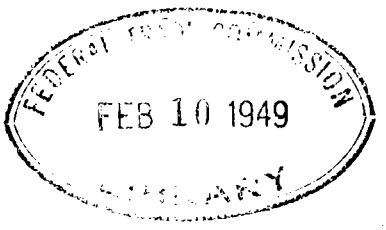
Statement of

EWIN L. DAVIS
COMMISSIONER, FEDERAL TRADE COMMISSION

Prepared for Delivery Before

SENATE SUBCOMMITTEE ON TRADE POLICIES

Monday, January 24, 1949



STATEMENT OF COMMISSIONER EWIN L. DAVIS

Mr. Chairman and Gentlemen of the Subcommittee, I am appearing before you today in response to an invitation from the Chairman. I am glad at any time to discuss with your Committee or the members thereof any pertinent questions relative to the Federal Trade Commission or its enforcement of the Acts of Congress in respect to those matters over which the Commission has jurisdiction.

In order that the members of the Committe may be informed as to my background and experience I shall state for the record that after practicing law in my home State of Tennessee I served as Judge of the Seventh Judicial Circuit of Tennessee for eight years. I later was a member of the House of epresentatives of the Congress for fourteen years and served for two years as Chairman of the House Committee on Merchant Marine, Radio, and Fisheries. I have been a member of the Federal Trade Commission for almost sixteen years.

I am confident that all the members of the Committee will agree that our political and economic systems are based on the premise of a competitive economy which of necessity is based on competitive pricing of commodities or services. To state it simply the primary purpose of the Antitrust laws was and is to provide a system of regulation by Government so that a buyer and purchaser alike may have the benefits of competitive pricing. This system of regulation to be effective must be constantly nourished by an awareness of the public interest and changing economic conditions by those charged with enforcement of the Antitrust laws. The members of the Federal Trade Commission must not view the problems of enforcement solely in the light of the special interests of any geographic or economic group, large or small. The Antitrust laws are general regulatory statutes for the benefit and protection of all and not for the special benefit of particular groups. The measure of the success of the Antitrust laws is the extent of their contribution to the public interest and the general welfare. In my opinion that contribution has been substantial.

Since the enactment by the Congress of the Sherman Act in 1890, with only one dissenting vote, there have been recurring discussions as to the necessity of amending the Antitrust laws. Except for certain exemptions as to specific groups, the considered judgment of various Congresses however has been that the Antitrust laws as generally applied should be strengthened - not weakened. For illustration, the Federal Trade Commission and Clayton Acts were passed in 1914 and the Robinson-Patman Act in 1936. Notwithstanding the enactment of these laws, the tendencies toward monopolies in business have increased due mainly to certain loopholes in these laws and to the shortage of funds for enforcement. The Federal Trade Commission has devoted its best efforts with the resources and tools at its command to the fostering of competition in our economy and to the prevention of monopoly and other restraints of trade. Because of its limited personnel and funds, the Commission might be criticised by adversely affected parties for not proceeding against all violations of the law which it administers. However, any criticism that the Commission has proceeded too far in too many cases is to say the least not a realistic view of the true situation at this time.

I recognize of course that after the decision in the Cement Case (F.T.C. vs. Cement Institute, et al, 333 U.S. 683) last April, widespread misapprehensions developed as to the implications of that decision and of other recent decisions. Many businessmen were sincerely confused and their confusion was intensified by the fact that some interests who were directly affected by those decisions were advocating modification of the Antitrust laws. However, this confusion has already begun to abate, and if Congress should determine that the laws are not to be changed at this time, much of the confusion which remains will in my judgment disappear. In testimony before this Subcommittee at the last session of Congress four members of the Commission indicated that they regard the basing point cases as merely aspects of the Commission's frontal attack upon price-fixing conspiracies and devices which eliminate competition. On October 12, 1948, the majority of the Commission released to the public a policy statement addressed to its staff in which the legal implications of geographic pricing practices were discussed at length. On January 12 of this year, less than two weeks ago, the majority of the Commission approved and made public a letter by its Secretary which contains answers to various questions submitted by the Chamber of Commerce of the State of New York as to the meaning and implications of the above described October 12 statement. I believe that these various statements have in large measure explained the views of the law by the majority of the Commission and have dissipated substantially the earlier confusion. If in the future it appears that any significant points are still obscure the Commission will consider issuing an additional public statement. However, there is obviously a limit beyond which the Commission should not go in issuing in its quasi-judicial capacity interpretations of the laws which it administers apart from its decisions in litigated cases. The question presented in these cases is whether or not the effects of certain pricing practices are injurious to competition. It required thousands of pages of testimony and other evidence in the Cement case to determine the facts as to the pricing policy in that industry and the effects on competition of that policy. It is for that reason that while the Commission may, when the public interest requires, make a general statement as to its interpretation of the law, it should not give ex-parte opinions on a given statement of alleged facts.

Much of the public discussion relative to the recent cases decided by the Commission has been in reference to the basing point system of pricing and the resulting practice of freight absorption by the concerns parties to that system. The Commission acting pursuant to section 5 of the Federal Trade Commission Act has challenged basing point systems when these systems have been used by groups in an industry to establish identical prices at each point of delivery. These are just another and perhaps more complex variety of the familiar collusive price fixing cases. They constitute violations of the Sherman Act as well as the Federal Trade Commission Act. In these cases the basing point system was an instrumentality used by concerns to fix prices. When the Commission challenged the fixing of prices by means of the basing point system it did not necessarily challenge the use of the basing point method of pricing. The Commission has not in a single case challenged the use of the basing point method of pricing per se separate and apart from collusion. The Commission has not challenged freight absorption per se. The Commission has not required F.O.B. mill pricing. The Commission has not challenged the legality of the use of uniform delivered prices by an individual concern.

It should be emphasized that the Commission does not see a violation of the law in every basing point pricing case which comes before it. Positive and irrefutable proof of this is contained in the fact that the Commission has closed without prejudice matters under consideration in which the facts revealed unmistakably the existence of basing point pricing which, however, was not accompanied by evidence of collusion in violation of the Federal Trade Commission Act or competitively injurious discrimination in violation of the Clayton Act.

For example, in two specific cases the Commission investigated charges that a basing point type of pricing was being followed and that it resulted in a violation of the law. In these cases the facts after investigation revealed unmistakably that a basing point method of pricing actually was being followed. Investigation also however failed to disclose sufficient evidences of collusion or discrimination to constitute violations of the law. Consequently, the Commission closed without prejudice each of these cases and no complaint was issued despite, and I repeat despite, the fact that basing point systems of pricing were followed. These cases reveal that the mere existence of basing point pricing in and of itself does not constitute in the opinion of the Commission a violation of any of the laws administered by the Federal Trade Commission.

The Commission has not required any concern to use any particular method or methods of pricing. Each seller may choose his own method of pricing provided that he does not conspire or agree with his competitors and provided that he does not discriminate in price in the manner prohibited by law and thereby injure competition or tend to create a monopoly. A seller may absorb freight or absorb part of his manufacturing costs or any other costs in order to in good faith meet an equally low price of a competitor. This price however must be a competitive price, not one fixed by agreement, express or implied, from all of the facts, and it must not injure or prevent competition among his customers. The United States Circuit Court of Appeals for the Seventh Circuit stated in its opinion (Milk and Ice Cream Can Institute vs. F.T.C. 152 F 2nd 478, 481) upholding the Commission's order against respondents using a so-called "freight equalization" system as follows:

> "It is argued, perhaps correctly, that such a freight system had long been employed by industry so that members thereof might deliver their product at the same price. In fact, the Commission recognizes that this freight equalization plan was used by petitioners prior to the organization of the Institute. Such being the case, the fact still remains that it was employed by petitioners for the purpose of fixing the delivered price of their product and by such use price competition was eliminated or at any rate seriously impaired. On the face of the situation, it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves. Any doubt in this respect, however, is removed by reference to the minutes of the Institute and other evidence found in the record."

The basic philosophy and dominating purpose of the Antitrust laws is to keep our commerce free from restraints of trade, and thereby to promote and foster competition in industry.

The present law is purposely general and flexible. Conditions change. New practices arise.

When the Clayton and Sherman Acts and the Federal Trade Commission Act were enacted, the single unit enterprise was typical of industry in the United States. When I was elected to Congress in 1918 this condition prevailed.

During the fourteen years I served in Congress and the almost sixteen years I have been a member of the Federal Trade Commission I have watched and applauded the productive growth of industry. No man appreciates more than I the Herculean task performed by industry in making this country the Arsenal of Democracy.

I have lived long in intimate contact with these matters. I have observed sometimes with apprehension the giant, complex, ramified enterprise structures which now permeate much of our industrial system. To my way of thinking collusive devices, such as those which have been frequently found to exist in basing point systems and other restraints of trade, have as their practical effect the achievement and perpetuation of control over prices by monopolistic corporations.

I yield to no one in my desire to see a free competitive economy in the United States survive and to preserve to industry and our people the prosperity and freedom we have achieved under the capitalistic system. Free competitive enterprise is the foundation of our capitalistic system. Whatever weakens that foundation weakens the lifeblood of industry and the capitalistic system.

In a free competitive atmosphere new enterprises arise, grow and expand production, compete and better their commodities, invent new commodities, and reduce prices. Both management and labor prosper.

Since the establishment of the Federal Trade Commission it has sought Court interpretation of points of law in disagreement. The Federal Trade Commission is an independent executive agency set up by the Congress to administer the Federal Trade Commission Act and portions of the Clayton Act. It is the duty of the Commission to seek the interpretation of important legal points at issue and to promote and foster competition in industry.

Mr. Chairman and Gentlemen of the Subcommittee it is my considered opinion that amendatory legislation along the line of S. 236 is neither necessary nor desirable.

The Council of Economic Advisers in its Third Annual Report to the President in December, 1948, in discussing competitive enterprise and the administered price problem stated in part as follows:

> "The extensive consideration which has been given by official commissions and by congressional committees to the problems resulting from the increasing size of business units has not yet led to any clear judgment about the proper national policy.

* * * *

"Study of the problem must continue, toward the end of creating competitive conditions throughout industry and thereby removing the need for those positive controls which alone could protect the public if it cannot be protected by restored competition.

* * * *

"As we give further thought to the subject, the business world itself has the opportunity to influence the final decision. Restraint in price policy, courage in expanding facilities to meet the expanding needs of the people, and the display of social responsibility in supporting programs of stabilization in the interest of maximum production and employment, will go far toward adjusting the relations of business and government. This may offer a better solution of the administered-price problem than can be found in legislation."

I am in accord with these views of the Council.

Questions as to what manner and to what extent S. 236 modifies and amends existing law present highly technical legal problems of interpretation. The Committee has requested the Commission to give the Committee the benefit of the views of the Commission on this subject. This study is now being made by the Commission and its staff and the results thereof will shortly be transmitted to the Committee. I am not prepared today to discuss the specific provisions of this bill. Two very competent and highly skilled attorneys on the staff of the Commission who have wide experience in these matters and who have participated in the formulation of the policy of the majority of the Commission as to geographic pricing questions have been requested to testify before your Committee tomorrow. I refer to Mr. Joseph Sheehy and Mr. Robert Dawkins. These two attorneys have made a careful study of S. 236 and I commend their testimony to your attention and consideration.

In making the above remarks I am speaking only for myself as an individual member of the Federal Trade Commission.

I thank the Chairman and Gentlemen of the Committee for your invitation to appear before you.