

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE
CLAYTON ACT

Docket 7770. Complaint, Feb. 4, 1960—Decision, May 15, 1963

Order vacating initial decision and dismissing charges that the largest supplier
of ready-mixed concrete in the southeastern Pennsylvania and northern Dela-

Complaint

62 F.T.C.

ware area, illegally acquired two competitors, the Commission deciding that the public interest would be adequately served by exercising close scrutiny of any similar future acquisitions made by respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C., Title 15, Sec. 21), charging as follows:

PARAGRAPH 1. Respondent Warner Company is a corporation organized and existing under the laws of the State of Delaware since 1929, with its office and principal place of business at 1721 Arch Street, Philadelphia 3, Pennsylvania.

PAR. 2. Respondent is engaged in the production, transportation and sale of sand, gravel, crushed stone, ready-mixed concrete, limestone, lime and lime products in commerce, as "commerce" is defined in the Clayton Act.

PAR. 3. Respondent was, prior to the acquisitions described hereinafter, the largest supplier of ready-mixed concrete in southeastern Pennsylvania and northern Delaware. More particularly, respondent's ready-mixed concrete area of distribution was principally in the Delaware River Valley from Morrisville, Pennsylvania to Wilmington, Delaware, and included the greater Philadelphia and adjacent areas. Assets of the respondent were substantial. On December 31, 1955, total assets were \$25,434,001 and for the year ended December 31, 1955, net sales were \$25,874,601.

Respondent is a vertically integrated corporation with respect to sand and gravel essential to the production of ready-mixed concrete. Respondent's sand and gravel deposits are located on 6,000 acres of land in Bucks County, near Morrisville, Pennsylvania, on the Delaware River, about 25 miles northeast of Philadelphia. Estimated sand and gravel reserves are 120,000,000 tons, which, at the present rate of exhaustion, would last in excess of forty years. Respondent's sand is approved by the State of Pennsylvania Department of Highways.

Respondent is also integrated insofar as its transportation facilities are concerned. Sand and gravel are floated along the Delaware River aboard a company fleet of seventy-eight barges. In 1959, ready-mixed concrete was delivered to customers on two hundred fifty-two company trucks equipped with mixer and agitator bodies.

In 1955, prior to the hereinafter described acquisitions, respondent

operated seven ready-mixed concrete plants throughout the above-described area. Locations of these plants were as follows:

Morrisville, Pennsylvania-----	1
Philadelphia, Pennsylvania-----	4
Tyson Street Plant on Delaware River	
Berks Street Plant on Delaware River	
Christiana Street Plant on Schuylkill River	
51st Street Plant on Schuylkill River	
Wilmington, Delaware on Christiana River-----	1
Porter Concrete Plant near Delaware City, Pennsylvania-----	1

All of respondent's Philadelphia plants have dock facilities for the handling of sand and gravel. With the exception of the Liberty Corporation, a company also selling ready-mixed concrete in the Philadelphia area, respondent is the only company in that area with such facilities.

PAR. 4. Ready-mixed concrete is produced by the mixing, in proper proportions, of four ingredients: cement, fine aggregate (sand), coarse aggregate (gravel or crushed stone) and water. The strength of the concrete is determined by the proportions in which the dry ingredients (cement, sand and gravel) are mixed. Generally, stronger concrete is produced by the use of greater quantities of cement.

Ready-mixed concrete is mixed and made ready for use prior to the time of its delivery at the construction site at which it is to be used. Ready-mixed concrete is of two types: central mix and transit mix. In producing central mix concrete, all four ingredients are mixed in a stationary mixer at the plant of the producer and, when thoroughly mixed, are poured into a ready-mix concrete truck which is so designed as to permit constant agitation of the fluid concrete while in transit to the delivery site. Transit mix concrete is actually mixed in the truck itself. The dry ingredients are first mixed in a stationary plant and poured, in their dry state, into a ready-mix truck. The water is not added until the truck is within a certain distance from its delivery point, at which time the water is added and agitation in the truck mixes the concrete prior to its delivery. With negligible exception, transit mix concrete and central mix concrete are used for the same purposes.

PAR. 5. Chester Materials Company (hereinafter sometimes referred to as "Chester") was a corporation organized under the laws of the State of Delaware in 1923, with its principal place of business located at Front and Franklin Streets, Chester, Pennsylvania. Prior to its acquisition, Chester was engaged primarily in the manufacture and sale of ready-mixed concrete and in the sale and distribution of sand and gravel. All sand and gravel used and sold by Chester prior to its acquisition by respondent was sold to it by said respondent.

Complaint

62 F.T.C.

The property of Chester consisted of 4.73 acres of land, with a frontage of 260 feet on the Delaware River, together with a ready-mix concrete plant, two unloading cranes, a truck shop building and office, and 26 ready-mix concrete trucks. Chester owned the only waterfront site in the Chester, Pennsylvania area which was used for the handling of sand and gravel.

The total dollar value of sales of Chester for the year 1955 for each of the three products sold by it was:

Sand.....	\$32,989
Gravel.....	54,208
Ready-mix concrete.....	834,751

During the year 1955, respondent sold sand and gravel to Chester in the following amounts:

Sand.....	\$158,720
Gravel.....	273,028

PAR. 6. Chester Materials Company was engaged in commerce as "commerce" is defined in the Clayton Act. Chester's ready-mixed concrete plant was located approximately 14 miles south of respondent's 51st Street, Philadelphia plant. It sold and delivered, and was potentially able to sell and deliver, ready-mixed concrete within areas in which respondent sells and delivers ready-mixed concrete.

PAR. 7. On February 24, 1956, respondent acquired the assets of the Chester Materials Company in exchange for 23,085 shares of Warner's common stock. The cash value of the consideration was approximately \$1,143,000.

PAR. 8. W. E. Johnson, Inc., was a corporation organized under the laws of Pennsylvania on November 24, 1953, and had its principal place of business at Route 202 and Mill Road, Paoli, Pennsylvania. Prior to its acquisition, W. E. Johnson, Inc., was engaged in the production and sale of ready-mixed concrete and crushed stone. The properties formerly owned by W. E. Johnson, Inc., and acquired by respondent include the following:

500 shares of common stock of Allentown-Portland Cement Company;

34.772 acres of land on which are located:

- Developed quarry;
- Undeveloped quarry;
- Concrete batch plant;
- Garage and shop building;
- 24 transit mix concrete trucks;
- 1 1¼-yard shovel;
- 2 6-ton cranes;

- 4 quarry trucks; and
- 2 Hough front-end loaders.

During the year ending October 31, 1956, total sales of ready-mixed concrete by W. E. Johnson, Inc., amounted to \$1,159,173.

Although supplying all of its own coarse aggregate, W. E. Johnson, Inc., produced no sand. During the year ending October 31, 1956, W. E. Johnson, Inc., purchased approximately 73% of its sand requirements from the respondent and 27% of its sand requirements from Mason Dixon Sand and Gravel Company, Perryville, Maryland.

PAR. 10. W. E. Johnson, Inc., was engaged in commerce as "commerce" is defined in the Clayton Act. W. E. Johnson, Inc., prior to its acquisition by respondent, was located approximately 18 miles from respondent's 51st Street plant and sold and delivered ready-mixed concrete within areas in which respondent sold and delivered ready-mixed concrete.

PAR. 11. On February 15, 1959, respondent acquired the assets of W. E. Johnson, Inc., in exchange for 24,500 shares of respondent's stock. The consideration paid for W. E. Johnson, Inc., was approximately \$1,109,000.

PAR. 12. Fine aggregate (sand) is in a limited supply in the area in which respondent and the two acquired firms operate. This is particularly true of sand approved by the Pennsylvania Department of Highways. In addition, transportation costs delimit the area in which said sand may be shipped profitably. Respondent is the largest producer of building and paving sand among sand producers capable of supplying sand to manufacturers of ready-mixed concrete in the marketing areas in which the respondent, and in particular, Chester and W. E. Johnson, Inc., sold said concrete. In 1955, Warner's sand production, amounting to 2,153,877 tons, exceeded the combined production of sand totaling approximately 1,600,000 tons by twelve sand producers within selling range of the acquired corporations' markets. The majority of the competitors of the former Chester and Johnson corporations were purchasers of said sand from respondent, prior to said acquisitions. As a result of said acquisitions, many competitors of the former Chester and Johnson companies are presently in actual and potential competition in the ready-mixed concrete market with their major supplier of an essential ingredient of said concrete, i.e., sand.

PAR. 13. In the year 1955, respondent ranked first in sales of ready-mixed concrete in the market area encompassed by the respondent and the two herein named acquired companies, with sales totaling \$14,899,578. The Chester Materials Company with sales of \$1,834,751, and the W. E. Johnson, Inc., with sales of \$1,095,300 ranked fourth and

Complaint

62 F.T.C.

sixth, respectively, for that same year. Percentage-wise, respondent's sales represented approximately 50 percent of said market; Chester sales approximately 6 percent; and Johnson sales approximately 4 percent. In a market consisting of approximately fifteen actual and potential competitors, the first six ranking companies including respondent and the two acquired firms accounted for approximately 83 percent of the sales for the year 1955.

PAR. 14. The effect of the aforesaid acquisitions of Chester Materials Company and W. E. Johnson, Inc., by Warner Company may be substantially to lessen competition or tend toward a monopoly in the ready-mixed concrete industry in an area approximately encompassing the geographic markets for ready-mixed concrete serviced (1) by respondent in and adjacent to Philadelphia in Pennsylvania, and in particular, by respondent's 51st Street plant; (2) by Chester Materials Company in and adjacent to Chester, Pennsylvania; (3) by W. E. Johnson, Inc., in and adjacent to Paoli, Pennsylvania; and (4) the areas of overlap which geographically and competitively connected respondent and the two acquired firms into one contiguous area.

More specifically, the aforesaid effects include the substantial, actual or potential lessening of competition or a tendency to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

1. Chester Materials Company has been permanently eliminated as an independent competitive factor in the ready-mixed concrete market in the above-designated area.

2. W. E. Johnson, Inc., has been permanently eliminated as an independent competitive factor in the ready-mixed concrete market in the above-designated area.

3. Actual and potential competition between respondent and Chester Materials Company has been and will be eliminated in the production and sale of ready-mixed concrete in the above-designated area.

4. Actual and potential competition between respondent and W. E. Johnson, Inc., has been and will be eliminated in the production and sale of ready-mixed concrete in the above-designated area.

5. Actual and potential competition generally in the production and sale of ready-mixed concrete may be substantially lessened in the above-designated area.

6. Industry-wide concentration of the production and sale of ready-mixed concrete in the above-designated area has been and may be increased.

7. The acquisitions give respondent the facilities and added market and geographic position and ability to actually and potentially domi-

nate the primary areas in which the two acquired firms formerly operated, in addition to enhancing its pre-acquisition position.

8. Respondent's acquisition of both Chester Materials Company and W. E. Johnson, Inc., has completely foreclosed the actual or potential sale of sand essential to the production of ready-mixed concrete to these two firms by any producer of sand.

9. Respondent's acquisition of said corporations, in combination with its control of a major portion of the areas' limited supply of approved fine aggregate essential for ready-mixed concrete production, has provided and may potentially provide, respondent with the ability to substantially lessen competition or tend toward a monopoly in the areas in which the acquired firms sold ready-mixed concrete.

PAR. 15. The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. Eugene Kaplan and Mr. Daniel H. Hanscom for the Commission.

Schnader, Harrison, Segal & Lewis, Philadelphia, Pa., for the respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

HISTORY OF THE PROCEEDING

The complaint herein was issued by the Federal Trade Commission on February 4, 1960, charging that Warner's acquisition on February 24, 1956, of the assets of Chester Materials Company and Warner's acquisition on February 15, 1959, [actually 1957], of W. E. Johnson, Inc., constitute violations in two particulars of Section 7 of the Clayton Act. Firstly, the complaint alleges that the effect of the acquisitions was substantially to lessen competition or tend toward a monopoly in the sale of ready-mix concrete in the area or areas in which Warner's 51st Street, Philadelphia, plant and those of the acquired companies sold that product. Secondly, the complaint alleges that the effect of these acquisitions was substantially to lessen competition or tend to create a monopoly in the sale of sand used as an ingredient of concrete in the aforesaid area or areas.

Warner's answer admits the acquisitions were made, but denies there was a single contiguous market area for ready-mix concrete in which Warner and the two acquired companies sold ready-mix concrete, denies that either ready-mix concrete or concrete sand constitutes a "line of commerce" as that term is used in Section 7 of the Clayton Act,

and denies that the effect of the acquisitions constitutes a violation of Section 7 in either the sale of ready-mix concrete or the sale of concrete sand.

A separate hearing, pursuant to Warner's motion to dismiss the complaint for lack of jurisdiction in the Commission, was held—limited to the single issue whether each of the acquired companies was engaged in interstate commerce. Upon the evidence adduced, and after oral argument and submission of supporting briefs, the hearing examiner on September 23, 1960, denied Warner's motion but made no specific findings of fact at that time.

Following the examiner's ruling on the jurisdictional issue, a hearing on the merits of the complaint was held, covering a period of 12 hearing days in which counsel supporting the complaint adduced testimony from 32 witnesses, including Robert C. Collins, a director and former president of Warner. The record of the hearing on the merits embraces 1250 pages of testimony and 128 documentary exhibits.

On June 28, 1961, at the conclusion of the presentation by counsel supporting the complaint, Warner made a motion to dismiss the complaint which was denied by an order of the hearing examiner dated November 6, 1961.

Also, on June 28, 1961, at the conclusion of the presentation of evidence by counsel supporting the complaint, respondent moved to strike certain specified items of evidence. Throughout the presentation of the case in support of the complaint against Warner, there were introduced into evidence, over objections made by Warner, many items of evidence, which, on their face, were not directed to any issue in the complaint and which were wholly irrelevant to this proceeding. Many of these items of evidence to which respondent's motion to strike was directed were received by the examiner "subject to connection". They are as follows:

1. *Evidence relating to coarse aggregates*

Although the complaint makes no charge that the questioned acquisitions may have an effect upon the production or sale of gravel, crushed stone, or other coarse aggregates, counsel supporting the complaint saw fit to introduce evidence relating to reserves, production and sales of coarse aggregates by Warner and by many other producers of ready-mix concrete located both within and without the geographical area which counsel supporting the complaint alleges is "the section of the country" here involved. These items were all received in evidence by the examiner subject to connection. Since the complaint makes no allegation of any effect upon competition in the production or sale of coarse aggregates, and since none of the evidence relating to coarse

1295

Initial Decision

aggregates was shown to have any relevance to the allegations made in the complaint, respondent validly urged that the following Commission exhibits be stricken in their entirety, except where a portion thereof is indicated:

Commission's Exhibit No.

- 137—Petrillo Bros., Inc.
- 138—Petrillo Bros., Inc.
- 149—G. & W. H. Corson, Inc. (line headed "Tons of gravel sold")
- 151—Liberty Corp. (last two columns)
- 155—Allied Concrete & Supply Co.
- 156—V. DiFrancesco & Sons, Inc. (last two columns)
- 158—Fizzano Bros. Concrete Products, Inc. (figures under heading "STONE")
- 210—Trap Rock, Inc. (last two columns)
- 237—Warner Co.
- 238—Warner Co.
- 241—Warner Co.
- 248—Chester Materials Co.
- 251—W. E. Johnson, Inc.
- 252—W. E. Johnson, Inc.
- 253—W. E. Johnson, Inc.
- 254—W. E. Johnson, Inc.
- 257—Warner Co. (portion reading "Cost of Gravel to Warner Co. at 51st Street Plant" and the figure contained thereafter)
- 258—A. L. Lewis Co.
- 259—A. L. Lewis Co. (columns headed "Gravel" and "Total")
- 261—Glenside Lumber & Coal Co. (columns dealing with gravel purchases.)

2. *Evidence relating to additions and improvements to the acquired plants*

Counsel supporting the complaint introduced in evidence Commission's Exhibits 243 and 244 and elicited testimony from Robert C. Collins, at pages 1840 through 1852 in the transcript, relating to various additions and improvements made by Warner at its Chester and Johnson plants since the acquisitions of Chester Materials and Johnson. No allegation is made in the complaint that any such additions or improvements have had or may have any effect whatever upon competition in the sale of ready-mix concrete. Moreover, there is no showing that the additions or improvements reflected in these exhibits and in Mr. Collins' testimony have any relevance to the allegations made in the complaint. Consequently, this evidence serves no useful purpose.

3. *Annual reports of Warner Company*

Counsel supporting the complaint also introduced in evidence, subject to connection, Commission's Exhibits 221 through 233, inclusive, which are annual and semiannual reports of Warner. During the hearing, counsel supporting the complaint indicated that the purpose for which these reports were introduced was to explain the "general organization of the company, the several acquisitions involved, the financial status of the company over the years and, again, additional description of the company itself."

Examination of these documents shows that they are comprehensive reports to the shareholders of a publicly owned company. Although they contain some information which is not relevant to this proceeding, they are reflective of the nature of the business and of the financial status of the company which, in part, is indicative of the economic power that may be exerted by the respondent pursuant to other evidence adduced in this case. The hearing examiner therefore, was inclined to receive such evidence to the extent that it has relevance. Irrelevant, immaterial or incompetent data contained therein has been excluded from consideration in rendering the initial decision in this case.

4. *Evidence by Samson Ready-Mix Concrete Co. representatives regarding alleged statements of Warner employees*

Three representatives of Samson Ready-Mix Concrete Co. testified with respect to statements allegedly made by employees of Warner. These statements, mainly those purportedly made in 1956 by two former Warner employees, Roy Miles and Sam Norley, in a bar of a tavern in Media, were interpreted by the witnesses to constitute threats by Warner against Samson. The import of such "threats" was presumably that Warner, after the acquisition of Chester Materials in that year, would aggressively compete with Samson, and that the result might put Samson out of business. The specific items of evidence regarding these alleged economic threats purportedly made by Warner employees are the following: Commission's Exhibits 146, 212, 213, 215, and 216, and the testimony of Samuel W. Williamson at transcript page 1056, line 6, through page 1092, line 22, and page 1699, line 13, through page 1704, line 14; the testimony of Mrs. Martha S. Williamson at transcript page 1511, line 21, through page 1582, line 11; and the testimony of Edward J. McKenna at transcript page 1584, line 3 through page 1598, line 19.

This evidence, which was received over Warner's timely objections,

subject to a proper foundation being laid appears to be incompetent in that the statements attributed to Warner employees were not shown to represent the policy of Warner. Moreover, it was not shown that those Warner employees were, in any event, authorized implicitly or otherwise to make the statements which they are alleged to have made as representative of Warner's competitive policy.

For the foregoing reasons the hearing examiner by order dated November 6, 1961, granted respondent's motion to strike the aforesaid identified evidence relating to (1) coarse aggregates, (2) additions and improvements to acquired plants, and (3) economic threats, purportedly by Warner employees as stated by Samson Ready-Mixed Concrete Company representatives, including part of the testimony of Samuel W. Williamson and Mrs. Martha S. Williamson in this regard. The motion to strike was otherwise denied. Thus the annual reports of Warner Company remain a part of the record with other evidence considered by the hearing examiner in resolving the issues in this case and in rendering findings. The evidence stricken for the reasons hereinbefore indicated has not been considered. However, consideration of such evidence would not in any event materially affect the decision in this case.

Although counsel in support of the complaint made a motion to reargue respondent's motion to strike the foregoing evidence, after reconsideration, the hearing examiner reaffirmed his decision on respondent's motion to strike.

On March 15, 1962, prior to oral argument on the proposed findings, respondent formally rested its case on the record, having previously indicated an intention to do so.

Thereafter, the hearing examiner carefully reviewed and considered the proposed findings of fact and conclusions of law filed by counsel in support of the complaint and counsel for respondent on February 13, 1962. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following

FINDINGS OF FACT

I. The Acquiring Company

1. The Warner Company, respondent herein (hereinafter referred to as "Warner") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with

its office and principal place of business located at 1721 Arch Street, Philadelphia, Pennsylvania.

2. Warner is engaged in the production, manufacture and sale of ready-mixed concrete, sand, gravel, crushed stone, railroad ballast, bituminous concrete (asphalt), blast furnace slag, lime, limestone, and "Lelite" (a light weight aggregate where a light weight concrete is specified).

3. During 1959, the last year prior to the issuance of the complaint, Warner's sales totaled \$32,382,052. Warner's sales of ready-mixed concrete for that year totaled \$16,717,526. As of December 31, 1959, Warner's assets in dollar value were \$33,100,081.

4. Warner is engaged in interstate commerce.

5. Warner Company is a producer and seller of ready-mixed concrete in the Delaware River industrial area from Princeton Junction, New Jersey, through Philadelphia, to below Wilmington, Delaware. Warner now operates a chain of ten modern ready-mixed concrete plants. Warner services by truck the metropolitan areas of Trenton, Philadelphia, Chester, Wilmington, and contiguous areas, westward to Paoli. Sand, gravel and "Super-Limoid" are also available at these plants.

6. Warner owns its own sources of sand and gravel consisting of a 6,000 acre deposit near Morrisville, Pennsylvania. Warner's reserves of sand and gravel as of January 1, 1956, were estimated to amount to 120,000,000 tons, or an estimated 40-year supply. In addition, Warner employs dredges on the Delaware River. Warner provides its ready-mixed concrete plants with sand and gravel by means of Warner owned tugboats and a fleet of seventy (70) river barges operating on the Delaware River, the last several of which cost \$65,000 to \$70,000 each, and by Warner owned railroad cars. Warner, except for the Liberty Corporation, is the only company having dock and crane facilities for the handling of these materials. Dock and crane facilities are available at all the Warner ready-mixed concrete plants except the Warner plants at Princeton Junction, New Jersey, Paoli, Pennsylvania, and Porter Station, Delaware.

7. In 1959, Warner owned over 250 ready-mixed concrete mixer trucks. Ready-mixed concrete trucks are shifted by Warner from plant to plant from Princeton Junction, New Jersey, to Porter Station, Delaware, below Wilmington, as the Warner ready-mixed concrete business requires. A ready-mixed concrete truck costs between \$17,000 and \$30,000. Liberty Corporation, the nearest competitor of Warner, has only 68 ready-mixed concrete trucks. Other ready-mixed con-

crete companies competing with Warner operated between 4 and 25 ready-mixed concrete mixer trucks, many of them fewer than 20.

II. *The Acquired Companies*

A. *Chester Materials Company*

8. On February 24, 1956, Warner acquired the assets of Chester Materials Company.

9. The Chester Materials Company (hereinafter referred to as Chester) was a corporation organized, existing and doing business under the laws of the State of Delaware since 1923, with its principal place of business at Chester, Pennsylvania. Chester, prior to February 24, 1956, was a producer of ready-mixed concrete in the greater Chester area. In 1955, sales of ready-mixed concrete by Chester totaled \$1,834,751. Chester purchased sand and gravel for its ready-mixed concrete business from Warner.

10. In the course and conduct of its business Chester was engaged in interstate commerce. There is substantial evidence of record that Chester Materials Company, prior to its acquisition by the respondent on February 24, 1956, consummated out-of-state sales indicative of engagement in interstate commerce. Chester trucks regularly delivered ready-mixed concrete, and other materials from its source of supply in Chester, Pennsylvania, to the Delaware works of the General Chemical Division of Allied Chemical & Dye Company, to the Colorado Fuel & Iron Company, and to other customers located in the State of Delaware.

11. Chester's plant, located on the Delaware River, consisted of approximately five acres containing a ready-mixed concrete plant, two unloading cranes, a truck shop, twenty-six trucks for transporting and delivering ready-mixed concrete, and various other equipment. Chester Materials Company owned a frontage of 260 feet on the Delaware River, together with all the machinery and equipment for a ready-mix operation and dock facilities for the handling of aggregates.

12. Chester Materials Company in 1955 was a substantial factor in the ready-mixed concrete business with a ready-mixed concrete plant about fourteen miles down the Delaware River from the Warner 51st Street Philadelphia, Pennsylvania, plant, and midway between this plant and the Warner Wilmington, Delaware, ready-mixed concrete plant.

Chester Materials Company in 1955 held fourth position in vol-

Initial Decision

62 F.T.C.

ume of business as a ready-mixed concrete producer and seller in the Philadelphia-Chester relevant market area hereinafter defined.

B. W. E. Johnson, Inc.

13. On February 15, 1957, Warner acquired the assets of W. E. Johnson, Inc.

14. W. E. Johnson, Inc. (hereinafter referred to as Johnson) was a corporation organized, existing and doing business since November 24, 1953, under the laws of the State of Pennsylvania, with its plant and principal place of business at Paoli, Pennsylvania. Johnson was engaged in the manufacture, production and sale of ready-mixed concrete and crushed stone. During the year ending October 31, 1956, Johnson sold ready-mixed concrete in the amount of over \$1,105,607.

15. In the course and conduct of its business Johnson was engaged in interstate commerce. Substantial evidence of record indicates that in 1954, Johnson sold in interstate commerce a railroad carload of crushed stone to a customer located at Camden, New Jersey. The railroad car was brought on to the siding of the Pennsylvania Railroad in the Johnson plant at Paoli, Pennsylvania, and there loaded with crushed stone by Johnson. Thereafter, Johnson caused the carload of crushed stone to be transported and delivered to the customer at Camden, New Jersey. In 1955, Johnson also sold in interstate commerce a carload of crushed stone to a customer located at Camden, New Jersey. The railroad car was brought on to the siding of the Pennsylvania Railroad in the Johnson plant at Paoli, Pennsylvania, and there loaded with crushed stone by Johnson. Thereafter, Johnson caused the carload of crushed stone to be transported and delivered to the customer at Camden, New Jersey.

Respondent has contended that the out-of-state sales by W. E. Johnson, Inc., were isolated, exploratory, experimental, unprofitable and two years precedent to the acquisition by Warner Company. The fact that the sales were an unprofitable experience of brief duration and infrequent, in no way diminishes the fact that interstate commerce was engaged in by Johnson within a reasonably brief period precedent to acquisition by Warner on February 15, 1957. Engagement by Johnson in interstate commerce is not predicated upon interstate purchases or upon the interstate movement of goods concept.¹

16. The Johnson plant was located on approximately thirty-four acres of land at Paoli, Pennsylvania, which contained the ready-mixed concrete plant, a railroad siding, a developed stone quarry, an

¹ See orders of hearing examiner dated September 23, 1960 and September 30, 1960.

undeveloped stone quarry, a garage, and a shop building. Johnson utilized 24 trucks for the transportation and delivery of ready-mixed concrete.

The Johnson plant, near Paoli, Pennsylvania, was located about sixteen (16) miles west of the Warner 51st Street, Philadelphia, Pennsylvania, plant and about the same distance north of the Chester Materials Plant at Chester, Pennsylvania.

17. In 1956, Johnson ranked fifth (5th) in the sale of ready-mixed concrete in the Philadelphia-Paoli-Chester area. Johnson purchased its requirements of sand for its ready-mixed concrete operation from Warner Company.

III. *The Nature of the Business*

18. Ready-mixed concrete is concrete delivered ready to pour at the construction site by means of special trucks with rotating barrels designed to permit mixing or agitation of the fluid concrete while in transit to the delivery site.

Such concrete is produced by the mixing, in proper proportions, of four ingredients: cement, fine aggregate (sand), coarse aggregate (gravel or crushed stone), and water. Ready-mixed concrete is of two types: central mix and transit mix. In producing central mix concrete, all four ingredients are combined in a stationary mixer at the plant of the producer and when thoroughly mixed are poured into a ready-mixed concrete truck which is designed to permit constant agitation of the fluid concrete while in transit to the delivery site. Transit mix concrete is actually mixed in the truck itself. The dry ingredients are poured, in their dry state, into a ready-mixed truck. The water is not added until the truck arrives at or is within a certain distance from its delivery point, at which time the water is added and agitation in the truck mixes the concrete prior to its delivery. Transit mix concrete and central mix concrete are both used for the same purposes. The term "ready-mixed concrete" is used to describe both central and transit mix concrete.

19. Ready-mixed concrete is utilized generally for all construction purposes such as the building of industrial, commercial and residential structures, foundations, bridges, highways, sidewalks, streets and sewers.

20. Ready-mixed concrete is used wherever concrete is required as a construction material. "On-site" concrete is no longer used to any significant degree in the Trenton-Philadelphia-Chester-Wilmington-Paoli area.

21. Ready-mixed concrete plants of the transit mix type can market

Initial Decision

62 F.T.C.

their product within any radius from the plant that the management finds it desirable to send its trucks. This is true because the water need not be added until arrival at the job site, or shortly before. "Central mix" ready-mixed concrete, because the water has been added at the plant to the dry cement and aggregate, cannot be allowed to remain in the mixer truck indefinitely because of the danger of the ready-mixed concrete "setting" or hardening within the mixer barrel.

22. The Warner ready-mixed concrete plants in Philadelphia, Pennsylvania, are all of the "central mix" type. Chester Materials Company, at the time of acquisition by Warner, was also of the "central mix" type. Johnson, when acquired by Warner, was a "transit mix" ready-mix operation.

23. Ready-mixed concrete has sufficient peculiar characteristics and uses to make it distinguishable from all other products.

24. "Central mix" ready-mixed concrete can be delivered at a distance up to two hours driving time from the plant, and "transit-mix" can be delivered to any distance a ready-mixed concrete company may desire to send a truck.

As a practical matter, however, a distance of 11 miles from the plant may be taken as the normal marketing area² of the Warner Philadelphia ready-mixed concrete plants, of the acquired ready-mixed concrete plant at Chester, Pennsylvania, and of the Johnson plant at Howellville, near Paoli, Pennsylvania.

25. The sales areas of Johnson, Chester, and Warner all overlapped in large and substantial territories in the area of South Philadelphia, Chester, and Paoli. Warner, Chester, and Johnson, prior to the acquisitions, all competed in geographic areas between the Warner 51st and Christian Street ready-mixed concrete plants, the Chester plant, and the Johnson plant.

The common sales area of Warner and Johnson was an area of about 70 square miles.

The common sales area of Warner and Chester was an area of about 75 square miles containing the southern portions of Philadelphia, the northern portions of Chester, the intervening area, and the area to the north and west of these territories.

Chester and Johnson also had a common sales area of about 70 square miles situated between Paoli and Chester. This area overlaps the foregoing described common sales area of Warner and both Chester and Johnson and contains a similar industrial and residential complexion.

² The marketing area, however, may extend to 15 or 20 miles.

IV. The Markets Served

26. The effective marketing area of a ready-mix concrete producer in the Greater Philadelphia area is normally a distance of about 11 miles from his plant, depending on the particular combination of circumstances involved. Under some circumstances the effective marketing area may extend a distance of 20 miles from the plant.

27. There are at least three geographic areas which constitute sections of the country within the meaning of Section 7, relevant to the acquisitions of Johnson and Chester by Warner.³ They are as follows:

(a) With respect to the acquisition of Chester, that section of the country in the area of overlap between a circle centered on the location of the plant of Chester at Chester, Pennsylvania, with a radius of approximately 11 miles, and a circle centered on the nearest Warner ready-mixed concrete plant (51st Street), with a radius also of 11 miles.

(b) With respect to the acquisition of Johnson, that section of the country in the area of overlap between a circle centered on the location of the Johnson plant at Howellville, near Paoli, with a radius of approximately 11 miles, and circles with a radius of 11 miles centered on the Warner plants at 51st Street, Philadelphia, and the Warner Chester plant (the former Chester Materials plant).

(c) With respect to the acquisitions of Johnson and Chester taken together, both the areas described above.

28. Allied Concrete & Supply Corp. operates a ready-mix concrete plant at Dresher, Pennsylvania. Allied delivers concrete in Pennsylvania within 8 to 12 miles of its plant.

29. Commercial Concrete Co. operates ready-mix concrete plants at Phoenixville and Norristown, Pennsylvania. Commercial delivers concrete in Pennsylvania within 12 to 15 miles of each plant.

30. G. & W. H. Corson, Inc., operates a ready-mix concrete plant near Plymouth Meeting, Pennsylvania, 9 miles east of Norristown. Corson delivers concrete in Pennsylvania within 10 to 12 miles of its plant.

31. V. DiFrancesco & Sons operates a ready-mix concrete plant at Havertown, Pennsylvania. DiFrancesco delivers concrete in Pennsylvania within 10 miles of its plant.

32. John T. Dyer Quarry Co. operated a ready-mix concrete plant in Bridgeport, a few miles northeast of the Johnson plant in Howell-

³ See Appendix A, a map of the relevant geographic market areas. In some instances this may extend from an 11 mile radius to 20 miles. [App. A omitted in printing.]

Initial Decision

62 F.T.C.

ville, from 1946 to 1958. In January 1959, several years after Warner's acquisition of Johnson, Dyer sold its Bridgeport plant to Highway Concrete Co. The evidence does not establish the sale was related to the fact of the acquisition.

33. The owner of Highway Concrete Co., who was then engaged in the bituminous concrete business, testified that he had concluded, after considering the existence of other concrete plants in the area (including Warner's Johnson plant), that Dyer's Bridgeport plant was a good investment and would earn a profit. After acquiring this plant, Highway invested additional amounts of capital to build a new central-mix concrete plant at that location. Highway delivers concrete within 12 miles of its plant.

34. Fizzano Bros. Concrete Products, Inc., operates a ready-mix concrete plant at Crum Lynne, Pennsylvania. Fizzano delivers concrete within 8 to 10 miles of its plant.

35. Glenside Lumber & Coal Co. operates a ready-mix concrete plant at Willow Grove, Pennsylvania. Glenside delivers concrete within 10 miles of its plant.

36. Liberty Corporation operates a ready-mix concrete plant at Delaware River and Orthodox Street, Philadelphia, Pennsylvania. Liberty delivers concrete within 12½ miles to 14 miles of its plant.

37. Samson Ready-Mix Concrete Co. operates a ready-mix concrete plant in Media, Pennsylvania. Samson delivers concrete within 8 to 12 miles of its plant.

38. Trans-Materials Co. operates a ready-mix concrete plant at West Chester, Pennsylvania. Trans-Materials delivers concrete within 5 to 20 miles of its plant.

39. Trap Rock, Inc., constructed a ready-mix concrete plant at 58th Street and Eastwick in Philadelphia, Pennsylvania, in 1959. Trap Rock's new plant was constructed less than 1 mile from Warner's 51st Street plant and not far distant from the plant of V. DiFrancesco & Sons. Trap Rock delivers concrete within 10 miles of its plant.

V. Position in Business of Respondent and its Competitors

40. The following chart reflects total annual sales of ready-mix concrete, in dollars, by Warner, Chester, and Johnson and by competitor firms aforementioned for the period from 1955 to 1960, inclusive: *

* Sources: Exhibits CX-140, 145, 149a, 151, 154a, 156, 158, 207, 209, 210, 245, 250, 255, 260, 261. (See also Appendix B reflecting percentages of total dollar volume of business and positions of competitors in business which is also made a part of these findings. [App. B omitted in printing.]

1295

Initial Decision

Company	1955	1956	1957	1958	1959	1960
Warner*	\$10,441,093	\$11,564,404	\$10,695,589	\$10,556,989	\$12,046,666	\$8,214,259
Chester	1,834,751	125,581				
Johnson	1,127,437	1,105,627	23,310			
Allied	593,007	750,437	724,414	652,902	746,162	928,187
Commercial (2 plants)	1,064,818	1,211,372	1,182,664	1,231,940	1,301,680	1,394,364
Corson	970,936	973,299	1,125,070	900,736	619,677	**942,076
DiFrancesco	2,129,567	1,538,061	1,251,644	950,911	1,059,045	1,076,113
Dyer and Highway (in 1959)	461,173	379,520	356,255	345,958	368,167	662,288
Fizzano	92,497	137,039	176,387	175,865	208,314	193,551
Glenside	889,392	626,658	600,653	518,578	546,820	544,358
Liberty	3,121,276	3,091,954	3,179,771	3,268,664	3,548,713	2,811,304
Samson	443,955	905,858	764,441	723,927	683,938	695,709
Trans-Materials	590,042	660,139	584,225	717,414	811,600	530,627
Trap Rock (from May 1959)					254,540	784,847
Total	23,759,944	23,069,949	20,664,423	20,043,854	22,195,322	18,777,683

*Berks Street, Christian Street, 51st Street and Tyson Street plants, and also Chester (from February 25, 1956) and Johnson (from February 16, 1957) plants.

**Figure for 1960 only is given on a fiscal year basis.

41. The following chart reflects total annual sales of ready-mix concrete in cubic yards, by Warner, Chester, and Johnson and by competitor firms aforementioned.⁵

Company	1955	1956	1957	1958	1959	1960
Warner*	784,983	846,528	752,729	749,001	874,472	601,227
Chester	129,253	9,455				
Johnson	79,337	79,058	2,602			
Allied	45,602	59,278	55,331	49,032	57,114	69,616
Commercial (2 plants)	78,876	89,028	83,057	87,571	92,492	104,465
Corson	75,902	75,102	82,387	65,417	44,318	**70,734
DiFrancesco	155,614	110,992	88,338	65,831	73,144	74,420
Dyer and Highway (in 1959)	33,801	26,589	25,183	24,540	26,152	47,001
Fizzano	7,115	10,541	13,065	13,027	14,880	13,825
Glenside	65,121	47,626	45,512	38,873	40,541	39,977
Liberty	249,895	244,124	235,606	243,580	272,019	225,636
Samson	32,709	65,821	54,391	51,718	48,411	50,237
Trans-Materials	41,912	47,468	41,541	51,789	57,956	37,197
Trap Rock (from May 1959)					19,983	59,140
Total	1,780,120	1,711,610	1,479,640	1,440,379	1,621,482	1,393,475

*Berks Street, Christian Street, 51st Street and Tyson Street, and also Chester (from February 25, 1956) and Johnson (from February 16, 1957) plants.

**Figure for 1960 only is given on a fiscal year basis.

VI. Threat to Competition or Tendency to Create Monopoly Resulting From Acquisitions at Issue

42. Prior to the acquisition of Chester Materials, Warner in 1955 had 43.9% in dollar volume and 44.1% in cubic yard volume of the total ready-mixed concrete sales by the companies doing business in the relevant market areas hereinbefore defined. From 1956 through 1959, Warner's share of the total increased to 54.3% in dollar volume and 53.9% in cubic yard volume. In 1960, the foregoing decreased

⁵ Sources: Exhibits CX-140, 145, 149, 151, 154a, 156, 158, 207, 209, 210, 246, 249, 256, 260, 261. (See also Appendix C reflecting percentages of total cubic yard volume of business and positions of competitors in business which is also a part of these findings.) [App. C omitted in printing.]

to 43.7% and 43.1% respectively. There is no evidence explaining the aforesaid reduction. At all times from 1955 through 1960, Warner held first position in volume of sales in these relevant market areas. Chester Materials' share of the business was approximately 7.7% of the total dollar volume of sales and 7.3% of the total cubic yard volume of sales in the relevant market areas prior to its acquisition by Warner in 1955. Also in 1955, prior to acquisition by Warner, Chester held fourth position in volume of sales in the relevant market areas hereinbefore defined.⁶

43. Prior to the acquisition of Johnson, Warner in 1956 had 50.4% in dollar volume and 49.7% in cubic yard volume of the total ready-mixed concrete sales by the companies doing business in the relevant market areas hereinbefore defined. From 1957 through 1959, Warner's share of the total increased to 53.3% in dollar volume and 53.9% in cubic yard volume. In 1960, there was a decrease to 43.7% and 43.1%, respectively. There is no evidence explaining the reason for the decrease. At all times as hereinbefore stated from 1955 through 1960, Warner held first position in volume of sales in these relevant market areas. Johnson's share of the business was approximately 4.7% of the total dollar volume of sales and 4.5% of the total cubic yard volume of sales in 1955. In 1956, immediately prior to acquisition by Warner, Johnson's share of the total business was approximately 4.8% in dollar volume and 4.6% in cubic yard volume in the relevant market areas. In 1955 and in 1956, prior to acquisition by Warner, Johnson held fifth position in volume of sales in the relevant market areas.⁷

44. There is evidence of record and the hearing examiner finds that after the acquisition of Chester and Johnson, some competitors of Warner in the relevant market areas reduced their prices approximately a dollar a yard or 5% to 7% in order to meet the reduced prices of Warner which the evidence suggests had assumed price leadership in consummating such reductions. There is also evidence of the fact that Warner's competitors reduced prices to meet the prices of competitors other than Warner, although more frequently it was to meet Warner competition. This evidence, however, has limited probative weight in the absence of comparative and complete documented prices of the various competitors including Warner in

⁶ See Appendix A for relevant market areas and Appendices B and C for the volume of business of Warner and Chester Materials. "Business" refers to the ready-mixed concrete business or sales. [Apps. A, B, and C omitted in printing.]

⁷ See Appendix A for relevant market areas, and Appendices B and C for volume of business acquired by the various competitors in the relevant market areas from 1955 through 1956, based on dollar volume and on cubic yard volume, respectively. "Business" refers to the ready-mixed concrete business or sales. [Apps. A, B, and C omitted in printing.]

the relevant market areas corroborative of the testimony to this effect. The evidence adduced nevertheless justifies the conclusion that Warner had the economic ability to assume price leadership and did so as hereinafter discussed.

45. There is no evidence having substantial probative weight indicative of actual diversion of business from competitors of Warner to Warner after the acquisition of Chester and Johnson except as may be reflected by Appendices B and C and testimony involving general statements to the effect that not infrequently a concrete job sought by a competitor of Warner was lost to Warner because of Warner's lower costs, better facilities and reduced ready-mixed concrete prices. Appendices B and C, with regard to certain companies losing business appear to suggest that the business rather than being diverted to Warner may have been diverted in part to other competitors whose volume of business increased from 1955 through 1960.⁸

46. The evidence also reflects and the hearing examiner further finds that a new competitor, i.e., Trap Rock entered into the business of selling ready-mixed concrete in the relevant market areas in 1959,⁹ attaining eleventh position of the twelve positions in those areas with 1.1% of the total dollar volume and 1.2% of the cubic yard volume of the total sales. In 1960, this same company attained seventh position with a dollar volume of 4.2% of the total business and a cubic yard volume of 4.2% of the total volume business.¹⁰ This evidence in and of itself does not of course impute that there may not be a lessening of competition resulting from the acquisitions.

47. Warner produces its own complete requirements of concrete, sand and coarse aggregate (gravel or crushed stone). Gravel is obtained by Warner from the Delaware River and from its deposits near Morrisville, Pennsylvania. Crushed stone is obtained from the Johnson quarry near Howellville, Pennsylvania. The securing of a supply of crushed stone was one of the dividends accruing to Warner from the acquisition of Johnson.

There is also some evidence to the effect that Warner supplies sand and gravel to some of its competitors in the relevant market area. One competitor seeking to purchase these ingredients from which ready-mixed concrete is made was advised by Warner that only a limited amount of such ingredients would be sold to him. This evidence, however, contrary to the view of counsel in support of the complaint in no way establishes that Warner was in a position to

⁸ See Appendices B and C, particularly as to the increased volume of sales of Allied, Trans-Materials, Samson, Corson (except in 1959), Liberty, and Fizzano and loss in volume of sales of DiFrancesco, Dyer and Glenside. [Apps. B and C omitted in printing.]

⁹ This is the period Warner had the highest percentage share of the business from 1955 to 1959.

¹⁰ See Appendices B and C. [Apps. B and C omitted in printing.]

control the ready-mixed concrete market as a result of its surplus supply of certain ingredients of ready-mixed concrete since there is no substantial evidence having probative weight indicative of a shortage of these ingredients in the relevant market. Furthermore, Warner's control over the sand and gravel market is unestablished.

48. Although counsel in support of the complaint contends that respondent has a cost advantage in marketing ready-mixed concrete because it has its own supply of ingredients such as sand and coarse aggregate, there is no evidence in the record of the cost of sand and gravel to Warner at its Chester or Johnson plants and there is no evidence of the price which Chester or Johnson paid to Warner for sand and gravel prior to the acquisitions. The record contains only scanty evidence as to the cost of aggregates to other companies which do business in the areas served by Chester and Johnson plants. What evidence there is leads to the inevitable conclusion that Warner's ownership of aggregates gives it no measurable competitive advantage in the areas served by its Chester and Johnson plants.

The record discloses that Warner's cost for sand delivered at its 51st Street plant is \$1.22 but there is no evidence of the cost to Warner of sand at its Chester or Johnson plants. Albert L. Lewis, owner of A. L. Lewis Co., testified that it costs approximately 5 cents per ton per mile to haul sand. John W. Fitzgerald, president of Liberty Corporation, testified that the cost of hauling a ton of sand 15 miles is approximately \$1.10. On the basis of these figures, it might be determined that sand hauled from Warner's 51st Street plant to its Johnson plant in Howellville costs Warner from \$2.10 to \$2.40 per ton. On the other hand, DiFrancesco pays \$1.90 per ton, delivered, for sand; Fizzano pays \$1.85 per ton, delivered, for sand and Samson purchases sand at \$1.85 per ton, delivered. It is apparent Warner has no cost advantage at its Johnson plant over the other firms mentioned on that basis.

There is no way to calculate the cost of sand to Warner at its Chester plant, since the cost per ton per mile of hauling sand by barge is not reflected in the record. There also is no evidence of the cost of coarse aggregates to Warner at Warner's Johnson, Chester or 51st Street plants. However, it seems clear that Warner has little or no price advantage over any other ready-mix producer in the areas around Howellville and Chester. Moreover, when the price of a cubic yard of concrete is in the range of \$13 to \$16 (e.g., CX-160 to 206), a price differential of 50 cents a cubic yard is deemed to be "negligible" by a contractor who weighs other factors such as quality.¹¹ Consequently, the record does not support and the hearing examiner so

¹¹ Tr. 1349.

finds that the contention that a price differential in favor of Warner at Chester of about 50 cents, which is the maximum differential which could conceivably be inferred from this record, is meaningful or would tend toward lessening of competition or the creation of a monopoly in the sale of ready-mix concrete.

CONCLUSIONS OF FACT

1. Chester Materials Company has been eliminated as an independent competitive factor in the ready-mixed concrete market in the effective area of competition hereinbefore defined.

2. W. E. Johnson, Inc., has been eliminated as an independent competitive factor in the ready-mixed concrete market in the effective area of competition hereinbefore defined.

3. Competition between respondent and Chester Materials has been eliminated in the production and sale of ready-mixed concrete in the effective area of competition hereinbefore defined.

4. Competition between respondent and W. E. Johnson, Inc., has been eliminated in the production and sale of ready-mixed concrete in the area of effective competition.

5. Considered either separately or jointly, the acquisition of Chester Materials Company and then W. E. Johnson, Inc., by respondent, both substantial competitors in the ready-mixed concrete industry in the designated areas, has increased respondent's share of the total ready-mixed concrete business to over 50% during the period from 1956 through 1959. Although in 1960 this share was reduced to the approximate percentage respondent had precedent to the acquisition, the reduction is unexplained and therefore inconclusive since there may have been special circumstances during the brief one year period that caused reduction in sales volume without relation to competition. The longer period from 1956 through 1959 is obviously more impressive as a valid basis for determining the economic ability of the respondent to control the market in contravention of Section 7 of the Clayton Act. As pointed out by Professor Derek C. Bok in 74 *Harvard Law Review* 226 at Page 277, in an article entitled "Section 7 of the Clayton Act and Merging of Law and Economics" cited in *Crown Zellerbach Corp. v. Federal Trade Commission* 296 F. 2d 800 (9th Cir. 1961):

* * * if the leader's share of the market exceeds fifty per cent, any given percentage increase in his sales will necessarily cause a larger percentage decrease in the sales of his rivals.

Thus the demonstrated ability of the respondent in the within case to attain a share of more than 50% by acquisitions during a substantial period of four years is also indicative of its ability to divert busi-

ness from its competitors by means of price leadership in reducing prices to a level constituting a threat to competition. As further pointed out by Professor Bok at page 278: "in most instances of price leadership it is the largest firm which leads."¹² The greater size connotes a greater striking power which may coerce the smaller firms into passive submission.¹³ This would appear to be particularly true in a competitive environment involving the limited geographic market within which ready-mixed concrete may as a practical matter be transported and sold. The Commission in order to establish a Section 7 case is not required to prove actual diversion of business to Warner or actual lessening of competition resulting from the acquisitions at issue. (See p. 44 of Commission Opinion, *Foremost Dairies Inc.*, Docket No. 6495).

The Commission's case, however, is not dependent exclusively upon statistical data indicative of the ability of the respondent to control the market by sharing in more than 50% of the business in the relevant market. It is also based upon an actual assumption of price leadership in reducing prices whereby respondent has been able to divert business to itself within the relevant market area to a point where the hearing examiner believes it has been established that the acquisitions may be said with reasonable probability to contain a threat that they may lead to a restraint of commerce or tend to create a monopoly of a line of commerce and the hearing examiner so finds. In fact, the acquisition of Chester alone in 1956 precedent to the acquisition of Johnson in 1957 enabled respondent to acquire over 50% of the share of the business in the relevant market area. Thus the cumulative effect of each company (i.e., Chester and Johnson) acquired by Warner reflects economic power which may tend to lead to the end result of eliminating competition within the relevant market area. (See concept enunciated in majority Commission Opinion re *Foremost Dairies, Inc.*, Docket No. 6495, page 44.)

Although in 1959 when respondent's share of the business was at its peak, new competition developed in the relevant market areas, as pointed out by Professor Bok in his article published in 74 *Harvard Law Review* 226, this is not incompatible with the reduction in the vigor of competition resulting from the loss of substantial competitors by acquisition. On this point he states as follows:

The loss of a substantial firm, however, may of itself induce a reduction in the vigor of competition. For even if new entrants are coming into the market or

¹² See, e.g., the case studies summarized in Bain, *Industrial Organization* 301-10 (1959). On the basis of his observation of competitive conditions in many industries, Professor Burns declared that "leadership would be expected to fall to the largest firm in an industry where there is any leader at all." A. R. Burns, *The Decline of Competition* 77 (1936).

¹³ See Bok, 74 *Harvard Law Review* 226, 227.

concentration is for some other reason declining, there will be one less substantial firm that would have existed but for the merger, and an adverse finding under § 7 is predicated on the presumption that competition would have been benefited had that firm remained independent.

6. The hearing examiner further finds and concludes the evidence reflects the respondent's self-recognition of its economic power to limit the sales of its competitors in restraint of competition and the expressed intent of respondent's representatives to impress competitors with such power. The uncontradicted testimony of Samuel W. Williamson, associated with Warner's competitor Samson, during cross-examination at pages 1705 and 1706 of the record referring to a conversation with Robert C. Collins, a director and former officer (i.e., 1942-1957 General Sales Manager, 1957-1960 Vice President, 1960 President and then Chairman) of the respondent corporation, indicates as follows:

Q. If Mr. Collins stated that you were not telling the truth when you said that he said that he didn't know whether Warner would let you sell 66,000 yards of concrete, would you change your testimony?

A. I would say he was respectfully mistaken.

Q. Now did you regard that as a threat by the Warner Company to your business?

A. Yes, I did.

Q. Did you take that threat seriously?

A. Yes.

Q. I suppose you took it seriously, because you knew the Warner Company was bigger than you were and any company that had the money to do so could cut prices and keep them cut until you could no longer afford to stay in business; is that right?

A. I knew they had me surrounded. When I went into that business in '55, Warner was just in Philadelphia, and by the time I woke up in time, they were all around me.

In the foregoing connection, Professor Bok in 74 Harvard Law Review, 226, at page 277, suggests the likely effect on competition when the leader or largest competitor asserts what he believes is his ability to control business. He states:

Still another significant aspect of increased size has to do with the psychological reaction which such growth may evoke in rival firms. The smaller companies cannot be expected to know all the relevant facts concerning the capacity of the leader to do them harm. They operate in a situation of considerable uncertainty, there the *status quo* is usually far preferable to being beaten in a serious fight with a larger organization. Under these circumstances size alone is likely to breed respect, and the smaller firms may simply assume that their bigger rival possesses a strength equivalent to his market share.

Of course if the bigger rival such as the respondent in the instant case does not in fact have economic strength equivalent to its market share, the probability of restraint could hardly be imputed from

the psychological reaction of a smaller competitor. In the instant case, however, the respondent's actual ability to control the market is demonstrated not only by its overwhelming share of the business, but by its assumption of price leadership in reducing prices of ready-mixed concrete to divert sales to itself. The evidence, however, does not with certainty establish that such a reduction actually affected competition. The respondent's competitors in the relevant market areas, eleven in number, with the exception of three, increased their business while in competition with the respondent. However, the evidence does establish that as a result of the acquisitions at issue, separately or jointly considered, there may be a substantial lessening of competition or a tendency to create a monopoly in the relevant market within the purview of Section 7 of the Clayton Act¹⁴ requiring that preventive measures be taken to preclude the effects of respondent's economic power or its exercise. The Commission does not need to establish its actual exercise or effect. It is sufficient that economic power incipiently exists that may be exercised or may have the effect of substantially lessening competition.¹⁵

7. The effect of the acquisitions of Chester Materials Company and W. E. Johnson, Inc. (separately or jointly in order of acquirement), by Warner Company may be substantially to lessen competition or tend toward a monopoly in the ready-mixed concrete industry in an area approximately encompassing the geographic markets for ready-mixed concrete serviced (1) by respondent in and adjacent to Philadelphia in Pennsylvania, and in particular, but not limited to, by respondent's 51st Street plant; (2) by the former Chester Materials Company plant in and adjacent to Chester, Pennsylvania; (3) by the former W. E. Johnson, Inc., plant in and adjacent to Paoli, Pennsylvania; and (4) the areas of overlap which geographically and competitively connect respondent and the two acquired firms into one contiguous area.¹⁶ This effect does not extend to the sale of sand used as an ingredient of concrete.

¹⁴ Section 7 of the Clayton Act provides in part as follows: "No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

¹⁵ See *U.S. v. E. I. du Pont de Nemours and Company*, 353 U.S. 586 (1957).

¹⁶ See *Foremost Dairies, Inc.*, Commission majority opinion at p. 49, Docket 6495, to the effect that the probable adverse effect of a merger on potential competition should be viewed in the environment within which it occurred. See also, Appendix A in this connection reflective of the geographic limitations of the market. [App. A omitted in printing.]

CONCLUSIONS OF LAW

1. Chester Materials Company was a corporation engaged "in commerce" within the meaning of Section 7 of the Clayton Act, as amended.

2. W. E. Johnson, Inc., was a corporation engaged "in commerce" within the meaning of Section 7 of the Clayton Act, as amended.

3. The Warner Company is a corporation engaged "in commerce" within the meaning of Section 7 of the Clayton Act, as amended.

4. Respondent acquired the business and assets of Chester Materials Company and W. E. Johnson, Inc., within the meaning of Section 7 of the Clayton Act, as amended.

5. Ready-mixed concrete is a "line of commerce" within the meaning of Section 7 of the Clayton Act, as amended.

6. An area approximately encompassing the geographic markets for ready-mixed concrete serviced (1) by respondent in and adjacent to Philadelphia in Pennsylvania, and in particular, but not limited to, by respondent's 51st Street plant; (2) by Chester Materials Company in and adjacent to Chester, Pennsylvania; (3) by W. E. Johnson, Inc., in and adjacent to Paoli, Pennsylvania; and (4) the areas of overlap which geographically and competitively connect respondent and the two acquired firms into one contiguous area are the area and areas of effective competition insofar as the aforesaid "line of commerce" is concerned and such area and areas of effective competition are a section and sections of the country, within the meaning of Section 7 of the Clayton Act, as amended.

7. In the aforesaid line of commerce, in the aforesaid section and sections of the country, the effects of respondent's acquisitions of Chester Materials Company and W. E. Johnson, Inc., may be substantially to lessen competition or tend to create a monopoly within the meaning of Section 7 of the Clayton Act, as amended.

Respondent argues that under Section 7 the adverse competitive impact or effect must be felt in a line of interstate commerce in which the acquired company is engaged. This argument is based on its interpretation of the statute. It is pointed out that Section 7 of the Clayton Act provides that "commerce" as used therein "means trade or commerce among the several states," that is, interstate commerce. It follows, therefore, according to respondent that the competitive injury must occur in "any line of (interstate) commerce." Citing *United States v. Brown Shoe Company*, 179 Fed. Supp. 721 (E.D. Mo. 1959) the Commission, however, in *Foremost Dairies, Inc.*, Docket No. 6495 decided to the contrary and in the majority opinion of the

Initial Decision

62 F.T.C.

Commission by Chairman Dixon dated April 30, 1962, at pp. 36 and 37 thereof it states as follows:

We do not agree with respondent's construction of this language which was added by the 1950 amendment of Section 7. It is our view that "line of commerce" denotes a product market. It has thus been defined by the court in the *Brown Shoe* case, *supra*, and in other cases therein cited. Moreover, considering the fact that the courts have held that a single state or a lesser area within a state may comprise an effective area of competition, we think it necessarily follows that the adverse competitive effects directly resulting from an acquisition can be measured upon intrastate competition. We do not think Congress, in expressly broadening the provisions of Section 7 by the 1950 amendment, intended to limit its application in the manner proposed by respondent. Section 7 does require that both the acquired and acquiring corporations be engaged in commerce and this is conceded as to both Golden State and Foremost. Having met this requirement, adverse competitive effects resulting from the activities of such interstate companies, whether such effects be local or interstate, are within the scope of Section 7.¹⁷

To the contrary in *Page v. Work*, 290 F. 2d 323 (9 Cir. 1961), with specific reference to Section 7 of the Clayton Act, the court held (290 F. 2d at 333-334):

It is to be noted that the plain language of the statute is to prohibit the acquisition by one corporation of the capital stock or assets of another corporation "where in any line of commerce in any section of the country, the effect of such acquisition * * * may be substantially to lessen competition, or to tend to create a monopoly." (Italics added). The purpose in the enactment of Section 18 was to cope with monopolistic tendencies in their incipiency, which were beyond the reach of the Sherman Act as judicially interpreted.* * * We recognize that the general language of the Sherman Act and of the Clayton Act was designed by Congress to exercise its powers under the Commerce Clause of the Constitution, U.S. Const. art. 1, § 8, cl. 3, to the fullest extent, nevertheless, *it must be interstate commerce which feels the pinch, or competition in interstate commerce which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in interstate commerce*, before the provisions of said sections become applicable.

In our view, the language of Section 18 in no way indicates that Congress intended to apply the provisions of that Act to purely local activities wholly directed to a local intrastate market and relating to a product not in the flow of interstate commerce and where the effects of interstate activities in which the parties engage are in substantial, inconsequential and fortuitous, if not non-existent. (Emphasis added.)

However, even assuming that adverse competitive effects in interstate commerce must be established, this appears to be imputed from a defendant's or respondent's engagement in interstate commerce under the concept enunciated in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954). In that case not involving a Section 7 viola-

¹⁷ Cf. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

tion of the Clayton Act, but which involves Sections 2(a) and 3 violations, the Supreme Court stated as follows:

We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business.

Although the subject matter of the Moore case involves price discrimination and does not involve the acquisition of assets of other companies or mergers, which may tend to substantially lessen competition or may tend to create a monopoly, the legal theory enunciated by the court in the Moore case is not unlike that presented in the within case. The ultimate purpose of the antitrust laws, including Section 7 of the Clayton Act, is to prevent companies engaged in interstate commerce from using their position in intrastate business to more effectively exercise their economic power in interstate commerce. A pursuance of a pattern devised to substantially control an intrastate market by a company engaged in interstate business such as the respondent, places them in a better position to exercise economic or monopolistic power in every State in which they do business, even though they may be competing in each State locally and the product which is the subject of competition may not be sold across State lines. As stated in the Moore case, if this method of competition were approved, the pattern for growth of a monopoly would be simple.

8. Therefore, the acquisitions of Chester Materials Company and W. E. Johnson, Inc., by respondent may be to substantially lessen competition or tend toward monopoly within the meaning of amended Section 7 of the Clayton Act, not only in the intrastate geographical areas in which respondent and the two acquired companies operated in selling ready-mixed concrete but also in interstate commerce. How-

ever, as reflected by the findings, the evidence does not support such a conclusion with regard to the sale of sand used as an ingredient of concrete.

Although the evidence as regards the sale of ready-mixed concrete is inconclusive in establishing that the acquisitions have actually resulted in Warner's substantial market power and actual elimination of competition, there is substantial evidence that the acquisitions have threatened to ripen into an effect prohibited by Section 7 of the Clayton Act. The competitive pattern evidenced in Appendices A, B and C coupled with other evidence indicative of the respondent's ability to control the relevant market and assumption of price leadership in reducing prices as the largest competitor in the relevant market area must necessarily lead one to conclude that there is a reasonable inference to be drawn therefrom that there is a tendency toward a monopoly, or threat that may lead to a restraint of commerce even though such restraint or substantial lessening of competition may not have actually occurred.¹⁸ This concept is clearly enunciated in the Supreme Court in the case of *U.S. v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), in which the court states as follows:

Section 7 is designed to arrest in its incipency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. * * *

We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.

A monopoly involves the power to * * * exclude competition when the monopolist desires to do so. Obviously, under Section 7 it was not necessary * * * to find that * * * [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly

¹⁸ See *Foremost Dairies, Inc.*, Commission majority opinion, Docket No. 6495 at p. 44 to the following effect:

"Amended Section 7 is designed to prevent the development of monopoly in its incipency. The test is not intended to be mergers *resulting* in substantial market power and actual elimination of competition but rather mergers which *may* tend to lead to this end result. This distinction between proof as to *actual* injury required under the Sherman Act, and *potential* injury under Section 7 is well documented in decisions involving horizontal and vertical mergers. Applying this distinction to market extension mergers leads to a logical inference that under Section 7, the necessary proof of violation of the statute consists of types of evidence showing that the acquiring firm possesses significant power in some markets or that its over-all organization gives it a decisive advantage in efficiency over its smaller rivals".

1295

Initial Decision

in the bud. Since by definition monopoly involves the power to eliminate competition a lessening of competition is clearly relevant in the determination of the existence of a tendency to monopolize. Accordingly in order to determine the existence of a tendency to monopoly in * * * any * * * line of business the area or areas of existing effective competition in which monopoly power might be exercised must first be determined * * * .

* * * * *

Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition "within the area of effective competition". Substantiality can be determined only in terms of the market affected. * * * The Clayton Act was intended to supplement the Sherman Act. (*Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346). Its aim was primarily to arrest apprehended consequences of inter-corporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case. The Senate declared the objective of the Clayton Act to be as follows:

" * * * Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trust, conspiracies, and monopolies *in their incipency and before consummation* * * * " S. Rep. No. 698, 63d Cong., 2d Sess. 1. (Emphasis added)

"Incipency" in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect. See *Trans-america Corp. v. Board of Governors*, 206 F. 2d 163, 166. To accomplish the congressional aim, the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.

SCOPE OF THE ORDER

Although the hearing examiner is of the view that a remedy less drastic than divestiture could perhaps accomplish the purposes of this proceeding, in preventing a continued violation of Section 7 of the Clayton Act, Section 11 of the Act appears to require divestiture if a Section 7 violation is established. It is required therein that a person violating Section 7 be ordered "to cease and desist from such violations *and* divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of Section 7 * * *". Nevertheless, there seems to be a valid question as to whether or not the foregoing portion of Section 11 should be strictly construed. Justice Brennan in rendering the majority opinion of the United States Supreme Court in *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316 at page 328, Footnote 9 states as follows:

We reject the Government's argument that the Federal Trade Commission and other administrative agencies charged with the duty of enforcing the statute

are required by § 11 of the Clayton Act to order divestiture whenever they find a violation of § 7, and that therefore courts acting under § 15 must give the same relief. Even if the administrative agencies were so limited, a question which we do not decide, Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).¹⁸

A further question is presented also, as to whether or not remedial relief without divestiture would be appropriate in the absence of a charge under Section 5 of the Federal Trade Commission Act. In the *Foremost Dairies* case, Docket No. 6495, for example, the Commission included charges of violating Section 5 of the Federal Trade Commission Act, as well as Section 7 of the Clayton Act. This would have made relief other than divestiture possible. However, the only charge in the within case is a violation of Section 7 of the Clayton Act. Although the foregoing issue has not been decisively resolved by the courts, it appears to have been the policy of the Federal Trade Commission, to grant divestiture in all cases when a violation of Section 7 has been established, without exception. The hearing examiner therefore must conclude that Section 11 should be construed literally and that the establishment of a violation under Section 7 of the Clayton Act requires divestiture under Section 11 of that Act. Thus possible consideration of alternative relief without divestiture preventative of the assumption of price leadership in reducing prices as a means of controlling the market coupled with continued surveillance and jurisdiction of the Commission even if adequate, would appear to be precluded.

Commissioner Elman has pointed out in his partly dissenting opinion in the *Foremost* case, Docket No. 6495, at page 8, that "Although a court may be reluctant to enter an order requiring continuing future supervision over industry practices and conditions, an administrative

¹⁸ See dissenting opinion of Justice Frankfurter in *U.S. v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 at page 364 as follows:

"Partly on the basis of these views, the Attorney General's National Committee to Study the Antitrust Laws recommended that divestiture 'not be decreed as a penalty,' that it 'not be invoked where less drastic remedies will accomplish the purpose of the litigation,' and that possible disruption of industry and markets as well as effect on the public, investors, customers, and employees be taken into account. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 355-356. This statement fairly reflects the views of this Court, to the effect that a decree must not 'impose penalties in the guise of preventing future violations,' *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409; that the least harsh of available measures should be adopted when the Court is satisfied that they will be effective, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 603 (concurring opinion); and that injunctive relief may well be an adequate sanction against continued wrongdoing, *id.*, at 604 (concurring opinion), and *Standard Oil Co. v. United States*, 221 U.S. 1, 77. Add to this that we have recognized a sound basis in reason for distinguishing palpably illegal activity from conduct that was arguably permissible, and for dealing with the latter less severely than the former. See *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419, 429; *United States v. United States Gypsum Co.*, 340 U.S. 76, 89-90."

agency is not restrained by such inhibitions and indeed the exercise of continuing administrative oversight is one of this Commission's primary responsibilities." In this connection, Commissioner Elman also points out that in addition to the divestiture, the most effective form of relief would be to impose on respondent the specific obligation to submit any future acquisitions to the Commission for scrutiny and approval before consummation.²⁰ The majority opinion by Chairman Dixon does not appear to disagree with this as a concept. Such relief is therefore deemed appropriate in the within case.

Accordingly, since the Federal Trade Commission has jurisdiction in this proceeding, the following order shall issue:

ORDER

It is ordered, That respondent, Warner Company, a corporation, and its officers, directors, agents, representatives and employees, shall divest itself, absolutely, in good faith, of all stock and assets, properties, rights and privileges, tangible or intangible, including, but not limited to, all plants, machinery, equipment, trade names and good will acquired by said respondent as a result of the acquisitions of the stock and assets of Chester Materials Company and W. E. Johnson, Inc., together with so much of the plants, machinery, buildings, improvements, equipment and other properties of whatever description that has been added to them, as may be necessary to restore effective competitors in the lines of commerce in which the former Chester Materials Company and the former W. E. Johnson, Inc., were engaged.

It is further ordered, That in such divestitures hereinbefore mentioned, none of the said assets, properties, rights or privileges, tangible or intangible, shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestitures or within a year prior thereto, was a stockholder, officer, director, employee or agent of, or otherwise, directly or indirectly, connected with, or under the control of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That for a period of five (5) years from the date of the issuance of this Order by the Federal Trade Commission, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, by merger, consolidation, or purchase, the assets, stock, share capital, or any other interest whatsoever in any plant or company producing ready-mixed concrete without the approval of the Commission.

It is further ordered, That the charges that the effect of the acqui-

²⁰ See page 8 of Commissioner Elman's partly dissenting opinion re *Foremost Dairies, Inc.*, Docket No. 6495, dated April 30, 1962.

tions alleged in the complaint was substantially to lessen competition or tend to create a monopoly in the sale of sand used as an ingredient of concrete in the relevant market areas, is herein and hereby dismissed.

ORDER DISMISSING COMPLAINT

This matter is before the Commission upon respondent's appeal from the initial decision of the hearing examiner. The Commission, while satisfied that it has jurisdiction with respect to respondent's acquisition of the assets of the Chester Materials Company, does not consider it necessary to decide the question of the legality, and need for divestiture, of such acquisition under Section 7 of the Clayton Act, as amended. The public interest will be adequately served by exercising close scrutiny of any similar future acquisitions made by respondent, which would raise most serious questions under Section 7. Our disposition of this matter makes it unnecessary to consider whether an order to cease and desist should now be entered. Accordingly,

It is ordered, That the initial decision be, and it hereby is, vacated, and that the complaint be, and it hereby is, dismissed.

Commissioner Dixon dissenting for the reason that he believes an order should be entered requiring the respondent to divest itself of the assets of the former Chester Materials Company, and Commissioner MacIntyre not concurring.