

Agreement into the Order and modify Order ¶ II.E. so that it does not conflict with a license of intellectual property granted to NARCO under the 2001 Settlement Agreement.

For the reasons stated below, the Commission has determined to grant the Petition.

I. The Order

The Order in this matter was issued by consent at the end of an investigation of RHI's proposed acquisition of Global Industrial Technologies, Inc. The Complaint alleges six product markets that include two types of refractory bricks used to line basic oxygen furnaces, electric arc furnaces, ladles, degassers and torpedo cars used in steel production. The Order requires RHI to divest to Resco pursuant to the Divestiture Agreement two plants and assets used to manufacture the refractory bricks. See Order ¶ II.A. The Order defines the Divestiture Agreement to include an asset purchase agreement and related contracts that effected the divestiture initially, and the 2000 Settlement Agreement that resolved contract disputes between Resco and NARCO, a wholly-owned subsidiary of RHI that RHI designated to sign the divestiture contracts.² See Order ¶¶ I.L. and I.M. Any modification of the Divestiture Agreement without the Commission's prior approval violates the Order. See Order ¶ II.F.

II. The Petition

The Petition seeks two forms of relief. First, RHI petitions the Commission to approve the 2001 Settlement Agreement because it modifies some of the terms of the 2000 Settlement Agreement incorporated into the Order.³ Second, RHI asks the Commission to reopen and modify the Order to incorporate the 2001 Settlement Agreement into the Order. RHI also asks the Commission to modify Order ¶ II.E. so that it does not conflict with the license to NARCO granted by the 2001 Settlement Agreement. RHI asserts, *inter alia*, that it is entitled to this relief because the terms of the 2001 Settlement Agreement are consistent with the Order and the requested relief will facilitate free trade.

III. Standard for Reopening and Modifying Final Orders

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 Commission

²The Commission made the Order final only after RHI's NARCO subsidiary and Resco, the "up front buyer," had resolved certain disputes concerning the Divestiture Agreement. Accordingly, when the Order was made final, it incorporated by reference the 2000 Settlement Agreement.

³The Commission has determined to approve the 2001 Settlement Agreement pursuant to Rule 2.41(f) for many of the same reasons that the Commission has decided to reopen and modify the Order pursuant to Rule 2.51.

determines that the public interest so requires.⁴ Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.⁵ In the case of “public interest” requests, FTC Rule of Practice 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 modification.⁶ 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.⁷ In addition, this showing must be supported by evidence that is credible and reliable.⁸

⁴Section 5 of the FTC Act also 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. The Petition does not allege any changed conditions of law or fact.

⁵ *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John Hart (June 5, 1986) at 5; 16 C.F.R. § 2.51.

⁶ 16 C.F.R. § 2.51.

⁷ Thus, a requester’s mere assertion of competitive injury or disadvantage will ordinarily not constitute a “satisfactory showing” where the requester is unable to demonstrate how the proposed modification would promote effective competition or otherwise serve the broader public interest. *See, e.g., California & Hawaiian Sugar*, 119 F.T.C. 39, 44-45 (1995) (a requester cannot avoid order obligations just because its competitors are not so restricted; order was reopened and modified, however, to allow limited comparative claims that encouraged competition by enabling consumers to distinguish and choose among otherwise fungible products).

⁸ The Statement of Basis and Purpose to Rule 2.51 states that, “[r]equests to reopen orders must not only allege facts that, if true, would constitute the necessary showing, but must also credibly demonstrate that the factual assertions are reliable. [The Rule] therefore specifically requires that requesters provide one or more affidavits to support facts alleged in requests to reopen and modify orders. This [requirement] will not only help the Commission in its decision making process but, by clarifying the applicable standard, aid requesters in presenting meritorious cases . . . This [requirement] specifies the procedural method for

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,⁹ 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 Commission Orders.¹⁰ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.¹¹

IV. It Is In The Public Interest To Grant The Petition

RHI's Petition asks the Commission pursuant to Rule 2.51 to reopen and modify the Order to incorporate the 2001 Settlement Agreement into the Order and to conform Order ¶ II.E. to the terms of the license attached to the 2001 Settlement Agreement ("License"). The Petition makes the requisite public interest showing to support reopening the Order by establishing that the License will promote competition and by showing that incorporating the 2001 Settlement Agreement will allow the Commission to enforce its terms. The Petition establishes that a modification of the Order is warranted because the License's contribution to competition and the benefits from incorporating the 2001 Settlement Agreement can be achieved without interfering with achieving the purposes of the Order.

RHI's Petition includes a satisfactory showing of a legitimate public interest reason to reopen the Order. The License grants NARCO the right to use Resco's intellectual property to manufacture a refractory brick known by NARCO's trade name of WO-4358. This refractory is used by a small number of steel producers to line a portion of ladles used in steel production. The composition of the WO-4358 refractory brick places it on the outer boundary of the market for magnesia-carbon refractory bricks used for steel ladles alleged in Paragraph 17 of the Complaint, and the WO-4358 may have slightly different performance characteristics than other products in the relevant market.

Although it is not clear whether the WO-4358 falls within or outside this relevant market, it is clear that competition in the market that includes magnesia-carbon refractory bricks used for steel ladles has increased since the Order was issued. Furthermore, Resco has competed successfully in this market because of the divestiture required by the Order. It is also very

substantiating factual assertions." 53 FR 40867 (Oct. 19, 1988).

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

¹⁰ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹¹ 16 C.F.R. § 2.51(b).

significant that Resco has agreed to grant the License. These circumstances suggest that modification of the Order to enable NARCO to use the License likely will promote the public interest by increasing competition further in the relevant market by adding a new product to the market.

In addition, the 2001 Settlement Agreement appears to be a reasonable settlement of disputes between NARCO and Resco. RHI, through its NARCO subsidiary, failed to comply fully with the 2000 Settlement Agreement incorporated into the Order.¹² Therefore, it is in the public interest to incorporate the 2001 Settlement Agreement into the Order so that RHI's obligations under the Order are consistent with NARCO's contractual obligations to Resco, and so that the Commission can enforce compliance with its terms and, thereby, protect the Order's remedy.

Balancing the reasons for and against the proposed modification of the Order, it also appears in the public interest to modify the Order as requested in the Petition. The requested changes to the Order likely will increase competition slightly to steel producers who use bricks like the WO-4358 for steel ladles. The proposed modification also will conform the Order to the 2001 Settlement Agreement and the License, and provide the Commission with the option to enforce these agreements when to do so promotes the public interest.¹³ It appears that the benefits from these modifications can be obtained without any sacrifice to achieving the purposes of the Order. Accordingly,

IT IS ORDERED that the Order in this matter be, and it hereby is, reopened; and,

IT IS FURTHER ORDERED that the Order be, and it hereby is, modified as follows:

1. Paragraph I.L. is modified to provide as follows:
 - L. "Divestiture Agreement" means each and all of the following:
 1. Asset Purchase Agreement (dated November 11, 1999) among North American Refractories Company and Resco Products, Inc., as amended by Amendment No. 1 to Asset Purchase Agreement (November 19, 1999), Amendment No. 2 to Asset Purchase Agreement (November 30, 1999), Amendment No. 3 to Asset Purchase Agreement (December 3, 1999), Amendment No. 4 to Asset Purchase Agreement (December 10, 1999),

¹²In a separate action, RHI has agreed to pay civil penalties and provide other relief for its past violations of the Order.

¹³As a technical matter, the Order's definitions need to reference and be consistent with the new settlement. Similarly, RHI's obligations under the Order and agreements between NARCO and Resco must not be inconsistent. Absent the proposed modification, Paragraph I.I.E. of the Order could be construed to conflict with the 2001 Settlement Agreement.

- Amendment No. 5 to Asset Purchase Agreement (December 10, 1999), and Amendment No. 6 to Asset Purchase Agreement (December 15, 1999);
2. Transition Services Agreement between North American Refractories Company and Resco Products, Inc. (March 3, 2000);
 3. Magnesite Supply Agreement among North American Refractories Company and Resco Products, Inc., ((March 3, 2000);
 4. First Settlement Agreement, including, but not limited to, the provisions of the First Settlement Agreement that modify the Divestiture Agreement; and
 5. Second Settlement Agreement, including, but not limited to, the provisions of the Second Settlement Agreement that modify the First Settlement Agreement or the Divestiture Agreement.
2. Paragraph I.M. is modified to provide:
- M. “First Settlement Agreement” means the Settlement Agreement between North American Refractories Company and Resco Products, Inc. (October 27, 2000).
3. Paragraph I.O. is added to provide:
- O. “Second Settlement Agreement” means the Settlement Agreement between North American Refractories Company and Resco Products, Inc. (October 19, 2001).
4. Paragraph I.P. is added to provide:
- P. “First License” means the patent license agreement attached as Exhibit C to the First Settlement Agreement.
5. Paragraph I.Q. is added to provide:
- Q. “Second License” means the patent license agreement attached as Exhibit D to the Second Settlement Agreement.

6. Paragraph II.E. is modified to provide:

E. Respondent shall not use any patents, trade secrets, or other intellectual property licensed from Resco pursuant to the First Settlement Agreement (including but not limited to the First License) for the research, development, manufacture, distribution, or sale of Divested Products in North America;

provided, however, that Respondent may exercise its rights under the Second License.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED: February 17, 2004