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STATEMENT BY

EVERETTE MacINTYRE, COMMISSIONER

FEDERAL TRADE COMMISSION

BEFORE THE

MICHIGAN PETROLEUM ASSOCIATION

ON

FEDERAL TRADE COMMISSION INQUIRY INTO PROBLEMS OF
COMPETITION IN THE MARKETING OF GASOLINE



Grand Rapids, Michigan

April 21, 1965

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Introduction

I have been requested to discuss with you today the Federal Trade Commission inquiry into the problems of competition in the marketing of gasoline. In that connection I was asked to explain "the scope of the forthcoming Federal Trade Commission hearings on gasoline marketing." It was suggested that I also should trace the history of the Commission's trade regulation rule procedure, how and when it started, and how it would apply to problems in any given industry.

It is helpful to an understanding of a discussion of these matters to have some information responsive to the question, "What is the Federal Trade Commission?"

The Federal Trade Commission

Separate statements from different persons through the years have been made which could be regarded as answers

to the question "What is the Federal Trade Commission?" These answers vary widely. Of course all who have any information about the Federal Trade Commission could answer the question with the statement that the Federal Trade Commission is a Federal agency of five Commissioners appointed by the President of the United States, by and with the consent of the Senate. From there, even the views of those who have some information about the Federal Trade Commission vary widely about it and what it does. The expressions of these widely varying views confuse and then compound confusion. However, one thing is clear - it is the responsibility and duty of the Federal Trade Commission to help protect business and the public from unfair acts and practices.

The Federal Trade Commission's principal authority to protect businessmen, consumers, and other members of the public from unfair acts and practices is derived from the Federal Trade Commission Act, as approved in 1914, and as amended in 1938.

The most important part of the Federal Trade Commission Act is set out in Section 5(a)(1) of said Act and contains only 19 words. Those words are: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."^{1/}

^{1/} 38 Stat. 717 (1914), as amended 52 Stat. 111 (1938), 15 U.S.C. §41 (1958).

The jurisdiction of the Commission originally was based upon injury to competition, actual or potential, and injury to or deception of the public was not of itself sufficient to constitute an offense under the statute. The defect became apparent in the 1930's when the courts set aside a Commission order against false advertising because there had been no showing of competitive injury. This imperfection was remedied by the 1938 amendment, which declared "unfair and deceptive acts and practices in commerce" to be in the same unlawful category as "unfair methods of competition." Since then the Commission has been able to proceed directly to protect consumers and other members of the public while at the same time eradicating competitive methods which unfairly divert trade from the honest to the unscrupulous members of the business community. We should therefore keep in mind, then, that the purpose of the Federal Trade Commission is to protect the public by protecting competition. Through its performance of that function the Federal Trade Commission serves as a guardian of our free and competitive enterprise system. We are all familiar with the fact that the concept underlying our public policy for a free and competitive enterprise system calls for free and fair competition.

Unless we accept that concept and acquire a reasonably

good understanding of what it means to us in our everyday affairs, we are not likely either to understand or accept the Federal Trade Commission or what it is doing. Indeed, we will suffer confusion and become confounded as that confusion becomes compounded.

It is my hope that the few remarks I make here today will help you avoid gross misunderstandings about the Federal Trade Commission and the recent developments there.

When the Sherman Antitrust Act was passed in 1890 it was thought that the language of its provisions was quite definite and sufficiently broad for appropriate regulation of interstate and foreign commerce. Particular basis for that thought is found in the words of the first section of that law to the following effect: "Every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal", and the words of Section 2 to the effect that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

First, proposals were made that the Sherman Act be amended to provide for some exemptions from its application to certain conditions and practices. Those proposals were rejected. Then proposals were made to make the application of the Sherman Act more flexible by making it effective only where trade restraints and monopolistic conditions were found to be unreasonable.

At first the Supreme Court rejected proposals that it make the Sherman Antitrust Act indefinite by reading into it an interpretation which would make it applicable only to unreasonable restraint of trade.^{2/}

Although these proposals were not acted on by the Congress, the law, through the process of judicial interpretation, was made almost as general and broad in its sweep as the common law of England and this country. A part of this development was the decision by the Court in the Standard Oil Case.^{3/} In that case the "rule of reason" was read into the Sherman Act and that law was, thereby, made to apply only to unreasonable restraints of trade.

^{2/} U.S. v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); U.S. v. Joint Traffic Association, 171 U.S. 505 (1898).

^{3/} 221 U.S. 1.

The uncertainties inherent in such a situation were aptly described in the opinion of Justice Harlan, a member of the Supreme Court, who participated in the decision in the Standard Oil Case.

Justice Harlan pointed out that now the Sherman Act, even though it is a criminal or penal statute, is indefinite and uncertain in its application. He observed that businessmen and others made subject to the Act are without guide lines regarding its application to particular situations.

The Federal Trade Commission Act is couched in terms almost as general as those of the Sherman Act and with greater breadth. The Supreme Court has ruled that the words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. However, they have held them to be applicable to practices opposed to good morals because characterized by deception, bad faith, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.

From existing circumstances and our experience, it is clear that public policy will continue to dictate that our antimonopoly laws continue with their broad sweep covering a multitude of unspecified trade practices

and conditions. It cannot be expected that the Congress will undertake to specify in new legislation each of the trade practices and conditions likely to fall within the broad sweep of the Sherman Act and the Federal Trade Act. Therefore, businessmen and the public are unlikely to enjoy flexibility, breadth and certainty under our anti-monopoly laws unless there is action from day to day by an administrative law agency such as the Federal Trade Commission, devoted to spelling out and specifying what trade restraints and conditions are unlawful, and aiding in the establishment of guide lines for avoidance of pitfalls leading to violations.

Trade Practice Conference Procedure

For a substantial period of time the Commission has utilized a trade practice conference procedure for the purpose of informing itself about industrywide practices alleged to be unfair. It has proceeded to utilize that information in formulating statements of what the Commission believed to be applicable as law to the trade practices in question. These statements were designated as Trade Practice Rules and were designed to afford guidance to industries and to enable them to voluntarily operate in compliance with the interpretations of the law

by the Commission and the courts. It was hoped that through such advisory rule-making procedures there would be voluntary compliance with the acts administered by the Commission.

Information was brought to the Commission's attention indicating that in a number of very important areas industrywide practices adverse to the trade generally, and apparently inconsistent with the law, had been continued despite the publicity attending the issuance of orders to cease and desist in mandatory proceedings and interpretations by the Commission through its Trade Practice Rules and Guides. It was clear that what was needed was a supplementary mechanism to inform and, at the same time, enforce, on an industrywide basis, compliance with the laws against illegal trade practices.

The Trade Regulation Rule Procedure

The Trade Regulation Rule procedure was thus created as an additional working tool of the Commission. I must emphasize that it does not replace the Trade Practice Conference and Guide programs; rather, it augments or supplements those programs.

Trade Regulation Rules serve a two-fold purpose -- to provide interpretation and information of the legal

requirements applicable to illegal practices and to serve as the basis for voluntary and simultaneous abandonment of such practices by industry members.

Under this new procedure the Commission promulgates rules expressing its experience and judgment, based upon facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes it administers. The rules thus developed and issued by the Commission may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular products or geographical markets as may be appropriate. Following its promulgation and issuance, and where any such rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission relies upon such rule, provided that the respondent has been given a fair hearing on the legality and propriety of applying the rule to the issue in his particular case. That is to say that the effective rule would be to take it as the basis for the establishment of a prima facie case with opportunity for the respondent charged with the violation of the rule to defend on the contention and showing that the rule

should not be regarded as legally binding and appropriately applicable to the practices which have been challenged as being in violation of the rule.

Of course before the Commission promulgates and issues rules of this kind under its new rule making process, it gives proper notice and affords hearings to all interested parties on any proposed rule. The proceedings may be initiated by the Commission upon its own motion or pursuant to a petition filed by any interested party. Following notice and hearings, the Commission, after due consideration of all relevant matters of fact, law, policy and discretion, proceeds to promulgate and issue the rule with a brief general statement of its basis and purpose. The rules do not become effective until after they have been published in the Federal Register.

In this dynamic and space age it is anticipated that changing conditions are likely to bring about need for revision or repeal of rules. Therefore, the Commission's policy and procedure provides for amendment, suspension, and repeal of any such rule. In that way the administrative process will serve the needs of the public interest and businessmen from day to day. Rapidly changing conditions emphasize that those needs can be served in no other way.

The Commission's Inquiries and Investigations

When the Federal Trade Commission is inadequately informed concerning any matter brought to its attention and to which it has a duty to devote resources and consideration, it seeks additional information about such matter through inquiries and investigations. Its published statements on its organization and procedures fully discuss the nature of these inquiries and investigations and how the Commission conducts them. Section 1.67 of the Commission's statement on its organization and procedure provides that "In connection with any rulemaking proceeding, the Commission at any time may conduct such investigations, make such studies, and hold such conferences as it may deem necessary. All or any part of any such investigation may be conducted under the provisions of the Commission's Rules."

On September 15, 1964 I addressed the 18th annual membership meeting of the Texas Independent Producers and Royalty Owners Association in Fort Worth, Texas. On that occasion I made reference to the fact that representatives of various groups in the petroleum industry (including your group) had petitioned the Federal Trade Commission to initiate Trade Regulation Rule proceedings with a view

to the promulgation of appropriate rules dealing with the marketing conditions prevalent in the petroleum industry.

On that occasion I also stated that the Federal Trade Commission had taken those various petitions under consideration. To me, as a member of the Federal Trade Commission, it is obvious that the Commission is inadequately informed about the matters discussed in your petition and the other petitions filed by representatives of the petroleum industry. We need more information if we are to consider appropriately the questions which have been raised. The Commission has some information about the petroleum industry but the size and complexity of the petroleum industry make it difficult for us to understand some things brought to our attention. For this reason I suggested to the Commission that it provide the representatives of the great petroleum industry with the opportunity of presenting to the Commission additional information about the industry and about its problems.

In response to those suggestions made by me and by others, the Federal Trade Commission took action. It did not initiate a Trade Regulation Rule proceeding, but it did serve notice that it would undertake a broad

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have filed with us. We who are members of the Federal Trade Commission need more complete and authoritative information about the conditions and practices which, we are informed, exist in the petroleum industry. To what better sources could we look for such information than the businessmen who are responsible for the conduct of the great petroleum industry in the United States?

In closing, may I emphasize that the over-all purpose of this type of inquiry is to assist the Commission in the discharge of its duties under the broad powers of the Federal Trade Commission Act.

At this point, of course, the Commission is not committed to the next course of action. The Commission's present interest in the competitive practices about which complaint has been made is prospective rather than retrospective, and it views its role in the hearing to be that of a fact-finder rather than that of the prosecutor.

I take this opportunity to thank you again for inviting me to address you on this important task which the Commission has undertaken. You may be sure that the Commission shares your concern over the problems which you and other industry representatives have brought to its attention. We anticipate that considerable attention will

be focused in the course of the Washington hearings on competitive problems such as those which you have told us exist in your area. In the event that the Commission should determine to hold additional hearings outside of Washington, D.C., you may be assured that careful consideration will be given to the scheduling of such hearings in this section of the country.