IN THE MATTER OF

UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECS. 3 AND 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2902. Consent Order, Sept. 28, 1977—Modifying Order, March 15, 1991

This order reopens the proceeding and modifies Paragraph I.A of the 1977 consent order [90 FTC 257] by allowing the respondent to enter into multi-year requirements contracts with several new industrial gas distribution companies ("NEWCOs").

ORDER MODIFYING CONSENT ORDER ISSUED SEPTEMBER 28, 1977

On November 2, 1990, Union Carbide Corporation ("Carbide") filed a "Request to Reopen Proceeding and Modify Order" ("request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission's Procedures and Rules of Practice, 16 CFR 2.51. The request asks the Commission to reopen and modify the consent order in Docket No. C-2902 ("order"). Carbide seeks to have paragraph I.A. of the order modified to permit Carbide to enter into requirements contracts for terms longer than one year with several gas distribution companies, which are to be formed from packaged gas distribution businesses in which UCIG had, as of November 1, 1990, more than a 50% interest ("NEWCOs") and are to be owned jointly by the Union Carbide Industrial Gas division ("UCIG") and its employees. The employees and management together will own more than 50% interest in each NEWCO. The order presently requires that any requirements contracts with distributors in which Carbide does not own a "majority interest" have initial terms not longer than one year and be terminable annually on not more than 90-days notice.

The Commission has carefully considered Carbide's request and has concluded that the public interest warrants reopening and modifying paragraph I.A to allow Carbide to enter into requirements contracts with the NEWCOs for terms greater than one year. Carbide did not request, and the Commission has not considered, that the order be

reopened and modified on the grounds of changed conditions of fact or law. The request was put on the public record and no comments were received.

Standard for Reopening a Final Order of the Commission

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 order to be altered, modified, or set aside in whole or in part."[1] The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the satisfactory showing of changed conditions to obtain a reopening. *See Gautreaux v. Pierce,* 535 F.Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.[2] If the Commission determines that the petitioner has made the necessary showing, it must reopen the order to consider whether modification is in fact required and the nature and extent of the modification.[3] The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. This burden is not a light one in view of the public interest in repose and finality of the Commission's orders. *See Federated Department Stores, Inc. v. Moitie,* 425 U.S. 394 (1981) (strong public interest

[1] 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.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

[2] The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong. 2d Sess. 9-10 (1979), states:

> Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient . . . . The Commission, to reemphasize, 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.

[3] The legislative history notes: "The Commission may employ whatever procedures it deems appropriate in aid" of the decision whether to modify an order. S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979).

considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . .[not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Respondents are invited in requests to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51(b). In the case of a request for modification based on this ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *See Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983) (unpublished) ("Damon Letter") at 2. 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." *Damon Corp.*, Docket No. 2916, 101 FTC 692 (1983). Once this showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *See* Damon Letter at 2, *see, e.g., Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

Requested Modification of Paragraph I.A of the Order

Carbide proposes to spin off a portion of UCIG to form approximately five new companies, the NEWCOs, that will sell packaged industrial gas in cylinders to retail distributors. The NEWCOs will take over UCIG's filling plants, calcium carbide based acetylene production facilities and packaged gas retail outlets. They will also acquire UCIG's cylinder inventory. UCIG will continue to sell industrial gas in bulk form to independent distributors and to the NEWCOs (which will become UCIG's largest bulk gas customers) which will sell packaged gas to independent distributors.

The NEWCOs will be run by current UCIG management. At least 35% of each NEWCO's voting securities will be owned by UCIG, and a majority of each NEWCO's stock will be owned by NEWCO Employee

Stock Ownership Plan ("ESOP"). The small remaining amount of stock of each NEWCO would be sold to the NEWCO management.[4] In addition, UCIG will have a warrant permitting it to purchase enough new issue stock to raise its common stock position in the NEWCO to over 50%. UCIG will not be required to exercise the warrant but may do so at any time with no constraint from the NEWCO. UCIG's stock ownership will assure it of a seat on the NEWCO's boards, and Carbide states that it is contemplated that UCIG will have the right to approve most major decisions by the NEWCOs. Request at 11.

UCIG proposes that it will enter into a multi-year supply contract with each NEWCO for industrial gas with (1) an "evergreen" provision—a provision that renews a contract from term to term in lieu of notice by one of the parties to the contrary; and (2) a right of UCIG to meet any lower price offered by a competitor.

The Order Should be Reopened and Modified

The Commission has determined that paragraph I.A of the order should be reopened and modified as requested by Carbide. Carbide's currently planned restructuring is neither prohibited nor required by anything in the order. As a consequence, the Commission is not called upon to consider whether Carbide's preference for a structure in which Carbide retains less than fifty percent ownership is a reasonable business decision. Carbide has shown, however, that its business judgment will be affected by the application of the order to Carbide's relationships with the NEWCOs. The order may thus cause injury to Carbide, by causing Carbide to choose a less preferred structure for the NEWCOs. Carbide has therefore shown, as a threshold matter, the potential for competitive injury if it is unable to use multi-year requirements contracts with the new companies to be spun off from UCIG. The Commission also has determined that applying the order to Carbide's relationship with the NEWCOs may deter these spin-offs, a result not intended by the order, and thus that the reasons for the modification outweigh any reasons against this modification.

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[4] Only NEWCO employees, UCIG and the ESOP will be permitted to own NEWCO stock. The NEWCOs will also be allowed to use a Linde-derived name (Linde is the trade name for UCIG gas) as a company name, use the Linde logo, enter into a reciprocal free exchange of safety information, an applications technology license and an exchange of cylinder technology. These benefits will be contingent upon the NEWCOs' continued use of UCIG gas, UCIG's continuation of ownership in the NEWCO, and maintenance of safety standards acceptable to UCIG.

1. Carbide has shown a threshold injury

Initially, Carbide asserts that it is experiencing financial difficulties in the packaged gas business and hopes that restructuring with employee-owned businesses will revitalize an otherwise stagnant business sector. The creation of the NEWCOs is not constrained by the order. Carbide also has shown that if multi-year contracts with the NEWCOs are not permitted it may incur costs—by having to choose a less preferred structure for the NEWCOs—as a result of the order in a way not contemplated when the order was entered.

Carbide's decision to create the NEWCOs stems from what it claims is the generally poor performance of its packaged gas business and the hope that a new structure will increase the competitiveness of the business. Carbide attributes this poor performance to a number of factors: the lack of entrepreneurial spirit needed to compete in the retail packaged gas business; outmoded fill plants and acetylene plants; poor productivity; excess labor costs; higher salary and benefit structures than its competitors because UCIG's compensation and benefits are pegged to the chemical industry as opposed to competition in the retail packaged gas business; and high overhead costs attributable to the existing Carbide structure.

The proposed spin-offs will, Carbide hopes, revitalize its packaged industrial gas business. The NEWCOs will have lower salary and benefit schedules and lower overhead costs. According to Carbide, a key component to the creation of the NEWCOs is that an Employee Stock Ownership Plan will own over 50% of each NEWCO. First, Carbide believes that a business that is majority owned by its employees will be a more effective competitor. Request at 16. According to Carbide's ESOP expert, companies in which ESOPs own over 50 percent of the business have higher productivity and perform better than conventional firms in terms of sales growth, operating margin, return on equity, book value per share growth, long term debt as a percentage of capitalization, and return on investment in company stock. *See* Request at Exhibit 4, Affidavit of John S. Hoffmire, III, President of Hoffmire & Associates, Ltd. Second, it is important that lenders to the ESOP for the acquisition of company stock are granted special tax incentives if the ESOP lendee owns 50% or more of the company. This allo·-s the lender frequently to offer the majority-owning ESOP reduced rates at which it may borrow money to invest in the company's stock; if the ESOP buys less than 50 percent of NEWCO, its cost of capital will be higher. Request at 17.

In Carbide's business judgment, it must invigorate its industrial gas business, and Carbide has chosen to spin off part of its business in an effort to gain efficiencies. This spin-off proposal is not prohibited by the order.

Although Carbide has not conditioned the spin-offs on the Commission's approval of the requested modification, it may change the form of the NEWCOs if the modification is not granted. Carbide states that it may increase its stock ownership in the NEWCOs to over 50%, thereby clearly retaining a "majority interest." Request at 17. By doing this, Carbide would be able to maintain long-term supply contracts but, in the process, the NEWCOs with minority ESOP ownership would likely forego some efficiency gains of the NEWCOs with majority ESOP ownership. Request at 17. Carbide has identified the potential efficiency losses from such a decision: the tax advantages Congress afforded to businesses that are more than 50% owned by ESOPs will be lost; the businesses' entrepreneurial incentives will be more limited; and "to the extent the NEWCOs are successful in expanding sales, this in turn would likely permit better loading of UCIG's plants and make UCIG a more effective competitor in gas production. If the ESOP's ability to acquire more than 50% of the NEWCO's stock harms NEWCO's cash flow and cost of capital— thus reducing its ability to compete—this will, in turn, adversely affect UCIG as the NEWCOs' supplier." Request at 17.[5]

The Commission has concluded that Carbide has met its threshold burden of establishing that it is suffering or may suffer some competitive injury as a result of the order and in a way not contemplated when the order was entered. Carbide has satisfactorily demonstrated a need for modification of the order to enable it to use requirements contracts with terms greater than one year with the NEWCOs. Carbide's proposal to spin off the packaged industrial gas business—as opposed to entering contracts or making acquisitions that increase concentration and vertical integration—was not a concern addressed by the complaint when the complaint and order were entered in 1977. The order's prohibition against requirements contracts with terms greater than one year may deter Carbide from making what may be cost-reducing changes in its industrial gas business. Accordingly, the order will likely impede Carbide's ability to compete vigorously and effectively in the industrial gas market.

[5] Carbide's cost savings would not technically be efficiencies, but nonetheless could strengthen Carbide's ability to compete.

2. The Order should be modified

The Commission has determined that Carbide's showing of need for the modification outweighs any reasons not to modify the order. In this particular situation, the use of long-term contracts with the NEWCOs is consistent with the apparent general intent of the order and does not increase the specific problems that paragraph I.A.1 was designed to remedy.

The complaint addressed Carbide's acquisitions and plans to acquire many industrial gas distributors, which would have had the effect of foreclosing Carbide's competitors from a substantial segment of the sale and manufacture of industrial gas, impairing the ability of nonintegrated competitors and distributors to compete in the sale of industrial gases, raising barriers to entry in the sale of industrial gases to distributors, accelerating a trend towards vertical integration of suppliers and distributors of industrial gases, and eliminating Carbide as a potential entrant through internal expansion into the retail sales of industrial gases in areas where it acquired an interest in distributors. Paragraphs III and IV of the order required Carbide to obtain the prior approval of the Commission before making certain acquisitions of downstream distributors. Both paragraphs expired in 1987.

The complaint also alleged that Carbide required independent distributors, pursuant to a contract, agreement or understanding, to purchase from Carbide their total requirements of each industrial gas. Complaint at paragraph 10(a). The effects of such acts were alleged to substantially lessen competition in the sale of industrial gas to independent distributors and consumers, increase entry barriers in the sales of industrial gases to distributors and deprive distributors of the opportunity of competing for sales of industrial gases to certain customers. Complaint at paragraph 11. Paragraphs I and II of the order curtail Carbide's non-acquisition behavior, such as multi-year contracts, that may have an effect similar to vertical acquisitions. These paragraphs are in effect until 1997.

Carbide's decision to change the structure of its industrial gas business—through the creation of the NEWCOs—does not run contrary to the concerns in the complaint. The complaint addressed the harmful effects of Carbide's further integration of the industrial gas business through acquisitions or other contractual activities with independent distributors. Although the NEWCOs will change from formerly 100% Carbide-owned businesses to less than wholly-owned

entities, Carbide will retain significant control over them. Using long-term requirements contracts with these entities, therefore, does not appear to vary significantly from Carbide's present relationship with its wholly-owned distributors. Because Carbide will not retain a majority interest in the NEWCOs, however, a modification is required to allow Carbide to pursue this particular restructuring.

Carbide's likely retention of a significant interest and effective control over many of the NEWCOs' operations does not outweigh the arguments favoring the requested order modification. Carbide already has complete control over its wholly-owned distributors, and the proposed spin-offs cannot enhance and may somewhat reduce that control. Although denying the use of multi-year contracts with the NEWCOs might force Carbide to break totally its ties with its formerly wholly-owned distributors, a denial also might stop or impede Carbide's preferred structuring plan for the NEWCOs. The Commission concludes, therefore, that the order's prohibition on long-term contracts should be modified in this instance.

The proposed modification narrowly outlines which entities will be allowed to have multi-year requirements contracts with Carbide. Carbide must own at least 35% of the distributor and have a warrant exercisable at its sole discretion permitting Carbide to cause the distributor to raise Carbide's stock interest to over 50%. In addition, the proposed language limits Carbide from entering into long-term contracts with distributors unless it is with a distributor that Carbide owned outright on November 1, 1990, or a distributor that was formed to conduct a packaged gas distribution business in which Carbide had a majority interest on November 1, 1990, and a majority of the stock is owned by an ESOP. This severely limits the number of entities with which Carbide can enter into long-term contracts; no current independent distributors could be included. The modification, therefore, allows Carbide to accomplish its spin-offs, but does not alter Carbide's obligations to its current independent distributors.

Even though Carbide will be able to enter into multi-year contracts with the NEWCOs, the NEWCOs will not be able to do the same with independent distributors or end users that acquire packaged gas from them, because the NEWCOs will be successors in interest to Carbide's cylinder gas business. Similarly, UCIG's bulk sales to independent distributors will also remain subject to the multi-year contract prohibition in the order. It is not inconsistent to treat the NEWCOs as separate entities, *i.e.*, not majority-owned subsidiaries of Carbide, for

purposes of UCIG contracts with the NEWCOs, but require the NEWCOs to adhere to the order in their contracts with independent distributors. Carbide has acknowledged that as a condition to the formation of the NEWCOs, the NEWCOs will agree to be bound by the terms of the order.

Accordingly, *it is ordered,* that this matter be reopened and that paragraph I.A of the Commission's order in Docket No. C-2902, issued on September 28, 1977, be modified, as of the date of service of this order, to add the following language to the end of paragraph I.A:

Provided, however, for the purpose of applying Part I.A.1 of this order, any distributor in which respondent owns not less than 35% of the distributor's common stock and in which respondent has a warrant exercisable at its sole discretion permitting respondent to cause the distributor to issue sufficient new stock to raise respondent's stock interest to more than 50% shall be treated in the same manner as a distributor in which respondent owns a majority interest, provided that (1) respondent owned more than 50% of the outstanding capital stock of such distributor on November 1, 1990, or (2) such distributor was formed to conduct a packaged gas distribution business in which respondent had a majority interest on November 1, 1990, and a majority of the stock of such distributor is owned by an employee stock ownership plan.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

A majority of the Commission today grants the petition of Union Carbide Corporation to reopen and modify the order in Docket C-2902, although Union Carbide failed to show public interest considerations that warrant reopening.[1] The decision of the majority is inconsistent with the Commission's standards for reopening a final order, and it is manifestly unfair to the respondents that have been held to those standards. The decision also is inconsistent with the Commission's ruling on a virtually identical petition in this same matter in 1988, and it is inconsistent with a decision in another matter

[1] Union Carbide in its petition to reopen relied solely on public interest considerations and did not allege changed conditions of law or fact. *See* § 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b).

that the Commission is now defending in federal court.[2] The decision is arbitrary and capricious. I dissent.

I.

Paragraph I.A of the order in Docket C-2902 bars Union Carbide from having supply contracts with an initial term of more than one year with industrial gas distributors "in which [Union Carbide] owns less than a majority interest."[3] The order does not restrict supply contracts between Union Carbide and distributors in which it owns a majority interest. These two alternatives would seem sufficient to address the universe of ownership interests that Union Carbide might have in distributors. But the modification granted today at Union Carbide's request creates a third category of distributors— those in which Union Carbide recently has divested its majority interest but with whom, unlike other firms in which Union Carbide also does not own a majority interest, Union Carbide is permitted to have longterm supply contracts. The only justification identified for reopening and so modifying the order is Union Carbide's preference for multi-year contracts with distributors that it formerly owned. Union Carbide's preference not to comply with a constraint to which it agreed is insufficient for reopening a final order of the Commission.

Reopening an order may be warranted in the public interest when the respondent shows as a threshold matter some affirmative need to modify the order, usually a competitive disadvantage resulting from the order that was not contemplated when the order was entered.[4] Union Carbide has not made the requisite threshold showing. Instead, Union Carbide in its request asserts that the order's one-year limit on contracts with distributors in which Union Carbide owns less than a majority interest impedes its ability to achieve efficient distribution. Request To Reopen Proceeding and Modify Order, November 2, 1990 ("request"), at 21. This alleged burden is the same burden Union Carbide agreed to assume in 1977 in settlement of alleged violations of law, and Union Carbide makes no showing that the competitive context of the order now is any different in nature or degree from when it agreed to the terms of the order.

[2] Louisiana-Pacific Corp., Docket C-2956, *appeal filed,* No. 90-35733 (9th Cir. Aug. 16, 1990).

[3] Paragraph I.A will expire in 1997.

[4] Once such a showing is made, the Commission will consider the reasons for and against modification and whether the particular modification requested is appropriate to remedy the identified harm. *See, e.q.,* Damon Corp., Docket C-2916, 101 FTC 689, 692 (1983).

Union Carbide's argument for multi-year supply contracts also is the identical argument that it made in its 1988 petition to reopen the order and that the Commission considered and rejected in 1988. Letter to Glen S. Howard, Esq., November 10, 1988. The majority does not even acknowledge the 1988 decision, much less explain why it should be overruled. This reveals a troubling inattention to the principles of law that should underlie our decisions. Like its twin in 1988, the request should be denied.

II.

Union Carbide proposes to create several new companies ("NEWCOs") by divesting its majority interest in several gas distribution companies that are wholly owned by Union Carbide Industrial Gases, Inc. ("UCIG"), a wholly-owned subsidiary of Union Carbide, to employee stock ownership plans ("ESOP"). UCIG will retain a substantial interest in each NEWCO and the right to buy enough NEWCO shares to reacquire a majority interest.[5] The NEWCOs will acquire UCIG's cylinder gas business, and UCIG anticipates that the NEWCOs will be UCIG's largest bulk gas customers. Request at 9-12. Union Carbide hopes to achieve a number of benefits from the ESOP-owned NEWCOs, including improved entrepreneurial spirit and the ability to cut costs. Request at 8-9 & 16-17.

Union Carbide insists that multi-year supply contracts with the NEWCOs are essential because the order's one-year limit on contracts with distributors in which Union Carbide owns less than a majority interest "impedes UCIG's ability to achieve efficient distribution." Request at 21. This is the argument that the Commission rejected in 1988. Union Carbide also warns that if the requested modification is not granted, UCIG may choose to keep its majority interest in the NEWCOs. Request at 16-17.[6] Why this should be objectionable to the Commission is unexplained.

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[5] The majority by its silence implicitly rejects Union Carbide's suggestion that its "*de facto* control" of the NEWCOs might be deemed a "majority interest" for purposes of paragraph I.A of the order. Request at 3 n.4. This seems correct according to the terms of the order.

[6] In a variation of this argument, Union Carbide asserts that it should "not be compelled" by its proposed divestiture "to forfeit its multi-year relationships" with its current subsidiaries. Request at 3. Although this argument has a certain facile appeal, it does not withstand examination. First, it is Union Carbide's 1988 argument in new clothes and, like the earlier petition, incorrectly assumes that the order's limit on contracts impedes Union Carbide's ability to compete in some way that was not contemplated when the order was entered. Second, the argument ignores the simple fact that the restriction to which Union Carbide objects does not and would not apply to its current subsidiaries but rather to newly organized non-subsidiaries. Third, and conversely, Union Carbide is not compelled under any scenario from forfeiting multi-year relationships with its actual subsidiaries. Finally, the word "forfeit" implies some new right to multi-year contracts with distributors in which Union Carbide owns less than a majority interest, but any such "right" was resolved by the order to which Union Carbide consented.

III.

I agree with the majority of the Commission that nothing in the order prohibits or requires Union Carbide's proposed divestiture to the NEWCOs. The order does not contemplate any particular structure for Union Carbide.[7] Paragraph I.A of the order accords different treatment to distributors that are majority-owned by Union Carbide and those that are not, but it is indifferent to the identity of owners other than Union Carbide. I also agree with the majority that the Commission need not decide "whether Carbide's preference" to divest its majority interest in its wholly-owned distributors "is a reasonable business decision." Order Modifying Consent Order at 5. The proposed divestitures clearly are matters with which the order is not concerned.[8]

I disagree with the conclusion of the majority that Union Carbide has made a threshold showing of competitive injury resulting from the order. The majority infers injury from Union Carbide's claim that "its business judgment will be affected by the application of the order to Carbide's relationships with the NEWCOs," *i.e.*, that the order may "caus[e] Carbide to choose a less preferred structure for the NEWCOs."[9] Order Modifying Consent Order at 5. In other words, the majority finds that the order creates an impediment to competition if the order affects Union Carbide's preference or "business judgment." This extraordinary conclusion relegates the decision whether to reopen final orders of the Commission to the business preferences of the respondent. If this is the standard, can there be a point to writing orders in the first place?

A final order of the Commission necessarily affects the business judgment of a respondent. The order is part of the legal landscape in which the respondent does business. For example, an order requiring divestiture surely affects the business judgment of a respondent. The

[7] Paragraphs III and IV of the order required Union Carbide for ten years to obtain the prior approval of the Commission before making certain acquisitions. They expired in 1987.

[8] Despite its disclaimer, the majority appears to attribute some efficiencies (or cost savings) to Union Carbide's restructuring plan. *See* Order Modifying Order at 6-7 & n.5. It is worth noting that it is a departure from the Commission's usual practice to accept assertions of efficiencies at face value. Further, it is not the Commission's primary concern to maximize the profitability of individual companies. If that were the case, the Commission would stand aside and allow anticompetitive mergers and, indeed, blatant price fixing to proceed unchallenged. The mode of thinking that underlies competition policy and the antitrust laws is that companies like Union Carbide generally can be expected to take care of their own interests, which leaves the Commission free to constrain any abuse of their methods and to maintain a level playing field among competitors.

[9] The majority presumably means a structure that is "less preferred" by Union Carbide, consistent with its statement that the Commission need not consider whether the proposed divestiture to the NEWCOs "is a reasonable business decision." The Commission is ill-equipped to assess the reasonableness of ESOP ownership versus other possible ownership structures.

respondent made a business judgment to acquire the assets required by the order to be divested and surely would prefer, in its business judgment, to keep them. But this is not a recognized or acceptable public interest reason for reopening and modifying the order. *See Louisiana-Pacific Corp.*, Docket C-2956, slip op. at 26 (November 15, 1989), *appeal filed*, No. 90-35733 (9th Cir. Aug. 16, 1990). Respondents subject to prior approval provisions no doubt would prefer to make acquisitions without first obtaining the Commission's approval, but we have consistently declined to substitute their business judgment for our independent review under the order. Carried to its logical extreme, the "business judgment" rule would obviate the need for orders in the first place: a respondent's business decisions to make certain acquisitions or to disseminate its preferred advertising or, indeed, to ignore the technical requirements of the Truth in Lending Act all would carry the day over the Commission's independent review under the law.

Union Carbide's arguments for reopening the order all are restatements of the argument, previously rejected by the Commission, that the one-year limit on supply contracts impedes its ability to compete. The argument has no greater credibility in the 1990 request in application to distributors previously owned by Union Carbide than it had in 1988 to distributors that were not previously owned by Union Carbide. In this request, as in the 1988 petition, Union Carbide fails to show, indeed, even to assert, that the limit on supply contracts impedes its ability to compete in any way that was not foreseeable when the order was entered.

The majority implicitly concludes that longterm contracts between Union Carbide and the NEWCOs will not be anticompetitive. This conclusion, of course, revisits the premises of the order and, correspondingly, revises the remedy according to our latter day perceptions of what is appropriate. This is precisely the avenue that is unavailable to us unless the standard for reopening is met. "Because a final order is presumptively valid, the continued need for the remedy imposed by the order is relevant if a need for modifying the order is demonstrated in the first instance, but the burden is on the petitioner to 'show that the . . . restraint [under the order] can no longer be justified, and that they are suffering injury, without countervailing advantage to the public interest.'" *Louisiana-Pacific Corp.*, Docket C-2956 (Nov. 15, 1989), slip op. at 9, *quoting United States v. Swift & Co.*, 189 F. Supp. 885, 906 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961).