

IN THE MATTER OF

SILO, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
ENERGY POLICY AND CONSERVATION ACT & THE FEDERAL TRADE
COMMISSION'S APPLIANCE LABELING RULE

Docket C-3263. Complaint, July 20, 1989—Decision, July 20, 1989

This consent order requires, among other things, the Philadelphia, Pa. based corporation, that operates stores that sell major appliances, to pay \$45,000 in civil penalties.

Appearances

For the Commission: *Kathryn Nielsen.*

For the respondent: *Erin Scher, Weil, Gotshal & Manges, New York City.*

COMPLAINT

Pursuant to the provisions of the Energy Policy and Conservation Act ("EPCA"), as amended, and by virtue of the authority vested in it by the aforementioned Act, the Federal Trade Commission, having reason to believe that SILO, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated and is violating said Act, and the Commission's Rule for Using Energy Costs and Consumption Information Used in Labeling and Advertising for Consumer Appliances Under the Energy Policy and Conservation Act ("Appliance Labeling Rule"), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. SILO, Inc. ("SILO") is a Pennsylvania corporation, with its office and principal place of business located at 6900 Lindbergh Boulevard, Philadelphia, Pennsylvania.

PAR. 2. Respondent advertises, offers for sale, and sells household appliances and electronic equipment in its retail stores located throughout the United States.

PAR. 3. The Energy Policy and Conservation Act, 42 U.S.C. 6291 et

seq., authorizes the Federal Trade Commission to prescribe rules requiring manufacturers to disclose certain energy usage information on labels placed on the exterior surface of covered products, including clothes washers, dishwashers, freezers, refrigerators, and refrigerator-freezers. EPCA also prohibits retailers from removing the labels from the appliances or rendering the labels illegible. 42 U.S.C. 6302(a)(2).

PAR. 4. Pursuant to 42 U.S.C. 6294, the Commission promulgated the Appliance Labeling Rule, 16 CFR 305, which requires manufacturers to affix an EnergyGuide label to the exterior surface of certain covered products, including clothes washers, dishwashers, freezers, refrigerators, and refrigerator-freezers. Section 305.11(a)(5) of the Appliance Labeling Rule, 16 CFR 305(11)(a)(5), specifies the contents of the EnergyGuide label, including a requirement that the following statement appear at the bottom of the label: "IMPORTANT. REMOVAL OF THIS LABEL BEFORE CONSUMER PURCHASE IS A VIOLATION OF FEDERAL LAW (42 U.S.C. 6302)." The Appliance Labeling Rule prohibits retailers from removing the EnergyGuide labels from the exterior surface of the appliances or rendering the labels illegible. 16 CFR 305.4(a)(2).

PAR. 5. Silo is a "retailer" or "covered products" as those terms are defined in 16 CFR 305.2(d) and (o) and 42 U.S.C. 6291(a)(13) and (a)(2).

PAR. 6. In numerous instances, SILO has removed the EnergyGuide labels from covered products, including refrigerators, refrigerator-freezers, freezers, dishwashers, and clothes washers or has rendered them illegible, thereby violating 16 CFR 305.4(a)(2) and 42 U.S.C. 6302(a)(2).

PAR. 7. At the times respondent engaged in the acts or practices described in paragraph six above, it did so "knowingly" as that term is used in 16 CFR 305.4(f) and 42 U.S.C. 6303(b). Respondent therefore is liable for civil penalties pursuant to 16 CFR 305.4(a)(2) and 42 U.S.C. 6303(a).

PAR. 8. 42 U.S.C. 6303(a) authorizes the Commission to assess a civil penalty of not more than \$100.00 for each violation. For purposes of assessing the civil penalty, each violation of 42 U.S.C. 6303(a) constitutes a separate violation with respect to each covered product.

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 of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Energy Policy and Conservation Act and the Federal Trade Commission's Appliance Labeling Rule; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of 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, 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 has violated the said Act and Rule, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent SILO, Inc. is a Pennsylvania corporation, with its offices and principal place of business located at 6900 Lindbergh Boulevard, Philadelphia, Pennsylvania.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent shall, within 30 days from the date of issuance of this order, pay, pursuant to 42 U.S.C. 6303, a civil penalty in the amount of \$45,000.00. Respondent shall make this payment by cashier's or certified check payable to the Treasurer of the United States and deliver it to Regional Director, Federal Trade Commission, 915 Second Avenue, Room 2806, Seattle, Washington 98174 for appropriate disposition. In the event of default, respondent shall be liable for interest calculated in accordance with 28 U.S.C. 1961, as amended.

Commissioner Strenio dissenting.

DISSENTING STATEMENT OF COMMISSIONER ANDREW J. STRENIO, JR.

I have voted against this consent agreement because it lacks an injunction barring SILO from violating the Energy Policy and Conservation Act. Such an injunction would increase deterrence against future violations by SILO or others and thereby assist the Commission in achieving compliance with this law.

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Complaint

IN THE MATTER OF
NUTRITONE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS.
5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3264. Complaint, July 24, 1989—Decision, July 24, 1989

This consent order prohibits, among other things, a Massachusetts corporation from making any representations concerning the efficacy of electric muscle stimulation ("EMS") treatment programs and products, unless respondents possess reliable scientific evidence to substantiate the representations. Respondents are required to retain, for at least five years, records supporting any future advertising and also required to post a copy of the order on the premises.

Appearances

For the Commission: *Sara V. Greenberg, William P. McDonough*
and *Phoebe Morse*.

For the respondents: *Alan J. Cushner*, Boston, Ma.

COMPLAINT

The Federal Trade Commission, having reason to believe that Nutritone, Inc., a corporation, also trading and doing business as Body By Design, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of said corporation ("respondents"), have violated Sections 5(a) and 12 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges that:

PARAGRAPH 1. (a) Respondent Nutritone, Inc., is a Massachusetts corporation. Its principal office or place of business is at 1172 Beacon Street, Newton, Massachusetts.

(b) Dinah H. Simonini and Donald L. Simonini are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including all the acts and practices alleged in this complaint below. Their principal office or place of business is the same as that of the corporation.

PAR. 2. Respondents have advertised, offered for sale, sold and distributed to the public an electric muscle stimulation program.

PAR. 3. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional materials, including, but not limited to, the advertising and promotional materials attached hereto as Exhibits A through D to promote the sale of their electric muscle stimulation treatment program.

PAR. 4. The acts or practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements and promotional materials for electric muscle stimulation, by various means in or affecting commerce and including *inter alia*, placing advertisements for broadcast by radio, in magazines and in newspapers distributed through the mail and across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of respondents' electrical muscle stimulation program.

PAR. 6. Typical statements in such advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements and promotional materials attached hereto as Exhibits A through D. Specifically, these advertisements and promotional materials contain the following statements:

1. Exercise 20 muscle groups simultaneously and achieve up to 1000 muscle contractions as in situps, pushups and leglifts.
2. Men develop the "V" shape.
3. Women tone stomachs, thighs and buttocks.
4. EMS can be the best workout of your life with significant strength gains.
5. Save time—in just 35 min. you can do the equivalent of 2 hours in the gym.
6. EMS is the new high technology way to tone or strengthen muscles for Men and Women.
7. No agonizing exercise—no pain.

PAR. 7. Through the use, *inter alia*, of the statements referred to in paragraph six and other statements contained in advertisements or promotional materials not specifically set forth herein, respondents have represented, and now represent, directly or by implication, that their electric muscle stimulation treatments:

1. Cause muscle contractions of comparable intensity to those

produced when normal healthy people do conventional physical exercise such as situps, pushups and leglifts;

2. Change the girth of various parts of the body such as the stomach, buttocks, and thighs;

3. Provide all the health benefits to normal healthy people of rigorous physical exercise;

4. Provide greater health benefits and increases in strength for normal healthy people in a specified period of time than a program of rigorous physical exercise for the same time period;

5. Are the result of recent scientific and technological learning and experimentation; and

PAR. 8. In truth and in fact, respondents' electric muscle stimulation treatments consisting of low-frequency, low-current muscle stimulation:

1. Do not cause muscle contractions of comparable intensity to those produced when normal healthy people do conventional physical exercise such as situps, pushups and leglifts;

2. Do not change the girth of various parts of the body such as the stomach, buttocks, and thigh;

3. Do not provide all the health benefits to normal healthy people of rigorous physical exercise;

4. Do not provide greater health benefits and increases in strength for normal healthy people in a specific period of time than programs of regular gym exercises for the same time period;

5. Are not the result of recent scientific and technological learning and experimentation. Therefore, the representations set forth in paragraph seven are false and misleading.

PAR. 9. Through the use, *inter alia*, of the statements referred to in paragraph six, and other statements contained in advertisements and promotional materials not specifically set forth herein, respondents have represented and now represent, directly or by implication, that at the time of making the representations set forth in paragraph seven respondents possessed and relied upon a reasonable basis for these representations.

PAR. 10. In truth and in fact, at the time of those representations respondents did not possess and rely upon a reasonable basis for making such representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of respondents as alleged in this complaint, and the placement in the hands of others of the means and

instrumentalities by and through which others may have used said acts and practices, constitute unfair and deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Have Any BODY You Want



FREE* SESSIONS

BODY BY DESIGN®

1172 Beacon St., Newton Four Corners
964-TRIM
288 Newbury St., Boston
236-TRIM

EMS — electrical muscle stimulation is the new high technology way to tone or strengthen muscles for Men or Women

- EMS can be the best workout of your life with significant strength gains.
- Exercise 20 muscle groups simultaneously and achieve up to 1000 muscle contractions as in situps, pushups and leglifts.
- Lie back and relax in private rooms with trained personnel.
- Save time — in just 35 min. you can do the equivalent of 2 hours in the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks
- Used for years by doctors for therapy

Call 964-TRIM for your introductory session. And bring in this ad for "ONE WEEK OF FREE VISITS (valued at \$67) when you sign up for a Body by Design program.

Offer expires May 30, 1987
Monday-Thursday 7:30 am-9 pm • Friday 7:30 am-8 pm
Saturday 9 am-5 pm

30. Use VISA, Mastercard, or American Express. 1

Learning Adventure Magazine April/May 1987


Exhibit A

Complaint

112 F.T.C.

EXHIBIT B

Have Any BODY You Want



**FREE*
SESSIONS**

**EMS — electrical muscle stimulation is
the new high technology way to tone
or build muscles for Men or Women**

- Best workout of your life with twice the muscle response.
- Work 20 areas and do the equivalent of 1000 situps, leglifts and pushups in 35 minutes.
- Lie back and relax in private rooms with licensed personnel.
- Save time — 1 month on EMS is worth 4-6 months at the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks.
- No agonizing exercise or next day pain.
- Used for years by doctors for therapy

Call 964-TRIM for your introductory session. And bring in this ad for *ONE WEEK OF FREE VISITS (valued at \$67) when you sign up for a Body by Design program.

Offer expires June 21, 1986
Call 964-TRIM

BODY BY DESIGN

1172 Beacon St., Newton Four Corners
Staffed by Licensed Medical Professionals
Monday-Thursday 8 am-9 pm • Friday 8 am-5 pm • Saturday 9 am-5 pm


*Boston Globe
June 10, 1986*

Complaint

EXHIBIT C

3/5/86
 Call, This is a copy of the coupon I received in
 yesterday's mail
 Carole

Have Any BODY You Want Absolutely Free *



EMS
 advanced muscle stimulation
 is the best high tech way to
 lose weight

- Lose 20 ors, and do the equivalent of 1000 steps, pushing lbs. out 1000
- Save time—1 month on EMS is worth 4-6 months at the gym.
- Lie back and relax in private rooms with licensed personnel.
- Men develop the "V" shape. Women tone stomach, thighs and buttocks.

WEIGHT NORMALIZATION PROGRAM

- Body fat analysis with weight recommendations
- Computerized food analysis meal plans and nutritional counseling
- Diet without hunger or loss of energy
- Exceed USDA requirements

BRING THIS COUPON For One Week FREE
 Use on body fat analysis only. Valid thru Expires 4/5/86

BRING THIS COUPON For 25% Off Our Weight Normalization Program
 Expires 4/5/86

Call 964-TRIM
 TO SCHEDULE YOUR INTRODUCTORY SESSION

BODY BY DESIGN
 1172 Beacon St., Newton Four Corners
 Staffed by Licensed Medical Professionals
 Monday-Thursday 7:30 am-9 pm • Friday 7:30 am-8 pm • Saturday 9 am-5 pm

ADVERTISE WITH SUPER COUPS (617) 551-1210 (TIC-01) B-12/PT-8A 014.15

Exhibit C

FEDERAL TRADE COMMISSION DECISIONS

Complaint

112 F.T.C.

EXHIBIT D

Have Any BODY You Want



FREE* SESSIONS

EMS — electrical muscle stimulation is the new high technology way to tone or build muscles for Men or Women

- Best workout of your life with twice the muscle response.
- Work 20 areas and do the equivalent of 1000 situps, leglifts and pushups in 35 minutes.
- Lie back and relax in private rooms with licensed personnel.
- Save time — 1 month on EMS is worth 4-6 months at the gym.
- Men develop the "V" shape.
- Women tone stomachs, thighs and buttocks.
- No agonizing exercise or next day pain.
- Used for years by doctors for therapy.

Call 964-TRIM for your introductory session. And bring in this ad for **ONE WEEK OF FREE VISITS** (valued at \$84) when you sign up for a Body by Design program.

Offer expires May 3, 1986
Call 964-TRIM

BODY BY DESIGN

1172 Beacon St., Newton Four Corners
Staffed by Licensed Medical Professionals
Monday-Thursday 8 am-9 pm • Friday 8 am-8 pm • Saturday 9 am-5 pm

Boston Globe

April 22, 1986

Exhibit D

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, 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 respondents have violated the said Act, and that 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 sixty (60) 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, Nutritone, Inc., is a corporation, d/b/a/ Body By Design, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 65 Main Street, Watertown, Massachusetts.

2. Respondents Dinah H. Simonini and Donald L. Simonini are officers of the corporation.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondents Nutritone, Inc., a corporation, its officers, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of the corporation, their successors and assigns, and respondents, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, selling or distribution of any electric muscle stimulation treatment program or product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, contrary to fact, that any low-frequency (1000 Hz and below) electric muscle stimulation treatment or product:

- A. Can cause muscle contractions of similar intensity to those produced by conventional exercise.
- B. Will visibly change the girth of any part of the body without a reduction in caloric intake or participation in a weight loss program.
- C. Provides similar or superior health benefits to those produced by rigorous conventional exercise for normal healthy people.
- D. Provides, in the same or shorter time period, health benefits similar or superior to those produced by conventional exercise.
- E. Are a result of any new or recent scientific and technological research and experimentation.

II.

It is further ordered, That respondents Nutritone, Inc., a corporation, its officers, and Dinah H. Simonini and Donald L. Simonini, individually and as officers of the corporation, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any diet, strength development, or fitness program or product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or by implication, concerning such program's or product's efficacy, or the comparability or superiority over other programs or products, or the results typically achieved by

consumers of the program or product unless, at the time of making such representation respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; *provided, however*, that for purposes of this order for any test, analysis, research, study, or other evidence to be "competent and reliable" it must be conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

III.

It is further ordered, That respondents shall for at least five years after the date of the last dissemination of the representation, maintain and upon reasonable request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondents in disseminating any representation covered by this order.
2. All test reports, studies, surveys, or demonstrations in their possession or control that contradict any representation of respondents that is covered by this order.

IV.

It is further ordered, That respondents shall conspicuously post a copy of this order on their premises.

V.

It is further ordered, That the corporate respondent and the individual respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order, or of any change in the position or responsibilities of Dinah H. Simonini or Donald L. Simonini in regard to any corporation or subsidiary of which either is an officer and which corporation or subsidiary is, directly or indirectly, involved in the sale or distribution of any electric muscle stimulation treatment program or product.

VI.

It is further ordered, That respondents shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
ADOLPH COORS COMPANY

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

Docket 8845. Order, Feb. 4, 1975—Modifying Order, Aug. 1, 1989*

This order reopens the proceeding and modifies the Commission's order issued on Feb. 4, 1975 (85 FTC 187), by deleting provisions that prohibited respondent from imposing certain territorial and customer restrictions on its distributors.

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

Adolph Coors Company ("Coors"), has filed, on April 3, 1989, a "Petition to Modify Order" ("Petition"), pursuant to Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The petition asks the Commission to reopen the proceeding and set aside the modified cease and desist order entered by the Commission on February 4, 1975, in Docket No. 8845, 85 FTC 187, "except insofar as the order prohibits price fixing or resale price maintenance." Petition at 2. Specifically, Coors requests that the Commission set aside in their entirety paragraphs 4(c), 5, 6, 7, 8 and 11 of the order, which prohibit Coors from, among other things, imposing non-price vertical restraints on distributors of Coors' beer products.¹ In support of its request, Coors argues that the order modification is warranted by changed conditions of law. Petition at 2-3. The petition was placed on the public record for thirty days, pursuant to Section 2.51(c) of the Commission's Rules, and one comment was received. For the reasons discussed below, the Commission has determined that Coors has not shown a changed condition of law requiring reopening the order but that Coors has shown that granting the request, with one exception, would be in the public interest. The Commission has therefore reopened and modified the order.

*Decision issued July 24, 1973 (83 FTC 32).

¹ In addition to prohibiting Coors from refusing to deliver beer to distributors selling outside their designated territory, paragraph 7 of the order also prohibits Coors from refusing to deliver beer to distributors who sell beer at prices, markups or profits lower than those approved by Coors. 85 FTC at 189.

I.

The Commission's complaint, issued on June 7, 1971, 83 FTC 32, alleges that Coors violated Section 5 of the Federal Trade Commission Act by, among other things, fixing wholesale and retail prices, imposing territorial and customer restrictions on its distributors, and using unfair short-term termination provisions in its contracts with distributors. Following extensive evidentiary hearings, the Administrative Law Judge ("ALJ") ordered the dismissal of the complaint against Coors. 83 FTC at 174. On appeal from the ALJ's Initial Decision, the Commission substituted its findings for those of the ALJ and issued its order on July 24, 1973. 83 FTC at 211. The Commission condemned Coors' territorial restraints as *per se* unlawful because they were part of an unlawful resale price maintenance scheme. Coors appealed the Commission's order to the United States Court of Appeals for the Tenth Circuit, which upheld all of the provisions of the Commission's order, except those dealing with the notice and arbitration requirement in the event of a distributor's termination. The court also held that Coors' territorial restraints were themselves *per se* unlawful under *United States v. Arnold, Schwinn & Co., et al.*, 388 U.S. 365 (1967). See *Adolph Coors Company v. FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

Consequently, the Commission issued its final order on February 4, 1975. The order, among other things, prohibits Coors from engaging in wholesale and retail price fixing, imposing certain non-price vertical restrictions on its distributors, including territorial restraints, and requiring exclusive draught accounts. 85 FTC 187.

II.

Coors requests that the Commission reopen the proceeding and set aside in their entirety paragraphs 4(c), 5, 6, 7, 8 and 11 of the order. Paragraph 4(c) of the order prohibits Coors from refusing to sell beer to any Coors distributor or terminating any Coors distributor because the distributor sold Coors beer to another distributor or retailer located outside of the territory granted to the Coors distributor. 85 FTC at 188. Paragraph 5 prohibits Coors from restricting "the territory in which or the persons to whom a distributor may sell Coors beer."² *Id.* at 189. Paragraph 6 prohibits Coors from allocating Coors

² A proviso to paragraph 5 states, however, that the order does not prohibit Coors from "convinving with the

beer among its distributors "in times of beer shortage at the Coors brewery," by any means not equitably related to their proportionate purchases of Coors beer during "the last three months before the allocation" *Id.* Paragraph 7 prohibits Coors from refusing to deliver all of a distributor's order because the distributor made sales outside of his assigned territory or because the distributor is selling Coors beer at "unapproved" prices or markups. *Id.* Paragraph 8 of the order prohibits Coors from prohibiting its distributors from selling Coors beer for "central warehouse delivery."³ *Id.* Finally, paragraph 11 generally prohibits Coors from hindering, suppressing or eliminating competition between or among distributors or retailers handling Coors beer. *Id.* at 189-90.⁴

Coors argues that these provisions of the order, especially in the context of Coors' unique brewing method, and experience with the unauthorized distribution of its products in expansion markets, have "placed Coors at a competitive disadvantage and [have] been harmful." Petition at 9. Among other things, Coors beer distributors are required to maintain Coors' beer products in refrigerated warehouses. Additionally, the distributors must monitor the age of their Coors inventory and are responsible for closely monitoring product shelf-life and ensuring that only fresh product is available to consumers. Petition at 5. Coors believes that its ability to restrict its distributors' territories and impose other non-price vertical restraints is necessary because such restrictions would allow Coors to (1) monitor better its distributors' performance, (2) provide incentives to distributors to invest the resources and provide services necessary to comply with Coors' quality control requirements, and (3) compete better against other beer brewers.

Coors asserts that the relief it seeks is required by a change in law. Specifically, Coors argues that the order provisions it is asking the Commission to set aside were predicated upon the *Schwinn* doctrine,

requirements of any state law." *Id.*

³ Coors, however, is not prohibited from establishing refrigeration standards for the central warehouses "which are substantially similar to those established for distributors." 85 FTC at 189.

⁴ Paragraph 1 of the order prohibits Coors from fixing the prices at which distributors sell Coors beer to retailers or the prices at which retailers sell Coors beer to consumers. Paragraphs 2 and 3 of the order (prohibiting Coors from suggesting prices or mark-ups for its distributors) expired by their own terms in 1978. Subparagraphs 4(a), (b) and (d) prohibit Coors from terminating any distributor because the distributor either sold beer or advertised at prices different from those approved by Coors, or because the distributor has distributed the product of another brewer. Paragraph 9 prohibits Coors from requiring that retailers serve Coors draught beer as their only light-colored draught beer. Paragraph 10 prohibits Coors from requiring its distributors to eliminate or refrain from obtaining and handling rival brands of beer in order to become or remain a Coors distributor. 85 FTC at 187-90. Coors does not seek relief from these remaining operative order provisions. Petition at 16.

which the Supreme Court overruled in *Continental T.V., Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36 (1977). Consequently, according to Coors, Coors' non-price vertical restraints "were never put to . . . the 'market power' analysis currently used in vertical, non-price restraint cases." Petition at 12. Coors asserts that it does not have sufficient market power⁵ to raise its prices significantly without materially and adversely affecting its business, and suggests that Coors' non-price vertical restraints would be judged under a rule of reason analysis today.

III.

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

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

⁵ Coors' national market share is less than eight percent and it no longer holds the leading position in any

particular modification sought is appropriate to remedy the identified harm.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make the requisite satisfactory showing. The petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified.⁶ If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if 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 given the public interest in 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).

IV.

Based on the information provided by Coors, and other available information, the Commission has determined that Coors has not made a satisfactory showing that changes in law require reopening the proceeding and setting aside the order provisions prohibiting Coors from imposing upon its distributors certain non-price vertical restraints, including territorial restrictions. However, the Commission has concluded that Coors has made a satisfactory showing that reopening the order and setting aside the non-price vertical restraints provisions is in the public interest.

The Commission's 1973 decision in this case, after finding that Coors engaged in unlawful resale price maintenance, called the territorial restraints "an obvious adjunct to Coors' efforts to control the prices at which its distributors and their retail accounts dispose of the product". 83 FTC at 192. Consequently, the Commission condemned Coors' territorial restraints as *per se* unlawful because they were part of the unlawful RPM scheme, but determined that it

⁶ The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979).

was not necessary to conclude that the restrictions in themselves were unlawful *per se*.⁷ The court of appeals held the restraints in themselves *per se* unlawful, citing *Schwinn*, albeit with substantial criticism. 497 F.2d 1178 at 1186-87.

Sylvania, which was decided shortly after the Commission issued the final order in this case, recognized that exclusive territories and other non-price vertical restraints are not inherently anticompetitive and must thus be judged under the rule of reason.⁸ *Sylvania* replaced the *per se* test for non-price vertical customer and territorial restraints outside RPM with a rule of reason test, but the Court did not change the *per se* rule for non-price vertical restraints that are part of a RPM scheme. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 760, n. 6 (1984). *Sylvania*, therefore, is not a change in law as to the order in this matter.

Although non-price vertical restraints are still *per se* unlawful as part of a RPM scheme, Coors does not request elimination of the order's prohibitions on RPM. Therefore, any territorial or other non-price vertical restrictions imposed as part of a resale price maintenance scheme would be *per se* unlawful and would violate this order even if modified as Coors requests. The non-price provisions of the order, apart from the RPM provisions, are thus best viewed as fencing-in provisions, intended to prevent the recurrence of resale price fixing. Coors has shown that the benefits of those provisions, when viewed under the rule of reason approach in *Sylvania*, are outweighed by the costs they impose, and may now be set aside in the public interest.

V.

Coors has made a threshold showing that the order provisions it requests be set aside impede and deter Coors (in states that do not permit or require territorial restrictions) from correcting impaired distribution problems and from adopting efficiency-maximizing distribution arrangements that would intensify interbrand competition.⁹

⁷ The Commission noted that "[a]s the court in *Schwinn* recognized, whatever the status of vertical restraints unaccompanied by price-fixing, the presence of price-fixing as part and parcel of a system of territorial restrictions renders the entire package illegal *per se*." *Id.* at 194.

⁸ See *Bellone Electronics Corporation*, 100 FTC 68 (1982).

⁹ For example, any steps Coors might take to increase distributor emphasis on providing a consistently fresh, quality product to the consuming public or to improve geographic market coverage may subject Coors to the risk of being accused of violating the order and, consequently, the risk of a civil penalty suit and judgment. By not being able to correct these distribution problems effectively, Coors is injured in its competition with other brewers. In fact, this order may injure Coors more than it would other brewers because of Coors' unique

(footnote cont'd)

These arrangements are available to Coors' competitors, and these order provisions therefore injure Coors' ability to compete effectively with other breweries.

Setting aside the non-price vertical restraints provisions of the order would enable Coors to employ distribution methods that likely would be reasonable under the rule of reason standard, because Coors lacks the necessary market power to raise its prices to supracompetitive levels. It would also allow Coors to take advantage of certain efficiencies in the distribution of its products, which, in turn, would promote interbrand competition. *Sylvania, supra*, at 54-55.

Allowing Coors to use what it considers the most efficient and cost effective distribution of its products, including agreeing with distributors in certain states to dedicate their sales efforts to designated geographic areas, would put Coors on an equal footing with other brewers and should make Coors and its distributors more effective competitors. This is consistent with the recognition that in competitive markets consensual non-price vertical arrangements can benefit both competition and the consumer. Coors' inability to impose non-price vertical restraints that its competitors are using places Coors at a competitive disadvantage. Because of the competitive nature of the beer industry, the costs of the prohibitions on non-price vertical restraints outweigh the continued need for these provisions. That balancing therefore supports modifying the order in the public interest.

VI.

With respect to Coors' request that the Commission set aside paragraph 11 of the order, the Commission has concluded that that paragraph's general prohibition against Coors "[h]indering, suppressing or eliminating competition . . . between or among distributors . . .," 85 FTC at 189-90, is overly restrictive and broad. This language may have a chilling effect on Coors' ability to take advantage of certain efficiencies in the distribution of its products. Moreover, in view of the current legal framework for analyzing vertical restraints, and the retention of the order's resale price maintenance prohibitions, paragraph 11 is no longer necessary to fence-in Coors' conduct concerning non-price vertical restraints it may impose upon its distributors.

brewing and distribution methods. See Bureau of Economics, Federal Trade Commission, *The Brewing Industry* at 111-13 (1978).

Finally, the Commission has also concluded that Coors has not made a satisfactory showing that changed conditions of fact or law or the public interest require that the Commission set aside the part of paragraph 7 of the order that concerns conduct involving resale price maintenance. Setting aside this part of paragraph 7 would be inconsistent with Coors' request that the Commission set aside "the order . . . except insofar as that order prohibits price fixing or resale price maintenance." Petition at 3.¹⁰ Additionally, retention of the resale price maintenance part of paragraph 7 is consistent with the primary objective of the order.

VII.

Accordingly, *it is ordered*, that this matter be reopened and that the Commission's order in Docket No. 8845, issued on February 4, 1975, be, and it hereby is, modified, as of the date of service of this order, by setting aside paragraphs 4(c), 5, 6, 8, and 11, and by modifying paragraph 7 to read:

7. Refusing to deliver all of a distributor's order because the distributor or the distributor's customer is selling Coors beer at prices, markups or profits lower than those approved by respondent.

Commissioner Strenio not participating.

¹⁰ Coors has not asked to be relieved from Subparagraphs 4(a) and (b), which prohibit Coors from terminating a distributor because that distributor or its customers resell at other than approved prices.

IN THE MATTER OF

PROMODES, S.A., ET AL.

Docket 9228. Interlocutory Order, August 10, 1989

ORDER

By motion dated August 4, 1989, the parties have jointly moved that respondent The Kroger Company ("Kroger") be dismissed from this action. In connection therewith, Kroger, along with Promodes S.A. and Red Food Stores, Inc. (collectively "Red Food"), and complaint counsel agree to the following provisions regarding discovery in this matter:

1. Kroger will respond in a timely manner to reasonable discovery requests, including document requests and interrogatories; and
2. Kroger documents, Kroger interrogatory responses and the sworn testimony of Kroger officials will be admissible to the same extent as if Kroger were a party. Complaint counsel and Red Food will not object to the introduction of Kroger documents, Kroger interrogatory responses or the sworn testimony of Kroger officials on the grounds that Kroger is no longer a party to this litigation.

The motion to dismiss is granted.

Complaint

112 F.T.C.

IN THE MATTER OF

NEW ENGLAND MOTOR RATE BUREAU, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9170. Complaint, Oct. 24, 1983—Final Order, Aug. 18, 1989*

This final order requires, among other things, the respondent to halt its collective ratemaking activities in certain states and to cancel, within six months, all tariffs it has filed in those states.

Appearances

For the Commission: *Michael E. Antalics, Robert J. Schroeder, Harold F. Moody and John H. Seesel.*

For the respondent: *Bryce Rea, Jr., Rea, Cross & Auchincloss, Washington, D.C. and Curtis Wood, New England Motor Rate Bureau, Inc., Burlington, Ma.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The New England Motor Rate Bureau, Inc., a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint the term "*carrier*" means a common carrier of property by motor vehicle.

"*Intrastate transportation*" means the pickup or receipt, transportation and delivery, wholly within any state of the United States, of property for compensation by a carrier authorized by that state to engage therein.

"*Member*" means any carrier or other person which pays dues or belongs to The New England Motor Rate Bureau, Inc., or to any successor corporation.

"*Tariff*" means the publication stating the rates of a carrier for the

intrastate transportation of property, excluding general rules and regulations.

“*Rate*” means a charge, payment or fixed price according to a ratio, scale or standard for direct or indirect transportation service.

“*Collective rate*” means any rate or charge established under any contract, agreement, understanding, plan, program, combination or conspiracy between two or more competing carriers, or between any carrier and respondent.

PARAGRAPH 1. Respondent, The New England Motor Rate Bureau, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 14 New England Executive Park, Burlington, Massachusetts. Respondent publishes and issues tariffs and supplements thereto containing intrastate rates for the transportation of property on behalf of member carriers.

PAR. 2. Common carriers by motor vehicle engaged in intrastate transportation of property within each of the states of Massachusetts, New Hampshire, Rhode Island and Vermont do so under certificates of public convenience and necessity granted by state regulatory agencies in the respective states. Such motor carriers are subject to rate regulation by a state agency and are required to charge just and reasonable rates. Motor common carriers in these states are not permitted to change the rates filed once they have been accepted by the state regulatory agencies in the respective states.

PAR. 3. The statutes which provide for regulation of common carriers engaged in the transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont do not command, authorize or otherwise provide for the establishment, operation or regulation of rate agreements containing collective rates among such common carriers or motor carrier rate-making bureaus.

PAR. 4. Except to the extent that competition has been restrained as herein alleged, respondent’s members have been and are now in competition among themselves and with other common carriers.

PAR. 5. Respondent’s membership consists of approximately 900 common carriers of property by motor vehicle. Respondent’s members are entitled to and do, among other things, vote for and elect the officers and directors of respondent. The control, direction and management of respondent is vested in the members of the Board of Directors, who employ a general manager who acts as chief

administrative officer of the corporation with direct charge of and supervision over the affairs of respondent.

PAR. 6. The acts and practices of respondent set forth in paragraph eight have been and are now in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

(A) Affect the flow of substantial sums of money from businesses and other private parties to respondent's members for rendering intrastate transportation services, which money flows across state lines;

(B) Affect the purchase and use of equipment and other goods and services by respondent's members which are shipped in interstate commerce; and

(C) Are supported by the receipt of dues and fees for services from out-of-state members and others.

PAR. 7. Shippers use intrastate transportation services of carriers within the states of Massachusetts, New Hampshire, Rhode Island and Vermont to move general commodities from warehouses and distribution centers to customers located in the same state as the warehouse or distribution center. These general commodities are transported from out-of-state origin points to such warehouses and distribution centers for distribution within these states. For intrastate deliveries of general commodities from warehouses and distribution centers, carriers charge shippers or shippers' customers the intrastate rates published by respondent. These intrastate shipping charges are factors which influence the prices of such general commodities. The intrastate delivery services of these carriers are an essential and integral part of the interstate business transactions of such shippers. Thus, the activities of these carriers have a substantial and direct effect upon interstate commerce.

PAR. 8. For many years and continuing up to and including the date of the issuance of this complaint, respondent, its members, officers and directors and others have agreed to engage, and have engaged, in a combination and conspiracy, agreement, concerted action or unfair and unlawful acts, policies and practices, the purpose or effect of which is, was, or may be to unlawfully hinder, restrain, restrict, suppress or eliminate competition among carriers engaged in the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont.

Pursuant to and in furtherance of said agreement and concert of action, respondent, its members and others have engaged and continue to engage in the following acts, policies and practices, among others:

(A) Initiating, preparing, developing, disseminating, and taking other actions to establish and maintain collective rates, which have the purpose or effect of fixing, establishing, stabilizing or otherwise tampering with rates charged for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont;

(B) Participating in and continuing to participate in the collective rates; and

(C) Filing collective rates with the state regulatory agencies in Massachusetts, New Hampshire, Rhode Island and Vermont.

PAR. 9. The acts and practices of respondent, its members and others as alleged in paragraph eight have been and are now having the effects, among others, of:

(A) Raising, fixing, stabilizing, pegging, maintaining, or otherwise interfering or tampering with the rates charged by carriers for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont;

(B) Restricting, restraining, hindering, preventing or frustrating rate competition among carriers in the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont;

(C) Depriving shippers patronizing carriers for intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont of the benefits of free and open competition in the provision of said services; and

(D) Depriving consumers in the states of Massachusetts, New Hampshire, Rhode Island and Vermont of the benefits of free and open competition in the intrastate transportation of property within said states.

PAR. 10. The acts, policies and practices of respondent, its members and others, as herein alleged, were and are to the prejudice and injury of the public and constituted and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Initial Decision

112 F.T.C.

INITIAL DECISION BY

ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

DECEMBER 12, 1986

PRELIMINARY STATEMENT

The complaint herein issued on October 24, 1983.¹ It charges [3] respondent, its members, officers and directors, and others with a continuing combination and conspiracy to fix rates charged for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont. The complaint alleges that respondent's membership consists of approximately 900 common carriers of property by motor vehicle, and that respondent, its members and others, have taken action to establish and maintain collective rates, which have the purpose of fixing, stabilizing or otherwise tampering with rates charged for the intrastate transportation of property within the states of Massachusetts, New Hampshire, Rhode Island and Vermont, and that these collective rates have been filed with the state regulatory agencies in such states. This action is alleged to have deprived shippers and consumers of the benefits of

¹ The delay in concluding this matter has occurred for several reasons. A prehearing conference was held on January 16, 1984, at which time the parties contemplated preparation and submission of a stipulation of facts. On March 23, 1984, the parties filed a stipulation of facts, and reserved the right to present further evidence into the record. Subpoenas *duces tecum* were issued at the request of complaint counsel to several of respondent's carrier members. By order dated May 25, 1984, the undersigned denied a motion to quash these subpoenas. The member carriers thereafter refused to comply with the subpoenas and by order of August 23, 1984 court enforcement of the subpoenas was directed by the Commission.

Enforcement of the subpoenas was ordered by the court on December 5, 1984. *FTC v. The New England Motor Rate Bureau, Inc., et al.*, Misc. No. 84-0268 (D.D.C. 1984) Subsequent to the court's order, on January 14, 1985, respondent and complaint counsel entered into a stipulation concerning the matters covered by the subpoenas.

Complaint counsel, on April 29, 1985, filed a motion for partial summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Respondent's answer to this motion was made in the form of a cross-motion for summary decision (see Cross Motion For Summary Decision, July 1, 1985), and complaint counsel's response to respondent's cross-motion was filed July 19, 1985.

Rulings on complaint counsel's motion for partial summary decision, and respondent's cross-motion for summary decision, were made on March 7, 1986. The delay in ruling on counsels' motions was occasioned by awaiting the First Circuit Court of Appeal's decision in *Massachusetts Furniture & Piano Movers Ass'n Inc., v. FTC*, 773 F.2d 391 (1985), *reh. denied* November 21, 1985, and the Commission's decision in the matter after the First Circuit's remand of the proceeding to the Commission. The Commission dismissed the *Mass. Movers* case by order dated March 19, 1986.

A prehearing conference was held April 29, 1986, and an order was issued to prepare for a trial to commence no later than mid-July 1986. On July 8, 1986 counsel advised the administrative law judge that a factual stipulation would be submitted which would expedite the completion of this matter. Such a stipulation was filed on August 28, 1986, and the record for reception of evidence was closed on September 26, 1986. Briefing of this matter followed and, after one extension of time for briefing purposes, was concluded on

free and open competition in the intrastate transportation of property within those states. Such acts, policies and practices are alleged to be to the prejudice and injury of the public and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's answer, dated November 30, 1983, denied the charging allegations of the complaint, and sets forth thirteen defenses to the complaint. These defenses include contentions that the complaint fails to state a claim on which relief can be granted; that respondent's members are subject to the Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*, and exempt from regulation by the Federal Trade Commission; that respondent's member carriers are the real parties in interest and are indispensable parties to this proceeding; that regulation of the activities challenged in the complaint is within the exclusive jurisdiction of the several states; that the challenged activities are subject to a special regulatory scheme and because of the clear repugnancy between that regulatory scheme and the Federal Trade Commission Act, the latter is impliedly repealed; that the activities alleged in the complaint are exempt from the Federal Trade Commission Act under the doctrines of *Parker v. Brown* and *Noerr-Pennington*; that the activities alleged in the complaint are exempt from the provisions of the Federal Trade Commission Act by virtue of Section 10706(b) of the Interstate Commerce Act, 49 U.S.C. 10706(b); that because of pervasive state regulation it would be unfair to hold respondent responsible for conduct implementing state regulation; that all matters raised by the complaint are within the primary jurisdiction of federal or state transportation regulatory agencies charged with the exclusive right and duty to regulate such matters and the Federal Trade Commission has failed to exhaust these administrative remedies; and that this proceeding is barred by doctrines of laches, estoppel and/or waiver.

On March 23, 1984 counsel for the parties filed a stipulation of facts and reserved the right to present further evidence into [4] the record. Complaint counsel then sought subpoenas *duces tecum* to be issued to respondent's carrier members. Subpoenas were issued but the member carriers refused to comply. Court enforcement was sought and compliance was ordered by the United States District Court for the District of Columbia. *FTC v. The New England Motor Rate Bureau, Inc., et al.*, Misc. No. 84-0268 (December 5, 1984) Thereafter, on January 14, 1985, the parties filed a stipulation which covered the matters sought by the subpoenas.

Complaint counsel, on April 29, 1985, filed a motion for partial summary decision pursuant to Section 3.24 of the Commission's Rules of Practice. Respondent's answer to this motion was in the form of a cross-motion for summary decision. (See Cross Motion For Summary Decision, dated July 1, 1985) Rulings were entered on March 7, 1986 granting in part complaint counsel's motion and denying respondent's motion. Since the rulings of March 7, 1986, granting in part complaint counsel's motion and denying respondent's motion, contained substantial findings of fact and conclusions and disposed of all of the issues in this proceeding except for respondent's *Parker v. Brown* [317 U.S. 341 (1942)] state action defense, the findings of fact, conclusions, and orders contained therein are made a part of this Initial Decision and are attached hereto as Attachments I and II.

Having reviewed the entire record of this proceeding,² and [5] the proposed findings of fact and legal memoranda submitted by the parties, including the memorandum filed by the National Association of Regulatory Utility Commissioners,³ the following findings of fact and conclusions are made and an appropriate order is entered.

FINDINGS OF FACT

NEW ENGLAND MOTOR RATE BUREAU, INC.

1. The New England Motor Rate Bureau, Inc. (NEMRB) is regulated by the Interstate Commerce Commission (ICC). See 40 U.S.C. 10706(b); *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, 364 I.C.C. 464, 921 (1980). (Stip. August 28, 1986, ¶ 1) The ICC's Boston Regional Office is sent notice of NEMRB's Annual, Board of Directors, General Rate Committee and Docket meetings, and an ICC agent from that office has attended those meetings on a

² The record of this proceeding consists of the following:

- (1) Stipulation, dated March 23, 1984
- (2) Complaint Counsel's First Request for Admissions, dated April 24, 1984*
- (3) Respondent's Answer To Complaint Counsel's First Request For Admissions, dated April 30, 1984*
- (4) Stipulation, dated January 14, 1985
- (5) Complaint Counsel's Second Request For Admissions, dated March 6, 1985*
- (6) Respondent's Answer To Complaint Counsel's Second Request For Admissions, dated March 15, 1985*
- (7) Order Granting In Part Complaint Counsel's Motion For Partial Summary Decision, dated March 7, 1986 (Attachment I hereto)
- (8) Order Denying Respondent's Cross-Motion For Summary Decision dated March 7, 1986 (Attachment II hereto)
- (9) Stipulation, dated August 28, 1986

* See Appendix to Complaint Counsel's Motion For Partial Summary Decision, dated April 29, 1985.

³ See Order Granting Motion Of The National Association of Regulatory Utility Commissioners For Leave To Intervene For Limited Purpose Of Filing Memorandum, dated December 10, 1986.

spot check basis. Notices of these meetings are also sent to the States of New Hampshire and Rhode Island and the Commonwealth of Massachusetts. (Stip. August 28, 1986, ¶ 3) The ICC last did a complete audit of NEMRB in late 1983 and early 1984. At that time a three-person investigating team from the ICC examined the records of NEMRB in depth and questioned its personnel at length regarding the operations of the Bureau. (Stip. August 28, 1986, ¶ 2)

2. Effective July 1, 1986, motor common carriers of freight (except parcel express carriers) are no longer required to file tariffs with the State of Vermont. Accordingly, NEMRB no longer formulates rates applicable to intrastate transportation of property in Vermont, nor does it file tariffs or supplements published by it with any agent in Vermont. (Stip. August 28, 1986, ¶ 4) [6]

STATE OF NEW HAMPSHIRE

3. Exhibit A attached to Stipulation dated August 28, 1986 is a true copy of New Hampshire's motor carrier statute. N.H. Rev. Stat. Ann. § 21-L; § 375-A&B *et seq.* (Stip. August 28, 1986, ¶ 5) Exhibit B attached to Stipulation dated August 28, 1986 is a true copy of New Hampshire's rules and regulations governing motor carriers of property. N.H. Admin. Code Puc 800 *et seq.*; 900 *et seq.* (Stip. August 28, 1986, ¶ 8)

4. The New Hampshire Department of Transportation (NHDOT) was created by statute in 1985 and it assumed responsibility for regulating intrastate transportation from the New Hampshire Public Utilities Commission, which formerly held such responsibilities. (Stip. August 28, 1986, ¶ 6) A Commissioner heads NHDOT and is responsible for regulating motor common carriers. N.H. Rev. Stat. Ann. § 21-L:2; § 375-A:14, § 375-B:17(I). The Commissioner may adopt rules regulating the form of tariff schedules and the manner of their filing. (Stip. August 28, 1986, ¶ 7)

5. The Bureau of Common Carriers (BCC) is a branch of NHDOT's Division of Public Works. BCC is primarily responsible for regulating intrastate motor carriers that transport property for hire. The Administrator of BCC reports to the Director of Public Works and Transportation, who is nominated by the Commissioner and appointed by the Governor. N.H. Rev. Stat. Ann. § 21-L:3 (II). (Stip. August 28, 1986, ¶ 9)

6. A motor carrier of property for hire must obtain from NHDOT a certificate, if a common carrier, or a permit, if a contract carrier,

