

Registry

R-98(B)

CT-94/01

THE COMPETITION TRIBUNAL

IN THE MATTER OF an Application by the Director of Investigation and Research under section 79 of the Competition Act R.S.C. 1985 c.C-34 as amended.

AND IN THE MATTER OF certain practices by A.C. Nielsen Company of Canada Limited.

BETWEEN:

THE DIRECTOR OF INVESTIGATION AND RESEARCH

Applicant

- and -

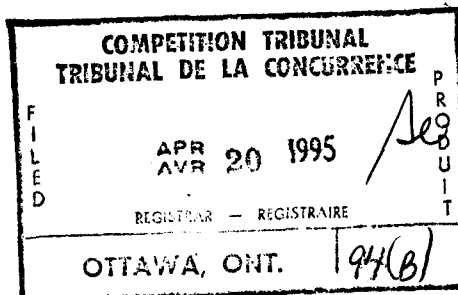
A.C. NIELSEN COMPANY OF CANADA LIMITED

Respondent

- and -

INFORMATION RESOURCES, INC.

Intervenor



AFFIDAVIT OF MARGARET E. GUERIN-CALVERT
(on behalf of the Respondent)

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

File No. CT-94/11
No. du dossier

Dir v D & B Companies
et

Exhibit No. R-98(B)
No. de la pièce

Filed on Apr. 20/95; 14 P/11
Déposée le

Registrar Shag
Greffier

AFFIDAVIT OF MARGARET E. GUERIN-CALVERT

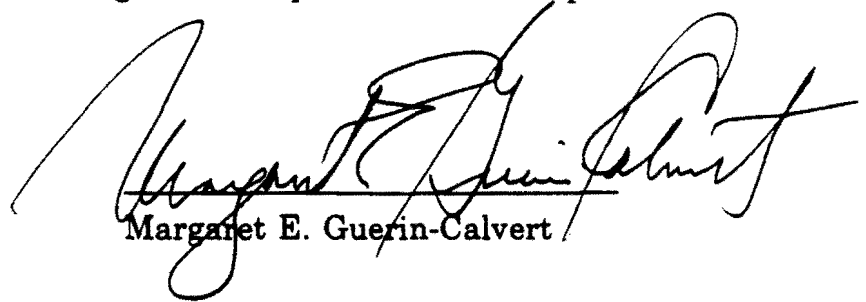
I, Margaret E. Guerin-Calvert, in the City of Potomac, in the state of Maryland of the United States of America, MAKE OATH AND SAY:

1. I am a Senior Vice President at Economists Incorporated, a consulting firm in Washington, D.C. that specializes in antitrust economics and applied microeconomics. I am trained as an industrial organization economist and have worked as an economist on issues related to competition and competition policy involving a variety of industries since 1979. During this 15 year period, I have reviewed a large number of competition issues and cases and have served as an economist both in government and in the private sector. Among other positions, I served as Assistant Chief of the Economic Regulatory Section at the Antitrust Division of the U.S. Department of Justice. I have written and edited numerous articles and books on industrial organization and competition policy and taught economics at the Institute of Policy Sciences at Duke University. My professional expertise is set out in detail in my *curriculum vitae* attached as Appendix I to my expert report.

2. I have been retained by Nielsen Marketing Research to provide an opinion on the claims made by the Director of Investigation and Research in the Notice of Application and Reply concerning the alleged anticompetitive effects of Nielsen Marketing Research's contracting practices with respect to scanner data in Canada.

3. My ability to comment on these issues is based on my experience and knowledge in the area of industrial organization and competition policy. I have also relied upon information provided by the parties to this proceeding, in particular, documents, including confidential documents produced by the Director, Nielsen, and the Intervenor, Information Resources Inc. ("IRI"), the examinations for discovery of the Director and Nielsen and the answers to the undertakings given on those examinations.

4. Attached hereto as Exhibit "A" to this my affidavit is a true copy of the report prepared for Nielsen Marketing Research pursuant to its request.


Margaret E. Guerin-Calvert

Sworn to before me in the District of Columbia in the United States of America this 20th day of September, 1994.


Notary Public

LORE J. RODRIGUEZ
A Notary Public of District of Columbia
My Commission Expires June 14, 1998

REPORT OF MARGARET E. GUERIN-CALVERT

September 20, 1994

I. Introduction

1. I have been asked to provide an economic analysis of claims made by the Director of Investigation and Research in the Notice of Application and Reply against A.C. Nielsen Company of Canada Limited. The Application alleges that A.C. Nielsen Company of Canada Limited (properly named, Nielsen Marketing Research, hereafter, "Nielsen") "substantially or completely controls the supply of scanner-based market tracking services in Canada" (Par 1 a); "that the supply of such services constitutes a distinct class or species of business" (Par 1 b); "that Nielsen has engaged in and continues to engage in a practice of anticompetitive acts" (Par 1 c); and "that such acts have had, are having and, unless restrained, will to continue to have the effect of preventing or lessening competition substantially in the supply of scanner-based market tracking services in Canada." (Par 1 d)

2. With respect to this last point, the Director alleges that "Nielsen has promoted and maintained its dominant position by completely foreclosing the market for scanner-based market tracking services to potential alternative suppliers of the service. There can be no new entry while Nielsen has exclusive access to the scanner data of all major grocery retailers." (Par 38) The Director alleges that these acts have affected price competition and innovation. (Par 39)

3. The "anticompetitive" acts or practices at issue primarily involve contracts signed with major grocery retailers in Canada in 1986, 1991 and later. The Director alleges that these contracts have restrained entry into

competition with Nielsen for the sale of market tracking services to consumer packaged goods manufacturers.

4. In order to evaluate these allegations, I reviewed materials submitted in this proceeding by the relevant parties, in particular, documents, including confidential documents produced by the Director, Nielsen, and the Intervenor, Information Resources Inc. ("IRI"), the examinations for discovery of the Director and Nielsen and the answers to the undertakings given on those examinations. I also rely on my expertise as an industrial organization economist, which is detailed further in my *curriculum vitae* attached as Appendix I.

5. Based on that review and my expertise, I have concluded that Nielsen's contracting practices with retailers in Canada have not foreclosed entry opportunities into competition for the sale of market tracking services to consumer packaged goods manufacturers in Canada; thus, they have not tended to lessen competition substantially in the sale of such services to these customers. Based on this assessment, I conclude that the relief sought by the Director as set out in the Application is unnecessary. The analysis and evidence that I used to support this conclusion are set out in this report.

6. My report considers the following. I examine the issue of relevant product market from the demand and supply side to identify the products that Nielsen is producing, the demands of consumer packaged goods manufacturers, and possible substitutes for the products that Nielsen has been producing during the relevant period. I evaluate these issues in the context of the time frame set out in the Director's Application, which begins in 1986. In addition, on the supply side, I identify the technologies that are employed in this industry to produce market tracking services and to identify firms that should be regarded as current competitors or likely entrants into the supply of the relevant products.

7. In addition to considering market definition and identifying competitors, I evaluate Nielsen's contracting practices in the context of these facts to determine whether these practices have limited in an anticompetitive way the ability of other firms to enter and expand in the sale of market tracking services in competition with Nielsen. This analysis includes an evaluation of the market conditions on the retailer (e.g., distribution channels such as grocery, drug, or confectionery) and manufacturer (e.g., a packaged goods manufacturer that buys a marketing report) sides of the business as well as information concerning providers of market tracking services.

II. Background On Nielsen's Sale of Products in Market Tracking

8. In evaluating the Director's product market definition, I started with an analysis of the market tracking products sold by Nielsen to consumer packaged goods manufacturers in Canada beginning in 1986 and the alternative services available to these customers. For purposes of this report, I have focused on the major groups of consumer packaged goods manufacturers in Canada, which include companies that sell consumer packaged goods through many channels of distribution. These customers include a wide variety of firms, including local, regional, national, and international suppliers of one or more consumer packaged goods.

9. Among the most important of these channels are the food, confectionery, and drug channels of distribution. Increasingly, channels of distribution such as mass merchandiser and larger stores, such as club stores, have become important means of distribution for many consumer packaged goods manufacturers. The importance of different channels of distribution can vary by type of product and over time. Manufacturing customers selling products through these channels of distribution are the customers for whom Nielsen has produced and sold a variety of market tracking and market research services in Canada and elsewhere. These are also the customers that are served by other companies in the market research industry with a variety of products.

10. There are a wide variety of reports and services that may be considered by the manufacturing customer. Market tracking services, such as those addressed in the Director's Application, provide information to the manufacturer on one or more of its products, either individually or relative to other products or other brands, and may have geographic, temporal, store, or promotional information characteristics. Market tracking services, such as those addressed in the Director's Application, can be based on several different sources of data, including data directly from the retail channel of distribution, from the chain or wholesaler warehouse supplying the retail channel, or from the consumer, among other sources.

11. Nielsen provides many different products to consumer packaged goods manufacturing customers, including reports on specific retailer organizations (e.g., key account reports), reports based on geographic area, such as city, regional (e.g., sectional) or national reports, and some specialized services (e.g., controlled store testing). Some of these services are based primarily on retailer data and data from stores, while others are based primarily on other sources of information such as consumer or household data. Some are based on data from a combination of these sources. Manufacturing customers vary in the number and type of services that they buy from Nielsen, both generally, and from year-to-year, depending on their needs. The sources and types of data that Nielsen has used in its services has varied over time, depending, in part, on the availability of data from different channels of distribution or purchase.

12. I have reviewed information on the products produced and sold by Nielsen during the time period in the Application, which starts in 1986. From 1986 to the present, I found that many of Nielsen's market tracking services were based on store audit and/or warehouse withdrawal information. Indeed, for the period 1986 to mid-year 1992, virtually all of Nielsen's reports sold to consumer packaged goods manufacturers were based primarily on warehouse withdrawal and/or store audit data. Moreover, there remain today a number of major channels of distribution

for which Nielsen's services sold to manufacturers interested in these channels of distribution are based primarily on store audit and/or warehouse withdrawal data.

III. Product Market Definition and Contracting Practices in the Context of These Facts:

13. I considered the Director's product market definition and competitive effects claims in light of these facts. In particular, I examined the market tracking services produced by Nielsen starting in 1986 in light of the Director's proposed relevant product market definition of scanner-based market tracking service and found that:

- For most of the period at issue, Nielsen did not produce the relevant product as defined by the Director.
- Competitors could have provided close substitutes for Nielsen's market tracking services without access to scanner data; they could have provided close substitutes based on the same sources of data on which Nielsen was developing its services or on other sources of data.
- To the extent that Nielsen was producing a product that would fall within the relevant product market as defined by the Director, namely a scanner-based market tracking service, its products included services other than a national scanner-based market tracking report. Many of the "scanner-based" reports sold by Nielsen were not based on scanner data from all major grocery retail chains; an entrant could have provided a close substitute for these products without access to scanner data from all major grocery retail chains.
- The pace of development of scanner-based services was not anticompetitively impeded by Nielsen; factors outside Nielsen's control were determinants of the pace of scanner product development.

- Nielsen's contracting practices during this period did not preclude a competitor from attempting to negotiate contracts with retailers for the types of data that Nielsen was using in the reports it was producing in each time period, whether store audit, warehouse withdrawal, scanner, or household data, among others. Competitors were not restrained anticompetitively by Nielsen's contracts in their ability to provide substitutes for the services provided by Nielsen.

- In addition to the prospect of a competitor entering and competing with local (e.g., city), regional, or national products, there were alternative products to which consumer packaged goods manufacturers could turn during the relevant time period.

- The Director's product market definition fails to take into account these products and competitors.

14. Because the central allegation in the Director's Application is that Nielsen's contracting practices raised barriers to entry to competition in the relevant product market, I address these contracting practices first and then address issues on the relevant market. I evaluated these allegations by examining Nielsen's contracts and contracting practices as well as pertinent information and materials related to scanner data and entry.

A. Contracting Practices

15. In evaluating Nielsen's retailer contracts, especially those in the retail grocery industry that are the focus of the Director's Application, I examined both Nielsen's contracting practices and the resulting contracts.¹

¹ The Application focuses primarily on allegations that Nielsen's contracts with major grocery retailers in Canada have restrained anticompetitively competition in the provision of market tracking services in Canada. In particular, the Application focuses on the concept that entry into provision of this service requires access to scanner data from all the major grocery chains, because, it is alleged, scanner data from these chains are necessary to the development of a national scanner-based tracking report for the food channel of distribution. A national scanner-based tracking service is, however,

The contracting process with grocery retailers that Nielsen undertook in 1986 (as well as in other years) involved an effort by Nielsen to negotiate independently with a retailer in a channel of distribution that could serve as an important source of data to Nielsen and an attempt to negotiate a price and terms of conditions for access to the data with that retailer.

16. In this contracting process, Nielsen has attempted to reach a negotiated contract with each retailer independently and sequentially. The retailer has a number of choices in this process. The retailer can choose to negotiate a contract pertaining to some or all of its data and information and can negotiate about the contract's conditions, including price and non-price terms. Non-price terms include conditions such as exclusivity or non-exclusivity with respect to certain aspects of the contract. Alternatively, the retailer can choose not to negotiate or sign a contract with a given supplier, including Nielsen. Depending on the outcome of this series of independent contracting efforts, Nielsen may be able to contract with a sufficient number of retailers to provide a key account, sectional, national, or combined set of reports to manufacturers. This outcome depends heavily on the relative size and geographic distribution of retailers in a specific channel of distribution and less so on the specific contract terms.

17. Nielsen had gone through such a contracting process with many of the largest grocery chains in Canada prior to 1986 as well as with other major retailers in other channels of distribution. Starting in 1986, contemporaneous with a proposed IRI - Retail Council of Canada ("RCC") joint venture in retail grocery scanning, Nielsen approached each of the major retail grocery chains independently in an effort to sign contracts with each retailer with respect to scanner data. This contrasts with the proposed approach of the IRI-RCC joint venture, which would have created

Not the only market tracking product and not the only scanner-based product that could be provided by an entrant.

a single and exclusive joint venture of the major grocery retailers in Canada for the provision of scanner data to a single supplier of market tracking services based on scanner data.² Nielsen's contracting practice, namely, approaching each retailer individually and sequentially, provided no certainty to Nielsen that it would be able to obtain contracts with a sufficient number of grocery chains to be able to, at some point, provide a national grocery market tracking service based on scanner data. One or more retailers could have chosen not to negotiate and sign a contract with Nielsen. Depending on the number and distribution of the retailers who may have chosen not to sign with Nielsen, Nielsen may have been able eventually to market a national grocery market tracking service based on scanner data. Alternatively, it may have found it possible only to market city, key account or sectional reports based on scanner data, and a national report based on scanner data augmented with store audit, warehouse withdrawal or other data.

18. More importantly, Nielsen's contracting practice did not preclude IRI (or another competitor) from embarking on a contracting strategy with respect to data from retail grocery chains similar to that employed by Nielsen. IRI could have abandoned the joint venture effort to sign all retailers simultaneously to an exclusive joint venture and could have approached each major grocery retailer independently and sequentially in an effort to sign up as many as possible for scanner data. IRI would have faced no greater (or less) certainty than Nielsen in this process that it could

² It is my understanding that the proposed IRI-RCC joint venture would have involved common contracts between IRI and the major grocery retailers in Canada, whereby IRI would have been the only company that would be able to obtain the scanner data developed by the grocery chains during the term of that contract. This arrangement for common exclusive contracts with all the major retailers for the scanner data would have precluded the prospect of competition from another supplier of services and would also have precluded a number of possibly profitable entry strategies, including attempting to obtain data from one or more retailers during the term of that contract and building up to a national sample by selling regional or more local services until a larger sample could be obtained.

sign up a sufficient number of grocery retailers to provide a national report or regional reports.³

19. During this contracting process, each major grocery chain independently considered and ultimately signed contracts with Nielsen. The outcome of this sequential process of a series of independent contract negotiations was that each of the major grocery chains was signed to a contract with respect to scanner data with Nielsen. The Director alleges that all of these contracts are exclusive contracts with respect to scanner data. The contracting outcome, however, was not an anticompetitive act or result. Rather it is the result of independent choices made by retailers. Nielsen does not have market power over the retailers such that it could force exclusives on each of them. Moreover, the outcome of the contracting practice, including whether retailers would choose to sign contracts with one or more companies and whether any company was able ultimately to provide a national scanner-based report on the grocery industry, was out of Nielsen's control. For example, if one or more retailers had negotiated a non-exclusive contract, the outcome clearly would not have been one in which Nielsen had exclusives with all.

³ Indeed, absent a joint venture approach such as the IRI-RCC proposal, it appears that this is the approach that IRI would likely have to take if it were currently to undertake negotiating contracts with major grocery retailers. IRI, just like Nielsen, would face uncertainty as to whether it would succeed in signing a sufficient number and distribution of grocery retailers to be able eventually to market a national, scanner-based market tracking service. This uncertainty is driven, in large part, by which retailers ultimately choose to negotiate and sign a contract. If, for example, one or more large retailers chooses not to sign with a particular company (or with any company), then it may not be possible for the particular company to provide a national market tracking report. Depending on the relative size and importance of the chain that chooses not to sign, the company may be able to produce a national report if there are sufficient data from other sources or if the company develops techniques to project for the non-participating retailer or retailers. Alternatively, the company may find it profitable to sell only regional or key account reports. If large retailers choose not to sign with any company for some period of time, it may be the case that no national report is provided, or one that is of lower quality is produced.

20. Whether or not Nielsen ended up with any contracts, whether exclusive or non-exclusive, depended substantially on whether IRI chose to adopt the contracting practice that it has used, for example, in the U.S. -- namely, to approach each retailer independently and attempt to sign a contract with it. In addition, whether any company was able ultimately to produce a national scanner-based tracking report would depend on which retailers agreed to negotiate and sign any contracts. These factors relating to retailer choices and IRI strategy were very important to the outcome of the contracting process and were not in Nielsen's control.

21. Changed market circumstances for two grocery retailers in 1989 led to the re-negotiation of these retailers' contracts with Nielsen. In 1991, Nielsen embarked again on the contracting process as its earlier contracts came to an end, and again independently dealt with each of the major grocery chains in an effort to negotiate a new contract with a retailer. At these points, as in 1986, IRI or another competitor had the ability to pursue the same strategy that Nielsen was pursuing-- namely, to deal directly with each retailer and attempt to negotiate a contract for the scanner data (or for any other data). The fact that Nielsen had "won" in the contracting process in 1986, did not give Nielsen market power over retailers in later years. Each retailer retained the ability to choose among independent bids and to solicit additional bids. The Nielsen contracts did not impose limitations on IRI's ability to approach retailers in 1991 or before as their contracts were nearing an end. Indeed, in 1991, IRI did enter into the contracting process and start to deal directly with individual retailers, including the largest grocery retailer, in the bidding process. The number of retailers that IRI chose to approach and the bids made were IRI's independent choice and not anticompetitively constrained by Nielsen. In reviewing materials in this proceeding, I found no evidence that IRI was "disadvantaged" in the amount that it could choose to bid on the contracts, either relative to Nielsen or absolutely, or constrained by Nielsen's previous contracts in approaching retailers. In addition, my review shows that IRI could have

attempted to negotiate the purchase of available historical data from retailers. Nielsen's retailer contracts did not preclude these outcomes.

22. More importantly, in 1991 as in 1986, Nielsen had no certainty that it would be successful in signing each retailer to a new contract. One or more retailers could have chosen not to re-sign, and this would have determined the kind of sample of data that Nielsen would obtain. In embarking on the re-signing process in 1991, as in 1986, Nielsen faced a variety of possible services that it might eventually be able to produce based on scanner data ranging from key accounts to a national report. Whether Nielsen or any firm provided a national grocery market tracking service based on scanner data was determined by the choices and the decisions of the retailers in this signing process and the vigor with which Nielsen and IRI pursued these contracts. This process was not inhibited or restrained anticompetitively by Nielsen's contracts. Moreover, the prospects, but not the certainty, of obtaining sufficient data for a national sample appear to have been sufficient to induce both IRI and Nielsen to embark on the contracting process.

23. The Director alleges that the fact that the major grocery retailer contracts that Nielsen signed in 1991 expire at different dates in itself represents a barrier to entry into the provision of scanner-based market tracking services.⁴ I have reviewed these contracts and materials

⁴ The Director's Application claims that access "to data from substantially all retailers would be required by a new entrant" and implicitly claims that this access has to be obtained on or about the same date (Par 40 b). Yet, there are a variety of entry strategies that are based on obtaining data from less than "all retailers" and include building up to a national sample. An entrant does not have to wait to make sales in this industry until it has developed a national sample. Moreover, investments made in developing products other than a national tracking service can be used in developing a national tracking service.

The Director's Application also treats terms and conditions of some of Nielsen's manufacturer contracts as presenting barriers to entry to a new competitor in market tracking services. In reviewing such contracts and other market conditions, I conclude that they do not anticompetitively constrain entry by such a competitor.

concerning these contracts provided by parties to this proceeding. The Director's Application also treats terms and conditions of some of Nielsen's manufacturer contracts as presenting barriers to entry to a new competitor in market tracking services. In reviewing such contracts and other market conditions, I conclude that they do not anticompetitively constrain entry by such a competitor. Actual differences in the termination dates or basis for contract termination appear to be the result of the negotiation by the retailer. Retailer negotiation explains other differences among contract terms.

24. More importantly, Nielsen's contracts with these retailers do not limit the ability of IRI or any other competitor to bid on these contracts or to express interest in bidding on these contracts when they are nearing expiration or possible termination. Indeed, it is my understanding that at least one large grocery retailer considered bids from both Nielsen and IRI in 1991. Winning this contract would have enabled IRI to begin building the set of retailers that it needed to sell one or more types of marketing services. In addition, in more recent contract re-negotiations, at least one grocery retailer, as well as another large retailer in a non-grocery channel of distribution, asked for bids from both and asked for bids on an exclusive and non-exclusive basis.

B. Development of Scanning Data in Canada

25. As one of the effects of Nielsen's alleged anticompetitive practices, the Director claims that the development of scanner-based services was impeded by Nielsen's contracting practices. Yet there are a number of important determinants of the availability of scanning data to any firm that wishes to use these data for producing a market tracking report. In general, these factors are not in the control of Nielsen and its contracts. First, Nielsen contracts do not control an important determinant of the

availability of scanning data, namely, the use of scanning equipment in retail chains of distribution. Where there is a low penetration of scanning equipment, all else equal, any service dependent solely on scanning data will be of poor or insufficient quality. Even where there is greater penetration of scanning equipment, factors such as the decisions by retailers to implement scanning at the chain level, to purchase or lease the equipment, to decide on the identity and number of stores that will use scanning equipment, and to monitor the development and the quality of the data can affect the availability, amount and quality of scanner data. Nielsen does not control these decisions and does not own the scanning equipment in the retail chains. Moreover, Nielsen cannot control which retailers in which chain of distribution are adopting scanning equipment and the rate at which it is developed. Even where scanner equipment is in place, overall data quality is very dependent on the extent to which retailer management chooses to establish practices and monitor practices that promote consistent scanner data quality throughout a retail chain. Nielsen cannot directly control these aspects of scanner data quality or the willingness of a given retailer to make its data available for sale to any supplier. Further, Nielsen does not have direct control over another aspect of scanner data quality, namely, manufacturer package design and use or re-use of product codes. All of these factors are important determinants of the development of scanner data for use in market tracking services of various kinds, and all are out of the direct control of Nielsen and are not affected by its contracting practices.

C. Assessment of Product Market Issues: Competition for Nielsen's Products from 1986 to the Present

26. This section addresses issues pertaining to product market in three parts. I divide the time frame covered in the Application (1986 to the present) into two parts: first, I consider competition for the products produced by Nielsen in 1986 to the present for all products except the national grocery tracking service it started to provide in mid-year 1992, and then I consider competition for this product. I then summarize my findings

with specific attention to the Director's product market definition in the third section. Based on the analysis in these three sections as well as the above, I conclude that the Director has defined the relevant product market too narrowly and has excluded products from competitors that should be included in the relevant market.

1. 1986-the present:

27. As of 1986, when the Director alleges that Nielsen's contracting practices had tended substantially to lessen competition in the provision of scanner-based market tracking services, Nielsen did not produce and sell a market tracking product based on scanner data to consumer packaged goods manufacturers. Simply put, in 1986, Nielsen did not produce and sell the relevant product as defined by the Director. As of this date, all of Nielsen's market tracking products sold to packaged goods manufacturers were based primarily on store audit and warehouse withdrawal data.

28. Moreover, Nielsen's contracting practices in 1986 did not limit or inhibit the ability of a competitor to enter in 1986 and provide a product that would be a close substitute for the products provided by Nielsen. A competitor could have entered in 1986 or later and attempted to replicate Nielsen's market tracking service services in one or more channels of distribution for food, confectionery, drug, and other manufacturers by a series of steps, including developing a sample of stores based on store audit and/or warehouse withdrawal data, developing a dictionary of the consumer products that were of interest to manufacturing customers, and seeking to sell the services to manufacturers. At any point that a competitor had decided to replicate some or all of Nielsen's actual marketing strategy or data collection methods in Canada in 1986 in order to begin providing market tracking services to manufacturers, it would not have been impeded by Nielsen's contracting practices. Nielsen's market position could have been affected by the entry or expansion of other providers of services using sources and types of data comparable to those

used by Nielsen.⁵ In addition, contrary to the Director's allegations, Nielsen's contracting practices did not preclude the opportunity for a competitor to enter and develop scanner-based products. A competitor could have come in and positioned itself to begin developing a variety of scanner-based market tracking services, including potentially a national report, depending on the outcome of its negotiations with retailers. Hence, Nielsen's alleged "dominance" in 1986 and before in the provision of market tracking services is not due to anticompetitive practices by Nielsen, nor was it maintained by anticompetitive practices.

29. For each year from 1986 to the present, a competitor could have replicated Nielsen's strategy and market tracking services in major channels of distribution including the drug, confectionery, and wholesale channels, without any scanner data. For this period, Nielsen's services to consumer packaged goods manufacturers on these channels of distribution have been based primarily on store audit and/or warehouse withdrawal data. From 1986 to the present in these channels of distribution, Nielsen has not provided the relevant product as defined by the Director. Moreover, Nielsen's contracting practices do not inhibit or limit the ability of a competitor to obtain these data and provide products in competition with Nielsen. Selling these types of services to manufacturers could provide an important source of entry and expansion into the sale of market tracking services that are close substitutes for those of Nielsen.

⁵ This may understate this effect because it ignores the possibility that market tracking services, other than those based on retail sources of data, may be close substitutes for Nielsen's products.

2. 1992-present (grocery)

30. There are some products that Nielsen began producing, primarily as of mid-year 1992, that are based largely on scanner data.⁶ These include products such as: key account, city, sectional, national and specialized reports developed from scanner data from the retail grocery channel of distribution. Prior to this time, the vast majority (measured by reports or revenues) of the reports sold by Nielsen to consumer packaged goods manufacturers interested in the food channel of distribution were based on store audit or warehouse withdrawal information. In the following, I review the Director's product market definition with particular focus on the grocery products in the post-1992 time frame and with reference to the other products for 1986 to the present.

D. Product Market Issues

31. In examining the Director's product market definition, I considered both the demand and the supply side. In evaluating the demand side, I examined whether there are other products, including those based on other types of data, that are substitutes for the products produced by Nielsen. The Director's Application alleges that there are no close substitutes for scanner-based tracking services and focuses attention specifically on a national market tracking service for products sold through the grocery or food channel of distribution. Yet, as indicated above, there are actually a number of products that fall into the market tracking category, only some of which are scanner-based and only some of which are national products. The information that I have reviewed thus far indicates that there were alternatives to scanner-based products for consumer packaged goods manufacturers during the period 1986 to the present. These products

⁶ Even these products rely to some extent on store audit and warehouse withdrawal or other data sources due to the lack of scanner data from some retail organizations.

include those that are based on individual chain data or on regional data, as well as reports that are based on data from store audit or warehouse withdrawal. In addition, there were products, such as those produced by ISL, which were based on consumer data. During the period 1986 to the present, these were products to which consumer packaged goods manufacturers could have turned as substitutes for those provided by Nielsen.

32. More importantly, by turning to the supply side, the information reviewed leads me to conclude that a competitor could provide one or more of the types of reports that Nielsen provides in channels of distribution, including the food channel of distribution, thereby providing direct competition for Nielsen's services. While the Director's Application focuses primarily, if not exclusively, on a national grocery market tracking report based on scanning, there are actually a wide array of other services produced by Nielsen in this area. These include key accounts and sectional reports, among others. Replicating these services, contrary to the statements in the Application, does not require scanner data from all major retail grocery chains in Canada. Similarly, city and sectional or regional reports do not require scanner data from the entire country, but representative data (whether from scanning, store audit, warehouse withdrawal, consumer or household data, or some combination of one or more of these sources) from a region of interest to the manufacturers. Production of these services can be undertaken on a far smaller scale than by development of samples based on the entire channel of distribution. This can be an effective entry strategy as well as a marketing niche approach for firms in this industry.⁷

33. Based on this review of the demand and the supply side and the information available, I conclude that the Director's product market

⁷ It appears, for example, fairly similar to the process by which IRI entered in the U.S.

definition is too narrow. Moreover, the available information does not support the Director's assessment that entry into this product market is foreclosed by Nielsen's practices. As a result, the Director excludes products of competitors that should be included as providing competition in the relevant market.

III. Conclusions

34. Based on this analysis, I conclude that Nielsen's contracting practices with retailers for the development of data for sale of market tracking services have not tended to lessen competition substantially in any relevant product market in Canada. These contracting practices have not anticompetitively restrained entry and expansion in market tracking services in Canada. To the extent that the production of scanner-based services in a major channel of distribution has been slower in Canada than the U.S., it is explained largely by factors outside of Nielsen's control. There has been, and continues to be in Canada the prospect for active competition in the provision of market tracking services, including scanner-based market tracking services. This competition, including the prospect of price as well as service competition, has not been anticompetitively constrained by Nielsen's contracting practices. As a result, relief such as that proposed by the Director is unnecessary. Moreover, many of the specific recommendations for relief made in the Application are potentially very costly and likely to impede the efficient operation of a competitive market in this industry.

CURRICULUM VITÆ

Margaret E. Guerin-Calvert

Office Address	Economists Incorporated 1233 20th Street, N.W., Suite 600 Washington, D.C. 20036 (202) 833-5258
Home	10112 New London Drive Potomac, MD 20854 (301) 365-3048
Education	A.B., Economics, Brown University, 1976 M.P.A., (Masters in Public Affairs) Woodrow Wilson School of Public and International Affairs, Princeton University, 1979
Professional Experience	<i>Present Position</i> - Senior Vice President Economists Incorporated 1990: Assistant Chief, Economic Regulatory Section, Economic Analysis Group, Antitrust Division, U.S. Department of Justice 1987: Senior Economist, Economists Incorporated 1986: Director of Analytical Resources Unit, Economic Analysis Group, Antitrust Division, U.S. Department of Justice 1985: Economist, Economic Analysis Group, Antitrust Division, U.S. Department of Justice 1982-1985: Economist, Financial Structure Section, Division of Research and Statistics, Board of Governors of the Federal Reserve System

**Experience
(continued)**

1979-1982: Economist, Economic Policy Office,
Antitrust Division, U.S. Department of
Justice

1976-1977: Research Associate, Energy Economics
Group, Arthur D. Little, Inc.

**Teaching
Experience**

1984: Adjunct Lecturer, Institute of Policy
Sciences, Duke University

1984-1989: Executive Education for Top State
Managers, conducted by The Institute of
Policy Sciences, Duke University

1983: Lecturer, Board of Governors of the Federal
Reserve System and American Institute of
Banking

1981: Lecturer, Antitrust Division, U.S.
Department of Justice

1979: Teaching Assistant, Princeton University

Testimony

Investigation into the Competitive Marketing of
Air Transportation, Civil Aeronautics
Board

Arbitration Between First Texas Savings
Association and Financial Interchange
Network

*U.S. v. Ivaco, Inc.; Cannon, Inc; and Jackson
Jordan, Inc.*

Consent Order Proceeding before the Competition
Tribunal, Canada Between The Director of
Investigation and Research and Air
Canada, Air Canada Services, Inc., PWA
Corporation, Canadian Airlines Interna-
tional, and the Gemini Group Automated
Distribution Systems Inc.

**Research and
Publications**

"Vertical Integration as a Threat to Competition: Airline Computer Reservation Systems," in J. Kwoka Jr. and L. White, eds, *The Antitrust Revolution*, (2nd edition), 1993.

"The 1992 Agency Horizontal Merger Guidelines and the Department of Justice's Approach to Bank Merger Analysis, *Antitrust Bulletin*, Vol. XXXVII, No. 3, Fall 1992, (with Janusz Ordovery).

"The 1992 Agency Horizontal Merger Guidelines and the Department of Justice Approach to Bank Mergers," in *Proceedings of the 28th Annual Conference on Bank Structure and Competition*, May 1992, (with Janusz Ordovery).

Electronic Services Networks: A Business and Public Policy Challenge, Praeger, 1991, (with S. Wildman).

"Computer Reservations Systems and their Network Linkages to the Airline Industry," in *Electronic Services, Networks: A Business and Public Policy Challenge*, Praeger, 1991, (with R. Noll).

"Electronic Services Networks Functions, Structures, and Public Policy" in *Electronic Services Networks: A Business and Public Policy Challenge*, Praeger, 1991, (with S. Wildman).

"New Developments in Airline Merger Analysis: Changes in the Industry and the Evidence," *Regulatory Reform*, January 1988.

"State and Federal Regulation in the Market for Corporate Control," EAG Discussion Paper, EAG 86-4, *Antitrust Bulletin*, Winter 1988, (with R. McGuckin and F. Warren-Boulton).

"Current Issues in Airline Mergers," presented at the Stanford Conference on Firm Ownership and Competition, June 19-20, 1987.

**Research and
Publications
(continued)**

"The 1982 Department of Justice Guidelines: Applications to Banking Markets," *Issues in Bank Regulation*, Winter 1983, reprinted in T. Havrilesky, R. Schweitzer, and J. Boorman, ed. *Dynamics of Banking*, Harlan Davidson, Inc., 1985.

"New Rules of the Game: Modifying Bank Merger Analysis to Account for Regulatory Changes," presented at the Association of Public Policy and Management Conference, New Orleans, October 1984.

"The Determinants of Thrift Institutions' Commercial Lending Activity," *Chicago Bank Structure and Competition Compendium*, September 1983, (with C. Dunham).

"How Quickly Can Thrifts Move into Commercial Lending?" *New England Economic Review*, November/December 1983, (with C. Dunham).

Direct and Rebuttal Testimony in the *Investigation into the Competitive Marketing of Air Transportation*, at the Civil Aeronautics Board, August 1980.

National Benefits / Costs of Enhanced Oil Recovery Research Final Report, Arthur D. Little, Inc., submitted to the Energy Research and Development Administration, August 1976, (with F. Mansvelt-Beck and T. Rothermal).

Department of Justice, *Report to Congress on Competition in the Coal Industry*, March 1982.

Department of Justice, *Report to Congress on the Computer Reservations Industry*, December 1985.