, preparing standard financial and regulatory reports, tax returns and benefits administration and complying with applicable law and governmental authorities in Canada.

[26] Amalco shall enforce the terms of this **Part V** as to any Person and take such action as is necessary to cause each such Person to comply with the terms of this **Part V**.

[27] Amalco will use reasonable commercial efforts to obtain any third party consents or waivers reasonably necessary to permit the assignment to, and assumption by, the Purchaser of all the contracts, licences, permits, agreements and authorizations included in the Divested Retail Business Assets. Nothing in this Agreement will constitute an agreement to assign or an attempted assignment of any contract or other commitment for which any requisite consent or waiver to the assignment thereof has not been obtained. To the extent permitted by applicable law and by the applicable contracts, licences, permits, agreements and authorizations, if any requisite consent or waiver has not been obtained on or prior to the completion of a Divestiture, the Divestiture Agreement shall provide that the applicable contract, licence, permit, agreement or authorization will

be held by Amalco in trust for the benefit of the Purchaser and the Divestiture Agreement may provide that the Purchaser will perform the obligations of Amalco thereunder and be entitled to receive all money becoming due and payable under and other benefits derived from the contract, licence, permit, agreement or authorization immediately after receipt by Amalco.

## VI. DIVESTITURE OF THE ASSETS

[28] The Initial Sale Period commences on the Closing Date and ends at the time prescribed in **Confidential Schedule “C”** to this Agreement.

[29] Upon commencement of the Initial Sale Period, Amalco shall promptly use all reasonable commercial efforts to effect the Divestiture as soon as practicable to a Purchaser approved by the Commissioner, and pursuant to a Divestiture Agreement or public offering approved by the Commissioner.

[30] Amalco shall promptly notify the Commissioner of any material change in the value of any of the Divestiture Assets, or any change in the status of any of the Divestiture Assets that could materially affect their market value or saleability owing to, *inter alia*, environmental, regulatory, zoning, marketability, retail associate/dealer issues, the failure to obtain any third party consents or waivers reasonably necessary to permit the assignment to, and assumption by, the Purchaser of all the contracts, licenses, permits, agreements and authorizations included in the Divested Retail Business Assets, or related reasons, in which case, provided that Amalco has not delivered the notice contemplated by **paragraph 31** in respect of such Divestiture Assets within ten (10) Business Days following the delivery of the notice contemplated by this **paragraph 30**, the Commissioner may, upon providing notice to Amalco, elect to substitute another retail gas station, which may be of the same or greater size (on the basis of having, for the twelve (12) month period prior to the Closing Date, the same or greater volumetric sales) and within the same geographic region as selected from the list of alternate retail gas stations provided in **Confidential Schedule “B.2”**.

[31] In the event that Amalco, acting reasonably, determines during the Initial Sale Period that a particular retail gas station comprising one of the Divested Stations listed in **Schedule “B” or Schedule “B.1”** is no longer suitable for Divestiture owing to, *inter alia*, environmental, regulatory, zoning, marketability, retail associate/dealer issues, the failure to obtain any third party consents or

waivers reasonably necessary to permit the assignment to, and assumption by, the Purchaser of all contracts, licenses, permits, agreements and authorizations included in the Divested Retail Business Assets, or related reasons, Amalco may substitute another retail gas station of the same or greater size (on the basis of having, for the twelve (12) month period prior to the Closing Date, the same or greater volumetric sales) and in the same Kent Area from **Confidential Schedule “B.2”**, provided that Amalco shall notify the Commissioner of any such substitution at least five (5) Business Days before making such substitution. Alternatively, Amalco may substitute another retail gas station from **Confidential Schedule “B.2”** that does not satisfy the above noted volumetric and/or geographic conditions, provided that Amalco has received the Commissioner’s prior written approval authorizing Amalco to do so. The Commissioner shall provide her determination within five (5) Business Days of Amalco’s notification.

[32] Where Amalco has substituted a retail gas station for one of the Divestiture Assets listed in **Schedule “B”** or **“B.1”**, Amalco shall use reasonable commercial efforts to enter into a Divestiture Agreement for that station by the end of the Initial Sale Period, as prescribed in **Confidential Schedule “C”** to this Agreement, with a Person approved by the Commissioner, and pursuant to a Divestiture Agreement approved by the Commissioner.

[33] With the exception of **paragraph 23**, nothing in this Agreement shall preclude Amalco’s ability to negotiate and agree upon terms with a Purchaser in respect of environmental liabilities, subject to all applicable laws.

[34] Amalco shall notify the Commissioner as soon as possible of any negotiations with a prospective Purchaser that may lead to a sale and shall forward copies to the Commissioner of any agreement that it signs with a prospective Purchaser, including non-binding expressions of interest.

[35] Amalco shall promptly notify the Commissioner of its intention to enter into a Divestiture Agreement with respect to any proposed Divestiture.

[36] Within ten (10) Business Days of receipt of the notice described in **paragraph 35**, the Commissioner may request additional information concerning the proposed Divestiture. If further additional information is requested by the Commissioner, it will be requested within five (5) Business Days of all of the information received from the prior request.

[37] The Commissioner shall notify Amalco of the approval of, or the objection to, the proposed Divestiture within ten (10) Business Days of the receipt of all additional information requested, pursuant to the immediately preceding paragraph.

[38] If the Commissioner does not require additional information as a result of the notification of Amalco referred to in **paragraph 35**, the Commissioner shall notify Amalco of the approval of, or the objection to, the proposed Divestiture within fifteen (15) Business Days of receiving such notice.

[39] Amalco is prohibited from re-acquiring, operating or managing any Divested Station identified in **Schedule “B”**, **Schedule “B.1”** or **Confidential Schedule “B.2”**, as modified, and where applicable, by **Confidential Schedule “E”**, as the case may be, for a period of ten (10) years from the date of the completion of the Divestiture.

[40] Divestiture Assets shall be considered Residual Assets, and the Divestiture of such Residual Assets shall be carried out by the Divestiture Trustee, where and only where:

- (a) a Divestiture Agreement has not been entered into and approved by the Commissioner during the Initial Sale Period; or
- (b) a Divestiture Agreement has been entered into and approved by the Commissioner during the Initial Sale Period, but the transaction contemplated by such Divestiture Agreement has not been completed either prior to the expiry of the Initial Sale Period or within a reasonable period of time thereafter as approved in advance by the Commissioner in accordance with **paragraph 22(d)**.

## VII. DIVESTITURE TRUSTEE SALE

[41] The Commissioner shall appoint the Divestiture Trustee in the manner set out in **Confidential Schedule “D”** to this Agreement. The Divestiture Trustee will be a Person with experience and expertise in acquisitions and divestitures.

[42] Immediately upon the expiration of the Initial Sale Period, the Divestiture Trustee shall have the exclusive authority, subject to oversight and approval by the Commissioner only, to control the Divestiture process of the Residual Assets and to effect the Divestiture of such Residual Assets by

whatever procedure the Divestiture Trustee believes in his, her or its sole discretion is suitable to enter into a Divestiture Agreement within the Trustee Sale Period.

[43] The Divestiture Trustee shall conduct the Divestiture of the Residual Assets in accordance with the provisions of this **Part VII** and **Confidential Schedules “A”, “C”, “D” and “E”**.

[44] The Divestiture Trustee shall execute a confidentiality agreement, in a form determined by the Commissioner, and refrain from communicating any Confidential Information to anyone except to the extent reasonably required to effect the Divestiture.

[45] The Divestiture Trustee shall have full access to the personnel (to the extent that such personnel is an employee of, or otherwise under the control of, Amalco), books, records and facilities related to the Residual Assets and any other information, including Confidential Information, deemed relevant by the Divestiture Trustee to effect the Divestiture, and Amalco shall take no action to interfere with the Divestiture.

[46] Amalco shall provide all assistance as may be reasonably requested by the Divestiture Trustee to effect the Divestiture. Amalco shall identify a Person responsible for responding to such requests of the Divestiture Trustee.

[47] The Divestiture Trustee shall have no authority to offer the Residual Assets for sale until after the completion of the Initial Sale Period, at which time the Divestiture Trustee shall have the exclusive authority and primary obligation to effect the Divestiture of the Residual Assets as provided in this **Part VII**. Amalco shall pay all reasonable fees and expenses charged or incurred by the Divestiture Trustee (although, for greater certainty, the Divestiture Trustee shall not incur any expenses related to site remediation, other than in respect of conducting required environmental testing necessary to prepare the Residual Assets for sale).

[48] The Divestiture Trustee shall effect the Divestiture of the Residual Assets as soon as practicable and no later than the end of the Trustee Sale Period. The Trustee Sale Period may be extended at the sole discretion of the Commissioner.

[49] The Divestiture Trustee shall have the sole authority to determine and to impose all reasonable and customary terms and conditions for the purpose of effecting the Divestiture, subject



to the terms set out in **Confidential Schedule “E”**. The Divestiture Trustee shall not, however, covenant or otherwise agree to any term in a Divestiture Agreement whereby Amalco would be prohibited from competing, directly or indirectly, with the Divested Retail Business for any period of time in respect of the sale of any products.

**[50]** The Divestiture Trustee shall serve, without bond or other security, at the reasonable cost and expense of Amalco on such reasonable and customary terms and conditions as the Commissioner may determine.

**[51]** The Divestiture Trustee shall have the authority to engage, at reasonable cost and expense to be borne by Amalco, such consultants, accountants, lawyers, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Divestiture Trustee's duties and responsibilities.

**[52]** Amalco will not be included in the process for the negotiation of agreements with Purchasers by the Divestiture Trustee, nor will Amalco have contact with prospective Purchasers, other than in the ordinary course of its business, unless such contact is approved by the Commissioner. However, with the consent of the Commissioner, the Divestiture Trustee may consult with Amalco in the presence of a representative of the Commissioner (except that the presence of a representative of the Commissioner shall not be required where the Divestiture Trustee has confirmed that the Commissioner has consented not to be present), where the Divestiture Trustee considers such consultation to be of assistance.

**[53]** Amalco shall pay all reasonable invoices submitted by the Divestiture Trustee on a monthly basis. Any outstanding monies owed to the Divestiture Trustee by Amalco shall be paid out from any proceeds of the Divestiture.

**[54]** Amalco shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or

expenses result from malfeasance, gross negligence, wilful misconduct or bad faith on the part of the Divestiture Trustee.

**[55]** If the Divestiture Trustee ceases to act or fails to act diligently or otherwise in accordance with this Agreement or any agreement between the Commissioner and the Divestiture Trustee, the Commissioner may appoint a substitute Divestiture Trustee in the same manner as provided for in this **Part VII** for appointment of the initial Divestiture Trustee.

**[56]** The Divestiture Trustee shall have no obligation or authority to operate or maintain the Divestiture Assets. Amalco shall continue to preserve and operate the Divestiture Assets in accordance with **Part IV** of this Agreement until such time as the Divestiture is effected.

**[57]** The Divestiture Trustee shall report in writing to the Commissioner every thirty (30) days, and upon the Commissioner's request within three (3) Business Days, concerning the Divestiture Trustee's efforts to discharge its obligations to effect the Divestiture of the Residual Assets. Such reports shall contain reasonable detail on the steps being taken by the Divestiture Trustee to effect the Divestiture of the Residual Assets, including but not limited to, the identity of prospective Purchasers, the status of negotiations with such prospective Purchasers, and any additional information requested by the Commissioner.

**[58]** The Divestiture Trustee shall promptly notify the Commissioner in writing, of any proposed Divestiture of the Residual Assets. Such notice shall include:

- (a) the identity of the proposed Purchaser;
- (b) the details of the proposed transaction;
- (c) information concerning whether the proposed Purchaser would likely satisfy the terms of this Agreement; and
- (d) any additional information requested by the Commissioner.

**[59]** The Divestiture Trustee shall only divest the Residual Assets to a Purchaser or Purchasers approved, in writing, by the Commissioner.

**[60]** If the Commissioner notifies the Divestiture Trustee that she has approved a proposed Divestiture of Residual Assets, the Divestiture Trustee shall forthwith notify Amalco, in writing, of such proposed Divestiture. Such notice shall include:

- (a) the identity of the proposed Purchaser; and
- (b) the details of the proposed transaction.

**[61]** Amalco may not object to, or challenge, the Divestiture Trustee Sale on any grounds other than malfeasance, gross negligence, wilful misconduct or bad faith on the part of the Divestiture Trustee in fulfilling its obligations hereunder. If Amalco objects to the terms and conditions of a Divestiture of Residual Assets that have been proposed by the Divestiture Trustee on the grounds of malfeasance, gross negligence, wilful misconduct or bad faith by the Divestiture Trustee, either of Amalco or the Commissioner may apply to the Tribunal for directions.

**[62]** The Commissioner may extend the Trustee Sale Period as the Commissioner considers necessary, in her sole discretion, to effect the Divestiture of the Residual Assets.

**[63]** The Divestiture Trustee's obligations and powers shall not expire under this Agreement until the Divestiture of the Residual Assets is effected.

#### **VIII. FAILURE OF DIVESTITURE TRUSTEE SALE**

**[64]** If, after the expiry of the Initial Sale Period, the Commissioner is of the opinion that the Divestiture of the Residual Assets will not likely be completed prior to the expiry of the Trustee Sale Period, the Commissioner may apply to the Tribunal for such order as is necessary to effect the Divestiture of the Residual Assets, including an order that other asset(s) used directly in the operation of the retail gas station business be offered for sale or additional steps be taken, to effect the Divestiture of the Residual Assets; provided that, for greater certainty, such asset(s) shall not include (a) Amalco's ownership interest in any Pioneer Entity or in UPI Energy LP, or (b) any upstream assets, such as, without limitation, any refinery or any terminal. Amalco agrees to submit to the Tribunal's jurisdiction to grant such relief.

## IX. AMALCO'S INTEREST IN PIONEER

[65] Amalco shall divest those Divested Stations that are located in the same geographic regions as a retail station of a Pioneer Entity as set out in **Schedule "B.1"** to this Agreement in accordance with the provisions of this Agreement as such provisions would otherwise apply to Divested Stations listed in **Schedule "B"** to this Agreement. For greater certainty, all of the obligations set forth in **Parts III, IV, V, VI, VII and VIII** of this Agreement will apply, *mutatis mutandis*, to the sale of Divested Stations described in **Schedule "B.1"**.

[66] Amalco's rights and powers to nominate directors to, or to remove directors from, the board of directors of each of PPHI and PPMI shall be exercised in accordance with **Confidential Schedule "F"** to this Agreement so as to ensure the independence from Amalco of such directors. Amalco shall also implement the restrictions on the disclosure or exchange of Competitively Sensitive Information between Amalco and any Pioneer Entity as required in **Confidential Schedule "F"** to this Agreement.

## X. ONTARIO WHOLESALE SUPPLY COMMITMENTS

[67] Amalco shall:

- (a) offer to provide, for ten (10) years from the Closing Date, Terminalling Services for not less than a total throughput of 800 ML per year to a Throughput Party, or to Throughput Parties, at the Metro Depot on customary trade terms including the payment of a Terminalling Fee (the "**Metro Depot Terminalling Services**");
- (b) offer to provide, for ten (10) years from the Closing Date, Terminalling Services to a Throughput Party or Throughput Parties at the Oakville Terminal for not less than a total throughput of 360 ML per year on customary trade terms including the payment of a Terminalling Fee (the "**Oakville Terminalling Services**"); and
- (c) sell at least 98 ML of unbranded gasoline per Wholesale Supply Year to Independent Marketers at or from the Metro Depot for ten (10) years from the Closing Date (the "**Independent Supply Obligations**").

[68] Amalco shall provide all services and facilities reasonably required by a Throughput Party or Throughput Parties for receipt, storage and rack delivery services for fungible gasoline and diesel products at Metro Depot or Oakville Terminal as applicable.

[69] With respect to Metro Depot Terminalling Services:

- (a) **Confidential Schedule “A”** shall apply as specified therein;
- (b) at the option of the Throughput Party or Throughput Parties, all of the throughput may be for fungible gasoline;
- (c) unless otherwise agreed to between Amalco and a Throughput Party (or Throughput Parties), 400 ML of throughput shall be on a Take or Pay basis. Unless otherwise agreed to, Amalco may limit the maximum total monthly throughput volume to no less than one-eleventh of 800 ML;
- (d) the Throughput Party (or Throughput Parties) may resell or trade any or all of the Metro Depot Terminalling Services to its affiliates, agents, customers, contractors or third parties (collectively “**Third Parties**” for the purposes of this **Part X**) at the Throughput Party’s (or Throughput Parties’) sole discretion, and Amalco shall grant to such Third Parties access to the Terminalling Services and loading facilities that is equal to, and subject to the same requirements of, the rights and access provided for the Throughput Party (or Throughput Parties) under the terms of this Agreement, provided that the Throughput Party (or Throughput Parties) acknowledges and agrees that it is responsible for any and all products lifted by Third Parties in accordance with this Agreement, the Throughput Party (or Throughput Parties) shall remain the party that is subject to the Terminalling Services agreement with Amalco and the Throughput Party (or Throughput Parties) shall remain the Person (or Persons) responsible for paying Amalco for the Terminalling Services;
- (e) the Throughput Party (or Throughput Parties) may terminate any agreement for Metro Depot Terminalling Services at any time after five (5) years following the Closing Date, provided that it provides Amalco with at least one (1) year’s advance

written notice;

- (f) in the event that, for any reason, an agreement or agreements for the Metro Depot Terminalling Services are terminated or the throughput capacity available under the Terminalling Services agreement is reduced to less than 800 ML per year, Amalco shall offer to provide Metro Depot Terminalling Services to other Throughput Parties so that the total throughput capacity available to a Throughput Party (or Throughput Parties) at Metro Depot pursuant to this Agreement will continue to be 800 ML per year for ten (10) years from the Closing Date; and
- (g) in the event that the Throughput Party is not (or the Throughput Parties are not) a current shipper on the TNPI as of the date of this Agreement, Amalco shall, at the request of the Throughput Party, offer to enter into an agreement to receive unbranded gasoline delivered to Amalco's Montreal Facility by the Throughput Party (or Throughput Parties), at the Throughput Party's (or Throughput Parties') risk and expense, and provide the equivalent volume, up to the agreed maximum terminal throughput, at the Metro Depot for a fee equal to the then current Montreal to Toronto TNPI pipeline tariff and terminal fees which are no less favourable than the terminal fees that Amalco extends to the Throughput Party or Throughput Parties at Metro Depot.

[70] With respect to the Oakville Terminalling Services, **Confidential Schedule "A"** shall apply as specified therein.

[71] There shall be no obligation on a Throughput Party to purchase or sell any product or service from or to Amalco as a condition of entering into an agreement for Terminalling Services at Metro Depot or Oakville Terminal.

[72] All agreements for the supply of Terminalling Services with a Throughput Party (or Throughput Parties) entered into under this Agreement, other than the agreement set out in **paragraph 6(a)** of **Confidential Schedule "A"**, shall be subject to approval by the Commissioner, in her sole discretion. In exercising her discretion to approve such agreements, the Commissioner

may take into account, *inter alia*, the likely impact of the agreement on competition and other relevant factors.

[73] Amalco shall promptly notify the Commissioner of its intention to enter into an agreement for Terminalling Services and forward copies of any agreement that it proposes to sign with a prospective Throughput Party (or Throughput Parties), including non-binding expressions of interest.

[74] Within ten (10) Business Days of receipt of the notice described in the immediately preceding paragraph, the Commissioner may request additional information concerning the proposed agreement and prospective Throughput Party (or Throughput Parties) that is relevant to the approval provided for in **paragraph 72** above. If further additional information is requested by the Commissioner, it will be requested within five (5) Business Days of all of the information received from the prior request.

[75] The Commissioner shall notify Amalco in writing of the approval of, or the objection to, the proposed Terminalling Services agreement within five (5) Business Days of the receipt of all additional information requested, pursuant to the immediately preceding paragraph.

[76] If the Commissioner does not require additional information as a result of the notification of Amalco referred to in **paragraph 73**, the Commissioner shall notify Amalco, in writing, of the approval of, or the objection to, the proposed Terminalling Services agreement within ten (10) Business Days of receiving such notice.

## **XI. INDEPENDENT INDUSTRY EXPERT SALE**

[77] In the event that Amalco has not concluded one or more agreements for the Metro Depot Terminalling Services as set out in **paragraph 67(a)**, or in the event that Amalco has not concluded agreements pursuant to **paragraph 67(b)** or **paragraph 69(f)** herein, within the time periods set out in **Confidential Schedule “A”**, the Commissioner shall appoint an Independent Industry Expert Seller, as required, to satisfy Amalco’s obligations hereunder in respect of Terminalling Services in accordance with **Confidential Schedule “A”** as specified therein. The Independent Industry Expert Seller shall use best efforts and shall have full and exclusive authority to conclude agreements which are binding on Amalco for any remaining volume not under contract for a total throughput obligation

at Metro Depot of 800ML per year, and a total throughput obligation at the Oakville Terminal of 360 ML per year, for ten (10) years from the Closing Date.

[78] Immediately upon his, her or its appointment, the Independent Industry Expert Seller shall have exclusive authority, subject to oversight and approval by the Commissioner only, to enter into agreements binding upon Amalco for Terminalling Services by whatever procedure the Independent Industry Expert Seller believes in its sole discretion is suitable to conclude such agreements with a Throughput Party (or Throughput Parties).

[79] Amalco shall be bound by agreements for Terminalling Services concluded by the Independent Industry Expert Seller on behalf of Amalco. Amalco agrees that it will do all such acts and execute all such further documents, and will cause the doing of all such acts and the execution of all such further documents as are within its power to cause the doing or execution of, as may be reasonably necessary to ensure that agreements entered into by the Independent Industry Expert Seller in accordance with this **Part XI** are binding upon and enforceable against Amalco.

[80] The Independent Industry Expert Seller shall conduct negotiations with a Throughput Party or Throughput Parties in accordance with the provisions of this **Part XI** and **Confidential Schedule “A”**.

[81] The Independent Industry Expert Seller shall execute a confidentiality agreement, in a form determined by the Commissioner, and refrain from communicating any Confidential Information to anyone except to the extent reasonably required to conclude agreements with a Throughput Party (or Throughput Parties).

[82] The Independent Industry Expert Seller shall have full access to the personnel (to the extent that such personnel is an employee of, or otherwise under the control of, Amalco), books, records and facilities related to Metro Depot Terminalling Services and Oakville Terminalling Services and any other information, including Confidential Information, deemed relevant by the Independent Industry Expert Seller to conclude agreements with a Throughput Party (or Throughput Parties), and Amalco shall take no action to interfere with such negotiations.



**[83]** Amalco shall provide all assistance as may be reasonably requested by the Independent Industry Expert Seller. Amalco shall identify a Person responsible for responding to such requests of the Independent Industry Expert Seller.

**[84]** Amalco shall pay all reasonable fees and expenses charged or incurred by the Independent Industry Expert Seller. Amalco shall pay all reasonable invoices submitted by the Independent Industry Expert Seller on a monthly basis.

**[85]** The Independent Industry Expert Seller shall serve, without bond or other security, at the reasonable cost and expense of Amalco on such reasonable and customary terms and conditions as the Commissioner may determine.

**[86]** The Independent Industry Expert Seller shall have the authority to engage, at reasonable cost and expense to be borne by Amalco, such consultants, accountants, lawyers, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Independent Industry Expert Seller's duties and responsibilities.

**[87]** Amalco will not be included in the process for the negotiation of agreements with a Throughput Party (or Throughput Parties) by the Independent Industry Expert Seller, nor will Amalco have contact with a prospective Throughput Party (or Throughput Parties), other than in the ordinary course of its business, unless such contact is approved by the Commissioner. However, with the consent of the Commissioner, the Independent Industry Expert Seller may consult with Amalco in the presence of a representative of the Commissioner (except that the presence of a representative of the Commissioner shall not be required where the Independent Industry Expert Seller has confirmed that the Commissioner has consented to not be present), where the Independent Industry Expert Seller considers such consultation to be of assistance.

**[88]** Amalco shall indemnify the Independent Industry Expert Seller and hold the Independent Industry Expert Seller harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Independent Industry Expert Seller's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defence of any claim, whether or not resulting in any liability, except to the extent

that such liabilities, losses, damages, claims, or expenses result from malfeasance, gross negligence, wilful misconduct or bad faith on the part of the Independent Industry Expert Seller.

**[89]** If the Independent Industry Expert Seller ceases to act or fails to act diligently or otherwise in accordance with this Agreement or any agreement between the Commissioner and the Independent Industry Expert Seller, the Commissioner may appoint a substitute Independent Industry Expert Seller in the same manner as provided for in this **Part XI** for appointment of the initial Independent Industry Expert Seller.

**[90]** The Independent Industry Expert Seller shall have no obligation or authority to operate or maintain the Metro Depot or Oakville Terminal or to supply any Terminalling Services.

**[91]** The Independent Industry Expert Seller shall report in writing to the Commissioner every thirty (30) days, and upon the Commissioner's request within three (3) Business Days, concerning the Independent Industry Expert Seller's efforts to conclude agreements for Terminalling Services with a Throughput Party (or Throughput Parties). Such reports shall contain reasonable detail on the steps being taken by the Independent Industry Expert Seller, including but not limited to, the identity of prospective Purchasers, the status of negotiations with such prospective Throughput Parties, and any additional information requested by the Commissioner.

**[92]** The Independent Industry Expert Seller shall promptly notify the Commissioner, in writing, of any proposed agreements for Terminalling Services with a Throughput Party (or Throughput Parties). Such notice shall include:

- (a) the identity of the proposed Throughput Party;
- (b) the details of the proposed transaction;
- (c) information concerning whether, in the view of the Independent Industry Expert Seller, the proposed agreement would likely satisfy the terms of this Agreement; and
- (d) any additional information requested by the Commissioner.

[93] The Independent Industry Expert Seller shall only conclude agreements for the Terminalling Services with a Throughput Party (or Throughput Parties) as approved, in writing, by the Commissioner.

[94] Amalco may not object to, or challenge, any agreement proposed or concluded by the Independent Industry Expert Seller on any grounds other than malfeasance, gross negligence, wilful misconduct, bad faith on the part of the Independent Industry Expert Seller in fulfilling his, her or its obligations hereunder or breach by the Independent Industry Expert Seller of **paragraphs 4, 5, 7 or 10 of Confidential Schedule "A"**. If Amalco objects to the terms and conditions of an agreement for the Terminalling Services with a Throughput Party (or Throughput Parties) that has been proposed or concluded by the Independent Industry Expert Seller on the grounds that the entering into of such agreement would be, or constituted, malfeasance, gross negligence, wilful misconduct or bad faith by the Independent Industry Expert Seller in fulfilling his, her or its obligations hereunder or contrary to the terms of **paragraphs 4, 5, 7 or 10 of Confidential Schedule "A"**, either of Amalco or the Commissioner may apply to the Tribunal for directions.

[95] **Confidential Schedule "A"** shall apply to this **Part XI** as specified therein.

## **XII. FAILURE OF INDEPENDENT INDUSTRY EXPERT SELLER SALE**

[96] If the Independent Industry Expert Seller is unable to conclude Terminalling Services agreements for the Metro Depot or the Oakville Terminal following any of the periods set out in **paragraphs 5 and 10 of Confidential Schedule "A"** in respect of all volume and time not already committed for the remaining part of the ten (10) year period contemplated by this Agreement, up to 800 ML at the Metro Depot and up to 360 ML at the Oakville Terminal, the Commissioner may apply to the Tribunal in accordance with **paragraph 11 of Confidential Schedule "A"**. Amalco agrees to submit to the Tribunal's jurisdiction to grant such relief.

## **XIII. INDEPENDENT SUPPLY OBLIGATIONS**

[97] With respect to Amalco's Independent Supply Obligations:

- (a) Amalco shall sell to Independent Marketers at least 98 ML of unbranded gasoline per Wholesale Supply Year at or from the Metro Depot for ten (10) years from the

Closing Date;

- (b) all sales by Amalco from the Metro Depot to Independent Marketers, whether as part of existing or new agreements in respect of all sales and processing or other supply arrangements with the Independent Marketers, in any Wholesale Supply Year, shall be added to determine if the volume required to be sold to Independent Marketers for that Wholesale Supply Year has been fully purchased; however, for the purpose of calculating the volume of unbranded gasoline sold by Amalco to Independent Marketers in any Wholesale Supply Year, no account shall be taken of any sales of gasoline to formerly branded Sunoco, GTO or Petro-Canada service stations in which there is in effect an unbranded gasoline supply arrangement as contemplated by **paragraph 24** of this Agreement;
- (c) the volume required to be sold to Independent Marketers of unbranded gasoline shall be comprised of the grades and quality as requested by Independent Marketers, provided that Amalco shall not be required to sell to Independent Marketers unbranded gasoline in a grade mix that is not in approximate proportions to the grade mix being sold by Amalco at the wholesale level from terminals in the Greater Toronto Area for resale at the retail level; and
- (d) unless requested by an Independent Marketer, all unbranded gasoline supplied herein shall be supplied at the Metro Depot.

**[98]** Nothing in this **Part XIII** of this Agreement shall be deemed to restrict or limit, in any manner, the ability of Amalco and an Independent Marketer to enter into processing or other supply arrangements not provided for therein.

#### **XIV. COMPLIANCE**

**[99]** Nothing in **Part X** or **Part XIII** of this Agreement shall be deemed to require Amalco to enter into or continue with Terminalling Services or Independent Supply Obligations with any Person (including an Affiliate of such Person) who is in default as a result of non-payment or material breach of any terms under any existing or previous processing or other supply arrangement with Amalco (or previously with Suncor or Petro-Canada, or their Affiliates).

[100] With respect to Terminalling Services and Independent Supply Obligations, nothing in **Parts X, XI or XIII** of this Agreement shall be deemed to require Amalco to enter into or otherwise continue to supply such services or supply on credit, other than as is standard practice in the Ontario wholesale industry and subject to a Throughput Party's and an Independent Marketer's credit worthiness.

[101] Amalco shall not be deemed to be in default under **Parts X, XI or XIII** of this Agreement if such default is caused by or is attributable to fire, storm, flood, war, hostilities, sabotage, blockade, explosion, accident, pandemic, strike, lockout, work stoppage or slowdown, labour disturbance, riot, rebellion, insurrection, act of God, expropriation or breakdown of or material injury to any facilities used in or for the production, transportation, manufacture, storage, handling or delivery of gasoline or diesel products, or of the crude oil or other materials from which any such products are manufactured or derived, or any other occurrence (whether similar or dissimilar to any of the foregoing) which is beyond the reasonable control of Amalco and which by the exercise of due diligence Amalco is unable to prevent or overcome; provided that Amalco shall not be relieved of any of its obligations under **Parts X, XI or XIII** as a result of the occurrence of any of the foregoing events (i) in the event of its failure to use commercially reasonable efforts to remedy the situation and remove such event in an adequate manner and with reasonable dispatch or (ii) with respect to any payment obligation under this Agreement.

[102] Amalco shall (i) beginning on February 1, 2010 and every six (6) months thereafter up to and including August 1, 2019, provide to the Commissioner a declaration of compliance with **Parts X, XI and XIII**, which shall include a description of the total throughput capacity committed to Throughput Parties at each of Metro Depot and Oakville Terminal and (ii) provide to the Commissioner information requested by the Commissioner to confirm compliance with **Parts X, XI and XIII** no later than ten (10) Business Days upon receiving a request for such information from the Commissioner.

[103] For purposes of determining or securing compliance with this Agreement, and subject to any legally recognized privilege, and upon written request and upon two (2) Business Days notice to Amalco, Amalco shall, without restraint or interference, permit any duly authorized representative(s) of the Commissioner:

- (a) access, during regular office hours of Amalco on Business Days, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Amalco related to compliance with this Agreement, which copying services shall be provided by Amalco at its expense; and
- (b) to interview officers, directors, or employees of Amalco regarding such matters.

**XV. NOTIFICATION**

**[104]** Amalco shall provide a copy of this Agreement to each of its officers, employees, or agents, having managerial responsibility for fulfilling any of Amalco's obligations under this Agreement; provided that, notwithstanding the foregoing, the Confidential Schedules of this Agreement shall not be provided to such officers, employees, or agents except to the extent that such provision is reasonably required to fulfill their responsibility for any of Amalco's obligations under this Agreement.

**[105]** Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the parties as follows:

(a) If to the Commissioner:

Competition Bureau  
Industry Canada  
Place du Portage, 21st Floor  
50 Victoria Street, Phase I  
Gatineau, Québec K1A 0C9  
Attention: Commissioner of Competition  
Fax: (819) 953-5013

With a copy to:

McCarthy Tétrault LLP  
Suite 5300  
66 Wellington St. West  
Toronto Dominion Bank Tower  
Toronto, Ontario  
Canada M5K 1E6  
Attention: Donald B. Houston  
Fax: (416) 868-0673

(b) If to the Respondents or Amalco:

Suncor Energy Inc.  
P.O. Box 38  
112 - 4th Avenue S.W.  
Calgary, AB T2P 2V5

Attention: Terrence J. Hopwood, Senior Vice President and General Counsel  
Fax: (403) 269-6218

With a copy to:

Blake, Cassels & Graydon LLP  
Commerce Court West  
199 Bay Street, 28<sup>th</sup> Floor  
Toronto, Ontario, M5L 1A9

Attention: Calvin S. Goldman, Brian A. Facey and Jason Gudofsky  
Fax: (416) 863-2653

or to such other street address, individual or electronic communication number or address as may be designated by notice given by any party to the other parties. Any demand, notice or other

communication given by personal delivery will be conclusively deemed to have been given on the day of actual delivery and, if given by registered mail, on the fifth (5<sup>th</sup>) Business Day following the deposit thereof in the mail and, if given by electronic communication, on the day of transmittal thereof if given during the normal business hours of the recipient and on the Business Day during which such normal business hours next occur if not given during such hours on any day. If the party giving any demand, notice or other communication knows or ought reasonably to know of any difficulties with the postal system that might affect the delivery of mail, any such demand, notice or other communication may not be mailed but must be given by personal delivery or by electronic communication.

## **XVI. DURATION**

[106] Amalco shall be bound by this Agreement until the Divestiture is effected, all of the Terminalling Services supplied, the Independent Supply Obligations have been discharged and all other obligations have been discharged in accordance with this Agreement or further order of the Tribunal.

[107] The Divestiture contemplated by this Agreement shall be deemed complete when all right, title and interest of Amalco in all of the Divestiture Assets have been conveyed in the manner provided for in this Agreement.

## **XVII. GENERAL**

[108] With the exception of the information in **Confidential Schedules “A”** and **“F”** to this Agreement (and, if the Divestiture is completed prior to the end of the Initial Sale Period, **Confidential Schedule “B.2”**), which information shall remain confidential at all times during and following the duration of this Agreement, confidential terms in this Agreement shall be made public upon the expiration of the Initial Sale Period, or when the Divestiture has been completed, whichever is later, provided that Amalco or the Commissioner may disclose the contents of **Confidential Schedule “F”** to any Pioneer Entity. The Respondents agree to the immediate registration of this Agreement with the Tribunal and the Respondents agree that it shall be binding upon Amalco.

[109] Notwithstanding the provisions of the previous paragraph, **Schedules “B”** and **“B.1”** to this Agreement shall be confidential for a period of twenty (20) days following the registration of this



Agreement with the Tribunal, provided that Amalco shall disclose the contents of **Schedules “B”** and **“B.1”** to this Agreement at any time to a *bona fide* potential Purchaser upon request. Nothing in this paragraph shall prevent Amalco from providing some or all of the contents of **Schedules “B”** and **“B.1”** to this Agreement to any Person, at any time.

[110] The Commissioner may agree to extend any of the time periods contemplated by this Agreement. The Respondents or Amalco, as appropriate, and the Commissioner may mutually agree to amend this Agreement in any manner pursuant to subsection 106(1) of the Act.

[111] Nothing in this Agreement (including the recitals hereto) precludes Amalco from bringing a future application under section 106 of the Act (or a successor or equivalent provision under the Act) to vary or rescind this Agreement on the grounds that the circumstances that led to the making of this Agreement have changed. Amalco agrees that it shall not, in any such application, contest the Commissioner’s present conclusion that the Transaction is likely to prevent or lessen competition substantially in respect of the retail marketing of gasoline in certain geographic areas in Ontario and in respect of the wholesale supply of gasoline in the Greater Toronto Area.

[112] Computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. I-21. For the purpose of this Agreement, the definition of “holiday” in the *Interpretation Act* shall be deemed to include Saturday.

[113] This Agreement constitutes the entire agreement between the Commissioner, Suncor and Petro-Canada and supersedes all prior agreements with respect to the subject matter hereof.

[114] This Agreement shall be governed by and interpreted in accordance with the laws of Ontario and the laws of Canada applicable therein.

[115] Nothing in this Agreement abrogates the notification obligations set out in Part IX of the Act.

[116] In the event of a dispute regarding the interpretation or application of this Agreement, any of the Commissioner, Suncor, Petro-Canada or Amalco may apply to the Tribunal for an order interpreting any of the provisions of this Agreement, and in no event shall any such dispute serve to suspend the Initial Sale Period except by order of the Tribunal. In the event of any conflict or inconsistency between the English language version of this Agreement and the French language

version of this Agreement, such conflict or inconsistency shall be resolved in favour of the English language version of this Agreement.

[117] This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.

The undersigned hereby agree to the registration of this Agreement.

DATED this 21<sup>st</sup> day of July, 2009.

[Original signed by “Melanie L. Aitken”]

\_\_\_\_\_  
Melanie L. Aitken  
Interim Commissioner of Competition

**SUNCOR ENERGY INC.**

[Original signed by “Terrence J. Hopwood”]

By: \_\_\_\_\_  
Name: Terrence J. Hopwood  
Title: Senior Vice President and General Counsel

**PETRO-CANADA**

[Original signed by “Ron A. Brenneman”]

By: \_\_\_\_\_  
Name: Ron A. Brenneman  
Title: President and Chief Executive Officer

**CONFIDENTIAL SCHEDULE "A"**

[CONFIDENTIAL]

**SCHEDULE "B"**

[CONFIDENTIAL]

**SCHEDULE "B.1"**

[CONFIDENTIAL]

**CONFIDENTIAL SCHEDULE “B.2”**

[CONFIDENTIAL]

**CONFIDENTIAL SCHEDULE "C"**

[CONFIDENTIAL]

**CONFIDENTIAL SCHEDULE “D”**

[CONFIDENTIAL]

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**CONFIDENTIAL SCHEDULE "E"**

[CONFIDENTIAL]

**CONFIDENTIAL SCHEDULE "F"**

[CONFIDENTIAL]

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