IN THE MATTER OF

PEPSICO, INC.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8856. Complaint, July 15, 1971 — Final Order, April 7, 1978.

This order, among other things, requires a Purchase, N.Y. soft drink manufacturer to cease imposing in any manner territorial limitations or class of customer restrictions on its licensed Pepsi-Cola or allied product bottlers, in connection with the sale or distribution of soft drink products sold in other than refillable containers. The firm is additionally required to provide protection for confidential commercial information submitted by its bottlers.

Appearances

For the Commission: *Raymond L. Hays, Martin A. Rosen, Michael Joel Bloom, Duncan J. Farmer* and *Jeffrey F. Shaw.*

For the respondent: *Milton Handler, Fred A. Freund, Elizabeth Head* and *Richard M. Steuer, Kaye, Scholer, Fierman, Hays & Handler,* New York City. *James G. Frangos* for PepsiCo, Inc., Purchase, N.Y.

For the intervenors: *Robert J. Sisk* and *James B. Kobak, Hughes, Hubbard & Reed,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that PepsiCo, Inc., hereby made and sometimes hereinafter referred to as respondent, or PepsiCo, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) Bottler – any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central warehousing – a method of distribution in which soft drink products are received at a storage facility and either resold or

(c) Concentrate – the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) Consignment – a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) Place of business – the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup – soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup – although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) Soft drink products – nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix or post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, New York. Respondent had sales of $848,265,196 and assets of $471,915,996 in 1969. In 1968, PepsiCo made domestic sales to over 500 bottlers located in every State of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 500 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio." PepsiCo bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its

bottlers, PepsiCo operates bottling plants in 25 areas of the United States and sells soft drink products to retailers. [3]

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its headquarters and production facilities and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. PepsiCo has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers. A typical agreement between respondent and its bottlers provides that the bottler is permitted "to bottle and distribute the carbonated beverage (herein called the 'Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the 'Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows: . . ."

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products has been eliminated;

(b) Competition between and among PesiCo's bottling operations and its bottlers in the distribution and sale of PepsiCo soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drinks products from the bottler of their choice at a competitive price; and [4]

(d) Consumers of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW JUDGE

OCTOBER 3, 1975

PRELIMINARY STATEMENT

In a complaint dated July 15, 1971, the Commission charged PepsiCo, Inc. with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). The crux of the charges was that the territorial exclusivity provisions in trademark licensing contracts PepsiCo enters with its [2] bottlers impose an illegal restraint on competition. The provision limits the geographical territory in which a bottler may manufacture and sell Pepsi-Cola products.

It was alleged that the illegal effects of the provision were that competition had been eliminated:

(a) between independent bottlers of PepsiCo products;

(b) at the wholesale level between independent bottlers of PepsiCo products and PepsiCo's own bottlers;

(c) in that retailers and other customers had been deprived of the right to purchase PepsiCo products from the bottler of their choice at a competitive price; and

(d) in that consumers of PepsiCo products had been deprived of the opportunity of obtaining PepsiCo products in an unrestricted market and at competitive prices.

In its answer, PepsiCo admitted that it is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) (Answer, pp. 4–5).

In summary, as affirmative defenses, PepsiCo stated that:

(a) the bottling appointments are valid exclusive representation agreements creating lawful ancillary restraints which are essential, fair and reasonable and not in violation of Section 5 of the Federal Trade Commission Act (Answer, p. 6);

(b) the complaint was fatally defective because it did not join the bottlers as respondents (Answer, pp. 6–7);

(c) the complaint was barred by laches and the statute of limitation (Answer, p. 7); and

(d) the complaint failed to state a claim upon which relief could be granted (Answer, p. 7). [3]

Because of the time which has elapsed since the complaint issued, it is appropriate to set forth a listing of significant actions by both sides which took place after July 15, 1971. These were:

1. On July 30, 1971, a Motion for Consolidation of this case with Dkts. 8853–8859, which pertain to exclusive territory provisions in the bottler licensing contracts used for other national brands of soft drinks, was filed by complaint counsel. That motion was denied by the administrative law judge on September 28, 1971.

2. On October 12, 1971, a Motion to Dismiss the complaint for nonjoinder of indispensable parties was filed by PepsiCo. The administrative law judge denied the motion on January 20, 1972. The appeal to the Commission was denied on March 23, 1972 (80 F.T.C. 1023). The appeal from that decision to the United States District Court for the Southern District of New York was denied on June 8, 1972 (343 F. Supp. 396). PepsiCo's complaint to the court sought a preliminary injunction to bring a halt to the Commission's proceeding. The court granted the Commission's request that the complaint be dismissed. The Court of Appeals for the Second Circuit affirmed on November 20, 1972 (472 F.2d 179) and the Supreme Court denied certiorari on October 9, 1973 (414 U.S. 876).

3. On November 22, 1971, the petitions of Pepsi-Cola Bottler's Association and of several bottlers of Pepsi-Cola to intervene in the proceedings were granted. As a result, there were three (3) individual bottler intervenors ((1) Pepsi-Cola Albany Bottling Company Inc. (2) Pepsi-Cola Bottling Company of Central Virginia and (3) Pepsi-Cola Bottling Company of Tampa) plus the Association, of which five hundred twelve (512) of the five hundred thirteen (513) of the Pepsi-Cola bottlers are members, who had standing to participate in the proceedings.

4. On July 31, 1972, former complaint counsel filed a motion for partial summary decision. That motion was denied by the administrative law judge on May 3, 1973.

5. On November 28, 1973, counsel for PepsiCo filed a motion to notify or join bottlers and requested that it be certified to the Commission. The motion was certified to the Commission by the administrative law judge on April 1, 1974. The motion was denied by

6. On January 14, 1974, a motion to discontinue the proceedings and for certification of the motion to the Commission was filed by counsel for PepsiCo. The administrative law judge certified the motion to the Commission on April 1, 1974. The Commission denied the motion on May 14, 1974.

7. Various requests for orders to protect confidential information of PepsiCo and others who supplied such information, were filed and granted during 1974 and 1975.

8. On December 17, 1974, counsel for PepsiCo filed a motion for informative disclosure of complaint counsel's affirmative case. This motion was denied by the administrative law judge on January 22, 1975.

9. On May 19, 1975, a motion to establish matters not at issue was filed by counsel for PepsiCo. The motion was denied by the administrative law judge on May 30, 1975.

10. The litigative hearings began on August 4, 1975, but on August 5, 1975, after several stipulations had been agreed upon and made a part of the record, the parties requested time to negotiate a stipulation which would obviate the need for further evidentiary hearings. Such a stipulation was executed on August 6, 1975. The text follows:

STIPULATION

It is hereby stipulated and agreed by and among respondent, intervenors and complaint counsel in the Matter of PepsiCo, Inc. (Docket No. 8856), subject to the approval of the Administrative Law Judge and the Federal Trade Commission, as follows:

1. All signatories agreed that the purpose of this stipulation is to obviate the need for a separate and lengthy trial record on the merits in PepsiCo, Inc. (Docket No. 8856) because the completed trial record in a companion matter. The Coca-Cola Company, et al. (Docket No. 8855, hereinafter "Coca-Cola proceeding"), is deemed by all signatories as an appropriate basis for an adjudication on the merits in this proceeding. All signatories further agree that use of the trial record of the Coca-Cola proceeding, and [5] all agreements, admissions and waivers in paragraphs 1 through 9 of this Stipulation, shall be for the purpose of this proceeding only and shall have no effect in any other proceeding. As used in this Stipulation, "this proceeding" means Matter of PepsiCo, Inc. (Docket No. 8856) and all appeals, reviews and procedures, both before the Commission and in the federal judiciary system, with respect thereto.

2. Respondent and the intervenors admit all of the jurisdictional facts set forth in the complaint in this proceeding. In the signing of this Stipulation, respondent's answer and all pleadings inconsistent with this admission are deemed to be amended to conform to such admission for the purpose of this proceeding only.

3. Respondent and intervenors agree and admit that the Federal Trade Commission has jurisdiction of this proceeding (Docket No. 8856) and of the respondent and intervenors and that this proceeding is in the public interest.

4. All signatories waive all provisions of the Commission's Rules of Practice and the provisions of all federal statutes including, but not restricted to, the Federal Trade

Commission Act and the Administrative Procedure Act, which are inconsistent with th procedures established in this Stipulation.

5. All signatories agree that they will accept the following actions or determination by the Administrative Law Judge:

a. The Administrative Law Judge's findings of ultimate facts, conclusions of lav and order issued in the Coca-Cola proceeding may be incorporated by reference an made a part of this proceeding by the Administrative Law Judge in whole or to th extent determined by him to be applicable to the [6] acts and practices charged in th Complaint in this proceeding.

b. The Administrative Law Judge may accord respondent's relevant agreements th same construction as accorded to those comparable agreements in the Coca-Col proceeding.

c. The entire trial record in the Coca-Cola proceeding shall be incorporated b reference and made a part of this proceeding. The Administrative Law Judge may selec or designate portions thereof which are or are not applicable in this proceeding a bearing upon the ultimate determination of the legality or illegality of respondent' agreements which he deems to be comparable to those in issue in the Coca-Col proceeding, and the acts and practices pertinent thereto.

d. As so incorporated in full, and as may be thereafter selected or designated by th Administrative Law Judge, such trial record may have equal force, effect and validity a a full trial record in an adversary hearing before the Administrative Law Judge on th allegations of the Commission's complaint in this proceeding.

e. The ultimate acts, practices and failures to act, with the results and effect thereof, as found by the Administrative Law Judge in his findings and decision in th Coca-Cola proceeding to be the acts or omissions of respondents and intervenors therein may be deemed, in whole or in part, by the Administrative Law Judge to be the ultimat acts, practices and failures to act, with the results and effects thereof, of PepsiCo and intervenors in this proceeding. [7]

f. In issuing his findings of fact, conclusions of law and order in this proceeding, th Administrative Law Judge may make such technical evidentiary amendments and adaptations with respect to the trial record in this proceeding as may be necessary t effect the purposes of this Stipulation.

6. All signatories agree that:

a. If the Administrative Law Judge's findings and conclusions shall be adverse t respondent or intervenors in this proceeding, respondent and intervenors reserve the right to make application to be heard as to the matter of the relief or the form of an order. In the event such an application to be heard is made, any signatory shall have the right to oppose such application, both as to form and substance, and to further contest and challenge the procedures and merits of any proceedings which ensue as a result of the granting of any such application in whole or in part.

b. If the Administrative Law Judge dismisses the complaint in full in the Coca-Cola proceeding, then a like order, founded upon appropriate findings of fact and conclusions of law in this proceeding, shall be deemed by all signatories to be entered herein, subject to the full and complete rights of complaint counsel to appeal and seek review of such order entered in this proceeding.

7. The procedural rights of the signatories with respect to review or appeal to the Commission or any court from any decision, findings of fact, conclusions of law, order or other ruling, which may be entered in this proceeding [8] by the Administrative Law Judge, including the implementation of this Stipulation, shall not be impaired.

8. At the time when the Administrative Law Judge's decision on the merits in this proceeding comes before the Commission for review, or at such other time as the

sole discretion and without notice to the signatories, may reject this Stipulation and the procedures adopted thereunder. Any ordered remand to the Administrative Law Judge shall be without prejudice to the signatories.

9. In the event that the Commission elects to confirm this Stipulation and the procedures and action taken pursuant thereto, the procedural rights of respondent and intervenors with respect to review of, or appeal from, any decision or order which the Commission may issue shall not be impaired.

10. It is further stipulated and agreed by and between respondent and intervenors only, and not complaint counsel, that to the extent the restraint which is challenged in this proceeding is upheld, respondent will construe all its Exclusive Bottling Appointments as imposing upon all its bottler trademark licensees thereunder a vertical territorial limitation confining their sales thereunder within the respective territories defined therein and prohibiting direct or indirect sales by them outside such defined territories.

We are proceeding on the basis of the understandings recited in the stipulation because it is apparent that if witnesses had been called to testify at a litigative hearing of this matter, their testimony would have been substantially the same as that of the witnesses who testified in the Coca-Cola hearings. Bottlers of Coca-Cola, Pepsi-Cola, Dr Pepper and of other national brand soft drinks testified in the Coca-Cola [9] hearings and it is clear that the interests and experiences of these bottlers were sufficiently similar to warrant reliance on that testimony in deciding this matter.

11. On August 14, 1975, the testimony of Walter S. Mack, former president of the Pepsi-Cola Company, was taken before me in order to preserve it for possible introduction into the record of this matter in the event the litigative hearings are resumed. Thereafter, the parties agreed to the testimony being added to the limited record of the case.

The findings of fact following are based on a review of the allegations made in the complaint, respondent's answers and the four stipulations entered by counsel which are a part of the evidentiary record of this proceeding. The testimony of Victor A. Bonomo, the current president of PepsiCo, was not considered because he did not finish his direct testimony and was not cross-examined.

In accordance with the stipulation quoted above, certain portions of the initial decision of In the Matter of Coca-Cola Company (Dkt. 8855), a copy of which is appended hereto, have been incorporated in this decision and made applicable to PepsiCo. Reference should be made to that document for a complete understanding of the decision in this proceeding.

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the PepsiCo (Dkt. 8856) and Coca-Cola (Dkt. 8855) records. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They

do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX – Commission's Exhibit, followed by number of exhibit being referenced.
RX – Respondent's Exhibit, followed by number of exhibit being referenced.
Tr. – Transcript preceded by the name of the witness and followed by the page number. **[10]**
Mack Tr. – Transcript of the deposition of Walter S. Mack.

FINDINGS OF FACT

PepsiCo, Inc.

1. PepsiCo, Inc. is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, New York. PepsiCo, Inc. had consolidated sales of $848,265,196 and consolidated assets, including non-soft drink and foreign sales and assets, of $471,915,966 in 1968. In 1968, PepsiCo, Inc. made domestic sales to approximately 500 bottlers in the United States. (Admitted in Answer; Stipulation No. 2, Tr. 285–86)

2. PepsiCo, Inc. is engaged, through its Pepsi-Cola Company division, in the manufacture and sale of concentrates and syrups which it sells to approximately 500 bottlers in the United States who purchase such concentrates or syrups under the terms of exclusive bottling appointment agreements licensing such bottlers to manufacture and sell soft drink products under PepsiCo, Inc.'s trademarks such as "Pepsi-Cola," "Pepsi," "Diet Pepsi-Cola," "Mountain Dew," "Teem," and "Patio." PepsiCo, Inc.'s licensed bottlers manufacture, can and/or bottle and package the soft drink products sold under PepsiCo's trademarks. In addition, subsidiaries of PepsiCo, Inc. operate approximately 20 bottling plants in various parts of the United States and sell the products of such plants. (Admitted in Answer; Stipulation No. 2, Tr. 286)

3. PepsiCo, Inc. has been and is now in competition with others engaged in the manufacture and sale of concentrates, syrups or soft drink products in commerce. (Admitted in Answer)

4. The Pepsi-Cola Company was a relatively late entrant into a soft drink market dominated by The Coca-Cola Company. (Mack. Tr. 82) In 1931, Pepsi-Cola was bankrupt and its assets had been sold by the trustee for $10.500. At the end of 1933, Pepsi-Cola hit upon a successful

marketing strategy — sale of Pepsi in 12-ounce [11] bottles for the same 5¢ price charged for 6 1/2-ounce bottles of Coca-Cola and a vigorous drive to recruit independent franchisees. (Stipulation No. 3, Tr. 295)

5. In 1932 and 1933, Pepsi-Cola had been bottled for the Pepsi-Cola Company and was sold principally in the New York metropolitan area. Arrangements were made for bottling Pepsi-Cola in a few other cities in 1934. But by the end of 1934, it became apparent that Pepsi-Cola's new found success with its "twice as much for a nickel" strategy could become permanent only if it were possible to build a large nationwide sales volume quickly. Pepsi-Cola Company, with its limited resources and distribution facilities, could not itself capitalize on the impact of its 12-ounce drink. (Mack, Tr. 15) Franchising local independent businessmen to bottle Pepsi provided a solution to the problem. (Stipulation No. 3, Tr. 295–96)

6. By promising exclusive territorial rights, which granted to the licensee, among other rights, the exclusive right to manufacture, distribute and sell trademarked soft drink products in a defined geographical area, Pepsi-Cola representatives were able to persuade local bottlers across the country to become Pepsi-Cola franchisees. (Stipulation No. 3, Tr. 296; Mack, Tr. 13, 16)

7. The emergence of Pepsi as a nationally recognized cola drink depended on the network of independent bottler appointments issued in the mid-1930's. The franchise system was the cornerstone of Pepsi-Cola's steady campaign to become a viable, aggressive competitor to Coca-Cola. The effectiveness of this campaign was in turn dependent on the determination, business acumen and financial stability of Pepsi-Cola's franchisees. In order to induce individuals with the requisite financial and managerial resources to establish a local bottling plant, effectively exploit market potential and win consumer approval of its relatively unknown cola drink, the Pepsi-Cola Company had to demonstrate its commitment to the franchisee's success. (Stipulation No. 3, Tr. 297)

8. This it did by granting the bottlers the exclusive right to bottle and sell Pepsi in their designated franchise areas. Appointment as a Pepsi-Cola franchisee meant that the local bottler must make a substantial capital investment in plant, bottling machinery, bottles, cases, trucks, [12] equipment and supplies. He had to be willing to devote substantial personal and financial resources on behalf of a relatively unknown drink, the ultimate acceptance of which in the national market was far from certain, and to battle Coca-Cola which had been even further entrenched by the recent bankruptcy of the predecessor Pepsi-Cola Company. Without exclusive territorial fran-

chises Pepsi-Cola Company would have been unable to achieve the nationwide sales volume essential to enable it to compete successfully with Coca-Cola. (Stipulation No. 3, Tr. 297; Mack, Tr. 11–13, 16–16A, 29)

9. The domestic Pepsi-Cola bottling appointment agreements of PepsiCo, Inc. provide that the bottler is appointed as PepsiCo, Inc.'s "exclusive bottler, to bottle and distribute the carbonated beverage (herein called the 'Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the 'Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows: . . ." and refers to said agreement for the complete terms thereof. (Stipulation No. 2, Tr. 287)

10. As part of the effort to establish Pepsi as a nationally accepted cola drink, eight wholly-owned subsidiaries of Pepsi-Cola Company were formed during the period 1931–1937 for the purpose of operating Pepsi-Cola franchises in their states of incorporation. Some of these franchises were later granted to local businessmen, while franchises for the New York, Newark, Pittsburgh, Philadelphia, and Boston metropolitan areas were retained. They served to insure the presence of Pepsi-Cola in these important markets, to promote consumer acceptance in those markets, and contributed to the goal of making the product available everywhere. (Stipulation No. 3, Tr. 298)

11. Following World War II, the ratio of Pepsi sales to sales of Coca-Cola began an upward climb; and by the mid–1950's the latter's commanding lead in bottle sales of 5 to 1 over Pepsi in 1940 had been reduced to 2.5 to 1. By 1960, Pepsi had become a strong contender to Coca-Cola, having further reduced its lead in the total market to 2 to 1 and in food stores, where consumers can pick and choose freely between competing brands, Pepsi was outsold by Coca-Cola only 1.2 to 1. (Stipulation No. 3, Tr. 298–99) [13]

Interstate Commerce

12. PepsiCo, Inc. is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44). (Admitted in Answer; Stipulation No. 2, Tr. 286)

The Soft Drink Industry and the Exclusive Territorial Franchise System

13. In accordance with the stipulation of the parties (see pp. 4–8, *supra*), the following findings of fact from the initial decision of *In the Matter of The Coca-Cola Company* (Dkt. 8855) are deemed applicable to

herein: Nos. 27–55, 58–59, 63–70, 72–122, 124–127, 129–149, 151–195 (pp. 15–24, 25, 28–29, 29–50, 50–52, 53–60, 60–76). Where the words "Coca-Cola" (the company) and Coca-Cola (the drink) appear, they should be read, as appropriate, PepsiCo and Pepsi-Cola.

Discussion and Conclusions of Law

In accordance with the stipulation of the parties (see pp. 4–8, *supra*), the discussion of the applicable legal principles and the conclusions of law from the initial decision of *In the Matter of The Coca-Cola Company* (Dkt. 8855) are incorporated by reference herein.

Order

It is ordered, That the complaint in this matter be, and it hereby is, dismissed.

Dissenting Statement of Commissioner Clanton

For the reasons expressed in my dissenting statement in the companion case involving the Coca-Cola Company, Dkt. 8855, I dissent from the Commission's decision with respect to PepsiCo, Inc.

Opinion

By Dole, *Commissioner:*

The complaint in this matter charges PepsiCo, Inc., with imposing territorial restrictions on the sale of Pepsi-Cola and allied products produced by independent bottlers, in violation of Section 5 of the Federal Trade Commission Act.

In 1968 PepsiCo had consolidated sales of $848,265,196 and consolidated assets, including non-soft drink and foreign sales and assets, of $471,915,966. Respondent's Pepsi-Cola Company division manufactures and sells soft drink concentrates and syrups to approximately 500 bottlers in the United States under the terms of exclusive bottling appointment agreements which authorize the bottlers to manufacture and sell soft drink products under PepsiCo trademarks, including "Pepsi-Cola," "Mountain Dew," "Teem," and "Patio." In addition to independent Pepsi-Cola and allied product bottlers, subsidiaries of PepsiCo operate approximately 20 bottling plants in various parts of the United States. (Admitted in Answer; Stipulation 2, Tr. 286).

I. Stipulation of Facts

The trial of this case before the judge commenced shortly after the conclusion of the trial involving similar charges alleged in the

complaint against *The Coca-Cola Company, et al.*, Dkt. 8855. Following two [2] days of hearings, the parties and intervenors stipulated, *inter alia*, that:

> . . . the completed trial record in a companion matter, The Coca-Cola Co., *et al.*, (Docket No. 8855, hereinafter "Coca-Cola proceeding"), is deemed by all signatories as an appropriate basis for an adjudication on the merits of this proceeding.

The stipulation further provides that, "The entire trial record in the Coca-Cola proceeding shall be incorporated by reference and made part of this proceeding." As so incorporated:

> . . . such trial record may have equal force, effect and validity as a full trial record in an adversary hearing before the Administrative Law Judge on the allegation of the Commission's complaint in this proceeding. (Stipulation ¶5d).

Shortly after this stipulation was entered into the record, the testimony of Walter S. Mack, former President of PepsiCo, was taken before the judge in order to preserve it for possible introduction into the record in the event further litigation became necessary. Thereafter, the judge ordered that Mr. Mack's testimony be added to the record, along with certain exhibits which were offered and received with Mr. Mack's testimony. (Order Placing the Deposition of Walter S. Mack in the Record, entered September 4, 1975, Docket Binder 8856–1–3–2; Supplemental Order to Order of September 4, 1975, entered September 9, 1975). The judge further ordered, pursuant to the stipulation of the parties and intervenors, that the trial record in the Coca-Cola proceedings be incorporated into, and made a part of, the record of this proceeding. The case is now before us on appeal by complaint counsel from an initial decision of the judge dismissing the complaint. The oral arguments of counsel in this matter and in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, were received at a consolidated hearing on appeal.

The Commission, having reviewed the record in its entirety, has determined that the order entered by the judge dismissing the complaint be vacated. The Commission has further determined that certain findings and conclusions in the opinion of the Commission in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, as hereinafter noted, shall be adopted as the findings and conclusions [3] of the Commission in this case. In addition, the findings of fact as set forth in the judge's initial decision shall be adopted by the Commission to the extent that they are not inconsistent with the findings and conclusions

II. History of PepsiCo and the Restraint

The record shows that the Pepsi-Cola Company had a difficult period of entry into the soft drink market. In 1931 Pepsi-Cola was bankrupt; a trustee sold its assets for $10,500. By 1934, however, the tide began to turn in its favor. It employed a new marketing strategy pursuant to which it sold Pepsi-Cola in 12-ounce bottles for the same price then being charged for 6 1/2-ounce bottles of Coca-Cola.

Prior to 1935, Pepsi-Cola was sold principally in the New York metropolitan area and a few other cities. Despite the success of its "twice as much for a nickel" strategy, respondent lacked the resources and distribution facilities to capitalize on the impact of its 12-ounce drink. (Mack, Tr. 15). Thus it initiated a drive to recruit independent entrepreneurs to bottle its product. (Stipulation No. 3, Tr. 295–96).

As an inducement to attract and encourage individual investors to establish local bottling plants, respondent granted them the exclusive right to bottle and sell "Pepsi" in designated geographic areas. Consequently, the bottling agreements provide that each bottler is appointed as PepsiCo's:

> . . . exclusive bottler, to bottle and distribute the carbonated beverage (herein called the "Beverage"), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the "Beverage trademark"), in the following described territory (herein referred to as the "Territory"), and nowhere else, bounded as follows:. . . ." (Stipulation No. 2, Tr. 287; *See also* RX 99, incorporated exhibit from Dkt. 8855).

It is undisputed that a network of independent bottlers was an important part of respondent's plan 40 years ago to expand the sales of Pepsi-Cola in competition nationwide with the bottlers of Coca-Cola. (Stipulation No. 3; Tr. 297, Mack, Tr. 11–13, 16–16A, 29). In addition to the recruitment of independent bottlers, respondent established, [4] during the period of 1931–1937, eight wholly-owned bottling subsidiaries. While some of these franchises were later granted to local businessmen, respondent retained the franchises for the New York, Newark, Pittsburgh, Philadelphia, and Boston metropolitan areas. (Stipulation No. 3, Tr. 298).

Following World War II, the ratio of Pepsi sales to sales of Coca-Cola began an upward climb: in 1940 Coca-Cola's lead in bottle sales was 5 to 1 over Pepsi; by the mid-1950's the lead was 2.5 to 1; by 1960 it was 2 to 1. (Stipulation No. 3, Tr. 298–99). The record further shows that by 1971 Pepsi-Cola had overtaken Coca-Cola as the leading brand in numerous cities (RX 2Y–Z39 incorporated exhibits from Dkt. 8855) and in several regions of the country. (RX 2Y–Z39–40, incorporated exhibits from Dkt. 8855). Thus, while territorial restrictions may have assisted a faltering new entrant into the market four decades ago,