FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

SEARS, ROEBUCK AND COMPANY

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

Docket C-2885. Consent Order, April 20, 1977—Modifying Order, July 5, 1989

This order reopens the proceeding and modifies the Commission's 1977 consent order [89 F.T.C. 240] by deleting the prohibition on respondent's use of radius clauses, modifying the prohibition on use clauses, and modifying the order so that when it applies to Sears in its capacity as a shopping center tenant it does so only when Sears is a major tenant.

ORDER REOPENING AND MODIFYING FINAL ORDER TO CEASE AND DESIST

On February 24, 1989, respondent Sears, Roebuck and Co. filed a "Petition to Set Aside Consent Order" ("Petition") asking the Commission to reopen and set aside the consent order issued in this matter on April 20, 1977, 89 FTC 240 (1977). In the event the order is not reopened and set aside in its entirety, Sears spells out in an "Alternative Proposed Modification of Order with Explanation" ("Alternative Proposal") specific modifications to the order that Sears requests for "all of the difficulties which have been caused to Sears by this order." Sears filed its request pursuant to subsection 5(b) of the FTC Act, 15 U.S.C. 45(b), and section 2.51 of the Federal Trade Commission Procedures and Rules of Practice, 16 CFR 2.51. One public comment was received.

The order prohibits Sears from, among other things, entering or enforcing certain restrictive lease or easement agreements in connection with its participation in regional and super regional shopping centers.[1] Sears operates department and specialty stores in shopping centers through its Sears Merchandise Group and engages in shopping center development and management through its Homart Development Co. *See* Petition at 25, 45.

[1] The order is limited to Sears' participation in shopping centers containing (1) 200,000 square feet or more of total floor area designed for retail occupancy, (2) at least two tenants other than respondent, (3) at least one major tenant other than respondent, and (4) on-site parking. *See* Paragraph I.(b).

Sears maintains in the Petition that changed conditions of fact and law require the Commission to reopen and set aside the order. Sears also requests that the Commission reopen and set aside the order in the public interest. In the event the Commission decides not to reopen the order in its entirety, Sears' Alternative Proposal asks the Commission to reopen and set aside or modify specific portions of the order that Sears finds particularly onerous and harmful to competition.

The Commission has carefully considered Sears' requests and has concluded that Sears has not made a satisfactory showing that reopening of the entire order is warranted based upon changed conditions of fact or law or in the public interest. Nor has Sears established that changed conditions require reopening of any prohibition in the order. However, the Commission has concluded that Sears has made a satisfactory showing that it would be in the public interest to reopen and set aside or modify several prohibitions in the order.

I. The Order to Cease and Desist

The Commission issued its complaint and order on April 20, 1977, with the consent of Sears. *See Sears, Roebuck and Co.*, 89 FTC 240 (1977). The order prohibits five generic types of restrictions in shopping center leases or operating agreements, namely, (1) radius clauses, that is, restrictions on a tenant's ability to operate a like store within a specified distance of the shopping center; (2) use clauses specifying the types of products or services that tenants shall sell; (3) rights held by major tenants to approve or disapprove admission of other tenants into the shopping center; (4) clauses that require developers to exclude specified types of retail merchants or specifically named retail merchants; and (5) tying clauses that require a retail merchant in one shopping center to operate one or more stores in other shopping centers developed or managed by Sears.

II. 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 the order 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.

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 to show how the public interest warrants the requested modification. 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983), at 2. For example, it may be in the public interest to modify an order to "relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). Once showing of need is made, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2. The Commission will consider whether the particular modification sought is appropriate to remedy the identified harm.

The language of section 5(b) plainly indicates 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, by means other than conclusory statements, why an order should be modified. 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., 2d Sess. 9-10 (1979). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to determine whether modification is required and, if so, the nature and extent of the modification. The 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).

III. Sears' Request to Reopen and Set Side the Order in Its Entirety

Sears requests that the order be reopened in its entirety either to set aside the order at this time or set a future date on which the order will expire. Sears, however, fails to show either changed conditions of law or fact that require reopening, now or in the future, or that such action is warranted in the public interest.

Sears first claims that recent changes of law now require that all restrictive shopping center covenants be judged under a rule of reason rather than the *per se* prohibitions contained in the Commission's order. Sears maintains that these restrictive covenants would be found to be reasonable under a reasonableness test. Sears relies upon *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), and the "accelerated trend away from widespread application of *per se* rules." *See* Petition at 4.

Although the *Sylvania* decision was a turning point in the law of vertical restraints, the Commission has consistently declined to reopen proceedings absent a specific showing that the order prohibits activity that subsequently has been found lawful.[2] Under a rule of reason analysis, the restraints in question here likely would not be found to restrain trade unreasonably absent a degree of market power. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 296 (1985). Sears, however, makes no showing either that the shopping centers it was associated with in 1977 did not possess market power or that the shopping centers it is associated with today do not possess market power. Without both showings, the Commission is unable to conclude that changes in law require reopening the entire order.

Additionally, Sears fails to make a sufficient showing that any factual changes in the shopping center industry occurring since the order was issued require reopening. Sears highlights an increase in the numbers of developers, major tenants, and mall tenants at a time when construction of new regional shopping centers "has virtually stopped;" an increase in the number of shopping centers built since the Commission's order was issued; and an increase in specialization of shopping centers. *See* Petition at 3. Sears also points to a trend toward the greater use of firms to manage shopping centers who do not have an ownership interest in the center. However, Sears has

[2] *See Encyclopaedia Britannica Inc.*, Docket No. 8908, Order Reopening the Proceeding and Modifying

failed to show how any of these changes alone or together eliminate the need for the order or make continued application of the order inequitable or harmful to competition.

Nor has Sears established sufficient public interest reasons to reopen the entire order. Sears claims that it is unfairly constrained by the order's prohibitions when most if not all competing tenants and developers in the shopping center industry are not so encumbered. According to Sears, it consented to the order because it believed that the Commission in the late 1970's was likely to issue a trade regulation rule for shopping centers that would proscribe the same activities prohibited by the order. However, that threatened trade regulation rule was never issued.

Although the reopening of several portions of the order may be in the public interest, Sears has not demonstrated that all of the order's provisions cause significant harm that outweigh the reasons not to make the modifications. Thus, Sears has not made a sufficient showing to warrant reopening the entire order in the public interest.[3]

IV. Sears' Request to Reopen Portions of the Order

The Commission has carefully considered Sears' request that certain specific prohibitions need reopening and modification in the event the Commission does not reopen and set aside the entire order. These prohibitions include the prohibition of radius clauses, use restrictive clauses, clauses giving rights of prior approval to Sears in its capacity as a tenant, tying clauses used by Sears in its capacity as a developer, and the joint use of employees by Sears' Merchandise Group and Sears' shopping center development group. Sears seeks also modification to exclude from the order Sears in its capacity as a specialty tenant and Sears in its capacity as a minority investor or non-owner shopping center manager. *See* Alternative Proposal.

Radius Clauses

Sears challenges the continuing need for the prohibition against the use of radius clauses by Sears in its capacity as a developer. *See* Paragraphs III.A.3. Sears' petition describes the efficiencies gained from radius clauses. According to Sears, radius restrictions increase

[3] Sears requests also that the Commission sunset the order in three years. The age of an order, standing alone, is not sufficient to satisfy the standard for reopening in the public interest. Moreover, the Commission generally does not sunset orders that prohibit unlawful conduct. *See William H. Rorer, Inc.*, Docket No. 8599, Order Modifying Cease and Desist Order, 104 FTC 544, 545-46 (1984); *Corn Products Refining Co.*, Docket No. 5502, Letter to Morton M. Maneker, Esq. (August 22, 1985), at 7-8.

traffic in the shopping center by requiring the tenant to concentrate on its store in the shopping center. A nearby store could siphon away customers from the center.

Sears has made the necessary showing of affirmative need to reopen and modify the prohibition against radius clauses in the public interest. Sears presents examples where tenants in Sears-owned centers have opened retail locations in nearby centers to the detriment of Sears' shopping center. Sears' petition also documents industry-wide usage of radius restrictions. Radius clauses that are limited in scope may stimulate competition and are unlikely to be anticompetitive. In the absence of competitive concerns about these restrictions, the harm to Sears outweighs any reasons for retaining the prohibition, and reopening is warranted in the public interest. Under the circumstances, the Commission will reopen and set aside this prohibition as the appropriate remedy to address Sears' showing of affirmative need.

Use Clauses

Sears challenges the continuing need for the prohibition against the employment of use clauses by Sears in its capacity as a developer. Use clauses specify the types of products or services that tenants shall sell. *See* Paragraph III.A.1, III.B.1. Sears' petition describes the efficiencies gained from use clauses. According to Sears, use clauses promote an optimum tenant mix and preserve the desired character of a shopping center.

Sears' petition demonstrates an affirmative need for modification of this prohibition. Sears shows that descriptions of range of price and fashion and quality in use clauses serve a competitive purpose, are unlikely to threaten tenants' pricing discretion, and are commonly used in the industry. The prohibitions particularly interfere with Sears' ability to draft use clauses narrowly enough to achieve an optimum tenant mix and to preserve the desired character of a shopping center. The Commission has long recognized that use clauses can play an important role in maintaining an optimal tenant mix in a shopping center. *See* Federal Trade Commission Statement Regarding Shopping Centers (March 1981); *Tysons Corner Regional Shopping Center*, 85 FTC 970, 1008, 1012, 1012 n.12, 1014, 1017-18 (1975).

Thus, Sears makes a satisfactory showing to warrant reopening of the prohibition of use clauses in the public interest. The Commission

has concluded that this harm can be appropriately remedied by deleting the language prohibiting use clauses that refer to ranges of price or fashion or quality.[4] However, the core prohibition against price fixing remains intact.[5]

Prior Approval

Paragraph II.A.2. prohibits Sears, in its capacity as a tenant, from entering or enforcing agreements granting it the right to approve or disapprove the entry into a shopping center of any other tenants. There are related paragraphs that prohibit more limited prior approval clauses, *e.g.*, preventing other tenants' expansion of floor space in the mall without the major tenant's approval. *See* Paragraphs II.A.3., II.A.4., II.A.7, II.A.8, II.A.11.

Sears challenges the order's approach to rights of prior approval exercised by tenants because the prohibition fails to recognize, according to Sears, the purported efficiency justifications for tenant-held rights of prior approval. Sears claims that it needs a voice in the selection of major tenants because the success of the shopping center and Sears' store in the center depend upon the other major tenants being an asset to the center. *See* Petition at 46. Accordingly, Sears seeks to reopen and modify these prohibitions to enable it to exercise a right of approval over entry by other major tenants into the center.

Sears fails to make the necessary showing of affirmative need to reopen the prohibitions against rights of prior approval in the public interest. Sears provides examples where a promised anchor tenant backed out and less desirable anchor tenants got locations in shopping centers where Sears was also an anchor. The examples do not indicate whether the harm to Sears resulted after the promised anchor backed out, did the developer have many anchors to choose from, some of whom Sears preferred? Or, was the developer having a hard time finding any anchor, so that Sears might have settled for the less desirable anchor? Sears has not made a satisfactory showing that

[4] As set forth below, the modification to Paragraph III.B.1. adds the language "of other tenants" consistent with Sears' proposed modification. *See* Alternative Proposal, Order, Paragraph III.B.1. This clarifies that the prohibition only applies to a tenant or to Sears specifying or controlling the prices of any other tenant. *See* Paragraph III.B.2.

[5] Paragraph III.G. imposes certain reporting requirements upon Sears in its capacity as a developer. Sears asks that the Commission modify the subparagraph to accord with any changes in the substantive prohibitions made by the Commission. In view of the modifications made herein to permit use clauses, Paragraph III.G.3. should be reopened and modified to strike references to price ranges, fashion ranges, and quality ranges.

Sears requests that the Commission add a new Paragraph III.F.3. to make clear that Sears could employ use clauses in off-price shopping centers requiring the tenant to sell high quality merchandise. The foregoing modification by the Commission to Paragraphs III.A.1. and III.B.1. makes such a modification unnecessary.

tenant-held rights of prior approval, in fact, enhance competition, or that Sears has been unable to protect its "legally cognizable interests" by requiring developers to select tenants only according to defined standards contained in shopping center agreements. Accordingly, Sears has not carried its burden to demonstrate an affirmative need to reopen and modify the prohibition against rights of prior approval.[6]

Tying Clauses

Paragraph III.A.4. prohibits Sears, in its capacity as a developer, from conditioning entry of a tenant into one shopping center upon that tenant's entry into another Sears shopping center. Sears claims that the prohibition may prevent it from offering a tenant a package rental rate covering locations in several shopping centers whereby it charges a lower relative rent then the rate for space in one center. Thus, Sears requests that the Commission reopen the prohibition by adding a new Paragraph III.F.2. Such a package rental rate would not necessarily violate Paragraph III.A.4. Thus, Sears has not shown an affirmative need to reopen and modify Paragraph III.A.4.

Joint Use of Common Officers and Employees by Sears' Merchandising and Development Groups

Paragraph III.C. prohibits Sears from using the same officers or employees in Sears' separate capacities as a tenant in or as a developer of shopping centers. Sears represents that the possible joint

[6] Sears' failure to carry its burden regarding rights of prior approval disposes also of Sears' request that the Commission adopt Sears' proposed order paragraphs in its Alternative Proposal, namely, Paragraphs II.A.2., II.A.3., II.A.4., II.A.7., II.A.8., II.A.11., III.E.9.

Sears asks that Paragraph III.E. be modified to expand the stated criterion that Sears can permissibly require a developer to following in selecting new or replacement tenants. *See* Alternative Proposal, Explanation of Amendments at 4, Proposed Paragraphs III.E.1., III.E.7, III.E.8., and III.E.10. The Commission has concluded that such reopening and modification of the order is unnecessary. Paragraph III.E. was not intended to be a definitive list of standards and Sears has flexibility in drafting criteria necessary to protect its "legally cognizable interests" without modification so long as the standards are not a cover for price fixing. In *Tysons Corner*, the Commission noted that the criteria set forth in Paragraph III.E. were

> not intended to constitute an exhaustive listing of the factors which [respondent major tenant] may insist be considered by a shopping center landlord in the management of the center, as a condition of [the respondent major tenant]'s signing a shopping center lease.

Tysons Corner, 85 FTC at 1017 n.19.

The Commission, however, will reopen and modify Paragraph III.E.3., which permits Sears to exercise limited approval rights for tenants within 150 feet of a Sears store. Sears has made a sufficient showing of an affirmative need for modification. Currently, Sears may prepare a list of acceptable tenant categories from which the developer can select tenants to be located next to Sears with certain limitations as to, for example, price ranges. Sears requests that the paragraph be modified to permit it to designate categories of retailers who are unacceptable rather than acceptable subject to the same limitations. Sears represents that it becomes nearly impossible under the current procedure to list all possible permissible uses. Thus, modification will facilitate operation of this paragraph without changing the substance of the prohibition.

use of officers by Sears' Merchandise Group and Homart, Sears' shopping center development arm, is not now a problem because Homart long ago became an autonomous unit. Sears argues, however, that both Sears units would benefit from using common corporate headquarters staff personnel for such matters as tax counseling, procurement assistance, computer expertise, personnel administration, insurance advice, legal advice, and accounting and general office management.

Sears fails to make the necessary showing of affirmative need to reopen Paragraph III.C. in the public interest. Sears does not refer to any instances where it has forgone benefits from using common corporate headquarters staff or suffered competitive harm. In any event, the Commission recognizes the potential benefits that may arise through use of common corporate headquarters staff and does not interpret Paragraph III.C. to prohibit Sears in its capacity as tenant and developer from drawing upon common staff expertise.

Sears as a Specialty Tenant

The order prohibitions against Sears in its capacity as a tenant apply broadly to Sears whether it is acting as a major tenant or as a satellite tenant in a shopping center. *See* Paragraph I.(c), I.(d), II.A., II.B. At the time the order was issued, Sears, as a tenant, was generally involved in shopping centers only in the capacity of a major tenant, according to Sears. Sears has now begun to branch into specialty stores, and eye care centers, and requests that the order be modified to exclude Sears as a specialty tenant.

Sears has made a satisfactory showing to warrant reopening of this aspect of the order in the public interest. In its capacity as a satellite tenant, Sears is unlikely to have the necessary leverage to obtain any unlawful restrictive covenants from developers. The Commission in *Tysons Corner* only focused upon restrictive covenants held by major tenants and not covenants held by satellite tenants. The value of Sears as a satellite tenant being able to compete without the order outweighs the likelihood that Sears in that capacity could secure any anticompetitive restrictive covenants in negotiations with developers. Under the circumstances, the Commission will modify the order to exclude Sears as a satellite tenant.[7] Previously, the Commission made

[7] Paragraph I.(d) defines "major tenant" as

> a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

this same distinction between a specialty store operation and a major tenant operation in *Tysons Corner* where the Commission modified the order in the public interest so as not to limit the ability of that respondent's specialty furniture store to secure exclusivity clauses in shopping center leases. *See Tysons Corner*, 86 FTC 921 (1975).[8]

Definition of "Developer"

Sears claims that the order prevents Sears from investing in some shopping center joint ventures. According to Sears, the order's strict requirements against radius and use clauses cause other investors to view Sears as a less attractive investment partner. Sears cites experiences where the order has impeded Sears' ability to participate in investment opportunities. *See* Petition at 42-43.

Similarly, Sears finds that the order frustrates its ability to compete for shopping center management services jobs in centers where it will have no ownership interest. According to Sears, shopping center owners prefer management firms who are not under prohibitions against radius and use clauses. Sears cites cases in which the order has placed Sears at a disadvantage in competing for such shopping center manager services positions. *See* Petition at 43-45.

Sears requests that the order's definition of developer be reopened and modified to exclude Sears when it holds a 30 percent or less ownership interest in a shopping center or is not the shopping center manager. *See* Alternative Proposal, Explanation at 1. Sears, however, has not made a satisfactory showing that this definition needs reopening. Central to Sears' claim is the order's prohibition against Sears' employment of radius and use clauses. However, the Commission has decided already to reopen and modify these prohibitions generally in the manner sought by Sears. Thus, Sears is no longer disadvantaged in relationship to competing investors or management services firms. Accordingly, the Commission denies Sears' request to reopen the order's definition of developer.[9]

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[8] Paragraph IV.B. imposes upon Sears as a tenant an obligation to send a copy of the order within 30 days after service of the order to each major tenant, shopping center joint venturer, and developer in every shopping center in which Sears is a major tenant. Sears asks that the requirement be set aside as obsolete. This paragraph is, indeed, obsolete because compliance was required and completed in 1977 and for that reason there is no affirmative need to set aside the paragraph.

[9] Sears also asks the Commission to reopen the order for the purpose of exempting shopping center agreements that Sears inherits when Sears acquires a shopping center in its capacity as a developer. *See* Alternative Proposal, Proposed Paragraphs III.E.11., III.F.6., Explanation of Amendments at 6. Sears, however, shows no affirmative need for such a modification. Restrictive shopping center agreements pose the same problem whether or not Sears negotiates or inherits them. Moreover, in the future, Sears will likely

V. Reopening and Modification

Accordingly, *it is ordered,* that the order issued in this matter on April 20, 1977, be, and it hereby is, reopened and modified, as of the date of service of this order, as follows.

1. Paragraph III.A.3. shall be set aside.
2. Paragraph III.A.1. shall be modified by striking "price, or within any range of prices, or within any range of fashions, or within any range of quality, when such descriptions identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices" and adding "specific prices or specific ranges of prices."
3. Paragraph III.B.1. shall be modified by striking "prices, price ranges, fashion ranges, quality ranges, which identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices" and adding "specific prices or specific ranges of prices of other tenants".
4. Paragraph II.A. and Paragraph II.B. shall be modified by substituting "major tenant" for "tenant" as that term is used to define the capacity in which Sears is acting.
5. Paragraph III.G.3. shall be modified by striking "price ranges, fashion ranges, quality ranges."
6. Paragraph III.E.3. shall be modified by inserting "not" following "landlord may."

STATEMENT OF CHAIRMAN DANIEL OLIVER

I concur in the decision to grant in part Sears' Petition to reopen and set aside the order in Docket No. C-2885; however, I would have set aside the order in its entirety. I concur wholly in the cogent antitrust analysis set forth in Commissioner Machol's separate statement. In my view, the procompetitive justifications for the restrictions prohibited by the order, as detailed by Commissioner Machol, warrant reopening and setting aside the order on public interest grounds.

In addition, I agree with the statement in today's order that a showing to require reopening is made when there are "significant changes in circumstances," that "eliminate the need for the order or make continued application of the order inequitable or harmful to

inherit fewer shopping center leases that do not conform to the order in view of this order's modification of the prohibitions against radius and use clauses.

competition." I cannot agree, however, with the further suggestion that for the Commission to reopen and set aside an order today, on the basis of a claim of change in law, Sears would have to show that it did not possess market power in 1977.

To answer whether there has been a change in law, we should look at the law.[1] In this case, the addition of the element of market power to the legal analysis is a significant change in law since the decision in *Tysons Corner*, 85 FTC 970 (1975). That being the case, a petitioner in Sears' position need only demonstrate that it has no market power today, and thus that there is no longer a need for the order. Otherwise, it is likely that there would be an absence of record evidence to address what was not an issue at the time an order was entered, and that such historical evidence would be nearly impossible to develop anew. When the law has changed as significantly as it has in this case, the petitioner's required factual showing should be limited to whether consumers today would be injured by the conduct that the order sought to prevent.

STATEMENT OF COMMISSIONER MARGOT E. MACHOL

While I concur in the decision to grant in part and deny in part Sears' Petition to reopen and set aside, or in the alternative, modify the order in Docket No. C-2885, I would prefer to reopen additional portions of the order and grant further modifications on public interest grounds.

Sears, in its capacity as both a shopping center developer and tenant, requests that the order's prohibitions on certain restrictions in shopping center leases and operating agreements, such as prior approval clauses, be set aside. A shopping center is essentially a joint venture between a shopping center developer (acting as landlord) and the retail tenant to operate a group of commercial establishments as a unit. *See* Clarkson & Muris, eds., *The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior* (1981) at 141. Shopping centers can provide significant efficiencies that are not available when retail establishments operate as stand-alone businesses or in downtown commercial areas. These efficiencies include lower search costs for consumers, and maximized traffic flow and lower operating costs for retailers.

[1] Such a construction will not open the floodgates to petitions to reopen every time a court or the Commission issues a new decision, because there is still the requirement that the change in law be significant.

Restrictions agreed upon by the joint venture participants that constrain tenant characteristics but do not fix the prices charged by any tenant may reasonably be related to the efficient operation and success of the shopping center. As such, these restrictions would generally be analyzed under the rule of reason. Such restraints are methods of controlling tenant mix and the character or marketing concept of a shopping center, which are important factors in the center's success. Shopping centers seek to provide a wide variety of stores that would appeal to particular groups of consumers. For example, some shopping centers cater to consumers who want high quality/high priced goods and services (*e.g.*, Water Tower Place in Chicago; Trump Tower in New York City), some to consumers who want discount goods (*e.g.*, Biggs Hypermarket in Cincinnati), and still others to consumers whose tastes fall between these extremes. While lease restrictions may reduce aspects of competition among stores within a particular shopping center, they may serve to stimulate competition among different shopping centers.

Sears explains that a major ("anchor") tenant makes a significant investment in a shopping center that is at risk for a considerable period of time. The ability to have a voice in the selection of other tenants is a way of protecting the investment of anchor tenants and encouraging their participation in shopping centers. In my view, Sears has shown that its inability to take a more active role in the selection of other tenants has caused it competitive injury, and may also have affected the ability of the shopping centers in which Sears participates to compete effectively with other shopping centers. Sears has also shown that it has been unable to protect its interests adequately by the means left available to it under the order. As a result, I conclude that Sears has made a showing sufficient to warrant reopening additional portions of the order.

Under a rule of reason analysis of the kinds of restraints at issue in the Sears order, the shopping centers in which Sears participates would at least need to possess market power before these restraints would be found to restrain trade unreasonably. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284 (1985); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). While Sears did not specifically address in its Petition whether the shopping centers with