

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

JIM WALTER CORPORATION

Docket 8986. Interlocutory Order, Mar. 30, 1978

Denial of respondent's petition for reconsideration of final order and accompanying opinion, for reopening the proceeding for issuance of an environmental impact statement, for tolling statutory time for filing petition for review, and for oral argument.

ORDER DENYING PETITION FOR RECONSIDERATION AND OTHER
RELIEF

Respondent, Jim Walter Corporation ("Jim Walter") has filed a petition for reconsideration of the Commission's Final Order and accompanying Opinion, for reopening the proceeding to receive certain affidavits, for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review in the court of appeals, and finally, for oral argument on these issues.

Jim Walter's petition for reconsideration seeks modification of the Commission's Final Order so that it may retain Carey-Canadian Mines, Ltd. ("Carey-Canadian"), a Canadian subsidiary of Panacore Corporation ("Panacore"), engaged in the mining of asbestos fiber, as well as the Philip Carey Division plant at Elizabethtown, Kentucky, which is engaged in the manufacture of urethane foam insulation.

The threshold question which must be faced in connection with a petition for reconsideration filed pursuant to Rule 3.55 is whether the petition raises issues which petitioner had a prior opportunity to address before the Commission. Respondent has been on notice since the commencement of this proceeding that, if liability were found, effective relief might encompass divestiture of all of the Panacore assets acquired by the Celotex Corporation.¹ Allowing respondent yet another opportunity to suggest an appropriate remedy in this case would serve to bifurcate the Commission's adjudicative proceedings into a liability phase, concluding upon issuance of a final order, and a remedy phase, commencing with a petition for reconsideration. Hence, for reasons of administrative efficiency and fairness to all parties, respondent's petition for reconsideration and for reopening of the record may be denied as not in accordance with Rule 3.55.

¹ The Administrative Law Judge's order would have required respondent to divest all of the assets of the Philip Carey Division of Panacore, including the Elizabethtown plant. I.D. P. 64-65. Although the Law Judge did not order divestiture of Carey-Canadian, complaint counsel urged on appeal that the Commission order divestiture of Celotex's new Goldsboro plant, as well as all Panacore assets, including Carey-Canadian. CAB at 26-27. Thus, respondent has been on notice from the onset of this litigation that Carey-Canadian might be divested and of possible obstacles to such divestiture, stemming from Canada's Foreign Investment Review Act, 21-22 Eliz. II, c. 46 (Can.), which was enacted on September 12, 1973, more than ten months prior to the issuance of the complaint.

Even considering the merits of respondent's petition, our decision remains the same. Only restoration of a viable competitive entity can mitigate the substantial harm to competition brought about by respondent's acquisition. As we have recently emphasized in a related context, the Commission must typically rely upon an inference that the acquired firm, which was a viable entity prior to its acquisition, is likely to be an effective future competitor after divestiture. *Fruehauf Corporation, Inc.*, Dkt. No. 8972 (Slip Op. at 35-36) (Feb. 22, 1978 [91 F.T.C. 132]); *RSR Corporation*, 88 F.T.C. 873, 894 (1976). Since the passage of time might weaken this inference, it is essential that divestiture incorporate all additions and improvements made to the original assets. That the Elizabethtown plant was under construction by Philip Carey at the time of the acquisition and had not yet begun operations is therefore of little consequence. Its value to a healthy, independent Philip Carey must be presumed in the absence of convincing proof to the contrary.

With respect to Carey-Canadian, Jim Walter highlights in its petition the percentage of Carey-Canadian sales to Philip Carey roofing plants. While such data is clearly material to formulation of an effective remedy, (see Commission Opinion at 49), it only represents part of the picture. As we noted previously, the Philip Carey division has purchased as much as 40 to 55 percent of its fiber needs from Carey-Canadian. Since most of this asbestos is apparently utilized for production of asphalt and tar roofing products, divestiture of Carey-Canadian is necessary to insure Philip Carey's ready access to supply of an essential raw material in addition to its successful reinstatement as a vigorous competitor in the product market found relevant in this case.²

Petitioner further argues that divestiture of Carey-Canadian cannot be accomplished without the approval of the Canadian Government and that political developments in the Province of Quebec, including the threat of nationalization, will be a "substantial negative factor" for prospective purchasers. We do not understand Jim Walter to contend that divestiture of Carey-Canadian is impossible, only that it cannot be accomplished in a facile manner. It is clearly inappropriate at this time to prognosticate on the likelihood of finding a Canadian purchaser for the subject assets or on the possibility of obtaining Canadian approval in the event a non-Canadian purchaser is found. Any insurmountable difficulties which do arise are best considered in the context of compliance.

² Even if the percentage of Philip Carey's output attributed to asphalt and tar roofing products utilizing asbestos is relatively small, the contribution to profit may be proportionately greater. And, of course, that does not take into account Carey-Canadian's own substantial contribution to the viability of Panacore prior to the acquisition by Jim Walter. (See CX-39-0)

Jim Walter has also petitioned the Commission for issuance of a detailed environmental impact statement or a statement as to why an environmental impact statement is not required. In support of its petition, respondent argues that the Commission's order could result in violation of antipollution laws in the event respondent divests to a "notorious polluter." At the outset, we do not believe an environmental impact statement need be prepared in connection with an order issued in an adjudicative proceeding. See Rule 1.82(d). Even were that rule inapplicable, we find nothing here to justify the filing of an impact statement.

Respondent's argument necessarily requires several difficult assumptions. We are required first to assume that potential purchasers will violate the law and second that Federal, state, and local environmental agencies are powerless to prevent transgressions of the law. We are also asked to assume that Jim Walter would divest to such a purchaser and that the Commission would concur in the transaction.

Further, a review of the case law confirms our view that the Commission's order cannot by any stretch of the imagination be characterized as a "major Federal action significantly affecting the quality of the human environment" 42 U.S.C. 4332(2)(c)(1970). The order here represents a partial return to the status quo existing prior to the acquisition. And like divestiture orders generally, the order affects only the ownership of existing plants and facilities; it does not necessarily entail the creation of new capacity or the consumption of additional environmental resources. See *Gifford-Hill & Co., Inc v. FTC*, 389 F. Supp. 167, 175 (D.D.C. 1974), *aff'd*, 523 F.2d 730 (D.C. Cir. 1975); *National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224, 1229-30 (D.D.C. 1976); *Duke City Lumber Co. v. Baty*, 382 F. Supp. 362, 375 (D.D.C. 1974), *aff'd in part*, 539 F.2d 220 (D.C. Cir. 1976).

It is ordered, therefore, that respondent's petition for reconsideration of the Final Order and accompanying Opinion in this proceeding for reopening the proceeding for issuance of an environmental impact statement, for tolling the statutory time for filing a petition for review, and for oral argument is hereby denied.

Chairman Pertschuk did not participate.

IN THE MATTER OF
THE COCA-COLA COMPANY, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8855. Complaint, July 15, 1971 — Final Order, April 7, 1978

This order, among other things, requires an Atlanta, Ga. soft drink manufacturer and three parent bottlers to cease imposing in any manner territorial limitations or class of customer restrictions on its licensed Coca-Cola or allied product bottlers, in connection with the sale or distribution of soft drink products sold in other than refillable containers. The firm is additionally required to provide protection for confidential information submitted by its bottlers.

Appearances

For the Commission: *Raymond L. Hays, Martin A. Rosen, Duncan J. Farmer, Michael J. Bloom and Jeffrey F. Shaw.*

For the respondents: *Gordon B. Spivack, Harry G. Sklarsky and Thomas D. Brislin, Lord, Day & Lord, New York City.*

J. Guy Beatty, Jr., Miller, Martin, Hitching, Tipton, Lenihan & Waterhouse, Chattanooga, Tenn. for Coca-Cola Bottling Co. (Thomas), Inc. and Coca-Cola Bottling Works (Thomas), Inc.

For the intervenors: *Willis B. Snell, William M. Hames, Michael L. Denger, Stephen S. Cowen and Robert W. Clark, III, Sutherland, Asbill & Brennan, Washington, D.C. for The Coca-Cola Bottlers' Association, The Scioto Coca-Cola Bottling Company, Roddy Manufacturing Company, Elberton Coca-Cola Bottling Company, Westminster Coca-Cola Bottling Company, Inc. and Texas Coca-Cola Bottling Company.*

Thomas Matthews, Wald, Harkrader & Ross, Washington, D.C. for Coca-Cola Bottling Company of Los Angeles, Quaker State Coca-Cola Bottling Co. and Detroit Coca-Cola Bottling Company.

Bartlett H. McGuire, Davis, Polk & Wardwell, New York City for The Coca-Cola Bottling Company of New York.

Theodore Kleinman, Zuckert, Scoutt & Rasenberger, Washington, D.C. for Associated Coca-Cola Bottling Co.

John P. Gaither, Witt, Gaither, Richardson, Henniss & Whitaker, Chattanooga, Tenn. for Consolidated Coca-Cola Bottling Co.

Robert N. Nanovic, Nanovic & McKinley, Jim Thorpe, Pa. for Coatesville Coca-Cola Bottling Works, Inc.

William H. Sanders, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo. for The Coca-Cola Bottling Company of Mid-America.