

IN THE MATTER OF
NATIONAL DAIRY PRODUCTS CORPORATION
MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2 (a)
OF THE CLAYTON ACT

Docket 8548. Final Order, Oct. 2, 1969—Modifying Order, July 27, 1982

This order reopens the proceeding and modifies the Commission's Final Order issued on October 2, 1969 (76 F.T.C. 392), to ease restrictions on pricing for jams, jellies and preserves, so that only those price differences that injure competition would violate the order. The Commission declined Kraft's request to rescind the order or have it expire in 1987.

ORDER MODIFYING FINAL ORDER

Whereas, a "Petition of Kraft, Inc. to Reopen And Modify Cease And Desist Order" was filed on March 10, 1982 by Kraft, Inc. the successor to National Dairy Products Corporation, pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, wherein Kraft, Inc. seeks to have the order that was issued on October 2, 1969 rescinded or modified;

Whereas, the matter was thereafter placed on the public record for thirty (30) days pursuant to Section 2.51(c) of the Commission's Rules of Practice, 16 C.F.R. 2.51(c), during which time comments from the public were received; and

Whereas, the Commission thereafter considered the petition presented by Kraft, Inc. and all of the information submitted as comments on the petition and has determined that the petition makes a satisfactory showing that changed conditions of fact or law or that the public interest requires that the order be reopened for the purpose of modification.

Accordingly, *It is ordered*, that the matter be reopened and that the order be modified so that it will read:

It is ordered, That respondent Kraft, Inc. a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporate device, in connection with the sale or offering for sale of jam, jelly or preserve products of its Retail Foods Group, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly in price between different purchasers of such products of like grade and quality for resale at the same level of distribution where the effect of such discrimination may be substantially to lessen competition or tend to create a

monopoly in the manufacture of jam, jelly or preserve products; *Provided, however,* that it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish any affirmative defense set forth in Sections 2(a) or 2(b) of the Clayton Act or Section 8 of the Motor Carrier Act of 1980.

It is further ordered, That respondent's request to rescind the order or to have the order expire in 1987 is denied.

IN THE MATTER OF
ASH GROVE CEMENT COMPANY

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

Docket 8785. Order, June 24, 1975—Modifying Order, July 29, 1982

This order reopens the proceeding and modifies the Commission's Order issued of June 24, 1975, (85 F.T.C. 1123) by deleting Paragraph IV from the Order, so as to allow respondent to retain the assets of its divested subsidiary, which it reacquired when the purchaser of the divested plant defaulted on its payments to respondent.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JUNE 24, 1975

The Federal Trade Commission having considered the June 2, 1982 petition of Ash Grove Cement Company to reopen this matter and to modify the order to cease and desist issued by the Commission on June 24, 1975, and having determined that changed conditions of fact and the public interest warrant reopening and modification of the order,

It is ordered, That this matter be, and it hereby is, reopened and that Paragraph IV of the Commission's order be, and it hereby is, deleted.

Complaint

100 F.T.C.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5
OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT*Docket 9130. Complaint, Aug. 10, 1979—Dismissal order, July 30, 1982*

The Federal Trade Commission has issued an order dismissing the 1979 complaint challenging Exxon's proposed acquisition of Reliance Electric Company, finding that, ". . . the acquisition would not have had competitive effects of the magnitude of those anticipated by the company and the Commission in 1979." The dismissed complaint alleged that the acquisition would eliminate Exxon as an actual potential entrant into the U.S. electronic variable speed industrial drives market.

*Appearances*For the Commission: *David W. Long.*For the respondents: *Robert M. Saylor, Covington & Burling,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have undertaken an acquisition that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that said undertaking therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1), and having found that a proceeding by it with respect thereof is in the public interest, hereby issues its complaint, charging as follows:

THE RESPONDENTS

1. Respondent Exxon Corporation (hereinafter "Exxon") is a New Jersey corporation with its principal office at 1251 Avenue of the Americas, New York, New York. Respondent Enco, Incorporated ("Enco") is a Delaware corporation with its principal office at the same address. It is a wholly-owned subsidiary of Exxon.
2. Exxon is the largest industrial corporation in the world in assets, and is the second largest in sales. Its principal business is the production, transportation and refining of crude oil, but it is also a

major producer of plastics, petrochemicals and other petroleum-based products. Exxon is also engaged in non-petroleum extractive industries such as copper, coal and uranium, and has been expanding into electronic communication and data handling, semiconductors, solar energy and other technological industries.

3. At all times relevant herein, Exxon sold and shipped its products throughout the United States, and engaged in or affected interstate commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44. The acquisition described in paragraphs 5 and 6 of this complaint likewise is in or affecting interstate commerce within the meaning of those statutes.

THE ACQUISITION

4. Reliance Electric Company (hereinafter "Reliance") is a Delaware corporation with its principal place of business at 29325 Chagrin Blvd., Cleveland, Ohio. Reliance is a leading manufacturer of electrical equipment and related products, as well as scales and balances, and also has a sizeable telecommunications business. In fiscal year 1978, Reliance had sales of \$966.3 million and assets of \$613.2 million, ranking it 262nd and 288th, respectively, on the Fortune 500 lists of American industrial corporations. Reliance's sales for fiscal year 1979, which ends in October 1979, are presently running at an annual rate of \$1.5 billion.

5. On May 25, 1979, Exxon announced its intent to initiate a cash tender offer for the purchase of any and all outstanding shares of the common stock of Reliance for \$72 per share and any and all outstanding shares of Reliance's Series A preferred stock for \$201.60 per share. On the basis of the shares outstanding as of January 31, 1979, the total value of the offer would be \$1.17 billion. The pre-announcement price of Reliance common stock was \$36.50 per share.

6. The tender offer was formally opened on June 28, 1979, by Enco. On July 11, 1979, the initial termination date of the offer, Exxon announced that the offer would be extended to July 13, 1979. On July 13, Exxon announced that over 95 percent of Reliance's common stock had been tendered.

7. On July 27, 1979, the Commission directed its attorneys to seek a preliminary injunction against consummation of the acquisition. On July 28, 1979, the United States District Court for the District of Columbia entered a temporary restraining order enjoining consummation of the acquisition pending a hearing and decision on the Commission's application for a preliminary injunction. By

order dated August 6, 1979, the district court extended the temporary restraining order until August 17, 1979.

TRADE AND COMMERCE

8. Electronic variable speed industrial drives ("EVSD") constitute a competitively significant line of commerce, or market.

9. A competitively significant geographic area in which EVSD are marketed is the United States.

10. The EVSD market is concentrated, with the four leading producers in 1977 having in excess of 55% of all sales.

11. Barriers to broad-product-line entry into the EVSD market are high.

12. Reliance is a leading producer of EVSD.

13. Exxon possesses technology that it claims would permit it to manufacture EVSD that are superior in operating characteristics and lower in cost than other EVSD currently available. Exxon has built at least two prototype or demonstration EVSD which have been installed and are operating in Exxon's refineries.

14. But for the acquisition of Reliance, in order to reap the commercial benefits of its technology, Exxon would enter the EVSD market either *de novo* or through the acquisition of a toehold company, *i.e.*, a company with a relatively small share of the EVSD market.

EFFECTS OF THE ACQUISITION

15. Exxon's acquisition of Reliance would eliminate Exxon as an actual potential entrant into the United States EVSD market, thereby eliminating the likelihood that entry by Exxon would:

- (a) decrease concentration in the market;
- (b) increase competition in the market; or
- (c) increase competition in the development of EVSD technology and products.

16. Exxon's acquisition of Reliance would likely have anticompetitive effects in the United States EVSD market, including but not limited to:

- (a) increasing the level of concentration in the market;
- (b) elevating barriers to entry into the market; or
- (c) eliminating competition in the development of EVSD technology and products.

VIOLATIONS CHARGED

17. The effect of the acquisition of Reliance by Exxon may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

18. Acquisition of Reliance by Exxon and Enco would constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. By undertaking the acquisition that would give rise to the violations described in paragraphs 17. and 18., Exxon and Enco have violated Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1).

ORDER DISMISSING COMPLAINT

On August 10, 1979, the Commission issued an administrative complaint against respondents challenging the intended acquisition of Reliance Electric Company by Exxon Corporation, through its subsidiary Enco, Incorporated. The complaint alleged that the acquisition, which was subsequently consummated pursuant to a hold-separate order¹, would eliminate Exxon as an actual potential entrant into the United States electronic variable speed industrial drives ("EVSD") market, thereby eliminating the likelihood that entry by Exxon would: (a) decrease concentration in the market; (b) increase competition in the market; or (c) increase competition in the development of EVSD technology and products. The factual premise of the complaint was that Exxon had made a breakthrough in EVSD technology and, but for the acquisition of Reliance, would enter the market either *de novo* or through the acquisition of a toehold company.

After substantial pretrial discovery, complaint counsel moved on May 14, 1982, for a dismissal of the complaint. The motion was certified to the Commission by the ALJ without a recommendation on May 17, 1982. Respondents did not file an answer.

In their motion and accompanying papers² complaint counsel have explained in detail how recent discovery has shown that Exxon, and consequently the Commission, misjudged the commercial viability of its new technology, called "alternating current synthesis" ("ACS").

¹ A temporary restraining order was issued on July 28, 1979 by United States District Judge Harold H. Greene. On August 17, 1979, District Judge John H. Pratt entered the hold-separate order. That order was modified on October 26, 1979, to exclude Reliance's "motors unit" from the hold-separate requirement and also on June 25, 1980. Certain aspects of the June 25 modification not relevant here were struck down by the Court of Appeals in December, 1980. *FTC v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980).

² The motion to dismiss and Attachments A-M were filed on the public record. Complaint counsel also filed *in camera* a lengthy memorandum in support and 68 attachments, consisting of internal Exxon documents and investigational transcripts.

Thus, rather than marketing ACS for Exxon, as Exxon had hoped, Reliance guided the company to the realization that ACS was not the breakthrough it had been thought to be and that, moreover, the prospects even for modest commercial exploitation were questionable: ACS suffered from serious reliability and serviceability problems, and its production costs were vastly greater than originally estimated. Consequently, on March 20, 1981, Exxon announced that it had abandoned its efforts to develop the ACS design. While Reliance's "ACS Group" (the unit not subject to the court's hold-separate order) explored the possibility of another technology, that effort was terminated in August, 1981.

In light of these newly discovered facts, it is now apparent that Exxon never was the significant potential entrant that it was alleged to be in the Commission's complaint. Even if Exxon had attempted to enter the EVSD market by alternative means,³ the Commission has no reason to believe that such entry, without a new technology, would have offered "a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."⁴ In any event, it now appears that the acquisition would not have had competitive effects of the magnitude of those anticipated by the company and the Commission in 1979.

The complaint is hereby dismissed.

³ Absent the Reliance acquisition, Exxon might have acquired a toehold company or continued internal development of the ACS technology. However, in either case, it would have learned eventually of the failings of ACS. This probably would have ended Exxon's interest in the EVSD market, since the company seems to have been interested in entering that market *only* as a technological innovator.

⁴ *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974).

