

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

ALBERTSON'S, INC.

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

Docket C-3064. Consent Order, April 21, 1981—Set Aside Order, July 1, 1987

The Federal Trade Commission has set aside a 1981 consent order with Albertson's, Inc., (97 F.T.C. 343), thus removing the Commission's prior approval requirement because there no longer appears to be a trend toward concentration in the relevant market.

ORDER REOPENING AND SETTING ASIDE ORDER ISSUED ON APRIL 21, 1981

On March 3, 1987, Albertson's, Inc. ("Albertson's") filed a "Petition To Reopen And Set Aside Consent 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 Commission's Rules of Practice. The request asked the Commission to reopen and set aside the consent order issued on April 21, 1981 ("the order"). Albertson's request was placed on the public record for thirty days, pursuant to section 2.51 of the Commission's Rules. No comments were received.

The complaint in this case was issued under Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act and alleged anticompetitive effects arising from Albertson's acquisition of Fazio's, the California Division of Fisher Foods, Inc., in July 1978. According to the complaint, the relevant product line in which to assess the acquisition was retail sales by retail grocery stores and the relevant geographic market was Los Angeles County and Orange County, California. The order prohibits Albertson's for a ten year period from acquiring, without prior Commission approval, five or more retail grocery stores in fifteen designated states and certain other geographic areas. *Albertson's, Inc.*, 97 FTC 343, 345, 347-348 (1981).

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 altered, modified, or set aside, in whole or in part, if the respondent makes a satisfactory showing that changed

conditions of law or fact require the order to be modified or set aside. 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.

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are invited in petitions to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. 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"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. *Damon Letter* at 2.

After reviewing Albertson's request, the Commission has concluded that respondent has not made a satisfactory showing that changed circumstances require that the order be set aside. The only real change that respondent has shown is that there is no longer a trend toward concentration in the relevant market. That change by itself does not establish that there is no further need for the order.

The Commission has concluded, however, that it is in the public interest to reopen and set aside the order. Albertson's has shown that the prior approval requirements of the order impose costs on respondent and put it at a disadvantage with respect to its competitors who are not under similar restraints. This affirmative need to modify the order must be weighed against the need for continuing the order. The costs shown by Albertson's were foreseeable at the time respondent agreed to the order and would not ordinarily provide a sufficient basis to justify termination of the order. However, respondent has also demonstrated that there is no continuing competitive need for the order in the Los Angeles/Orange County market that was the focus of the Commission's complaint. The respondent has shown that the relevant market is relatively unconcentrated and that any trend toward concentration that may have existed at the time the order issued appears to have been arrested. Accordingly, the reasons for setting aside the order outweigh the reasons for retaining the order.

The Commission has likewise concluded that it is in the public interest to set aside the prior approval requirements of the order with respect to the fifteen states and other geographic areas which are designated therein. The allegations of the complaint related exclusively to the Los Angeles/Orange County market and with the setting aside of the primary relief, the ancillary relief should also be set aside.

Accordingly, *It is ordered*, That this matter be, and it hereby is reopened and that the Commission's order issued on April 21, 1981, shall be set aside as of the effective date of this order.

Commissioner Bailey was recorded as voting in the negative.

IN THE MATTER OF
AMERICAN HOECHST CORPORATION, ET AL.

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

Docket C-3215. Complaint, July 2, 1987—Decision, July 2, 1987

This consent order permits, among other things, American Hoechst Corp. to divest certain polyester fiber businesses. The respondent must make the divestiture to a Commission-approved acquirer within one year and must obtain the Commission's prior approval for certain acquisitions for the next ten years.

Appearances

For the Commission: *Rhett Krulla, Ronald B. Rowe, and Jeffrey I. Zuckerman.*

For the respondents: *William R. Norfolk, Sullivan & Cromwell, Washington, D.C. and William Pelster, Skadden, Arps, Slate, Meagher, & Flom, New York City.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondents, American Hoechst Corporation, Hoechst Aktiengesellschaft, referred to herein collectively as "Hoechst," and Celanese Corporation, corporations subject to the jurisdiction of the Commission, have entered into an agreement, described in paragraph 15 herein, that, if consummated, would violate the provisions of 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; that said agreement and the actions of respondents to implement that agreement constitute violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, the Commission 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: [2]

I. DEFINITIONS

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