

IN THE MATTER OF

THE MAGNAVOX COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 8822. Consent Order, June 9, 1971—Modifying Order, Mar. 12, 1990*

This order reopens the proceeding and modifies Commission's order issued on June 9, 1971 (78 FTC 1183) by setting aside paragraphs I.(H), I.(I), I.(E) and I.(S), and by modifying paragraphs I.(N), I.(P) and I.(T), in certain respects.

ORDER GRANTING IN PART AND DENYING IN PART
REQUEST TO REOPEN AND MODIFY ORDER

The Magnavox Company ("Magnavox"), has filed a "Request to Reopen and Modify Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 45 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Request asks the Commission to reopen the proceeding and modify the consent order issued by the Commission on June 9, 1971, in this matter. 78 FTC 1183. The order was previously modified by the Commission on July 11, 1983. 102 FTC 807. Magnavox asks the Commission to set aside and modify several provisions contained in Paragraph I of the order, each of which imposes restrictions on Magnavox's relationships with its dealers in connection with the distribution and sale of consumer electronics products.¹ In support of its Request, Magnavox argues that the modification is warranted by changed conditions of law and fact, and by the public interest. Magnavox's Request was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules. No [2] comments were received. For the reasons discussed below, the Commission has determined that Magnavox has not shown that changed conditions of law or fact require reopening the order but that Magnavox has shown that granting portions of the Request would be in the public interest. The Commission has therefore reopened and modified the order.

¹ After filing its Request, Magnavox requested certain alternative relief relating to the announcement of prices and unilateral refusals to deal.

I.

The complaint in this case alleged that Magnavox violated Section 5 of the Federal Trade Commission Act by fixing the prices at which its retail dealers advertised and sold its consumer electronic products in the United States. 78 FTC 1185. The complaint listed numerous specific acts and practices allegedly used by Magnavox "[i]n furtherance of [Magnavox's price-fixing] policy," including, for example, threatening to discontinue doing business with dealers suspected of selling Magnavox's products at other than its established retail prices. *Id.* at 1186. The complaint did not allege that the specific acts were themselves unlawful outside the scope of a resale price maintenance scheme. The complaint also charged that Magnavox had engaged in exclusive dealing, full-line forcing and tying practices in connection with the sale and distribution of its consumer electronic products. *Id.* at 1186-87. Magnavox consented to the Commission's order.

Paragraph I of the consent order prohibits Magnavox and its successors² and assigns from engaging in any of twenty-two specified acts and practices related to vertical price fixing. Magnavox's Request seeks the deletion and/or modification of certain of the prohibitions set forth in Paragraph I of the order. Specifically, Magnavox requests the Commission to delete [3] subparagraphs (H)³ and (I)⁴ of Paragraph I. Magnavox also requests that the Commission add a new provision to the order expressly permitting Magnavox to establish cooperative advertising programs under which Magnavox would pay for certain dealer advertising of Magnavox's consumer electronic products on conditions established by Magnavox. Magnavox also requests the Commission to set aside subparagraph (S)⁵ and delete "terminating" from subparagraph (T),⁶ and add an additional new

² Currently, North American Philips Corporation distributes all Magnavox, Sylvania, Philco and Philips consumer electronic products through a division named Philips Electronics Company. Request at 3. When we refer to "Magnavox," we include all Philips brands, including Sylvania, Philco, and Philips.

³ Subparagraph (H) prohibits Magnavox from "[t]hreatening to withhold or withholding earned cooperative advertising credits from dealers for the reason that they advertise its products at retail prices other than established or suggested retail prices." 78 FTC 1189.

⁴ Subparagraph (I) prohibits Magnavox from "[r]equiring that a dealer not state a combination price for its products and other merchandise as a condition for reimbursement under any cooperative advertising program pursuant to which reimbursement is offered." *Id.*

⁵ Subparagraph (S) prohibits Magnavox from "[t]erminating business relationships with any dealer because the dealer has sold or is selling or is suspected of selling its products at other than its established prices or suggested retail prices." 78 FTC 1190-91.

⁶ Subparagraph (T), as modified by the Commission in 1983, prohibits Magnavox from "[t]erminating, 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." 102 FTC 808.

provision to the order expressly permitting it to announce its resale prices for consumer electronic products in advance and refuse to deal with any dealer who fails to comply. Additionally, Magnavox requests that the Commission remove the order's restrictions on Magnavox's ability to obtain certain [4] information from its dealers by modifying subparagraphs (N)⁷ and (P).⁸ Magnavox would also like the Commission to add a new provision to the order expressly permitting Magnavox to offer consumer rebates through its dealers. Finally, Magnavox requests that the Commission delete subparagraph (E)⁹ and add a new provision to the order expressly permitting Magnavox to print its suggested resale prices on tickets, tags or other markings affixed, or to be affixed, to consumer electronic products Magnavox ships to its retail dealers ("preticketing").

In its Request, Magnavox argues that the relief it is seeking is required by changed conditions of law and fact, and by the public interest. Magnavox asserts that the aforementioned provisions contain "non-price restrictions, ancillary restrictions which may have, at most, an incidental effect on resale prices, and restrictions on the unilateral pricing policies of [Magnavox] which do not involve any contract, agreement, understanding, or arrangement with [Magnavox's] dealers." Request at 7. Magnavox believes that under decisions rendered by the Supreme Court and the Commission since entry of the order in 1971, these restrictions proscribe conduct that is no longer *per se* unlawful and must thus be judged under the rule of reason test. Magnavox asserts that the markets for consumer electronic products are highly competitive and are fragmented among numerous competitors, "none of which enjoys anything near a dominant position in any market." Request at 3. Magnavox also asserts that these restrictions hinder its efforts to compete with firms not subject to the order's constraints. Magnavox states that granting its Request would enable Magnavox to become a more effective competitor. [5]

⁷ Subparagraph (N) prohibits Magnavox from "[i]nspecting sales and business records of any dealer for the purpose of ascertaining the prices at which, or the customers to whom, such dealer sells its products . . ." 78 FTC at 1190.

⁸ Subparagraph (P) prohibits Magnavox from "[r]equiring . . . dealers to report the identity of other dealers, and the prices at which such other dealers . . . sell its products, or the customers to whom such other dealers sell its products." *Id.* Under the proposed modification, Magnavox would be able to require its dealers to report only the identity of customers to whom such other dealers sell its products.

⁹ Subparagraph (E) prohibits Magnavox from "[r]equiring dealers to affix to any of its products . . . price tags bearing its established or suggested retail prices." 78 FTC at 1189.

II.

Section 5(b) of the FTC Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order to make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

The Commission may also modify an order pursuant to Section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules of Practice invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.¹⁰ If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if

¹⁰ The Commission may properly decline to reopen an order if a request is "merely conclusory 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 modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). See also Rule 2.51(b) of the Commission's Rules of Practice and Procedure, which requires affidavits in support of petitions to reopen and modify.

so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to [6] meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders.¹¹

III.

Magnavox has failed to show that the modifications it seeks are required by a change in law. All of the provisions that Magnavox seeks to have set aside or modified are parts of the order's overall prohibition of resale price maintenance. Nothing in the complaint or order suggests that they were imposed because the prohibited conduct itself, absent resale price maintenance, was *per se* unlawful. Of course, resale price maintenance schemes remain *per se* unlawful. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which was decided six years after the Commission issued the order in this case, recognized that non-price vertical restraints are not inherently anticompetitive and must thus be judged under the rule of reason.¹² The Supreme Court in *Sylvania* replaced the *per se* test for non-price vertical customer restraints outside resale price maintenance with a rule of reason test, but the Court did not change the *per se* rule for non-price vertical restraints that are part of a resale price maintenance scheme. Magnavox has failed to show that any of the conduct in which it wishes to engage has become lawful *if* part of resale price maintenance. Because these provisions prohibit conduct that is unlawful if engaged in as part of resale price maintenance, and because *Sylvania* did not change the law as to such conduct, Magnavox has failed to show that its request should be granted based upon a change in law.

Magnavox has also failed to show that changed conditions of fact require the Commission to reopen and modify the order. Although Magnavox has presented evidence intended to show that the United States consumer electronic products market today is competitive, the record does not contain any evidence of market structure at the time the Commission issued the order, because the complaint was premised on a *per se* theory of resale price maintenance. Based only upon a

¹¹ See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹² See *In the Matter of Beltone Electronics Corporation, et al.*, 100 FTC 68 (1982) (illustrating that *Sylvania* has significantly affected the Commission's analysis of non-price vertical restraints).

description of today's consumer electronic market, Magnavox has not shown that changed conditions of fact make the order unnecessary or harmful to competition, requiring the order to be reopened and modified. Indeed, resale price maintenance would be unlawful today, even if Magnavox had [7] shown that the market had changed from concentrated to unconcentrated since the order was issued.

IV.

Notwithstanding Magnavox's failure to demonstrate changed conditions of law or fact, Magnavox has shown that the public interest warrants reopening and modifying the order. The provisions it seeks to have changed prohibit some lawful conduct if engaged in outside of a resale price maintenance scheme, and Magnavox, in most instances, has shown that it is being injured in competing with other firms who are free to and do engage in such things as cooperative advertising, preticketing, and rebates. So long as Magnavox continues to be prohibited by the core provisions of Paragraph I from engaging in resale price maintenance, certain broader prohibitions of that paragraph now impose costs that outweigh their continuing benefit. See generally *Lenox, Inc.*, Order Granting in Part and Denying in Part Request to Reopen and Set Aside Order, 5 Trade Reg. Rep. (CCH) ¶ 22,672 (1989). We discuss each of those provisions below:

The Cooperative Advertising Restrictions

Magnavox has requested two modifications of the order and the addition of a proviso to allow it to offer certain price-restrictive cooperative advertising programs. Specifically, Magnavox asks the Commission to modify the order as follows:

1. Delete Paragraphs I(H) and I(I) of the order;¹³ and
2. Add a new Paragraph IX, which would read:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining cooperative advertising programs under which respondent will pay for certain dealer advertising of respondent's consumer electronic products on conditions established by respondent, including conditions as to the prices at which Magnavox's consumer electronic products are offered in such dealer advertising.

Magnavox contends that its ability to compete is adversely affected by the order's restrictions concerning price-restrictive cooperative

¹³ See 78 FTC 1189.

advertising programs. Many of Magnavox's competitors currently use such programs with respect to consumer electronic product lines that are directly competitive with the Magnavox, Sylvania, Philips and Philco lines. Request at 79-83, 95-98, 102-03, 107-08 and 112-113. In light of Magnavox's competitors' [8] use of programs that Magnavox cannot offer, Magnavox has made a threshold showing that the order is causing competitive injury.

In 1987, the Commission set aside the order in *The Advertising Checking Bureau, Inc.*, 93 FTC 4 (1979), which prohibited the respondent from auditing cooperative advertising programs that require dealers to advertise at a specified price, or not to advertise at discount prices, as a condition to receiving advertising allowances or credits. In support of its determination to set aside that order, the Commission relied on the Supreme Court's decision in *Sylvania and Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), noting, among other things, that those decisions "make it clear that the rule of reason should be applied in determining whether non-price vertical restraints unreasonably restrain competition and violate the antitrust laws. In a vertical setting, the *per se* rule applies only to agreements to fix resale prices that prevent the dealer from making independent pricing decisions. See *Monsanto*, 465 U.S. at 764." *The Advertising Checking Bureau, Inc.*, Slip Opinion, p. 2 (FTC Docket No. C-2947, 1987).¹⁴ The Commission also noted that "[t]he fact that a distributional restraint may have an incidental effect on resale prices is not by itself enough to condemn the practice as *per se* unlawful." *Id.* With respect to price restrictive cooperative advertising programs specifically, the Commission held that such programs "would not by themselves constitute agreements to fix resale prices." *Id.* Moreover, the Commission recognized that price restrictive cooperative advertising programs are in fact "likely to be procompetitive . . . in most cases . . . by . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial . . . [t]his, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." *Id.* at 3.¹⁵

In conjunction with the Commission's decision to set aside the order in *The Advertising Checking Bureau, Inc.*, the Commission also announced that it had withdrawn its 1980 policy statement regarding price restrictions in cooperative advertising programs, which had

¹⁴ Of course, *Sylvania* did not change the *per se* rule against resale price maintenance, the conduct that the order against Magnavox was designed to end.

¹⁵ The Commission set aside *The Advertising Checking Bureau, Inc.* order on public interest grounds.

stated the Commission's intention to challenge as *per se* unlawful cooperative advertising programs restricting reimbursement for the advertising of discounts. The Commission announced its new policy as to price restrictions in cooperative advertising programs as follows: [9]

The Commission now concludes that price restrictions in cooperative advertising programs, standing alone, are not *per se* unlawful. The *per se* rule applies to conduct that is so plainly anticompetitive that it is conclusively presumed to be unreasonable without an elaborate inquiry into competitive effects. Cooperative advertising programs that restrict reimbursement for the advertising of discounts do not appear to fall into this category

6 Trade Reg. Rep. (CCH) ¶ 39,057.

The approach followed by the Commission when it adopted its new cooperative advertising policy and set aside the order in *The Advertising Checking Bureau, Inc.* is equally applicable to Magnavox's request that the Commission set aside Paragraphs I(H) and I(I) of the order. These "fencing-in" provisions prohibit price restrictions that Magnavox might want to impose on its dealers in connection with its cooperative advertising programs. Such restrictions may not necessarily be part of an illegal resale price maintenance scheme. Of course, any cooperative advertising program implemented by Magnavox as part of a resale price maintenance scheme would be *per se* unlawful and would violate the order even if modified as Magnavox requests.¹⁶

Magnavox has further shown that setting aside these provisions is not likely to permit Magnavox to exert market power. The markets for most of the consumer electronic products sold by Magnavox appear to be competitive and fragmented and have numerous competitors, none of which has a controlling market share. Because these industries generally appear competitive, Magnavox's use of price-restrictive cooperative advertising programs, without further agreement on the price or price levels to be charged by retailers, is not likely to restrict interbrand competition or reduce output.¹⁷ Additionally, Magnavox has demonstrated that there have been numerous new entrants into the markets for consumer electronic products since the Commission issued the order in this case. Request at 49-50. In view of

¹⁶ Moreover, Magnavox would continue to be subject to any duties and obligations arising from the Robinson-Patman Act's requirement that promotional allowances be accorded to competing customers on proportionally equal terms.

¹⁷ See, e.g., *Sylvania, supra*, where the Court noted that "[t]he degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer." 433 U.S. at 52 n.19.

the fragmented market shares and the historical ease of entry, the exercise of market power would seem unlikely, suggesting that the proposed modifications should be considered efficiency enhancing. *Teac Corp. of America*, 104 FTC 634, 635-37 (1984). Setting [10] aside the order's restrictions on Magnavox's adoption and implementation of price-restrictive cooperative advertising programs would allow Magnavox to compete more effectively, to the benefit of consumers of Magnavox's consumer electronic products.

In its Request, Magnavox argues that certain remaining order provisions might be construed to prohibit Magnavox from engaging in otherwise lawful price-restrictive cooperative advertising programs, and that setting aside the order's specific restrictions concerning cooperative advertising programs may not afford Magnavox the relief it seeks unless it is expressly stated that nothing in the order prevents Magnavox from engaging in such conduct. Consequently, Magnavox asks the Commission to add to the order a new provision conferring that express assurance. We believe that the requested proviso is neither necessary nor warranted. Beyond subparagraphs (H) and (I), which we agree should be set aside, Magnavox cites subparagraphs (A), (B), (F), (G) and (O) as arguably prohibiting these cooperative advertising programs. However, Paragraphs I(A) and I(B), the order's "core" resale price maintenance prohibitions, speak of fixing resale prices, or establishing plans to fix resale prices. Paragraphs I(F) and I(G) prohibit Magnavox from disseminating mandatory price lists or designating mandatory prices in advertisements or promotional materials. Finally, Paragraph I(O) prohibits efforts to obtain dealers' promises to charge certain prices. The revisions to the advertising guidelines, and the setting aside of *Advertising Checking Bureau*, make clear that price-restrictive cooperative advertising programs do not in themselves constitute agreements on resale prices. Thus, such an advertising program would not violate Paragraphs I(A), I(B) or I(O) and would not amount to the establishment of mandatory prices in violation of Paragraphs I(F) or I(G). The Commission would therefore not construe the remaining portions of the modified order to prohibit Magnavox from establishing and maintaining a cooperative advertising program that included conditions as to the prices at which Magnavox offered its consumer electronic products, so long as such advertising program were not part of a resale price maintenance scheme. In light of the foregoing, the Commission has determined to deny Magnavox's request that the Commission add the aforementioned proviso to this order.

The Modification Concerning Magnavox's Ability
To Announce Resale Prices And To Refuse To Deal With
Those Who Fail To Comply

Magnavox has requested that the order be modified to allow it to announce resale prices and unilaterally refuse to deal with those who fail to comply. Specifically, Magnavox requests,

1. That Paragraph I(S) be set aside, and that the word "terminating" be deleted from Paragraph I(T), and [11]

2. That a new Paragraph X be added, which would read:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from announcing its resale prices for consumer electronic products in advance and refusing to deal in any such product with any dealer who fails to resell such product at the announced price.

In *Monsanto* and *Sharp*, the Supreme Court reiterated the resale pricing rights of a manufacturer under *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("[i]n the absence of any purpose to create . . . a monopoly . . . [a] manufacturer [may] exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell") and discussed the legality of a manufacturer's refusal to deal with distributors who fail to adhere to the resale prices established by the manufacturer for its products. Specifically, the Court held that "[u]nder *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Monsanto*, 465 U.S. at 761.¹⁸ Four years after its decision in *Monsanto*, the Court reaffirmed the rationale of its *Monsanto* decision in *Sharp* when it held that a manufacturer's agreement with a distributor to terminate a competing distributor to eliminate his price cutting was not unlawful *per se* unless the retained distributor also agreed with the manufacturer to set its prices at some level. 108 S. Ct. at 1518, 1521.¹⁹ [12]

¹⁸ The Court in *Monsanto* also recognized the pro-competitive reasons why a manufacturer may wish to exercise its right to announce its resale prices and refuse to sell to dealers who do not comply, when it stated that "[t]he manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the products, and will want to see that 'free riders' do not interfere" 465 U.S. at 762-63.

¹⁹ In *Sharp*, the Court again recognized that a manufacturer may have legitimate reasons for exercising its right under *Monsanto* to refuse to sell its products to distributors who fail to adhere to the manufacturer's suggested resale prices. Specifically, the Court noted that "manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by 'free riding' on the services provided by other dealers." *Id.* at 1523.

Subparagraph (S) and the word “terminating” in subparagraph (T) prohibit Magnavox from exercising the unilateral right it would have under *Monsanto* to announce its resale prices in advance and refuse to deal with those who fail to comply. Magnavox has shown, however, that since the Court’s decision in *Monsanto*, many of its competitors have adopted and implemented resale pricing policies that are consistent with the Court’s decision in *Monsanto*. See, e.g., Request at 51-52, 85-89, 95-96, 102-03, 107 and 113-14. Additionally, Magnavox has shown that its inability freely to adopt similar lawful resale pricing policies impedes its ability to correct distributional problems and adopt efficiency-maximizing distributional arrangements that would intensify interbrand competition. For example, unlike its competitors, Magnavox cannot refuse to deal with discounting retailers (without the risk of being accused of violating the order and, consequently, the risk of a civil penalty suit and judgment) and thus support its full-service dealers who dedicate substantial resources to educating potential consumers about the features of Magnavox’s products but who then often lose the ultimate sale to “free-riding” retailers who offer the same products at a discounted price. This restriction has caused Magnavox to lose the services of a number of full-service dealers who discontinued the line because of Magnavox’s “failure to prevent competing retailers who provide little or no service in their stores from selling Magnavox products at deeply discounted prices.” Request at 96. See also Request at 102, 107-08 and 113-14.

It is now appropriate to set aside these restrictions.²⁰ This modification will allow Magnavox to announce its resale prices for consumer electronic products in advance and refuse to deal with any dealer who fails to comply. It should therefore enable Magnavox to protect its full-service dealers from the activities of “free-riding” dealers and encourage its full-service dealers to provide the promotion and sales-related services that it believes are necessary to market Magnavox consumer electronic products efficiently. This modification retains all the order’s provisions that prohibit Magnavox from engaging in resale price maintenance. The Commission may invoke them if Magnavox engages in conduct that goes beyond what is lawful under *Monsanto*. Having set aside subparagraph (S) and “terminating” from subparagraph (T), the Commission would not [13] construe

²⁰ The remaining part of subparagraph (T) will continue to prohibit Magnavox from harassing, threatening, or coercing its dealers (all actions which still may lead to agreements and which therefore remain unlawful).

the remaining portions of the modified order²¹ as prohibiting Magnavox from announcing its resale prices for consumer electronic products in advance and refusing to deal in any such product with any dealer who fails to comply, so long as such conduct is not part of a resale price maintenance scheme. Therefore, Magnavox's requested proviso is unnecessary.

The Modifications Concerning Magnavox's Ability To Obtain
Certain Information From Its Dealers

Paragraph I(N) of the order prohibits Magnavox from inspecting the records of any of its dealers for the purpose of ascertaining the prices at which, or the customers to whom, such dealer sells its products. 78 FTC at 1190. Consequently, Magnavox may not even request any dealer to permit such inspection. Paragraph I(P) prohibits Magnavox from requiring dealers to report the identity of other dealers, the prices at which such other dealers sell its products, or the customers to whom such other dealers sell Magnavox's products. *Id.* Therefore, Magnavox has requested that the Commission,

1. Modify Paragraph I(N) of the order by adding the words underlined below and deleting the words in brackets below, as follows:

N. [Inspecting sales and business records of any dealer] Requiring any dealer to permit respondent to inspect the dealer's sales and business records for the purpose of ascertaining the prices at which [, or the customers to whom,] such dealer sells its products; provided, however, that nothing in this order shall be deemed to prevent respondent from inspecting such records where such inspection is authorized by law, or for the purpose of assisting respondent to establish its compliance with the provisions of the order issued on December 23, 1964 in Consent Order No. C-869, or with any other obligation or requirement of any government authority. [14]

2. Modify Paragraph I(P) by deleting the words in brackets below, as follows:

P. Requiring, soliciting or encouraging dealers to report the identity of other dealers, and the prices at which such other dealers advertise, offer for sale or sell its products [, or the customers to whom such other dealers sell its products].

The proposed modifications would allow Magnavox to request information from its dealers as to the prices at which they sell

²¹ Magnavox has also cited Paragraphs I(B) and I(F), in addition to I(S) and I(T) discussed previously, as arguably prohibiting the unilateral conduct in which Magnavox seeks to engage. Those two provisions, however, prohibit fixing resale prices, and publishing mandatory prices, and the Commission will not read them as prohibiting a mere announcement of resale prices. Because the dealer would remain free to follow that announced price or not (and subject itself to the risk of being terminated), the announced price would not be mandatory. Paragraph I(F) would continue to prohibit Magnavox from requiring its dealers to charge the published resale prices.

Magnavox's products.²² Additionally, Magnavox would no longer be prohibited from requesting or requiring any dealer to provide information as to the customers to whom that dealer or any other dealer sells Magnavox's products, or from inspecting any such information provided.²³

Magnavox has failed to meet its burden of demonstrating that the order should be modified with respect to inspection of dealer price data. Although the Supreme Court's decisions in *Monsanto* and *Sharp* suggest that legitimate reasons may exist for a manufacturer and a distributor to exchange price information,²⁴ Magnavox has presented no factual basis for finding that this aspect of the order should be amended. Magnavox asserts that it is placed at a competitive disadvantage by the inability to inspect dealer price records, but it does not allege that any [15] competitor employs this practice.²⁵ Magnavox states that access to dealers' price records would assist it "to maintain an efficient distribution system," Request at 53, but Magnavox provides no elaboration. This is not a particularized showing of harm from the existing consent order, and it does not satisfy Magnavox's burden of demonstrating why modification of the order would serve the public interest. There are strong public interest considerations in finality of consent orders, and Magnavox has failed to present any facts demonstrating that this requested modification would be appropriate. Accordingly, the Commission has determined to deny Magnavox's request to modify the portions of Paragraph I(N) relating to the inspection of its dealers' pricing records.

The requested modifications regarding identification of customers appear consistent with the Commission's determination in 1983 to delete the order's transshipment provisions. Presumably, Magnavox would like to be able to require or request its dealers to identify the customers to whom they or other dealers sell its products so that it could enforce any transshipment restrictions imposed on its dealers.

²² Magnavox, however, would continue to be prohibited from requiring any dealer to provide such information. Magnavox states that it "has no desire to impose such a requirement on its dealers." Request at 33.

²³ Magnavox does not seek modification of the provision of paragraph I(P), which prohibits it from requiring dealers to provide information concerning the prices at which other dealers sell Magnavox's products.

²⁴ In *Monsanto*, the Court recognized that a manufacturer and its distributors have "legitimate reasons to exchange information about the prices and the reception of their products in the market." 465 U.S. at 762. Likewise, in *Sharp*, the Court noted that in *Monsanto* it had "... eschewed adoption of an evidentiary standard that ... 'would create an irrational dislocation of the market' by preventing legitimate communication between a manufacturer and its distributors." 108 S. Ct. at 1520.

²⁵ In contrast, in areas where Magnavox has demonstrated competitive disadvantage, it has presented a factual showing as to its competitors' practices.

Consequently, not affording Magnavox the relief it seeks concerning the customer information restrictions could impede Magnavox from making any such transshipment restrictions effective²⁶ and would thus be inconsistent with the previous modification of the order.²⁷ Additionally, as discussed earlier, Magnavox has shown that granting these modifications is not likely to result in Magnavox engaging in unlawful conduct. [16]

The Modification Concerning Consumer Rebates

Magnavox would also like to be able to institute consumer rebate programs, under which it would offer rebates to consumers who purchase its consumer electronic products from a Magnavox dealer. The rebates would be paid by Magnavox as credits issued to its dealers on the condition that the dealers apply the amounts to reduce the prices to consumers for the purchased products. Magnavox believes that certain order provisions may be construed to prohibit Magnavox from offering consumer rebates through its dealers.²⁸ To eliminate the risk that any Magnavox consumer rebate program might be deemed to violate the order, Magnavox asks the Commission to add the following new paragraph to the order, which would expressly permit Magnavox to offer such programs:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from offering, establishing or maintaining any consumer rebate program under which respondent will pay a rebate to consumers who purchase one or more of respondents consumer electronic products from a dealer, regardless of whether said rebate is paid by respondent directly to the consumer or is paid by respondent to the dealer on the condition that the dealer apply the amount of the rebate to reduce the dealer's price to the consumer for the product(s) purchased.

Magnavox has demonstrated that many of its competitors in the

²⁶ In support of the deletion of the transshipment provisions, the Commission pointed out that those provisions were "adopted as 'fencing-in' restraints ancillary to the order's ban on resale price maintenance" and that "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." 102 FTC at 807-08.

²⁷ See also *Lenox, supra*, (Commission deleted certain provisions from the order because they were inconsistent with a previous order modification); and *Dahlberg Electronics, Inc.*, 101 FTC 703 (1983) (Commission deleted order provision prohibiting respondent from requiring or coercing its dealers to submit to respondent the names of any customers of such dealers).

²⁸ See, e.g., paragraph I(J) which prohibits Magnavox from "[e]ngaging in any retail sales of its products through its dealers in which it establishes . . . the retail prices or discounts therefrom and at the same time either (i) fixes the time and/or duration of such sale, or (ii) preselects the products to be offered." 78 FTC at 1189-90. See also paragraph I(K) which prohibits Magnavox from "[e]stablishing any criteria as to the type of merchandise eligible for or fixing or suggesting the amount of an allowance which dealers may grant on merchandise traded in on the purchase of [Magnavox's] products." *Id.* at 1190.

consumer electronic products market have offered consumer rebates, which are popular among consumers, through their respective dealers. Additionally, Magnavox has demonstrated that it is at a significant competitive disadvantage because it has not been able to offer such programs, given the risk that they might be deemed to constitute violations of the order.

In *Armstrong Cork Company*, 104 FTC 540 (1984), the Commission modified an order so that it could not be read to [17] prohibit the kind of consumer rebate programs Magnavox would like to offer its dealers. In granting the modification requested by Armstrong, the Commission stated:

Armstrong states that it views the presence of the term "rebates" in that paragraph as prohibiting it from funnelling "direct-to-consumer" rebates through wholesalers and retailers. Armstrong has demonstrated that permitting it to offer rebates in this manner will benefit both Armstrong and consumers. And, permitting Armstrong to funnel "direct-to-consumer" rebates through wholesalers and retailers should not affect [their] ability to independently determine the resale price of the product. Moreover, if Armstrong should use the rebates to engage in [resale price maintenance], it would violate the order provisions prohibiting resale price fixing. Thus, because [this modification] should benefit both Armstrong and consumers without permitting [resale price maintenance], granting [the modification] is in the public interest.

Id. at 541.

The original provision in the *Armstrong* order had prohibited:

Enforcing, or attempting to enforce, the price or prices or suggested prices, discounts, rebates or terms or conditions for the resale of Armstrong floor covering products.

68 FTC 849, 854 (1965). The Commission, in 1984, deleted "rebates or terms or conditions" from that provision, leaving the prohibition against,

Enforcing, or attempting to enforce the price or prices or suggested prices or discounts for the resale of Armstrong floor covering products.

104 FTC at 542-43. The Commission has thus interpreted the *Armstrong* order, as it now reads, to allow consumer rebate programs. Comparing the revised *Armstrong* provision to Paragraph I(J) of the *Magnavox* order, it seems clear that direct-to-consumer rebates should not be viewed as prohibited in this order either.

Similarly, Paragraph I(K) also does not appear to prohibit such consumer rebates. Therefore, the Commission has determined to deny Magnavox's request for the aforementioned proviso. The Commission, however, would not construe the order as prohibiting Magnavox from offering consumer rebates (whether paid by Magnavox directly to consumers or dealers), so long as such programs were not part of a resale price maintenance scheme. [18]

The Modification Concerning "Preticketing"

Magnavox's last request concerns its desire to engage in a practice commonly known as "preticketing"—printing its suggested retail prices on tickets, tags or other markings affixed to consumer electronic products that Magnavox ships to its dealers. Magnavox believes that paragraph I(E) of the order, which prohibits Magnavox from requiring its dealers to attach to any of its products price tags bearing its established or suggested retail prices, precludes preticketing. 78 FTC 1189. Accordingly, Magnavox asks the Commission to delete paragraph I(E)²⁹ and add a new paragraph XII, which would read:

It is further ordered, That nothing in this order shall be construed to prohibit respondent from engaging in "preticketing," i.e. suggesting resale prices on any tag, ticket or other marking affixed or to be affixed to any product sold to a reseller.

Setting aside paragraph I(E) is consistent with the Supreme Court's holding in *Monsanto* that "the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply." 465 U.S. at 761. The Commission has also recognized that preticketing is one way in which a manufacturer announces its resale price in advance and that the practice is not in itself unlawful. *See Interco Incorporated*, Trade Reg. Rep. (CCH) Transfer Binder ¶22,512 (1988) (order setting aside a ban on preticketing because, among other things, "[r]espondents have shown that the ban on preticketing prohibits them from marketing their products in a manner that is available to their competitors and that would otherwise be lawful." *Id.*, slip op. at 6.).

As discussed earlier, given the consumer electronic products market structure, and Magnavox's relative position, Magnavox's preticketing

²⁹ The prohibitions in Paragraphs I(A), I(B), I(F), I(G) and I(J) against suggesting retail prices expired by their terms in 1973.

practices are unlikely to be unreasonable. Magnavox has demonstrated that the ban on preticketing places it at a competitive disadvantage with respect to its competitors who are not subject to similar provisions. Request at 54-55, 117-118. Consequently, the affirmative need to modify the order to eliminate the competitive disadvantage outweighs any continuing [19] need for the prohibition on preticketing.³⁰

The Commission has determined to deny Magnavox's request to add to the order the aforementioned preticketing provision. Magnavox suggests that the provision is needed because Paragraph I(O), which prohibits securing or attempting to secure dealers' promises on retail prices, would still prohibit preticketing. While Paragraph I(O) generally prohibits efforts to obtain dealers' agreements to maintain resale prices, the Commission does not construe Paragraph I(O) and the remaining portions of the order, as modified, as prohibiting Magnavox from engaging in "preticketing," so long as such conduct is not part of a resale price maintenance scheme.

V.

In sum, the Commission has determined that Magnavox generally has made a satisfactory showing that reopening the order and modifying the non-price vertical restraints provisions discussed above is in the public interest. With the exception of the portion of its Request relating to inspection of its dealers' price records, Magnavox has adequately demonstrated that the modifications it seeks would enable Magnavox to use what it considers the most efficient and cost effective distribution of its consumer electronic products and put Magnavox on an equal basis with its competitors. It would also retain the prohibitions against resale price maintenance. Magnavox's conduct would of course also continue to be subject to a case-by-case, rule of reason analysis under the antitrust laws. In light of the Commission's interpretations of the remainder of the order, Magnavox's requested provisos are unnecessary.

Accordingly, *it is ordered*, that this matter be reopened and that the

³⁰ In *Interco*, the Commission, in support of its decision to set aside a ban on preticketing contained in a 1978 order, noted, among other things, that "[t]he ban on preticketing is in the nature of a 'fencing-in' provision to prevent respondents from using otherwise lawful preticketing as a device to accomplish vertical price fixing. The Commission believes that the conduct that led to the entry of this order has been interrupted for a sufficient period of time so that the ban on preticketing is no longer necessary either to dissipate the effects of respondents' past conduct or to prevent its recurrence." *Id.* The Magnavox order has been in effect since 1971—seven years longer than the order in *Interco*.

Commission's modified order in Docket No. 8822, be, and it hereby is, modified, as of the date of service of this order, by setting aside Paragraphs I(H), I(I), I(E) and I(S), and by modifying Paragraphs I(N), I(P), and I(T), respectively, as follows: [20]

N. Inspecting sales and business records of any dealer for the purpose of ascertaining the prices at which such dealer sells its products; provided, however, that nothing in this Order shall be deemed to prevent respondent from inspecting such records where such inspection is authorized by law, or for the purpose of assisting respondent to establish its compliance with the provisions of the order issued on December 23, 1964 in Consent Order No. C-869, or with any other obligation or requirement of any government authority.

P. Requiring, soliciting or encouraging dealers to report the identity of other dealers, and the prices at which such other dealers advertise, offer for sale or sell its products.

T. 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.

Commissioner Strenio not participating.

IN THE MATTER OF

ILLINOIS CEREAL MILLS, INC.

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

Docket 9213. Complaint, June 30, 1988—Decision, March 12, 1990

This consent order prohibits, among other things, a manufacturer and seller of industrial dry corn milling products from acquiring industrial dry corn milling assets in the U.S., or any interest in a U.S. industrial dry corn milling company, for a period of ten (10) years, without prior Commission approval.

Appearances

For the Commission: *Joseph S. Brownman and Ronald B. Rowe.*

For the respondent: *James Sneed, Steven P. Murphy, and Lizbeth R. Levinson, McDermott, Will & Emery, Washington, D.C. Eugene J. Meigher, Joyce L. Bartoo, and Randall J. Boe, Arent, Fox, Kitner, Plotkin & Kahn, Washington, D.C. Dennis R. Rilinger, Watson, Ess, Marshall & Enggas, Kansas City, MO. Kael B. Kennedy, Matrov, Salzman, Madoff & Gunn, Chicago, IL.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Illinois Cereal Mills, Inc., a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire, took actions to implement the agreement to acquire, and did in fact acquire, certain assets from respondent Elders Grain, Inc. in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it 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), stating its charges as follows:

I. DEFINITIONS

1. For purposes of this complaint, the following definitions apply: