

Opinion

64 F.T.C.

IN THE MATTER OF

OXWALL TOOL COMPANY, LTD., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 7491. Complaint, May 15, 1959—Decision, Jan. 16, 1964

Order denying motion for further modification of amended order, dated September 9, 1963, 63 F.T.C. 566, and restating the provisions of the cease and desist order—requiring conspicuous affirmative disclosure of the country of origin on imported handtools themselves and on the containers thereof.

OPINION OF THE COMMISSION

JANUARY 16, 1964

This proceeding is concerned with respondents' obligation to disclose the foreign origin of tools they import for domestic sale and distribution. We have already considered this matter on two other occasions, and it has now come up on respondents' motion and affidavit requesting clarification and modification of the Commission's final order entered September 9, 1963 whose pertinent provisions are set forth in the margin.¹ At respondents' request the effective date of that order has been stayed pending our decision on their latest motion.

Respondents contend that the modification of the original order to cease and desist, incorporated in the order of September 9, 1963, does not go far enough to meet the exigencies of their business and, in fact, has made uncertain the measures they must undertake to assure compliance with the Commission's order.

Our original order prohibited respondents from selling imported tools without conspicuously disclosing thereon the country of origin

¹ "IT IS ORDERED that respondents * * * do forthwith cease and desist from:

"1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing in a conspicuous place on the products themselves the country of origin thereof.

"2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment. Provided, however, that in those instances where (a) two or more products imported from two or more foreign countries or places are packaged together in the same container, where (b) the imported articles themselves are clearly and conspicuously marked with the country of origin, and where (c) the container is unsealed and the articles may be readily removed therefrom for examination by a prospective purchaser prior to purchase, the disclosure, in a conspicuous place on the container, that all or a portion of the contents of such package are imported and that the country or place of origin of foreign made products is set forth on each product, shall constitute compliance with the terms of this order."

or from selling imported tools in containers or with attachments obscuring the mark on such products identifying the country of origin, unless this information is conspicuously disclosed on the container or attachment.² Oxwall and the individual respondents do not object to making the required disclosure on the tools themselves but argue strenuously that any requirement going beyond the obligation to generally disclose on the containers or attachments of their products that such merchandise is imported and requiring in addition the identification of the country of origin of the imported tools on such containers or attachments, as a practical matter, is impossible of fulfillment, or at least unduly burdensome because their sources of supply for identical tools may be scattered throughout the world and they cannot anticipate with accuracy the country of origin of particular articles at any one time. This problem is compounded, respondents assert, when their tools are sold in assortments comprising imports from several countries.

Respondents previously submitted this argument to the Commission in their motion to reopen and modify filed November 20, 1962. In response to these contentions, we reopened the proceeding and modified the challenged prohibition. As amended, the order provides that in those instances where the containers hide or obscure the mark identifying the country of origin on the imported merchandise, a statement on the container to the effect that all or part of the products contained therein are imported and that the place of origin of the foreign articles is set forth on each product will suffice if three conditions are met—first, two or more tools are imported from different countries and are packaged in the same container; second, the imported articles are themselves clearly marked with the country of origin, and third, the articles in the container may be readily removed for inspection prior to purchase.³

We first turn to respondents' most serious contention, namely, that under the terms of the order respondents are precluded from utilizing certain methods of packaging, namely, skin and bubble packs.⁴ The first sentence of paragraph 2 of the order permits any type of pack-

² The challenged provision of the original order stated as follows:

"IT IS ORDERED that respondents * * * do forthwith cease and desist from:

* * * * *

"2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment * * *".

³ See footnote 1, *supra*.

⁴ A bubble or skin pack is essentially a container consisting of clear, transparent material, sealing merchandise to a background card. (p. 10. Respondents' affidavit, filed November 1, 1963.)

aging, sealed or unsealed, with no requirement that a notation signaling foreign origin be marked on the container or attachment as long as such container or attachment does not conceal or obscure the mark on the merchandise disclosing the country of origin. Respondent, however, apparently misconstrued this proviso as requiring that in each case the exact country of origin be marked not only on the tool but also on the container or attachment even in those cases where the container or attachment does not obscure the foreign origin identification on the imported item. Their misapprehension on this basic point seems to be the principal source of their difficulties. Assuming that skin or bubble packs are in fact constituted of clear, transparent material as respondents assert in their motion, they should have no insuperable difficulty in complying with the terms of this provision.

We now turn to the ambiguities which respondents assert are inherent in the order. Despite their suggestion to the contrary, the omission of the phrase "or with attachments" from the second sentence of paragraph 2 is intentional.⁵ As already pointed out, respondents are free to utilize sealed containers such as bubble or skin packs without any foreign origin identification on these containers as long as such packaging does not obscure the foreign origin mark on the articles enclosed therein. In this connection, we note further that respondents have correctly construed the second sentence of paragraph 2 as limiting their option to apprise prospective customers of the foreign origin of their merchandise by the more general notation on the container that all or part of its contents are imported to those instances where such containers are unsealed and the enclosed items may be readily removed for inspection.

The order, moreover, does not permit the inference that Oxwall is prohibited from using skin or bubble packs in those instances where one or more of the items are imported from two or more foreign countries merely by condition (a) in the second sentence in paragraph 2 of the order;⁶ the two sentences in the second paragraph of the order do not limit each other as respondents apparently contend: rather, they afford alternative methods of compliance.

Respondents object further that the use of the term "products" in the first sentence in paragraph 2 of the order is not clear. They assert:

* * * A literal reading of that sentence, our attorney advises us, may either mean the same item imported from several countries or several items, each

⁵ Attachments, for the purposes of this order, are to be construed as packaging or containers consisting of a clear plastic material sealed to a background card.

⁶ See footnote 1, *supra*.

of which may come from one or more countries. In either case, whichever the meaning the problem of mistake or unintentional misrepresentation as to country of foreign origin, or deliberate sabotage of our instructions still exist * * *.⁷

A straightforward reading of the order, we hold, can lead to no conclusion except that the term "products" necessarily encompasses both interpretations advanced by respondents. Conceivably, however, respondents may find compliance with the terms of the order not as difficult as they profess, since evidently their protest, to a considerable extent, at least, must be ascribed to a fundamental misapprehension on their part as to the import of the provisions of the amended order.

Submission by respondents of the packaging and foreign origin markings they intend to use to the Compliance Division would be helpful in dispelling the misunderstanding which now seems to exist. Consultation by the Commission's Staff and respondents relating to concrete examples of Oxwall's containers and foreign origin markings in the light of this opinion would be the procedure most calculated to define Oxwall's obligations under the order with dispatch.

Under the circumstances, there is no reason for further extended consideration of respondents' suggested order submitted in their earlier motion filed November 20, 1962. This proposal would provide without qualification that the foreign disclosure requirement is satisfied in the case of all types of packaging by a general statement on the container or attachment to the effect that the contents are imported wholly or in part, and that the country of foreign origin is specifically set forth on the enclosed imported articles. Respondents, in urging the Commission to adopt this course, rely on *Regent Games, Inc., et al.*, Docket No. C-167 (1962) [61 F.T.C. 44], a consent proceeding. In our disposition of this matter, we are not unmindful of the order in *Regent Games*, and in fact we modified Oxwall's order in the light of that precedent. The remedy imposed in each proceeding, however, must be fitted to the facts of the particular case. Although the Commission may, in certain instances, adapt the approach taken in a consent order proceeding to other matters, we have determined that the *Regent* order is not applicable without qualification to the facts of this case. The remedy imposed in consent proceedings, which are devoid of finding of fact, can be applied to other matters only with caution, since cases settled by consent in general give only the broadest outline of the unfair trade practices giving rise to Commission action. In this instance we are persuaded

⁷ Respondents' affidavit filed November 1, 1963, p. 7.

that the final order issued September 9, 1963 has afforded respondents as much relief in the light of their practical business problems as is consistent with the right of prospective customers to be fully advised of the origin of Oxwall's products. Accordingly, respondents' request for further modification of the order in this proceeding will be denied.

FINAL ORDER

This matter came before the Commission on respondents' motion and affidavit filed November 1, 1963, for a clarification and modification of the final order issued September 9, 1963 [63 F.T.C. 566]. At the same time respondents requested an extension of time within which to file their report of compliance and a stay of the effective date of the order to preserve their right of appeal pending Commission action on their motion. Complaint counsel on November 12, 1963 filed his answer in opposition to respondents' motion and affidavit. The effective date of the final order of September 9, 1963 was stayed until further notice. The Commission has now determined for the reasons stated in the accompanying opinion, construing the order in response to the questions raised by respondents' motion and affidavit, that the final order should not be modified. Accordingly:

It is ordered, That respondents Oxwall Tool Company, Ltd., a corporation, and its officers, and respondents Max J. Blum and Sidney Blum, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of imported merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing in a conspicuous place on the products themselves the country of origin thereof.
2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment. Provided, however, that in those instances where (a) two or more products imported from two or more foreign countries or places are packaged together in the same container, where (b) the imported articles themselves are clearly and conspicuously marked with the country of origin, and where (c) the container is unsealed and the articles may be readily removed

therefrom for examination by a prospective purchaser prior to purchase, the disclosure, in a conspicuous place on the container, that all or a portion of the contents of such package are imported and that the country or place of origin of foreign made products is set forth on each product, shall constitute compliance with the terms of this order.

It is further ordered. That respondents, Oxwall Tool Company, Ltd., Max J. Blum and Sidney Blum, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist as set forth herein.

IN THE MATTER OF

BRILLO MANUFACTURING COMPANY, INC.

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

Docket 6557. Complaint, May 22, 1956—Decision, Jan. 17, 1964

Order requiring the largest producer of steel wool and steel wool products in the United States, to divest itself absolutely, within one year, of all the assets, properties, rights and privileges, tangible and intangible, relating to the sale of industrial steel wool, acquired by its acquisition in 1955 of the fourth ranking producer of household steel wool, but excluding from the order the plant and fixed assets of the acquired company; to refrain for five years from selling industrial steel wool to customers of the acquired company except as it served them in 1955; and to cease and desist from manufacturing industrial steel wool on the acquired premises except for such amounts as might be a by-product of the manufacture of household steel wool products.

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 Brillo Manufacturing Company, Inc., (hereinafter referred to as "respondent"), is a corporation organized and existing under the laws of the State of New York, with its office

and principal place of business at 60 John Street, Brooklyn 1, New York.

PAR. 2. The Williams Company (hereinafter referred to as "Williams") is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at London, Ohio.

PAR. 3. Respondent is engaged in the production and sale of steel wool and steel wool products for household usage and of steel wool and steel wool products for industrial usage, and other metal wools, in commerce, as "commerce" is defined in the Clayton Act. During the year 1954, respondent's sales of said products exceeded \$11,000,000. Respondent is, and prior to the acquisition described in Paragraph 5 hereof was, the largest producer of steel wool and steel wool products in the United States.

PAR. 4. Prior to July 1955, Williams was engaged in the production and sale of steel wool and steel wool products for household usage and of steel wool and steel wool products for industrial usage, in commerce, as "commerce" is defined in the Clayton Act. During the year 1954, Williams' sales of said products were approximately \$838,000. Prior to its acquisition by respondent, Williams was one of the four largest producers of steel and steel wool products in the United States.

PAR. 5. On or after July 5, 1955, respondent acquired, for the sum of \$800,000, all of the outstanding capital stock and the assets and the business of Williams.

PAR. 6. Prior to the aforementioned acquisition, respondent was the dominant factor in the steel wool producing industry in both the household and the industrial segments of said industry.

Sales by producers of steel wool and steel wool products for household usage totaled approximately \$20,000,000 in the United States in 1954. Respondent's sales accounted for approximately 50% of this amount. Respondent's sales, when combined with those of the number two ranking producer in the household market, accounted for approximately 90% of all sales in said market in 1954.

The remaining 10% of 1954 household sales was distributed among the remaining four producers in the household market, including Williams. Williams ranked number four in the household market even though its sales of household steel wool and steel wool products were only a minor fraction of its gross 1954 sales.

Respondent, by virtue of the acquisition of Williams, increased its dominance in the production and sale of household steel wool and steel wool products and eliminated as a competitive factor in the market the fourth ranking producer of said products. Respondent's acquisition of

Williams increased respondent's market share of the household market to a far greater extent than that enjoyed by respondent and Williams combined prior to the acquisition. This disproportionate increase is due to the fact that respondent, by virtue of the acquisition of Williams' facilities, has been able to produce larger amounts of household steel wool and steel wool products from said facilities than Williams produced, while retaining or increasing the production of steel wool and steel wool products for industrial usage from said facilities.

Sales by producers of steel wool and steel wool products for industrial usage totaled approximately \$4,500,000 in the United States in 1954. Respondent's sales accounted for approximately 30% of this amount. Respondent's sales, when combined with those of the number two ranking producer in the industrial market, accounted for approximately 55% of all sales in said market in 1954. The remaining 45% of 1954 industrial sales was distributed among the remaining five producers, including Williams, in the industrial market. Williams was the third ranking producer in the industrial market in 1954, its share of said market being approximately 17% of the total market and 33% of the market enjoyed by the smallest five producers. Respondent, by virtue of the acquisition of Williams, increased its dominance in the production and sale of industrial steel wool and steel wool products and eliminated as a competitive factor in the market the third ranking producer of said products.

PAR. 7. In addition to the increased dominance in both the household and industrial markets, as heretofore delineated, respondent, by virtue of the acquisition, has acquired a new location and facilities in London, Ohio, from which shipments of household and industrial steel wool and steel wool products can be shipped to respondent's customers in the western, southern and midwestern areas of the United States at lower freight rates than shipments to said customers formerly made from respondent's Brooklyn, New York, address. Said freight benefits vary from \$2.50 to \$3.00 per 100 pounds of goods shipped. Freight costs are a major factor in the steel wool industry and steel wool and steel wool products are customarily sold freight prepaid by the producer. As a result of the aforementioned freight benefits gained by virtue of the acquisition, respondent may be able to reduce the prices it charges for its steel wool and steel wool products in both the household and industrial markets. The effect of said freight advantages resulting from the acquisition has had and may have a substantial tendency to further increase respondent's dominance in both the household and the industrial markets.

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PAR. 8. Respondent has violated Section 7 of the Clayton Act as amended in that the acquisition of the stock and assets of Williams, as described in Paragraph 5 hereof, may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of steel wool and steel wool products in the United States and in each of them.

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

1. Actual and potential competition between respondent and Williams has been and will be eliminated in the production and sale of household steel wool and steel wool products.
2. Actual and potential competition between respondent and Williams has been and will be eliminated in the production and sale of industrial steel wool and steel wool products.
3. Actual and potential competition generally in the production of steel wool and steel wool products, both household and industrial, may be substantially lessened.
4. Williams has been permanently eliminated as an independent competitive factor in the steel wool industry, in both the household and industrial markets.
5. Respondent's competitive position in the production and sale of household and of industrial steel wool and steel wool products may be enhanced to the detriment of actual and potential competition.
6. Industrywide concentration of the production and sale of household and of industrial steel wool and steel wool products has been and may be increased.
7. The elimination of one of the four leading producers of steel wool and steel wool products in both the household and the industrial markets substantially increases respondent's position and dominance in said markets.
8. The acquisition gives respondent the facilities, the market position and the dominant ability to monopolize or to tend to monopolize the household and the industrial steel wool and steel wool products markets.

PAR. 9. The foregoing acquisition, 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.

OPINION OF THE COMMISSION

JULY 31, 1963

By DIXON, *Commissioner*:

I

This is a proceeding under Section 7 of the Clayton Act, as amended,¹ which 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 tend to create a monopoly.

We are here solely concerned with the acquisition by the respondent, Brillo Manufacturing Company, Inc. (hereinafter Brillo), of The Williams Company (hereinafter Williams), a corporation competing with Brillo in the manufacture and sale of steel wool products.

This is the third time that this matter is being considered by the Commission and this constitutes the third opinion on the merits. The two preceding opinions, issued May 23, 1958 (54 F.T.C. 1905), and March 25, 1960 (56 F.T.C. 1673), were occasioned by appeals from the hearing examiner's decisions dispositive of respondent's motions to dismiss. In its March 25, 1960, opinion reversing the hearing examiner's initial decision granting the motion to dismiss, the Commission discussed at some length its reasons for holding that the evidence was sufficient to establish a prima facie violation of the statute. Since the respondent has not seen fit to present any additional evidence in its defense,² we are reviewing precisely the same evidence we have twice before considered. But this fact does not make the present opinion redundant, for the case before us is now in quite a different posture. Under our practice when a motion to dis-

¹ 64 Stat. 1125, 15 U.S.C. § 18.

² While the respondent has not chosen to adduce any additional evidence beyond that presented during the time when the case-in-chief was in progress, this does not mean that the record is devoid of defensive evidence. During presentation of the case-in-chief the respondent was permitted to engage in cross-examination which extended well beyond the scope of the direct examination. It was also permitted to place in evidence a substantial number of defensive exhibits.

miss is under consideration, all evidence adduced in support of the case-in-chief is viewed in the light most favorable to the complaint.³ In ruling upon the two motions to dismiss we have never reached the ultimate decision as to whether the facts merit the issuance of an order of divestiture. As we pointed out in the *Vulcanized Rubber* opinion (note 3, *supra*), "The ultimate decision of whether an order to cease and desist will be issued, even in the absence of further evidence, is not reached; and it could well be that a hearing officer, upon full consideration of a proceeding submitted for final decision, after making appropriate determinations concerning the credibility of witnesses, the weight to be given conflicting evidence, and other pertinent questions involved, would dismiss the complaint even though he had theretofore denied a motion to dismiss for failure of the record to establish a prima facie case." What applies to the hearing examiner, of course, applies equally to the Commission and we are not committed at this point to either dismissal or the issuance of a corrective order.

There seems to be little point in reviewing at length all of the elements examined in the preceding opinion which led the Commission to conclude that a prima facie case existed. We do, however, feel the need to enlarge upon some of the points previously made, for the purpose of clarifying our position in the light of recent authoritative decisions by the Supreme and lesser Federal Courts. In this connection it must be remembered that the amended Section 7 is an infant among the antitrust statutes and it is only in very recent years that authoritative precedents have come into being.

II

The acquisition with which we are here concerned took place on July 5, 1955. Brillo acquired all of the outstanding shares of Williams stock for \$800,000. At the time of the acquisition the appraised value (net sound value) of Williams was \$891,935. The acquisition is very definitely of the "horizontal" type and there is no question that Brillo and Williams did in fact compete in the sale of many steel wool products.

Since the acquisition Brillo has operated Williams as a subsidiary, exercising complete control and direction over its operations. The

³ "A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case-in-chief, like a Federal district court in ruling on a similar motion in a nonjury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint. Thus, an appeal from a ruling denying such a motion should be granted only when it is apparent that there is in the record no substantial evidence in support of the complaint and the ruling was obviously erroneous." *Vulcanized Rubber and Plastics Company*, 52 F.T.C. 533, 534-535 (1955).

Brillo president is now the president of Williams and the former president of Williams is now the executive vice president and general manager of Williams. With one exception all of the directors on the Williams board are officials of Brillo. Brillo has greatly increased the size of the Williams physical plant and has utilized it to manufacture and ship Brillo-branded products as well as continuing the manufacturing and sale of the Williams product line.

Williams was not a failing company but operated at a profit at the time of the acquisition. The sales and profit position of Williams during the three and one-half years immediately preceding its acquisition is illustrated by the following tabulation:

	1952	1953	1954	1955 to June 29
Sales.....	\$869, 479	\$869, 964	\$837, 921	\$514, 185
Net income.....	53, 305	62, 736	20, 884	26, 420

The basic raw material from which steel wool is made is a specially processed steel wire made to rigid specifications. All of the United States steel wool producers purchase steel wire from only two sources, American Steel and Wire Division of the United States Steel and The Bethlehem Steel Company. The wire suppliers do not offer quantity discounts and it appears that all producers pay the same basic price for wire regardless of the quantity purchased.

In making steel wool, a continuous length of wire travels at a high rate of speed over a series of tracks and reels. Hardened, sharpened tools are held against the wire at various points, shaving off the tiny V-shaped strands of steel wool. The knives or tools used to shave off the finer grades of steel wool contain teeth which are invisible to the naked eye. The most critical point in the manufacturing process is adjustment of the tool against the wire. Highly competent and well-trained personnel are needed to operate the machines. A training period of from three to six months is required to adequately train an operator.

The steel wool machines themselves are very large, stationary, custom-made units not generally available on the open market. They have no utility or function other than the production of metal wool and may cost as much as \$200,000 each. There is available, however, a custom-made machine of German manufacture which is available for a substantially lower price. One of the producers, International Steel Wool Co. of Springfield, Ohio, uses only this cheaper machine and has found it to be satisfactory.

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While wools from a base material of bronze or aluminum can be and are produced, this production accounts for a very minor part of the business of any of the producers.

Steel wool itself is most commonly classified into seven grades or sizes: 0000, 000, 00, 0, 1, 2, and 3. Grade 0000 is the finest or smallest grade and grade 3 is the heaviest or most coarse grade.

After production on a steel wool machine, steel wool is further processed into a variety of distinct products and while there is some overlapping it would appear that the products fabricated for one group of consumers or market are generally not useful to other types of consumers constituting other markets.

III

In ruling upon the respondent's first motion to dismiss, the hearing examiner found that the lines of commerce involved in this proceeding are industrial and household. By this it was meant that that group of customers who purchase steel wool products for eventual resale to consumers who will make use of it in their homes constitute a separate and distinct market from that group of purchasers who make commercial, institutional or industrial use of the products. In our opinion upon the cross-appeals taken from the hearing examiner's disposal of the first motion to dismiss we assigned as error the hearing examiner's delineation of the two separate markets or lines of commerce upon the sole basis that the industrial and household markets constitute the areas of effective competition between the acquired and the acquiring corporations. We held that:

* * * The test instead is whether these products are shown by the facts to have such peculiar characteristics and uses as to constitute them a "line of commerce" within the meaning of the act. *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). That the acquired and acquiring corporations both made industrial steel wool was only one circumstance to be considered. Additional factors which could have been taken into account include data relating to the manner in which the products are marketed, their physical characteristics, prices and possibly other things bearing on the question of whether or not they may be distinguished competitively from other wares. On the other hand, as the examiner in essence held, the mere fact that articles other than steel wool are marketed for industrial use as abrasives is not adequate legal warrant for including all abrasive products in the relevant line of commerce. The determinations as to the area of effective competition should have been made on the basis of all record facts delineating the relevant market or markets. (54 F.T.C. 1905, 1906.)

Acting in compliance with the Commission's instruction, the hearing examiner re-examined his conclusions as to the lines of commerce involved and in his initial decision of November 25, 1958, again decided that the proper relevant markets would encompass household and industrial steel wools. Our opinion of March 25, 1960 (56 F.T.C.

1672), reversed the hearing examiner on his dismissal of the case but affirmed his findings with respect to the lines of commerce.

Since the proper definition of the lines of commerce here involved has been considered at such lengths in preceding stages of this litigation, only a few comments are necessary at this time. We do not believe that the recent decision of the Supreme Court in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), has changed the law with respect to this concept but constitutes more of a reaffirmation of principles previously announced. The Court held that the boundaries of a market sufficiently well defined to be useful for antitrust purposes " * * * may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (370 U.S. at 325.)

Without going into burdensome and probably redundant detail pointing out the manner in which the facts in this proceeding meet this criteria, there is utility in a brief discussion of a few salient points which we deem important and controlling. Steel wool is generally recognized as an essentially unique product, *i.e.*, possessing "peculiar characteristics and uses." It can be used either wet or dry and on either a wet or dry surface. It will both clean and polish solid and oxidized surfaces. It is fine and flexible so that it can be used on rough and irregular surfaces.

Respondent urges that many products compete directly with steel wool and should be included within the lines of commerce. It points out that products such as cleansing powders and plastic sponges can be used to clean household pots and pans. Without going into detail concerning these and the many other products which compete with steel wool, we note that no competing product is capable of the variety of applications possible with steel wool. Any householder who has ever utilized steel wool to clean cooking utensils, white-wall tires, golf clubs, rusty tools, linoleum or tile floors, and to remove peeling paint or rust recognizes that this is a uniquely versatile product. The same holds true in the industrial field where steel wool has no peer for smoothing the curved surfaces of fine furniture, for cleaning and smoothing hardwood floors, and deburring metal.

Moreover, both the industry members and the public recognize steel wool as an essentially unique product sold and distributed in its own separate markets. There is little or no cross-elasticity of demand between steel wool and other products. The machinery upon which it is produced cannot be utilized to produce products other than metal wool.

The division of the total steel wool market into the two submarkets of household and industrial follows the practice of the producers themselves. The industry considers the household market a separate and distinct field from the industrial market and different products and prices prevail between the two.

The principal household product is the compressed steel wool pad, sold either impregnated with soap or in boxes containing a separate bar of soap. A product form of less importance in this market is steel wool processed into small balls. On the other hand, industrial steel wool products take a wide variety of forms. Industrial steel wool is sold in huge compressed pads for use on floor grinding and polishing machines; it is also sold in huge rolls for use in various factory operations.

The evidence clearly indicates that both household and industrial steel wool products are sold in separate relevant product markets. The single most peculiar "characteristic and use" of steel wool and steel wool products is that no other product will perform all of the multiple functions of steel wool in either the household or the industrial market. The housewife can buy steel wool for dozens of household uses rather than buying separate products for each use. The same fact applies equally in the industrial field. Although other products may compete with steel wool for some uses, such demand exists at the outer boundaries of the steel wool market and need not be considered in evaluating the competitive impact of this merger between two steel wool producers.

Both parties agree that the section of the country, that is, the relevant geographic market, consists of the entire United States.

IV

The manufacture of steel wool is not a large industry and there have never been more than eight independent producers of steel wool actually operating at any one time.

In 1955, the year of acquisition, there were only seven producers in effective operation. These seven companies and their sales volume in 1955 were as follows:

Company:	Total Steel Wool Sales
Brillo Manufacturing Company, Brooklyn, New York.....	\$12,953,629
SOS Manufacturing Co., Chicago, Illinois.....	12,848,395
American Steel Wool Company, Long Island City, New York..	1,311,654
James H. Rhodes & Company, Chicago, Illinois.....	949,801
The Williams Company, London, Ohio.....	935,913
Durawool Company, Brooklyn, New York.....	301,080
International Steel Wool Company, Springfield, Ohio.....	120,432

Brillo and Williams were competitors in both the industrial and household steel wool markets. In the year prior to the acquisition Brillo accounted for 46.39 percent of sales in the household market, and 32.6 percent of sales in the industrial market; Williams' share in these respective markets were .3 percent and 18.0 percent. Since the major impact of the merger quite obviously was in the industrial market, we shall turn first to this aspect of the matter.

The term "industrial market" is not comprehensively descriptive of the line of commerce it is here used to describe. The industrial market in this proceeding includes all sales of steel wool to purchasers other than householders. It includes, for example, sales made to the United States Government and sales to hospitals, hotels and restaurants, where it is probably put to much the same use as in a household. In manufacturing, steel wool is used to remove burrs from nonferrous metals and laminated plastics. The furniture manufacturing industry utilizes substantial quantities for smoothing down raw woods and for rubbing successive coats of varnish and other finishing agents to produce a desired degree of sheen. Steel wool is extensively used by painting contractors to roughen and clean old painted surfaces. The flooring installation and maintenance trade makes extensive use of steel wool to finish and clean wooden floors. It is also used to remove wax and to otherwise maintain floors of all kinds.

While household steel wool is sold to consumers through retail grocery stores, industrial steel wool is sold to distributors and jobbers who, in turn, resell to hardware stores, building and painting supply houses, and building maintenance supplies dealers. Many of the largest industrial users purchase steel wool directly from the manufacturers through brokers.

The following tabulation shows the total sales made by all participants in the industrial market for the years 1950 through 1956:

TOTAL INDUSTRIAL SALES OF AMERICAN PRODUCERS

Company	1950		1951		1952		1953	
	Amount	Per-cent	Amount	Per-cent	Amount	Per-cent	Amount	Per-cent
Brillo.....	\$800,369	17.6	\$1,070,156	19.0	\$899,217	25.5	\$1,087,280	26.3
Williams.....	1,136,473	25.0	1,379,819	24.4	781,295	22.2	790,718	19.2
S.O.S.....			89,055	1.6	5,786	0.2	6,279	0.1
Cleanser.....	43,478	1.0	168,113	3.0	21,110	0.6	12,013	0.3
American.....	1,156,575	24.4	1,206,655	21.4	825,965	23.4	959,675	22.3
Rhodes.....	1,068,905	23.5	1,329,040	23.5	757,359	21.5	951,345	23.0
Durawool.....	160,520	3.5	232,078	4.1	159,403	4.5	242,528	5.9
International.....	180,134	4.0	170,181	3.0	73,277	2.1	76,689	1.9
Alloy.....	xxx		xxx		xxx		xxx	
	4,546,456	100.0	5,645,098	100.0	3,523,412	100.0	4,126,527	100.0

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TOTAL INDUSTRIAL SALES OF AMERICAN PRODUCERS—Continued

Company	1954		1955		1956	
	Amount	Percent	Amount	Percent	Amount	Percent
Brillo.....	\$1,229,187	29.1	\$1,582,334	32.6	\$1,750,461	33.1
Williams.....	770,093	18.2	¹ 872,932	18.0	⁴ 770,233	14.5
Total.....			2,455,266	50.6	2,520,694	47.6
S.O.S.....	11,732	0.3	99,641	2.0	228,548	4.3
Cleanser.....	52,055	1.2	(²)			
American.....	908,473	21.5	984,954	20.3	1,013,899	19.2
Rhodes.....	901,994	21.3	949,801	19.5	990,094	18.7
Durawool.....	255,833	6.1	249,080	5.1	270,198	5.1
International.....	98,000	2.3	120,432	2.5	115,045	2.2
Alloy.....	xxx		112	(³)	151,613	2.9
	4,227,367	100.0	4,859,286	100.0	5,290,091	100.0

¹ Does not include transfer of \$86,987 to Brillo.² Acquired by S.O.S.—1954.³ Less than five one-hundredths of one percent.⁴ Does not include transfer of \$382,299 to Brillo.

Among the significant trends indicated by the tabulation is the dramatic growth of Brillo at the expense of its competitors. In 1950 Brillo ranked fourth in the market, accounting for only 17.6 percent of the total sales. By 1955, prior to the merger, Brillo had increased its market share by 15 percentage points, thereby nearly doubling its share. The three principal competitors which formerly outranked it, American, Williams, and Rhodes, lost a total of approximately 16 percent in market shares. The acquisition of Williams further increased Brillo's share of the market, giving it 50.6 percent as opposed to its 1950 share of 17.6 percent. We do not consider significant the 1956 drop in Brillo and Williams' combined market share since such short run post-complaint aberrations are unlikely to reflect a permanent situation or trend.

As we stated above in this opinion, we do not intend to repeat all of the findings and conclusions made in our preceding opinions and, in particular, in our opinion of March 25, 1960 [56 F.T.C. 1672]. All of the findings and conclusions with respect to industrial market which appear in that opinion continue in full effect and there is no need to restate them here. However, it seems to the Commission that the significance to be attached to market structure data in this proceeding requires some clarification.

In our 1958 opinion we held that it was error for the hearing examiner to hold " * * * that a significant increase in a producer's already substantial share of the market necessarily demonstrates likelihood of statutorily forbidden effects in every distributional situation." (54 F.T.C. 1905, 1907.) In our 1960 opinion we pointed out that our prior ruling was based upon the belief that the hearing

examiner " * * * gave overwhelming consideration to market shares to the complete exclusion of all other relevant economic factors." (56 F.T.C. at 1674.) We then pointed out that the hearing examiner apparently misconstrued our prior holding and "He now ignores the great and perhaps conclusive weight to be given to these very same considerations when viewed in connection with an already existing heavy industry concentration and other relevant record facts. When we refused to adhere to the rigid yardstick utilized by the hearing examiner in his earlier ruling, and directed that he look at all the relevant facts of competition, we did not want to be taken to conclude that in certain situations the rigid yardstick of market shares might not only be extremely meaningful, but indeed perhaps conclusive under some circumstances on the issue of probability of competitive injury or tendency to monopoly. Obviously the more concentrated an industry, the more meaningful it becomes; * * *" (56 F.T.C. at 1674.)

The soundness of the Commission's view on this point has recently been confirmed by the Supreme Court. In *United States v. Philadelphia National Bank et al.*, 31 U.S. L. Wk. 4650 (June 17, 1963), the Court stated:

[The] intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. 31 U.S. L. Wk. at 4662.

Previously, the Court in its *Brown Shoe* decision had analyzed the entire problem of whether the effect of a merger "may be substantially to lessen competition" and had enumerated a number of economic factors which may "properly be taken into account" in determining the probable competitive effect. It declared:

* * * Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account. 370 U.S. 294, 321-322.

The Court did not imply, however, that all of these factors would be relevant in every case. Indeed, evidence was not developed with respect to each of these factors in the case then before the Court. The Court explained that " * * * the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its market structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Ibid.*, p. 322, n. 38. Obviously, the extent of "further examination of a particular market" required for "judging the probable anticompetitive effect of the merger" will vary from case to case. The relevant factors necessary for judging one case are not necessarily relevant in judging another.

The market structure evidence in this record provides sufficient basis for making the judgment that this merger may tend toward monopoly in the industrial steel wool market. Here we have an industry which was already highly concentrated prior to the merger, and was experiencing increasing concentration. When a merger takes place within the framework of a highly oligopolistic market, economic factors which may be relevant in mergers taking place in less concentrated markets are of little or no importance, while conversely, the materiality of others is intensified. Obviously, in an industry which has always been highly concentrated among a very few firms, factors such as a history of mergers in the industry and of growth of the respondent by mergers are of little significance, for in such an industry no lengthy trends could develop. In the industrial steel wool market three or four additional mergers would produce an absolute monopoly.

In this case the record establishes beyond question that prior to the merger Brillo already was the leading concern in the industrial steel wool market and that the acquisition has served to enhance its power and potential dominance over this market. The record clearly shows a tremendous disparity between the size and resources of Brillo as compared to any of its competitors in this market, excepting S.O.S., which does not appear to be deeply engaged therein. The record shows that Brillo's competitors operate at low profit margins, in part occasioned by an inability to fully utilize their plant capacity. Brillo, on the other hand, would appear to be a profitable concern in a strong financial position.⁴ Moreover, it appears that the disparity has progressively widened during the period from 1950 to

⁴ As an example of the financial disparity which exists, the remuneration, consisting of salary and dividends, received by Brillo's four top officers in 1956 exceeded the sales of two of its competitors, International and Alloy.

1955, with Brillo increasing its share of the market at the expense of its competitors. As the tabulation of industrial sales which appears above shows, Brillo's share of the industrial market in 1950 was only 17.6 percent. In that year its three principal competitors, Williams, American and Rhodes, had 25 percent, 25.4 percent and 23.5 percent, respectively. By 1955 Brillo had increased its share to 32.6 percent. Williams had dropped to 18 percent while American and Rhodes had dropped to 20.3 percent and 19.5 percent, respectively.

As we pointed out in our opinion of March 23, 1960, the conditions in the industrial market make it extremely unattractive to prospective entrants, and those attempting entry face formidable barriers to success. The increasing dominance of Brillo makes this field even less attractive to prospective entrants. Moreover, Brillo's relatively large sales and profits in the household market free it from sole reliance on competitive circumstances in the industrial market, whereas all but one of its competitors, S.O.S., are dependent entirely on the sales and profits which they earn in the industrial market.

Respondent argues that it is very easy to enter the industrial wool industry and that, therefore, the mere existence of potential entrance was sufficient to undermine any adverse effects which might otherwise result from the merger. Especially important, in its view, was the fact that two firms have in fact entered the industry since World War II.

The record indicates that the chief barrier confronting new entrants in the industrial steel wool industry is that the small size of the industry makes it difficult for new entrants to acquire a sufficient market share to sustain an efficient size operation; thus, even though they may be able to build, equip and operate an efficient plant, they are unable to obtain sufficient sales volume to operate it efficiently. The experiences of Alloy and Durawool demonstrate this problem. Although Alloy had the potential ability to produce at costs comparable to other plants, it was not able to obtain a sales volume sufficient to operate at capacity. Similarly, although Durawool had a larger market share than Alloy, its profit margins were less than one-third those of Brillo's. Its failure to expand significantly its market share—which peaked in 1954—between 1950 and 1956 suggests that its prospects of becoming as efficient as Brillo are not good.

The very fact that there have never been more than eight producers of industrial steel wool speaks ill for the chances of effective price competition in this industry. In such an oligopolistic setting, the chances of effective competition of the type envisioned by the framers of Section 7 are further endangered when the largest producer

expands its position *vis-a-vis* its smaller rivals by acquiring one of the largest rivals. There may be truth to respondent's statement that the relatively small size of this industry prohibits the pie from being cut into many pieces. But the future size of the cuts of the pie for all except Brillo is likely to be even smaller as the dominance of Brillo is further enhanced through this merger. Certainly if prior to the merger competitors already found it difficult to expand their market position, and only two new firms entered this industry, it is hardly likely that potential entrants will neutralize the adverse effects of this merger upon competition. In truth, past structural developments in this industry argue to the contrary.

It is the Commission's conclusion that Brillo's acquisition of Williams may lessen competition or tend to monopoly in the industrial steel wool line of commerce throughout the country. The acquisition has significantly enhanced the power of the dominant firm in an already oligopolistic market. Lacking some showing of special circumstances in justification of the merger we must, and do, hold that Brillo has violated Section 7 of the amended Clayton Act.

In the current initial decision from which the respondent is now appealing, the hearing examiner did not consider it necessary to make any finding with respect to the impact of the merger upon the household market, holding: "It must now be considered well settled that an acquisition violates the Act if it has the proscribed effect in any one out of all the relevant lines of commerce." (Initial decision of February 28, 1962, p. 15.) We concur in this view of the examiner.

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We think there is an alternative route to decision in this case which also fully supports a finding of illegality under Section 7. In its recent decision in *United States v. Philadelphia National Bank*, *supra*, the Supreme Court made the following statement concerning the enforcement of Section 7 of the Clayton Act: "in any case in which it is possible, without doing violence to the congressional objective embodied in section 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." 31 U.S. L. Wk. 4650, 4662. At the time of Brillo's acquisition of Williams, there were in the entire steel wool manufacturing industry only seven firms, and the two leading ones, Brillo and S.O.S., between them accounted for 88 percent of the total sales of the industry. (Williams accounted for 3 percent of such sales.) Under such circumstances, *any* acquisition by Brillo or S.O.S. of one of its competitors would, we believe, be presumptively violative of

Section 7. For the market structure was already so unhealthy, from the viewpoint of preserving conditions favorable to competition, that every additional increase in concentration would almost certainly have a pronounced anticompetitive effect, and indeed bring the industry perilously close to duopoly. As the Supreme Court stated in *Philadelphia National Bank*, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." 31 U.S. L. Wk., at 4663, n. 42. The instant case reveals a degree of market concentration far greater than was involved in *Philadelphia National Bank*, and therefore an even more streamlined approach than was there adopted by the Supreme Court is appropriate here. When an industry reaches the extraordinary degree of concentration here present, where two firms control almost 90 percent of the total sales of the industry and face only five competitors, any acquisition by the dominant firms of a competitor "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 31 U.S. L. Wk. at 4662. No such evidence has been forthcoming in the instant case.

Consequently, the acquisition of Williams by Brillo is seen to be unlawfully independently of our analysis, in an earlier part of this opinion, of relevant product market and barriers to entry. Even if it were the case that the industrial and household markets should be considered together as a single "line of commerce," and that, therefore, the Commission's previous conclusions are not decisive, there is still no affirmative showing that the barriers to entry into the appropriate line of commerce are insubstantial enough to rebut the presumption that the acquisition may substantially lessen competition. And, under the proper approach to Section 7 described by the Supreme Court, the absence of such affirmative proof is decisive in a case involving the extraordinary degree of concentration shown by this record.

Having found a law violation, the Commission is now confronted with the question of the proper remedy. The aim of an order here, as in any merger proceeding, must be to restore competition to the level which existed prior to the acquisition. But in accomplishing this result, care must be exercised to insure that the remedial order will not unduly handicap or restrict the respondent in its operation of a viable business.

After respondent's motion to rest and present this matter for final decision upon the record was granted on August 25, 1961, the hearing examiner solicited the parties' views with respect to the form of

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order which should be entered. Without conceding any violation, counsel for respondent proposed an order which would divest Brillo of certain assets but would permit it to retain the physical plant and facilities of Williams. Complaint counsel requested a complete divestiture and persuaded the hearing examiner that this remedy was appropriate. Complaint counsel also requested an order which would direct Brillo to refrain from future acquisitions of competitors in the steel wool industry.

Under the circumstances of this proceeding, the Commission feels that its ability to formulate an equitable and effective remedy will be greatly improved by knowledge of the current views of the parties on this point. Thus, an order will issue directing respondent's counsel and counsel supporting the complaint to file, within thirty days, an order deemed appropriate in the light of current industry conditions, together with a brief in support thereof.

The findings and conclusions upon which the Commission's decision is based are its own as set out in this and its preceding opinions. The Commission, therefore, does not adopt the initial decision of the hearing examiner, and our order will provide for such decision to be set aside.

Commissioner Anderson concurs in the result.

ORDER PROVIDING FOR SUBMISSION OF PROPOSALS FOR FINAL ORDER

JULY 31, 1963

This matter having been heard upon the respondent's appeal from the hearing examiner's initial decision filed February 28, 1962, and the Commission, for the reasons stated in its accompanying opinion, having determined that the respondent by the acquisition of The Williams Company, Inc., has violated Section 7 of the Clayton Act, as amended:

It is ordered, That the respondent's appeal seeking dismissal of the complaint be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and set aside, in lieu of which the Commission hereby adopts the findings and conclusions set forth in its accompanying opinion and in its opinions of May 23, 1958 [54 F.T.C. 1905], and March 25, 1960 [56 F.T.C. 1672].

It is further ordered, That counsel for the respondent and counsel supporting the complaint shall, within thirty (30) days after service upon them of this order, file with the Commission proposed forms of an order deemed appropriate for disposition of this proceeding in the light of the Commission's decision, together with supporting briefs. The Commission thereafter will enter its final order.

By the Commission, Commissioner Anderson concurring in the result.

FINAL ORDER

Pursuant to the Commission's order of July 31, 1963, counsel for the respondent and counsel supporting the complaint having filed with the Commission proposed forms of final orders deemed suitable for the Commission's use in disposition of this proceeding, together with supporting briefs; and

The Commission having considered the proposals and having concluded that the order submitted by respondent's counsel, modified in the interest of clarity and to encompass respondent's successors and assigns, will be appropriate in the light of the Commission's decision:

It is ordered, That respondent Brillo Manufacturing Company, Inc., a corporation, and its officers, directors, agents, representatives and employees, and its successors and assigns, within one year from service hereof shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible and intangible, of The Williams Company relating to the sale of industrial steel wool, including patents, trademarks, trade names, and customers' lists, acquired by said respondent as a result of its acquisition of the stock of The Williams Company, but excluding the Williams plant, machinery, equipment and other fixed assets.

It is further ordered, That in such divestment no property above mentioned to be divested shall be sold or transferred, directly or indirectly to anyone, who at the time of the divestiture is a stockholder, officer, director, employee or agent of, or otherwise directly or indirectly connected with, or under the control or influence of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That from and after the effective date of such divestiture, respondent shall refrain, for a period of five (5) years, from selling industrial steel wool to customers of The Williams Company, excepting that respondent may continue to sell industrial steel wool to any customer it served in common with Williams as of July 5, 1955, providing the maximum unit annual quantity sold to each such common customer does not exceed the total unit quantity which respondent sold to it in the twelve months immediately preceding July 5, 1955.

It is further ordered, That from and after the effective date of such divestiture, respondent shall cease and desist from manufacturing industrial steel wool on the premises acquired from The Williams Company, except such amounts of industrial steel wool as may be

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incidental or a by-product of the manufacture of household steel wool products on such premises, and which are not suitable for conversion into household form.

It is further ordered, That as used herein the term "industrial steel wool" means steel wool of all grades and finished forms produced for sale to industrial users; the term "household steel wool" means steel wool and steel wool products other than industrial steel wool, and includes all steel wool products produced and sold for use by householders.

It is further ordered, That respondent shall, within ninety (90) days from the date of service upon it of this order, submit, in writing, for the consideration and approval of the Commission, its plans for compliance with this order, including the date within which compliance can be effected.

By the Commission, Commissioner Anderson concurring in the result and Commissioner MacIntyre not concurring.