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Complaint

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, Commissioner 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 co-conspiring 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 petroleum 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

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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 competition 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

of gasoline being sold by others in the market could be and was manipulated, stabilized, controlled and affected.

PAR. 10. Pursuant to the conspiracy and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement, respondent and the aforesaid independent lessee-dealers executed a written agreement purporting to be cast in the form of a legal consignment contract. Said contracts are cast in such form for the purpose and with the attempt to immunize and insulate a mere price manipulation scheme from the antitrust laws. Said agreements are nothing more than shams and subterfuges having as their primary purpose and function of a temporary illegal price fixing vehicle, which affects, manipulates, restrains and/or stabilizes price competition or contributes to artificial uniformity of gasoline prices in the market. The said consignment contracts as alleged herein bear no bona fide relationship to the business needs and requirements of either the respondent or its independent lessee-dealers, and in substance the status of gasoline purchaser and vendor did and does exist as between respondent and its independent lessee-dealers notwithstanding the representation by form to the contrary. Furthermore, in most, if not all, instances each dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded and induced, through various means and methods employed by respondent, to enter into such agreements.

PAR. 11. The unlawful planned common course of action as herein alleged is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors, distributors and retailers of gasoline, as well as to the competitors of respondent's lessee-dealers, in the "Delmarva Peninsula" area, as well as other areas where so employed, and has a dangerous tendency to and does unreasonably restrain, manipulate, hinder, suppress, and/or stabilize competition in the "Delmarva Peninsula" area, and other areas, between and among respondent's lessee-dealers; respondent's lessee-dealers and respondent's owned and operated service stations; respondent's lessee-dealers including its own service stations and the respective retail dealers of respondent's independent distributors; respondent's lessee-dealers including its own service stations and those distributors which market at retail; respondent's lessee-dealers including its own service stations and the retail dealers of other gasoline marketers; and between and among respondent and its independent distributors.

It has unreasonably restrained, manipulated, hindered, suppressed and/or stabilized competition therein in the distribution and sale of gasoline in commerce within the meaning of the Federal Trade

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Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PAR. 12. All of the allegations of Paragraphs One through Six of Count I and Paragraphs Nine through Eleven of Count II of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count III the same as if they were repeated herein verbatim.

PAR. 13. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent, its independent distributors and lessee-dealers 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. 14. Beginning in or about May 1957, respondent acting through its agents, officers, employees, and its independent distributors (said independent distributors are to be considered as and are herein alleged as unnamed co-conspirators) engaged in selling respondent's gasoline and other petroleum products to independent service stations as well as through their own service stations 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 and for the further purpose of aiding, abetting and in furtherance of the consignment plan of distribution as alleged in Count I herein as well as the price manipulation, fixing and/or stabilization scheme as alleged in Count II Paragraph 9 hereof, conspired to and have entered into, maintained and carried out a combination, planned common course of action, understanding and agreement, through which they would maintain and fix, and did maintain and fix, the price at which gasoline was sold or would be sold at the wholesale level, as well as at retail in the gasoline service stations owned and operated or sold to by said distributors.

PAR. 15. Pursuant to the conspiracy and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement respondent in conspiracy and combination with the aforesaid independent distributors, adhered to, performed and did the following acts and things:

(1) Agreed to and did grant certain allowances, discounts or rebates from the tank wagon price to the distributors' customers

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on the condition that the dealer customer would conform his retail price to a price dictated by respondent.

(2) Agreed to and did provide to its distributors certain allowances, discounts or rebates from the distributors' cost upon the condition, understanding and agreement that said distributors provide their customers with certain allowances, discounts or rebates and further provided, that said customers of the distributors would adhere to and post the retail price or prices dictated by respondent.

(3) Pressured, threatened, coerced and otherwise persuaded and induced said dealer customers of said distributors to post and adhere to retail prices dictated by respondent from time to time.

PAR. 16. The unlawful planned common course of action as herein alleged is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors, distributors and retailers of gasoline, as well as to the competitors of said distributors, in the "Delmarva Peninsula" area, as well as other areas where so employed, and has a dangerous tendency to and does unreasonably restrain, manipulate, hinder, suppress and/or stabilize competition in the "Delmarva Peninsula" area, and other areas; between and among the independent retail customers of a distributor and the retail outlets owned and/or operated by a distributor; the retail customers of the distributors; the retail customers of the distributors and the independent lessee-dealers of respondent as well as those retail outlets owned and/or operated by respondent; the retail customers of the distributors including distributor owned and/or operated outlets and the retail dealers of other gasoline marketers; respondent's independent distributors; respondent's independent distributors and the distributors of other gasoline marketers; and between and among respondent and its independent distributors.

It has unreasonably restrained, manipulated, hindered, suppressed and/or stabilized competition therein in the distribution and sale of gasoline in commerce within the meaning of the Federal Trade Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and Mr. Alan Weber for the Commission.

Mr. Edward F. Howrey and Mr. Harold F. Baker of Howrey, Simon, Baker & Murchison, Washington, D.C., and

Mr. Roy W. Johns and Mr. Joel L. Carr of the Atlantic Refining Company, Philadelphia, Pa., for the respondent.

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INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

March 7, 1962

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PRELIMINARY STATEMENT

The Commission, on April 13, 1959, issued a complaint against the respondent The Atlantic Refining Company (erroneously described as The Atlantic Refining Company, *Inc.*). The complaint has three counts.

Count I charges the respondent, which is described as a major oil company, with violating Section 5 of the Federal Trade Commission Act in the marketing of 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. It is alleged that respondent in the delivery and sale of its gasoline to its various marketing outlets, particularly in the territory known as "Delmarva Peninsula", comprised of portions of the States of Delaware, Maryland, and Virginia, has entered into agreements whereby respondent delivers and sells respondent's brands

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of gasoline to independent distributors and lessee-dealers in interstate commerce.

It is alleged under Count I that during disturbed market conditions in the retail sale of gasoline known as "price wars", under the guise and pretext of giving assistance to its lessee-dealers, respondent has 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 this connection, it is alleged that by means of various provisions in the dealer leases, and through a system of policing the business operations of said independent lessee-dealers, the respondent, to a substantial extent, dominates and controls the operation of the service stations leased or subleased from respondent.

It is specifically alleged that, beginning in or about May 1957, respondent put into effect in the "Delmarva Peninsula" area such a device or plan to enable it to fix the retail prices of the gasoline sold by its lessee-dealers to the consuming public, and to effectuate and carry out said plan, respondent influenced, persuaded or otherwise induced or caused its independent lessee-dealers to enter into agreements with it designated and known as "temporary consignment contracts", by the use of which uniformity of price was achieved as between the lessee-dealers of respondent; and that said uniformity of price contributed to a stabilization of price competition in the market during a period of price disturbance hereinbefore mentioned. It is further alleged that in most instances the said dealers were unwilling parties to the arrangement, having been coerced by various means and methods employed to enter into such consignment contracts; that, under said contracts, the lessee-dealers received a certain designated commission on each gallon of gasoline sold at his service station, but forfeited his customary margin of profit; and that, in most instances, the commission received is not equal in amount to the dealer's usual and customary margin of profit. It is also alleged that those dealers who do not participate in the said consignment contract operation are charged the tank wagon price which to them is more than is the cost to a participating dealer.

It is further alleged in Count I that respondent, through and by virtue of said consignment contract plan, controls the prices at which gasoline is sold at retail by its said lessee-dealers and prevents price competition between said lessee-dealers and with others, thus tending to insure uniformity of prices despite the presence of factors in the market which would, in the absence of such artificial restraint and control, encourage competition.

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It is further alleged under this Count that, in addition to said lessee-dealers, respondent also sells its gasoline to wholesale distributors in the "Delmarva Peninsula" area, which said distributors in some instances operate service stations at retail and also sell to retail customers selling respondent's brand of gasoline; and that in order to insure the success of the consignment agreement plan of operation and to achieve the aims and purposes hereinbefore mentioned, respondent, by various means and methods, caused the said distributors to maintain the retail prices of their own retail stations, as well as the dealer-customer stations, in conformity with the prices posted by respondent's lessee-dealers operating under the aforesaid consignment agreement plan.

Finally, it is pleaded under Count I that the said acts and practices of respondent have a dangerous tendency and have hindered, suppressed, and restrained the sale and distribution of gasoline in interstate commerce and hindered and prevented free competition in the sale of gasoline in such commerce, and reposes in the respondent the power and control sufficient to stabilize prices in the said areas where it markets gasoline at wholesale and retail levels of distribution and deprives the public and the lessee-dealers and others of the advantage of competition in price which they otherwise would enjoy under the condition of normal, free and unrestrained competition.

Under Count II, all the allegations of Count I are adopted and incorporated by reference. In addition, it is specifically alleged that, beginning in or about May 1957, respondent, acting through its agents and independent lessee-dealers as unnamed co-conspirators engaged in selling respondent's gasoline and other petroleum products in the "Delmarva Peninsula" area and other areas, conspired and carried out a combination or planned common course of action through which the price of gasoline sold in the service stations of said independent lessee-dealers was fixed and maintained as well as the price at which gasoline was sold by others in that market.

It is further alleged under Count II that, pursuant to such conspiracy and planned common course of action, the respondent and the aforesaid independent lessee-dealers executed written agreements purporting to be consignment contracts which were nothing more than shams and subterfuges, having as their primary purpose and function a temporary, illegal price-fixing vehicle: that the said consignment contracts bear no bona fide relationship to the business needs and requirements of either the respondent or its independent lessee-dealers and that in most instances each dealer was an unwilling party to the arrangement, having been coerced through

