UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Robert Pitofsky, Chairman
Mary L. Azcuenaga
Janet D. Steiger
Roscoe B. Starek, III
Christine A. Varney

In the Matter of Home Oxygen & Medical Equipment Co., a limited partnership, Mitchell P. Tarkoff, M.D., Revels M. Cayton, M.D., Robert I. Deutsch, M.D., Leland G. Dobbs, M.D., Fredric N. Herskowitz, M.D., Jerrold A. Kram, M.D., R. Wayne Mall, M.D., Richard A. Nusser, M.D., Joel H. Richert, M.D., John E. Sailer, M.D., Herbert M. Schub, M.D., Jamil S. Sulieman, M.D., and T. Craig Williams, M.D., individually, and as partners, trading and doing business as Home Oxygen & Medical Equipment Company.	DOCKET NO. C-3530

ORDER REOPENING AND MODIFYING ORDER

On April 16, 1996, Dr. John E. Sailer, one of the respondents named in the consent order issued by the Commission on September 14, 1994, in Docket No. C-3530 ("Order"), filed his

Paragraph II. prohibits each respondent from specified grants or acquisitions of interests in oxygen systems in the relevant geographic market if, after such a grant or acquisition, more than twenty-five percent of the pulmonologists who practice in the relevant geographic market would be affiliated with the entity. Paragraph III. requires each respondent to notify the Commission within thirty days of making certain specified acquisitions.

Dr. Sailer's letter and verified statement together have been treated as a Petition To Reopen and Modify Consent Order ("Petition") in this matter. Dr. Sailer requests that the Commission reopen and modify the Order 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 C.F.R. § 2.51, to set aside the Order as it applies to him. The thirty-day public comment period on Dr. Sailer's Petition ended on August 11, 1996. No comments were received. For the reasons discussed below, the Commission has determined to grant Dr. Sailer's Petition.

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 such 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.[1]

The Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Id. 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 modification. In the case of a request for modification based on public interest grounds, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. See Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) at 2. If the showing of need is

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[1] Cf. United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376-77 (9th Cir. 1992), where the court noted that "[a] decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification." Id.

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.[2] 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.[3]

As required by Section 2.51(b), Dr. Sailer has submitted an affidavit affirming that he is permanently retired from the practice of medicine and that he neither now or in the future plans to acquire any interest in any medically related venture including durable medical goods. The complaint in this matter alleged that Dr. Sailer, in partnership with the other named respondent pulmonologists, through their partnership interest in respondent Home Oxygen & Medical Equipment Company, violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. The alleged anticompetitive effects resulted from the respondents, as a significant percentage of pulmonary doctors

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[2] 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). See also Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

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

practicing in the relevant market, referring patients to their pulmonary equipment company. Dr. Sailer no longer has patients to refer to a medically related company and no longer owns an interest in any such company. Moreover, even a subsequent acquisition of such an interest either currently proscribed by the order or for which the order requires notice would lack competitive significance because Dr. Sailer is retired and, consequently, has no patients to refer to such a company.

Dr. Sailer has, therefore, made a satisfactory showing that conditions of fact have changed. Having determined to reopen the Order, the Commission next considers whether the Order should be modified and, if so, how. In this matter, Dr. Sailer's

[4] 108 F.T.C. at 188. Cf. National Tea Company, Order Reopening and Setting Aside Order Issued on July 23, 1980, 111 F.T.C. 109 (1988).

Donald S. Clark
Secretary

SEAL

ISSUED: October 4, 1996

SEPARATE STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

In the Matter of
Home Oxygen and Medical Equipment Co.

Docket No. C-3530

Because I have consistently questioned the Commission's basis for even issuing the consent orders in this matter as well as in *Certain Home Oxygen Pulmonologists*, Docket No. C-3531, and *Homecare Oxygen and Medical Equipment Co.*, Docket No. C-3532,[1] I would have preferred to view Dr. Sailer's petition as an occasion for reexamining all three orders and, ideally, for determining that they should be vacated. The Commission, however, has chosen to confine its scrutiny to Dr. Sailer's situation under the *Home Oxygen* order. I agree that the order should be set aside as to him in light of his retirement from medical practice. Nevertheless, given that Dr. Sailer's retirement constitutes a change of fact and that the Commission has relied entirely on this changed circumstance in reaching its decision, I see no reason for the Commission's order to include the boilerplate paragraph on page 3 that sets forth the separate "public interest" standard for reopening and modifying orders.

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[1] Statement of Commissioner Roscoe B. Starek, III, in *Home Oxygen and Medical Equipment Co.*, Docket No. C-3530; *Certain Home Oxygen Pulmonologists*, Docket No. C-3531; *Homecare Oxygen and Medical Equipment Co.*, Docket No. C-3532.