STATEMENT BY

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ON

# SOME CRITERIA FOR APPLYING INDUSTRY-WIDE ENFORCEMENT MEASURES UNDER THE ROBINSON-PATMAN ACT

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## SOME CRITERIA FOR APPLYING INDUSTRY-WIDE ENFORCEMENT MEASURES UNDER THE ROBINSON-PATMAN ACT

The question of where and how industry-wide enforcement measures should be applied under the Robinson-Patman Act 1/ is one of the most difficult issues currently facing the Commission. It has been argued, and possibly with some logic, that to be completely fair the Commission should proceed simultaneously against all industry members suspected of violating the price discrimination act. Obviously, this is not possible in all cases where litigation is employed simply because of the Commission's restricted budgetary and manpower resources. The Commission must weigh the desirability of proceeding against all law violators simultaneously in the light of its limited resources, taking into consideration the need for proceeding at least against obvious abuses on the part of the more prominent members of the industry concerned. The solution of where the balance is to be placed is not an easy one. In fact, this dilemma brings to mind Mr. Justice Frankfurter's aphorism in another context that "A confident answer cannot be given; some answer must be given." 2/

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1/ 49 Stat. 1526 (1936); 15 U.S.C. 5 (1965).

2/ Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61, 78 (1953).

The Commission has considerable discretion in this area, as the Seventh Circuit remarked recently:

> ". . . The Commission need not hold an order against one company in abeyance until it proceeds similarly against all others. Otherwise, Commission orders would be forever pending and unlawful practices rarely, if ever, corrected. . . ." 3/

The very latitude given the Commission in this connection, however, makes it mandatory that such discretion be exercised wisely.

Clearly, the variables facing the Commission in determining whether a situation is ripe for industry-wide enforcement measures include among their number the structure of the industry, the nature of the alleged unfair trade practice, and the enforcement tools available to the Commission. Before turning to these, however, it might be helpful to set the mood, so to speak, by referring to the testimony of the Chairman before the Senate Subcommittee of the Committee on Appropriations in the spring of this year. A few references to that testimony will, I am sure, make it clear that the FTC now has the will and the desire to turn to industry-wide enforcement measures as opposed to individual case-by-case enforcement through litigation whenever possible. For example, the Chairman,

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3/ United Biscuit Company of America v. Federal Trade Commission, __ F.2d __ (7th Cir. 1965).

speaking for the Commission, advised that it has now "turned a difficult corner in veering from patternless hit-and-miss law enforcement to a guidance role that invites, encourages, and backstops efforts of American business to police itself," 4/ and that over a three-year period this agency has attempted to change its emphasis in enforcement procedures by minimizing reliance on the case-by-case approach. 5/ Significantly, the enforcement bureaus have been instructed that they are no longer to report to the Commission recommendations on single complaints without further advising as to whether the alleged unfair practice is general in the industry. If the alleged law violation is widespread, then the staff is expected to recommend some program and plan for dealing with the industry-wide nature of the problem. 6/

Before dealing with industry-wide discriminatory practices, the Commission, of course, must be in a position to ascertain the extent of the alleged violation of law. Accordingly, the manner in which Robinson-Patman Act proceedings are initiated at the Commission deserves some consideration. Price discriminations are generally not a matter of public record; rather, they are hidden from view. Under the Robinson-Patman

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4/ Testimony, Paul Rand Dixon, Chairman, Federal Trade Commission, Hearings, Subcommittee of the Committee on Appropriations, United States Senate, Independent Offices Appropriations 1966, 89th Cong., 1st Sess. (1965), p. 323.

5/ Id. at 827.

6/ Id. at 828.

Act, unlike the merger statute, the staff is generally not in a position to spot troublesome areas merely from a reading of available publications. Usually, the first indication of illegal price discriminations comes to the Commission by way of complaint from aggrieved industry members. The result in the past had initially been issuance of complaint with a view toward putting an end to the individual violation found. Frequently the investigation directed to an individual respondent or group of respondents developed other cases and in that manner many proceedings over a period of time developed industry-wide impact. Of necessity many of the proceedings were not undertaken concurrently, giving rise to a cry of unfairness. In view of current policy, the Commission, in the future, will emphasize industry-wide enforcement proceedings more than in the past. This dictates it be furnished with more complete economic data with respect to the pricing practices of those industries under consideration in order to put administration of the Act on a more rational basis. Effective industry-wide proceedings under the Robinson-Patman Act require planning. Planning, which is essentially another label for research, is, of course, prerequisite to the effective discharge of the regulatory duties of any administrative agency. 7/

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7/ See Friendly, The Federal Administrative Agencies - The Need For Better Definition Of Standards, Harv. Univ. Pr. (1962), p. 162, citing Oppenheim, The National Transportation Policy And Intercarrier Competitive Rates (1945), pp. 123-124.

In short, it may be necessary to further integrate the activities of the Commission's professional legal and economic staffs in order to facilitate industry-wide proceedings under the Robinson-Patman Act and in other areas. In some proceedings this has already occurred and I hope to see more of it in the future. I think the administration of the Robinson-Patman Act deserves no less. While the structure of an industry will undoubtedly influence competitive behavior, unfair practices such as discriminatory pricing will inevitably influence both the structure of an industry and the viability of competition within that industry. For that reason, if no other, the Commission should actively seek out the areas where broad-scale rule making or adjudicatory proceedings will have the widest impact.

Before turning to current and recent industry-wide proceedings under the Robinson-Patman Act and possible future developments along these lines, it may be in order to briefly delineate the investigative, policy making and law enforcement procedures available to the Commission. Industry-wide proceedings under the Robinson-Patman Act and the other statutes entrusted to the Commission for administration may come under three broad categories, namely, investigation or fact finding, rule making, and adjudication. Basic to

everything the Commission does, of course, is fact finding. It is the prerequisite for determining whether the Commission should proceed at all and, if so, whether the problems posed are best resolved by rule making, litigation or informal settlement.

In those instances where a preliminary investigation shows that discriminatory practices are widespread, the Commission, in order to effectively investigate the particular industry on a broad scale without dissipating its investigative resources, may require the industry members concerned to file Special Reports under Section 6(b) of the Federal Trade Commission Act 8/ with respect to the alleged violations of law.

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8/ Section 6(b) requires:

> "To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission." 38 Stat. 721 (1914); 15 U.S.C.A. Sec. 46 (1965).

Where a broad-scale investigation is to be conducted of an industry composed of many smaller units, conservation of the Commission's investigative resources almost makes the utilization of the Section 6(b) process mandatory. In fact, the Special Reports lend themselves particularly to the investigation of alleged Robinson-Patman Act violations. Especially notable in the exercise of the Commission's powers under this statute have been the Commission's investigation, relating to Section 2(c) of the Robinson-Patman Act, in the citrus fruit industry 9/ and relating to Section 2(d) of the

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9/ In April 1962 orders to file special reports were sent to approximately 92 fresh fruit grower-shippers in Florida and some 32 in Arizona and California. Information supplied by the Department of Agriculture indicated that the 124 order recipients shipped approximately 95% of the fruit consumed fresh in the nation.

The reports provided enough information for the filing of some 84 grower-shipper complaints. In each case the respondent executed a consent agreement. Their acquiescence apparently was brought about by the fact that illegal brokerage payments had further reduced profit margins which had declined sharply because of rising labor costs. The growers could not have agreed among themselves to cease making such payments, because of Sherman Act implications.

The special reports also furnished enough information regarding the receipt of brokerage payments by buyers to enable the issuance of some 40 buyers' complaints. Most of those matters were also resolved by consent.

statute in the wearing apparel industry, 10/ involving several hundred respondents. These proceedings, which laid the foundation for numerous cease and desist orders in these

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10/ The Commission opinion in Abby-Kent Co., et al., F.T.C. Docket C-328, et al. (1965), pp. 1,2, gives the following statistics with respect to the Section 6(b) investigation pursued in that industry:

> "In early 1961, following the receipt of many complaints from small apparel retailers, small manufacturers and apparel salesmen, the Commission addressed Orders to File Special Reports to some 232 of the nation's leading buying offices and chain department and specialty store complexes. The orders required the buyers to submit, among other things, the names of apparel suppliers who had granted advertising and promotional allowances during a given twelve-month period, together with the amounts and purposes of the payments. . . .
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> "A tabular sheet for each supplier was prepared from the buyers' Special Reports. They indicated the customers each favored and the amounts paid. In February 1962 the Commission unanimously decided to address Orders to File Special Reports to the 250 sellers who granted the largest amounts of allowances to the greatest number of buyers. Later that year when it was discovered that certain significant sellers had been omitted, some 60 additional orders were transmitted.
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> "A majority of the Special Reports filed provided sufficient documentation to give the Commission reason to believe that violations of Section 2(d) of the amended Clayton Act existed. . . ."

industries, are classic examples of the Commission's use of the power to insure maximum investigative coverage in the case of a particular industry while insuring that the Commission's investigative manpower would not become bogged down in that proceeding but remain available for other projects. 11/

The liberal use of the rule making powers of this Agency, of course, at first glance seems to be the ideal vehicle for securing industry-wide compliance with the law. Rule making "is the best procedure we have for allowing large numbers of parties to express what they want with respect to law or policy that will affect them". 12/ It is undoubtedly the ideal proceeding for dealing with the conflict between important industry segments over the interpretation of the law.

The Commission's most significant procedures in the rule making category are the trade practice and trade regulation

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11/ Further examples of the Commission's effort to utilize new methods in order to insure maximum effect from its limited resources in industry-wide proceedings have been fact finding hearings at which industry members appear before the full Commission, as, for example, in the gasoline hearings. See infra.

12/ Davis, Administrative Law, § 6.13 (1965).

rules. 13/ Trade practice rules are designed to eliminate and prevent unlawful trade practices on a voluntary industry-wide basis 14/ and have been utilized by the Commission since at least 1919.15/ These rules, generally promulgated at the request of the particular industry, seek to interpret and inform businessmen of the legal requirements applicable to certain practices widespread in the industry and to provide a basis for voluntary and simultaneous abandonment of illegal conduct by industry members.

The newest rule making procedure at the Commission, and possibly the most promising vehicle for securing industry-wide compliance with the law, is the trade regulation rule

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13/ Allied to the FTC's rule making procedures are its administrative interpretations of the law, entitled Guides. Of the Guides currently in effect, only one has application to the Robinson-Patman Act, namely, the "Guides for Advertising Allowances and Other Merchandise Payments", adopted May 19, 1960, 1 CCH Trade Reg. Rep. ¶ 3980 (1965). These Guides, however, do not focus on the specific problems of a particular industry. As a result, they do not have the same potential for achieving compliance with the law on an industry-wide basis as do trade practice or trade regulation rules drafted to deal with concrete problems.

14/ An example of one of the more exhaustive recent attempts to codify the requirements of the Robinson-Patman Act for the benefit of an entire industry is the Trade Practice Rules for the Phonograph Records Industry, 16 C.F.R. 67 (1964).

15/ For a discussion of the early development of the trade practice conference procedure, see Blaisdell, The Federal Trade Commission, Colum. Univ. Pr. (1932), p. 92.

procedure adopted in 1962. In the case of both the trade regulation rule and trade practice conference procedures, the Commission's rules of practice make ample provision for affording the interested parties an opportunity to be heard prior to promulgation of the rule. 16/

The significant difference between the two types of rule making procedures, which are both expressions of Commission policy, is simply that in the case of the trade regulation rule, the latter is accompanied by findings of fact. 17/ Accordingly, in an adjudicative proceeding for violation of a trade regulation rule, the Commission may rely not only upon the proposition of law or policy contained in the rule, but also

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16/ Section 1.67, Commission's Rules of Practice.

17/ The difference between trade regulation rules and trade practice conference procedures is a difference in degree. "As a practical matter, then, trade practice rules are not merely voluntary and advisory; they are, in many instances, enforceable and enforced." (Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, and Accompanying Statement of Basis and Purpose of the Rule issued June 22, 1964, p. 143.)

on the underlying factual matters determined in the rule making proceeding. 18/

The use of the rule making power in the Robinson-Patman area, however, requires particular caution on the part of the Commission. Too often in the past have rules purporting to interpret this Act in effect debased the process by merely paraphrasing the words of the statute. On the other hand, the Robinson-Patman Act, unlike the Federal Trade Commission Act, is a fairly specific statute. Accordingly, the Commission must exercise considerable care that by its interpretation of the statute it does not in effect amend the Act.

The rule making approach will not be applicable in all instances of price discrimination whether of industry-wide prevalence or not. The value of a rule on an issue in a settled area of the law is debatable. In addition, the issues to which the rule is to address itself should be fairly narrow and capable of specific definition in the context of the industry to which it is addressed. As Professor Davis has noted, the attempt to clarify a whole area through a rule or

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18/ The Commission is not obliged to prove anew disputed issues of fact in an adjudicative proceeding against those industry members allegedly violating the rule if findings on such facts had been previously made in the proceeding promulgating the rule. (Id. at 146.)

policy statement would often be foolhardy. 19/ In short, a rule purporting to deal with every conceivable problem under the Act might raise as many problems as it seeks to dispel. Accordingly, while the rule making process has a great deal to recommend it when the Commission is faced with widespread practices violative of the price discrimination act, it is a procedure which must be used with discretion.

One approach to industry-wide law enforcement through litigation may be characterized by the attempt to prosecute industry leaders or at least the most flagrant practitioners of price discrimination and to secure industry-wide compliance as a result of the example made. On the other hand, the Commission may proceed against all, or at least a majority, of the industry members involved in the alleged violation of law. The Commission has utilized both approaches and both alternatives have their disadvantages. In the first case, the Commission may be criticized for singling out certain industry members, leaving them at a disadvantage vis-a-vis their competitors, while in the second case it has sometimes been argued that the Commission is harassing business as well as forcing a price uniformity at variance with the general purpose of the antitrust laws.

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19/ Davis, supra note 12.

As in certain other periods of its development, the Commission's enforcement pattern is at present in a transitional stage. Therefore, no hard and fast rules can be laid down as to the industries or types of law violations which will be dealt with in an industry-wide fashion or the investigational or the law enforcement measures which will be applied in a particular instance. A cursory examination of three recent or current proceedings of industry-wide impact, namely, the trade practice conference rules for the fresh fruit and vegetable industry, the gasoline marketing inquiry and the so-called wearing apparel cases may, however, foreshadow future trends in Commission application of law enforcement techniques on an industry-wide basis in the price discrimination area. My discussion here, it should be noted, of course does not pretend to be an exhaustive citation of all current industry-wide proceedings relating to discriminatory pricing.

The trade practice rules for the fresh fruit and vegetable industry, promulgated April 15, 1965, 20/ are one of the more noteworthy recent examples of the Commission's exercise of its rule making power in the area of price discrimination. This rule making proceeding, interestingly, had its genesis in the investigation and subsequent adjudicatory proceedings brought in the citrus fruits industry. These, of course, resulted in numerous cease and desist orders against growers

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20/ 30 F.R. 5331 (1965).

and buyers, involving more than 100 complaints and orders. 21/ As a result, those industry members not under order and the related fresh fruit and vegetable industry both desired guidance.

Another factor compelling the citrus and fresh fruit and vegetable industries to request a trade practice conference were certain Commission decisions, namely, Flotill and Hruby, 22/ which to some extent had unsettled previous judicial construction of the "except for services rendered" proviso in Section 2(c) of the Robinson-Patman Act. This issue, among others troubling the industry, posed the question of whether buyers or their agents could be compensated for brokerage services performed by the buyer. Other important questions relating to the interpretation of Section 2(c) also were involved.

This rule making proceeding is noteworthy, passing over, for the moment, the substantive aspect, because it shows the potential of rule making for settling questions in an uncertain area of the law where important segments of the industry are at odds on the proper interpretation of a statute. 23/

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21/ E.g., Florida Citrus Exchange, 53 F.T.C. 493 (1956); Eidson Produce Co., 60 F.T.C. (1962); Exchange Distributing Co., 61 F.T.C. 1 (1962); Hruby Distributing Co., 61 F.T.C. 1437 (1962).

22/ Flotill Products, Inc., et al., Docket No. 7226 (1964); Hruby, supra note 21.

23/ On the one side of the issue, the proponents of the proposed rules, namely, the United Fresh Fruit and Vegetable

(cont'd on p. 16)

Significantly, the hearing on the proposed rules in October of 1964 was held before the full Commission. The increasing number of hearings in which the full Commission hears the views of different industry segments on unfair trade practices and the law enforcement problems facing them is, I believe, a salutary development. The Commission as a whole, as a result of such hearings, is forced to acquaint itself with the problems of the industry being regulated in a manner not possible merely from the reading of a cold record or the report of a single Commissioner or a staff member designated to hold hearings.

In many ways the fresh fruit and vegetable rules present a textbook example of the Commission's use of its rule making power to secure compliance with the law on the part of an industry constituted of many businessmen. Further, the central

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(Cont'd from p. 15)

Association and the Florida Fresh Citrus Shippers Association, among others, contended that brokerage on the basis of recent Commission decisions should not be forbidden unless no services were rendered by the other party. They argued that if services are performed by a businessman purchasing the goods, he is entitled to be recompensed and Section 2(c) does not apply. On the other side, among others, and this shows the wide impact which the rules were thought to have, was the National Association of Retail Grocers, whose interests are not limited to fresh fruits and vegetables alone, as well as the National Food Brokers Association. Both contended that permitting brokerage payments for services performed by the buyer or his agent would give powerful buyers considerable leverage, helping them to receive unearned price advantages and would in fact have the potential of jeopardizing the whole price discrimination act. In addition, a considerable number of individuals and representatives of associations in the food industry also argued on this issue pro and con.

problems dealt with, though of considerable importance, were narrow and readily defined. In short, the issues presented were of the type that lend themselves to the rule making process.

Conceivably, the most significant current industry-wide proceeding connected with Robinson-Patman Act problems is the broad inquiry into gasoline marketing announced on December 30, 1964. To my regret, the Commission, in launching this venture, coupled the inquiry with the dismissal, on administrative grounds, of those adjudicative cases in the gasoline marketing field then awaiting Commission decision. Findings of fact in those proceedings might well have given us a head-start in the current industry-wide proceeding. 24/ Nevertheless, the current inquiry is an important proceeding and I hope that its outcome will benefit both the industry and the consumers it serves.

The broad inquiry into gasoline marketing and the adjudicative cases preceding it had their genesis in the price wars recurring throughout the nation. This situation impelled the Mid-Continent Independent Refiners Association (MIRA) to petition the Commission for a trade regulation rule under the Robinson-Patman and Federal Trade Commission Acts with apparently the primary purpose of preventing major gasoline

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24/ See my dissent in Pure Oil Company, Docket No. 6640, The Texas Company, Docket No. 6898, Standard Oil Company (Indiana), Docket No. 7567, and Shell Oil Company, Docket No. 8537 (December 28, 1964).

companies from using the financial advantage derived from their integrated activities and geographic diversity for the purpose of subsidizing price discriminations and sales below cost to their independent competitors' alleged disadvantage. In effect, MIRA asks the Commission, under the Robinson-Patman Act, to embody in the rule a presumption that brand names will not affect the determination of like grade and quality in the case of gasoline. And, further, MIRA requests that the Commission promulgate a rule that it shall be prima facie evidence of injury when a territorial price discrimination results in a reduction of customer price differentials between the seller's gasoline and those gasolines normally selling at a lower price. 25/

The MIRA proposals, on the surface at least, lend themselves to an industry-wide rule making proceeding. The issues presented by the proposed rule are defined in terms of the oil or gasoline industry. Further, the proposed rule deals with sufficiently narrow issues so that if enacted it would be a meaningful guide and not an amorphous paraphrase of the generalized language of

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25/ Under the Federal Trade Commission Act MIRA requests a rule prohibiting sales below cost where the effect may be to lessen or injure competition and setting standards for computing the cost of gasoline.

the statute, which itself would later require construction. This is not to say, of course, that an evaluation of all the facts brought to light during this hearing will necessarily support the promulgation of MIRA's proposed rules.

The suggested rules at the hearing before the Commission were the subject of spirited debate on the part of industry members participating in the hearings held in May. The clash of views visibly illustrated to the Commission the varied structure of the industry and the complexities of the problems involved in regulatory efforts to resolve the problems of gasoline price wars. 26/ In short, the proceeding evidences the Commission's concern to utilize the industry-wide proceeding as a vehicle to equitably deal with the problems of industry members, ranging from the largest corporations

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26/ For the purpose of discussion here, the gasoline marketing industry may be classified as falling into three categories: first, the twenty major oil companies which are fully integrated, engaged in production of crude oil and refining and own and/or operate wholesale and retail distribution facilities; secondly, the 140 smaller integrated, partially integrated and nonintegrated independent refining companies; and, finally, 5000 companies and firms engaged in distribution at the wholesale level. (Petition for Trade Regulation Rules for Gasoline Marketing, National Congress of Petroleum Retailers, Inc., p. 4.) In addition, of course, representatives of service station operators, whose number is legion, also testified.

in the nation to the service station operator in your own neighborhood. If nothing else, it shows a willingness to engage in industry-wide proceedings on a very ambitious scale, indeed.

As in other industry-wide proceedings dealing with the price discrimination problem, the Commission is again faced with the issue of whether an industry-wide regulatory effort might have the opposite result of that intended. Certainly, one of the crucial arguments in opposition to the rules proposed by MIRA seems to be the objection raised in almost all broad-scale proceedings dealing with the Robinson-Patman Act--that they would have the tendency to stifle competition and in effect foster price uniformity at variance with the other antitrust laws. One memorandum in opposition 27/ even suggested that mere participation in a trade regulation rule proceeding, looking toward these rules, might violate the Sherman Act.

In view of the complexity of the problem posed, the Commission will have to mobilize the best of its resources. In this connection, the broad marketing inquiry is significant for having integrated the efforts of the economic and legal staffs in a proceeding involving enforcement of the price discrimination act to an extent unprecedented in recent years.

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27/ Cited in Mid-Continent Independent Refiners Association's Amended Petition for Trade Regulation Rules for the Marketing of Gasoline, filed July 16, 1965, p. 4, f.n. 1.

Finally, it should be noted that the Commission, in initiating this proceeding, bound itself only to conduct the hearings. It did not undertake to issue rules but left the result of the current proceeding flexible. As a result, other alternatives are: no action, or the issuance of a fact finding report by either the staff or the Commission. In the latter eventuality, the Commission, in addition to its investigative function, may have engaged at least in a form of embryonic rule making.

The final example of a current industry-wide proceeding which I would like to discuss with you is one cast in a more traditional mold--the so-called wearing apparel cases. 28/ In the period May 1963 to August 1965 the Commission accepted a total of 298 consent orders from wearing apparel manufacturers prohibiting violation of Section 2(d) of the Clayton Act, as amended. Aside from the number of wearing apparel manufacturers put under order, the case is notable since it is the first Commission decision or public pronouncement delineating the criteria for choosing between the various adjudicatory and rule making procedures available for dealing with discriminatory practices on an industry-wide basis. The rule making approach

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28/ Abby-Kent Co., Inc., et al., F.T.C. Docket No. C-328, et al. (1965).

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28/ Abby-Kent Co., Inc., et al., F.T.C. Docket No. C-328, et al. (1965).

was rejected in this instance since various trade practice conference rules issued for the industry had failed to significantly reduce the payment of discriminatory advertising allowances. A trade regulation rule was not promulgated since that procedure is not practical when the discriminations involved are sporadic and secretive. Selective litigation against certain suppliers and the Commission's Guides had also failed to visibly improve the situation. In short, there was no practical alternative to seeking enforceable cease and desist orders running against all significant industry members engaged in the alleged violations of law.

In summary, the advisory and rule making approach is obviously the ideal medium for dealing with Robinson-Patman Act problems on an expeditious and equitable industry-wide basis if the conditions are right. Just as obviously, the Commission, if it wishes to effectively enforce the law either in individual cases or as to entire industries, must resort to the issuance of complaints and cease and desist orders when, as in the wearing apparel situation, the facts indicate that it is the only viable method in that particular situation. From its earliest years, continuing to the present, litigation on the part of the Commission has been denounced

with varying degrees of emotion as wasteful, a source of harassment to business, and even as an instrument of oppression. 29/ The Commission should, of course, be alert to possible abuses. On the other hand, the Commission should not be forgetful of the statutory scheme which places the cease and desist order at the heart of its enforcement measures. In certain instances, industry-wide problems simply will not respond to the rule making advisory procedures, and litigation, at least as a last resort, must remain among the law enforcement measures available to the Commission when the facts dictate this approach.

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29/ E.g., Commissioner Humphrey, in one of the more extravagant attacks in this vein, stated, in an address on January 6, 1931, that:

> "Under the old policy of litigation it became an instrument of oppression and disturbance and injury instead of a help to business. It harassed and annoyed business instead of assisting it. Business soon regarded the commission with distrust and fear and suspicion—as an enemy. There was no cooperation between the commission and business. Business wanted the commission abolished and the commission regarded business as generally dishonest. [Footnote omitted.]" (Cited in Herring, Public Administration And The Public Interest (1936)), p. 125.