

TESTIMONY OF MATTHEW P. MCCULLOUGH

January 6, 2016

Good afternoon. My name is Matt McCullough. I am a partner with the law firm of Curtis, Mallet-Prevost representing respondents in this proceeding. I want to take this time to briefly discuss the domestic like product in this investigation – large residential washers.

Commission staff should be familiar with the product, as it was the subject of an investigation only a few short years ago.

In the prior investigation, the Commission found a single domestic like product comprised of a continuum of products marked by multiple variations but with a preponderance of similarities when considering the Commission's six like product factors. In doing so, the Commission rejected Whirlpool's argument to exclude top-load washers with a capacity of less than 3.7 cubic feet after Whirlpool secured a similar change to the scope of the investigation. The Commission expressly noted the absence of any clear dividing line to distinguish such products from the continuum of large residential washers it found.

Nothing has changed. Large residential washers are still large residential washers. Nonetheless, Whirlpool argues for a domestic like product definition that is co-extensive with its proposed scope definition. That means it wants to exclude from the domestic like product certain large residential washers, including certain top load and front load washers defined by a particular combination of transmission technologies, as well as certain large capacity front load models. But for a variety of reasons Whirlpool's argument fails. These particular product variations must be included in the domestic like product.

First, the Commission is not required to limit the domestic like product to products co-extensive with the scope. The issue for the Commission is whether there is a continuum of large residential washers that is broader than the scope, with no reasonable dividing line that could confine the domestic like product to merchandise co-extensive with the scope.

Second, the Commission answered this question in the prior investigation. It concluded that there is no reasonable dividing line.

Third, Whirlpool's own petition undermines its argument.

Whirlpool cannot distinguish its proposed exclusions from any of the six factors it has addressed at pages 36 to 38 of its petition. If you read Whirlpool's analysis, you are compelled to conclude that these proposed exclusions are part of the domestic like product continuum.

Finally, claimed lack of domestic production – the sole basis for Whirlpool's decision to limit its scope definition before the Department of Commerce -- is not a sufficient basis for excluding product variations from a domestic like product comprised of a continuum of products. The Commission has often included within a domestic like product continuum product variations that all parties agreed were not produced in the United States.

Commission staff can further test Whirlpool's argument by reference to Whirlpool's own examples of its proposed scope exclusions. {SLIDE} Consider the first exclusion, which is comprised of top load large residential washers that have a drive train consisting of

a PSC motor, a belt drive, and a flat wrap spring clutch. This is from Exhibit 9 of the Whirlpool petition.

{SLIDE} Look carefully at this picture. Does this excluded Haier washer look any different than a Whirlpool washer that meets the scope definition? What about the product features and specifications? Lets look at the specifications listed by Haier in its product catalog and those presented by Whirlpool on its own web page. {SLIDE} Neither focuses on things like PSC motors, belt drives, or flat wrap spring clutches, or lack thereof. Both seek to emphasize the same set of features and specifications -- things like capacity, number of temperature selections, number of wash or rinse cycles, etc. {SLIDE} Most importantly, and here I borrow from Whirlpool's own words, they both emphasize the fact that they can be "used to wash fabrics using water and detergent in conjunction with wash, rinse, and spin cycles typically programmed into the unit."

But perhaps the most telling aspect of Whirlpool's Exhibit 9 is the obvious connection between Whirlpool's proposed scope exclusion and

in scope product. **{SLIDE}** Take a look at this Haier listing in Exhibit 9. What does the retailer invite the customer to do? The retailer suggests the customer might also like a number of other washer models. The collection of models is not arranged based on their incorporation of certain transmission technologies, or any specific combination thereof. **{SLIDE}** Indeed, three of the four suggested washer models are, in fact, in-scope merchandise and span a range of prices and features.

And so we have come full circle. Again, to quote from Whirlpool, “while there are differences among washers in terms of how they are loaded, rotational axis, the efficiency of their energy and water usage, and their transmission systems, these differences do not detract from the more basic similarities” These are in fact interchangeable products that travel the same channels of distribution, are perceived by retailers and customers alike to be the same, are produced in the same basic manner, and where there is overlap in price. You can do this same exercise with Whirlpool’s other proposed exclusions using the examples included in the petition in Exhibits 10 and 11.

Yes, the comparisons I just made use imports and not domestic products to prove the point about the domestic like product, but this merely reflects Whirlpool's choice in defining the scope of investigation. The comparisons also demonstrate that the domestic like product continuum -- defined by the Commission and not Whirlpool -- is broader than what Whirlpool proposes. These three product exclusions are squarely within the continuum of merchandise that comprises the domestic like product -- large residential washers.

In closing, I make these comments for purposes of the Commission's preliminary determination. We reserve the right to consider other like product issues for purposes of any final determination.