

Modifying Order

119 F.T.C.

IN THE MATTER OF

INTERCO INCORPORATED, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2929. Consent Order, Sept. 26, 1978--Modifying Order, March 27, 1995*

The order reopens a 1978 consent order (92 FTC 405) that settled allegations that the respondents had engaged in anticompetitive practices, including illegally fixing resale prices for their products. This order modifies the consent order so that the respondents are permitted to implement lawful price-restrictive cooperative advertising programs and to unilaterally terminate resellers for failure to adhere to previously announced resale prices or sales periods.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO
REOPEN AND MODIFY ORDER ISSUED SEPTEMBER 26, 1978

On October 26, 1994, London Fog Industries, Inc. ("London Fog"), as successor to Londontown Corporation, filed its Petition to Reopen Proceedings and Modify Consent Order ("Petition") in Docket No. C-2929, 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's Rules of Practice, 16 CFR 2.51. London Fog asks the Commission to reopen and modify the consent order issued by the Commission on September 26, 1978 ("order"), in *Interco Inc.*, 92 FTC 405 (1978).¹

In its Petition, London Fog asks the Commission to reopen the order and modify provisions that limit London Fog's ability to restrict the prices advertised by its dealers for London Fog apparel and unilaterally to terminate a dealer for failure to adhere to previously announced resale prices. In support of its Petition, London Fog maintains that reopening and modification is warranted by the public interest.² London Fog's Petition was placed on the public record for thirty days; one comment was received. For the reasons discussed below, the Commission has determined to reopen and modify the order.

¹ The order previously was reopened and modified in 1986, *Interco, Inc.*, 108 FTC 133 (1986) (deleting paragraphs II.1 and II.2 applicable to footwear), and in 1988, *Interco, Inc.*, 110 FTC 153 (1988) (deleting prohibition on preticketing with suggested resale prices).

² London Fog does not claim that reopening is required by changed conditions of law or fact.

I. 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. 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 it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").³

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 petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 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 29, 1983), at 2 (unpublished) ("Damon Letter"). 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.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will 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 petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a

³ See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modified the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

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) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether 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 petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner'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).

II. REOPENING IS IN THE PUBLIC INTEREST

London Fog asserts in its Petition that its inability under the order to maintain price-restrictive cooperative advertising programs and unilaterally to terminate resellers that decline to adhere to previously announced resale prices and sale periods impedes its ability to compete. Because of the restrictions, London Fog maintains, it is unable effectively to restructure its dealer network, introduce new product lines, and terminate business relationships with retailers that advertise and price London Fog products in a matter inconsistent with the brand's image and quality and with London Fog's marketing strategies.

London Fog's inability to institute price restrictive cooperative advertising programs and unilaterally to terminate discounting dealers has, in London Fog's view, caused an erosion of its dealer base, especially high end, customer service oriented department and specialty stores. According to London Fog, discounting of London Fog products by a number of retailers that use London Fog products as price leaders has caused other retailers to stop carrying London Fog products. London Fog contends that the order restrains it from effectively implementing marketing plans to meet this competitive challenge and to make it more competitive in the long run.

London Fog once sold its London Fog coats to "better" department and specialty stores,⁴ but the company no longer counts that category of retailers among its customers. London Fog attributes its diminished appeal to better stores to the constant discount promotions of London Fog brand merchandise by discounting retailers that have changed the image of London Fog from a product marketed at "every day prices"⁵ to a promotional product, reducing the appeal of London Fog merchandise to the better stores.

London Fog states that the discount pricing strategy of some retailers is damaging the quality image of its products and making its product less desirable to stores that compete by offering high levels of customer service with every day pricing rather than "discount" prices. Since the order became final, according to London Fog, many high-end service oriented stores have terminated their relationship with London Fog. These same retailers continue to carry coats marketed by London Fog's competitors even though some of these brands also are sold at discounters, apparently because London Fog's competitors are better able to control how their products are advertised and promoted by discounters, according to London Fog.

London Fog claims that its competitors are able to do business with both categories of retailers by using marketing programs that are not permitted to London Fog under the order. The ability to use price restrictive cooperative advertising programs and unilaterally to terminate a retailer for failure to adhere to previously announced resale prices and sale periods encourages service oriented stores to compete with the discount stores with respect to these brands, according to London Fog. London Fog claims that the requested modifications would give it the necessary latitude to compete more effectively for sales to better department and specialty stores.

London Fog has demonstrated that discount advertising is harming London Fog's quality image and affecting its ability to market its product through certain retailers. It also has shown that the

⁴ According to London Fog, these stores provide a significant level of customer service and do not offer everyday discounts, although most have seasonal sales with price reductions. In general, the merchandise offered by better department and specialty stores is higher priced than that carried by mainstream department stores and is marketed as high quality, designer, prestige or status items.

⁵ According to London Fog, an "every day pricing" strategy means pricing a product at a certain retail price, to be distinguished from designating a high "original" price against which discounts are immediately taken. London Fog explains that every day prices are not necessarily higher than discount or promotional prices; the every day price at one store might be the discount price at another. The difference is the consumer's perception of the product (discounted brand versus non-discounted brand) and the degree of the bargain he or she is getting.

order is inhibiting London Fog's efforts to implement certain marketing strategies that could increase its sales. Therefore, London Fog has established that reopening would be in the public interest.

III. THE ORDER SHOULD BE MODIFIED

London Fog requests that the order be modified to permit London Fog to implement price restrictive cooperative advertising programs and unilaterally to terminate a reseller who refuses to sell London Fog brands at London Fog's previously published resale prices. For this purpose, London Fog has requested that the following proviso be added to paragraph I of the order:

Provided that nothing in this order shall be construed to prohibit the implementation of a lawful price restrictive cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

The Commission previously has modified orders to permit implementation of price restrictive cooperative advertising programs. Such programs are not *per se* unlawful and do not prevent a dealer from selling at discount prices or from advertising discount prices at the dealer's own expense. See *Advertising Checking Bureau, Inc.*, 109 FTC 146, 147 (1987).⁶ 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.* The Commission has said that price restrictive cooperative advertising programs likely are procompetitive or competitively neutral in most cases "by, for example, . . . channeling the retailer's advertising efforts in directions that the manufacturer believes consumers will find more compelling and beneficial. This, in turn, may stimulate dealer promotion and investment and, thus, benefit interbrand competition." 109 FTC at 147.⁷

⁶ See also *Clinique Laboratories, Inc.*, Docket C-3027 (Feb. 8, 1993), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,330; *U.S. Pioneer Electronics Corp.*, Docket C-2755 (April 8, 1992), reprinted in [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 23,172; *The Magnavox Co.*, 113 FTC 255 (1990).

⁷ In *Advertising Checking Bureau*, the Commission announced rescission of its 1980 Policy Statement Regarding Price Restrictions In Advertising Programs (viewing such programs as *per se* unlawful). 109 FTC at 146 n.1; see Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs -- Rescission, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (May 21, 1987).

Modifying the order to permit London Fog to institute lawful price restrictive cooperative advertising programs is consistent with Commission policy and cases. Such restrictions may not necessarily be part of an illegal RPM scheme and have been recognized as reasonable in many circumstances.⁸ London Fog's use of price restrictive cooperative advertising programs, absent further agreement on the price or price levels to be charged by the retailers, is not likely to restrict interbrand competition or reduce output. Of course, any cooperative advertising program implemented by London Fog as part of a scheme to fix resale prices would be *per se* unlawful and would violate paragraph I.1 of the order. In addition, the proviso's limitation to a "lawful price restrictive cooperative advertising program" will retain the order's prohibition against such programs if they are part of a plan to implement resale price maintenance.

The new proviso to paragraph I also would permit London Fog unilaterally to terminate a reseller for failure to adhere to previously announced prices. This conduct is lawful under *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919), which permits a supplier to "announce its resale prices in advance and refuse to deal with those who do not comply."⁹ Accordingly, the Commission has determined to add the described proviso to paragraph I of the order. The modification would permit London Fog to attract high end retailers and implement its overall marketing plans.

IV. ADDITIONAL MODIFICATIONS OF THE ORDER

London Fog has requested other modifications to remove language that London Fog maintains is inconsistent with the new proviso to paragraph I of the order. We consider each of these requests below.

Paragraph I.4. According to London Fog, paragraph I.4. of the order limits its ability to disseminate advertising and promotional materials in connection with a price restrictive cooperative advertising program, by requiring London Fog to state that suggested

⁸ See *In re Nissan Antitrust Litig.*, 577 F.2d 910 (5th Cir. 1978), *Cert. denied*, 439 U.S. 1072 (1979) (price restrictive cooperative advertising not *per se* unlawful); see also *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717 (1988).

⁹ The restriction in the order was in the nature of fencing in relief. Fencing in provisions in orders restrict otherwise lawful conduct to prevent repetition of the violation or to mitigate the effects of prior unlawful conduct.

prices are "suggested only" in any "list, book, advertising, promotional material or other document." To enable London Fog to implement a price-restrictive cooperative advertising program, London Fog requests that the Commission delete the underlined language in paragraph I.4., and replace it with the language in parentheses, as follows:

... it shall be clearly stated on the pages of any list, book, advertising, promotional material or other document (list, order form, catalog or stock control book) where any suggested resale price or sale period appears:

"THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS]."

The Commission believes that language of the proviso added to paragraph I of the order is sufficient to permit London Fog to implement a price restrictive cooperative program, notwithstanding paragraph I.4. Regardless of the type of document on which London Fog chooses to disseminate suggested prices, dealers remain free to determine their own resale prices, even if London Fog may condition the payment of advertising allowances on the advertisement of a particular price. To further clarify that London Fog is permitted under the order to specify prices in connection with such a program, paragraph I.4 should be modified to state that "except, however, in connection with a lawful price restrictive cooperative advertising program, the provision of such allowances may be conditioned on particular advertised prices."

Paragraph I.6. London Fog has requested that paragraph I.6 of the order be deleted. Paragraph I.6 bars London Fog from "[c]ommunicating with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period." London Fog claims that this paragraph of the order prevents it from sharing market information with and recommending pricing strategies to its retailers, communications that would tend to enhance the competitiveness of London Fog's products in the marketplace. The provision does not bar London Fog from disseminating market information and pricing strategies and recommendations to its retailers. Instead, it prohibits London Fog from communicating concerning a reseller's "deviation" from "resale price[s] or sale period[s]." Communications about deviations from

the seller's suggested resale prices could provide an opportunity to achieve an unlawful meeting of the minds concerning price and should continue to be prohibited.

London Fog claims that implementation of a price restrictive cooperative advertising program would involve communications barred by paragraph I.6. Because communications to implement a price restrictive cooperative advertising plan would be permissible under the new proviso to paragraph I, deletion of paragraph I.6 is not necessary. Under the proviso, London Fog can communicate with resellers within the context of London Fog's cooperative advertising program regarding advertising that is ineligible for reimbursement. In addition, an announcement by London Fog, consistent with Colgate and the new proviso to paragraph I, that it would terminate discounters could be characterized as a communication prohibited by this provision. In an excess of caution, in order to make clear that communications permitted under the new proviso are not barred by paragraph I.6, the phrase "except communications consistent with the proviso to paragraph I" should be added.

Paragraph I.7. London Fog also requests that paragraph I.7 of the order be modified by deleting the underlined words, as follows:

Suggesting or requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

London Fog says that the provision may inhibit its communications with dealers in connection with a lawful price restrictive cooperative advertising program. The requested modification would permit London Fog to suggest prices at which a reseller may wish to advertise a product without permitting London Fog to require a reseller to advertise products at a specified price. It also would allow London Fog to share information with its dealers regarding advertised prices for London Fog merchandise and to make seasonal advertising suggestions without violating the order. London Fog would continue to be barred under the order from fixing advertised prices. A lawful price restrictive cooperative advertising program permitted under the new proviso of paragraph I necessarily allows London Fog to condition the payment of advertising allowances on specific advertised prices. These communications could be barred as "suggestions" for pricing under this provision of

the order. Therefore, the words "Suggesting or" should be deleted from paragraph 1.7 of the order.

Paragraph I.8. London Fog has requested that the Commission add the language in parentheses to paragraph I.8., which prohibits:

Representing that any action (other than termination or any action related to a lawful price restrictive cooperative advertising program) may or will be taken against any reseller if it deviates from any resale price or sale period.¹⁰

The addition of the phrase "other than termination" is consistent with the new proviso to paragraph I of the order and will allow London Fog to represent its intention to terminate a reseller for failure to adhere to London Fog's previously announced resale prices. The modification would not allow London Fog to threaten to terminate a dealer for discounting. Consistent with Colgate, London Fog would have the option to terminate the dealer, not to threaten the dealer to attempt to coerce its compliance. The language "other than termination" will be added to paragraph I.8 as described above.

The remainder of the modification that London Fog requests is too broad. Addition of the phrase "or any action related to a lawful price restrictive cooperative advertising program" does not appear to be necessary for a lawful price restrictive cooperative advertising program, and it could permit London Fog to use its cooperative advertising program to retaliate against discounting dealers and to coerce an agreement on resale prices. Under the new proviso to paragraph I, London Fog may withhold cooperative advertising credits for advertisements that do not meet the cooperative program's specifications. The order, as modified, does not contemplate that London Fog could take (or threaten to take) other action to enforce a price restrictive cooperative advertising program. Therefore, the request to add "or any action related to a lawful price restrictive cooperative advertising program" to paragraph I.8 of the order is denied.

Paragraph 1.9. London Fog has requested that the Commission delete paragraph I.9, which prohibits "[t]hreatening to withhold or withholding advertising allowances . . . from any reseller . . . because said reseller advertises or sells at a certain resale price." The

¹⁰ By letter dated December 30, 1994, London Fog requested that the word "lawful" be added before the words "price restrictive cooperative advertising program."

paragraph should be modified to the extent that it is inconsistent with the new proviso to paragraph I that permits London Fog to condition the payment of advertising allowances on the price at which a retailer advertises a product. The Commission similarly modified the orders in Pioneer and Magnavox to permit price restrictive cooperative advertising programs.¹¹ The requested modification of paragraph I.9 is not warranted, however, to the extent that the provision bars London Fog from conditioning such allowances on the retailer's "sell[ing] at a certain resale price." The modifications to the order do not permit London Fog to use a cooperative advertising program to fix resale prices or to coerce retailer adherence to them. Therefore, paragraph I.9 will be modified by deleting the words "advertises or."

Paragraph I.12. London Fog also has requested that the Commission add the bold language to and delete the underlined language from paragraph I.12, which prohibits:

Terminating, suspending, delaying shipments to or taking or threatening any action (**other than terminating**) against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future. Provided that each of the respondents retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

This paragraph would bar London Fog from unilaterally terminating a reseller consistent with Colgate and the new proviso to paragraph I of the order. The deletion of the word "Terminating" from paragraph I.12 makes it consistent with the new proviso. Unilateral termination of a dealer for discounting is not unlawful. Therefore, the word "Terminating" will be deleted from paragraph I.12.

The addition of the words "other than terminating" to paragraph I.12, however, would allow London Fog to threaten to terminate resellers for failure to adhere to resale prices. Threats to obtain dealer acquiescence in resale prices are "plainly relevant and persuasive to a meeting of the minds" that could result in an unlawful agreement to fix resale prices. *See Monsanto Co. v. Spray-Rite*

¹¹ See note 6 *supra*.

Corporation, 465 U.S. 752, 765 & n.10 (1984); *see also Lenox, Inc.*, 111 FTC 612, 617 (1989). London Fog may, consistent with the order, announce in advance its intention to terminate any dealer who fails to adhere to London Fog's previously announced resale prices and it may terminate any such dealer, but it may not threaten a dealer to coerce compliance with or agreement to suggested retail prices. Therefore, London Fog's request to add the words "other than terminating" to paragraph I.12 is denied.

V. CONCLUSION

London Fog has shown that reopening the order and adding the proviso to paragraph I and making the above described modifications are warranted in the public interest. The order as modified retains the prohibition on resale price maintenance, but will permit London Fog to engage in otherwise lawful, potentially procompetitive conduct.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the Commission's modified order in Docket No. C-2929 be, and it hereby is, modified, as of the effective date of this order, as follows:

(a) Paragraph I is modified by adding the following proviso:

Provided, that nothing in this order shall be construed to prohibit the implementation of a lawful price restrictive cooperative advertising program or the unilateral termination of a reseller for failure to adhere to previously announced resale prices or sale periods.

(b) Paragraph I.4 of the order is modified by adding the following language at the end of the provision:

Except, however, in connection with a lawful price restrictive cooperative advertising program, the provision of such allowances may be conditioned on particular advertised prices.

(c) Paragraph I.6 of the order is modified by adding "except communications consistent with the proviso to paragraph I," as follows:

Communicating, except communications consistent with the proviso to paragraph I, with any reseller or prospective reseller concerning its deviation or alleged deviation from any resale price or sale period.

(d) Paragraph I.7 of the order is modified by deleting the words "Suggesting or," as follows:

Requiring that any reseller or prospective reseller refrain from or discontinue advertising any product at a certain resale price.

(e) Paragraph I.8 is modified by adding the words "(other than termination)," as follows:

Representing that any action (other than termination) may or will be taken against any reseller if it deviates from any resale price or sale period.

(f) Paragraph I.9 is modified by deleting the words "advertises or," as follows:

Threatening to withhold or withholding advertising allowances or any other assistance, payment, service or consideration from any reseller, or limiting or restricting the eligibility of any reseller to receive such benefits because said reseller sells at a certain resale price.

(g) Paragraph I.12 is modified by deleting the word "Terminating," as follows:

Suspending, delaying shipments to or taking or threatening any action against any reseller because the reseller has, or was alleged to have, sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future. Provided that each of the respondents retains the right to terminate any reseller for lawful business reasons not inconsistent with this paragraph or any other paragraph of this order.

Commissioner Starek concurring in part and dissenting in part.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission's decision to reopen and modify the order in Docket No. C-2929 in the public interest. However, for the reasons described in my statements in California and Hawaiian Sugar Co.¹² and Service Corporation International,¹³ I do not join in the analysis the Commission uses to reach its result. Moreover, I dissent with respect to the decision to deny the respondent's requested modifications to the "fencing-in" relief contained in paragraphs I.4, I.6, I.7, I.8, I.9, and I.12.

The Commission states that respondents petitioning for order modification under the public interest standard "must demonstrate as a threshold matter some affirmative need to modify the order." Order at 2. The Commission has applied this "threshold" inconsistently and has often found it satisfied by very tenuous showings. In this matter, even a relatively strict interpretation of "affirmative need" does not create a significant obstacle to modification. Thus, the Commission can require a separate affirmative need showing in this case without engaging in the sort of tortuous reasoning that less hospitable facts have required in some past cases. Nevertheless, I continue to favor an integrated cost-benefit analysis in the evaluation of petitions for order modification under the public interest rubric of Section 2.51. Such an analysis supports the conclusion that the order in this case should be reopened and modified.

I would grant respondent's requests to delete any language in the underlying order that expands on the core prohibition against unlawful resale price maintenance ("RPM"). Although RPM remains unlawful *per se*,¹⁴ its competitive effects in most circumstances are ambiguous at worst. In this context, fencing-in relief is inappropriate: the otherwise lawful fenced-in conduct carries little risk of significant competitive harm and is at least as likely to be

¹² Order Reopening the Proceeding and Modifying Cease and Desist Order in Docket No. C-2858 (Jan. 17, 1995) (Starek, concurring).

¹³ Order Reopening and Modifying Order in Docket No. 9071 (May 12, 1994) (Starek, concurring).

¹⁴ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (RPM held unlawful upon mere proof of agreement). See also *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720, 724 (1988) (reaffirming and distinguishing the *per se* rule against RPM).

procompetitive. Where the Commission has reopened an existing order for purposes of modification, this analysis suggests that requests to alleviate or eliminate fencing-in prohibitions should be granted liberally.¹⁵

Presented with an opportunity to pare this 1978 order to its core prohibitions and to eliminate constraints on efficient conduct, the Commission instead attempts in today's order to specify with greater precision the metes and bounds of permissible conduct in respondent's vertical relationships. As long as the core prohibition remains in place, and where the Commission cannot find that the fenced-in conduct is likely to be anticompetitive, granting the relief as requested appears more likely to serve the public interest than this sort of fine-tuning.

¹⁵ In fashioning a new order to address RPM, the Commission should strictly tailor injunctive relief to the *per se* allegations. Where the Commission has reopened an existing order for purposes of modification, the same considerations favor granting requests for reducing or eliminating fencing-in relief. Here, the Commission has already determined that the competitive benefits of reopening and modification outweigh the interest in repose and finality, and has proceeded to modify the order. Under these circumstances, the costs of granting the requested modifications certainly are not higher than the costs of devising alternative modifications. Therefore, the Commission's choice of modifications can be based on the relative competitive merits. Having reopened the order, I would have preferred to grant all of the requested modifications to the fencing-in provisions

Set Aside Order

119 F.T.C.

IN THE MATTER OF

PITTSBURGH PLATE GLASS COMPANY

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 2(a) OF THE CLAYTON ACT*Docket 6699. Consent Order, April 19, 1957 -- Set Aside Order, April 4, 1995*

This order reopens a 1957 consent order -- which prohibited the respondent from discriminating in price between competing purchasers by charging auto manufacturers less for automotive safety glass than it charged glass distributors and glass dealers -- and sets aside the consent order pursuant to the Commission's Sunset Policy Statement, under which the Commission presumes that the public interest requires terminating competition orders that are more than 20 years old.

ORDER REOPENING PROCEEDING
AND SETTING ASIDE ORDER

On December 9, 1994, PPG Industries, Inc., the successor to Pittsburgh Plate Glass Company, ("PPG"), filed a Petition to Reopen and Set Aside Consent Order ("Petition") in this matter. PPG requests that the Commission set aside the 1957 consent order in this matter pursuant to Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, and the Statement of Policy With Respect to Duration of Competition Orders and Statement of Intention to Solicit Public Comment With Respect to Duration of Consumer Protection Orders, issued July 22, 1994, published at 59 Fed. Reg. 45,286-92 (Sept. 1, 1994) ("Sunset Policy Statement"). In the Petition, PPG affirmatively states that it has not engaged in any conduct violating the terms of the order. The request was placed on the public record, and the thirty-day comment period expired on January 16, 1995. Two public comments were received.

The Commission in its July 22, 1994, Sunset Policy Statement said, in relevant part, that "effective immediately, the Commission will presume, in the context of petitions to reopen and modify existing orders, that the public interest requires setting aside orders in effect for more than twenty years."¹ The Commission's order in Docket No. 6699 was issued on April 19, 1957, and has been in effect for more than 37 years. Consistent with the Commission's July 22,

¹ See Sunset Policy Statement, 59 Fed. Reg. at 45,289.