U.S. Department of Justice
Antitrust Division

Digest of Business Reviews

2002-2007

DIGEST OF BUSINESS REVIEWS

2002

02-1 Washington State Medical Association 09/23/02

Medical Services Price/Fee Review

Facts: The Washington State Medical Association (the "WSMA") is a statewide professional association serving physicians and physician assistants in Washington state. The WSMA wants to initiate a voluntary annual survey to collect fee and reimbursement information from its members, compile statistics based on the survey responses, and make the results available to its membership. The WSMA intends to publish (1) average charges for particular physician services, and (2) average insurer reimbursement for such services, aggregated by "Health Insurer." Provider fee data will be aggregated; provider-specific information will not be disseminated in the survey results. The survey results would not be confidential, and the WSMA expects them to become widely available. The WSMA intends, where possible, for the survey to meet the requirements of the antitrust safety zone set forth in Statement 6 of the *Statements of Antitrust Enforcement Policy*, jointly issued by the Department of Justice and the Federal Trade in August 1996. Additionally, the WSMA represents that it will work to prevent physicians from using the survey to engage in boycotts or collusive pricing by controlling WSMA staff, educating members, and issuing instructions about how the survey may permissibly be used under the antitrust laws.

Response: The first portion of the survey, concerning the average charges for services, appears to fall within the Statement 6 safety zone. The second part of the survey, average reimbursement for each service aggregated by Health Insurer, does not fall within the Statement 6 safety zone and could have anticompetitive effects. However, based on the WSMA's representations as to the procompetitive justifications for the survey and the steps it will take to prevent the survey from having anticompetitive effects, along with the presence of factors making it unlikely that the survey results could be used effectively for anticompetitive ends, the Department has no intention of challenging the survey at this time.

02-2 American Welding Society 10/07/02

Industrial Products Standards Program

Facts: The American Welding Society ("AWS"), a nonprofit association, represents a wide range of manufacturers and users of welding equipment. AWS publishes technical codes, standards, guides, and recommended practices related to welding, which are developed by the technical committees of AWS. An AWS Subcommittee has proposed a standard to reduce the cost of building, maintaining, or changing robotic welding cells that involves the adoption of a technical specification for the communication of information between the various devices in such cells. During its consideration of this standard, the Subcommittee reviewed two competing proposals. One member of the Subcommittee offered to make a proprietary product available for use as the basis for the standard, agreeing to provide technical assistance to anyone interested in implementing the standard and to waive any patent or proprietary rights to the product in connection with use of the specification. Other members of the Subcommittee preferred another product that was already widely accepted and used in other industries. These members argued that adoption of the standard using the proprietary product would not be accepted by industry and would give the company whose product the standard was based upon a competitive advantage. Ultimately, the Subcommittee is proposing a standard based on use of the proprietary product.

Response: The Department has no present intention to challenge the proposed standard. The Department does not pick competitive winners or losers. Instead, the Department determines whether the process of standard-setting has been abused to seek an anticompetitive advantage and whether the proposed standard is the product of any anticompetitive conduct on the part of the organization or its members. The antitrust legality of private standards is determined using a rule of reason analysis. The Department's disinclination to challenge the proposed standard is based on several factors. Based on the information provided, there is no indication of anticompetitive conduct on the part of AWS or its members. The procedures for setting standards are open and the Subcommittee carefully considered the advantages and disadvantages of alternative products to include in the standard. In addition, the owner of the intellectual property rights incorporated by the standard waived those rights in connection with adherence to the standard. In these circumstances, the Department will not presume that AWS and its varied membership have incorrectly determined that the proposed standard would best serve consumer interests.

02-3 Consortium of Free Electronic Tax Preparation and Filing Service Companies 10/07/02

Tax Preparation Services Joint Venture

Facts: A group of private sector companies (the "Consortium") intends to offer free electronic tax preparation and filing services in coordination with the Internal Revenue Service. Membership will be open to all persons meeting the standards set forth in its operating agreement. There are no prohibitions or limitations on the ability of members to offer free or paid tax preparation or filing services outside the Consortium. The details of each participant's offer of free services will not be made available to other participants until the offers are made to the public.

Response: The Department has no present intention of challenging the formation and operations of the Consortium. It appears that competition among Consortium members and between Consortium members and non-members should not be adversely impacted by the proposed agreement. Rather, the agreement appears intended to make free electronic tax preparation and filing services readily available to many taxpayers who previously could not take advantage of such services. The confidentiality of each participant's offer prior to its public availability should inhibit the ability to coordinate in advance the extent of the free service offers. Finally, it is significant that the IRS will retain final control over the IRS Web page where the free services will be offered.

02-4 3G Patent Platform Partnership 11/12/02

Wireless Telecommunications Services and Products

Patent Licensing

Facts: The 3G Patent Platform Partnership ("3G3P") proposes to create a "patent platform" for Third Generation ("3G") wireless technology. There are five distinct 3G radio interface standards. The platform will identify patents essential to compliance with one or more of the standards, and will make available standard license agreements for individual patents. In order to address the Department's concerns about potential competition between the 3G standards, 3G3P has agreed to restructure the platform to provide a distinct Platform Company ("PlatformCo") for the licensing of essential patents for each of the standards. The individual PlatformCos will determine the terms of licensing and royalty payments for their members' essential patents. Licensors and licensees will retain the ability to negotiate license terms for patents separately from the PlatformCo standardized terms. The PlatformCos will not aggregate all the patents essential to a particular standard into a single license. Persons who obtain licenses under the terms of a PlatformCo license will be obliged to "grant-back" licenses to essential patents that they hold for that (but only that) standard.

Response: It appears that the patent platform is not likely to impede competition and could offer some integrative efficiencies. Essential patents associated with a single 3G standard are likely to be complements rather than substitutes. To preserve potential competition between 3G standards, 3G3P will create an independent PlatformCo for each standard to handle competitively sensitive licensing matters, including determination of royalty rates. Non-licensors have been appropriately excluded from competitively sensitive functions. The restrictions on the scope of the "grant-back" obligation and the ability of licensors to negotiate independently with licensees give individual licensors meaningful options to protect their interests. The platform offers the potential for efficiencies with respect to the generation and dissemination of information about essential 3G patents, and the identification and evaluation of which patents are essential, as well as creating the opportunity to reduce the cost of negotiations over license terms. The Department is not presently inclined to initiate antitrust enforcement action against the proposed conduct.

02-5 National Consumer Telecommunications Data Exchange — 03/12/02

Telecommunications, Public Utilities, and Credit Information Services — Information Exchange

Facts: The National Consumer Telecommunications Data Exchange ("NCTDE") is a credit data exchange service with a current membership of telecommunications carriers. It provides its members with advance warning about prospective customers who pose a credit risk, and also enables its members to locate former customers who did not pay their bills by using its "skip tracing" service. Prior to its establishment, NCTDE received a favorable business review letter. NCTDE now proposes to open its membership to other types of utilities, for example, electric power, gas, and water companies. Information will be exchanged on a "blind" basis, and each member will determine unilaterally the terms on which it will do business with a customer with a bad credit history. A member that uses the "skip tracing" service determines unilaterally whether to pursue its rights against the customer.

Response: The Department does not believe it likely that the proposed expansion of NCTDE's credit information exchange will produce any anticompetitive effects. The addition of non-telecommunications utilities to membership does not change the conclusions previously reached by the Department. The limited amounts of information exchanged are not likely to result in concerted decisions with respect to price or other terms. NCTDE will not give its members a competitive advantage over rivals because it will be open to all utilities on a non-discriminatory basis. The Department has no present intention to challenge the proposal.

02-6 American Trucking Associations 11/15/02

Trucking Model Contract

Facts: The American Trucking Associations (the "ATA"), the national trade association representing the interests of motor carriers, state trucking associations, and national trucking conferences, would like to develop and circulate a model contract for members to use on a voluntary basis. Members opting to work with the model contract may use individual provisions or the model contract in its entirety. All terms in the model contract for rates and charges, including fuel surcharges, loading and unloading services, detention charges, and drop charges, would be left blank for each carrier to negotiate individually with shippers. Likewise, terms in the model contract relating to limitations on liability for loss of goods and carrier insurance would be left blank for each carrier to negotiate individually with shippers.

Response: It appears that the model contract's rate-related terms are all blank, left to negotiation by the parties; the model contract does not appear to incorporate any standard or collectively-set rates or rules. Also, because the model contract will be made available to carriers to use on a voluntary basis, and use of the contract or any individual provisions will be left to the determination of each company acting independently, carriers will remain free to compete on terms and provisions. Further, the proposed model contract could have procompetitive effects by improving the efficiency of contract negotiations, thereby potentially reducing rates to shippers. The Department has no present intention to challenge the proposal.

02-7 Michigan Hospital Group, Inc. 04/03/02

Hospital Services Joint Venture and Multiprovider Network

Facts: Michigan Hospital Group, Inc. ("MHG") proposes to negotiate contracts on behalf of its members—seven small, geographically dispersed community hospitals—with insurance companies, employers, and managed care plans for the provision of primary care hospital services. MHG would be a non-exclusive network, and its members would remain free to contract directly with health plans and other payers or to join other provider networks. As the joint venture develops, MHG will collect and analyze data from its members and furnish recommendations to enable them to manage input costs better. Proprietary data collected from individual hospitals would be treated in strict confidence, and no individual member would have access to any other member's costs or prices.

Response: If operated properly, it is not likely that MHG will produce anticompetitive effects. It appears that no MHG hospital competes with any other MHG hospital, either to attract patients or to become a member of the local hospital panel for any health plan. It also appears that MHG is a *bona fide* joint venture designed to facilitate health care contracting between community hospitals and those managed care organizations or other large third-party payers who wish to negotiate or contract with MHG hospitals on a collective basis. For these reasons, the Department has no present intention to challenge the proposed conduct. However, the letter does not extend beyond MHG's original seven members, and does not extend to a method for adding additional members based on a test of percentages of new members' inpatient discharges by zip code. Given the range of factors to be evaluated, it is not clear that any test could be established in advance that could successfully predict which hospitals could join MHG without harm to competition.

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2003

03-1 BroChem Marketing, Inc. 05/13/03

Chemicals Information Exchange

Facts: BroChem Marketing, Inc. ("BroChem") plans to establish a Chemical Information System (the "CIS") that would be made available to wholesale chemical distributors seeking information on the product lines of chemical producers. The CIS would compile information provided by chemical producers (including product names, producer names, other producers of the same products, and prices) in a computer database. BroChem will charge both chemical producers and chemical distributors a fee to use the database. At the Department's request, BroChem will establish computer safeguards to ensure that each chemical producer can access only information it has provided to BroChem, and that each chemical distributor can access only information on chemical products that it has been authorized to market. To address concerns raised by the Department about sample price schedules that BroChem had planned to calculate and include in the CIS, BroChem proposes to substitute formulas that merely assist individual distributors in calculating prices schedules based on variable information that each distributor will input independently.

Response: It is reasonable to conclude that the CIS could produce procompetitive efficiencies by eliminating the need for time-consuming one-on-one communications between producers and distributors to obtain the information that the CIS would make available in a single source. At the same time, the CIS would not contain information that could act as a focal point for price coordination among producers. The Department has no present intention to challenge BroChem's proposed operations.

03-2 Woodwork Institute of California 08/20/03

Architectural Millwork Best Practices and Cost Survey

Facts: Woodwork Institute of California ("WIC"), a voluntary membership association in the architectural millwork industry, proposes to conduct a cost survey for the purpose of identifying performance measures and best practices within its industry. WIC plans to invite all architectural millwork manufacturers that wish to participate (whether or not members of WIC) to submit certain historical cost information to an independent third party who will compile and perform statistical analysis on the data and publish the results. Data will be more than three months old at the time the results of the survey are disseminated, and data on any particular statistical point will not be disseminated unless it is sufficiently aggregated that recipients would not be able to identify the data supplied by any individual company. The results will be available for free to participating WIC members and for purchase by others.

Response: The proposed survey should not have any anticompetitive effects. The use of any "best practice" developed will be voluntary. Moreover, the limited nature of the proposed cooperation — historic cost information on an aggregated basis with no discussion of pricing or other sales-related conduct — should limit any risk that the data exchanged could lead to concerted pricing. To the extent that the survey reduces costs for architectural millwork firms, the Department anticipates the proposal may lead to lower prices and expanded output. The Department has no current intention to challenge the proposed survey.

03-3 The National Cable Television Cooperative, Inc. 10/17/03

Cable Television Joint Purchasing Cooperative

Facts: The National Cable Television Cooperative, Inc. ("NCTC") negotiates on behalf of its members—primarily independent cable systems and smaller multiple system owners—for their purchases of cable television programming offered by national networks. In 1985, NCTC received a favorable business review from the Department for its plan to negotiate master contracts with programmers, to which its individual members could subscribe. But NCTC states that its current procedures hinder its ability to negotiate volume discounts because it cannot guarantee any volume of participation in its master contracts, as members decide whether to participate only after the contract has been negotiated. Therefore, NCTC proposes to amend its procedures to allow members who wish to participate in a new master contract with a programmer to state their reserve price before negotiations commence. If the negotiated contract price is equal to or below a member's reserve price, that member must participate in the contract.

Response: The Department does not believe that NCTC's proposed new joint purchasing procedures will have anticompetitive effects. NCTC's members almost certainly would not constitute such a significant percentage of all purchases in the relevant market to raise concerns about monopsony power. Nor will NCTC's procedures appreciably facilitate price collusion among its members. The overwhelming majority of its members do not compete with each other. With respect to the small proportion of members who do serve overlapping areas, any concern about collusion is mitigated by: (1) the adoption of safeguards precluding the dissemination of competitively sensitive information about who participates in contracts and reserve prices to other members; (2) the likelihood that NCTC will negotiate contract terms to serve the interests of the great majority of its members who do not compete with each other; and (3) the competition faced by all of NCTC's members from direct broadcast satellite providers, who are not members. The Department has no current intention to challenge NCTC's proposed conduct.

DIGEST OF BUSINESS REVIEWS

2004

04-1 Internationally Board-Certified Lactation Consultants 05/25/04

Lactation Consultation Services Price/Fee Review

Facts: Competing providers in the field of internationally board-certified lactation consultation propose to conduct an online survey of fees charged by private-practice or self-employed Internationally Board-Certified Lactation Consultants ("IBCLCs"). The survey would determine the range of prices customarily charged by self-employed IBCLCs. The requesting IBCLCs believe that such a survey would enhance competition by encouraging practitioners to set fees that are lower than competitors' fees in their area. The information from the survey would be collected following principles outlined in Section 6.A of the *Statements of Antitrust Enforcement Policy in Health Care*, jointly issued by the Department and the Federal Trade Commission in August 1996 (the "*Statements*").

Response: The Department has no present intention to take enforcement action against the proposed survey, as the survey meets the requirements set forth as a safety zone in Statement 6 of the *Statements*. The Department notes that the proposed survey is not being conducted to aid in collective contracting for services with insurers or other payers, but only to be shared among IBCLCs to assist in setting fees on an individual and uncoordinated basis. The Department also notes the existence of internet listserves where lactation consultants episodically have mentioned prices or sensitive fee information, and expresses its concern that such listserves could serve as fora for problematic discussions.

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2005

05-1 MediaNews Group, Inc., the Denver News Agency, and E.W. Scripps Co. 12/08/2005

Newspapers

Joint Venture and Newspaper Preservation Act

Facts: MediaNews Group, Inc. ("MediaNews"), the Denver News Agency ("DNA"), and E.W. Scripps ("Scripps") propose the creation of a new free edition of the *Denver Post*. MediaNews' *Denver Post* and Scripps' *Rocky Mountain News* operate in a newspaper Joint Operating Agreement (the "JOA") approved by the Attorney General pursuant to the Newspaper Preservation Act, 15 U.S.C. §§1801-1804 (the "NPA"). The new edition of the *Denver Post* will be reportorially and editorially independent from Scripps' *Rocky Mountain News*. DNA, which sets rates and communicates with advertisers on behalf of the JOA, will handle only the commercial non-reportorial and non-editorial functions of the new edition. Expenses and revenues of the new edition will be treated and allocated in the same way as those of the *Denver Post* and the *Rocky Mountain News*.

Response: The Department reviews the proposal as any other potentially anticompetitive joint conduct because, in the absence of an amendment to the JOA or a side agreement, it appears not to be immunized by the NPA. However, the Department has no present intention to take enforcement action against the new edition of the *Denver Post*. The creation of the new edition likely will increase output and create greater choice for both readers and advertisers in the Denver metropolitan area, and it appears that MediaNews could not efficiently operate the new edition independently of the JOA. Additionally, the Deparment has no present intention to assert that the proposal jeopardizes the JOA's antitrust immunity. The creation of a new edition of a newspaper publication within the JOA, in such a way that is consistent with the requirements of the NPA and does not fundamentally change the JOA approved by the Attorney General, should not jeopardize the parties' pre-existing NPA immunity.

DIGEST OF BUSINESS REVIEWS

2006

06-1 American Peanut Shellers Association 02/02/2006

Peanuts Standards Program

Facts: The American Peanut Shellers Association (the "APSA") is a non-profit trade association composed of commercial peanut shellers and crushers located in Alabama, Florida, and Georgia. The APSA proposes to promulgate revised trading rules and grade standards (the "Rules"), which establish grade standards for each type of peanut sold as well as standard non-price contractual terms and provisions. The Department issued favorable business reviews of trading rules and grade standards proposed by the APSA's predecessor. The APSA purports to have created this new version in order to remove obsolete terms and to respond to changes in the federal peanut program.

Response: The Rules are not likely to reduce competition. They appear to use general commercial language that should enhance the ability of parties to enter into contracts to buy or sell peanuts. In addition, the grade standards appear to be used only as base standards, with buyers of shelled peanuts frequently applying their own standards. Finally, the Rules are voluntary, leaving buyers and sellers of peanuts free to compete by using their own contract terms and standards instead of those suggested by the APSA. The Department has no present intention to challenge the Rules.

06-2 Fair Factories Clearinghouse and World Monitors Inc. 06/19/2006

Clothing and Manufacturing Information Exchange

Facts: World Monitors Incorporated and the Fair Factories Clearinghouse (the "FFC") propose to operate a database collecting information about workplace conditions in manufacturing facilities across the globe. The FFC states that the database initiative is designed to put individual companies in a better position to know whether their suppliers, which typically serve multiple customers, are complying with applicable laws and widely recognized workplace standards related to the existence "sweatshops" in the manufacture of consumer goods. The database will consist primarily of information collected through audits undertaken or commissioned by FFC members. FFC members will have the option, but not the obligation, to contribute information to the database.

Response: The FFC initiative potentially raises concerns because audits may contain certain factories' wage and hour information and because the database may facilitate concerted action by FFC members against factories. But the initiative should yield some cost savings benefits. Additionally, the FFC is adopting safeguards against the exchange among factories of competitively sensitive information, allowing factories to access wage and hour information only in aggregate form. Finally, it is unlikely that the creation of the database would by itself have anticompetitive effects through the facilitation of collusion among customers of the factories being audited. The Department has no current intention to challenge the FFC initiative.

06-3 Linen Systems for Healthcare, LLC 08/08/2006

Textiles and Laundry Services Joint Venture

Facts: Linen Systems for Healthcare, LLC, a joint venture of regional textile maintenance companies, proposes to market textile rental and laundry services to specialized healthcare clients under the name MEDtegrity. It represents that a lack of any significant geographic overlap prevents its members from competing in any significant way. MEDtegrity members propose to market their services as part of a joint venture in order to compete for the business of national healthcare outpatient centers ("HOCs"), which demand services on a national basis. Members would remain free to compete for national business independent of the joint venture and would continue to act independently in seeking business within their own localities. HOCs will have the right to pick those MEDtegrity members with whom they will deal and will not have to deal with all or a minimum subset of members.

Response: The Department finds that the formation and operation of the MEDtegrity joint venture is not likely to produce anticompetitive effects. The proposed joint venture adds a new competitor for national HOC accounts without restricting output or harming the competition between MEDtegrity members. The rules of the joint venture will limit information exchanges among its members that might reduce price competition that theoretically could take place outside of the joint venture. The Department has no present intention to challenge the MEDtegrity joint venture.

06-4 American Trucking Associations, Inc. 08/10/2006

Transportation Services Model Contract

Facts: The American Trucking Associations, Inc. (the "ATA") is the national trade association representing the interests of motor carriers, state trucking associations, and national trucking conferences. The ATA proposes to develop and publicize two model agreements between motor carriers and freight transportation brokers. Terms in the model agreements for rates and charges, as well as certain non-rate terms, will be left blank for each carrier to negotiate individually with brokers. The model agreements will be made available to ATA members to utilize at their discretion on a purely voluntary basis.

Response: The Department determines that making the model agreements available to the trucking industry is not likely to reduce competition. The model agreements are not mandatory and do not specify rates or other competitively significant terms, leaving carriers free to compete by offering their individually determined contract terms and provisions to brokers. Furthermore, the model agreements could have procompetitive effects by improving the efficiency of contract negotiations, potentially reducing shipping rates. The Department has no present intention of challenging the ATA's proposal.

06-5 VMEbus International Trade Association 10/30/2006

Computers Standards Program and Patent Licensing

Facts: VMEbus International Trade Association ("VITA") is a non-profit standards development organization that promotes the development of industry standards for VMEbus computer architecture. VITA seeks to promote an open VME architecture and, to this end, implemented a policy allowing the incorporation of patented technology into its standards only when the patent holder commits to license on reasonable and non-discriminatory terms. This strategy has proven insufficient, VITA claims, as patent holders have demanded royalties significantly higher than expected. To reduce the likelihood of unexpected hold-up by patent holders, VITA proposes a new patent policy requiring participants in its standard-setting process to (1) disclose patents that are essential to implement the new standard, (2) commit to license any such patents on fair, reasonable, and non-discriminatory terms, and (3) declare the maximum royalty rates and the most restrictive non-royalty terms they will request for any such patents. Working group members may consider the various declared licensing terms when deciding which technology to support during the standard-setting process, but may not negotiate or discuss specific licensing terms.

Response: The Department analyzes the proposed patent policy under the rule of reason because it does not appear to be a sham designed to cloak naked price fixing or bid rigging. The policy permits working group members to evaluate substitute technologies on both technical merit and licensing terms when setting a standard. This preserves competition among patent holders, allows working group members to make more informed decisions, and decreases the chances that standard-setting efforts will be jeopardized by unexpectedly costly licensing terms or litigation. The policy should not allow licensees to depress the price of licenses for patented technology through joint action because it prohibits any joint discussion of licensing terms and because individual licensing terms will be negotiated separately by the patent holder and each licensee (subject to the restrictions in the patent holder's unilateral declaration of most restrictive terms). The Department has no present intention to take antitrust enforcement action against the proposed patent policy.

06-6 Southeastern Public Service Authority 12/27/2006

Waste Disposal Services Horizontal Agreement (Misc.) and Vertical Agreement (Misc.)

Facts: The Southeastern Public Service Authority ("SPSA") proposes entering into a contract with John C. Holland Enterprises, Inc. ("Holland") for the disposal of construction and demolition debris ("CDD") waste by Holland at SPSA's landfill. SPSA is a public body established for the purpose of providing public services, including waste disposal services. Holland owns and operates a competing landfill. The proposed contract sets a threshold volume of CDD waste that Holland will supply and SPSA will accept at the contract rate. The term of the proposed contract is one year, but the contract can be terminated by either party with thirty days' notice. The proposed contract is based on terms that SPSA offers to any waste hauler who commits to providing SPSA with a minimum quantity of CDD waste. SPSA contends that the proposed contract will result in additional throughput at SPSA's landfill, which will reduce average operating costs and, in turn, increase profits.

Response: The Department concludes that the proposed contract does not appear likely to have anticompetitive effects. Because maximum volume under the proposed contract is a relatively insignificant part of SPSA's waste disposal capacity, and the contract is for a short duration, the contract likely will not materially reduce either party's incentive or ability to compete for waste disposal. The proposed contract also is not likely to facilitate explicit or tacit collusion, since it does not facilitate the exchange of any significant competitively sensitive information that is not otherwise publicly available, or link either party's pricing or output to the conduct of the other party. The Department has no present intention to challenge the proposed contract.

DIGEST OF BUSINESS REVIEWS

2007

07-1	National Association of Small Trucking Companies and Bell & Company		04/09/2007
	Transportation Services		Cost Survey and Best Practices

Facts: The National Association of Small Trucking Companies ("NASTC") and Bell & Company propose to conduct an operational and financial survey of small- and medium-sized trucking companies. The proposed survey will collect data on equipment, revenues and expenses, balance sheets, and employees. The survey will be administered by third parties, and individual company information will be kept strictly confidential. The collected information will be shared, in aggregate form only, with participants and non-participants to enable them to benchmark themselves against the aggregate information and to reduce their operating costs. The survey procedures appear to fall within the safe-harbor rules set forth in Statement 6.A of the *Statements of Antitrust Enforcement Policy in Health Care*, jointly issued by Department and the Federal Trade Commission in August 1996. NASTC also may recommend best practices based on the aggregated data.

Response: The Department concludes that the proposed survey is not likely to reduce competition. Participation by members of an industry in benchmarking surveys does not necessarily raise antitrust concerns. In fact, with appropriate safeguards, such surveys can benefit consumers when industry members utilize the results to operate more efficiently or to price their products or services more competitively. The proposed survey appears to include appropriate safeguards to prevent the use of survey information to facilitate collusion or otherwise reduce competition. The use of any recommended best practices would be voluntary, and recommendations will not be made on competitively sensitive matters such as specific rates. The Department has no present intention to challenge the proposed survey.

07-2 Institute of Electrical and Electronics Engineers, Inc. 04/30/2007

Electronics and Electrical Equipment Standards Program and Patent Licensing

Facts: The Institute of Electrical and Electronics Engineers, Inc. ("IEEE") is a non-profit professional association that, through its Standards Association ("IEEE-SA"), has issued standards used in a variety of fields and industries (*e.g.*, information technology, power and energy, telecommunications, and transportation safety). In order to produce standards that any willing implementer can use and that will become widely adopted, IEEE-SA seeks to ensure that licenses for patent claims that are essential to implement an IEEE-SA standard are broadly available on reasonable terms. To this end, IEEE-SA's current patent policy requires members of a working group to (1) disclose any patent claims or patent applications essential to implement the standard they are drafting, and (2) if they hold any such patents, state either (a) that they will not enforce their essential patent claims, or (b) that they are willing to license their essential patent claims on reasonable and nondiscriminatory ("RAND") terms. IEEE-SA represents that it has encountered two difficulties in relying on RAND commitments. First, RAND terms are inherently vague. Ambiguities may result in litigation, which delays the introduction of standardized products, and unexpectedly high licensing fees, which result in higher prices for consumers. Second, the prohibition of any discussion relating to licensing terms in working groups prevents members from making cost-benefit comparisons. To address these issues, IEEE-SA proposes to change its patent policy to give patent holders the option to disclose publicly and commit to the most restrictive licensing terms (including the maximum royalty rate) they would offer for patent claims essential to the standard. In addition, working group members would be allowed to discuss the relative costs and benefits of alternative technologies within technical standard-setting meetings, but could not discuss specific licensing terms.

Response: The Department analyzes the proposed patent policy under the rule of reason because it does not appear to be a sham used to cloak price fixing or bid rigging. The policy potentially generates competition among patent holders on licensing terms and allows working group members to make more informed decisions, comparing alternative technologies both on technical merit and cost. In addition, the increased predictability of licensing terms could lead to faster implementation of the standard and could decrease litigation. The Department has no present intention to take antitrust enforcement action against the proposed patent policy.

07-3 Advanced Energy Consortium 08/23/2007

Oil and Gas Exploration Joint Research Project

Facts: The Advanced Energy Consortium (the "AEC"), a group of two oilfield service companies and five petroleum producing companies, proposes to fund and conduct research and development activities under the management of the Bureau of Economic Geology of The University of Texas at Austin. The objective of the research is to develop subsurface microsensors and nanosensors and associated nanomaterials that will allow for the collection of more accurate information regarding the physical characteristics of hydrocarbon reservoirs.

Response: The Department concludes that it does not appear likely that the joint venture will restrict price or output for any product or limit research competition among the members. Commercialization of the results of the proposed research is outside the scope of the venture. Participants in the venture retain the right to engage in independent research and to obtain any intellectual property rights derived from such independent research. In fact, to the extent that the AEC engages in research efforts that would not be undertaken by individual firms, the joint venture may have the procompetitive effect of promoting innovation. The Department has no present intention to take antitrust enforcement action against the proposed conduct.