

Interlocutory Order

99 F.T.C.

IN THE MATTER OF
JIM WALTER CORPORATION

Docket 8986. Interlocutory Order, March 15, 1982

ORDER DEFINING THE SCOPE OF THE PROCEEDINGS ON REMAND AND
DIRECTING COMPLAINT COUNSEL TO SUBMIT A PROPOSED AMENDED
COMPLAINT

On March 13, 1981, the Commission directed complaint counsel and respondent to file briefs presenting their views as to further disposition of this matter.

Complaint counsel argue that under the standards enunciated by the reviewing court, *Jim Walter Corp. v. FTC*, 625 F.2d 679 (5th Cir. 1980), staff could prove in further hearings the existence of two relevant geographic markets: (a) the 26-state area extending from Texas to and including New York and Massachusetts; and (b) the 41 states east of the Rocky Mountains. Complaint counsel also argue that the Commission's prior product market determinations were correct and continue to be correct in both of the proposed geographic markets and that the acquisition violates Section 7 of the Clayton Act, 15 U.S.C. 18, in either or both geographic markets. Complaint counsel also assert that their case would not be affected even if elastomeric roofing materials were included in the product market,¹ and conclude by asserting that a new hearing would be in the public interest both because the acquisition assertedly violates Section 7 and because complaint counsel think there is a strong likelihood of effective relief.

Respondent, Jim Walter Corporation ("JWC"), on the other hand, argues that principles of fairness and finality, as well as the Commission's rules, require a dismissal of the complaint. Even if a dismissal is not required, JWC argues that new evidentiary hearings are not appropriate inasmuch as they would necessarily entail extended discovery and the consideration of current evidence relating to market definition (product and geographic), market share data and the structure of the market, thereby, in JWC's view, causing considerable waste of resources. JWC further argues that the 26-state area and 41-state area asserted by complaint counsel are not relevant markets within which to assess the effects of the acquisition and that, in any event, complaint counsel have shown neither an ability to prove either actual or potential anticompetitive effects nor the appropriateness of divestiture as a remedy.

¹ "Elastomeric roofing materials" consist of solid-preformed sheets and liquids. The term includes the synthetic rubbers neoprene and Hypalon as well as acrylic, butyl, rubberized asphalt, urethane and silicone.

The Commission rejects JWC's assertion that dismissal of the complaint is required. The court of appeals "vacate[d] the FTC decision and remand[ed] the case for reconsideration in light of [the court's] opinion" and "for such proceedings * * * as may be appropriate." 625 F.2d at 684, 678. In so doing, the court suggested several areas of further inquiry. Indeed, any fair reading of the court's opinion shows that the court fully expected that the remand might involve a new trial of some, or several, issues. 625 F.2d at 681, 683-684. Settled principles of administrative law establish that this disposition of the case was well within the court's discretion. *E.g., Ford Motor Co. v. NLRB*, 305 U.S. 364, 372-375 (1939).² While JWC's argument for dismissal is not a frivolous one, the decision whether to dismiss or proceed must, given the court's mandate allowing the Commission to proceed, depend upon whether the Commission has reason to believe both that the challenged conduct violates the law and that further proceedings are in the public interest.

In the present case, the Commission has considered the court's decision, as well as the arguments and factual statements set out in the briefs of the parties submitted in response to the Commission's Order of March 13, 1981. We have determined that the present record, and the factual assertions made in the parties' briefs, give the Commission reason to believe that both (1) asphalt and tar roofing products and (2) asphalt and tar proof products as well as elastomeric roofing materials are appropriate markets within which to assess the effects of the acquisition in both (1) the 26-state area and (2) the 41-state area advanced by complaint counsel. The Commission also has reason to believe that the acquisition may have had, or may cause, anticompetitive effects in all of these markets.

The Commission also believes that the public interest would be best served by holding further hearings to determine both the legality of the acquisition and, should the transaction be found illegal, the appropriate remedy. Given the time elapsed since the acquisition was consummated, the Commission has determined that it is appropriate on remand for the Administrative Law Judge to focus upon the industry as it has developed in the intervening years and, should the acquisition be found unlawful, to consider what, if any, remedy is most appropriate, given the present structure of the market(s).³ See *e.g., United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597-598 (1957).

² The Commission similarly rejects JWC's argument that Commission Rule 3.55, 16 C.F.R. 3.55, requires dismissal. As JWC points out, Rule 3.55 governs petitions for reconsideration of Commission decisions. The Rule has nothing to do with the disposition of this matter on remand.

³ Post-acquisition evidence is solicited on remand here because of our decision that evidence of a new product line—elastomeric roofing materials—in addition to the tar and asphalt roofing materials should be included in the

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In view of the comments by the court of appeals regarding the possible interest of *Celotex Corporation*, 625 F.2d at 681, the Commission believes Celotex should be joined as a respondent on remand. Also, while the original complaint in this matter alleged only a violation of Section 7 of the Clayton Act, 15 U.S.C. 18, the Commission believes that on remand the Administrative Law Judge should consider the legality of the acquisition under Section 5 of the FTC Act, 15 U.S.C. 45, as well as under Section 7.

In light of the Commission's determination to (1) order retrial of the case; (2) join Celotex Corporation as a party; (3) allege a possible violation of Section 5 of the FTC Act; (4) allege two relevant product markets and adverse competitive effects in two geographic markets; and (5) evaluate the post-acquisition effects of the acquisition, the administrative complaint must be amended. However, Commission Rule 3.15(a), 16 C.F.R. 3.15(a), plainly provides that the scope of the required amendments is beyond the authority of an Administrative Law Judge to order and amendments such as those required by this Order may be issued only by order of the Commission, upon certification by an Administrative Law Judge. In the present case the matter is pending before the Commission on remand from the court of appeals and the parties have already submitted briefs discussing the disposition of the case on remand. Although the present posture of the case would thus allow the Commission to prepare and direct the issuance of an amended administrative complaint, nonetheless the Commission believes it would be better practice for complaint counsel to prepare a proposed amended complaint that is consistent with the terms of this Order. Because this matter is already before the Commission, it makes no sense for the amended complaint to be certified to the Commission by an Administrative Law Judge. Accordingly, to avoid unnecessary duplication, this Order instructs complaint counsel to submit, within 14 days, directly to the Commission, a proposed amended complaint which the Commission might then direct the Secretary to issue and serve. It also provides respondent an opportunity to address the proposed amendments in writing. Accordingly,

It is hereby ordered That within 14 days after the issuance of the Order complaint counsel submit to the Commission, and serve upon

assessment of the anticompetitive effects of this acquisition. Although post-acquisition evidence should not be given "too much weight," *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965), principally because it is within the power of the acquiring company to manipulate the acquired assets in a manner favorable to its case, *United States v. Continental Can Co.*, 378 U.S. 441, 463 (1964), it is nevertheless appropriate to consider post-acquisition evidence in particular Section 7 cases. There is authority for relying on "the best information available" in assessing a merger as old as this one (ten years). *Consolidated Foods Corp.*, 380 U.S. at 605-06 (Stewart, J. concurring in the judgment).

counsel for Jim Walter Corporation, a proposed amended complaint that is consistent with this order;

It is further ordered That if Jim Walter Corporation wishes to address the proposed amended complaint, it shall file its comments within 14 days of service upon it of the proposed amended complaint; and

It is further ordered That upon issuance of the amended complaint this matter is remanded to the Administrative Law Judge to conduct further proceedings consistent with the opinion of the court of appeals and this Order.

Commissioner Pertschuk did not participate.

Modifying Order

99 F.T.C.

IN THE MATTER OF

HERCULES INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT*Docket C-1794. Final Order, Sept. 23, 1970—Modified Order, Apr. 8, 1982.*

This order reopens the proceeding and modifies the Commission's order issued on September 23, 1970, 77 F.T.C. 1242, 35 F.R. 16366, by deleting Paragraphs IV and VIII from the order, so as to allow the company to acquire domestic rope producers without prior Commission approval and to relieve respondent of the obligation of notifying the Commission of any change in the corporate organization.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

By petition filed December 1, 1981, respondent Columbian Rope Company ("Columbian") requests, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), that Paragraph IV and VIII of the Commission's Order issued in this matter on September 23, 1970, be modified so that Columbian no longer requires the Commission's prior approval to acquire, directly or indirectly, the whole or any part of the stock, share capital or assets of any company involved in the manufacture and sale of rope in the United States. Columbian also sought to delete the only other order provision binding Columbian, Paragraph VIII, which requires notice of changes in corporate organization.

Pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, the petition was placed on the public record for thirty days. No comments were received.

Upon consideration of the petition and its supporting materials the Commission finds that elimination of Paragraphs IV and VIII is in the public interest.

Accordingly, *it is ordered*, that the proceeding be, and it hereby is, reopened for the purpose of modifying the Order entered therein;

It is further ordered, That the Paragraph IV and Paragraph VIII shall terminate upon service of this order.