

IN THE MATTER OF

LIQUID AIR CORPORATION OF NORTH AMERICA, ET AL.
AND
L'AIR LIQUIDE SOCIETE ANONYME, ET AL.MODIFYING ORDERS IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT

*Docket C-2990 & C-3216. Consent Orders, Sept. 5, 1979 & July 15, 1987—
Modifying Orders, Oct. 17, 1988*

The Federal Trade Commission has reopened proceedings and modified consent orders, (94 F.T.C. 390 & 110 F.T.C. 19), issued on Sept. 5, 1979 and on July 15, 1987, by deleting the requirement that respondents obtain prior Commission approval as to internal reorganization activities.

ORDER REOPENING AND MODIFYING
ORDERS ISSUED ON SEPTEMBER 5, 1979, AGAINST
LIQUID AIR CORPORATION OF NORTH AMERICA
AND ON JULY 15, 1987, AGAINST
L'AIR LIQUIDE SOCIETE ANONYME POUR L'ETUDE ET
L'EXPLOITATION DES PROCEDES GEORGES CLAUDE

On June 20, 1988, Liquid Air Corporation (formerly known as Liquid Air Corporation of North America) ("LAC") and its parent, L'Air Liquide Societe Anonyme Pour L'Etude Et L'Exploitation Des Procedes Georges Claude ("L'Air Liquide"), filed a "Request To Reopen Proceeding And Modify Orders In Docket No. C-2990 And In Docket No. C-3216" ("request"). The request was filed 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, 16 CFR 2.51. The request asked the Commission to reopen the proceedings in Docket No. C-2990 and Docket No. C-3216 and modify the consent orders issued by the Commission on September 5, 1979, and July 15, 1987, in these respective matters. The respondents' request was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. One comment was received.

The complaint in Docket No. C-2990 was issued under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and alleged anticompetitive effects

arising from LAC's acquisition of the Industrial Gases Division of Chemetron Corporation ("Chemetron"), a wholly-owned subsidiary of Allegheny Ludlum Industries, Inc. ("Allegheny").¹ The order in Docket No. C-2990, which was issued by the Commission on September 5, 1979, 94 FTC 390 (1979), among other things, prohibits the respondents in that matter, including LAC, for a ten-year period ending on September 20, 1989, from acquiring without the prior approval of the Commission any United States air separation gases producer. The order defines "air separation gases producer" to mean "a person who is engaged in both (1) the production, and (2) the distribution and sale of two or more of the air separation gases."² 94 FTC at 396. The order's prior approval provision thus applies to, among other things, intra-entity transactions involving LAC's possible acquisition of air separation gases producers which are owned and controlled by LAC or its parent.³

The complaint in Docket No. C-3216 was also issued under Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the FTC Act, 15 U.S.C. 45, and alleged anticompetitive effects arising from L'Air Liquide's acquisition of the outstanding voting securities of Big Three Industries, Inc. ("Big Three"). The order in Docket No. C-3216, which was issued by the Commission on July 15, 1987, among other things, prohibits L'Air Liquide, for a ten-year period ending on July 20, 1997, from acquiring without the prior approval of the Commission any United States merchant air separation gases producer. Paragraph I.(7.) of the order defines "merchant air separation gases producer" to mean "any person that is engaged in all of the following: (i) production, (ii) distribution and (iii) sale of two or more merchant air separation gases."⁴ The order's prior approval requirement in Docket No. C-3216 thus also applies to, among other things, intra-entity transactions involving L'Air Liquide's possible acquisition of merchant air separation gases producers which are owned and controlled by L'Air Liquide and/or LAC.⁵ However, the order also provides that

¹ Allegheny and Chemetron are also named respondents under the order in Docket No. C-2990. Neither, however, has asked the Commission to modify the order in this matter. This order modifying the order issued on September 5, 1979, in Docket No. C-2990 applies only to respondent LAC.

² "Air separation gases" is defined in the order to mean "oxygen, nitrogen and argon in gaseous or liquid form, or both." 94 FTC at 396.

³ The order in Docket No. C-2990 applies only to LAC "and all subsidiaries which it controls." 94 FTC at 396. LAC's parent, L'Air Liquide, is thus not covered by the order.

⁴ "Merchant air separation gases" is defined in paragraph I.(6.) of the order to mean "oxygen, nitrogen and argon sold in liquid form or packaged in cylinders."

⁵ The order in Docket No. C-3216 applies to L'Air Liquide and "all subsidiaries it controls." See paragraph I.(1.)

“nothing in this order or in the Commission’s order entered in Docket No. C-2990 shall require L’Air Liquide to obtain prior Commission approval if L’Air Liquide increases its ownership in [LAC] or causes Big Three to acquire [LAC].” See paragraph VII, *L’Air Liquide* order. Both LAC and L’Air Liquide, under the orders in Dockets No. C-2990 and C-3216, respectively, are required to obtain the prior approval of the Commission for a transaction in which L’Air Liquide causes LAC to acquire all or any part of Big Three.

Section 5(b) of the Federal Trade Commission Act provides that the Commission may modify an order when the Commission determines that the public interest so requires. Therefore, the Commission has invited respondents to show in petitions to reopen how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, 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.*, 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 the respondents’ request, the Commission has determined that it is in the public interest to reopen the proceedings and modify the orders in Dockets No. C-2990 and C-3216. The respondents have shown that the prior approval requirements of the orders impose substantial compliance costs on the respondents because they require the respondents to obtain the prior approval of the Commission in connection with the respondents’ wholly internal activities. Such internal activities would raise no competitive questions and would not warrant prior approval review.

The orders’ prior approval provisions are also inconsistent with the principle that the coordinated activity of a parent and its wholly-owned subsidiaries must be viewed as that of a single enterprise for Federal antitrust law purposes. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Any internal corporate restructuring by L’Air Liquide is not likely to raise significant competitive consequences, and the Commission’s orders in Docket Nos. C-3216 and C-2990 afford the Commission the opportunity to monitor the respondents’ covered inter-entity merger activities.

Accordingly, *it is ordered*, that these matters be, and they are hereby, reopened and that the opening subparagraph (j) of the order in Docket No. C-2990 and paragraph I.7. of the order in Docket No. C-3216 be, and they are hereby, modified as follows:

Docket No. C-2990

(j) "*Air separation gases producer*" shall mean a person who is engaged in both (1) the production, and (2) the distribution and sale of two or more of the air separation gases, excluding, as to respondent Liquid Air Corporation, any individual, partnership, firm, corporation, association, or any other business or legal entity, controlled by L'Air Liquide Societe Anonyme Pour L'Etude Et L'Exploitation Des Procedes Georges Claude. "Control" shall mean either (i) holding 50 percent or more of the outstanding voting securities of an issuer or (ii) in the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity, or (iii) having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

Docket No. C-3216

I.7. "*Merchant air separation gases producer*" means any person that is engaged in all of the following: (i) production, (ii) distribution, and (iii) sale of two or more merchant air separation gases, excluding any individual, partnership, firm, corporation, association, or any other business or legal entity, controlled by L'Air Liquide.

"Control" shall mean either (i) holding 50 percent or more of the outstanding voting securities of an issuer or (ii) in the case of an entity that has no outstanding voting securities, having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity, or (iii) having the contractual power presently to designate 50 percent or more of the directors of a corporation, or in the case of unincorporated entities, of individuals exercising similar functions.

IN THE MATTER OF

NORTH AMERICAN PHILIPS CORPORATION

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

Docket 9209. Complaint, Aug. 3, 1987—Final Order, Oct. 24, 1988

This Final Order prohibits, among other things, the North American Philips Corp., Norelco's parent company, from misrepresenting the performance of the Clean Water Machine or any other product that treats water and also from misrepresenting any test or study of its products. The order requires respondent to have substantiation for any performance claims it makes for any electric-powered consumer appliance, including hair dryers, makeup mirrors, coffee makers, and razors.

Appearances

For the Commission: *Joel C. Winston.*

For the respondent: *Forrest Hainline, III, Swidler & Berlin,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that North American Philips Corporation, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. North American Philips Corporation is a Delaware corporation, with its offices and principal place of business located at 100 East 42nd Street, New York, New York.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed the Norelco Clean Water Machine ("Clean Water Machine") and replaceable filter cartridges ("filters") for the Clean Water Machine. The Clean Water Machine is a self-contained, table-top product designed to remove contaminants from tap water by forcing the water through an activated charcoal filter.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce.