

IN THE MATTER OF

CULLIGAN, INC.

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

Docket 6673. Consent Order, May 23, 1957—Set Aside Order, May 14, 1990

The Federal Trade Commission has set aside a 1957 consent order with Culligan, Inc., (53 FTC 1072), thus deleting a provision prohibiting respondent from using exclusive dealing to foreclose competition in the water softener industry. The Commission concluded that changed factual circumstances merit setting aside the order.

ORDER REOPENING AND SETTING ASIDE FINAL ORDER

On December 15, 1989, Culligan International Company ("Culligan") filed a request to reopen and set aside the consent order that was entered in this proceeding on May 23, 1957, in settlement of allegations that Culligan's exclusive dealing contracts violated Section 3 of the Clayton Act, 15 U.S.C. 14.¹ 53 FTC 1072 (1957). Culligan's petition was placed on the public record for 30 days. No comments were received. For the reasons described below, the Commission reopens and sets aside this order pursuant to Section 11(b) of the Clayton Act. 15 U.S.C. 21(b).

Culligan argues that its request is supported by changes of law and of fact as well as the public interest. The Commission has considered Culligan's request and has concluded that the company has made a sufficient showing of changed conditions of fact to require reopening the order and that on further consideration, these changes of fact justify setting the order aside.

I. BACKGROUND

A. *Culligan's Business At Time of Complaint*

Culligan's petition states that "from 1957-1962 Culligan probably enjoyed as high as a 30% share of the water-softener market based on factory exit shipments." Affidavit of Donald A. Mahlstedt ("Aff.") at 31. Culligan's water softening products were marketed in 1955 to

¹ The order that Culligan seeks to have set aside, Docket No. 6673, was based on a consent agreement between Culligan, Inc., and the Commission. Culligan is the successor to Culligan Inc., the respondent against which the order was entered.

customers as a service, rather than as the sale of a product. Pet. at 15; Aff. ¶17. The filters that "softened" water had to be changed regularly and were "regenerated" by the Culligan dealers. Aff. ¶17. To provide their service the dealers "often kept keys to the home of customers, had brine pits [for regeneration] and a trucking fleet." Aff. ¶19. Most of Culligan's equipment sales are made through franchised dealers, which, for many years before 1957, were required to sign contracts committing themselves to deal exclusively with Culligan. Aff. ¶¶11-16.

B. The Complaint

The complaint alleged that Culligan "sells more water conditioning products for domestic use in the United States than any other manufacturer or distributor of such equipment," and that "it occupies a dominant position in the manufacture, distribution and sale of such products in the United States." The complaint also alleged that Culligan engaged in exclusive dealing by including in its contracts with its retail dealers a condition that they "not use or deal in the products or . . . other commodities of a competitor" According to the complaint, these exclusive dealing contracts extended for periods of twenty-five years and were renewable on agreement of the parties. Finally, the complaint alleged that under Section 3 of the Clayton Act, the effect of Culligan's exclusive dealing contracts "may be to substantially lessen competition in the line of commerce in which the respondent is engaged and in the line of commerce in which the customers and purchasers of respondent's products are engaged; and tend to create a monopoly in respondent"

C. The 1957 Order

The Commission's order prohibits Culligan from "selling" or "continuing in operation or effect, any . . . understanding" that its dealers "shall not use or deal in similar or related products supplied by any competitor of competitors of respondent." It also contained language stating "nothing in this order shall prohibit respondent from entering into an agreement . . . prohibiting [dealers] from using . . . parts . . . which would adversely affect [Culligan's] water conditioning service units." 53 FTC at 1073-4.

II. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER OF THE COMMISSION

The Commission has authority to reopen and modify its orders

issued pursuant to Section 3 of the Clayton Act under Section 11(b) of that statute. Section 11(b) states that:

[T]he Commission . . . may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission . . . conditions of fact or of law have so changed as to require such action or if the public interest shall so require

The Commission has not previously addressed its authority to reopen and modify under this provision. When Congress amended the Clayton Act in 1959,² however, to give the Commission this authority, it chose the same wording it had enacted in 1938 when it authorized the Commission to reopen and modify orders issued under the Federal Trade Commission Act.³ Therefore, the Commission's decisions under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provide authoritative guidance on the application of Section 11 of the Clayton Act.⁴

Section 5(b) of the Federal Trade Commission Act states that the Commission "shall reopen" an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. *See*, S. Rep. No. 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see 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 Drugstores Northwest, Inc.*, Docket

² Finality Act of 1959, Pub. L. No. 86-107, 73 Stat. 243 (1959).

³ Wheeler-Lea Act of 1938, 52 Stat. 111 (1938). Although § 5(b) was amended in 1980, the new language did not change the standard for ordering 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), and added the requirement that the Commission act on petitions to reopen within 120 days of filing. Although there is no statutory requirement that the Commission act within 120 days on petitions to modify an order issued pursuant to the Clayton Act, the Commission's Rule 2.51 states that the Commission will act on all petitions to modify orders within 120 days.

⁴ *See Kennecott Copper Corp. v. FTC*, 542 F.2d 801, 803 (1976) (characterizing related portions of § 5(b) and (c) of the Federal Trade Commission Act and § 11(b) and (c) of the Clayton Act as "substantially the same"); *see generally, United States v. American Building Maintenance Industries*, 422 U.S. 271, 277 (1975) (stating that interpretations of one of these acts is "particularly relevant to a proper interpretation of the [other] . . . since both were designed to deal with closely related aspects of the same problem").

No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) (modification warranted by "clear showing" of changes that have eliminated reasons for order or are such that the order causes unanticipated hardship).⁵

The language of section 5(b) plainly anticipates that the burden is on the petitioner to make "a satisfactory showing" of changed conditions of fact or law to obtain reopening of the order. *See also 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"). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Even, however, where it has concluded that changes of fact or law require (or that the public interest warrants) reopening an order, the Commission need not modify or vacate that order. *See, Louisiana Pacific Corp.*, Docket No. C-2956, Order and Opinion, Nov. 15, 1989, Slip op. at 6-7.

The legislative history makes clear that the petitioner has the burden of showing, by means other than conclusory statements, why an order should be modified.⁶ The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 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");

⁵ Section 5(b) also provides that the Commission may reopen and modify an order, when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Commission Rule 2.51 therefore invites respondents to show in petitions to reopen how the public interest warrants the requested action. 16 CFR 2.51. In such a case, the respondent normally must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983), at 2 (hereafter "Damon Letter") (unpublished).

⁶ The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient . . . The Commission, to reemphasize, 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.

RSR Corp. v. FTC, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

III. CHANGED CONDITIONS OF FACT IN THIS MATTER WARRANT
REOPENING AND VACATION OF THE ORDER

Culligan has based its request that the Commission reopen the order on changed conditions of law and of fact and on public interest considerations. For the reasons described below, the Commission concludes that the changes of fact described in the Petition require reopening of the order.⁷

Culligan's Petition shows that changes of fact merit setting aside the order. The water-softener industry is not highly concentrated. See Aff., Exhibit 3. Culligan, which "from 1957-62 . . . probably enjoyed as high as a 30% share of the water-softener market based on factory exit shipments" (Aff. ¶ 31), now has a share of less than 15.6 percent, and its share has been declining in recent years. Aff. ¶ 31. In addition, new entry appears to be easy and not dependent on access to Culligan's distributors. Aff. ¶¶ 37-38. The percentage of water-softener dealers controlled by Culligan has dropped from an estimated 22% in 1972 based on a total of 4,500 outlets to less than 10% today based on a total of over 8,000 outlets. Aff. ¶ 38. So-called "assemblers" now account for more than 58% of the market. Aff. ¶ 33. Culligan, therefore, appears to lack market power.

The Commission concludes that the order is no longer necessary to prevent Culligan from using exclusive dealing to foreclose competition. Having duly considered Culligan's petition, the Commission concludes that changed factual circumstances not foreseeable when the order was issued warrant setting aside that order.

Accordingly, for the reasons above, *it is ordered*, that this matter be, and it hereby is, reopened and that the Commission's order in Docket No. 6673 issued on May 23, 1957, be, and it hereby is, set aside as to Culligan, Inc. as of the date of this order.

Commissioner Strenio not participating.

⁷ Having decided to reopen the order on the basis of changes of fact, the Commission does not reach the issue whether reopening is required by changes of law, or is warranted in the public interest. See e.g. *Goodyear Tire & Rubber Co.*, Docket No. 6486, Order Reopening and Setting Aside Final Order Issued on March 9, 1961 (June 2, 1989) at 5 (Commission may limit decision to a single ground that is clear and well established, rather than discuss all issues raised by a petition).

IN THE MATTER OF

PROMODES, S.A., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket 9228. Complaint, Apr. 20, 1989—Decision, May 17, 1990*

This consent order requires, among other things, Red Food Stores, Inc., a subsidiary of Promodes S.A., a French grocery company, to divest six supermarkets; requires the divestiture to be made to a Commission-approved acquirer or acquirers within nine months after the order becomes final; and if the respondents do not divest in that time, requires that the respondents shall consent to the appointment by the Commission of a trustee to divest the properties.

Appearances

For the Commission: *Marimichael O. Skubel* and *Ronald B. Rowe*.

For the respondents: *Elaine M. Russo, Sherman & Sterling*, New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents, Promodes, S.A., a foreign corporation, Red Food Stores, Inc. (collectively "Red Food"), a wholly-owned subsidiary of Promodes, S.A., and The Kroger Company ("Kroger"), corporations subject to the jurisdiction of the Commission, have entered into an agreement pursuant to which Red Food will purchase the supermarket assets of Kroger in Chattanooga, Tennessee, that, if completed, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45; that said offer, and the actions of the respondents to implement that offer, constitute violations of Section 5 of the FTC Act; and that a proceeding by the Commission in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section