Statement of

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Before the

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

OF THE COMMITTEE ON THE JUDICIARY,

UNITED STATES SENATE

Wednesday, June 27, 1956

I appear before your Subcommittee to acquaint you with the views of a majority of the membership of the Federal Trade Commission on S. 11 and H.R. 1840.

In a letter addressed to the full Senate Committee on the Judiciary on March 1, 1956, I enumerated my own personal reasons for favoring this proposed legislation, and on April 19, 1956, I testified before the Antitrust Subcommittee of the House Committee on the Judiciary in support of the similar House measures. At that time my colleagues, Commissioners Secrest and Anderson, were of the opinion that enactment of legislation of this kind was premature, seeing that the Commission had not found the good-faith defense to have been established in any proceeding brought after the Supreme Court held in 1951 in the Standard Oil case (Standard Oil Co. (Indiana) v. FTC, 340 U.S. 231) that the defense was irrebuttable, and also because the Standard Oil case itself was shortly to be decided again by the Seventh Circuit Court of Appeals on the very question of whether the Commission had correctly rejected Standard's good-faith defense. Accordingly Commissioners Secrest and Anderson associated themselves with the two other members of the Commission, Chairman Gwynne and Commissioner Mason, in opposing passage.

Commissioners Secrest and Anderson have altered their position in consequence of the Seventh Circuit's recent Standard Oil decision disapproving the Commission's rejection of the good-faith defense, as well as the Supreme Court's recent refusal to review the decision of Balian Ice Cream Co., Inc. v. Arden Farms Co., 231 F. 2d 356 (9th Cir. 1955). Both these judicial developments present alarming implications for future enforcement of the price-discrimination section of the Clayton Act in its existing form.

After the Supreme Court decided in 1951 that the good-faith meeting of competition was an absolute defense to a charge of price discrimination, even though competition might be substantially injured as a result, the Standard Oil case was remanded to the Commission for appropriate findings on the question of Standard's good faith. Upon reconsidering the record, the Commission found that Standard, in extending price concessions to four of its jobbers in and around Detroit, had not met the equally low prices of its competitors in good faith. The principal ground for this finding was that the discriminations had not been granted in response to specific attempts by competitors to lure away Standard's customers by offering lower prices but were rather a company policy that had continued over a period of years. When the case went back to the Seventh Circuit for review the Commission emphatically reminded the Court in its brief that the good-faith proviso of the Robinson-Patman Act does not concern itself with pricing systems but deals with individual competitive situations rather than a general system of competition, and it argued that a precedent of holding on the facts shown that Standard had acted in good faith would make the Robinson-Patman amendment of the Clayton Act meaningless, for such a decision would then serve as authority for employing the defense to justify a systematically discriminatory pricing method whenever several competitors of the discriminating seller used the same system. Notwithstanding this, the Seventh Circuit disagreed with the Commission's finding and, in short, adopted Standard's argument that to retain the four jobbers in question as customers it had to accord them continuing preferential treatment, regardless of the disadvantage resulting to other Standard customers competing with the favored jobbers.

The second court decision to cause grave concern to my two colleagues and myself was the Supreme Court's refusal last month to review the decision of the Ninth Circuit in the Balian case. While the Ninth Circuit's decision is open to criticism on several scores, we are particularly disturbed at its approval of the trial court's finding that the good-faith defense was established. In the Balian case, a number of independent local ice cream manufacturers in the Los Angeles market sued Arden Farms Co., a corporation operating in Arizona and the Pacific Northwest, for treble damages based on an injury allegedly resulting from Arden's lowering its prices in the Los Angeles market for a substantial length of time while maintaining them elsewhere. The trial court, with the subsequent approval of the Ninth Circuit Court of Appeals, accepted a good-faith defense that was based on a showing that there had been active price competition generally in the Los Angeles ice cream market and that defendants' lower prices were necessitated by "competitive conditions." Thus the courts held legal a harmful territorial price discrimination by Arden that lasted for months on the ground that Arden was "meeting competition," although the meeting of a particular price of a particular competitor, as the wording of the good-faith proviso of Section 2(b) of the Clayton Act seems plainly to contemplate, was not involved. In brief, Arden was permitted to plead a highly competitive market as a basis for "meeting competition" through ruinous price discrimination.

The Commission majority for which I speak feels strongly that these two decisions dramatically illustrate the danger inherent in providing a complete good-faith defense to the charge of price discrimination. In fact, it is believed that if the defense can be successfully interposed in cases like Standard Oil and Balian Ice Cream, where there was no question that severe injury was suffered by small business concerns as a result of unfair pricing policies, then Section 2(a) of the Clayton Act is pretty much of a dead letter.

In our judgment, in the light of these decisions it is hard to conceive of a situation where the absolute defense to a price discrimination charge cannot be arranged and thereafter raised. We cannot help concluding that the most important section of the Robinson-Patman Act has thus been emasculated. Indeed, the language of the minority of the Supreme Court in their 1951 Standard Oil decision appears to have been prophetic:

> The Court's interpretation leaves what the seller can do almost as wide open as before [i.e., before the Robinson-Patman Amendment]. * * * It seems clear to us that the interpretation put upon the clause of the Robinson-Patman Act by the Court means that no real change has been brought about by the amendment. [340 U.S. at 253.]

As we see it, large businesses will be free to "meet" one another's competition through discriminatory price concessions to selected customers, regardless of the competitive havoc thus inflicted on the small businesses required to pay higher prices while trying to compete with the favored accounts. And not only will the favored dealers be enabled to divert trade from those not in a position to meet their prices; the large companies utilizing price discrimination for the purpose of eliminating their smaller competitors will find it possible, because of their superior financial staying power, to subsidize less profitable or even unprofitable sales for long periods of time in order to achieve their ends. The need for strong anti-price-discrimination laws is especially acute in the current buyer's market, when producers compete sharply and make price concessions to certain customers but not to all.

S. 11 and H.R. 1840 would make it clear that discriminatory pricing by or in favor of large business entities would not be allowed to destroy small, independent concerns, and would make efficiency rather than size the key to survival.

We believe that enactment of this legislation would mean a return to the fundamental idea of the Robinson-Patman Act, which was simply that where price discrimination produces substantial injury to competition or sets in motion a tendency toward monopoly it should be halted, regardless of whether the lower price was made in an effort to meet a competitor's price. We think that it could hardly have been the purpose behind the Robinson-Patman Act to perpetuate what had been a major weakness of the old Clayton Act and to exempt from the area of Commission enforcement all price discriminations made in the name of "meeting competition" but nonetheless injurious to concerns not given an opportunity to buy at the discriminatory prices. Yet this is the present state of the law, thanks to the judicial interpretations I have mentioned.

Implicit in the Clayton Act and its Robinson-Patman amendment is the proposition that price discrimination is an important instrument of monopolistic growth. If such be the case, there can surely be no sound reason for legitimizing it when it is practiced as a means of "meeting competition." It must not be forgotten that it was the failure of the Sherman Act to arrest the trend toward monopolies that led to these later implementing laws directed at suppressing monopolies in their early stages. If the Federal Trade Commission is to afford relief to small business from the injurious effects of a price discrimination which lessens competition or tends to create a monopoly, it will be necessary to overturn the two Standard Oil of Indiana decisions and the

Balian decision by eliminating the defense of "meeting competition in good faith" where such injurious effects are present.