

IN THE MATTER OF
THE MAGNAVOX COMPANY

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

Docket 8822. Consent Order, June 9, 1971—Modifying Order, July 11, 1983

This order reopens the proceeding and modifies the Commission's order issued on June 9, 1971 (78 F.T.C. 1183), by amending Part I-T and deleting Part I-V of the order, to permit the company to control the transshipment of its consumer electronic products. The modification also deletes Part III of the order, which had prohibited the company from engaging in exclusive dealing, full line forcing and tying practices in connection with the sale of its products.

ORDER MODIFYING DECISION AND ORDER

On February 2, 1983, respondent The Magnavox Company ("Magnavox") filed its "Request To Reopen And Modify Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice. The Request asked that the Commission reopen the consent order that was issued on June 9, 1971, in this matter ("the order") and modify it in two respects. First, Magnavox requested that certain words in Part I-T of the order and all of Part I-V be deleted to eliminate order language that prevents Magnavox from prohibiting transshipment of its consumer electronic products. Second, Magnavox requested that the Commission delete Part III of the order, which forbids respondent from engaging in exclusive dealing, full line forcing and tying practices in connection with the sale and distribution of its consumer electronic products. Magnavox's Request was on the public record for thirty days and no comments were received.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening and modification of the order in the manner requested by respondent.

The transshipment provisions of the order were adopted as "fencing-in" restraints ancillary to the order's ban on resale price maintenance. *See FTC v. National Lead Co.*, 352 U.S. 419 (1957). Respondent has specifically represented in its Request that it does not fix the price at which its customers resell any of the products purchased from it, that prices vary from outlet to outlet, and that current market conditions would prevent it from fixing resale prices even if it were so inclined. Respondent also has argued that the image of the Magnavox brand is being harmed by its inability to control transshipment of its

products to outlets that, at least in some instances, do not have the resources to provide adequate pre-sale and post-sale service.

The transshipment provisions in question have been in effect for nearly twelve years, and appear to have served their remedial purposes. There is no indication that respondent during that time has engaged in resale price maintenance or has breached the order's provisions governing transshipping restraints. Particularly in view of the continued existence of the order's underlying prohibitions against resale price maintenance, there no longer appears to be a need to continue the transshipment provisions of the order.

Part III of the order forbids respondent from engaging in exclusive dealing, full line forcing and tying practices in connection with the sale and distribution of its consumer electronic products. The Commission has determined that the public interest will be served if it deletes Part III of the order. It does not appear that respondent has the market power to impose exclusive dealing or related arrangements on a competitively significant number of its dealer outlets. Any exclusive dealing or similar arrangements that respondent may adopt with respect to its outlets is not likely to result in any significant market foreclosure of competitors, or to raise entry barriers. Moreover, Magnavox contemplates that any exclusive arrangements that it may adopt would be terminable by dealers at will. As the Commission pointed out in *Beltone Electronics Corp.*, Docket No. 8928 (Slip Opinion, July 6, 1982) [100 F.T.C. 68], the length of time that competitors are foreclosed by exclusive transactions has been an important element in the evaluation of such contracts. Slip Opinion, at 34, n. 39 [100 F.T.C. at 204]. The provisions of Part III of the order apparently are acting to inhibit respondent's ability to build a strong distribution network. At the same time, respondent's competitors, including its larger competitors, are not under comparable restraints.

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened and that Part I-T of the order be, and it hereby is, amended to read as follows:

T. Terminating, harassing, threatening, intimidating, coercing or delaying shipments to any dealer because the dealer has sold or is selling its products at other than its established or suggested retail prices.

It is further ordered, That Part I-V of the order be, and it hereby is, deleted.

It is further ordered, That Part III of the order be, and it hereby is, deleted.

Commissioners Pertschuk and Bailey voted in the affirmative as to the modification to Part III of the original order and voted in the

negative as to the modification deleting Part I, subparts T and V, of the original order relating to transshipping.

STATEMENT OF COMMISSIONER PERTSCHUK DISSENTING IN PART

I dissent from the Commission's decision to modify the order in this matter to permit the North American Philips Consumer Electronics Corporation (NAP), the successor to the Magnavox consumer electronics line, to ban transshipment of its consumer electronic products.¹ The petition sets forth no changed circumstances or public interest sufficient to require the complete lifting of the order's prohibition on transshipping bans, which was one of the restrictions put into place to prevent Magnavox from resuming the practice of resale price maintenance (RPM). Further, while NAP asserts that its market share has declined since the Magnavox order went into effect in 1971, it has made no showing that this was the result of transshipping. Also, while claiming that market prices in this industry are competitive, NAP has presented no specific evidence of discounting by its authorized dealers. It is thus uncertain whether there would be much intrabrand price competition in NAP's consumer electronic products if it could completely stop transshipments to other retailers, including price-cutters.

NAP argues that it no longer engages in RPM and that the order's fencing-in measure outlawing transshipping bans is therefore no longer necessary. Presumably, however, an important reason Magnavox no longer fixes resale prices is because the order's many anti-RPM provisions, including the one allowing transshipping, have prevented it from doing so. There is no hard evidence in the record that Magnavox would go back to RPM, or necessarily use the reacquired right to bar transshipping as a means for furthering new RPM schemes. But there is growing evidence that many manufacturers, including some in the consumer electronics industry, are increasingly cutting off discounters, relying in part on the new freedom to restrict transshipping. For example, according to the *Wall Street Journal* (June 21, 1983, p. 37), "many manufacturers besides Pioneer [a competitor of Magnavox] have choked off supplies to discounters in recent months . . ."²

I am frankly concerned that the FTC's present policy of non-enforcement of the law against RPM, together with the relaxation of transshipping restrictions on a number of past resale price fixers, has

¹ The Magnavox Co. continues to exist, but is no longer in the consumer electronics business.

² In the same article, the Secretary of Lenox, Inc.—which just last year was allowed by the FTC to resume banning transshipments of its fine china, see *Lenox, Inc.*, Docket No. 8718, July 12, 1982 [100 F.T.C. 259]—implied a readiness to restrict transshipments to discounters in saying that while "we don't terminate anybody for discounting," transshipping to unauthorized price-cutters "takes away control of our image."

contributed to this reported trend of cutting off discounters. It is this overriding worry, as well as NAP's failure to make the requisite statutory showing for relief, that has led me to oppose the company's request for permission to prohibit transshipping.

Admittedly, product image and adequate pre-sale and post-sale services are important components of marketing and customer satisfaction in the consumer electronics industry, and NAP—like its competitors—is entitled to maintain them. However, this legitimate business objective can be achieved by means far more compatible with price competition than the rather blunt instrument of transshipping bans, which are typically used to cut off discounters. The NAP Magnavox Dealer Agreement already requires retailers to maintain sufficient product services. NAP's main complaint seems to be that it is barred by the transshipping ban from establishing similar standards for other dealers with whom it has no relationship. If so, that problem could be easily fixed by modifying the order to allow NAP to set reasonable non-discriminatory criteria on transshippers, while still permitting its dealers to sell to other retailers who meet those objective criteria. This is what the Commission did in the *Pioneer* and *JBL* matters,³ and what it could and should have done here.⁴ It is a sensible solution that would protect both NAP's competitive interest in freely choosing its dealers and the consumer's economic interest in vigorous price competition.

STATEMENT OF COMMISSIONER BAILEY DISSENTING IN PART

As my votes in the order modification requests by *JBL Sound, Inc.*, *Lenox Inc.*, and *U.S. Pioneer Electronics* show, I will not lightly give companies under an order to cease and desist resale price maintenance *carte blanche* to control product transshipment. I firmly believe that principles of finality dictate that FTC orders should be reopened only upon a strong showing of need. Also, transshipment bans can so easily be used as a facilitating device for resale price maintenance that less draconian means should always be sought to achieve the stated goals of ensuring pre-and post-sale service. Here petitioner has made an adequate, though not overwhelming, showing of "free rider" problems associated with the Magnavox brand being transshipped to outlets that, in some instances, fail to provide adequate service. How-

³ *U.S. Pioneer Electronics Corp.*, Docket No. C-2755, Nov. 5, 1982 [100 F.T.C. 526]; *James B. Lansing Sound, Inc.*, 97 F.T.C. 914 (1981). In retrospect, this may be what the Commission should also have done in *Lenox*.

⁴ NAP contends that unlike *Pioneer* it is entitled to a complete lifting of transshipping restrictions because it has no "current plan" to eliminate classes of retailers, including discounters (Petition at 29). That may be so, though NAP admits that it "may want to adopt a . . . categorical policy" itself on barring transshipping (Petition at 27). In any event, objective, non-discriminatory standards governing transshipping would give NAP flexibility in preventing unsatisfactory retailers from dealing in its products, while preserving qualified discounters' access to those products and thus some enhanced degree of intrabrand competition.

ever, petitioner has not shown why a total ban on transshipping is needed to correct this sporadic problem or why a *Pioneer*-type order would not suffice. Accordingly, I must partially¹ dissent from the Commission's decision.

¹ I have voted to grant petitioner's request for deletion of Part III of the order which absolutely prohibits exclusive dealing, full line forcing and tying practices. The legality of these practices depends upon market conditions and other factors associated with rule of reason analysis. While *per se* treatment may have been appropriate as a fencing in device when this order was issued twelve years ago, enough time has passed to justify a return to the normal standard.

IN THE MATTER OF
THE GRAND UNION COMPANY, ET AL.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT

Docket 9121. Complaint, Nov. 21, 1978—Final Order, July 18, 1983

Finding no violation of antitrust law, the Commission has ordered that the complaint challenging The Grand Union Company's 1978 acquisition of Colonial Stores, Inc. be dismissed.

Appearances

For the Commission: *James T. Rohrer, Katherine B. Alphin, Douglas B. Brown, David R. Flowerree and Linda Earley Chastang.*

For the respondents: *William C. Pelster, Joan M. Secofsky, Barbara Z. Blumenthal and Kenneth A. Plevan, Skadden, Arps, Slate, Meagher & Flom, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Grand Union Company; Grand Union Holdings Inc.; Cavenham (USA), Inc.; and Cavenham Holdings, Inc., corporations subject to the jurisdiction of the Commission, have acquired the stock of Colonial Stores, Inc., a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act [15 U.S.C. 45(b)] and states its charges as follows:

I. DEFINITIONS

For the purposes of this complaint, the following definitions shall apply:

1. *Retail food stores* are retail establishments primarily engaged in selling food for home preparation and consumption.
2. *Supermarket* is a retail establishment primarily engaged in selling a wide variety of canned and frozen food, dry groceries (either