

## IN THE MATTER OF

## THE PENN TRAFFIC COMPANY

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

*Docket C-3577. Consent Order, May 15, 1995--Modifying Order, Jan. 10, 1997*

This order reopens a 1995 consent order -- that required the respondent to divest one supermarket in each of the three Pennsylvania areas designated -- and this order modifies the consent order by terminating the respondent's obligation to divest one of its two supermarkets in Mount Carmel, Pennsylvania, in part, because Penn Traffic has demonstrated that new entrants into the Mount Carmel market has eliminated the need for the divestiture.

## ORDER REOPENING AND MODIFYING ORDER

On September 13, 1996, respondent The Penn Traffic Company ("Penn Traffic") filed a Petition of Respondent the Penn Traffic Company to Reopen and Set Aside the Provisions of Paragraph II.A.3 of the Order Entered Herein ("Petition"). In its Petition, Penn Traffic requests that the Commission reopen the order in Docket No. C-3577 ("order") to set aside paragraph II.A.3 which requires Penn Traffic to divest either one of two supermarkets it owns in Mt. Carmel, Pennsylvania. The Petition addresses the remaining one of three supermarket divestitures required by the order. The Commission previously approved Penn Traffic's application for divestiture of the other two supermarkets on June 17, 1996.<sup>1</sup>

For the reasons discussed below, the Commission has determined that Penn Traffic has demonstrated changed conditions of fact sufficient to require the reopening and modification of the order.

## I. THE PETITION

In its Petition,<sup>2</sup> Penn Traffic requests that the Commission modify the order to eliminate the remaining required divestiture under the

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<sup>1</sup> Penn Traffic completed the sale of the assets of the supermarket in Towanda, Pennsylvania on July 2, 1996 (required pursuant to ¶ II.A.1 of the order), and completed the sale of the supermarket in Pittston, Pennsylvania on July 5, 1996 (required pursuant to ¶ II.A.2 of the order).

<sup>2</sup> In support of its Petition, Penn Traffic provided the affidavit of Robert G. Coleman, Director of Real Estate for the Riverside Division of the Penn Traffic Company ("Coleman Affidavit").

order--*i.e.* a supermarket divestiture in Mt. Carmel.<sup>3</sup> Penn Traffic bases its Petition on changed conditions of fact and public interest considerations.<sup>4</sup> The changes of fact alleged by Penn Traffic include the actual entry into the Mt. Carmel market of a Sav-A-Lot store and the prospective entry (in March 1997) of a Wal-Mart Supercenter (featuring a large supermarket), just outside the Mt. Carmel Township limits. At the time the order became final (May 22, 1995), Sav-A-Lot had not opened its store and Wal-Mart had not announced its decision to build a Supercenter near Mt. Carmel.

In addition to change of fact, Penn Traffic argues that it is in the public interest to grant its Petition, because a further divestiture would, in effect, force Penn Traffic to exit the local Mt. Carmel market. Penn Traffic alleges that the above-described changes in the competitive conditions have contributed to its inability to effect a divestiture in Mt. Carmel. According to Penn Traffic, these conditions have eroded the marketability and long-term viability of its smaller Mt. Carmel supermarket location for use as a supermarket. Therefore, Penn Traffic states that if required to divest in Mt. Carmel, it will attempt to sell its larger supermarket and then close the smaller supermarket, thereby exiting the local Mt. Carmel market.<sup>5</sup>

## II. STANDARD FOR REOPENING AND MODIFYING FINAL ORDERS

Section 5(b) of the Federal Trade Commission Act provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" 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 it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-

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<sup>3</sup> Order, ¶ II.A.3.

<sup>4</sup> Penn Traffic does not assert that any change of law requires reopening the order.

<sup>5</sup> Petition at pp. 11-13. Coleman Affidavit at ¶¶ 8-9, 22-24.

2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").<sup>6</sup>

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.<sup>7</sup> In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order.<sup>8</sup> For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order."<sup>9</sup> Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.<sup>10</sup> The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.<sup>11</sup>

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not

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<sup>6</sup> *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

<sup>7</sup> Hart Letter at 5; 16 CFR 2.51.

<sup>8</sup> *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) ¶ 22,207.

<sup>9</sup> *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

<sup>10</sup> Damon Letter at 2.

<sup>11</sup> Damon Letter at 4.

required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one 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).

III. PENN TRAFFIC HAS DEMONSTRATED CHANGED CONDITIONS OF  
FACT THAT REQUIRE THE REOPENING AND  
MODIFICATION OF THE ORDER

Penn Traffic's Petition demonstrates that new entry into the relevant market eliminates the need for a divestiture pursuant to paragraph II.A.3 of the order. The Petition does not contain sufficient information for the Commission to conclude that the Sav-A-Lot is a "supermarket," as defined by the order, and is, thereby, in the relevant product market.<sup>12</sup> However, the Wal-Mart Supercenter will feature a full-line supermarket of at least 40,000 square-feet<sup>13</sup> (larger than either of Penn Traffic's two Mt. Carmel supermarkets)<sup>14</sup> and is, thus, in the relevant product market.<sup>15</sup>

This Supercenter will be located approximately one mile from the city limits of Mt. Carmel, the geographic market identified in the complaint,<sup>16</sup> and less than two miles from either of Penn Traffic's two Mt. Carmel supermarkets.<sup>17</sup> The Supercenter location is in a relatively undeveloped area between Mt. Carmel and Shamokin and is easily accessible by car from both of these more developed population centers. Such a sizable, well-recognized entrant, in this semi-rural area, where most supermarket shopping is done by car, will draw customers from a broader geographic region than is identified in the

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<sup>12</sup> Although Sav-A-Lot offers many items sold through supermarkets, Penn Traffic has not demonstrated that the Sav-A-Lot carries all relevant product categories identified in paragraph I.D of the order as defining a "supermarket," e.g. fresh meat, nor that the Sav-A-Lot carries the variety of brands and sizes within a category that would be found in Penn Traffic's comparable supermarkets.

<sup>13</sup> Wal-Mart sources estimate the grocery and grocery-related product area of this Supercenter to be between 40,000 and 60,000 square feet.

<sup>14</sup> Penn Traffic operates one 29,000 square foot supermarket and one 25,000 square foot supermarket in Mt. Carmel.

<sup>15</sup> The Supercenter, currently under construction, will have a total of 186,000 square feet.

<sup>16</sup> Paragraph 7(b) of the complaint in this matter identifies the Mount Carmel, Pennsylvania area to include "the Borough of Mount Carmel and the Township of Mount Carmel."

<sup>17</sup> Prior to the opening of the Supercenter, the nearest supermarkets to Penn Traffic's Mt. Carmel supermarkets are in Shamokin, Pennsylvania, eight miles east of Mt. Carmel.

complaint.<sup>18</sup> Therefore, unlike the competitive conditions that existed when the order became final, supermarket competition will expand outside the Mt. Carmel Township limits to include the Supercenter.

Further, Penn Traffic has responded to these anticipated competitive changes by initiating plans to expand (to about 40,000 square feet) and improve the larger of its Mt. Carmel supermarkets.<sup>19</sup> Accordingly, when the Wal-Mart Supercenter opens, it appears certain that it will be in direct competition with Penn Traffic's supermarkets in Mt. Carmel.

Given the sales volume that can reasonably be expected to be generated from the residents of Mt. Carmel,<sup>20</sup> the additional competition from a large competitor, such as Wal-Mart, is sufficient to remedy the competitive concerns that the order is designed to address.<sup>21</sup> Therefore, the imminent entry of the Wal-Mart Supercenter constitutes a change of fact that eliminates the need for Penn Traffic to divest a supermarket in Mt. Carmel and requires the reopening and modification of the order to set aside paragraph II.A.3 which requires such a divestiture.

Because the Commission has determined to grant Penn Traffic's Petition based on change of fact, we do not reach a determination with respect to Penn Traffic's public interest arguments.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's order be, and it hereby is, modified to set aside paragraph II.A.3, as of the effective date of this order.

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<sup>18</sup> In addition, Wal-Mart's general merchandise product selection further increases its potential drawing power from these areas.

<sup>19</sup> Coleman Affidavit at ¶¶ 27-28.

<sup>20</sup> Studies conducted by Penn Traffic estimate the total weekly potential food store sales from Mt. Carmel, Atlas, and Kulpmont boroughs, and Mt. Carmel Township in Pennsylvania to be \$361,000. Coleman Affidavit at ¶ 12.

<sup>21</sup> Penn Traffic estimates that the Supercenter may succeed in taking approximately \$150,000 in weekly sales, or about 41.5% of the total potential sales (of \$361,000) from the Mt. Carmel trade area identified in the Coleman Affidavit ¶ 12. Coleman Affidavit ¶ 19.

Complaint

123 F.T.C.

## IN THE MATTER OF

MONTANA ASSOCIATED PHYSICIANS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3704. Complaint, Jan. 13, 1997--Decision, Jan. 13, 1997*

This consent order prohibits, among other things, two Montana-based organizations from entering or attempting to enter into any agreement with physicians to: negotiate or refuse to deal with any third-party payer; determine the terms on which physicians deal with such payers; or fix the fees charged for any physician's services. In addition, the consent order prohibits the respondents from advising physicians to raise, maintain or adjust the fees charged for their medical services, or encouraging adherence to any fee schedule for physician's services.

*Appearances*

For the Commission: *Robert Leibenluft, Steve Osnowitz and William Baer.*

For the respondents: *James Kirkland, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Washington, D.C. and James Sneed, McDermott, Will & Emery, Washington, D.C.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Montana Associated Physicians, Inc. ("MAPI") and the Billings Physician Hospital Alliance, Inc. ("BPHA"), hereinafter sometimes referred to as respondents, have violated and are violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana.