DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
in Harper & Row, Publishers, Inc., Docket 9217,
MacMillan, Inc., Docket 9218,
The Hearst Corporation, Docket 9219,
Putnam Berkley Group, Inc., Docket 9220,
Simon & Schuster, Inc., Docket 9221, and
Random House, Inc., Docket 9222.

These cases against six book publishers all involve allegations of unlawful price discrimination in connection with the sale of books to resellers. Although all six respondents reached agreement with complaint counsel on proposed settlements several years ago, the Commission inexplicably has failed to act on the proposed consent orders. Now, almost four years after the matters were removed from adjudication to consider the proposed consent agreements,[1] the Commission has decided to dismiss the complaints. I do not understand and certainly cannot endorse this decision.

The most obvious justification for dismissing the complaints, a conclusion that the respondents did not engage in the unlawful price discrimination alleged in the complaints, is noticeably absent from the Commission's order. The majority instead cites four reasons for its order. The first reason the majority offers is the evolving industry "dynamics and structure . . . reflecting the growth of 'superstores' and warehouse or 'club' stores." It is not at all clear how such changes might mitigate the practice, alleged in the Commission's complaints, of unlawfully discriminating in price among retailers of books. Indeed, one could speculate that the growth of significant discount retailers would result in more rather than less price discrimination against disfavored retailers.[2] This is simply not a valid reason to dismiss the complaints.

[1] Proposed consent agreements having been executed by the respondents and complaint counsel, the matters were withdrawn from adjudication by the Secretary pursuant to Section 3.25(c) of the Commission's Rules of Practice on November 12, 1992.

[2] The private Robinson-Patman actions brought by the American Booksellers Association against several book publishers tend to suggest that unlawful price discrimination is not a thing of the past in the industry.

Second, the majority suggests that the "principal forms" of discriminatory practices that led to the complaints have been replaced with other pricing strategies that "may limit the potential benefits of the proposed consent agreements." This rationale for dismissal does not suggest a conclusion that the respondents did not violate the law but rather appears to reflect a concern about the remedial effectiveness of the proposed orders.[3] Traditionally, an order of the Commission addressing unlawful price discrimination requires the respondent to cease and desist from such conduct in the future.[4] Such an order is not easily outmoded by changing fashions in discriminatory practices. To the extent that the proposed consent orders were inadequate, the usual options have been available to the Commission to seek appropriate relief: The Commission could have sought appropriate revisions in the proposed consent orders, or it could have rejected the orders and returned the matters to adjudication.

Third, the majority expresses dismay that orders against the six book publishers may be ineffective, because the respondents would be free to use the "meeting competition" defense[5] to meet the prices of publishers not subject to Commission order. Of course, the respondents would be free to meet competition. That is what the defense is for. If what the majority means to suggest is that book publishers not under order also are engaging

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[3] To the extent that the majority may intend to suggest that the specific practices that led to the complaints have been abandoned, it should be noted that abandonment is not a sufficient basis, under well-established precedent, to avoid a Commission order. See, e.g., Warner Communications, Inc., 105 F.T.C. 342 (1985).

[4] E.g., YKK (U.S.A.) Inc., 98 F.T.C. 25 (1981). See also the form of notice order the Commission issued with each of the complaints in these six cases: "[R]espondent shall . . . cease and desist from discriminating in price" by selling to two purchasers at different prices.

[5] Section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b).

in discriminatory pricing, the solution would appear to be to initiate additional investigations, not to dismiss these complaints. As far as I know, the Commission never before has deemed enforcement of the Robinson-Patman Act fruitless on the ground that a respondent under order could lawfully meet the presumptively lawful prices of its competitors, and it seems a very odd proposition to adopt.

Finally, the majority cites the success that the American Booksellers Association has had in its private Robinson-Patman suits against several publishers. The Association has negotiated settlements with four publishers. The implication is that the Association's success should somehow stand in for the Commission's law enforcement. This is very confusing, when the same majority suggests that a mere six FTC orders would have been ineffective.

The unfortunate choice to dismiss the complaints may indeed save "scarce public resources" from further expenditure in these cases, but it is an imprudent waste of the substantial law enforcement resources that this agency already has expended.

I dissent.