

Statement of the Commission

75 F.T.C.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon her of this order, file with the Commission a report, in writing, setting forth in detail the manner and form of her compliance with this order.

IN THE MATTER OF

BROADWAY-HALE STORES, INC.

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

Docket C-1057. Complaint, Apr. 14, 1966—Decision, Mar. 5, 1969

Order modifying an earlier consent order dated April 14, 1966, 69 F.T.C. 601, which prohibited for 5 years any acquisition by the respondent of any department or GMAF (General Merchandise, Apparel and Furniture) store without prior Commission approval, by extending the ban for an additional three years.

IN THE MATTER OF

BROADWAY-HALE STORES ACQUISITION OF
NIEMAN-MARCUS COMPANY

STATEMENT OF THE COMMISSION

MARCH 5, 1969

The Commission has approved the request of Broadway-Hale Company, a West Coast-based department store chain, to acquire Neiman-Marcus, a Texas-based department store.¹ This approval was granted because a majority of the Commission concluded that the acquisition did not eliminate either actual or potential competition between the two firms and was not anticompetitive. The Commission was unable to conclude on the basis of the available evidence that this acquisition would unduly enhance or contribute to existing levels of industry concentration.

Broadway-Hale ranks 13th in sales in the overall department store field with 46 stores (as of late October, 1968) in California, Arizona and Nevada. It had annual consolidated sales (as of

¹ The Commission's approval was required under the terms of Broadway-Hale's consent agreement of April 14, 1966, under which it agreed not to acquire any department store or other GMAF stores other than the Emporium-Capwell Company for the five year period from 1966 to 1971 without Commission permission.

1967) of approximately \$457 million. Neiman-Marcus with four stores in Houston, Dallas, and Fort Worth had 1967 sales of \$63 million. Together the combined firms will continue to rank 13th in sales in the department store industry.

Broadway-Hale and Neiman-Marcus operate in two different markets separated geographically by over 1000 miles. Neiman-Marcus is not a conventional department store but falls into the department store classification of specialty store. Its methods of sale and the price lines of its merchandise are substantially different from those of Broadway-Hale. A minority of the products sold by both involve some overlapping characteristics. Nevertheless, in the main, Broadway-Hale does the bulk of its merchandising in products of middle price range while Neiman-Marcus does the bulk of its business in the highly specialized, high-priced, luxury items catering primarily to a different segment of customers. Further, Broadway-Hale offers typical salesperson service in conventional department store surroundings while Neiman-Marcus offers intensely individualized and personalized sales service in a very decorous sales atmosphere.²

Since Broadway-Hale and Neiman-Marcus are in different geographic markets and sell basically different products in dissimilar marketing circumstances, there was never any suggestion that actual competition between the two firms would be eliminated.

The issue confronting the Commission in determining whether the merger could or might have anticompetitive elements, therefore was to proceed on a consideration of whether overall department store knowhow, management, and other skills are transferable and potentially interchangeable between the two types of stores in such a way that the two could be regarded as potential competitors of each other. In other words, the question before the Commission was whether there was a realistic possibility that either store independently would expand its product line and geographic market boundary in such a way as to offer competition to the other.

After considering the known facts respecting this industry and these two firms, the Commission concluded that the two firms could not be regarded as potential competitors and that the merger would not therefore eliminate potential competition.

² One factor illustrating that department stores do in fact have relatively distinct groups of customers and lines of merchandise is that a number of department store owners operate these two types of stores separately, and in some cases the middle price range department store and the specialty store are even located side by side in the same city.

Internal expansion by conventional department stores such as Broadway-Hale into markets as geographically separated as Texas and California is economically and technically difficult because of the need to recruit an entire department store marketing organization sensitive to regional and local styles, trends and tastes. Moreover, the use of central management to supervise such branch outlets is also difficult because of the need to make decisions quickly and preferably on the spot. Conventional department stores today, therefore, consider such territorial leaps and product expansion by internal means over widely separated areas to be generally unfeasible.³

Aside from this general aspect of the nature of potential department store internal expansion which the Commission, of course, recognizes may be influenced by current thinking among department store specialists and would be subject to change and to error, the Commission in the instant case had before it affirmative evidence that the actual expansion programs of these two companies which had been formulated well before this merger was in the works excluded any consideration of exploiting the geographic market areas here involved.

Broadway-Hale had long-announced growth plans of attaining \$1 billion in sales by 1976. Projecting a modest normal increase of 8 percent in its sales a year, Broadway-Hale could be expected to reach \$900 million of this goal by 1976 by internal growth, thus leaving only an additional \$100 million to be obtained through internal expansion of outlets or acquisition (not even including sales of a mail order firm acquired in 1968, which was not an acquisition under order). Given such modest needs, Broadway-Hale apparently envisaged adding this \$100 million in sales through the addition of two to four stores per year within its existing markets. It seemed unlikely and unrealistic for the Commission to assume that under these expansion plans, Broadway-Hale had any intention or indeed could have expected to jump the 1000 miles or so from the growing markets of the Far West to the Texas market and establish a department store there, especially in the light of the current thinking of conventional department stores as to the difficulties of such internal expansion.

Internal evidence from Neiman-Marcus' files made it equally clear that Neiman-Marcus would not have expanded into the Broadway-Hale markets of the West Coast, *i.e.*, California and

³ Such leaps are more feasible for specialty stores such as Neiman-Marcus, since among other things tastes in specialty items such as designer clothes, quality glassware, etc., are basically "national" rather than local or regional.

Arizona. In numerous memoranda, written long before the proposed merger, Mr. Marcus is quoted as rejecting California and Arizona as suitable locations. In one such memorandum, discussing the desirability of expansion into Florida vis-a-vis California, he stated:

In many ways Florida today reminds me of California twenty years ago in its method of growth and its speed of growth. The one advantage which a store here would have over a store in California is that there is less competition from a large specialty store. All of the competition basically is in the form of small specialty shops which are formidable individually and collectively but there is no one big specialty store such as you would run into in quantity in the Los Angeles area.

Over and above the absence of potential competition and foreclosed entry, in this situation, the Commission found no evidence that this merger might possibly entail the other anticompetitive consequences envisioned to flow from increased concentration, *i.e.*, the imposition of price discipline for price competition, the deterioration in competitive vigor of national firms facing each other's local markets, or the destruction of competition from the buying side. Only four of the hundred largest dollar volume suppliers of each firm are common suppliers to both Broadway-Hale and Neiman-Marcus. Three of those four tended to be in different lines or different price ranges of the same line. Further, an essential condition of the merger agreement between the two companies was a stipulation that management of Neiman-Marcus is to remain autonomous within the Marcus family. Thus the Marcus interests will continue to exercise their own independent price, buying and selling conduct in an operation separate in locale and in merchandising techniques from that of Broadway-Hale.

No standard of approval has ever been laid down in the orders entered by the Commission which have required companies to obtain the Commission's approval before making certain types of acquisitions. Since these orders do not contain outright bans on future acquisitions, the approval requirement must of necessity contemplate some circumstances under which some department store acquisitions would be approved by the Commission. The issue before the Commission, therefore, was whether the acquisition of Neiman-Marcus was within the class of acquisitions which the ban had contemplated would be unacceptable or did it fall within that group which the ban had contemplated might be permissible and hence would be approved.

The Commission had before it two possible bases on which to

determine whether approval of the merger would or would not be consistent with the public interest underlying Section 7 of the Clayton Act: its own prior actions in the department store field, and its rulings on similar applications for approval in the analogous food retailing field in which the Commission had also sought to challenge mergers in an industry which had evidenced substantial increases in concentration levels.

Testing the acquisitions in the light of its continuing merger concern in the department store field, the Commission concluded that this acquisition did not have any of the aspects of elimination of actual or potential competition found in the prior department store matters. The merger most closely related to the Broadway-Hale—Neiman-Marcus acquisition in terms of its exclusive reliance on increased concentration and the elimination of potential competition as the basis for the alleged illegality was the acquisition in 1963 by Federated Stores of Bullock's, Inc. Federated in 1963 ranked number one in the conventional department store industry with annual sales then of approximately \$933 million. Bullock's ranked second in 1963 in its market among the major conventional department store chains on the West Coast with 24 outlets including seven large stores and 1963 sales of about \$200 million. Despite the allegations that overall concentration levels were increasing in the department store industry, the fact that Federated had already established a small operating base of its own on the West Coast, and the contention that the merger of these two substantially and directly competitive department store chains would likely result in significantly increased purchasing power, the Commission without dissent agreed that the allegedly anticompetitive impact of this merger did not require that the merger be undone and decided that a ban on future acquisitions without prior Commission approval was sufficient. If the Commission's case against Federated did not demand divestiture, it was difficult for the Commission to conclude that it should disapprove the much smaller acquisition here not involving direct competitors and not having any potential anticompetitive aspects so far as the Commission could determine.⁴

The Commission was confronted with a somewhat comparable request for its approval of a purchaser by a West Coast-based regional food chain of a midwestern-based group of food chain

⁴ Indeed the staff upon later evaluation of the Federated merger in the context of comparing it in perspective with other merger cases in the department store industry, advised the Commission that in its view the potential competition aspect of the case as alleged was sufficiently "weak" to warrant the acceptance of the order limited to the acquisition ban.

stores required to be divested under a Commission order. Concentration levels in the food distribution industry have also been of substantial concern to the Commission as has its concern for department store concentration. Again the Commission had to determine whether this purchase was likely to eliminate potential competition between the two firms, and this in turn depended largely on whether it was likely that the West Coast chain would or could have expanded internally into the midwest area. In this case, the Commission was confronted with the fact that the purchaser had an internal expansion program which had involved one prior geographic internal expansion jump of some 700 miles. Nevertheless, after first disapproving the purchase, the Commission changed its mind and unanimously approved the purchase because it was convinced that the merger did not eliminate competition.⁵

If the public interest was not endangered by these market extension mergers between competitors dealing in the same product lines in the department store and food retailing fields, the Commission majority did not believe that the instant merger, which cannot be clearly classified as either a market of product extension merger since the firms are in separate geographic markets and deal for the most part in dissimilar lines, should be disapproved.

The Commission still remains concerned with the continuing problem of concentration levels in this department store field. Its approval of this merger is not intended to suggest any major reversal in policy. Even in light of the aforementioned evidence indicating virtually no lessening of potential competition, the Commission determined nevertheless not to grant approval to this merger unless Broadway-Hale would agree to a three year extension of its existing ban on department store acquisitions which only had two years remaining under the original consent order.

All requests for approval of department store acquisitions under the outstanding orders which the Commission has entered will continue to be examined under the criteria as to whether they impair actual or potential competition. Such criteria include questions of whether the acquisitions involve stores in the same or new geographic markets which carry the same general product lines and employ comparable merchandising techniques, whether they represent backward or forward integration among suppliers

⁵ *Consolidated Foods Corporation*, Dkt. C-1024, Commissioner MacIntyre not participating.

and marketers, and whether they result in extension of the acquiring firm's business into new product lines in the same geographic market area. When a company under a merger ban requests permission to make an acquisition which falls into one of these categories, or which otherwise appears on its face to have possible anticompetitive consequences, such request will probably not be granted unless the parties can demonstrate that the possibility of such anticompetitive consequences is remote. Mergers, such as the instant one, which are not in any of the above categories and which are not otherwise found to threaten actual or potential competition will, in the opinion of the majority of the Commission, be permitted.

· IN THE MATTER OF

BROADWAY-HALE STORES ACQUISITION OF
NIEMAN-MARCUS COMPANY

SEPARATE STATEMENT

BY MACINTYRE, *Commissioner*:

A factor involved in the disposition of this matter but glossed over by the dissents, is the fact that the parties have agreed to the entry of a further order banning future acquisitions by Broadway-Hale for an additional period of five years unless the Federal Trade Commission approves. As a result, within the next five years such mergers may be prohibited if the consent of the Commission is not secured irrespective of whether they are held in violation of law.

This matter, I agree, should be considered in the context of this agency's previous actions in the department store field. One of the dissents, however, by implication at least, seeks to distinguish this case from the Commission's disposition of the *Federated-Bullocks* matter, both on procedural and substantive grounds. As far as the practical results reached are concerned, however, there is no meaningful distinction in the disposition of this matter and the *Federated* case. In both proceedings, the Commission permitted the acquisition to stand after consent to a ban on future acquisitions unless they are approved. The real difference is that the evidence of illegality in *Federated*, contrary to this case, was substantial. The fact that a *de novo* complaint and consent order issued in one case and not the other is a meaningless quibble. Orders to cease and desist were issued in

both cases. The modified order in this case providing the additional ban for five years will, of course, be on the public record.

The dissent does raise some questions about the Commission's procedures but again the issues go beyond the confines of this case. There are a number of other merger proceedings on our docket where the Commission failed to follow "the built-in procedural safeguards" which the dissent has contended should be applied here.

For example, in the *Federated* case, the crucial decisions were made in the course of and pursuant to oral presentations to the Commission by respondents on an off-the-record basis. A vital part of the decision-making process in that proceeding, as a practical matter, was simply unreviewable. The fact that the Commission's complaint and consent order subsequently went on the public record did not cure that defect. Moreover, while the Commission agreed to listen to an informal presentation by *Federated*, it refused over my objection to extend a similar opportunity to one of the parties most directly concerned, the Chief Executive Officer of *Bullocks*, the acquired concern, who opposed the merger. Perhaps, and there is no way of telling now, had the Commission had the benefit of his views, its perspective might have been quite different. My motion to hear that official lost because of a failure of the majority of the Commission to vote for it. Perhaps in light of the dissent's attack on the procedures in this matter, it would be a healthy thing for the Commission to make public its minutes, including all motions and the votes thereon in both of these matters.

Who is for secrecy here? I am not. My record on such matters is clear. In keeping with my position, I think we should consider making available to the public for inspection the motions and votes of each of the Commissioners not only on this matter but also on all similar matters in similar situations. I did not invent *ex parte* proceedings at the Federal Trade Commission. Indeed, unsuccessfully I have opposed non-public proceedings in a large variety of situations which appeared to be clothed with the public interest.

On reflection, I have come to the conclusion that nonpublic *ex parte* proceedings involving informal conferences of Commissioners and respondents should be avoided in those cases where the question is whether complaint should issue, what should the terms of an order be, or in cases such as this, whether approval should be granted or withheld for a merger where the respond-

ent is subject to a ban on future acquisitions. Also, it is my view that investigational hearings on matters clothed with wide public interest should not be held in secret. In view of the current interest both here at the Commission and elsewhere for making available more information on the administrative process, it is to be hoped that the Commissioners will be able to agree on a modification of these procedures to achieve these objectives.

BROADWAY-HALE STORES, INC.
(ACQUISITION OF NEIMAN-MARCUS COMPANY)

DISSENTING STATEMENT

BY ELMAN, *Commissioner*:

This is an extremely important and troubling case. Important not only because of the rank and significance of the firms involved but also because of the deleterious consequences that can be expected to ensue from the Commission's action. Having stopped in the mid-1960's the merger movement that threatened to transform the structure of the retail department store industry, the Commission now invites a new and potentially irreversible merger movement. What is particularly disturbing is that this significant action has been taken in an unreviewable, essentially secret, *ex parte* proceeding in which no evidence was taken, no cross-examination permitted, no record made, and no opportunity afforded interested parties to intervene.

That the Commission itself has belatedly recognized the large public importance of this case is manifest in its determination to issue a statement concerning this matter in response to a dissenting statement circulated by me in early February. Ordinarily, requests by a party subject to an order requiring prior approval of merger transactions are disposed of in a simple letter sent to the requesting party and his counsel. This procedure is followed even when a member of the Commission dissents, with or without opinion, from the Commission's decision. Such a letter was prepared by the staff in this case. The Commission's subsequent determination to prepare and issue an elaborate statement of justification in response to my dissent is unusual. Although it has gone to great lengths to find reasons for its action, the statement provides no adequate grounds for the Commission's decision and dispels none of the concerns raised by the Commission's disposition of this matter.

I

This case reflects serious defects in the process followed by the Commission in approving the legality of a merger proposed to be made by a company under an order prohibiting it from making acquisitions for a specified period without securing the Commission's prior approval.

Where a challenged acquisition is made by a company *not* under such a ban, the Commission, before finding the acquisition to be lawful, is required to follow procedures containing built-in safeguards for the protection of the public. A complaint is issued by the Commission which is a matter of public record and the subject of a press release. The complaint initiates a formal, adversary proceeding which is fully public. The respondent's answer and other pleadings are public. A public hearing is held before an examiner, where evidence is taken and a record is made on the basis of which the examiner makes findings of fact and renders an initial decision—all of these actions being public. The appeal to the Commission, including briefs and oral arguments, is public; and, by statute and rule, *ex parte* communications with Commissioners are strictly forbidden. Interested third parties (including the Attorney General) may seek to intervene or file amicus submissions, on the public record. If the Commission finally decides that the merger is lawful, its conclusion is based on the record made, and the correctness of its findings of fact, decision, and opinion can be judged in the light of the evidence and arguments in the public record.

In sharp contrast is the procedure followed by the Commission in approving the legality of a merger proposed to be made by a company, like Broadway-Hale, which is under an order containing a ban on future acquisitions. The processing of such an application for Commission approval is *ex parte*, non-adversary, and secret. The application and supporting materials are "confidential" and not available for public inspection. Interested third parties (who may not even be aware of the pendency of the application) have no opportunity to present any comments or opposition. If the staff supports the application, there is no one to oppose it. On the other hand, if the staff opposes the application, its reasons for recommending disapproval are kept tightly secret. No evidence is taken; there is no public record, no findings, and no decision or opinion of the Commission. Nor is there any specific prohibition against *ex parte* communications with Commissioners.

Such a process contains built-in dangers to the public interest. It is always necessary that public confidence be maintained in the efficiency and integrity of an agency's procedures, especially where, as here, the stakes are so high, measured not merely in terms of the financial interests of the private parties involved, but, more importantly, the large public interest in preventing mergers which, because they may substantially lessen competition, violate the antitrust laws.

II

On the merits, this would appear to be an open-and-shut case of a merger which is unlawful because, in the words of Section 7 of the Clayton Act, "the effect of such acquisition may be substantially to lessen competition" in the department and specialty-store industry. In putting its stamp of approval on the merger, the Commission treats the self-serving *ex parte* assertions and contentions of the parties as if they were findings of fact based on evidence of record in an adversary proceeding. Some of these findings and conclusions seem to be most extraordinary.

It is immaterial, of course, that Broadway-Hale and Neiman-Marcus are not now direct competitors in the same geographical markets. That is not the basis for urging disapproval here. The reasons underlying the unanimous staff recommendation for disapproving the merger of Broadway-Hale and Neiman-Marcus run deeper and broader. In essence, the staff's legal and economic analysis support the conclusion, which seems clearly correct both on the facts and on the law, that this merger (1) would eliminate potential competition between the parties, which is real and not merely theoretical, (2) would unduly increase industry and market concentration, and (3) would trigger a new merger trend in the industry, defeating the very purpose of the bans on future acquisitions contained in consent orders issued by the Commission in 1965 and 1966 against five major department store chains, including Broadway-Hale.

In assessing the implications of this merger, it is important to bear in mind the structure and recent history of the department store industry. Substantial increases in concentration have taken place in the past two decades, and the large number of significant mergers undertaken by leading chains has been a primary factor in this trend. Between 1951 and 1965 the 20 largest department store companies (in 1967) acquired 73 companies operating 168 department stores. It was to stop this merger movement, which threatened a drastic restructuring of the

retail department store industry, that the Commission entered orders prohibiting further acquisitions by Broadway-Hale and four of its principal competitors. Four of these firms, excluding Spartan Industries, Inc., acquired 36 department store chains between 1951 and 1965 operating 87 stores and having combined preacquisition assets of approximately \$892 million. From 1951 to 1965 merger activity by the leading department store firms showed no signs of abating, but from 1966 to the present their merger activity has substantially subsided. There is no doubt that the Commission's orders have been the primary factors in stemming the merger movement. There is also no doubt that approval of this merger will probably trigger a new and undesirable merger trend in this industry.

The Commission can approve this merger only by ignoring these facts and by devising a market definition and a conception of potential competition that can best be described as contrived and fanciful. The Commission implies that if Broadway-Hale and Neiman-Marcus were in the same geographical market they would not be competitors because Neiman-Marcus carries a somewhat higher price line than Broadway-Hale. The short answer to this contention is that it was flatly rejected by the Supreme Court in the *Brown Shoe*¹ case. Moreover, an analysis, prepared by the Commission's Bureau of Economics from data submitted by Broadway-Hale and Neiman-Marcus, of the kinds of merchandise and the price lines carried by the two companies indicates substantial product and price overlap—apparently greater than that found in the *Brown Shoe* case and *a fortiori* enough to justify treating this as a horizontal merger if the two firms were in the same geographical market.

III

The Commission's conclusion that the Broadway-Hale, Neiman-Marcus merger does not eliminate significant potential competition is even more flimsy.

Broadway-Hale has been one of the most rapidly growing conventional department store chains. Between 1965 and 1967, Broadway almost tripled its sales from \$233 million to \$638 million,² and has expressed a sales goal of \$1 billion by 1976. Broadway now operates stores in Phoenix, Arizona. While Phoe-

¹ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

² It is important to note that a sizeable part of this increase resulted from its acquisition of Emporium-Capwell—a firm which had pre-acquisition sales of approximately \$166 million—which led the Commission to enter its ban on future acquisitions.

nix is over 1,000 miles from Dallas, the closest city in which Neiman now operates, there are very few large cities between Phoenix and Dallas. A strong possibility exists that Broadway will expand further in the southwest region of the United States, quite possibly into the Dallas-Fort Worth area. Neiman has expressed a similar desire to expand. It has initiated a \$50 million ten-year development program to expand its operations by building ten stores outside of Texas designed to increase its sales from \$69 million to \$190 million.

These facts concerning the two firms make internal expansion objectively probable. Conditions in the California and Texas markets make the inference that Broadway-Hale and Neiman-Marcus were significant potential competitors virtually inescapable. As the Supreme Court has made clear, narrow geographical or product limits are not the test of whether a substantial company is a likely potential entrant into another market. The real test, particularly in the retail department store industry, is whether the market in question shows great growth prospects.

It is also undeniable that California and Texas are among the most rapidly growing markets in the country. If the merger route were closed, substantial department store chains like Broadway-Hale and Neiman-Marcus, each on the periphery of the other's marketing area, would be likely to enter these burgeoning markets by internal expansion. Moreover, the department store business is very highly concentrated on a local basis with the four largest firms accounting for anywhere from 47 percent to 100 percent in a sample of eight major markets in California, Texas, and Oregon. If oligopoly is not to become entrenched, if concentration is not to increase and if prospects for deconcentration are to remain alive, it is doubly important that large retail department stores in adjacent markets not be permitted to enter such dynamic growing markets by acquiring other substantial firms already there.

The Commission's conclusion that Neiman-Marcus would not have entered the California market internally is based on a self-serving memorandum from Neiman-Marcus' files. This finding ignores a long line of court and Commission precedents, based on elementary economic concepts, holding that proof of subjective intent to enter the market is not essential to show that a firm was a potential competitor in that market.³ Near-

³ See, e.g., *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *Brodley, Oligopoly Power Under the Sherman*

ness of the firm to the market, its resourcefulness, its financial situation, and the economic incentives to entry—for example, the attractiveness of the market in terms of profit, risk and its growth prospects—all bear on whether the firm is a potential entrant.⁴ By all these criteria the two firms involved in this case were each potential entrants in the other's market. In view of Neiman-Marcus' ten-year development and expansion plans, there is no question that it was at least an important potential competitor and a likely entrant into the rapidly growing West Coast markets in which Broadway-Hale now operates.

The Commission's contrary finding also lays bare the procedural deficiencies in this case. Like the Commission's extraordinary conclusion, discussed below, that internal expansion by firms in the retail department store industry is impossible, the finding concerning Neiman-Marcus' subjective intent is not based on materials presented in a litigated record. No investigation was made by the Commission, no documents subpoenaed. The Commission's findings generally, and this one in particular, are predicated solely on materials submitted by the parties in an *ex parte* non-adversary proceeding, with no opportunity for cross-examination. The Commission has no way of knowing whether there are other materials bearing on subjective intent, on Neiman-Marcus' expansion plans or on the other issues; it must rely on the self-serving materials and information submitted by Broadway-Hale and Neiman-Marcus.

Perhaps the most vulnerable finding made by the Commission rests in its conclusion that internal expansion by department store chains is practically impossible. It is inconceivable that this "finding," or perhaps "assertion" is more accurate, would be upheld by a court if the finding had been made in an adjudicative proceeding, even under the limited standard of reviewability applicable to factual determinations of the Commission. The finding that retail department store chains are unable to jump from one geographical area to another will come as quite a surprise to Sears, J.C. Penney, Montgomery Ward, and other chains which have grown almost exclusively by internal expansion.

and Clayton Acts—From Economic Theory to Legal Policy, 19 Stan. L. Rev. 285, 357-59 (1967); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313 (1965).

⁴ See, e.g., *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D. N.Y. 1958). In that case the court rejected the argument of the parties that neither alone could have entered the Chicago market and that the subjective intention of each was not to enter the market. These arguments were found to be "not persuasive in light of their prior activities and history, their financial resources, their growth and demonstrated capacity through the years to meet the challenge of a constantly growing economy." *Id.* at 616.

sion.⁵ The experience of other conventional department stores—like Allied Stores, whose Jordan Marsh division, headquartered in Boston, recently opened new stores in Miami, Fort Lauderdale, and Orlando, Florida, and Rhodes Western, a west coast chain which expanded from Oregon and California to Texas, New Mexico, and Arizona—belies the Commission's assertion that such jumps are impossible.⁶ Discount department store companies, which are most like the conventional department store group in which the Commission puts Broadway-Hale, have expanded substantially by internal means. The Commission would have to look no further than the Washington suburbs to discover that S. Klein and E. J. Korvette have made the move from New York to Washington without having to merge to get here.⁷ The same quick look will disclose that Lord & Taylor and Saks Fifth-Avenue have also expanded from New York to Washington, despite the geographical, emotional and psychological separation from headquarters that the Commission finds so overwhelming. The short of it is that what Sears, J.C. Penney, Wards, Rhodes, Allied, S. Klein, Korvette, Lord & Taylor, Saks, and other smaller chains have managed to do, should not be impossible for Broadway-Hale and Neiman-Marcus to do. The Commission's finding to the contrary is merely jerry-built to support the conclusion that this particular merger should be approved.

The Commission's finding also represents a self-fulfilling prophecy. The Commission says, in essence, "since, historically, many department stores have chosen to enter new markets by merger and not internal expansion, we conclude that internal expansion is difficult or impossible and we will allow mergers." There is no

⁵ A brief review of the annual reports of these firms discloses that since 1957 Sears has built 257 new stores, 123 of which were completely new operations on new sites and 134 of which were built on sites formerly occupied by smaller Sears stores. In the same period J. C. Penney has built 515 stores, 223 of which were entirely new, and Montgomery Ward has built 189 entirely new stores. In sum, these three firms alone have built at least 535 brand new stores, on new sites, many of them in markets far removed from their headquarters and from their previous marketing area. To accomplish this expansion they had to hire additional managerial, clerical and other personnel, and perform all the other tasks that according to the Commission make internal expansion impossible.

⁶ These are not isolated examples. Others include Broadway-Hale's jump from California, to Las Vegas, Nevada, R. H. Macy's expansion within California, and various jumps by other divisions of Allied Stores besides Jordan Marsh. Even relatively small regional conventional department stores have grown by internal growth. For example, J. B. Ivey, Charlotte, North Carolina, has reportedly expanded into Greenville, South Carolina, and Jacksonville, Florida. Other smaller companies reportedly growing into new metropolitan markets include Millers, Knoxville, Tennessee; L. S. Ayres of Indianapolis; and Goldblatt's of Chicago.

⁷ Since 1956 Korvette's has built over 30 new stores, many of them, as the Commission well knows, in new marketing areas. This expansion too was managed internally. Stores involved in the E. J. Korvette-Spartan Industries merger are not included in this count.

doubt that department store chains, if allowed to do so, will prefer the easier course of entering new markets by merger rather than internal expansion.⁸ History will thus of necessity "bear out" the Commission's conclusion. On the other hand, if firms operating in this dynamic, rapidly changing industry were told, as they were by the Commission in 1965 and 1966, that the trend of expansion through making substantial acquisitions must be halted, there can be little doubt that they would expand into desirable new markets through internal growth, a view borne out by developments in the industry since the Commission's orders were entered.

It bears repetition here that Section 7 does not require proof to a statistical certainty that a merger will substantially lessen competition, although reading the Commission's statement in this matter one might think so. The Commission's view is that since it cannot say with positive certitude that either Broadway-Hale or Neiman-Marcus would in the immediate future enter the other's market, the merger must be approved. But, in accordance with its purpose of preserving a competitive economy, Section 7 requires application of a standard based on long-term probabilities, not short-range certainties. The test is not whether, but for the merger, Broadway-Hale or Neiman-Marcus was planning to move into the other's market next week or next month. It is whether, measured by the objective criteria laid down by the Supreme Court and the Commission in cases like *El Paso*, *Penn-Olin*, *Clorox*, and others, there was a reasonable prospect that they would expand and grow into competitors confronting each other in the same market—a genuine prospect of potential competition that this merger will eliminate.

IV

The Commission's action here cannot be reconciled with a long and unbroken line of court and Commission precedents. The quotations in the footnote reveal the extent of the break with

⁸ This preference for growth by merger is not unlike that expressed by the parties in the landmark *Bethlehem Steel* case, 168 F. Supp. 576 (S.D.N.Y. 1958), where, as Judge Weinfeld observed, "Each defendant in urging the merger takes a dim view of its ability to undertake, on its own, a program to meet the existing and anticipated demand * * * in the Chicago [market]." In rejecting these arguments, Judge Weinfeld concluded that these were expressions of business "preference" as to how best to expand, rather than matters of economic necessity. See note 5, *supra*. Experience bore out the wisdom of Judge Weinfeld's decision. After Bethlehem was prevented from making a market extension merger into the Chicago market, it decided that it would enter by internal growth.

established precedents which is here being made.⁹ This disregard for precedent indicates another disturbing aspect of the Commission's decision to approve this merger. The Department of Justice and the FTC have concurrent jurisdiction to enforce Section 7 of the Clayton Act. Under the existing liaison arrangement, this case has been "cleared" to the Commission. However, if the Antitrust Division were to have asserted jurisdiction here,

⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 315-16, 323, 346 (1962):

"The dominant theme pervading Congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. * * * Congress used the words 'may be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. * * * We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipency. * * *" See also *United States v. Philadelphia National Bank*, 374 U.S. 321, 362, 367 (1963); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659 (1964); *United States v. Continental Can Co.*, 378 U.S. 441, 465 (1964); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552 (1966).

Foremost Dairies, Inc., 60 F.T.C. 944, 1050, 1051, 1082, 1083, 1084 (1962) (Opinion of the Commission by Chairman Dixon):

"* * * We are well aware that it is during times of economic change that many industries have been transformed via mergers from relatively competitive ones to oligopolistic ones because public understanding was not alerted in time to curb such developments. * * *

"The legislative history further indicates that Section 7 was designed to intervene in the 'cumulative process' by which a competitive industry may be completely transformed as a result of successive mergers. * * *

"It is our opinion that the cumulative effect of a prior series of acquisitions by a respondent is an important element in determining the legality of a particular acquisition under consideration. * * * It is equally clear from the legislative history that Section 7, as amended, is intended to embrace all types of acquisitions regardless of their designations. Therefore, the question of whether a particular conglomerate or market extension merger violates Section 7 must be answered, just as in the case of horizontal mergers, by a showing that the merger may have the effect of substantially lessening competition or tend to create a monopoly. * * * We think it clear that the cumulative effect of a series of mergers is of importance and has a direct bearing on . . . [the] market power and possible competitive advantage of an acquiring firm even though a later acquisition takes place in a market in which that firm did not already operate."

National Tea Co., Docket No. 7453, concurring opinion of Commissioner Jones, pp. 5, 8, 12 (March 4, 1966) [69 F.T.C. 226, 302, 304, 306, 307]:

"The legislative history of the amendment to Section 7 of the Clayton Act makes clear that one of the major objectives of Congress in enacting the amendment was to arrest the rising tide of economic concentration by coping with monopolistic tendencies in their incipency and to prevent the elimination from any given market of substantial independent units. * * * [T]he Commission's congressional mandate is not to wait until concentration has become undue, but rather to act when a movement towards oligopoly is discernible. * * * [T]here is an incipient trend towards concentration discernible in this industry and I believe that the Commission is acting within the intent and spirit of the Act in calling a halt to these acquisitions before the present market structure ceases to exist.

"The desire to stem this increasing concentration in its incipency is enhanced by the realization that the mergers challenged in this proceeding are but part of a definite trend towards expansion through acquisition present in the industry as a whole as well as in respondent's business philosophy. Consequently, the probable anticompetitive effects resulting from these acquisitions are increased when viewed as part of a trend. As part of a trend, the movement towards concentration resulting from these acquisitions is clearly accelerated." See also, *National Tea Co.*, Docket No. 7453, pp. 5, 6, 7-8, 15 (March 4, 1966) (Opinion of the Commission by Chairman Dixon, concurred in by Commissioners MacIntyre and Jones) [69 F.T.C. 226, 265, 268, 269, 270-271].

it is inconceivable that the merger would not have been challenged in court, and successfully. It comes clearly within the established precedents and the Merger Guidelines released by the Department of Justice on May 30, 1968.

The weakness of the Commission's position in this matter is perhaps best evidenced by its reliance, as the closest precedent for its action here, on the consent order issued by the Commission in *Federated-Bullock's*. That was the first of the cases in which the Commission undertook, by the issuance of consent orders which included "containment" provisions banning future acquisitions, to halt the merger trend in the department store industry. It was soon followed by the issuance of similar orders against Broadway-Hale and other large department store chains which had been growing not through internal expansion but via the acquisition route. The rationale of these orders was, as Commissioner Nicholson points out, that "the Commission was willing to grant respondents one-bite-at-the-apple in return for containment of a demonstrated trend toward concentration, not only within local markets but also national."

In none of these cases did the Commission approve the legality of the acquisitions challenged in the complaint. It seems to me that any member of the Commission who approved the acquisitions challenged in the complaints in those cases and considered them to be lawful should not have voted either for the issuance of complaints or the orders to cease and desist. If a merger is lawful, it should neither be challenged by the Commission nor be made the basis of an order.

We are told now, however, that since these various consent orders "merely" provided for only a "containment" of the status quo by banning future mergers, the Commission was thereby "approving" the legality of the acquisitions challenged in those cases. This is nonsense. Carried to its logical conclusion, this would mean that whenever a company is under an order prohibiting future acquisitions, the Commission would have to approve any proposed merger if it were no worse than those challenged in the original complaint. Thus, the Commission, having entered such an order against Federated for its acquisition of Bullock's, would be obliged to approve every application by Federated (or any other company under order) to merge with another department store like Bullock's. The absurdity of this argument is obvious. If taken seriously, it would mean that all of the consent orders containing prohibitions on future acquisitions, in every

industry where the Commission has followed that approach,¹⁰ would have no effect whatsoever in halting industry merger trends. If the new merger is no worse than those challenged in the original complaints, it would automatically be approved by the Commission.

The significance of the three-year extension of the ban on future acquisitions by Broadway-Hale is thus put in proper perspective. So long as the Commission is willing to approve mergers like the one now before us, Broadway-Hale might just as well be under such a ban in perpetuity for all the difference it would make.

The public interest has been ill-served by the Commission's action in this matter, and I must dissent.

BROADWAY-HALE STORES, INC.

(ACQUISITION OF NEIMAN-MARCUS COMPANY)

DISSENTING STATEMENT

BY NICHOLSON, *Commissioner*:

I have reason to believe that the *Neiman-Marcus* acquisition violates Section 7, but, under the prevailing circumstances, do not agree that such a belief is necessary for disapproval of the questioned merger by the Commission.

The acquiring company, *Broadway-Hale Stores*, is no stranger to Section 7 inquiries by the Commission. In 1966, we charged that its acquisition of a large department store chain had the unlawful effects, *inter alia*: of eliminating substantial potential competition within the relevant product markets involved herein, and contributing to a trend toward national concentration in the same product markets. The complaint was settled upon respondent's agreement that it would make no further acquisitions within the industry without prior Commission approval.¹

Apparently, the Commission was willing to grant respondents one-bite-at-the-apple in return for containment of a demonstrated trend toward concentration, not only within local markets but also national. As the Commission's Chief Economist reported to Congress, this policy of containment has effectively promoted

¹⁰ For example, the same type of enforcement approach, entering consent orders with "containment" prohibitions on future acquisitions rather than requiring divestiture, as been followed in the retail food industry (*National Tea*) and the textile industry (*Burlington Industries*).

¹ Docket No. C-1057 (April 20, 1966).

the prophylactic aim of the Celler-Kefauver Act. Its "most important impact" has been "its deterrent effect."²

It is incorrect in my opinion, to say that we will judge future acquisitions by those already under order solely under the criteria as to whether the new acquisition violates Section 7. The standard is less. We should disapprove such acquisitions if: (1) the merger contributes to aggregated concentration; (2) there is a probability that the merger may renew or revitalize an industry trend toward concentration; and (3) approval of the merger will contribute to, instead of dispel, uncertainty concerning the government's approach to enforcement of the Celler-Kefauver Act.

With regard to the latter point, the business community is aware that the Commission and the Department of Justice have built their guidelines concerning conglomerate mergers of the product and market extension variety in the dairy, food retailing, and other industries, on the basis of Commission proceedings involving "containment" orders and the Commission's landmark conglomerate merger decisions in *Procter & Gamble*,³ *Beatrice Foods*,⁴ and *General Foods*.⁵

Approval of the Broadway-Hale/Neiman-Marcus coalition violates these guidelines, contributes to national and local market concentration; and offers the prospect of revitalization of a dangerous trend toward concentration, not only in the department store industry, but also in those other industries operating under merger bans.

I share Commissioner Elman's concern, as do other Commissioners, about the Commission's procedures for public disclosure of our actions. In this, as in similar proceedings over the years, the Commission has acted without any opportunity for public consideration of our action. The Commission has been considering, as it should, methods by which its actions may become more open to public scrutiny. In accordance with this view, we should act, with respect to any proposed merger involving a company under a merger "ban," *provisionally*, with *full* before-the-fact disclosure of the views of the majority and minority.⁶

² Mueller, *The Celler-Kefauver Act: Sixteen Years of Enforcement*, Staff of Subcommittee No. 5, House Comm. on the Judiciary, 90th Cong., 1st Sess. (Comm. Print 1967). Dr. Mueller pointed out the decline in merger activity by the leading firms in the dairy and food retailing industries. Figures presently available to the Commission show a similar decline in merger activity in the department store industry since the Commission's orders of 1965 and 1966.

³ Docket No. 6901 (Opinion of the Commission, November 26, 1963) [63 F.T.C. 1465, 1534].

⁴ Docket No. 6653 (Opinion of the Commission, April 26, 1965) [67 F.T.C. 473, 697].

⁵ Docket No. 8600 (Opinion of the Commission, March 11, 1966) [69 F.T.C. 380, 407].

⁶ The Commission *provisionally* accepts consent settlements, permitting public comment

Complaint

75 F.T.C.

ORDER OF MODIFICATION

The Commission being of the opinion that the public interest requires that Part I of the Commission's order of April 14, 1966, should be reopened and modified and Broadway-Hale Stores, Inc., having by letter dated February 7, 1969, which will be treated as part of the record herein, and in lieu of any other procedure provided by a statute administered by the Commission or by the Commission's Rules of Practice for Adjudicative Proceedings, consented to the modification of said Part I of said order of April 14, 1966;

Now, therefore, it is hereby ordered, That Part I of the order of April 14, 1966, be, and it hereby is, modified as follows:

"It is ordered, That, for five (5) years from the effective date of this modified order, respondent, Broadway-Hale Stores, Inc., shall cease and desist from acquiring, directly or indirectly, without first notifying the Federal Trade Commission and obtaining its consent, any department store or other GMAF store, or any interest in capital stock or other share capital, or any assets constituting a substantial part of all of the assets, of any concern engaged in the department store or other GMAF store business in the United States, other than The Emporium Capwell Company."

Commissioners Elman and Nicholson not concurring.