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STATEMENT BY

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MEMBER FEDERAL TRADE COMMISSION

BEFORE

CONVENTION OF

NATIONAL CONGRESS PETROLEUM RETAILERS, INC.

ON

MEASURES FOR PRESERVING COMPETITION

ROANOKE, VIRGINIA

AUGUST 22, 1962.

Introduction

It is pleasing to visit and talk with you on this the occasion of the 16th Annual Session of the National Congress of Petroleum Retailers, Inc. Your annual Sessions are interesting and important. They provide a forum where your representatives and others express ideas and suggestions regarding the problems faced in the effort to maintain a free and competitive enterprise system in this country. For example, yesterday you had scheduled on your program for this, your 16th Annual Session, Hon. Tom Steed (D. Okla.) for an address. He is Chairman of a Subcommittee of the House Small Business Committee. As such, he has shown his self to be a strong supporter of Hon. Wright Patman (D. Texas), Chairman of that Committee. When either of those gentlemen address you, you know that a champion of small business has been before you. Also, you know that you have heard from one who understands and can discuss with you in a useful way the problems faced by small business.

It is most inspiring to visit and talk with you on this occasion. Your leaders are persons who are dedicated to the effort of maintaining a free and fair competitive enterprise system in this country. Some of us in Washington are aware that they are lonely in that situation. That is true because while many proclaim the virtues of competition, few are willing to dedicate themselves completely to its cause. In fighting for the cause of free and fair

competition the leaders of your organization have stood out as targets of those who oppose our public policy for competitive enterprises.

The service stations operated by members of your organization are meeting places where representatives of the suppliers meet customers and representatives of customers. Therefore, the service stations have become points where opposing economic forces not only converge but their impact is felt. The manner and effectiveness with which the service stations are able to and do deal with these opposing forces is quite important not only to the station operators but to the public.

Likewise, the Federal Trade Commission is a meeting place where the forces of the laws against unfair acts and practices, the administration of those laws, and the acts and practices against which they are directed meet. The manner in which the Federal Trade Commission deals with these opposing forces are quite important to you and all other members of the public. It is through the Commission's discharge of its responsibilities in this respect that it applies measures for preserving competition.

Before I conclude my statement to you today it is my intention to discuss some plans recently approved by the Commission for applying some new measures for preserving competition.

Heretofore the Commission has largely depended upon utilization of the case-by-case approach for preserving competition.

Recently the Commission, as I shall explain later, approved a procedure through which it is hoped all action by the Commission in its effort to preserve competition will not be through individual cases, singling out individual firms or persons, but instead will be action against practices on an industry-wide basis where practices challenged are widespread in particular industries.

Long ago it was learned that we would never be able to train enough doctors to treat and cure all prospective cases of typhoid unless preventive measures were taken. Therefore, preventive measures were taken to purify the drinking water and thereby reduce the number of typhoid cases. Through such preventive measures we have had wonderful results. Occasionally, we do have typhoid cases. Of course they must be dealt with as cases. Likewise, we will find it necessary to deal with certain anti-competitive problems and parties in individual cases.

Moreover, we are on the threshhold of being compelled not only to acknowledge but to afford recognition to the facts of life that certain anti-competitive situations are so thoroughly entrenched that they are completely immunized from the application of our antimonopoly laws. This is a serious matter. Our greatest hope is that our measures for preserving competition will prove effective from further entrenchment and immunization. The alternative is startling -- it is government regulation and control.

Although there is no longer any serious debate concerning our national commitment to the compulsions of competition as the basic method for preserving and expanding the strength of our economy, there is scarcely any item in our national program for implementing this commitment that is not the subject of continuing controversy.

This is not simply to state that differences of opinion can always be found concerning any Government program that will affect different segments of the economy in different ways. The gap between our virtually unanimous commitment to competition as a standard for the structure and performance of the economy and our divided counsel on methods for preserving competition is the direct result of deep-rooted questions at the heart of the concept of competition itself. What does this mean?

The concept of competition embodies the conviction that the highest standard of continuing achievement for the economy can be reached only if we maintain the conditions for optimum productivity by the greatest possible number of individual competitors. And this cannot be brought about, we believe, through detailed regulation of the daily activities of those responsible for directing individual firms. Indeed, the very process of competition may at times erode opportunities for competition while at the same time overly detailed regulation of competition may suppress incentives to competition more surely than an absence of regulation.

I

The Law

The members of Congress responsible for passage of the Sherman Act in 1890 foresaw this dilemma. They therefore framed our original anti-trust statute in broad terms, leaving future applications to future enforcement action by the Department of Justice. At the core of this action lay Congressional appreciation of the fact that competition, like truth or justice, is not something that can be measured on a simple scale. Indeed, the forms that competition may take are so varied that there is danger that measures designed to preserve competition may in fact sterilize it.

This is the basic problem with which our laws and enforcement procedures have grappled over the years and it is this problem that we continue to face today. Let us look briefly at the ways in which the laws have been developed.

The Sherman Act

The Sherman Act outlaws every contract, combination, or conspiracy in restraint of trade or commerce; it also outlaws monopolizing, attempts to monopolize, and combinations or conspiracies to monopolize trade or commerce. More specifically, under Section 1 of the Act, agreements to fix prices, allocate markets, or exclude suppliers or customers are prohibited. Left open, however, for court decision, on a case basis, are questions of what constitutes appropriate economic evidence of agreements where direct evidence is lacking. Section 2 of the Act prohibits excessive control of a market by an individual

company, as well as predatory practices by one or more companies, aimed at such control. Left open for court decision, in individual cases, are questions of how market control is determined, what market shares indicate danger points, and what types of public constraint should be applied when the structure of a market is such that a small group of companies, rather than a single company, exercises effective market control.

Although the prohibitions of the Sherman Act have proved in recent years to have great strength and breadth, they proved in their earliest years to be so general that their applications had to be tested over and over in the light of a court enunciated "rule of reason." The slow progress of this method of enforcement, however, soon generated pressure for new laws embodying more definite provisions.

The Federal Trade Commission and Clayton Acts

The Federal Trade Commission Act, passed in 1914, provided for the establishment of the Commission as a continuing body of experts committed to developing an understanding of competitive problems in industry settings. This body was empowered to prevent unfair methods of competition in commerce before Sherman Act violation could result and to this end was set up as an independent agency free of the direct control of the Executive.

The Clayton Act, also passed in 1914, was, like the Federal Trade Commission Act, designed to supplement the Sherman Act, but was aimed at specific practices which Congress believed would, if left unchecked, violate the Sherman Act. Exclusive dealing contracts were prohibited

where they might substantially lessen competition or tend to monopoly in any line of commerce. Left open, however, were questions concerning the conditions under which such contracts would endanger competition. Price discrimination was also prohibited where it might substantially lessen competition or tend to monopoly in any line of commerce, with questions concerning the conditions under which these consequences might result left open for resolution by the courts. The Clayton Act also prohibited acquisitions of corporate stock which might substantially lessen competition between the buying and selling company or might restrain commerce in any section or community or might tend to create a monopoly in any line of commerce. As with the other sections of the law, Congress left open questions concerning what was meant by a substantial lessening of competition and the courts soon raised further questions by holding that the Act applied only if there had been competition between the acquiring and acquired company and if an acquisition of stock had not been followed by an acquisition of assets.

Despite the fact that the Federal Trade Commission Act and the Clayton Act had been designed to strengthen the Sherman Act, their wording turned out to be so broad that their potential applications became uncertain while their actual applications became so narrow that related practices were left untouched. These two sets of problems began to be apparent in the early 1920's, but the relative prosperity of the economy, combined with a slowly developing body of Commission and Court decisions, obscured its full meaning. By the 1930's, however, the advancing depression gave powerful impetus to those who had already begun to seek amendments to the law.

The Robinson-Patman Act

The Robinson-Patman Act was intended by its sponsors to prevent mass buyers, such as A & P, from exerting pressure on suppliers to obtain price concessions not available to their smaller less-integrated rivals. It was, therefore, designed primarily to preserve the bargaining status of small independent buyers vis a vis their large and vertically integrated competitors as well as to preserve the bargaining status of small sellers who did not wish to, or could not, grant the price concessions exacted by the chains. Like the earlier laws, however, this one also was open to court interpretation on a detailed basis.

After the Robinson-Patman Act

In 1939, with the depression receding, President Roosevelt set up the Temporary National Economic Committee (TNEC) to study the growth and causes of concentration and to make proposals for maintaining competition in the increasingly complex economic environment of that day. The advent of World War II, however, prevented serious consideration of the Committee's many proposals and after the War, new problems began to emerge as the economy expanded and major companies began to move into more integrated and diversified activities.

During that period, court decisions under the Sherman Act, the Federal Trade Commission Act, and the Clayton Act were giving the enforcement agencies tools for challenging monopoly power of the type disclosed in the Alcoa case, basing point pricing of the type disclosed in the Cement case, price discrimination of the type presented in Corn Products and Staley, exclusive dealing contracts of the type presented in Standard

Stations, and related practices. But, while the law was becoming increasingly more competent to deal with monopoly, pricing, and exclusive dealing, it was becoming increasingly helpless with respect to acquisitions and mergers. In 1950, Congress sought to remedy this deficiency through the Celler-Kefauver amendment to the Clayton Act which prohibits acquisitions of stock or assets where the acquisition may result in a substantial lessening of competition or a tendency to monopoly in any line of commerce in any section of the country. And, in Dupont (General Motors), Crown Zellerbach, and Brown Shoe, the Supreme Court has taken a strong stand with respect to both horizontal and vertical acquisitions which may substantially lessen competition.

II

Administration of the Law

Introduction

Even with the wide range of tools available to the antitrust division of the Department of Justice and to the Federal Trade Commission through the enactment of the various antitrust and trade regulatory laws, it became apparent by 1960 that administrative techniques not theretofore used in the application of those laws would have to be utilized, if we are to experience any reasonable degree of success in the effectuation of our public policy for maintaining a free and competitive enterprise system.

With the rapid growth of the economy, it was becoming increasingly evident that new methods had to be found for probing trade practices on an

industrywise basis and for dealing with them promptly, equitably, and effectively. Therefore, the Commission has begun to develop new procedures for expediting its case process.

The first of the new procedures went into effect almost a year ago. Under them, a company against which a complaint is about to issue receives a proposed order at the same time it is served with a complaint. The company has ten days within which to notify the Commission whether it will accept the order in substantially the form proposed. If it does, the case ends there. If the order is not accepted, Federal Trade Commission hearings go forward. But, once hearings begin, they now proceed to a conclusion without the lengthy recesses that formerly marked many of the Commission's cases. Indeed, hearings may now be recessed only with the sanction of the Commission itself.

At the time when the Commission announced this set of procedures, it was, however, already evident that additional methods for expediting the Commission's business might become necessary. When I took office in the Fall of 1961, I said that I would like to see the Commission explore its rule-making powers to determine whether it could, after hearings, issue authoritative statements concerning industry-wide practices which violated the law. Now, barely a year later, a new Commission Trade Regulation Rules procedure embodying these proposals has gone into effect. I plan to take the remainder of my time this morning to talk to you about this new procedure and to outline the challenges we see ahead.

The Federal Trade Commission's Trade Regulation Rules

I have already noted that our statutes prohibit a broad range of activities which we believe can have destructive effects upon competition. The requirements of the laws could, however, be more readily understood and followed if the Federal Trade Commission stood ready to redefine, through appropriate and binding rules, the applications of the laws in particular economic situations. Such administrative interpretations would, in effect, express the experience and judgment of the Commission based on facts of which it had knowledge derived from studies, reports, investigations, hearings, and other proceedings. Rules of this kind could indeed be designed to keep business informed on an industry-wide basis of its rights and obligations under the laws we administer.

Under the Commission's new procedures that went into effect in June of this year, Trade Regulation Rules proceedings may be initiated by the Commission upon its own motion or upon outside request. Interested parties will have an opportunity to present written data, views, and arguments. After consideration of all relevant matters of fact, law, policy, and discretion, including relevant matters presented by interested parties, the Commission will formulate tentative rules, together with a concise general statement of their basis and purpose. Tentative rules will be published in the Federal Register and will in turn be the subject of Federal Trade Commission hearings at which the views of interested parties may be presented. If the hearings develop a need for a rule, it will be issued by the Commission and will apply to specific unfair methods of competition by designated classes of companies in a

designated industry or market.

Once a rule has been issued, it will, from the Commission's point of view, become the standard for compliance with the law, although a company affected may petition for withdrawal of the rule, for changes, or for suspension in an individual case.

A company engaging in a practice prohibited by rule would, after investigation, find itself the subject of a Commission complaint. At the subsequent hearing, the Commission's staff would have to present proof that the company had engaged in the banned method of competition, but it would not have to present evidence that the practice itself was an unfair method of competition. The respondent company would have two defenses available in such a case: it could show that it had not engaged in the practice or that the rule should not apply in its case, but it could not challenge the validity of the rule as such.

We recognize that formulation of the Trade Regulation Rules will require the Commission's staff to focus its existing skills in the preparation and analysis of industry information. Indeed, Trade Regulation rule-making will require a combination of economic and legal facts that will identify unfair methods of competition without providing a framework for suppression of novel forms of competition.

The Trade Regulation Rules will supplement the Commission's trade practice conference work on the one hand and its advisory opinions on the other. Like trade practice conference rules, the Trade Regulation Rules will apply to all members of an industry; but unlike these rules, they will focus sharply on the facts of competition rather than on the vocabulary of the law. Like the advisory opinions, the Trade Regulation Rules will put companies on notice concerning specific practices against

which the Commission would be likely to proceed; but unlike the advisory opinions, Trade Regulation Rules will apply not to an individual company, but to all similar companies in an industry covered by a rule.

III

The Problems Before Us

We at the Commission recognize that we have fashioned a novel approach to rule-making by an administrative agency. We recognize also that we must begin to develop the concrete meaning of our procedures through the rules we formulate. We do not know at this time what questions will come before us first, nor have we established general criteria for the rules we will adopt and those we will avoid. We do know, however, that initially each set of rules will stand on its own, since we intend to hold independent hearings to explore the applicability of each proposed rule to a definite method of competition in an individual industry setting.

It is anticipated that formulation of rules prohibiting false and misleading advertising claims can go forward relatively expeditiously, since notice of the facts that would constitute evidence of violation can be made a part of a rule itself. It is, however, anticipated that other methods of unfair competition will present more thorny rule-making problems that will engage the attention of the Commission for years to come.

No one can, of course, foresee all the questions of policy or program that will come before us in formulating such rules; it is, however, possible to suggest some of the problems the Commission will have to consider in working out the scope and limits of its new program.

First, although each rule will be designed to focus on a specific method of competition in a particular industry, no rule can reach beyond the existing statutory powers of the Commission. We believe, however, that analysis of each practice in each market setting will enable us to state the circumstances under which a particular method of competition may become an unfair method of competition and to pin-point a rule that will define the law with precision as it applies to that practice in that setting.

Second, our procedures do not require that rules be formulated exclusively in the negative or in the affirmative. Although rules prohibiting given practices have been envisaged in our preliminary discussions, we are not precluded from exploring rules which would require particular practices, where the law implicitly makes such requirements.

Third, we are aware that we will frequently encounter a particular practice which presses hard upon suppliers, competitors, or customers of those engaging in this practice, but that we may be in doubt as to whether the practice is characteristic of active competition or is a method of suppressing competition. But this is a problem with which the Commission has always had to deal and we believe that, through hearings designed to give full weight to industry facts, we will be able to make the required distinctions and to deal equitably with those whose competitive lives will be governed by our rules.

Fourth, and perhaps ultimately the most pressing question before us, will concern the scope of our power to classify companies and to limit the application of a rule to particular classes of otherwise similar companies.

We believe, for example, that we have the power to establish rules applicable to purchases or sales of particular products in the United States or in specific parts of the country; our statutory responsibility would, however, appear also to require us to narrow the application of a rule when the competitive consequences of a practice may vary with the type of company that engages in it.

To take an extreme, and for the sake of simplicity a purely hypothetical, example. Suppose that industry A is made up of retailers who sell a range of loosely related products throughout the United States. Some retailers are directly integrated with large wholesaling or manufacturing operations; some are loosely organized to perform related buying or advertising functions; some are affiliated with large enterprises in unrelated or only peripherally related fields; many, although a declining number, are independents--a few large independents and many smaller ones. Assume that in certain areas several of the largest integrated, multi-unit companies have been acquiring independents and that opportunities for the remaining independents to purchase from non-integrated suppliers who are not also their competitors have been decreasing. It may be possible for the Commission, after examining the relevant facts, to issue a rule prohibiting integrated, multi-unit companies that have already made one acquisition of a retailer of the type in question in a given area from making other acquisitions of the same type in the same area. Such a rule would apply only to specified companies operating in defined markets and would leave other companies free to make similar acquisitions--subject only to possible challenge under Clayton 7 procedures and not under the rule as such.

Or to take another hypothetical example. Suppose that in industry B, competition is primarily regional because the industry's products incur heavy transportation costs. Suppose that in a given region, relatively isolated from outside shipments, three producers manufacture a given range of products and four or five others manufacture limited portions of the range. Let us assume further that the largest manufacturer accounts for approximately 60% of the market; the second accounts for approximately 11%; and the third, for approximately 9%--with the remainder of the market split among other regional mills and in-shipments from outside the area. Let us suppose finally that the situation in other regions is similar, although the percents of markets involved may differ. In this situation, it might be possible for the Commission, after study of the facts, to formulate a rule that would prohibit companies accounting for, say, 50% or more of sales of the specified products in defined regions from acquiring other companies accounting for, say, 5% or more of the sales of the same products in the same regions.

Or, as a third example, let us suppose that in industry C the largest suppliers grant rebates for cumulative purchases of $1 million a year or more by any one purchaser. Assume also that there are few purchasers who qualify for such rebates and that the rebates cannot be justified on the basis of costs or any of the other justifications provided by the Robinson-Patman Act. Here again, after consideration of the facts, it might be possible for the Commission to formulate a rule prohibiting such rebates.

Let me emphasize that these examples are purely speculative; that they are not designed to identify any set of companies or markets; and that rules will not be issued on a mass-production basis. Indeed, the

Commission will at all times be mindful that each rule must be formulated on the basis of facts that accurately portray individual industry and market conditions.

IV

The Future

The Commission can be expected to explore its new rule-making procedures with due deliberation as it seeks to give industry-wide coherence to laws that have previously been administered through individual cases. In the process, it will at all times be seeking for a balance within which it can strengthen the framework for fair and vigorous competition without sacrificing one to the other. By giving careful consideration to the economic characteristics of each industry for which rules are proposed and by taking responsible cognizance of the differing positions of different companies within these industries, the Commission expects to be able to formulate rules that can be applied equitably in specific market settings.

In going forward with its rule-making program, the Commission knows that it must rely both on its staff and on industry for proposals as to the industries and markets to which it should turn its attention, for facts upon which a particular rule should be based, for analysis of the expected consequences of proposed rules, and for suggestions as to when rules need to be modified or withdrawn.

Through our new rules, as well as through our more traditional procedures, we intend, under our mandate from Congress,

to maintain and preserve the greatest possible number and variety of competitive opportunities in every field, not only because the principles of competition require this, but because the future of democracy is bound up with our steadfastness in maintaining a climate for vigorous experimentation in every line of commerce that contributes to the growth of our economy.

V

Conclusion

We have discussed a number of measures which have been taken to preserve competition. These are measures which have been taken by the Government through the enactment and administration of laws. These actions by the Government have pinpointed areas in our economy where competition has been injured severely as a result of conduct contrary to our antimonopoly public policy. What the Government has done and can be expected to do will not result in clearing up all of these trouble spots. Businessmen concerned about measures to maintain competition also must act. Frequently it is said that more than 90% of businessmen desire to play square and support our public policy for maintaining competition. It is to that large segment of business an appeal has been made and is continuing to be made for help in the enforcement of our public policy for preserving competition. In this effort all must become more than vocal partners. Effective action on the part of all partners - government, business and the public - is needed.