File No. CT 98/2

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S. 1985, c.C-34, as amended, and the *Competition Tribunal Rules*, SOR/94-290, as amended (the "*Rules*");

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b) of the *Competition Act* relating to the proposed acquisition of ICG Propane Inc. by Superior Propane Inc.;

AND IN THE MATTER OF an Application by the Director of Investigation and Research for orders pursuant to s 92 and other provisions of the *Competition Act* consequential thereto.

B E T W E E N:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

SUPERIOR PROPANE INC., PETRO-CANADA, THE CHANCELLOR HOLDINGS CORPORATION and ICG PROPANE INC.

Respondents

REPLY TO THE RESPONSE OF SUPERIOR PROPANE INC. and ICG PROPANE INC.

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1. Save and in so far as the same consists of admissions the Director joins issue with and denies each ground and material fact relevant thereto as set out in the Response and puts the Respondents Superior Propane Inc. and ICG Propane Inc. (the "Respondents") to the strict proof thereof.

2. The Director pleads in reply to paragraphs 41 ff of the Response that the Respondents have miscast the reference to equipment and services markets therein, in apparent reference to the Application, as referring to the supply and service of appliances. The Director has referred in the Application to the supply and service of equipment as tanks and related infrastructure, and accessories (such as appliances).

3. The Director accepts that the relevant markets herein are local in nature as referred to in paragraphs 9, 16, 44 and elsewhere in the Response, and pleads that this is inconsistent with the generic energy market plead by the Respondents, which, in any event is denied, and is not particularised in order to identify the relevant impact in each of the said markets.

4. The Director pleads in reply to paragraph 43 of the Response, that as plead in the Application there are a number of product sub markets, each of which is subject to particular competitive circumstances. However without particulars of the "Conclusion as to Relevant Product Market" in said paragraph 43, the Director is unable to further reply to the inconsistent second and third sentences thereof.

5. By way of general reply to the issue of product market the Director denies that the markets referred to in the Application, namely the supply and delivery of propane, the supply and delivery of propane equipment (or accessories), and the service and maintenance of propane equipment (or accessories), to retail and wholesale customers, in the residential, commercial, industrial, agricultural, automotive and wholesale segments as well as in national and major accounts, are too narrow. ICG is clearly Superior's closest competitor, followed by other propane distributors who generally are not capable of providing service to the full range of end uses for

propane but are capable of supplying greater head to head competition with Superior than is provided by alternate energy sources. All products face competition at sufficiently high prices and propane is no exception. The price of other energy forms may appear to create a ceiling for propane in some markets, but it will not correspond with the competitive price for propane. The Director recognises the role of alternate fuels in the Application, however, given the wide differences in prices per energy unit between propane and other fuels, and, the different product characteristics which promote such differences, it is wrong to allege that they are close substitutes.

6. By way of reply to paragraphs 56ff of the Response the Director pleads that the Respondents have failed to distinguish between competitive, meaningful entry and unsustainable entry of limited scope. Entry by the small entrants referred to by the Respondents has been of limited scope and has exerted little, if any, constraining influence on the market. It will not materially affect the existing quiescent, ordered state of competition premised upon an oligopolistic price and service leadership which the merged entity will now assume.

7. By way of reply to paragraph 74 of the Response, the Director pleads that notwithstanding whether or not Superior and ICG were rivals or acted jointly, the pre-merger conduct of the parties does not rule out the further exploitation of increased market power that the Merger between Superior and ICG (the “Merger”) will produce.

8. The Director pleads that the reference to “the Director’s approval” of the 1993 Superior/Premier transaction in paragraphs 11, 30, 74 and elsewhere in the Response is irrelevant and of no legal or factual consequence to the matters referred to in the Application. In the alternative, although the Respondents have not

plead any legal or other consequences in their reference to the 1993 examination by the Director of the 1993 Superior/Premier transaction in their Response, nevertheless the following facts arose in relation to the examination of the said transaction:

a) In 1993, Superior represented to the Director that the relevant product market for analyzing the transaction was propane. A letter dated October 29, 1993 from Superior's counsel to the Director stated in part:

> "Superior believes that the Bureau's analysis of the competitive impact of the Proposed Transaction should be conducted on the basis that the relevant product market is propane for use, on the one hand, as a heating and cooking fuel, and, on the other hand, as an automotive transportation fuel.
>
> While the traditional segment is part of a larger agricultural, commercial, industrial and residential market for heating fuels, in many cases the costs associated with switching from propane to an alternate heating fuel (oil, gas, electricity, etc.) are such that alternate heating fuels do not likely represent substitutes for propane which could effectively restrain a modest, non-transitory (ie. - 5%) price increase. Similarly, while the technology exists to permit automobiles to operate on either propane or gasoline (at the option of the user), most propane-powered automobiles in Canada do not have a gasoline or diesel capability with the result that, given switching costs, gasoline and diesel fuel do not likely represent substitutes for propane which could effectively restrain a modest, non-transitory increase in the price of auto-propane."

b) The Director relied upon the representations of the parties and concluded that the relevant market was propane, not generic energy;

c) The transaction was characterised as a regional matter primarily focussed upon the auto propane market;

d) The transaction did not raise serious competitive concerns because the then market leader, ICG, remained in western Canada;

e) The Director did not “approve the transaction” and in fact refused to provide an Advance Ruling Certificate under s 102 of the Act; and

f) The Director concluded and advised that the matter was still under scrutiny and that he would monitor the competitive effects of the transaction.

9. The Director pleads that the Respondents bear the onus of demonstrating the defence provided by s 96 of the Act allegedly sought and relied upon in paragraphs 76 ff. The Director will seek particulars of the precise nature of the said defence prior to the hearing of this matter.

10. The Director denies that the Merger will generate gains in efficiency to the extent alleged by the Respondents.

11. Many of the efficiency gains alleged by the Respondents are not unique to the Merger and could, and would likely, be obtained by alternative means if the dissolution or divestiture orders sought by the Director were granted. Some of the proposed savings and rationalization described in paragraphs 77 through 83 could, and would likely, be achieved either independently by the parties or through less anti-competitive transactions involving third parties.

12. To the extent that the efficiency gains alleged by the Respondents do not constitute a savings of real resources and merely represent a redistribution of income between two or more persons, they should not be considered for the purposes of Section 96

of the *Competition Act* ("the *Act*"). These include alleged savings resulting from a reduction in output, service, quality or variety or the sale of assets.

13. The efficiency gains alleged by the Respondents are overstated and do not fully recognize the expenditures that would be required to achieve same. These expenditures include employee severance, retraining, relocation of personnel, redeployment of equipment and other implementation costs.

14. The Merger eliminates competition and creates a monopoly in a number of markets. In light of the purpose of the *Competition Act*, as evidenced in s. 1.1, it is inappropriate for the Tribunal to consider efficiency gains resulting from a monopoly in those markets given that:

    (a) the overriding purpose of the *Act* is to maintain a competitive system; and

    (b) no merger to monopoly could ever, by definition, bring about gains in efficiency that offset the effects of the merger on competition.

15. In the alternative, if the Tribunal feels compelled to consider efficiency gains with respect to those markets in which the Merger creates a monopoly then the efficiency gains attributable to the Merger, if any, in those markets will not be greater than or offset the effects of the substantial lessening or prevention of competition resulting from the Merger, which effects include those listed in paragraph 16 below.

16. The efficiency gains attributable to the Merger, if any, in those markets in which a monopoly will not be created, will not be greater than, and will not offset, the effects of a substantial lessening or prevention of competition resulting from the Merger,

which effects include:

(a) the elimination or reduction of competition and product choices for consumers;

(b) the elimination or reduction of the opportunities for small and medium size enterprises to equitably and effectively participate in propane markets;

(c) the likelihood of substantial price increases in many markets;

(d) the reduction in output and deterioration of service, quality and variety in many markets;

(e) the reduction in the pace of innovation; and,

(f) any costs and distortions to the Canadian economy attributable to the transfer of surplus from consumers to producers.

17. The Director pleads that the Respondents, in paragraph 86 of the Response have admitted that the matters which are the subject of the voluntary “undertakings” set out therein are significant barriers to entry in the markets as described in the Application, and not the market as alleged by the Respondents in the Response. While such matters, characterised as contingent undertakings, are irrelevant to the due progress of the within matter, the Respondents have thereby waived any or any alleged privilege regarding other matters of competitive concern and remedy which have passed between the Director and the Respondents in relation to the transaction.

18. In any event the matters referred to in paragraph 86 are insufficient to remedy the substantial lessening or prevention of competition as alleged in the Application or at all.

19. The Director thereby joins issue with the Respondents on their Response.

Dated at Ottawa this 12th day of February, 1999

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