

IN THE MATTER OF

SUPERMARKET DEVELOPMENT CORPORATION, ET AL.

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

Docket C-3224. Consent Order, Mar. 17, 1988--Modifying Order, Sept. 5, 1995

This order reopens a 1988 consent order (110 FTC 369) that settled allegations that the acquisition of the El Paso Division of Safeway Stores, Inc., by Supermarket Development Corporation and Furr's, Inc. would reduce supermarket competition in 12 towns in New Mexico and western Texas, and required, for ten years, prior Commission approval before acquiring supermarket assets. This order modifies the consent order by substituting for the prior-approval requirement a provision requiring Furr's Supermarket to notify the Commission at least 30 days before acquiring certain supermarkets in those areas.

ORDER REOPENING AND MODIFYING ORDER

On April 3, 1995, Furr's Supermarkets, Inc. ("FSI"), a successor to respondent Supermarket Development Corporation ("SDC") and its subsidiary Furr's, Inc. ("Furr's"), filed an Application to Modify Consent Order ("Application") in Docket No. C-3224, 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 and Procedure, 16 CFR 2.51. The Application requested that the Commission reopen and modify paragraph IV, the prior approval provision of the order in Docket No. C-3224, to permit FSI to acquire fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. In its Application, FSI asserts that the public interest supports its request for reopening and modification. The Application was placed on the public record for thirty days, and no comments were received. Subsequently, on July 14 and 21, 1995, FSI filed amendments to its Application, requesting that the Commission set aside the prior approval requirement in its entirety, or in the alternative, substitute a prior notice requirement, citing the Statement of Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions, issued on June 22, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Prior Approval Policy Statement").

The Commission, in its Prior Approval Policy Statement, said, in relevant part, that "the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement." Consistent with the Commission's Prior Approval Policy Statement, the presumption is that the prior approval requirement in this order should be terminated. Nothing to overcome the presumption having been presented, the Commission has determined to reopen the proceedings and modify the order in Docket No. C-3224 to set aside the prior approval requirement.

The Commission also stated that it would continue to fashion remedies as needed in the public interest, including ordering narrow prior notification requirements in certain limited circumstances. Accordingly, a prior notification provision may be used where there is a credible risk that a company would, but for an order, engage in an anticompetitive merger that would not be subject to the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino ("HSR") Act, 15 U.S.C. 18a. As explained in the Prior Approval Policy Statement, the need for a prior notification requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors.

The Commission has determined that the record in this case evidences a credible risk that the respondent and its successors could engage in future anticompetitive acquisitions that would not be reportable under the HSR Act. The complaint in Docket No. C-3224 charged that respondent SDC's proposed acquisition of the El Paso Division of Safeway Stores, Inc. would, if consummated, violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by substantially lessening competition in the retail sale and distribution of food and grocery store items in supermarkets in twelve relevant geographic markets consisting of individual cities and towns in Texas and New Mexico. (Complaint, ¶¶ 13-15, 18-19). The complaint also alleged that there were nineteen cities and towns in Texas and New Mexico in which respondent SDC and Safeway both operated grocery stores (*Id.*, at ¶ 12), and paragraph IV of the order required respondent to obtain prior Commission approval before acquiring any retail grocery store or any interest in a retail grocery store in those nineteen cities and towns.

There has been no showing that the competitive conditions that gave rise to the Commission's complaint and order in Docket No. C-3224 no longer exist. Moreover, the size and localized nature of the relevant markets and the likely size and other characteristics of the market participants and relevant transactions as identified in the complaint and order indicate that future acquisitions that would currently be covered by the provisions of paragraph IV of the order would probably not be subject to the premerger notification and waiting period requirements of the HSR Act. Accordingly, pursuant to the Prior Approval Policy Statement, the Commission has determined to modify paragraph IV of the order to substitute a prior notification requirement for the prior approval requirement.

The Commission has also determined, pursuant to the Prior Approval Policy Statement, to exclude from paragraph IV FSI's acquisitions of fee simple interests in real estate on which FSI currently operates a retail grocery store as a lessee. FSI has a contractual right to operate each of the leased stores for terms that extend beyond the remainder of the order. FSI's change in status from a leaseholder to a feeowner in any one or more of these stores would have no practical effect on competition in the relevant markets. Under the circumstances, it is unnecessary to require prior notice of these transactions.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

It is further ordered, That paragraph IV of the order in Docket No. C-3224 be, and hereby is, modified, as of the effective date of this order, to read as follows:

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Furr's shall not, without prior notification to the Federal Trade Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of offer to purchase the facility, or any interest in a retail grocery store or any interest in any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store in the following cities or towns:

Albuquerque, New Mexico; Alamogordo, New Mexico; Artesia, New Mexico; Carlsbad, New Mexico; Clovis, New Mexico; El Paso, Texas; Espanola, New Mexico; Fort Stockton, Texas; Hobbs, New Mexico; Las Cruces, New Mexico; Las Vegas, New Mexico; Lovington, New Mexico; Midland, Texas; Odessa, Texas; Pecos, Texas; Portales, New Mexico; Roswell, New Mexico; Santa Fe, New Mexico; and Silver City, New Mexico.

The prior notification required by this paragraph shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Furr's and not of any other party to the transaction. Furr's shall provide the Notification to the Commission at least thirty days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information, Furr's shall not consummate the transaction until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a.

Provided further that these prohibitions shall not relate to the construction of new facilities by Furr's, or the leasing of a facility by Furr's not presently a grocery store in those locations, or the acquisition by Furr's of the fee simple interest in real estate for a facility in which it currently operates a retail grocery store as the lessee.

One year from the date of service of this order and annually thereafter, Furr's shall file with the Commission a verified written report of its compliance with this paragraph.

IN THE MATTER OF

GIANT FOOD, INC.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6459. Modified Consent Order, April 13, 1964--Set Aside Order, Sept. 7, 1995*

This order reopens a 1964 consent order--which prohibited Giant from inducing its suppliers to offer, or to receive from its suppliers, compensation for promotional services or facilities on terms that Giant knew were not proportionally equal to the terms those suppliers offered other retailers--and sets aside the consent order pursuant to the Commission's 1994 Sunset Policy Statement, under which the Commission presumed that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On June 5, 1995, Giant Food, Inc. ("Giant Food") filed its Request To Reopen and Vacate Order ("Petition") in this matter. Respondent requests that the Commission set aside the 1964 order, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued on July 22, 1994, and published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, respondent affirmatively states that it has complied with the terms of the order. The Petition was placed on the public record for thirty days, and no comments were received.

The Commission in its Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's cease and desist order in Docket No. 6459, issued on June 1, 1961, affirmed as modified by the United States Court of Appeals for the District of Columbia Circuit on June

¹ Sunset Policy Statement, 59 Fed. Reg. at 45,289.