

FEDERAL TRADE COMMISSION DECISIONS

Interlocutory Order

105 F.T.C.

IN THE MATTER OF

WARNER COMMUNICATIONS, INC., ET AL.

Docket 9174. Interlocutory Order, May 24, 1985.

ORDER

Respondents have filed several motions requesting that this matter be terminated, either by dismissal of the complaint or by consideration and eventual acceptance of a proposed consent agreement.

In disposition of these and related motions *it is hereby ordered* as follows:

1. Respondents' application pursuant to Section 3.23(b) of the Commission's Rules for review of the administrative law judge's order of March 27, 1985, is granted.

2. Respondents' motion to dismiss the complaint is denied. Section 7 of the Clayton Act, 15 U.S.C. 18, prohibits acquisitions having certain anticompetitive effects. The Commission is empowered by Section 11 of the Clayton Act, 15 U.S.C. 21, to enforce compliance with Section 7. The Commission is similarly empowered by 15 U.S.C. 45(a) to enforce compliance with the FTC Act. The complaint in this case alleges that the acquisition proposed by the respondents would violate these statutes. The fact that the respondents have not consummated their proposed transaction, and claim to have abandoned it, does not oust this statutory grant of jurisdiction. The Commission's subject-matter jurisdiction depends on the nature of the alleged illegal conduct, and not on whether it is ongoing at any particular point during the trial. To hold otherwise would mean that a Commission law enforcement action could be brought to a halt at any time, even after a complaint and injunction have issued, by an abandonment, even a temporary one, of the challenged conduct. The cases indicate that voluntary cessation of unlawful activity is not a basis for halting a law enforcement action. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 309 (1897) (Sherman Act cases). Indeed, Section 13(b) of the Clayton Act, 15 U.S.C. 53(b), expressly contemplates adjudication of the merits of the legality of unconsummated mergers when it provides for enjoining a proposed merger pending administrative hearings. And, in fact, the consummation of this transaction has been preliminarily enjoined pursuant to Section 13(b) pending Commission adjudication of the matter. *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984).

The nonconsummation of the proposed transaction does not affect the Commission's subject-matter jurisdiction, but it may on an appropriate showing justify a conclusion that the matter is moot. Here, however, the claim that the allegedly unlawful transaction has been abandoned does not make the matter moot. At a minimum, questions of fact remain which prevent us from concluding that "it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," in either identical or functionally-equivalent form. *United States v. Phosphate Export Ass'n*, *supra*, 393 U.S. at 203; see *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953).

Respondents' additional arguments for dismissal are not persuasive. First, we believe that complaint counsel's demand for a prior-approval term in any final order is not made inappropriate by the Hart-Scott-Rodino Act, since that statute was intended only to ensure that the enforcement agencies receive prior notice of mergers, and nothing in its legislative history suggests that it was intended to supersede the use of fencing-in provisions imposed after a merger has actually been found improper. Second, while we express no view as to the appropriate remedy in this case, we see nothing requiring dismissal in the fact that complaint counsel have offered to settle on terms that were more or less favorable to respondents at different stages of the litigation, since any settlement offer will reflect the party's assessment of the strength of his case as of that particular point in the trial. Finally, we find that continuation of the administrative hearings would be in the public interest, because, as we have said, there exist substantial questions of fact as to the risk that a violation may recur.

Nothing in this order, however, precludes the administrative law judge from subsequently concluding on an appropriate showing that mootness has been demonstrated or that relief is unnecessary. See *United States v. Phosphate Export Ass'n*, *supra*, 393 U.S. at 203-04.

3. Respondents' motion to withdraw this matter from adjudication for consideration of a proposed consent agreement pursuant to Section 3.25(d) of the Commission's Rules is denied. Because the proposed settlement is on terms significantly different from the terms of Commission orders in similar cases, and because questions of fact concerning appropriate remedy remain, we are not satisfied that there is a likelihood of settlement on the terms proposed.

4. Respondents' motion for leave to reply to complaint counsel's answer to respondents' motion for dismissal of the complaint is granted.

5. Complaint counsel's motion for leave to reply to the motion of respondents to withdraw this matter from adjudication was filed with the Commission on March 25, 1985. A motion for leave to file a statement of Bureau of Competition Director Timothy J. Muris was filed

with the Commission on April 18, 1985, with the statement attached. The second motion sought leave to address the same questions as the first. Because the Bureau Director is the chief counsel supporting the complaint, we have treated the second motion as a duplicate of the first, which we have granted, and we have treated the statement attached to the second motion as complaint counsel's reply.

6. Respondents' request that their opposition to the motion for leave to file statement of Bureau Director Timothy Muris be considered as a response to that statement is granted.

7. The administrative law judge is directed to terminate the stay of the adjudicative hearing without unnecessary delay.

It is so ordered.

IN THE MATTER OF

GREAT LAKES CARBON CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8805. Final Order, June 5, 1973—Modifying Order, June 4, 1985

This order reopens the proceeding and modifies the Commission's order issued on June 5, 1973 (82 F.T.C. 1529) to provide that the order, which was scheduled to expire in June of 1993, will terminate immediately upon entry of the modifying order. After considering respondent's petition requesting termination of the 1973 order, together with other relevant information, the Commission determined that the requested modification would serve the public interest. Changes in the market indicated that the order, which among other things required the companies to restrict their contracts for the purchase and sale of industrial quality petroleum coke to terms of three years, was no longer necessary and impeded the ability of respondent companies to compete effectively.

ORDER REOPENING AND MODIFYING ORDER ISSUED JUNE 5, 1973

By a petition filed on January 3, 1985, respondent Great Lakes Carbon Corporation joined by respondents Standard Oil Company (Indiana), Conoco, Inc., Derby Refining Company, Farmland Industries, Inc., Sun Refining and Marketing Company, Texaco, Inc., and Mobil Oil Corporation (by its separate submission filed on January 7, 1985), request that the Commission reopen the proceeding in Docket No. 8805 and modify Paragraph X of the order to provide that the order terminate immediately. Upon consideration of Great Lakes' petition and other relevant information, the Commission now finds that the public interest warrants reopening the proceeding and modifying Paragraph X of the order as requested.

The record describes an industry in which the respondents' use of long-term sales and purchase contracts by and between the respondents and others for industrial quality petroleum coke would not appear likely to have anticompetitive effects during the next eight years. Changes in the market indicate that the order is no longer necessary and the order has accomplished all it is likely to do. At the same time, the order now appears to be limiting respondents' ability to compete effectively for, among other things, participation in cogeneration and waste heat recovery projects, development of new markets, and export sales. As a result, we conclude that it is in the public interest to set aside this order.

Accordingly,

It is ordered, That this matter be and it hereby is reopened, and that