

Statement of Commissioner MacIntyre

65 F.T.C.

consisting of advertising or other publicity furnished by or through respondents, or any of them, in a toy catalog, handbill, circular, or any other printed publication, serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by said respondents, or any of them, in connection with the processing, handling, sale or offering for sale, of any toy, game or hobby products manufactured, sold, or offered for sale by the manufacturer or supplier when the said respondents know or should know that such payment or consideration is not made available on proportionally equal terms to all other customers competing with said respondents in the distribution of such toy, game or hobby products.

It is further ordered, That the complaint as to respondent Marcus Mercantile Co. be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's initial decision and order as modified and supplemented by the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents subject to the order to cease and desist shall, within sixty (60) days after service upon them 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 said order.

Commissioner Reilly not participating.

IN THE MATTER OF

THE REGINA CORPORATION

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8323. Complaint, Mar. 14, 1961—Decision, April 7, 1964

Order reopening and modifying desist order of Oct. 11, 1962, 61 F.T.C. 983, so that "its terms will be in explicit accord with" the Commission's revised Guides Against Deceptive Pricing issued Jan. 8, 1964.

STATEMENT OF COMMISSIONER MACINTYRE

APRIL 7, 1964

I am again compelled to issue a separate statement setting forth my views on the Commission's action in modifying a cease and desist order in a deceptive pricing case antedating the revised Guides issued

January 8, 1964. In the petition now before us, respondent, Regina Corporation (Regina), requests that the order be set aside in its entirety on the ground that the activities documented by the record do not constitute a violation of Section 5 of the Federal Trade Commission Act as presently interpreted by the Commission in the light of the revised Guides. In the alternative, Regina asks that the order be explicitly modified to conform to the new Guides.

In rejecting respondent's plea that the order be set aside, the Commission employs rather facile generalizations, glossing over the contention that Regina's past activities as documented by the record do not constitute a violation of the law as now construed. Sweeping aside Regina's arguments on this point, the Commission broadly asserts:

* * * the standards enunciated in the Guides are intended to be prospective, rather than retrospective, in their application. The public interest would not be served if the Commission were to undertake the time-consuming and unsatisfactory task of attempting to review, in the light of every new policy pronouncement, the records of all the cases in which cease and desist orders have become final, in order to ascertain whether the records would support a finding of violation under the new standards. It is very doubtful how accurate such retrospective evaluation could be, or how useful would be a process of continuous reexamination of old, and frequently stale, records.

I cannot adopt this rationale, for the simple reason that it does not come to grips with Regina's contention on this point, which, in fact, raises serious questions meriting a responsive and reasoned reply. At the outset, I may state that the assertion that the Guides are intended to be prospective rather than retrospective in their application avoids the realities of the matter. The Commission has only recently dismissed complaints in a number of proceedings brought prior to the issuance of the revised Guides on the ground that the proof in these proceedings did not meet the new standards. *E.g.*, see *Filderman Corporation, Inc., et al.*, Docket No. 7878 (1964) [64 F.T.C. 427]. The Commission's assertion that the Guides are prospective, in rebuttal of respondent's request for rescission, is particularly inappropriate because the application of cease and desist orders are not retrospective but prospective as far as respondent's obligations thereunder are concerned. Regina and respondents in other cases may well question the effect on their future business decisions if all Commission policy reversals of this nature will be prospectively applied without regard to what has gone before.

The Commission, in this instance, has ignored another fundamental consideration. As I understand Section 5 of the Federal Trade Commission Act, the Commission is empowered to issue cease and desist

Statement of Commissioner MacIntyre

65 F.T.C.

orders only upon a finding that a violation of law has occurred.¹ Unless the Commission comes to grips with the issue of whether respondent's past actions documented in this proceeding are violative of the Act, I do not see how, in good conscience, it can keep in effect a cease and desist order bearing on respondent's future conduct. The justification that a review of the record in this proceeding would be either unduly troublesome or time consuming does not absolve the Commission from performing its statutory functions. The Commission will have to grapple with this issue, either in this proceeding or in other deceptive pricing cases wherein outstanding orders issued prior to January 8, 1964, are in effect, and the number of cases in this category are, of course, numerous. The Commission may refuse, at this time, to decide the question of whether a respondent's activities leading to an outstanding cease and desist order are in violation of the law as presently interpreted by this agency. We should not, however, be surprised if the courts are asked to fill the vacuum the Commission has left, if we abdicate our functions in this manner.

The Commission's treatment of this issue ignores the further point that a decision on the merits as to whether respondent's past conduct violates the law as now construed is required here so that at least respondent and those on the Commission's staff charged with enforcing this and similar orders will know what the Commission's position is. While the evasion of this question may stave off some admittedly difficult problems in the immediate future, in the long run it can only lead to further disarray in an area of the law already subject to considerable confusion.²

Ignoring the issue of whether the respondent should be under order at all, the Commission has modified *Regina's* order by elaborating on its "*pro tanto*" modification procedure employed in *Clinton Watch Company, et al.*, Docket No. 7434 (Order Denying Petition To Reopen Proceeding, issued February 17, 1964) [64 F.T.C. 1443], with which I was unable to agree at that time.³ In this instance, in addition to stating that all outstanding orders shall be interpreted and "thus *pro tanto* modified, so as to impose on respondents subject to such orders no greater or different obligations than are stated in the Commission's newly-revised Guides Against Deceptive Pricing", the Commission has

¹ Section 5(b) of the Federal Trade Commission Act states in pertinent part: "* * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served * * * an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. * * *"

² See my statement on the revised Guides, issued January 8, 1964.

³ See my statement, *Clinton Watch Company, et al.*, Docket No. 7434, February 17, 1964 [64 F.T.C. 1444].

specifically amended the order to require respondents to cease and desist from the following:

Advertising or disseminating any list or pre-ticketed price unless such price is a good faith estimate of the actual retail price and does not appreciably exceed the highest price at which substantial sales are made in respondent's trade area.

As I stated in *Clinton Watch Company, et al.*, Docket No. 7434,⁴ respect for the businessmen who come before us, as well as for the appellate courts, requires that Commission orders be drafted with sufficient precision so that they can be understood. Although the modification of the *Regina* order is somewhat more elaborate than that of *Clinton*, Regina's obligations are defined with no greater clarity than those of the watch company under its modified order. The modified order in this proceeding is a classic example of the enforcement problems which may be expected from the use of terms which have not been adequately defined by either the courts or this agency.⁵ In this case the Commission has done again what the Supreme Court said we should not do, namely, shifted to the courts the burden of determining the factual question of what constitutes unfair conduct. See *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37 (1948). I must reiterate my surprise that this Commission, which recently has made so many pronouncements of the necessity for clear and definitive orders is, in the deceptive pricing area, issuing orders, the terms of which are so imprecise and indefinite that they can lead only to administrative and judicial confusion.⁶

ORDER REOPENING PROCEEDINGS AND MODIFYING CEASE AND DESIST ORDER

By telegram dated February 7, 1964, the Commission advised counsel for respondent in the above-captioned proceeding that, upon appropriate petition therefor, the Commission would modify the cease and desist order against respondent to conform with the revised Guides

⁴ *Id.*

⁵ For example, respondent, under the modified order, is required to employ a "good faith estimate" of the actual retail price prior to advertising or disseminating list or preticketed prices. To my knowledge neither the Commission nor the courts have ever defined the criteria for determining the good faith of the seller in estimating actual retail prices in any trade area. There is the further requirement that Regina cease and desist from disseminating list prices or preticketed prices unless such prices do not "appreciably exceed" the highest price at which substantial sales are made in respondent's trade area. Again, there is no precedent which will aid either Regina or other respondents similarly situated or the Commission's staff, for that matter, in determining the meaning of that phrase. The Commission leaves unanswered the question of by what percentage a list price or preticketed price would have to exceed the highest price in a trade area at which substantial sales are made. Respondents and the Commission's staff will be faced with similar difficulties in trying to divine what "substantial sales" might be in a particular trade area. The applicable percentage could conceivably vary from 1 to 100 percent.

⁶ See my statement, *Clinton Watch Company, et al.*, *supra* n. 3 [64 F.T.C. 1444].

