

rial sought has been entered into. This stipulation between counsel was reached on April 15, 1969, and for this reason the hearing examiner recommends that respondent's above-mentioned motion be allowed. For the reasons set out in the request it will be granted. Accordingly,

It is ordered, That the examiner's request be, and it hereby is, granted.

NATIONAL TEA COMPANY

Docket 7453. Order and Opinion, May 20, 1969

Order denying respondent's request for modification of an anti-merger order.

OPINION OF THE COMMISSION

Respondent, National Tea Co., by petition filed March 26, 1969, requests modification of the final order issued in this matter on March 4, 1966. That order prohibits respondent from acquiring the whole or any part of the stock or assets of any firm, partnership or corporation engaged in the retail sale of food products for a period of ten years without the prior approval of the Commission.

Subsequent to the issuance of this order, the Commission, on January 17, 1967, announced its Enforcement Policy with Respect to Mergers in the Food Distribution Industries. Therein, the Commission expressed the view that mergers and acquisitions which satisfy each of three specified criteria do not ordinarily require specific Commission review. In three matters involving retail food chains, settled by consent agreement after the announcement of the Enforcement Policy, the Commission accepted orders which require prior Commission approval for all acquisitions except those satisfying the three announced criteria.

Respondent states that its position is comparable to that of the three retail food chains under consent orders, and it requests that its order be modified so as not to require it to obtain our prior approval for acquisitions meeting the three criteria.

The fact that three other retail food chains are under less stringent orders than respondent is not, of itself, sufficient justification for modification of the order. The order against respondent is the remedy which, on the basis of the facts in the litigated record, the Commission found necessary to correct imbalances in the markets caused by respondent's acquisitions. In finding twenty-four of respondent's acquisitions to be unlawful,

the Commission relied in part on the fact that each was a part of a "cumulative series" of acquisitions that made up a larger whole. Moreover, respondent was the leader in the merger movement in this industry, with its numerous acquisitions substantially increasing concentration in the already concentrated chain store sector of the market. It was under these circumstances that the Commission decided that even minor increases in concentration as a result of acquisitions by this respondent should be carefully examined. As expressed in the concurring statement in this case "[T]he facts presented here by the instant case constitute precisely the type of predictable lessening of competition which the [Clayton] Act was intended to cover and fully justify the imposition of an injunction against respondent from making future acquisitions which is the sole relief ordered here."

The Enforcement Policy statement, relied upon by respondent, does not grant permission for a company to make acquisitions satisfying the three criteria either with or without prior Commission approval. Obviously, the legality of an acquisition meeting these criteria must be determined on the basis of all of the known circumstances.

Respondent has made no showing of a changed condition of fact or law which would warrant the requested modification. It is our opinion that the public interest will best be served by continuing the requirement for prior Commission approval of all retail food store acquisitions by respondent. This, of course, does not mean that respondent will not be permitted to make any acquisitions for the ten-year period. However, viewed against the background of the litigated record, the Commission believes that an acquisition by respondent which satisfies the three criteria may nevertheless have an anticompetitive impact, and that a determination on this issue should be made by the Commission on each acquisition contemplated by respondent. Accordingly, respondent's request will be denied.

Commissioner Elman not concurring.

ORDER DENYING PETITION TO MODIFY FINAL ORDER

This matter having come before the Commission upon respondent's petition, filed March 26, 1969, requesting modification of the final order, and upon the answer of the Director, Bureau of Restraint of Trade, in opposition to said petition; and

The Commission for the reasons stated in the accompanying opinion having determined that the petition should be denied: