It is further ordered, That the allegations of the complaint that respondent engaged in predatory pricing practices be, and they hereby are, dismissed.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order set forth herein.

By the Commission, Commisisoner Anderson concurring in the result.

IN THE MATTER OF

THE ATLANTIC REFINING COMPANY

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 7471. Complaint, Apr. 13, 1959—Decision, Nov. 22, 1963

Order requiring a major integrated petroleum products marketing company to cease coercing its independent lessee-dealers in the "Delmarva Peninsula" area of Delaware, Maryland and Virginia, during a local price war, to sell its gasoline at uniform and non-competitive prices by means of a so-called "temporary consignment contract"; conspiring with such retail dealers to fix and maintain the uniform prices through the medium of the "consignment contracts"; and conspiring with its independent wholesale distributors to maintain the uniform consumer resale prices by granting the coconspiring distributors certain rebates to be passed on to their dealer customers maintaining the uniform prices.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Atlantic Refining Company, Inc., a corporation, hereinafter referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereof as follows:

COUNT I

PARAGRAPH 1. Respondent, The Atlantic Refining Company, Inc.,* is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with

* Respondent's correct name is The Atlantic Refining Company.

its principal office and place of business located at 260 South Broad Street, Philadelphia 1, Pennsylvania. Respondent is a major oil company, and is now and for several years last past, has been, among other endeavors, primarily engaged in the offering for sale, sale and distribution of gasoline and other petroleum products throughout a seventeen state marketing area. Said gasoline is advertised and sold under the brand names of "Atlantic Gasoline" and "Imperial Gasoline", ("Atlantic" being the regular brand and "Imperial" being the hi-test or ethyl). Said gasoline enjoys wide public acceptance wherever it is marketed and is considered a major brand product. Respondent, one of the nation's leading producers and marketers of gasoline and other petroleum products, comprises an integrated unit in the petrolum industry in that it is engaged in the acquisition and exploitation of oil producing properties located in the United States as well as in foreign lands; the refining of crude oil and the subsequent manufacture therefrom of various petroleum products including gasoline; and the subsequent distribution and marketing at wholesale and retail of the products of its refineries in the United States and foreign lands. Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. It owns or controls approximately twenty-five ocean-going tankers, as well as various pipe-line systems used for the transportation of crude oil and refined petroleum products. Furthermore, it owns and operates water terminals and bulk plants in different marketing areas from which its petroleum products are delivered to the various marketing outlets for subsequent sale to the consumer. In 1956 the gross sales, including petroleum products, of the respondent and its consolidated subsidiaries amounted to $544,864,558.

PAR. 2. Respondent markets its gasoline and petroleum products through its owned and operated service stations; through independent lessee-dealer service stations; and through independent distributors who in addition to supplying gasoline to service stations operated by them also sell to independent lessee-dealer service stations.

Respondent, in the delivery and sale of its gasoline to its various marketing outlets located in a seventeen state area, and in particular in eastern Pennsylvania and that area termed the "Delmarva" peninsula—said peninsula being comprised of portions of the three states, Delaware, Maryland and Virginia—has entered into agreements, contracts and/or leases, now in force, whereby respondent delivers and sells to independent distributors and independent lessee-dealers all of their respective requirements of respondent's brands of gasoline during the terms of such contracts. In the course of supplying said customers and making deliveries pursuant to the terms of said agreements, contracts and/or leases, respondent ships its gasoline from its refineries across state lines to bulk stations and other terminal or distributing facilities located in or near the various marketing areas. From these points it is delivered to independent distributors and/or independent lessee-dealers, for subsequent sale to members of the purchasing public. There is now, and has been at all times mentioned herein, a continuous stream of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said gasoline between respondent's refineries, terminals and bulk stations and said independent distributors and/or independent lessee-dealers in the areas set forth herein. All of said deliveries from respondent, and the receiving, as well as the purchases and resale by the said independent distributors and/or independent lessee-dealers have been in the course and furtherance of such commerce.

PAR. 3. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 4. Certain conditions which create or contribute to temporary disturbances of the retail price structure of gasoline at the service station level, occur and have occurred on various occasions and at various times in the areas in which respondent markets its gasoline. These are sometimes referred to as "price disturbances", or as "depressed prices" but more commonly they are referred to and known as "price wars". "Price wars" may originate from any one of a number of casual factors. During such occasions, respondent has, under the guise and pretext of giving assistance to its lessee-dealers, conceived, adopted and put into operation certain plans or methods for the purpose, and with the effect, of controlling the prices at which gasoline is sold at respondent's lessee-dealer service stations.

In the "Delmarva Peninsula" area, as well as elsewhere, respondent has a number of retail outlets through which its refined petroleum products, including gasoline, are sold to the consuming public. A substantial number of such outlets are operated by independent businessmen, or who would be in the absence of the power and control exercised over them by respondent, who lease or sub-lease their service station properties from respondent and who have entered into supply contracts for gasoline and certain other requirements with respondent.

By means of various provisions in the leases, sub-leases and supply contracts and through a system of policing the business operations of the said independent lessee-dealers by constant inspection and surveillance, the respondent is able to and does, to a substantial extent and degree, dominate and control the manner in which said lessee-dealers operate the service stations leased or sub-leased from respondent. The power resident in respondent through such domination and control is exercised, exerted and used by respondent to persuade, influence, coerce and induce said independent lessee-dealers to abide by, agree to, adhere to, follow or acquiesce in, various plans, policies or methods of doing business which may be suggested by respondent or which respondent may desire or elect to place in effect and operation. At all times the independent lessee-dealer is conscious and aware of the power of respondent and is influenced by such power in the everyday decisions made by him in the conduct of his business.

Beginning in or about May 1967, respondent conceived, adopted and put into operation in the "Delmarva Peninsula" area a device, plan or scheme to enable it to fix the retail prices of the gasoline sold by its lessee-dealers to the consuming public.

To effectuate and carry out the plan, respondent, relying on the power and control it possesses and exerts over its independent lessee-dealers in the conduct of their business, influenced, persuaded or otherwise induced or caused its independent lessee-dealers to enter into agreements with it which are designated or commonly referred to and known as "temporary consignment contracts". By the use of such temporary contracts uniformity of price is achieved as between lessee-dealers of respondent and said uniformity of price contributes to a manipulation and/or stabilization of price competition in the market during a period of price disturbance as described above. In most, if not all, instances the said dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded or induced by various means and methods employed by respondent, to enter into such consignment contracts. Said contracts have been, and are now being, entered into and carried out with complete indifference as to an individual dealer's competitive situation, or need. During the period the agreement remains in effect, respondent is ceded the right by the lessee-dealer to establish the resale price of the gasoline to the purchasing public. Said dealer receives a certain designated commission on each gallon of gasoline sold at his service station but forfeits his customary margin of profit. In most instances, if not in all, the commission received by a dealer is not equal in amount to said usual and customary margin of profit. The amount of said commission to be paid is computed by a specific formula, operating in relation to the retail price or prices posted and the amount of the temporarily established consignment tank wagon cost (i.e., temporary wholesale price). To those dealers who do not participate in the consignment plan operation, the tank wagon price to them is more than is the cost to a participating dealer.

Respondent, through and by virtue of said plan is able to, and does, control the prices at which gasoline is sold at retail by its lessee-dealers and thus tends to, and does, during the period the plan is in operation, manipulate, eliminate, frustrate and prevent price competition between its lessee-dealers and with others. Such power and control removes any probability or possibility of price competition, thus, tending to insure uniformity of prices despite the presence of factors in the market which would, in the absence of this artificial restraint and control, encourage competition.

Respondent, in addition to its lessee-dealers, also sells its gasoline to wholesale distributors in this area, as well as in others. Said distributors in some instances operate service stations of their own and also sell to and have as customers other service stations selling respondent's brand of gasoline. Said distributors conduct their businesses and sell within established exclusive territories, said exclusive territories having been previously established by contract between the parties. In order to assure that the consignment plan of operations would achieve the aims and purposes intended, respondent, by various means and methods, caused the distributors to maintain the retail prices at their own stations as well as those posted at their dealer-customer stations in conformity with the prices posted by respondent's lessee-dealers operating under the aforesaid consignment plan. Furthermore, at times and on various occasions, respondent, acting on its own initiative, through various means and methods, attempted to and did cause the dealer customers of said distributors to post and maintain their retail price or prices in conformity with the price being posted by respondent's lessee-dealers operating under the aforesaid consignment plan.

Par. 5. The acts and practices of respondent as herein alleged have a dangerous tendency to and have hindered, suppressed and restrained the sale and distribution of gasoline, in commerce, among and between the various States of the United States and the District of Columbia, and hindered and prevented normal, free and unrestrained competition in the sale of gasoline in commerce; have a dangerous tendency and capacity to repose, and do repose, in respondent the power and control sufficient to stabilize or contribute to the stabilization of prices in the area or areas where it markets its gasoline; created and continue to create an artificial price structure in which the free play of market forces is suppressed, hindered and prevented; make for price uniformity at the wholesale and retail levels of sale and distribution to the detriment of the purchasing public; and deprive the public and its lessee-dealers and others of the advantage of competition in price and otherwise which they would enjoy under a condition of normal, free and unrestrained competition.

PAR. 6. The acts and practices of the respondent as herein alleged are all to the prejudice of the public, and its lessee-dealers and the competitors of its lessee-dealers and its distributors and constitute unfair acts and practices and unfair methods of comeptition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 7. All of the allegations of Paragraphs 1 through 6 of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 8. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent, its lessee-dealers and independent distributors have been and are now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 9. Beginning in or about May 1957, respondent, acting through its agents, officers, employees and its independent lessee-dealers (said lessee-dealers are to be considered as and are herewith alleged as unnamed co-conspirators), engaged in selling respondent's gasoline and other petroleum products in the "Delmarva Peninsula" area, and other areas, for the purpose of manipulating, suppressing, preventing, hindering or stabilizing price competition in the distribution and sale in commerce of gasoline during a price disturbance period, conspired to and have entered into, maintained and carried out a combination, planned common course of action, understanding or agreement, through which the price of gasoline sold in the service stations of said independent lessee-dealers could be fixed and maintained, and was fixed and maintained, and through which the price