

Commission to treat as confidential must be submitted on separate sheets of paper, each clearly marked "Confidential Business Information" at the top. All submissions requesting confidential treatment must conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. 201.6). All written submissions, except for confidential business information, will be made available in the Office of the Secretary of the Commission for inspection by interested parties. To be assured of consideration by the Commission, written statements relating to the Commission's report should be submitted to the Commission at the earliest practical date and should be received no later than the close of business on April 10, 1997. All submissions should be addressed to the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436.

Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

Issued: December 2, 1996.

By order of the Commission.

Donna R. Koehnke,

Secretary.

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DEPARTMENT OF JUSTICE

Antitrust Division; U.S. v. Oldcastle Northeast, Inc. et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (c)-(h), the United States publishes below the comment received on the proposed final judgment in *United States, et al. v. Oldcastle Northeast, Inc., et al.*, Civil Action No. 396CV01749 AWT, filed in the United States District Court for the District of Connecticut, together with the United States' response to that comment.

Copies of the comment and response to the comment are available for inspection and copying in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, N.W., Washington, DC 20530 (telephone: (202) 514-2481), and at the Office of the Clerk of the United States District Court for the District of Connecticut. Copies of

these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,

Director of Operations.

December 2, 1996

James A. Dunbar, Esquire
Venable, Baetjer and Howard
1800 Mercantile Bank & Trust Building
Two Hopkins Plaza
Baltimore, Maryland 21201-2978

Re: *United States, et al. v. Oldcastle Northeast, Inc., et al.*, Civil Action No.: 396CV01749 AWT (District of Connecticut, September 3, 1996)

Dear Mr. Dunbar: This letter responds to your letter of November 1, 1996 commenting on the proposed Final Judgment in the above-referenced civil antitrust case challenging the acquisition by CRH plc (CRH) through Oldcastle Northeast, Inc. (Oldcastle) of Tilcon, Inc. (Tilcon) from BTR plc (BTR). The Complaint alleges that the acquisition violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, because it is likely substantially to lessen competition in the manufacture and sale of asphalt concrete in the greater Hartford, Connecticut area. Under the proposed Final Judgment, the defendants are required to divest Tilcon's East Granby, Connecticut quarry; two, three-ton, hot-mix plants located at the East Granby Quarry; and all intangible assets located at the quarry to assure that competition is not substantially lessened in the greater Hartford area.

In your letter, you expressed concern that the proposed Final Judgment does not address competitive concerns in additional geographic areas (Vermont and the southwestern and central parts of New Hampshire). The analytical process used by the Antitrust Division to determine which areas the acquisition might raise substantial competitive concerns required us to assess a number of factors including market concentration, potential adverse competitive effects, and entry. These factors must be evaluated in an economically meaningful product and geographic market. This analysis is aimed at allowing the Division to answer the ultimate inquiry: whether the acquisition is likely to create or enhance market power or facilitate the exercise of market power in a relevant market. After a thorough investigation which included the geographic areas mentioned in your letter, the Division concluded that the asphalt concrete market in the greater Hartford area was the relevant market where Oldcastle's acquisition of Tilcon might create or enhance market power. It was determined that in Vermont and central New Hampshire, the same number of competitors would be present after the acquisition as were present before the acquisition. In southwestern New Hampshire, a sufficient number of competitors were found to be active in the region. The Division concluded that in these three areas, the acquisition did not raise significant competitive concerns.

Your letter also raises concerns about the transfer to Pike Industries (a subsidiary of Oldcastle) of Tilcon's right of first refusal to purchase the assets of your client, Frank W. Whitcomb Construction Corporation (Whitcomb). Until Oldcastle elects to

exercise this option, Whitcomb will remain a competitor to Pike Industries in Vermont and New Hampshire. If Oldcastle elects to exercise the option, the Division has the ability to investigate the competitive impact of the potential acquisition at that time.

In carefully reviewing the concerns made in your letter about asphalt concrete competition in New Hampshire and Vermont, it is clear that your concerns are outside the scope of the Complaint filed by the Division. When evaluating a complaint and proposed final judgment under the Antitrust Procedures and Penalties Act, unless a strong showing of bad faith or improper behavior can be made, a court will not reach beyond the complaint to evaluate claims that the Division did not make and to inquire why they were not made (*See, United States v. Microsoft Corp.*, 56 F.3d 1448, 1459-60 (D.C. Cir 1995)). A court's authority to review a decree depends on how the Division exercises its prosecutorial discretion. In this instance, the Court's review is linked to whether the proposed Final Judgment assures that competition will not be substantially lessened as alleged in the Complaint brought by the Division.

The Division appreciates you bringing your concerns to our attention and hopes that this information will alleviate them. While the Division understands your position, we believe that the proposed Final Judgment will adequately alleviate the competitive concerns created by CRH's acquisition of Tilcon from BTR. Pursuant to the Antitrust Procedures and Penalties Act, a copy of your letter and this response will be published in the Federal Register and filed with the Court.

Thank you for your interest in the enforcement of the antitrust laws.

Sincerely yours,

Frederick H. Parmenter,

Senior Trial Attorney.

November 1, 1996

VIA HAND-DELIVERY

J. Robert Kramer, Esquire
Chief, Litigation II Section
Antitrust Division

United States Department of Justice
1401 H Street, N.W.—Suite 3000
Washington, D.C. 20530

Re: *United States of America, et al. v. Oldcastle Northeast, Inc., et al.*, Civil Action No. 396 CV 01749 AWT, *In the United States District Court for the District of Connecticut*

Dear Mr. Kramer: This letter will serve as the comments of my client, The Frank W. Whitcomb Construction Corporation ("Whitcomb"), on the proposed final judgment in the above-referenced matter. These comments concern an issue that has already been raised with the Department of Justice, but has not been acted upon.

We believe that the facts and circumstances set forth in this letter demonstrate that the acquisition of Tilcon, Inc. by Oldcastle Northeast, Inc. ("Oldcastle") presents a substantial threat to competition in the aggregate and asphalt paving business in Vermont and the southwestern and central parts of New Hampshire, by elimination of a potential

competitor and the possible elimination of substantially all competition in those areas.

Whitcomb is in the aggregate and asphalt paving business, primarily in the states of New Hampshire and Vermont. Pike Industries is Whitcomb's primary competitor. Whitcomb and Pike are the only competitors in Vermont with the exception of occasional minimal competition in the southeast and northeast corners of the State. Pike is a subsidiary of Oldcastle Northeast, Inc., and an indirect subsidiary of CRH, Inc., defendants in the above-referenced matter.

Tilcon is a large regional aggregate and paving company that, Whitcomb believes, works primarily in New York, parts of New England, and the Middle Atlantic States. At present, it is not a direct competitor in most of Whitcomb's market area as described above, but it is a potential competitor.

Since 1993, Whitcomb has been considering the sale of portions or all of its business. In 1993, Whitcomb sold an asphalt plant located in Keene, New Hampshire (which is in the southwestern part of the State) to a subsidiary of Tilcon. As a part of that sale Tilcon also purchased a Right of First Refusal to purchase other plants and real estate owned by Whitcomb. (A copy of the portion of the sale contract relating to the Right of First Refusal is attached hereto.) We understand that as part of the purchase of Tilcon by Oldcastle, this Right of First Refusal has been assigned to Oldcastle.

The proposed acquisition of Tilcon by Oldcastle threatens competition in the aggregate and asphalt paving business in Vermont and south-central New Hampshire in two ways. First, it eliminates Tilcon as a potential competitor. Before the acquisition, the market consisted of two significant actual competitors, Pike and Whitcomb, and at least one potential competitor, Tilcon. After the acquisition, Tilcon will no longer offer potential competition.

Second, with the assignment of the Right of First Refusal to Oldcastle, the proposed acquisition threatens to eliminate competition in the Whitcomb market area almost completely. Whitcomb would like to sell all or part of its business to an entity that can provide viable competition in the market area. The existence of the Right of First Refusal in the hands of its principal competitor makes it difficult to find such a purchaser. Knowledge on the part of a potential purchaser that a competitor could prevent any purchase of Whitcomb or its assets will discourage most entities from attempting to buy Whitcomb or any part of it. If Oldcastle is permitted to exercise the Right of First Refusal, then competition in Vermont will be almost completely eliminated and competition in south-central New Hampshire will be significantly impaired.

As is set forth in the compliant and the competitive impact statement in this case, there are high entry barriers into the manufacture and sale of asphalt concrete. The paving business itself, with the extensive use of expensive heavy equipment, is also capital intensive.

There are no real substitutes for asphalt concrete products, and manufacturers and buyers of asphalt concrete recognize asphalt

as the distinct product. Transportation costs and delivery time make it difficult for entities outside of a geographic market—in this case the Whitcomb market area of Vermont and south-central New Hampshire—to compete with competitors located in the market.

In this case, the United States decided to sue Tilcon and CRH/Oldcastle because the acquisition would reduce the number of competitors operating hot mix plants in the greater Hartford area from 3 to 2 and reduce the number of competitors supplying asphalt concrete construction projects in that area from 2 to 1. The proposed acquisition has a comparable competitive effect in the Whitcomb market area. It reduces by 1 the number of potential competitors, by eliminating Tilcon; and it threatens to reduce the number of competitors supplying asphalt concrete construction projects in the market area from 2 to 1, in the event that Oldcastle is able to exercise the Right of First Refusal to purchase all or a substantial part of Whitcomb. In such an event, Oldcastle would control the price of asphalt concrete in the State of Vermont.

The potential harm stemming from the acquisition is particularly substantial in this case because the main purchasers of asphalt concrete for paving projects are tax-supported government entities such as the State of Vermont.

Under the circumstances, we request that the Justice Department withdraw its consent to the proposed acquisition unless and until there is an agreement by both Tilcon and the acquiring companies that the Right of First Refusal is null and void, and that they will not exercise or attempt to exercise it. In the alternative, if the government declines to take any action relating to the Right of First Refusal, then the Court should modify the Consent Decree to add such a provision.

Thank you for your attention to this matter. Please do not hesitate to call me if you should have any questions.

Very truly yours,

James A. Dunbar

Attachment

16. *Right of First Refusal.* (a) As an additional inducement to enter into this Agreement, Seller agrees that Seller shall not, directly or indirectly, sell or transfer (whether by sale of stock, acquisitive merger, business combination or otherwise), or offer to sell, transfer or lease (other than a lease for a term of not more than three years) (any such sale, lease, transfer or offer therefor herein as "Transfer") any of its business real estate, now owned or hereafter acquired (except the real estate identified on *Schedule 16.1*), to any other person without first offering to Transfer such assets to the Buyer. If the Buyer and Seller are unable to agree on the price and the terms of any Transfer after full disclosure of information and negotiating in good faith for a period of sixty (60) days, then Seller shall be free to solicit offers on such property to or from any third parties, but only at a price and on terms no more favorable to the purchaser than the price and terms offered to the Buyer. In the event that the Seller receives a bona fide offer to purchase or lease any such property, directly or indirectly, Seller shall provide Buyer with

notice of its intent to Transfer. Buyer shall have thirty (30) days to decide internally whether it wishes to purchase or lease the property at such price and on such terms, and, if so, Buyer shall have another thirty (30) days to obtain the approval of its parent corporation(s). Seller agrees to provide Buyer with notice of the acquisition of any after-acquired real estate used in connection with its aggregate and hot mix business, and Seller agrees to execute any such instruments for recordation on the appropriate land records as Buyer shall reasonably request. For purposes of this Section 16, the term "Seller" shall include not only the Frank W. Whitcomb Construction Corp. ("FWWCC"), but also any other company, corporation, trust, partnership, association or entity of any form in which either FWWCC, Claire R. Whitcomb, Frank L. Whitcomb or the Frank W. Whitcomb Trust shall have an interest whether direct or indirect.

(b) Frank L. Whitcomb and the Frank W. Whitcomb Trust, (the "shareholders") agree not to sell or transfer more than one-third of the outstanding shares of stock of Seller to any other person without in each and every case first offering to sell any such business assets or shares of stock at the same price and on the same terms as offered to any such person. As to any proposed sale exceeding one-third of the share, Buyer shall have sixty (60) days in which to exercise the right of first refusal granted hereunder. The sixty (60) day period shall commence after written notice to Buyer and the delivery of all information reasonably necessary to enable Buyer to make a decision. Notwithstanding the foregoing, the shareholders shall be free to transfer shares to any family member or any trust or other entity established for the benefit of any family member provided that the transferee agrees to be bound by the same terms and conditions hereof.

(c) Seller agrees that it shall not issue any shares of stock, or warrants, options or other rights to acquire shares of stock, to any persons other than Frank L. Whitcomb or the Frank W. Whitcomb Trust if the issuance of such shares of stock would result in the aggregate ownership of the Frank L. Whitcomb or the Frank W. Whitcomb Trust (or any transferees permitted under paragraph (b) above) to be less than two-thirds of the total stock issued and outstanding, computed on a fully diluted basis.

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Antitrust Division

United States of America v. Westinghouse Electric Corporation and Infinity Broadcasting Corporation; Proposed Final Judgment and Competitive Impact Statement

The consent decree in *United States v. Westinghouse Electric Corporation and Infinity Broadcasting Corporation*