

Complaint

IN THE MATTER OF

ENERJET CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4006; File No. 9923192*
Complaint, April 16, 2001--Decision, April 16, 2001

This consent order addresses Respondent Enerjet's compliance with the Energy Policy and Conservation Act and the Appliance Labeling Rule. The order, among other things, requires the respondent to pay a \$10,000 civil penalty for violating the Appliance Labeling Rule. The order also prohibits the respondent from making any representation about the energy use or efficiency of any product it manufactures that is subject to the Appliance Labeling Rule -- or the cost of energy consumed by such product -- unless the product has been tested in accordance with a test procedure prescribed by the Secretary of Energy and the representation fairly discloses the results of such testing.

Participants

For the Commission: *John Rothchild, James Mills, Elaine D. Kolish, and [Bureau of Economics]*.

For the Respondent: *David I. Wilson, Silverberg Goldman & Bikoff, L.L.P.*

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Enerjet Corporation ("respondent"), a corporation, has violated the provisions of the Energy Policy and Conservation Act ("EPCA"), the Federal Trade Commission Act ("FTC Act"), and the Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Under the Energy Policy and Conservation Act ("Appliance Labeling Rule" or "Rule"), and it appearing to the Commission that this proceeding is in the public interest, alleges:

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1. Respondent Enerjet Corporation is a New York corporation with its principal office or place of business at 45 Drexel Drive, Bay Shore, New York 11706.
2. Respondent manufactures, advertises, offers for sale, and sells oil- and gas-fired boilers that are used for residential hot-water or steam space heating. Respondent sells its boilers to distributors, who resell them to installers or residential customers.
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act.
4. The EPCA, 42 U.S.C. § 6291 et seq., directs the Commission to prescribe rules requiring manufacturers to affix energy-consumption labels to certain specified appliances, to make certain other disclosures, and to file certain reports. 42 U.S.C. § 6294.

Relevant Provisions of the EPCA and the Appliance Labeling Rule

5. Pursuant to its authority under the EPCA, 42 U.S.C. § 6294, the Commission promulgated the Appliance Labeling Rule. 16 C.F.R. Part 305. Among other things, the Rule prohibits a manufacturer from: (a) knowingly distributing any new covered product in commerce unless the product is labeled in accordance with the Rule, 16 C.F.R. § 305.4(a)(1); (b) knowingly distributing certain covered products, including furnaces, in commerce unless the manufacturer furnishes a fact sheet concerning the product to distributors and retailers that purchase the product (or, alternatively, supplies such information in an approved industry directory), 16 C.F.R. §§ 305.4(a)(1), 305.11(b), (c); and (c) refusing to submit certain prescribed annual reports to the Commission, 16 C.F.R. §§ 305.4(b)(2), 305.8.
6. The EPCA also prohibits a manufacturer from making any representation with respect to the energy use or efficiency of a

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covered product, or the cost of energy consumed by such product, unless the product has been tested in accordance with a prescribed test procedure and the representation fairly discloses the results of such testing. 42 U.S.C. § 6293(c). A representation that violates § 6293(c) is deemed to be an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), except to the extent that such representation is a violation of the Appliance Labeling Rule. 42 U.S.C. § 6303(c).

Status of Respondent and Its Products

7. Respondent is a “manufacturer” as defined in the Rule. 16 C.F.R. § 305.2(c). The boilers that respondent manufactures and distributes are “new covered products” and “furnaces” as defined in the Rule. 16 C.F.R. §§ 305.4(l), 305.3(g).

Respondent’s Violations of the Appliance Labeling Rule

8. Respondent has knowingly distributed in commerce oil-fired boilers, with model numbers belonging to the “OA” series (“OA oil boilers”), that are not marked with labels displaying the information that the Rule requires. In particular, the labels respondent has used do not display the name of the manufacturer, the annual fuel utilization efficiency rating, the range of annual fuel utilization efficiency ratings for comparable products, an indication of where the labeled product falls within this range, and certain prescribed generic statements, all as required by the Rule, 16 C.F.R. § 305.11(a)(5)(ii). Respondent has thereby violated 16 C.F.R. § 305.4(a)(1).

9. During 1997, respondent knowingly distributed OA oil boilers in commerce without furnishing a fact sheet concerning the boilers to distributors that purchase its products, and without supplying the required information in an approved industry directory, as required by the Rule, 16 C.F.R. § 305.11(b), (c). Respondent has thereby violated 16 C.F.R. § 305.4(a)(1).

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10. Respondent has failed to submit an annual report for the year 1997 to the Commission concerning its OA oil boilers, as required by the Rule, 16 C.F.R. § 305.8. Respondent has thereby violated 16 C.F.R. § 305.4(b)(2).

11. The EPCA, as amended by the Debt Collection Improvement Act of 1996, authorizes the Commission to assess a civil penalty of not more than \$110 for each violation of the Appliance Labeling Rule. 42 U.S.C. § 6303(a); FTC Rules of Practice, 16 C.F.R. §§ 1.97, 1.98. Each shipment of a covered product that is not labeled as required by the Rule, each covered product that is shipped without provision of a conforming fact sheet, and each day of a manufacturer's failure to submit an annual report constitutes a violation. 42 U.S.C. § 6303(a).

Respondent's Violations of the EPCA

12. Respondent has made representations with respect to the energy efficiency of its OA oil boilers that do not fairly disclose the results of testing of the boilers in accordance with the test procedure prescribed by the Secretary of the Department of Energy under the authority of 42 U.S.C. § 6293. In particular, respondent has produced and distributed brochures describing its OA oil boilers in which it assigns specific annual fuel utilization efficiency ("AFUE") ratings to various of its boilers. The stated AFUE ratings do not accurately disclose the actual ratings of the boilers according to the prescribed test procedures, but rather overstate the energy efficiency of the boilers.

13. The representations described in paragraph 12 violate the EPCA, 42 U.S.C. § 6293(c), and do not violate the Rule. Accordingly, those representations are deemed to be unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this sixteenth day of April, 2001, has issued this complaint against respondent.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and admission by the respondent of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Enerjet Corporation is a New York corporation with its principal office or place of business at 45 Drexel Drive, Bay Shore, New York 11706.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. "Covered product" shall mean any product that is defined in 16 C.F.R. § 305.3, and as to which a test procedure is applicable under 42 U.S.C. § 6293(a) & (b).
2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent, and its successors and assigns, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, promotion, offering for sale, sale, or distribution of boilers or other covered products, in or affecting commerce, shall not make any representation with respect to the energy use or efficiency of such covered product, or the cost of energy consumed by such product, unless the product has been tested in accordance with a test procedure prescribed by the Secretary of Energy pursuant to 42 U.S.C. § 6293(a) & (b), and the representation fairly discloses the results of such testing.

II.

IT IS FURTHER ORDERED that, within 5 days from the date of issuance of this order, respondent shall pay, pursuant to 42 U.S.C. § 6303(a), a civil penalty in the amount of \$10,000. Respondent shall make this payment by electronic fund transfer to the Treasurer of the United States, pursuant to a procedure to be specified by FTC staff in writing. In the event of default, respondent shall be liable for interest calculated in accordance with 28 U.S.C. § 1961.

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III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation with respect to the energy use or efficiency of any covered product, or the cost of energy consumed by such product, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials, including test results, that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

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V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in its corporate structure that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporate structure about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director for Enforcement, Federal Trade Commission, 600 Pennsylvania Avenue N.W., Washington, DC 20580.

VI.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate on April 16, 2021, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

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- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on March 5, 2001

The Federal Trade Commission has accepted, subject to final approval, an agreement for entry of a consent order from Enerjet Corporation (“Enerjet”). The agreement would settle a complaint by the Federal Trade Commission that Enerjet violated (1) the Rule Concerning Disclosures Regarding Energy Consumption and Water Use of Certain Home Appliances and Other Products Under the Energy Policy and Conservation Act (“Appliance Labeling Rule” or “Rule”), 16 C.F.R. Part 305, and (2) the Energy Policy and Conservation Act (“EPCA”), 42 U.S.C. § 6201 et seq.

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter concerns Enerjet’s compliance with regulatory requirements relating to certain boilers that it manufactures. The administrative complaint alleges that Enerjet violated the Appliance Labeling Rule in several respects. First, the complaint alleges that Enerjet knowingly distributed certain oil-fired boilers that were not marked with labels displaying the information that the Rule requires. In particular, the complaint alleges, the labels Enerjet used did not display the name of the manufacturer, the annual fuel utilization efficiency rating of the boiler, the range of annual fuel utilization efficiency ratings for comparable products, an indication of where the labeled product falls within this range, and certain prescribed generic statements. Second, the complaint alleges that during 1997 Enerjet knowingly distributed boilers without furnishing a fact sheet concerning the boilers, and without supplying the required information in an approved industry directory. Third, the complaint alleges that Enerjet failed to submit a 1997 annual report concerning its boilers.

Analysis

The complaint also alleges that Enerjet violated the EPCA by distributing brochures that do not accurately disclose the annual fuel utilization efficiency ratings of its boilers in accordance with the test procedure prescribed by the Secretary of the Department of Energy, but rather overstate the energy efficiency of the boilers.

The proposed consent order requires Enerjet to pay a \$10,000 civil penalty for violating the Rule. It also prohibits Enerjet from making any representation about the energy use or efficiency of any product it manufactures that is subject to the Rule, or the cost of energy consumed by such product, unless the product has been tested in accordance with a test procedure prescribed by the Secretary of Energy and the representation fairly discloses the results of such testing.

The remainder of the proposed consent order contains provisions regarding recordkeeping, distribution of the order, notification of changes in corporate status, filing of a compliance report, and termination of the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement or the proposed order or to modify their terms in any way.

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IN THE MATTER OF

AMERICA ONLINE, INC. AND TIME WARNER INC.

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

Docket C-3989; File No. 0010105
Complaint, December 14, 2000--Decision, April 17, 2001

This consent order addresses the merger of Respondent America Online, Inc. ("AOL") -- the world's leading internet service provider ("ISP"), with more than 27 million members -- and Respondent Time Warner Inc. (Time Warner"), the nation's second largest cable television distributor; a leading cable television network provider; the owner of a number of leading cable television networks, such as Home Box Office and CNN; and the Cartoon Network; and the owner of a wide variety of entertainment and media businesses, including leading magazine franchises and established record labels. The order, among other things, requires the respondents -- before they can make AOL's broadband ISP service available in certain Identified Cable Divisions representing over 70 percent of Time Warner's cable customers -- first to make available cable broadband service offered by Earthlink, Inc., pursuant to an agreement (approved by the Commission) between Time Warner and Earthlink. The order also prohibits the respondents from beginning to advertise or promote AOL's broadband ISP service to subscribers in a cable division until Earthlink's competing ISP service is available to subscribers in that cable division -- or Earthlink advertises or promotes its service in that cable division -- whichever occurs first. In addition, the order requires the respondents -- within 90 days after making AOL's broadband ISP service available to subscribers -- to enter into agreements (approved by the Commission) (1) to carry at least two other non-affiliated broadband ISPs to provide cable broadband ISP services in the Identified Cable Divisions, and (2) to carry at least three other non-affiliated ISPs to provide cable broadband ISP services in its other cable divisions. The order also requires the respondents to negotiate and enter into arms' length, commercial agreements with any other non-affiliated ISP that seeks to provide cable broadband ISP service on Time Warner's cable system. An accompanying Order to Hold Separate requires the respondents to hold AOL and Road Runner separate in each Identified Cable Division until they have made an affiliated ISP available to broadband customers in that Identified Cable Division.