

Interlocutory Order

100 F.T.C.

IN THE MATTER OF

U.S. PIONEER ELECTRONICS CORP.

Docket C-2755. Interlocutory Order, Etc., Nov. 5, 1982

REOPENING OF ORDER AND ORDER TO SHOW CAUSE

By petition of June 30, 1982, respondent U.S. Pioneer Electronics Corp. ("Pioneer") requests that Paragraph I(11) of the Commission's order issued against Pioneer on October 24, 1975 be modified so that the order would no longer prohibit Pioneer from restricting transshipment by sellers of its products. Pursuant to Section 2.51 of the Commission's Rules of Practice the petition was placed on the public record for comment.

Upon consideration of Pioneer's petition and supporting materials and the public comments, the Commission now finds that Pioneer would likely suffer significant competitive injury unless the order is modified. However, the Commission also finds that a limited prohibition of transshipment restrictions is necessary to ensure that the order's principal purpose, the encouragement of resale price competition in relevant Pioneer products, is achieved. Therefore, *it is ordered* that the order in this matter be reopened; that Pioneer's petition to delete Paragraph I(11) of the order is denied; and pursuant to Section 3.72(b) of the Commission's Rules of Practice, that on or before the thirtieth (30) day after service of this Order to Show Cause upon it, the Respondent may show cause, if any there be, why the public interest does not require the Commission to modify Paragraph I(11) of the order in this matter so that it will read as follows:

Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses, except as expressly provided herein. This order shall not prohibit respondent from establishing lawful, reasonable, and non-discriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability nor shall this order prohibit respondent from requiring its dealers who sell respondent's products for resale to make such sales only to dealers who maintain such minimum standards.

SEPARATE STATEMENT OF COMMISSIONER CLANTON, IN WHICH
CHAIRMAN MILLER CONCURS

The Commission today has issued an Order requiring U.S. Pioneer to show cause why its 1975 consent decree should not be modified to ban Pioneer from restricting transshipments to retailers who meet certain yet-to-be-established criteria. I would have preferred to grant Pioneer's petition in its entirety. I have noted for the Order only because a contrary vote would have deadlocked the Commission, leaving the original consent decree in effect and affording Pioneer no relief at all.

The original consent decree prohibited Pioneer from placing any restriction on transshipments, as an ancillary measure designed to reinforce other provisions prohibiting resale price maintenance.¹ Pioneer's affidavits clearly demonstrate that transshipments are frequently made to retailers who fail to provide adequate promotion and support services (a highly important aspect of stereo component marketing), and that this undermines the efforts of authorized dealers who do provide those services. Indeed, the Commission and its Bureaus of Competition and Economics agree that the "free rider" problem in this case is significant. Even more important, Pioneer's affidavits have also demonstrated the existence of considerable price competition among its authorized dealers. A survey of advertisements of authorized Pioneer dealers (including those who will apparently remain as dealers under Pioneer's proposed modification of its distribution system) shows, for example, a Pioneer receiver advertised at prices from \$96 to \$199, and a Pioneer tape deck advertised between \$139 and \$189—in each case, a range well below the suggested list price of that item.

In short, Pioneer has clearly carried its burden of demonstrating both the existence of serious free rider problems and the presence of vigorous price competition. I am unclear as to what additional evidence my fellow Commissioners would require.

To be sure, the Commission's decision today does permit Pioneer to establish reasonable, objective criteria for dealer services, and to ban transshipments to dealers who do not meet those criteria. However, this represents a much more intrusive or "regulatory" remedy than we customarily adopt, and in my view it should be confined to cases where there is a clear need for it. The difficulties of drawing up such criteria are obvious (to say nothing of the difficulties in enforcing them), and we have heretofore been very cautious in adopting

¹ The provisions prohibiting resale price maintenance were not challenged by Pioneer's petition and will remain in effect.

analogous remedies even in litigated cases where the Commission found an antitrust violation.² In this case, by contrast, there is no evidence suggesting that this remedy is necessary (or would even be of any use) to supplement the Order's provisions banning resale price maintenance. As indicated above, all the available evidence indicates that retail prices have become extremely competitive in the seven years the Order has been in effect. There is absolutely no evidence of any noncompliance with the ban on resale price maintenance (or with any other provision of the Order), and no evidence that that ban cannot continue to be enforced without restricting Pioneer's control over transshipments.

Thus, I am voting for this Order with extreme reluctance, and do so only because it represents the lesser of two evils. In my view, a far better course would have been to grant Pioneer's petition in its entirety.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK
REGARDING U.S. PIONEER PETITION

Pioneer petitioned to be relieved totally from a Commission order provision which prohibits it from restricting its dealers' ability to transship audio components to other retail distributors. This provision was included in a 1975 order in response to Pioneer's alleged resale price-fixing activities. The rationale of the provision was to prohibit Pioneer from continuing to prohibit transshipping in order to further its resale price-fixing scheme and to provide a means for restoring intraband competition in Pioneer products.

Pioneer has made a showing that it has suffered a decline in market share in recent years and that there is some discounting by Pioneer dealers. On the other hand, there is no real proof that Pioneer's declining market share is the result of transshipping and, in fact, some commenters argued otherwise. Moreover, while there has been discounting of Pioneer products, Pioneer is planning to reorganize substantially its distribution system and to terminate a large number of dealers, including many who are clearly discounters.

² See *Onkyo U.S.A. Corp.*, 100 F.T.C. 59, Docket No. C-3092 (Aug. 24, 1982), where we issued an Order prohibiting resale price maintenance without any restriction on the respondent's control over transshipments, and *Lenox, Inc.*, 100 F.T.C. 259, Docket No. C-8718 (July 12, 1982), where we recently modified an Order to eliminate a ban on restricting transshipments without requiring the manufacturer to set up any objective criteria for transshippers. Even after finding unlawful resale price maintenance in *Russell Stover Candies, Inc.*, 100 F.T.C. 1, Docket No. 9140 (July 1, 1982), the Commission did not attempt to set objective criteria and require the manufacturer to permit sales or transshipments to all retailers who met those criteria. The Commission did incorporate an "objective criteria" requirement into its modification of a consent order in *James B. Lansing Sound, Inc.*, 97 F.T.C. 914, Docket No. C-1785 (May 20, 1981) but in that case this was the modification specifically requested by the respondent's petition.

Under these circumstances, the Bureau of Competition has recommended that Pioneer's order be modified to allow it to set reasonable non-discriminatory criteria on transshipments, but not to prohibit totally its dealers from selling to other retailers. In view of the uncertainty about the future of intraband competition for Pioneer products, I believe this more limited modification is appropriate. It will allow Pioneer to prevent identifiable classes of retailers from dealing in its products while retaining some additional spur to intraband competition.¹

SEPARATE STATEMENT OF COMMISSIONER BAILEY

I have voted to grant partial relief to petitioner Pioneer Electronics in order to permit some control over product transshipments, as long as the standards proscribing such transshipments are reasonable and consistent with the order's main prohibition against resale price maintenance.

The Supreme Court's decision in *Continental TV Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), sets out analytic principles for non-price vertical restraints that petitioner urges should be taken into account in analysis of the petition. But I also believe that a petitioner must demonstrate that a competitive injury results from the order's current operation, or that the provision in question is unnecessary to achieve the relief that was the main thrust of the order. It is in regard to a colorable demonstration of competitive injury that I believe petitioner Pioneer has succeeded where others have failed. The limited relief granted should be sufficient to correct the competitive "free rider" harms set out by Pioneer, and Pioneer has acknowledged that some of their objections to the order are met by this approach.

I did not agree, however, that the petition should be granted outright. I believe there is a continued need to assure that resale price maintenance is prevented. My caution in approaching the petition was influenced by petitioner's alteration of its distribution system following a corporate leadership reorganization, as a consequence of which at least one major class of discounters was dropped as dealers. In this regard, I took into account the public record comments of representatives of this grouping. The facts peculiar to each petition most often determine the outcome, at least to my view.

¹ A similar order modification was made in *James B. Lansing Sound, Inc.*, 97 F.T.C. 914, Docket No. C-1785, but there the modification was requested by the petitioner. In *Lenox, Inc.*, 100 F.T.C. 259, Docket No. 8718, where a restriction on transshipping bans was eliminated, the record showed discounting by Lenox dealers with no imminent termination of discounting dealers. In *Russell Stover*, 100 F.T.C. 1, Docket No. 9140, the order does not prohibit restrictions on transshipments, but that resale price maintenance scheme was based on agreements, the legal basis of which were disputed in good faith by the respondent.

As we see more and more petitions seeking release from FTC orders, I continue to believe that strict standards should be applied to these requests. If a strong showing of need to reopen an order is not presented, I tend to endorse the presumptions of finality and repose that accompany a final FTC order resolving a legal dispute. Otherwise the credibility of FTC orders will be called into question.

IN THE MATTER OF
HERCULES INCORPORATED

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT

Docket C-1794. Consent Order, Sept. 23, 1970—Modifying Order, Nov. 8, 1982

This order reopens the proceeding and modifies the Commission's order issued on Sept. 23, 1970 (77 F.T.C. 1242); *modified* April 8, 1982 (99 F.T.C. 404), by deleting Paragraphs II, V and VII from the order. The deletion of these Paragraphs allows the company to acquire stocks, share capital or assets of Columbian Rope Company without prior Commission approval, and repeals provisions requiring the company to notify the Commission of any change in the corporate respondent or furnish compliance reports upon request.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

By petition filed June 24, 1982, respondent Hercules Incorporated ("Hercules") requests, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), that Paragraph II of the Commission's order issued in this matter on September 23, 1970, be modified so that Hercules no longer requires the Commission's prior approval to acquire, directly or indirectly, the whole or any part of the stock, share capital or assets of Columbian Rope Company. Hercules also sought to delete the other order provisions binding Hercules, Paragraph VII, which requires notice of changes in corporate organization and Paragraph V, which requires compliance reports when requested by the Commission.

Pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, the petition was placed on the public record for thirty days. No comments were received.

The Commission has determined that order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years. In most cases, the Commission believes that such prior approval provisions will have served their remedial and deterrent purposes after ten years and that the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time. The Commission has reviewed respondent's petition as well as supplemental information and has concluded that the order has served its law enforcement and remedial goals.

Therefore, upon consideration of the petition and its supporting materials the Commission, in the exercise of its discretion, finds that elimination of Paragraphs II, V, and VII is in the public interest.