LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 17, 1967

Order denying respondent's motion that complaint be dismissed or suspended on grounds that Commission's broad survey of cement industry prejudices respondent's right to a fair hearing.

OPINION OF THE COMMISSION

The hearing examiner has certified to the Commission respondent's motion to dismiss the complaint or suspend the proceeding with the recommendation that the motion be denied. Respondent's motion presents essentially the same arguments which it has made to the Commission in support of two prior motions in this case. In our opinion of February 6, 1967 [p. 1618 herein], denying respondent's motion to vacate the complaint herein, we rejected its claim that the Commission acted improperly by conducting a general industrywide inquiry into vertical mergers in the cement industry while the complaint against respondent was pending. We made clear in that opinion that the background information acquired by the Commission as a result of its broad survey of vertical mergers in the cement industry would in no way prejudice respondent's right to a fair hearing and decision. We also said in that opinion, and we reiterate here, that the burden of proving the allegations of the complaint remains with complaint counsel, and that adjudication by the hearing examiner and the Commission will be made on the record, in accordance with due process and the Administrative Procedure Act. We see no reason either to dismiss the complaint or to suspend this proceeding. Accordingly, respondent's motion is denied in its entirety.

Commissioner MacIntyre did not participate.

ORDER DENYING MOTION TO DISMISS COMPLAINT

Upon consideration of the hearing examiner's certification of respondent's motion to dismiss the complaint or suspend this proceeding, and for the reasons set forth in the accompanying opinion of the Commission,

It is ordered, That respondent's motion be, and it hereby is, denied.

Commissioner MacIntyre not participating.

WINN-DIXIE STORES, INC.

Docket C–1110. Order and Opinion, Apr. 17, 1967

Order denying respondent's petition that this proceeding be reopened and the order modified.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's petition, filed February 17, 1967, requesting modification of the order which issued on September 14, 1966 [70 F.T.C. 611].

The order provides "that for ten (10) years from the effective date of this order, respondent shall not, without the prior approval of the Federal Trade Commission, make any acquisition, directly or indirectly, of any retail food or grocery stores in the United States." This order is based upon a consent agreement which provides, in part, that "* * * [I]n the event that the Federal Trade Commission issues any Order or Rule which is less restrictive than the provisions of this Order, in any proceeding involving mergers or acquisitions by a grocery store chain, then the Commission shall, upon the application of respondent, pursuant to Rule 3.28 of the Commission's Rules of Practice, reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the restrictions imposed upon respondent herein into conformity with those imposed upon its competitors."

Respondent contends that the Commission's statement setting forth its "Enforcement Policy With Respect To Mergers In The Food Distribution Industries," dated January 3, 1967, constitutes an order or rule within the meaning of the provision in the consent agreement. It argues that the stated policy is less restrictive than its order and that therefore the order should be modified to incorporate three announced enforcement criteria. In substance, the requested modification would permit respondent to make certain types of food or grocery store acquisitions without the prior approval of the Commission.

In answer to this petition, the Chief, Division of Mergers, requests that it be denied for the reason that the desired modification does not require that a future acquisition meet *each* of the three criteria, as specified in the policy statement. However, he further states that were respondent to indicate its willingness to conform its proposed modification to this requirement the staff would not oppose the petition. In its reply, filed March 22, 1967, respondent agrees to amend its petition to meet the staff's objection.

It is the Commission's position that modification of the order is not warranted on the grounds of the stated enforcement policy.

In the first place, it is very doubtful that the policy statement constitutes an "Order or Rule * * * in any proceeding involving mergers or acquisitions by a grocery store chain," within the language of the provision in the consent agreement.

More importantly, even if the enforcement policy could be considered such a "Rule," it is not "less restrictive" than respondent's order upon any grocery store chain. The statement does not itself impose any restrictions. The purpose of the policy statement is to set forth the Commission's intentions as to future actions with respect to mergers in the food distribution industries and to describe what actions will likely be taken. With respect to the three criteria which respondent would have us incorporate in its order, the policy statement simply points out that mergers satisfying these criteria do not ordinarily require specific Commission review. This does not constitute permission to any competitor to make acquisitions fulfilling these criteria either with or without prior Commission approval. Any restrictions that may be imposed on competitors with respect to obtaining Commission approval prior to making an acquisition must result from a proceeding involving those competitors and not from the policy statement.

Finally, the fallacy inherent in respondent's argument that the enforcement policy is "less restrictive" than its order is best reflected in its requested modification. Respondent asks to be relieved of obtaining prior Commission approval for certain categories of acquisitions. However, it is obvious that if there were any substance to respondent's argument, modification would extend to relief from prior approval for *all* acquisitions since the enforcement policy does not require prior Commission approval for any acquisition.

We do not believe that the language of the proviso can be so construed as to require modification of the order here on the basis of a policy statement which, in fact, merely articulates the standards the Commission intends to follow in dealing with future mergers in the food distribution industry.

For the foregoing reasons, respondent's petition is denied and an appropriate order will be entered.

Commissioner Elman did not concur.

ORDER DENYING PETITION FOR MODIFICATION OF FINAL ORDER

This matter having come before the Commission upon respondent's petition, filed February 17, 1967, requesting that this proceeding be reopened and that the order issued on September 14, 1966 [70 F.T.C. 611], be modified; and

The Commission, for the reasons stated in the accompanying