

IN THE MATTER OF
CENTURY 21 COMMODORE PLAZA, INC., ET AL.
DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9088. Complaint, Aug. 11, 1976—Dismissal Order, June 9, 1980

This order affirms the initial decision of the administrative law judge and grants complaint counsel's motion for dismissal of a complaint alleging that a North Miami Beach, Fla. realtor illegally required buyers of its Florida condominiums to enter into long-term leases of recreation facilities.

Appearances

For the Commission: *Richard C. Donohue* and *David A. Eisenstein*.

For the respondents: *Gerald F. Richman, Frates, Floyd, Pearson, Stewart, Richman & Greer*, Miami, Fla. and *Warren L. Miller, Stein, Halpert & Miller*, Washington, D.C. for respondents Century 21 Commodore Plaza, Inc. and Norman Cohen. *Jerome S. Richman*, Miami, Fla. for respondent Saul Morgan.

COMPLAINT

The Federal Trade Commission, having reason to believe that Century 21 Commodore Plaza, Inc. and Norman Cohen and Saul J. Morgan have violated the provisions of the Federal Trade Commission Act, and that a proceeding with respect to such violations would be in the public interest, hereby issues its complaint, setting forth its charges as follows:

Parties

1. Respondent Century 21 Commodore Plaza, Inc. is a Florida Corporation doing business at 18321 Biscayne Blvd., North Miami Beach, Florida.
2. The Corporate Respondent is the developer of certain real property in Dade County, Florida upon which is situated the condominium development known as Century 21 Commodore Plaza. Century 21 Commodore Plaza comprises 654 residential apartment units. In 1970, respondent filed a Declaration of Condominium submitting the property to condominium ownership and By-laws governing the operation of Commodore Plaza at Century 21 Condominium Association, Inc. (the Association) to be composed of condominium owners who would subsequently purchase units from the corporate respondent.

3. Respondent Norman Cohen is and at relevant times in the past has been an officer and shareholder of the corporate respondent, and has formulated, directed, and controlled the acts and practices of the corporate respondent, including those hereinafter set forth. Respondent Cohen is a trustee and lessor of the recreation lease under which the corporate respondent's buyers are obligated. Respondent Cohen has been at relevant times in the past an officer of the Association. Respondent Cohen is or has been an officer of Morgan's Bay Management Corporation, Inc. (the Management Company) which company is the manager named in the management agreement which the corporate respondent's buyers are required to execute.

4. Respondent Saul J. Morgan has been at relevant times in the past an officer and shareholder of the corporate respondent, and has formulated, directed, and controlled the acts and practices of the corporate respondent, including those hereinafter set forth. Respondent Morgan is or has been a trustee and lessor of the recreation lease under which the corporate respondent's buyers are obligated. Respondent Morgan has been an officer of the Association. Respondent Morgan has been an officer of the Management Company.

5. The Association is a corporation not for profit incorporated under the laws of the state of Florida on December 16, 1970 for the purpose of operating the then to be created condominium known as Commodore Plaza at Century 21. For approximately one year from that date, the Association was under the control of a three member board of directors composed of respondent Norman Cohen, respondent Saul J. Morgan, and David Morgan, a shareholder in the corporate respondent and the brother of respondent Saul J. Morgan. During the time that the Association was under the control of the respondents, the Association executed a long term recreation lease with the individual respondents and a management agreement with the Management Company to which subsequent buyers were bound.

Jurisdiction

6. Respondents are, or at relevant times in the past have been, in the business of selling or offering for sale condominium apartment units for residential purposes to the general public. Respondents have also, through various wholly or partially-owned subsidiaries, been engaged in the construction, management and servicing of the condominium units and of the related common areas, in the leasing of recreation facilities and in the providing of other services related to the above.

7. In the course and conduct of the aforesaid, respondents cause

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and have caused their promotional materials, contracts, and various business papers to be transmitted through the U.S. mails and other interstate instrumentalities from their place of business in Florida to customers and prospective customers in various other States and Territories of the United States. Respondents have held promotional parties in Boston, Massachusetts, and New York, New York, and have otherwise contacted persons residing in those areas in order to obtain buyers for respondents' condominium units.

8. Respondents thus maintain and at all times mentioned herein have maintained a substantial course of trade in condominium units and related facilities in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

VIOLATIONS

9. To purchase one of respondents' condominium units, a purchaser must:

- (a) acquire an individual fee simple interest in a particular apartment unit;
- (b) acquire a fee simple interest in common with owners of other units in certain common areas of the structure and in underlying and surrounding land;
- (c) ratify a long-term lease of certain actual or proposed recreational facilities, entered into on the buyer's behalf by the respondent, and the rent for which is subject to increase based on an escalator clause tied to the Food Index of the Consumer Price Index;
- (d) execute an agreement pledging the purchaser's ownership interests as security for payment of rent under the aforementioned lease; and
- (e) ratify a management agreement entered into on the buyer's behalf by the respondent.

10. Consummation of the purchase of one of respondents' condominium units requires execution or ratification of approximately eight separate documents containing over 100 pages. The documents are prepared by respondents, and most or all of them contain technical legal language and are difficult for a layman or a lawyer not expert in condominium law to interpret.

11. The condominium form of ownership is a recent innovation in the law of real property in the United States and in the State of Florida. The obligations attendant thereto and the documents described in paragraphs 9 and 10, above, are not associated with other types of real property transactions.

12. A substantial number of purchasers of respondents' condominium units were and are persons: (1) having no previous experience with condominiums; (2) not residents of the State of Florida; and/or (3) who have retired and who, as a consequence of their retirement status, do not expect substantial increases in their incomes.

13. The facts set forth in paragraphs 9, 10, 11, and 12, above, were known or should have been known to respondents.

I

14. In print advertising and elsewhere, respondents, directly or by implication, make and have made numerous representations to prospective purchasers with respect to the facilities and services associated with the purchase of respondents' condominium units, including but not limited to representations that:

a. The water of Morgan Bay was safe and healthy for swimming at the time that such representations were made.

b. A golf course was planned for the immediate future.

c. Other facilities and services including but not limited to a shopping plaza; a medical center; a chapel; tram service and other transportation; bowling lanes; a restaurant; and adequate protective security were planned for the immediate future.

d. Other facilities and services promised and provided would be owned in common by the unit owners as a part of their condominium purchase, or would be leased to the unit owners at a fixed monthly rate, and would not entail expense beyond that rate to unit owners.

15. In truth and in fact:

a. Respondents knew or had reason to know that Morgan Bay was not safe and healthy for swimming.

b. A golf course was never built.

c. The facilities and services set forth in paragraph 14(c), above, were never provided.

d. Some other services and facilities promised were never provided; those provided have entailed substantial additional expense to unit owners.

The representations made by respondents as alleged in paragraph 14, above, are unfair and deceptive within the meaning of Section Five of the Federal Trade Commission Act.

16. In print advertising and elsewhere, respondents made statements and representations, directly or by implication, concerning the present and future economic value of respondents' condominium units,

including representations concerning the facilities and services to be provided, the marketability of the units, the present value of the units, and the costs and charges associated with ownership of the units.

17. In making the statements and representations alleged in paragraph 16, above, respondents failed to disclose material facts concerning the effect of the documents described in paragraphs 9 and 10, above, on the present and future value and marketability of the condominium units, and the costs and charges associated with ownership of one of the units, including but not limited to the facts that said documents provided that:

a. Respondents had no express contractual obligation which required them to provide the facilities described in paragraph 14, above, on the terms and conditions represented.

b. Buyers are required through the Association to pay rent under the recreation lease for a period of 99 years.

c. The amount buyers will be required to pay over the term of the lease will be substantially higher than the amount originally imposed by the rent obligation as a result of the Cost of Living Adjustment to Rental also provided for in the lease. The adjustment provision states that the amount of rent due under the lease will be increased annually in accordance with increases in the Food Index of the Consumer Price Index, but that once increased, the rent shall not decrease over the term of the lease.

d. In addition to the rent provided for under the lease agreement, buyers are required to assume all costs associated with the maintenance of the recreation facilities, including but not limited to all costs of taxes, insurance, utilities, and repair and replacement of facilities. As a result of the said requirement, respondents' buyers must pay substantial amounts over and above the rent provided for in the recreation lease toward the maintenance of the leased facilities.

e. Buyers are required to return the leased facilities to the developer at the end of the 99 year lease term in as good a condition as the facilities were received at the beginning of the lease term.

f. The base rent and the adjustments thereto provided for under the recreation lease will require respondents' buyers to pay an amount in excess of the purchase price of their units over the term of the lease.

g. The recreation lease requires the buyers to pay the respondents' attorneys' fees and other costs including the amount of any judgment associated with any attempt on the part of the buyers or any other person to invalidate or modify any aspect of the lease, to make any claim against respondents' interest in the lease, or to enforce the respondents' obligations as lessor under the lease.

h. The terms of the Pledge Agreement require the unit owner to subject all of his right, title, and interest in his condominium unit and the common element appurtenant thereto to a lien held by the developer. The effect of the said Pledge Agreement is to permit respondents to threaten and to effect foreclosure against a unit owner's home in the event of any default in payment due under the lease agreement.

i. The management agreement provides that the Management Company's fee for its services shall be 5% of the amount of the costs assessed against the Association without regard to the actual value of the services provided by the Management Company in connection with such assessments. The management agreement provides that the Management Company may incur many of the costs to be assessed against the Association in the Management Company's sole discretion. The said provision described provides the Management Company with no incentive to preserve the assets of the Association since the greater the costs assessed against the Association, the higher is the Management Company's fee.

j. The management contract provides that money collected from the Association shall be applied by the Management Company in the following order: to the payment of insurance premiums; to the payment of the Management Company's fee, determined as described in i., above; to the payment of rent and other obligations under the recreation lease, as described in b.-f., above; and to the payment of utilities and other costs.

k. The effect of the provision described in j., above, is to compel the Association to pay the rent provided for under the recreation lease and to pay the fee to the Management Company before the Association may pay its costs for utilities and other necessary expenses.

l. The management agreement provides that the agreement between the Management Company and the Association continue for a minimum period of 15 years, and be renewable for successive ten year periods thereafter.

m. The unit owners ratified actions taken by respondents in their capacity as officers and directors of the unit owners association.

n. The unit owners undertook other duties and obligations not known to them.

Said failure to disclose material facts is unfair and deceptive within the meaning of Section Five of the Federal Trade Commission Act.

18. The use by respondents of the aforesaid false, misleading, and deceptive statements and representations and the failure by respondents to disclose material facts have had the tendency and capacity to

mislead members of the purchasing public into erroneous and mistaken beliefs concerning respondents' condominium units and to induce the purchase of respondents' condominium units and to induce the execution of the pledge agreement and of the documents binding purchasers to the recreation lease and management agreement by reason of said erroneous and mistaken beliefs, and constitute unfair and deceptive acts or practices within the meaning of Section Five of the Federal Trade Commission Act.

II

19. In the course of the condominium sale transaction as described in paragraphs 9-18 above, buyers of respondents' condominium units executed the documents described in paragraph nine. Under the circumstances of the said transaction:

a. The imposition or enforcement of the requirement that charges be assessed against the unit owners under the provisions of the recreation lease described in 17b. to 17f., above, is an unfair act or practice.

b. The imposition or enforcement of the requirement that the unit owners pay respondents' costs of litigation, as described in 17g., above, deters the raising of valid claims and defenses, and imposes unreasonable costs on the unit owners, and is an unfair act or practice.

c. The taking or enforcement of a security interest in the unit owners' homes under the provisions of the pledge agreement described in 17h., above, is an unfair act or practice.

d. The imposition or enforcement of the provisions of the management agreement described in 17j., above, is an unfair act or practice.

e. The imposition or enforcement of the requirement under the management agreement that the Association pay the costs imposed on it by respondents described in 17j. to 17k., above, before it may pay its necessary expenses is unfair to the Association and to the individual unit owners.

f. The term of the management agreement as described in 17l., above, denied the Association the right to cancel or amend for at least 15 years an agreement the provisions of which impose excessive and unfairly determined costs on the unit owners who make up the Association and the imposition or enforcement of said term is an unfair act or practice.

III

20. Respondents' continued enforcement of or attempt to enforce

the Recreation Lease, the Pledge Agreement, and the Management Agreement, or any of these, executed under the circumstances described herein and containing the terms and conditions described herein constitutes an unfair act or practice.

IV

21. The aforementioned acts and practices, as herein alleged, both separately and in the aggregate, were and are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section Five of the Federal Trade Commission Act.

INITIAL DECISION BY LEWIS F. PARKER,
ADMINISTRATIVE LAW JUDGE

FEBRUARY 7, 1980

A. FINDINGS OF FACT

1. Respondent Century 21 Commodore Plaza, Inc. is a Florida Corporation doing business at 18321 Biscayne Blvd., North Miami Beach, Florida.

2. The Corporate Respondent is the developer of certain real property in Dade County, Florida upon which is situated the condominium development known as Century 21 Commodore Plaza.

3. Respondent Norman Cohen is and at relevant times in the past has been an officer and shareholder of the corporate respondent and was a trustee and lessor of the recreation lease under which the corporate respondent's buyers were obligated.

4. Respondent Saul J. Morgan was an officer and shareholder of the corporate respondent, and was a trustee and lessor of the recreation lease under which the corporate respondent's buyers were obligated.

5. On April 10, 1979, on motion by complaint counsel, I amended the complaint in this case, with the result that the only issue remaining is whether the use by Mr. Cohen of the long term recreation lease is per se unfair or deceptive. Complaint counsel have now filed a motion asking me to dismiss the amended complaint.

B. CONCLUSIONS OF LAW

Complaint counsel recommend dismissal because changes made after this complaint issued—in the applicable law by statute, regulation and the courts make it unlikely that the problems addressed in the

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case will occur in the future (p. 2 of their motion). I agree. Furthermore, the unit owners at Commodore Plaza who were affected by the recreation lease have purchased it from Mr. Cohen. In my opinion, these developments remove any need for a decision on the merits in this case, and further proceedings would not be in the public interest.

C. ORDER

It is ordered, That the complaint be, and it hereby is, dismissed as to all respondents.

ORDER AFFIRMING THE INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE GRANTING COMPLAINT COUNSEL'S MOTION FOR DISMISSAL

The administrative law judge in the above-captioned case issued an Initial Decision on February 7, 1980 dismissing those portions of the original complaint charging that enforcement of allegedly unfair provisions of a condominium lease agreement violated Section 5 of the Federal Trade Commission Act. The ALJ recommends dismissal because of changes in Florida condominium law, the state of location of the property, and because respondents have signed a settlement agreement with the condominium association.

After considering the record before us, the Commission has determined to affirm the dismissal of this complaint. However, we reverse the ALJ's decision to amend the complaint by deleting certain allegations under Rule 3.15 of the Commission's Rules of Practice and emphasize that only the Commission has authority to eliminate complaint allegations under the circumstances presented here.

Our original complaint issued in August of 1976 charged not only that enforcement by respondents of the lease provisions constituted an unfair practice under Section 5, but also that respondents had deceptively misrepresented the attributes of the condominium arrangement and its leased facilities. In February 1978, we denied a motion by complaint counsel to dismiss or stay the entire complaint. That motion was based upon the changes in Florida law and pending litigation in that state involving operation of the lease provisions. One of the main reasons we denied the dismissal request was because the complaint's misrepresentation charges would not be resolved by either changes in Florida law or the pending litigation.

On April 10, 1979, the ALJ, upon motion of complaint counsel, stated the charges in the complaint pertaining to the advertising representations and several, but not all, of the charges pertaining to the failure to disclose material facts. The misrepresentation charges

that remained dealt with respondents' failure to disclose to purchasers the existence and operation of the same provisions which formed the basis of charges concerning enforcement of the lease. The ALJ, without certifying the motion to the Commission, stated that the deletions were justified whether treated as an amendment to the complaint under Section 3.15 of the Rules of Practice, or a dismissal of charges under Section 3.22 of our Rules.

The ALJ's failure to seek Commission approval of the deletion of these charges was in error whether viewed as a dismissal or an amendment.

Under Section 3.15, an ALJ has a limited power to amend without seeking Commission approval. This power extends *only* to matters that facilitate the determination of the merits of a controversy, and has been held to apply to changes that merely clarify the details of existing charges. *Capitol Record Distributing Corp.*, 58 F.T.C. 1170 (1961). "... (T)he Commission reserves to itself the discretionary determination of when there is reason to believe the law has been violated and when the public interest requires the institution of proceedings, as well as the authority to frame charges. . . ." *Id.* at 1173. The implementation of any amendment that substantively changes prior Commission action has not been delegated to the ALJ and must be certified to the Commission for approval. *Id.* at 1174.

The limitations on the authority of an ALJ apply with equal force whether the proposed alteration will add to or delete from charges in the complaint. In *Crush International Limited, et al.*, 80 F.T.C. 1023 (1972), the Commission discussed an ALJ's authority to allow an amendment proposing deletion of certain parties from the complaint. We stated that the ALJ had no authority to amend "except to the extent that his ruling deals with matters of procedure rather than substance, such as deletion of an individual respondent who has deceased or the substitution of respondents improperly named. . . ." *Id.* at 1024. Conversely, it follows that if a party were to be deleted for other than these merely technical reasons, such as for example to focus the litigation on a more blatant offender, the amendment is inherently substantive; it would go to the heart of the Commission's initial discretionary determination of violation and must be certified to the Commission for approval.

Similarly, the deletion of the charges in the instant case cannot be considered a procedural technicality. Under no circumstances can a deletion of charges be said to facilitate a determination of the merits because the merits of the deleted charges will never be reached. In addition, the deletion substantively changes both the Commission's prior actions in initially issuing the complaint and its denial of

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complaint counsel's first motion to dismiss, which was based in part on the failure of Florida law to resolve the misrepresentation issues.

The same result obtains if this procedure is considered as a dismissal. The same boundaries between procedural and substantive actions limit an ALJ's authority in this regard. *Crush International, supra*. If a dismissal is based on a determination that the public interest is no longer affected—a proposition that was explicitly stated by the ALJ in the instant case—the action must be certified for Commission approval.

This decision should not be read to affect any of an ALJ's independent powers under the Rules of Practice. Under Section 3.15, an ALJ may consolidate similar charges of a Commission complaint in order that trial of issues will be easier for the parties or follow a more logical litigation pattern. Such a situation falls comfortably within an ALJ's power under Section 3.15 to alter a complaint "to facilitate a determination of the merits." The instant case, however, involved a wholesale deletion of substantive charges; an action which mandates certification to the Commission. In addition, our clarification of the Rules in no way affects an ALJ's power to dismiss without certification if complaint counsel have not met their burden of proof on an issue or the power to grant summary decision under Section 3.24. Considering the ALJ's action in light of complaint counsel's motion, however, it is apparent that these powers were not presented as a basis for the ALJ's independent action of deleting the misrepresentation charges.

Despite the error that has been committed, we have decided that it does not justify sending this matter back for further litigation on the deleted charges. A review of the record indicates that dismissal of these charges was warranted, although the procedure followed was incorrect. However, after a review of the record, we are in agreement with the ALJ's decision to dismiss and, therefore, the error was harmless.

The changes resulting from the new Florida laws dealing with the conscionability of recreation leases and the settlement agreement alleviate many of the concerns expressed in our original complaint. The Florida law establishes a presumption against the conscionability of recreation leases that contain nine specific provisions, all of which are present in the instant case. Fla. Stat. Sec. 718.122. This law should protect Florida consumers in the future from many of the flagrant abuses associated with recreational leases.

The changes in Florida law, however, do not go as far as a potential Commission order could have under Section 5. Under the Florida condominium law, all of the nine provisions must be present in order to trigger the presumption. Arguably, a lessor could include seven of the

nine provisions contained in the law, and avoid operation of the presumption. In addition, while Florida law requires an aggregate of provisions, the Commission's initial complaint charged that the inclusion of particular provisions alone may constitute an unfair act. Finally, the Florida courts have held that the new laws cannot be applied retroactively. Thus, lease agreements consummated prior to the adoption of the Florida legislation will be judged under the less stringent common law standards.

Although these differences between Florida law and possible applications for Section 5 underscore important long run considerations for protection of the consumer and may merit future Commission investigation, a review of the present posture of the instant adjudication convinces us that this case is not the appropriate vehicle for the establishment of Commission precedent.

Respondents and the condominium association have negotiated a settlement whereby the latter have purchased the lease. Part of that agreement prohibits the association from benefitting from FTC action. Any attempt to fashion consumer redress under Section 19 would therefore be difficult and may interfere with or jeopardize the benefits the condominium association has obtained under the settlement.

Similar considerations militate against a potential cease and desist order against respondents. The association now owns the lease and is in a position to cure any injury that may have resulted from respondents' allegedly unfair practices. Since the practices that would be the basis of such an order are no longer within the control of respondents, an order could arguably verge on being frivolous. Although a cease and desist order could be fashioned to prohibit respondents from engaging in similar practices in other lease arrangements, we have no evidence that respondents have such lease arrangements or that consumers are being adversely affected by any practices by respondents. Such an order would go beyond the scope of the adjudication before us. Thus, we are unable to determine if such an order is necessary to preserve the public interest.

Finally, the new Florida laws may act as a substantial deterrent to the practices that we expressed concern about in our complaint. Because the laws are relatively new, we have no way of determining whether their operation will be an effective means of consumer protection or whether consumers are still being injured despite the existence of the laws. Out of deference to state actions and because it is impossible, at this point, to gauge the public interest, we feel that the prudent course is to stay Commission action for the present.

We have also determined that continued litigation over the misrepresentation charges would not, at this point, result in a long range

benefit to the public interest. Many of the misrepresentation charges were included in the complaint to illustrate the context in which unfair or deceptive practices may have occurred with respect to the lease agreement. Further, the new Florida law contains provisions requiring pre-disclosure of material facts concerning condominium sales and concerning advertising the availability of facilities not as yet completed. Fla. Stat. Sec. 718.501. Thus, the law prospectively deters the same abuses that a potential Commission cease and desist order could cover.

Considering all of the circumstances that have changed the status of this litigation since the issuance of the complaint, we agree with the ALJ that, on balance, the case should no longer be pursued. Accordingly,

It is ordered, That the Initial Decision granting dismissal be affirmed.

Modifying Order

IN THE MATTER OF

TIME INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-1919. Decision, May 13, 1971—Modifying Order, June 9, 1980*

This order reopens proceeding and modifies a consent order issued on May 13, 1971, 78 F.T.C. 1004, 36 FR 11916, against a major New York City magazine publisher and its wholly-owned subsidiary, Family Publications Services, Inc., by adding to subparagraph (g) of the "It is further ordered" paragraph of the order a modification which deals with the matter of confidential treatment of the material terms of any contract between Time Incorporated and the "paid-during-service" companies.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND
DESIST ORDER

Time Incorporated (Time Inc.) filed a request that the proceeding be reopened pursuant to Rule 2.51 of the Commission's Rules of Practice on October 17, 1979. In its request, Time Inc. stated that prior to the issuance of the consent order, Time Inc. had been engaged through its wholly-owned subsidiary, Family Publications Service, Inc. (Family) in door-to-door and telephone sales of magazine subscriptions to the public at a fixed contract price paid in monthly installments for a term of years [This sale method is still in use and is referred to in the industry as the "Paid-During-Service" (PDS) plan]; and that three months prior to issuance of the order, Family ceased PDS sales, and Time Inc. has not directly engaged in PDS sales since that time.

Time Inc. also stated that it is at a competitive disadvantage vis-a-vis other magazine publishers, because it had been unable to use the service of independent PDS companies due to the order which requires that the sale and collection practices of any company retained by Time Inc. to sell its magazines under a PDS plan, must conform to the provisions of the order, and that Time Inc. must discontinue dealing with those companies whose practices violate the order and must institute a monitoring program adequate to reveal whether the retained companies are complying with the requirements of the order.

Time Inc. requested that it be relieved from these requirements of the order because all the PDS companies have refused to sell its magazines and to be bound by the order.

The Commission informed Time Inc. by letter dated December 19, 1979 that it had determined to deny the October 17, 1979 request, but that it was willing to reopen the proceeding and modify the order as