UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of	)	
PENDLETON WOOLEN MILLS, INC., a corporation.	)	Docket No. C-2985

ORDER GRANTING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED JULY 31, 1979

On April 1, 1996, Pendleton Woolen Mills, Inc. ("Pendleton"), filed its "Request To Reopen" ("Petition") in Docket No. C-2985, 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, 16 C.F.R. § 2.51 ("Rules"). Pendleton asks the Commission to reopen and modify the consent order issued by the Commission on July 31, 1979 ("Order"), in Pendleton Woolen Mills, Inc., 94 F.T.C. 229 (1979).

In its Petition, Pendleton asks the Commission to reopen the Order and modify provisions that limit Pendleton's ability to restrict the prices advertised by its dealers for Pendleton apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, Pendleton maintains that reopening and modification is warranted by changed conditions of fact and the public interest. Pendleton's Petition was placed on the public record for thirty days; no comments were received.

I. 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 it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); see Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[1]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 C.F.R. § 2.51. In such a case, 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 29, 1983), at 2 (unpublished) ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." Damon Corp., 101 F.T.C. 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); see also Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the

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[1] See also United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. See Federated Department Stores, Inc. v. Moitie, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

II. Reopening Is in the Public Interest

Pendleton asserts in its Petition that its inability under the Order to establish and maintain price-restrictive cooperative advertising programs and unilaterally to terminate resellers that decline to adhere to previously announced resale prices and sale periods has impeded its ability to compete. Because of restrictions in the Order, Pendleton maintains, it is unable to choose freely those with whom it will deal and unable to terminate business relationships with retailers that advertise and price Pendleton products in a matter inconsistent with Pendleton's image and quality and with Pendleton's marketing strategies. In addition, Pendleton claims that it is unable under the Order unilaterally to impose restrictions on cooperative advertising or to specify sales break dates.

According to Pendleton, "both the retail and manufacturing side of the apparel industry have undergone tremendous changes over the last 15 years." Petition at 3.[2] The changes identified by Pendleton include increased competition from imports,[3] unprecedented restructuring in the retail industry, including a proliferation of discount, warehouse and factory outlets, and increased retail discounting.[4] Petition at 3-4. According to

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[2] Because the Commission has determined that the Order should be reopened and modified in the public interest, it need not and does not consider whether Pendleton has shown changed conditions that would require reopening the Order.

[3] More than 60 percent of all apparel sold in the United States is now manufactured abroad, according to the Petition at 4.

[4] Similar changes in retailing were cited in Levi Strauss & Co., Docket No. 9081, Order Reopening and Modifying Order Issued on July 12, 1978 (December 20, 1994) (apparel manufacturers

(continued...)

Pendleton, the growth of discount, warehouse and factory outlets has eroded the market share of Pendleton's customers, traditional department stores and specialty stores,[5] which "have faced serious financial problems in the last decade."[6] Petition at 4. Pendleton claims that the increased discounting and its inability under the Order to respond unilaterally to the discounting have resulted in decreased sales by Pendleton to its traditional department store and specialty store customers and decreased promotion and emphasis on Pendleton products by those retailers.[7]

Pendleton states that the Order has put it "at a substantial disadvantage in competing with foreign and other domestic clothing manufacturers." Petition at 5. Unlike its competitors, Pendleton cannot unilaterally impose "marketing controls"[8] and is

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[4](...continued)
integrating into retailing to showcase their products, market their complete lines and demonstrate to their retailer-customers the benefits of promoting the manufacturer's products). See also Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 5 ("discount advertising is harming London Fog's quality image and affecting its ability to market its product through certain retailers.").

[5] Pendleton does not offer its products to discount or warehouse operations. See Affidavit of Dick Poth, President of Pendleton Woolen Mills, Inc. (August 14, 1995) ¶ 7 ("Poth Affidavit").

[6] Pendleton reports that from 1988 through 1994, it lost more than 100 accounts because of bankruptcy or other financial problems, approximately 640 accounts because of store closures or going out of business and approximately 40 accounts for other reasons. Poth Affidavit ¶ 11.

[7] Poth Affidavit ¶ 13; Affidavit of Jon Stine (June 26, 1995), ¶ 6 ("Stine Affidavit").

[8] Petition at 7. Specifically, Pendleton claims that the Order prevents it from choosing its customers, from restricting cooperative advertising or specifying sale breakdates, and from choosing to stop selling to a retailer because of that retailer's pricing, practices that Pendleton claims are available to its competitors. Poth Affidavit ¶¶ 12-13. See also Stine Affidavit ¶¶ 2-5; Affidavits of Lauren Bensen (June 6, 1995), ¶¶ 1-4; and
(continued...)

reluctant to suggest that its customers refrain from "excessive or inappropriate promotion of its products" that "ultimately results in decreased profitability" for its customers. Petition at 7. Pendleton believes that the use of these marketing controls would increase its sales and increase the profitability of the line for its customers. Poth Affidavit ¶¶ 12-15; Stine Affidavit ¶¶ 6-7 & 9. The ability to use price restrictive cooperative advertising programs and unilaterally to terminate a retailer for failure to adhere to previously announced resale prices would encourage service-oriented stores to compete with the discount stores with respect to these brands, according to Pendleton. Finally, Pendleton asserts that the requested modifications would enable it to compete more effectively for sales to retailers that stress quality over price and that provide a high level of service to consumers.[9] Pendleton has found that such retailers do best with Pendleton merchandise. Petition at 6.

Pendleton has shown that the public interest warrants reopening the Order to consider whether it should be modified. Pendleton has shown that the Order prohibits conduct that by itself may not be unlawful and that the prohibition inhibits its ability to compete with firms that are free to and do engage in price-restrictive cooperative advertising and promotional programs and that are free to choose those with whom they will deal.

III. The Order Should Be Modified

Pendleton requests that the Order be modified to permit Pendleton to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller that refuses to sell Pendleton products at Pendleton's previously announced resale prices. For these purposes, Pendleton has requested that the following proviso be added to Paragraph I of the Order:

> PROVIDED THAT nothing in this order shall be construed to prohibit the implementation of a lawful, price restrictive, cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

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[8](...continued)
Karen Decasperis (May 31, 1995), ¶¶ 1-2.

[9] Pendleton traditionally has sold its products through retailers that have a "quality image and who provide a high level of service to the consumer." Poth Affidavit ¶ 2.

The Commission previously has modified orders to permit implementation of price restrictive cooperative advertising programs. Price restrictive cooperative advertising is not per se unlawful and does not prevent a dealer from selling at discount prices or from advertising discount prices at the retailer's own expense. See Advertising Checking Bureau, Inc., 109 F.T.C. 146, 147 (1987).[10] The Commission has said that "[t]he fact that a distributional restraint may have an incidental effect on resale price is not by itself enough to condemn the practice as per se unlawful." Id. The Commission also has said that price restrictive cooperative advertising programs likely are procompetitive or competitively neutral in most cases "by, for example, . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." 109 F.T.C. at 147.[11]

Modification of the Order to permit Pendleton to institute lawful price restrictive cooperative advertising programs is consistent with Commission policy and cases. Such restrictions may not necessarily be part of an illegal RPM scheme and have been recognized as reasonable in many circumstances.[12] Pendleton's use of price restrictive cooperative advertising programs, absent further agreement on price or price levels to be charged by the retailers, is not likely to restrict interbrand

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[10] See also Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995); Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330; U.S. Pioneer Electronics Corp., Docket No. C-2755 (April 8, 1992), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,172; The Magnavox Co., 113 F.T.C. 255 (1990).

[11] In Advertising Checking Bureau, the Commission announced rescission of its 1980 Policy Statement Regarding Price Restrictions In Cooperative Advertising Programs (viewing such programs as per se unlawful). 109 F.T.C. at 146 n.1; see Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

[12] See In re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), cert. denied, 439 U.S. 1072 (1979) (price restrictive cooperative advertising not per se unlawful); see also Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988).

competition or to reduce output. Of course, any cooperative advertising program implemented by Pendleton as part of a scheme to fix resale prices would be per se unlawful and would violate Paragraph I.1. of the Order. In addition, the proviso's limitation to a "lawful price restrictive cooperative advertising program" will retain the Order's prohibition against such programs if they are part of a plan to implement resale price maintenance.

The new proviso to Paragraph I also would permit Pendleton unilaterally to terminate a reseller for failure to adhere to previously announced prices. This conduct is lawful under United States v. Colgate Co., 250 U.S. 300, 307 (1919), which permits a supplier to "announce its resale prices in advance and refuse to deal with those who do not comply." Accordingly, the Commission has determined to add the proviso quoted above to Paragraph I of the Order. The modification would permit Pendleton to engage in conduct that is lawful if not a part of a resale price maintenance scheme.

IV. Additional Modification of the Order

Pendleton has requested additional modifications of the Order to remove language that Pendleton maintains is inconsistent with the new proviso to Paragraph I of the Order. Each of these requests is considered below.

Paragraph I.1. -- According to Pendleton, the words "advertise, promote" in Paragraph I.1. of the Order[13] would be confusing as to Pendleton's ability to "take any lawful steps vis-a-vis its accounts' pricing practices." Petition at 9. Pendleton requests that the Commission delete these words from Paragraph I.1. of the Order.

The language of the proviso added to Paragraph I of the Order is sufficient to permit Pendleton to implement lawful price restrictive cooperative advertising programs. Deleting the words "advertise, promote" from Paragraph I.1., however, could be construed to allow agreements on advertised prices that go beyond such lawful cooperative advertising programs. Pendleton has not requested or shown that it should be permitted to enter such agreements outside lawful cooperative advertising programs. Accordingly, the request to delete the words "advertise, promote," from Paragraph I.1. of the Order is denied.

Paragraph I.4. -- Pendleton has requested that the words "or terminating" be deleted from Paragraph I.4. of the Order.[14] According to Pendleton, these words directly contradict the proviso added to Paragraph I of the Order and would cause confusion as to Pendleton's right, for example, unilaterally to terminate a retailer after receiving complaints from other retailers about the first retailer's pricing. The words "or

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[13] Paragraph I.1. prohibits Pendleton from:

> Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

[14] Paragraph I.4. prohibits Pendleton from:

> Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer.

acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer" should be deleted from Paragraph I.4. of the Order.[15] Deleting these words is consistent with the decision of the Commission in Lenox, Inc., 111 F.T.C. 612, 617-18 & 620 (1989). In Lenox, the Commission modified the order by deleting the words "or acting on reports so obtained by refusing or threatening to refuse sales to the dealers so reported" from a provision barring Lenox from requesting its dealers to report any retailer that did not observe the resale prices suggested by Lenox. The conduct prohibited by the deleted words in Lenox included termination of a dealer. As the Supreme Court explained in Monsanto, dealers "are an important source of information for manufacturers," dealer complaints about price cutters "arise in the normal course of business and do not indicate illegal concerted action" and a manufacturer's termination of a dealer following complaints from other dealers would not, by itself, support an inference of concerted action. 465 U.S. at 763-64. To the extent that this portion of Paragraph I.4 may inhibit Pendleton from legitimate unilateral conduct, it may cause competitive injury. Any conduct that would be unlawful under this part of Paragraph I.4 would be prohibited by other provisions of the Order.

Paragraph I.5. -- Pendleton asks the Commission to delete the words "advertising" and "or advertised" from Paragraph I.5. of the Order.[16] Pendleton claims that inclusion of these words in Paragraph I.5., notwithstanding the Paragraph I proviso, may interfere with its ability to address legitimate concerns about the advertising and marketing of its products. The words should be deleted from Paragraph I.5. The references to "advertising"

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[15] See Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 763-764 (1984) (per se unlawful agreement could not be inferred from nothing more than a dealer termination following competitors' complaints); see also Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) (vertical agreement to terminate a price-cutting dealer is not per se unlawful unless there is also an agreement on price or price levels).

[16] Paragraph I.5. prohibits Pendleton from:

> Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold or advertised.

in Paragraph I.5. of the Order could hinder Pendleton's ability to institute a lawful, price restrictive cooperative advertising program. Deleting these words makes clear that Pendleton can impose price restrictions on its dealers in connection with a lawful cooperative advertising program, consistent with the Commission's conclusion that price restrictions in cooperative advertising programs, standing alone, are not per se unlawful. See Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

Paragraph I.6. -- Pendleton has asked the Commission to delete Paragraph I.6. in its entirety, or, in the alternative, delete the words "Terminating or" from Paragraph I.6. of the Order.[17] Pendleton believes that this provision, but especially the word "Terminating," prohibits Pendleton from unilaterally terminating "a dealer because of the dealer's pricing practices . . . ." Petition at 12. According to Pendleton, such conduct is "clearly . . . lawful action." Id.

The prohibition in Paragraph I.6. against "terminating . . . any dealer" restricts Pendleton from unilaterally terminating such a dealer even if the termination is consistent with the Colgate doctrine. Deleting the word "terminating" from Paragraph I.6 will make the Order consistent with the proviso language that restores Pendleton's Colgate rights. Unilateral termination of a dealer for discounting is not in itself unlawful. See Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995) at 10. The request to delete the word "terminating" from Paragraph I.6. of the Order is

[17] Paragraph I.6. prohibits Pendleton from:

> Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

granted.[18] For clarity, the words "(other than termination)" should be added to the paragraph following the word "action."

Paragraph II -- Pendleton requests that the Commission delete Paragraph II from the Order.[19] Pendleton states that "if [Pendleton] remains subject to paragraph II, it will be reluctant to take lawful action which might be construed as contrary to representations required by that provision." Petition at 12.

Paragraph II relates to Pendleton's use of suggested retail prices. Under the Order, Pendleton could not suggest retail prices for a period that expired in 1982. The remaining provisions of Paragraph II restrict the use of suggested retail prices. Specifically, Pendleton must "[c]learly and conspicuously state on any material on which such suggested price is stated that such price is suggested only," Order ¶ II.a, and

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[18] Paragraph I.6., as modified, would bar Pendleton from threatening to terminate dealers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices. Pendleton may, consistent with the Order, as modified, announce in advance its intention to terminate any dealer who fails to adhere to its previously announced resale prices and it may terminate any such dealer, but "it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices." See Interco Incorporated, Docket No. C-2929, Order Granting in Part and Denying in Part Request To Reopen and Modify Order Issued September 26, 1978 (March 27, 1995), at 10.

[19] Paragraph II of the Order prohibits:

> Publishing, disseminating, circulating, providing or communicating, orally or in writing or by any other means, any suggested retail price from the date of service of this order until April 20, 1982; *provided, however,* that if, after April 20, 1982, respondent suggests any retail price, respondent shall:
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> a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.
>
> b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

notify its customers that they are not obligated to adhere to suggested retail prices and that "such suggested retail price is advisory only." Order ¶ II.b. The Commission considered modification of a similar provision in Clinique[20] and set the provision aside in the public interest. The Commission concluded that the provision in the Clinique order addressed conduct (suggested prices) that by itself may not be unlawful and was no longer necessary to ensure compliance with the law. Consistent with Clinique, Paragraph II should be set aside.

V. Conclusion

Pendleton has shown that reopening the Order is in the public interest and that the Order should be modified as described above. The Order as modified bars Pendleton from engaging in resale price maintenance and permits Pendleton to engage in otherwise lawful conduct.

Accordingly, IT IS ORDERED that this matter be, and it hereby is, reopened and that the Commission's Order in Docket No. C-2985 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) Paragraph I is modified by adding the following proviso:

> PROVIDED THAT nothing in this Order shall be construed to prohibit the implementation of a lawful, price restrictive, cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

(b) Paragraph I.4. is modified by deleting the words "or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating any dealer," as follows:

> Requiring, requesting, or soliciting any dealer to report the identity of any other dealer, because of the price at which such dealer is advertising, offering to sell or selling any product.

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[20] Clinique Laboratories, Inc., Docket No. C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330.

(c) Paragraph I.5. is modified to delete the words "advertising" and "or advertised," as follows:

> Conducting any surveillance program to determine whether any dealer is offering for sale or selling any product at a resale price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control or enforce the retail price at which any product is sold.

(d) Paragraph I.6. is modified by deleting the words "Terminating or" and "other" and adding "(other than termination)," as follows:

> Taking any action (other than termination) to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

(e) Paragraph II is set aside.

(f) Pendleton's request to modify Paragraph I.1. to delete the words "advertise, promote" is denied.

By the Commission, Commissioner Starek concurring in the result only.

Donald S. Clark
Secretary

SEAL

ISSUED: September 30, 1996

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN THE RESULT

In the Matter of Pendleton Woolen Mills, Inc.

Docket No. C-2985

I concur in the Commission's decision to reopen and modify the order in this matter. Respondent Pendleton Woolen Mills, Inc. has shown that the order prohibits conduct that by itself may not be unlawful, and that the prohibition inhibits its ability to compete with firms that are free to (and do) engage in price-restrictive advertising programs and can freely choose with whom they will deal.

As I have stated elsewhere, however, I cannot concur fully in the reasoning expressed in today's order because I do not share in the view that respondent "must demonstrate as a threshold matter some affirmative need to modify the Order" when a petition to reopen is judged under the public interest standard. *Order Granting in Part Request to Reopen and Modify Order*, Docket No. C-2985, at 2. Neither the statute[1] nor the Commission rule[2] governing our consideration of petitions to reopen provides for an "affirmative need" requirement that a petitioner must meet. I would therefore prefer that such language be deleted from this and future Commission rulings granting or denying petitions to reopen existing orders.

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[1] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b).

[2] Rule 2.51(b) of the Commission's Rules of Practice, 16 C.F.R. § 2.51(b).