

# **INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS**

**IN THE MATTER OF**

**KONINKLIJKE AHOLD N.V.**

*Docket No. C-4027 – Order July 21, 2006*

Order granting the Petition of Ahold to reopen and modify the Order of January 16, 2002.

## **ORDER REOPENING AND MODIFYING ORDER**

On April 10, 2006, Koninklijke Ahold N.V. (“Ahold”), one of the respondents named in the consent order issued by the Commission on January 16, 2002, in Docket No. C-4027 (“Order”), filed a Petition requesting the Commission to reopen and set aside the Order insofar as it applies to Ahold (“Petition”). Ahold has accomplished the divestitures mandated by the Order and the remaining Order provisions require notice of future acquisitions and filing of annual compliance reports. Ahold’s Petition was filed 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 C.F.R. § 2.51. In its Petition, Ahold asserts that changed circumstances eliminate the continuing need for the Order as it relates to Ahold.<sup>1</sup> Ahold also contends the requested modification is in the public interest.<sup>2</sup> On April 18, 2006, the Commission placed Ahold’s Petition on the public record and invited the public, for a period of 30 days, to submit comments on the Petition. No comments have been received. The Commission has reviewed the Petition and has determined to grant Ahold’s Petition.

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<sup>1</sup> Petition at 1-2, 5-6

<sup>2</sup> *Id.* at 6-8

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The Order that Ahold seeks to modify resulted from Ahold's acquisition of Bruno Supermarkets, Inc. ("Bruno") in 2001. The acquisition raised competitive concerns in the retail sale of food and grocery products in supermarkets located in "areas in and near Sandersville, Georgia and Milledgeville, Georgia."<sup>3</sup> At the time, Ahold and Bruno's were direct competitors in Sandersville and Milledgeville and the Complaint alleged, among other things, that the acquisition would eliminate direct competition between Ahold and Bruno's in these areas.<sup>4</sup>

To remedy the competitive concerns raised by the acquisition, the Order required Ahold to divest its BI-LO supermarket in Milledgeville, Georgia (located in Baldwin County), and its BI-LO supermarket in Sandersville, Georgia (located in Washington County).<sup>5</sup> Ahold divested the two supermarkets on December 14, 2001, and December 17, 2001, respectively. The Order's remaining operative provisions prohibit Ahold, for a ten-year period ending on January 21, 2012, from (1) acquiring any supermarket in Baldwin or Washington Counties without providing advance written notice to the Commission; (2) entering into or enforcing any agreement that restricts the ability of any person acquiring any location used as a supermarket to operate a supermarket at that site if the supermarket was formerly owned or operated by Ahold or Bruno's in either Baldwin or Washington Counties; and (3) with certain exceptions, removing any fixtures or equipment from any property owned or leased by Ahold or Bruno's in Baldwin and Washington Counties that no longer operates as a supermarket.<sup>6</sup> Ahold is also required to file annual reports of its compliance with the Order until 2012, notify the

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3 Complaint, Docket No. C-4027, ¶¶ 9-13.

4 *Id.* ¶ 17.

5 Order ¶ II.

6 *Id.* ¶¶ IV and V.

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Commission prior to any corporate changes that may affect compliance obligations arising out of the Order, and permit the Commission access, upon reasonable request, to all records and employees.<sup>7</sup>

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), 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” require such modification.<sup>8</sup> 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.<sup>9</sup> The Commission may also modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action.<sup>10</sup> Thus, Section 2.51 of the Commission’s Rules of Practice, as amended, invites respondents

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<sup>7</sup> *Id.* ¶¶ VI, VII and VIII.

<sup>8</sup> Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which 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.

<sup>9</sup> See S. Rep. No. 96-500, 96th Cong., 2nd Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished); 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>10</sup> See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992).

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in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must make a *prima facie* “satisfactory showing” of a legitimate public interest reason or other reasons justifying the requested modification.<sup>11</sup> In this instance, however, we do not need to assess the sufficiency of Ahold’s public interest showing because Ahold has made the requisite satisfactory showing that changed conditions of fact require the Order to be reopened and set aside as to Ahold.

The record shows that on January 31, 2005, Ahold sold all of its interests in BI-LO Holding, LLC, to Lone Star U. S. Acquisitions, LLC (“Lone Star”). As a result, Ahold no longer owns or operates supermarkets in Baldwin and Washington Counties, Georgia, the relevant areas that are the subject of the Order’s remaining operative provisions.<sup>12</sup> The record also shows that Lone Star has acknowledged and agreed that it would continue to comply with the obligations of the Order as Ahold’s successor to those requirements.<sup>13</sup> Further, Ahold has stated that it has no present intention to re-enter Baldwin County or Washington County.<sup>14</sup>

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11 See Requests to Reopen, Supplementary Information, 65 Fed. Reg. 50,636, 50,637 (Aug. 21, 2001) *amending* 16 C.F.R. § 2.51(b).

12 Order ¶¶ IV- VIII.

13 Petition at 6 and Exhibit 10. See also Ahold’s Compliance Report (January 13, 2006).

14 *Id.* at 4-5 and Non-Public Exhibit 2 and Appendix I: Affidavit of Brian W. Hotarek, Executive Vice President of Ahold U.S.A. , Inc., In Support Of Petition To Reopen And Modify Decision And Order (April 4, 2006), and Affidavit of Thomas A. Hippler, Executive Vice President and General Counsel of Ahold U.S.A., Inc., In Support Of Petition To Reopen And Modify Decision And Order (June 8, 2006).

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Ahold's exit from the relevant markets eliminates the continuing need for the Order's remaining requirements to apply to Ahold and thus is a sufficient changed circumstance to support setting aside the Order as to Ahold.<sup>15</sup> Setting aside Paragraph IV. of the Order (the prior notification provision) as to Ahold is also consistent with the *Statement of the Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions* issued June 21, 1995 ("Prior Approval Policy Statement").<sup>16</sup> There is no evidence that a prior notification provision is needed as to Ahold as Ahold and its related entities do not own any interest in any supermarket operation in the relevant markets identified in the Order. Although Ahold remains in the supermarket business in areas that are not addressed by the Order, an acquisition by Ahold of any competitively significant supermarket operation in the relevant markets likely would be reportable under the Hart-Scott-Rodino Act, 15 U.S.C. 18a.<sup>17</sup>

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15 See *Entergy Corporation, et al.*, Docket No. C-3998, Order Reopening and Setting Aside Order (July 1, 2005) ("the factual premise underlying the concerns that led to entry of the Order, . . . arose specifically from the acquisition of Entergy's ownership interest in Gulf South . . . . The sale of Gulf South constitutes a substantial change that eliminates the continuing need for the Order's requirements); see also *Union Carbide Corporation* 108 F.T.C. 184 (1986) (order modified because respondent had clearly exited a business covered by the order and had demonstrated it had no intention of re-entering the business).

16 60 Fed. Reg. 39,745-47 (August 3, 1995); 4 Trade Reg. Rep. (CCH) ¶ 13,241, at 20,991 (June 21, 1995).

17 In its Prior Approval Policy Statement, the Commission states 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. . . [and that as a general matter] Commission orders in such cases will not include prior approval or prior notification requirements." *Id.* at 2. See *KKR Associates, L.P.*, 120 F.T.C. 879 (October 31, 1995) (setting aside order containing prior approval provision pursuant to Prior Approval Policy Statement).

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Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened; and that the Commission's Order issued on January 16, 2002 be, and it hereby is, set aside as to respondent Ahold as of the effective date of this Order, but will continue in effect with respect to Ahold's successor, Lone Star U. S. Acquisitions, LLC.

By the Commission.

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IN THE MATTER OF

**RAMBUS INCORPORATED**

*Docket No. 9302 – Order: July 31, 2006*

**ORDER REVERSING AND VACATING INITIAL  
DECISION AND ACCOMPANYING ORDER,  
SCHEDULING SUPPLEMENTAL BRIEFING ON ISSUES  
OF REMEDY, AND DENYING COMPLAINT COUNSEL’S  
MOTION FOR SANCTIONS**

This matter having been heard by the Commission upon the appeal of Counsel Supporting the Complaint and the cross-appeal of Respondent, and upon the respective briefs and oral arguments in support of such positions, and the Commission having determined that Respondent has violated Section 5 of the Federal Trade Commission Act – for the reasons stated in the accompanying Opinion – the Commission has therefore determined to reverse and vacate the Initial Decision, to vacate the Order accompanying the Initial Decision, and to direct supplemental briefing on issues of remedy. The Commission has also determined to deny Complaint Counsel’s Motion for Sanctions Due to Rambus’s Spoliation of Documents (Aug. 10, 2005) (“Motion for Sanctions”).

Accordingly,

**IT IS ORDERED THAT** the Initial Decision dismissing the Complaint in this proceeding be, and it hereby is, **REVERSED** and **VACATED**;

**IT IS FURTHER ORDERED THAT** all findings and conclusions in the Initial Decision, other than those expressly cited and relied upon in the Opinion accompanying this Order, be, and they hereby are, **SET ASIDE**;