

IN THE MATTER OF

OWENS-CORNING FIBERGLAS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT

Docket C-3061. Complaint, March 30, 1981—Decision, March 30, 1981

This consent order requires, among other things, a Toledo manufacturer of glass fiber products, including glass fiber-based asphalt roofing products, to divest to a Commission-approved buyer within 24 months from the effective date of the order, the four specified asphalt roofing plants acquired from the Lloyd A. Fry Roofing Company in 1977. Further, should the company decide to sell the Trumbull asphalt refinery located adjacent to each divested plant, during the ten-year period following the divestiture, it is required, in certain circumstances, to give the owner of the roofing plant the right of first refusal to purchase. Additionally, the firm is barred for ten years, from acquiring without prior Commission approval, any interest in an asphalt roofing plant located in the "Western Market."

Appearances

For the Commission: *David W. Long.*

For the respondent: *James T. Halverson and Gregory Bentley,*
Shearman & Sterling, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Owens-Corning Fiberglas Corporation ("OCF"), a corporation subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), through the acquisition of certain assets of Lloyd A. Fry Roofing Company ("Fry") and that a proceeding in respect thereof is in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Asphalt roofing products* means saturated felt, roll roofing and

asphalt shingles. *Asphalt roofing products* specifically excludes accessory items such as asphalt cements, adhesives, primers and mineral granules.

(b) *Saturated felt* consists of a dry felt base, made from rags, wood and other cellulose fibers or from glass fiber or asbestos, which is saturated, coated, or impregnated with an oxidized asphalt or tar saturant, but is otherwise untreated.

(c) *Roll roofing* is made from saturated felt by applying an additional coating of more viscous, weather-resistant oxidized asphalt. *Roll roofing* may be either mineral or smooth surfaced. *Roll roofing* includes, *inter alia*, the products known as *cap sheets* and *base sheets*.

(d) *Asphalt shingles* are mineral-surfaced roll roofing which have been machine-cut into rectangular strips or other shapes.

(e) The *Western market* consists of the states of California, Oregon, Washington, Arizona, Nevada, Utah and Idaho.

II. OWENS-CORNING FIBERGLAS CORPORATION

2. Respondent OCF is a corporation organized under the laws of the State of Delaware, with its principal place of business at Fiberglas Tower, Toledo, Ohio.

3. OCF is the nation's largest manufacturer of glass fiber products, including glass fiber insulation and glass fiber-based asphalt roofing products, bathroom fixtures, non-corrosive tanks, and large diameter glass fiber-reinforced tanks. In fiscal year 1979, OCF had consolidated net revenues of approximately \$2.26 billion and consolidated net income of approximately \$109 million.

4. At all times relevant hereto, OCF sold and shipped asphalt roofing products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

III. LLOYD A. FRY ROOFING COMPANY

5. Fry was a corporation organized under the laws of the State of Delaware, with its principal place of business at 5818 Archer Road, Summit, Illinois. Prior to the acquisition, Fry was the nation's largest privately-held manufacturer of asphalt roofing products.

6. At all times relevant hereto, Fry sold and shipped asphalt roofing products throughout the United States, engaged in commerce within the meaning of the Clayton Act, as amended, and

engaged in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. THE ACQUISITION

7. On or about April 20, 1977, OCF acquired certain assets, including the asphalt roofing products assets, of Fry and two of its subsidiaries for approximately \$101 million. Post-acquisition adjustments raised the final purchase price to approximately \$108 million.

V. TRADE AND COMMERCE

8. Asphalt roofing products constitute a competitively significant line of commerce, or market.

9. The Western market is a relevant geographic market for the manufacture and sale of asphalt roofing products.

10. The Western market is substantially concentrated, with the four largest sellers accounting for approximately 57 percent and the eight largest sellers accounting for approximately 87.2 percent of asphalt roofing products sales in 1977.

VI. COMPETITION

11. Prior to the acquisition, OCF and Fry were substantial actual competitors in the manufacture and sale of asphalt roofing products in the Western market.

VII. EFFECTS OF THE ACQUISITION

12. The effects of the acquisition include but may not be limited to the following:

(a) actual competition between OCF and Fry in the sale of asphalt roofing products was eliminated;

(b) actual competition between competitors generally in the sale of asphalt roofing products may be lessened;

(c) Fry was eliminated as an actual substantial independent competitor in the sale of asphalt roofing products; and

(d) concentration in the Western market was increased substantially, diminishing the possibilities for eventual deconcentration of that market.

VIII. VIOLATIONS CHARGED

13. The effect of the acquisition of Fry by OCF may be substan-

tially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

14. The acquisition of Fry by OCF constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioner Pertschuk did not participate.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of certain assets of Lloyd A. Fry Roofing Company by Owens-Corning Fiberglas Corporation ("OCF") and OCF having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge OCF with violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

OCF, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by OCF of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by OCF that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that OCF has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

ORDER

For the purpose of this Order the following definitions shall apply:

1. *OCF* means Owens-Corning Fiberglas Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices at Fiberglas Tower, Toledo, Ohio, and its successors and assigns.
2. *Fry* means Lloyd A. Fry Roofing Company, certain assets of

which (as well as certain assets of Trumbull Asphalt Company of Delaware and Summit Wholesale Supply Company) were acquired by OCF pursuant to an agreement dated April 20, 1977.

3. *Plant* means all properties and assets acquired and received from Fry, consisting of all real and personal property described in Paragraphs 4.8 and 4.9 of the Sale of Assets Agreement dated April 20, 1977, among OCF, Fry, Trumbull Asphalt Company of Delaware and Summit Wholesale Supply Company and in Exhibits F-H to such agreement, together with all additions and improvements thereto, that are located at:

- (a) Compton, California;
- (b) Portland, Oregon;
- (c) San Leandro, California; and
- (d) Woods Cross, Utah;

provided, however, that the term *Plant* does not include those assets or properties disposed of by OCF in the ordinary course of the business of operating or renovating such facilities for the manufacture of asphalt roofing products; and *provided further* that the term *Plant* does not include such properties or assets as would otherwise be deemed part of the Plant where the Eligible Person acquiring the Plant elects, in its sole discretion, but subject to the approval of the Commission, not to acquire those properties or assets; and *provided further* that the term *Plant* shall include only the land, properties and assets so acquired and received from Fry as are approximately indicated as within the areas bounded by solid red lines on the attached maps.

4. *Person* means any individual, corporation, partnership, joint venture, trust, unincorporated association, or other business or legal entity.

5. *Asphalt Facility* means a plant operated by OCF's Trumbull Asphalt Division, which produces *inter alia* oxidized roofing asphalt.

6. *Asphalt Roofing Plant* means a plant primarily engaged in the manufacture of *asphalt roofing products* as such products are defined in Paragraphs I(1)(a)-(d) of the Complaint.

7. *Eligible Person* means any Person approved by the Commission. No Person shall be considered for status as an Eligible Person unless the Commission is satisfied that the Person has the capacity and intention to operate the Plant(s) to be acquired as a facility or facilities for the manufacture of asphalt roofing products.

8. *Divest* means any act by which OCF sells, transfers, conveys or relinquishes ownership, possessory interest and control of the Plants.

I.

It is ordered, That within twenty-four (24) months of the effective date of this Order OCF shall Divest the Plants subject to the terms of this Order. The Plants may be Divested either separately or in any combination.

II.

It is further ordered, That the divestitures of the Plants shall be made only to one or more Eligible Persons and that OCF shall submit the proposed divestitures to the Commission for its prior approval.

III.

It is further ordered, That pending the divestitures required by this Order, OCF shall not cause, and shall use its best efforts to prevent, the deterioration of the Plants in a manner that impairs the marketability of any such Plants, normal wear and tear excluded. OCF may, but shall not be required to, make capital expenditures for the improvement of the Plants. Nothing in this Order shall prevent OCF from operating or furloughing employees at the Plants in a manner consistent with normal business practice, comparable to the manner in which it operates or furloughs at its other Asphalt Roofing Plants, pending the divestitures required by this Order.

IV.

It is further ordered, That if, at any time during the ten (10) years following the divestiture of each Plant, OCF desires to sell the Asphalt Facility located adjacent to such Plant to a third-party not owned directly or indirectly more than 5% by OCF, then OCF shall, after reaching agreement with such third-party as to the price, terms and conditions to be included in the contract of sale between such third-party and OCF but prior to executing such contract of sale, first offer to sell such Asphalt Facility to whichever Person then owns such Plant for the same price, and upon the same terms and conditions, as are shown in such proposed contract of sale with such third-party; *provided further,* that for the purposes of this Paragraph "OCF" shall include any subsidiary in which the voting stock is more than 50 percent owned directly or indirectly by OCF.

V.

It is further ordered, That for a period of ten (10) years from the date of this Order, OCF shall not directly or indirectly acquire, through purchase, lease or such other transaction as would confer ownership, possessory interest or control of, any Asphalt Roofing Plant located in the states of California, Oregon, Washington, Arizona, Nevada, Utah or Idaho, without the prior approval of the Commission.

VI.

It is further ordered, That OCF shall within ninety (90) days from the effective date of this Order and every ninety (90) days thereafter until the divestitures required by this Order are completed submit in writing to the Commission a verified report setting forth in detail the manner and form in which OCF intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as the Commission may from time to time reasonably require.

VII.

It is further ordered, That OCF notify the Commission at least thirty (30) days prior to effecting any proposed change in corporate respondent which may affect compliance with the obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation.

VIII.

It is further ordered, That OCF shall, upon written request of the Secretary of the Commission or the Director of the Bureau of Competition of the Commission made to OCF at its principal office for the purpose of securing compliance with this Order, and for no other purpose, permit duly authorized representatives of the Commission or the Director of the Bureau of Competition, subject to any legally recognized privilege:

(1) reasonable access during the office hours of OCF, which may have counsel present, to those books, ledgers, accounts, correspondence, memoranda, and other records and documents in OCF's possession or control which relate materially and substantially to any matter contained in this Order; and

(2) an opportunity, subject to the reasonable convenience of OCF, to interview officers or employees of OCF, who may have counsel present, regarding such matters.

The foregoing provision shall not be interpreted to provide any access for the Commission to records relating to any of the business activities of OCF other than the Plants and Asphalt Facilities subject to this Order. Access hereunder to Asphalt Facilities records shall be limited to records relating solely to compliance with the requirements of Paragraph IV of this Order.

IX.

Nothing in this Order shall be deemed or construed to affect any statutory rights to confidential treatment of documents or information provided to the Commission by OCF, as such rights are accorded by the Federal Trade Commission Improvements Act of 1980 or other statute.

Commissioner Pertschuk did not participate.

IN THE MATTER OF

THE COCA-COLA COMPANY, ET AL.

Docket 8855. Interlocutory Order, April 1, 1981

Dismissing proceeding without prejudice to reopen under the standards of the Soft Drink Interbrand Competition Act.

ORDER

Respondents filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's cease and desist order issued herein on April 7, 1978. Subsequently, Congress enacted the Soft Drink Interbrand Competition Act, Pub. Law No. 96-308, 94 Stat. 939 (1980), which established standards for judging the challenged restraints which differ from those under which the Commission tried and decided these proceedings. Therefore, in September 1980, the Commission requested the Court of Appeals to set aside the Commission's order and remand these proceedings to the Commission for dismissal, without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act. By an opinion and judgment dated February 5, 1981, the Court of Appeals granted the Commission's request.

Now, therefore, *it is hereby ordered*, in accordance with the opinion and judgment of the Court of Appeals, that this proceeding be, and hereby is, dismissed, without prejudice to any future proceedings under the standards of the Soft Drink Interbrand Competition Act.

Commissioner Pertschuk did not participate.