

IN THE MATTER OF
FIRESTONE TIRE & RUBBER CO., ET AL.

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

Docket 6487. Final Order, Mar. 9, 1961—Set Aside Order, Aug. 2, 1991

The Federal Trade Commission has set aside a 1961 order with the Firestone Tire & Rubber Co. and Shell Oil Co., (58 FTC 371), thus terminating provisions, as to Shell Oil, that prohibited the use of certain sales commission agreements and related practices with Firestone and other suppliers of tires, batteries, and accessories. The Commission concluded that significant changes of law since the entry of the final order warranted reopening and setting aside the entire order as it applies to Shell.

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

On April 4, 1991, the Shell Oil Company ("Shell") filed a request to reopen and set aside ("request") the Final Order that was entered in Docket No. 6487 on March 9, 1961 ("order"). 58 FTC 371 (1961). 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 (1991). The request was on the public record for thirty days. No comments were received.

The order Shell seeks to have set aside was based on a finding by the Commission that agreements between Shell and the Firestone Tire and Rubber Company ("Firestone") and between Shell and the Goodyear Tire and Rubber Company ("Goodyear") constituted unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. Under the agreements, Shell received commissions on the sale of Firestone and Goodyear "TBA products"¹ to designated Shell franchisees.

The order prohibits Shell from continuing the sales commission agreements and related business practices with Firestone or other Shell suppliers. The order also prohibits Firestone from maintaining such agreements with Shell or any other marketing oil company. Goodyear was prohibited from engaging in such practices in a similar

¹ TBA products are tires, batteries, and other automotive accessories.

order that was entered in a companion case, Docket No. 6486, brought against Goodyear and the Atlantic Refining Company ("Atlantic").²

Docket No. 6487 was fully litigated. The Commission's order was modified in part by the Court of Appeals in 1966. *Shell Oil Company v. FTC*, 360 F.2d 470 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

Shell asserts that, since the adjudication of the Commission's order, there have been changes of law and of fact that warrant reopening the order and setting it aside.

Previously, the Commission reopened and set aside the order in the companion case, both as to Atlantic, 111 FTC 662 (1989), and as to Goodyear, 113 FTC 763 (August 21, 1990), on the grounds that there have been relevant changes of law and there is no longer any need for that order.

Shell argues that its order ought to be set aside as well. It does not advance any arguments that were not urged on behalf of Atlantic and Goodyear; rather, its arguments include the grounds articulated by the Commission in setting aside the order in Docket No. 6486 as to Atlantic and Goodyear.

The Commission has considered Shell's request and has concluded that Shell has made a satisfactory showing of changed conditions of law that warrants setting aside the entire order in Docket No. 6487 as it applies to Shell. Significant changes of law since the entry of the order in this matter warrant reopening and setting aside the order.

Background

The Commission issued its complaint on January 11, 1956, alleging that the sales commission agreement concerning tires, batteries and other automotive accessories ("TBA") between Shell and Firestone constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The sales commission agreement provided that, in return for Shell's efforts to promote Firestone's TBA, Firestone would pay Shell a commission of ten percent on gross sales made by Firestone to Shell franchisees. The initial decision of the

² *Atlantic Refining Co.*, Docket 6486, 58 FTC 309 (1961), *aff'd*, 331 F.2d 394 (7th Cir. 1964), *aff'd*, 381 U.S. 357, *reh'q denied*, 382 U.S. 873 (1965), *order set aside*, 111 FTC 662 (1989) (as to Atlantic) and 113 FTC 763 (August 21, 1990) (as to Goodyear); An additional case involved sales commission agreements between petroleum product and TBA product companies, *B.F. Goodrich Co.*, 62 FTC 1172 (1963), *rev'd*, 336 F.2d 754 (D.C. Cir. 1964), *vacated & remanded*, 381 U.S. 739 (1965), *opinion on remand*, 60 FTC 22 (1966), *rev'd*, 383 F.2d 942 (D.C. Cir. 1967), *rev'd & remanded*, 393 U.S. 223 (1968), *order modified*, 75 FTC 410 (1969).

hearing examiner was issued on October 23, 1959. The Commission's opinion, issued on March 9, 1961, found "Shell has sufficient economic power over its wholesale and retail distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics" and concluded "the use of the sales commission plan in favor of Firestone constitutes an unfair method of competition." 58 FTC 371, 385. The Commission supported its conclusion by finding that the agreements unlawfully restricted competition in TBA products at the manufacturing, wholesale and retail levels and denied consumers the benefits of competition. 58 FTC at 385, 414-15.

The Commission ordered Shell to cease:

1. All agreements under which Shell would receive anything of value from vendors of TBA for sales to Shell franchisees;
2. Accepting anything of value for promoting the sale of any vendor's TBA products;
3. Using contracts or other means to encourage its franchisees to acquire any vendor's TBA products (other than Shell TBA products);
4. Monitoring the sale of any vendor's TBA products other than its own;
5. Coercing Shell franchisees to acquire TBA products;
6. Preventing Shell franchisees from acquiring the TBA products of their choice.

The Court of Appeals upheld the Commission's finding that the sales commission agreement constituted an unfair method of competition.³ The court found that Shell had economic power over its dealers, which it derived from its control of the dealers' supplies of petroleum products, short-term leases and equipment loan contracts, financing arrangements and housekeeping requirements for dealers. *See* 360 F.2d at 479-481. The court of appeals affirmed the Commission's conclusions that Shell used its economic leverage over its dealers in carrying out the sales commission plan, causing adverse competitive effects in the TBA market in violation of Section 5. 360 F.2d at 486-87; *see also Atlantic Refining Co.*, 381 U.S. at 368 (Atlantic "exerted the persuasion that is a natural incident of its economic power.")⁴ Although the court spoke of Shell's "dominant economic power over its dealers," 360 F. 2d at 479, it did not make any findings concerning

³ *Shell Oil Co. v. FTC*, 360 F. 2d 470 (5th Cir. 1966), *cert. den.*, 385 U.S. 1002 (1967).

⁴ *See also Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (fear of nonrenewal of short-term leases used to enforce resale prices).

the firm's market power in an interbrand market. But, the court of appeals also determined that Shell had not coerced its franchisees and, therefore, declined to enforce paragraphs 5 and 6, described above, that ordered Shell to cease coercing its dealers. 360 F.2d at 486.

The court of appeals viewed the commission sales agreements as similar to tying arrangements. 360 F. 2d at 477. But the court recognized that the agreements were not tying arrangements and declined to apply a *per se* rule. 360 F. 2d at 477, 487. *See also Atlantic Refining Co.*, 381 U.S. at 369 ("We recognize that the . . . contract is not a tying arrangement."). Instead, the anticompetitive effects of the commission sales agreements in the TBA market, especially the "destructive effects" on competitors of Firestone and Goodyear, were examined. 360 F.2d at 484. At the same time, however, consistent with the opinion of the Supreme Court in *Atlantic Refining Co.*, the court said that "extensive [full scale] economic analysis of the competitive effect" was unnecessary. 360 F. 2d at 483 (alteration in original), *quoting* 381 U.S. at 371. Instead, it was sufficient to find that a not insubstantial portion of the TBA market was foreclosed. *Id.*; 381 U.S. at 371. The Supreme Court also said that the Commission need not consider "evidence of economic justification" for the sales commission agreements: "While these contracts may provide [Shell] with an economical method of assuring efficient product distribution among its dealers they also amount to a device that permits [TBA] suppliers . . . through the use of oil company power, to effectively sew up large markets." 381 U.S. at 371. Thus, while the court did not apply a *per se* standard, the standard it applied was similar to a *per se* standard, in that it did not include a detailed explanation of the competitive effects of the agreements. Any deviation from a *per se* standard rested on the court's insistence on evidence of Shell's possession of some "dominant power" over its dealers, its exercise of that power, and the effect of that power over a not insubstantial amount of commerce. *See* 360 F. 2d at 487 (summarizing evidence).

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 altered, modified, or set aside if the respondent "makes a satisfactory showing that changed conditions of law or

fact” so require.⁵ 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 FTC 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 eliminate reasons for order or such that order causes unanticipated hardship).

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.⁶ If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether

⁵ 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.

⁶ 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.

modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen 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).

Shell has requested that the Commission reopen and set aside the order because changed conditions of fact and of law require such action. For the reasons described below, changes of law warrant reopening and setting aside the order against Shell. Having reopened and set aside the order on the basis of changes of law, the Commission does not reach the issue of whether the changes of fact warrant reopening.

Changed Conditions of Law Warrant Reopening the Order

A change in law that is sufficient to require reopening is one that has the effect of bringing the terms of the order in conflict with existing law. See *Louisiana-Pacific Corp.*, Docket C-2956, slip op. at 20 (Nov. 15, 1989); *Lenox, Inc.*, Docket 8718, 111 FTC 612, 614 (1989). Shell claims that, since the order was entered, the law applicable to tying arrangements and nonprice vertical restraints has changed significantly, requiring consideration of issues that were not considered when the order was entered. Shell asserts that the decisions in *United States v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) and *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 17-18 (1984), require a showing that "the Commission in 1961 did not require, that Shell had market power in the tying product—retail gasoline sales." Request at 11. Shell also asserts that the Commission did not in 1961 consider the possible justifications for the sales commission agreements, as required by the decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Request at 10-15.

The Commission has concluded that the order in this matter should

be reopened for two reasons. First, because the earlier analysis that formed the basis for the Commission's 1961 order did not rest on a determination regarding the market power of the respondents—a determination that would be an integral part of such an analysis under *Fortner* and *Hyde*—the Commission has concluded that the legal standard for liability has changed. Second, the Commission did not consider “evidence of economic justification” for the sales commission agreements. This was consistent with the opinion of the Supreme Court in *Atlantic Refining Co.*, 381 U.S. 357, 371 (1965), even though, the Court said, the agreements “may provide. . .an economical method of assuring efficient product distribution.” *Id.* at 369. To the extent that this case involved nonprice vertical restraints by a supplier, inquiry into economic justifications has been required since the decision of the Supreme Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). These conclusions are consistent with the Commission's actions vacating the orders in *Atlantic* and *B.F. Goodrich*.

The Order Should Be Set Aside

The question remains whether modification of the order is appropriate. An order is not automatically set aside on the ground that the law has changed, unless the petitioner also shows that there is no need for the order or continued application of the order is inequitable or harmful to competition. See *Lenox, Inc.*, Docket 8718, 111 FTC 612, 614 (1989); *Bulova Watch Co., Inc.*, 102 FTC 1834 (1983). See also *Louisiana Pacific Corp.*, Docket C-2956, slip. op. at 6-7 (Nov. 27, 1989).

Shell has satisfied the standard to have the order set aside. As in the companion case involving Atlantic and Goodyear, the Commission never had evidence that Shell, the oil marketing company, possessed “economic power” as that term has been understood since *Fortner*, supra.⁷ Furthermore, since 1961, the influence of gas station franchisors over franchisees has been limited by enactment of the Petroleum Marketing Practices Act, 15 U.S.C. 2801 *et seq.*, in 1978.

Shell has also shown that there is no need for the order by citing evidence that gas stations as a group currently have too small a market share to produce substantial competitive effects on TBA distribution. Gas stations nationwide sold only 3 percent of replace-

⁷ The Commission's 1961 opinion in Docket 6487 suggests that Shell's share of national gasoline sales was on the order of 5 percent. 58 FTC at 407.

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ment batteries and 8 percent of replacement tires in 1987, compared, respectively, to 44 percent and 37 percent of such replacement sales in 1961. 58 FTC at 325-26; Request at 18. Specialty stores and mass merchandisers have become more important suppliers of these products. Request at 18-19. As a result, distribution arrangements like those at issue in this case would not likely have the same adverse foreclosure and entry deterring effects on competition in the TBA market that the Commission found in 1961.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 6487 issued on March 9, 1961, be set aside as to Shell Oil Co. as of the date of this order.

Commissioner Yao not participating.

IN THE MATTER OF
ADVENTIST HEALTH SYSTEM/WEST, ET AL.

Docket 9234. Interlocutory Order, August 2, 1991

ORDER

This matter has been heard by the Commission upon the appeal from the initial decision of counsel supporting the complaint, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to reverse the initial decision and remand the matter for further proceedings. Therefore,

It is ordered, That the initial decision of the Administrative Law Judge is reversed and the matter remanded for further proceedings in accordance with this order and accompanying opinion.

By the Commission.*

OPINION OF THE COMMISSION¹

By Strenio, *Commissioner*:

The issue presented here is whether the Administrative Law Judge ("ALJ") erred when he granted Adventist Health System/West's ("AHS/West") and Ukiah Adventist Hospital's ("Ukiah Adventist") motion to dismiss and motion for summary decision on the ground that respondents' acquisition of substantially all the assets of Ukiah General Hospital ("UGH") did not satisfy the jurisdictional requirements of the Clayton Act. We find that the ALJ erred when he granted the motion to dismiss. His order is reversed and the matter remanded for further proceedings consistent with this opinion.

I. PROCEDURAL HISTORY

On November 7, 1989, the Federal Trade Commission ("Commis-

*Prior to leaving the Commission, Commissioner Strenio registered a vote in the affirmative for the Order and Opinion of the Commission in this matter. Commissioner Yao did not register a vote in this matter.

¹ The following abbreviations are used in this opinion:

- STIP. - Stipulations (June 19, 1990) (in camera).
- CCAB - Appeal Brief of Counsel Supporting the Complaint (Sept. 10, 1990).
- RAB - Brief of Appellees Adventist Health System/West and Ukiah Adventist Hospital (Oct. 11, 1990).
- CCRB - Reply Brief of Counsel Supporting the Complaint (Oct. 23, 1990).
- TOA - Official Transcript of the Oral Argument before the Federal Trade Commission (Dec. 18, 1990).