

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Edith Ramirez, Chairwoman  
Julie Brill  
Maureen K. Ohlhausen  
Terrell McSweeney

In the Matter of

unless “stayed, in whole or in part and subject to such conditions as may be appropriate, by the Commission” or “an appropriate court of appeals of the United States.” 15 U.S.C. § 45(g)(2). Service of the Commission’s Opinion and Final Order was accomplished on October 19, 2015. Thus, absent a stay, the Final Order will become effective on December 18, 2015.

Under Commission Rule 3.56(c) an application for stay must address the following four factors: (1) the likelihood of the applicant’s success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. See 16 C.F.R. 3.56(c); *McWane, Inc.*, 2014 WL 1630460, at \*1 (FTC Apr 11, 2014). The required showing of the likelihood of success is “inversely proportional to the amount of irreparable injury suffered absent the stay.” See, e.g., *North Texas Specialty Physicians*, 41 F.T.C. 456, 458 & n.2 (2006). We consider these factors below.

### Analysis

Addressing the first factor, ECM focuses solely on the Commission’s determination that ECM’s unqualified claim that its additive makes plastics “biodegradable (without reference to time period) is false and unsubstantiated. ECM first argues that the Commission erroneously construed this claim as implying complete biodegradation in a landfill within a reasonably short period of time (five years or less). It also contends that the Commission’s Final Order violates the First Amendment because it bars ECM from making what ECM maintains are scientifically verifiable claims that its additive accelerates biodegradation of plastic products. This, ECM argues that the Commission violated its due process rights by failing to provide notice that an implied claim of biodegradation within five years was at issue in this case. Finally, ECM also

ECM's claims were important to the purchasing decisions of those in ECM's commercial supply chain. Allowing marketing claims that the Commission found to be misleading, unsubstantiated, and material to purchasing decisions is not in the public interest.

On the issue of harm absent a ~~statute~~ ECM claims that it will suffer two types of irreparable injury