

Interlocutory Orders, Etc.

AGRIUM, INC.

Docket No. C-4277. Order, March 7, 2011

Order granting respondent's petition to reopen and set aside the consent order entered in this matter because the acquisition on which the consent order was based never occurred.

ORDER REOPENING AND SETTING ASIDE ORDERS

Agrium, Inc. filed its Petition To Reopen and Set Aside Orders on November 23, 2010. Agrium bases the Petition on the changed fact that Agrium's pending hostile takeover of CF Holdings, Inc., upon which the Commission's final Decision and Order, and the Order to Hold Separate ("Orders"), were premised, ultimately never occurred and has been abandoned. For the reasons stated below, the Commission has determined to grant the Petition and has reopened and set aside the Orders.

I. BACKGROUND - THE COMMISSION'S COMPLAINT AND ORDERS

This matter arose from Agrium's proposed acquisition of CF. Agrium pursued a hostile tender offer for CF that began in February 2009, and continued throughout most of 2009. CF, however, rebuffed Agrium's advances and launched its own tender offer to acquire the much larger Terra Industries. Agrium's proposed acquisition of CF raised competitive concerns in the anhydrous ammonia terminal markets in Ritzville, Washington, and Marseilles, Illinois.

Agrium agreed to settle the matter, and on December 22, 2009, the Commission accepted an agreement containing consent orders for public comment. At that time, the Commission issued its Complaint alleging that the merger between Agrium and CF, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC

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Act¹. At the same time, the Commission also issued and served its Order to Hold Separate and Maintain Assets (“Hold Separate Order”), which became final. Following a public comment period, the Commission issued and served the Decision and Order on February 3, 2010. The Decision and Order requires Agrium to divest CF’s Ritzville, Washington, and Agrium’s Marseilles, Illinois, anhydrous ammonia terminals to Terra and to terminate its distribution agreement with Rentech Energy Midwest Corporation – all triggered by completion of Agrium’s acquisition of CF. The Hold Separate Order requires Agrium to maintain and hold separate Agrium’s Marseilles, Illinois terminal pending its divestiture. As a part of the divestiture, Agrium also agreed to sell its 50% interest in the Carseland Nitrogen Operations facility in Alberta, Canada, which produces anhydrous ammonia and would supply the Ritzville terminal.

Ultimately, Agrium was not successful in acquiring CF. Agrium announced on March 11, 2010, that it would not go forward with the acquisition, and let its outstanding offer for CF expire on March 22, 2010². CF completed its acquisition of Terra on April 19, 2010. Agrium withdrew its Hart-Scott-Rodino (“HSR”) filing to acquire CF on November 23, 2010³. Although Agrium’s obligations to divest never ripened, it has been holding the Marseilles terminal separate as required by the Hold Separate Order.

II. AGRIMUM’S PETITION

Agrium states that the remedial purpose of the Orders was to remedy the lessening of competition resulting from the Agrium-CF

¹ Complaint ¶ 17.

² Petition at 2-3.

³ Petition at Exhibit 1: Letter to Premerger Notification Office from Joseph J. Simons, November 23, 2010.

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acquisition as alleged in the Commission's Complaint.⁴ Agrium adds, "Similarly, the purpose of the Hold Separate Order is to facilitate the purpose of the Consent Agreement in remedying the lessening of competition as alleged in the Complaint."⁵ Agrium notes that the Agrium-CF acquisition never occurred and that Agrium "no longer intends to pursue an acquisition of CF."⁶ Agrium asserts that these circumstances constitute changed conditions of fact that eliminate the need for the Orders⁷.

Agrium also asserts that the public interest warrants setting aside the Orders because the Orders are imposing significant costs on Agrium⁸. Agrium claims to have lost the flexibility to operate the terminal as it chooses. Specifically, Agrium states that the Orders "limit how Agrium conducts business at the Marseilles Terminal: limiting Agrium from transferring or firing employees; requiring it to maintain current contracts; requiring it to continue existing levels of maintenance and continue with previously planned improvements; preventing it from selling any part of the Marseilles Terminal property or using it as collateral; requiring Agrium to maintain corporate financial support; and requiring it to continue EH&S and engineering support services."⁹

⁴ Petition at 4.

⁵ *Id.*

⁶ *Id.* and Petition at Exhibit A, Affidavit of Joni Paulus in Support of Petition of Agrium, Inc. To Reopen and Set Aside Orders ("Affidavit") ¶¶ 12-13.

⁷ Petition at 5 ("Without the Agrium-CF acquisition, the factual underpinnings of the Commission's Complaint and subsequent Orders have been eliminated.").

⁸ Petition at 5.

⁹ Petition at 5, citing Affidavit ¶ 9. Agrium also states that the periodic reports require a considerable amount of time and impose costs that create no value for Agrium and "are passed on to Agrium's customers and its shareholders." *Id.*

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No public comments were filed during the Commission's public comment period.

III. STANDARD FOR REOPENING AND MODIFYING A FINAL ORDER

A final order may be reopened and modified on the grounds set forth in § 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b). First, Section 5(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" so require¹⁰. 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 competition¹¹. The Commission's Rule 2.51(b) requires such "satisfactory showing" to include affidavits setting forth admissible facts.¹²

Second, Section 5(b) provides that the Commission may also reopen and 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

¹⁰ See also *Supplementary Information, Amendment to the Commission's Rules of Practice* § 2.51(b), 16 CFR 2.51(b) (August 15, 2001).

¹¹ S. Rep. No. 96-500, 96th Cong., 2d 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) ("Hart Letter"). 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.").

¹² 16 C.F.R. § 2.51(b).

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requested modification¹³. In the case of “public interest” requests, Rule 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification¹⁴. This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. Just as for petitions based on changed conditions, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,¹⁵ and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner’s burden is not a light one in view of the public interest in repose and the finality of the

¹³ Hart Letter at 5; 16 C.F.R. § 2.51.

¹⁴ 16 C.F.R. § 2.51.

¹⁵ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

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Commission's orders¹⁶. All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.¹⁷

IV. THE ORDERS WILL BE REOPENED AND SET ASIDE

The Commission has determined to reopen and set aside the Orders as requested by Agrium. The Orders were premised on the Complaint's allegation that Agrium's acquisition of CF would be unlawful. The Decision and Order's divestiture requirements would remedy that violation, and the Hold Separate Order is intended to be a temporary order to maintain assets and keep them separate, viable, and competitive pending the divestiture.

The Decision and Order explicitly states that the purpose of the Order is "to remedy the lessening of competition alleged in the Commission's complaint."¹⁸ As noted above, the Complaint alleges that the merger between Agrium and CF, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the FTC Act¹⁹. Agrium has categorically abandoned its efforts to acquire CF and has withdrawn its HSR Notification for the acquisition. This fundamental premise to the Commission's Complaint is now effectively a nullity²⁰.

¹⁶ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹⁷ 16 C.F.R. § 2.51(b).

¹⁸ Final Order ¶¶ II.K., III.H., IV.B.

¹⁹ Complaint ¶ 17.

²⁰ It is very unlikely that Agrium would attempt to acquire CF again. See Petition at Exhibit A, Affidavit ¶ 13: Joni Paulus, General Counsel for Agrium states: "Agrium has withdrawn its HSR filing and no longer intends to pursue an acquisition of CF." Any renewed attempt by Agrium to acquire CF again would require a new HSR Notification.

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Accordingly, it is altogether unlikely that the Decision and Order's divestiture obligations will ever arise, and so they should be set aside. Further, without the divestiture requirement in place, there is no reason to retain Agrium's obligations to continue observing the temporary requirements under the Hold Separate Order. The Hold Separate Order was implemented as a temporary requirement to keep the assets-to-be-divested in good operating order pending their divestiture. Its requirements are obviated if the obligation to divest the held-separate assets is terminated. There is no continuing need to restrict Agrium's flexibility to control, operate, or dispose of the Marseilles terminal as it so chooses.

Setting aside the Orders in this case is consistent with the Commission's determination to set aside the final order in *Johnson & Johnson*, C-4154 (2005). In that case, Johnson & Johnson ("J&J") had an agreement to acquire Guidant Corporation. Following an investigation, the Commission entered an order, with J&J's consent, requiring J&J to divest assets, license technology, and end certain distribution arrangements. The order became final in December 2005. Before J&J could complete its acquisition of Guidant, however, Boston Scientific Corporation ("BSC") made a competing bid for Guidant. Eventually, Guidant agreed to be acquired by BSC, and on January 25, 2006, Guidant terminated its agreement with J&J. Later in 2006, the Commission accepted for public comment an agreement containing consent order with BSC, and BSC then completed its acquisition of Guidant. On May 26, 2006, the Commission granted J&J's petition to set aside the J&J order.²¹

²¹ Order Reopening and Setting Aside Order, *Johnson & Johnson*, Docket No. C-4154, at 4 ("The acquisition agreement between J&J and Guidant has been terminated, and the acquisition was never consummated. Accordingly, the basic premise of the Order, the unlawful acquisition that it was designed to remedy, did not come to pass. Therefore there is no reason to keep the Order in place."). See also *PacifiCorp*, File No. 971-0091 (Commission withdrawal from the consent agreement and closing of the matter when PacifiCorp withdrew its bid for TEG after the Commission had accepted the consent for public comment, but before the order was made final); Order Reopening and Setting Aside Order, *In the Matter of Entergy Corporation and Entergy-Koch, L.P.*, Docket No. C-3998 (2005) (Commission reopened and set aside the order when Entergy sold its

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Agrium has terminated and abandoned its proposed acquisition of CF and has withdrawn its HSR filing; and there is no indication that it will be reprised.²² This constitutes changed facts that eliminate the need to retain the Orders.

IT IS ORDERED that this matter be, and it hereby is, reopened and that the Decision and Order and Order to Hold Separate be, and they hereby are, set aside.

By the Commission.

interest in the assets that gave rise to the competitive concerns addressed by the order).

²² Additionally, CF's acquisition of Terra has created additional market overlaps that very likely would be implicated by any future combination of Agrium and CF, all of which could be reviewed pursuant to a new HSR filing.