

Modifying Order

111 F.T.C.

IN THE MATTER OF

CANADA CEMENT LAFARGE LTD., ET AL.

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

Docket C-3100. Consent Order, Dec. 21, 1982—Modifying Order, Apr. 4, 1989

This order reopens the proceeding and modifies Paragraph VIII of the Commission's consent order (100 FTC 563) by deleting the requirement for prior approval of acquisitions in the state of Florida. The modifying order is the result of the Commission granting in part and denying in part the respondents' requests for modifications of the terms of the original order.

ORDER GRANTING IN PART AND DENYING IN PART
REQUEST TO REOPEN AND MODIFY ORDER
ISSUED DECEMBER 21, 1982

On December 5, 1988, Lafarge Corporation ("Lafarge") filed a Supplemental Petition To Reopen And Modify Consent Order ("Supplemental Petition") and asked that its original Petition to Reopen and Modify Consent Order ("Petition") filed August 11, 1988, be deemed refiled. Under the order, Lafarge is the successor to Canada Cement Lafarge Ltd. ("CCL"). 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 Supplemental Petition asks the Commission to reopen and modify the order in Docket No. C-3100. Lafarge requests that the order be modified by setting aside Paragraph VIII to relieve it of the need to obtain prior Commission approval for acquisitions of cement assets. The Petition and the Supplemental Petition were 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, 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 the acquisition by CCL of General Portland Inc. ("GPI") in October 1981. 100 FTC 583 (1982). According to the complaint, the relevant geographic markets were the Inland Market and the Florida Market.

The "Inland Market" was defined as northern and eastern Alabama, Georgia, southeastern Tennessee and northern Florida. The "Florida Market" was defined as the peninsular region of the State of Florida. 100 FTC at 584. Paragraph VIII of the order, which was issued by the Commission on December 21, 1982, prohibits respondents for a ten year period ending on January 10, 1993, from acquiring without the prior approval of the Commission, any cement manufacturing or grinding plant or distribution terminal in South Carolina, Georgia, Alabama, Tennessee, and Florida or in any Plant Areas in which respondents, at the time of the acquisition, are then engaged in the manufacture of cement. 100 FTC at 570. The order defines "Plant Area" as each area in the United States within a 300 mile radius of any cement plant owned or leased by respondents in either the United States or Canada.

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 require such order to be altered, modified, or set aside in whole or in part." 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.

If the Commission determines that the petitioner has made the required showing of changed conditions, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the repose and finality of Commission orders. See *Federated Department Stores v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

The Commission may also modify an order pursuant to section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest warrants such action. Section 2.51 of the Commission's Rules invites respondents in petitions to reopen to show how the public interest warrants the

requested modification. 16 CFR 2.51. In the case of a request for modification based on this latter ground, a petitioner 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 29, 1983), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979).

The Commission has determined that reopening the order and modifying Paragraph VIII by deleting the State of Florida from the geographic coverage of the prior approval provision are warranted by changed conditions of fact. Lafarge has demonstrated changes in the Florida Market, resulting from technological and other developments, that have led to significantly increased cement imports. These changes, which have occurred in the northern part of Florida as well, remove any significant concerns that any Lafarge acquisition in Florida might raise antitrust concerns and so should be subject to prior approval. Developments in unloading technology have lowered water transportation costs, and reduced world-wide demand has caused foreign producers to ship more cement into Florida. As a result, Florida is likely a part of a broader geographic market including western Europe and Latin America. It is unlikely that any acquisition in that broader geographic market would warrant antitrust scrutiny.

After carefully considering the remainder of Lafarge's request for relief from the prior approval requirement, the Commission has

concluded that Lafarge has not made a satisfactory showing that changed conditions of fact or the public interest require Paragraph VIII to be further modified. After reviewing Lafarge's Petition and Supplemental Petition, as well as the affidavits and economic analyses supplied therewith, it does not appear that Lafarge has shown that changed conditions eliminate the need for the prior approval requirement or that any injury from the prior approval requirement outweighs the need for the order.

Lafarge has not shown that the same changes that have eliminated the need to review acquisitions in Florida have affected the Inland Market or other regional markets to the same extent. Indeed, whatever changes in imports that have occurred in those areas do not appear to have been significant. Lafarge concedes that the factual changes alleged in the Inland Market and in Plant Areas were possibly foreseeable and have been less extreme than in Florida, and Lafarge recognizes that its evidence of changed conditions in those markets may not be sufficient to meet its burden of proving changed factual circumstances. Petition at 7, 16. Lafarge has also not shown changes of fact that demonstrate that the Inland Market is not a relevant geographic market.¹ The Commission has therefore concluded that Lafarge has not shown changed conditions that eliminate the need for a prior approval provision in these areas.

Lafarge also asserts in its Petition that the changes related to the Inland Market and to the markets where the Plant Areas are located, though possibly foreseeable, have so altered the public interest balance that the prior approval requirement should be removed under the public interest standard. Lafarge contends that "the public interest is harmed by continuation of the prior approval requirement because Lafarge is unable to compete in the market for cement-producing and distributing assets, even if no significant antitrust risk is created by the potential acquisition." Petition at 19. The Petition and the Economic Report submitted with the Petition² identified three instances in which the prior approval requirement allegedly prevented or inhibited Lafarge's ability to acquire certain cement assets.³ Those,

¹ Lafarge's analysis of the Inland Market in its cement market studies may not accurately depict the appropriate geographic market because its assessment of the supply response of firms on the fringe of the postulated markets may be overstated. Moreover, the deregulation of railroad rates, which is a basis for Lafarge's analysis of geographic markets, occurred prior to the date of the issuance of this order and therefore is not a changed condition.

² Michael W. Klass, "Economic Analysis of the Proposed Relaxation of the Prior Approval Provision of the Consent Order Governing Lafarge Corporation's Acquisition of United States Cement Assets," August 11, 1988 ("Economic Report").

³ The first instance involved GPI's attempt to acquire a cement terminal in West Palm Beach, Florida, from

however, are instances in which it was clearly foreseeable that the order's prior approval provision would apply. It was also foreseeable at the time the respondents agreed to the order that the prior approval requirement would impose costs upon such acquisitions by Lafarge, and it was equally foreseeable that Lafarge's competitors would not be subject to similar requirements. The costs identified by Lafarge do not ordinarily provide a sufficient basis to justify termination of a prior approval provision in an order. See Order Reopening and Setting Aside Order Issued on April 21, 1981, *Albertson's, Inc.*, Docket No. C-3064, July 1, 1987, at 4. Unlike the showing in *Albertson's*, Lafarge has failed to show that no acquisition or series of acquisitions that it might make over the next four years would raise competitive concerns. The Commission has therefore determined that Lafarge has failed to make the threshold showing of injury under the public interest standard.

Additionally, even if Lafarge had met its threshold burden of showing a need for relief from the prior approval provision for acquisitions in the Inland Market and in Plant Areas, Lafarge has not established that the reasons for making the modification outweigh the continuing need for the order's prior approval requirements. In the Petition and the Economic Report, Lafarge alleges that while changes in the Inland Market may not be sufficient to establish changed conditions of fact necessitating reopening the order, the facts do establish that under current merger analysis, the Inland Market, as defined in the complaint, never existed or no longer is a relevant market. Petition at 16, Economic Report at 29. Lafarge claims that since the Inland Market, as redefined by Lafarge, is no longer concentrated, the public interest requires elimination of the prior approval requirement for acquisitions in that area. After reviewing Lafarge's Supplement Petition and supporting documents, the Com-

Ideal Basics Industries in November 1982, while the consent order in this matter was pending. According to Lafarge, Ideal backed out of the transaction because of the need for GPI to obtain prior Commission approval of the sale—"a time consuming process." Petition at 13-14. Subsequently, in 1984, Lafarge desired to lease a West Palm Beach terminal, but instead entered into an allegedly more costly through-put arrangement because it was uncertain if the lease of the terminal was subject to the prior approval requirement. In neither instance did Lafarge seek prior approval from the Commission.

The second instance involved a cement plant in Seattle, which was sold at auction. Lafarge claims that the prior approval requirement prevented it from bidding on those assets. Petition at 19-20. The third situation cited by Lafarge involved its acquisition of the Huron Division of National Gypsum Company. Lafarge alleges that the costs of the acquisition were raised by the legal and economic expert fees it incurred to seek prior approval and by the 11 month wait for the Commission's prior approval process to be concluded. Petition at 20-21. The Commission notes, however, that Lafarge did make that acquisition, and notes further that Lafarge's delay in responding to the staff's requests for information contributed to the time needed to decide

mission has concluded that Lafarge has failed to show that there is no continuing need for the order in the Inland Market defined in the complaint. In addition, absent extraordinary circumstances, the Commission will not reconsider whether the markets alleged in the complaint are valid. Lafarge chose not to contest the complaint. Absent a showing of changed conditions or a threshold showing of injury, the Commission will not revisit issues that could have been, but were not contested.

Lafarge's claims relating to the lack of a continuing need for prior approval of acquisitions within 300 miles of Lafarge's currently existing cement plants are mainly based on the same factual allegations as its arguments relating to the Inland Market. It claims that, due to changes in transportation regulations and technology, it is now economically feasible to ship cement longer distances than at the time of the order and that as a result, cement markets are geographically broader and less concentrated. It also claims that the changes in the technology of shipping cement by water have opened the U.S. markets to imports, obviating the need to be concerned about possible anticompetitive activity by domestic producers.

Lafarge has failed to demonstrate that there are no geographic markets within the United States in which any possible acquisition by Lafarge would warrant the Commission's scrutiny. As noted previously, Lafarge's cement market studies may not accurately depict the appropriate geographic market in which to review acquisitions in Plant Areas, and thus fail to demonstrate that no acquisition in any Plant Areas would warrant scrutiny by the Commission.⁴ Lafarge's proposed acquisition of the Huron Division from National Gypsum is an example of a recent transaction subject to the order that raised significant antitrust issues and required extensive scrutiny before the Commission granted approval.⁵

The Petition requests that if the prior approval provision is not set aside, the Commission substitute a prior notification requirement for the prior approval requirement for acquisitions made in Plant Areas. Because the Commission has determined that Lafarge has failed to

⁴ Because neither the complaint nor the order define the geographic market for acquisitions in Plant Areas, the Commission will determine the appropriate market analysis at the time any request for prior approval is made.

⁵ Even Lafarge's demonstration that water-based terminals can be constructed in Florida within a two-year time frame does not demonstrate that such terminals could be constructed anywhere on the United States coastline. The permitting process varies from jurisdiction to jurisdiction, and Lafarge has not shown that a terminal could be built within two years in other Plant Areas. Therefore, Lafarge has not shown that acquisitions in Plant Areas that include deep water ports should be removed from order coverage.

show that there is no longer a continuing need for prior approval of acquisitions by Lafarge in Plant Areas and because prior notification would not be an adequate substitute for the Commission's review under a prior approval provision, this request is also denied.

The Commission, therefore, has determined to grant Lafarge's request to reopen and modify Paragraph VIII of the order to delete the requirement for prior approval of acquisitions in the State of Florida. Further, the Commission has determined to deny Lafarge's request in all other respects.

According, *it is ordered*, that this matter be reopened and that Paragraph VIII of the Commission's order in Docket No. C-3100 be modified, as of the date of service of this order, to read as follows:

VIII.

If is further ordered, That for a period of ten years respondents shall not acquire, without the prior approval of the commission, any cement manufacturing or grinding plant or distribution terminal in South Carolina, Georgia, Alabama and Tennessee or in any Plant Areas (other than in Florida) in which respondents, at the time of the acquisition, are then engaged in the manufacture of cement.

SEPARATE STATEMENT OF CHAIRMAN DANIEL OLIVER

I concur in the Commission's decision to grant Lafarge's request to reopen and modify Paragraph VIII of the order, by deleting the requirement for prior approval of acquisitions in the State of Florida, and to deny Lafarge's request in all other respects. However, in reaching this conclusion, I do not join in imposing the standard espoused in *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2, that petitioner demonstrate some "affirmative need" for modification when invoking the public interest. The "affirmative need" standard is required neither by Section 5(b) of the Federal Trade Commission Act nor by Rule 2.51 of the Commission's Rules of Practice, and the Commission should not impose this additional hurdle. The "affirmative need" standard creates no discernible benefits. Nevertheless, in my view, the public interest is served by continuing to impose the prior approval requirement for acquisitions in the Inland Market and Plant Areas outside of Florida.

IN THE MATTER OF

PPG INDUSTRIES, INC., ET AL.

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

Docket 9204. Complaint, Jan. 29, 1986—Decision, Apr. 5, 1989

This consent order requires, among other things, a Pittsburgh, Pa. manufacturer and seller to obtain prior Commission approval before acquiring any interest in a company that makes aircraft transparencies, if that company has more than \$750,000 in sales in the U.S., and to provide the FTC prior notice before making other acquisitions.

Appearances

For the Commission: *Steven A. Newborn.*

For the respondents: *Joseph A. DeFrancis, Carla Hills, Scott G. Knudson, Irwin Goldbloom and Peter L. Winik, Latham, Watkins & Hills, Washington, D.C.; David J. Hickton, David J. Armstrong, and Dorothy A. Davis, Dickie, McCamey & Chilcote, Pittsburgh, Pa. and Bertum Kantor, Wachtell, Lipton, Rosen & Katz, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondents, PPG Industries, Inc. ("PPG") and Swedlow, Inc. ("Swedlow"), corporations subject to the jurisdiction of the Commission, have entered into agreements that violate Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45); that through those agreements PPG has agreed to acquire Swedlow; that such acquisition, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended; and it appearing that a proceeding in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the