

IN THE MATTER OF
CORNING GLASS WORKS

Docket 8874. Interlocutory Order, July 24, 1973.

Order denying respondent's motion for reconsideration of final order, or in the alternative, for reopening of proceeding.

Appearances

For the Commission: *R. A. Bloch, S. B. Gold.*

For the respondent: *Sherman & Sterling*, New York, New York,
William C. Ughetta, secretary and general counsel, Corning Glass
Works, Corning, New York.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION
OF THE FINAL ORDER OR IN THE ALTERNATIVE FOR
REOPENING OF PROCEEDING

On June 5, 1973 [82 F.T.C. 1675], the Commission issued its decision sustaining Counts I, II, and IV of the complaint and dismissing Counts III and V. Accompanying the Commission's Opinion was an order to cease and desist which was virtually identical to the proposed order which accompanied service of the complaint (the "notice order"), except for deletion of language which pertained to the two counts that were dismissed.

Respondent has now filed a motion pursuant to Section 3.55 of

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the Commission's rules for reconsideration of the terms of the Commission's Order.¹ Alternatively, it requests that the Commission reopen the proceeding pursuant to Section 3.72(a) for purposes of altering the terms of the order.²

Complaint counsel has filed an answer opposing respondent's motion on both procedural and substantive grounds. It argues, first of all, that except for certain editorial changes made by the Commission from the original notice order, respondent had full opportunity throughout the proceeding to raise objections to the terms of the order as they pertained to the counts that were sustained, but never raised any objection. Having failed to voice any objection, complaint counsel argues that respondent has failed to meet the requirement of Section 3.55 which limits reconsideration to "questions * * * upon which the petitioner had no opportunity to argue before the Commission."

Complaint counsel also strenuously avows that in a stipulation entered into by the parties, respondent agreed to the appropriateness of the terms of the notice order as they applied to respective counts of the complaint, should liability on any of those counts be established.³ Complaint counsel states that this was his understanding of the stipulation and that he repeatedly referred throughout the record to the stipulation as having this meaning

¹ Section 3.55 provides in pertinent part:

"Within twenty (20) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the ground in support thereof. Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission."

² Section 3.72(a) provides:

"At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a United States court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding."

³ The stipulation entered into by the parties during the pre-hearing stage of the proceeding reads:

"1. Relief relating to the allegations of Counts I, II, and IV of the complaint shall be entered against Respondent Corning Glass Works only in the extent that the allegations of Count II of the complaint are sustained.

"2. Relief relating to the allegations of Count III of the complaint shall be entered against Respondent Corning Glass Works only in the event that the allegations of Count III of the complaint are sustained.

"3. Relief relating to the allegations of Count V of the complaint shall be entered against Respondent Corning Glass Works only in the event that the allegations of Count V of the complaint are sustained. * * *"

and respondent never indicated disagreement.⁴

Although we think there is considerable merit to complaint counsel's argument that respondent should be deemed to have stipulated as to the appropriateness of the terms of the notice order and, in any case, should have raised objections to the provisions in the notice order before now, we believe that no useful purpose would be served by refusing to consider respondent's arguments.⁵

Nevertheless, having considered the objections set forth by respondent, the Commission finds no reason to disturb its June 5 order or remand for additional proceeding before an administrative law judge.⁶ We will deal with its arguments *seriatim* as they are presented in respondent's motion.

(i) Respondent contends that Paragraph I(3) (b) is overbroad because it allegedly will prevent fair trade state wholesalers from soliciting contracts from fair trade state retailers. This is not a correct reading of the order. The proviso that immediately follows excepts (b)'s prohibitions with respect to "lawfully obtained" fair trade contracts. This permits respondent to continue to require fair trade state wholesalers to obtain fair trade contracts from fair trade state retailers, subject only to the prohibition, for a limited period of time, of resolicitation of contracts from

⁴ It might be noted that the Commission also was under this impression. See Opinion, p. 5. Our view was based in part on the characterization of the stipulation in the Initial Decision at p. 2 that:

"At this oral argument counsel for both sides agreed that there were no factual disputes between the parties; that Counts II, III and V raised purely legal questions which could properly be decided on a motion for summary decision; and that in line with the stipulation between the parties filed October 17, 1972, a decision on these cross-motions for summary decision *would be dispositive of the entire proceeding.*" (Emphasis added)

The quoted passage originally appeared in respondents' proposed initial decision.

⁵ Technically, the Final Order issued by the Commission on June 5, 1973, was not *verbatim* the notice order served with the complaint. In addition to deletion of some paragraphs which dealt only with the two counts that were dismissed, other paragraphs necessarily had to be redrafted to some extent and some editorial changes were made. Therefore, it can be argued that the manner, at least, in which the order was redrafted to accommodate dismissal of the two counts presented a "new question" under Rule 3.55. Furthermore, the Commission always has discretion to re-examine the propriety or correctness of its orders, including stipulated orders, prior to the time the record is before a court for review. (See Rule 3.71.)

⁶ The Commission takes due note of the fact that respondent prefaces its arguments with the statement that they are not intended to be "all-inclusive." However, respondent cannot expect this Commission to entertain its objections and arguments for reopening on a piecemeal basis. All grounds must be raised in the moving papers. Since, on the basis of the present motion, we find insufficient reason to revise the order or remand for further proceedings, our decision here will be final as to all matters which respondent could have raised at this time.

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certain signer-only state retailers as provided in Paragraph IV (3).

(ii) Respondent complains that the exempting proviso contained in Paragraph I(3) of the Final Order is limited to subparagraph (b), rather than to both subparagraph (a) and (b) as contained in the notice order. The order as it now reads is correct. This was a change made by the Commission simply because the proviso—which permits actions taken in states having fair trade laws—could have no application, in any event, to subparagraph (a) which pertains to certain actions (circulation of blacklists) in states which have no fair trade laws.

(iii) Respondent suggests that clarifying language added by the Commission to Paragraph I(4) to permit actions expressly sanctioned by Sections 5(a) (3) of the McGuire Act, as well as Section 5(a) (2) of that Act, needs further revision. However, we think the language as it now reads adequately indicates that this is the meaning.

(iv) Respondent questions the reference to Paragraph III(2) (b) contained in Paragraph V, which reference was added in the Final Order by the Commission. Respondent overlooks that this change was necessary in view of our change in line 6 to refer to “fair trade states” rather than just “non-signer” fair trade states as the notice order previously read. The latter change, in turn, was necessitated by our dismissal of Count III.

(v) Respondent raises a question as to the “any reseller located within” language of Paragraph I(1). It suggests the language needs qualification to make it clear that fair trade contracts can apply to resales from wholesale locations in fair trade states to retailers for resale in fair trade states, regardless of the fact that the wholesaler or retailer may have a main office or other outlets in free trade states. Respondent does not suggest what clarifying language it wants, but we think the Commission’s decision of June 5 makes it clear that the locus of a “resale,” as that term is used in the McGuire Act, is the location of individual wholesale outlets from which the goods are to be shipped. (See Slip Opinion at 16 n.15.) This same rule applies to resales by retailers, *i.e.*, the locus of “resales” are the stores from which the goods can be purchased by the customer—or in the case of mail-order firms, from where the goods are shipped. Thus, for purposes of our order, “reseller” will refer not to an entire corporate entity in the case of a chain reseller, but to its individual sales outlets from which the goods will be shipped. Respondent may enter into a fair trade contract with a buyer’s headquarters as long as the

contract clearly will apply only to resales of goods that take place (*i.e.*, shipped) from facilities located in fair trade states.

(vi) Respondent requests that exemption of actions taken pursuant to Section 5(a) (3) of the McGuire Act be added to Paragraph II. Such a change would be superfluous since nothing in that paragraph would prevent actions taken pursuant to Section 5(a) (3).

(vii) Respondent objects to the requirement in Paragraph III 1(a) that it send copies of the order to every reseller who was under a Corning fair trade contract on or after March 1, 1971. Respondent asserts that it should not be required to send copies to wholesalers and retailers in fair trade states—and particularly retailers in the non-signer states.

The Commission believes that this requirement should not be changed. Notice of the order to *wholesalers* in fair trade states is necessary because some of these wholesalers may be multistate and have outlets in free trade states. A blanket requirement of notice to all wholesalers will not be greatly burdensome since it appears that respondent's wholesalers (free trade *and* fair trade) number only about 400 (Attachment F to Complaint).

The reason for retaining the requirement of sending copies of the order to fair trade state *retailers* is that Count I of the Complaint charged that whenever a free trade state wholesaler resold Corning Ware to a fair trade state retailer, the Corning wholesale contract fixed the resale price. While not litigated, respondent agreed to accept the relief related to that count (n.3, *supra*). As complaint counsel point out, even though respondent may lawfully regulate the price at which non-signer state retailers sell, the existence of free trade state wholesalers makes it impossible to fix always their *purchase* prices. It is quite proper, therefore, to require respondents to inform non-signer state retailers, as well as signer-only state retailers, that they are free to buy from free trade state wholesalers at a price that cannot be regulated by Corning.

(viii) Contrary to respondent's assertion, Paragraph IV (3) does not require it to amend fair trade contracts which are presently in conformity to other provisions of the order.

(ix) Paragraph VI (2) requires respondent to notify the Commission in advance of any proposed changes in its method of distribution of fair traded commodities or in its contracts or agreements relating thereto. This provision relates only to matters that affect fair trade activities of respondent and is obviously a

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necessary means of assuring compliance with the order and the McGuire Act.

(x) Paragraph III(2)(b)(iv) of the order requires that respondent notify certain retailers in signer-only states (whose contracts will be cancelled by virtue of the fact they were obtained by Corning in an unlawful manner) that until they enter into new fair trade contracts they "may, and are encouraged to" sell at prices they individually determine. The quoted language is necessary to remove any doubt from such retailers' minds as to their legal rights and is a reasonable provision in our view.

(xii)-(xvi) Finally, respondent argues that the order is vague, burdensome, or impossible of fulfillment. We have examined its contentions, but disagree that any change should be made. Most of the problems raised by respondent can best be handled as a compliance matter, rather than by revising language of the order. Thus, compliance problems that may have been caused by a loss of some records due to a recent flood should be presented to the Commission after the order becomes effective. Obviously, the Commission will not insist on respondent performing acts that have been rendered impossible through no fault of its own.

Accordingly, the Commission having found no reason to modify its Final Order in this matter or to reopen for further proceeding,

It is ordered, That respondent's motion, filed July 5, 1973 for reconsideration, or in the alternative for reopening of the proceeding, be, and it hereby is, denied.

Commissioner Thompson not participating.

IN THE MATTER OF

HALL'S FURNITURE COMPANY, INC., ET AL.

CONSENT ORDER, ETC. IN REGARD TO THE ALLEGED VIOLATION
OF THE TRUTH IN LENDING AND FEDERAL TRADE COMMISSION
ACTS

Docket C-2426. Complaint, July 25, 1973—Decision, July 25, 1973.

Consent order requiring a Los Angeles, California seller and distributor of