BEFORE THE FEDERAL TRADE COMMISSION

Federal Trade Commission

Superior Court Trial Lawyers' Association

PETITION FOR MODIFICATION OR INTERPRETATION OF INJUNCTIVE DECREE TO LIMIT SCOPE OF DECREE TO PRICE FIXING

Pursuant to 15 U.S.C. Section 45(b) and 16 C.F.R Section 2.51, the Superior Court Trial Lawyers' Association (the "Association"), by undersigned counsel, petitions for modification of the injunctive decree imposed by the Federal Trade Commission in the above-referenced case, which decree prohibits collective action among the Association's members for the purpose of "fixing, increasing, stabilizing or otherwise affecting in any way" the level of fees paid by the District of Columbia Superior Court to court-appointed lawyers. The Association makes this request because the modification in question is in the public interest.

Such modification is compelled on the grounds discussed above because the Association wishes to contemplate the possibility to protest collectively the Superior Court's anticipated suspension of payments due to the Association's members. The

[redacted]

[redacted]

modification of the ten-year old decree to remove the cloud over legitimate future activities.

Finally, the Association needs a ruling by the FTC regarding this second possible protest as soon as possible because it cannot wait until the Plan is implemented to take such action. The Association would lilke any such protest to commence when the Plan [redacted]

WHEREFORE, Respondent the Superior Court Trial Lawyers' Association asks

for the reasons set forth above in this Petition For Modification of Injunctive Decree and in the accompanying Memorandum of Law in Support thereof, that the Federal Trade Commission modify or interpret the decree imposed upon the Association in the above-referenced case to limit the scope of said decree to price-fixing.

Respectfully Submitted

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BEFORE THE FEDERAL TRADE COMMISSION

Federal Trade Commission

[redacted]

Superior Court Trial Lawyers' Association

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR MODIFICATION OR INTERPRETATION OF INJUNCTIVE DECREE TO LIMIT SCOPE TO

[redacted]

PRICE-FIXING

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I. SUMMARY OF MEMORANDUM

In 1990, the Supreme Court held that collective action by the Superior Court Trial Lawyers' Association ("the Association") to increase the rates paid to its members constituted unlawful price-fixing {Section II.A, p 8}. As a result of this decision, the FTC imposed an injunctive decree (the "Decree") on the Association which prohibits group boycotts by the Association of the Court relating to any effort to "fix, increase, stabilize or impact in any way the level of fees" for court appointed legal services, as well as any recommendations by the Association that any of its members engage in such activity. {Section II.B, p.10 }. The

[redacted]

A new situation has now arisen. The District of Columbia Superior Court is having a

[redacted]

any lawyer from providing court-appointed legal services" in connection with any unlawful boycott. {Section II.B, p. 8}. Thus, the Association cannot at this time discuss meaningfully the possibility of the Proposed Protest. {Section II.D, p. 15}.

Obviously, the Association makes this request now because it cannot meaningfully consider a work stoppage as a response to an indefinite suspension of payments unless it knows that the FTC will not seek sanctions for such behavior. The Court could choose to suspend CJA

lawyers suggest the conclusion that it is lawful under a Rule of Reason analysis. {Section IV.A.3.d, p. 23}.

II. FACTS

A. The SCTLA Decision

The dispute which lead to the imposition of the Decree is described in FTC v. Superior

[redacted]

the Supreme Court held that the Association's efforts in 1983 to boycott the Superior Court in

[redacted]

[redacted]

continuing, cooperating in or carrying out any agreement, understanding or planned common course of action, either express or implied," if such joint action was part of an effort to "fix, increase, stabilize or otherwise affect the level of fees . . . of court-appointed legal services." FTC v. SCTLA, 107 F.T.C. 510 (1986), at 603-604 (emphasis added).

C. The Impact On The Market For Court-Appointed Legal Services Of The [redacted]

[redacted]

At present, the rate of pay ($50 an hour for all work) for CJA appointments is not in controversy. However, since the fall of 1998, the Superior Court has twice engaged in an [redacted]

[redacted] indicated a new crisis could occur at the end of any new fiscal year.[3]

[redacted]

In short, the Superior Court is likely to engage in additional suspension of payments to

[redacted]

suspension of payments to all lawyers, collective action to protest such activity has a procompetitive effect on the market in question.

The procompetitive effects of the Proposed Protest on the market for CJA appointments is demonstrated by the analysis provided by Dr. James Ratliff, Senior Economist, Law and Economics Consulting Group (the "Ratliff Opinion"), attached as Exhibit C). The Ratliff Opinion reviews the relevant facts of the present situation and observes that a CJA payment at present has two parameters, price and time. Further, the fact that the "time of payment is chosen at the discretion of the court," coupled with the prior suspensions of payment by the court "have created reasonable uncertainty among the lawyers about when their future payments would be delivered." Id. at Para. 21.

Dr. Ratliff thus opines that the Proposed Protest would be procompetitive because it

The Association has been informally advised that the FTC's Bureau of Compliance considers the Proposed Protest a violation of the Decree, and would therefore seek substantial penalties against

course of strategy at this time. See, Association Affidavit at Para 8.

III. THE FTC SHOULD REOPEN THE DECREE AS SOON AS PRACTICABLE

The Association asks that the FTC change or interpret the Decree so as not to preclude the Proposed Protest.[6] Such modification is in the public interest because the Decree at present

[redacted]

anticipated breach of contractual obligations by the Superior Court.

[redacted]

particular modification sought is appropriate to remedy the identified harm. MidCon Corp., supra, at 103. The FTC has granted such requests for modification in the past. See, Chevron

[redacted]

respondent's ability to compete outweighs any further need for the order); Interco, Inc., supra (public interest supports elimination of `fencing in' provisions in consent decree); Pasteur

[redacted]

order continue to impose significant costs and may adversely affect public health needs); Red

[redacted]

Protest.[8]

In short, a plain reading of the Decree compels the conclusion that the Decree refers only

to price-fixing.

2. The FTC Viewed the Decree as Prohibiting Only Price-Fixing When It was Issued

Consistent with the plain language of the Decree is language in the FTC v. SCTLA Decision, page 9 supra, that issued the Decree, which language makes it clear that the FTC imposed the Decree in order to prevent future price-fixing. Responding to arguments from the Association and its officers (the "Respondents") that imposition of the Decree was not necessary, the FTC opined that "[t]he entry of an order is appropriate to prevent the Respondents from

[redacted]

[redacted]

distinguishing between a "naked restraints" analysis, applicable where the effects of a challenged

[redacted]

conduct are clear, and the traditional Rule of Reason, applicable where the competitive effects of

On the other hand, where there is evidence of a plausible procompetitive justification for a challenged restraint, the courts will apply a Rule of Reason analysis and factors such as safety and product quality may become relevant. See, e.g., Consolidated Metal Prods. v. American Petroleum Inst., 846 F.2d 284, 292, 294-96 (5th Cir. 1988) (upholding safety-based standard);

Clamp-All Corp. v. Cast Iron Pipe Inst., 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S.

Cable Co., 346 U.S. 656 (1961)(denial of necessary certification of product); Associated Press v. United States, 326 U.S. 1 (1945)(denial of important sources of news); Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959). In these cases, the boycott often cut off access to a supply facility or market necessary to enable the boycotted firm to compete. Silver, supra; Radiant Burners, supra, and frequently the boycotting firms possessed a dominant position in the relevant market. Silver, supra, Associated Press, supra; Fashion Originators Guild of America Inc. v. FTC, supra.

[redacted]

rules adopted by professional associations as unreasonable per se. See, California Dental, supra; FTC v. Indiana Federation of Dentists, supra; Professional Engineers, supra. Moreover, it has declined to apply the per se rule to collective action such as that in the present case where the

[redacted]

> A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because
>
> not all concerted refusals to deal are predominantly anticompetitive.

Id. at 298.

As with the expulsion in Northwest, the Proposed Protest would not be considered per se unlawful because the Association would be denying neither the Superior Court nor any [redacted] competitor any business element for effective competition. Far from seeking to disadvantage a [redacted]

a desire to restrain competition. See Plueckhahn v. Farmers Ins. Exchange, 749 F.2d 241 (5th

[redacted]

Cir.) cert. denied 473 U.S. 905 (1985) (restrictions on certain employee transfers among related

[redacted]

insurance entities were adopted to eliminate conflict of interest problems and passed muster

[redacted]

were reluctant to use them as their agents, and eventually they went out of business. Id. at 103.

The plaintiffs alleged that the root of the defendants' discontent was not the alleged fraud, but rather the diminishing proportion of the agents' insurance business that the defendants had been enjoying. According to the plaintiffs, the insurers terminated the agency contract and

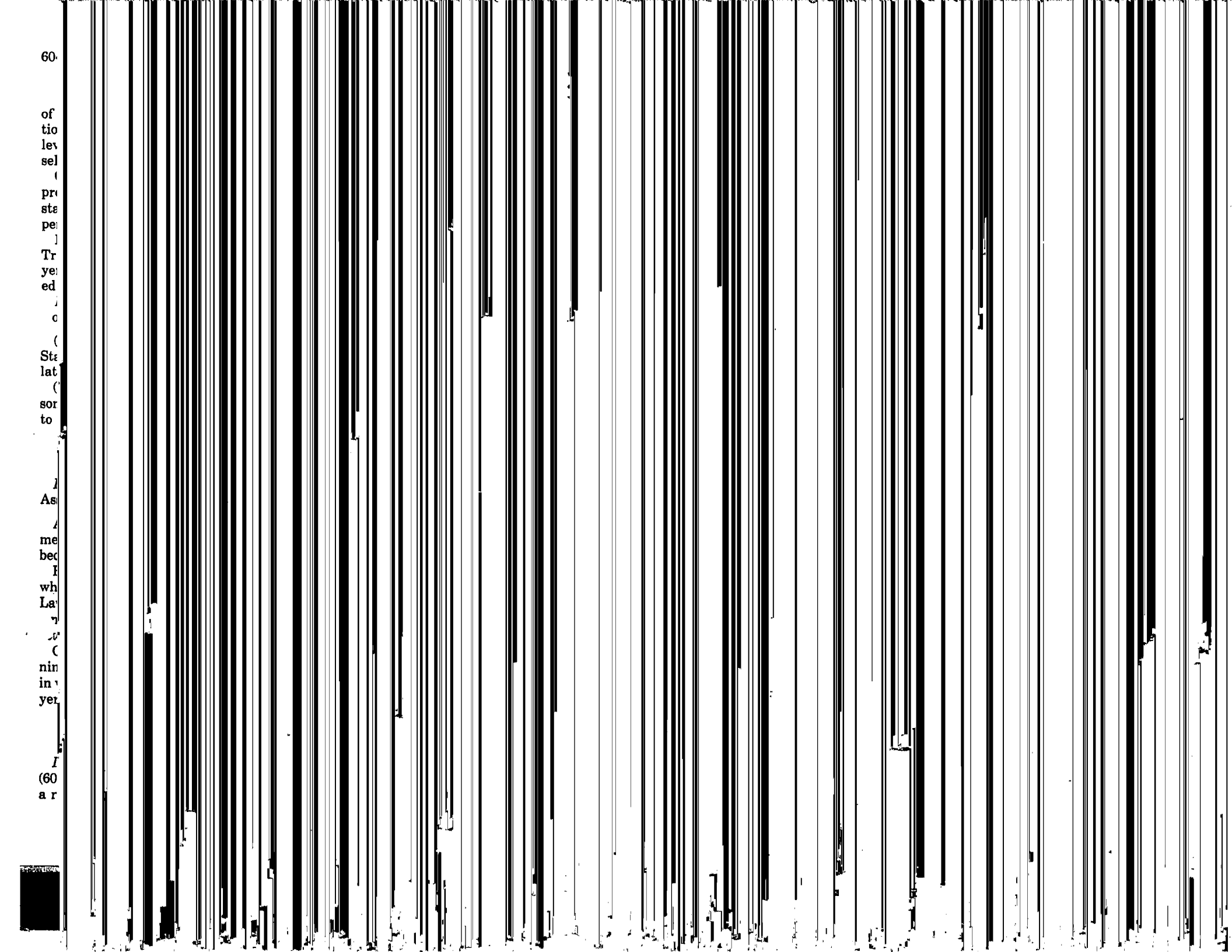
restraint. As the defendants in Blackburn had a legitimate foundation based on prior dealings to refuse to deal with the plaintiffs in that case, so the Association in this case has a right, based on its prior dealings with the Superior Court, to refuse to do business with that institution. Thus, as

McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 (5th Cir. 1972) (Exclusion by committee of representatives of various airlines from tourguide of tours by particular tour operator neither coercive nor exclusionary and therefore lawful); Chastain v. AT & T, 401 F.Supp. 151, 160-62 (D.D.C. 1975)(Refusal to provide automatic telephone service to

encouraging its members to engage in lawful and procompetitive activity, while the proposed relief would give the Association and its members the ability to take lawful and procompetitive

[redacted]

lawyers.. The FTC should modify or interpret the Decree to provide the Association and its members with this ability.



BEFORE THE FEDERAL TRADE COMMISSION

Federal Trade Commission

v. Docket No C-1043-83

[redacted]

EXHIBIT B

[redacted]

not refuse to provide any court-appointed legal services, interfere with the operations of the Superior Court, or discourage any person from providing court-appointed legal

affect the level of fees of court-appointed legal services.

6. I am also aware that the Decree prohibits any member of the Association from

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Memorandum

To: **Thomas Willcox**
From: **Jim Ratliff**
Date: September 19, 2001
Case: **Superior Court Trial Lawyers' Association**
Re: **Is the Proposed Protest an attempt to fix price?**

Qualifications

1) My name is James D. Ratliff. I received a Ph.D. in economics from the University of California—Berkeley in 1993 and a B.A. in physics and mathematics from Oberlin College in 1979. From 1992 through 1997 I was an Assistant Professor of Economics in the College of Business and Public Administration at the University of Arizona. I am now a Senior Managing Economist at LECG LLC, which provides sophisticated economic and financial analysis, expert testimony, litigation support, and strategic management consulting to a broad range of public and private enterprises.

2) During my doctoral training, my subsequent research, and my teaching to doctoral students in economics, I specialized in advanced microeconomic theory, a subfield of economics which subsumes contract theory, *i.e.*, the economic analysis of contracts. Much of my study of contracts has been in the particular context of principal-agent relationships. My other field of specialization is industrial organization, the subfield of economics most relevant to antitrust analysis.

c) As a matter of law, as soon as a judge approves a voucher in this regard, a contract exists between the Superior Court and the lawyer applicant for the payment of

services.

d) The contract that exists as a matter of law does not explicitly specify in any way the time at which the Court should deliver payment to the CJA lawyer.

e) The Superior Court has twice indefinitely suspended payments to CJA lawyers. Court

officials have indicated that such a suspension could happen occur in the future.

f) The present rate of pay for CJA appointments is $50 per hour for all work. This rate of pay is not in controversy.

g) The Superior Court Trial Lawyers' Association (the Association) is operating under an injunctive decree ("Decree") imposed by the Federal Trade Commission (FTC) which restricts efforts by the the Association to "fix, increase, stabilize or otherwise

The result of my general analysis was that a collective effort to affect a nonprice component of compensation could be either procompetitive or anticompetitive, and that which particular outcome obtained in any particular situation depends upon the particular facts obtaining, such as how the time of payment is determined absent the collective effort and upon how flexibly negotiable the nominal payment is.

9) For example, when, contrary to the particular facts of this case, (a) the time of payment is known with certainty by a lawyer prior to accepting an assignment, (b) the court has an unblemished record adhering to the specified payment schedule, and (c) the nominal fee is locked in for a significant length of time, a collective effort to accelerate the time of payment could be anticompetitive.

10) However, when, as in the present case, (a) the time of payment is not known with certainty by a lawyer prior to accepting an assignment, (b) the time of payment is chosen at the discretion of the court, (c) prior suspensions of payment by the court have reasonably created substantial uncertainty by the lawyers about when their future payments would be delivered, and (d) collective action to affect the nominal payment is effectively prohibited, then a collective effort to deter or end a suspension of payment

this question from two different perspectives. First, I analyze the question as a linguistic one in the context of everyday business and commerce. Secondly, I analyze the question from the perspective of the goals of antitrust law and Sherman Act Section 1 in particular.

16) There are numerous examples from everyday business and commerce that suggest that it is a pervasive linguistic convention that the word "price" refers to only the nominal payment *p*.

17) [redacted]

[Code of Federal Regulations]
[Title 16, Volume 1, Par 0 to 999]
[Revised as of January 1, 1998]
From the U.S. Government Printing Office via GPO Acces
[CITE: 16CFR2.51]

Ex. D

TITLE 16--COMMERCIAL PRACTICES

CHAPTER I--FEDERAL TRADE COMMISSION

[redacted]

Subpart E--Requests to Reopen

Sec. 2.51 Requests to reopen.

(a) Scope. Any person, partnership, or corporation subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final, may file with the Secretary a request that the Commission reopen the proceeding to consider whether the rule or order, including any affirmative relief provision contained therein, should be altered,

[redacted]

modified, or set aside in whole or in part.

(b) Contents. A request under this section shall contain

[redacted]