

IN THE MATTER OF
THE KROGER COMPANY

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

Docket 9102. Final Order, Sept. 25, 1981—Modifying Order, Dec. 29, 1982

As agreed to by the FTC and The Kroger Company, this Order modifies the Commission's Final Order issued on September 25, 1981 (98 F.T.C. 639). The Modified Final Order prohibits Kroger from advertising survey-based food price comparisons that refer to a particular city, metropolitan area or competitor, unless: (1) employees responsible for pricing Kroger's products do not know which items have been selected for the survey prior to its completion; and (2) the claim does not generalize the results of the survey to a product category that has been systematically excluded from the survey, unless such generalization clearly and conspicuously discloses that the product category has been excluded from the survey. The Order, which will remain in effect until December 31, 1984, dismisses the allegations contained in Paragraphs Six B and D, and Seven B and D of the complaint.

MODIFIED FINAL ORDER

The Kroger Company having filed in the United States Court of Appeals for the Eleventh Circuit a petition for review of the order to cease and desist issued herein on September 25, 1981; and the Commission and the Kroger Company having subsequently agreed upon the provisions of a final order modifying the order of September 25; and the Commission having the authority to modify its order by virtue of the fact that the record in the proceeding has not been filed with the court of appeals (*see* 15 U.S.C. 45(b) and Commission rule 3.72(a)); accordingly,

It is ordered That the order of September 25, 1981, be, and it hereby is, modified in accordance with the parties' agreement to read as follows:

ORDER

I.

A. *Respondent* means the Kroger Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, acting directly or indirectly through any corporation, subsidiary or other device in the sale of food, household items and other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

b. *Survey-based food price comparison* means an advertised claim

that refers to a survey of respondent's and any competitor's food prices and that projects the result obtained from the survey sample to items not included in the survey.

II.

It is ordered, That respondent cease and desist from advertising any survey-based food price comparison that refers, directly or indirectly, to a particular city, metropolitan area or competitor (or competitors) by name or other designation unless:

A. Employees responsible for pricing respondent's merchandise do not know which items have been selected for the survey prior to its completion, and

B. The claim does not generalize the results of the survey to a product category that has been systematically excluded therefrom; *provided, however,* that no such generalization will be deemed to extend to any product category whose systematic exclusion is disclosed clearly and conspicuously in respondent's advertisements.

III.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a written report setting forth in detail the manner and form in which it has complied, or intends to comply, with this order.

IV.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporation 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 which may affect compliance obligations arising out of this order.

V.

It is further ordered, That the provisions of this order shall remain in effect until December 31, 1984.

VI.

It is further ordered, That the allegations contained in Paragraphs

Six B and D, and Seven B and D, of the Complaint be, and they hereby are, dismissed.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I view the willingness of a majority of the Commission to accept what is essentially an illusory order as a product of the sustained ideologically-based attack on this case by the Chairman and the Director of the Bureau of Consumer Protection in connection with their proposals for weakening the Commission's deception and advertising substantiation standards.

Before I explain the inadequacies of the modified final order agreed to by Kroger and the Commission, I believe it is useful to review briefly the basic facts of the case to remind the Commission that its initial finding of liability and accompanying order were quite reasonable.

Kroger ran a lengthy and remarkably successful advertising campaign relying on its own price survey, comparing it to competitors. As those familiar with the history of *advertised* supermarket price surveys know, there is a powerful tendency to structure such surveys to produce results favorable to the advertiser. In Kroger's case, this incentive resulted in a number of survey characteristics. First, its comparison was limited to "dry groceries"—that is, fresh meat and produce were excluded though the record showed Kroger tended to be higher in those categories; second, the person in each marketing area who set prices for the items, the "grocery merchandiser," was responsible for selecting the items to be placed in the survey; third, in some cities, the grocery merchandiser systematically put items in the survey that Kroger was buying from manufacturers on special promotion and in turn temporarily reducing at retail.

Kroger almost always "won" its own survey and emphasized in weekly newspaper ads that it had again been shown to have the lowest prices in each metropolitan area. There is something of an abstract debate in the Commission's opinion about whether Kroger claimed to have *more* lower prices, or the *most* lower prices, compared to its competitors, but the key claims found by the Commission were that it was cheaper overall to shop at Kroger and that Kroger had a survey which backed up that claim. 98 F.T.C. 639, 736 (1981).

At the same time Kroger was conducting its advertised survey, it was regularly conducting two internal surveys for its own management. One of these was a market basket survey—that is, a survey

which showed the cost of a typical "market basket" of food, purchased on a weekly basis for a household, compared with Kroger's competitors. The record evidence indicates that this market basket had all the earmarks of a reliable survey. The persons who chose the items did some rough and ready—but reasonable—weighing of the items and changed the items over time. Most importantly, they had no incentive to manipulate the items because the results were for internal use only.

The record in the case shows how Kroger's *internal* survey stacked up with its *advertised* survey. In general, Kroger did relatively well in the grocery category, and not so well in meat and produce. For example, of all the market basket checks conducted by Kroger in Ft. Wayne, Indiana, it was lowest on grocery items five out of nine times but lowest on produce two out of nine times and lowest on meat one out of nine times. The patterns in the other cities are similar. 98 F.T.C. at 683-86. Yet virtually every week, Kroger's advertised survey proclaimed it to be the chain with the lowest prices. The record contains numerous examples where both of Kroger's internal surveys—the market basket comparison and a comparison of the number of items on which Kroger was lower—showed Kroger to be higher than others at the same time the advertised survey showed Kroger to be lowest. (See CX 813)

In response to these practices the Commission issued an order covering any future advertised survey upon which Kroger bases a claim comparing its prices to those of its competitors in a particular area. That order, in its key parts, said that if Kroger advertised such a survey, it would have to: 1) make sure the items were selected in a representative way and that employees responsible for pricing products did not know the items on the survey; and 2) make sure claims based on the survey fairly represented the results of the survey (for example, if major categories of food were left out, the claim would have to make that clear). There is little doubt that Kroger's own internal survey could have met those requirements. It is inconceivable to me that those standards are unreasonable and that American consumers would not feel misled if they were violated.

Yet most of the modest but fundamental standards contained in the final order have been jettisoned by the Commission in the settlement with Kroger, apparently on some theory that meeting them would disrupt the flow of "useful" information. It is a highly dubious proposition that advertisements of surveys in which items aren't chosen representatively or which draw conclusions which do not fairly represent the actual survey are particularly useful for

anything. Apparently believing that elimination of these requirements did not weaken the order enough, the Commission also finally gave in to Kroger's central demand for an automatic "sunsetting" of the order after a short period of time.

Neither the record, the reasonable exercise of our remedial discretion, nor considerations of competitive equity compel these major concessions and modifications to the final order that was once deemed by the Commission to be a reasonable and restrained resolution of this case. The majority opinion authored by Commissioner Clanton set forth clear justification for the prescribed sampling methods and survey misrepresentation provisions that are deleted from the modified order. Nothing has persuaded me since that time that these provisions are now either unnecessary or unwarranted. As explained in some detail in the opinion, the prescribed sampling methods provided reasonable flexibility and specificity to Kroger on suitable means of sampling for its price surveys. Also, the general fencing-in prohibition on survey misrepresentations was reasonably related to the core deception in Kroger's price patrol, *e.g.*, overall price claims which were misleading because they failed to disclose the systematic exclusion of large product categories from the survey.

With respect to the two-year sunset provision, there are better ways of responding to any legitimate concerns of potential competitive inequity that Kroger may have from being "singled out" by the Commission. These could include serving the order on Kroger's competitors under the Commission's Section 205 authority, and reconsidering the order in the future should the Commission demonstrate a refusal to hold Kroger's competitors to the same standards. These alternatives would strike a much better balance between the agency's interest in preserving the integrity of its record findings and enforcement credibility in this case, with Kroger's interest in avoiding unfair competitive injury. With the inclusion of the short-term sunset provision, the order loses all credibility in the industry, assuring that no Kroger competitor will feel obliged to obey it, even if placed on notice of its requirements by the Commission. Further, and even more damaging to the Commission's enforcement interests, such an automatic sunset provision (which to my knowledge is virtually unprecedented in consumer protection cases) would create an irresistible temptation for other respondents to demand similar sunset relief on competitive equity or other grounds, particularly in this era of deregulation and decreased enforcement activity. If the basis of the Commission's concession to Kroger's demand for automatic sunset protection is that a majority of the

Commission no longer believes in its own findings of liability or its ability to defend them on appeal, then it would be more straightforward simply to admit mistake and dismiss the case. At the very least, that would avoid the dangerous precedent that will be set for our consumer protection mission by acceptance of this sunset provision.

As my colleagues know, I was not adverse to settlement of this case on justifiable grounds. But I am not so anxious to settle that I would acquiesce to settlement on these terms. Yet it seems to me that it is precisely such an overwhelming urge to settle this case at all costs that has driven the Commission toward acceptance of this modified order.

Because I am not prepared to pay such a price, I am dissenting from the Commission's agreement with Kroger.

**Sale of cement manufacturing plant would be in compliance with
divestiture pursuant to proposed Consent Order. [811 0158,
Canada Cement Lafarge Ltd.]**

August 18, 1982

Dear Mr. Munin:

This is in response to your request of [May 18, 1982], on behalf of Canada Cement Lafarge Ltd. (CCL), for an advisory opinion pursuant to Sections 1.1-1.4 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. 1.1-1.4 (1982). The Commission has carefully reviewed your application and has concluded that, should the Agreement Containing Consent Order (File No. 811-0158, In the Matter of Canada Cement Lafarge Ltd.) ultimately be accepted, sale by General Portland (GP) of the Chattanooga Plant to RC Cement (RC) (or to the newly-formed affiliate described in your Application) would be in compliance with Paragraphs I through IV of the Order.

Rule 1.1(a) (2) provides that an advisory opinion may be issued on a proposed corporate acquisition so long as it is not the subject of a current proceeding (Section 1.1(b) (1)). Your proposed sale to RC falls within Rule 1.1, since that sale is not currently under investigation. But, inasmuch as the sale is intended as a divestiture pursuant to a consent order, your application has presented an unusual procedural issue. You request prompt approval of the sale; however, the consent agreement is still before the Commission, pending the sixty days' public comment period required by Section 2.32 of the Rules of Practice following its provisional acceptance by the Commission. On the other hand, the thirty days' public comment period required by Section 2.41(f) of the Rules of Practice for applications for approval of proposed divestitures cannot commence in the absence of an outstanding order.

Nevertheless, your application presents persuasive reasons for Commission approval of the purchaser before the end of the public comment period applicable to the provisionally accepted order. The Commission has determined that issuance of an advisory opinion concerning the acceptability of RC as a purchaser, subject to eventual approval of the consent order itself, is appropriate at this juncture. Publication of CCL's application and the attendant press release on May 28, 1982, have provided the thirty days' public comment that would have been required by Rule 2.41(f). This Advisory Opinion, however, in no way commits the Commission to finally accept the consent order, nor does it address the legality of the sale to RC under any order, rule or law other than the consent order.

The Commission's conclusion that the sale of the Chattanooga plant to RC would conform to the requirements of Paragraphs I-IV of the consent order is based in part on data supplied by CCL in support of the application and in part on data obtained by the Commission's staff in the investigation of CCL's acquisition of GP and other recent acquisitions in the cement industry. In November 1981, following an investigation of CCL's proposed acquisition of GP, CCL and attorneys of the Bureau of Competition entered into an Agreement Containing Consent Order whereby CCL would be required to sell either GP's Chattanooga, Tennessee, plant within eighteen months of the date on which the Order becomes final, or CCL's Demopolis, Alabama, plant within an additional twelve months.* The Commission has provisionally accepted this Agreement, and the consent order it contained has been placed on the public record for comment. In the interim, CCL has negotiated an agreement with RC to purchase the Chattanooga plant along with certain of its raw material sources and distribution terminals in Atlanta and Columbus, Georgia and Knoxville, Tennessee. The letter of intent signed by GP and RC on May 4, 1982, provides that if the sale is not consummated by a certain date, RC may withdraw from its agreement to purchase the assets in question. RC is currently the only potential purchaser contacted by GP who is pursuing purchase of the Chattanooga plant.

RC is a St. Louis-based holding company which owns 100% of the stock of River Cement Company (River). River produces cement in Missouri and ships it to distribution terminals along the Ohio and Mississippi Rivers. River does not appear to compete directly with the Chattanooga plant of GP. Although both firms sell cement in Tennessee, River's sales from its terminal in Memphis, are concentrated in western Tennessee and the Chattanooga plant sells in the eastern part of the state. Based on available data, the Commission finds that the sale of GP's Chattanooga plant to RC would probably not have a substantial anticompetitive effect in any relevant market.

River is an experienced cement producer that may be expected to become a strong competitor of CCL's Demopolis plant in the area served by the Chattanooga plant.

As noted above, your application requesting this Advisory Opinion has been placed on the Commission's public record in accordance with Section 1.4 of the Commission's Rules, 16 C.F.R. 1.4 (1982). Your separate request, pursuant to Rule 1.4, for continuing confidential treatment of the information listed on pages 6 and 7 of the non-public version of your application, has been considered by the

* The Bureau of Competition investigation had shown that GP's plant at Chattanooga and that of CCL at Demopolis are direct competitors in the sale of portland cement in southeastern Tennessee, Alabama, Georgia, and the northern Florida panhandle.

Commission. The Commission will not disclose the above described information without giving CCL ten days advance notice of intended disclosure, as required by Section 6(f) and Section 21(c) of the Federal Trade Commission Act as amended, 15 U.S.C. 46(f), 57-b-2(c).

By direction of the Commission.

Application for Advisory Opinion

May 18, 1982

General Portland Inc. ("GP"), an indirectly wholly-owned subsidiary of Canada Cement Lafarge Ltd. ("CCL"), respectfully applies to the Federal Trade Commission (the "Commission") for an advisory opinion pursuant to Section 1.1(a) (2) of the Rules of Practice and Procedure issued by the Commission (the "Rules"), relating to a course of conduct which GP currently proposes to pursue. Moreover, for the reasons stated herein, GP requests that this application be given EXPEDITED TREATMENT in being placed on the public record for a 30-day public comment period and in being acted upon by the Commission following the end of that public comment period.

A. Background.

On October 2, 1981, CCL (through a subsidiary) made a cash tender offer for any or all of the outstanding common stock of GP. On November 13, 1981, CCL announced that it had purchased 4,870,245 shares of GP stock and by November 20, 1981, CCL held 93.1% of such stock.

Prior to the acquisition of the GP stock, the staff of the Commission initiated an investigation of the proposed acquisition of GP by CCL. CCL, Lafarge Coppee S.A. (the 54% parent of CCL) and the Commission staff signed an agreement containing a consent order (the "Consent Order") settling the investigation on November 11, 1981. The Consent Order will be binding on CCL, Lafarge Coppee and their subsidiaries, including GP.

The Consent Order still has not been provisionally accepted by the Commission or placed on the public record for comments, more than six months after it was signed. In light of the 60-day public comment period required for proposed consent orders under the Rules, the length of time for the Commission to complete its internal processes of reviewing the Consent Order, responding to any public comments and finally acting upon the Consent Order, and any delays that may be inherent in the Commission's summer schedule, it appears unlikely to GP that the Consent Order will be issued in final form before September, even if the Consent Order is placed on the public record by June 1 (only two weeks from now).

Since the Consent Order was signed, GP has been actively searching for potential buyers for the Chattanooga cement plant of GP (the "Chattanooga Plant"), so as to be able to divest the Chattanooga Plant in compliance with Articles I through IV of the proposed Consent Order. Such a buyer has been found and a letter of intent signed by it and GP on May 4, 1982: RC Cement Company ("RC Cement"). GP believes that the Commission will find RC Cement to be a highly acceptable buyer for the Chattanooga Plant.¹

However, GP believes that it is extremely important to obtain a Commission determination prior to June 30, 1982 that *if* the Commission ultimately issues the Consent Order, RC Cement would be an approved buyer for the Chattanooga Plant under the Consent Order, and that the prior sale of the Chattanooga Plant to RC Cement or its newly-formed affiliate would be in compliance with Articles I through IV of the Consent Order, so that a sale may be made to RC Cement by June 30.

A delay in obtaining such a Commission determination until the Consent Order itself becomes final—a delay of at least two or three months after June 30—will significantly increase the risks of long-term harm to the Chattanooga Plant's competitive health and that unexpected developments in the U.S. economy or the U.S. cement industry might result in the loss of this highly desirable buyer. Therefore, for the reasons stated in more detail below, GP respectfully requests an advisory opinion from the Commission answering the following question:

If the Federal Trade Commission ultimately issues a consent order containing Articles I through IV, inclusive, of the Consent Order signed on November 11, 1981 by Canada Cement Lafarge Ltd., Lafarge Coppee S.A. and the Commission staff, then will the prior sale described in Exhibit 1 hereto to RC Cement or its affiliate be to "an acquirer approved by the Commission" within the meaning of such Article I and in compliance with the requirements of such Articles I through IV, inclusive?

B. *Basis on Which Advisory Opinion is Sought.*

Under Section 1.1(a) (2) of the Rules, GP may request advice from the Commission with respect to a course of action that it intends to pursue, where the matter involves a proposed corporate acquisition (such as RC Cement's proposed acquisition of GP's Chattanooga Plant).²

¹ In addition to making this application for an advisory opinion from the Commission, GP filed an application on May 11, 1982 with the Commission seeking approval under the Consent Order—if and when the Consent Order is issued in final form—of RC Cement or a newly-formed affiliate thereof as a buyer of the Chattanooga Plant. A copy of this May 11 application is attached as Exhibit 1. [Not reproduced herein.]

² Section 1.2(b) and Section 2.41(f) of the Rules do not apply to GP's request for an advisory opinion here, since these two provisions in the Commission's Rules apply only where there is an "outstanding" order to cease and desist issued by the Commission that might be violated by the proposed course of conduct. In GP's case, there is no outstanding order applicable to it, nor will there be such an order prior to September. Moreover, an advisory

(footnote continued)

*C. Facts and Arguments Relevant to
Issuance of an Advisory Opinion.*

In its efforts to comply with the requirements of Articles I through IV of the proposed Consent Order, GP has—even prior to the effectiveness of the Consent Order—actively searched for a buyer for the Chattanooga Plant which would prove acceptable to the Commission. In that search, GP has looked aggressively for a buyer which had no competitive overlaps with the Chattanooga Plant, which did not have a major share of the U.S. cement industry, and which possesses the skills and resources to enable it to use the Chattanooga Plant to compete vigorously after the divestiture.

1. Description of the Buyer.

GP believes it has found such a desirable buyer in RC Cement. RC Cement is a holding company based in St. Louis, Mo., which owns 100% of River Cement Company (“River”). River owns one cement plant in Festus, Mo., and a grinding facility in Orange, Tex. capable of grinding clinker into cement. River’s Festus cement plant has a cement capacity of 1,150,000 tons annually and it supplies cement to five terminals along the Ohio and Mississippi Rivers (at St. Louis, Mo., Cincinnati, Oh., Memphis, Tenn., Natchez, Miss., and Burnside, La.). The Orange, Tex. grinding plant has a capacity to grind clinker into cement at a rate of 400,000 tons annually. The Orange plant has no terminals.

GP understands that River’s facilities do not sell any cement at all in any county in which GP’s Chattanooga Plant sells cement. For example, the Chattanooga Plant sells no cement in western Tennessee or northern Mississippi (that is, in areas served by River’s Memphis terminal) or in Kentucky (that is, in areas served by River’s Cincinnati terminal). River, in turn, has no terminals or distribution facilities in central or eastern Tennessee, northeastern Alabama or northwestern Georgia (that is, in areas served by the Chattanooga Plant).

GP further understands that RC Cement is affiliated with another small U.S. cement producer based in the Lehigh Valley of Penn-

(footnote continued from previous page)

opinion may be granted here, since (a) the question raised is not hypothetical in nature, (b) the course of conduct raised by GP’s application (that is, GP’s sale of the Chattanooga Plant to RC Cement) is not the same or substantially the same as the course of conduct under investigation or the subject of a current proceeding involving the Commission (that is, CCL’s recent acquisition of GP), and (c) an informed opinion may be formed by the Commission without extensive investigation, clinical study, testing or collateral inquiry. As a result, prior to the final issuance of the Consent Order, GP has no recourse to Commission advice concerning GP’s planned sale of the Chattanooga Plant to RC Cement other than by seeking an advisory opinion pursuant to Section 1.1(a) of the Rules.

sylvania: Hercules Cement Co. A 40% shareholder in RC Cement is IFINT S.A. (formerly IFI International S.A.), a publicly-held Luxembourg-based investment company in which Istituto Finanziario Industriale S.p.A. ("IFI"), an Italian company, owns a 24.6% interest (through two 100% subsidiaries).

IFI also owns approximately 51% of Unicem S.p.A., a publicly-held Italian cement company which owns an additional 20% of RC Cement. (As a result, IFINT and IFI together own 60% of RC Cement.) The remaining 40% of RC Cement is owned (through a 100% subsidiary) by . . . an Italian entity independent of both IFI and IFINT which has cement operations in Italy and Brazil.

GP understands that IFINT is the largest shareholder in U.S. Cement Co. ("U.S. Cement"), which owns 100% of Hercules Cement Co. IFINT owns 46.7% of U.S. Cement stock. Unicem and . . . (an independent company with cement operations in the U.K. and Australia) own the remaining interests in U.S. Cement, with 20% and 33.3%, respectively. (As a result, through IFI's controlling interest in Unicem, IFI and IFINT together own 66.7% of the stock of U.S. Cement.)

Hercules has a single cement plant, located in Stockerton, Pa., with a capacity of 700,000 tons. It operates a single terminal, located in Fort Meade, Maryland. CCL understands that Hercules sells no cement in any county in which the Chattanooga Plant sells cement.

Under the May 4 letter of intent with RC Cement, the buyer of the Chattanooga Plant may be RC Cement itself or a newly-formed affiliate thereof. Such an affiliate would involve only the existing shareholders owning interests in RC Cement and U.S. Cement, although both . . . and . . . are believed to be still considering whether or not to be shareholders in any newly-formed company acquiring the Chattanooga Plant. Regardless of whether these two companies choose to participate, however, IFI and IFINT will control a majority of the buyer's stock³ As a result, IFI and IFINT will together own a controlling interest in the Chattanooga Plant, just as they together hold majority interests in RC Cement and U.S. Cement.

GP believes that RC Cement or its new affiliate will very well fit the requirements of the Commission relating to the divestiture of the Chattanooga Plant, if the Consent Order is issued in final form.

The affiliated U.S. cement companies River and Hercules do not compete at all with the Chattanooga Plant. They are owned by European companies which have slowly been building up a presence in the U.S. cement industry and are seeking to expand into new areas of the

³ At present, GP understands the affiliate would be owned as follows: . . . would own 33.3% of the new affiliate and a second newly-formed company ("Newco-2") would own 66.7%. Newco-2 would in turn be owned 40% by IFINT (through two 100% subsidiaries), 20% by IFI (through its 51%-owned Unicem) and 40% by . . . Therefore, IFI and IFINT would together own a majority interest in the majority shareholder (Newco-2) of the actual acquiring affiliate.

U.S. by this acquisition. The combined cement capacities of River and Hercules of 2,250,000 tons represent only 2.3% of 1980 U.S. cement capacity (based on Portland Cement Association data), ranking the affiliated companies as 17th in combined size among U.S. cement producers. Even while comparatively small, however, RC Cement and its affiliate Hercules clearly possess the skill and resources to compete successfully using the Chattanooga Plant.

2. *Basis for GP's Request for an Expedited Advisory Opinion.*

However desirable RC Cement or its new affiliate may be as a buyer, it will be of little avail if GP loses RC Cement as the buyer of the Chattanooga Plant. It is certainly not in the public interest to delay the sale of the Chattanooga Plant to an acceptable buyer. GP believes that there are imperative reasons for obtaining approval of RC Cement or its newly-formed affiliate (conditioned on the possible issuance of the Consent Order) from the Commission so that GP can sell the Chattanooga Plant to this buyer by the planned closing date of June 30, 1982.

Delays in obtaining Commission approval or in consummating the sale entail considerable risks of losing RC Cement. If lost, GP does not know how long it will take to find a new buyer or whether one will be found at all within the time periods imposed by the Consent Order.

First, GP must emphasize that GP and RC Cement have only signed a non-binding letter of intent. Both parties seek to close the transaction as soon as possible, with a projected closing date of June 30. If the parties have not consummated the transaction by June 30, RC Cement will be free to walk away from the purchase.

Second, the greater the delay before GP can sell the Chattanooga Plant, the greater the risk of unforeseeable adverse events occurring in the U.S. economy or the U.S. cement industry that would endanger or frustrate the proposed sale. For example, a major U.S. cement company could at any time choose to announce an intention to sell a cement plant somewhere in the U.S. that RC Cement finds to be a more desirable investment commercially than it finds the Chattanooga Plant. The occurrence of this or some other unforeseeable event prior to the sale of the Chattanooga Plant could lead RC Cement to back out of the acquisition or prevent GP from finding other buyers within the 18-month time period in the Consent Order. Moreover, even if alternative buyers can be found at all within this time period, there can be no assurance that the buyers would be as acceptable to the Commission or as likely to be a pro-competitive force in the Chattanooga Plant's market as will be RC Cement.

Third, the greater the delay before GP can sell the Chattanooga Plant, the greater the risk that competitors of the Chattanooga Plant

may be able to persuade members of GP's excellent sales and supervisory team at this facility to leave GP and go to work for them. To date, GP has been able to keep its sales and marketing team at the Chattanooga Plant together, despite their natural concern and uncertainties over their future. These personnel—the key to competitive success of any cement plant—have known that their plant was going to be sold to a new buyer for over six months now. GP does not know how long it will be able to continue to hold its team together successfully.

The importance of the sales and marketing team to RC Cement is unmistakably clear, as seen in Paragraph 10 of the letter of intent which provides in part:

It must be emphasized that any key sales and supervisory personnel who might be contemplating leaving GP's employ will not give GP any warning of their intention. At any time, GP may simply receive notice from such personnel that they will be leaving. The longer the delays, the more possible the loss of key sales and supervisory personnel who are uncertain and worried about their personal futures.

Fourth, the greater the delays, the greater the risk that major clients may be lost, with as little warning as a loss of key personnel. The cement industry is founded to a considerable degree on personal relationships and GP understands that its competitors are soliciting its customers on the basis of the uncertainty of the future of the Chattanooga Plant, who will ultimately own it, how reliable a source of supply it will be, and similar doubts.

GP must emphasize that if any of these risks actually occur, it may severely harm the competitive ability of the Chattanooga Plant, as well as GP's ability to find a buyer acceptable to the Commission. Once harmed, restoring the competitive health of the Chattanooga Plant may be both difficult and time consuming.

GP also wishes to point out that it has been doing precisely what it knows the Commission staff wants here and what GP believes the Commission will want: find a desirable, viable buyer for the Chattanooga Plant quickly and in a manner which protects the Chattanooga Plant's competitive abilities. Losing this sale to RC Cement may well engender loss of all or most of the Consent Order's 18-month period in which GP must find another buyer, indeed even if such a buyer can be found at all. Moreover, it may develop that the only buyers interested in the Chattanooga Plant would not be as acceptable to the Commission or be as pro-competitive a force in the Chattanooga Plant's market as would be RC Cement.

D. Conclusion.

In making this application, GP is not asking the Commission to predetermine whether or not it will ultimately issue the Consent

Order. It is not asking that the Commission staff or the Commission itself cut short their analysis of the desirability of RC Cement or its newly-formed affiliate as a desirable buyer for the Chattanooga Plant. Finally, it is not seeking to truncate or frustrate the ability of the public to consider the sale of the Chattanooga Plant or to comment on it, within a 30-day public comment period.

GP is simply asking the Commission to give it an advisory opinion to the effect that *if* the Commission ultimately issues a consent order containing Articles I through IV of the Consent Order, then RC Cement or its newly-formed affiliate will be an approved buyer thereunder and the prior sale of the Chattanooga Plant to them will satisfy the provisions of Articles I through IV of the Consent Order. GP is simply asking the Commission staff and the Commission to conclude its analysis of the sale on an expeditious basis and to render its advice prior to June 30. Finally, GP is willing to have the proposed sale of the Chattanooga Plant put on the public record for a 30-day public comment period (even though the Rules dealing with requests for advisory opinions do not require this) in order to give the public time to consider and comment on the sale.

In the event that the Commission renders a positive advisory opinion, GP will be in a position to sell the Chattanooga Plant to RC Cement or its newly-formed affiliate, accepting the risk that the Commission might ultimately reject the Consent Order. In such a case, GP might find that it has sold the Chattanooga Plant unnecessarily. Nevertheless, the risk of this would be one acceptable to GP, especially when compared to the risks inherent in delaying the sale by several additional months by awaiting final action on the Consent Order.

E. *Confidentiality.*

GP respectfully requests that the confidential material included in Exhibit 1 and the names of the possible minority European shareholders in the newly-formed RC Cement affiliate described herein be accorded confidential treatment under the FTC Improvements Act of 1980 and the Commission's Rules, for the reasons set forth in Exhibit 1.

Respectfully submitted,

/s/ *Louis Munin*

Senior Vice President and
Chief Financial Officer
General Portland Inc.