

IN THE MATTER OF
LOUISIANA-PACIFIC CORPORATION

Docket C-2956. Interlocutory Order, November 15, 1989

ORDER

This matter having been heard by the Commission on the briefs and oral argument of Louisiana-Pacific Corporation and of the Bureau of Competition in support of and in opposition to modification of the order in Docket No. C-2956, for the reasons stated in the accompanying opinion, the Commission has determined to deny the petitions to modify the order. Accordingly,

It is ordered, That the petitions to modify the order in Docket No. C-2956 be, and they hereby are, denied.

By the Commission.*

OPINION OF THE COMMISSION

BY AZCUENAGA, *Commissioner*:

The 1979 consent order in this matter was designed to resolve the Commission's concern that Louisiana-Pacific's proposed acquisition of Fibreboard Corporation would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The order required Louisiana-Pacific, among other things, to divest within two years from the date of the order a fiberboard plant at Rocklin, California, and to obtain prior Commission approval of any acquisitions in the defined market for a period of ten years. In 1980 and in 1981, Louisiana-Pacific asked the Commission to set aside these provisions of the order.

The Commission in 1980 and in 1981 denied the two petitions to reopen and modify the consent order filed by Louisiana-Pacific, on the ground that Louisiana-Pacific had failed to make a satisfactory showing of changed conditions of law or fact or public interest considerations sufficient to require reopening. In the subsequent civil penalty action, initiated by the Commission in 1981 for Louisiana-Pacific's failure to divest as required by the order, the District Court

*Prior to leaving the Commission, former Commissioner Machol registered her vote in the affirmative for the Order and the Opinion of the Commission in this matter. Commission Owen did not register a vote in this matter.

found that Louisiana-Pacific had violated the order and imposed a civil penalty of \$4 million. *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504 (D. Or. 1982). On appeal, the Court of Appeals for the Ninth Circuit vacated the civil penalty award on the ground that the Commission had not adequately explained its reasons for denying the 1981 petition to reopen. *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445 (9th Cir. 1985). Although the Commission issued a statement of its reasons for denying the petition, Letter to John C. Hart, June 5, 1986, the District Court did not consider the findings but remanded to the Commission with instructions to reopen the order and consider modification. *United States v. Louisiana-Pacific Corp.*, 654 F. Supp. 962 (D. Or. 1987), *appeal dismissed*, 846 F.2d 43 (9th Cir. 1988). The history of this proceeding is described in greater detail in Part I below and in the June 5, 1986, letter of the Commission to John C. Hart.

The issue in this proceeding is whether the Commission should have modified, altered or set aside the order in this matter in response to the 1981 petition of Louisiana-Pacific Corporation to reopen and modify the order and, if so, how.¹ The Commission has considered the matter on the briefs and oral [2] argument of the respondent and of the Bureau of Competition. For the reasons stated below, the petition to modify the order is denied.

I. Background

The consent order was negotiated after the Commission, on June 7, 1978, authorized its staff to seek a preliminary injunction under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), to block Louisiana-Pacific's proposed acquisition of Fibreboard Corporation, pending administrative adjudication of the lawfulness of the acquisition. The Commission considered memoranda submitted by Louisiana-Pacific (dated May 24, 1978) and Fibreboard (dated May 23 and June 6, 1978) before making its decision to seek a preliminary injunction.²

Instead of proceeding immediately to court, the Commission directed its staff to explore Louisiana-Pacific's offer, submitted by its attorneys, to settle the matter by divesting the medium density fiberboard plant at Rocklin, California, then owned by Fibreboard.

¹ Accordingly, we consider here the allegations of the 1981 petition. Subsequent developments are not at issue.

² Copies of these memoranda are Exhibits 4, 5 and 6 in Bureau of Competition's Exhibits to Answer to Louisiana-Pacific Corporation's Response to Order Reopening Order (hereafter "Exhibit —").

After two weeks of settlement negotiations, Louisiana-Pacific offered to divest the Rocklin plant or, at its discretion, to waive its option to purchase a particleboard plant at Ukiah, California, then owned by Georgia-Pacific Corporation and leased, with an option to purchase, by Louisiana-Pacific. On June 23, 1978, the Commission rejected Louisiana-Pacific's settlement proposal and directed its staff to seek an injunction, unless Louisiana-Pacific would agree to divest the Rocklin plant and to accept a limited restriction on certain future acquisitions. Louisiana-Pacific agreed to the settlement and signed the consent agreement on June 26, 1978. In exchange for Louisiana-Pacific's agreement to the terms of the order, the Commission discontinued its plan to seek a preliminary injunction to prevent the acquisition of Fibreboard Corporation and terminated its prosecution of the matter.

The Commission issued its complaint and the order in settlement of the complaint on February 27, 1979. The order became final on March 28, 1979. The complaint alleged that Louisiana-Pacific's acquisition of Fibreboard Corporation would, if consummated, violate 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. *Louisiana-Pacific Corp.*, Docket No. C-2956, [3] 93 FTC 308 (1979).³ The order, to which Louisiana-Pacific consented, required Louisiana-Pacific to divest within two years from the date of the order the medium density fiberboard plant in Rocklin, California, and for a period of ten years from the date of the order to obtain the approval of the Commission before making certain acquisitions.

Less than one year after the order was final, in a petition dated February 4, 1980, supplemented by a letter dated June 11, 1980, Louisiana-Pacific asked the Commission to set aside the divestiture requirement and the prior approval clause.⁴ The Commission considered the request and determined that the petition failed to demonstrate changes of fact or law or considerations affecting the public interest that warranted reopening the order. The Commission issued its decision and notified Louisiana-Pacific of the denial of the petition to reopen by letter dated June 26, 1980.

³ Count I of the Commission's complaint challenged Louisiana-Pacific's acquisition of Fibreboard Corporation; Count II of the complaint challenged its 1976 acquisition from Evans Products of a particleboard plant in Missoula, Montana, and its 1976 lease from Georgia-Pacific of a particleboard plant at Ukiah, California. The five-year lease gave Louisiana-Pacific an option to buy the Ukiah plant at the end of three years. The consent order settled both counts of the complaint.

⁴ Exhibits 1 & 2. Exhibit 1 includes Louisiana-Pacific's 1980 Petition to Reopen and its Memorandum in Support of Petition To Reopen Proceedings for the Purpose of Modifying a Final Order (hereafter "1980 Memorandum").

On June 25, 1981, three months after the date by which Louisiana-Pacific had agreed to divest the Rocklin plant, Louisiana-Pacific filed its second petition to reopen the order, again asking the Commission to set aside the requirement to divest.⁵ The second petition incorporated by reference the first petition to reopen and alleged additional grounds for the requested modification. The Commission again considered Louisiana-Pacific's request and again determined that Louisiana-Pacific had not made a sufficient showing under Section 5(b) of [4] the Federal Trade Commission Act, 15 U.S.C. 45(b), to require reopening of the order. The Commission issued its decision by letter dated July 31, 1981.

In the Commission's subsequent action against Louisiana-Pacific for failure to divest the Rocklin plant in violation of the order, Louisiana-Pacific counterclaimed, alleging that the Commission's denial of the second petition to reopen the order was improper. The District Court granted the government's motion for summary judgment on the merits of the counterclaim. *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 501 (D. Or. 1982). The District Court also found that Louisiana-Pacific had violated the order and imposed a \$4 million civil penalty, largely because Louisiana-Pacific had not made a good faith effort to divest the plant. *United States v. Louisiana-Pacific Corp.*, 554 F. Supp. 504, 510 (D. Or. 1982). On appeal, the court of Appeals for the Ninth Circuit found that the Commission's statement of reasons for denying Louisiana-Pacific's 1981 petition lacked sufficient detail and instructed the District Court to require from the Commission a fuller statement of reasons for the denial of the June 25, 1981, petition. *United States v. Louisiana-Pacific Corp.*, 754 F.2d 1445 (9th Cir. 1985). The Commission provided its statement of reasons for the denial of the 1981 petition by letter dated June 5, 1986.

On application for reinstatement of the civil penalty, the District Court concluded that the decision of the Court of Appeals required the Commission to reopen the order to consider whether the order should have been modified, altered or set aside in response to Louisiana-Pacific's 1981 petition to reopen.⁶ The District Court concluded that

⁵ Exhibit 3 (hereafter "1981 Petition"). In 1981, Louisiana-Pacific had not yet divested the Rocklin plant. Final divestiture of the Rocklin plant was approved by the District Court in December 1983, after the court-appointed trustee had obtained eleven offers during a 90-day search. See *United States v. Louisiana-Pacific Corp.*, 569 F. Supp. 1138 (D. Or.), *reconsideration denied*, 569 F. Supp. 1141 (D. Or. 1983).

⁶ Louisiana-Pacific filed a third petition to reopen and modify the order on November 9, 1988. In the 1988 petition, Louisiana-Pacific asked the Commission to set aside the order in its entirety and to dismiss the civil penalty action pending in the District Court. The Commission denied the petition by letter dated March 9, 1989, to Clifford N. Carlsen, Jr., Esq., and Michael E. Arthur, Esq.

the order should be reopened on the theory that “[t]he Ninth Circuit’s opinion makes clear that a satisfactory showing [sufficient to require reopening] is made if the petition states with particularity the changed conditions” and that “LP stated the changed conditions with particularity”⁷

The FTC must [reopen and consider modification] in this case because LP stated the changed conditions with particularity. Specifically, LP pointed to its reduced capacity for production of particleboard and medium density fiberboard. This reduction [5] tended to show a reduction of market power in the relevant market. Also, LP pointed to the then depressed conditions in the forest products industry, which made the divestiture of the Rocklin plan[t] more onerous than originally thought.

United States v. Louisiana-Pacific Corp., 654 F. Supp. 962, 965 (D. Or. 1987), *appeal dismissed*, 846 F.2d 43 (9th Cir. 1988).⁷ Although the Commission respectfully disagrees with the court’s standard for reopening, the matter of reopening has been resolved by the District Court for the purpose of this remand proceeding, and the issue here is whether the order should be modified, altered or set aside and, if so, how. Pursuant to the District Court’s decision, the Commission instituted this adjudicative proceeding.

II. Standard for Modifying a Final Order of the Commission

Modification of a final order is warranted when significant unanticipated changes in circumstances or considerations of the public interest eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *See, e.g., Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (no modification for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drug Stores Northwest, Inc.*, Docket No. C-3039, Letter to H. B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers that the order sought to remedy); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification warranted by “clear showing” of changes that eliminate reasons for order or such that the order causes unanticipated hardship). For example, it may be in the public interest to modify an order “to relieve

⁷ The Commission appealed from the District Court’s decision on the ground that the District Court incorrectly construed the standard under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), for reopening final Commission orders. The Court of Appeals decided that the District Court’s remand order was not appealable and dismissed for lack of appellate jurisdiction. The Commission preserves the issue of the proper standard for reopening (as distinguished from the standard for modification after reopening) for future proceedings in this and other cases.

any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). In addition, the Commission will consider the reasons favoring modification and any reasons not to modify the order. *See, e.g., Chevron Corp.*, Docket No. C-3147, 105 FTC 228 [6] (1985) (modification warranted in public interest when potential harm to respondent's ability to compete outweighs any further need for order).

In reopening proceedings, the petitioner has the burden of showing why an order should be modified. *See Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *United States v. Swift & Co.*, 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961) (consent "decree must enjoy a solid presumption that it was founded on fact and supported by reason"); *see Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for [not reopening] except in the most extraordinary circumstances"); *United States v. Swift & Co.*, 286 U.S. 106, 120 (1932) (denying request to modify consent order: "What was then solemnly adjudged as a final composition of an historic litigation will not lightly be undone at the suit of the offenders, and the composition held for nothing."); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to Commission order).

Louisiana-Pacific asserts that the District Court's conclusion that the Commission must reopen the order is tantamount to a conclusion that the Commission must modify the order. R.I.B. at 2; R.R.B. at 8-9.⁸ This could be true only if Louisiana-Pacific's allegations of changed conditions were in fact equivalent to "changed conditions

⁸ We use the following abbreviations in this opinion:

- | | |
|--------|---|
| R.I.B. | Louisiana-Pacific's Response to Commission Order of August 9, 1988, Reopening Consent (Respondent's Initial Brief) |
| R.R.B. | Rebuttal of Louisiana-Pacific Corporation (Respondent's Rebuttal Brief) |
| C.A.B. | Bureau of Competition Answer to Louisiana-Pacific Corporation's Response to Order Reopening Order (Bureau of Competition's Answering Brief) |

[that] require such order to be altered, modified, or set aside," within the meaning of [7] Section 5(b) of the Federal Trade Commission Act.⁹ Neither the Commission nor the courts have found such equivalence.¹⁰ The Court of Appeals said that Louisiana-Pacific's petition to reopen contained "substantive allegations that are not facially frivolous," but the Court of Appeals also said that "[w]e do not suggest that L-P's petitions required the FTC to modify the consent order." 745 F.2d at 1449-50.¹¹ The District Court "express[ed] no opinion on what the FTC should conclude" after reopening and said that "the legislative history makes clear that the FTC is not required to modify the order simply because it is required to *consider* modification." 654 F. Supp. at 965 (emphasis in original). See also S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979) ("this section does not require that the Commission modify any final order").

Louisiana-Pacific also incorrectly asserts that the decisions of the District Court and the Court of Appeals "contemplate and require" the Commission to consider additional evidence and testimony. R.I.B. at 6. The Court of Appeals said that the Commission could not summarily reject a petition to [8] reopen, "other than one that is meritless on its face, without making findings and without offering a clear statement of its reasons for rejecting the petition." 754 F.2d at 1449. The Court of Appeals said that it could not "evaluate the respective claims of the parties" because the Commission had not provided a statement of its reasons for denying Louisiana-Pacific's petition, *id.*, and it remanded to the District Court with instructions to require the Commission "to enter specific findings with regard to L-P's petitions." *Id.*, at 1450. This is not a requirement to hold an evidentiary hearing. The District Court remanded to require the

⁹ Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order . . . 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 such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made." S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979).

¹⁰ Indeed, the District Court's application of a different standard for reopening—"changed conditions [stated] with particularity"—was the basis for the Commission's appeal of the remand order. See note 7 *supra*. The Court of Appeals said that the changed conditions must be of the type that require modification but did not consider whether Louisiana-Pacific's allegations met this standard. 754 F.2d at 1449 nn.3 & 4.

¹¹ The Court of Appeals, considering the appeal from the District Court's remand order, said that "the order of remand does not dictate the result of the reconsideration. The FTC may or may not find that the consent decree should be modified." 846 F.2d at 44.

Commission to consider modification and also did not require an evidentiary hearing.

Evidentiary hearings are not required in adjudicative proceedings when there are no disputed issues of material fact. *E.g.*, *Consolidated Oil & Gas, Inc., v. FERC*, 806 F.2d 275, 279-80 (D.C. Cir. 1986); *Louisiana Land & Exploration Co. v. FERC*, 788 F.2d 1132, 1137-38 (5th Cir. 1986); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1362-64 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1123 (1986). The Commission, in considering Louisiana-Pacific's petitions to reopen, has not disputed the basic facts alleged by Louisiana-Pacific. Rather, for the purpose of evaluating Louisiana-Pacific's petitions, the Commission has assumed that the factual assertions were true. *See* September 13, 1988, Order of the Commission, at 2.¹² Although Louisiana-Pacific has argued that the Commission "cannot properly determine that no facts are in dispute, because it has not heard all the facts that L-P is entitled to place before it," R.I.B. at 7, Louisiana-Pacific has not in its briefs, at oral argument or by motion attempted to show any material controverted facts that require resolution.¹³ *See* R.R.B. at 14 n.1.¹⁴ [9]

Louisiana-Pacific argues that because the order is a consent order, unsupported by written findings of fact and an opinion, the Bureau of Competition must be required to "introduce the factual premises underlying the complaint" to provide Louisiana-Pacific "with a point of departure for its allegations of change." R.R.B. at 18. Louisiana-Pacific also argues that the Bureau of Competition should offer affirmative evidence to show that "in 1981, L-P's retention of Rocklin would have been anticompetitive in any way, or that divestiture was still needed or would have been procompetitive" and that the

¹² The Order, denying Louisiana-Pacific's request to refer the matter to an administrative law judge, stated that "[t]he factual allegations of Louisiana-Pacific's 1981 petition to reopen the consent order are not disputed, and the respondent has not disclosed in its Motion for Referral any controverted facts that require resolution."

¹³ Counsel for Louisiana-Pacific stated at oral argument that any additional facts presented by Louisiana-Pacific would not be new but would support the factual allegations already made in the petitions. Oral Argument Tr. at 48.

¹⁴ Louisiana-Pacific asserted that it "would expect to introduce, among other things, evidence of the type contained in L-P's" November 8, 1988, petition to reopen and modify the order. The 1988 petition, however, introduced no new facts warranting reopening but argued, as in earlier petitions, that the product market was unconcentrated, that Louisiana-Pacific lacked market power and that the absence of a challenge to certain acquisitions by Georgia-Pacific demonstrated the lack of need for this order. Louisiana-Pacific also argued in the 1988 petition that reopening and modification would be appropriate because of the 1988 "spin-off" of Fibreboard and the lack of financial benefit to Louisiana-Pacific from Fibreboard or Rocklin. Louisiana-Pacific also argued that the prior approval clause imposed a competitive disadvantage and was no longer necessary and that further proceedings were not in the public interest. The prior approval clause has now expired by the terms of the order.

Commission should “render *de novo* findings regarding the continued need for divestiture of the Rocklin facility.” R.R.B. at 3-4. These arguments seriously misperceive the petitioner’s burden in an order modification proceeding.

Because the order, entered on the considered consent of the parties, “enjoy[s] a solid presumption that it was founded on fact and supported by reason,” petitioners seeking modification “bear the burden of proof on their petitions, and the burden is heavy.” *United States v. Swift & Co.*, 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff’d per curiam*, 367 U.S. 909 (1961). Because a final order is presumptively valid, the continued need for the remedy imposed by the order is relevant if a need for modifying the order is demonstrated in the first instance, but the burden is not on the proponents of the order to justify it. Rather, the burden is on the petitioner to “show that the decree when entered was supported by conditions which have so altered with the passage of time that the restraint can no longer be justified, and that they are suffering injury, without countervailing advantage to the public interest.” 189 F. Supp. at 906.

Louisiana-Pacific apparently would litigate the complaint now, more than ten years after the Fibreboard acquisition occurred, although the Commission terminated its prosecution of the matter in 1978, when Louisiana-Pacific signed the consent order. Proving a violation now, or even in 1980 or 1981, after the parties had negotiated a final consent order in settlement of the complaint, is beyond the scope of modification proceedings. By consenting to an order, respondents “relinquished the right to insist that an offense be proved, and the right to show that no [10] violation had been committed. Having accepted a decree drawn on the theory of a violation of the antitrust laws, they cannot [later] vacate or modify the decree on the ground that the theory was unsound.” *United States v. Swift & Co.*, 189 F. Supp. at 907, *citing*, *Swift & Co. v. United States*, 276 U.S. 311 (1929); *see also* *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (decree “is not subject to impeachment in its application to the conditions that existed at its making”).

Although the factual allegations of Louisiana-Pacific’s petitions to reopen are undisputed, the conclusions to be drawn from those facts are disputed. Accepting Louisiana-Pacific’s basic factual allegations as true does not mean that the Commission must also adopt the inferences and conclusions preferred by Louisiana-Pacific. The conclusions and inferences from those undisputed facts are to be drawn by

the Commission. See, e.g., *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 739 (1945); *FTC v. Pacific States Paper Trade Association*, 273 U.S. 52, 63 (1927) ("The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission."). For example, the fact that economic conditions changed between 1978 and 1981 is not disputed, but this does not mean that the Commission must also agree with Louisiana-Pacific's conclusion from this basic fact that modification of the order is required. See R.R.B. at 25. Our responsibility, under the order of the District Court, is to consider whether the facts alleged by Louisiana-Pacific are sufficient to warrant modification of the consent order.

We also reject Louisiana-Pacific's assertion that the record in this proceeding must be limited to the jurisdictional facts alleged in the complaint and the facts alleged in Louisiana-Pacific's petitions to reopen. R.I.B. at 14. The "nonadjudicative" facts cited by Louisiana-Pacific—the Commission's decisions to seek a preliminary injunction to prevent Louisiana-Pacific's acquisition of Fibreboard and to issue a complaint with the consent order, the compliance reports submitted by Louisiana-Pacific under the order¹⁵ and the [11] Commission's decisions to deny Louisiana-Pacific's 1980 and 1981 petitions to reopen and to seek enforcement of the order and civil penalties for violation of the order—all are matters of record and, so far as we are aware, undisputed. Although Louisiana-Pacific apparently would exclude from the record the pre-order memoranda submitted to the Commission by Louisiana-Pacific and Fibreboard, Louisiana-Pacific has not asserted that those memoranda are inaccurate or erroneous.¹⁶

¹⁵ Louisiana-Pacific does not dispute the truth of its compliance reports but asserted at oral argument that they "had to do with correspondence and writings" and were "not a full record" of Louisiana-Pacific's efforts to divest. Oral Argument Tr. at 11-14. This assertion is belied by (1) Louisiana-Pacific's statement that the "specifics" of its efforts to divest Rocklin "are set out in detail in L-P's bimonthly reports of compliance," 1981 Petition at 3; and (2) the June 10, 1981, affidavit of Donald R. Kayser, a vice president of Louisiana-Pacific, stating that each of the eight compliance reports provided, as required by the order, "a complete set of all correspondence . . . summaries of telephone conversations, plant inspections and all other activities and efforts directed at divestiture" of the Rocklin plant. 1981 Petition exhibit 1, at 2. The possibility that individual employees and officers may have "had personal contact with prospective purchasers of the Rockland [sic] plant," Oral Argument Tr. at 12, that were not mentioned in Louisiana-Pacific's compliance reports is not, however, relevant to this proceeding.

Louisiana-Pacific asserts that it must be permitted "to rebut inferences that might be drawn from compliance reports standing alone." R.R.B. at 29. There would be no end to the adjudicative process if a party were permitted an additional hearing to attempt to rebut every inference drawn from the evidence by the adjudicative body.

¹⁶ Indeed, Louisiana-Pacific's 1980 petition "dr[e]w significantly" on the 1978 memoranda. 1980 Memorandum at 1 n.1. In any event, the Commission has not relied in this opinion or in the 1986 Findings (Letter to John C. Hart, June 5, 1986) on facts alleged in the 1978 pre-order memoranda of Louisiana-Pacific or Fibreboard to contradict factual allegations made by Louisiana-Pacific in its petitions to reopen. Rather, the

Despite its general assertions of the possibility of prejudice "when the agency takes official notice of a material and contested adjudicative fact," R.I.B. at 17, Louisiana-Pacific has made no specific claims of prejudice, nor has it identified any material, contested facts, although it has had the opportunity to do so, in its motion to refer the matter to an administrative law judge, in its briefs and oral argument in this proceeding or in any additional motion it was at liberty to file. Courts customarily take notice of their respective records in ongoing proceedings, and the principle seems equally applicable here. *See C. McCormick, Evidence* 927 (3d ed. 1984). [12]

III. Alleged Changed Conditions of Fact

Louisiana-Pacific alleged in its 1980 and 1981 petitions to reopen that economic conditions in the forest products industry had changed since the order issued in 1979 and that, in response to those economic conditions, Louisiana-Pacific had reduced its capacity to produce particleboard and multiple-density fiberboard. Louisiana-Pacific argued in its petitions that these changed conditions "dispelled any probability of adverse competitive effects on which the 1978 complaint might have been based" and, therefore, required modification of the order. R.I.B. at 23. Louisiana-Pacific also argued that as a result of changed economic conditions, it could not divest the Rocklin plant at a price that Louisiana-Pacific considered to be fair. We have considered these allegations and conclude that these changed conditions are not sufficient to warrant modification of the order.

A. Capacity Reductions

In its petitions, Louisiana-Pacific claimed that its decisions to reduce its particleboard and medium density fiberboard production capacity, in light of economic conditions, constituted changed conditions of fact that made divestiture of the Rocklin plant unnecessary.¹⁷ Louisiana-Pacific asserted that because its 1981 capacity was less than its capacity in 1978, its 1981 capacity could not be "regarded as

1978 memoranda have been cited to the extent that they show that arguments made by Louisiana-Pacific in its petitions to reopen were not new arguments but were arguments made by the parties and considered by the Commission before the order was entered.

¹⁷ In the 1980 petition, Louisiana-Pacific described some reduction in its production capacity and offered to forgo its option to purchase additional capacity at Ukiah. In the 1981 petition, Louisiana-Pacific reported that it had not exercised its option to purchase Ukiah, principally because of economic conditions in the forest products industry. *See* R.I.B. at 20. In both petitions, Louisiana-Pacific argued that the reduction in capacity eliminated any need for the divestiture required by the order. *See* R.I.B. at 34.

unlawfully anti-competitive or unduly concentrative." 1981 petition at 10-11.¹⁸ [13]

The gist of this argument is that Louisiana-Pacific's unilateral business decisions to reduce internal capacity levels obviated the need for the remedy provided in the consent order. The remedial purpose of the order, however, was not to reduce Louisiana-Pacific's or the industry's capacity to produce the relevant product, and Louisiana-Pacific's unilateral decision to reduce its capacity simply was not responsive to the competitive concerns identified by the Commission in its complaint or to the remedial purposes of the order.¹⁹

The Commission's order in this case sought to remedy the lessening of competition and the increase in concentration that the Commission believed would result from Louisiana-Pacific's acquisitions and, through divestiture, to preserve the potential for deconcentration in the relevant markets. A divestiture that places assets in the hands of another firm is the most effective means of restoring competition to its preacquisition condition. *See, e.g., United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 326-33 (1961); *RSR Corp. v. FTC*, 602 F.2d 1317, 1326 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("Once a violation of Section 7 has been established, divestiture is the usual remedy."). The order in this case required Louisiana-Pacific to divest an identified unit of its capacity to an independent firm for the purpose of restoring competition.

Louisiana-Pacific elected to change its internal capacity levels with full knowledge of its obligation under the order to divest the Rocklin plant. Such changes, brought about by business decisions uniquely within Louisiana-Pacific's control, are not significant or unforeseen changes of the kind that eliminate the need for the divestiture required by the order.²⁰ [14] Instead, Louisiana-Pacific's argument

¹⁸ Louisiana-Pacific observed in its 1981 petition that its capacity was then below the level of its capacity in 1976, after its acquisition of a particleboard plant from Evans Products (*see note 3 supra*). Louisiana-Pacific argued that because the Commission did not challenge the Evans acquisition in 1976, the Commission must have decided that Louisiana-Pacific's capacity at that time was acceptable. 1981 Petition at 10. This conclusion clearly was unwarranted. Commission inaction with respect to a particular transaction is no more than a decision that enforcement action would not be in the public interest, based on the facts unique to that transaction. In addition, as discussed below, Louisiana-Pacific's production capacity, standing alone, is not probative of competition in the market or of the need for divestiture.

¹⁹ Louisiana-Pacific's argument incorrectly suggests that the purpose of the divestiture order was to penalize Louisiana-Pacific for the alleged law violation by reducing its productive capacity. *See also* 1980 Memorandum at 4 ("punitive order of divestiture"). Rather, the purpose was to increase competition and reduce concentration by placing assets in the hands of an independent competitor.

²⁰ Although Louisiana-Pacific's obligation to divest the Rocklin plant was outstanding, Louisiana-Pacific chose to reduce its capacity not by divesting the Rocklin plant but by closing two other plants in early 1980. 1981 Petition at 6-9. While Louisiana-Pacific was closing plants, allegedly in response to economic conditions, it was investing additional capital to improve the Rocklin plant. 1980 Memorandum at 75-76.

suggests that the Commission's ability to effect relief with respect to anticompetitive acquisitions (or indeed to correct any competitive problem under Section 5 of the Federal Trade Commission Act) would be avoidable at the discretion of the respondent. Such a result clearly would be contrary to the public interest in redressing violations of the law²¹ and in repose and finality of orders.

Louisiana-Pacific's unilateral capacity reduction would not promote competition²² or achieve deconcentration as would a divestiture.²³ Even if we assume that a shift in Louisiana-Pacific's relative position in the market would be determinative, Louisiana-Pacific has not alleged anything that would tell us whether other industry members, in response to the same economic conditions, changed their respective capacity in a way that affected market concentration, total market size or the relative size of competitors in the market.²⁴ Louisiana-Pacific made no claim of changes in structural characteristics of the market, such as ease of entry, that might obviate the need for the divestiture required by the order. Compare *Genstar Limited*, Docket No. C-3049, 104 FTC 264 (1984) (modification granted on showing of increased industry capacity that eliminated need for order restrictions). [15]

Louisiana-Pacific's decisions to reduce its production capacity and its reductions in capacity were not significant or unforeseeable changes in competitive conditions that would obviate the need for the remedy provided in the order or that would impose on Louisiana-Pacific any burden different from that contemplated when Louisiana-Pacific agreed to the order. See *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification appropriate on clear showing of changes that have eliminated reasons for order or such that order causes unanticipated hardship).

Louisiana-Pacific also argued that its decision to waive its option to

²¹ In *United States v. E.I. duPont de Nemours & Co.*, 366 U.S. at 332-333, the Court said that when the purpose is to remedy an anticompetitive acquisition, "[t]he decree of the courts must be faithfully executed and no form of dissolution be permitted that in substance or effect amounts to restoring the combination which it was the purpose of the decree to terminate," "quoting *United States v. Union Pacific R. Co.*, 226 U.S. 470, 477 (1913).

²² Decisions to reduce output can in certain circumstances themselves signal antitrust problems. See *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989).

²³ Counsel for Louisiana-Pacific agreed at oral argument that a single firm's reduction in capacity does not necessarily reduce that firm's market share. Oral Argument Tr. at 53.

²⁴ Louisiana-Pacific attempts to demonstrate a decline in its market share by computing its 1981 capacity as a percentage of 1978 industry capacity. R.I.B. at 21-22; 1980 Memorandum at 48-51. This computation does not convey information about Louisiana-Pacific's market share in 1981. Similarly, the percentage change in Louisiana-Pacific's capacity between 1978 and 1981, R.I.B. at 21-22, does not convey information about Louisiana-Pacific's market position.

purchase the Ukiah plant was equivalent to a divestiture and that, therefore, the anticompetitive effects of one acquisition challenged by the Commission would be "fully dissipated" when the Ukiah lease expired in August 1981. 1981 Petition at 7; *see* R.I.B. at 34.²⁵ The alternative of a Ukiah "divestiture" (*i.e.*, waiving the option to purchase Ukiah) was presented to and considered and rejected by the Commission before Louisiana-Pacific agreed to the consent order in this case and, therefore, did not constitute a changed condition of fact. In June 1978, Louisiana-Pacific offered to forgo its option to purchase the Ukiah plant in lieu of divesting the Rocklin plant. The Commission determined in 1978, before Louisiana-Pacific signed the consent order, that the "Ukiah option" offered by Louisiana-Pacific was less consistent with the public interest in maintaining competition than the divestiture of the Rocklin plant. Three days later, on June 26, 1978, after the Commission had rejected the "Ukiah option" in settlement of the case, Louisiana-Pacific agreed to the order requiring divestiture of the Rocklin plant. Louisiana-Pacific's decision to forgo its option on the Ukiah property was not a changed condition within the meaning of Section 5(b), because the Commission had considered this specific possibility before the order was entered.

B. Economic Conditions

In its 1981 petition, Louisiana-Pacific argued that elimination of the divestiture obligation was required because, as a result of high interest rates and depressed conditions in the forest products industry, the company had been unable to divest the Rocklin plant at a price that Louisiana-Pacific [16] considered to be fair.²⁶ 1981 Petition at 3; R.I.B. at 28. Louisiana-Pacific argued that it should not be required to forgo the substantial profits that it believed it could have gained by selling the Rocklin plant in a healthier economic environment.

The price that Louisiana-Pacific could obtain for the Rocklin plant was not a changed condition of fact that warranted modification of the order, because the order required Louisiana-Pacific to divest the Rocklin plant unconditionally, without regard to price. *See United States v. Beatrice Foods Co.*, 344 F. Supp. 104, 116-17 (D. Minn. 1972), *aff'd*, 493 F.2d 1259, 1275 (8th Cir. 1974), *cert. denied*, 429 U.S. 961 (1975) (inability to obtain subjectively desired "fair price"

²⁵ Louisiana-Pacific shut down the Ukiah plant in mid-1980. R.I.B. at 20.

²⁶ Louisiana-Pacific argues that "unforeseen economic conditions so profoundly depressed the market value of the Rocklin plant that it was impossible for L-P to sell into such a market without accepting an unintended and unwarranted forfeiture of between \$20 and \$25 million." R.I.B. at 28.

not a defense to civil penalty action for failure to make timely divestiture); *accord*, *United States v. Papercraft Corp.*, 393 F. Supp. 415 (W.D. Pa. 1975), *aff'd*, 540 F.2d 131 (3d Cir. 1976); *United States v. Swingline, Inc.*, 371 F. Supp. 37 (E.D.N.Y. 1974).²⁷ Because the order required Louisiana-Pacific to divest unconditionally, Louisiana-Pacific had no right to expect or to condition divestiture on a certain price for Rocklin in any market and, therefore, could not claim that modification of the order was required because it might have to sell the plant at a price lower [17] than what it subjectively considered fair.²⁸ Changed economic conditions resulting in a price for Rocklin that Louisiana-Pacific deemed insufficient did not constitute changed conditions that warranted modification of the order.

Louisiana-Pacific did not argue that economic conditions made divestiture of the Rocklin plant impossible but only that it would be unlikely to get the price it wanted. *See* R.I.B. at 28; 1981 Petition at 3. *Compare RSR Corp.*, Docket No. 8959, 98 FTC 872 (1981) (divestiture order modified on public interest grounds after respondent claimed that no buyer available "at any price"). Louisiana-Pacific's petition stated only (1) that economic conditions in the forest products industry had changed for the worse and (2) that Louisiana-Pacific could not sell Rocklin at a "fair" price.²⁹ 1981 Petition at 25. Louisiana-Pacific did not claim that economic conditions, as opposed to its unwillingness to accept a lower price, were the reason that it failed to divest the plant within the time required by the order.³⁰ Indeed, in its 1981 petition, Louisiana-Pacific admitted that it could divest Rocklin, notwithstanding economic conditions, if it would

²⁷ Louisiana-Pacific concedes that *Beatrice* stands for the proposition that "a respondent is not excused from its consent order obligations when it can obtain only an unexpectedly low price for the property ordered divested." R.R.B. at 26 (emphasis in original). The *Beatrice* court also noted that nothing in the order "suggests anything to indicate that defendant's divestiture obligation under the order was to be affected by the price defendant received." 344 F. Supp. at 116.

Louisiana-Pacific argues that the modified order in *RSR Corp.*, Docket No. 8959, 98 FTC 872 (1981), establishes a different rule, because it "contains language affirmatively establishing an absolute divestiture obligation." R.R.B. at 27. This is incorrect. The *RSR* order, modified in the public interest after *RSR* claimed that it could not divest "at any price," required an auction "at no minimum price." The no-minimum-price provision in *RSR* describes the terms of the auction. Neither auctions nor no-minimum-price provisions are usual terms in divestiture orders.

²⁸ The divestiture of the Rocklin plant was required by the Commission to remedy an allegedly unlawful acquisition. Louisiana-Pacific, having agreed to the remedy in settlement of the complaint, could not later unilaterally set a price on the remedy.

²⁹ In its 1980 petition, Louisiana-Pacific argued that Rocklin was "a valuable production facility" and that divestiture would be unjust in view of Louisiana-Pacific's recent capital investments to improve Rocklin. 1980 Memorandum at 6 & 75-76.

³⁰ Louisiana-Pacific was three times reminded by the staff of the Commission that Louisiana-Pacific was not entitled to any subjectively desired price for the plant. Exhibits 7, 8 & 9 (letters to James W. Lock, Assistant General Counsel, Louisiana-Pacific Corp., April 10, 1980 (at 3), December 18, 1980, and February 5, 1981).

accept a price lower than its subjectively determined "fair price." 1981 Petition at 3 & 25.

Louisiana-Pacific's claims in its 1981 petition that changed economic conditions would require sale of the Rocklin plant at a "distress" price, resulting in a "forfeiture of between twenty and twenty-five million dollars," 1981 Petition at 25; R.I.B. at 28, were conclusory statements, unsupported by the law or the facts. "Forfeiture" implies some right to a particular, higher price, but Louisiana-Pacific had no right to a particular price for Rocklin. The "\$20 to 25 million forfeiture" suggests that the Rocklin plant had a market value of approximately \$40 million (which was Louisiana-Pacific's asking price for the [18] plant in 1980 and 1981). The most accurate indications in the record of the plant's market value are the offers for Rocklin when Louisiana-Pacific put the plant up for bid: those bids, received in December 1980, ranged from \$17 million to \$25 million.³¹ Louisiana-Pacific rejected all of them.

In its 1981 petition, Louisiana-Pacific did not contend that adverse economic conditions or high interest rates had existed in 1979 or the first half of 1980, which constituted the greater part of the divestiture period. Rather, according to the petition, these conditions began in late 1980 and continued to the date of the petition, June 1981—the last five months of the two-year divestiture period and the first three months after the divestiture period ended. 1981 Petition at 6. The March 1979 consent order required Louisiana-Pacific to divest the Rocklin plant within two years. Louisiana-Pacific chose to seek offers for the Rocklin plant during only one thirty-day period in 1979 and did not offer the plant for sale again until one year later, in July 1980. Louisiana-Pacific's compliance reports show that the company did not attempt to market Rocklin during fourteen of the twenty-four months of the divestiture period.³² [19] Louisiana-Pacific's election to wait

³¹ Louisiana-Pacific did not claim that it would have lost money if it had accepted any of these bids. See 1981 Petition Exhibit 1. The District Court concluded that Louisiana-Pacific's asking price for the Rocklin plant "was too high," 554 F. Supp. at 510, and said:

Various values were placed upon Rocklin: its book value of \$11.7 million; a "tax basis" of \$12 million, an estimated sale price/fair value of \$20 million; a "replacement" value of \$21 million; an "in-house" evaluation of \$12-15 million; an "independent" appraisal price of \$35 million, a "probable value" of \$6-8 million and asking prices of up to \$40 million. The only conclusion supported by the evidence is that Rocklin was worth what defendant could get for it.

Id. at 508.

³² Louisiana-Pacific knew at least from the Commission's June 1986 Findings that the Commission inferred from the facts recited in the compliance reports that efforts to divest Rocklin had been minimal. See also letter to Robert E. Liedquist, Esq., from the Commission (March 30, 1981) (denying request for extension of time to divest, in part because "efforts to divest do not exhibit sufficient diligence to warrant the relief requested") (Exhibit 10). Louisiana-Pacific did not argue that different inferences might be drawn from its compliance

until late in the divestiture period to sell the Rocklin plant, perhaps to its financial detriment,³³ and its determination to obtain a particular price for the plant were choices that Louisiana-Pacific made with full knowledge of the provisions of the order, not changed conditions of fact. Even if they were changed conditions of fact, they would not be changes sufficient to warrant modification, because Louisiana-Pacific was required to divest without regard to price.³⁴ [20]

In its petitions, Louisiana-Pacific cited economic conditions that varied over time resulting in reductions in its production capacity and its inability to divest the Rocklin plant at a "fair" price as changed conditions of fact that warranted modification of the order. We find that the alleged changes were not significant changes in fact that warranted modification of the order and that the alleged changes did not alter the nature of Louisiana-Pacific's obligations under the order. See S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979); see also *United States v. Swift & Co.*, 286 U.S. 106 (1932).

IV. Alleged Changes in Law

Louisiana-Pacific claimed that modification of the order was required by changes in the law as allegedly reflected in decisions of the Commission entered after June 1978, when Louisiana-Pacific signed the consent order in this case.³⁵ There was no change in the

reports or identify any material issues of disputed fact in them. See note 15 *supra*. The sole issue that Louisiana-Pacific identifies—"the Bureau neglects to inform the Commission that . . . L-P was investing substantially in the Rocklin plant," R.R.B. at 29, was fully alleged in Louisiana-Pacific's petitions. See note 29 *supra* & note 33 *infra*.

Louisiana-Pacific's efforts to divest Rocklin were fully litigated in District Court. The court found that Louisiana-Pacific "did not make any significant effort to divest prior to July of 1980," and that Louisiana-Pacific "admit[ted] that its efforts lacked the maximum effort" between August 1979 and July 1980. 554 F. Supp. at 509.

³³ Louisiana-Pacific suggests that its divestiture efforts should be construed in light of the fact that "L-P was investing substantially in the Rocklin plant in order to make it more attractive to potential buyers, and hence more marketable." R.R.B. at 29. Louisiana-Pacific had earlier argued that in view of its investments to improve the Rocklin plant, requiring divestiture under the order would "perpetuate an injustice." 1980 Memorandum at 76.

³⁴ The 1981 petition does not make entirely clear whether Louisiana-Pacific claimed that its alleged inability to obtain a higher price for the Rocklin plant was a change in fact or a public interest consideration. In view of the unconditional obligation to divest in order to remedy alleged anticompetitive effects, Louisiana-Pacific's interest in a higher price for the plant did not raise public interest concerns and was outweighed by the public interest in attaining the remedial purposes of the order and in finality and repose of orders. See *RSR Corp.*, Docket No. 8959, 88 FTC 800, 895 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) ("[T]he possibility that a corporation . . . may suffer some loss of value as a result of actions necessary to redress the results of the corporation's illegal conduct can be of no relevance to the determination of proper relief in a Section 7 case. . . . The antitrust laws would deserve little respect if they permitted those who violated them to escape with the fruits of their misconduct on grounds that imposition of an effective remedy would incidentally result in even a substantial monetary loss." (Citation omitted.)).

³⁵ In its 1980 petition, Louisiana-Pacific cited *Coca-Cola Bottling Co.*, 93 FTC 110 (issued January 23, 1979, one month before issuance of the order in this case); *The Pillsbury Co.*, 93 FTC 966 (1979); and *SKF*

(footnote cont'd)

statutory or decisional law that had the effect of bringing the terms of the order into conflict with existing law and, therefore, required modification. See *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961); *Ferrell v. Pierce*, 743 F.2d 454, 461-66 (7th Cir. 1984); *Bulova Watch Co.*, 102 FTC 1834 (1983) (change in law applicable to nonprice vertical restraints); *Lenox, Inc.*, Docket No. 8718, Order Granting in Part and Denying in Part Request To Reopen and Set Aside Order (April 19, 1989). Instead, the decisions cited by Louisiana-Pacific simply reflected the application of existing principles of law to different factual situations. Louisiana-Pacific's arguments concerning alleged changes in the law were [21] primarily attempts to argue again issues that had been fully considered by the Commission before Louisiana-Pacific agreed to be bound by the order.³⁶

Louisiana-Pacific's petitions appear to claim that the Commission applied a *per se* rule of illegality based solely on market share statistics in evaluating the proposed Louisiana-Pacific/Fibreboard transaction and that this approach was rejected in subsequent decisions of the Commission. See 1980 Memorandum at 13-14, 52-53, 65.³⁷ This argument mischaracterizes the analysis of the transaction, because there is not and was not then a *per se* rule for evaluating horizontal mergers. Market share and concentration data weigh heavily in the analysis, but, standing alone, these data are not dispositive of legality. See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

Because Louisiana-Pacific elected to enter into a consent agreement instead of litigating its view of the issues, the Commission had no occasion to prepare a written opinion stating its analysis of the facts in this case. The issues discussed in the cases cited by Louisiana-

Industries, Inc., 94 FTC 6 (1979). In its 1981 petition, Louisiana-Pacific cited *Heublein, Inc.*, 96 FTC 385 (1980); and *RSR Corp.*, 656 F.2d 718 (D.C. Cir. 1981). See R.I.B. at 39-44. Louisiana-Pacific's citation of *RSR Corp.* is especially puzzling; the court affirmed denial of RSR's petition to reopen because the same product market arguments urged in support of reopening had been considered and rejected by the Commission and the Ninth Circuit in *RSR Corp.*, 88 FTC 800 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

³⁶ Louisiana-Pacific argued in 1980 as a basis for modification "that the proposed merger was lawful in all respects" and that the consent order was based on "erroneous premise[s] of fact and conclusion[s] of law" concerning relevant markets and competitive effects. 1980 Memorandum at 15-16 & *passim*. Louisiana-Pacific also stated that "stripped down to essentials," the petition requested a "reappraisal" of the order. *Id.* at 80. Compare R.R.B. at 2 n.1 ("L-P does not intend by its Petition to withdraw its consent to the order in this case, or to attack the order's validity."):

³⁷ Louisiana-Pacific asserted that "[t]he order is founded in multiple underlying error, compounded by a conclusive presumption of illegality based upon a rigid doctrine of quantitative substantiality rejected by a long line of cases that hold that Section 7 does not admit to an interpretation grounded in *per se* illegality." 1980 Memorandum at 52-53. Compare R.R.B. at 32 n.9 ("L-P does not contend that the Commission applied a *per se* rule of illegality to its challenge of the Fibreboard acquisition."):

Pacific, however, such as market definition, product cluster, degree of competitive overlap, the financial condition of the companies and the likely competitive effect of the transaction, were discussed in materials submitted to the Commission by Louisiana-Pacific and Fibreboard in 1978 and considered by the Commission before it accepted the consent agreement that Louisiana-Pacific signed. See *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("The injunction, whether right or wrong, is not subject to impeachment in its application [22] to the conditions that existed at its making."); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (assertions "considered in detail" before order entered not basis for reopening order).

Louisiana-Pacific's principal argument is that subsequent cases demonstrate a different approach to product market analysis from that used in 1978 when Louisiana-Pacific signed the consent order in this matter, but the product market analysis in the cases cited by Louisiana-Pacific does not demonstrate a change in law.³⁸ In the cases cited by Louisiana-Pacific, the Commission relied for its product market analysis on the same traditional principles that it relied on in *Beatrice Foods Co.*, 86 FTC 1, 55-59 (1975), *aff'd*, 540 F.2d 303 (7th Cir. 1976), a case cited by Louisiana-Pacific in 1978 in its pre-order memorandum in support of its market definition arguments.³⁹ The Commission applied the same principles in 1976, in *RSR Corp.*, 88 FTC 800 (1976), *aff'd*, 602 F.2d 1317, 1320-22 (9th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), a case cited by Louisiana-Pacific in its 1981 petition to support its product market arguments. 1981 Petition at 14-18. Although Louisiana-Pacific may continue to disagree with the product market alleged in the Commission's complaint, as it did before it signed the consent order, the cases do not demonstrate a change in the law concerning product market definition between 1979 and 1981, and there simply is no reason to think that in applying the law concerning product market definition the Commission departed from established principles when it issued the Louisiana-Pacific order in 1979.

Louisiana-Pacific suggested that a change in the law could be inferred from the fact that the Commission did not challenge Georgia-

³⁸ Louisiana-Pacific argues that subsequent cases show that the Commission's complaint erroneously included multidensity fiberboard and particleboard in the same product market. R.I.B. at 24-26, 36-45; R.R.B. at 31-32. Louisiana-Pacific made the same argument—that the alleged product market was erroneous under existing precedent—in its 1978 pre-order memorandum. 1978 Louisiana-Pacific Memorandum at 11-19 (Exhibit 4).

³⁹ 1978 Louisiana-Pacific Memorandum at 18 (Exhibit 4).

Pacific Corp.'s acquisition of Holly Hill Lumber Co. The Commission's inaction in any particular case, however, is nothing more than a determination that law enforcement action is not in the public interest, based on the facts of that case. There simply is no basis for inferring a "change in law" from the exercise of prosecutorial discretion in particular cases. [23]

Louisiana-Pacific also argued that permitting Georgia-Pacific to acquire Holly Hill while requiring Louisiana-Pacific to divest under the order "illustrates the very situation Congress sought to remedy when it enacted Section 5(b)—namely, one in which 'changed conditions have caused a company under order to be unfairly disadvantaged vis-a-vis its competitors.'" R.I.B. at 45.⁴⁰ This argument is based on the unfounded assumption that the two fact situations were identical in all respects. In response to a similar argument, the Supreme Court held that, absent patent abuse of discretion, the Commission is not obliged to withhold enforcement of an order on the respondent's claim that its competitors, not under order, are engaged in similar unlawful conduct. *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries v. FTC*, 355 U.S. 411 (1958).

Louisiana-Pacific also sought modification of the ten-year prior approval requirement of the order, on the ground that the requirement was "unsupported by any violation of law and essentially unnecessary when viewed in the context of the premerger notification obligations of L-P" under the Hart-Scott-Rodino amendments to the Clayton Act. 1980 Petition at 3.⁴¹ The premerger notification requirements of the Clayton Act did not constitute a change in the law requiring modification of the order, because the premerger notification program is not coextensive with the order's prior approval requirement. The Commission generally has continued to include prior approval clauses in its merger orders since the enactment of the Hart-Scott-Rodino amendments. In addition, Louisiana-Pacific was fully aware of the Hart-Scott-Rodino amendments at the time it agreed to the terms of this order (the Act was passed in 1977; in 1978, only the implementing regulations needed to be promulgated) and was free to raise during negotiation reliance on the statutory premerger notification

⁴⁰ S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979), indicates that the Commission should consider modification if outstanding orders impose disparate relief for comparable misconduct on competing firms.

⁴¹ Louisiana-Pacific's argument that the prior approval requirement was "unsupported by any violation of law" is a request to reconsider the premises of the order, not a basis for modification of the order. By its consent, Louisiana-Pacific "relinquished the right to insist that an offense be proved, and the right to show that no violation had been committed." *United States v. Swift & Co.*, 189 F. Supp. at 907.

requirements rather than a prior approval clause to monitor the relevant markets.

The "changes in law" alleged by Louisiana-Pacific were not changes in legal principles but instead reflected the application by the Commission of existing law in different factual contexts. [24] Section 5(b) contemplates a significant change in the law that would bring the order into conflict with existing law before the change would be such as to require modification of a final order. Louisiana-Pacific did not identify any such changes in its petitions, and we find that no such changes in the statutory or decisional law had occurred. Accordingly, no modification is warranted by changes in law.

V. Alleged Public Interest Considerations

Louisiana-Pacific asserted in its petitions that modification of the order to eliminate the divestiture requirement would serve the public interest, but Louisiana-Pacific's "public interest" arguments were essentially a request that the Commission reconsider the premises of the order. These arguments did not demonstrate a need for modifying the order, but were an attempt by Louisiana-Pacific to rescind its consent to the order and argue again the issues that the consent agreement resolved. These arguments did not raise public interest issues, and they disregarded the strong public interest in repose and finality. *See RSR Corp. v. FTC*, 656 F.2d 718 (D.C. Cir. 1981) (modification denied when same issues had been litigated fully before the Commission and the Ninth Circuit).⁴²

As public interest considerations, Louisiana-Pacific argued that the Commission had not considered all of the relevant factors before entering the order and that the Commission was "never fully apprised of the circumstances" of the merger. Louisiana-Pacific also implied that the arguments advanced by Louisiana-Pacific and Fibreboard before Louisiana-Pacific signed the consent agreement were not fully considered by the Commission. 1980 Memorandum at 2; *see R.R.B.* at 36 n.11. This is yet another attempt to reargue the premises of the order.

Every material argument that Louisiana-Pacific advanced to the Commission in its 1980 and 1981 petitions to reopen was presented to the Commission before Louisiana-Pacific signed the consent agreement. In May 1978, both Louisiana-Pacific and Fibreboard were

⁴² The court in *RSR* said that "[b]oth the Supreme Court and this court consistently have subscribed to the rule that administrative agencies are not to be required to reopen their final orders 'except in the most extraordinary circumstances.'" 656 F.2d at 721 (footnote omitted).

informed that the Commission's staff intended to recommend that the Commission seek a preliminary injunction to prevent consummation of the merger. Both companies were informed of the staff's views of the appropriate market definitions and of the likely competitive effects and were invited to submit memoranda in support of their views on these and other relevant [25] issues. Both companies prepared memoranda that were forwarded to the Commission, *see* note 2 *supra*, and considered by it in making its decision to take enforcement action. Every material argument concerning market definition and competitive effects that was advanced in Louisiana-Pacific's 1980 petition was also stated in one or both of the 1978 pre-order memoranda submitted by Louisiana-Pacific and Fibreboard. Indeed, substantial portions of Louisiana-Pacific's 1980 petition are taken virtually verbatim from the 1978 memoranda, and the petition states that it "draws significantly upon" the 1978 memoranda. 1980 Memorandum at 1 n.1.

Louisiana-Pacific argued in its petitions to reopen and in 1978 that medium density fiberboard and particleboard should not be included in the same product market and that, if the two were included in the same market, other products should be included in the same "product cluster."⁴³ Louisiana-Pacific also argued in its petitions and in 1978 that the geographic markets alleged in the complaint were improperly defined.⁴⁴ Both before and after the order was entered, Louisiana-Pacific argued that market shares were improperly based on capacity⁴⁵ and that factors other than market share, especially Fibreboard's distressed financial condition⁴⁶ and Louisiana-Pacific's need for timber,⁴⁷ should be considered in analyzing the merger. Because the Commission considered these arguments before accepting the order in this case, Louisiana-Pacific's claim that the Commission did not consider these arguments was unfounded and does not present a public interest basis for modifying the order. In such circumstances, the public interest requires finality. *See RSR Corp. v. FTC*, 656 F.2d 718, 721 (D.C. Cir. 1981).

⁴³ 1978 Louisiana-Pacific Memorandum at 11-19 (Exhibit 4); 1980 Memorandum at 16-40; 1981 Petition at 11-12.

⁴⁴ 1978 Louisiana-Pacific Memorandum at 19-26 (Exhibit 4); 1980 Memorandum at 40-46; 1981 Petition at 20-24.

⁴⁵ 1978 Louisiana-Pacific Memorandum at 25 (Exhibit 4); 1980 Memorandum at 46-52; 1981 Petition at 20-24.

⁴⁶ May 1978 Fibreboard Memorandum at 13-28 (Exhibit 5); June 1978 Fibreboard Memorandum at 11-14 (Exhibit 6); 1980 Memorandum at 15, 57-60; 1981 Petition at 26.

⁴⁷ 1978 Louisiana-Pacific Memorandum at 2-3, 9-11 (Exhibit 4); May 1978 Fibreboard Memorandum at 4-7 (Exhibit 5); 1980 Memorandum at 7-12.

Louisiana-Pacific also asserted that elimination of the divestiture requirement would be in the public interest, because the Rocklin plant was profitable and income from it would enhance [26] Louisiana-Pacific's ability to support and expand other of its businesses. 1980 Memorandum at 75-76. This argument says only that the order imposed a burden on Louisiana-Pacific, and it misperceives the public interest standard for reopening and modification of Commission orders.

The Commission may determine that modification would be in the public interest if the respondent demonstrates that the order impedes competition. *E.g.*, *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). When such a showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make the modification. Louisiana-Pacific, however, made no showing that the requirement to divest the Rocklin plant would injure competition in the relevant market or would competitively disadvantage Louisiana-Pacific in any way that was not contemplated when the order was entered. In the usual case, an acquiring company presumably contemplates that the acquired assets will be profitable, and the company would rather retain than divest those assets. Some loss of prospective profits attributable to particular assets is, therefore, reasonably foreseeable whenever the Commission requires a divestiture to remedy the alleged anticompetitive effects of a proposed acquisition. This is not sufficient reason to forestall imposition of a divestiture order in the first place, *see United States v. E.I. duPont de Nemours & Co.*, 366 U.S. 316 (1961), or to avoid compliance with the order after the fact. The claim that the Rocklin plant was profitable was not a showing that the order imposed a burden that was not contemplated when Louisiana-Pacific agreed to the order or that the order impeded competition. The argument that Louisiana-Pacific should retain those profits was insufficient to outweigh the public interest in the remedy provided by the order and in the finality and repose of Commission orders.

Louisiana-Pacific also argued that its acquisition of Fibreboard was inconsequential in comparison to cases in which the Commission had not required divestiture and, therefore, that no divestiture should have been required in this case. 1980 Memorandum at 76-80. The cases cited by Louisiana-Pacific, however, involved different transactions in different markets and, as Louisiana-Pacific correctly noted, different remedies. As discussed above, each transaction involves the applica-

tion of existing principles of law to particular facts. In addition, the cases cited by Louisiana-Pacific in support of this argument were consent agreements, and the remedy in each case, as in this one, is affected by the give and take of negotiations. The fact that the Commission may have negotiated different remedies with other respondents is, absent a change in the law or a showing of unfair competitive disadvantage, *see* S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979), irrelevant to the remedy that was negotiated between the Commission and Louisiana-Pacific. [27]

This argument, like Louisiana-Pacific's other alleged public interest arguments, did not demonstrate a need for modifying the order but instead was an attempt to question the premises of the order to which Louisiana-Pacific had agreed. In effect, Louisiana-Pacific argued that the divestiture requirement should be modified because Louisiana-Pacific should not have agreed to the order in the first place. A consent order, like a litigated order, is subject to modification when it "has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, 286 U.S. 106, 114-15. This principle has not been shown to apply in this case.

Louisiana-Pacific did not identify any public interest consideration sufficient to warrant modification of the order. Accordingly, we conclude that the public interest did not require modification of the order.

VI. Conclusion

We find that Louisiana-Pacific did not in either its 1980 or its 1981 petition to reopen make a showing that required modification of the order, because Louisiana-Pacific did not allege a significant change affecting the order or an unfair disadvantage resulting from it. Louisiana-Pacific's petitions did not allege significant changes in fact or law affecting the order but rather repeated arguments that had been presented to and considered and rejected by the Commission before the order was entered. It is appropriate to modify an order if it appears that the continued application of the order will be inequitable or that extraordinary changes in circumstances have eliminated the need for the order. But Louisiana-Pacific made no such showing. Instead, Louisiana-Pacific sought reconsideration of the terms of the order, under essentially the same conditions that prevailed when it agreed to those terms.

The reduction in the company's production capacity was self-

imposed and was undertaken with full knowledge of the requirements of the order. The petitions were silent as to the competitive effects of the capacity reduction and did not describe how this action by Louisiana-Pacific might accomplish the remedial purposes of the order. Even if changed economic conditions affected Louisiana-Pacific's ability to obtain the price that it wanted for the Rocklin plant, because the order obligation to divest was not conditioned on a particular price, those conditions did not alter the nature of Louisiana-Pacific's obligations to divest. The burdens that the order imposed on Louisiana-Pacific were essentially the same both before and after the changes alleged by Louisiana-Pacific. [28]

The changes alleged by Louisiana-Pacific were not significant changes that eliminated the need for the remedy provided in the order or such that the order caused unforeseen injury to Louisiana-Pacific. The cases that, according to Louisiana-Pacific, demonstrated changes in the law did not manifest any change but demonstrated instead the application of existing principles of law to different facts. Louisiana-Pacific pointed to no other consideration that required modification of the order. The fact that the order required Louisiana-Pacific to sell a profitable plant was clearly not a changed condition or a public interest consideration that would require modification of the order.

Accordingly, Louisiana-Pacific's petitions to modify the order in Docket No. C-2956 are denied.

CONCURRING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

In reiterating my support for the Commission opinion, I also wish to take issue with Louisiana-Pacific's contention that an economic downturn in the forest products industry eliminated any prospect for anticompetitive effects here. Respondent's Initial Brief at 23. This argument is hardly convincing even if one concludes that a sharp recession or depression did occur in the industry. After all, downturns are hardly unknown in cyclical industries and often turn out to be short-lived phenomena that do not yield the kind of longer-term relief sought by the Commission in requiring divestiture.

In addition, although a downturn may create temporary excess capacity in an industry, this by itself does not preclude anticompetitive activity or effects. Indeed, cartels have formed under such conditions. See A. Phillips, *Market Structure, Organization and Performance* 105 (1962) (on *Addyston Pipe*); F. Scherer, *Industrial Market*

Structure and Economic Performance 500-01 (2d ed. 1980) (on *Socony-Vacuum Oil Co.*). Nor does excess capacity alone necessarily reduce the likelihood of collusion. See *FTC v. Elders Grain, Inc.*, 1989-1 Trade Cas. (CCH) ¶68,411 at 60,263 (7th Cir. Jan. 30, 1989); see also Hay & Kelley, *An Empirical Survey of Price Fixing Conspiracies*, 17 J. Law & Econ. 13, 17 (1974). Accordingly, a party to a consent order does not meet its burden of demonstrating changed circumstances simply by pointing to subsequent economic hard times in a particular industry.

CONCURRING STATEMENT OF COMMISSIONER MARGOT E. MACHOL

I fully concur in the opinion of the Commission. I write separately only to emphasize a fundamental point of which Louisiana-Pacific appears to have lost sight rather early in this grossly overextended proceeding: Commission orders, whether issued at the conclusion of litigation or by consent, mean what they say. Neither sort of order is entered lightly or capriciously by the Commission, but upon due consideration of its consequences and of the injury to competition and consumers it is intended to redress. A party under either sort of order is fully obligated by law to obey its terms, unless and until they are modified in accordance with our statute and rules.

A special consideration, however, stems from the nature of the consent-order process. When, as in this instance, an order has been entered as the outcome of a process of negotiation and compromise between the Commission and a respondent (or potential respondent), the Commission is warranted in assuming that the party has undertaken its obligation in full contemplation of its gravity and without reservation or purpose of evasion. No such party should suppose that the consent process is simply the opening gun in a course of foot-dragging and conclusory assertions of changed circumstances.

573

Interlocutory Order

IN THE MATTER OF

THE NEW ENGLAND MOTOR RATE BUREAU, INC.

Docket 9170. Interlocutory Order, November 17, 1989

ORDER

Respondent and complaint counsel agree that, pursuant to Section 3.82(d)(2) of the Commission's Rules of Practice, respondent's application for attorney's fees and expenses under the Equal Access to Justice Act should be held in abeyance pending final disposition of respondent's appeal of the Commission decision.

It is so ordered.