

IN THE MATTER OF
MONTGOMERY WARD & COMPANY, INCORPORATED

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

Docket C-3006. Complaint, Jan. 24, 1980—Decision, Jan. 24, 1980

This consent order requires, among other things, a Chicago, Ill. firm, engaged in the operation of a chain of department and catalog stores, to cease making unsubstantiated safety-related claims regarding the installation, operation or maintenance of woodburning heaters and Franklin fireplaces; or any representation that contradicts the requirements of prevailing model building or fire protection codes. Respondent is required to include in its catalogs a conspicuous notice providing minimum distances from adjacent walls at which heating devices can be safely and properly installed; and advising consumers that such information has been previously misstated; that improperly installed heating devices are fire hazards and should be immediately relocated; and that respondent, at its own expense, will reinstall improperly installed heaters and provide shields for previously purchased Franklin fireplaces. Additionally, the company is required, within six months, to revise and reprint promotional and instructional material so as to comply with the terms of the order, and provide its sales personnel with corrected installation information.

Appearances

For the Commission: *William C. Holmes.*

For the respondent: *William J. Thompson, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Montgomery Ward & Co., Incorporated, a 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 in that respect as follows:

I. Respondent

PARAGRAPH 1. Respondent Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal executive offices located at Montgomery Ward Plaza, Chicago, Illinois.

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PAR. 2. Respondent, one of the world's largest merchandising organizations, sells a broad range of merchandise lines through its nationwide mail-order catalog business and through retail stores located throughout the United States.

II. Products

PAR. 3. Among the products sold and offered for sale by respondent through its mail-order catalogs and retail stores are "woodburning heaters" and "Franklin fireplaces." These devices burn wood or other solid fuel as a means of heating the rooms in which the devices are placed. Examples of such devices include the "pot belly stove," the "parlor heater," the "comfort heater," the "circulating wood heater" and the "Franklin-style fireplace."

III. Jurisdiction

PAR. 4. In the course and conduct of its aforesaid business, respondent has caused such woodburning heaters and Franklin fireplaces to be advertised, sold, transported and shipped across state lines. Respondent has thereby, at all times relevant to this complaint, maintained a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

IV. Violations

A. Count I

PAR. 5. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made false representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed.

Among and typical, but not all inclusive, of such false representations are the following:

1. Respondent has represented to consumers, in written advertisements and in written materials packaged with the products, directly or by implication, that five of its Franklin fireplaces (models 21015, 21017, 21335, 21336 and 21337) can be safely and properly installed as close to adjacent combustible walls as 18 inches at the backs of the devices without installing a special protective heat shield between the devices and the combustible walls. However, product safety tests applicable to these devices performed before such representations by respondent

were made determined that minimum safe clearances for these fireplaces from adjacent combustible walls are 18 inches at the backs of the devices with a special protective heat shield installed between the devices and the combustible walls. Moreover, respondent was aware or should have been aware of the results of these tests before the aforementioned representations were made.

2. Respondent has represented to consumers, in written advertisements and in written materials packaged with the product, directly or by implication, that one of its woodburning heaters (model 7366) can be safely and properly installed as close to adjacent combustible walls as 18 inches at the back of the device. However, this heater is of a type which, in the opinion of experts, and according to building and fire protection codes in effect in numerous states, counties and municipalities throughout the United States, should not be installed closer than 36 inches from adjacent combustible walls.

3. Respondent has represented to consumers, in written advertisements and in oral sales presentations by its sales personnel, directly or by implication, that two more of its woodburning heaters (models 7377 and 7387) can be safely and properly installed as close as 24 inches from adjacent combustible walls. However, product safety tests conducted by respondent's own Merchandise Testing Laboratories before these representations were made determined that minimum safe clearances from combustible walls for these two devices are 30 inches at the backs of the devices and 36 inches at the sides.

4. Respondent has represented to consumers in written advertisements, directly or by implication, that still another of its woodburning heaters (model 5722) can be safely and properly installed as close as 24 inches from adjacent combustible walls. However, product safety tests performed by the manufacturer of this model and by Underwriters Laboratories, Inc. determined that minimum safe clearances from combustible walls for model 5722 are 36 inches at the back of the device and 30 inches at the sides. Moreover, respondent was aware of the results of these tests before the aforementioned representations were made.

5. Respondent has represented to consumers in a free promotional booklet mailed to prospective purchasers that its Franklin fireplaces can be safely and properly installed as close as 12 inches at the sides of the devices from adjacent combustible walls. However, product safety tests on at least two of respondent's Franklin fireplaces (models 21015 and 21017) have determined that safe and proper clearance requirements at the sides of these devices are 36 inches—not 12 inches.

PAR. 6. The false representations by respondent referred to in Paragraph Five above have the tendency and capacity to:

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1. Cause consumers to install woodburning heaters and Franklin fireplaces at insufficient and unsafe distances from adjacent combustible walls, thereby subjecting consumers to potential fire loss and risks of personal injury and property damage.
2. Induce consumers into ordering woodburning heaters and Franklin fireplaces under the assumption that such devices can be safely and properly installed according to the representations contained in written advertisements and other promotional materials and presentations used by respondent to induce sales of such devices.

PAR. 7. The false representations by respondent referred to in Paragraph Five above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

B. Count II

PAR. 8. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made contradictory representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed.

Among and typical, but not all inclusive, of such contradictory representations are the following:

1. Respondent has made contradictory representations to consumers in written materials packaged by respondent with three of its woodburning heaters (models 7366, 7386 and 7396) concerning the safe and proper installation of these devices. Diagrams contained in these written materials show proper clearances from adjacent combustible walls for these three devices as being 24 inches at the backs of the devices and 30 inches at the sides. However, printed instructions that appear immediately below the diagrams state that these devices should be installed with clearances from combustible walls of 18 inches at the backs of the devices and 36 inches at the sides.
2. Respondent has represented to consumers in written advertisements, directly or by implication, that four more of its woodburning heaters (models 7326, 7336, 7377 and 7387) may be safely and properly installed as close as 24 inches from adjacent combustible walls. However, in the written materials packaged by respondent with these four devices, respondent has informed consumers that these devices should be installed with clearances from combustible walls of at least 30 inches at the backs of the devices and 36 inches at the sides.

PAR. 9. The contradictory representations by respondent referred to in Paragraph Eight above have the tendency and capacity to:

1. Confuse consumers into installing woodburning heaters and Franklin fireplaces at insufficient and unsafe distances from adjacent combustible walls, thereby subjecting consumers to potential fire loss and risks of personal injury and property damage.

2. Induce consumers into ordering woodburning heaters and Franklin fireplaces under the assumption that such devices can be safely and properly installed according to the representations contained in written advertisements and other promotional materials used by respondent to induce sales of such devices.

PAR. 10. The contradictory representations by respondent referred to in Paragraph Eight above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

C. Count III

PAR. 11. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made unsubstantiated representations to consumers concerning the minimum distances from adjacent combustible walls at which such devices can be safely and properly installed, where such representations have lacked a prior reasonable, scientific basis.

Among and typical, but not all inclusive, of such scientifically unsubstantiated representations are the following:

1. The false representations referred to in Paragraph Five above involving models 21015, 21017, 21335, 21336, 21337, 7377, 7387 and 5722 not only lacked prior scientific substantiation but were even contradicted by actual scientific tests conducted before the representations were made.

2. The false representations referred to in Paragraph Five above involving model 7366, and the contradictory representations referred to in Paragraph Eight above involving models 7366, 7386, 7396, 7326 and 7336, were made without prior scientific substantiation, since respondent was and is aware of no scientific tests conducted on these models to substantiate such representations.

3. Respondent has represented to consumers in written advertisements, directly or by implication, that another of its woodburning heaters (model 5718), can be installed as close as 24 inches from adjacent combustible walls. However, not only were these representations made without prior scientific substantiation; these representations contradicted the results of prior scientific tests on a comparable model, and of which respondent was aware, in which it was found that minimum safe clearances from combustible walls for the comparable

model were 36 inches at the back of the device and 30 inches at the sides.

PAR. 12. The scientifically unsubstantiated representations referred to in Paragraph Eleven above:

1. Involve specific claims concerning the safe usage of potentially hazardous consumer products.
2. Involve potential personal injury and property damage in the event that the representations are false.
3. Are of a type that consumers cannot themselves verify, since they lack the necessary equipment and expertise.

PAR. 13. The scientifically unsubstantiated representations referred to in Paragraph Eleven above contradict and offend model building, mechanical and fire protection codes recommended by the International Conference of Building Officials, the American Insurance Association, the Southern Building Code Congress, and the National Fire Protection Association. These model codes, which have been adopted by numerous states, counties and municipalities throughout the nation, require either that devices such as respondent's woodburning heaters and Franklin fireplaces, models 7326, 7336, 7366, 7377, 7387, 21015, 21017, 21335, 21336 and 21337, be specifically and scientifically tested to establish minimum safe clearances for the devices from adjacent combustible walls, or, in the absence of such tests, that such devices be installed with clearances of at least 36 inches from adjacent combustible walls.

PAR. 14. Certain insurance companies look to the aforementioned model codes when determining the insurability of private dwellings. If a home owner fails to comply with the requirements of such model codes, such insurance companies may, as applicable, either refuse to grant a home owner's policy to the home owner or cancel the home owner's existing policy.

PAR. 15. In light of factors such as those referred to in Paragraphs Twelve through Fourteen above, the representations by respondent referred to in Paragraph Eleven above were unfair and deceptive, since they were made without a prior reasonable basis and, in particular, without prior adequate scientific substantiation.

PAR. 16. The representations by respondent referred to in Paragraph Eleven above have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

D. Count IV

PAR. 17. In connection with the sale and offering for sale of certain

of its woodburning heaters and Franklin fireplaces, respondent has, as described in Counts I, II and III above, made representations to consumers concerning the safe and proper usage of potentially dangerous consumer products, where such representations have been false, contradictory and/or scientifically unsubstantiated. A continuing and lingering effect of such representations is the danger that, where such representations were in fact false and unsafe, consumers who have already installed such devices in accordance with such representations will, unless notified otherwise, continue to be exposed to unreasonable risks of personal injury and property damage.

PAR. 18. It is an unfair or deceptive act or practice for respondent to continue to fail to:

1. Notify past purchasers of the dangers created by reliance upon those representations already shown to be false by actual scientific tests and expert opinion (see Count I above).
2. Conduct adequate scientific tests to assess the safety of those representations respecting which scientific tests have not yet been conducted (see Count III above), and notify past purchasers of any safety hazards disclosed by such tests and involving respondent's representations.

PAR. 19. Respondent's continuing failure to give the notices to past purchasers referred to in Paragraph Eighteen above constitutes an unfair act or practice in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

E. COUNT V

PAR. 20. In connection with the sale and offering for sale of certain of its woodburning heaters and Franklin fireplaces, respondent has made false or deceptive representations to consumers concerning the applicability and results of third party product tests, listing and approvals.

Among and typical, but not all inclusive, of such false or deceptive representations are the following:

1. Respondent has represented to consumers, in written materials and in oral sales presentations by its sales personnel, that five of its Franklin fireplaces (models 21015, 21017, 21335, 21336 and 21337) have been "listed" and approved under International Conference of Building Officials ("ICBO") research reports for installation as close to adjacent combustible walls as: 12 inches at the backs of the devices if a special protective heat shield is used; or 18 inches if the heat shield is not used. In actuality, however, the ICBO research reports applicable to these devices require that they be installed with the heat shield

(never without the heat shield) and be installed at least 18 inches (not 12 inches) from combustible walls.

2. Respondent has represented to consumers in written advertisements that one of its woodburning heaters (model 5722) has been "listed" and approved by Underwriters Laboratories, Inc. ("UL") for installation as close as 24 inches from combustible walls. In actuality, however, the UL listing for model 5722 requires that for the device to be listed, minimum safe clearances "must" be maintained from adjacent combustible walls of "not less than . . . 36 inches at back of cabinet, 30 inches at sides."

PAR. 21. Consumers rely upon UL and ICBO listings and other third party products tests, listings and approvals when choosing consumer products.

PAR. 22. State, county and municipal building officials rely upon UL and ICBO listings when determining whether devices such as respondent's woodburning heaters and Franklin fireplaces satisfy the requirements of local building and fire protection codes.

PAR. 23. The representations referred to in Paragraph Twenty above have the tendency and capacity to mislead and deceive consumers and state, county and municipal building officials as to the applicability and results of third party product tests, listings and approvals, and have constituted unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

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 Chicago 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 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 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34, 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 Montgomery Ward & Co., Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal executive offices located at Montgomery Ward Plaza, Chicago, Illinois.

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 respondent Montgomery Ward & Co., Incorporated (hereinafter "respondent"), a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or distribution in or affecting commerce of any woodburning heaters or Franklin fireplaces, forthwith cease and desist from, directly or indirectly:

A. Making any representation to consumers regarding the safe or proper installation clearances for any woodburning heater or Franklin fireplace from adjacent combustible walls, where such representation contradicts the general clearance requirements from combustible walls contained in prevailing model building, mechanical and fire protection codes, unless prior to the time such representation is first made, respondent possesses and relies upon a competent scientific test which substantiates such representation. *Provided*, that for purposes of this order, a "competent scientific test" shall mean:

A test in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the profession to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, or (b) with the exception of the specific tests required by Paragraph III.A below, by persons

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employed by respondent, if they are qualified by professional training, education and experience and can conduct and evaluate the test in an objective manner.

- B. Making any safety-related representation to consumers regarding the installation (other than clearances from adjacent combustible walls), operation or maintenance of any woodburning heater or Franklin fireplace, unless prior to the time such representation is first made, respondent possesses and relies upon competent and reliable evidence which substantiates such representation, including but not limited to competent scientific tests or competent and reliable opinions of scientific, engineering or other experts, including employees of respondent, who are qualified by professional training or experience to render competent judgments in such matters.
- C. Making any representation to consumers regarding any woodburning heater or Franklin fireplace, which misstates or misrepresents the results or applicability of any test, listing or approval by any third party.

II.

It is further ordered, That respondent shall include as a full page located in the center of its October 1979 catalog house clearance books, and as a full page located immediately preceding the first page of the Index in its Spring & Summer 1980 semi-annual general catalog, the following notice, conspicuously displayed:

IMPORTANT SAFETY NOTICE TO OWNERS OF WARDS WOODBURNING HEATERS AND FRANKLIN FIREPLACES

Some recent Wards catalogs, fireplace booklets, descriptive manuals, owner's guides, or sales person statements understated some of the minimum recommended clearances between some Wards woodburning heaters and Franklin fireplaces and adjacent combustible walls (see the list of model numbers below). If you purchased one of these heaters or fireplaces and installed it closer to combustible walls than the distances shown in the chart below, it should be relocated IMMEDIATELY. Failure to relocate the heater or fireplace to these distances, or (if needed) to install a protective heat shield between it and combustible walls, COULD CAUSE A FIRE.

CLEARANCES FOR MODELS 5722, 7377, 7387, 21015 AND 21017:

STOVE MODEL

5722 (Circulating wood heater)
7377 (Comfort heater)

DISTANCE FROM REAR

36 inches from back of stove
30 inches from back of stove

DISTANCE FROM SIDES

30 inches from sides of stove
36 inches from sides of stove

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7387 (Parlor heater)	30 inches from back of stove	36 inches from sides of stove
21015 (Franklin fireplace)	18 inches from back of fireplace, <u>with heat shield installed on the inside back wall of fireplace</u>	36 inches from sides of firebox opening
21017 (Franklin fireplace)	18 inches from back of fireplace, <u>with heat shield installed on the inside back wall of fireplace</u>	36 inches from sides of firebox opening

If you have installed one of the above heaters or fireplaces at less than the distances from combustible walls shown above, or without a heat shield where a heat shield is needed, Wards will help you by either relocating the heater or fireplace to the correct distance or by providing or installing the heat shield, at Wards' expense.

CLEARANCES FOR MODELS 21335, 21336 AND 21337:

<u>STOVE MODEL</u>	<u>DISTANCE FROM REAR</u>	<u>DISTANCE FROM SIDES</u>
"Little Ben" Franklin fireplace (Wards model 21335; Hearth Craft model 220)	18 inches from back of fireplace, <u>with heat shield installed on back of fireplace</u>	12 inches from sides of cast iron hearth
"Big Ben" Franklin fireplace (Wards model 21336; Hearth Craft model 260)	18 inches from back of fireplace, <u>with heat shield installed on back of fireplace</u>	12 inches from sides of cast iron hearth
"Giant Ben" Franklin fireplace (Wards model 21337; Hearth Craft model 300)	18 inches from back of fireplace, <u>with heat shield installed on back of fireplace</u>	12 inches from sides of cast iron hearth

If you have purchased one of the above three Franklin fireplaces from Wards and installed it without a heat shield, Wards will provide or install a heat shield at Wards' expense.

FOR FURTHER INFORMATION, write:

Mr. Donald C. Gutmann,
Customer Relations Manager, 4-N
Montgomery Ward & Co., Incorporated
Montgomery Ward Plaza
Chicago, Illinois 60671

To enable us to assist you promptly, please try to include the following information in your letter, if known: your name, address and telephone number, the unit you own, the distance from the back and sides of your unit to adjacent combustible walls, whether your unit is installed with a heat shield, and the address where your unit is located."

III.

It is further ordered, That:

A. Respondent shall promptly submit the following of its models of woodburning heaters to one or more independent product testing laboratories approved for this purpose by the Federal Trade Commission or its delegees, for determination by competent scientific tests, as defined in Paragraph I.A above, of the minimum recommended installation clearances for such models from adjacent combustible walls: models 5718, 7326 and 7336, as offered in respondent's Spring & Summer 1978 catalog, and models 7366, 7386 and 7396, as offered in respondent's Fall & Winter 1977 catalog.

B. If the results of the tests required by Paragraph III.A above on respondent's models 5718, 7326, 7336, 7366, 7386 and 7396, show that respondent has understated the minimum recommended clearances for any such model from adjacent combustible walls, in any of its current or past catalogs, fireplace booklets, descriptive manuals or owner's guides, respondent shall include in the notice required by Paragraph II above notification of the clearances determined by such test and an offer to relocate the model to such clearances at respondent's expense.

IV.

It is further ordered, That respondent shall take all such steps as are necessary to carry out its obligations described in the notice required by Paragraphs II and III.B above to relocate certain woodburning heaters and Franklin fireplaces, or provide or install protective heat shields where needed, at respondent's expense. *Provided, that:*

A. Respondent may, at its election, have the necessary work performed by persons selected by it, including its own employees, who are competent to perform such work.

B. Respondent shall, if relocation of a particular heater or fireplace, or installation of the necessary heat shield on its Franklin fireplace models 21335, 21336 and 21337, is not acceptable to the consumer, offer instead to remove the unit, refund the full purchase price paid by the consumer for the unit (including shipping and handling charges), and make reasonable repairs to the consumer's premises necessitated by such removal, at respondent's expense.

C. Respondent may, at its election, if it concludes that relocating a particular heater or fireplace, or installing the necessary heat shield on its Franklin fireplace models 21015, 21017, 21335, 21336 or 21337, would not be feasible, instead offer to remove the unit, refund the full purchase price paid by the consumer for the unit (including shipping

and handling charges), and make reasonable repairs to the consumer's premises necessitated by such removal, at respondent's expense.

D. Respondent may, as regards its Franklin fireplace models 21335, 21336 and 21337, require the consumer to submit proof of purchase satisfactory to respondent showing that the consumer purchased his or her unit from respondent, before respondent must approve any remedy under this order for said consumer, which approval by respondent shall not be unreasonably withheld.

V.

It is further ordered, That:

A. Respondent shall send to each of its retail sales departments involved in the sale of any woodburning heater or Franklin fireplace, prior to or contemporaneously with the selling of such item in that department, descriptive manual pages or other written information for the department's sales personnel setting forth the clearance requirements from adjacent combustible walls, and the heat shield requirements, if any, for the installation of that item.

B. For a period of six (6) months from the effective date of this order (plus such additional time as may be necessary to conduct competent scientific tests and to print the materials), respondent shall send to all company retail and catalog stores, as available based upon competent scientific tests, written point of sale material for distribution to consumers inquiring about any of the woodburning heaters or Franklin fireplaces which are covered by the notice requirements of Paragraphs II and III.B of this order, and which respondent is then offering for sale to consumers, setting forth the clearance requirements from adjacent combustible walls, and the heat shield requirements, if any, for the installation of such items.

VI.

It is further ordered, That respondent shall have a period of six (6) months from the effective date of this order to revise and reprint all printed materials as required to comply with this order, including but not limited to owner's guides, advertising copy, catalog copy and descriptive materials, and shall not be in violation of this order because of the existence of owner's guides packaged with products prior to the effective date of this order. *Provided*, that during such period, respondent shall use its best efforts to advise customers and consumers of the installation information contained in the notice required by Paragraphs II and III.B above of this order, and to include with the woodburning heaters and Franklin fireplaces covered by such notice

corrected installation information concerning recommended clearances from adjacent combustible walls.

VII.

It is further ordered, That respondent shall:

A. Sixty (60) and two hundred forty (240) days after the effective date of this order, file with the Commission reports in writing setting forth in detail the manner and form in which it has complied with this order.

B. Maintain files of all persons making written requests to respondent to have woodburning heaters or Franklin fireplaces covered by the notice required by Paragraphs II and III.B of this order relocated, or installed or provided with heat shields, where respondent has refused such requests, which files shall contain the names and addresses of such persons and the information on which each such refusal was based, including all correspondence from the consumer concerning the consumer's request. Such files shall be made available for inspection and copying, upon reasonable notice, by a duly authorized agent of the Commission during respondent's regular business hours.

C. Forthwith distribute a copy of this order to each of its operating divisions which is involved in the sale or offering for sale of, or the selection, evaluation or preparation of materials regarding, woodburning heaters or Franklin fireplaces.

D. Notify the Commission at least thirty (30) days prior to any proposed change in the 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 respondent which may affect compliance obligations arising out of this order.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

*Docket 8917. Interlocutory Order, Jan. 29, 1980*ORDER DENYING RESPONDENT BRISTOL-MYERS' MOTION THAT THE
COMMISSION TAKE OFFICIAL NOTICE OR THAT IT REOPEN THE
RECORD

On November 26, 1979, respondent, Bristol-Myers Company, ("Bristol-Myers") filed a motion requesting the Commission to take official notice of selected newspaper reports about the initial decision in this case, or reopen the record so those reports could be introduced into evidence. Bristol-Myers contends that these reports have misstated the findings made by the administrative law judge, demonstrating that the press has misunderstood not only the tenor of the initial decision, but also the affirmative disclosures which Bristol-Myers has been ordered to include in its comparative advertising. The respondent argues that the reports consequently provide direct evidence of the likelihood that consumers will also misconstrue the affirmative advertising disclosures. Complaint counsel answered Bristol-Myers' motion on December 3, 1979, opposing it on grounds that the newspaper reports are neither reliable nor probative evidence of consumers' understanding of the affirmative disclosures.

At this point in the proceedings at least, we are not persuaded of a need either to notice the proffered clippings officially or to reopen the record for the introduction into evidence. The newspaper reports seem, in fact, to be only dimly relevant to the issue of consumer perceptions. The respondent's motion does not state that newspapers have generally mischaracterized the affirmative disclosures which would be given to consumers; rather the motion asserts only that the press has misconstrued the findings on which the order of the administrative law judge is based. On the other hand, we also note from the motion that one of the respondent's witnesses has already testified directly about the probable impact on consumers of affirmative disclosures that are similar or identical to those set forth in the initial decision. Therefore, it is not apparent that the selected newspaper reports constitute evidence necessary or helpful to a proper resolution of this case.¹ Accordingly,

It is ordered, That Bristol-Myers' motion be and hereby is denied. Commissioner Pitofsky did not participate.

¹ The Commission may at any time take official notice of appropriate material on its own motion. Pursuant to Rule 3.43(d), however, parties are entitled to disprove an officially noticed fact if the Commission's decision is based on it, in whole or in part, and it is a material fact that does not appear in evidence of record.