Dissenting Statement of Christine S. Wilson
Notice of Proposed Rulemaking: Energy Labeling Rule
December 10, 2018

I dissent from the Commission's decision to issue a Federal Register Notice seeking comment on the proposed changes to the Energy Labeling Rule. I appreciate that staff undertook this Rule review to improve its organization and clarity. Moreover, I understand that the Commission is required by statute to issue a rule governing the energy labeling of appliances.[1] I question, however, whether it is necessary for the Rule to prescribe the weight of the paper (58 pounds per 500 sheets) a manufacturer must use when printing the EnergyGuide label and the minimum peel capacity of the adhesive it must use to affix the label to the appliance. I believe this Commission should review its roster of rules with a deregulatory mindset. Consequently, the Commission should use this opportunity to rethink its approach to the scope and detail of this Rule's requirements.

Freeing businesses from unnecessarily prescriptive requirements benefits consumers. Airlines are one oft-quoted example. In the late 1970s, Alfred E. Kahn was appointed to run the Civil Aeronautics Board, which at that time regulated both price and non-price aspects of competition, including airline routes, fares, and schedules. Regulations even went so far as to specify the size of sandwiches served in flight.[2] Soon after taking office, Kahn recommended disbanding the agency, and Congress agreed.[3] The changes were dramatic: inflation-adjusted round-trip airfares roughly halved over the next 30 years.[4] On some routes, prices fell even further. For example, the minimum inflation-adjusted price an airline could charge between New York and Los Angeles was $1,442 in 1974; consumers now routinely pay less than $300.[5]

Although deregulating energy labeling pales in comparison to Kahn's comprehensive deregulation of the airline industry, the same principle – to leave firms room to experiment within the bounds set by applicable law – applies here. For example, a manufacturer with particularly impressive energy conservation statistics might wish to

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[1] Energy Policy and Conservation Act, 42 U.S.C. 6295.

[2] Interview with Alfred E. Kahn, Professor Emeritus of Economics, Cornell University, available at https://www.pbs.org/fmc/interviews/kahn.htm ("Since the airlines could not compete in price, they competed in quality. . . . Instead of competing on the meals that they gave and free in-flight entertainment, under regulation, internationally, that was prohibited, because that was another kind of competition. So they actually regulated the size of sandwiches in the international routes.").

[3] The CAB's micromanagement of airlines' operations – up to and including sandwich sizes – led then-CAB Chairman Kahn, later the "Father of Deregulation," to ask "Is this what my mother raised me to do?" See HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970, at 321 (2015) (providing quote without attribution); see also Nancy L. Rose, In Remembrance of Alfred E. Kahn: Fred Kahn's Impact on Deregulation and Regulatory Reform, 102 Am. Econ. Rev. Papers & Proceedings 376 (2012).

[4] See, e.g., Derek Thompson, How Airline Ticket Prices Fell 50% in 30 Years (and Why Nobody Noticed), The Atlantic, Feb. 28, 2013, https://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/

[5] Id.

trumpet that achievement with a larger and more detailed graphic. A manufacturer with less impressive statistics must of course satisfy its baseline labeling obligations. Surely, we as a Commission can provide guidance on labeling requirements without dictating minutia involving the type of paper and adhesive employed.

In short, I support fulfilling the statutory mandate that Congress has imposed, but cannot vote to issue the Rule in its present form. As it stands, the Rule is laden with many additional commandments that go far beyond what is necessary to fulfill our obligation under the relevant statute. Although the Commission long ago abandoned some of the most egregious instances of invasive regulatory zeal that earned it the sobriquet of the "second most powerful legislature in Washington,"[6] forswearing new mistakes is not enough. We must also revisit and pare back existing regulatory excesses, including some of the requirements contained in this rule.

[6] See, e.g., J. Howard Beales III & Timothy J. Muris, FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?, 83 Geo. Wash. L. Rev. 2157, 2159 (2015) (quoting Jean Carper, The Backlash at the FTC, Wash. Post, Feb. 6, 1977, at C1).