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INDEPENDENT BUSINESS AND PUBLIC POLICY

Statement by

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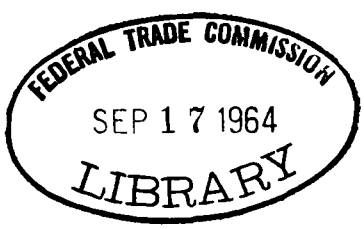
Member of the Federal Trade Commission

Before the

18th Annual Membership Meeting

of the

TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION



Fort Worth, Texas
September 15, 1964

INDEPENDENT BUSINESS AND PUBLIC POLICY

It is a pleasure to visit with you on this occasion of TIPRO'S 18th Annual Membership Meeting and to discuss with you certain aspects of independent business and public policy. That is especially true since you are representatives of independent oil producers in this great oil producing State. Pleasure is an inevitable product of an occasion such as this when it reflects, as this one does, the fine efforts of your efficient officials who have been responsible for arranging this meeting.

The subject your officials assigned to me to discuss with you, namely, Independent Business and Public Policy, added to my interest in this meeting of yours. As you know, for a number of years I have been concerned with work at the Federal Trade Commission and on the staff of the Congress of the United States. I served for quite a period of time as General Counsel to an investigating committee of the House of Representatives where an effort was directed to the problems of independent business. In that connection I worked with many able and dedicated men who devoted time and effort toward the development of a public policy with respect to independent business. Some expressions of that public policy were

incorporated in the Small Business Act of July 18, 1958 (Public Law 85-536). The first part of that legislation contains a public policy statement of the Congress regarding independent business. It is in these words:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of the Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.

This is the general policy statement of Congress regarding small business. But more specifically, the Congress went on to say that in various ways:

> It is the declared policy of Congress that the Government should aid, counsel, assist and protect, insofar as possible, the interests of small-business concerns in order to preserve free competitive enterprise . . .

The Congress, in defining the kind of business enterprise to which that public policy applies declared that it -

> . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.

Thus it is seen that Congress declared that our economic system of private enterprise is dependent upon the

preservation of independent businesses in large numbers. This is because a large number of competitors in any line of business would be expected to provide free competition. It was considered that such a system of a large number of independent business firms would enhance economic freedom for the individual persons involved. Why was this considered so important? The answer is simple: All through the history of business enterprise, it has been accepted as self-evident that personal and political liberties thrive in those areas where economic freedom is protected and preserved. Indeed, the objective underlying all of our Federal antimonopoly legislation has been the preservation of competition and economic freedom. It became abundantly clear that the maintenance of political freedom could be assured only through the maintenance of economic freedom.

Through the years since the Sherman Antitrust Act was approved in 1890, much has been done to implement this public policy for the preservation of competition and economic freedom. Among the measures taken was the establishment of the Federal Trade Commission through the enactment of the Federal Trade Commission Act and the Clayton Act in 1914. The very purpose of these measures was to provide a basis for action halting things and acts "against

public policy because of their dangerous tendency unduly to hinder competition or create monopoly."

In the fifty years since its establishment in 1914, the Federal Trade Commission has done much to help preserve our American economic system of private enterprise through the maintenance of free and fair competition. It has labored to remove shackles and hindrances from free and fair competition. We are proud of its accomplishments over these fifty years of its work. But we realize that its work is unfinished. Problems continually arise but we are continuing in our efforts to solve them in the interests of business, the consumers and the public generally.

Among the problems currently before us are those presented by your representatives in March and April of this year when they filed petitions with the Federal Trade Commission for the promulgation of a trade regulation rule applicable to the marketing of petroleum products.

What is a trade regulation rule? A trade regulation rule is provided for in a new procedure adopted and made effective by the Federal Trade Commission in June of 1962. It provides for the promulgation of rules and regulations applicable to unlawful trade practices. These rules and regulations are somewhat different in nature and in effect from the Trade Practice Conference Rules heretofore promulgated by the Commission. However, they do not

replace the Trade Practice Conference Program the Commission has had in effect for many years.

While Trade Practice Conference Rules have served and will continue to serve a useful purpose, something more was needed.

An abundance of information had developed showing that in a number of very important areas industrywide practices adverse to the trade generally, and apparently inconsistent with law, have been continued despite full publicity given to interpretations by the Commission through its Trade Practice Rules and guides. Thus, it has been made clear that what has been needed is some supplementary mechanism to enforce, on an industrywide basis, a compliance with the law against unwholesome and destructive trade practices. This is particularly true in those instances where the use of the unfair trade practice involves large numbers, perhaps hundreds, in a given industry. Obviously, it is impractical and perhaps unfair to proceed against one or two in such litigation and leave the others free to continue the questionable practices. It is against that backdrop that the Federal Trade Commission adopted the new rule making process effective June 1, 1962.

Under this new procedure the Commission will promulgate 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 may rely upon such rule, provided that the respondent shall have been given a fair hearing on the legality and propriety of applying the rule to the issue in his particular case.

Of course before the Commission would promulgate and issue rules of this kind under its new rule making process, it will give proper notice and afford 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 therefor filed by any interested party. Following notice and hearings, the Commission, after due consideration of all relevant matters of fact, law, policy and discretion, would proceed to promulgate and issue the rule with a brief general statement of its

basis and purpose. It would not become effective until after it was 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 procedures provide 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.

It can be seen quite readily that in taking these steps in a situation the Commission not only would be providing relief from unfair and damaging trade practices but also would be providing businessmen with guides to avoid the pitfalls of law violation.

In taking these forward steps the Federal Trade Commission has moved to fulfill one of the most important roles for which it was created. President Wilson, who had asked the Congress to create the Commission, made it clear that he wanted the agency to assist businessmen in securing a better understanding of their responsibility under the law.

On September 2, 1916, in his speech of acceptance on renomination to the Presidency, Wilson restated his view of

the function of the Commission in the following terms:

> . . . a Trade Commission has been created with powers of guidance and accomodation which have relieved business men of unfounded fears and set them upon the road of hopeful and confident enterprise.

On March 11, 1964, Mid-Continent Independent Refiners Association (MIRA) filed with the Commission a "Petition for a Trade Regulation Rule for the Marketing of Gasoline," wherein the Federal Trade Commission was asked to promulgate a Trade Regulation Rule that would codify the price discrimination proscriptions of the Robinson-Patman Act as they apply to the marketing of refined gasoline. MIRA is described as "an association of independent refiners operating primarily in the mid-continent region."

Their petition asserts that the elimination of unfair marketing practices would substantially improve the competitive opportunities of the independents and the proposed rule is aimed at this end. The petition takes the position that even though the proposed rule merely restates existing law, the promulgation of definitive guide lines in the form of a rule would provide all industry members with information about the law applicable to undesirable and damaging practices. Furthermore, it was stated that adoption of such a rule by the Commission would simplify enforcement of the law against any recalcitrant industry members.

In describing the problem said to be at the basis of the proposed rule, the petition focuses attention upon two discriminatory pricing practices alleged to be disruptive of sound business procedures in the petroleum industry. The first is the sale by major refiners of excess gasoline to so-called "unbranded" or independent dealers at prices substantially below the prices paid by regularly branded outlets of these majors. It was alleged that the "unbranded" or independent dealer, in order to increase volume, cuts his price to reflect the lower price that he pays for this gasoline; the major brand suppliers then must cut their prices to help their branded dealers compete. Thus, the spiral of a price war is set in motion.

The petition states that even though the gasoline sold to the branded and unbranded customers is identical within the meaning of the Robinson-Patman Act, the unbranded dealers pay lower prices for it because of the refiners' belief that they will not resell it under the refiners' brand name.

MIRA'S petition also attacks a second pricing practice allegedly engaged in by some major companies "to expand the market share of the retail market by eliminating the historic differential between major and non-major brands."

Texas Independent Producers and Royalty Owners Association

filed with the Commission a "Joinder in Petition for a Trade Regulation Rule for the Marketing of Gasoline" dated April 15, 1964. In that petition support is expressed for the petition of MIRA seeking the initiation of proceedings by the Commission directed toward the promulgation of a Trade Regulation Rule dealing with the marketing of refined gasoline. This is predicated on the conviction that such proceedings are necessary "to preserve the free enterprise system and prevent the further growth of monopoly, to promote fair competition, and to end unlawful practice designed to destroy competition." This petition expresses concern about the unjustified and harmful crude price cuts being posted by leading integrated companies and which, assertedly, are related to the chaotic retail gasoline marketing prices.

The petition of TIPRO traces the history of the purchase of crude oil in the United States under the type of contracts known as "division orders" which call for payment on "posted prices." Under this system, the petition states that most independent producers are captives of their purchasers, who in the usual situation own the only pipelines serving their fields. It is alleged that the result is such that the independent producer usually must sell to this purchaser-pipeline combination or not sell at all.

The petition also states that the major integrated companies are themselves producers of vast amounts of domestic crude oil, and the publicly announced goal of many of them is to become self-sufficient in crude oil supplies.

The petition asserted, therefore, that independent producers would benefit if the trade regulation rule procedure were utilized and a rule promulgated to end destructive gasoline marketing practices. Also, it was asserted in the petition that if that were done, it would have a direct bearing on crude oil prices beneficial to independent producers, in that it would prohibit destructive competitive practices.

Following the filing of those petitions, a third petition was filed by the National Congress of Petroleum Retailers, Inc. In general, this latter petition was directed toward the same general problem. It alleged the existence of discriminatory practices with injuries to competition.

The vastness and importance of the petroleum industry require that we proceed carefully in our consideration of the matters involved in these petitions. The industry and the public cannot afford for us to make a mistake in this matter. According to the American Petroleum Institute's 1963 edition of "Petroleum Facts and Figures", more than 66 billion gallons of gasoline were consumed in this country in 1962. Then only 79 million motor

vehicles were registered. That registration has now passed the total of 82 million. Billions of dollars are being collected in gasoline taxes. These taxes are increasing to an amazing total annually. These facts and figures point up the vastness and importance of any problem involving the petroleum industry. Shown is the necessity for us to be fairly correct in our decision for the solution of any problem affecting the petroleum industry. Indeed, it is clear that this is so important a matter that we should not undertake to act on it without being fully informed.

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 example, it has been noted that the wholesale price index (1957-1959 = 100) for crude petroleum in 1964 has dropped to its lowest point in approximately 8 years, namely 96.8. This is to be con-

trasted with the consumer price index for all items, which has risen from 100.7 in 1958 to 105.4 in 1962.

Obviously you, as representatives of producers of petroleum, are as much concerned about what those facts portend as are the producers of agricultural products whose incomes have dropped while the prices of things they buy have increased.

Some have raised the question as to whether the unfavorable showing in the crude petroleum price index when contrasted with the consumer price index on all items has any relation to the problems and practices presented by the petitions filed with the Federal Trade Commission by you and other representatives of the petroleum industry. We at the Commission do not have adequate information to supply an answer to any such question. Answers which have been provided by others have been indefinite.

For these reasons I have 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. This would be a response to the petitions which have been filed by your representatives and other representatives of the petroleum industry.

You are assured that I, as a member of the Federal Trade Commission, will continue urging my colleagues, members of the Commission, to give these petitions appropriate consideration. Also, it is my view that "appropriate consideration" should include the holding of a public hearing which would provide representatives of the petroleum industry with the opportunity to appear before and present to the Federal Trade Commission information about the conditions and practices said to exist. It is my view that your great petroleum industry, our economy in general, and the public would benefit from action by the Federal Trade Commission in providing such a public hearing on the matters presented by the petitions which you and other representatives of the petroleum industry have filed with us. We who are members of the Federal Trade Commission need more complete and authoritative information about the conditions and practices said to exist in the petroleum industry. To what better sources could we look for such information than the business men who are responsible for the conduct of the great petroleum industry in the United States?

I thank you.