

IN THE MATTER OF
UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2902. Consent Order, Sept. 28, 1977—Modifying Order, Nov. 14, 1986

The Federal Trade Commission has modified a 1977 consent order (90 F.T.C. 257) by removing references to welding products and gas welding apparatus. Respondent is no longer in the welding business.

ORDER MODIFYING CONSENT ORDER
ISSUED SEPTEMBER 28, 1977

On May 22, 1986, Union Carbide Corporation ("Carbide") filed a "Request to Reopen Proceeding and Modify Order" ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51. The Request asks the Commission to reopen and modify the consent order in Docket No. C-2902. The Request seeks three modifications.

First, Carbide requests that Paragraph I.A.1 of the order be modified to enable it to enter requirements contracts for terms up to five years. The order presently requires that any requirements contracts have initial terms not longer than one year and be terminable annually on not more than 90-day notice. Second, Carbide requests that Paragraph III of the order be modified to enable it to acquire independent distributors of industrial gases upon 30-days prior notice, as opposed to the current requirement that Carbide obtain the prior approval of the Commission for most such acquisitions. Third, Carbide requests that the Commission delete from the order all prohibitions relating to "Welding Products" and "Gas Welding Apparatus."

The Commission has carefully considered Carbide's Request and has concluded that Carbide has not made a satisfactory threshold showing that changed conditions of fact or law or the public interest require Paragraphs I.A.1 or III to be reopened to consider whether these provisions should be modified to allow five-year requirements contracts or distributor acquisitions upon prior notice. However, the Commission has found that reopening the order and deleting references to "Welding Products" and "Gas Welding Apparatus" is warranted by changed conditions of fact and the public interest.

In making these findings the Commission has considered Carbide's

Request, Amerigas Inc.'s comment, and Carbide's response to that comment.

Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, letter to John C. Hart (June 5, 1986), at 4 ("Louisiana-Pacific Letter"). The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute. Louisiana-Pacific Letter at 5-6. This burden is not a light one in view of the public interest in repose and the finality of the Commission's orders. See *Federated Department Stores, Inc., v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality). If the Commission determines that the petitioner has satisfied this requirement, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Section 5(b) does not require that the Commission modify any order. S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979).

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). If the respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

Requested Modification of Paragraph I.A.1 of the Order

The Commission finds that Paragraph I.A.1 of the order should not be reopened at this time. The Commission believes, as a matter of policy, that generally it should refrain from reopening an order provision when there exists reason to believe that a respondent is in violation of the very provision it seeks to modify.

There is substantial reason to believe that Carbide is violating Paragraph I.A.1. The Commission believes that by offering and ex-

ecuting producer pricing agreements ("PPAs"), Carbide has failed to comply with the provision in Paragraph I.A.1 that prohibits Carbide from entering into long term requirements contracts with independent industrial gas distributors.

The Commission has reason to believe that Carbide's violations of the order were not inadvertent, but have been in considerable bad faith. The Commission's files contain evidence that over 40 PPAs were offered or executed pursuant to a program that commenced with the knowledge and approval of senior level corporate executives. These agreements were offered to distributors from 1979, less than two years after the order was entered, to 1985, when the Commission discovered their existence. Although Carbide had previously sought the advice of the Commission's staff with respect to compliance matters, Carbide never sought advice regarding PPAs. The Commission's rules expressly provide a procedure for obtaining such advice. See 16 CFR 2.41. Additionally, Carbide never affirmatively disclosed to the Commission such contracts, despite that it was offering and executing PPAs before, during, and after it filed (and later withdrew) a petition in 1983 seeking modification of Paragraph I.A.1 of the order; Carbide's avowed reason for using PPAs is essentially identical to one of its stated needs for modifying the order in 1983. Although Carbide may have perceived a need to enter long term requirements contracts, it chose to effect its own remedies, despite the prohibition contained in the order and the Commission's procedures for order modifications. Accordingly, it would not be in the public interest to reopen Paragraph I.A.1 of the order at this time to consider Carbide's request for modification of that provision.

Additionally, the Commission finds that neither changes of law nor fact require the reopening of Paragraph I.A.1 of the order. Carbide has failed to show any changes in statutory or decisional law that have the effect of bringing the provisions of Paragraph I.A.1 into conflict with existing law. See *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). Exclusive dealing arrangements always have been subject to a rule of reason analysis. Carbide's asserted changes in law, at most, reflect a shift in focus among the several factors traditionally considered under a rule of reason analysis as applied to exclusive dealing.

Changed factual circumstances justify modification of an order only when the changed circumstances (1) were unforeseeable when the order was entered and result in severe competitive hardship, and (2) virtually eliminate the dangers the order sought to remedy. *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, letter to H.B. Hummelt (Jan. 22, 1982) (citing *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)). The changes that Carbide points to fail to satisfy this

standard. For example, Carbide notes that since 1977: (1) the number of national industrial gas producers has increased; (2) its market share has declined; (3) its competitors have increased their number of independent distributors; and (4) independent distributors possess increased bargaining power. However, Carbide has failed to show that these changes have been significant. For example, according to its own estimates, Carbide's reductions in its market shares have been marginal. Additionally, although Carbide asserts that its share of independent distributors has declined since 1977, the amount of the decline in percentage points is minimal. Carbide has failed to show how these changes reflect more than the normal, foreseeable evolution of the industry or how these changes eliminate any possible continued need for the order.

In sum, the Commission has determined that neither changes in fact nor in law require reopening of Paragraph I.A.1 of the order to consider Carbide's requested modification of that provision. Additionally, the Commission has determined that it would not be in the public interest to reopen Paragraph I.A.1 to consider modification at this time. The public interest is served by denying a request for reopening and modification of an order provision while compliance issues remain unresolved. This action by the Commission will enhance its ability to ensure compliance with this order and other outstanding orders, enhance the deterrent effect of all orders and of Section 5 itself, and serve to discourage "self-help" order modifications. Thus, based on these policy considerations, the Commission finds that the public interest does not warrant reopening and modification of Paragraph I.A.1 of the order.

Requested Modification of Paragraph III of the Order

The Commission finds Carbide has failed to show any changed conditions of law or fact or public interest considerations that require or warrant reopening Paragraph III of the order.

Carbide contends that both changes of law and fact require the reopening of Paragraph III of the order. However, Carbide has failed to point to any change in statutory or decisional law with respect to vertical acquisitions that has the effect of bringing the terms of the order into conflict with existing law. The Commission also notes that, in those instances where prior approval is required, the Commission will analyze such requests in a manner consistent with current law and policy. Thus, any changes regarding the application of the law of vertical restraints will be considered by the Commission when reviewing an application for prior approval.

Carbide also states that modification of Paragraph III of the order is required by changed conditions of fact. The Commission finds that

Carbide has failed to show significant changes in fact that require reopening. Carbide alleges that: (1) the number of national gas producers is increasing; (2) its market share is declining; (3) the number of distributors serving competitors is increasing; and (4) independent distributors' bargaining power has increased. As discussed earlier, Carbide has failed to show that these changes were unforeseeable, or that they reflect more than the natural evolution of the industry. Paragraph III recognizes such evolution as evidenced by the ten-year term of that provision.

Carbide contends that modification of the order to permit vertical mergers after prior notice rather than prior approval would serve the public interest. The Commission finds that neither of the grounds that Carbide raises warrants reopening the order in the public interest. First, Carbide states that the regulatory burden imposed by the prior approval requirement prevents it from competing on equal terms with its competitors. This claim does not warrant relief. Carbide has failed to document any burden imposed by the prior approval requirement that was not foreseeable when the order was issued or how that burden has changed over the years. Additionally, the Commission notes that Carbide has not identified instances in which it was actually prejudiced by the prior approval requirement. Instead, Carbide identifies generally the burden that might be imposed by any prior approval requirement: added costs, uncertainty, and delay. Second, Carbide states that distributors seeking to sell their businesses may face reduced marketing opportunities because Carbide, a likely prospective purchaser, may be foreclosed from making such acquisitions. This concern was presented to and considered by the Commission in 1977. Carbide fails to point to any factual changes that would justify the Commission's treating this consideration differently now. In sum, the Commission finds that the public interest does not warrant reopening the order to consider whether to modify Paragraph III.

*Request to Delete References to "Welding Products"
and "Gas Welding Apparatus"*

The Commission finds that Carbide has made a satisfactory showing of changed conditions of fact to warrant reopening the order to consider deleting references to "Welding Products" and "Gas Welding Apparatus." In 1985, Carbide sold its gas welding apparatus and welding products operations. In the Request, Carbide states its intention not to reenter that line of business. The Commission finds that deleting references to "Welding Products" and "Gas Welding Apparatus" is warranted by changed conditions of fact and by the public interests.

Accordingly, *it is ordered*, that this matter be reopened with respect to Carbide's third request and that Paragraphs I, III, and IV of the

Commission's order in Docket No. C-2902, issued on September 28, 1977, be modified, as of the date of service of this order, to read as follows:

I.

It is ordered and directed, That for a period of twenty (20) years from the date of service of this order, respondent Union Carbide Corporation (hereinafter Union Carbide), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of industrial gases to distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any distributor:

1. To purchase from Union Carbide all or any part of its requirements of any industrial gas unless (a) the initial term of such contract or agreement is one year or less, and (b) such contract or agreement may be terminated by either party effective on any anniversary date upon written notice given some minimum period in advance of such date as set forth in such contract, such minimum period to be not more than ninety (90) days; or

2. To purchase from Union Carbide all or any part of its requirements of any industrial gas at one or more locations as a condition to being permitted to purchase from Union Carbide such industrial gas at another location; or

3. To purchase from Union Carbide all or any part of its requirements of any industrial gas at any location as a condition to being permitted to purchase from Union Carbide any other industrial gas at the same or any other location.

B. Not refuse to sell, subject to Paragraph A.1 above, industrial gases to a Union Carbide distributor because that distributor refuses (1) to purchase all or a designated part of its requirements of industrial gases from Union Carbide; or (2) to purchase from Union Carbide all or any part of its requirements of industrial gases at more than one of its locations.

* * * * *

III.

A. *It is further ordered,* That for a period of ten (10) years from the date of service of this order, Union Carbide shall not without prior

approval of the Commission, except as otherwise provided in Paragraph B of this Part III, acquire, directly or indirectly, the whole or any part of the assets, stock, share capital of, or other equity interest in, any distributor of industrial gases.

B. No prior approval shall be required under this order for any acquisition by Union Carbide of any assets, stock, share capital of, or other equity interest in, any distributor of industrial gases if such acquisition meets any of the following standards:

1. The acquisition involves only a change in the equity interest of Union Carbide in a distributor in which Union Carbide already holds an equity interest; or

2. Except to the extent such acquisition is covered by clause 3 of this Paragraph B, the consummation of the acquisition does not result in Union Carbide owning an equity interest, obtained by acquisition, in distributors to whom, in the calendar year prior to the calendar year in which such acquisition is consummated, Union Carbide sold in excess of 16 percent of its total sales of industrial gases sold in such year to all acquired and independent distributors; *provided, however*, that no acquisition of a distributor shall be exempt from prior approval under this clause 2 unless the distributor to be acquired purchased from Union Carbide more than 50 percent of its total purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated; or

3. The acquisition is not covered by clause 2 of this Paragraph B, but within twelve (12) months prior to the consummation of such acquisition Union Carbide has divested absolutely and in good faith by sale or spin-off its equity interests in one or more distributors the aggregate dollar value of whose purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated was equal to or in excess of the aggregate dollar value of purchases of industrial gases in such prior calendar year, by the distributor so acquired; *provided, however*, that, to the extent that any purchases by a divested distributor are utilized by Union Carbide in a determination that an acquisition falls within the provisions of clause 2 or 3 of this Paragraph B, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of this clause 3; or

4. The transaction involves only (a) the purchase of products from a distributor in the normal course of business, or (b) the purchase of fixed assets from an independent distributor in a transaction in which the distributor will continue thereafter to carry on its function as an independent distributor in which Union Carbide has no equity interest; or

5. But for the acquisition by Union Carbide, the distributor would have ceased business operations as an industrial gas distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

C. During the period that this Part III is in effect, Union Carbide shall advise the Commission, prior to consummation thereof, of each acquisition of the type described in Paragraph A of this Part III as to which prior approval is not required because of the provisions of Paragraphs B.2 or B.3 of this Part III.

D. During the period that this Part III is in effect, Union Carbide shall, within ninety (90) days from the date of each acquisition described in Paragraph B.5 of this Part III, provide information sufficient for the Commission to determine whether, but for the acquisition by Union Carbide, the distributor would have ceased business operations as an industrial gas distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

IV.

It is further ordered, That if, during the ten (10) year period beginning on the date of service of this order, any distributor of industrial gases in which Union Carbide holds an equity interest acquires, without the prior approval of the Commission to the extent such approval would be required under Part III of this order if such acquisition were made directly or indirectly by Union Carbide, the whole or any part of the assets, stock, or share capital of, or other equity interest in, any distributor of industrial gases, then Union Carbide shall within six (6) months thereafter divest absolutely and in good faith by sale or spin-off its equity interests in one or more distributors, the aggregate dollar value of whose purchases of industrial gases in the prior calendar year was equal to or in excess of the aggregate dollar value of purchases of industrial gases in such prior calendar year by the distributor so acquired; *provided, however,* that to the extent that any purchases by a divested distributor are utilized by Union Carbide in determining compliance with the divestiture provisions of this Part IV, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of Paragraph III B.3 of this order.

Chairman Oliver dissented.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

I agree with the Commission's decision to reopen and modify its 1977 consent order with Union Carbide by removing references to welding products and gas welding apparatus. These references are unnecessary, because Union Carbide is no longer a participant in the welding business.

I disagree, however, with the Commission's decision not to reopen for modification Paragraph I.A of the order. Union Carbide requested that the Commission modify Paragraph I.A to allow Union Carbide to enter into long term contracts with gas distributors. Union Carbide has demonstrated that long term contracts are necessary to compete effectively in industrial gas production and supply, that the order's prohibitions on long term contracts place Union Carbide at a competitive disadvantage, and that the public interest would best be served by removing these prohibitions.

The Commission has made clear that Union Carbide's apparent violations of Paragraph I.A played an important role in the Commission's decision not to reopen Paragraph I.A. I strongly advocate vindication of the Commission's orders and I believe that the Commission would be fully justified in seeking appropriate relief for order violations. I also believe, however, that anticompetitive orders breed disrespect for the law, frustrating the Commission's enforcement of legitimate orders. Moreover, and perhaps most important, forcing compliance with errant Commission orders places the Commission in the undesirable position of harming rather than helping consumers.

For this reason, I voted against the Commission's decision to modify the Union Carbide order in part.

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9189. Complaint,* Dec. 20, 1984—Decision, Dec. 3, 1986*

This consent order prohibits, among other things, twenty six Detroit, Mich.-area Chevrolet associations, dealerships and dealers from conspiring to not advertise in the classified sections of newspapers or to not advertise vehicle prices at all.

Appearances

For the Commission: *Dennis F. Johnson, Robert C. Jones, Richard B. Smith, Richard A. Wolff, Timothy Suich and Morris Bloom.*

For the respondents: *Lawrence F. Ranieszski and Robert Y. Weller, Colombo & Colombo, Birmingham, Mich. and James F. Rill, Jeffrey W. King and Christopher J. MacAvoy, Collier, Shannon, Rill & Scott, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent parties named in the caption hereof, and hereinafter more particularly described and designated as "respondents," have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Each of the parties described below is hereby named as a respondent herein in the capacity set forth in the caption to this complaint. Each respondent named in his capacity as an officer of a corporate respondent formulates, directs and controls the acts and practices of said corporate respondent.

* The complaint was issued against associations, dealerships and dealers for Chrysler-Plymouth and Cadillac, as well. For the decisions issued against these respondents see 108 F.T.C. 243 and 249.