Order denying respondent's petition for reconsideration and its motion to reopen the record and supplement additional evidence.

OPINION OF THE COMMISSION

Respondent on December 9, 1965, filed a Petition for Reconsideration under § 3.25 of the Commission's Rules and a Motion to Supplement or Reopen the Record for Purposes of Receiving Evidence. We are of the opinion that both petitions must be denied.

Since the objective of both motions is the same, that is, to

secure further consideration of this matter by the Commission, the two will be treated herein together. The petition for reconsideration cites two grounds, namely, (1) under the Commission's interpretation of the Supreme Court's ruling in *Tampa Electric Company* v. *Nashville Coal Company*, 365 U.S. 320 (1961), the evidence supports respondent's position with regard to relevant section of the country and (2) the Commission was wrong in using only shipment figures as a basis for determining market shares; it should have used both shipment figures and the unused capacity of the mills shipping to destinations within the 23 county area.

The motion to reopen and supplement is grounded upon asserted new evidence which demonstrates a post-acquisition change in market structure materially affecting the questions of relevant market, competitive effect and remedy.

In its first asserted ground for reconsideration respondent takes the position that the Commission interpreted *Tampa* as imposing a burden upon respondent to show that the suppliers to the 23 county area were "eager" to ship elsewhere and that those firms shipping substantial quantities of cement into the 23 county area were shipping elsewhere to a significant degree; and notwithstanding the inequity of the Commission's imposing this burden, it has been sustained by the respondent.

Apart from the merit of this contention, we must first determine whether respondent has met the threshhold requirements of § 3.25 of the Commission's Rules which states that the petition "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

We are of the opinion that even had the Commission so interpreted *Tampa* this would not present a new question within the meaning of Rule 3.25. The question of relevant market was thoroughly briefed and argued and the interpretation ascribed to the Commission by respondent is in no sense a new question as to which respondent has had no opportunity to argue.

Nevertheless, since respondent has chosen to interpret the Commission's interpretation of *Tampa*, we think it necessary in the interests of clarity to dispose of the substance of respondent's contention.

The language which prompts respondent's motion appears at page 6 [68 F.T.C. 1204, 1208] of the Commission opinion:

> In *Tampa*, record evidence was found that the coal companies supplying Tampa were "eager" to ship outside the Georgia and Florida area. And

according to the Supreme Court, "By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida." We infer from this language that respondent here at least has the burden of coming forward with some evidence meeting the criteria implicit in the court's statement. But from our examination of the record, there is no evidence that the suppliers to the 23 county area were "eager" to ship elsewhere or that those firms shipping substantial quantities of cement into the area were shipping elsewhere to any significant degree. . . .

It was not our intention that the comparison between this case and *Tampa* should begin and end with the interpretation of the word "eager," nor that the decision in this case turn on that word alone or even on *Tampa* alone.

In *Tampa* the Supreme Court held that the area of effective competition is determined by (1) the area in which the seller operates and (2) the area to which the purchaser can practicably turn for supplies. 365 U.S. 320, 327 (1961). Respondent emphasizes the first of these considerations at the expense of the second. The Commission found it necessary to weigh the two. Because of the peculiarities of cement distribution, the second of these two considerations becomes of substantial importance. In short, as was stated in *U.S.* v. *Philadelphia National Bank,* 374 U.S. 321, 357 (1963), the proper area is that where ". . . the effect of the merger on competition will be direct and immediate." In this case as in *Tampa* that area is, as outlined above, that in which the seller operates and to which the purchaser can practicably turn for supplies.

In *Tampa* the Court was satisfied that the relevant market embraced the 700 coal producers to whom the purchaser could practicably turn for supplies, that is, those firms who could serve the same market, *i.e.,* peninsula Florida. Their eagerness to sell elsewhere throughout the broad seven state area established that it was this broad area in which they were interested and that foreclosure from Tampa made no significant difference to them.

In the present case the Commission is convinced from the evidence that purchasers in the 23 county area can practicably turn for supplies only to those firms shipping substantial quantities of cement into the area. To them what happens in the 23 county area makes a significant difference as demonstrated by the fact of their shipping substantial quantities there and their concomitant disinterest in shipping substantial quantities elsewhere. Thus, the area in which 100% of the acquiring company's "standard" brand cement is sold and 66% of the acquired company's sales were made secured 90% of its needs from companies with plants and terminals located therein. These companies make

75% of their total shipments to that area. Thus, it was this 23 county area to which the firms supplying substantial amounts were eager to sell and to which they did sell in substantial quantities as is amply demonstrated by the record.

Complaint counsel sustained his burden that this is the relevant section of the country. The burden of proof was never placed upon respondent as alleged in its petition for reconsideration. However, if it wanted to undermine the *prima facie* showing of complaint counsel, it had the obligation of going forward with evidence that the substantial suppliers were in fact not substantial suppliers or that this 23 county area did not make a significant difference to them and that they looked elsewhere, eagerly if you will, for sales or that the purchasers could practicably turn for supplies to a much broader area. Respondent had no burden in this regard initially of course and the Commission did not interpret *Tampa* as imposing such a burden. As was stated in the Commission's opinion, respondent had a duty to show, if it wanted to rebut complaint counsel's case, that the substantial shippers to the 23 county area were eager to ship elsewhere or that they were shipping elsewhere to a significant degree.

Respondent did not do this and does not propose to do it now. It proposes to show that those firms accounting for a minor fraction of total shipments into the 23 county area were eager to ship elsewhere. This is a logical inference from the fact that they ship most of their cement elsewhere. But it does not overcome the problem that the eagerness to ship elsewhere and the exigencies of cement distribution disqualify these firms in the first instance because they establish clearly that the purchasers in the 23 county area could not practicably turn to these firms for supplies.

This question was briefed and argued at all stages of this proceeding and was thoroughly considered by the Commission and adequately disposed of in the Commission's opinion. Respondent has not raised a new question under § 3.25 and its petition must be denied.

Moreover, respondent's contention that the substantial shippers into the 23 county area were shipping elsewhere to a significant degree does not warrant extensive consideration here. This is simply the assertion of a conclusion contrary to that reached by the Commission after its examination of the whole record. It is in no sense a new question.

The second asserted ground for reconsideration is that in calculating market share the Commission should have considered

shipments plus unused standby capacity rather than shipments alone.

Here again respondent fails to satisfy the requirements of § 3.25. This question was also briefed and argued and specifically adverted to in the Commission's opinion, and thus no new question is raised. We are satisfied that *Crown Zellerbach Corporation* v. *F.T.C.*, 296 F. 2d 800 (1961), and *Permanente Cement Co.*, D. 7939, April 24, 1964 [65 F.T.C. 410], were not misapplied and that on the record of this case in this industry sales or shipment figures rather than production or capacity figures, used or unused, are more significant in calculating market sales.

By its Motion to Reopen and Supplement also filed December 9, 1965, respondent seeks to have admitted into evidence a number of exhibits, two of which, it alleges, were cited in the Commission's opinion in this case and should therefore be admitted in evidence, while the others are affidavits attesting to post-acquisition structural changes in the market warranting admission into the record and consideration by the Commission.

The basis for respondent's motion as to the first two exhibits, RX 94 and 95, is apparently a reference in the Commission's opinion to the sale of Plant B after the filing of the initial decision in this matter [1] and a reference to the ". . . competitive huffing and puffing of firms such as U.S. Steel, Pittsburgh Plate Glass. . . ." [2] These references derive from statements in an affidavit of respondent's witness L. T. Welshans, RX 94, submitted to the hearing examiner, with a motion filed by respondent to supplement the record filed September 22, 1964, after the filing of the initial decision. This motion was never ruled upon.

It is apparent from the context of the Commission's opinion that these references do not affect the result and were in no way crucial to the Commission's consideration of this matter. Therefore, since respondent itself advised us of these facts it cannot now be heard to say that it was prejudiced by these references. We see no reason for reopening the record on the basis of this claim of respondent.

Exhibit RX 95 was an affidavit of one Henry G. Hohorst. It does not appear that any material from this affidavit was used in the Commission's opinion.

In regard to the other affidavits which respondent seeks to have admitted in evidence, it can be said that they contain data

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[1] Commission Opinion, p. 2, footnote 2 [68 F.T.C. 1205], and p. 12 [68 F.T.C. 1213].
[2] Commission Opinion, p. 10 [68 F.T.C. 1211].

relating to changes in the post-acquisition market structure in the 23 county area.

Judging from their number, one might infer substantial post-acquisition changes. Examination shows, however, little more than the ebb and flow of competitive activity with minor changes in market composition and share. The material does not suggest the sort of radical change in market structure which warrants reconsideration of post-acquisition evidence.

An appropriate order will issue.

Commissioner MacIntyre did not concur.

ORDER DENYING PETITION FOR RECONSIDERATION AND MOTION TO REOPEN AND SUPPLEMENT THE RECORD

The Commission on October 22, 1965 [68 F.T.C. 1204], having rendered its decision in this proceeding affirming the findings of fact contained in the initial decision of the hearing examiner, and issuing its order upon complaint counsel to file a proposed form of order and supporting memorandum within 30 days of service of the Commission's order and requiring respondent within 30 days of service of complaint counsel's proposed order to file its own alternative form of order and supporting memorandum, and

Respondent on December 9, 1965, having filed its Petition for Reconsideration and Motion to Reopen and Supplement the Record and the Commission having considered said motions and the answers in opposition thereto filed by complaint counsel,

It is ordered, That respondent's Petition for Reconsideration and Motion to Reopen and Supplement the Record be, and they hereby are, denied.

It is further ordered, That within ten (10) days of service of this order complaint counsel shall file a proposed form of final order in this matter accompanied by a supporting memorandum. Within ten (10) days of service of complaint counsel's proposed order respondent shall file its alternative form of order and supporting memorandum. Upon consideration of all material submitted, the Commission will enter its final order.

Commissioner MacIntyre not concurring.

VIVIANO MACARONI COMPANY

Docket 8666. Order and Opinion, March 9, 1966

Order denying request of respondent for access to confidential Commission documents pertaining to certain investigations.

OPINION OF THE COMMISSION

This matter is before the Commission on the certification of the hearing examiner of a portion of the application of respondent's counsel, filed March 1, 1966, requesting the inspection and copying of documents in the Commission's confidential files pertaining to investigations made by the Commission. Complaint counsel, on March 4, 1966, filed a memorandum stating their position as to the examiner's certification.

The respondent's request for documents to the hearing examiner was as follows:

2. . . .

(a) All letters written to the Federal Trade Commission by all of the persons listed in Appendix A hereto which have been identified to the respondent as prospective Commission witnesses or any additional Commission witnesses not yet identified and also copies of all letters sent by the Commission to said persons;

(b) All written statements given by the persons listed in paragraph 2(a) above;

(c) All memoranda of meetings, interviews and/or telephone conversations made by Commission personnel with all of the persons listed in paragraph 2(a) above.

At the commencement of the hearings on March 2, 1966, agreement was reached satisfactory to the parties which in substance provides that the documents called for by subparagraphs 2(a) and 2(b) will be made available to respondent if they contain a statement or statements pertinent to the witnesses' testimony or the issues involved in the proceeding. Such documents will be first turned over to the hearing examiner for his inspection.

Accordingly, the certification concerns solely the request under 2(c), above, which is for all memoranda of meetings, interviews, and/or telephone conversations made by Commission personnel with prospective witnesses.

Documents of this kind, if any such exist, would be contained in the confidential files of the Commission and these generally can be obtained only under the provisions of § 1.134 of the Commission's Rules of Practice. The cases dealing with this question have made clear that a request during the course of a hearing for confidential information in the Commission's files