

IN THE MATTER OF

REDMAN INDUSTRIES, INC., FLEETWOOD ENTERPRISES,
INC., SKYLINE CORPORATION, AND COMMODORE
CORPORATIONVACATING ORDERS IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

*Dockets C-2640, C-2641, C-2642, & C-2643. Consent Orders,
March 4, 1975—Vacating Orders, June 16, 1988*

The Federal Trade Commission has reopened proceedings and vacated consent orders, (85 F.T.C. 309, 414, 444, & 472), issued in 1975 against four mobile home companies, concerning the companies' failure to perform warranty services within a reasonable period of time and required the companies to establish and maintain warranty-related complaint and service systems. The Commission ruled that it would be in the public interest to reopen the proceedings and vacate the consent orders.

ORDER REOPENING THE PROCEEDINGS AND VACATING
CEASE AND DESIST ORDERS

Petitioners Redman Industries, Inc., Fleetwood Enterprises, Inc., Skyline Corporation, and Commodore Corporation have each filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, to reopen the proceeding and vacate the order issued against it on March 4, 1975, in Docket No. C-2640, C-2641, C-2642 and C-2643 respectively.

The orders in this matter and a rulemaking proceeding arose out of an industry-wide investigation of the mobile home industry initiated in 1972. That investigation revealed that a substantial number of purchasers of mobile homes encountered difficulty in obtaining warranty performance to remedy defects appearing in mobile homes after delivery and occupancy. It appeared that the primary cause of warranty nonperformance involved disputes between the manufacturer and dealer over which had the responsibility for the defective condition giving rise to the request for warranty service. Such disputes generally revolved around the question of whether the defective condition was the result of defective materials or workmanship, which is the manufacturer's responsibility under its warranty, or was the result of improper "set up"¹, which is usually performed by and is the

¹ The general practice of mobile home manufacturers has been to offer one-year warranties covering defects in materials and workmanship. Such warranties typically exclude "set up" from the scope of coverage. "Set up" involves preparing the ground (grading, compacting, etc.) at the home site, excavating foundation holes and filling them with concrete to make piers, setting blocks or jackstands on the piers, setting the home on the blocks or jackstands, leveling the home so it sets evenly on the blocks or jackstands, affixing the home to anchors in the ground by means of cables that hold it in place, and connecting utilities.

responsibility of the dealer. Although industry practice calls for the dealer to perform warranty service, that dealer will be reluctant to undertake repairs he deems to be the manufacturer's responsibility if there is a question as to whether he will be reimbursed by the manufacturer for such service.

Unfortunately, attributing responsibility for a defective condition is not always simple. A number of defective conditions, *e.g.*, roof leaks, sagging floors, buckling walls, and improperly fitting or misaligned windows, doors, and cabinets can be attributable to either set up or defective materials or workmanship. Where such conditions existed, disputes over responsibility frequently arose and warranty service often went unperformed until the question was resolved.

The orders issued against the petitioners endeavored to remedy this warranty service problem by requiring:

1. completion of warranty service within specified time limits;
2. inspection of homes by respondent or its retailers at the time of tender of possession;
3. reinspection of homes within 90 days of tender of possession;
4. correction by respondent or its retailers of any defect discovered in a home or its set up during reinspection;
5. written agreements between respondent and its retailers delineating their respective responsibilities for warranty and warranty related service;
6. monitoring by respondent of retailers' warranty performance through purchaser questionnaires, periodic on-site reviews of retailers' service facilities and personnel, and retailer reports to respondent regarding mandatory inspections and reinspection;
7. self-monitoring by respondent of its fulfillment of warranty obligations through detailed internal monthly reports by personnel responsible for warranty service to company officials;
8. establishment by respondent of a prescribed warranty complaint handling procedure; and
9. extensive record keeping.

The proposed mobile home rule and the provisional acceptance of the four mobile home consent agreements were announced at the same press conference on December 26, 1974. The mobile home rule, as originally proposed, was essentially identical to the provisions of the mobile home orders. The four respondents apparently were targeted for enforcement action on the basis of size. They were four of the larger manufacturers of mobile homes. Commission staff did not deem their practices any worse than those of the industry as a whole. J. Thomas Rosch, then-Director of the Bureau of Consumer Protection, stated at the press conference that the orders would be superced-

ed by any rule that was promulgated. This also appears to be the understanding of the respondents.

It later became apparent that there were serious flaws in the proposed regulatory scheme, and that the anticipated benefits consumers would derive from application of the proposed rule to the entire industry would be exceeded by the costs of implementing the proposed regulations. Primarily for this reason, the Commission terminated the mobile home rulemaking proceeding on November 19, 1986. The staff's cost/benefit analysis that demonstrated this flaw was based in large measure on data subpoenaed from Redman, Fleetwood, and Skyline. Petitioners argue that the cost/benefit analysis is a changed condition of fact that demonstrates that they are burdened with costly requirements that do not produce countervailing consumer benefits. This, they argue, places them at a competitive disadvantage and as a consequence is not in the public interest.

Petitioners also allege that regulation of this industry has changed significantly since the orders were issued. At the time the orders were negotiated, the mobile home industry and the manufacturer warranties assertedly received limited governmental review. The mobile home orders and the proposed rule were designed to remedy perceived problems that developed during the construction, transportation, and set up of mobile homes. Underlying warranty service problems stemming from the difficulty of attributing responsibility for a defective condition to the manufacturer or the dealer was the lack of uniform construction standards both with respect to the construction of the mobile home itself and its set up. However, petitioners argue, since that time the Department of Housing and Urban Development has promulgated regulations pursuant to the National Manufactured Home Construction and Safety Standards Act of 1974 ("Manufactured Home Act"), 42 U.S.C. 5401, *et seq.*, which protects mobile home purchasers by creating construction and safety standards for mobile homes.

In addition, petitioners argue that a number of states are regulating the industry. Seventeen states, accounting for almost one-half of all mobile home sales and one-half of the population of the United States, require that all mobile homes sold within these states be warranted by the manufacturer. Forty-one states, accounting for over 90% of mobile homes shipped, license or have bonding requirements which regulate mobile home manufacturers and dealers. In at least fourteen of these states, accounting for about 50% of all mobile homes, the licensing requirements are tied to warranty service. In addition, building codes in a number of jurisdictions now cover the set up of mobile homes.

Petitioners also argue that shortly after the provisional acceptance

of the mobile home orders, the Magnuson-Moss Act became law. It established requirements for express warranties and prohibited certain limitations on implied warranties. Warrantors must include in their warranties the products or parts covered by warranty, what the warrantor will do in the event of a defect or malfunction, what the customer must do to obtain warranty performance, and other disclosures. In addition, Magnuson-Moss creates a private right of action against a warrantor who fails to comply with any obligation under the Act for damages and equitable relief, and a provision allowing for the recovery of costs and expenses including attorney fees.

Finally, petitioners assert that mobile homes purchased using Veteran's Administration and Federal Housing Administration financing, two of the principal sources of mobile home financing, must be warranted by the manufacturer.

FINDINGS

The basic showing required of a respondent to reopen a proceeding and have an order modified or vacated is set out in Section 5(b) of the Federal Trade Commission Act, which reads in pertinent part:

"[T]he Commission shall reopen any such order to consider whether such order . . . should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part."

In addition to changed conditions of law or fact as grounds for reopening, the Commission will also reopen a proceeding if the public interest so requires. The additional ground is set out in Rule 2.51(b) of the Commission's Rules of Practice which governs the contents of requests to reopen:

"A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified, or set aside in whole or in part, or that the public interest so requires. This requirement shall not be deemed satisfied if a request is merely conclusive or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications of the rule or order."

Commission practice has been to keep orders and rulemaking proceedings separate. Orders are issued when violations of the Federal Trade Commission Act have occurred (in the case of a litigated order) or when the Commission has reason to believe violations have occurred (in the case of consent orders). Rulemakings, broadly speaking,

are proceedings to determine whether an industry-wide rule will benefit consumers and further the purposes of the Federal Trade Commission Act.

Here we have a situation which we believe is unique in Commission history in that the orders were explicitly and completely linked with the proposed rulemaking. Respondents were engaged in practices that were industry-wide and their practices were deemed no worse than those of the industry as a whole. It was because of this conjunction that the then-Bureau Director stated that the orders would be superceded by any rule that was promulgated; there is no indication that the Commission thought otherwise at the time. Moreover, it was fully anticipated by the Commission at the time that a rule embodying provisions substantially similar to those contained in the orders eventually would be promulgated. However, the Commission instead later determined to end the rulemaking proceeding based upon its review of a completed record. Under these unprecedented circumstances, we conclude it would be in the public interest to vacate these orders, which consisted substantially of the remedies contemplated and rejected in the rulemaking.²

Based on the foregoing, we conclude that petitioners have demonstrated that the public interest requires reopening each proceeding and vacating each order.

It is therefore ordered, That the proceedings be reopened and that the orders issued on March 4, 1975, in Docket No. C-2640, C-2641, C-2642 and C-2643 be vacated.

SEPARATE STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I agree that the petitioners have demonstrated that the public interest requires reopening and vacating the orders in Docket Nos. C-2640, C-2641, C-2642 and C-2643. I differ, however, from the majority's explanation of why such action is in the public interest.

Under the public interest standard of Section 5(b), a petitioner must demonstrate as a threshold matter some affirmative need to modify or set aside the order. *See, e.g., Damon Corp.*, Docket No. C-2916, letter to Joel E. Hoffman, Esq. (March 24, 1983) (unpublished). A showing that an order impedes competition is sufficient to meet that standard. *Control Data Corp.*, Docket No. 8940, letter to Steven J. Olson (April 22, 1988) (unpublished) ("Control Data letter"). The threshold showing that the order impedes the petitioners' ability to compete has been made here. Compliance data obtained by subpoena from petitioners Fleetwood, Redman, and Skyline demonstrate that these orders im-

² We find it unnecessary to reach petitioners' arguments of changed conditions of law or fact and express no opinions on their merits.

pede their ability to compete by imposing costs on petitioners but not on their competitors. See *William H. Rorer, Inc.*, 104 FTC 544, 547 (1984).

Once the threshold showing is made, the Commission will weigh the reasons favoring the modification against any reasons not to make that modification.¹ See, e.g., Control Data letter at 8. Here, there appears to be no reason not to vacate the orders. These orders are essentially identical to the proposed industrywide trade regulation rule that the Commission declined to promulgate in 1986 because the Commission concluded that the proposed rule would not benefit consumers. Because these orders address the same practices and contain essentially the same provisions as the proposed rule, it is reasonable to conclude that these orders, like the proposed rule, do not benefit consumers.

At least two reasons support vacating the orders. First, as discussed above, the orders impose costs that place the petitioners at a competitive disadvantage. Second, the petitioners and the Commission assumed that these orders eventually would be superseded by a trade regulation rule that would impose the same requirements on all manufacturers of mobile homes. The Commission's decision not to promulgate an industrywide rule appears to have been completely unanticipated.

Because the petitioners have demonstrated an affirmative need to vacate the orders, and because the reasons in favor of vacating the orders outweigh the reasons against vacating the orders, I conclude that the petitioners have demonstrated that the public interest requires reopening and vacating each of these orders.

¹ This approach is similar to that followed by courts when they decide whether to modify final court orders. See, e.g., *United States v. Swift & Co.*, 286 U.S. 106, 114-15 ("[A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong"); *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982).