IN THE MATTER OF

TECH SPRAY, INC., ET AL.

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

Docket C-3377. Complaint, Mar. 25, 1992--Decision, Mar. 25, 1992

This consent order prohibits, among other things, a Texas corporation and its owner from making false and unsubstantiated environmental claims in the marketing of any product. In addition, the order requires respondents to maintain, for three years, all materials relied upon to substantiate any representations, and for a copy of the order to be distributed to each operating division.

Appearances

For the Commission: *Michael Dershowitz* and *Mary Koelbel Engle*.

For the respondents: *Robert D. Forrester, Gibson, Ochsner & Adkins*, Amarillo, TX.

COMPLAINT

The Federal Trade Commission, having reason to believe that Tech Spray, Inc., a corporation, and Richard Russell, individually and as officer of said corporation ("respondents"), have violated the provisions 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:

PARAGRAPH 1. Respondent Tech Spray, Inc. ("Tech Spray") is a Texas corporation with its office and principal place of business at 88 North Hughes Street, Amarillo, Texas.

Respondent Richard Russell is an officer of Tech Spray. He formulates, directs, and controls the acts and practices of Tech Spray. His business address is the same as that of Tech Spray.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents have advertised, offered for sale, sold, and distributed certain electronic equipment cleaning products containing the chemicals chlorofluorocarbons ("CFCs"), 1,1,1- trichloroethane, and/or hydrochlorofluorocarbons ("HCFCs") to the public, including but not limited to Blue Shower, Flux Stripper OF, Instant Chiller, Precision Duster, and Kleen-All ("respondents' products").

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as commerce is defined in the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements, including product labeling, and other promotional materials for respondents' products, including, but not necessarily limited to, the attached Exhibits A and B.

The product labeling on the caps of the Blue Shower (Exhibit A) and Instant Kleen-All cans includes the following statement:

Ozone Friendly Formula

The product labeling on the front of the Precision Duster and Instant Chiller cans (Exhibit B) includes the following statement:

OZONE FRIENDLY

PAR. 5. Through the statements referred to in paragraph four in product labeling (Exhibits A and B), respondents have represented, directly or by implication, that there are no ingredients in respondents' products that deplete the earth's ozone layer.

PAR. 6. Respondents have disseminated or have caused to be disseminated advertisements for respondents' products, including, but not necessarily limited to, the attached Exhibit C.

The aforesaid product labeling on the cap and the can of Flux Stripper OF (Exhibit C) includes the following statements:

Ozone Friendly Formula [cap]
CFC Free [can]

PAR. 7. Through the statements referred to in paragraph six in product labeling (Exhibit C), respondents have represented, directly or by implication, that because respondents' product contains no CFCs, it will not deplete the earth's ozone layer.

PAR. 8. Respondents have disseminated or have caused to be disseminated print advertisements for respondents' products, including, but not necessarily limited to, the attached Exhibit D.

The aforesaid print advertisement (Exhibit D) includes the following statements:

The Best Reason For Our Ozone-Friendly Products.

Because we take our responsibility to future generations seriously, Tech Spray has introduced a line of high performance Ozone-Friendly products. Tech Spray's Ozone-Friendly products have ozone depletion potential levels lower than those specified by the Montreal Protocol or current EPA guidelines.
... Tech Spray will continue to develop efficient and environmentally safe solutions to meet tomorrow's needs. Not only do Tech Spray's new Ozone-Friendly products help protect the environment, but they provide the same level of product quality and efficiency you have come to expect from the leading manufacturer of electronic production and field service chemicals.

PAR. 9. Through the statements referred to in paragraph eight in advertising (Exhibit D), respondents have represented, directly or by implication, that respondents' products are environmentally safe, do not pose a significant adverse risk to the environment or the ozone layer, and contain levels of ozone-depleting chemicals lower than those specified for products by the Montreal Protocol and EPA guidelines.

PAR. 10. In truth and in fact, respondents' products contain harmful ozone-depleting chemicals -- CFCs, 1,1,1-trichloroethane, or HCFCs -- which contribute to the depletion of the earth's ozone layer; the Montreal Protocol and EPA guidelines do not specify ozone-depletion potential levels that products may contain; and respondents' products, though they have lower ozone-depletion potentials than they did before they were reformulated, still consist primarily of ozone-depleting chemicals. Therefore, the representations set forth in paragraphs five, seven, and nine were, and are, false and misleading.

PAR. 11. Through the statements and representations referred to in paragraphs five, seven, and nine respondents have represented,

directly or by implication, that at the time they made such representations, respondents possessed and relied upon a reasonable basis for such representations.

PAR. 12. In truth and in fact, at the time respondents made such representations, respondents did not possess and rely upon a reasonable basis for such representations. Therefore, the representation set forth in paragraph eleven was, and is, false and misleading.

PAR. 13. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

EXHIBIT A

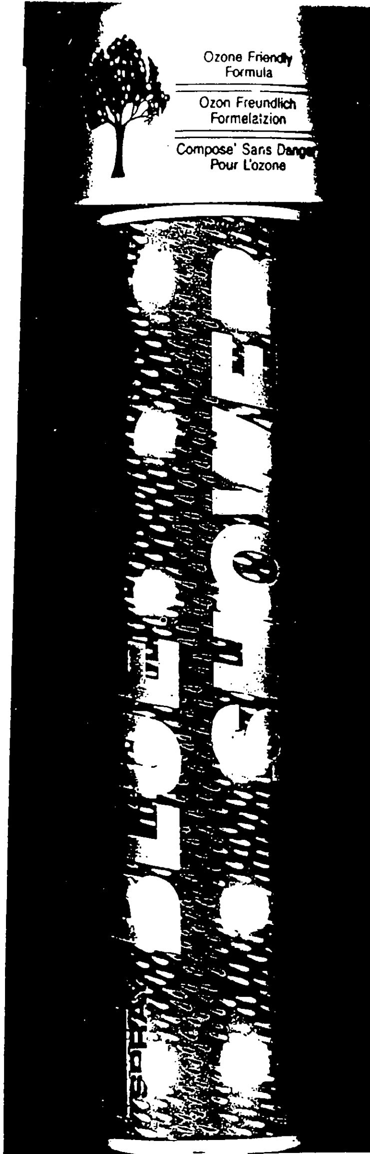

EXHIBIT A

EXHIBIT B

EXHIBIT C

Complaint

EXHIBIT D

The Best Reason For Our Ozone Friendly Products.

Because we take our responsibility to future generations seriously, Tech Spray has introduced a line of high performance Ozone-Friendly products.

Tech Spray's Ozone-Friendly products have ozone depletion potential levels lower than those specified by the Montreal Protocol or current EPA guidelines.

And this is only the beginning. Tech Spray will continue to develop efficient and environmentally safe solutions to meet tomorrow's needs.

Not only do Tech Spray's new Ozone-Friendly products help protect the environment, but they provide the same level of product quality and efficiency you have come to expect from the leading manufacturer of electronic production and field service chemicals.

The reformulation of these products has not altered their effectiveness, safety or odor. From cleaners and degreasers to dusting gas and freeze sprays, these products will get the job done.

These are just some of Tech Spray's Ozone Friendly Products.

See for yourself. Simply call and we will send you free information and samples of the new Tech Spray Ozone-Friendly products.

TECH SPRAY

Chemically Engineered Solutions ...
Solutions For Your Problems.

P.O. Box 949 ■ Amarillo, TX 79105-9935
Phone: (806) 372-8523 ■ Toll-Free: (800) 858-4043
In TX: (800) 692-4677 ■ Fax (806) 372-8750

Tech Spray (EC) LTD
55 East Parade ■ Harrogate HG1 5LQ
North Yorkshire ■ England
Phone 0423-520699
Fax 0423-504630

EXHIBIT D

DECISION AND ORDER

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

The respondents, their attorneys, 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 complaint, a statement that the signing of the 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 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 Tech Spray, Inc. ("Tech Spray") is a Texas corporation with its office and principal place of business at 88 North Hughes Street, Amarillo, Texas. Respondent Richard Russell is an officer of Tech Spray. He formulates, directs, and controls the acts and practices of Tech Spray, and his principal office and place of business is located at the above address.

2. 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

DEFINITIONS

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

"*Class I ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class I substances currently include chlorofluorocarbons, halons, carbon tetrachloride, and l,l,l-trichlorethane.

"*Class II ozone-depleting substance*" means a substance that harms the environment by destroying ozone in the upper atmosphere and is listed as such in Title 6 of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, and any other substance which may in the future be added to the list pursuant to Title 6 of the Act. Class II substances currently include hydrochlorofluorocarbons.

I.

It is ordered, That respondents Tech Spray, Inc. ("Tech Spray"), a corporation, its successors and assigns, and its officers, and Richard Russell, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing that any such product containing any Class I or Class II ozone-depleting substance is "ozone friendly," "ozone safe," or, by words, depictions, or symbols representing directly or by implication that any such product will not deplete, destroy, or otherwise adversely affect ozone in the upper atmosphere.

II.

It is further ordered, That respondents Tech Spray, a corporation, its successors and assigns, and its officers, and Richard Russell, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any 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, by words, depictions, or symbols, that any product offers any environmental benefit, unless at the time of making such representation, respondents possess and rely upon competent and reliable scientific evidence that substantiates such representation. To the extent such evidence consists of scientific or professional tests, analyses, research, studies, or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "competent and reliable" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession to yield accurate and reliable results.

III.

It is further ordered, That for three years from the date that the representations to which they pertain are last disseminated, respondents shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any representation covered by this order; and

B. All tests, reports, studies, surveys, or other materials in respondents' possession or control that contradict, qualify, or call into question such representation or the basis upon which respondents relied for such representation.

IV.

It is further ordered, That the corporate respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels, or other such sales materials covered by this order.

V.

It is further ordered, That the corporate respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a 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 under this order.

VI.

It is further ordered, That the individual respondent shall promptly notify the Commission in the event of the discontinuance of his present business or employment and of each affiliation with a new business or employment. In addition, for a period of five (5) years from the date of service of this order, he shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale, distribution, and/or manufacturing of industrial cleaning or degreasing products or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale, distribution, and/or manufacturing of industrial cleaning or degreasing products. Each such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which such respondent is newly engaged, as well as a description of such respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

VII.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, and at such other times as the Commission may require, 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

U.S. PIONEER ELECTRONICS CORP.

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

Docket C-2755. Consent Order, Oct. 24, 1975--Modifying Order and Order to Show Cause, April 8, 1992

This order reopens the proceeding and modifies, in part, the Commission's consent order issued in 1975 [86 FTC 1002], by allowing the company to withhold cooperative advertising allowances from dealers and to unilaterally terminate dealers who have advertised its products at prices other than those suggested by the company. In addition, the Commission ordered the respondent to show cause why additional modification to paragraph I.10. should not be made.

ORDER GRANTING IN PART AND DENYING IN PART REQUEST TO REOPEN AND MODIFY ORDER ISSUED OCTOBER 24, 1975, AND ORDER TO SHOW CAUSE

Pioneer Electronics (USA) Inc., the successor corporation to U.S. Pioneer Electronics ("Pioneer"), has filed a "Petition to Reopen Proceedings and to Modify Consent Order ("Petition")[1] in Docket No. C-2755, pursuant to Section 5(b) of the Federal Trade Commis-sion Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. Pioneer asks the Commission to reopen and modify the consent order issued by the Commission on October 25, 1975 ("order"), *U.S. Pioneer Electronics Corp.*, 86 FTC 1002 (1975). The order was previously reopened by the Commission on November 5, 1982, 100 FTC 526 (1982), pursuant to an order to show cause and modified on March 18, 1983, 101 FTC 372 (1983).[2]

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[1] Pioneer submitted a Memorandum in Support of Petition to Reopen Proceedings and to Modify Consent Order ("Petition Memo") with its Petition.

[2] The Commission modified paragraph I.11. to allow Pioneer to prevent transshipment of its products to outlets that do not provide adequate point of sale promotions and service.

Pioneer asks the Commission to set aside and modify several provisions contained in paragraph I of the order, each of which limits Pioneer's ability to impose restrictions on its dealers' advertised prices in connection with the sale of consumer electronics products. In support of its Petition, Pioneer argues that the modifications are warranted by changed conditions of law and fact, and by the public interest. Pioneer's Petition was placed on the public record for thirty days, pursuant to Section 2.51 of the Commission's Rules. No public comments were received.

For the reasons discussed below, the Commission has determined that Pioneer has not shown that changed conditions of law or fact require reopening the order but that Pioneer has demonstrated that it is in the public interest for the order to be reopened and modified in part. The Commission has, therefore, reopened and modified the order. Also, pursuant to Section 3.72 of the Commission's Rules, the Commission is issuing an Order to Show Cause why it is not in the public interest for the Commission to modify the order further to remove restrictions regarding Pioneer's ability to terminate a dealer who does not comply with suggested resale prices.

I.

The Complaint and Order

The complaint in this case alleged that Pioneer violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging, in combination with its dealers, in courses of action to unlawfully fix, establish, stabilize or maintain the suggested retail prices at which its products were resold.[3] The complaint listed seven specific acts and practices in which Pioneer engaged in "furtherance of" those courses of action, including, for example, establishing agreements, under-

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[3] At about this same time, the Commission issued a number of similar vertical price fixing complaints and orders against Pioneer's competitors. *See United Audio Products, Inc.*, C-2828, 88 FTC 24 (1976); *Nikko Electronic Corporation of America*, C-2829, 88 FTC 31 (1976); *Sansui Electronics Corporation*, C-2754, 86 FTC 995 (1975); *Sherwood Electronic Laboratories, Inc.*, C-2753, 86 FTC 988 (1975); *TEAC Corporation of America*, C-2752, 86 FTC 981 (1975).

standings, or arrangements with its dealers, as a condition precedent to granting or retaining a dealership, that such dealers will maintain certain resale or retail prices, and soliciting and obtaining its dealers' cooperation and assistance in identifying and reporting any dealer who advertises, offers to sell, or sells products at prices lower than certain resale prices, 86 FTC at 1003. The order prohibits Pioneer, its successors and assigns, from engaging in any of twelve specified acts and practices related to vertical price fixing. *Id.* at 1005-6. Pioneer consented to the Commission's order.

II.

Pioneer's Petition

The prohibitions at issue in the Petition relate to the advertising restrictions in paragraphs I.2., I.5., I.6., I.8., and I.10. of the order. Specifically, Pioneer requests the Commission to delete paragraph I.6.[4] (which refers to cooperative advertising restrictions) and modify

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[4] Paragraph I.6. prohibits Pioneer from:

> Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer because said dealer advertises respondent's products at retail prices other than that which respondent deems appropriate or has approved.

paragraphs I.2., I.5., I.8., and I.10.[5] by removing all other advertising restrictions.

Pioneer argues that the relief it is seeking is required by changed conditions of law and fact, and by the public interest. Pioneer asserts that Minimum Advertising Price ("MAP") programs prohibited by the order "are not by themselves agreements to fix prices. Instead they are merely 'fencing-in' provisions. As long as there is no resale price maintenance behavior, and there cannot be given the clear case law from the Supreme Court as well as the provisions of the order which remain in effect, these 'fencing-in' provisions are no longer necessary." Petition Memo at 15. Pioneer asserts that under decisions rendered by the Supreme Court and the Commission since entry of the order in 1975, non-price vertical restrictions are to be governed by the rule of reason, and are no longer considered *per se* violations of the law.

Pioneer states that the requested modifications are necessary because it is "one of only a few manufacturers in the home electronics industry that cannot adopt" MAP programs, *i.e.*, Pioneer cannot compete on a level playing field. That unequal playing field

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[5] Pioneer requests that the Commission delete the bracketed words from the following order paragraphs. Paragraph I.2.:

> Fixing, establishing, controlling or maintaining the prices at which dealers may [advertise, promote, offer for sale or] sell respondent's products.

Petition at 1. Paragraph I.5.:

> Refusing to sell or threatening to refuse to sell to any dealer who desires to engage in the sale of respondent's products for the reason that such dealer will not enter into an understanding or agreement with respondent to [advertise or] sell said products at respondent's established or suggested retail price.

Petition at 2. Paragraph I.8.:

> Securing or attempting to secure any promises or assurances from dealers or prospective dealers regarding the prices at which such dealers will [advertise or] sell respondent's products [or requesting or requiring any dealer or prospective dealer to obtain approval from respondent for prices offered by said dealers in advertisements for respondent's products].

Petition at 2-3. Paragraph I.10.:

> Terminating, threatening, intimidating, coercing, delaying shipments, or taking any other action to prevent the sale of respondent's products by a dealer because said dealer has [advertised or] sold, is [advertising or] selling, or is suspected of [advertising or] selling such products at other than prices that respondent may deem to be appropriate or has approved.

Petition at 3.

impairs interbrand competition by disadvantaging Pioneer when competing for dealers because dealers find Pioneer brands less profitable than those of manufacturers with MAP programs, and damaging competition for consumers because the public "often forms an incorrect impression of the quality of Pioneer products because the advertised Pioneer price is often well below the advertised price of the comparable product . . ., though the actual sales prices for the products are nearly the same." Petition Memo at 7.

Pioneer states that dealers must invest a large amount of money, space and resources when adding a new brand of electronics for sale. These investments will only be made if "there is a reasonable assurance of a profitable, long term relationship with the new supplier." Petition Memo at 8. This relationship depends upon getting consumers to the store. In the electronics field, that is done predominantly through advertising.

Pioneer claims that the use of "blow-out" advertisements -- advertisements of well-known products that are offered near dealer cost to build store traffic -- destroys the attractiveness of Pioneer as a product line for "virtually all dealers." Petition Memo at 9. As a result, Pioneer alleges, "dealers either refuse to carry Pioneer or simply do not carry it in quantities or promote it as heavily as competing products which have MAP programs." *Id.* Retailers are harmed by the low advertised prices because the customers "will" buy the products at the stores with the lower price, whether or not another retailer would have matched the price, and customers may decide that the higher priced retailer is not competitive generally and refuse to shop there. Petition Memo at 10.

Pioneer states that MAP programs are especially important for "'high-end' 'big ticket' products" such as projection televisions because of the greater need for retailer investment in sales and service training. Petition Memo at 10. Pioneer also cites the lack of MAP programs as harming its ability to distribute through "channels of trade other than retail dealers." *Id.* The only different retail channel Pioneer discusses is a nation-wide catalog distributed thrice yearly. The catalog chooses to limit the Pioneer products it carries to "step-up" products because they are less often "blow-out" advertisement targets.

Pioneer also claims that "controlling advertising prices allows a manufacturer to position and promote high-end products properly and to introduce new products." Petition Memo at 11. Pioneer states that a damaged reputation in the electronics industry is especially difficult to rehabilitate because of the constant inflow of entirely new products onto the market. Pioneer and its customers have been harmed the most because, Pioneer alleges, it is a leading innovator in the home electronics industry and it "has lost many sales and its reputation as a high quality innovator has been seriously damaged by advertisements of these new products at prices at, or below, dealer cost." *Id.* As a result, dealers will shy away from investing in the products and, Pioneer claims, customers ultimately will be harmed. Finally, Pioneer notes that the "inconsistent treatment of manufacturers is magnified by the fact that consumers are not aware of the unlevel field." Petition Memo at 13. Consumers, therefore, incorrectly conclude that Pioneer products are "lower quality or less technologically sophisticated" when they see them advertised at only sales prices. Petition Memo at 13 (citing affidavit of Mark Smith, Senior Manager, Planning and Coordination, for the Home Electronics Division of Pioneer ("Smith Aff.") at ¶9 and ¶10).

III.

Standards for Reopening and Modification

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. 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. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that 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 repose and the finality of Commission orders.[7]

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[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., lst Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

[7] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

IV.

Pioneer Has Failed to Demonstrate Changed Conditions of Law or Fact That Require Reopening of the Order

Pioneer has failed to show that the modifications it seeks are required by changes of law. The provisions that Pioneer seeks to have set aside are part of the order's overall prohibition on resale price maintenance. Nothing in the complaint or order suggests that the cooperative advertising restrictions or any of the other advertising restrictions were imposed because the prohibited conduct itself, absent resale price maintenance, was *per se* unlawful.[8] The Pioneer order is, in that sense, virtually identical to the order in *The Magnavox Company*, 78 FTC 1183 (1971). In its modification of the order in Magnavox ("1990 Magnavox Modification"), the Commission denied Magnavox's request for a reopening and modification of the "fencing-in" provisions of the order on the basis of changed conditions of law. The Commission's denial of Pioneer's Petition based on change of law is consistent with the Commission's analysis in the 1990 Magnavox Modification.

Resale price maintenance schemes remain *per se* unlawful. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which was decided two years after the Commission issued the order in this case, recognized that non-price vertical restraints are not inherently anticompetitive and must thus be judged under the rule of

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[8] *Cf. Sharp Electronics Corporation*, 112 FTC 303 (1989), in which the Commission set aside the order based on change of law. The Sharp Electronics order prohibited Sharp from engaging in only non-price vertical restraints, such as territorial restrictions; the non-price vertical restrictions were not a part of an overall order prohibiting resale price maintenance. At the time the order was entered all vertical restrictions were *per se* unlawful under *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365 (1977). The Commission vacated the order based upon the change in law in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) and its progeny, which changed the test from *per se* to rule of reason analysis for non-price vertical restraints. The Commission noted that GTE Sylvania did not "change the *per se* rule against resale price maintenance." 112 FTC at 306 fn. 3. The Pioneer order differs from the Sharp Electronics order in that the complaint against Pioneer was concerned with non-price conduct that was a part of resale price maintenance and the order prohibited non-price vertical restraints as a part of the prohibitions on resale price maintenance.