

IN THE MATTER OF
GOODYEAR TIRE & RUBBER COMPANY, ET AL.

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 6486. Consent Order, Mar. 9, 1961—Set Aside Order, Aug. 21, 1990

The Federal Trade Commission has set aside a 1961 consent order with Goodyear Tire & Rubber Co., (58 FTC 309), which prohibited the company from entering into sales commission agreements with any oil marketing company for the marketing of tires, batteries, and accessories. The Commission concluded that changes of law warranted reopening the proceeding, and that because there is little prospect that the activities prohibited by the 1961 order could now diminish competition, there was no need to maintain the order, and it should be set aside.

ORDER REOPENING AND SETTING ASIDE FINAL ORDER
ISSUED ON MARCH 9, 1961

On April 23, 1990, the Goodyear Tire & Rubber Company ("Goodyear") filed a request to reopen and set aside the Final Order that was entered in this proceeding on March 9, 1961. Goodyear's request was on the public record for thirty days. No comments were received. The request was filed pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51.

The order Goodyear seeks to have set aside, Docket No. 6486, was based on a finding by the Commission that an agreement between the Atlantic Refining Company ("Atlantic") and the Goodyear Tire and Rubber Company ("Goodyear") constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. Under the agreement, Atlantic received commissions on the sale of Goodyear products to designated Atlantic franchisees. The order prohibited Atlantic from continuing the sales commission agreement and related business practices with Goodyear or other Atlantic suppliers. The order also prohibited Goodyear from maintaining such agreements with Atlantic or any other marketing oil company.

Docket No. 6486 was fully litigated. The Commission's decision and order were affirmed and enforced by the Seventh Circuit Court of Appeals on April 24, 1964, and affirmed by the United States

Supreme Court on June 1, 1965. Goodyear asserts that, since the adjudication of the Commission's order, there have been changes of law that warrant reopening the order and setting it aside.

The Atlantic Richfield Company ("Arco") was formed as a result of the merger of Atlantic with other oil companies. Arco became the successor to Atlantic and was thereby bound by the terms of the order in Docket No. 6486. On February 3, 1989, Arco filed a request to reopen and set aside that order. On June 2, 1989, the Commission granted that request as to Arco. Order Reopening and Setting Aside Final Order Issued on March 9, 1961 ("Order Setting Aside").

The Commission has considered Goodyear's request and has concluded that Goodyear has made a showing that warrants setting aside the entire order in Docket No. 6486. Significant changes of law since the entry of the order in this matter warrant setting aside the order.

BACKGROUND

The Commission issued the complaint that initiated the adjudication of this matter on January 11, 1956. The initial decision of the hearing examiner was issued on October 23, 1959. The Commission's opinion, issued on March 9, 1961, held that the sales commission agreement concerning tires, batteries, and other automotive accessories ("TBA") between Atlantic and Goodyear and another between Atlantic and the Firestone Tire and Rubber Company ("Firestone") constituted unfair methods of competition and violated Section 5 of the Federal Trade Commission Act. 58 FTC 309. The Court of Appeals and the United States Supreme Court upheld the Commission's decision and order. 331 F.2d 394 (7th Cir. 1964), 381 U.S. 357 (1965).

The Decision

The factual basis for the finding that the sales commission agreement violated the Federal Trade Commission Act was explicitly set out in the Commission's decision. Prior to 1951, Atlantic had acquired TBA products and resold them to its petroleum franchisees. In 1951, it switched to a system under which Atlantic selected manufacturers of TBA to supply its franchisees. Atlantic entered into "best efforts" contracts with Goodyear and Firestone. Under these contracts Atlantic agreed that it would exert its best efforts to promote Goodyear products to all of its franchisees within a designated geographic area and Firestone products within another

area. In return those companies agreed to limit TBA sales to Atlantic franchisees within the designated areas and to pay Atlantic a commission on all their sales to the franchisees. Under the sales commission plan, designated Goodyear and Firestone wholesalers were allocated geographical regions. In each region, one wholesaler was to be the sole source of TBA to each Atlantic franchisee.

The Commission's decision stated this arrangement was unlawful because it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." 58 FTC at 367. The Commission found that Atlantic had "sufficient economic power" to reduce competition that would have existed from suppliers of other TBA products. *Id.* at 364.

Atlantic was found to have successfully implemented its sales commission program through the use of threats and coercion. *Id.* at 347. The record contains lengthy references both to complaints by franchisees that they would have purchased other TBA products absent pressure from Atlantic and to instructions by Atlantic that its pressure must be implemented in a covert manner. *Id.* at 328, 355, 357.

The decision stated that Atlantic threatened, explicitly and implicitly, to cancel franchises of gas stations that did not buy the TBA products that Atlantic recommended. *Id.* at 343-47. The gas station franchise agreements were subject to annual review and could be cancelled by Atlantic on a number of subjective grounds. *Id.* at 356.

The Commission found: "Goodyear thus appeared confident that the presence of an Atlantic salesman together with the Goodyear representative would render unnecessary any higgling or haggling over price before an initial order for TBA from Atlantic dealers." *Id.* at 355. The record before the Commission also contained evidence that, "Goodyear has sales commission contracts with a number of other marketing oil companies, and these agreements are in all material respects identical with the Goodyear-Atlantic contract. . . . The evidence of record in this case shows that oil companies other than Atlantic have employed coercive tactics in requiring their dealers to purchase Goodyear TBA." *Id.* at 352.

The Hearing Examiner found that sales of TBA were vital to service station owners. TBA provided both the products for the full services expected by customers and additional revenues that made the stations profitable. 58 FTC at 313.

The Commission's decision concerning the Atlantic sales commission plan was one of three such plans that the Commission found unlawful. In the other two actions, involving Shell Oil and Texaco, the Commission decisions were also upheld on review. See, *Firestone Tire & Rubber Co.*, 58 FTC 383 *aff'd sub nom. Shell Oil Co. v. FTC*, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), and *B.F. Goodrich Tire & Rubber Co.*, 69 FTC 22 (1966), *rev'd sub nom. Texaco, Inc. v. FTC*, 383 F.2d 942 (D.C. Cir. 1967) *rev'd sub nom. FTC v. Texaco, Inc.*, 393 U.S. 223 (1968). The Commission also had evidence before it concerning the use of sales commission plans for marketing TBA products to the franchises of seven other oil companies. 58 FTC at 359.

Atlantic and Goodyear denied that their sales commission agreement harmed competition and asserted it was "a legitimate and competitive method of distributing TBA which benefits suppliers of TBA products, oil companies, dealers and distributors of petroleum products and the consuming public." 58 FTC at 324. The Supreme Court, however, rejected the parties' claim that the Commission erred when it refused "to consider evidence of economic justification for the program." 381 U.S. 357 at 371. It also rejected the contention "that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories." *Ibid.* It rejected the necessity of these inquiries on the ground that "the effect of this plan is similar to that of a tie-in." *Ibid.*

In these cases, it appears the Commission was concerned about the cumulative effect of foreclosure of competition in TBA products as a result of all the agreements. While Atlantic's share of the retail gasoline market in the area served by its franchisees was 6.8%, the Commission noted that gas stations as a group accounted for 37% of the sales of tires and tubes, 44% of the sales of batteries and 20% of the sales of automotive accessories. *Id.* at 325-6. In the *Shell* case, between 1948 and 1958, the market share of gas stations for TBA products had increased from 31 to 45 percent of all sales. 58 FTC 371 (1961). The Commission alleged that gas stations were likely to become even more important in the sale of TBA. 58 FTC at 326.

The Order

The Commission entered an order that forbade Atlantic from promoting or coordinating the sale of TBA products from any TBA

vendor other than itself to Atlantic franchisees. It also forbade Goodyear from:

1. Entering into or continuing agreements with Atlantic or other marketing oil companies in connection with sales of Goodyear TBA products by distributors of any such oil company.
2. Paying or offering to pay anything of value to any marketing oil company for promoting the sale of any Goodyear TBA products by distributors of any such oil company.
3. Participating in monitoring the sales of TBA products to distributors of any marketing oil company for such oil company.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission 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" so require.¹ 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 or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. *See*, S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 F.T.C. 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that have

¹ Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in 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.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

eliminated reasons for order or such that the order causes unanticipated hardship).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in requests to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent 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 24, 1983), at 2 (hereafter "Damon Letter") (unpublished). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2; see, e.g., *Chevron Corp.*, Docket No. C-3147, 3 Trade Reg. Rep. (CCH) 22,239 (March 13, 1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for order). The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the requester to make "a satisfactory showing" of changed conditions to obtain reopening of the order. See also *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered"). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.² If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order,

² The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient The Commission, to reemphasize, 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.

however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) ("sound basis for . . . [not reopening] except in the most extraordinary circumstances"); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

Goodyear asserts that there have been changes of law that require the Commission to reopen and set aside the order.

CHANGES OF LAW WARRANT REOPENING THE ORDER

Goodyear urges that, since the order was entered, court and Commission decisions have significantly changed the antitrust law that applies to tying and other non-price vertical restraints. Specifically it cites two lines of cases that would require the Commission to consider issues that the Commission did not address when it found the Goodyear-Atlantic sales commission plan was an unfair method of competition. The issues are:

A requirement, pursuant to *United States Steel Corp. v. Fortner*, 429 U.S. 610 (1977), that "economic power" concerning the tying product be demonstrated in terms of market power, and

A requirement, pursuant to *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), to consider efficiencies resulting from the vertical restraints that might enhance interbrand competition.

Request at 34 *et seq.*

These arguments track the Commission's decision in setting aside this order as to Arco. The Commission concluded these changes of law were relevant to its original decision:

"[f]or purposes of reopening the order, the important point is that the Commission made no inquiry concerning the market power of Atlantic and that today such an inquiry would be mandatory. . . . *Fortner* and subsequent cases established criteria that changed the law of tying in ways that are central to the determination of this case. Accordingly, there has been a change of law that warrants reopening this order."

Order Setting Aside at pp. 6-7. It further concluded that;

If the Commission's finding was not that the sales commission plan was an unlawful tie, the plan was, nevertheless, held to be a *per se* unlawful vertical restraint of some other type. Since the Supreme Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), it has been clear that non-price vertical restraints generally are to be evaluated under a rule of reason standard. That standard requires consideration of whether interbrand competition may be enhanced by efficiencies resulting from vertical restraints. But as the Supreme Court noted in affirming the order in this case, the Commission refused to consider "evidence of economic justification" or to analyze "the competitive effect of the sales commission plan, examining the entire market in tires, batteries and accessories." 381 U.S. 357 at 371 (1965). Thus, to the extent the Commission's decision rests on an analysis of vertical restraints, it appears that this change of law also requires reopening the order.

Id. at 7.

The same conclusion applies to Goodyear. There have been no subsequent developments in the antitrust law that would warrant a different outcome, therefore the order is reopened as to Goodyear also.

THE ORDER WILL BE SET ASIDE

Having concluded that changes of law warrant reopening the order, the question remains whether modification of the order is appropriate. An order is not set aside automatically on the grounds that the law has changed, even if, as here, the Commission refused to consider issues that later become mandatory. Having satisfied itself on a record of adequate proof under then prevailing standards, the Commission does not have to reprove its case to maintain a final order. The order remains in force unless the requester can show either that there is no basis in current law on which such a case could be brought and no need for the order or that the current effect of the order is detrimental to competition. *See, Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986).

In the context of this request, Goodyear has made no showing of harm to competition resulting from the restraints the order imposes on it. It must, therefore, persuade the Commission that there is no need for the order. Goodyear urges that the Commission's decision setting aside the order as to Arco made the findings necessary when it determined that "gas stations as a group, and Arco in particular, probably have too small a market share to produce substantial competitive effects on TBA distribution." Order Setting Aside at pp. 7-8. The Commission's decision noted that the market share of gas

stations had declined from 37 percent in 1961 to sales of "8 percent of replacement tires in 1987." Order Setting Aside at n. 3.

Goodyear's request may appear to deserve a closer look at possible competitive effects, because it has a much larger share of the TBA market than Arco, or all gas stations, and Goodyear could augment that share through agreements with marketing oil companies. Goodyear concedes that it produces a substantial share of replacement tires in the American market, including tires sold by gas stations. (Goodyear's share of the battery and accessories market is negligible. Request at n. 10)

However, even if Goodyear were to capture all tire sales to gas stations that would not satisfy the standard for unlawful tying set out in *Fortner, supra*. An unlawful tie requires the existence of a tying product that has market power and use of that market power to tie the sale of the tied product. *See also, Jefferson Parish Hospital District No. 2 v. Hyde*, 446 U.S. 2 (1984). In this order, the gas station franchise is the tying product, not tires.

In any case, gas station franchises do not appear at this time to have the potential to create market power in the sale of tires. Their once substantial share has been lost to mass marketers and specialty automotive stores. *See Arco Request*, Tables 1 and 2. As a result, if Goodyear were to engage in the activities currently prohibited by the order, it appears that there is little prospect that such activities could diminish competition. There is, therefore, no need to maintain the order.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 6486 issued on March 9, 1961, be set aside as to Goodyear as of the date of this order.

Modifying Order

113 F.T.C.

IN THE MATTER OF

THE KROGER CO.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9040. Consent Order, Nov. 11, 1977—Modifying Order, Aug. 21, 1990*

This order reopens the proceeding and modifies the 1977 consent order (90 FTC 459) which, with certain limitations, required respondent to keep advertised sale items on hand and to sell them at no more than the advertised price. Respondent's petition was based on the 1989 amendment to the Commission's Retail Food Store Advertising & Marketing Practices Rule (the "Unavailability Rule"). The Commission concluded that its action in amending the Unavailability Rule constituted a changed condition of law and fact, requiring that the proceeding be reopened and the order modified.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On April 23, 1990, The Kroger Co., a corporation, filed a request to reopen the proceeding and modify the consent order entered against it by the Commission on November 11, 1977, in Docket No. 9040 (90 FTC 459).

The request to reopen the proceeding and modify the consent order was placed on the public record on April 23, 1990, and a press release regarding the request was issued on May 10, 1990. The public comment period ended on June 11, 1990, and no comments were filed. On July 31, 1990, petitioner withdrew its request that part III.A.(1) of the consent order be deleted. The deadline to rule on petitioner's request was August 21, 1990.

Petitioner is one of the nation's largest food retailers. The order prohibits it from failing to have advertised items readily available for sale, from failing to mark each item with a price no higher than the advertised price, and from failing to sell each item at a price no higher than the advertised price. Petitioner may, however, avoid liability for its failure to comply with these proscriptions if it discloses in its sale advertisements specific exceptions, limitations or restrictions with respect to store, item and price. Petitioner must also maintain a continuing surveillance program which entails surveys of its stores to ascertain the rates of unavailability, over price marking and over-