

UNITED STATES STEEL CORPORATION*

Docket 8655. Order, March 4, 1971.

Order granting appeals of two third party companies and quashing the subpoenas *duces tecum* issued by hearing examiner directed to said companies.

ORDER RULING ON APPEALS

This matter is before the Commission on the appeal of Colonial Sand & Stone Co., Inc., filed February 1, 1971, and the appeal of Andrew La Grega Ready Mix Corporation and others, also filed on February 1, 1971, both appeals pursuant to Section 3.35 of the Commission's Rules of Practice.¹ The appeal of Colonial is from an order of the hearing examiner, filed January 21, 1971, denying a motion to quash two subpoenas *duces tecum* requested by respondent herein and issued by the examiner on December 4, 1970. The appeal of Andrew La Grega and others is from a similar order denying a motion to quash or limit subpoenas *duces tecum* requested by respondent and issued by the examiner in December 1970. Both appeals challenge the subpoenas as calling for irrelevant information, imposing an oppressive burden of compliance, and threatening disclosure of confidential information. Counsel supporting the complaint have moved for permission to join in these appeals, to the extent that such appeals are based on the lack of relevance of the material sought. Respondent has filed briefs in opposition to the appeals and to complaint counsel's motion.

This matter was remanded to the Commission in *United States Steel Corp. v. Federal Trade Commission*, 426 F. 2d 592 (6th Cir. 1970) for findings of fact and further proceedings relating exclusively to the "failing company" defense. Responding to the remand, the Commission, by its order of September 25, 1970, limited the issues to whether:

- (a) As of January 1963 the financial condition and resources of Certified Industries was so dire that it faced the grave possibility of a business failure;
- (b) Between January 1963 and April 1964 no prospective purchaser other than United States Steel Corporation was interested in acquiring Certified;

*See 81 F.T.C. 629, for order and opinion modifying the initial decision, following remand by U.S.C.A. 6th Circuit, to conform with the views set forth in the Commission's opinion, adopting the modified initial decision following remand, and directing the filing of the findings and conclusions with the court.

¹ Respondent is in error in contending that the appeal should have been brought under Section 3.23 of the rules. Equally without merit is respondent's contention that the appeal was untimely filed. Notice of the examiner's ruling was not received by appellant until January 25, 1971. Therefore, the appeal was filed well within the period allowed by the rules.

(c) "Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings" was "dim or nonexistent" either in January 1963 or in April 1964; and

(d) The U.S. Steel—Certified vertical ties did, in fact, take an unlawful cast as early as January 1963.

The information sought by respondent's subpoena relates generally to sales and purchases of portland cement and ready-mixed concrete by appellants and their general financial condition, from 1964 to 1969, a period following the acquisition by U.S. Steel of Certified. It is respondent's position that this information is relevant to issue "(c)" of the Commission's remand order, *supra*. Specifically, respondent argues, "To prove that a failing company's opportunity for continued competitive viability through bankruptcy proceedings was 'nonexistent' * * * a respondent would logically have to show what in fact would have occurred in such proceedings beyond the date of the acquisition." The information sought by the subpoena, respondent maintains, would show the state of the market, whether it was depressed or deteriorating, for the period after the acquisition. These factors, respondent contends, would be significant to a trustee or receiver confronted with determining what he would and could do with Certified.

It is Colonial's position that the condition of the market subsequent to the acquisition is irrelevant "in view of the Court of Appeal's mandate to determine Certified's status as a failing company by April 30, 1964." But, even assuming that such post-acquisition evidence was relevant, Colonial contends that the information sought by the subpoena has no bearing upon the state of the market, with a possible exception of Colonial's sales of ready-mixed concrete.

Neither of the two decisions leading to the remand of this matter, *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), or *U.S. Steel Corporation v. Federal Trade Commission*, 426 F. 2d 592 (6th Cir. 1970), reached the question of the admissibility of post-acquisition evidence. However, this question is not one of first impression. Fortunately, the Commission has the advantage of hindsight in considering the use of post-acquisition evidence. In 1961 the Commission remanded the proceeding *In the Matter of Procter & Gamble Co.*, 63 FTC 1477, to obtain post-acquisition evidence. Two years later it realized that it had been mistaken and, in its review of the second initial decision, expressed regret at having delayed the matter unnecessarily. It therefore disregarded the post-acquisition data in making its findings, and based its final decision on the record submitted to it prior to remand. In so ruling, the Commission made the following observation:

That effective relief in a Section 7 proceeding becomes increasingly difficult, to the point of impossibility, over time, coupled with the other considerations we

have mentioned, argues in favor of sharply narrowing, wherever possible, the scope of permissible legal inquiry. Clear and relatively simple rules, and the rigorous exclusion of evidence which bears only remotely upon the central concerns of the statute, are essential if Section 7 is not to become a judicial and administrative nullity.

The Circuit Court held that the Commission had erred in failing to give weight to the post-acquisition evidence, *Procter & Gamble Co. v. Federal Trade Commission*, 358 F. 2d 74 (6th Cir. 1966). The Supreme Court, however, reversed the Circuit Court, holding:

Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. * * * The section can deal only with probabilities, not with certainties. * * * And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipency would be frustrated. *Federal Trade Commission v. Procter & Gamble Company*, 386 U.S. 568, 577 (1967).

In the instant matter, respondent, U.S. Steel Corporation, would distinguish this holding from its request for post-acquisition data bearing on the failing company defense. In determining the question of Certified's prospects of surviving bankruptcy, respondent says that it is "unlike the competitive effect test of Section 7" as the latter is "solely one of reasonable probability. * * *" We disagree. A determination of a company's prospects for some form of continued competitive vitality through bankruptcy proceedings must also be based on a prognostication at the time of the acquisition. It would be anomalous to employ the incipency test in judging the competitive impact of an acquisition and then defeat the purpose of that approach by applying a different test for determining the applicability of the failing company defense.

Further, even if we believed that the *Procter & Gamble* holding was inapposite, we would rule that the subpoenas in question be quashed, as the information sought too tenuously relates to the question of Certified's prospects of surviving bankruptcy. We recognize that even tenuous evidence may be admissible if no reliable evidence is otherwise available. But, surely, that is not the case here. Evidence of the state of the market and of Certified's financial strength at the time of the acquisition (or when the illegal ties obtained an "unlawful cast") and the period preceding such date, very clearly will effectively reveal the company's prospects at the time of the acquisition. Furthermore, this tenuous evidence should be rejected for the additional reason that it would very likely open the record to a variety of collateral questions: *e.g.*, what effect did the integrated U.S. Steel-Certified have on the state of the post-acquisition market; was the state of the post-acquisi-