

Modifying Order

121 F.T.C.

IN THE MATTER OF

ALLEGHANY CORPORATION

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-3335. Consent Order, July 11, 1991--Modifying Order, June 27, 1996*

This order reopens a 1991 consent order -- that required the New York-based title insurance company to divest certain rights and interests to a Commission-approved acquirer, and, for ten years, to obtain Commission approval before acquiring certain title-insurance related assets -- and this order modifies the consent order by terminating the provision requiring notification of acquisitions of copies of title records, but will retain the requirement for acquisitions of original title records.

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany" or "respondent"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Reopen and Modify Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders 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, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Alleghany's Petition requests that the Commission reopen and modify the orders to remove paragraph V of the 1987 and 1991 orders, which currently requires Alleghany to seek the prior approval of the Commission for certain acquisitions. In addition, Alleghany requests that the Commission set aside or modify the prior notice provisions of paragraph VI of the 1987 and 1991 orders. Alleghany's Petition was placed on the public record for thirty days. No comments were

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

received. For the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of 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, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the 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 also announced, in its Statement, its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], 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 policy announced" in the Statement. *Id.* However, the Commission also stated that "[n]o presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this statement."

The complaint in Docket No. C-3218 alleged that Alleghany's acquisition of Safeco Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant information in Cook County, Illinois, and in Los Angeles County, California.

Paragraph V of the 1987 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in entities with interests in a title plant that serves Cook County, Illinois, or Los Angeles County, California. Paragraph VI of the 1987 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to title plants servicing any geographic area for which Alleghany also has an ownership interest in a title plant.

The Commission's complaint in Docket No. C-3335 alleged that Alleghany's acquisition of title insurance-related assets of Westwood Equities Corporation would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by substantially lessening competition in the production and/or sale of title plant and back plant information in nine relevant markets. Paragraph V of the 1991 order requires Alleghany, for ten years, to obtain Commission approval before acquiring any interest in certain entities having interests in title plants serving the relevant markets.

Paragraph VI of the 1991 order requires Alleghany, for ten years, to give the Commission notice and observe a waiting period before acquiring certain interests relating to a title plant or back plant serving any geographic area for which Alleghany has an ownership interest in a title plant or back plant.

Under the Commission's Prior Approval Policy Statement, the presumption is that setting aside the prior approval requirement in these orders is in the public interest. Alleghany has shown that these matters do not present the limited circumstances in which narrow prior approval provisions may be appropriate. Accordingly, the Commission has determined to reopen the proceedings and modify the orders to delete paragraph V.

The Policy Statement does not adopt a presumption in favor of reopening existing prior notice provisions.² Accordingly, Alleghany must show that reopening is required by changed conditions of law or fact or warranted in the public interest.³ As developed below, Alleghany has not demonstrated that changed conditions or the public interest require reopening and modifying the orders to set aside completely the existing prior notice provisions.

Alleghany has demonstrated, however, that the public interest requires exempting from the prior notice provisions acquisitions of copies of title records where the seller retains the originals. In contrast to the acquisition of sole rights to title records, such as buying a title plant or back plant, which may be anticompetitive depending on market conditions, the acquisition of copies of records, where the seller retains the original, can be pro-competitive where the transaction otherwise places no restraints on competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records. In addition, acquisitions of copies enable the seller to compete more effectively by lowering its costs yet not removing any records from its control. By inhibiting the potential benefits of such transactions, the costs and delays associated with requiring prior notice of these acquisitions are thus harmful to competition and an unnecessary burden on Alleghany. Accordingly, Alleghany has demonstrated a sufficient affirmative need to have the 1987 and 1991 orders modified in this limited manner. In addition, the balance favors modifying the orders, because there are no reasons to retain the provisions as written, and the proviso is narrowly-tailored to the benefit identified.⁴

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of the orders be, and it hereby is, deleted in its entirety; and

It is further ordered, That paragraph VI of the orders be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

² Policy Statement at 4-5.

³ See Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,027. Alleghany does not allege changed conditions as a basis for reopening in its Petition.

⁴ Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests "or language to similar effect." Petition at 13, n.4.

Notification is not required to be made pursuant to this paragraph with respect to any acquisition by Alleghany of a copy of title records or other information from a person or entity which thereafter retains the original records or information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

Commissioner Azcuenaga dissenting insofar as the Commission modifies the prior notice requirement in paragraph VI, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

In its September 14, 1995, petition, Alleghany Corporation requested reopening and modification of two orders based on the Commission's Prior Approval Policy Statement.¹ On November 15, 1995, Alleghany refiled an identical petition, accompanied by declarations from two executives of Alleghany subsidiaries. The refiled petition maintained its original argument -- that, under the authority of the Policy Statement, the orders' prior approval requirements should be deleted and their prior notice provisions also deleted (or at least modified). Although the two executives' declarations alluded in general terms to the "costs," "burdens," "difficulties," and "delays" occasioned by the orders, nowhere in its petition did Alleghany purport to rely on -- or even refer to -- either the "changed conditions" or the "public interest" standard set forth in Section 5(b) of the Federal Trade Commission Act² and Rule 2.51 of the Commission's Rules of Practice.³

Nevertheless, in today's order the Commission invokes both the Policy Statement and the "public interest" element of Rule 2.51 to address Alleghany's request. The Commission determines that public interest considerations warrant the addition of a proviso to paragraph VI of each order that would generally dispense with the prior notice requirement when the respondent proposes to acquire copies of title records from a seller that retains the original records.

¹ Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions, 4 Trade Reg. Rep. (CCH) ¶ 13,241 ("Policy Statement").

² 15 U.S.C. 45(b).

³ 16 CFR 2.51.

Although I concur in the result reached by my colleagues -- deletion of the prior approval provision and elimination of the prior notice requirement as it pertains to respondent's acquisition of copies -- I do not believe that it was necessary to rely on the public interest element of Rule 2.51. Rather, the Policy Statement by itself furnishes sufficient grounds on which to decide Alleghany's petition. The Commission declared in the Policy Statement that prior notice requirements in existing orders "will continue to be considered on a case-by-case basis *under the policy announced in this [i.e., the Prior Approval Policy] Statement*"⁴ -- an assertion that on its face signifies that existing prior notice provisions will be evaluated under the "credible risk" standard applicable to new prior notice provisions.⁵ The Commission said nothing in the Policy Statement about judging existing prior notice provisions under the more general standards of Rule 2.51.⁶ If a respondent can show that the factors enunciated in the Policy Statement support modification or deletion of a prior notice requirement, the respondent need not additionally demonstrate that the changed conditions/public interest factors of Rule 2.51 are satisfied. Because the Policy Statement criteria are entirely adequate for the treatment of Alleghany's petition, the reference in today's order to public interest factors is surplusage, likely to create confusion.

If today's order indicates that the Commission perceives a need to search outside the text of the Policy Statement for principles to guide its disposition of prior notice requirements, then it might be appropriate to amend the Policy Statement to apprise the public of that view. Contrary to the message sent by today's action, nothing in the wording of the Policy Statement gives any hint that the Commission considers its announced standard for evaluating prior notice provisions as less than self-sufficient.

⁴ Policy Statement, 4 Trade Reg. Rep. (CCH) ¶ 13,241 at 20,992 (*italics added*).

⁵ The standard for whether a newly-issued order should include a prior notice requirement is whether "there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.*

⁶ The Policy Statement's sole (and fleeting) reference to Section 5(b) of the Federal Trade Commission Act and Rule 2.51, *Id.*, seems clearly intended to indicate the *procedural* path that a respondent should follow in seeking reopening and modification of a prior approval or prior notice order. Nowhere in the Policy Statement, however, did the Commission signal an intent to supplant (or even supplement) the Policy Statement's very specific substantive criteria with the more general standards of Section 5(b) and Rule 2.51.

The attached alternate version of a Commission order illustrates what I would have considered an appropriate disposition of Alleghany's petition under the Policy Statement's criteria. It treats the various aspects of Alleghany's request, and it requires reliance on nothing more than the Policy Statement's "credible risk" test to conclude that a prior notice requirement should be retained except as to acquisitions of copies.

ATTACHMENT TO STATEMENT OF
COMMISSIONER ROSCOE B. STAREK, III:
ALTERNATE VERSION OF COMMISSION ORDER

ORDER REOPENING AND MODIFYING ORDER

On November 15, 1995, Alleghany Corporation ("Alleghany"), the respondent named in the consent order issued by the Commission on September 8, 1987, in Docket No. C-3218 ("1987 order") and in the consent order issued by the Commission on July 11, 1991, in Docket No. C-3335 ("1991 order"), filed its Petition To Re-Open and Modify Consent Orders ("Petition") in these matters. Alleghany asks that the Commission reopen and modify the 1987 and 1991 orders 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, and consistent with the Statement of Federal Trade Commission Policy Concerning Prior Approval And Prior Notice Provisions, issued on June 21, 1995 ("Prior Approval Policy Statement" or "Statement").¹ Alleghany's Petition requests that the Commission reopen and modify each order to delete paragraph V, which currently requires Alleghany to seek the prior approval of the Commission to acquire any interest in or assets of certain named competitors or in a title plant or back plant in certain parts of the country. Alleghany also requests that the Commission either set aside the prior notice provisions of paragraph VI of each order or limit the prior notice provisions to the geographic markets alleged in the complaints. Finally, Alleghany requests that the Commission add a proviso to the prior notice provisions so as to exempt from coverage acquisitions of copies of title records when the seller retains the original records. Alleghany's Petition was placed on the public record for thirty days. No comments were received. For

¹ 60 Fed. Reg. 39745-47 (Aug. 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241.

the reasons discussed below, the Commission has determined to grant Alleghany's Petition in part.

The Commission, in its Prior Approval Policy Statement, "concluded that a general policy of requiring prior approval is no longer needed," citing the availability of 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, to protect the public interest in effective merger law enforcement. Prior Approval Policy Statement at 2. The Commission announced that it will "henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger." As a general matter, "Commission orders in such cases will not include prior approval or prior notification requirements." *Id.*

The Commission stated that it will continue to fashion remedies as needed in the public interest, including ordering narrow prior approval or prior notification requirements in certain limited circumstances. The Commission said in its Prior Approval Policy Statement that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." The Commission also said that "a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger." *Id.* at 3. As explained in the 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 also announced in its Statement its intention "to initiate a process for reviewing the retention or modification of these existing requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." *Id.* at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Prior Approval Policy Statement], the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification

determined to reopen the proceedings and modify the orders to delete paragraph V.

The presumption under the Prior Approval Policy Statement does not apply to existing prior notice provisions,² and application of the factors set forth in the Statement has led the Commission to determine that, with one exception described below, the prior notice requirements of paragraph VI should be retained. The markets alleged in the complaints are small local areas, each of which must be analyzed separately. There is a credible risk that Alleghany could make an anticompetitive acquisition of a title plant or a back plant without being required to file under HSR. None of the divestitures that Alleghany made in satisfaction of the 1987 and 1991 orders was valued above the \$15 million HSR threshold. Moreover, Alleghany has not demonstrated that an acquisition of a title plant or a back plant outside the markets alleged in the complaints would raise no antitrust concerns.

The Commission is satisfied, however, that there is no credible risk of an unreportable, anticompetitive acquisition when the transaction merely involves the acquisition of copies of title records while the seller retains the originals. In contrast to the acquisition of sole rights to title records (such as buying a title plant or back plant), which may be anticompetitive depending on market conditions, the acquisition of copies of records -- *i.e.*, where the seller retains the original -- is likely to be procompetitive (or at worst competitively neutral) because the transaction places no restraints on post-acquisition competition between the parties. Acquisitions of copies of records enable the acquirer to compete more effectively by increasing the depth of coverage of its existing records and enable the seller to compete more effectively by lowering its costs while not removing records from its control. Accordingly, the Commission considers prior notice of such transactions unnecessary and has added to paragraph VI of each order a proviso exempting the acquisition of copies.³

Accordingly, *It is ordered*, That these matters be, and they hereby are, reopened; and

It is further ordered, That paragraph V of each order be, and it hereby is, deleted in its entirety; and

² Prior Approval Policy Statement at 4-5.

³ Although the proviso language differs slightly from the language proposed by Alleghany, the Petition requests as an alternative "language to similar effect." Petition at 13 n.4.

It is further ordered, That paragraph VI of each order be, and it hereby is, modified, as of the effective date of this order, to add the following to the end of the paragraph:

Notification is not required to be made pursuant to this paragraph with respect to any acquisition by Alleghany of a copy of title records or other information from a person or entity that thereafter retains the original records or information in its ownership and control, and where competition in the ordinary course between the parties is not otherwise restrained.

RE: The Coca-Cola Company
Docket No. 9207

January 26, 1996

Dear Mr. Lipsky and Mr. Coffman:

On October 2, 1995, The Coca-Cola Company ("Coca-Cola") filed a Petition to Reopen and Modify Consent Order ("Petition") entered in Docket 9207.¹ Coca-Cola filed the Petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51, and the FTC Policy Statement Concerning Prior Approval and Prior Notice Provisions, issued on June 21, 1995, and published at 60 Fed. Reg. 39,745-47 (August 3, 1995) ("Policy Statement"). In its Petition, Coca-Cola requests that the proceeding be reopened and the order modified so as to delete the prior approval clause that requires Coca-Cola to obtain the approval of the Commission prior to acquiring an interest in the Dr Pepper brand of carbonated soft drink concentrate. The Petition was placed on the public record for comment, and no comments were received. For the reasons discussed below, the Commission has determined to deny Coca-Cola's Petition.

The order that Coca-Cola seeks to modify resulted from Coca-Cola's 1986 attempt to acquire DP Holdings, Inc., which at the time controlled the Dr Pepper brand of carbonated soft drink concentrate. On July 31, 1986, the Commission obtained a preliminary injunction of the 1986 proposed acquisition.² On August 5, 1986, DP Holdings terminated its agreement with Coca-Cola.

On July 15, 1986, the Commission filed its administrative complaint with respect to the proposed acquisition by Coca-Cola. Because Coca-Cola had not acquired the Dr Pepper brand, no divestiture was necessary, and the principal relief sought by complaint counsel in the administrative proceeding, and ultimately ordered by the Commission, was an order with a prior approval requirement. The Commission's final order, issued on June 13, 1994,

¹ Although Coca-Cola's petition characterizes the Commission's order in Docket 9207 as a "consent order," in fact, the order is a litigated order that was modified by the Commission pursuant to a settlement that was reached while a petition for review was pending in the court of appeals.

² *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), dismissed as moot *per curiam* 829 F.2d 191 (D.C. Cir. 1987).

imposed both a prior approval requirement and a prior notice requirement on Coca-Cola with respect to certain acquisitions of carbonated soft drink concentrate companies and brands. Coca-Cola appealed the Commission's decision.

Pending that appeal, in the spring of 1995, Coca-Cola and the Commission's General Counsel's Office negotiated a settlement, resulting in an order with a narrower prior approval clause and a narrower prior notice clause than were included in the Commission's 1994 order. As part of the settlement, Coca-Cola agreed to the dismissal of its petitions for appellate review. The negotiated order, which is now the final order, requires Coca-Cola to seek the Commission's approval prior to acquiring any interest in the Dr Pepper brand of carbonated soft drink concentrate, rather than any brand of carbonated soft drink concentrate as the June, 1994, order had required. It also requires Coca-Cola to give the Commission prior notice of an acquisition of an interest in any carbonated soft drink concentrate company that sells over 10 million cases of soft drinks a year and to which the requirements of the Hart-Scott-Rodino Act do not apply. Coca-Cola has petitioned the Commission to delete only the prior approval clause in the negotiated order.

At the time of the Coca-Cola litigation, the Commission's policy was to require a prior approval requirement in all merger consent orders. *See* O.M. 5.4.4.2., Staff Bulletin 88-01. Early in 1995, the Commission began a re-examination of that policy, ultimately concluding that "a general policy of requiring prior approval is no longer needed," and that the Commission would rely instead principally on the premerger notification and waiting period requirements of the Hart-Scott-Rodino Act. Policy Statement at 2.

The Commission recognized, however, that narrow prior approval or prior notification provisions may be necessary to protect the public interest in some circumstances. As to the former, the Commission concluded that "a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger." Policy Statement at 2.

The Policy Statement also addressed the question of existing orders, such as the one in this case, that contained prior approval requirements. The Commission announced its intention "to initiate a process for reviewing the retention or modification of these existing

requirements" and invited respondents subject to such requirements "to submit a request to reopen the order." Policy Statement at 4. The Commission determined that, "when a petition is filed to reopen and modify an order pursuant to . . . [the Policy Statement], 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 policy announced" in the Policy Statement. *Id.* at 4. Thus, the Policy Statement contemplates that an existing prior approval requirement may be retained where there is a "credible risk" that the respondent may attempt to revive the same or a similar anticompetitive merger.

In this proceeding, the Commission has already found that Coca-Cola's proposed acquisition of Dr Pepper would have been anticompetitive if consummated.³ The Coca-Cola Company, slip op. at 63. Therefore, Coca-Cola's petition to reopen and modify presents the question whether there exists a "credible risk" that Coca-Cola will revive its efforts to acquire Dr Pepper.

While it is settled law that a law violator may not escape a remedial order by merely promising, without more, that it will not repeat the violation (*see SCM Corp. v. FTC*, 565 F.2d 807, 812 (2d Cir. 1977)), Coca-Cola has to this day never disavowed an interest in acquiring Dr Pepper in the future. When counsel for Coca-Cola was asked at the oral argument before the Commission about Coca-Cola's intentions with respect to the acquisition of Dr Pepper, counsel refused to state on the record what those intentions were.⁴ Although Coca-Cola's equivocation on this issue was expressly noted by the Commission in its decision of June 13, 1994 (The Coca-Cola Company, slip op. at 18-19 & n.33), Coca-Cola's petition to reopen and modify maintains Coca-Cola's steadfast refusal to give the Commission any assurance in this regard. In any event, the Dr Pepper brand still exists, Coca-Cola continues in the concentrate business, and Coca-Cola has both the ability and the incentive to

³ Coca-Cola's Petition does not assert that the facts underlying the Commission's original conclusions have changed, or otherwise assert that changed conditions of fact or law require the order to be reopened.

⁴ "When asked at oral argument whether Coca-Cola had made a commitment not to acquire Dr Pepper, the answer was non-responsive and certainly not a clear negative." The Coca-Cola Company, slip op. at 18. (*See, also, id.* at 18, n. 33, for the exchange between then-Chairman Steiger and counsel for Coca-Cola, including a discussion of counsel's subsequent attempt to correct the transcript of the oral argument by changing not his answer to the Chairman's question, but the question itself.)

acquire Dr Pepper if it became available.⁵ There continues to be, therefore, a credible risk that Coca-Cola may revive its efforts to acquire Dr Pepper.

The limited prior approval requirement in the negotiated order simply restricts Coca-Cola's ability to revive an anticompetitive acquisition, and is limited to the assets at issue in the challenged transaction. It is, thus, consistent with the Policy Statement, which anticipates that such prior approval provisions will "typically be limited to the proposed merger or other combination of essentially the same relevant assets that were involved in the challenged transaction." Policy Statement at 3.⁶ Coca-Cola has not made any other argument showing that the order should be further modified.

Because there remains a credible risk that Coca-Cola will attempt to revive an anticompetitive acquisition, it is appropriate in this case to retain the limited prior approval clause described in the Commission's Policy Statement. Therefore, the Commission has denied the Petition of The Coca-Cola Company to reopen and modify the order in Docket No. 9207.

By direction of the Commission, Commissioner Azcuenaga and Commissioner Starek recused.

⁵ The Petition's acknowledgment that the Dr Pepper brand has been bought twice since Coca-Cola's attempt was thwarted shows, contrary to the Petition's inference, that this brand can be readily bought and sold.

⁶ The Commission also notes that, at the time it developed and issued its new policy, Senator Strom Thurmond raised a number of questions with respect to the application of the policy to the order against Coca-Cola. The Commission's June 21, 1995, letter to Senator Strom Thurmond, responding to those questions, stated: "In response to your question whether the settlement with The Coca-Cola Company, Dkt No. 9207 (Commissioner Azcuenaga and Commissioner Starek, recused), reflects a change in policy, we believe it is consistent with the Commission's new policy, although it predates the adoption of that policy." June 21, 1995, letter to Strom Thurmond, by the direction of the Commission, at 2, n.3. Thus, the Commission has previously considered whether the settlement in The Coca-Cola Company is consistent with its new prior approval policy and has concluded that it is.