IN THE MATTER OF

WARNER COMMUNICATIONS INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket 9174. Complaint, March 19, 1984—Decision, Sept. 8, 1986

This consent order requires, among other things, a New York City record company to obtain prior FTC approval before acquiring any interest in major record companies and to notify the FTC about distribution agreements planned with those companies.

Appearances

For the Commission: *Robert W. Doyle, Jr.* and *Richard Malatt.*

For the respondents: *Stuart Robinowitz* and *Martin Flumenbaum, Paul, Weiss, Rifkind, Wharton & Garrison,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondents, Warner Communications Inc., Warner Bros. Records, Inc., (collectively "Warner"), Chappell & Co., Inc., and PolyGram Records, Inc. (collectively "PolyGram"), subject to the jurisdiction of the Commission, have agreed to a merger of each firm's prerecorded music businesses that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITION

1. For the purposes of this complaint, *prerecorded music* refers to music sold to consumers in the form of records (singles, LPs, and compact discs) and tapes (cassettes, 8-track cartridges, and reel-to-reel tapes).

II. WARNER COMMUNICATIONS INC. AND WARNER BROS. RECORDS, INC.

2. Respondent Warner Communications Inc. is a Delaware corporation with its principal place of business in New York, New York. Warner Communications Inc. is a worldwide entertainment firm with interests in prerecorded music, pay television, motion pictures, consumer electronics and publishing. In 1982 it had revenues of about $4 billion and a profit of $257.8 million.

3. Warner Communications Inc. is the owner of all the outstanding shares of Warner Bros. Records, Inc.

4. Warner Bros. Records, Inc. is a Delaware corporation with its principal place of business in New York, New York. It is a wholly owned subsidiary of Warner Communications Inc., and one of several Warner Communications' domestic companies involved in the prerecorded music business.

III. CHAPPELL & CO. AND POLYGRAM RECORDS, INC.

5. Chappell & Co. and PolyGram Records, Inc. are part of a collection of domestic and foreign corporations known as the "PolyGram Group," which is a joint venture of the N.V. Philips Gloeilampenfabrieken ("Philips") of the Netherlands and Siemens, AG of West Germany. Both Chappell & Co. and PolyGram Records, Inc. are corporations organized and existing under the laws of the State of Delaware with their corporate headquarters located in New York, New York.

6. PolyGram Records, Inc. is currently the PolyGram Group's principal organization for its U.S. prerecorded music operations. The PolyGram Group had worldwide prerecorded music sales in 1982 of about $1 billion, with gross sales exceeding $150 million in the United States.

IV. JURISDICTION

7. At all times relevant herein, each of the companies named in this complaint has been engaged in activities that are in or affecting commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. THE PROPOSED MERGER

8. Warner and PolyGram have agreed to merge their prerecorded music businesses in the U.S. and in the rest of the world. In the United States, Warner will transfer its prerecorded music assets to respondent Warner Bros. Records, Inc. PolyGram will transfer its prerecord-

ed music business to respondent Chappell & Co. These two corporations will then merge, and the surviving corporation, Warner-PolyGram, Inc., will then issue new stock: 80 class A shares to Warner; 13 class B shares to PolyGram's shareholder, PolyGram B.V. and 7 class B shares to PolyGram's shareholder, PolyGram GmbH. Warner will also receive 65 shares (representing $65 million principal amount) of Non-Voting 9 percent preferred shares.

9. Warner and PolyGram's parent, Philips, also plan to merge their prerecorded music businesses in the rest of the world.

VI. TRADE OF COMMERCE

10. The relevant product market in which to assess the competitive effects of the merger is the market for prerecorded music.

11. The relevant geographic market in which to assess the competitive effects of the merger is the United States.

12. The relevant market is moderately concentrated.

13. Barriers to entry into the distribution of the relevant product are substantial.

14. Both Warner and PolyGram are substantial competitors in the relevant product and geographic markets.

VII. EFFECTS OF THE MERGER

15. The effect of the proposed merger, if consummated, may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), inasmuch as it will, among other things, result in all of the following:

(a) Eliminate substantial actual competition between Warner and PolyGram in the relevant market;

(b) Eliminate substantial potential competition between Warner and PolyGram;

(c) Eliminate substantial actual and potential competition between the other companies engaged in the distribution of the relevant product; and

(d) Significantly increase the level of industry concentration in the relevant market.

VIII. VIOLATIONS CHARGED

16. The proposed merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and, if consummated, Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

Decision and Order

The Commission having heretofore issued its complaint charging the respondents Warner Communications Inc. and Warner Bros. Records, Inc. with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondents Warner Communications Inc. and Warner Bros. Records, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware, with offices and principal places of business located at 75 Rockefeller Plaza, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

Definitions

Warner, as used herein, means Warner Communications Inc., Warner Bros. Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns, and the officers, directors, employees, or agents of their parents, divisions, subsidiaries, successors and assigns.

PolyGram, as used herein, means Chappell & Co., Inc., PolyGram

Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns and the officers, directors, employees or agents of their parents, divisions, subsidiaries, successors and assigns.

Major record company, as used herein, means the following record companies that are vertically integrated into the creation and national distribution of prerecorded music: Warner, PolyGram, CBS Inc., Capitol Records Inc., RCA Corporation and MCA Corporation.

Distribution Agreement, as used herein, means a contractual arrangement whereby one major record company undertakes to distribute nationally prerecorded music for another major record company, as defined herein, to prerecorded music retailers, one-stops, rack jobbers or other subdistributors for resale. *Distribution Agreement* shall not include an arrangement by which a major record company licenses particular tracks of an artist's music to another record company for the purpose of making so-called *compilation albums.*

Effective date, as used herein, means the date on which the agreement containing consent order between respondents and counsel for the Commission was executed.

I.

It is ordered, That Warner terminate immediately all agreements that provide for or contemplate the merger of, or a joint venture between, its prerecorded music operations and those of PolyGram in the United States, including but not limited to the Letter of Intent dated July 26, 1983, and Agreement of Merger and Plan of Reorganization dated December 29, 1983; and return or destroy all documents, if any, regarding confidential information provided to Warner by PolyGram in connection with merger or joint venture negotiations or agreements.

II.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any interest in, or any stock, share capital or assets of any major record company; *provided, however,* that nothing in this order shall prohibit a director of Warner from acquiring, for investment purposes only, an interest of not more than one (1) percent of the stock, share capital or equity of any such concern.

III.

It is further ordered, That for a period of five (5) years from the effective date hereof, Warner shall not, without providing written advance notification to the Federal Trade Commission, enter into a distribution agreement with a major record company, as defined herein. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"). Warner shall provide the Notification to the Federal Trade Commission at least fifteen (15) days prior to entering into the distribution agreement (hereinafter referred to as the "first waiting period"). The Notification shall be given by Warner and not by any party whose records Warner seeks to distribute. At the time of the filing of the Notification, Warner shall provide to the Commission supplemental information, either in Warner's possession or reasonably available to Warner. Such supplemental information shall include a copy of the proposed agreement; the names of the principal representatives of Warner and the firm whose records are to be distributed who negotiated the proposed distribution agreement; any management or strategic plans discussing the proposed distribution agreement; and documents discussing market shares and competitive conditions in the prerecorded music industry. If within the first waiting period of fifteen (15) days, the Federal Trade Commission makes a written request for additional information, Warner shall comply with said request within an additional period of fifteen (15) days or sooner. Warner shall not enter into the proposed distribution agreement for fifteen (15) days after the submission of the additional information.

IV.

It is further ordered, To the extent that it will affect Warner's compliance obligations arising out of this order, Warner shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or any other changes in the record operations of the corporation.

V.

It is further ordered, That Warner shall, within sixty (60) days after service upon it of this order, and annually thereafter for five years, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Strenio did not participate.

IN THE MATTER OF

POLYGRAM RECORDS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION AND SEC. 7 OF THE CLAYTON ACTS

Docket 9174. Complaint, March 19, 1984—Decision, Sept. 8, 1986*

This consent order requires, among other things, a New York City record company to obtain prior FTC approval before acquiring any interest in major record companies and to notify the FTC about distribution agreements planned with those companies.

Appearances

For the Commission: *Robert W. Doyle, Jr.* and *Richard Malatt.*

For the respondents: *James E. Akers, Sullivan & Cromwell,* New York City.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents, Chappell & Co. Inc., formerly an affiliated company under common ownership now merged with PolyGram Records, Inc., and PolyGram Records, Inc., with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent, PolyGram Records, Inc., its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in

* Complaint previously published at 108 F.T.C. 105.

further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent, PolyGram Records, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with offices and principal places of business located in the City of New York, State of New York. Respondent Chappell & Co. Inc. was merged with PolyGram Records, Inc. in January of 1984.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

Warner, as used herein, means Warner Communications Inc., Warner Bros. Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns, and the officers, directors, employees, or agents of their parents, divisions, subsidiaries, successors and assigns.

PolyGram, as used herein, means Chappell & Co., Inc., PolyGram Records, Inc., as well as their officers, directors, employees, agents, their parents, divisions, subsidiaries, successors, assigns and the officers, directors, employees or agents of their parents, divisions, subsidiaries, successors and assigns.

Major record company, as used herein, means the following record companies that are vertically integrated into the creation and national distribution of prerecorded music: Warner, PolyGram, CBS Inc., and RCA Corporation.

Distribution Agreement, as used herein, means a contractual arrangement whereby one major record company undertakes to distribute nationally prerecorded music for another major record company, as defined herein, to prerecorded music retailers, one-stops, rack jobbers or other subdistributors for resale.

Prerecorded music means recorded audio-only performances sold in the form of records (singles, LPs and compact discs) and tapes (cassettes, 8-track cartridges and reel-to-reel tapes).

Effective date, as used herein, means the date on which the agreement containing consent order between respondent and counsel for the Commission was executed.

I.

It is ordered, That PolyGram terminate immediately all agreements that provide for or contemplate the merger of, or a joint venture between, its prerecorded music operations and those of Warner in the United States, including but not limited to the Letter of Intent dated July 26, 1983, and Agreement of Merger and Plan of Reorganization dated December 29, 1983; and return or destroy all documents, if any, regarding confidential information provided to PolyGram by Warner in connection with merger or joint venture negotiations or agreements.

II.

It is further ordered, That for a period of five (5) years from the effective date hereof, PolyGram cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, any interest in, or any stock, share capital or assets of the United States operations of any other major record company.

III.

It is further ordered, That for a period of five (5) years from the effective date hereof, PolyGram shall not, without providing written advance notification to the Federal Trade Commission, enter into a United States distribution agreement with any other major record company, as defined herein. Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations, as amended (hereinafter referred to as "the Notification"). PolyGram shall provide the Notification to the Federal Trade Commission at least fifteen (15) days prior to entering into the distribution agreement (hereinafter referred to as the "first waiting period"). At the time of the filing of the Notification, PolyGram shall provide to the Commission supplemental information, either in PolyGram's possession or reasonably available to PolyGram. Such supplemental information shall include a copy of the proposed agreement; the names of the principal representatives of PolyGram and the principal representatives of the firm whose records are to be distributed (or that intends to distribute PolyGram's records) who negotiated the proposed distribution agreement; any management or strategic plans discussing the proposed distribution agreement; and documents discussing market shares and competitive conditions in the prerecorded music industry. If within the first waiting period of fifteen (15) days, the Federal Trade Commission makes a written request for additional information, PolyGram shall comply with said request within an additional period of fifteen (15) days or sooner. PolyGram shall not enter into the proposed distribution agreement for fifteen (15) days after the submission of the additional information.

IV.

It is further ordered, To the extent that it will affect PolyGram's compliance obligations arising out of this order, PolyGram shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or any other changes in the record operations of the corporation.

V.

It is further ordered, That PolyGram shall, within sixty (60) days after service upon it of this order, and annually thereafter for five years, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

Chairman Oliver and Commissioner Strenio did not participate.

IN THE MATTER OF

THE NORTH CAROLINA ORTHOPAEDIC ASSOCIATION

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

Docket C-3200. Complaint, Sept. 19, 1986—Decision, Sept. 19, 1986.

This consent order, among other things, prohibits The North Carolina Orthopaedic Assoc. from placing unreasonable restrictions against podiatrists seeking access to hospital facilities or surgical privileges and inducing hospitals or medical staffs to deny such privileges to qualified podiatrists.

Appearances

For the Commission: *Douglas B. Brown* and *Charles Peterson.*

For the respondent: *George L. Little, Jr.* and *F. Joseph Treacy, Petree, Stockton, Robinson, Vaughn, Glaze & Maready,* Winston-Salem, N.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the North Carolina Orthopaedic Association, a non-profit corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, 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 as follows:

PARAGRAPH 1. Respondent, the North Carolina Orthopaedic Association, is a non-profit corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.

PAR. 2. Respondent is a professional association organized in substantial part to represent the interests of orthopedic surgeons who practice in North Carolina and the profession of orthopedics in North Carolina. Respondent has approximately 225 members. Many of respondent's activities are of a scientific and educational nature. A significant portion of respondent's activities furthers its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. Most members of the North Carolina Orthopaedic Association provide medical care for a fee. Most, if not all, of respondent's members have been and are now in competition among themselves and with other health care providers in the State of North Carolina.

PAR. 4. In the course of their treatment of patients, North Carolina orthopedic surgeons:

(a) receive and treat patients from other states;

(b) receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines; and

(c) prescribe medicines and medical devices that are shipped in interstate commerce.

PAR. 5. There are approximately 100 podiatrists in North Carolina. Most of them are engaged in the business of providing podiatric services for a fee. Podiatrists in North Carolina are licensed to provide diagnostic, medical and surgical services limited to the foot. Podiatrists compete with orthopedic surgeons in the delivery of some health care services.

PAR. 6. In the course of their treatment of patients, North Carolina podiatrists:

(a) receive and treat patients from other states;

(b) receive substantial sums of money from the federal government and from private insurers for rendering medical services, which money flows across state lines; and

(c) prescribe medicines and medical devices that are shipped in interstate commerce.

PAR. 7. Graduates of podiatry schools and residency programs in podiatry decide where to practice based on a number of factors. One important factor for many podiatrists is their ability to obtain access to hospital facilities that allow them to perform surgery within the scope of their state licenses and in accordance with their training and experience.

PAR. 8. The acts or practices described herein are in interstate commerce or affect the interstate activities of respondent's members, third parties who pay for orthopedic services, hospitals, podiatrists, or others, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 9. Respondent has agreed, combined, or conspired with some of its members and with others to engage in conduct that unreasonably restrains the practice of podiatry. In particular, they have agreed, combined, or conspired to take action to exclude or unreasonably discriminate against podiatrists who seek, within the scope of their professional licenses as described in Paragraph Five, surgical privileges or access to or use of hospital facilities. As part of or in furtherance of the agreement, combination, or conspiracy regarding podiatry, respondent passed two resolutions opposing the hospital practice of podiatry, its members were enjoined to review or change hospital bylaws accordingly, and some of respondent's members have participated in such review or change of hospital bylaws.

PAR. 10. The purposes or effects and the tendency and capacity of the agreement, combination, or conspiracy and the acts and practices described in Paragraph Nine of this complaint are and have been to unreasonably restrain competition and to deny to the public the benefits of competition in the following ways, among others:

(a) Competition based on price, quality and service in the delivery of professional health services has been lessened;

(b) The ability of patients and prospective patients to select a licensed practitioner of their choice has been hindered;

(c) The ability of podiatrists to compete with medical doctors has been restricted; and

(d) Podiatrists have been discouraged from practicing in North Carolina because of the difficulty of obtaining hospital privileges.

PAR. 11. The aforesaid agreement, combination, or conspiracy and the acts and practices of respondent constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such agreement, combination, or conspiracy and the acts and practices of respondent are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent North Carolina Orthopaedic Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That, for the purpose of this order, *respondent* means the North Carolina Orthopaedic Association, a non-profit corporation, its Executive Committee, officers, representatives, agents, employees, successors, and assigns.

II.

It is ordered, That respondent shall cease and desist from, directly or indirectly or through any corporate or other device, in or in connection with respondent's activities as a professional non-profit association in or affecting commerce, the following:

A. Entering into, continuing, maintaining, adhering to, acquiescing in, or aiding and abetting any agreement, combination or conspiracy to unreasonably exclude, unreasonably discriminate against, or place unreasonable restrictions on any podiatrist seeking or having surgical privileges at any hospital or access to or use of any hospital facilities, when such privileges, access or use is permitted under North Carolina law;

B. Inducing or seeking to induce any hospital, hospital medical staff, physician, or other person or entity to obstruct or deny surgical privileges at any hospital or access to or use of any hospital facilities by the podiatric profession or any licensed podiatrist through any representation that is false or deceptive within the meaning of the Federal Trade Commission Act.

Provided, That nothing in subpart II(B) shall prohibit respondent from making or publishing a representation for which respondent possesses a reasonable basis regarding the training, education, practice, or other qualifications of podiatrists or any individual podiatrist.

Provided further, That nothing in this order shall prohibit respondent from exercising rights guaranteed by the First Amendment to the United States Constitution to petition any federal, state, or local government, executive agency or legislative body concerning legislation, rules or procedures, or to participate in any federal, state, or local administrative or judicial proceeding.

III.

It is further ordered, That, within sixty (60) days after the date of service of this order, respondent shall:

A. Mail or otherwise furnish a copy of this order, accompanied by the cover letter attached as Appendix I, to each person who on the date of service of this order is a member of respondent and to each person who on the date of service of this order is an executive employee of respondent;

B. Mail or personally deliver a copy of this order, accompanied by the cover letter attached as Appendix I, to the President of the North Carolina Medical Society;

C. Withdraw any policy, standard, or position regarding podiatry, if any, that is inconsistent with the terms of Part II of this order.

IV.

It is further ordered, That respondent shall:

A. File a written report with the Commission within ninety (90) days following the date of service of this order, and annually on the anniversary of the date of service of this order for a period of five (5) years, and at such other times as the Commission or Commission staff may by written notice to respondent require, setting forth in detail the manner and form in which it has complied with this order;

B. For five (5) years after the date of service of this order, maintain and make available to the Commission staff, for inspection and copying upon reasonable notice, any documents regarding podiatric clinical privileges or access to hospital facilities, podiatric training or education, or the appropriate scope of practice by podiatrists; and

C. For five (5) years after the date of service of this order, provide each new member and each new executive employee of the respondent, or any other employee whose responsibilities include disseminating respondent's views, with a copy of this order at the time he or she is accepted into membership or employment.

V.

It is further ordered, That respondent shall notify the Commission of any proposed change in its organization at least thirty (30) days prior to the proposed change in respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change that may affect compliance with this order.

APPENDIX I

Dear [Sir or Madam]:

As you may know, on ______ the Federal Trade Commission issued a Consent Order settling charges that the North Carolina Orthopaedic Association (NCOA) has been involved in activities that restricted the lawful practice of podiatry and restrained competition between medical doctors and podiatrists. This order was entered as part of a compromise settlement in order to save NCOA the expense of defending a costly litigation and without any admission whatsoever of any wrongdoing on the part of NCOA. NCOA has not admitted that it has violated the law, nor admitted that it has done the acts alleged in the Complaint except those relating solely to jurisdiction.

Under the terms of the Order issued by the Commission, among other things, NCOA is prohibited from entering into or maintaining any agreement or conspiracy to unreasonably exclude or discriminate against any podiatrist seeking or having surgical privileges at any hospital or access to or use of any hospital facilities, when such privileges, access or use is permitted under North Carolina law.

The Order also prohibits NCOA from inducing any hospital, hospital medical staff, physician, or other person or entity to obstruct or deny surgical privileges at any hospital or access to or use of any hospital facilities by the podiatric profession or any licensed podiatrist through any representation for which NCOA does not have a reasonable basis.

The Order, however, does not prohibit NCOA or its members from exercising their First Amendment rights to petition any legislative or executive body concerning any rules, legislation, or procedures, or participating in any administrative or judicial proceeding. The Order does not prevent any individual from engaging in unilateral conduct, in an individual capacity and not as an officer, agent or representative of NCOA.

Pursuant to the Order issued by the Federal Trade Commission, we are withdrawing all of our policies and statements relating to podiatry, if any, that are not consistent with the Order.

Your attention to these matters will be appreciated. Thank you for your cooperation.

Sincerely,

President
The North Carolina Orthopaedic Association

IN THE MATTER OF

PITTSBURGH PENN OIL COMPANY, ET AL.

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

Docket 9203. Complaint, Jan. 16, 1986—Decision, Sept. 29, 1986

This consent order requires, among other things, a Creighton, Pa. automotive fluids company to cease falsely representing that its automotive oils, transmission fluids and antifreeze meet standardized industry ratings and standards established by Ford and General Motors.

Appearances

For the Commission: *James K. Leonard, Nathan P. Owen* and *Tamra S. Kempf.*

For the respondents: *Stephen J. Laidhold, Lampl, Sable, Makoroff & Libenson,* Pittsburgh, Pa.

COMPLAINT

The Federal Trade Commission, having reason to believe that Pittsburgh Penn Oil Company, a corporation, and Fred Danovitz, individually and as an officer of said corporation ("respondents"), have violated Section 5 of the Federal Trade Commission Act and, it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent Pittsburgh Penn Oil Company is a Pennsylvania corporation with its principal office and place of business located at Box 296, Route 28, Freeport Road, Creighton, PA.

(b) Respondent Fred Danovitz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondent.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents are, and have been, engaged in the production and sale of substantial quantities of engine oil, automatic transmission fluid, antifreeze-coolant and other automotive and petroleum products. Respondents package their products under the brand names of the corporate respondent, including Prize Penn, Sure-Matic and

Sure Permanent, and under the brand names of independent merchandisers.

PAR. 3. In the course and conduct of their business, respondents cause their products to be sent to purchasers in various States of the United States. Respondents prepare promotional and labeling materials for their products and disseminate these materials in various States of the United States. Respondents maintain, and at all times relevant herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and in order to induce the sale of their engine oils, respondents have made statements in their promotional literature and on their containers of engine oil. Typical of these statements are the following:

1. SAE 10W–40
2. Exceeds requirements for A.P.I. service classifications—SC, SD, SF

PAR. 5. Through the use of these and other similar statements, respondents have represented, directly or by implication, that respondents' engine oils have met the standards established by the Society of Automotive Engineers ("SAE") and the American Petroleum Institute ("API") for the stated SAE viscosity and API service classification, respectively.

PAR. 6. In truth and in fact, in numerous instances, respondents' engine oils have not met the standards established by the SAE and the API for the stated SAE viscosity and API service classification, respectively. Therefore, the representation set forth in Paragraph Five has been, and is, false and misleading.

PAR. 7. In the course and conduct of their business, and in order to induce the sale of their engine oils, respondents have made statements on their containers of engine oil not labeled with any API service classification. Typical of these statements are the following:

1. High grade lubricant for modern high-speed motors
2. Longer engine life for the new long-life engines

PAR. 8. Through the use of these and other similar statements, respondents have represented, directly or by implication, that respondents' engine oils were suitable for use in engines manufactured in model years 1980 to the present.

PAR. 9. In truth and in fact, in numerous instances, respondents' engine oils have not been suitable for use in engines manufactured in model years 1980 to the present. Therefore, the representation set forth in Paragraph Eight has been, and is, false and misleading.

PAR. 10. In the course and conduct of their business, and in order to induce the sale of their automatic transmission fluids, respondents have made statements on their containers of automatic transmission fluid. Typical of these statements are the following:

1. "DEXRON® II" or "a substitute for DEXRON® II"
2. "Type F"
3. "Ford Approved"

PAR. 11. Through the use of these and other similar statements, respondents have respectively represented, directly or by implication, that respondents' automatic transmission fluids have met the standards established by General Motors Corporation for DEXRON® II transmission fluids, have met the standards established by Ford Motor Company for Type F automatic transmission fluids, and have been approved by Ford Motor Company.

PAR. 12. In truth and in fact, in numerous instances, respondents' automatic transmission fluids have not met the standards established by General Motors Corporation for DEXRON® II automatic transmission fluids, have not met the standards established by Ford Motor Company for Type F automatic transmission fluids, and have not been approved by Ford Motor Company. Therefore, the representations set forth in Paragraph Eleven have been, and are, false and misleading.

PAR. 13. In the course and conduct of their business, and in order to induce the sale of their antifreeze-coolants, respondents have made statements on their containers of antifreeze-coolant. Typical of these statements is a "protection chart" stating that respondents' antifreeze-coolant has afforded given levels of protection against freezing in engine cooling systems, including protection against freezing down to -34 degrees F. when respondents' antifreeze-coolant has been mixed with an equal amount of water.

PAR. 14. Through the use of this chart and other similar statements, respondents have represented, directly or by implication, that respondents' antifreeze-coolant has afforded the stated levels of protection against freezing in engine cooling systems, including protection down to -34 degrees F. when mixed with an equal amount of water.

PAR. 15. In truth and in fact, in numerous instances, respondents' antifreeze-coolant has not afforded the stated levels of protection against freezing in engine cooling systems, including protection down to -34 degrees F. when mixed with an equal amount of water. Therefore, the representation set forth in Paragraph Fourteen has been, and is, false and misleading.

PAR. 16. Through the use of the statements described in Paragraphs Four, Seven, Ten and Thirteen and the use of other similar statements, respondents have represented, directly or by implication, that at the times of making the representations set forth in Paragraphs Five, Eight, Eleven and Fourteen, respectively, respondents possessed and relied upon a reasonable basis for making those representations.

PAR. 17. In truth and in fact, at such times respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, the representation set forth in Paragraph Sixteen was, and is, false and misleading.

PAR. 18. Respondents' dissemination of the aforesaid material representations and the placement in the hands of others of means and instrumentalities by and through which others may have used the aforesaid representations have had, and now have, the likelihood to mislead consumers and to induce such consumers to purchase and use respondents' engine oils, automatic transmission fluids and anti-freeze-coolants.

PAR. 19. The acts or practices of respondents as alleged in this complaint constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Pittsburgh Penn Oil Company is a Pennsylvania

corporation with its principal office and place of business located at Box 296, Route 28, Freeport Road, Creighton, PA.

Respondent Fred Danovitz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office and place of business is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

Order

I.

It is ordered, That respondents Pittsburgh Penn Oil Company, a corporation, its successors and assigns, and its officers, and Fred Danovitz, individually and as an officer of the corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any engine oil, automatic transmission fluid or antifreeze-coolant in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication (*e.g.*, by making a product claim such as "high grade lubricant for modern high-speed motors" or "longer engine life for the new long-life engines"), that any engine oil has any American Petroleum Institute (API) service classification;

B. Representing, directly or by implication, that any engine oil has any Society of Automotive Engineers (SAE) viscosity;

C. Representing, directly or by implication, that any automatic transmission fluid has been approved by or meets any specification set by General Motors Corporation, Ford Motor Company or any other company;

D. Representing, directly or by implication, that any antifreeze-coolant affords a stated level of protection against freezing in engine cooling systems; or

E. Representing, directly or by implication, that any engine oil, automatic transmission fluid or antifreeze-coolant possesses any other performance or quality characteristic or has been tested or approved;

unless such representation is true and unless, at the time of making such representation, respondents, their successors or assigns possess and rely upon competent and reliable evidence which substantiates the representation.

II.

It is further ordered, That respondents, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the production, labeling, advertising, offering for sale, sale or distribution of any automotive or petroleum product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting in any manner, directly or by implication, that any such product possesses any performance or quality characteristic or has been tested or approved.

III.

It is further ordered, That respondents, their successors and assigns shall draw a representative sample from each production batch or run, and from each filling run, of engine oil, automatic transmission fluid and antifreeze-coolant, shall document the method or methods used to draw such samples, and shall for at least one year retain and upon reasonable notice make available to the Commission for inspection and testing a properly marked portion of each such sample and that for a period of three (3) years after the date of service of this order respondents, their successors and assigns shall, at the option of the Commission, cause to be tested (as described below) by a competent and independent laboratory approved by the Commission, at the expense of respondents, their successors or assigns, up to seventy-five (75) samples of engine oil, automatic transmission fluid and/or antifreeze-coolant, the samples being either such retained samples or samples sold by respondents, their successors or assigns, and shall submit to the Commission copies of the results of such tests within twenty (20) days after the Commission has identified the retained sample(s) to be tested or has tendered the sold sample(s) to be tested, as the case may be; *provided, however,* that the twenty (20)-day period shall be extended by the length of any delay during the period beyond the control of respondents, their successors or assigns:

A. Engine oil samples tested pursuant to this Part shall be subjected to the then current version of the following American Society for

Testing and Materials (ASTM) tests and other tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);

2. Low-temperature viscosity (multi-temperature version of ASTM D2602, described in Appendix A of SAE J300 APR 84) (test required only for multigrade oils);

3. Borderline pumping temperature (ASTM D3829) (test required only for multigrade oils);

4. Nitrogen (ASTM D3228 or chemiluminescence);

5. Sulfated ash (ASTM D874);

6. Total Base Number (ASTM D2896); and

7. Elemental analysis showing parts per million of barium, calcium, magnesium, phosphorus, sodium, and zinc (emission spectrometry or other generally accepted method).

B. Automatic transmission fluid samples tested pursuant to this Part shall be subjected to the then current version of the following tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);

2. Flash point (ASTM D92);

3. Brookfield viscosity at -40 degrees C. (ASTM D2983);

4. Nitrogen (ASTM D3228 or chemiluminescence); and

5. Elemental analysis showing parts per million of boron, calcium, phosphorus, sulfur, and zinc (emission spectrometry or other generally accepted method.

C. Antifreeze-coolant samples tested pursuant to this Part shall be subjected to the then current version of the following tests or any succeeding tests that have the same force and effect:

1. Specific gravity (ASTM D1122);

2. Freezing point, 50% by volume in distilled water (ASTM D1177);

3. Boiling point, 50% by volume in distilled water (ASTM D1120);

4. pH, 50% by volume in distilled water (ASTM D1287);

5. Reserve alkalinity (ASTM D1121);

6. Water, % by weight (ASTM D1123); and

7. Elemental analysis showing parts per million of boron, phosphorus, silicon, and sodium (emission spectrometry or other generally accepted method).

IV.

It is further ordered, That respondents, their successors and assigns shall clearly and indelibly mark each container or the outside of each case of engine oil, automatic transmission fluid and antifreeze-coolant with information identifying the relevant production batch(es) or run(s), production date(s) and filling date(s); *provided,* that containers so marked shall be marked on the day of filling, and cases so marked shall be marked on the day of packing.

V.

It is further ordered, That respondents, their successors and assigns shall retain records which substantiate any representation covered by this order for three (3) years after the last date on which the representation was made and upon reasonable notice shall make such records available to the Commission for inspection and copying; *provided,* that for engine oils, automatic transmission fluids and antifreeze-coolants produced or packaged by respondents, their successors or assigns, such records shall include blend formulas and specifications; formulas and specifications supplied to respondents, their successors or assigns by additive companies; documents describing the physical and chemical characteristics of additives purchased by respondents, their successors or assigns; pertinent licensing agreements; records describing purchases and inventories of base stocks and additives of respondents, their successors or assigns; records showing for each production batch or run the production date, the tank(s) used, the quantity of each ingredient used, the date of transfer to another tank(s), the tank(s) so used, the quantity transferred to each tank, and the results of quality control tests run; records showing for each filling run the filling date, the tank(s) used, the quantity drawn from each tank, the size and number of containers filled, the results of quality control tests run, and, if known at the time of the filling run, the shipping destination and intended customer; and records indicating the dates on which each tank used in production or filling is emptied.

VI.

It is further ordered, That respondents, their successors and assigns shall retain records of their sales of engine oil, automatic transmission fluid and antifreeze-coolant for three (3) years after each such sale which identify the name and address of each purchaser and the quantity of each of these products sold to each purchaser, shall retain for three (3) years from the date of their first possession all documents, including letters from consumers, customers and industry members and responses thereto, which constitute or relate to a complaint about or an unfavorable assessment of any engine oil, automatic transmission fluid or antifreeze-coolant sold by respondents, their successors or assigns and upon reasonable notice shall make such records and documents available to the Commission for inspection and copying; *provided*, that, this Part VI shall apply only to such sales and first possessions occurring within five (5) years of the date of service of this order.

VII.

It is further ordered, That respondent Pittsburgh Penn Oil Company, its successors and assigns shall forthwith distribute a copy of this order to each of its subsidiaries and divisions and to all present and future agents, representatives and employees having responsibilities for advertising, production, packaging, quality control or corporate policy with respect to the subject matter of this order, shall secure from each such person a signed and dated statement acknowledging receipt of the order and shall maintain such statement for three (3) years after the end of such person's employment by respondent, its successors or assigns.

VIII.

It is further ordered, That respondent Fred Danovitz shall promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment and that, for a period of ten (10) years from the date of service of this order, respondent Fred Danovitz shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the production, labeling, advertising, offering for sale, sale or distribution of any automotive, petroleum or chemical product and of his affiliation with any new business or employment in which his own duties or responsibilities involve the production, labeling, advertising, offering for sale, sale or distribution of any automotive, petroleum or chemical product, with each such notice to include his new business address and a statement of the nature of the business or employment in which he is newly engaged, as well as a description of his duties and responsibilities in connection with the business or employment.

IX.

It is further ordered, That respondent Pittsburgh Penn Oil Company, its successors and assigns shall notify the Commission at least thirty (30) days prior to any proposed change to itself, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change which may affect compliance obligations arising out of this order.

X.

It is further ordered, That respondents, their successors and assigns shall, within sixty (60) days after the date of service of this order, file a written report with the Commission setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2929. Consent Order, Sept. 26, 1978—Modifying Order, Oct. 3, 1986

The Federal Trade Commission has modified a 1978 consent order with respondents by setting aside the portions of the order pertaining to the exclusive dealing prohibitions. The Commission concluded that respondents do not have the market power to exclude competitors.

ORDER REOPENING AND SETTING ASIDE PORTIONS OF ORDER ISSUED SEPTEMBER 26, 1978

On May 6, 1986, respondents Interco Incorporated ("Interco"), Londontown Corporation ("Londontown") and Queen Casuals, Inc. ("Queen Casuals") filed a "Request As Supplemented To Reopen And Set Aside Part Of 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 Commission's Rules of Practice. Londontown and Queen Casuals are wholly owned subsidiaries of Interco. The Request asked the Commission to reopen the consent order issued on September 26, 1978, ("the order") and set aside paragraphs (1) and (2) of Part II of the order. [92 F.T.C. 404]

Paragraphs (1) and (2) of Part II of the order are applicable only to respondents' footwear products. Paragraph (1) of Part II forbids respondents from enforcing any agreement, understanding or arrangement which prevents resellers or prospective resellers from selling the footwear products of competitors or from independently determining the volume of footwear to be purchased from competitors. Paragraph (2) of Part II prohibits respondents from requiring or inducing resellers to cancel orders for or not purchase footwear products supplied by competitors.

After reviewing respondents' Request, the Commission has concluded that the public interest warrants reopening and setting aside the mentioned paragraphs of the order as requested by respondents. The action we take today is consistent with our previous determinations in *Brown Shoe Company, Inc.*, Docket No. 7606, July 16, 1984 [104 F.T.C. 266], and in *International Shoe Company,* Docket No. 6835, January 30, 1985 [105 F.T.C. 191]. In both of those matters the Commission set aside perpetual exclusive dealing orders in the footwear industry. The same considerations which prompted our actions in these earlier matters are applicable to the present request. Respondents have demonstrated that they do not have market power in the domestic footwear industry either at the manufacturing or retailing levels. Given the present characteristics of the shoe industry and that respondents do not have market power by which they may exclude competitors, paragraphs (1) and (2) of Part II of the order now serve no procompetitive purpose and may impede respondents' efforts to achieve efficient distribution of their footwear products through lawful practices available to their competitors.

Accordingly, *it is ordered* that this matter be and it hereby is reopened and that paragraphs (1) and (2) of Part II of the Commission's Decision and Order issued on September 26, 1978, shall be of no further force and effect.

IN THE MATTER OF

MAX FACTOR & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC 2(d) OF THE CLAYTON ACT

Docket C-3201. Complaint, Oct. 15, 1986—Decision, Oct. 15, 1986

This consent order requires, among other things, a Stamford, Conn. cosmetics company to make promotional allowances available on proportionally equal terms to all of its customers, and in particular, to make alternatives, such as handbills or other in-store promotional activities, available to customers for whom its basic promotional plans are not usable or economically feasible. Respondent is required to notify all its customers that the promotional payments and alternatives are available.

Appearances

For the Commission: *Paul R. Roark.*

For the respondents: *Steven C. McCracken, Gibson, Dunn & Crutcher,* Newport Beach, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Max Factor & Co. has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13(d)), 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. Respondent Max Factor & Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 Gatehouse Road, Stamford, Connecticut.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, sale, and distribution of cosmetic products.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, having sold and shipped its cosmetic products or caused them to be transported from its previous principal place of business in California and its current principal place of business in Connecticut to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of credits or sums of money, hereinafter referred to as "promotional allowances," either directly or indirectly by way of discounts, allowances, rebates, or deductions, as compensation or in consideration for promotional services or facilities, including advertising in various media such as newspapers, furnished by customers in connection with the sale or offering for sale of respondent's cosmetic products.

PAR. 5. In granting promotional allowances, respondent discriminated against particular customers in that respondent did not make such promotional allowances functionally available, on proportionally equal terms, to all customers competing in the sale and distribution of respondent's cosmetic products. Respondent failed to offer alternative terms and conditions to customers for whom respondent's basic promotional allowances were not usable and suitable.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2(d) of the Clayton Act, as amended. The acts and practices of respondent, as herein alleged, may recur in the absence of the relief herein contemplated.

Chairman Oliver and Commissioner Strenio dissented.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Max Factor & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 Gatehouse Road, Stamford, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

A. The term *cosmetic products* shall mean cosmetics, fragrances, toiletries, and beauty aids.

B. The term *respondent's cosmetic products* shall include: (a) all cosmetic products advertised, offered for sale, sold, or distributed by respondent; (b) all cosmetic products bearing any of respondent's trademarks that are advertised, offered for sale, sold, or distributed by respondent's corporate parent or a division or subsidiary of such parent; and (c) all cosmetic products advertised, offered for sale, sold, or distributed by respondent's corporate parent or a division or subsidiary of such parent as part of a program in which cosmetic products bearing any of respondent's trademarks are also advertised, offered for sale, sold, or distributed.

II.

A. *It is further ordered,* That respondent Max Factor & Co., a corporation, and its officers, directors, agents, representatives, and employees, and its successors and assigns, directly or indirectly or through any corporation, subsidiary, division or other device, shall cease and desist from paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for advertising or promotional services or facilities furnished by or through such customer in connection with the advertising, offering for sale, sale, or distribution of respondent's cosmetic products in or affecting commerce, as "commerce" is defined in the Clayton Act, as amended, or the Federal Trade Commission Act, as amended, unless:

1. Respondent makes such compensation or consideration available on proportionally equal terms for alternative services or facilities that are usable and economically feasible for all customers who compete in the distribution or resale of respondent's cosmetic products and for whom respondent's basic promotional plans are not usable or economically feasible; *provided*, that with respect to respondent's cooperative advertising and drive plans, such alternative services or facilities may include handbills and circulars in amounts not less than 1,000, or other in-store promotional activities acceptable to respondent; and

2. All customers who compete in the distribution or resale of respondent's cosmetic products are informed in the manner provided in Paragraph II.B. of this order of the availability of such compensation or consideration.

B. *It is further ordered*, That respondent shall inform those retailers who purchase respondent's cosmetic products, including retailers who do not purchase directly from respondent, of the availability of its promotional plans, as required by Paragraph II.A. of this order, as follows:

1. Respondent shall imprint on the smallest shipping container used for respondent's cosmetic products the legend, "Promotional allowances are periodically made available by Max Factor & Co. to all retailers. To obtain information about these promotional opportunities contact your Sales Representative or call [Mary O'Brian at our Headquarters office (212) 856–6664]"; and

2. For each promotion respondent shall cause copies of "offer letters" or similar materials explaining the availability of alternative methods of participation in respondent's advertising or promotional program or plan to be supplied to all direct purchasing retailers, and to its wholesalers or distributors in sufficient quantity for presentation or delivery by such wholesalers or distributors to each customer of such wholesaler or distributor, and shall request such wholesalers and distributors to present or deliver such materials to such customers.

C. *Provided, however*, That nothing herein contained shall be construed or interpreted to abridge or otherwise restrict respondent's entitlement to avail itself of the "Meeting Competition Defense," the provisions of which are contained in Section 2(b) of the Clayton Act, 15 U.S.C. 13(b), as amended.

III.

It is further ordered, That respondent shall deliver, within thirty (30) days of the date of service upon it of this order, a copy of this order to all current sales management and sales personnel who are engaged in the sale of any of respondent's cosmetic products within the United States, and shall for a period of five (5) years thereafter deliver a copy of this order to all such future sales management and sales personnel within thirty (30) days of their employment in such positions.

IV.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries doing business in the United States, or any other change in respondent that may affect compliance obligations arising out of the order.

Chairman Oliver and Commissioner Strenio dissented.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

In a decision that ignores the interests of American consumers, a majority of the Commission has determined to accept a consent order in this matter arising out of charges that respondent Max Factor violated Section 5 of the Federal Trade Commission Act, and Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Specifically, the Commission's complaint issued with this consent alleges that Max Factor engaged in unlawful discriminatory promotional allowances. For the reasons stated below, I dissent from the issuance of an order in this matter.

As a matter of both statutory law and decisional precedent, the

Commission has a responsibility to justify—on public interest grounds—any action it takes. Section 5(b) of the FTC Act provides that the Commission shall issue a complaint only when it appears that a proceeding "would be to the interest of the public. . . ." As long ago as 1929, the Supreme Court held that "to justify the Commission in filing a complaint under §5, the purpose must be protection of the public," and concluded that "[i]n determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion."[1]

The Robinson-Patman Act, violations of which are also alleged here, does not require a specific finding that enforcement action will serve the public interest.[2] The case law interpreting that section, however, makes clear that the Commission has the same broad discretion as with Section 5 of the FTC Act in choosing how it will deploy its resources.[3]

Within the past year, this principle respecting agency discretion has been reaffirmed by the Supreme Court:

> [A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.[4]

Ignoring its obligation to act in the public interest, the majority has opted instead to impose an anticompetitive order on a notion that there has been a technical violation of the law.[5] Such a course of

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[1] *FTC v. Klesner,* 280 U.S. 19, 27, 28 (1929). *See also FTC v. Royal Milling Co.,* 288 U.S. 212 (1933); *Exposition Press, Inc. v. FTC,* 295 F.2d 869 (2d Cir. 1961), *cert. denied,* 370 U.S. 917 (1962).

[2] Indeed, a literal reading of the statute might suggest the contrary. Clayton Act Section 11(b) provides that "[w]henever the Commission or Board vested with jurisdiction . . . shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of [the] Act, it shall issue . . . a complaint. . . ." Section 2 of the Clayton Act is, of course, the Robinson-Patman Act.

[3] In *Moog Industries, Inc. v. FTC,* 355 U.S. 411, 413 (1958), for example, the Court held in a Robinson-Patman case that "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

[4] *Heckler v. Chaney,* 470 U.S. 821, 105 S.Ct. 1649, 1656, 84 L.Ed. 2d 714 (1985). Although the argument can be made that entry of this order consumes few additional resources, the great bulk of the expenditures necessary to prosecute this action already having been spent, I find such reasoning to be unpersuasive. The fact that many resources may have been misallocated in the past does not justify waste of some future resources. Moreover, entry of this order will necessitate future expenditures in the form of compliance costs. Any enforcement proceedings similarly would entail further resources.

[5] The majority apparently infers that Max Factor committed a technical violation, based in part, it seems, on its willingness to sign a consent decree. Yet it is unclear to me that any violation was committed. Our past precedents indicate that proportionality can be based on value to the seller, *Lever Bros. Co.,* 50 F.T.C. 494 (1953), an approach that has been approved by the Supreme Court. *FTC v. Simplicity Pattern Co.,* 360 U.S. 55, 61 n.4 (1959).

The record does not indicate whether or not Max Factor's payments were proportional to value. In addition, promotional allowances do not violate the Robinson-Patman Act if they are made to meet competition, *Exquisite* action is, in my view, regrettable and inconsistent with established precedent.

I can find no basis, and none has been suggested to me by staff or the Commission majority, for concluding that any public interest is served by entry of this consent order.[6] To the contrary, the far more likely result of today's action will be decreased consumer welfare by forcing Max Factor to operate at less than maximum efficiency and at a competitive disadvantage relative to other firms in the industry.

I reach this conclusion on the basis of certain critical facts that are not in dispute. First, the cosmetics industry is intensely competitive. Although there may be disagreement regarding precise market shares, all agree that there are numerous competitors in each segment of the overall cosmetics market.

Second, there has never been the hint of a suggestion from any quarter that any of Max Factor's practices had an adverse impact on competition.[7] Max Factor is but one of a large number of cosmetic suppliers, none of which appears at any point to have possessed the power to raise prices or dictate the terms of purchase.

Third, Max Factor is clearly a declining firm in a competitive industry. The record suggests that in terms of market share and sales, Max Factor has suffered severe declines both recently and during the period that it allegedly engaged in discriminatory promotional activities (the late 1970's).

Fourth, it has now been nearly seven years since the occurrence of the practices that gave rise to this action. In the interim, Max Factor has undergone four changes in ownership and management. Moreover, its corporate headquarters has moved from Los Angeles to Stamford, Connecticut, resulting in a wholesale change in management.

From these undisputed facts, certain conclusions are inescapable. First, even the limited record before us demonstrates that because the cosmetics industry is intensely competitive, the market will not allow

Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). In light of Max Factor's market share, it appears probable that its allowances were driven by competitive necessity rather than an exercise of economic price discrimination.

[6] It has been suggested that the public interest in Robinson-Patman cases is not with advancing consumer welfare but with protecting the vitality of small businesses. Even assuming, for the sake of argument, the validity of such a theory, this order does not serve even that interest. In the first place, Max Factor *is* a minor and struggling player in the intensely competitive cosmetics industry. The purported beneficiary has become instead the prey. Moreover, to the extent the public interest is defined as encouraging protection of small buyers, there is no basis for entering this order. This proceeding was not initiated as the result of buyer complaints, and no buyer—small or large—was shown by the staff's evidence to have been placed at a competitive disadvantage as a result of any alleged conduct.

[7] I am aware that the weight of authority currently accords virtual per se status to Sections 2(d) and 2(e) of the Robinson-Patman Act, and that a showing of competitive injury is not required to prove a violation. Although there is authority to the contrary (*e.g., Allen Pen Co. v. Springfield Photo Mount Co*, 653 F.2d 17, 24–25 (1st Cir. 1981)), that issue need not be reached in the setting of the present case. Regardless of what the result would be if the issue arose in the context of a full scale trial on the merits, we are presented with a very different situation: the issues here are (a) whether in the proper exercise of prosecutorial discretion the Commission should devote scarce enforcement and compliance resources every time a technical violation of the statute is alleged, even though there is absolutely no proof of injury to competition or consumers, and (b) whether the Commission is compelled to issue an order it can predict will be anticompetitive.

price or service discrimination of any systematic or persistent sort. Prices among buyers will tend to reflect cost differences, and promotional expenditures among buyers will in any meaningful sense tend to be proportionally equal. As noted above, the staff has uncovered no evidence that any allegedly disfavored buyer lost sales or was placed at a competitive disadvantage as a result of any conduct engaged in by Max Factor.

Second, the existence of a competitive market suggests that Max Factor, already a declining firm, will be disadvantaged by the order, relative to its competitors. When competition prevails, promotions or discounts are offered only if the supplier perceives that it is efficient to do so; *i.e.*, the supplier receives equivalent value in exchange for the promotion or discount. Thus, to the extent the order requires payments to those not previously offered such, it forces discrimination in their favor. Such a result is inefficient, decreases consumer welfare, and is not in the public interest. Moreover, entry of the majority's order will subject Max Factor to higher penalties and significantly more stringent record-keeping compliance obligations than its competitors. This undoubtedly will have a chilling effect on Max Factor's marketing, including its competitive pricing decisions. It can also be expected to result in a sales decline and a decrease in consumer satisfaction. Can this result be in the public interest?

Third, the several changes in ownership and the complete overhaul in management, coupled with evidence that Max Factor has implemented an extensive Robinson-Patman Act compliance program, suggest that there is little cognizable danger of any recurring law violation. In these circumstances, it is incumbent on the Commission, in the exercise of its discretion, to close the investigation.[8] The unlikelihood of recurrence is further suggested by the extended length of time since the period of the alleged violations.[9]

In addition, the unusually broad scope of the order raises very real concerns. The majority order applies to cosmetic products not only of Max Factor or bearing Max Factor trademarks, but also those of its "corporate parent or a division or subsidiary of such a parent," if the products of both Max Factor and its parental affiliate are sold "as part of a program."

Although the meaning of that somewhat vague quoted term is not further defined by the order, one need not possess extraordinary power to understand the attendant problems that may arise. Owner-

[8] *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984); *International Harvester Co.*, 104 F.T.C. 949, 1069–70 (1984) (no order warranted because, *inter alia*, "Harvester's voluntary notification program has already provided all the relief that could be expected from a Commission order" and Harvester was unlikely to "return to its earlier violation"); *Chesebrough-Pond's Inc.*, 66 F.T.C. 252 (1964); *Paxton & Gallagher Co.*, 59 F.T.C. 1089 (1961) (changes in respondent's ownership and management vitiated Commission concern with resumption of unlawful conduct).

[9] *Great Southwestern Land Co.*, 73 F.T.C. 440 (1968); *Simon & Schuster, Inc.*, 71 F.T.C. 1490 (1968).

ship of Max Factor has turned over several times in the recent past. There is no evidence to suggest that this trend has run its course. Entry of this order, however, could impose tremendous costs in the form of inefficiencies on a subsequent purchaser—in particular one already part of the cosmetics industry.

Specifically, to avoid falling within the burdensome umbrella of the order, an acquiring company might have to structure the transaction in a manner that is less than efficient. Moreover, the post-acquisition entity would be inclined to shy away from such potentially efficient practices as common sales forces or collective advertising.

An equally unfortunate result will be the inevitable chilling effect felt by new owners discouraged from engaging in aggressive or innovative marketing schemes that are potentially pro-competitive. Less vigorous and more expensive marketing admits of only one consequence—higher costs passed through in the form of higher prices to consumers. It is difficult, to say the least, to divine the public interest served.

As Commissioner Strenio notes in his dissenting statement (p. 2), the majority has determined to issue a perpetual order against Max Factor. The majority's mistake, enshrined for the ages, serves as a compelling reminder why orders should be limited to finite terms.

This Commission's record in enforcing the Robinson-Patman Act does not commend the Commission to the American consumer. Its prior interpretations and enforcement actions have worked staggering injury on consumers, to say nothing of small businesses such as Max Factor. The Commission majority today has let slip an opportunity to undo some of that harm. By insisting on an order that is certain to have anticompetitive consequences—with no conceivable offsetting benefits to competition and consumers—the Commission majority turns and retreats away from rational antitrust enforcement. The American consumer deserves better. I had understood this Commission's mandate to be the promotion of consumer welfare through the fostering of competition. I dissent from the majority's refusal to carry out that charge in this case.

SEPARATE STATEMENT BY COMMISSIONER ANDREW J. STRENIO, JR.

I regret that I cannot join in the majority decision. Weighing all the factors in this case, I have concluded that the issuance of this particular consent order is not in the public interest. Instead, I would have directed staff to renegotiate the consent to more carefully tailor it to fit the circumstances revealed on the record.

In order to place this case in context, it is worth noting several factors. To begin with, the violations alleged occurred over six years ago and the management of Max Factor has changed hands several times in the interim. More importantly, we have no evidence that Max Factor's conduct over six years ago harmed competitors, retailers or consumers.

For example, based on the dated record before us, we have no reason to conclude that Max Factor—a relatively small competitor in an intensely competitive industry—possessed the market power necessary to engage in economic price discrimination or the offering of discriminatory allowances. We have no reason to conclude that smaller retailers received less than a competitive level of promotional allowances. Indeed, we have no reason to conclude that Max Factor had any incentive to harm efficient smaller accounts or to "overpay" larger accounts, since either action would have been directly contrary to Max Factor's interests.

We do, however, have reason to fear that this consent order could harm smaller retailers and consumers. For instance, Max Factor has argued that its promotional efforts to ensure the association of its products with the most upscale stores had a "spillover benefit" of enhanced sales at smaller stores as well. If, because of the order, Max Factor now cuts back its promotional allowances to the most upscale stores, then smaller stores may be hurt by a corresponding reduction in any such spillover benefits. Moreover, if Max Factor is unable to compete [2] vigorously as a consequence of the order, then consumers will ultimately lose as well.[1]

Despite all the above, the Commission's unquestionable duty to enforce the Robinson-Patman Act and the strong evidence of at least a technical violation those six years ago may, nonetheless, provide a basis for securing an appropriate consent order from Max Factor. But this consent order is seriously deficient in two regards.

First, the terms of the order are overly broad. For example, Paragraph II(B)(2) of the order requires Max Factor to provide direct notice of all promotional plans to specified retailers in perpetuity through an expensive and cumbersome process. But effective notice could be provided through a number of alternative mechanisms, such as by adequately advertising in trade publications and the like. Specifying forever a single, costly process for notifying retailers seems unneces-

[1] I have considered the proposition that neither the Robinson-Patman Act nor the Supreme Court's decision in *Simplicity Pattern Co. v. F.T.C.*, 360 U.S. 55 (1959) preclude some examination of efficiency justifications or overall competitive effects of questioned conduct. A number of Supreme Court cases that postdate *Simplicity* state that rigid application of a *per se* rule in Sherman Act cases is not appropriate in every circumstance. For example, to avoid condemning potentially pro-competitive conduct, the Supreme Court in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 433 U.S. 36 (1977), characterized the *per se* rule as a "demanding standard", *id.* at 50, and stated that "any departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing." *Id.* at 58–59. While I have not reached a firm conclusion on the issue, it may be appropriate for the Commission to consider whether and how modern Supreme Court decisions on *per se* analysis under the Sherman Act should affect our analysis in cases under Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

sarily harsh without a showing that either the law or enforcement considerations mandate such a result.[2]

Second, the order is disturbingly vague because it requires Max Factor to make promotional compensation or consideration available on "proportionally equal terms" without defining what [3] that means. This is important because of Max Factor's claim of spillover benefits from its promotional activities. Again, the claim is that although certain upscale stores may have received higher direct promotional allowances, the assertedly less-favored accounts benefitted indirectly by a resulting general increase in demand for Max Factor products. In turn, Max Factor may have received greater value in increased sales per promotional dollar spent at certain stores.

If this case had been litigated, a major question would have been whether proportionality must be measured solely by the direct cost to Max Factor or whether the value received by Max Factor could be an allowable standard. The answer is not entirely clear. In 1972, the Commission, with no in-depth explanation, appeared to reverse considerable precedent that sustained a value-based approach to proportionality.[3] In effect, the Commission modified its Fred Meyer Guides to require apparently that sellers must provide equal allowances to all buyers based upon cost alone, regardless of the value received by the seller from those expenditures.[4] The law is not completely clear because the Fred Meyer Guides are "guides," not exact prescriptions. On the one hand, the "guides" state that allowances that have little or no relationship to cost or approximate cost of the service provided by the retailer "*may* be considered to be in violation" of the law[5] while, on the other, "[n]o single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used."[6] One commentator generally sympathetic to the Robinson-Patman Act has noted that there has been no judicial explication of the Commission's 1972 modification, either [4] accepting it or attempting to interpret its limitations.[7] I think that the Commission could and should have clarified the scope of the 1972

[2] For one commentator's view *see* Rowe, *Price Discrimination Under the Robinson-Patman Act* 414 (1962). Rowe states that the original text of Section 2(d) requiring that proportionally equal treatment be "offered" to all customers was modified to provide only that it be "available." Thus, he argues that mandatory personal solicitation departs from the text (and purpose) of the Act.

[3] The Commission's "reasonableness approach," in which value to the seller could be taken into account, "was echoed in the courts and the Commission for years." ABA Antitrust Section, Monograph No. 4, II The Robinson-Patman Act: Policy and Law 66 (1983). *See also* III E. Kintner & J. Bauer, *Federal Antitrust Law* 557–66 (1983) for a discussion of the change in the Commission's approach.

[4] An example of a value-based approach to proportionality is found in *Lever Bros.*, 50 F.T.C. 494 (1953).

[5] 16 CFR 240.9, Example 1, n.2 (1985) (emphasis added).

[6] 16 CFR 240.7 (1985). Kintner states that the legislative history is ambiguous on this issue. Kinter, *supra*, at 558 n.130.

[7] Kintner, *supra*, at 565–66. Kintner argues that a strict "cost" standard would make implementation of legitimate promotional plans "cumbersome and expensive." *Id.* at 566.

modification before issuing this order.[8] Instead, the majority's approach forces Max Factor to guess the answer—with the prospect of heavy civil penalties for a wrong guess, and considerable uncertainty and legal expenses even for a correct guess.

For all these reasons, I respectfully disagree with the majority's decision to issue this specific consent order. It is indeed ironic that this order may prove to be yet another instance where the Robinson-Patman Act is enforced in a manner that penalizes, rather than protects, smaller competitors.

[8] After all, it may be contended that requiring equal payments to all buyers regardless of the value received by the seller is really a disguised price concession to the buyers who provide the least value. If so, the order could have the effect of forcing Max Factor to engage indirectly in economic price discrimination, which may be contrary to the purpose of Section 2 of the Robinson-Patman Act.

IN THE MATTER OF

ORKIN EXTERMINATING COMPANY, INC.

Docket 9176. Interlocutory Order, Oct. 16, 1986.

NOTICE OF INTENT TO RELEASE *IN CAMERA* INFORMATION

This is to advise Orkin Exterminating Company that, consistent with Section 21(d)(2) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(d)(2)(1982), and Commission Rule 3.45(a), 16 C.F.R. 3.45(a) (1986), the Commission intends to include in the public decisional documents in this proceeding certain information that the Administrative Law Judge received into the *in camera* record. The information that will be made public appears in those portions of the Initial Decision currently filed on the *in camera* record of this proceeding.

In making a determination to release *in camera* information in the course of an adjudicative proceeding, the Commission must balance the potential harm of such release to the protected party against the substantial interest in the public's having available the factual background underlying a Commission decision. Public knowledge of such information permits both improved evaluation of the fairness and wisdom of a given Commission decision and provides clearer guidance to affected parties. *See RSR Corp.*, 88 F.T.C. 206 and 88 F.T.C. 734 (1976).

Here we have concluded that the potential harm to Orkin Exterminating Company from release of the limited information cited above is slight and is outweighed by the value of making the basis of Commission decisions public to the greatest extent possible. In addition, most of the information in question already appears in the public binders of this proceeding rather than, or in addition to, the binder containing *in camera* material. The figures are at least two years old and do not appear to provide sufficient information to competitors to conclude that their release would impose a "clearly defined, serious injury" on Orkin. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). *See also Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), as modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

The information reflected in the portions of the Initial Decision cited above will be placed on the public record of this proceeding no sooner than ten calendar days from service of this notice upon counsel for Orkin Exterminating Company.

IN THE MATTER OF

ELECTRONIC SYSTEMS INTERNATIONAL, INC., ET AL.

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

Docket 9201. Complaint, Nov. 1, 1985—Decision, Oct. 30, 1986

This consent order requires, among other things, a Norcross, Ga. manufacturer and marketer of "SavIt" duty cyclers to cease making unsubstantiated representations as to the efficiency of its products or services. Additionally, respondents are required to request all dealers of its products to refrain from making the challenged claims and to recall all promotional material that does not conform to the proposed order.

Appearances

For the Commission: *Michael Dershowitz* and *Sandra N. Hammer.*

For the respondents: *R. Hal Meeks, Jr., Petterson, Young, Self & Asselin,* Atlanta, Ga.

COMPLAINT

The Federal Trade Commission, having reason to believe that Electronic Systems International, Inc., a corporation, and Gene B. Patterson, individually and as an officer of said corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Electronic Systems International, Inc. is a Georgia corporation with its principal office or place of business at 2797 Peterson Place, Norcross, Georgia.

(b) Gene B. Patterson is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of the corporation.

(c) Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, advertise, offer for sale, sell and distribute energy control devices for residential or small commercial use.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. In advertisements, some of which contain graphs and photographs, respondents have made various statements about the energy savings capability of their energy control devices sold under the brand name "SavIt," among others. Typical and illustrative of these statements, but not all-inclusive thereof, are the following from the advertisements attached hereto as Exhibits A and B:

SavIt is designed to reduce your heating and cooling cost 20% or more annually . . .

SavIt will save consumers a minimum of 20% and a maximum of 40% on their annual heating and cooling bills.

SavIt can pay for itself in energy savings in less than 18 months.

Competent and reliable tests or studies have verified the energy-saving claims made for SavIt.

SavIt qualifies for an energy tax credit.

PAR. 5. Through the use of the above statements, and other statements in advertisements not specifically set forth herein, respondents have made the following material representations, directly or by implication:

(1) Use of the SavIt energy control device will save consumers at least 20% and possibly as much as 40% on their annual small commercial or home heating and cooling bills.

(2) It can take less than 18 months for consumers to save enough money on their small commercial or home heating and cooling bills by using the SavIt energy control device to recoup the retail cost of the SavIt energy control device.

(3) Competent and reliable tests or studies have verified that consumers will save at least 20% and possibly as much as 40% on their annual small commercial or home heating and cooling bills by using the SavIt energy control device.

(4) SavIt is a qualified energy conservation product according to the U.S. Tax Code, thereby permitting purchasers of the product to obtain a tax credit and reduce their federal income tax liability.

PAR. 6. In truth and in fact:

(1) Consumers will not save 20%, or close to 20%, on their annual small commercial or home heating and cooling bills as a result of using the SavIt energy control device.

(2) Few, if any, consumers can save enough money on their small commercial or home heating and cooling bills by using the SavIt

energy control device to recoup the cost of the SavIt device within 18 months, or close to 18 months.

(3) Energy savings of 20% to 40% on consumers' annual small commercial or home heating and cooling bills due to the use of the SavIt energy control device have not been verified by competent and reliable tests or studies.

(4) SavIt is not a qualified energy conservation product according to the U.S. Tax Code. Therefore, purchasers of SavIt cannot obtain a tax credit or reduce their federal income tax liability by purchasing the product.

Therefore, the representations set forth in Paragraph Five were, and are, false and misleading.

PAR. 7. Through the use of the statements set forth in Paragraph Four, and others not specifically set forth herein, respondents have represented, directly or by implication, that at the time of making the representations set forth in Paragraph Five they possessed and relied upon a reasonable basis for those representations.

PAR. 8. In truth and in fact, at the time of the initial dissemination of the representations and each subsequent dissemination, respondents did not possess and rely upon a reasonable basis for making those representations because, *inter alia,* respondents' test protocols and calculations were not designed or conducted in a manner to produce competent, reliable and statistically meaningful results. Therefore, respondents' representations, as set forth in Paragraph Seven, were, and are, false and misleading.

PAR. 9. The acts or practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

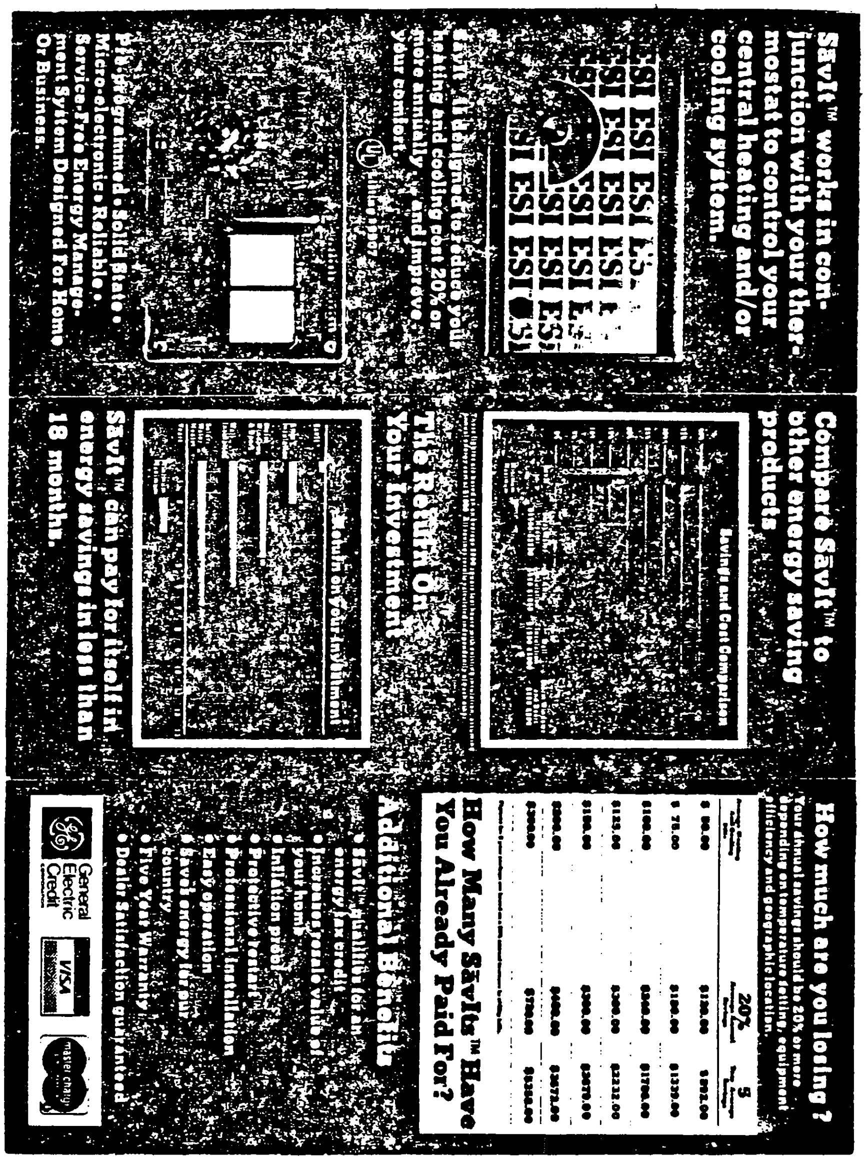

SāvIt™ works in conjunction with your thermostat to control your central heating and/or cooling system.
SāvIt™ is designed to reduce your heating and cooling cost 20% or more annually ... and improve your comfort.
Pre-programmed • Solid State • Micro-electronic • Reliable • Service-Free Energy Management System Designed For Home Or Business.
Compare SāvIt™ to other energy saving products
Savings and Cost Comparison
The Return On Your Investment
Return on your investment
SāvIt™ can pay for itself in energy savings in less than 18 months.
How much are you losing?
Your annual savings should be 20% or more depending on temperature setting, equipment efficiency and geographic location.
20%
5
How Many SāvIts™ Have You Already Paid For?
Additional Benefits
• SāvIt™ qualifies for an energy tax credit
• Increases resale value of your home
• Inflation proof
• Protective restart
• Professional installation
• Easy operation
• Saves energy for our country
• Five Year Warranty
• Dealer Satisfaction guaranteed
General Electric Credit
VISA
master charge

Exhibit "A"

EXHIBIT B

Exhibit "B"

How much are you LOSING?

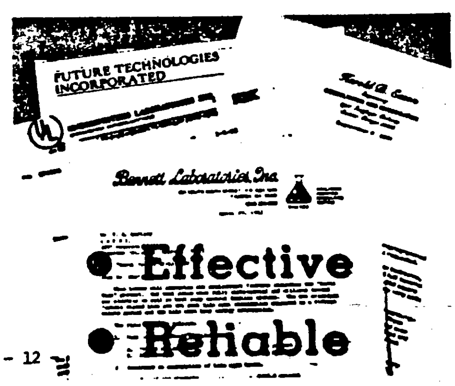
Average Monthly Heating/Cooling Bill	20% Average Annual Savings	5 Year Average Savings
$ 50.00	$120.00	$892.00
$ 75.00	$180.00	$1339.00
$100.00	$240.00	$1786.00
$125.00	$300.00	$2232.00
$150.00	$360.00	$2679.00
$200.00	$480.00	$3572.00
$300.00	$720.00	$5358.00

Figures for 5 year savings are based on a 20% annual increase in utility bills.

Featured In The Energy Saving House Of The 1982 World's Fair

The theme "Energy Turns the World" was chosen by the 1982 World's Fair™ to provide an international focal point for solutions to the world's energy crisis. The Energy Saving House™ of the World's Fair was initiated to show visitors from all over the world the most energy efficient conservation methods and products for homes like yours.

The Product Review Board of the Energy Saving House chose $avIt™ as a practical, reliable product that provides immediate answers to residential energy conservation. It is the only home and light commercial energy management system chosen to be displayed in the Energy Saving House.



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DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Electronic Systems International, Inc. is a Georgia corporation with its principal office and place of business at 2797 Peterson Place, Norcross, Georgia.

Respondent Gene B. Patterson is an officer of the corporate respondent. He actively participated in the advertising practices which are the subject of the complaint issued by the Federal Trade Commission. His address is the same as that of the corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this order, the following definitions shall apply:

Energy-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to energy savings, energy cost savings, efficiency or conservation, "payback," or "payback" potential.

A *competent and reliable test* means any scientific, engineering, laboratory, or other analytical report, study or survey prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation and analytical procedures that ensure accurate, reliable and statistically meaningful results.

Small commercial heating and cooling systems are similar to residential, central forced air type systems.

A *duty-cycler* (sometimes referred to as a *cyclic controller*) means any electronic device which:

(a) functions to interrupt a thermostatically-controlled cycle of any single, residential or small commercial, forced air central heating or air conditioning unit; or which

(b) may be incorporated in any other product, such as a setback thermostat, to function in the manner described in (a) above.

Respondents market their duty-cycler under the brand name "Sav-It"™, among others.

A *duty-cycler* is not:

(a) a residential setback thermostat; or

(b) an energy load management or control device used in large commercial or industrial settings to turn off a series of electrical heating, cooling, or ventilating equipment for predetermined periods of time during operating hours to reduce consumption and demand (*i.e.*, the rate at which electric energy is delivered to the series of equipment.)

PART I

It is ordered, That respondents Electronic Systems International, Inc., a corporation, its successors and assigns, and its officers, and Gene B. Patterson, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any duty-cycler or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, in any manner that:

(1) Consumers will save 20%, or close to 20%, on their annual small

commercial or home heating and cooling bills as a result of using a duty-cycler, as defined herein.

(2) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using respondents' duty-cycler, as defined herein, to recoup a retail cost of approximately $400 within 18 months, or close to 18 months.

(3) More than a few consumers may be able to save enough money on their small commercial or home heating and cooling bills by using any duty-cycler, as defined herein, costing approximately $400 to recoup such cost within 18 months, or close to 18 months.

(4) Consumers can obtain a federal tax credit or reduce their federal income tax liability, by purchasing a duty-cycler, as defined herein, unless such is the case.

B. Making any energy-related claim for any duty-cycler, or any other product or service, unless at the time that the claim is made, respondents possess and rely upon a competent and reliable test or other objective material which substantiates the claim.

C. Misrepresenting, directly or by implication, in any manner, the purpose, content, or conclusion of any test, study, or survey upon which respondents rely as substantiation for any energy-related claim, or making any representation which is inconsistent with the results or conclusions of any such test, study or survey.

PART II

It is further ordered, That respondents Electronic Systems International, Inc., a corporation, its successors and assigns, and its officers, and Gene B. Patterson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution of any duty-cycler or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall, for at least three years from the date of the last dissemination of energy-related claims, maintain and upon request make available to Federal Trade Commission staff for inspection and copying, copies of:

1. all materials relied upon to substantiate any energy-related claim; and

2. all test reports, studies, surveys or demonstrations in their possession that contradict, qualify, or call into question any energy-related claim.

PART III

It is further ordered, That respondents shall:

A. Within thirty (30) days after the date of service of this order, send the following material via first class mail to every person or firm that is a current distributor or dealer of respondents' duty-cycler equipment:

1. a copy of this order, and
2. a copy of the cover letter attached to this order as Attachment A, incorporated herein by reference.

B. Distribute a copy of this order to each of respondents' operating divisions, and to each of its officers, agents, representatives or employees engaged in the preparation or placement of advertisements or other sales materials.

C. Supply to the Federal Trade Commission upon request the names and addresses of those parties to whom respondents distributed the material required by Paragraphs A and B of Part III of this order.

PART IV

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

PART V

It is further ordered, That each individual respondent named herein shall for a period of 3 years from the date of service of this order, promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment whose activities include the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices and of his affiliation with any new business or employment in which his own duties and responsibilities involve the manufacture, advertising, promotion, offering for sale, sale, or distribution of energy control devices, with each such notice to include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

PART VI

It is further ordered, That respondents shall, within sixty (60) days after this order becomes final, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order.

ATTACHMENT A

ELECTRONIC SYSTEMS INTERNATIONAL, INC. LETTERHEAD

Re: Settlement with Federal Trade Commission

Dear Electronic Systems International, Inc. Dealer:

As a result of a Federal Trade Commission investigation of advertising claims for our duty-cycler product, we have entered into the enclosed Settlement Agreement and Order. The Agreement is for settlement purposes only and does not constitute an admission that we violated the law. At issue in the investigation were a number of energy cost savings, payback and federal energy tax credit claims.

We have agreed to stop making certain claims in the future and to refrain from using all promotional material that may contain such claims. In order to ensure that such claims will no longer be made, we request that you refrain from making them, either orally or in writing, and from distributing any literature in your possession which does not conform to the enclosed agreement. Please return to us any promotional literature or film concerning the duty-cycler and we will replace it with updated literature and an edited film as appropriate.

Thank you for your assistance in this matter.

Sincerely,

President
Electronic Systems International, Inc.

IN THE MATTER OF

GCS ELECTRONICS, INC., ET AL.

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

Docket C-3202. Complaint, Oct. 30, 1986—Decision, Oct. 30, 1986

This consent order prohibits, among other things, a Costa Mesa, Calif. electronics company from making unsubstantiated claims about the capabilities of its portable "Mark II Executive Phone."

Appearances

For the Commission: *Steven A. Shaffer* and *Joel Winston.*

For the respondents: *Pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that GCS Electronics, Inc., a corporation, and Gene Comfort, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. GCS is a California corporation, with its offices and principal place of business at 3200 Park Center Drive, 7th Floor, Costa Mesa, California.

Respondent Gene Comfort is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His office and principal place of business is the same as that of the corporation.

Respondents cooperate and act together in carrying out the acts and practices alleged in this complaint.

PAR. 2. Respondents manufacture, advertise, offer for sale, and sell mobile radiotelephones and mobile radiotelephone equipment, including the GCS Executive Phone Mark II ("Mark II").

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce.

PAR. 4. Typical of respondents' advertisements for the Mark II, but not necessarily all-inclusive thereof, are attached hereto as Attachments A and B. The aforesaid advertisements contain the following statements:

(a) up to 50 mile (80 kilometer) range.
(b) 50 MILE RANGE—
With your new Mark II, you enjoy an incredible up to 50–mile receiving range - 80 kilometers - an unheard of over 1200 square mile coverage in each city!
This range, which varies somewhat plus or minus depending upon local conditions, is measured on a diameter usually from the center of your town or almost any city or town you happen to be visiting.
(c) You merely answer and talk direct as you would on any other telephone, a very easy operation.
(d) It is not a CB. It's not a walkie-talkie.

PAR. 5. Through the use of the statements referred to in Paragraph Four (a)-(b) and others in advertisements not specifically set forth herein, respondents have represented, directly or by implication, that:

(a) An appreciable number of users of the Mark II will achieve a range of 50 miles or close to 50 miles, measured between the user and the center of almost any city or town in the United States, under circumstances reasonably foreseen by consumers.
(b) Every user of the Mark II will achieve a range reasonably close to 50 miles.
(c) Every user of the Mark II will achieve a coverage of at least 1200 square miles in each city.
(d) The Mark II allows the user to transmit and receive messages simultaneously.
PAR. 6. In truth and in fact,

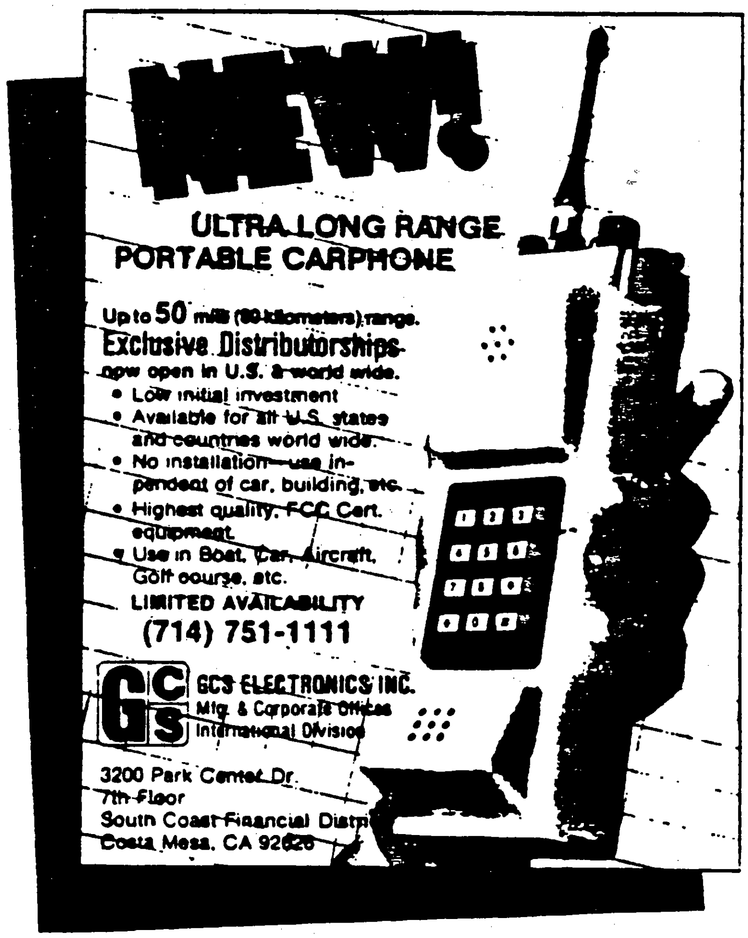
(a) few, if any, consumers using the Mark II will achieve a range of 50 miles or close to 50 miles under reasonably foreseen circumstances.
(b) Not every user of the Mark II will achieve a range reasonably close to 50 miles.
(c) Not every user of the Mark II will achieve a coverage of at least 1200 square miles in each city.
(d) The Mark II does not allow the user to transmit and receive messages simultaneously.

Therefore, respondents' representations as set forth in Paragraph Five were and are false and misleading.
PAR. 7. Through the use of the statements and representations set forth in Paragraphs Four and Five and others not specifically set forth herein, respondents have represented, directly or by implication, that they possessed and relied upon a reasonable basis for such representations at the time they made the representations.

PAR. 8. In truth and in fact, at the time respondents made these representations, respondents did not possess and rely upon a reasonable basis for such representations. Therefore, respondents' representations as set forth in Paragraph Seven were and are false and misleading.

PAR. 9. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

ATTACHMENT A



ATTACHMENT A

ATTACHMENT B

The Portable Executive Communicator

MARK II

ATTACHMENT B

MARK II GCS Executive Phone

Everything you've ever wanted in your own personal go-everywhere communications system.

WORKS LIKE A DREAM

It is a dream come true. Executive Phone Mark II is the telephone system you've always dreamed of but never thought you'd see in your lifetime.

Imagine yourself relaxing at your favorite hideaway in or near your city. Is today the day you'll receive the important call you've been waiting for — the one that will net you thousands, even hundreds of thousands, of dollars?

You don't know. But you're prepared. You take your Mark II with you everywhere: in the car, to restaurants, out on the golf course, in office buildings, day or night, everywhere.

Now! There it is! There's that vital call! You didn't miss it, thanks to your Executive Phone Mark II. It alerted you immediately with a gentle electronic tone!

Isn't this the communications tool you've always wanted? A phone with no external wires at all? A phone on which people can reach you, you can reach them — indoors or out — in almost any city?

YES, THE MARK II IS EXPENSIVE

Highly sophisticated space-age technology makes GCS Executive Phone a miracle not everyone can afford. But if you can afford it, you're probably successful enough, and your time valuable enough, you can scarcely afford to be without it.

If you are one of those fortunate few who have "arrived," you increase both your efficiency and your pleasure with the Executive Phone. Call your office from the board room in a skyscraper clear across town. Receive important messages while dining at a restaurant. Make appointments from your car. Close a contract from the dock at your marina. Play a worryfree round of golf knowing you won't miss that important call. Check on your stocks while lazing on the beach. Put your deadtime to work: change an appointment while waiting in a line at the airport.

If you're this caliber of person, you can doubtless add appreciably to your success, and that of your company, with this extraordinary communications tool.

But the clincher is the fantastic "speed of light" range — the feature that make GCS Executive Phone the most versatile communications tool of this century.

50-MILE RANGE —

With your new Mark II you enjoy an incredible up to 50-mile receiving range — 80 kilometers — an unheard of over 1200 square mile coverage in each city!

This range, which varies somewhat plus or minus depending upon local conditions, is measured on a diameter usually from the center of your town or almost any city or town you happen to be visiting. And it matters little where you are — in the basement, in an underground parking garage, in the very center of a large shopping center — there's virtually no escape for Executive Phone's powerful and sophisticated electronics. However, if you wish privacy, merely switch off your Mark II and a secretary will automatically answer all your calls, holding messages for you.

USE IN ALL 50 STATES

GCS Executive Phone can be used on many services located in all cities throughout the United States, including Alaska and Hawaii. Just punch the button on your hand held transmitter receiver to call direct from any of thousands of U.S. cities.

Your hook up is only $30-$40 a month (average). We will assist in registering you. Any long distance calls you make are charged at a normal rate. Some areas may add a small per-minute charge. However, all expenses are a write-off if business related.

USE INTERNATIONALLY

Do you travel abroad? With adjustments, your Mark II can be used in any country of the world — even those that have no tele-inter connect facilities. GCS has a complete assortment of auxiliary equipment that permits your Executive Phone to be used with any telephone system on any continent.

PRIVATE UNLISTED NUMBER

You don't have to be a radio operator, CB-er, manipulate a lot of buttons, or have any technical training to use the Mark II. In fact, no license is necessary. Callers reach you on your own private unlisted number. You merely answer and talk direct as you would on any other telephone, a very easy operation.

People can call you, you can call them, whether you're at your home base city or traveling elsewhere.

A ONE-OF-A-KIND INSTRUMENT

The GCS Executive Phone Mark II is not to be confused with any other kind of communications device. It's not a CB. It's not a walkie-talkie. It's not one of those short range portables selling for less money that you can carry only as far as your back yard pool.

The Mark II is a highly sophisticated space-age long range instrument that keeps you in communication with important matters all over the entire city. It is the only equipment of its kind and it eliminates the need for car phones or beepers.

EXECUTIVE FEATURES

The instrument you see pictured is all there is to the Mark II. It's all self contained. There's no cradle, no instrument base, nor any other kind of auxiliary equipment to carry with you. The antenna is virtually internal; there's no long mast to reel out.

The complete Executive Phone weighs only [illegible] ounces [illegible] kilograms. It can be carried out of sight — in your pocket, briefcase, glove compartment, or golf bag — until that important call comes in.

The Mark II has special features such as a control you can turn up so a roomful of people can hear a conference call — or that you can turn way down for complete privacy. But for most functions, the instrument has the standard push buttons you're used to using on any touch telephone.

In short, the Mark II has the features you want:

- Direct Dial*
- Single Touch Operation
- Totally Portable
- Rechargeable Battery
- [illegible] Channels
- FCC Approved
- No Wires of Any Type
- Full [illegible] Year Warranty
- Immediate Delivery
- Micro Circuitry Technology
- Available Throughout the U.S.
- International Models Available

TAX WRITE-OFF

That's another big benefit. If you use your new GCS Executive Phone for business, you can deduct phone calls, service charges, interest expense, depreciation and filing fees. The first year you can take a [illegible] investment tax credit and deduct it from any taxes due. The investment tax credit alone will probably give you free use of the instrument the first year. Check with your accountant on these matters.

* [illegible]

ATTACHMENT B


Incredible Power
Up to
50 Mile
Range
Worldwide
ATTACHMENT B

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent GCS Electronics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 3200 Park Center Drive, 7th Floor, in the City of Costa Mesa, State of California.

Respondent Gene Comfort is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

Definition

Range-related claim means any general or specific, oral or written representation that, directly or by implication, describes or refers to the distance over which a radiotelephone communications device will receive and transmit signals that are of commercially useable quality.

I.

It is ordered, That respondents GCS Electronics, Inc., a corporation, its successors and assigns, and its officers, and Gene Comfort, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any mobile telephone or other radiotelephone communications device in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing in any manner, directly or by implication, any performance characteristic of any such device unless at the time of such representation, respondents possess and rely upon a reasonable basis for such representation, consisting of competent and reliable evidence which substantiates such representation.

B. Making any range-related claim about any such device which uses the phrase "up to" or words of similar import unless the maximum level of performance can be achieved by an appreciable number of consumers; and further, in any instances where consumers could not reasonably foresee the major factors or conditions affecting the maximum level of performance, cease and desist from failing to disclose clearly and prominently the class of consumers who can achieve the maximum level of performance.

C. Misrepresenting in any manner, directly or by implication, the range or coverage of any such device.

D. Misrepresenting in any manner, directly or by implication, the ability of any such device to transmit and receive messages simultaneously.

II.

It is further ordered, That for three years from the date that the representations to which they pertain are last disseminated, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys or other materials in their possession or control that contradict, qualify or call into question such representation or the basis upon which respondents relied for such representation.

III.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations under this order.

IV.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any obligation arising under this order.

V.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, file with the Commission a written report setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BENEFICIAL CORPORATION, ET AL.

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

Docket 8922. Consent Order, Sept. 12, 1979—Modifying Order, Nov. 3, 1986

The Federal Trade Commission has modified a 1979 consent order (94 F.T.C. 425) by: (1) removing a prohibition on the use of the term "instant tax refund", but requiring respondents to disclose that a fee is involved and to make the refund within five days; (2) deleting a requirement that respondents disclose all terms of their guarantees in ads and replacing it with a provision allowing respondents to disclose that full details can be obtained by reading the guarantee; (3) requiring respondents to disclose that their offer to pay obligations resulting from the companys' errors does not include payment of taxes that its customers owe; (4) modifying a prohibition against advertising the expertise of their tax preparers by allowing claims that can be substantiated; and (5) modifying a prohibition against the disclosure of confidential taxpayer information, by allowing such disclosure if IRS procedures are followed.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On May 28, 1986, Beneficial Corporation, and Beneficial Management Corporation, both Delaware corporations, filed a request to reopen and modify the order entered against them by the Commission on September 12, 1979, in Docket No. 8922 (94 F.T.C. 425).

The request to reopen and modify was placed on the public record and a press release was issued on June 12, 1986. The public comment period ended on July 14, 1986, and two comments were filed. The deadline to rule on petitioners' request has been extended to November 3, 1986.

Petitioners are engaged in the advertising and sale of an income tax preparation service for individual taxpayers. The order: prohibits use of the term "instant tax refund"; requires disclosure of all terms of a guarantee; prohibits a misrepresentation of the reimbursement petitioner will make to consumers in the event of an error and requires a disclosure that petitioner will not reimburse the consumer for additional taxes; makes absolute prohibitions against the implication that more of its customers receive refunds than taxpayers at large; and that their personnel are experts or unusually competent. The order further sets up a format to be followed pertaining to the consumers' consent to use information obtained from them.

Petitioners assert that changed conditions of fact and law and the public interest require that certain paragraphs of the order be modified. Specifically, they request: that Paragraph 1 be modified so that they can use the term "instant tax refund" under certain circumstances; that Paragraph 2 be modified to limit the terms that must be disclosed in a guarantee; that Paragraphs 5 and 6 be modified to eliminate the absolute prohibitions regarding the percentage of customers who receive refunds and the competency of their personnel, to permit truthful and non-deceptive representations; and that Paragraph 7 be modified to conform to the Internal Revenue Code standard for obtaining the consent of the consumer to use information instead of the format provided in the order.

Paragraph 1 of the Order

Paragraph 1 of the order prohibits use of the term "instant tax refund" or like phrases, unless petitioner discloses that this refund is a "normal" loan with no relationship to the tax refund, and that the taxpayer will be expected to meet the normal qualifications for borrowing. Petitioners state that there has been a change in fact in that they are now able to participate with the Internal Revenue Service in an electronic filing program, in certain market areas, by which the IRS expects to be able to reduce the time for issuing refunds by approximately three weeks. Based on this expectation petitioner arranges with a bank and the taxpayer to have the bank grant the taxpayer an interest free loan in 3 days. There is a charge for this service. The taxpayer agrees to have his refund sent to the bank to repay the loan, and any interest charge by the bank during this period is paid by the petitioner. Petitioner proposes to modify the order so that they can advertise this procedure as an "instant tax refund" without the required disclosures, in those market areas in which they are participating with the IRS in the electronic filing program. The order provision will otherwise stay in effect in areas in which the IRS is not using the program.

When the Commission issued the order it suggested that if petitioners should begin offering a special loan service actually related to the tax refund, they might seek to reopen the order. The Commission agrees with the petitioners that Paragraph 1 should be modified to reflect the stated changed factual condition. However, since there is a charge for the service, and in order to regulate the term "instant", respondents have consented to modify Paragraph 1 to prohibit any implication that there is no charge, and to limit the time within which the taxpayer will receive his loan money.

Paragraph 2

Paragraph 2 prohibits "Using any guarantee without clearly and conspicuously disclosing the terms, conditions and limitations in any such guarantee, or misrepresenting in any manner the terms and conditions of any guarantee." Petitioners state that this could be burdensome in attempting to include all details of a guarantee in a 30-second television commercial. When the order was issued the Commission was concerned about the guarantee that petitioners would reimburse consumers for any interest or penalty charges caused by petitioners' error in the preparation of a tax return but would not pay any additional tax. The Commission wanted this term disclosed and specifically required it in Paragraph 4 of the order. The proposed language would retain the disclosure that petitioners do not pay additional tax in the event of the error but that the consumer should look to the guarantee for all other terms and would read as follows:

Subject to the disclosure required by Paragraph 4, herein, using any guarantee without clearly and conspicuously disclosing the fact that any terms, conditions, or limitations are stated in the guarantee; or misrepresenting in any manner the terms and conditions of any guarantee.

The Commission agrees with the petitioners that it is in the public interest to modify Paragraph 2 since it is burdensome, and the modified paragraph will retain the main condition that the Commission was concerned about and will advise the consumer to read the guarantee for any other conditions. Such a provision should not be deceptive or misleading.

Paragraph 5

Paragraph 5 is an absolute prohibition against any representation that the percentage of respondents' customers who receive tax refunds is greater than the percentage of individual taxpayers at large who receive refunds. Petitioners request that the paragraph be modified so that they can make truthful and non-deceptive representations about the percentage of their customers who receive refunds. Accordingly, they request to add a clause stating ". . . *provided however*, that nothing herein shall prevent truthful and non-deceptive representations with respect to the average percentage of respondents' customers who receive tax refunds."

The Commission agrees that petitioners should be allowed to make truthful and non-deceptive representations. Any deceptive implication is prohibited, but the absolute prohibition is modified so that a representation that does not cause a deceptive implication may be used.

Paragraph 6

This paragraph is an absolute prohibition against representations about the competence of respondents' tax preparing personnel. Respondents state that there is a change in fact as to the extent of training which the personnel are required to undergo compared to the training required at the time the order was issued. They also cite the change in law with respect to commercial or professional advertising and cite examples of competitors advertising the terms "expert" or "professional". They request that the paragraph be modified to prohibit: "Misrepresenting, in any manner, the competence or the ability of respondents' tax preparing personnel."

The Commission agrees that the extent of training which petitioners' personnel are now required to undergo constitutes a change in fact which justifies modification of the absolute prohibition of this paragraph to prohibit only misrepresentations of competence.

Paragraph 7

Paragraph 7 of the order establishes the format to be followed in obtaining the consent of taxpayers to use information obtained in preparing the tax return. Respondents state that since the order was issued, Section 7216 of the Internal Revenue Code establishes a required format. This accomplishes the same purpose and gives the consumer the same protection, but use of both formats becomes overlapping and burdensome. Moreover, respondents cite the fact that the Commission has amended the *H&R Block* order and the proposed modification is exactly the same language as in the *Block* order. [100 F.T.C. 523 (1982)]

The Commission agrees that compliance with the provisions of the Internal Revenue Code will accomplish the same purpose as the existing order and that respondents should not be required to use two formats, and therefore, agrees that this paragraph of the order should be modified.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) requires that an order be modified or set aside upon a satisfactory showing that changed conditions of law or fact require that the order be altered, modified or set aside. The Commission has concluded that respondents have adequately shown that changed conditions of law and fact require that the order be modified in the manner requested.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on September 12, 1979, is hereby modified to read as follows:

Order

It is ordered, That respondents, Beneficial Corporation and Beneficial Management Corporation, corporations, and their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the preparation of income tax returns or the extension of consumer credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Instant Tax Refund" or "Immediate Tax Refund" or like phrases using words of similar import or meaning, unless such phrases are used in connection with an electronic refund program in which the respondents participate in conjunction with the United States Internal Revenue Service; *provided, however,* that such phrases will not be used if a loan is being offered that has no relationship to the individual's income tax refund, or refers to a "normal", "usual", "standard" or "regular" loan by the respondents, or is a loan with respect to which the prospective borrowers will be expected to meet qualifications to borrow which are "normal", "usual", "standard" or "regular" (or words having the same or equivalent meaning) under the respondents' loan qualification criteria; *provided further, however,* that each individual will receive the loan money within five days of applying for the loan, (respondents will not be responsible for any delay caused by the Postal Service), and that no advertisement relating to any such loan represents directly or by implication, contrary to fact, that there is no service charge for the refund program involving a loan.
2. Subject to the disclosure required by Paragraph 4, herein, using any guarantee without clearly and conspicuously disclosing the fact that any terms, conditions, or limitations are stated in the guarantee; or misrepresenting, in any manner, the terms and conditions of any guarantee.
3. Representing, directly or by implication, that respondents will reimburse their customers for any payments the customer may be required to make in addition to his initial tax payment, in instances where such additional payment results from an error by respondents in the preparation of the tax return; *provided, however,* that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.
4. Failing to disclose, clearly and conspicuously, whenever respondents make any representation, directly or by implication, as to their responsibility for, or obligation resulting from, errors attributable to

respondents in the preparation of tax returns, that respondents will not reimburse the taxpayer for any deficiency payment which results from said errors; *provided, however,* that it shall be a defense in any enforcement proceeding for respondents to establish that they make such payments.

5. Representing, directly or by implication, that the percentage of respondents' customers who receive tax refunds is demonstrably greater than the percentage of individual taxpayers at large who receive refunds; or misrepresenting, in any manner, the magnitude or frequency of refunds received by respondents' tax preparation customers; *provided, however,* that nothing herein shall prevent truthful and non-deceptive representations with respect to the average percentage of respondents' customers who receive tax refunds.

6. Misrepresenting, in any manner, the competence or ability of respondents' tax preparing personnel.

7. Using information concerning any customers of respondents, including the name and/or address of the customer, obtained as a result of the preparation of the customer's tax return for any purpose which is not essential or necessary for the preparation of said tax return, except as specifically authorized by the Internal Revenue Service pursuant to Section 7216 of the Internal Revenue Code and the regulations promulgated thereunder or by future amendments thereto.

IN THE MATTER OF

ROSWIL, INC.

trading and doing business as

RAMEY SUPER MARKETS

CONSENT ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9172. Complaint, Dec. 16, 1983—Decision, Nov. 12, 1986*

This consent order requires a Springfield, Mo. grocer, among other things, to cease engaging in concerted action that restricts the gathering or reporting of comparative grocery price data. Additionally, respondent is prohibited from: (1) requiring price checkers to buy the surveyed items; (2) denying price checkers the same access to Roswil's stores as customers; and (3) coercing any price checker, publisher or broadcaster into discontinuing price reporting. Further, respondent is required to take several steps to increase the likelihood that price surveys will be resumed in Springfield, Missouri. According to the order, the company must reimburse the local cable television station up to $1,000 of its costs if it decides to broadcast a comparative grocery price program and notify the public that such program will be aired.

Appearances

For the Commission: *Patricia A. Bremer.*

For the respondent: *Donald W. Jones, Hulston, Jones & Sullivan,* Springfield, Mo.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such com-

* Complaint previously published at 104 F.T.C. 526 (1984).

plaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to § 3.25 of its Rules, now in further conformity with the procedure prescribed in § 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Roswil, Inc., is a Missouri corporation, trading and doing business as Ramey Super Markets. Its registered agent is Flavius Freeman, 1–130 Corporate Square, Springfield, Missouri.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

For the purpose of this order, the following definitions shall apply:

A. *Roswil* means Roswil, Inc., its divisions and subsidiaries, officers, directors, representatives, agents, employees, successors and assigns.

B. *Price check* or *price checking* means the collecting, from information available to customers, of retail prices of items offered for sale by any retail grocery store (SIC 5411), which is done neither by nor on behalf of a person engaged in the sale of groceries, and which information is used in price reporting.

C. *Price checker* means any person engaged in price checking.

D. *Price reporting* or *price report* means the dissemination to the public of price checking information through any medium by any person not engaged in the sale of groceries.

E. *Springfield* means the counties of Christian and Greene, Missouri.

F. *Customer* means any individual who enters a retail grocery store for the purpose of grocery shopping, whether or not that individual actually makes a purchase.

G. *Person* means individuals, corporations, partnerships, unincorporated associations, and any other business entity.

H. *Geographic area* means: (1) a Standard Metropolitan Statistical

Area as defined by the Bureau of the Census, U.S. Department of Commerce, as of October 1, 1982; or (2) a county.

I. *Supermarket* means any retail grocery store (SIC 5411) with annual sales of more than one million dollars ($1,000,000.00).

II.

It is ordered, That:

A. Roswil shall forthwith cease and desist from taking any action in concert with any other person engaged in the sale of grocery products which has the purpose or effect of restricting, impeding, interfering with or preventing price checking or price reporting.

B. Except as provided in Paragraphs II.C. and II.D., until September 7, 1989, Roswil shall cease and desist from taking or threatening to take any unilateral action that would:

1. Require price checkers to purchase items to be price checked as a condition of allowing them to price check; or

2. Deny price checkers the same access to Roswil's supermarkets as is provided to customers; or

3. Coerce, or attempt to coerce, any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting.

C. 1. Nothing in Paragraph II.B. shall prevent Roswil from adopting reasonable, non-discriminatory rules governing the number of price checkers in its supermarkets at any one time for the purpose of preventing disruption of Roswil's normal business operations.

2. Nothing in subparagraph II.B.3. shall prevent Roswil from publicly commenting upon or objecting to any price report in which its prices are compared to those of any other grocery retailer.

3. Whenever Roswil believes that conditions exist that justify the exclusion of a price checker, it may submit to the Federal Trade Commission a sworn statement setting forth with particularity the facts that Roswil believes meet such conditions. For purposes of this order, the only conditions justifying the exclusion of a price checker are that another supermarket operator with whose prices Roswil's prices are compared in a price report has knowingly tampered with or manipulated the results of such price report for its own competitive gain either (a) by the use of information wrongfully obtained and not available to all supermarket operators whose prices are being compared, or (b) by inducing any price reporter or price checker to cause false information to be published or broadcast. Following the Federal Trade Commission's actual receipt of such statement, Roswil may exclude the price checkers from its supermarkets in the geographic

area(s) covered by the affected price report for so long as the conditions set forth in Roswil's statement shall exist. In any civil penalty action against Roswil for a violation of subparagraph II.B.2. occurring after notice to the Federal Trade Commission was given by Roswil as provided in this subparagraph, Roswil shall have the burden of proving, by a preponderance of the evidence, that the conditions justifying the exclusion of a price checker as set forth in this subparagraph have been met. In meeting its burden, Roswil may offer evidence only for the purpose of proving the facts set forth in its statement to the Federal Trade Commission. Nothing in this subparagraph shall be construed to be an exception to the prohibitions of Paragraph II.A. of this order.

D. 1. Nothing in Paragraph II.B. shall prohibit Roswil from requiring any company to pay a fee for collecting in its stores information that is not available to customers.

2. Nothing in Paragraph II.B. shall prohibit Roswil from requiring any company to pay a fee for collecting information in its stores, if said company is presently or has been under contract to Roswil to pay such a fee for collecting such information, or if the primary purpose of collection such information is not to disseminate it to the public.

III.

It is further ordered, That, upon the resumption of price reporting by TeleCable of Springfield that is similar in quality and coverage to that broadcast by it prior to October 14, 1981, and that includes any Roswil supermarket, and upon receipt by Roswil of written request for payment from TeleCable, Roswil shall reimburse TeleCable for its actual cost of obtaining a price reporting program up to the amount of two hundred fifty dollars ($250.00) per week. Roswil's obligation under this Part (III) shall terminate either when it has reimbursed TeleCable in the total amount of one thousand dollars ($1,000.00) or three (3) years following the date on which this order becomes final, whichever occurs first. Roswil shall not reimburse TeleCable for costs incurred by TeleCable during any week for which TeleCable's costs are reimbursed by any other person.

IV.

It is further ordered, That, within seven (7) days following the date on which this order becomes final, Roswil shall send a letter, a copy of which is attached here as Exhibit A, together with a copy of this order, to TeleCable of Springfield, informing TeleCable of Roswil's obligations under Parts II and V of this order, TeleCable's rights under Part III, and the notices that Roswil must receive from TeleCable before certain order provisions become binding upon Roswil.

V.

It is further ordered, That, if at any time during the two years following the date on which this order becomes final, Roswil is notified in writing by TeleCable of Springfield that price reporting that includes any of Roswil's supermarkets has resumed in Springfield:

A. For a period of sixty (60) days following the receipt of such notice, Roswil shall post signs no smaller than 30 inches by 40 inches in a front window in each of Roswil's supermarkets in Springfield, stating:

GROCERY PRICE SURVEY

A price survey comparing prices of selected grocery items at Ramey's and other Springfield grocery supermarkets is being broadcast over cable television. This comparative price survey can be seen on channel ______ and is broadcast from __________ to __________.

B. For a period of sixty (60) days following the receipt of such notice, whenever Roswil places food advertisements of one-half page or larger in any printed advertising medium with circulation of 15,000 or more copies in Springfield, Roswil shall publish an announcement as a part thereof in the same language provided in Paragraph V.A. This announcement shall be no smaller than 3 inches high by 3 inches wide and shall be printed in conspicuous type. In each week in which Roswil does not place a one-half page or larger food advertisement in such printed advertising medium, Roswil shall place this announcement as a display advertisement in any printed advertising medium with circulation of 15,000 or more copies in Springfield.

VI.

It is further ordered, That Roswil shall, within seven (7) days after the date on which this order becomes final, and once a year thereafter for three years, provide a copy of this order to each of its officers actively engaged in the operation of its supermarkets in Springfield and to each manager of a Ramey supermarket located in Springfield, and secure from each such individual a signed statement acknowledging receipt of this order.

VII.

It is further ordered, That Roswil shall, within sixty (60) days after the date on which this order becomes final, file with the Commission a verified written report, setting forth in detail the manner and form in which Roswil has complied with this order. Additional reports shall be filed at such other times as the Commission may by written notice require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this order.

VIII.

It is further ordered, That Roswil shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in it such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corporation or its retail grocery operations, which may affect compliance obligations arising out of this order.

EXHIBIT A

TeleCable of Springfield
1533 South Enterprise
Springfield, Missouri 65801

Dear Sir or Madam:

This is to notify you that Roswil, Inc. ("Roswil"), which operates Ramey Super Markets in Springfield, Missouri, has entered into a consent order with the Federal Trade Commission in which it has agreed that it will not interfere with efforts by independent parties such as TeleCable of Springfield to engage in price reporting or price checking in Roswil's grocery stores in Springfield. Roswil has agreed that it will not require price checkers to purchase the items being price checked, will not deny price checkers the same access to its supermarkets as is provided to customers, and will not attempt to coerce any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting. The terms of and limitations on Roswil's agreement are set forth in a consent order issued by the Federal Trade Commission, a copy of which is enclosed herewith.

If TeleCable of Springfield institutes a price reporting program similar or superior in quality and coverage to the one broadcast by TeleCable in 1981, and if the program includes any of Roswil's grocery stores in Springfield, Missouri, Roswil will reimburse TeleCable for its actual costs of obtaining price reports, up to the amount of $250 per week, and up to $1,000 in total. Roswil will also place notices in its Springfield grocery stores and in its weekly advertisements, informing consumers of TeleCable's price surveys. The precise terms of Roswil's obligations to place such notices, and to reimburse TeleCable for certain of its costs, are set forth in the enclosed consent order.

In order to receive any funds to which you may be entitled and to effect the placement of the notices described above, please notify Roswil in writing, c/o President, Ramey

Super Markets, 3259 East Sunshine, Springfield, Missouri 65804, stating when the program began or is scheduled to begin, the time and channel on which the survey will be broadcast, and TeleCable's costs, if any, of obtaining the survey information.

Very truly yours,

President
Ramey Super Markets

Enclosure

IN THE MATTER OF

GENERAL RAILWAY SIGNAL CO., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. (2) OF THE CLAYTON ACT

Docket C-837. Consent Order, Sept. 24, 1964—Modifying Order, Nov. 13, 1986

The Federal Trade Commission has modified a 1964 consent order (66 F.T.C. 882) by permitting American Standard Corp., a successor to original respondent Westinghouse Air Brake, to engage in activities necessary to participate in lawful joint ventures. The FTC found that respondent "has adequately demonstrated that evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures . . .".

ORDER MODIFYING CONSENT ORDER ISSUED SEPTEMBER 24, 1964

On April 8, 1986, American Standard Inc. ("American Standard"), successor to respondent Westinghouse Air Brake Co. ("WABCO"), filed a "Request To Reopen Proceeding and Terminate 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 Commission's Rules of Practice. The Request asks the Commission to reopen the proceeding and vacate the consent order issued September 24, 1964, ("order") in its entirety. In the alternative, the Request asks the Commission to modify the order "to permit conduct that is otherwise permissible under the antitrust laws, including conduct that is reasonably ancillary to the formation or operation of lawful joint ventures, exempt from application of the antitrust laws, or beyond the subject matter jurisdiction of the FTC."

After reviewing the Request and other relevant information, the Commission has concluded that it is in the public interest to modify the order to permit American Standard to engage in conduct that is ancillary to and reasonably necessary for the formation or operation of any joint venture that is lawful under the antitrust laws. American Standard has adequately demonstrated that evolving technological and economic factors in the railroad signaling equipment and systems industry have created a competitive need for American Standard to participate in joint ventures to research, develop and produce integrated railroad systems and to bid for "turnkey" railroad projects. The order's present language, designed to restrain conduct that might facilitate collusive agreements, could be interpreted to prohibit otherwise lawful joint venture activity. It is in the public interest to modify the order to enable American Standard to participate in otherwise lawful joint venture activity because the competitive injury American Standard will likely suffer if it cannot engage in such lawful activity is not outweighed by any need to retain the order in its current form.[1]

American Standard also seeks modification of the order to clarify that its terms do not prohibit conduct statutorily exempt from application of the antitrust laws or beyond the subject matter jurisdiction of the Commission under Section 5(a) of the Federal Trade Commission Act, as amended. Such limitations, however, already apply to this order and all other orders of the Commission. Therefore, a modification merely to restate existing law is unnecessary.

American Standard has not made an adequate showing that changed conditions of fact or law, or the public interest, require vacation of the order in its entirety. The order contains provisions that enjoin horizontal agreements concerning prices, territories, markets, customers and certain other matters, which are generally *per se* unlawful. American Standard has not demonstrated that these provisions harm its competitive posture and, accordingly, has not demonstrated a need to modify these provisions.

The order contains several other provisions, including restrictions on the use of requirements contracts and cumulative volume discounts and on exchanges of information about price or other terms of sale. The Commission finds that the asserted changes in fact and law relied upon by American Standard do not provide a basis for vacating these provisions.

Although the domestic signaling industry has become less concentrated since the order was entered, the signaling market remains highly concentrated and is dominated, as it was at the time the order was entered, by two firms, one of which is American Standard. Little new entry has occurred since the order was entered, and foreign signaling firms continue to face substantial barriers to entry. Given this continued market structure, the changes in the domestic signaling industry cited by American Standard do not constitute unforeseeable changes in fact sufficient to require termination of the order's provisions prohibiting requirements contracts, cumulative volume discounts and information exchanges.

Asserted changes in law since 1964 also do not require termination of these provisions. The legality of requirements contracts has always

[1] The order's provisions are aimed at horizontal conduct and agreements. The order language prohibiting agreements with "any other person, persons or business entity not a party hereto" is limited by the existing exemption for any "bona fide offer, agreement or transaction with any other person, persons or business entity to purchase or sell railroad signaling and control systems or railroad signaling equipment at prices, terms or conditions of sale independently determined and offered and independently accepted." The new modification for lawful joint venture activities will be a further limitation. The "any other person . . . not a party hereto" language will, in practical effect, mean only vendors of signaling equipment or systems.

been determined by a rule of reason analysis. Although certain factors, such as the extent of market foreclosure, have received different degrees of emphasis under the rule of reason since the order was entered, this does not rise to the level of a change in law sufficient to reopen and vacate the order. The order reflects a determination that the respondents could use requirements contracts to achieve anticompetitive effects, rather than a determination that all requirements contracts are *per se* anticompetitive. Similarly, the cases cited by American Standard with respect to volume discounts do not establish a fundamental change in law requiring modification of the order. These cases merely articulate the statutory defenses provided by Section 2(a) of the Clayton Act, 15 U.S.C. 13(a), as amended, and such defenses are already available under the order even though not explicitly set forth therein. *See FTC v. Ruberoid,* 343 U.S. 470 (1952); *William H. Rorer, Inc.,* Docket No. 8599, 104 F.T.C. 544 (1984). To the extent that such defenses might have been deemed inapplicable because the prohibition of cumulative volume discounts is premised upon the allegations of the complaint that such discounts violated Section 5 of the Federal Commission Act as well as Section 2(a) of the Clayton Act, the Commission, in the public interest, has determined that the statutory defenses should apply.

American Standard also has not identified public interest considerations sufficient to warrant termination of these provisions of the order. The Commission may determine that the public interest requires reopening of an order if the respondent demonstrates that it is competitively disadvantaged by the order. When such a showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make the modification. American Standard, however, has not made a threshold showing that it is competitively disadvantaged by these provisions, except to the extent that the order may be construed to prohibit lawful joint ventures. Accordingly, the public interest does not require reopening and termination or modification of these provisions.

Accordingly, *it is ordered,* that this order be and it hereby is reopened and that the Commission's order issued on September 24, 1964, be and it hereby is modified to include a new subparagraph (4), at 66 F.T.C. 882, 893 (1964), to read as follows:

(4) Nothing contained in the foregoing paragraphs of the order shall be construed to prohibit respondent WABCO from engaging in any conduct or entering into any agreement that is ancillary to and reasonably necessary for the formation or operation of a joint venture that is lawful under the antitrust laws.

IN THE MATTER OF

UNION CARBIDE CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND CLAYTON ACTS

Docket C-2902. Consent Order, Sept. 28, 1977—Modifying Order, Nov. 14, 1986

The Federal Trade Commission has modified a 1977 consent order (90 F.T.C. 257) by removing references to welding products and gas welding apparatus. Respondent is no longer in the welding business.

ORDER MODIFYING CONSENT ORDER ISSUED SEPTEMBER 28, 1977

On May 22, 1986, 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 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. The Request seeks three modifications.

First, Carbide requests that Paragraph I.A.1 of the order be modified to enable it to enter requirements contracts for terms up to five years. The order presently requires that any requirements contracts have initial terms not longer than one year and be terminable annually on not more than 90-day notice. Second, Carbide requests that Paragraph III of the order be modified to enable it to acquire independent distributors of industrial gases upon 30-days prior notice, as opposed to the current requirement that Carbide obtain the prior approval of the Commission for most such acquisitions. Third, Carbide requests that the Commission delete from the order all prohibitions relating to "Welding Products" and "Gas Welding Apparatus."

The Commission has carefully considered Carbide's Request and has concluded that Carbide has not made a satisfactory threshold showing that changed conditions of fact or law or the public interest require Paragraphs I.A.1 or III to be reopened to consider whether these provisions should be modified to allow five-year requirements contracts or distributor acquisitions upon prior notice. However, the Commission has found that reopening the order and deleting references to "Welding Products" and "Gas Welding Apparatus" is warranted by changed conditions of fact and the public interest.

In making these findings the Commission has considered Carbide's

Request, Amerigas Inc.'s comment, and Carbide's response to that comment.

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" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.,* Docket No. C-2956, letter to John C. Hart (June 5, 1986), at 4 ("Louisiana-Pacific Letter"). The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute. Louisiana-Pacific Letter at 5–6. This burden is not a light one in view of the public interest in repose and the finality of the Commission's orders. *See Federated Department Stores, Inc., v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality). If the Commission determines that the petitioner has satisfied this requirement, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. Section 5(b) does not require that the Commission modify any order. S. Rep. No. 96–500, 96th Cong., 2d Sess. 10 (1979).

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.,* Docket No. C-2916, letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter"). If the respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

Requested Modification of Paragraph I.A.1 of the Order

The Commission finds that Paragraph I.A.1 of the order should not be reopened at this time. The Commission believes, as a matter of policy, that generally it should refrain from reopening an order provision when there exists reason to believe that a respondent is in violation of the very provision it seeks to modify.

There is substantial reason to believe that Carbide is violating Paragraph I.A.1. The Commission believes that by offering and executing producer pricing agreements ("PPAs"), Carbide has failed to comply with the provision in Paragraph I.A.1 that prohibits Carbide from entering into long term requirements contracts with independent industrial gas distributors.

The Commission has reason to believe that Carbide's violations of the order were not inadvertent, but have been in considerable bad faith. The Commission's files contain evidence that over 40 PPAs were offered or executed pursuant to a program that commenced with the knowledge and approval of senior level corporate executives. These agreements were offered to distributors from 1979, less than two years after the order was entered, to 1985, when the Commission discovered their existence. Although Carbide had previously sought the advice of the Commission's staff with respect to compliance matters, Carbide never sought advice regarding PPAs. The Commission's rules expressly provide a procedure for obtaining such advice. *See* 16 CFR 2.41. Additionally, Carbide never affirmatively disclosed to the Commission such contracts, despite that it was offering and executing PPAs before, during, and after it filed (and later withdrew) a petition in 1983 seeking modification of Paragraph I.A.1 of the order; Carbide's avowed reason for using PPAs is essentially identical to one of its stated needs for modifying the order in 1983. Although Carbide may have perceived a need to enter long term requirements contracts, it chose to effect its own remedies, despite the prohibition contained in the order and the Commission's procedures for order modifications. Accordingly, it would not be in the public interest to reopen Paragraph I.A.1 of the order at this time to consider Carbide's request for modification of that provision.

Additionally, the Commission finds that neither changes of law nor fact require the reopening of Paragraph I.A.1 of the order. Carbide has failed to show any changes in statutory or decisional law that have the effect of bringing the provisions of Paragraph I.A.1 into conflict with existing law. *See System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). Exclusive dealing arrangements always have been subject to a rule of reason analysis. Carbide's asserted changes in law, at most, reflect a shift in focus among the several factors traditionally considered under a rule of reason analysis as applied to exclusive dealing.

Changed factual circumstances justify modification of an order only when the changed circumstances (1) were unforeseeable when the order was entered and result in severe competitive hardship, and (2) virtually eliminate the dangers the order sought to remedy. *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, letter to H.B. Hummelt (Jan. 22, 1982) (citing *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)). The changes that Carbide points to fail to satisfy this standard. For example, Carbide notes that since 1977: (1) the number of national industrial gas producers has increased; (2) its market share has declined; (3) its competitors have increased their number of independent distributors; and (4) independent distributors possess increased bargaining power. However, Carbide has failed to show that these changes have been significant. For example, according to its own estimates, Carbide's reductions in its market shares have been marginal. Additionally, although Carbide asserts that its share of independent distributors has declined since 1977, the amount of the decline in percentage points is minimal. Carbide has failed to show how these changes reflect more than the normal, foreseeable evolution of the industry or how these changes eliminate any possible continued need for the order.

In sum, the Commission has determined that neither changes in fact nor in law require reopening of Paragraph I.A.1 of the order to consider Carbide's requested modification of that provision. Additionally, the Commission has determined that it would not be in the public interest to reopen Paragraph I.A.1 to consider modification at this time. The public interest is served by denying a request for reopening and modification of an order provision while compliance issues remain unresolved. This action by the Commission will enhance its ability to ensure compliance with this order and other outstanding orders, enhance the deterrent effect of all orders and of Section 5 itself, and serve to discourage "self-help" order modifications. Thus, based on these policy considerations, the Commission finds that the public interest does not warrant reopening and modification of Paragraph I.A.1 of the order.

Requested Modification of Paragraph III of the Order

The Commission finds Carbide has failed to show any changed conditions of law or fact or public interest considerations that require or warrant reopening Paragraph III of the order.

Carbide contends that both changes of law and fact require the reopening of Paragraph III of the order. However, Carbide has failed to point to any change in statutory or decisional law with respect to vertical acquisitions that has the effect of bringing the terms of the order into conflict with existing law. The Commission also notes that, in those instances where prior approval is required, the Commission will analyze such requests in a manner consistent with current law and policy. Thus, any changes regarding the application of the law of vertical restraints will be considered by the Commission when reviewing an application for prior approval.

Carbide also states that modification of Paragraph III of the order is required by changed conditions of fact. The Commission finds that

Carbide has failed to show significant changes in fact that require reopening. Carbide alleges that: (1) the number of national gas producers is increasing; (2) its market share is declining; (3) the number of distributors serving competitors is increasing; and (4) independent distributors' bargaining power has increased. As discussed earlier, Carbide has failed to show that these changes were unforeseeable, or that they reflect more than the natural evolution of the industry. Paragraph III recognizes such evolution as evidenced by the ten-year term of that provision.

Carbide contends that modification of the order to permit vertical mergers after prior notice rather than prior approval would serve the public interest. The Commission finds that neither of the grounds that Carbide raises warrants reopening the order in the public interest. First, Carbide states that the regulatory burden imposed by the prior approval requirement prevents it from competing on equal terms with its competitors. This claim does not warrant relief. Carbide has failed to document any burden imposed by the prior approval requirement that was not foreseeable when the order was issued or how that burden has changed over the years. Additionally, the Commission notes that Carbide has not identified instances in which it was actually prejudiced by the prior approval requirement. Instead, Carbide identifies generally the burden that might be imposed by any prior approval requirement: added costs, uncertainty, and delay. Second, Carbide states that distributors seeking to sell their businesses may face reduced marketing opportunities because Carbide, a likely prospective purchaser, may be foreclosed from making such acquisitions. This concern was presented to and considered by the Commission in 1977. Carbide fails to point to any factual changes that would justify the Commission's treating this consideration differently now. In sum, the Commission finds that the public interest does not warrant reopening the order to consider whether to modify Paragraph III.

Request to Delete References to "Welding Products" and "Gas Welding Apparatus"

The Commission finds that Carbide has made a satisfactory showing of changed conditions of fact to warrant reopening the order to consider deleting references to "Welding Products" and "Gas Welding Apparatus." In 1985, Carbide sold its gas welding apparatus and welding products operations. In the Request, Carbide states its intention not to reenter that line of business. The Commission finds that deleting references to "Welding Products" and "Gas Welding Apparatus" is warranted by changed conditions of fact and by the public interests.

Accordingly, *it is ordered*, that this matter be reopened with respect to Carbide's third request and that Paragraphs I, III, and IV 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 read as follows:

I.

It is ordered and directed, That for a period of twenty (20) years from the date of service of this order, respondent Union Carbide Corporation (hereinafter Union Carbide), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of industrial gases to distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any distributor:

1. To purchase from Union Carbide all or any part of its requirements of any industrial gas unless (a) the initial term of such contract or agreement is one year or less, and (b) such contract or agreement may be terminated by either party effective on any anniversary date upon written notice given some minimum period in advance of such date as set forth in such contract, such minimum period to be not more than ninety (90) days; or

2. To purchase from Union Carbide all or any part of its requirements of any industrial gas at one or more locations as a condition to being permitted to purchase from Union Carbide such industrial gas at another location; or

3. To purchase from Union Carbide all or any part of its requirements of any industrial gas at any location as a condition to being permitted to purchase from Union Carbide any other industrial gas at the same or any other location.

B. Not refuse to sell, subject to Paragraph A.1 above, industrial gases to a Union Carbide distributor because that distributor refuses (1) to purchase all or a designated part of its requirements of industrial gases from Union Carbide; or (2) to purchase from Union Carbide all or any part of its requirements of industrial gases at more than one of its locations.

* * * * * * *

III.

A. *It is further ordered,* That for a period of ten (10) years from the date of service of this order, Union Carbide shall not without prior approval of the Commission, except as otherwise provided in Paragraph B of this Part III, acquire, directly or indirectly, the whole or any part of the assets, stock, share capital of, or other equity interest in, any distributor of industrial gases.

B. No prior approval shall be required under this order for any acquisition by Union Carbide of any assets, stock, share capital of, or other equity interest in, any distributor of industrial gases if such acquisition meets any of the following standards:

1. The acquisition involves only a change in the equity interest of Union Carbide in a distributor in which Union Carbide already holds an equity interest; or

2. Except to the extent such acquisition is covered by clause 3 of this Paragraph B, the consummation of the acquisition does not result in Union Carbide owning an equity interest, obtained by acquisition, in distributors to whom, in the calendar year prior to the calendar year in which such acquisition is consummated, Union Carbide sold in excess of 16 percent of its total sales of industrial gases sold in such year to all acquired and independent distributors; *provided, however,* that no acquisition of a distributor shall be exempt from prior approval under this clause 2 unless the distributor to be acquired purchased from Union Carbide more than 50 percent of its total purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated; or

3. The acquisition is not covered by clause 2 of this Paragraph B, but within twelve (12) months prior to the consummation of such acquisition Union Carbide has divested absolutely and in good faith by sale or spin-off its equity interests in one or more distributors the aggregate dollar value of whose purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated was equal to or in excess of the aggregate dollar value of purchases of industrial gases in such prior calendar year, by the distributor so acquired; *provided, however,* that, to the extent that any purchases by a divested distributor are utilized by Union Carbide in a determination that an acquisition falls within the provisions of clause 2 or 3 of this Paragraph B, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of this clause 3; or

4. The transaction involves only (a) the purchase of products from a distributor in the normal course of business, or (b) the purchase of fixed assets from an independent distributor in a transaction in which the distributor will continue thereafter to carry on its function as an independent distributor in which Union Carbide has no equity interest; or

5. But for the acquisition by Union Carbide, the distributor would have ceased business operations as an industrial gas distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

C. During the period that this Part III is in effect, Union Carbide shall advise the Commission, prior to consummation thereof, of each acquisition of the type described in Paragraph A of this Part III as to which prior approval is not required because of the provisions of Paragraphs B.2 or B.3 of this Part III.

D. During the period that this Part III is in effect, Union Carbide shall, within ninety (90) days from the date of each acquisition described in Paragraph B.5 of this Part III, provide information sufficient for the Commission to determine whether, but for the acquisition by Union Carbide, the distributor would have ceased business operations as an industrial gas distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

IV.

It is further ordered, That if, during the ten (10) year period beginning on the date of service of this order, any distributor of industrial gases in which Union Carbide holds an equity interest acquires, without the prior approval of the Commission to the extent such approval would be required under Part III of this order if such acquisition were made directly or indirectly by Union Carbide, the whole or any part of the assets, stock, or share capital of, or other equity interest in, any distributor of industrial gases, then Union Carbide shall within six (6) months thereafter divest absolutely and in good faith by sale or spin-off its equity interests in one or more distributors, the aggregate dollar value of whose purchases of industrial gases in the prior calendar year was equal to or in excess of the aggregate dollar value of purchases of industrial gases in such prior calendar year by the distributor so acquired; *provided, however,* that to the extent that any purchases by a divested distributor are utilized by Union Carbide in determining compliance with the divestiture provisions of this Part IV, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of Paragraph III B.3 of this order.

Chairman Oliver dissented.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

I agree with the Commission's decision to reopen and modify its 1977 consent order with Union Carbide by removing references to welding products and gas welding apparatus. These references are unnecessary, because Union Carbide is no longer a participant in the welding business.

I disagree, however, with the Commission's decision not to reopen for modification Paragraph I.A of the order. Union Carbide requested that the Commission modify Paragraph I.A to allow Union Carbide to enter into long term contracts with gas distributors. Union Carbide has demonstrated that long term contracts are necessary to compete effectively in industrial gas production and supply, that the order's prohibitions on long term contracts place Union Carbide at a competitive disadvantage, and that the public interest would best be served by removing these prohibitions.

The Commission has made clear that Union Carbide's apparent violations of Paragraph I.A played an important role in the Commission's decision not to reopen Paragraph I.A. I strongly advocate vindication of the Commission's orders and I believe that the Commission would be fully justified in seeking appropriate relief for order violations. I also believe, however, that anticompetitive orders breed disrespect for the law, frustrating the Commission's enforcement of legitimate orders. Moreover, and perhaps most important, forcing compliance with errant Commission orders places the Commission in the undesirable position of harming rather than helping consumers.

For this reason, I voted against the Commission's decision to modify the Union Carbide order in part.