

satisfactory showing that changed conditions of law or fact” so require.² 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.³

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.⁴ In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.⁵ This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the

² See *Supplementary Information, Amendment to 16 CFR 2.51(b)*, announced August 15, 2001, (“Amendment”).

³ 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unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (“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.”).

⁴ Hart Letter at 5; 16 C.F.R. § 2.51.

⁵ 16 C.F.R. § 2.51.

Commission to modify it,⁶ and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.⁷ All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.⁸

IV. ANALYSIS

The Commission has determined to reopen and modify the Order as requested by Respondents. CoolBrands has shown that unanticipated changes in demand for its products have stretched its manufacturing capacity, and the extension will enable it to expand its capacity and move production of Dreamery, Godiva ice cream and Whole Fruit in-house in an orderly way, better enabling it to compete in the long term. Dreyer's has already agreed to the extension.

Specifically, after the entry of the Order, CoolBrands entered into a license to produce and sell "low carb," full fat ice cream pints and novelties under the "Atkins" name. Stein Affidavit at ¶ 38. This new product launch has been extremely successful, and as a result CoolBrands has had to increase greatly its production of Atkins ice cream to meet demand. Stein Affidavit at ¶ 40. Positioned as a superpremium ice cream, the Atkins line increases CoolBrands' presence in the market. As a superpremium, it is delivered through the direct store delivery distribution systems that CoolBrands acquired as part of its acquisition of Dreyer's.

⁶ See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

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

⁸ 16 C.F.R. § 2.51(b).

